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# Preface

CEB published its pioneer edition of California Civil Procedure During Trial in 1960. The 1960 book was replaced by two volumes in 1982 and 1984. These two volumes were supplemented regularly through June 1994, and will no longer be updated. This three-volume looseleaf set entirely replaces the 1982 and 1984 casebound volumes of California Civil Procedure During Trial.

Several new chapters have been added to this edition, and all chapters have been rewritten to include topics that are now important to current law and practice. Similarly, to reflect its broader scope, the title of this book was expanded to California Trial Practice: Civil Procedure During Trial. This book has two purposes: The first is to describe the legal rules governing procedure during trial; the second is to offer sound, practical guidance about how to practice the trial lawyer's art skillfully and successfully within the framework of those rules.

The new opening chapter on handling trials efficiently should be a useful resource in an era of continually rising litigation costs. A separate chapter on the procedures and strategies involved in making and opposing motions in limine reflects the growing significance of these proceedings in trial practice compared to a decade ago. There are also new chapters on jury management and jury deliberations, including potential remedies for the misconduct that can occur during trial and deliberations. A new evidence overview chapter is intended to help trial lawyers focus on key issues and to trigger problem areas that may need attention before their cases can be proved at trial.

Many talented authors and consultants throughout California contributed to this book, identifying changes in trial practice and suggesting how material could be presented in new, original ways. Their names appear in the "Acknowledgments," "About the 2010 Update Authors," "About the Third Edition Authors," "Consultants" and "Authors of Previous Editions" sections.

Not only have these authors and consultants assisted CEB in fulfilling its educational mission, they have also benefited individual members of the California bar. We expect that their legal points and practice tips will help make trial practice more effective and more satisfying for the lawyers who use these volumes.

Checklists and other format features ensure that this book will be practical and useful, and will make material easier to find and understand. A computer disk containing the forms and many of the checklists found in the book accompanies these volumes.

Legal editing of each chapter was performed by CEB attorneys. Linda Compton was the project supervisor, and edited chaps 1, 4, 9, 14, 18, 19, 22, 23, 24, and 25. Linda Russell assisted in the planning of the new edition, and edited chaps 8, 13, and 20. Kay Tindel edited chaps 2, 3, 5, 6, 7, 10, 11, and 15. Deborah Magers-Rankin edited chaps 12, 16, 17, 21, 26, and 27.

Cinda Ely was responsible for copyediting and production of these volumes, assisted by Maryann Aberg. Legal citation checking was provided by Elliot Cohen, Enrique DeAnda, Lane Parker, Brenda Ray, Phillip Robertson, Ken Scudder, Mindy Spatt, Mujahidun Sumchai, Crin Valley, and Tova Zeff. The index was prepared by Robert W. Burke, Jr. Composition was performed by CEB's Electronic Publishing Staff. The book was designed by Cheryl Ventimiglia.

**APRIL 2010 UPDATE**

CEB wishes to acknowledge and thank Dan Woods, a trial lawyer with White & Case LLP in Los Angeles, for his work as the author of this update. Mr. Woods reviewed the year's legal developments and contributed update material to the book's chapters.

CEB also wishes to acknowledge Judge Jacqueline A. Connor of the Los Angeles Superior Court for her generous contributions to chapters 8 and 17, and Judge Patricia M. Lucas of the Santa Clara Superior Court for her generous contributions to chapters 11 and 16.

CEB Attorney Editor David Saunders and Legal Editors Elizabeth Allen, Enrique DeAnda, Kenneth Marr and Karen Nutter contributed to this update. Kenya Denman and Nila Kanzaria provided administrative support. Richard Dempewolf handled copyediting and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

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Many practicing lawyers and judges throughout California reviewed chapter manuscripts. Others advised us in planning the scope and content of this book. To them, we give our special thanks. Their names are listed on the "Consultants" pages that follow.

In addition, CEB wishes to express appreciation and to acknowledge the following contributions made by practicing attorneys to particular chapters:

James P. Watson of Stanton, Kay & Watson, in San Francisco, contributed to the first chapter of this book, particularly to the sections on handling multiple party cases.

The checklist on trial preparation at the end of chap 2 was adapted from Preparing for Trial (Cal CEB Action Guide Summer 1992) by Maureen McClain and Jeffrey Polsky.

Portions of the voir dire sections of chap 8 relied on an article in the CEB Civil Litigation Reporter (June 1991), titled "Voir Dire Revisited: The Bull's Viewpoint," by William A. Brockett of The Litigation Strategies Group in Emeryville.

The leading questions checklist at the end of chap 11 was written for a CEB evidence skills workshop by Professor Edward Imwinkelried, of the University of California, Davis, School of Law.

The computer simulations section of chap 13 was prepared by Sidney K. Kanazawa, a partner with McGuire & Woods in Los Angeles.

The samples and checklists at the end of chap 16 were adapted from Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide Winter 1994) by Donald F. Miles and Deborah Kemp.

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**CALIFORNIA CIVIL PROCEDURE DURING TRIAL**

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# Selected Developments

**April 2010 Update**

**Expert witnesses.** For a recent case discussing how a plaintiff was entitled to present new expert witness testimony in a new trial on a claim that he had abandoned before the first trial, see *Gordon v Nissan Motor Co.* (2009) 170 CA4th 1103, 88 CR3d 778, in §2.18.

**Attorney preparation for trial.** For a recent case discussing how to expand the designated scope of an expert's testimony, see *Easterby v Clark* (2009) 171 CA4th 772, 778, 90 CR3d 81, discussed in §5.13.

**Disqualification of judge.** For a recent case discussing the timeliness of challenging a judge, see *Swift v Superior Court* (2009) 172 CA4th 878, 883, 91 CR3d 504, in §6.71.

**Motion in limine.** For a recent case discussing the use of motions in limine to decide dispositive issues, see *K.C. Multimedia Inc. v Bank of America Technol. & Operations, Inc.* (2009) 171 CA4th 939, 950, 90 CR3d 247, in §7.5.

**Selection of jurors.** The party challenging the jury selection method must show that the method actually prejudiced the ability to select a jury from a representative cross-section. See *People v Mayfield* (1997) 14 C4th 668, 728, 60 CR2d 1, discussed in §8.20.

**Admissibility of official records.** For two recent cases discussing the introduction of official records as evidence, see *Jazayeri v Mao* (2009) 174 CA4th 301, 94 CR3d 198, and *Molenda v DMV* (2009) 172 CA4th 974, 91 CR3d 792, in §10.26.

**Requests for admission at trial.** The trial court may impose conditions when granting the motion to withdraw or amend an admission. See *New Albertsons, Inc. v Superior Court* (2009) 168 CA4th 1403, 86 CR3d 457, discussed in §12.124.

**Misconduct of counsel.** A more stringent test for disqualification of an attorney applies when there is an actual, present, simultaneous representation of clients. See *In re Charlisse C.* (2008) 45 C4th 145, 84 CR3d 597, discussed in §§16.41, 16.42.

In *People v Ward* (2009) 173 CA4th 1518, 1528, 93 CR3d 871, trial counsel was held in contempt for accusing a prosecutor of misconduct in the presence of the jury, after the court ordered him not to do so. See §16.102.

**Punitive damages.** For a recent case discussing the reasonable relationship between punitive and compensatory damages, see *Roby v McKesson Corp.* (2009) 47 C4th 686, 101 CR3d 773, in §19.20.

**Verdicts.** The California Supreme Court held that the silence of a juror whom the trial court inadvertently neglected to poll did not constitute disagreement with the verdict. See *Keener v Jeld-Wen, Inc.* (2009) 46 C4th 247, 257, 92 CR3d 862, discussed in §§22.22, 22.31.

**Judgments.** An order nunc pro tunc corrects a clerical error by placing on the record what was actually decided by the court but was incorrectly recorded. See *Marriage of Padgett* (2009) 172 CA4th 830, 91 CR3d 475, discussed in §23.30.

**Attorney fees.** Under the Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996), prevailing defendants are entitled to attorney fees only if the plaintiff's action is "unreasonable, frivolous, or meritless." See *Mangano v Verity, Inc.* (2008) 167 CA4th 944, 84 CR3d 526, discussed in §26.5.

For a recent case discussing "prevailing party" under CCP §527.6, see *Krug v Maschmeier* (2009) 172 CA4th 796, 91 CR3d 452, in §26.5.

An order denying sanctions under CCP §128.7 and former CCP §2023 is appealable as a collateral order. See *Muller v Fresno Community Hosp. & Med. Ctr.* (2009) 172 CA4th 887, 91 CR3d 617, discussed in §26.53.

Under CCP §1021.5, attorney fees may be awarded to plaintiff's counsel for opposing defendant county's amicus brief in a related matter, when the county was advocating the same interpretation of the statute in both suits. See *Ramon v County of Santa Clara* (2009) 173 CA4th 915, 93 CR3d 278, discussed in §26.62.

For a recent case discussing the granting of attorney fees after the successful defense of a suit to stay arbitration under a contract, see *Turner v Schultz* (2009) 175 CA4th 974, 96 CR3d 659, in §26.94.

In arriving at a reasonable amount, an award of fees as costs must bear a "reasonable relationship" to the

substantive recovery. See *Garcia v Santana* (2009) 174 CA4th 464, 473, 94 CR3d 299, discussed in §26.132.

A court may award attorney fees even if the client incurred no actual expense. See *Young v Exxon Mobile Corp.* (2008) 168 CA4th 1467, 1477, 86 CR3d 507, discussed in §26.136.

**Costs.** In *Linthicum v Butterfield* (2009) 175 CA4th 259, 270, 95 CR3d 538, the court of appeal upheld an award of costs despite a claims release in a CCP §998 offer, because the release did not apply to claims outside the scope of action. See §27.65.

For a recent case finding that there was no constitutional limitation on the amount of compounding interest authorized by renewal statutes, see *OCM Principal Opportunities Fund, L.P. v CIBC World Markets Corp.* (2008) 168 CA4th 185, 85 CR3d 350, discussed in §27.120.

When a judgment is modified on appeal, whether upward or downward, interest accrues from the date of entry of the *original order,* not from that of the new judgment. See *Munoz v City of Union City* (2009) 173 CA4th 199, 92 CR3d 527, discussed in §27.115.

For two recent cases discussing the recovery of prejudgment interest under CC §3287, see *Roodenburg v Pavestone Co., L.P.* (2009) 171 CA4th 185, 89 CR3d 558, and *Doppes v Bentley Motors, Inc.* (2009) 174 CA4th 1004, 94 CR3d 797, in §27.122.

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## Cutoff Dates

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# 1

# Handling Trials Efficiently

**Judge Patricia M. Lucas**
**Judge Jacqueline A. Connor**
**Judge Andrew J. Wistrich**
**James N. Penrod**

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## §1.1 I. SCOPE OF CHAPTER

This chapter offers trial lawyers ideas and practical advice for planning a more streamlined, cost-efficient trial while still obtaining a favorable outcome for the client. The authors identify various procedures and analyze their potential impact on trial efficiency. Chapter sections provide cross-references to sources that discuss these procedures more fully.

Trial judges are responsible for managing the proceedings, eliminating unnecessary delays, and enabling the just and efficient resolution of cases. See Cal Rules of Ct, Standards of J Admin 2.1. In most trials today, both counsel and the court are aware of many efficiency techniques that can be adopted during trial. Sections 1.2-1.4 describe judicial case management and consider the impact these techniques may have on the trial outcome, and suggest ways in which counsel can evaluate that impact. The traditional trial is compared to alternative dispute resolution (ADR) models in §§1.5-1.7. Sections 1.8-1.14 focus on the structure of the trial (*e.g.,* jury versus bench trial, severance, consolidation), including changes in the order of proof (*e.g.,* bifurcation, organization by issue instead of by party). Using jury questionnaires and other techniques to streamline voir dire and assist the jury's fact-finding process are discussed in §§1.15-1.23. On organizing the conduct of the trial and the presentation of evidence, see §§1.24-1.45. Finally, multiple party and complex cases are highlighted in §§1.46-1.48. References that offer further information on the topics discussed in this chapter appear in §1.49.

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## II. GENERAL ISSUES

### §1.2 A. Judicial case management

The management of filed cases is governed by the Trial Court Delay Reduction Act of 1990 (Govt C §§68600-68620), the California Rules of Court (see Cal Rules of Ct 3.700-3.735), and local rules. The Trial Court Delay Reduction Act 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)).

Each court may have its own delay reduction case management rules (Govt C §68612), and 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); Santa Clara Ct R 1A-1F (differential civil case management system). Cases may also be exempted by local rule. See, *e.g.*, Los Angeles Ct R 7.2(b).

**PRACTICE TIP:** Counsel should contact the clerk of the particular court where an action is pending 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 http://www.courtinfo.ca.gov/courts/trial/courtlist.htm.

Each trial court classifies filed cases on the basis of their relative complexity and sets goals for their timely disposition. Except those exempt under Cal Rules of Ct, Standards of J Admin 2.2(g), 75 percent of unlimited civil cases must be disposed of within 12 months, 85 percent within 18 months, and 100 percent within 24 months of filing. Cal Rules of Ct, Standards of J Admin 2.2(f); see Cal Rules of Ct 3.713(b). The court is responsible for applying the rules in a fair, practical, and flexible manner so as to achieve the ends of justice. Cal Rules of Ct 3.700. For more information on judicial case management at the pretrial stage, see California Civil Procedure Before Trial, chap 40 (4th ed Cal CEB 2004).

The trial judge has the responsibility to manage the trial proceedings to ensure that all parties are prepared and have a fair opportunity to present evidence, and that the trial begins on schedule and proceeds to the end without unnecessary interruption. See Cal Rules of Ct, Standards of J Admin 2.1. Standard 2.20 specifies techniques of trial management that judges should use in communicating with counsel, maintaining the momentum and continuity of trial, and, in longer trials, respecting jurors' needs for personal time.

**NOTE:** Methods for making the trial more efficient can involve almost any part of a trial, starting with motions in limine or jury selection before trial. They may affect the order of proof and presentation of evidence during trial, or the structure of the trial itself. See, *e.g.,* §§1.9-1.10 on severance and consolidation. Counsel should consider suggesting ways in which the court might handle the particular trial more efficiently. See Judicial Perspective in §1.4.

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## §1.2A B. Efficiency and other trial goals

Three competing values govern the choice among available trial procedures. These values are justice, efficiency, and advocacy. Making a trial more "just" means improving accuracy in adjudicating the facts and understanding the law, and in applying the law to the facts. Making a trial more "efficient" means reducing the amount of time required to try a case. Making room for all counsel to "advocate" on behalf of their clients means increasing the likelihood that each side will present its case fully and achieve the best possible results. Participants in the trial process view these competing goals very differently. Judges and jurors value justice and efficiency more than advocacy. Although justice is the most worthy goal, efficiency must not be ignored because a society cannot commit unlimited resources to resolving disputes. The goal of efficiency is to reduce trial time without sacrificing the more important objective of having cases decided "justly," in accordance with the facts and the law.

Lawyers and clients value advocacy the most, are interested in efficiency when it will result in cost savings, and attach little or no value to an adverse (but presumably just) outcome. From a trial advocate's point of view, winning the case means that the lawyer has persuaded the trier of fact that the client's position is in accord with the law (*i.e.,* a decision for your side is right and just). Although a lawyer may initiate or support efforts to improve the accuracy and efficiency of the trial, the primary goal is to achieve the best possible win or, if a win is not feasible, to achieve the best possible loss, within the constraints of professional ethics.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.3 1. Evaluate effect of efficiency technique

### §1.3 1. Evaluate effect of efficiency technique

Trial counsel should evaluate every trial procedure from the standpoint of whether it will help or hurt the client's chances of prevailing. Before requesting or opposing an efficiency measure, it is important to assess the advantages and disadvantages to each side. Many trial procedures contain biases (*e.g.,* rules on which side may present evidence first or who may argue last) and do influence the outcome. Counsel should consider the manner in which the trial will be conducted and its impact on 12 untrained lay jurors from the community.

**EXAMPLE:** Techniques that structure jury decisionmaking, or that separate the adjudication of facts from the application of law to facts, may encourage the decisionmaker to focus on the elements of a claim or defense and diminish the role played by sympathy or passion, to one side's detriment and the other's advantage. A defendant who has a strong technical defense, unrelated to the merits, may benefit from a highly structured trial in which the defense is decided before the fact finder is exposed to the full circumstances surrounding the plaintiff's claim.

Some techniques may overemphasize efficiency. For example, unreasonably strict time limits on opening statements, witness examinations, and closing arguments might shorten trials, but the cost of this increased efficiency may be too high if it impairs jury comprehension.

Similarly, other techniques may lose sight of efficiency. For example, endless voir dire might result in the selection of the fairest possible jury, but the cost and effort may not produce a different outcome. The loss of confidence by the jurors, both those selected and those in the venire, in what is perceived as game-playing and a disrespect of their time, creates a larger long-term and serious problem in loss of support for the judicial system and the legal profession generally.

**JUDICIAL PERSPECTIVE:** Consider whether a particular technique will have an unfavorable consequence. Remember that you are attempting to persuade the judge and jurors to see the merits of your side. The importance of your credibility before your jury cannot be overemphasized. Causing jurors to become bored, irritated, or angry at you or your client will hurt your case. Showing courtesy and due regard for their time is an important element of success at trial. Consider, too, that you may appear before the judge on other occasions and that these jurors will serve on other juries and will talk to their friends and acquaintances about their experience and about you. Although you owe your client a duty of zealous advocacy, unlike your client, you are a repeat player in the courthouse and an officer of the court. Do not lose sight of the fact that the manner in which you conduct your trial will have a lasting impact on your reputation and on the public's perception of the justice system.

When counsel believes that an efficiency technique will adversely affect a client's interests, or even result in a trial that is truly unfair, it is vital to say so, and to make reasonable arguments to the court supporting that view. A trial lawyer should resist pressures to conduct the trial in a way that has a negative bearing on the outcome of the case. Most judges respect the trial lawyer's advocacy role and are inclined to allow counsel considerable latitude in deciding how to present the case.

If a particular technique is adopted over an objection, counsel should be sure to make a record that preserves the objection for a possible appeal. On objecting and protecting the record, see §§15.19-15.44.

**PRACTICE TIP:** Because choices concerning the manner in which the trial is conducted can be important, let your client know the options and explain the reasons for your choices among those options. Discuss the benefits, and any costs or risks, associated with a particular efficiency technique. Your client may value efficiency and cost savings more than you do. Full and frank communication about the advantages and disadvantages of various trial techniques rarely hurts the attorney-client relationship, but lack of communication often does.

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### §1.4 2. Assess costs of efficiency technique

Counsel who decides that an efficiency technique advances a client's chances of prevailing should consider requesting, as early in the process as possible, that it be used in the case. At this point, cost should be considered. Some techniques, while reducing trial cost by making trial faster and more efficient, do not reduce the overall costs of litigation. Often, the work that makes a fast and smooth trial possible may actually make the trial more expensive. Trial counsel should question whether the expense and effort of implementing a particular efficiency technique will be worthwhile in a given case.

Whenever an efficiency technique advances the client's interest, reduces overall litigation costs as well as the cost of trial, and assists the jurors, counsel should try to use it. To the extent that a technique improves trial efficiency but does not change the total costs, it probably should be used. To the extent that a technique advances a client's interests but increases either the cost of the trial itself or the overall costs of litigation, counsel and client need to weigh the benefits against the expense and decide whether to request it or, if another party requests it, whether to oppose its use.

**JUDICIAL PERSPECTIVE:** Request as early as possible (with follow-up as appropriate) that the trial judge specify the manner of conducting the trial and what will and will not be permitted. Most judges assume that an issue brought up at the last minute, particularly when a panel of jurors is waiting, is not as important as one that is addressed professionally and fully in advance. Eleventh hour objections simply do not have the force and effect of a thoughtful, prepared position about the value or lack of value of a technique or approach.

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## §1.5 C. Alternative dispute resolution (ADR) models

Interest in alternative dispute resolution ("ADR") reflects an interest in improving the efficiency of litigation. In arbitration and mediation, the parties have greater flexibility in designing procedures to suit themselves. The litigants—as long as they can agree—can fashion a more streamlined and less expensive proceeding than would be possible if their cases were tried in court.

**EXAMPLE:** In a complex contract arbitration, the parties agreed that, after the first of several damages claims was litigated in the traditional fashion (with opening statements, direct examination, cross-examination, and detailed written summations), the remaining claims would be decided through detailed written presentations, with each party having the option to cross-examine a subset of the other party's witnesses for a few hours each. The dispute was resolved quickly and with surprisingly little cross-examination after the initial phase.

There has been a tremendous growth in court-connected ADR programs. See §1.6A. Local court programs under the Trial Court Delay Reduction Act of 1990 (Govt C §§68600-68620), such as the Civil Referee Assistant Hearings (CRASH) in Los Angeles County, provide an opportunity for cases to be mediated in conjunction with the American Board of Trial Lawyers (ABOTA), whose defense and plaintiffs' attorneys assist the litigants to engage in settlement discussions in fairly simple cases. Early Neutral Evaluation (ENE) is available as a pilot program in the Central and West districts of Los Angeles County. Well-established in the federal courts, ENE encourages the parties to assess their positions realistically at the start of the case. See, *e.g.,* ND Cal ADR Local R 2-5(b)(2). Court settlement conferences and case management orders that specify the use of ADR have been adopted in an attempt to make the litigation process more efficient.

**PRACTICE TIP:** Check local rules early and often for the availability and, in some cases, mandatory use of court-connected ADR programs.

Certain cases are not appropriate for ADR, such as cases in which:

- The parties are seeking to establish legal precedent;
- The public has an overriding interest in the outcome;
- Public sanctioning of certain conduct is needed to deter it in the future; or
- Repetitive violations of law are involved and need to be addressed collectively and uniformly.

Private and court-connected ADR methods include negotiation, mediation, contractual arbitration, judicial arbitration, settlement conferences, mini-trials, private judging, and summary jury trials. For discussion of these methods, see A Litigator's Guide to Effective Use of ADR in California (Cal CEB 2005). See also California Civil Procedure Before Trial, chap 45 (4th ed Cal CEB 2004). For brief discussion of arbitration, see §1.6; for private judging, see §1.7.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.6 1. Arbitration

## §1.6 1. Arbitration

Arbitration is used to resolve a wide variety of disputes, including those governed by contractual agreements in certain industries, *e.g.,* construction, labor, and banking. On contractual arbitration (CCP §§1280-1294.2), see A Litigator's Guide to Effective Use of ADR in California, chap 9 (Cal CEB 2005). Parties can also stipulate to arbitration and to whether it will be binding. On mandatory judicial arbitration (CCP §§1141.10-1141.31), see Effective Use of ADR, chap 11, and California Civil Procedure Before Trial, chap 33, §§45.47-45.48 (4th ed Cal CEB 2004).

Debate is growing over whether arbitration is always less expensive and thus more efficient. Arbitration is suited to cases that can be tried in a relatively brief period, *e.g.,* within 1 week or at least in one hearing on consecutive days without recesses. Arbitration offers the significant advantage and cost savings of proceeding on a date certain chosen by the parties and the arbitrator, without being subjected to the risk of a continuance by a busy court as well as having the undivided attention of a neutral. Complex arbitrations, like bench trials, often involve lengthy breaks and require repeated preparation—which, in turn, increases the overall cost. Hiring arbitrators has also become a major expense.

Arbitration has the same advantages as a bench trial (*e.g.,* no jury-related events and delays, informality, fewer evidentiary issues) and disadvantages (*e.g.,* only one trier of fact whose biases are not reined in by deliberation with 11 others). Unlike a bench trial, however, there are few grounds on which to appeal an arbitration award. On bench trials, see §1.8. Many attorneys believe that arbitrators, rather than ruling for one party or another, are more prone to seek a compromise resolution than judges.

**PRACTICE TIP:** When stipulating to an arbitrator, always ask opposing counsel to disclose any connection to or prior experiences with any arbitrator being considered. The arbitrator (or a proposed arbitrator) is bound to make similar disclosures about the parties, counsel, and other matters. See Cal Rules of Ct, Ethics Standards for Neutral Arbitration in Contractual Arbitration 1-17.

Consider the following questions when deciding whether to arbitrate:

- Will you be involved in choosing the arbitrator?
- What is the likely effect of not being able to appeal error or the amount of the award? The lack of posttrial remedies for appealing or reversing the outcome is a disadvantage if you lose.
- If you represent a defendant, are the damages likely to be better contained in arbitration?
- If you are plaintiff's counsel, does presumably quicker resolution outweigh the conventional wisdom that arbitration awards are lower than jury awards?
- Is arbitration likely to provide your client with a lower-cost alternative to a full-blown trial without substantially compromising other trial goals (see §1.2)?
- Will arbitration help to improve the relationship between the parties? This aspect can be important in business litigation in which the parties may have an ongoing relationship or want to continue doing business.
- Will arbitration help to improve communication between the parties and their attorneys? Sometimes, a case is not resolved before a formal trial because counsel has not elicited the client's objectives or integrated those objectives into the litigation strategy.
- Is there a chance that arbitration will encourage earlier and better case analysis and preparation?
- Will arbitration enhance your client's ability to protect its privacy interests? A formal trial could seriously disrupt the personal and business lives of your client or of nonparties involved with your client.
- If arbitration is a faster track than trial, is the advantage of shortening the time to disposition important to your client?
- Are you subject to a binding arbitration contract? If so, does it meet all the statutory requirements? If it does not, is it worthwhile to challenge it?
- Will arbitration provide greater flexibility in designing trial procedures to suit the parties (*e.g.,* will arbitrators be more willing to view the site of the event)?
- Will the parties' interests be better served by a judgment that can be tailored to their individual needs? To be

enforced, a jury verdict or a court decision may require the court's continuing involvement.

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### §1.6A 2. Mediation

Mediation has become a widely accepted way of resolving disputes. In the past, mediation was distinguishable from other forms of dispute resolution because it was a voluntary process. In important ways, it still is, because the mediator has no power to impose a resolution on the parties, who are free to end the process without reaching agreement.

In many situations, litigating parties do not have a choice in participating in mediation, but must participate in court-ordered mediation. See CCP §§1775-1775.15. After a complaint is filed, the trial courts may now assign the parties to mediation in court-connected ADR programs before setting a case for trial. See, *e.g.,* Cal Rules of Ct 3.722(a). With increasing frequency, commercial contracts mandate mediation of a dispute before arbitration or court action can be commenced.

Mediation styles and approaches vary widely. In some mediations, the attorneys may negotiate a resolution on behalf of their clients and focus on legal arguments in much the same way arbitrations are conducted. Many courts have pro bono panels for mediation, which can be perfectly appropriate for most cases, but private mediators with expertise in the particular subject matter of the dispute are sometimes indispensable. In an evaluative type of mediation, the neutral may be called on to assess the probable trial outcome if the case does not settle. In other mediation models, the clients may participate actively in discussions in joint sessions with opposing parties and other counsel, and in separate caucuses with only their own attorney and the mediator present. In a facilitative mediation, the mediator may encourage the parties to explore options for resolving the case that meet their needs but would not necessarily resemble a trial result. In the more collaborative types of mediations, the attorneys who are able to fashion excellent results for their clients have developed the communication proficiencies necessary for sophisticated deal-making. For a thorough discussion of the problem-solving skills useful to an advocate negotiating in less adversarial settings, see A Litigator's Guide to Effective Use of ADR in California (Cal CEB 2005).

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## §1.7 3. Private judging

Unlike civil trials, "private trials" can be conducted at times more convenient to the parties, in surroundings less intimidating to witnesses, with a private judge not distracted by other matters, and in facilities better equipped for effective communication. Hiring a private judge who will hear the case on an arbitration or other ADR model (see §§1.5-1.6A) can result in cost savings.

The parties may also be able to find a private judge who has specific experience in the subject matter of the dispute. Agreeing to resolve the dispute by private judging raises issues similar to those in choosing a bench trial or arbitration as opposed to a jury trial. See §§1.6, 1.8.

When stipulating to a private judge, the parties need to draft the scope of their agreement carefully. The stipulation will govern the authority of the private judge and appeal rights. The delegation of judicial power is constitutionally limited and can only be effected by a "stipulation of the parties litigant." Cal Const art VI, §2.1. For example, when the parties stipulated to a certain private judge who later recused himself, the court did not have the power to appoint another private judge. *Kim v Superior Court* (1998) 64 CA4th 256, 75 CR2d 468.

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## III. STRUCTURING THE TRIAL

### §1.8 A. Jury trial versus bench trial

Bench trials can result in a better, more cost-effective resolution of the case. When a case is decided entirely by a judge, court and counsel do not need to deal with voir dire, jury instructions or verdict forms, the jury's coming and going, or conferences at sidebar or in chambers. Counsel spend less time on motions in limine and other evidentiary disputes before trial, and they need not be as alert for hearsay problems and other objectionable matters during trial that could adversely influence the jury. For discussion of law, procedures, and strategies in bench trials, see chap 24.

Regardless of trial efficiency considerations, however, California litigants have a right to have their cases decided by a jury if they properly and timely request one. Cal Const art I, §16. On right to jury trial, see §§8.2-8.14.

Some attorneys believe that as fact finders, juries tend to be less harsh than judges in applying the law and more sympathetic in reaching a verdict, often awarding higher general or punitive damages. The view favoring juries also holds that 12 people have better recall and more cumulative experience than does one person, and that any biases are held in check because people do not want to admit them in front of the other jurors. Particular arguments or defenses are more likely new to a jury, whereas a judge may have heard the same positions proposed numerous times in the past. A judge may have hidden and undisclosed biases that may control the result, or historical connections to parties or others associated with the case of which counsel is not aware.

Other attorneys believe that a bench trial is better because the matter will be decided on the law rather than on emotions, and that there is greater certainty and predictability. See Kalven & Zeisel, The American Jury §9.42 (1986) (study showing that judges and juries disagree in about 20-25 percent of jury trials, with roughly two-thirds of disagreements over values rather than facts; juries recognize values that judges exclude based on law). Bench trials tend to reduce the risk of retrial from reversible error, and there is no risk of a hung jury. Litigants who are eager to resolve their disputes may also opt for an earlier bench trial date.

One advantage of jury trials is that the judge can act as an evidence "gatekeeper," preventing the jury from being exposed to inadmissible prejudicial evidence. In a bench trial, the judge is unavoidably exposed to inadmissible evidence that he or she may be unable to ignore. See Wistrich, Guthrie, & Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U Pa L Rev 1251 (Mar. 2005).

Although bench trials reduce time spent in court, they do not always result in remarkably less overall attorney time. Instead of forcing the case to a conclusion in the shortest amount of time because the jury is waiting for the evidence, courts frequently take lengthy breaks during bench trials (*e.g.,* to hear a criminal case or to attend to other matters). Time savings can be lost because counsel must keep preparing themselves and their witnesses before trial resumes. Most courts require detailed pretrial and posttrial briefs in bench trials (see §24.8), which further erodes the time savings gained from a trial without a jury. Counsel must also take time to draft a proposed statement of decision and proposed judgment (or file written objections to these documents) after the court reaches a tentative decision. See §§24.34-24.50.

When a choice is available and the parties have waived a jury or are willing to stipulate to a bench trial, whether to try the case before a jury or a judge is a complex decision that depends on the interaction of the facts, law, and issues. Some factors counsel and client might consider in making this decision are:

- The amount at issue and the projected attorney fees;
- The complexity or novelty of the facts;
- The complexity of the relevant law;
- The judge's qualities and attitudes, if known;
- A lawyer's experience and success in handling jury trials relative to opposing counsel's;
- The nature of the claims and the defenses and their emotional appeal to a jury;
- If representing the defendant, the financial resources of the client (*e.g.,* whether a deep-pocket corporation or a corner drug store);

- Whether the witnesses will be more liked or disliked by a jury than a judge;
- The precision of the damages case if representing the plaintiff (a jury might be preferable for imprecise or general damages and for punitive damages);
- Whether an earlier trial date would be available if a jury is not required; and
- Appellate considerations (*e.g.,* in a bench trial, there will be no errors in jury instructions, which is usually a fruitful area for reversal for a party who expects to lose).

For further discussion of which type of trial is preferable in a particular case, see §24.3. On waiving jury trial and relief from that waiver, see §§8.15-8.16.

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## §1.9 B. Severance or separate trial

Severance or a separate trial is a procedural device enabling the court to divide a lawsuit into two or more parts, to establish the order in which they will be resolved, and to resolve them separately. Severance can improve efficiency because it allows the court to avoid adjudicating every issue in a case when deciding a subset of the issues may be dispositive. A motion to sever can be made with respect to parties, issues, or evidentiary matters. Bifurcation usually refers to a special type of severance—namely, holding separate trials on the issues of liability and damages. On bifurcation, see §1.12.

**PRACTICE TIP:** Consider severance whenever the efficiency of a trial will be enhanced by eliminating any parties who have claims or causes of action that are necessarily appended, but unrelated, to the main case. Not only can this step have a major effect on trial efficiency, it can have tremendous strategic importance in presenting the case clearly, simply, and without confusing the jury.

Severance is particularly attractive when:

- Resolution of one issue may resolve the entire case (*e.g.,* the defendant is likely to prevail on a res judicata defense);
- Evidence admissible on one issue might unfairly prejudice the jury on another issue;
- One of several coplaintiffs or codefendants is situated differently or has adopted a different strategy from that of the others; or
- A case is too complex to be digested in one sitting.

See *Foreman & Clark Corp. v Fallon* (1971) 3 C3d 875, 888 n8, 92 CR 162.

Severance is usually permissive. See CCP §1048(b) (the general severance statute); CCP §598 (court may try any issue or portion of it before any other issue); CCP §597 (permits trial of affirmative defenses such as limitations, release, or res judicata before trial of plaintiff's claim).

In a few circumstances, however, severance is mandatory. See CCP §597.5 (limitations defense in medical negligence case must be tried first on motion of any party); CC §3295 (if defendant requests, plaintiff's right to recover punitive damages must be established by clear and convincing evidence before evidence of defendant's finances may be presented to jury); CCP §1260.020 (in eminent domain proceedings, compatibility of public issues must be resolved first); CC §1670.5 (issue of unconscionability must be tried to court before other issues are tried to jury); Fam C §3023 (child custody issues must be tried first).

For further discussion of severance and separate trial, see §§6.99-6.104. See also California Civil Procedure Before Trial §§43.63-43.102 (4th ed Cal CEB 2004).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.10 C. Consolidation

## §1.10 C. Consolidation

The consolidation procedure can be a useful efficiency technique because it allows the court to combine two or more separately filed lawsuits for simultaneous disposition. The principal requirements for consolidation are that the suits involve a common question of law or fact and that their combination will not unfairly prejudice any party (*e.g.*, by allowing introduction of evidence against a party that would have been admissible in only one of the cases against that party had they not been consolidated). See *Todd-Stenberg v Dalkon Shield Claimants Trust* (1996) 48 CA4th 976, 56 CR2d 16 (affirming judgments for three plaintiffs in consolidated personal injury cases involving use of intrauterine device made by same manufacturer; court found cases had common issues and undue confusion or prejudice was unlikely to result).

Generally, consolidation is permissive. See CCP §1048(a) (the general consolidation statute). Other statutes permit consolidation in specific instances, most of which are probably redundant of §1048(a). See, *e.g.,* CCP §1281.3 (permits consolidation of separate contract arbitration proceedings); CCP §376 (permits consolidation of action by parents to recover for injuries to their child with action for wrongful death of the child); CCP §377.62 (permits consolidation on motion of any interested party of a wrongful death action under CCP §377.60 with a survival action under CCP §§377.20-377.43).

In a few instances, consolidation is mandatory. See, *e.g.,* Lab C §3853 (requires consolidation of employee's action to recover personal injury damages against third party tortfeasor with employer's action against the same tortfeasor to recover reimbursement for workers' compensation benefits provided by employer to employee).

The main purpose of consolidation is to promote efficiency by avoiding inconsistent rulings or verdicts and parallel or serial litigation of the same or similar issues. *Mueller v J.C. Penney Co.* (1985) 173 CA3d 713, 722, 219 CR 272. Reasons to deny consolidation include the danger that it may produce an incomprehensible case that cannot be handled fairly or understood by a jury.

In evaluating the wisdom of moving for consolidation, plaintiff's counsel should consider the following:

- The probability that a single case can be tried more quickly than a consolidated action.
- The possibility that the individual cases may, contrary to the usual assumption, affect each other adversely.
- The danger of being forced to share a prorata amount of a limited fund with plaintiffs in other actions.
- The likelihood that counsel will lose at least some measure of control that could otherwise be exerted over the proceedings.
- The risk that consolidating plaintiff's action with a weaker claim will reduce the prospects for a successful verdict or a large judgment; or, conversely, the hope that a strong liability claim, while not producing substantial damages, will help weaker claims to receive larger damages.
- The risk that counsel will receive a lower fee if not selected to serve as lead counsel (if this interest conflicts with your client's best interests, the client's interests must, of course, prevail; you are a fiduciary).
- The possibility that counsel will be forced to take part in hearings or depositions unrelated to the client's claims.
- The likelihood that combined multiple claims will prejudice the jury against the defendant.
- The overall savings in time and expense to counsel and clients.
- Whether a statute expressly provides for consolidation of the case (*e.g.,* CCP §1250.240, permitting consolidation of condemnation actions relating to separate real property parcels located in the same county; CC §§3175, 3214, allowing consolidation of actions to enforce payment of construction claim after issuance of stop notices).

Some of these considerations will not apply if the consolidation is limited to cases filed by the same plaintiffs' attorney. Generally, plaintiffs' attorneys will move for consolidation only when they believe that the cases will be benefited, substantial time and expense will be saved, or the cases will come to trial sooner (*e.g.,* if a case is entitled to preference, it can also advance the other consolidated cases to an earlier trial date). Although consolidation can save time and expense, the risk of prejudicial error is increased, and any reversal on appeal will probably apply to all the

cases.

A defense attorney who may wish to oppose consolidation should consider the following:

- The possibility that plaintiffs' actions may be tried more quickly and less expensively if they are consolidated.
- The likelihood that if consolidation is defeated, some plaintiffs may be discouraged from independently pursuing their claims.
- The danger that harmful evidence will be admitted during a consolidated trial that might not have been revealed if the actions had been tried separately.
- The possibility that counsel will be forced to take part in hearings or depositions unrelated to the client's case.
- The risk that the sheer number of claims may cause the jury to infer that the defendant did something wrong.
- The risk that the jury might become inflamed by the defendant's causing harm to so many and award punitive damages.
- The risk that many weak cases against the defendant may be enhanced by a few strong cases.
- The possibility that, with the cases consolidated, defense counsel may be able to settle them more easily and for less money by making a lump-sum settlement. (Often, very strong or very weak cases are easier to settle as part of a large group, although plaintiffs' counsel must be alert to conflicts here.)

Pleadings opposing consolidation should explain in detail the divergences of fact and law among the cases. Spreadsheet comparisons can be effective. Consolidation may cause so much confusion that it will not serve as an efficiency technique, because the case will become too large to present comprehensibly. Defense counsel should argue the unfairness of requiring unrelated plaintiffs to present individual claims in a combined proceeding against a single defendant.

**EXAMPLE:** In a case involving workplace exposure to a toxic substance, the opposition brief should show that the plaintiffs worked at different job sites; that they worked at different jobs at the different sites; that each plaintiff worked at many different jobs over a long period of time; that the plaintiffs were exposed to many different potential toxic or harmful agents at each job and at each site; that each plaintiff has a different history of exposure to potential toxins outside the workplace; that the plaintiffs have different and varying wages and losses; that they all have different diseases, conditions, and symptoms; and that they all have different health histories, including age, smoking history, family history, weight, complicating conditions such as heart conditions, diabetes, or asthma. To the extent that differing legal theories and defenses apply to each plaintiff (*e.g.,* Proposition 51, employer negligence, statute of limitations, lien issues, supervening cause, comparative negligence, state of the art), these should also be set forth in detail.

For further discussion of consolidation procedures, see California Civil Procedure Before Trial §§43.2-43.62 (4th ed Cal CEB 2004).

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## §1.11 D. Changing order of proof

The normal order of trial proceedings is that each party, starting with the plaintiff, presents its entire case at once, except for cross-examination and rebuttal, unless the court "for special reasons" directs otherwise. See CCP §607. If the defendant bears the predominant burden of proof, the order may be reversed or modified. See *Coogan Fin. Corp. v Beatcher* (1932) 120 CA 278, 7 P2d 695. Merely bearing the burden of proof on an affirmative defense does not constitute bearing the "overall" burden of proof. *Ferguson v Dam* (1934) 140 CA 701, 35 P2d 1072.

**EXAMPLE:** The defendant would bear the "overall" or "preponderant" burden of proof if the defendant admitted all essential elements of the plaintiff's prima facie case, so that only the defendant's limitation of actions defense was left to be tried.

Under Evid C §320, the court has discretion to "regulate the order of proof." See also CCP §598 (court may require that a certain issue be tried before other issues). On severance, see §1.9.

Trial courts have wide latitude in setting the order of proof, and such rulings are usually upheld on appeal. See, *e.g., County of San Luis Obispo v Bailey* (1971) 4 C3d 518, 527, 93 CR 859 (recognizing that order of proof rests largely within trial court's discretion). In particular, the court may vary the normal sequence to save time for both the court and the litigants. *Silver v Shemanski* (1949) 89 CA2d 520, 529, 201 P2d 418 (affirming order that potentially dispositive issues be tried first). For further discussion, see §§1.12 (bifurcation), 1.13 (trying case by issue).

**PRACTICE TIP:** Counsel should consider one other form of modifying the order of witnesses when a jury faces the challenge of evaluating competing expert testimony on technical or complex issues. Some practitioners, jurors, and judges have found it extremely helpful to have the experts testify "back to back," while the issues are still fresh in jurors' minds and the conflicts can be addressed at essentially the same time.

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## §1.12 1. Bifurcation: Trying dispositive issue first

Proof may be reordered so that a discrete and potentially dispositive issue—such as a limitation of actions defense—may be resolved as early as possible, out of the normal sequence. If the single dispositive issue can be tried separately, a tremendous amount of time can be saved if it resolves the case. It is also common to reverse the order in a bifurcated or trifurcated case so that causation or damages may be tried first in an effort to resolve the case. See CCP §598 ("[t]he court may, when … the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby," order bifurcation).

Bifurcation contemplates that all evidence and argument on the first issue will be presented, and a decision reached on that issue, before any evidence or argument relating to other issues is presented. Depending on the outcome, the trial either ends with the decision on the first issue or proceeds to other issues. See, *e.g.,* CCP §597.5 (limitations defense in medical negligence case must be tried first on motion of any party); CCP §598 (court may try any issue or portion of it before any other issue).

It is often difficult to obtain agreement on bifurcation or trifurcation because one side or the other may perceive that it will be disadvantaged or advantaged by the manner in which proof may be reordered. These perceptions are often correct, and it will be up to the court to decide the issue. Consider moving for bifurcation, particularly in complex cases, in which the case is tried in stages, with separate opening statements, closing arguments, jury instructions, and verdict forms for each stage. On motions for bifurcation, see §§6.100-6.102.

**NOTE:** Bifurcation overlaps with severance or separate trials, and it is in fact a limited form of severance. See discussion of severance in §1.9 and also §§6.99-6.104.

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### §1.13 2. Organizing trial around issues instead of parties

Another way to reorder proof is to call witnesses out of the normal sequence throughout the trial, not just for the first dispositive issue. That is, all witnesses whose testimony relates to a single issue would testify. For example, a crucial issue in a contract could be tried in 1 day with witnesses testifying for both sides. See also Practice Tip in §1.11.

This method often creates a more efficient trial, and it assists the trier of fact when two or more witnesses each have only partial knowledge of an event. Having these witnesses testify back to back may also help the jury to better assess the relative credibility of the witnesses and the relative merits of their testimony.

A concern in reordering proof in this manner is that a party cannot present its evidence in the sequence that may be most persuasive. The flow of one party's case might also disrupted by the challenging testimony of the other party's witnesses.

As long as it does not result in a miscarriage of justice, the court has discretion to reorder proof (*e.g.,* to enhance juror comprehension) even if that reordering deprives a party of a perceived tactical advantage. *Diamond Springs Lime Co. v American River Constructors* (1971) 16 CA3d 581, 602, 94 CR 200 (verdict unsuccessfully attacked on ground that sequence in which multiple defendants were ordered to present cases put one defendant at tactical disadvantage). See also *Jaffe v Albertson Co.* (1966) 243 CA2d 592, 609, 53 CR 25 (potentially dispositive equitable issues may be tried before legal issues).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.14 E. Using special masters or referees

## §1.14 E. Using special masters or referees

Unlike a private judge that the parties agree will hear the case, a special master or referee may be appointed by the court even when the parties do not agree, on the court's own motion or a party's motion, to decide particular issues while the rest of the case goes to trial. The courts have the power to appoint special masters or referees to assist in fact finding. CCP §639.

**EXAMPLE 1:** A special master can be helpful when there are accounting issues that would be time-consuming for jurors and judge to resolve in a courtroom but that could readily be resolved by an accountant.

**EXAMPLE 2:** A special master may possess engineering expertise that would otherwise require lengthy expert testimony before a jury could understand the issues involved.

There are some restrictions on the appointment of special masters, *e.g.,* dispositive motions cannot be resolved under the reference procedures prescribed by §639, because the California Constitution prohibits a delegation of judicial power, except for the performance of subordinate judicial duties. Cal Const art VI, §22. See *De Guere v Universal City Studios, Inc.* (1997) 56 CA4th 482, 65 CR2d 438 (reversing trial court's holding that adopted referee's findings and entered judgment for defendant on grounds referee should not have decided issues of law). See also *Aetna Ins. Co. v Superior Court* (1986) 182 CA3d 431, 435, 227 CR 460.

When the parties agree, a referee may ascertain a fact necessary to enable the court to determine the action; any or all issues of fact or law may be tried by reference. CCP §638.

The parties usually share the cost of the special master or referee equally. In cases with multiple plaintiffs or defendants, however, the court may allocate the costs in a manner that it believes is fairer than equal apportionment. In a case with one plaintiff and two defendants, the court may order the plaintiff to pay 50 percent of the cost of the special master or referee and the defendants (or whichever defendant is involved in a particular issue) to pay the other 50 percent.

**NOTE:** If one party is indigent, however, the court may not order the other party to bear the entire cost of a special master or referee. *Taggares v Superior Court* (1998) 62 CA4th 94, 72 CR2d 387.

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## IV. IMPROVING JURY PROCEDURES

### A. Selecting the jury

### §1.15 1. Conducting voir dire

Voir dire can be, but need not be, one of the most time-consuming aspects of a trial. All trial lawyers should be mindful that it is generally the most distasteful part of jury service for jurors. Using jury questionnaires, having the judge ask foundational and follow-up questions, reducing the number of jurors or alternative jurors, and using creative methods of selecting the jury are all techniques aimed at reducing voir dire time. See §§1.16-1.18.

In civil cases, counsel have the right to personally conduct voir dire after the court has completed its questioning of prospective jurors. The court has the power to limit each side to a fixed number of minutes or hours for attorney-conducted voir dire, as long as those limits are reasonable. See CCP §222.5; Cal Rules of Ct 3.1540, Standards of J Admin 3.25.

What limits may the court appropriately place on attorney voir dire? A touchstone for answering this question lies in the statutory requirement that counsel have an opportunity to develop enough information to enable an intelligent exercise of challenges. To this end, the court should permit liberal and probing examination to discover bias or prejudice with regard to the circumstances of the case, and "should not preclude additional nonrepetitive or nonduplicative questioning" on topics the court has already covered. CCP §222.5. Voir dire procedures are discussed in detail in §§8.30-8.53. Ultimately, the scope of attorney voir dire is within the judge's discretion and "shall be within reasonable limits." CCP §222.5. Counsel should address this issue in advance, either at an early status conference or at (but no later than) the final status conference. To the extent the judge imposes time limits, trial lawyers can shift much of what they seek to ask onto the trial court. The trial judge does not have any "time limits," and trial counsel should take advantage of this by having basic information addressed by the court's questioning of jurors.

**PRACTICE TIP:** Filing a list of judicial questions for voir dire in advance will increase the likelihood that the judge will cover the bulk of the questioning. However, filing pages of questions that are essentially boilerplate will cause a loss of credibility and defeat the purpose of the request. Well-constructed and focused voir dire questions will be the most successful, both in terms of acquiring the information and convincing the court to pose the questions, thereby saving the limited time accorded to the lawyers for their voir dire. This approach allows trial counsel to assess, as early as possible, which jurors are worth follow-up and which require no additional time, because they already appear to be favorable or unfavorable. As most experienced trial lawyers generally agree, the purpose of voir dire is more of a "deselection" exercise than a selection exercise.

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### §1.16 2. Using jury questionnaires

A written questionnaire, to be answered by prospective jurors under penalty of perjury, may shorten the selection process. See CCP §§205, 222.5. Jury questionnaires have the advantage of allowing counsel to ask questions that could not easily be asked aloud, particularly if the case covers a sensitive subject that could make jurors feel awkward or embarrassed if they are questioned personally.

**PRACTICE TIP:** Trial lawyers should always be attentive to areas of sensitivity and, at the first hint of discomfort, should ask the court if the inquiry could be continued at sidebar or in chambers. Matters that might not seem controversial may be very sensitive topics for some jurors; ignoring this possibility can prove extremely detrimental to trial counsel. At the same time, matters that a reasonable person would expect to generate feelings of sensitivity may be of no consequence to some jurors. Jurors should be given the privilege of deciding for themselves whether they require the privacy of a sidebar or in chambers conference. Trial lawyers who sense and protect that sensitivity and concern for privacy will gain many points with the jury.

Jurors often reveal prejudices in the pages of a written questionnaire that they would be embarrassed to voice before the court and other jurors. When a case contains issues that may trigger serious biases and prejudices, which people might be unwilling to admit openly, a questionnaire can be invaluable. Statements of clear bias or prejudice on the questionnaire should form the basis for a successful challenge for cause without further need to question the juror. This will also prevent poisonous statements from being made in front of the other jurors.

It is a good idea for counsel to have a short brief on challenges for cause available for trial judges. On challenges for cause, see §§8.54-8.64.

Although much time may be spent arguing beforehand about the questionnaires' content, jurors usually fill them out in an hour or less on the first day. For the questionnaires to be useful, the trial attorneys must spend some time reviewing the responses. Counsel often review the responses with jury consultants. With the completed questionnaires in hand, counsel can prepare for voir dire and conduct it more expeditiously than would be possible without such detailed written information. The questionnaire process should be used selectively, and the questionnaire itself should be finely tailored to the specific areas that are required. Jurors often see these questionnaires as "tests," and many are put off by them. The less additional time needed for the procedure, the more likely the court will consider it. Some courts permit jurors to respond in writing to questionnaires in the morning, with counsel given time over the noon break to review them, and with voir dire recommencing after the lunch break. On procedures for requesting and using jury questionnaires, see §§8.43-8.45.

An alternative to written questionnaires is a preprinted set of questions that the jurors can be individually provided either just before they come into the courtroom or as they enter. Questions can be broad or focused, providing jurors with a preview of the scope of the inquiry. This provides a comfort factor that often elicits more thoughtful responses and permits jurors a "heads up" to request some privacy in responding. Many courts have prepared questionnaires that are used in every trial, while others customize them depending on the nature of the causes of action at issue. These are generally well received by jurors.

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## §1.17 3. Reducing number of jurors

Under California law, a jury in a civil case presumptively consists of 12 persons, although the parties may agree to a jury of fewer members. Cal Const art I, §16; CCP §220.

Many courts and commentators advocate smaller juries as a way to improve trial efficiency. Some trial lawyers, however, believe that smaller juries have poorer collective memories, display different patterns of juror interaction from a larger jury, and reach verdicts different from those of larger juries. Some courts have noted the concern that smaller juries tend to have fewer minority representatives. While reducing the number of jurors is more efficient in a pure sense, some lawyers and judges believe it causes a sacrifice of justice.

**PRACTICE TIP:** It is not usually a good idea to stipulate to a reduced number of jurors. If you do agree to a reduced number, be sure to also agree on how many will be required to reach a verdict. On polling the jury (in a 12-member jury, 9 of 12 required for a verdict), see §22.22.

Reducing the number of alternate jurors who will take the place of any jurors who cannot complete the trial can also streamline the voir dire process. But it is important to have enough alternate jurors to avoid a mistrial. The number of alternates should be higher for longer trials. If a mistrial and retrying the case can be avoided, having a sufficient number of alternates available is itself an efficiency technique.

**PRACTICE TIP:** Local rules may provide guidelines on the number of alternate jurors, depending on the expected length of the trial. See, *e.g.,* Los Angeles Ct R 8.22 (four alternates if trial more than 20 days, three alternates if 7-20 days, two alternates if 4-6 days, no alternates if 1-3 days).

The manner of handling alternate jurors can affect their willingness to pay attention to the evidence. Accordingly, some courts do not tell jurors which of them will serve as alternates until the trial is over. Some judges do not select the alternates until the end of trial, but most trial lawyers prefer knowing which jurors are going to decide the case because this knowledge may affect how they conduct the trial.

**EXAMPLE:** Counsel should be cautious about proceeding without designation of alternates at the beginning of trial. Statutorily, alternates are not even selected until the jury is impaneled and sworn. CCP §234. In *People v Glenn* (1990) 225 CA3d 618, 621, 275 CR 276, the court noted that the random selection of alternates at the end of trial by the court's clerk was a technical violation of Pen C §1089 (and presumably CCP §234). The court added that there was no prejudice from the failure to designate the alternates in advance. 225 CA3d at 622. There may be other problems with late designations of alternates. In one trial, the juror subsequently chosen as the alternate had been informally designated by the other jurors, unbeknownst to the attorneys, as their "official notetaker" because of that juror's superior note-taking skills and the other jurors objected when this juror was excluded from deliberations. For further discussion of alternate jurors, see §§8.74-8.77.

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## §1.18 4. Methods of jury selection

Traditionally, jury selection involves drawing 12 names, seating the 12 people in the jury box, and then questioning them one at a time, first by the judge and then by counsel. Many trial lawyers favor this method because it allows time to relate to individual jurors, take notes on their responses to questions, and make more considered decisions about exercising peremptory challenges.

A variation of this method has all 12 jurors questioned first by plaintiff's counsel and then by defense counsel. With either method, each juror dismissed for cause (or for any reason other than a peremptory challenge) is replaced by another juror until there are 12 people in the box for which there are no challenges for cause or reasons for recusal.

Peremptory challenges then begin in alternating fashion by counsel from each side until 12 jurors remain in the box and both sides have either exhausted their challenges or accepted the jury. The process proceeds with the alternates in the same fashion.

Another method, called the "struck jury" or "six pack," is becoming the standard because it takes less time, provides for a larger pool from which to elicit answers, and allows more interaction among the jurors. With this method, a sufficient number of jurors is drawn to fill the box, plus several alternates, plus a number equal to all peremptory challenges available to all parties. As some jurors are examined for cause and excused, they are replaced and the new jurors are questioned. The questioning and challenges for cause are completed before the exercise of peremptory challenges begins. Peremptory challenges for each side may be exercised all at once or the parties may alternate. The jurors may be excused for a few minutes so that challenges can be handled in the courtroom without the jurors present. The first 12 jurors who remain, and any alternates, are seated and the remainder are excused.

Some counsel prefer this method because they believe they can view the entire universe of possible jurors and eliminate some of the guesswork involved in the traditional method. They can see which jurors are coming up as replacements, and those jurors are privy to the same questioning at the same time as the first 12. For further discussion on methods and additional variations in selecting juries, see chap 8.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.18A 5. Mini-opening statements

### §1.18A 5. Mini-opening statements

Mini-opening statements are increasingly used in many courts and are currently encouraged in the California Rules of Court. See Cal Rules of Ct 2.1034. Their purpose is not to substitute for opening statements at trial, but "to place voir dire questions in context and to generate interest in the case so that prospective jurors will be less inclined to claim marginal hardships." Comment to Cal Rules of Ct 2.1034.

Mini-opening statements are short (usually 3 to 5 minutes), nonargumentative statements made by each party to the panel *before* voir dire commences. These statements provide the background information and underlying dispute to jurors so that voir dire questions from the judge and from counsel are presented in context.

The advantages to mini-opening statements at the start of voir dire are many:

- Attorneys and judges who have served on jury duty consistently observe that the joint statements of the case traditionally read to jurors by the court tend to be dry, uninteresting, and sanitized to the point that the real dispute often cannot be discerned.
- Providing the opportunity to each side to articulate a focused thumbnail sketch of the dispute results in better, more thoughtful and relevant answers by jurors and the exposure of biases at a stage that facilitates either a challenge for cause or a peremptory challenge.
- Jurors become more engaged after they hear the "story" and are more likely to abandon efforts to find a way to avoid jury duty.
- Presenting the advocate's perspective, rather than the judge's perspective, can be powerful at this initial stage.

Mini-opening statements eliminate the perceived need by attorneys to ask problematic "hypothetical" voir dire questions to assess jurors' reactions to the specifics of their case, thus reducing attorney voir dire time.

Disadvantages are generally the same as with regular opening statements, *i.e.,* they can become argumentative. Counsel who anticipates that the other side will abuse this procedure should address the issue in advance, *e.g.,* by inquiring of the court before the mini-opening statements begin how it would like counsel to proceed. The opportunity for a "free spin," however, is an advantage that counsel should not easily relinquish.

**PRACTICE TIP:** If mini-opening statements will be used, be sure to clarify with the judge when the statements will be made. For example, many practitioners and judges have found that they are most effective when delivered as one of the first presentations to the panel, after introductions by the judge. They are best given before jurors are told the time estimate for the trial. Experience has shown that after time estimates are given, most jurors focus on reviewing their personal calendars and are often too distracted to take in information imparted while they are worrying about accommodating the time commitment of a trial.

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## B. Techniques for assisting fact-finding process

### §1.19 1. Juror note-taking

Many judges and trial attorneys feel that jurors who take notes tend to be more attentive than jurors who do not. Since people in everyday life take notes to facilitate recall of information, juror note-taking may be especially useful in longer and more complex trials. Often, jurors can answer evidentiary questions during deliberations by referring to notes instead of asking for testimony to be reread.

Jurors must be permitted to take written notes in all civil and criminal trials. Cal Rules of Ct 2.1031. The trial judge, at the start of a trial, must so inform the jurors, and the court must provide the jurors with suitable materials for their note-taking. Cal Rules of Ct 2.1031. See, *e.g.,* Los Angeles Ct R 8.38 (jurors and alternates must be furnished with notepads and pencils). Several cautionary Judicial Council Approved Jury Instructions (CACI) address jurors' note-taking during trial and the use of notes in deliberations. See, *e.g.,* CACI 102, 5010.

The practice in some courts is for the notes to be left in the jury room at night and collected by the bailiff, and destroyed after the trial. If the notes will be handled in this way, the court should inform the jury. Some jurors like to keep their notes and copies of jury instructions, if they were individually provided, as souvenirs of their jury duty. Trial counsel often forget that the experience of being a juror on a trial is a unique and rare experience and one that often very favorably shapes jurors' perceptions of our democracy and the justice system. Whether jurors should be allowed to keep their own materials after a trial is concluded is a matter of trial court discretion.

The practice of jurors taking notes on laptops, however, is still in its infancy and raises issues that call for careful consideration. Many young people are accustomed to taking notes exclusively on their laptops and have never taken notes in any other way. The problems arise when laptops are taken home at the end of each trial day, with the possibility that the information might be shared with others. Laptops may also tempt some jurors to undertake illicit Internet investigations or searches. If a juror asks to use a laptop for note-taking, counsel should ask the court to strongly admonish the juror to guard access to any stored notes during trial and to refrain from using the laptop for any purpose other than note-taking.

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### §1.19A 2. Juror notebooks

California Rules of Court 2.1032 states that the "trial judge should encourage counsel in complex civil cases to include key documents, exhibits, and other appropriate materials in notebooks" to assist jurors in performing their duties. Jurors in all types of civil cases may also benefit from the use of notebooks during trial. Comment to Cal Rules of Ct 2.1032.

Juror efficiency can be improved by the attorneys' compiling notebooks made for the trial. These notebooks may contain a glossary of legal and technical terms, a list of witnesses with a summary of who they are (with photographs, if possible), key documents and evidence, and individual copies of the jury instructions. With a corporate party, it can be especially helpful to include an organizational chart so that the jury can more readily follow the testimony. In construction defect and medical malpractice cases in particular, timelines are extremely useful in helping jurors keep track of the chronology of events at issue.

To avoid overwhelming the jury, any exhibits included in the notebooks should be limited to no more than a total of 10 pages of exhibits (five pieces of paper per party). It may be helpful for the court to specifically advise the jurors that key exhibits are included in their notebooks and that they will be cued whenever one of the documents is referenced by a witness or attorney. This will discourage them from reviewing the documents randomly and distracting themselves from testimony or other exhibits that are being presented.

**PRACTICE TIP:** Some jurors prefer taking notes on steno pads rather than in notebooks. Counsel should be open to the alternatives and should work out such issues with the court in advance. The steno pads tend to be easier for jurors to use in trial when taking notes, while the notebooks make the notes easier to retrieve during deliberations.

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### §1.20 3. Juror questions

California Rules of Court 2.1033 states: "A trial judge should allow jurors to submit written questions directed to witnesses." If a question is submitted, the court must give counsel an opportunity to object to the questions outside the jury's presence. Cal Rules of Ct 2.1033.

Many courts permit wide-ranging juror questions, not only those directed to witnesses. Cases over the past two decades have uniformly supported the ability of jurors to ask questions, provided that they are not posed orally but are submitted in writing in the course of a trial. *People v Ochoa* (1998) 19 C4th 353, 79 CR2d 408; *People v Cummings* (1993) 4 C4th 1233, 18 CR2d 796; *People v Gates* (1979) 97 CA3d Supp 10, 14, 158 CR 759.

Trial lawyers who have experience in receiving and responding to juror questions value this technique and note that the process enhances their ability to short-circuit juror speculation. They argue that if jurors are not allowed to pose their questions, they have no access to answers other than their private guesswork. Attorneys uncomfortable with the procedure argue that jurors might become overzealous advocates and could ask inappropriate questions that might prejudice a party.

The experience of courts permitting questions is generally consistent: The questions are usually few and appropriate; the process takes very little extra time and does not disrupt the normal flow of the trial; the tool enhances the ability of trial lawyers to shape the conclusions of the jurors by responding to specific concerns; and jurors report that they remain more engaged because they know they can ask questions, even if they do not actually submit any. Experts in adult education also tend to support the ability of jurors to submit questions as a normal means by which information is gathered and decisions are made.

**JUDICIAL PERSPECTIVE:** After a written question is submitted, the court should permit both attorneys to examine it, make necessary objections, and obtain a ruling, all out of the jury's presence. *People v Majors* (1998) 18 C4th 385, 407, 75 CR2d 684. The court should advise the jurors that the Evidence Code controls whether any such questions will be answered. This protects both sides from any inference that the information is being kept from them because it might damage one side or the other.

Some courts provide that a juror with a question should submit it to the judge in writing through the bailiff. The judge and counsel can then decide how to answer it or whether to answer it at all (*e.g.*, by a court instruction clarifying any misunderstanding, recalling a witness, or alerting counsel to the need to explain the significance of particular evidence in closing argument). Sometimes, the question is one that only the court can answer or that calls for an admonition by the court (*e.g.*, a question about the availability of insurance, an issue that is otherwise not addressed by the court until final instructions). Such questions, if posed, can eliminate confusion or distractions early in the trial. On managing the jury, see chap 17.

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### 4. Jury's access to instructions

### §1.21 a. Preinstructions

As laypersons, jurors do not always know what is important or what they should focus on while listening to the evidence. Preinstructions, which include the basic elements of each cause of action, provide a structure that encourages a more intelligent assessment of the evidence at the time it is being presented. Trial counsel can address evidence to specific elements without losing jurors' attention, and jurors become more efficient and effective fact finders.

Ideally, the court should read or make available individual copies of basic instructions, which include the elements of the causes of action, before any testimony is given. Providing individual copies of preinstructions is extremely helpful to jurors, who may refer to them as needed throughout the trial. Preinstructions can be included in juror notebooks. The goal of preinstruction is to help the jury understand its role in the trial, focus on the issues, and listen to the evidence in a more effective manner. California Rules of Court 2.1035 and the Judicial Council California Civil Jury Instructions (CACI) support the procedure of preinstructing the jury. On preinstructing the jury, see §§20.47-20.49.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.21A b. Final instructions

### §1.21A b. Final instructions

Even the most conscientious juror can find it challenging or frustrating to try to follow the oral presentation of final instructions. The court must advise the jurors that a written copy of the instructions is available and must provide them with a copy if they request it. CCP §612.5.

Because most adults learn more effectively by simultaneous reading and listening, it makes sense that juror comprehension will be greatly enhanced if jurors can see the instructions while they are being read. Some judges provide individual copies of the final instructions to jurors to allow them to follow along. Other judges prefer to use PowerPoint software, which ensures that the jurors will focus on each instruction as it is read and will not miss an instruction because they are reading ahead or behind on their own copies.

If the court uses either of these approaches and instructs the jury before argument, the consequent increase in juror comprehension of the instructions provides a powerful tool for the advocates during final argument. Counsel can direct each juror's attention to specific instructions and use helpful legal language to support the client's argument in conjunction with the evidence.

Courts allowing jurors to have individual copies of instructions in the jury room have found that jurors have fewer questions about the instructions during deliberations. Juror feedback has regularly revealed that jurors are very conscientious in reviewing the instructions and redirecting the deliberation process when it improperly deviates from the evidence presented and veers into speculation. For further discussion of jury instructions and jury deliberations, see chaps 20-21.

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## §1.22 5. Verdict forms

A "general verdict" is one in which the jury makes a general pronouncement on all the issues in favor of one party or the other. CCP §624.

A "general verdict with special interrogatories" requires a jury to render a general verdict as well as to answer specified questions or make separate factual findings that test that general verdict. A "special verdict" is defined as one in which jurors make specific factual findings, leaving the judgment, or the application of the law to the facts, for the court. See CCP §§624-625.

A general verdict is the most "efficient" method because it generally takes the jury less time and is less vulnerable to reversible error. Many complex cases, however, lend themselves to special verdicts (or to a general verdict with special interrogatories) because such verdicts provide a structure for deliberations and thus enhance the prospect that that the jury has understood and applied the law correctly. Studies show that jurors find understanding and applying the law to be the most difficult part of their decisionmaking. Special verdicts and, to a lesser extent, general verdicts accompanied by special interrogatories guide jurors through this difficult task. See Casper, Restructuring a Traditional Civil Jury: The Effects of Changes in Composition and Procedures, in Verdict: Assessing the Civil Jury System 436 (Robert E. Litan, ed., 1993).

Attorneys who must rely on technical defenses, and who assess the opposing party's position, on balance, to be a sympathetic one, often favor the special verdict form or request the jury to return special findings with its general verdict. For detailed discussion of verdicts, see chap 22.

**JUDICIAL PERSPECTIVE:** Many judges now require both sides to provide a proposed verdict form at the final status conference. Even if not required, this practice is advisable as a matter of professionalism and effective advocacy. When the format of the verdict form has been resolved at an early stage, trial counsel can better explain to jurors the decisions that they will be called on to make. Trial counsel who overestimate the ability of lay jurors to follow procedures do so at their peril. Giving jurors the verdict forms at the beginning of trial, even if later modifications are necessary, will provide jurors with the framework they need to assess the import and value of the evidence being presented, as well as enhance their understanding of the quality of the decisions they will ultimately be required to make. Counsel should strongly consider including individual copies of these verdict forms in the jury notebook, if one is provided to each juror. See §1.19A. Such copies in the hands of jurors during final argument are an inexpensive and effective tool for counsel and, if the jury will make special findings, help to clarify the jury's decisionmaking process.

A mistake trial lawyers often make is to assume that jurors know how to fill out a special verdict form in support of one side or the other. This is particularly dangerous when the issues are complex or there are multiple findings at stake. In a lengthy special verdict form, one technique successfully used by trial attorneys in a complex case was to "fill out" the form for the jurors, using a unique color for each party. For example, a verdict in favor of Plaintiff A was filled out throughout the form in the color yellow. A verdict in favor of another party might be in blue. These filled-out forms were then provided to the jurors and used very effectively as a tool by counsel during closing argument.

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## §1.23 C. Specially selected juries

There has been considerable controversy over jurors' ability to understand complex cases and decide them in accordance with applicable law. Some trial lawyers fear that knowledgeable jurors will share information during deliberations from their own expertise, apart from the evidence presented at trial. If all counsel stipulate to a specially selected jury and approach the court in advance about such a procedure, their clients may benefit from a shorter trial because the jury readily understands the facts at issue in the case. See Abramson, *Presenting Technologically Complex Cases to Lay Judges and Juries*, 14 Hastings Comm & Ent LJ 259 (1992); Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 Northwestern U L Rev 190 (1990).

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## V. CONDUCTING THE TRIAL

### §1.24 A. Streamlining evidence

Juries usually base their verdicts on a small number of crucial points. Too often, lawyers tend to offer as much evidence as possible, either in the belief that this will make their case more convincing or for fear of leaving something out. See Schwarzer, *Reforming Jury Trials*, 132 FRD 575, 578 (1991) (posttrial interviews with jurors "invariably disclose complaints about the lawyers' prolixity and tendency to present too much evidence"). Jurors often claim that they feel insulted by the repetition trial lawyers seem to believe is necessary. Finding the fine line between making sure the point is not lost and losing the point by insulting jurors is a skill that requires thought and preparation.

It is better to focus clearly on the issues of the case, select what is truly relevant, and present only the facts needed to prove the claims or defenses. Putting on a shorter case is usually more persuasive. Knowing when to quit is a critical skill. See Vinson, Jury Trials: The Psychology of Winning Strategy 173 (3d ed 1996).

**PRACTICE TIP:** Counsel should focus on eliciting the evidence needed to support closing argument. After that evidence is elicited, counsel should move on. Jurors appreciate counsel treating them as intelligent observers and tend to have greater confidence in the side that provides them with the information they need to make a decision while not wasting their time.

Sections 1.25-1.32 suggest different methods for streamlining evidence during trial.

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## §1.25 1. Narrowing the issues

The best way to shorten a trial is to reduce the number of issues to be tried. Partial summary judgment motions and the various discovery methods can result in narrowing the issues to be tried. Almost any measure that encourages pretrial preparation (*e.g.,* mandatory exchanges of exhibits, stipulations to the admission of exhibits, witness lists, jury instructions, and verdict forms) will help narrow the issues and reduce the areas of disagreement and argument among counsel.

**PRACTICE TIP:** In important cases, to help narrow the issues, consider using a "focus group" before trial that would be representative of jurors in the area of the trial. Focus group members can be asked to deliberate to a verdict or respond to questionnaires based on videotaped opening statements—including an opening statement presenting the opposing position in the strongest possible way. These "jurors" can also listen to a truncated presentation of the evidence through one or two witnesses and can help you decide the theme of your case, what evidence to stress during the trial, and the most effective tactics for dealing with the opponent's strong points. Although focus groups can make the trial itself more efficient, they usually add to the overall litigation costs and are justified only in cases with a great deal at stake. A less expensive alternative, which trial lawyers have relied on for ages, is to discuss the case with colleagues, friends, and relatives and assess their reactions to proposed evidence and arguments.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.25A 2. Summarizing depositions

## §1.25A 2. Summarizing depositions

Even the most conscientious juror finds it difficult to extract information from the reading of a deposition transcript. Counsel should not resort to reading transcripts to a jury unless there is no other alternative. If a deposition has been video recorded, counsel should present the video (appropriately edited) rather than read from the transcript. If transcript reading is necessary because there is no video recording and no live witness, excerpts should be kept to an absolute minimum.

**PRACTICE TIP:** Consider summarizing the deposition testimony and inviting a stipulation from opposing counsel to use of the summary in lieu of reading the transcript. Redacted transcripts that are both read aloud and shown simultaneously on courtroom monitors, with only the key sentences or paragraphs, suitable to the relevant evidence being presented, can be very effective.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.26 3. In limine motions and chambers conferences

### §1.26 3. In limine motions and chambers conferences

In limine motions and pretrial chambers conferences are invaluable trial management tools that help to focus the issues and expedite the trial. However, boilerplate motions on issues that are undisputed are a waste of the court's time and impair counsel's credibility. For example, a motion to exclude insurance information or settlement offers should never be made. For detailed discussion on the procedures and strategies of motions in limine, see chap 7. On pretrial chambers conferences, see §§6.2-6.5.

Motions in limine may resolve issues about the propriety of questionable evidence and minimize the risk of delay during trial. Counsel can obtain pretrial rulings on evidentiary problems, particularly any that may be highly prejudicial. This step reduces the danger that the jury may be exposed to improper material and avoids keeping the jury waiting while lengthy arguments are conducted to decide whether important evidence will be admitted.

Counsel should be attentive throughout trial preparation to any evidence that will likely elicit an objection. To the extent reasonably possible, ask the court to rule on that objection in advance, preferably at the final pretrial conference. While advocates always have an obligation to make objections when appropriate and when necessary to preserve an issue for appeal, jurors often assume that the objecting attorney is trying to hide damaging evidence. If the objection is sustained, then counsel has successfully hidden something damaging. If the objection is overruled, trial counsel "loses" and the jurors will be especially attentive to the damaging evidence that then is heard. Either way, objections are a "lose-lose" scenario with jurors. The most experienced and effective trial lawyers try not to object in front of jurors and do so only when absolutely necessary. If objections are made and ruled on in advance, counsel should be sure to obtain a stipulation that all objections will be deemed made at trial so that the issue is preserved for appeal.

**JUDICIAL PERSPECTIVE:** Motions in limine must be carefully analyzed because they sometimes suggest issues your opponent may not have considered. If so, you may prefer not to make the motion or choose to wait and raise the issue later. See §7.11. However, the risk in waiting to object to an issue is that the court may infer that the issue is not of great consequence. Even the most thoughtful trial judge is not likely to be able to give the objection as much weight if it is presented for the first time in the midst of a witness examination. There is also the inherent risk that jurors may hear enough snippets of the objectionable testimony and figure out what is being presented, even if the objection is sustained.

Pretrial chambers conferences allow the court to inform counsel of courtroom etiquette, available courthouse storage space for files, conference rooms for witnesses and counsel, blackboards and audio-visual equipment, location of electrical outlets, and other "housekeeping" arrangements that may be useful during trial. The chambers conferences also provide an opportunity to confirm that premarked exhibits, witness lists, deposition testimony, and proposed jury instructions have been exchanged. Any disputes about graphics or other visual aids, particularly any that may be used during opening statements, can also be resolved during a pretrial conference.

**PRACTICE TIP:** If you plan to use any kind of graphic or other visual aid, call the judge's clerk a few weeks before your trial date or use a case management conference to arrange for you or someone else working with you on the trial to visit the courtroom. Always test your equipment to ensure that everything will be where the judge wants it and in working order during the trial. It may also be a good idea to ask the clerk about the judge's preferences concerning the types of graphic or visual aids that will be presented to the jury and where they should be located in the courtroom. To the extent that any technology is going to be used, make sure that "Plan B" is in effect in the often likely event that there are technical glitches.

Many courts go a step further at the final case management or chambers conference by requiring that both sides offer all the exhibits and discovery responses they propose to use at trial, and assert all objections to the other side's proposed exhibits and discovery responses. If the objections are overruled, the exhibits are immediately admitted into evidence. This step enables counsel to refer to the exhibits during opening statement and eliminates wasting time during the trial by arguing evidentiary objections and marking exhibits. It also makes it easier for counsel and the court

to keep track of which exhibits have been admitted and which have been refused. Finally, it obviates the need to call witnesses whose testimony would be necessary only to lay foundation for admission of exhibits.

**PRACTICE TIP:** Consider working with opposing counsel and the court by stipulating to the admission of all or nearly all proposed exhibits. Start with the premise that once an exhibit is marked in front of the jury, it is deemed admitted. If this assumption causes problems with any exhibits, those should be presented to the court in advance for a ruling. All exhibits can be premarked. This advance preparation also makes it possible to select key exhibits that are appropriate to be provided to each juror individually in the jury book. See §§1.20, 1.30.

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### §1.27 4. Court's exclusions

Reducing the number of witnesses, eliminating cumulative witnesses and cumulative testimony, and reducing the length of witness testimony as well as the number of exhibits can materially shorten a trial and retain the attention and focus of jurors. At least in lengthy trials, courts often encourage counsel to reduce the number of witnesses, particularly cumulative witnesses. The court may, for example, limit the number of experts called. Evid C §723. See *Horn v General Motors Corp.* (1976) 17 C3d 359, 371, 131 CR 78; *Ramsey v Marutamaya Ogatsu Fireworks Co.* (1977) 72 CA3d 516, 532, 140 CR 247.

The court must exclude irrelevant evidence. Evid C §350. Even relevant evidence may be excluded under Evid C §352 if its probative value is substantially outweighed by the likelihood that its admission will consume undue time or create a substantial danger of undue prejudice or confusion, or will mislead the jury. See §10.16. In some counties, prejudicial or time-consuming evidence is customarily excluded on the court's own motion. See, *e.g.,* Los Angeles Ct R 8.89.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.28 5. Stipulations

## §1.28 5. Stipulations

An effective way to shorten a trial and to focus the jurors' attention on the real issues of the case is for the parties to enter into stipulations that reduce the number of factual or legal issues requiring resolution. For example, to simplify the issues of fact to be tried, the local rules for the United States District Court for the Central District of California require the parties to stipulate to facts on which the parties know or have reason to know there can be no dispute. See CD Cal Local Civ R 16-2.2. Counsel should also consider evidentiary stipulations for records, exhibits, and testimony about which there is no real controversy. On stipulated facts and testimony, see §§14.47-14.52. On foundational stipulations, see §13.86.

Stipulations of fact, however, do not have the impact that live testimony has, but if the court is willing to recite that the parties have reached agreement on certain facts to save the jury's time, the stipulation can enhance the parties' credibility with the jurors. The court may read the stipulations to the jury before, during, or after the presentation of evidence, or the court may allow the parties to read them to the jury at designated times. Counsel should also be permitted to read the stipulations during opening statements and closing arguments.

**PRACTICE TIP:** One method to ensure that factual stipulations are not overlooked or discounted by the jury is to prepare the stipulated information on a piece of paper, attach a blueback to the document to highlight it, and mark it as a court exhibit. It then becomes available for counsel to use during the trial or final argument, and is also a physical exhibit for the jurors to review during deliberations.

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## §1.29 6. Judicial notice

An often overlooked efficiency measure is judicial notice. See Evid C §§451-456. If the court takes judicial notice of a matter, counsel does not need to take the time to present evidence proving it. The court will instruct the jurors that they must accept the judicially noticed matter as indisputably true. See Evid C §457.

**EXAMPLE:** The court may take judicial notice of construction costs on the basis of a published estimator's guide—books that are widely accepted in the industry—thus obviating the need for lengthy expert testimony.

For detailed discussion of the procedures and strategies involved in requesting the court to take judicial notice of particular matters, see chap 14.

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## 7. Presenting trial exhibits

### §1.30 a. Premarking exhibits

Judges and juries quickly sense when counsel is attempting to simplify or expedite proceedings, and such efforts are always appreciated. Premarking exhibits is an easy step counsel can take to make sure the trial proceeds efficiently. It wastes time during trial if counsel, the clerk, and the court reporter are fumbling with marking exhibits. See generally Cal Rules of Court, Standards of J Admin 3.10: "Litigants in complex litigation cases should be required to minimize evidentiary disputes and to organize efficiently their exhibits and other evidence prior to trial."

**PRACTICE TIP:** Check local rules for any requirements on handling and premarking exhibits. Premarking documents is usually accomplished without the court's involvement, using an identifying letter or number, listed on court-prescribed forms to record evidence, and exchanged before trial. See Los Angeles Ct R 8.60, 7.9(h). Some courts prefer that one party use letters to identify its exhibits and that the other party use numbers. Other courts prefer that all parties use numbers, and assign blocks, *e.g.,* 1-199 to plaintiff, 200-399 to defendant *A,* 400-599 to defendant *B,* and so on. If there are voluminous exhibits, blocks of numbers are preferable to doubled and tripled alphabetic designations, *i.e.,* exhibits AA or ddd, and similar designations, should be avoided. See, *e.g.,* Los Angeles Ct R 8.62: "The most efficient method of marking exhibits is by the use of arabic numerals." If local rules do not address how exhibits should be marked, you should contact the judge's clerk to inquire about the court's preference. Handling and premarking exhibits is a time-consuming task you do not want to have to do a second time.

For further ideas on handling trial exhibits and premarking them in limine and at pretrial conferences, see §1.26. On organizing trial materials, including premarking exhibits, see chap 3.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.31 b. Copies of exhibits

### §1.31 b. Copies of exhibits

To try a case efficiently, some litigators prepare at least four copies of all documents well before trial (one each for plaintiff, defendant, the judge, and the witness). Because copying can be a tremendous expense, other litigators try cases with only one or two copies of all documents. While opposing counsel will have their own copies of depositions, it is important to keep in mind that the document that has been marked will be the one shown to the witness. Thus, the court will not have a copy unless counsel provides it. Opposing counsel may appear obstructive or ill-prepared if they do not have copies of depositions and exhibits at hand or if they are floundering around to find them.

**PRACTICE TIP:** Learn the judge's preferences for furnishing copies to the court or other counsel. You can often communicate effectively with the court clerk on these subjects, or they can be ascertained at the chambers conference. See §§1.26, 6.2. Selecting key exhibits to be provided (or included in juror notebooks) to jurors individually can enhance the value and impact of the exhibit. Although blow-ups are sometimes an appropriate way of presenting certain exhibits, providing jurors with their own copies is often preferable. Jurors can refer to them as needed and can focus on the most critical details. Keep in mind, however, that when jurors have their own copies of exhibits, it is possible that they will be reading them when key testimony is being given. Remain attentive to encouraging the jurors to focus on the information that you are currently presenting.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.32 c. Creating visual aids

### §1.32 c. Creating visual aids

Using visual aids, models, and simulations can be an important tool in making trials more efficient and in simplifying the witnesses' duty to explain and describe events. Viewing graphic displays assists the jury to understand witnesses' explanations more quickly and more accurately. Visual aids also provide an opportunity to reinforce messages delivered orally or through documents. The Standards of Judicial Administration also provide that trial judges should be "receptive to using technology in managing the trial and the presentation of evidence." Cal Rules of Ct, Standards of J Admin 2.20(b)(5).

**PRACTICE TIP:** To avoid interruptions, disclose in advance any visual aid you intend to use in opening statement, argument, or during trial. Check local rules because they sometimes require disclosure before trial. See, *e.g.,* Los Angeles Ct R 8.74. For further ideas on handling graphics in limine and at pretrial conferences, see §1.26.

The only limit is that visual aids must be likely to assist the jury to understand issues in the case. See §13.8. Consider the following items as possible visual aids in any given trial:

- Charts, diagrams, and graphs
- Enlargements of crucial documents
- Timelines
- Maps
- A mannequin or skeleton
- Film, videotapes, or photographs
- Models
- Posed photographs replicating an event
- Someone doing a demonstration
- Other types of demonstration (*e.g.,* a machine in operation)
- Computer animation
- On-site jury views.

Before deciding whether to use visual aids during trial, consider the following questions:

- What message are you trying to deliver?
- What is the best way to communicate that message?
- How much more will it cost to deliver that message with a visual aid?
- Will the visual aid be admissible?
- If it is not admissible in trial, can it nevertheless be used in argument?
- If the court rules it inadmissible, what other approach will you have as a backup strategy?

In large, complex cases, it is worth hiring a consultant to design and help produce visual aids. For example, using computer animation to rotate an object in three-dimensional space to show different perspectives or to recreate nonexistent or destroyed items or to present a complex process, while expensive, may help the judge or jury visualize what could not otherwise be seen. Even a tutorial on the technology or business involved, given by an expert witness early in the trial, can sometimes assist the judge and jury to understand the case.

With so many options, and so much new technology, counsel should avoid the danger that the message will get lost in the medium. Graphics that are too flashy may detract from a key theme, be disallowed by the court, or help the opponent's case. The more elaborate the visual aid, the greater the risk something will go wrong or backfire. The worst thing that can happen with a blackboard is a broken piece of chalk, but with computer animation, a system failure can mean hours of delay.

Visual aids that are too small, or otherwise too difficult for the jury to see, can hurt the effectiveness of counsel's presentation. A small Polaroid photograph that the jurors cannot see, or a sloppily drawn diagram on a slip of paper, can be more detrimental to a presentation than no exhibit at all. On developing visual aids, graphic exhibits, and

computer simulations, see chap 13.

**PRACTICE TIP:** Do not confuse and overwhelm the jury with too many visual aids and exhibits. Keep in mind the technology being used by opposing counsel. Bigger and flashier are not always better; it may simply remind the jury that your client's pocket is deeper than the other side's. However, professionally presented technology can be extremely effective regardless of who presents it. Trial counsel's exhibits should be designed with the opposition in mind as well as the court and jurors. Reduce the volume of exhibits by eliminating those of marginal importance and by summarizing voluminous transactional records whenever possible. Consider how best to present important exhibits to the judge and jury. Enlargements of documents or overhead projections are simple, easy to prepare and use, and often as effective as expensive graphics illustrating the same points. Enlargements can be better than giving individual copies to the jurors because you can control the focus of their attention, but if the document or exhibit is important enough, consider preparing both enlargements and individual copies. If you want the jurors to shift their focus from an exhibit to a witness, the enlargement can be turned aside or the projector turned off. Give the judge a tabbed and indexed notebook of proposed exhibits and demonstrative aids before trial. The court will then have the exhibit list handy for reference during testimony, as well as for ruling on any unresolved objections.

A jury view is also a visual aid. Some trial lawyers argue that a trip to the site of the event can help jurors to place the events in context. But because jury views require time and expense, this step is clearly not an efficiency measure. Other trial lawyers worry that a completely unexpected prejudicial event might occur during a visit to the site. For these reasons, neither the courts nor lawyers favor jury views, and they are seldom requested. For discussion of fact finder views in bench trials, see §24.6; in jury trials, see §17.9.

**PRACTICE TIP:** If exhibits have been numbered but not otherwise referred to in trial, consider not offering them into evidence. It is often dangerous to provide voluminous exhibits to jurors with no direction or structure supplied by witnesses during the trial. Generally, the greater the volume of exhibits presented, the decreased likelihood that jurors will even look at them. In addition, admitting voluminous documents, such as medical records, presents the problem of jurors seeing notations or reading handwritten entries in unpredictable ways that were never anticipated by trial counsel. If a visual aid is not admitted, consider using it during argument. However, if any exhibit is used strictly for argument, counsel should always advise the jury that the particular exhibit will not go into the deliberating room. It is not unheard-of for jurors to assume they will have access to exhibits used during argument and fail to take notes. This situation can be avoided by ensuring that all exhibits are as neutrally prepared as possible without losing the point of the exhibit so that admissibility is not compromised. If, despite such efforts, admission is denied, jurors should be advised on their limited use in argument.

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## §1.33 B. Disclosing order of witnesses

Requiring disclosure of the general order of witnesses from the beginning to the end of trial, and specific disclosure of witnesses 48 hours before they are called, usually improves trial efficiency. See, *e.g.,* Los Angeles Ct R 8.81. Counsel are better prepared to examine witnesses, are less likely to ramble, and are better able to deal with objections and other issues that may arise with particular witnesses.

In contrast, when opposing counsel is surprised by the identity of the next witness, a typical reaction is to seek a recess or postponement at the conclusion of the witness's testimony, or undertake meaningless cross-examination designed to occupy the rest of the trial day to preserve the opportunity to complete the cross-examination the next day. The interests of justice are seldom served by forcing counsel to spontaneously cross-examine when a well-prepared cross-examination would reveal flaws in the evidence offered.

Disclosing witness order also reduces cost because preparation can be more orderly (avoiding unfruitful cross-examination or crash preparation for witnesses that are being called unexpectedly). Some counsel resist mutual disclosure of witnesses because they see an advantage in not doing so, but most courts will require it if opposing counsel requests. For further discussion, see §6.3.

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### §1.34 C. Interim summaries

Many courts permit interim summaries during the course of a trial. This technique allows attorneys to summarize their client's side of the case during the presentation of evidence. Generally, a prearranged number of minutes is allocated to each side, to be banked and used at the discretion of trial counsel. Some attorneys believe interim summaries to be useful in facilitating juror comprehension, particularly when jurors are presented with complex or technical information or when there has been a break in the trial, such as a long holiday weekend (*e.g.,* the attorney can immediately explain the relevance of the evidence). Otherwise, because opening statements are limited to a presentation of the facts (see §9.2), the jurors may be genuinely confused about what is important in the evidence being offered. Usually, not until closing argument will the jurors for the first time receive a systematic, detailed overview of the case. Besides aiding juror understanding and retention, interim summaries usually have the effect of making the closing arguments tighter, thereby reducing total trial time.

**EXAMPLE:** Counsel for both parties are allowed to begin the first day of each week of a lengthy trial with a 20-minute summary of the preceding week's evidence and how it relates to the issues the jury will be required to decide in the case. This method has the advantage of refreshing the jurors' memory of the previous week's testimony before a new week of testimony begins and avoids the need to repeat what was previously presented. Some attorneys are opposed to interim summaries, particularly if the court allows them to be given at any time, because they might invite abuse and interrupt the normal flow of both parties' cases. In these circumstances, interim summaries can deteriorate into emotional comments that keep both sides off balance and make it impossible to predict when responsive arguments may be necessary. It is important that the judge permit only summaries and not argument. Some attorneys also believe that it is unfair to the defense to have the case summarized and "argued" midtrial, during the plaintiff's presentation of evidence and before any defense evidence has been offered. The technique ultimately works best if not abused, and any concern about abuse by opposing counsel can and should be addressed in advance of trial.

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### §1.34A 1. Witness introductions

An effective variation of interim summaries is the introduction of each new witness by a short statement explaining what he or she will be contributing. Such an introduction, usually a single sentence explaining what the witness will testify to, puts that witness into context and allows the jury to maintain focus. This can be particularly helpful when witnesses are not called in a logical chronological order, as is frequently the case despite best efforts.

**PRACTICE TIP:** This technique should be proposed in advance. It will assist the jurors, take virtually no extra time, and maintain the flow and momentum by keeping the witness in context. Most judges will permit this technique, provided that it remains a neutral introduction and not a disguised argument.

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### §1.35 2. Summaries of testimony

Occasionally, courts have required that direct testimony of some witnesses, particularly expert witnesses, be submitted before trial in narrative written form. Instead of conducting direct examination in oral question and answer format, the written narrative is reviewed by the court (in a bench trial) or read to the jury. The attorney then asks whether the witness wants to add or change anything in the written statement. Taking into account events that have occurred during the trial, the attorney may ask a few additional questions. Finally, the witness is presented for cross-examination and rebuttal. See Solomon, *Techniques for Shortening Trials*, 65 FRD 485, 490 (1974) ("These statements by expert witnesses are popular with attorneys. It gives counsel … the opportunity to have the testimony of the witness presented to the court or jury in a clear, concise, and orderly manner, and it gives the opposing counsel an opportunity to adequately prepare for cross-examination").

Opponents of this approach to direct examination feel that although reading narrative summaries in lieu of live testimony clearly saves time, it risks boring the judge and jury and provides fewer opportunities for the fact finder to evaluate the witnesses' credibility. For truly unimportant witnesses, however, it may be an effective efficiency measure. On the examination of witnesses generally, see chap 11.

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### §1.36 D. Court-imposed time limits

The court's setting of time limits in trial has been upheld on appeal when the limits were deemed to have been reasonable. See, *e.g., Ryan v Commission on Judicial Performance* (1988) 45 C3d 518, 530, 247 CR 378 (time limits permitted for argument); *People v Visciotti* (1992) 2 C4th 1, 48, 5 CR2d 495; *People v Wright* (1990) 52 C3d 367, 419, 276 CR 731; *People v Morales* (1988) 203 CA3d 970, 972, 250 CR 240 (time limits on voir dire); *Wilson v Kopp* (1952) 114 CA2d 198, 208, 250 P2d 166 (not reversible error to set 40-minute time limit on closing argument, at least in absence of objection by counsel). But see *People v Green* (1893) 99 C 564, 569, 34 P 231 (limiting closing argument or opening statement to 1 hour each per side in complicated case held too restrictive).

The rationale for setting time limits is that they stimulate the litigants to narrow the areas of inquiry and advocacy to those that are relevant and material. Some judges believe that overall time limits also encourage trial lawyers to pare away redundant witnesses and documents, while still providing latitude in putting on their cases. See Cal Rules of Ct, Standards of J Admin 2.20(b)(2) (trial judge should "set reasonable time limits" after consultation with counsel) and 3.10(d) ("[t]ime limits should be regularly used to expedite major phases of complex litigation"). On multiple party litigation, see §§1.46-1.48.

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### §1.37 1. Limiting parties' total trial time

Many judges prefer to set time limits for the entire trial, with the clock ticking at each point that counsel takes the floor asking questions, whether direct or cross, opening statement, or closing argument, thereby allowing trial counsel to set their own priorities for what is important and what to devote time to consistent with their clients' interests. Another method of imposing time limits is to limit certain parts of the trial, such as direct examination, cross-examination, opening statements, and closing arguments. See §1.38.

**EXAMPLE:** In a federal case, the court's placement of a 56-hour time limit on the trial, which resulted in one party running out of time and being left with only 5 minutes per witness for cross-examination, was valid and not a due process violation. *General Signal Corp. v MCI Telecommunications Corp.* (9th Cir 1995) 66 F3d 1500, 1508.

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### §1.38 2. Abbreviating trial segments

Most experienced trial lawyers are prepared to conduct a swift, hard-hitting trial. If the court is inclined to set time limits, counsel generally prefer limits on the total trial time rather than on individual segments, so that they have more leeway as needed. See §1.37.

**EXAMPLE:** In a jury trial, the court has the discretion to fix the duration of closing arguments consistent with the magnitude and complexity of the case. See *Bates v Newman* (1953) 121 CA2d 800, 809, 264 P2d 197 (affirmed ruling that limited each side to 30 minutes for opening statement and to about 50 minutes for closing argument in jury trial). In a bench trial, the judge may proceed without either opening statements or closing arguments, choosing instead to rely on trial briefs and written summations. See §§19.8, 24.12.

Setting time limits on trial segments may shorten a trial but has the disadvantage of requiring the court to intrude into counsel's choices about what aspects of the case warrant emphasis. If time limits on discrete trial segments are nevertheless imposed, counsel should try to work with the court to make them realistic and subject to reconsideration as the trial unfolds.

**PRACTICE TIP:** If the court sets time limits, it is advisable to request that the court inform the jury. The jurors are invariably grateful for the respect for their time implicit in such limitations, and will be less inclined to speculate as to why more witnesses were not called or other evidence not presented.

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### §1.39 3. Mandatory resting when evidence not ready

In some trials in which counsel is ill-prepared, the court may insist that counsel proceed to present evidence on pain of being deemed to have rested (absent extraordinary circumstances). This rule ensures that, if a witness is late or finishes early, counsel will have another witness ready or will fill the gap productively by reading deposition testimony, presenting exhibits, or otherwise moving the trial forward. Without such a rule, a party may run out of evidence to present, thus forcing a premature end to the day's trial schedule and an unappreciated waste of juror and court time.

As a practical matter, however, most courts recognize that it is difficult to manage the presentation of a case so perfectly that counsel can predict how long every witness or event is going to take. For this reason, they rarely impose this sanction, although the threat of it probably has a positive effect on trial efficiency. To avoid seeming both unprepared and cavalier about jurors' time, counsel should make every effort to have witnesses ready and waiting. Taking witnesses out of order, if there is a gap and another witness is available, or having other evidence at hand to present, is preferable to wasting jury time.

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## E. Courtroom hours and activities

### §1.40 1. Scheduling half days

Several scheduling options are available that will make the trial itself proceed more quickly and efficiently. For example, trials conducted on a half-day basis (8 a.m. to 1 p.m.) avoid the disruption of a lunch break and are often more productive than trials conducted on a full schedule. Generally, full trial days yield no more than 5-1/2 or 6 hours of testimony. A truncated schedule can achieve the same yield while permitting other work to go forward.

Although trial attorneys generally work full-time on a case regardless of how it is tried, a half-day schedule often results in a more organized, better-presented trial because counsel will be less fatigued and better able to prepare for each day's events. For other scheduling ideas, see §1.41.

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## §1.41 2. Avoiding recesses

It is always more efficient to let the trial gather momentum and keep it going until the case is submitted to the trier of fact. Doing so means avoiding recesses whenever possible. Some attorneys believe that relatively long and uninterrupted trial days that run consecutively tend to shorten the duration of trial by eliminating the need to remind the judge or jury what occurred earlier.

It is particularly important not to lose the impact of evidence after both sides have rested by having to retreat for a discussion completing final instructions. Such interruptions can be harmful distractions to jurors and at such a key point in the trial can cause them to lose focus and engagement in the outcome. It also sets up a delay between the final presentation of witnesses and trial counsel's final arguments. If jury instructions are presented and completed as fully as possible during pretrial preparations, delays can be virtually eliminated and the jury can move from listening to the evidence to hearing instructions that prepare them immediately for argument and deliberations.

**PRACTICE TIP:** Many judges are interested in resolving all final instructions as early as possible. If proposed instructions are prepared and discussed at the final status conference, it becomes a relatively simple exercise to eliminate those that become obsolete and to add those that become relevant, so that the transition from the presentation of evidence to instructions to argument is seamless. As noted in §1.21, the optimal format is to have the instructions completed with individual copies available to jurors before the recitation by the court, thereby allowing jurors to better understand the instructions by being able to read along with the recitation. Experts in adult education uniformly confirm that the presentation of information in multiple formats (*e.g.,* oral and visual) exponentially increases the comprehension of the listener. It also provides an additional tool during argument, when counsel can specifically direct jurors to those instructions that assist their case.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.42 3. Starting on time

## §1.42 3. Starting on time

Courts and counsel can improve trial efficiency and command the respect of jurors by strictly enforcing and cooperating with starting times, holding recesses to a fixed, brief period, and avoiding frequent or prolonged recesses. See Cal Rules of Ct, Standards of J Admin 2.20(b)(3), (6). Doing so ensures that the momentum of the trial is carried through to the time a verdict or a decision is reached. Whatever the designated time to commence, whether in the morning or after recesses, trial counsel should always be at counsel table ready to go.

**EXAMPLE 1:** Simply starting on time each morning, rather than having counsel, witnesses, the judge, and jurors drift in 10 to 20 minutes late each day or after every break, can save considerable time over the course of a lengthy trial.

**EXAMPLE 2:** Completing the testimony of a witness before ending a trial day minimizes repetition and has a favorable impact on the next day's start. The next witness can then be in court ready to be sworn when the trial reconvenes.

For other examples, see Solomon, *Techniques for Shortening Trials*, 65 FRD 485 (1974).

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## §1.43 4. Eliminating unnecessary bench and chambers conferences

A significant source of delay in jury trials is the frequent sidebar or chambers conferences during trial to resolve evidentiary and other issues out of the jury's hearing or presence. California Rules of Court, Standards of J Admin 2.20 provides that the trial judge should permit sidebar conferences only when necessary and keep them as short as possible. Sidebar conferences create interruptions that are distracting and generally extremely frustrating for jurors because they interrupt the flow of the testimony and make them feel that relevant matters are being hidden from them. They also require the court to decide important and complex issues under time pressure and often without the benefit of a thorough briefing, thus increasing the risk of error as well as inconsistent rulings. See Practice Tip in §1.26.

Although reducing the number and length of bench conferences increases trial efficiency, they cannot always be prevented or eliminated. They are often necessary and highly useful in averting serious prejudice, reversible error, or other undesirable events. Except when a problem arises that could not reasonably have been anticipated earlier, trial counsel should request such conferences sparingly. If they are necessary, they can and should take place on counsel's time, not the jurors' time, either at the end of the trial day or before the trial normally resumes in the morning. Many local rules require evidentiary motions to be heard before the trial begins. See §1.26; see chap 7 on in limine motions.

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## §1.44 5. Eliminating argumentative behavior of counsel

Courts and counsel can improve trial efficiency by enforcing and honoring rules with regard to objections. An objection and the grounds for it should be stated briefly on the record, without unnecessary speeches or commentary. On procedures for making trial objections, see chap 15.

Argumentative behavior among counsel, which can consume much court time and is seldom desirable or productive, should be kept to a minimum. For discussion of argumentative conduct that can amount to misconduct, see §§16.21, 16.31. Experienced trial counsel are keenly aware of the value of their credibility with both the judge and the jury. This capital can be lost by surly or unprofessional conduct before or during the trial.

**JUDICIAL PERSPECTIVE:** Jurors quickly notice if a trial lawyer is being reasonable and accommodating while still remaining an advocate. Refusing to stipulate or otherwise behaving in less than civil and professional fashion, or making objections when there is little to gain, even if technically valid, tend to erode the credibility of the trial lawyer making the objections in the eyes of both judge and jurors.

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### §1.45 G. Court-appointed experts

In highly technical cases in which both sides' experts may have given conflicting testimony leaving the jurors confused, the court may decide to appoint a neutral expert. See generally Evid C §730. An expert can provide a basic tutorial on the subject that has remained obscure to the jury, identify the issues that the parties' experts disagree on, and explain the basis for their disagreement. As a practical matter, the court should consider appointing a neutral expert witness when there is a wide disparity between the opinions of the experts called by the parties, or when an impartial opinion would aid the fact finder to resolve the conflicting points of view.

Many trial lawyers oppose the use of court-appointed experts, even when they are neutral, because it removes control of the litigation from counsel, who rarely know for certain which side the expert will support. The objectivity that a jury may impute to a court-appointed expert may also harm a party's case. If the case can be helped by a neutral expert, however, counsel might advocate such a court-appointed expert.

The court's use of experts can also be expensive. The parties pay for the experts to review the case without being able to control how much time they will spend. The cost of a neutral expert appointed by the court is initially shared by the parties, and after trial taxed as costs to the losing party. Evid C §731(c). On recovering costs, see chap 27. For discussion of expert witnesses, see §§11.130-11.151.

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## VI. MULTIPLE PARTY CASES

### A. Relationship among counsel

### §1.46 1. Similarly aligned parties

Multiple party cases present many opportunities to increase trial efficiency. When the parties are aligned, counsel should attempt to establish good working relationships, agree to avoid duplicative discovery and gathering of evidence, and divide the work of preparing for trial. It is to the clients' benefit to refrain from any infighting or confusion at trial that would benefit a common adversary. Sometimes, the court appoints "lead counsel" to coordinate these activities. Multiple party cases often require exceptional judicial management and may be designated as "complex" for purposes of pretrial discovery under Cal Rules of Ct 3.400-3.403. See California Civil Procedure Before Trial, chap 40 (4th ed Cal CEB 2004).

The lawyers' loyalty is first to their own clients over the alliance that has been temporarily established for trial management purposes, and codefendants' commitment to their alliance generally varies inversely with the approach of trial, *i.e.*, codefendants have a greater tendency to settle on their own with the plaintiff on the eve of trial.

Defendants, in particular, should consider implementing the following strategies in multiparty cases:

- It may be advantageous to resolve claims for indemnity, contribution, or cross-claims in a separate proceeding if it has been conclusively determined that one or more defendants are liable to the plaintiff. In fact, it may be a better strategy to stipulate not to file cross-complaints but to file indemnity actions after the plaintiff's case is resolved.
- Arbitration or another ADR method (see §§1.5-1.7) may work to resolve two or more codefendants' disputes so that a united front at trial can be presented to the plaintiff.
- With the judge's approval, counsel may stipulate that an objection by one party is an objection by all.
- It may be advisable to enter into a joint defense agreement to protect the attorney-client and work-product privileges to the extent that co-counsel are working together on a case.

**NOTE:** Arguably, disclosure in this context is reasonably necessary to accomplish the purpose for which counsel was consulted, and therefore the privilege is not waived. See, *e.g., Insurance Co. of N. Am. v Superior Court* (1980) 108 CA3d 758, 765 n1, 166 CR 880; *Cooke v Superior Court* (1978) 83 CA3d 582, 588, 147 CR 915. See Comment to Evid C §952.

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## §1.47 2. Problems of control

From an efficiency standpoint, it is better for multiple parties on each side of a case to come to an agreement on the use of peremptory challenges, on the order of opening statements, and on the presentation of their cases rather than compelling the judge to make these decisions. Counsel may not like the judge's decisions as well as the agreements they can hammer out on their own.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.48 B. Special designation of counsel

## §1.48 B. Special designation of counsel

Many efficiency issues involved in multiparty litigation have to do with the division of work among co-counsel. For example, the court has the authority to appoint a liaison counsel, to designate lead counsel and a steering committee of counsel, and to deal with issues relating to compensation of liaison, lead, and other counsel. These arrangements may also raise issues of privilege. See §1.46. On complex cases and coordination of complex actions, see Cal Rules of Ct 3.400-3.403, 3.501-3.506.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/1 Handling Trials Efficiently/§1.49 VII. SELECTED BIBLIOGRAPHY

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/Chapter Outline

# 2

# Completing Pretrial Procedures

**Stephen H. Marcus**
**Marlene I. Camacho**

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  - 2. Procedures under master calendar §2.64
- C. Consider pretrial motions §2.65

VII. CHECKLIST: TRIAL PREPARATION §2.66

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## §2.1 I. SCOPE OF CHAPTER

The procedures described in this chapter begin immediately after counsel receives a trial date. The chapter covers the steps required to complete pretrial procedures, *e.g.,* final discovery (see §§2.2-2.18), including the effect of judicial arbitration on those procedures. See §§2.19-2.24. The chapter assumes that you have already followed the applicable procedures to obtain a trial date (see California Civil Procedure Before Trial, chaps 40-42 (4th ed Cal CEB 2004)), although a trial department or courtroom may not yet be assigned.

This chapter also discusses the procedures that must be followed to obtain a trial by jury, *i.e.,* to demand the jury and pay the jury fees. See §§2.25-2.35. On determining right to jury trial and relief from waiver if that right has been waived, see chap 8.

Before trial in some cases, counsel should evaluate the effects of adverse publicity on the client's case and consider motions for a continuance or change of venue. These issues are discussed in §§2.36-2.60.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/ II. COMPLETE FINAL DISCOVERY/ A. Deadlines for completing discovery before arbitration or trial/ 1. If case sent to arbitration/§2.2 a. Usually no discovery after hearing except by court order

## II. COMPLETE FINAL DISCOVERY

### A. Deadlines for completing discovery before arbitration or trial

#### 1. If case sent to arbitration

### §2.2 a. Usually no discovery after hearing except by court order

If the case has been sent to judicial arbitration (see §§2.19-2.24), complete discovery at least 15 days before arbitration begins. Cal Rules of Ct 3.822. When a party requests a trial de novo after the arbitration, no discovery, except expert witness depositions (see §2.3), may be conducted after the arbitration hearing unless the parties stipulate otherwise or a court order allows discovery on a showing of good cause. CCP §§1141.24, 2024.040(a).

For further discussion of judicial arbitration and discovery, see California Civil Procedure Before Trial, chap 37 (4th ed Cal CEB 2004).

**PRACTICE TIP:** If the court orders an early nonbinding arbitration, consider entering into a stipulation with all parties to allow discovery after the arbitration. In a judicial district in which the courts are congested and there is likely to be a lengthy period of time between the arbitration and the trial, the court may allow at least limited postarbitration discovery.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.3 b. Exception: Expert witness discovery permitted

### §2.3 b. Exception: Expert witness discovery permitted

If one party requests a trial de novo after the arbitration, expert witness discovery under CCP §§2034.010-2034.730 can be completed on or before the 15th day before the initial trial date. CCP §2024.030. See §2.7.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.4 2. If case not sent to arbitration

### §2.4 2. If case not sent to arbitration

If the case is not sent to judicial arbitration, a party must complete nonexpert discovery proceedings on or before the 30th day before the initial trial date, subject to certain exceptions (see §§2.5-2.8 for exceptions). CCP §§2024.010-2024.020.

A continuance or postponement of the trial date does not reopen discovery. CCP §2024.020(b). However, if the court grants a new trial, declares a mistrial, or orders a reversal on appeal, discovery reopens as a matter of right and the last date for completing discovery is calculated from the date initially set for the new trial of the action. See *Fairmont Ins. Co. v Superior Court* (2000) 22 C4th 245, 92 CR2d 70.

Discovery is considered complete on the day responses are due or the day a deposition begins. CCP §2024.010. For example, depositions begun 31 or more days before the initial trial date may be completed within 30 days before trial.

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### §2.5 a. Effect of local rules

The Judicial Council preempts local rules on discovery, ex parte applications, motions, pleadings, and form and format of court papers. Cal Rules of Ct 3.20(a). Local rules adopted under the Trial Court Delay Reduction Act of 1990 (Govt C §§68600-68620) are not preempted, nor are local rules on motions in limine and trial or posttrial proceedings. Cal Rules of Ct 3.20(b).

**NOTE:** Although the trial court may adopt local case management rules, the court does not have authority to shorten statutory time periods. Govt C §68616. The California Civil Discovery Act (CCP §§2016.010-2036.050) governs deadlines for individual discovery methods. Govt C §§68616(f), 68620(c).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.6 b. If court allows later discovery

### §2.6 b. If court allows later discovery

Discovery proceedings less than 30 days before the initial trial date may be conducted only by court order or on noticed motion, ex parte application, or joint application signed by all parties, or by the parties' agreement confirmed in writing. CCP §§2024.050(a)-(b), 2024.060. See §2.11 on moving for additional discovery after the discovery deadline.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.7 c. Expert witness discovery

### §2.7 c. Expert witness discovery

Discovery proceedings involving expert witnesses identified under CCP §§2034.010-2034.730 can, and must, be completed on or before the 15th day before the trial date. CCP §2024.030.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.8 d. Unlawful detainer and eminent domain discovery

### §2.8 d. Unlawful detainer and eminent domain discovery

In unlawful detainer actions, parties must complete discovery on or before the fifth day before the date set for trial. CCP §2024.040(b). In eminent domain proceedings, conduct discovery according to CCP §§1258.010-1258.300, not under CCP §§2024.010-2024.060. See CCP §2024.040(b).

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## §2.9 3. Determine when to initiate final discovery requests

If you have not completed discovery, serve the discovery request (*e.g.,* send interrogatories) early enough so that the statutory time for response will not fall within the 30 days before the initial trial date. See generally CCP §§2024.010-2024.020.

**PRACTICE TIP:** Even if you have propounded extensive written discovery, consider a final round of written discovery near the cutoff date to make sure no new facts have emerged. See CCP §2030.070 (supplemental interrogatory).

Remember to add 5 calendar days to the statutory response period when serving a discovery request by mail if the address is in California, 10 days if the address is outside California but in the United States, and 20 days if the address is outside the United States. CCP §§1013, 2016.050. See, *e.g., Brochtrup v Intep* (1987) 190 CA3d 323, 332, 235 CR 390 (30-day period to respond extended for 5 days, under §1013, when service is by mail); *Citicorp N. Am., Inc. v Superior Court* (1989) 213 CA3d 563, 567, 261 CR 668 (§1013 is procedural statute of general application that extends any period to act following service by mail). If the discovery request is served by Express Mail or other authorized method of delivery providing for overnight delivery, the statutory response period is extended by 2 court days. CCP §1013(b).

Allow sufficient time to serve a notice for a discovery motion, if necessary. The court must hear the motion on or before the 15th day before the initial trial date. CCP §2024.020(a). The motions and supporting papers must be served and filed at least 16 court days before the hearing (add 5 calendar days if served by mail within the State of California, 2 court days if served by Express Mail or other overnight delivery service). CCP §§1005(b), 1013; Cal Rules of Ct 3.1300. All papers opposing a discovery motion or reply papers shall be served by personal delivery, facsimile transmission, express mail, or other statutory means reasonably calculated to ensure delivery to the other party not later than the close of the next business day after the time the opposing papers or reply papers are filed. CCP §1005(c). Code of Civil Procedure §1013, which extends the time within which a right may be exercised, does *not* apply to a notice of intention to move for new trial, notice of intention to vacate judgment under CCP §663a, or notice of appeal. CCP §1013.

On discovery motions in general, see California Civil Discovery Practice, chap 15 (4th ed Cal CEB 2006).

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## B. Making discovery motions before trial

### §2.10 1. Deadline for court to hear motions

The court must **hear** motions concerning discovery on or before the 15th day before the date initially set for trial. CCP §2024.020(a). Discovery motions concerning expert witnesses must be heard on or before the 10th day before the date first set for trial. CCP §2024.030. 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 December 2009).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.11 2. Moving for additional discovery after deadline dates

## §2.11 2. Moving for additional discovery after deadline dates

Any party may move to have the court delay the deadlines for discovery completion, or to reopen discovery if trial is continued or after a judicial arbitration award. The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. CCP §2024.050(a).

To support the motion, provide the court with the facts it must consider while exercising its discretion to grant or deny the motion (CCP §2024.050(b)), *e.g.*:

- The necessity and reasons for the discovery;
- The diligence or lack of diligence of the party seeking discovery and the reasons it was not completed earlier;
- Whether the discovery will prevent the trial from going forward on the date set or will otherwise interfere with the court's trial calendar; and
- The length of time between the time previously set, and currently set, for trial.

The court must also impose sanctions against a party or counsel who unsuccessfully makes, or opposes, a motion to reopen discovery, unless the court finds that the motion, or opposition, was made in good faith. CCP §2024.050(c).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.12 C. Object to discovery that falls within 30 days before trial

### §2.12 C. Object to discovery that falls within 30 days before trial

If there is no agreement confirmed in writing or court order permitting late discovery, a party served with a discovery request, whose statutory period for completion falls after the discovery deadline (under statute or set by the court), may object as explained in §§2.13-2.17.

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## §2.13 1. Deposition of client

If opposing counsel notices a deposition of the client within 30 days before trial, first serve a formal written objection based on an error or irregularity in the deposition notice. This objection should be personally served at least 3 calendar days before the scheduled deposition (additional time is required if the objection is served by mail; see CCP §1013). CCP §2025.410(a). Objecting preserves the right to raise the objection at trial when opposing counsel tries to use the deposition.

This objection to the form of the notice does not stay the deposition. To prevent the deposition from proceeding, either:

- Include in the objection that the deponent, who is a party or witness under your control, will not appear at the deposition because CCP §§2024.010-2024.020 provide that discovery must be completed on or before the 30th day before the date initially set for trial; or
- Move for an order staying the deposition and quashing the deposition notice under CCP §2025.410(c).

In either event, make a reasonable and good faith attempt to resolve the problem informally before objecting or moving to stay the deposition. CCP §2025.410(c).

Arguably, the deponent should be able to refuse to attend an untimely noticed deposition and not have to bear the expense or burden of having to move for an order. This argument is based on CCP §2024.050, which places the burden of justifying late discovery on the party seeking it. If the deponent does not appear, the party noticing the deposition can move to compel the deposition under CCP §2025.450 and to extend time to complete discovery under CCP §2024.050(a). See §2.11. The risk of not appearing at the deposition is that if the party seeking discovery brings a motion to compel the deposition, the court must impose sanctions against the deponent for not attending unless the court finds that the deponent acted with substantial justification. CCP §2025.450(c).

**PRACTICE TIP:** If you make a timely objection because you believe that the late deposition is unjustified, *e.g.,* no newly discovered evidence has made the deposition important, you may be safe in placing the burden on the deposing party to move to compel. However, the better strategy is to contact opposing counsel and resolve your objections before instructing your client not to attend the deposition, *e.g.,* you and opposing counsel might agree that interrogatories or some other type of discovery would better serve opposing counsel's purpose, or may agree to a more convenient location, time, or time limit for the deposition.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.14 2. Deposition of nonparty witness

## §2.14 2. Deposition of nonparty witness

If the deposition of someone other than the client is noticed after the discovery deadline, counsel can object and not attend under CCP §2025.410(b), which provides that if counsel does not attend, opposing counsel cannot use the deposition at trial if the court later determines that the objection was valid. CCP §2025.410(b).

**PRACTICE TIP:** The better strategy is to move for an order staying the deposition and quashing the deposition subpoena (CCP §2025.410(c)) instead of letting the deposition proceed in your absence.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.15 3. Interrogatories; request for admission; request for production and inspection, copying, testing or sampling of documents or things or entry on land or other property

## §2.15 3. Interrogatories; request for admission; request for production and inspection, copying, testing or sampling of documents or things or entry on land or other property

Respond by objecting to late-served discovery requests on the ground that they were served in violation of CCP §§2024.010-2024.020.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.16 4. Physical, mental, or blood examination

## §2.16 4. Physical, mental, or blood examination

Object to an untimely demand for physical, mental, or blood examination in the response you file under CCP §2032.230.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.17 5. Expert witness discovery

### §2.17 5. Expert witness discovery

Object and seek a protective order under CCP §2034.250. A party who has served an untimely demand may move to be relieved of the consequences of that error under CCP §473 (relief from mistake). Relief is not limited to that specified in the discovery statutes. *Zellerino v Brown* (1991) 235 CA3d 1097, 1 CR2d 222.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.18 D. If trial date continued or new trial ordered

### §2.18 D. If trial date continued or new trial ordered

If the initial trial date is continued, neither discovery nor the right to designate experts reopens. *Beverly Hosp. v Superior Court* (1993) 19 CA4th 1289, 1294, 24 CR2d 238. A limited exception to this rule is that the death or serious illness of a trial attorney or party may constitute good cause to reopen discovery after a trial date has been continued. *Hernandez v Superior Court* (2004) 115 CA4th 1242, 1247, 9 CR3d 821.

New experts may be designated before a new trial, after a motion for new trial has been granted, after a case has been reversed on appeal, or after a mistrial is declared. *Fairmont Ins. Co. v Superior Court* (2000) 22 C4th 245, 92 CR2d 70. A party is entitled to present new expert witness testimony in a new trial on a claim abandoned in the prior trial. *Gordon v Nissan Motor Co.* (2009) 170 CA4th 1103, 1112, 88 CR3d 778. An order for a new trial reopens demands for exchange of expert witness information. *Hirano v Hirano* (2007) 158 CA4th 1, 6, 69 CR3d 646. See §2.4.

**EXAMPLE 1:** The trial court ordered a new trial on the issue of damages. Plaintiff in the new trial had the right to introduce new and additional evidence and therefore had the right to designate new experts. *Guzman v Superior Court* (1993) 19 CA4th 705, 23 CR2d 585.

**EXAMPLE 2:** A mistrial was declared after a hung jury. More than 70 days before the new trial date, plaintiff served defendants with a new demand to exchange of expert witness information. The court found that allowing new discovery after a mistrial might promote rather than defeat a more expeditious resolution of the case. *Beverly Hosp. v Superior Court, supra*.

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## III. EFFECT OF JUDICIAL ARBITRATION ON PRETRIAL PROCEDURES

### §2.19 A. Requesting trial de novo after arbitration

If the case was sent to arbitration under CCP §§1141.10-1141.31, and the arbitrator has made an award, within 30 days after the award is filed, either party may file a request for a trial de novo. CCP §1141.20; Cal Rules of Ct 3.826(a). The court then restores the case to the same position on the civil active list that it occupied before it was sent to arbitration, or sets a new trial date at a post-arbitration case management conference. CCP §1141.20(b), Cal Rules of Ct 3.826(b).

If neither party requests a trial de novo within the 30-day period, the arbitration award is entered as the final judgment in the action. CCP §1141.20; Cal Rules of Ct 3.827(a). Such a judgment has the same force and effect as any other judgment in a civil action or proceeding, except that it may not be appealed. CCP §1141.23; Cal Rules of Ct 3.827(c). On attacking or setting aside judgment, see CCP §1141.23; Cal Rules of Ct 3.828(a).

For complete discussion of judicial arbitration, see California Civil Procedure Before Trial, chap 37 (4th ed Cal CEB 2004); A Litigator's Guide to Effective Use of ADR in California (Cal CEB 2005).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/ B. Effect of judicial arbitration/§2.20 1. On CCP §583.310 dismissal period

## B. Effect of judicial arbitration

### §2.20 1. On CCP §583.310 dismissal period

If the action is submitted to or remains in judicial arbitration in the last 6 months of the 5-year period to bring the case to trial (CCP §583.310), the period from 4 years and 6 months after the action was filed until the date a CCP §1141.20 trial de novo request is filed is not included in the CCP §583.310 5-year dismissal period. CCP §1141.17.

**EXAMPLE:** Plaintiff filed a complaint on February 14, 2004, and the case was submitted to arbitration after August 14, 2008, 4 years and 6 months after the complaint was filed. Plaintiff filed a request for trial de novo on November 15, 2008, 93 days after the 4-year/6-month anniversary. If the case had not been sent to arbitration, the 5 years would have expired on February 14, 2009. However, because the case was sent to arbitration, the 5-year period expired on May 18, 2009.

**PRACTICE TIP:** You will get the same result if you calculate the expiration date in different ways. Using the dates in the example above, you may (1) add 6 months to the date the trial de novo request is filed (6 months after November 18, 2003); (2) stop counting the 5-year period, starting on the date 4 years and 6 months after the complaint was filed, and resume counting when the request for trial de novo is filed (on November 19, 2003, you begin counting the 4-year/6-month period plus 1 day); or (3) add the period of time the 5-year period is tolled (time between 4 years and 6 months after the filing of the complaint and the filing of the request for trial de novo) to the date the 5-year period would have expired, as the court did in *Drummond v Murata* (1991) 227 CA3d 44, 49, 277 CR 727 (court added days to date 5-year period would have expired to come up with new expiration date).

Except as specified in CCP §1141.17, submission of an action to arbitration does not suspend or toll the running of any time periods found in CCP §§583.110-583.430. CCP §1147.17(a). *Drummond v Murata, supra*. However, courts have held that tolling can end in ways not specified in CCP §1141.17. See *Winston v Woodward* (1992) 3 CA4th 361, 367, 4 CR2d 126 (arbitrator decided that matter was not amenable to arbitration); *Niesner v Kusch* (1986) 186 CA3d 291, 297, 230 CR 613 (scheduled arbitration hearing never occurred). The statute does not specify what event would end the tolling if arbitration is not completed.

The tolling provisions of CCP §1141.17 do not apply to arbitration by contract. *Dodd v Ford* (1984) 153 CA3d 426, 200 CR 256 (because parties stipulated to binding arbitration, request for trial de novo not allowed). In such cases, the rules on dismissal for delay in prosecution are the same as in other civil cases (*Dodd v Ford, supra*), although, once a case is submitted to binding arbitration, it is the arbitrator who decides whether there has been an unreasonable delay in prosecution that would justify dismissal. See *Burgess v Kaiser Found. Hosp.* (1993) 16 CA4th 1077, 1081, 20 CR2d 488; *Nanfito v Superior Court* (1991) 2 CA4th 315, 318, 2 CR2d 876.

See California Civil Procedure Before Trial, chap 39 (4th ed Cal CEB 2004) on dismissal of case for failure to prosecute.

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### §2.21 2. On trial-setting procedures when trial de novo requested

When a party files a request for a trial de novo, the court on a master calendar system restores the case to the same position on the civil active list that it occupied before it was sent to arbitration. CCP §1141.20(b). In a single assignment court, if the court did not set a trial date at the pre-arbitration case management conference, it will set a trial date post-arbitration at a continued case management conference. Cal Rules of Ct 3.828(a).

**PRACTICE TIP:** Check local rules and call the court clerk to learn the local court's procedure in restoring the case to the civil active list and setting a trial date.

Be prepared to immediately take whatever action is necessary to expedite setting a trial de novo if the 5-year deadline is near, *e.g.,* move to advance the trial date and request an order shortening time for the motion to advance the trial date. At a minimum, you have the duty to notify the court of its duty to calendar a case within the 5-year limitation period and to follow up with the court to make sure the trial date is set. *Messih v Levine* (1991) 228 CA3d 454, 278 CR 825. Failure to do so has been found to be a lack of diligence sufficient to allow the court to dismiss the case. *Santa Monica Hosp. Med. Ctr. v Superior Court* (1988) 203 CA3d 1026, 250 CR 384; *Berry v Weitzman* (1988) 203 CA3d 351, 249 CR 816.

**PRACTICE TIP:** Always confirm any telephone follow-up in writing and keep copies of all, *e.g.,* correspondence, notes, and notices. Ask the person you speak with for his or her full name and direct a confirming letter to this person's attention. If you face a motion to dismiss, you can file these documents to show that you were diligent.

For further discussion of the effect of judicial arbitration on the CCP §583.310 dismissal period for failure to prosecute, see §2.20.

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### §2.22 3. On conduct of trial

If a party requests a trial de novo, the case must be tried as if no arbitration proceedings had occurred. Cal Rules of Ct 3.826(c). During the trial de novo, no reference may be made to:

- The arbitration award;
- The fact that arbitration occurred;
- Any evidence presented at the arbitration hearing; or
- Any other aspect of the arbitration proceedings.

None of the above may be used as affirmative evidence, for impeachment, or for any other purpose at the trial. Cal Rules of Ct 3.826(c). Any reference to the arbitration proceedings or award during the subsequent trial is deemed an irregularity in the trial proceedings and is a ground for moving for new trial under CCP §657. CCP §1141.25. On misconduct of counsel and court generally, see chap 16.

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### 4. On discovery

### §2.23 a. Complete most discovery before arbitration hearing

When a case is submitted to judicial arbitration, CCP §2024.020(a) is superseded by Cal Rules of Ct 3.822, and parties can conduct discovery until the 15th day before arbitration (*i.e.,* although discovery would have been barred by CCP §2024.020(a), Rule 3.822 controls). *Zinn v Superior Court* (1980) 108 CA3d 583, 589, 166 CR 640 (parties agreed to submit case to judicial arbitration at mandatory pretrial conference 11 days before date set for trial).

If additional time is needed to complete discovery before the arbitration, make a motion showing good cause and asking the court to extend the time to complete discovery. Cal Rules of Ct 3.822. On requesting discovery after arbitration and before trial de novo, including discovery of expert witnesses, see §§2.2-2.3, 2.24.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.24 b. Conduct permissible discovery after arbitration award

### §2.24 b. Conduct permissible discovery after arbitration award

In cases ordered to arbitration under CCP §1141.16(a), no discovery is permissible after the arbitration award (CCP §1141.24), except:

- Expert witness discovery;
- Any discovery if the parties stipulate; or
- Any discovery allowed by the court on a showing of good cause.

If unable to obtain an agreement to conduct postarbitration discovery, file a motion requesting additional discovery, and be prepared to show in the motion:

- Why the discovery is necessary;
- Diligence in seeking discovery;
- The reasons for not obtaining it sooner; and
- Whether trial would be delayed or the other party prejudiced.

See *Regan v Lanet* (1987) 197 CA3d 353, 243 CR 20 (court upheld denial of further discovery to losing party in arbitration). The courts disfavor discovery after arbitration, especially to the losing party, who might be fishing for information to improve the chances of winning on a second round. For further discussion, see §§2.2-2.3.

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## IV. OBTAIN TRIAL BY JURY

### A. Demand for jury trial

### §2.25 1. Timing

The statutory deadline to demand a jury trial is (CCP §631(d)(4)):

- At the time the case is first set for trial, if the setting is on notice or stipulation (*e.g.,* at the case management conference), counsel must announce that a jury is required; or
- Within 5 days after notice of setting, if the court set the trial date without prior notice or if there was no stipulation of counsel.

If there has been a waiver of a trial by jury, the court has the discretion on just terms to allow a jury trial. CCP §631(e). See §§8.15-8.17.

**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 and not a court day.

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## 2. How to make demand

### §2.26 a. Case management statement

The Judicial Council has adopted a form Case Management Statement (Form CM-110) for mandatory use. The statement must be filed with the court and served on all parties no later than 15 days before the case management conference. Cal Rules of Ct 3.725. Check the box at item 5 for a party requesting a jury trial. The case management conference to review each case must be scheduled no later than 180 days after the initial complaint was filed. Cal Rules of Ct 3.721. On cases exempt from civil trial court management rules, see Cal Rules of Ct 3.712, 3.714. On court management rules, see California Civil Procedure Before Trial, chaps 40-44 (4th ed Cal CEB 2004).

Traditionally, the demand for a jury trial was included in the at-issue memorandum. Most courts, however, do not require an at-issue memorandum, as evidenced by the repeal of former Cal Rules of Ct 209. Cases before July 1, 2002, the date the Judicial Council adopted former Cal Rules of Ct 212 and Judicial Council Form CM-110, often address issues of demanding and waiving jury trial in the context of at-issue memorandums. See, *e.g., Mutual Bldg. Loan Ass'n v Corum* (1934) 220 C 282, 287, 30 P2d 509 (failure to demand jury trial in at-issue memorandum is not in itself waiver of right to jury); *March v Pettis* (1977) 66 CA3d 473, 136 CR 3 (party that explicitly answers "no" in at-issue memorandum to question of whether jury trial is demanded has expressly waived right to jury). For further discussion on waiving right to jury trial and relief from that waiver, see §§8.15-8.17.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.27 b. Check local rules

### §2.27 b. Check local rules

Consult local court rules for any additional procedures for demanding a jury trial. Some trial courts may require their own case cover sheet with an option for requesting a jury trial when first appearing in the case. See Cal Rules of Ct 3.220(a) (Judicial Council's Civil Case Cover Sheet (Judicial Council Form CM-010) must be filed in addition to any cover sheet required by local rule).

**PRACTICE TIP:** Even if local rules do not require it, in an abundance of caution counsel might consider demanding a jury in the complaint or responsive pleading in addition to demanding a jury in the case management statement.

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### §2.28 c. Announcement on the record

Counsel's announcement on the record at the time the case is first set for trial that a jury trial is demanded has been held sufficient. *Union Oil Co. v Hane* (1938) 27 CA2d 106, 80 P2d 516. For example, a party may demand a jury by appearing at a pretrial conference and stating that a jury is required. See *De Castro v Rowe* (1963) 223 CA2d 547, 558, 36 CR 53. Similarly, when the party that originally demanded a jury orally waives the jury in front of the trial judge, opposing party can promptly make an oral demand in front of that judge. See CCP §631(c); *McIntosh v Bowman* (1984) 151 CA3d 357, 361, 198 CR 533.

Under Cal Rules of Ct 3.727, topics that the parties must address at the case management conference include whether a jury trial is demanded. The case management order may include a provision for a jury or a nonjury trial. Cal Rules of Ct 3.727.

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### §2.29 d. Motion for jury trial

If the right to a jury trial is not guaranteed by law, counsel may move for jury trial. Whether a jury trial is appropriate depends on the gist of the action, which ordinarily is determined by the mode of relief sought and the issues raised. *Walton v Walton* (1995) 31 CA4th 277, 291, 36 CR2d 901. On when a party is entitled to a jury trial, see §§8.3-8.8.

Alternatively, counsel may request an advisory jury. Although former Cal Rules of Ct 377 was repealed because its procedures were thought to be burdensome, the Advisory Committee Comment (2003) states that repeal of the rule is not intended to prevent the court, in its discretion, to approve the use of an advisory jury. For further discussion, see §8.13.

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## §2.30 3. Requesting jury after waiver

The court may, in its discretion and on just terms, allow a trial by jury although there may have been a waiver of a trial by jury. Cal Rules of Ct 3.727. However, even if abuse of discretion is found, reversal of the judgment is not required unless there is a showing of actual prejudice. See *McIntosh v Bowman* (1984) 151 CA3d 357, 363, 198 CR 533. For further discussion on waiver, see §§8.15-8.17.

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## B. Deposit jury fees

### §2.31 1. Who pays and how to pay

To avoid waiving the jury, each party demanding a jury trial must deposit advance jury fees with the court, and additional fees at the beginning of the second and each succeeding day of trial. CCP §631(d)(5)-(6). In eminent domain proceedings, the party seeking condemnation must deposit the jury fees regardless of who demanded the jury. CCP §631.5.

Each party demanding a jury makes the deposit with the "clerk or judge." CCP §631(b)-(c). Most clerks' offices will accept the deposit in the form of a check (showing the name of the case and case number) from the attorney or the attorney's firm.

**PRACTICE TIP:** It is a good idea to ask the clerk's office whether there are any special requirements for the form of the jury fees deposit (*e.g.,* money order) and where to make it (*e.g.,* directly with the clerk, cashier, or other person).

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## §2.32 2. Time limit for deposits of jury fees

Each party demanding a jury trial (see §§2.25-2.30) must deposit advance jury fees at least 25 calendar days before the date initially set for trial. CCP §631(b). In unlawful detainer actions, the fees must be deposited at least 5 days before the date set for trial. CCP §631(b).

Additional fees are due at the beginning of the second day and each succeeding day's trial session. CCP §631(c). If more than one party has demanded a jury, counsel must stipulate (or the court must order) the amount to be paid daily by each party. CCP §631(c).

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### §2.33 3. Amount of jury fee deposit

The total amount of the advance jury fee deposited 25 days before the trial date (5 days in unlawful detainer actions; see §2.32) may not exceed a total of $150 for each party demanding a jury trial. CCP §631(b). Counsel should check local rules and the court's fee schedule for the amount to deposit for jury fees before trial.

The amount of the jury fees due at the beginning of the second and each succeeding day of trial must be a sum equal to that day's fees and mileage of the jury, including fees and mileage for the jury panel if the trial jury has not yet been selected and sworn. CCP §631(c).

After the first day of trial, the statutory daily fee for each juror is $15. CCP §215(a). Under some circumstances, government and public employees may not be paid a jury fee. CCP §215(b). Jurors must be reimbursed at the rate of $.34 per mile for each mile actually traveled in attending court, "in going only"; *i.e.,* jurors are reimbursed for mileage only one way. CCP §215(c).

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### §2.34 4. Effect of failing to deposit fees: Jury trial waived

A party waives the right to a jury trial by failing to make a timely deposit of the jury fees (CCP §631(d)(5)-(6)), but the court has discretion to grant relief from that waiver. CCP §631(e). *Johnson-Stovall v Superior Court* (1993) 17 CA4th 808, 21 CR2d 494 (court abused its discretion by denying relief when no showing was made of prejudice to court or other parties). See also *Byram v Superior Court* (1977) 74 CA3d 648, 141 CR 604. On discretion of court to relieve waiver, see §8.16.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.35 5. Jury fees refunded if case is settled or continued

### §2.35 5. Jury fees refunded if case is settled or continued

When a party deposits jury fees and that party waives a jury or obtains a continuance of the trial, or the case is settled, the amount of the deposit is not refundable if the court finds there has been insufficient time to notify the jurors that the trial will not proceed at the time set. CCP §631.3. The depositing party must request a refund within 20 business days after the date the jury was waived or the action was settled, dismissed, or continued; otherwise, the fees will be transferred to the Controller for deposit into the Trial Court Trust Fund. CCP §631.3.

**PRACTICE TIP:** Consult local rules because they may state how to avoid forfeiture. See, *e.g.,* San Mateo Ct R 2.7.6 (notify court in writing at least 2 court days before trial). The local rules might also state when fees are considered refundable.

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## V. PUBLICITY, PREJUDICE, AND FAIR TRIAL

### A. Client's right to fair trial may conflict with other rights

#### §2.36 1. Constitutional and statutory provisions on how trials are conducted

The right to a fair trial and an individual's right to privacy (Cal Const art I, §1) may conflict with the guarantee of a public trial (Cal Const art I, §15; CCP §124) ("sittings of every court shall be public"). When a case attracts extensive media coverage, conflicts may arise between two constitutional rights: free speech and freedom of the press on one hand (see US Const amend I; Cal Const art I, §2(a)) and the due process right to a fair trial on the other (see US Const amend XIV; Cal Const art I, §7). In fact, the conflict may be even greater under the California Constitution because the courts have held that the free speech and free press rights under Cal Const art I, §2(a) are broader than similar rights in the First Amendment of the United States Constitution. *San Jose Mercury-News v Municipal Court* (1982) 30 C3d 498, 508, 179 CR 772. See *NBC Subsidiary (KNBC-TV) Inc. v Superior Court* (1999) 20 C4th 1178, 1191, 86 CR2d 778 (civil litigant's right to fair trial may override media interests and warrant closure of proceedings).

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### §2.37 2. Who can assert right to public trial

Not only the parties to an action, but also members of the public or the press, may assert the right to a public trial. See CCP §124; *Wrather-Alvarez Broad., Inc. v Hewicker* (1957) 147 CA2d 509, 305 P2d 236; *Kirstowsky v Superior Court* (1956) 143 CA2d 745, 300 P2d 163. Members of the press have no greater rights to be present at court hearings than do members of the public. See 143 CA2d at 754. See also *Houchins v KQED, Inc.* (1978) 438 US 1, 57 L Ed 2d 553, 98 S Ct 2588. In fact, the Judicial Council has adopted rules limiting radio, television, and other media coverage of state court proceedings. See Cal Rules of Ct 1.150 and discussion of this rule in §2.38.

**NOTE:** For a rule of professional conduct governing trial publicity and extrajudicial statements made by attorneys about adjudicative proceedings, see Cal Rules of Prof Cond 5-120.

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### 3. Limitations on public rights

### §2.38 a. Controlling courtroom

A trial judge, in the interest of the fair administration of justice, can impose reasonable limitations on public access to a trial. *Richmond Newspapers, Inc. v Virginia* (1980) 448 US 555, 65 L Ed 2d 973, 100 S Ct 2814. For example, because courtrooms have limited capacity, there may sometimes not be enough room for everyone who wants to get in. When this occurs, the court can impose reasonable restrictions on general access, including preferential seating for media representatives.

A court order is necessary before film and electronic media may record or broadcast trial proceedings. Cal Rules of Ct 1.150(c), (e). The court can regulate or refuse recording or broadcasting by film or electronic media to protect the rights of the parties and the dignity of the court, or to assure the orderly conduct of the proceedings. For factors to be considered by the judge in ruling on a request to record or broadcast proceedings, see Cal Rules of Ct 1.150(e).

In federal court, when local rules prohibit television coverage of a trial, television cameras are not permitted in the courtroom even if the judge and the parties in a particular case are willing to waive the rule. *Westmoreland v CBS, Inc.* (2d Cir 1984) 752 F2d 16.

The court has the inherent power to exclude or expel disorderly spectators from the courtroom. *People v Tugwell* (1917) 32 CA 520, 163 P 508. On locking doors for the convenience of the court and all others present while the jury is being instructed, see *People v Buck* (1941) 46 CA2d 558, 116 P2d 160.

**NOTE:** In no event may the media photograph, record, or broadcast proceedings in chambers, proceedings otherwise closed to the public, jury selection proceedings, bench conferences, conferences between attorneys, or conferences between an attorney and a client or a witness. Cal Rules of Ct 1.150(e).

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### §2.39 b. Allowing party to present case

The court may restrict courtroom access to ensure that a defendant receives a fair trial and has a fair opportunity to present a defense. *Kirstowsky v Superior Court* (1956) 143 CA2d 745, 300 P2d 163. In *Kirstowsky,* the court held that the trial court had inherent power to order the public and press excluded during the testimony of defendant, who was emotionally disturbed and could not testify freely with the public present. But the court of appeal also held that it would be improper to exclude the public during the entire trial or for any part of the trial other than when defendant testified. 143 CA2d at 754.

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### §2.40 c. Protecting juror's privacy

Although the United States Supreme Court has held that the press has a right to be present during jury selection proceedings in criminal cases, a juror during voir dire may request an opportunity to present information about a deeply personal matter to the judge in chambers, on the record. *Press-Enterprise Co. v Superior Court* (1984) 464 US 501, 78 L Ed 2d 629, 104 S Ct 819. Following this precedent, the California courts have ruled that juror questionnaires are part of the public record and the press has a right to have access to the questionnaires (except for questionnaires on juror qualification; see §8.45), just as they have a right to be present during voir dire. See *Copley Press, Inc. v Superior Court* (1991) 228 CA3d 77, 278 CR 443; *Lesher Communications, Inc. v Superior Court* (1990) 224 CA3d 774, 274 CR 154.

Although the press may be present, film and electronic media may not photograph, record, or broadcast jury selection proceedings. In addition, photographing a juror is prohibited. Cal Rules of Ct 1.150(e).

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### §2.41 4. Who can waive right to public trial

Some early California cases held that a party could waive the right to a public trial. See *People v Swafford* (1884) 65 C 223, 3 P 809. See also *People v Tugwell* (1917) 32 CA 520, 163 P 508. The present view is that a party's waiver of the right to a public trial is not sufficient to exclude the public. See *Kirstowsky v Superior Court* (1956) 143 CA2d 745, 300 P2d 163. See also *Richmond Newspapers, Inc. v Virginia* (1980) 448 US 555, 65 L Ed 2d 973, 100 S Ct 2814; *In re Shortridge* (1893) 99 C 526, 34 P 227.

If a party waives the right to a public trial either expressly or by failure to timely object to an exclusion order, that party can not later raise the lack of a public trial on appeal. See *People v Blanco* (1959) 170 CA2d 758, 339 P2d 906.

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## B. Protective orders to prevent publicity and prejudice

### §2.42 1. Court has authority to issue protective orders

To ensure a fair trial in a pending action, the court can issue a protective order (sometimes called a "gag order"). See *Younger v Smith* (1973) 30 CA3d 138, 106 CR 225; *Hamilton v Municipal Court* (1969) 270 CA2d 797, 76 CR 168. Such an order might, for example, prohibit the parties, counsel, witnesses, law enforcement agents, and court personnel from disseminating information about a pending criminal trial to the news media. See *Hamilton v Municipal Court, supra*. However, the court rarely uses prior restraint on publication in the name of a fair trial. *Sun Co. v Superior Court* (1973) 29 CA3d 815, 830, 105 CR 873.

Protective orders are used in civil cases, *e.g.,* to prevent a newspaper from publishing materials obtained through discovery like pretrial depositions and interrogatories (*Seattle Times Co. v Rhinehart* (1984) 467 US 20, 32, 81 L Ed 2d 17, 26, 104 S Ct 2199) or to protect a nonlitigant's right to privacy (see *Colonial Life & Acc. Ins. Co. v Superior Court* (1982) 31 C3d 785, 183 CR 810; *Olympic Club v Superior Court* (1991) 229 CA3d 358, 282 CR 1). However, there are no California cases authorizing the use of protective "gag" orders for pretrial publicity in civil actions. For a case in which the court vacated a protective order issued in a civil action because the order infringed on the First Amendment, see *CBS, Inc. v Young* (6th Cir 1975) 522 F2d 234.

**NOTE:** Although disciplinary rules are not precisely analogous to protective orders, in some jurisdictions attorneys may be prohibited from commenting on a civil case by American Bar Association Model Rules of Prof Cond 3.6, which prohibits comments that present a "substantial likelihood of materially prejudicing an adjudicative proceeding." In California, a violation of the ABA Model Rules is not a ground to discipline attorneys. See Bus & P C §§6077, 6100. For a California rule of professional conduct that governs trial publicity and extrajudicial statements made by attorneys about adjudicative proceedings, see Cal Rules of Prof Cond 5-120.

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### §2.43 2. Requirements to justify gag order

In criminal cases, the showing required to justify a protective order varies, depending on the party against whom the protective order is sought. If the order prohibits the news media from printing information about witnesses, the moving party would need to show that the speech or publicity constitutes a clear and present danger to the administration of justice. *Sun Co. v Superior Court* (1973) 29 CA3d 815, 829, 105 CR 873 (release of names and photographs of state prison inmates to be called by prosecution as witnesses in murder trial). See also *Nebraska Press Ass'n v Stuart* (1976) 427 US 539, 49 L Ed 2d 683, 96 S Ct 2791.

If the protective order is directed against prosecutors in a pending criminal action, the moving party must show that there is a "reasonable likelihood" of prejudicial news that would make it difficult to impanel an impartial jury and would tend to prevent a fair trial. *Younger v Smith* (1973) 30 CA3d 138, 106 CR 225, citing *U.S. v Tijerina* (10th Cir 1969) 412 F2d 661, 666. The court noted that a different standard might apply to a protective order directed to a defendant, citing *Hamilton v Municipal Court* (1969) 270 CA2d 797, 76 CR 168.

To obtain a pretrial temporary restraining order preventing television news from broadcasting tapes related to a trial, the moving party must show *more* than that the publicity would have a "devastating effect" on the parties' opportunity for a fair trial. See *KCST-TV Channel 39 v Municipal Court* (1988) 201 CA3d 143, 146, 246 CR 869; *CBS, Inc. v U.S. Dist. Court* (9th Cir 1984) 729 F2d 1174. The Ninth Circuit required that the publicity must threaten to prejudice the entire community so that "twelve unbiased jurors cannot be found." 729 F2d at 1180. Before such an order would be proper, the trial court must also consider whether any mitigating measures would be effective as alternatives to the order. See §§2.51-2.57 for mitigating measures of jury voir dire and see §§2.45-2.49 for motion to change venue.

**NOTE:** While an attorney's statements made in court filings or on the record in court are privileged, an attorney's statements about a case to the press or to others outside court are not privileged. An attorney who is speaking publicly about a case needs to be careful because out-of-court statements may serve as the basis of a legal action. See CC §47.

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## §2.44 C. Remedies to dissipate effect of publicity and prejudice

Less restrictive means than closing trials and issuing protective orders (discussed in §§2.45-2.60) are available to combat adverse publicity. Often, the court can lessen the impact of adverse publicity by using one or more of a "panoply" of measures available to protect the defendant and ensure the constitutionality and fairness of proceedings. Such measures include granting a change of venue, postponing trial until the effect of pretrial publicity subsides, conducting a searching voir dire, giving clear and emphatic instructions to the jury, and sequestering its members. *Brian W. v Superior Court* (1978) 20 C3d 618, 625, 143 CR 717. See also *Nebraska Press Ass'n v Stuart* (1976) 427 US 539, 563, 49 L Ed 2d 683, 700, 96 S Ct 2791. Some of these means are discussed in §§2.45-2.60.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.45 1. Motions for continuance and change of venue

## §2.45 1. Motions for continuance and change of venue

In any case in which adverse publicity threatens to subvert the client's ability to receive a fair trial, consider moving for a continuance (see §2.46) and for change of venue (see §2.47). Although both motions have the effect of removing the trial to a less prejudicial atmosphere, one through delay and the other through change of location, neither motion should be considered as a substitute for the other. File the motions together in the alternative to protect the record on any appeal.

**PRACTICE TIP:** Save time and expense by making the motions together; only one appearance is necessary and you can use the same affidavits or declarations for both motions. On information that must be included in supporting affidavits and declarations, see §2.48.

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### §2.46 a. Motion for continuance

Even if the court is likely to deny the motion, be sure, as soon as unfair pretrial publicity arises, to move to continue the trial to a later date. See *Allstate Ins. Co. v King* (1967) 252 CA2d 698, 60 CR 892; *Delaney v U.S.* (1st Cir 1952) 199 F2d 107. If the motion is not made, the opposing party may argue that the right to appeal on the ground of an unfair trial due to prejudicial publicity has been waived. See *Kauffman v De Mutiis* (1948) 31 C2d 429, 189 P2d 271 (party who failed to request continuance when subpoenaed witness did not appear was not entitled to new trial under CCP §657 on ground of accident or surprise).

Denial of a motion for a continuance before trial does not preclude its later revival at the trial date when it may be possible to show additional or continuing prejudice. For example, a party may make or revive a motion for continuance when and if impaneling an unbiased jury becomes difficult. *U.S. v Malinsky* (SD NY 1957) 20 FRD 300, 303.

**PRACTICE TIP:** If you decide to revive the motion at the time of trial, file additional and updated affidavits or declarations whenever possible. On information to include in supporting affidavits and declarations, see §2.48.

For discussion of trial continuances generally, see §§6.6-6.25.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.47 b. Motion for change of venue

### §2.47 b. Motion for change of venue

When the client is faced with adverse publicity, consider moving for change of venue to preserve the record on this point in the event of an appeal. In *Maine v Superior Court* (1968) 68 C2d 375, 386, 66 CR 724, the court stated that "failure to seek a change of venue may suggest to a reviewing court on appeal that no prejudice was suffered by the defendant." See also *Stroble v California* (1952) 343 US 181, 193, 96 L Ed 872, 882, 72 S Ct 599. But see *Delaney v U.S.* (1st Cir 1952) 199 F2d 107, 116 (when defendant moved for continuance, defendant's appeal did not suffer from failure to apply for change of venue). On moving to change venue, see CCP §397(b). For detailed discussions on challenging venue, procedure, and review of orders, see California Civil Procedure Before Trial, chap 20 (4th ed Cal CEB 2004).

**NOTE:** Read change-of-venue cases carefully because the language of the criminal change-of-venue statute is slightly different from that in the civil statute. Compare Pen C §1033(a) ("reasonable likelihood that a fair and impartial trial cannot be had in the county") with CCP §397(b) ("reason to believe that an impartial trial cannot be had"). Although there is little difference between these statutes, most change-of-venue cases are criminal cases and rely on Pen C §1033.

It is important to make this motion promptly to avoid any possible argument of waiver. See *Willingham v Pecora* (1941) 44 CA2d 289, 112 P2d 328 (court denied motion for change of venue under former CCP §397(3) (now §397(c)) because motion was not made within reasonable time). See also *Newman v County of Sonoma* (1961) 56 C2d 625, 628, 15 CR 914 ("general rule is that a party seeking a change of venue must act within a reasonable time"); *Adams v Superior Court* (1964) 226 CA2d 365, 38 CR 164 (motion for change of venue must be made within reasonable time in circumstances of particular case).

The trial court may hold the motion in abeyance or deny it with leave to renew it during voir dire. See *Cook v Pendergast* (1882) 61 C 72; *People v Spring Valley Co.* (1952) 109 CA2d 656, 241 P2d 1069 (motion denied subject to being renewed on proceedings for empanelment of jury if it appeared that fair and impartial jury could not be obtained); *J. I. Case Threshing Mach. Co. v Copren Bros.* (1917) 35 CA 70, 169 P 443. Although postponing the decision on such a motion until voir dire examination is not *required* (see *People v Ocean Shore R.R.* (1938) 24 CA2d 420, 75 P2d 560), the California Supreme Court has increasingly approved of such postponements. See *People v Harris* (1981) 28 C3d 935, 949, 171 CR 679. The court's rationale is that the trial court cannot assess the impact of pretrial publicity on the jury until voir dire. See *Odle v Superior Court* (1982) 32 C3d 932, 187 CR 455.

For detailed discussion on challenging venue, procedure, and review of orders, see Civ Proc Before Trial, chap 15.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.48 c. Supporting affidavits or declarations; Oral argument

### §2.48 c. Supporting affidavits or declarations; Oral argument

When moving for a change of venue, for a continuance owing to adverse publicity, or for both, draft the supporting affidavits or declarations to include evidentiary facts, not conclusions. See *People v Bennett* (1955) 132 CA2d 569, 282 P2d 590. Describe in detail the extent and nature of the adverse publicity and its continuing impact on the party's ability to receive a fair trial.

Attach all available prejudicial newspaper and magazine clippings as exhibits and include the circulation figures for the appropriate publications in the community and elsewhere. If the newspaper or newspapers are the only daily newspapers in the community, show this fact as well. Whenever possible, obtain direct quotations from radio and television newscasts. Describe or otherwise reproduce any pertinent portions of the telecast. It may be necessary to subpoena taped transcripts of past programs that are kept by many radio and television stations.

**PRACTICE TIP:** Descriptions of statewide or nationwide prejudice against the class of party litigants are not sufficient. See *U.S. v Dennis* (2d Cir 1950) 183 F2d 201, 226, aff'd (1951) 341 US 494; *U.S. v Dioguardi* (SD NY 1956) 20 FRD 33. You must demonstrate that the adverse publicity and prejudice exist throughout the *local* area, particularly if you are trying the case in a large metropolitan district. Otherwise, the court may conclude that it is still possible to impanel an unbiased jury. See *Press-Enterprise v Superior Court* (1994) 22 CA4th 498, 504, 27 CR2d 708; *CBS, Inc. v U.S. Dist. Court* (9th Cir 1984) 729 F2d 1174.

When the expense is justified, consider conducting surveys to ascertain public opinion on the case. Services are available that telephone representative members of the community to learn how many have heard about a case, where they heard about the case, and whether they had formed an opinion. See, *e.g., People v Proctor* (1992) 4 C4th 499, 524, 15 CR2d 340.

Direct the court's attention to specific details of highly prejudicial statements or material evidence revealed in the publicity. Theoretically, it is irrelevant whether the published material is admissible as evidence at trial, because in its published form it is still not subject to cross-examination. However, the case will be stronger if any evidentiary material revealed in the publicity is clearly inadmissible.

The following factors may lead a court to change venue or to grant a continuance and, if present, must be included in the affidavits or declarations:

- False or inadmissible facts in the publicity that, if true or admissible, would be crucial to the action;
- Hostile or prejudiced statements, news stories, and publicity about the party (not just about a general class or group of persons to which the party belongs);
- Participation by counsel or the opposing party in disseminating the adverse publicity;
- Public statements against the party made by many citizens, particularly prominent persons;
- Hostile acts against the party or the party's associates;
- Public demonstrations during any phase of the legal proceedings;
- Newspaper approval of hostile acts or hostile statements;
- Civic meetings on the case;
- The need for special court rules to deal with crowds at the proceedings;
- Publicized statements that tend to impugn a party's character; and
- Long-continued and presently existing hostile and prejudicial acts and statements.

In some cases, the appropriate remedy might be a change of venue, *e.g.,* when the adverse publicity occurs in a small community. See *Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724 (disclosure of confession without its admissibility having been tested in judicial hearing). When appropriate, point out this fact in the supporting affidavits or declarations.

File supplementary affidavits or declarations showing continuing publicity and prejudice right up to the time of arguing the motion. For example, the court denied a motion for change of venue because the moving party's affidavits were

silent on the continuing effect of adverse publicity on the right to a fair trial, and counteraffidavits tended to show that excitement aroused by the crime had stopped 3 weeks before the motion was filed. See *People v Goldenson* (1888) 76 C 328, 19 P 161.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.49 d. Counteraffidavits or declarations

### §2.49 d. Counteraffidavits or declarations

Although the moving party has the burden of proof, the opposing party may file affidavits or declarations opposing the motion. In addition to attempting to refute any material facts set forth in the moving party's affidavit or declaration, consider including the following in the counteraffidavit or declaration:

- The adverse publicity or hostility, although once present, has abated;
- The hostility or prejudice was toward a class of persons and not the moving party specifically;
- The specific facts of the case before the court were not the subject matter of the publicity;
- Continuing or transferring the action will involve extra expense, inconvenience to witnesses, or the possibility that a witness will be unable to appear; and
- Case law favors less drastic remedies to cure any unfair pretrial publicity (see §§2.50-2.60).

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### §2.50 2. Bench trial

If a case has aroused public passion or if publicity about prejudicial facts has been extensive, consider a bench trial without a jury. This solution will work only if both parties agree to forgo the right to a jury trial. It would be unfair to force a party to forgo the constitutional right of trial by jury because of community prejudice. See *Maryland v Baltimore Radio Show, Inc.* (1950) 338 US 912, 915, 94 L Ed 562, 564, 70 S Ct 252 (separate opinion of Frankfurter, J.).

Counsel should evaluate whether the trial judge would, in fact, be less partial. Local judges, who must run for reelection, are not necessarily free from conscious or subconscious bias. See *Craig v Harney* (1947) 331 US 367, 395, 91 L Ed 1546, 1561, 67 S Ct 1249 (dissenting opinion of Jackson, J.).

On right to jury trial generally, see §§8.2-8.8. For discussion of bench trials generally, see chap 24.

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### §2.51 3. Voir dire examination

In *People v Harris* (1981) 28 C3d 935, 949, 171 CR 679, the California Supreme Court affirmed the trial court's denial of defendants' motion for change of venue based on prejudicial pretrial publicity because "voir dire may demonstrate that pretrial publicity had no prejudicial effect." Similarly, the Ninth Circuit stated that a trial court should consider the use of voir dire to control the effect of pretrial publicity before restraining media broadcasting of trial information. See *CBS, Inc. v U.S. Dist. Court* (9th Cir 1984) 729 F2d 1174.

In civil cases, CCP §222.5 provides for the examination of prospective jurors, first by the court and then by each party, to discover any bias or prejudice concerning the circumstances of the particular case. If bias or prejudice is discovered, the juror can be dismissed by a challenge for cause under CCP §225. On jury selection, see chap 8.

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### §2.52 a. The dilemma: Asking questions about pretrial publicity may increase prejudice

When a case involves prejudicial pretrial publicity, the trial attorney faces an obvious dilemma on the voir dire examination—does the trial lawyer question the jurors at length about pretrial publicity and thereby alert the jury to the existence of the publicity? If the attorney appears to have no unusual difficulty in selecting a jury, challenging only a few prospective jurors for cause or failing to exhaust all peremptory challenges, an appellate court might feel that an impartial jury has or could have been impaneled. *People v Bennett* (1955) 132 CA2d 569, 282 P2d 590; *U.S. v Moran* (2d Cir 1952) 194 F2d 623. But questioning jurors at length about the extent and scope of their knowledge of pretrial publicity will fix those facts firmly in their minds. Moreover, once the jury leaves the courtroom, a juror who is ignorant of the publicity may be tempted to satisfy the curiosity that such questions would naturally arouse. See *Maryland v Baltimore Radio Show, Inc.* (1950) 338 US 912, 916, 94 L Ed 562, 565, 70 S Ct 252 (separate opinion of Frankfurter, J., quoting trial judge's statement that voir dire on pretrial publicity would be useless).

Nonetheless, the courts increasingly rely on voir dire, and on the assurance of the individual juror that he or she can be fair and impartial, as a "cure" for any possible prejudice from pretrial publicity. See, *e.g., People v Webb* (1993) 6 C4th 494, 515, 24 CR2d 779; *People v Proctor* (1992) 4 C4th 499, 527, 15 CR2d 340; *Odle v Superior Court* (1982) 32 C3d 932, 956, 187 CR 455 (dissenting opinion of Bird, C.J.).

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### b. The solution

### §2.53 (1) Have judge conduct questioning

It may be preferable to have the judge conduct the examination of individual jurors about whether they have seen or heard the pretrial publicity. If the judge carefully and individually questions the jurors about their opinions and knowledge of pretrial publicity, a juror is less likely to infer that the lawyers are trying to hide something.

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### §2.54 (2) Conduct individual voir dire

Courts also use this individual voir dire to ask about the nature and extent of the juror's knowledge of pretrial publicity and how, if at all, the publicity may affect the juror. *Odle v Superior Court* (1982) 32 C3d 932, 187 CR 455. Consider asking the court to voir dire the jurors individually on the issue of pretrial publicity.

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### §2.55 (3) Juror questionnaires

Juror questionnaires are increasingly used to gather information about the jurors before oral voir dire begins. See §§1.16, 8.43-8.45. Consider using questionnaires to gather information about each juror's exposure to and attitude about pretrial publicity. This process will help avoid having one juror's answers influence the others and tainting jurors who have not been exposed to the publicity by the responses of those who have.

**PRACTICE TIP:** Counsel should work out timing and use of questionnaires with the judge so that counsel has sufficient time to review the questionnaires before voir dire begins.

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### §2.56 (4) Challenge for cause

A challenge for cause because of knowledge of publicity, even if the court denies the challenge, can form the basis to renew motions to change venue or to continue the trial. The challenge can also be the basis for a future motion for mistrial, a motion for new trial, and appeal.

Grounds for challenging prospective jurors for cause include implied or actual bias. CCP §225(b)(1)(B)-(C). Implied bias, as defined in CCP §229, includes:

- Having an unqualified opinion or belief about the merits of the action founded on knowledge of its material facts or of some of them. CCP §229(e).
- The existence of a state of mind in the juror evincing enmity against or bias to either party. CCP §229(f).

A prospective juror can be challenged for cause under CCP §§225 and 229(e)-(f), even when the juror's bias is based on incorrect "material facts" about the case. But see *Riley v Davis* (1922) 57 CA 477, 483, 207 P 699.

**EXAMPLE:** A juror may believe the defendant to be guilty because he heard that the defendant's fingerprints were found at the scene. This juror may be challenged for cause even if the juror was incorrect and the defendant's fingerprints were not found at the scene.

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### §2.57 (5) Peremptory challenge

Exhaust all peremptory challenges. No reversible error occurs by the erroneous denial of a challenge for cause unless all peremptory challenges are exhausted and it appears that a party wanted to exercise an additional peremptory challenge. See *Leibman v Curtis* (1955) 138 CA2d 222, 291 P2d 542; *Scragg v Sallee* (1914) 24 CA 133, 139, 140 P 706. If all peremptory challenges are not exercised, the appellate court may assume that counsel was satisfied that the jury was fair and impartial. See *People v Cummings* (1993) 4 C4th 1233, 1277, 18 CR2d 796.

**PRACTICE TIP:** As a practical matter, when the publicity is extremely widespread and well known throughout the community, a prospective juror's answer on voir dire of never having heard of the case is suspect. It may be preferable to have an honest juror who says that he or she will *try* to disregard pretrial publicity. Recognize, however, that it is human nature for a juror to be influenced to some degree by preexisting knowledge of certain events, even if the juror promises to be fair and impartial.

See also §2.52. For discussion of jury selection generally, see chap 8.

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### §2.58 4. Instructions to disregard publicity

Courts frequently have the view that their instructions to disregard statements heard outside the trial will cleanse the jurors' minds of any prejudice or predilections created by those statements. See, *e.g., U.S. v Malinsky* (SD NY 1957) 20 FRD 300. See also *Nebraska Press Ass'n v Stuart* (1976) 427 US 539, 564, 49 L Ed 2d 683, 700, 96 S Ct 2791. In the "DeLorean tapes" case, the Ninth Circuit held that the trial court had not adequately considered the use of "emphatic and clear instructions" to dissipate any prejudice before enjoining CBS from broadcasting the tapes. *CBS, Inc. v U.S. Dist. Court* (9th Cir 1984) 729 F2d 1174, 1183.

The effectiveness of such instructions has been seriously questioned. See, *e.g., Delaney v U.S.* (1st Cir 1952) 199 F2d 107, 112, quoting from *Krulewitch v U.S.* (1949) 336 US 440, 453, 93 L Ed 790, 799, 69 S Ct 716 ("[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury … all practicing lawyers know to be unmitigated fiction").

It may be useful, however, to request the court to instruct the jurors at the outset of the trial to refrain from reading or listening to media accounts of the pending action during trial. Evidence that a juror ignored this instruction could provide the basis for a mistrial.

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### §2.59 5. Sequestration of jurors

Although sequestration insulates jurors only after they are sworn, it enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the importance of the jurors' oaths. *Nebraska Press Ass'n v Stuart* (1976) 427 US 539, 564, 49 L Ed 2d 683, 700, 96 S Ct 2791.

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## §2.60 6. Juror misconduct

If during trial a juror receives evidence out of court through newspapers or other sources of publicity, seek remedies for juror misconduct. See chap 17.

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## VI. OBTAIN TRIAL ASSIGNMENT

### §2.61 A. Ascertain procedures under court's case management rules

The Judicial Council has the responsibility of implementing the Trial Court Delay Reduction Act of 1990 (TCDRA) (Govt C §§68600-68620) to reduce delays in litigation and to establish a differential classification system for managing cases based on their relative complexity. Govt C §68603(c). The TCDRA was enacted to shorten the time for final disposition of cases consistent with just and effective resolution by giving the trial court control of the pace of litigation. See Cal Rules of Ct, Standards of J Admin 2.1; Cal Rules of Ct 3.713. To that end, the Judicial Council has adopted the court management rules in Cal Rules of Ct 3.700-3.735. Of particular concern to litigators is the rule that requires the court to schedule an initial case management conference to review every general civil case, except complex and exempted cases, no later than 180 days (or only about 6 months) after the initial complaint was filed. On the issues that counsel must be prepared to set forth in a party's case management statement and to discuss with other counsel and with the court at this conference, see Cal Rules of Ct 3.721-3.730.

The TCDRA applies to general civil cases. Govt C §68605.5. Cases exempt from TCDRA include probate, guardianship, conservatorship, family law, parentage, custody, adoption, juvenile, small claims, and unlawful detainer proceedings. Cal Rules of Ct 1.6(4).

**PRACTICE TIP:** There is variation among the local case management programs established by the different counties—and even among individual judges within the same court. Be sure to check local rules and confer with the clerk of the judge who is assigned to the case. On final case management conference before trial, see §6.3.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.62 B. Difference between master calendar and one-judge system

## §2.62 B. Difference between master calendar and one-judge system

Some counties assign the case to one judge for all purposes at an early stage, and that judge controls the litigation. In Los Angeles County, for example, all cases are assigned to a judge for all purposes (with some minor exceptions). In counties that assign the case to one judge for all purposes, the judge, not the master calendar department, sets the trial date. In counties using the master calendar system, the master calendar department assigns trial dates for all cases.

Counsel should check local rules because procedures for assigning trial dates vary. See Cal Rules of Ct 10.900 (each court must adopt calendaring system that will advance delay reduction goals) and Cal Rules of Ct 10.901 (each court must maintain calendar and case flow management system that ensure a sufficient number of cases are set for trial).

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## §2.63 1. Procedures under one-judge system

In a county where one judge handles a case for all purposes, that judge will review the case management conference, which is scheduled no later than 180 days after the initial complaint was filed. Cal Rules of Ct 3.720-3.730. Subjects that the parties must address at the conference include, if the case has not previously been set for trial, the date by which the case will be ready for trial and the available trial dates. Cal Rules of Ct 3.727.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.64 2. Procedures under master calendar

## §2.64 2. Procedures under master calendar

In some trial courts, even after passage of the Trial Court Delay Reduction Act of 1990 (Govt C §§68600-68620), the master calendar department assigns trial dates for the cases. Even in these courts, on the noticed motion of a party, the presiding judge may order the case assigned to one judge for all or such limited purposes as will promote the efficient administration of justice. Cal Rules of Ct 3.734.

**PRACTICE TIP:** You may exercise your peremptory challenge under CCP §170.6, challenging the judge when your case is assigned.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.65 C. Consider pretrial motions

## §2.65 C. Consider pretrial motions

Counsel should make certain motions in the department of the presiding judge or in the master calendar department, *e.g.*:

- Motions to continue the trial. See §§6.6-6.25.
- Motions under CCP §170.6 to disqualify the trial judge assigned by a master calendar department. CCP §170.6(a)(2). See §§6.26-6.28.

Frequently, all motions in cases assigned to one judge for all purposes under the Trial Court Delay Reduction Act of 1990 (Govt C §§68600-68620) are heard before the assigned judge. Check local rules, however, because some motions may be assigned to specific departments. For other pretrial motions that may be made shortly before trial, or on the first day of trial, see chap 6.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/2 Completing Pretrial Procedures/§2.66 VII. CHECKLIST: TRIAL PREPARATION

## §2.66 VII. CHECKLIST: TRIAL PREPARATION

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

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When you know the trial date, review this checklist and the dates in the statutes indicated, and calculate backward from the trial date to see when each activity must be completed. Make sure you allow for additional days for service by mail where permitted under CCP §1013 and the time for the opposing party's potential response, *e.g.*, if the party objects to your request, will you have enough time to compel a response? See §2.9.

| ACTION | DATE DUE | DATE DONE |
|---|---|---|
| I. WHEN YOU RECEIVE NOTICE OF TRIAL DATE | | |
| Advise client of trial date and settlement conference date | _____ | _____ |
| Advise any insurance carrier of trial date and settlement conference date | _____ | _____ |
| Advise witnesses of trial | _____ | _____ |
| Review file to evaluate for settlement | _____ | _____ |
| II. FINAL DISCOVERY REQUESTS | | |
| Demand disclosure of expert witnesses (CCP §§2034.010-2034.240). See California Civil Discovery Practice §§11.9-11.14 (4th ed Cal CEB 2006). | _____ | _____ |
| Demand and schedule an independent medical examination (CCP §§2032.020, 2032.220-2032.260). See Civil Discovery §§10.30-10.39. | _____ | _____ |
| Notice deposition of party with or without records (CCP §2025.270). | _____ | _____ |
| Notice depositions of nonparties (CCP §§2024.010-2024.020, 2025.270). | _____ | _____ |
| Serve interrogatories (CCP §2030.260(a)). See Civil Discovery §§7.13-7.16, 7.21-7.24, 7.53-7.54. | _____ | _____ |
| Send request for production (CCP §§2031.010-2031.060). See Civil Discovery §§8.15, 8.69. | _____ | _____ |

| | | |
|---|---|---|
| Request supplemental interrogatory responses (CCP §2030.070). | _____ | _____ |
| Demand bill of particulars (CCP §454). See Civil Discovery §2.44. | _____ | _____ |
| Exchange expert witness information (CCP §2034.220). See Civil Discovery, chap 11. | _____ | _____ |
| Supplement your own discovery responses (CCP §2030.310(a)). | _____ | _____ |
| Notice expert witness depositions (CCP §§2034.220, 2034.030). | _____ | _____ |
| Move to compel discovery (CCP §2024.020(a)). | _____ | _____ |
| Make sure discovery is complete, or obtain extension (CCP §§2024.020(a), 2024.050(a)-(b), 2024.060). | _____ | _____ |
| Supplement expert disclosure (CCP §2034.280). | _____ | _____ |
| Complete expert depositions (CCP §2024.030). | _____ | _____ |
| III. COMPLETE PRETRIAL PROCEDURES | | |
| File motion for summary judgment (CCP §437c). See California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004). | _____ | _____ |
| File motion to sever or bifurcate trial (CCP §§598, 1005). See §§6.99-6.104. | _____ | _____ |
| Serve notice by mail on parties to attend trial and bring specified documents (CCP §§1013, 1987(b)-(c)). See §4.37. | _____ | _____ |
| Serve subpoena on witnesses for trial with consumer records (CCP §1985.3). See §§4.21-4.23. | _____ | _____ |
| Prepare for case management and any settlement conferences. See §§6.2-6.5. | _____ | _____ |
| Deposit jury fees (CCP §631). See §§2.31-2.35. | _____ | _____ |
| Serve notice on parties to attend | _____ | _____ |

trial (CCP §1987). See §4.37.

Review judges for CCP §§170 and 170.6 challenges. See §§6.28-6.31. _____ _____

IV. ORGANIZING FOR TRIAL

Organize case files, set up trial system, *e.g.*, a trial notebook. See §§3.4-3.16. _____ _____

Research legal issues. Gather authorities for any anticipated trial motions (*e.g.*, nonsuit after plaintiff's opening statement). See §§3.24, 3.32, chap 18. _____ _____

Review, organize evidence (see §§3.17-3.48): _____ _____

- Create issue/evidence outline. _____ _____
- Decide which witnesses to call. See §§5.8-5.12. _____ _____
- Decide what documents, records, or other evidence must be produced for trial; organize documentary evidence. See chap 3. _____ _____
- Decide whether judicial notice needed. See chap 14. _____ _____
- Plan the trial exhibits needed to explain the evidence. See chap 13. _____ _____
- Amend pleadings (Cal Rules of Ct 3.1300(a), 3.1324). See §§6.87-6.93, 18.103-18.123. _____ _____
- Prepare trial brief. See §§3.49-3.53. _____ _____
- Prepare motions in limine. See §3.24, chap 7. _____ _____
- Meet with your witnesses and prepare for witness testimony. See §§3.27-3.30, chap 5. _____ _____
- Arrange to meet with your experts. See California Expert Witness Guide, chaps 12-15 (2d ed Cal CEB 1991). _____ _____
- Develop cross-examination of other parties' witnesses. See _____ _____

chap 11.

| | | |
|---|---|---|
| Anticipate points that adverse parties and witnesses can be impeached on. See chap 12. | _____ | _____ |
| Prepare jury instructions. See §3.35, chap 20. | _____ | _____ |
| Prepare verdict forms. See chap 22. | _____ | _____ |
| Prepare questions for jury voir dire. See §3.25, chap 8. | _____ | _____ |
| Prepare opening statement. See §3.26, chap 9. | _____ | _____ |
| Prepare closing argument. See §3.36, chap 19. | _____ | _____ |
| Consider what stipulations should be agreed to with other counsel. See chap 14. | _____ | _____ |
| List questions to ask judge or court clerk at in chambers conference. See §6.5. | _____ | _____ |

*Comment:* See chap 4 on compelling witnesses' attendance at trial. On final discovery requests, remember the discovery cutoff periods under CCP §§2024.010, 2024.020. See §§2.2-2.9; Preparing for Trial (Cal CEB Action Guide March 2008); California Civil Discovery Practice (4th ed Cal CEB 2006). See chap 3 for discussion of organizing for trial.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/Chapter Outline

# 3

# Organizing Trial Materials

**Christopher B. Hockett**
**Cynthia A. Coe**

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.1 I. SCOPE OF CHAPTER

## §3.1 I. SCOPE OF CHAPTER

This chapter identifies a general method of organizing trial materials that can be adapted for different types and sizes of cases. For additional literature on organizing trial materials, including alternative approaches, see the bibliography in §3.70.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.2 A. Key to conducting effective trial: Organization

## §3.2 A. Key to conducting effective trial: Organization

Being effective at trial requires the highest level of organization and preparation. Any disorganization or unpreparedness will show, and it can undermine a case. For example, direct examination of a witness may become muddled if counsel has to stop and search the file for exhibits that the witness must identify and explain. Cross-examination will be ineffective, and perhaps even misfire, if materials that contradict the witness's testimony cannot be located smoothly and quickly.

The best time to start organizing trial materials is when setting up the files at the inception of the case. The files may need to be reorganized as part of the trial preparation, however, both to make the trial easier to prepare for as well as easier to conduct.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.3 B. Choosing appropriate organizational system

## §3.3 B. Choosing appropriate organizational system

The attorney responsible for organizing the case and preparing it for trial must choose an organizational method that is appropriate for the case. For a complex case (such as a class action or large antitrust case), a method that can handle large volumes and many different types of material is essential. Smaller and simpler cases will need a less elaborate organizational plan.

The lead trial attorney should be intimately involved in preparing and organizing the trial materials, even in complicated cases, and should not count on paralegals, assistants, or even less experienced attorneys to make crucial judgment calls. No attorney is too senior or experienced not to review all the documents in a small case and the key documents early in a large case. There is no substitute for being familiar with and being able to quickly find items during trial.

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## §3.4 II. ORGANIZING FILES AND TRIAL MATERIALS

The lead trial attorney should review all files in the case in order to prepare the issue outline and to identify the evidence to be presented at trial (see §§3.18-3.23). Presumably, a method of setting up and organizing files that will expedite review is already in place. On case management systems, see California Civil Procedure Before Trial §§1.32-1.47 (4th ed Cal CEB 2004). During this review, the trial attorney should feel free to reorganize the system as appropriate to more easily find the materials needed at trial.

As relevant materials are identified, they can be sorted by issue, *e.g.,* material relevant to formation of contract in one file, material relevant to breach of contract in another. If material is relevant to more than one issue, a document index can be created to indicate all issues to which the material relates. See §3.9. See §§3.5-3.48 as a source of ideas for the tools that will be needed in pretrial organization.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.5 A. Basic client and case information sheet

## §3.5 A. Basic client and case information sheet

Counsel should make sure the file contains a sheet showing basic information such as the names, addresses, and telephone numbers of the client, opposing counsel, and co-counsel (if any), the court and case number, and any internal billing numbers or references. Having this information in one place will save time, and the sheet will serve as a handy portable reference at trial.

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## B. File categories

### §3.6 1. File index

It is vital to prepare and keep current a file index for quick reference to the location of specific materials in the files. An accurate, detailed index is essential in complex cases that may have voluminous files.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.7 2. Examples of file categories

## §3.7 2. Examples of file categories

- Correspondence
- Nondiscovery Pleadings
- Nondiscovery Motions and Demurrers
- Discovery
- Depositions
    - Transcripts and Disks (by name of deponent)
    - Videotapes
    - Summaries
    - Signature Pages and Corrections
- Documents
    - Organized by Issue
    - "Hot" Documents
    - Chronological Organization
    - Documents Subject to Protective Order
    - Document Summaries
    - Original Documents
    - Document Index (divided on the basis of issues, chronology of events, or other frame of reference)
- Hearing Transcripts
- Legal Research
- Attorney's Notes
- Witnesses
    - Opposing Experts
    - Supporting Experts
- Settlement and Damages Information
- Demonstrative and Physical Evidence
- Drafts and Duplicates File

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.8 C. Using computers and other technology

## §3.8 C. Using computers and other technology

Computers and other forms of technology have revolutionized trial presentations. Where posterboards, overhead projectors with transparencies, and other tools were once common, today's trial presentations include real-time court reporting; computer software programs that can display exhibits, depositions, or both simultaneously; large flat screen television-style monitors; and PowerPoint presentations.

The use of modern technology can help retain the interest of jurors and make complex information more readily understandable. At the same time, fundamental rules of effectiveness still apply—the use of technology should be organized, smooth, and not overwhelming.

Technology enables counsel to handle documents in several ways, including the use of an Elmo (a more advanced version of the overhead projector). Software programs allow exhibits to be loaded into a computer and projected onto a screen or television monitor. Early decisions on how to organize and manage documents can pay big dividends at trial. For further information on computer-generated evidence, see §§13.107-13.108.

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## §3.9 1. File management and indexing

For large and complex litigation matters, an index of documents, pleadings, correspondence, and other materials should be put into the computer database. The database allows the index to be easily updated and helps in locating specific information quickly.

A computerized document index is probably neither necessary nor cost effective for one small case. However, a computerized indexing system for all case files at a law firm spreads the cost over all cases and, where useful, makes document indexes affordable for any case. This type of centralized indexing system that keeps track of all documents in all the cases can also be used to help organize documents for trial.

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## §3.10 2. Calendaring dates and deadlines

Even at the trial preparation stage, many dates and deadlines must be tracked, and the consequences of missing a deadline can be catastrophic. See chap 2 on pretrial deadlines. Computer calendaring programs keep track of key dates and issue reminders.

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## §3.11 3. Document databases and issue coding

In complex cases with a large number of documents, it may be advantageous to create a database containing information on each document or group of documents. Doing so can greatly reduce the time required to find particular documents and to identify groups of relevant documents in preparing first for depositions and then for trial.

In witness preparation, for example, the trial attorney must often sift through large quantities of documents to locate the few that will actually be used as exhibits. Although this process may be undertaken manually, it is very time-consuming. If all documents have been scanned into a computerized database (see §§3.12-3.13), word searches help to identify potentially relevant documents in a fraction of the time.

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### §3.12 a. Coding

To expedite a computer search for specific documents, certain basic document information should be entered into the database, *e.g.*:

- Author;
- Recipient;
- Date;
- Subject; and
- A code for each issue to which the material relates.

It then becomes a simple matter to locate documents and receive reports on the documents, using the coded information. For example, it is possible to ask for and obtain a list of all documents written by the defendant in May 2007.

The main drawbacks of coding each document are the time and cost of entering the data into the database. For the end product to be useful, every document must be reviewed and analyzed with care and intelligence. The significant front-end time and expense must be balanced against the savings that will result when the task is complete and the database can be used. This calculation is not an easy one to make, especially because it should be made as early as possible to maximize the savings realized from the database after its creation. Typically, the largest document-intensive cases are appropriate for this kind of database because of the efficiencies involved. The smaller the case, the less likely it is that this approach will be cost-effective.

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### §3.13 b. Optical character readers

Another option is to have the full text of documents scanned into the computer database with an optical character reader (OCR), a tool that performs word searches based on any word in the document. But because one of the biggest drawbacks for OCRs has been inaccuracy—if the document is of poor quality and difficult to read, the scanner may be unable to decipher and accurately convert it to text in the computer—word searches may be unsatisfactory, and the additional cost of proofreading the computer text may be required.

Finally, the documents may need to be coded (see §3.12) in order to be able to locate specific information about a document or part of a document. Otherwise, searching the text of the document may not reveal the information needed, *e.g.,* the relevant issue, the date, the author, or the recipient.

See §3.15 for OCR use in transcripts.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.14 c. Imaging

### §3.14 c. Imaging

Pictures or copies of documents can be stored on the computer for about the same price as making a photocopy, providing an exact replica of the document that the computer can print out, complete with, for example, handwritten notes. With this method, the document does not become text or data in the computer.

Although this method does not allow searching through and sorting by the contents of the document, it does allow viewing and handling multiple documents without having to physically go through file cabinets or boxes. When a copy of a document is needed in a hurry, the document may be found in the computer and printed in far less time than it takes to sort through files.

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## §3.15 4. Deposition databases

Most, if not all, court reporters now provide an electronic file of a deposition or a hearing that they provide along with the written transcript, at no or at a nominal cost. With appropriate software, the text of depositions can be searched for key words and annotated with the attorney's notes. When preparing for trial, a computerized search of deposition testimony saves enormous amounts of time that otherwise used to be spent scouring deposition transcripts. During trial itself, word searches may provide instantaneous location of the desired deposition passage on a screen or computer monitor.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.16 D. Reorganizing files to eliminate nontrial materials

## §3.16 D. Reorganizing files to eliminate nontrial materials

The files must be reorganized for use during trial by eliminating material that will not be used at the trial itself. This reorganization should begin *after* counsel has:

- Completed discovery;
- Assembled, collated, and properly filed all case documents;
- Interviewed witnesses;
- Researched legal issues; and
- Formulated the issue outline.

Material that is not relevant to the trial itself should be segregated from relevant material. Either nonrelevant materials may be removed from each file, or all relevant materials may be transferred into the trial notebook and the files that will actually be used in the courtroom.

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## III. PREPARING MATERIALS FOR USE AT TRIAL

### A. Trial and issue outline

### §3.17 1. Why to prepare

An issue outline lists the factual and legal issues that the client must prove or disprove to prevail at trial and then lists the evidence that will be presented to prove or disprove that issue. An issue outline will help to organize the trial notebook and to formulate a theory of the case that best complements the evidence. The outline may also be used as a tool to determine the evidence to use to prove or disprove an issue, and the order of proof to best persuade the fact finder. Finally, the outline should be used as a master checklist for introducing evidence during trial to eliminate the possibility of overlooking evidence and failing to prove an issue or defense. See sample issue outline in §3.67.

The issue outline is different from outlines that attorneys commonly prepare for discovery. A discovery outline focuses on the likely sources of information to prove the client's case, whereas the issue outline focuses on the method of proving facts at trial, *e.g.,* which witness will testify to what fact. Of course, the discovery outline may evolve into an issue outline as the case progresses. For discussion of a discovery plan, see Creating Your Discovery Plan (Cal CEB Action Guide February 2007); California Civil Discovery Practice, chap 2 (4th ed Cal CEB 2006).

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## §3.18 2. How to prepare

To prepare the issue outline, the trial attorney should review legal authorities to be clear on what must be proved at trial, *e.g.,* 6 Witkin, Summary of California Law, Torts, §§767-817 (10th ed 2005) lists the elements of a cause of action for fraud, and the legal and factual issues that arise in connection with those elements. These elements and the legal and factual issues become the *main issues* and *subissues* of the issue outline. A review of the key jury instructions that will be submitted in the case provides an essential reminder of what needs to be proved at trial. See sample issue outline in §3.67 and list of what to include in the outline in §3.20. Once the issues have been identified, review every file in the case to learn which facts can already be proved and which areas require further discovery.

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## §3.19 3. When to prepare

It is best to create the issue outline well before the trial date, *e.g.,* before the discovery cutoff (see §2.10). Trial counsel should allow sufficient time for additional discovery if evidence is needed to prove or disprove an issue. The issue outline should be revised as additional discovery is completed and reviewed carefully as the discovery cutoff approaches in order to fill in any gaps.

Many experienced litigators begin to rough in the issue outline at the outset of the case, even before the pleadings have been filed. When preparing the initial issue outline, counsel should consider it a work in progress, to be continually updated as the case progresses.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.20 4. What to include

## §3.20 4. What to include

For the plaintiff, the issue outline necessarily encompasses every element of each cause of action, and for the defendant, it encompasses every element of each defense. These *main issues* in the issue outline are framed by the controlling pleadings, *i.e.,* the causes of action in the complaint or the affirmative defenses in the answer.

The *subissues* in the issue outline are the evidentiary and legal issues that support the main issues.

The issue outline should contain the following information:

- Main issues and subissues.
- Facts supporting each issue or subissue.
- Evidence proving those facts, *e.g.*:
- Percipient witnesses;
- Documentary and demonstrative evidence;
- Foundational witnesses (to authenticate documents, when these witnesses are different from percipient witnesses); and
- Whether expert testimony is necessary.
- Damages report(s).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.21 B. Preparing trial notebook; format and contents

## §3.21 B. Preparing trial notebook; format and contents

A trial notebook provides a practical and concise method of organizing material for trial. The main purpose of the trial notebook is to allow quick access to key material during trial. It is typically a looseleaf ring binder, divided by tabs into sections. Some attorneys use a file-folder system or one of the numerous trial organization/notebook products with, *e.g.,* preprinted tabs, table of contents, forms.

The size of the trial notebook and the type of information in it depend on the complexity of the case. In general, however, the notebook should have a section for each major element of the trial in the order in which they will be used at trial. For example, each of the topics covered in §§3.22-3.37 will probably need its own section.

Extra paper should be placed in each section for note taking during trial. A "To Do" section can be useful for writing down tasks and issues that must be pursued during trial.

**PRACTICE TIP:** Despite the need to include all important information, remember that the primary purpose of the trial notebook is to allow quick access to this material during the trial. Keep the size of the trial notebook manageable.

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## §3.22 1. Issue outline

The issue outline that was prepared before trial (see §§3.17-3.20 and sample in §3.67) should be one of the first components of the trial notebook so that it can be referred to when preparing other trial materials, *e.g.,* opening and closing statements. Counsel should refer to the outline during trial to ensure that all issues are proved and all evidence is presented.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.23 2. Trial brief

## §3.23 2. Trial brief

A copy of the trial brief should compose one of the sections in the trial notebook. See §§3.49-3.53.

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## §3.24 3. Motions in limine

One section in the trial notebook should hold copies of motions in limine and copies of authorities supporting those motions. See §3.57, chap 7.

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## §3.25 4. Materials for voir dire

Another section in the trial notebook should contain voir dire materials and methods to keep track of the selection and seating of the jurors. See §3.58, chap 8.

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## §3.26 5. Opening statement

An important component of the trial notebook is the opening statement, setting forth the facts counsel expects to prove at trial. The notebook should also list the demonstrative aids (such as charts or enlargements) that will be used during the opening statement. On opening statement generally, see chap 9.

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### §3.27 6. Witness list or information sheets

The trial notebook should contain a list of names, addresses, and home and office telephone numbers of the client and witnesses so that they may be contacted during trial. Alternatively, witness information sheets (see §5.18) with this information could be incorporated directly into the notebook. It is also helpful to list this information on anyone who may be needed in an emergency, such as co-counsel or legal assistants. All this information should be on the basic client and case information sheet. See §3.5.

To help plan and prepare for trial, it is a good idea to prepare a witness list with the name of each witness, the points counsel plans to cover with that witness, and the exhibits that will be introduced with that witness. This list should be organized in the order in which the witnesses will be presented. See §5.20.

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### §3.28 7. Witness examination plan

The trial notebook should have a section for each witness, containing the witness examination plan (see §5.19 for how to create the plan). This plan should list the questions to be asked, the testimony expected from the witness to prove or disprove an issue in the case, and any anticipated objections that must be overcome to make that testimony admissible. The plan should also list the exhibits that will be offered through the witness's testimony. When the witness examination plan has been properly prepared, counsel can examine each witness, armed only with the appropriate section of the trial notebook, the witness's deposition (if any), and the exhibits pertaining to that witness. Each witness section should also contain the subpoena or notice to appear for that witness. See chap 4 on compelling attendance and documents at trial.

When the documents pertaining to each witness are bulky, a separate file may have to be set up for each witness (see §§3.40-3.43). That file should include copies of the exhibits that will be offered during the witness's testimony, notes on admissibility of the exhibits, and the witness's deposition.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.29 a. Anticipated objections to admissibility of documents

### §3.29 a. Anticipated objections to admissibility of documents

Because a witness will be used to provide the foundation for admitting certain exhibits, if it is anticipated that opposing counsel will dispute the admissibility of an important document, this possibility should be noted in the witness plan and a short memo prepared on the information that will be needed if the objection is raised. See §§15.45-15.64. This memo might be used as the basis for more extensive memorandums if the court needs or requests them during trial. See §§3.44, 3.54.

Counsel should carefully review the opponent's key documents and consider whether it is strategically desirable to object to them. If so, it will be necessary to research the grounds on which the objection would be based. A note of the grounds for the objections should be put in the witness plan for each of the opposing party's witnesses, and a memo should be prepared and attached to a copy of the document. See §3.42. This process will help counsel to state the objection and the grounds properly and effectively, maximize the chances of success, and protect the record in the event of an appeal.

**NOTE:** Use in limine motions to deal with many of these evidentiary issues and objections, and be sure to check local rules that may require in limine motions to be filed and heard in advance of the trial. See chap 7.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.30 b. Impeachment evidence

### §3.30 b. Impeachment evidence

Quick and effective impeachment depends on careful organization of impeachment material; it should be segregated by witness in the trial notebook and incorporated into the witness examination plan. On using deposition testimony, interrogatories, and requests for admission to impeach witness, see chap 12.

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## §3.31 8. Table of exhibits

Counsel should create a table listing the exhibits in the order in which they will be introduced at trial. A place in the table should be reserved for inserting the clerk's identifying number or letter and indicating whether the court admitted the exhibit into evidence and, if so, the date of admission. This table can serve as a handy reference to the status of all documents marked for identification and offered in evidence. See sample exhibit log in §13.140.

During trial, the exhibit list will need to be updated as documents are introduced. It is a good idea to occasionally compare the information on the table of exhibits with the clerk's record, to ensure that they correspond in every detail. If a discrepancy is found, the transcript should be checked to learn which version is correct.

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## §3.32 9. Legal issues and research

A legal issues and research section of the trial notebook should include any important memorandums that counsel anticipates submitting at trial. See §3.54. It should also contain copies of any legal authorities that are likely to be relied on when arguing orally before the court. See, *e.g.,* §3.29.

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## §3.33 10. Stipulations, requests for judicial notice, and key discovery responses

The trial notebook should contain a section for undisputed matters. If, for example, the parties have agreed to certain background material, a copy of the stipulation should be kept in the trial notebook. On judicial notice, admissions, and stipulations, see chap 14. In addition, key discovery responses (such as responses to requests for admission) should be included so that they will be readily available. See §§14.47-14.52. Any requests for judicial notice should also be placed here. See §§14.6-14.42.

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## §3.34 11. Local rules and standing orders

A current copy of local court rules and any standing court orders (*i.e.,* orders concerning all cases issued by the court or individual judges) should be included in the trial notebook (and reviewed well in advance of trial). Having this information handy may minimize the risk of procedural errors.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.35 12. Jury instructions

## §3.35 12. Jury instructions

A section in the trial notebook should be reserved for a copy of the jury instructions requested by all parties. See §§3.59-3.60, chap 20.

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## §3.36 13. Closing argument

A separate section should be included for closing argument. Here, counsel may add notes made during the trial that are relevant to the closing argument. Depending on the nature and complexity of the case, it may be useful to include an outline of the closing argument that was prepared before and during trial. See chap 19.

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## §3.37 14. Verdict forms

Another section in the trial notebook should contain a copy of the verdict form that will be submitted to the court. See §3.61, chap 22.

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## §3.38 C. Other trial files

Although the trial notebook places the most important materials close at hand, other materials must also be brought to trial that may be needed in responding to the opposition's evidence. These materials, even if voluminous, can be conveniently organized in hanging files in boxes. Typical files are pleadings, witness files or binders, documentary evidence, deposition transcripts and videotapes, and legal authorities. See §§3.39-3.45. These files should be labeled and indexed so that the relevant materials can be found quickly.

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## §3.39 1. Pleadings and court orders

The controlling pleadings (*i.e.,* complaint, answer, cross-complaint, and answer to cross-complaint) should be put in a separate pleadings file. This file should not include superseded pleadings (although they may be sufficiently relevant to be placed in the trial notebook for impeachment purposes). See §3.30. Counsel should obtain a copy of the court docket sheet that lists all documents filed with the court to confirm before trial that the pleadings file is complete.

A separate file should contain all prior substantive court orders in the case, *e.g.,* rulings on evidentiary matters and summary judgment rulings. Then, if a dispute arises as to whether a party failed to comply with a court order (*e.g.,* a party improperly mentions prejudicial matters in front of the jury) or exceeds the scope of the issues for trial (*e.g.,* when the scope has been limited by a partial adjudication of issues), counsel will be prepared with a copy of the order. Copies of the orders provide a basis for asking the court to admonish opposing attorneys who violate those orders during trial. See §§16.66-16.90 on misconduct of counsel.

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## §3.40 2. Witness files or binders

All information on witnesses who may testify at trial together should be gathered either into a separate section of the trial notebook or placed in a separate file or binder for each witness. It may be useful to include the following material:

- A copy of the witness examination plan (see §3.28);
- All statements and declarations by or about the witness, deposition transcripts, and records of the witness (see §3.43);
- Reports from and notes concerning the witness;
- Subpoenas of nonparty witnesses, if they do not appear and contempt proceedings become necessary (see §3.55); and
- Documents and demonstrative evidence that will be introduced via that witness and a list of anticipated objections to the admissibility of that evidence (see §§3.41-3.42).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.41 a. Documentary and demonstrative evidence

## §3.41 a. Documentary and demonstrative evidence

Documentary and demonstrative evidence should be organized by witness, *i.e.,* exhibits that will be offered or referred to in examining that witness should be inserted in that witness's file or in a separate file attached to the appropriate witness file. Counsel should arrange the exhibits in the order in which they will be introduced at trial. If a particular witness will testify on many exhibits, a master list of those exhibits should be put in that witness's file.

It may be useful to keep important original and other documents that will be offered into evidence in a separate document file, with a note on the source of the documents and the dates they were obtained on document index sheets. See §3.9 and sample in §3.69. On trial exhibits, see chap 13.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.42 b. Anticipated objections to admissibility of documents

### §3.42 b. Anticipated objections to admissibility of documents

Because witnesses will provide the foundation for admitting certain exhibits, when opposing counsel is expected to dispute the admissibility of an important document, the trial attorney should prepare a memo stating the information needed if that objection is raised. The memo should be clipped to the document or placed in the witness file or the legal research file for easy reference when arguing the point. See §3.42.

**NOTE:** In limine motions may be used to deal with many of these evidentiary issues and objections. See chap 7.

The memo should state the anticipated objection, the grounds for admitting the evidence, and pertinent authorities. This memo might form the basis of more extensive memorandums, which can be submitted to the judge, if necessary. See §3.55.

When an exhibit is long or complex, a summary should be made for a quick review at trial.

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### §3.43 c. Deposition transcripts, videotapes, and recordings

Deposition transcripts, as well as any deposition summaries, should be organized by witness. If the witness has made any corrections to the transcript, a copy of the corrections should be included. It is important to mark the corrections in the working copy of the deposition so that the witness can be impeached without having to refer to a separate list of corrections. If the witness's deposition was video recorded, a copy of the deposition may be placed in the file. The original video recording should have been kept by the operator who made it. See CCP §2025.560(a). On using the deposition transcript or video recording at trial, see §12.32.

Alternatively, if numerous depositions were taken, it is often more practical to file the transcripts alphabetically by the deponents' last names in boxes. Note that some courts require counsel to lodge the original deposition transcript with the court before trial. Los Angeles Ct R 8.71. See §12.14.

**NOTE:** If offering a electronic audio or audio-video recording into evidence, remember to supply the court and parties with a typed transcript. Cal Rules of Ct 2.1040.

See §§12.78-12.88 on additional requirements for use of recorded depositions at trial.

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## §3.44 3. Legal research

Unlike the legal issues section of the trial notebook, which contains only the most important legal issues (see §3.32), this file should contain all legal research and authorities accumulated from the beginning of the case. This file should also include a copy of the trial brief and any other legal memorandums in support of anticipated trial motions. On trial motions, see chap 18. If the file contains extensive legal research, it is helpful to create an index to that material.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.45 4. Optional documentary and demonstrative evidence

## §3.45 4. Optional documentary and demonstrative evidence

Other documents and evidence that might be needed for unanticipated developments, such as the appearance of a surprise witness, should also be organized and brought to trial.

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## D. Copies of documents

### §3.46 1. Court may require copies of documents

Some courts require that, before the trial begins, copies of the documents on the exhibit list be exchanged between the attorneys and another copy of each document supplied to the court. See, *e.g.,* Los Angeles Ct R 7.9(h). Some courts also require that copies of exhibits and other demonstrative evidence be made available to jurors and alternates. See, *e.g.,* Los Angeles Ct R 8.66.

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## §3.47 2. Facilitate witness examination by providing copies

Even when it is not required, it is good practice to make enough copies of the documents to give to opposing counsel and the witnesses before offering them into evidence. Failure to have sufficient copies on hand may require counsel to repeatedly show the document to the witness. Opposing counsel may also interrupt to ask to see the document, thereby disrupting the flow of the examination.

Supplying copies of documents to the opposing attorney, the witness, and the court expedites both the examination and the rulings on the documents' admissibility. On admissibility of documents and demonstrative evidence, see chap 13.

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## §3.48 3. Keep track of costs

If a case involves a large number of exhibits, a record of the costs of copying them should be retained because the prevailing party may recover such costs. See CCP §1033.5(b)(3). On recovering costs, see chap 27.

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## IV. PREPARING TRIAL-RELATED DOCUMENTS TO FILE WITH COURT

### A. Trial brief

#### 1. Why to prepare

### §3.49 a. Educate judge about the case

Virtually every case of any significance warrants the preparation of a trial brief. A trial brief is, in essence, a memorandum of facts and law that educates the judge about the client's factual and legal claims. It provides in one document a perspective of the case that cannot be readily gained from merely reviewing the court file, because the brief spells out the arguments after the parties have had the benefit of discovery.

**PRACTICE TIP:** Consult local court management rules and, if applicable, check with the trial judge (see §§6.2-6.5) about the purpose, timing, and content of the trial brief. For example, some courts require a detailed issue conference statement, containing a statement of facts and legal issues, to be filed before trial. See, *e.g.,* Contra Costa Ct R 5(K)(2) (statement must be served and filed 5 court days before issue conference). This statement in effect replaces the trial brief because you have already provided the court with a summary of the facts and legal issues and many of the legal issues will have been resolved before the date of trial at the issue conference.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.50 b. Briefly develop theory of case

### §3.50 b. Briefly develop theory of case

A good trial brief does much more than summarize the claims and set forth the applicable law. One of its most important functions is to lay out a theory of the case (assuming, of course, that counsel is willing to give up the element of surprise). The goal is to enable the judge to view the evidence with counsel's theory of the case in mind.

**EXAMPLE:** In defending a fraud case, you see that your client made statements that the opposition claims were misrepresentations. To show at trial that the statements were true, set the stage for that theory in the trial brief by summarizing the facts and showing how your client's statements were consistent with those facts.

Although it should give a complete overview of the case, the trial brief should, in fact, be brief. The point is not to argue every marginally relevant fact but to focus on the facts and arguments that will win the case.

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### §3.51 2. How to prepare

In preparing the trial brief, counsel should analyze:

- The facts and the law; and
- The client's and opponent's claims.

Relying on a detailed issue outline (see §§3.17-3.20) and the trial notebook (see §§3.21-3.37) will facilitate preparation of the brief.

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### §3.52 3. Submit as early as possible

A trial brief's effectiveness may be influenced by when it is submitted. Ordinarily, it is best to submit it at the earliest possible time so that the judge's first impression of the case will be based on the view of the issues in the brief. Many courts routinely hold an informal chambers conference when the case is first assigned to the trial judge, providing an opportunity for counsel to personally submit the brief. See §§6.2-6.5. The trial brief sets the stage for subsequent dispositive motions during or after trial, such as a motion for nonsuit or for a directed verdict. See §§18.7-18.34 (nonsuit), 18.35-18.56 (directed verdict). If the judge has had the opportunity to read the brief before trial, counsel may have a greater chance of obtaining a favorable ruling.

**PRACTICE TIP:** Check local case management rules (see §§2.61-2.64) on the timing for submitting the trial brief.

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### §3.53 4. What to include

A good trial brief should include:

- A summary of the case, describing in concise easy-to-read terms the parties' claims and defenses as asserted in the pleadings;
- A statement of the facts that counsel expects the evidence to show (the brief may also describe the opponent's factual contentions and a rebuttal to those contentions); and
- A detailed discussion of all legal arguments, with citations to and excerpts from pertinent authorities.

Legal arguments should be interwoven with and applied to the facts of the case, but avoid string cites and excessive case quotations. Emphasize the central issues that establish liability and damages or defenses to those issues. Minor points of law and anticipated evidentiary issues are normally not included in the brief but may be the subject of supplemental memorandums. See §3.54.

Experienced trial attorneys usually observe (or otherwise investigate) what the judge's chambers library contains and provide *complete* copies of any cited materials not readily at hand. Other legal memorandums already filed in the case should not be incorporated into the brief. If the case is important enough to go to trial, it deserves a fresh reworking in the brief of any legal points to be highlighted for the judge.

Finally, the trial brief should contain anything that the court requests or orders be included. See *Generale Bank Nederland v Eyes of the Beholder Ltd.* (1998) 61 CA4th 1384, 1389, 72 CR2d 188.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.54 B. Supplemental memorandums

## §3.54 B. Supplemental memorandums

An effective device during the trial is to submit, as the need arises, supplemental memorandums prepared in advance on particular legal questions, *e.g.,* admissibility of certain types of evidence. The point at which counsel expects to submit these memorandums should be noted in the witness examination plan (see §§3.28, 3.42, 5.19). Moreover, the court may *require* that additional memorandums on specific points be filed as they arise during the trial.

**NOTE:** Make sure that the judge will accept supplemental memorandums during trial. Some judges want all potential legal points to be included in the initial trial brief and dislike a piecemeal approach.

When a complex evidentiary issue is involved, counsel should prepare a motion in limine to be sure that the matter is given the time and thought it deserves. See chap 7.

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## §3.55 C. Trial subpoenas

Trial counsel should prepare and serve trial subpoenas on all nonparty witnesses that will be called at trial. CCP §1985(a). Subpoenas may be issued by counsel of record. CCP §1985(c). See chap 4 on compelling witnesses to testify and the production of documents at trial.

In addition to the witness's attendance, a subpoena duces tecum requires the witness to bring any desired books, documents, or other items to the trial. CCP §1985(a). An affidavit must accompany a subpoena duces tecum, showing good cause for the production of the matters and things requested in the subpoena. The affidavit must also specify the exact matters or things desired, set forth in detail their materiality to the issues, and state that the witness has the desired matters or things in his or her possession or control. CCP §1985(b). If punitive damages have been requested, counsel may subpoena information from the defendant about its profits or financial condition. CC §3295(c).

**PRACTICE TIP:** If a nonparty witness is friendly, you can avoid serving the witness by asking him or her to accept service of the subpoena and confirm acceptance in writing.

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## §3.56 D. Lists of exhibits

Some courts require each party to prepare a list of exhibits that they intend to offer in evidence. Exhibits that will be used for impeachment need not appear on the list. Copies of the lists can be exchanged with opposing counsel before answering "ready" in the master trial calendar department. See, *e.g.,* Los Angeles Ct R 7.9(h).

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## §3.57 E. Pretrial and trial motions

In addition to motions designed to narrow the issues before trial (*e.g.,* a motion for partial adjudication of issues), counsel should consider whether any other pretrial motions are warranted. See chaps 6-7.

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## §3.58 F. Voir dire and jury questionnaires

Under Cal Rules of Ct 3.1540, prospective jurors are first examined for impartiality by the trial judge. A party may submit additional questions for the judge to ask the jurors. At the attorney's request and within reasonable limits, the court must permit the attorney to supplement the court's examination by direct oral examination.

To the extent possible, counsel should prepare and submit to the court, with copies to the adverse party, proposed questions for the court to ask during its examination. See Cal Rules of Ct, Standards of J Admin 3.25. See also Los Angeles Ct R 8.20(h), 8.31. For questions the trial judge normally asks the entire jury panel as well as improper areas of inquiry, see Standard 3.25.

Counsel may also want to prepare a questionnaire that would elicit certain information from prospective jurors before they undergo voir dire. See §§8.43-8.45 on jury questionnaires.

A method for keeping track of the relevant information about prospective jurors should be prepared. One method is to draw a grid with 12 boxes and, as each prospective juror is seated for voir dire, his or her name is recorded on a post-it in the corresponding box along with relevant information about the juror and follow-up questions for that juror. When a juror is excused and a replacement is selected, the post-it can be removed and a new one put in its place on the appropriate box to record information on the new juror.

On selecting and seating jury generally, see chap 8.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/ G. Jury instructions/§3.59 1. When to submit

## G. Jury instructions

### §3.59 1. When to submit

All proposed jury instructions covering the law as disclosed by the pleadings must be delivered to the trial judge and served on opposing counsel before the first witness is sworn. CCP §607a. Additional proposed instructions on questions of law developed by the evidence and not disclosed by the pleadings may be submitted to the court and served on opposing counsel before the commencement of argument. CCP §607a.

**PRACTICE TIP:** Because local practice varies on when instructions must be submitted, determine whether there is a local rule or whether the trial judge has a preference. See, *e.g.,* San Francisco Ct R 6.4 (jury instructions to be delivered to the trial judge on the day of assignment to the trial department; within 2 days thereafter, all counsel must meet and confer, and notify the judge in writing which of the proposed instructions are acceptable to all parties). See also Los Angeles Ct R 7.9(h) (jury instructions to be served on opposing counsel 5 days before final case management conference).

For full discussion of jury instructions, see chap 20.

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### §3.60 2. Required format

The California Civil Jury Instructions (CACI) "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(e).

California Rules of Court 2.1055 contains specific instructions for the form and format of proposed jury instructions. Cal Rules of Ct 2.1055(b)-(d). These revisions prohibit local court forms or rules from requiring that jury instructions be submitted in any manner other than that set out in Rule 2.1055. Cal Rules of Ct 2.1055(e).

Counsel must submit all jury instructions, whether previously approved by the court (*e.g.*, CACI instructions) or specially prepared by counsel, to the court in the format required in Cal Rules of Ct 2.1055(b)-(d).

For instructions based on forms not previously approved by the court, counsel must include at the bottom of each proposed instruction a citation of authorities, if any, supporting the statement of law in the instruction (Cal Rules of Ct 2.1055(d)). The instructions must be numbered consecutively, but not be bound firmly together. Cal Rules of Ct 2.1055(b). The court may refuse to give proposed instructions, except those required by law, and may indicate on the record the reason for any refusal. See Judicial Council, *Jury Instructions: Format for Proposed Instructions* (Nov. 17, 2003). Although the judge is not required to endorse on the proposed instruction the reason for refusing the instruction (see Cal Rules of Ct 2.1055; §20.29), to ensure that the appellate record is accurate and complete, counsel should monitor the disposition of proposed instructions and ask the court to indicate on the record or in writing the reason for refusing any jury instruction.

**PRACTICE TIP:** Have copies of the instructions that do not include title, citations to authorities, or the identity of the party requesting the instruction because the court is required to give the jury copies if the jury requests them. CCP §612.5.

For detailed discussion of jury instructions and samples, see chap 20.

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## §3.61 H. Verdict, special interrogatories, and statement of decision

Trial counsel should prepare the form of verdict before trial. If the jury will make special findings, written questions of fact should also be submitted on those issues. These "special interrogatories" must be delivered to the trial judge and served on opposing counsel in proper form for submission to the jury before the commencement of argument. Cal Rules of Ct 3.1580. On verdicts generally, see chap 22.

In bench trials, it is good practice to draft a proposed statement of decision before trial. See CCP §632; Cal Rules of Ct 2.1590. If it is prepared in conjunction with the issue outline, the statement will help to establish the facts to be proved under each legal theory. On statement of decision generally, see §§24.43-24.50.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/ V. FINAL PREPARATION/§3.62 A. Documents and demonstrative evidence

## V. FINAL PREPARATION

### §3.62 A. Documents and demonstrative evidence

Counsel should check all exhibits to ensure that the documents to be offered at trial will be available in their proper order. It is particularly important that necessary original documents will be available. On admissibility requirements of documents, see §§13.64-13.84.

Demonstrative evidence, such as charts, diagrams, maps, photographs, and enlargements, should be reviewed for accuracy, and if an expert witness is involved, shown to him or her before the trial. Counsel should make sure that necessary equipment, such as overhead projectors, video monitors, easels with paper and pens, and chalk boards with chalk are readily available. If the courtroom is unfamiliar, counsel should visit it before trial and plan the location of demonstrative aids where they will be visible to the witness, opposing counsel, the judge, and the jury. For detailed discussion of exhibits, see chap 13.

**PRACTICE TIP:** If any unusual demonstrative aids will be used, check with the court about any restrictions. See, *e.g.,* Los Angeles Ct R 8.59 (restricting inherently dangerous or cumbersome items as exhibits). If an enlargement of a document will be used, the court may prefer that it be marked for display and a standard size offered into evidence.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.63 B. Computers and audio-visual equipment

## §3.63 B. Computers and audio-visual equipment

Arrangements must be made for the presentation of any evidence requiring computers or audio-visual equipment, as in a video recorded deposition. The equipment, which may include several monitors, should be placed so that everyone can see it. Before trial, arrangements should also be made to ascertain whether any special electrical requirements or accessories are needed to run the equipment in question. See §§13.107-13.108.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.64 C. Prepare witnesses and schedule confirmation

## §3.64 C. Prepare witnesses and schedule confirmation

Counsel should confirm that all witnesses have been served with subpoenas and, if applicable, subpoenas duces tecum. See §3.55. If any witness has a scheduling conflict, the court should be so informed on the first day of trial. That witness may then be placed "on call" in accordance with CCP §1985.1. See §§4.20, 4.58.

Counsel should schedule pretrial meetings with friendly witnesses to prepare them to testify. See §5.22. Counsel should also meet with the client or the client's representative to discuss courtroom demeanor and, if the client will testify, the client's testimony. See §§5.32-5.43.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.65 D. Codes, texts, and authorities to bring to court

### §3.65 D. Codes, texts, and authorities to bring to court

On the day of trial, it will be helpful to have arranged to have access in court to the Evidence Code, Code of Civil Procedure, relevant forms of California Civil Jury Instructions approved by the Judicial Council (CACI), and other codes, texts, or authorities that may be used at trial. If an expert witness will rely on or could be impeached with a treatise, that treatise should be at hand in the courtroom.

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### §3.66 E. Ask clerk to mark and number documents

When a substantial number of documents are involved, trial counsel should ask the court clerk to mark them for identification before using them at trial. Premarking the exhibits ensures that the jury will not be bored or annoyed while voluminous exhibits are being marked, and it enhances the flow of the examination by eliminating the cumbersome process of marking the exhibits and recording the information on counsel's exhibit record.

Some courts request that all documents be marked for identification before trial. See Los Angeles Ct R 8.60. It is good practice for counsel to present all exhibits, except those anticipated in good faith for use for impeachment or tactical surprise, to the clerk for marking before the first witness is sworn.

**PRACTICE TIP:** Ascertain whether the trial court uses a uniform numbering system. Some courts have a system for marking exhibits. See Los Angeles Ct R 8.62. In a case with only two parties and no more than 25 exhibits, some courts allow the plaintiff's exhibits to be marked numerically and defendant's exhibits marked alphabetically.

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## VI. SAMPLE FORMS

### §3.67 A. Issue outline

A portion of a plaintiff's issue outline illustrates one cause of action based on fraud. To find the elements for that cause of action, see, *e.g.,* 5 Witkin, Summary of California Law, Torts, §§676-718 (10th ed 2005). The cause of action (I) and the elements (A-E) are the main issues, and the other issues to be proved at trial become the subissues of the issue outline. Each element or issue should be followed by the facts and the evidence proving those facts.

**ISSUE OUTLINE**

| *Issues and Subissues* | *Facts* | *Evidence: Witnesses* | *Evidence: Documents (and Foundational Witnesses)* |
|---|---|---|---|
| I. Fraud | | | |
| A. Defendant's misrepresentation of fact | | | |
| 1. What defendant represented | That defendant company was worth $1 million | Plaintiff and defendant's employees | Defendant's financial statement of 12/9/09 (foundation laid by defendant's accountant) |
| 2. Representations were false | Company was not worth $1 million | Expert CPA | Defendant's general ledger, journals, bank records (defendant, defendant's accountant, bank custodian of records) |
| B. Defendant knew representation was false. | | | |
| C. Defendant intended to deceived | | | |
| D. Plaintiff relied on the representations | | | |
| E. Plaintiff was damaged | | | |

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.68 B. Document index

## §3.68 B. Document index

**DOCUMENT INDEX [by issue]**

A. Issue: What defendant represented

| *Document No.* | *Document Date* | *Description; Original or Copy* | *Source of Document* | *Produced to Other Party* | *File Location of Document* | *Removal of Document* |
|---|---|---|---|---|---|---|
| 1 | 8-9-07 | Financial Statement of Defendant Co. (copy) | Defendant's Deposition | N/A | Document File #1 | 7-9-08 sent to CPA; returned; placed in plaintiff's witness file |
| 2 | 1-9-08 | Defendant's letter to Plaintiff (orig) | Plaintiff | 3-5-09 | Document File #2 | Placed in plaintiff's witness file |

B. Issue: Falsity of Representations

| *Document No.* | *Document Date* | *Description; Original or Copy* | *Source of Document* | *Produced to Other Party* | *File Location of Document* | *Removal of Document* |
|---|---|---|---|---|---|---|
| 5 | 2007 | General Ledger of Defendant Co. (copy) | Accountant | N/A | Document File #2 | 7-9-08 sent to CPA; returned; placed in Accountant's witness file |

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.69 C. Exhibit log

## §3.69 C. Exhibit log

**Sample Exhibit Log Form**

**EXHIBIT LOG**

| *Exhibit No.* | *Description* | *Marked for Identification* | *Offered* | *Admitted* |
|---|---|---|---|---|
| 1 | Financial Stmt of Def. Co. | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/3 Organizing Trial Materials/§3.70 VII. SELECTED BIBLIOGRAPHY

## §3.70 VII. SELECTED BIBLIOGRAPHY


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# 4

# Compelling Attendance and Production of Evidence

**Holly J. Fujie**

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3. Form: Written objections to notice to attend and produce evidence at trial (CCP §1987(c)) §4.73

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## §4.1 I. SCOPE OF CHAPTER

This chapter discusses the procedures that can be used for producing testimony and evidence at trial, including:

- Compelling the attendance of witnesses at trial by subpoena and using a subpoena duces tecum commanding witnesses to produce documents and other evidence at their court appearance (CCP §1985; see §§4.6-4.20);
- Subpoenaing documents governed by additional procedures because they are defined as "the personal records of a consumer" (CCP §1985.3; see §§4.21-4.23);
- Subpoenaing the production of business documents by a custodian of records with or without a person also appearing to testify (CCP §1987.3; see §§4.24-4.28);
- Serving a notice to attend, or a notice to attend and produce evidence, on parties or party-related witnesses (*e.g.,* officers, agents) or persons for whose immediate benefit the action or proceeding is prosecuted or defended (CCP §1987(b); see §§4.36-4.39).

The procedures for objecting to a subpoena or notice, including motions to quash, are discussed in §§4.45-4.51.

Counsel's enforcement options, including civil penalties and contempt proceedings after a witness disobeys a subpoena or notice to attend, are covered in §§4.52-4.54.

On costs and witness fees, see §§4.40-4.44.

Forms are in §§4.55-4.73.

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## II. SUMMARY OF PROCEDURES

### §4.2 A. Subpoena of nonparty witnesses

The main process used to compel attendance of a nonparty witness at trial is a civil subpoena. A subpoena is an order directing a person to attend at a particular time and place to testify. CCP §1985. The Judicial Council form of subpoena that must be used appears in §4.55.

A subpoena duces tecum requires a person to appear and bring specified evidence. CCP §1985. A subpoena duces tecum is the appropriate method for obtaining the production at trial of any books, documents, or other things under the control of a nonparty witness who is not a party of record. See mandatory Judicial Council form in §4.55A. An affidavit or declaration describing the documents and things to be produced must accompany a subpoena duces tecum. See CCP §1985(b). The declaration that appears on the back of the Judicial Council form of subpoena duces tecum may be filled out, or a separate affidavit or declaration may be attached to the subpoena duces tecum form. See §§4.7-4.13.

A subpoena is not necessary to compel a party's attendance (or a party's attendance and production of documents). Written notice is sufficient for a party, a person for whose immediate benefit the action is prosecuted or defended, or an officer, a director, or a managing agent of any such party or person. See §4.36.

**NOTE:** Evidence may be produced in response to a subpoena duces tecum without the need for a witness to appear when the requirements of Evid C §§1560-1561 are satisfied. CCP §1987.3. See §§4.24-4.28.

For additional requirements that must be met when the materials to be produced are "the personal records of a consumer" maintained by the witness, see §§4.21-4.23. On notice procedures for compelling a party to produce evidence, see §§4.36-4.38.

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### §4.3 1. Advantages of subpoenaing friendly witnesses

Most experienced trial lawyers subpoena all witnesses, even friendly witnesses whom they intend to call at trial, including their own experts and other "friendly" nonparty witnesses. To do otherwise is too risky, both in terms of obtaining a continuance from the court if a key witness fails to appear and of subjecting themselves to malpractice exposure if forced to trial without testimony essential to the prosecution or defense of the case.

When subpoenaing witnesses for trial, some attorneys subpoena all witnesses for the same time and place (*e.g.,* to Department 1 at 9 a.m. on the first day of trial) and include a letter confirming the subpoena's instructions that, under CCP §1985.1, different arrangements may be made if requested. The letter explains that the only alternative is for the witnesses to appear at the stated time and then have the court order them back the next day, a procedure that could continue until each witness actually testifies. Attorneys who use this method find that witnesses understand the subpoena process better and are much more willing to agree to a schedule of notification and appearance. For sample letter, see §4.20.

Advantages of using the subpoena process include:

- A subpoena can impress a witness with the importance of the proceeding. If a subpoenaed witness nonetheless fails to appear due to illness, emergency, inadvertence, or mistake, a ground may exist for obtaining a trial continuance. See §6.9.
- Without a subpoena, the court will be less inclined to grant a continuance or even a brief recess when an important witness does not appear at the agreed time and place. Counsel should be cautious about reaching an agreement with a witness to testify, or relying on a stipulation with counsel for a witness to appear, without *first* serving a subpoena. For form of agreement for witness to appear "on call" after subpoena is served, see §4.58.
- A subpoena makes it more difficult for the opposing party to suggest bias by eliciting an admission that the witness appeared voluntarily and without a subpoena. This consideration may be particularly important with regard to expert and nonparty witnesses.
- Service of the subpoena entitles the witness to reimbursement for witness fees and mileage. See §4.41. It can also be shown to an employer to justify paid time off when the witness appears at the trial, thus helping to mitigate the inconvenience and expense associated with giving testimony.
- Without a formal subpoena, counsel cannot enforce contempt proceedings against a witness who has failed to appear at the agreed time and place. Such an agreement, however, is enforceable after a subpoena has been served. See §4.20. On contempt proceedings, see §4.52.

**CAUTION:** Be sure that the subpoena process does not antagonize an otherwise friendly witness. Telephone the witness ahead of time (or have someone in your office coordinate these calls) to explain that a subpoena will be issued and ask where and when the subpoena can be conveniently served. This initial telephone call is also a good opportunity to offer, after the subpoena is served, to follow up with an on-call agreement for the witness to appear at the trial when needed. See §4.20.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.4 2. When to use subpoena for parties: Time periods for notice expired

### §4.4 2. When to use subpoena for parties: Time periods for notice expired

Although it is not necessary to subpoena parties, they may be subpoenaed. In a situation in which the time periods for noticing a party's attendance or production of evidence at trial have already expired, a subpoena (or subpoena duces tecum) may be the best and only method for compelling such testimony or production unless a court order shortening the time for notice can be obtained. See CCP §1987(b)-(c) (notice must be served at least 10 days before required appearance; at least 20 days if books, documents, or other things are requested). See §4.37.

No specific time periods govern when a subpoena should be served. Service of a subpoena must simply allow the person "a reasonable time" for preparation and travel to the place of attendance. CCP §1987(a). If surprise developments occur on the eve of trial or during the trial itself, use a subpoena to compel attendance or production of evidence.

When the opposing party refuses to stipulate or otherwise cooperate, and time is short, counsel should use the subpoena process to compel attendance of, or production of evidence from, a party, a person benefiting from the action, or an officer, a director, or a managing agent of any such party or person. See §4.6.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.5 B. Notice to parties, persons 'benefiting' from action, or other 'related' witnesses

### §4.5 B. Notice to parties, persons "benefiting" from action, or other "related" witnesses

Although the subpoena power may be invoked to require the attendance of any witness, it need not be used for (CCP §1987(b)):

- A party to the action or proceeding;
- A person for whose immediate benefit the action or proceeding is being prosecuted or defended; or
- An officer, a director, or a managing agent of any such party or person.

A written notice is sufficient to compel the appearance of a party, a person "benefiting" from the action, or an officer, a director, or a managing agent of any such party or person. CCP §1987(b). Such notice gives the noticing party the same rights concerning compliance and sanctions as if a subpoena had been served. CCP §1987(b).

Procedures and tactical considerations on use of the notice to attend, and the notice to attend and produce, are discussed in §§4.36-4.39.

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## III. SUBPOENA PROCEDURES

### §4.6 A. Issuing subpoena or subpoena duces tecum

The Judicial Council has adopted mandatory forms for civil subpoenas. See Cal Rules of Ct 1.30-1.44 and 2.131-2.134. The form of subpoena compelling a witness's attendance only is reproduced in §4.55. If the witness's attendance as well as the production of books, documents, or things in the possession or control of a witness is needed, the subpoena duces tecum form reproduced in §4.55A must be used. For step-by-step directions on completing the subpoena forms, see Handling Subpoenas (Cal CEB Action Guide May 2009).

Blank civil subpoena forms may be obtained from the court clerk for a small fee, or counsel may photocopy or print out the form from p 1-21 of the current California Judicial Council Forms Manual (Cal CEB 1981), which provides the forms both in print and electronic formats.

After the form is filled in, the usual practice is for an attorney of record in the pending action to sign and issue a subpoena or a subpoena duces tecum requiring attendance and/or production of evidence at the trial. CCP §1985(c). Like all process, a subpoena is issued in the name of "The People of the State of California." Govt C §100. The subpoena must be served on the witness personally. See §4.15.

**NOTE:** A less convenient statutory procedure, which is rarely used for a represented party but which a person appearing in propria persona can follow, is to obtain a civil subpoena form from the court and have the clerk or a judge issue it. The clerk or judge must issue a subpoena or a subpoena duces tecum signed and sealed, but otherwise blank, to a party requesting it. CCP §1985(c). See *McLeod v Board of Pension Comm'rs* (1970) 14 CA3d 23, 28, 94 CR 58 (issuance of ordinary subpoena is statutory right; clerk or judge has no discretion to refuse to issue it, even if subpoena is then subject to motion to quash).

When a county recorder is using a microfilm system for recording and a witness is subpoenaed to present a record, the witness is deemed to have complied with the subpoena if the witness produces a certified copy. CCP §1985(a).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.7 B. Preparing affidavit or declaration in support of subpoena duces tecum

## §4.7 B. Preparing affidavit or declaration in support of subpoena duces tecum

An affidavit must accompany a subpoena duces tecum requesting that the witness appear and produce evidence. CCP §1985(b). The declaration that appears on the back of the Judicial Council form of subpoena duces tecum may be filled out (see §4.55A), or a separate affidavit or declaration may be attached (see §4.56).

If preparing an attachment to the subpoena duces tecum form, a declaration is usually more convenient and commonly used in place of the affidavit mentioned in CCP §1985. See CCP §2015.5 (declaration under penalty of perjury may substitute for affidavit before officer authorized to administer oaths). For form of declaration supporting civil subpoena duces tecum (trial), see §4.56.

An attorney rather than the party usually prepares and signs the supporting declaration because of the legal requirements involved, *e.g.,* showing the requested items' "materiality" to the issues and "good cause" for their production. See CCP §1985(b).

**PRACTICE TIP:** If the discovery cutoff has not passed (see §2.4), counsel who lacks the necessary information to prepare a sufficient declaration or affidavit to accompany the trial subpoena should seek that information through the use of written interrogatories and depositions. See *Flora Crane Serv. v Superior Court* (1965) 234 CA2d 767, 790, 45 CR 79.

A subpoena duces tecum *may* be served on any person (and *must* be served to compel production of evidence from a nonparty). See discussion in §§4.2-4.4. If the witness is a party, however, the notice procedure for requesting production of evidence is much simpler and does not require a supporting affidavit or declaration. See §4.38.

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### §4.8 1. Legal requirements

The declaration printed on the back of the Judicial Council form of subpoena duces tecum includes space for filling out the information required by the statute (see CCP §1985(b)), and specifies that additional material may be continued on numbered attachments. See form in §4.55A. A separate affidavit or declaration, if drafted to accompany the subpoena duces tecum form, must contain this same information. See form in §4.56.

Either the declaration on the back of the form or an attached document prepared in support of the subpoena duces tecum must (CCP §1985(b)):

- Show good cause for the production of the matters or things described (see §4.9);
- Specify the exact matters or things to be produced (see §4.10);
- Set forth in full detail the materiality of those matters or things to the issues in the case (see §4.11);
- State that the matters or things are in the witness's possession or control (see §4.12); and
- Meet admissible evidence standard (*e.g.,* state personally known facts, avoid conclusions or hearsay; see §4.13).

Failure to meet all the elements required by CCP §1985(b) makes an affidavit or declaration in support of a subpoena duces tecum fatally defective. CCP §1985; *Johnson v Superior Court* (1968) 258 CA2d 829, 835, 66 CR 134.

**Rationale:** The purpose of these requirements is to protect constitutional guaranties, *e.g.,* the United States Constitution's guaranty against unreasonable search and seizure under the Fourth Amendment. See *McClatchy Newspapers v Superior Court* (1945) 26 C2d 386, 396, 159 P2d 944; *Pacific Lighting Leasing Co. v Superior Court* (1976) 60 CA3d 552, 564, 131 CR 559; *People ex rel Dep't of Pub. Works v Younger* (1970) 5 CA3d 575, 580, 86 CR 237.

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### §4.9 a. Show good cause

Good cause must be shown for the production of the subpoenaed items. CCP §1985(b). This means that the affidavit or declaration in support of the subpoena duces tecum must set forth facts showing that production from the witness is justified. See *Beesley v Superior Court* (1962) 58 C2d 205, 23 CR 390.

Unlike matters subject to discovery (see CCP §2017.010), the proof needed to support a civil trial subpoena requires more than mere relevance to the subject matter of the case. A party may not be able to show good cause if the documents to be produced can be obtained elsewhere. See *People ex rel Dep't of Pub. Works v Younger* (1970) 5 CA3d 575, 580, 86 CR 237 (in eminent domain trial, defendant requested state appraiser's report of condemned property, declaring information unavailable from any other source; good cause not shown, because property could have been inspected by another appraiser who could give written report).

**Compare:** An affidavit or a declaration showing good cause for production of documents need not accompany discovery subpoenas under CCP §2020.410(c). See CCP §§2020.410(c), 2020.510(b).

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### §4.10 b. Specify exact matters to be produced

The affidavit or declaration in support of a subpoena duces tecum must describe the exact matters or things that the witness is directed to produce at trial. CCP §1985(b). The specificity requirement of CCP §1985(b) cannot be met when documents are only generally described.

**EXAMPLE 1:** An affidavit requesting "all correspondence, records and documents" is too broad to support a trial subpoena. *Pacific Auto. Ins. Co. v Superior Court* (1969) 273 CA2d 61, 70, 77 CR 836 (all documents concerned an accident investigation).

**EXAMPLE 2:** Court quashed doctor's subpoena requesting burdensome blanket search of Board of Medical Examiners records on ground that declaration was defective because description did not comply with specificity requirement statute. *Grannis v Board of Med. Exam'rs* (1971) 19 CA3d 551, 564, 96 CR 863.

The *contents* of documents need not be specifically stated, however, when some method of identifying the requested items is used. *Pacific Solvents Co. v Superior Court* (1948) 88 CA2d 953, 954, 199 P2d 740 (not necessary to list contents of several requested government orders identified by numbers and effective dates).

In certain situations, the courts have validated affidavits and declarations containing general descriptions, *e.g.,* when a designation of documents is as specific as the circumstances permit, reasonably accurate, and understandable to the adverse party. See *McClatchy Newspapers v Superior Court* (1945) 26 C2d 386, 397, 159 P2d 944; *Pelton Motors, Inc. v Superior Court* (1953) 120 CA2d 565, 569, 261 P2d 275. The requirement of specificity may be relaxed when the parties (*e.g.,* partners, joint venturers, spouses, trustees) have a common or special interest in the documents to be produced. *Strauss v Superior Court* (1950) 36 C2d 396, 403, 224 P2d 726 (court upheld trust beneficiary's subpoena duces tecum directed to trustee seeking production of all books, documents, and records relating to trust).

**Compare:** Discovery subpoenas under CCP §2020.410(a) may designate records to be produced either by specifically describing each individual item or by merely "reasonably particularizing" each *category* of item. A discovery subpoena does not require an accompanying affidavit or declaration. See §4.9.

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### §4.11 c. Describe materiality of requested items to case issues

The supporting declaration or affidavit must set forth "in full detail" the materiality of the requested documents to the issues in the case. CCP §1985(b). The materiality requirement justifying a subpoena duces tecum cannot be met when the affidavit merely relies on the legal conclusion, stated in general terms, that the desired documents are relevant and material. *People ex rel Dep't of Pub. Works v Younger* (1970) 5 CA3d 575, 580, 86 CR 237. On stating facts and avoiding legal conclusions in affidavit or declaration, see §4.13.

Typically, the subpoenaing party establishes materiality by relating the requested documents to the issues raised by the pleadings or the issues that will be tried in the case.

**EXAMPLE:** Counsel can refer in the declaration to portions of the pleadings to which the documents requested pertain. See *American Fed'n of Musicians v Superior Court* (1957) 150 CA2d 165, 170, 309 P2d 874 (proper for court to consider allegations of complaint as well as affidavit in determining materiality of records sought).

A mere statement on information and belief that the defendant possessed certain documents that the plaintiff believed were necessary to prove the allegations in the complaint, however, was held to be insufficient. See *Johnson v Superior Court* (1968) 258 CA2d 829, 837, 66 CR 134. Similarly, mere suspicion that books and papers contain material evidence does not warrant an order for production. *Austin v Turrentine* (1939) 30 CA2d 750, 761, 87 P2d 72.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.12 d. State that witness has possession or control of requested items

### §4.12 d. State that witness has possession or control of requested items

An affidavit or a declaration in support of a subpoena duces tecum must state that the witness has possession or control of the desired matters or things. CCP §1985(b).

An affidavit alleging that the witness had custody of the named documents and objects on information and belief is insufficient. See *Lewis v Superior Court* (1953) 118 CA2d 770, 773, 258 P2d 1084. On requirement of personal knowledge, see §4.13.

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### §4.13 e. Admissible evidence standard: State personally known facts

Like all declarations, a declaration in support of a subpoena duces tecum should set out admissible evidence. The declarant should state probative facts on which the ultimate fact depends, rather than conclusions, opinions, or ultimate facts. *Johnson v Superior Court* (1968) 258 CA2d 829, 66 CR 134. See *Pacific Auto. Ins. Co. v Superior Court* (1969) 273 CA2d 61, 67, 77 CR 836 (legal conclusions not adequate to show materiality or good cause); *Shell Oil Co. v Superior Court* (1930) 109 CA 75, 292 P 531 (mandamus granted to restrain enforcement of order permitting inspection when no facts set forth).

The existence of conclusions in a declaration or an affidavit does not invalidate it, however, when the conclusions are supported by sufficient allegations of evidentiary fact. See *Vartanian v Croll* (1953) 117 CA2d 639, 648, 256 P2d 1022 (motion concerning CCP §473).

The declaration should be made on personal knowledge rather than on information and belief, *i.e.,* the declarant would be able to testify to the truth of the matters declared if called as a witness. A supporting declaration or affidavit based on information or belief, or hearsay, is insufficient. *Procter & Gamble Mfg. Co. v Superior Court* (1954) 124 CA2d 157, 162, 268 P2d 199. See *Lantz v State Bar* (1931) 212 C 213, 221, 298 P 497 (unless it is affirmatively stated or can fairly be inferred to the contrary, statements in declarations are presumed to be based on personal knowledge).

If the ultimate fact to be proved cannot be directly averred, however, the court may allow statements on information and belief. *City of Santa Cruz v Municipal Court* (1989) 49 C3d 74, 88, 260 CR 520. See *Pacific Air Lines, Inc. v Superior Court* (1965) 231 CA2d 591, 42 CR 70 (court upheld affidavit alleging party's lack of residence for a change of venue on information and belief absent controverting facts).

Facts may be alleged on information and belief if the affidavit also specifies facts in support of that information and belief. *Grannis v Board of Med. Exam'rs* (1971) 19 CA3d 551, 564, 96 CR 863 (declaration that sets forth facts in support of said information and belief is sufficient). Allegations on information and belief may also be upheld when adverse parties (*e.g.,* partners, joint venturers, spouses, trustees) have a common interest in the documents to be produced. See *Union Trust Co. v Superior Court* (1938) 11 C2d 449, 460, 81 P2d 150 (order for inspection of books and records).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.14 2. Retain original affidavit or declaration until final judgment

### §4.14 2. Retain original affidavit or declaration until final judgment

The party who caused a subpoena duces tecum to be served must retain the original affidavit or declaration until final judgment in the action. CCP §1987.5.

The affidavit or declaration should not be filed with the court unless a party or witness affected by the subpoena makes a reasonable request that the original be filed (*e.g.,* the affidavit or declaration becomes the subject of a dispute by a party challenging its legal sufficiency). See CCP §1987.5. On legal requirements, see §§4.7-4.13.

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### C. Serving subpoena or subpoena duces tecum

### §4.15 1. Personal service required

Service of a subpoena that compels a witness to testify at trial is normally made by delivering "a copy, or a ticket containing its substance, to the witness personally." CCP §1987(a). See *In re Abrams* (1980) 108 CA3d 685, 166 CR 749 (improper to serve subpoena on attorney for nonparty witness). The original subpoena need not be shown to the witness. CCP §1987(a). On cost of serving subpoena, see §4.40.

A subpoena duces tecum that requires the witness to bring specified documents when appearing at the trial is served in the same manner as a subpoena. The affidavit or declaration must be served at the same time as the subpoena duces tecum is served. CCP §1985(b).

**Exceptions:** Personal service is not necessary when a custodian of records is subpoenaed, if the subpoenaing party is interested in the production of documents only and does not desire the personal appearance of the organization's custodian of records or other qualified witness. See §§4.24-4.28. For requirements when the desired documents are "records of a consumer," see §§4.21-4.23.

On alternative procedures that make it unnecessary to serve subpoenas on certain government employees personally (*e.g.,* firefighters, probation officers), copies of which may be left with an immediate superior at the public entity's office, see Govt C §68097.1. For discussion, see §4.29.

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### §4.16 2. Who may serve subpoena

Although service of a subpoena may be made by any person (CCP §1987(a)), someone who is credible and not connected with the litigation (*e.g.,* the attorney's investigator or a hired process server) should serve the subpoena to discourage a claim that service was not duly made.

Counsel may ask a sheriff, marshal, or constable to effect service. See Govt C §§26608, 26660, 71265. On cost of service of subpoena by sheriff or other peace officer, see §4.40.

Using a registered process server has one advantage over other methods. A registered process server's "return" (*i.e.,* proof of service) establishes a presumption of the facts stated in the return. Evid C §647. A professional process server is also governed by certain statutes concerning business conduct. See Bus & P C §§22350-22360.

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### §4.17 3. Time requirements

Unlike notices to attend or notices to attend and produce, which are directed to parties, subpoenas and subpoenas duces tecum have no service deadlines. Service must be made to allow the witness "a reasonable time for preparation and travel to the place of attendance." CCP §1987(a).

As long as the "reasonable time" standard of CCP §1987(a) can be met, a subpoena or subpoena duces tecum may be served shortly before or even during trial. In contrast, the time requirement for a party who has been served a notice to attend is 10 days. CCP §1987(b). For a notice to attend and produce, the time requirement is 20 days. CCP §1987(c). If circumstances allow for these time periods to be observed, the subpoena should not be vulnerable to a challenge based on insufficient time to prepare and travel. Cooperative nonparty witnesses may be willing to produce documents much more quickly. When appropriate, counsel should argue that much shorter time periods are "reasonable" under the circumstances. On serving a subpoena on parties after time for notice has expired, see §4.4.

**Exception:** When a subpoena duces tecum requests the "personal records of a consumer" but not the testimony of the witness producing them, time periods designed to ensure the consumer an opportunity to challenge the subpoena must be observed. See §4.22. Strict time requirements also exist when serving a subpoena on some public officers. See, *e.g.,* Govt C §68097.3 (subpoena for appearance of highway patrol member must be served at least 5 days before date of required attendance). See §4.29.

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### §4.18 4. Subpoena power limited to California "residents"

A person served with a trial subpoena must attend as a witness before any court, judge, justice, or other officer, if the witness is a resident within the state at the time of service. CCP §1989. A "resident" need only live in the state when served, not claim it as his or her permanent home. See *In re Morelli* (1970) 11 CA3d 819, 831, 91 CR 72, overruled on other grounds in *Cedars-Sinai Imaging Med. Group v Superior Court* (2000) 83 CA4th 1281, 1287 n6, 100 CR2d 320 ("[t]he subpoena section envisages nothing more than *an abode …* which gives the 'resident' a sojourning connection with the area").

The statute does not envision the subpoena of "nonresidents" who happen to be physically present in California at the time of service. See CCP §1989. There is no known case on point, and enforcement of a subpoena after a nonresident left California would of course be problematic. By analogy to cases upholding service of summons, however, counsel can argue that there are no constitutional prohibitions against asserting personal jurisdiction over nonresidents served with a subpoena when they are present in the state. See *Burnham v Superior Court* (1990) 495 US 604, 109 L Ed 2d 631, 110 S Ct 2105 (service of summons on nonresident who was in state at time of service held valid).

The territorial reach of a trial subpoena does not extend beyond the borders of California. If an important witness resides outside California, that person's deposition should be taken well before trial. Although attendance at a trial in California cannot be compelled, witnesses may be subpoenaed to out-of-state depositions under the laws of other states and the deposition testimony later introduced at trial. See CCP §§2025.620, 2026.010.

**PRACTICE TIP:** Because deposition transcripts read to the jury are a poor substitute for the testimony of a "live witness," consider videotaping the out-of-state deposition. Also consider obtaining the deponent's agreement to testify voluntarily at the trial, even though there is no statutory means for compelling that testimony. If the witness refuses to appear, or agrees to do so but does not show up, the videotaped deposition can be used. On taking videotaped depositions and compelling depositions in other states, see California Civil Discovery Practice, chaps 5, 12 (4th ed Cal CEB 2006).

**Exception:** If personal attendance is not requested, a nonresident custodian of records may be required to produce documents under a subpoena duces tecum. See CCP §1987.3. To enforce compliance, however, the custodian would probably have to be an employee of a business subject to California jurisdiction. On subpoenaing documents from a custodian of records, see §4.24.

**Compare:** A party can be compelled by notice to produce records or other items in its possession or control even if that evidence is located outside California, as long as it is in the party's possession or control. On notice procedures, see §§4.36-4.38.

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### §4.19 D. Proof of service; filing optional

After service, the person serving the subpoena or subpoena duces tecum completes and signs the proof of service form on the reverse side of the official form of subpoena. See §4.55. The form includes the date and time of service, whether fees were demanded, and what fees, if any, were paid.

Counsel may file the original subpoena and proof of service with the court clerk before the date of the witness's appearance, but there is no requirement to do so.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.20 E. Agreement to appear after subpoena served

### §4.20 E. Agreement to appear after subpoena served

A person who has been subpoenaed may enter into an agreement with the party who served the subpoena to appear at a time other than that specified in the subpoena or on any agreed-on notice. CCP §1985.1. See also Govt C §68097.9 (applying to a peace officer of the Department of the California Highway Patrol, sheriff, deputy sheriff, marshal, deputy marshal, fireman, or city policeman).

Failure to appear after such an agreement has been made may be punished as contempt by the court issuing the subpoena. CCP §1985.1. See §4.52.

**PRACTICE TIP:** Any person having personal knowledge of the facts establishing or disproving such an agreement after a subpoena has been served (and after the witness's failure to appear) may prove them by an affidavit. CCP §1985.1. To avoid having to go to this effort, obtain the agreement in writing signed by the person subpoenaed. See sample form in §4.58.

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## IV. SUBPOENAING PARTICULAR WITNESSES OR DOCUMENTS

### §4.21 A. Personal records of consumer

Certain procedures must be followed when serving a subpoena duces tecum that requires a witness to produce personal records of a consumer. See CCP §1985.3. These procedures are meant to protect a consumer's privacy by giving notice that specified personal records have been subpoenaed so that the consumer has an opportunity to object or move to quash the proposed subpoena. *Sasson v Katash* (1983) 146 CA3d 119, 194 CR 46.

**NOTE:** Code of Civil Procedure §1985.3 does not apply to proceedings conducted under specified provisions of the Labor Code. See CCP §1985.3(j). State and local agencies and certain public entities involved in adjudicative proceedings are also exempt from the requirements of CCP §1985.3. If the consumer is the subpoenaing party and is the only subject of the subpoenaed records, notice and delivery of the other documents specified in CCP §1985.6(b) to the consumer are not required. CCP §1985.6(k). If not, see §4.22 for what must be served on the consumer and when service is required.

Under CCP §1985.3(a), "consumer," "personal records," "witness," "subpoenaing party," and "deposition officer" are specifically defined:

- A "consumer" is any individual, partnership of five or fewer persons, association, or trust that has transacted business with a witness who maintains the consumer's personal records that have been subpoenaed for a civil action or proceeding.
- "Personal records" means the original or any copy of any books, documents, other writings, or electronic data that are maintained by a witness.
- A "witness" is any of the persons or institutions listed in CCP §1985.3(a)(1) (*e.g.*, physician, dentist, state or national bank, insurance company, attorney, psychotherapist, school).
- A "subpoenaing party" is the person who caused the subpoena duces tecum to be issued or served in a civil action. This term does not include state and local agencies under Govt C §7465 or any entity provided for under Cal Const art VI in any proceeding of that entity under Bus & P C §6000.
- A "deposition officer" is a person who meets the qualifications specified in CCP §2020.420.

For more information on these terms, see CCP §1985.3(a).

The procedures of CCP §1985.3 must be followed with regard to requests for "personal records" maintained by state and local agencies that file personnel, medical, and other information. In this situation, "witness" means a government agency, and "consumer" means an employee of the agency or any other natural person. CCP §1985.4.

The procedures of CCP §1985.3 do not apply to requests for records that do not identify any particular consumer and that require a custodian of records to delete all information that would in any way identify a consumer whose records are to be produced. CCP §1985.3(i).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.22 1. Timing and service; consumer notice

## §4.22 1. Timing and service; consumer notice

Many special rules govern notice to the consumer of the subpoena of personal records and under what circumstances the witness can and cannot produce those records to the subpoenaing party, as follows:

**Earlier production date by court order.** A subpoenaing party is entitled on a showing of good cause (provided the rights of witnesses and consumers are preserved) to obtain an order (a) shortening time for service of a subpoena duces tecum or (b) waiving other requirements of CCP §1985.3(b) if the subpoenaing party shows due diligence. CCP §1985.3(h).

**What must be served on consumer [witness]; timing.** The statute requires that at least 10 days before the date of production, and at least 5 days *before* the subpoena duces tecum is served on the *witness* (plus extra days if service is by mail; see CCP §1013), copies of the following items must be served on the *consumer* (CCP §1985.3(b)):

- The subpoena duces tecum to the witness for the production of the consumer's records (see §4.6);
- The supporting affidavit or declaration, which may be filled out on the back of the subpoena form, or attached to the form as a separate document (see §4.7);
- The notice to the consumer (see form in §4.59 and discussion below); and
- Proof of service (attesting that the above items were served on the consumer), which will be served on the witness in accordance with CCP §1985.3(c)(1). See discussion below.

**NOTE:** Because the witness must be served at least 15 days before the date of production, as long as this is at least 20 days after issuance of the subpoena (see CCP §§1985.3(d), CCP §2020.410(c)), and the consumer must be served with the above items at least 5 days before the witness, serve the consumer at least 20 days before the production date (plus extra days if service is by mail).

**How to serve consumer.** Under CCP §1985.3(b)(1), the subpoena duces tecum with supporting declaration, notice to consumer, and proof of service to be served on the witness must be served on the consumer personally, at the consumer's last-known address, or in accordance with CCP §§1010-1020 (service by mail, facsimile, or express or other overnight delivery). If the consumer is a party, the items must be served on the consumer's attorney of record. CCP §1985.3(b)(1).

**Notice to consumer.** The Judicial Council has approved for mandatory use a notice to consumer (or employee) and objection. See §4.59. This form, printed in a typeface designed to call attention to the notice, is in compliance with the requirements of CCP §1985.3(e), and indicates that

- Records about the consumer are being sought from the witness named on the attached subpoena;
- If the consumer objects to the witness's furnishing the records to the party seeking the records, the consumer must file papers with the court within 10 days after receiving the subpoena; and
- If the party who is seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer's interest in protecting the right of privacy.

**When and what must be served on witness.** Before the production of the records, the subpoenaing party must (CCP §1985.3(c)):

- Serve or cause to be served on the witness proof that the consumer was served, personally or by mail, with copies of the subpoena duces tecum, supporting affidavit, and notice of privacy rights (see form in §4.60); or
- Furnish the witness a written authorization, signed by the consumer or the consumer's attorney of record, to release the records.

The witness may assume that any attorney signing the authorization acted with the consumer's consent, and that any objection to the release of records is waived. CCP §1985.3(c)(2). The subpoenaing party's failure to comply with the procedures of CCP §1985.3 is sufficient basis for the witness to refuse to produce the personal records requested. CCP §1985.3(k).

The subpoena must command compliance on a date that is no earlier than 20 days after the issuance, or 15 days after the service, of the subpoena, whichever is later. CCP §1985.3(d).

A subpoena duces tecum for personal records maintained by a telephone corporation that is a public utility is not valid or effective unless it includes a consent to release signed by the consumer whose records are requested. CCP §1985.3(f).

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### §4.23 2. Consumer's objections

The rules regarding objecting to a subpoena duces tecum vary depending on whether the consumer is a party of the civil action in which the subpoena duces tecum is served. If the consumer is a party to the action, the consumer may make a motion under CCP §1987.1(b)(3) to quash or modify the subpoena duces tecum or direct compliance with it, on such terms and conditions as the court declares, including protective orders. Notice of the motion to quash or modify must be given to the witness or deposition officer at least 5 days before the production date. CCP §1985.3(g).

A failure to provide notice to the deposition officer does not invalidate the motion to quash or modify the subpoena duces tecum, but may be raised by the deposition officer as an affirmative defense in any action for liability for improper release of records. CCP §1985.3(g). On motions to quash or modify, see §§4.45-4.48.

If the consumer is not a party to the civil action and his or her personal records are being sought by a subpoena duces tecum, that consumer may, at any time before the date of production, serve on the subpoenaing party, the witness, and the deposition officer a written objection that cites the grounds on which production of the personal records should be prohibited. CCP §1985.3(g).

No witness or deposition officer is required to produce personal records after receipt of notice that the motion has been made, or of a written objection from a nonparty consumer, except (a) on order of the court in which the action is pending or (b) by agreement of the parties, witnesses, and consumers affected. CCP §1985.3(g).

The party requesting a consumer's personal records may bring a motion under CCP §1987.1 to enforce the subpoena within 20 days of service of the written objection. The motion must be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the dispute between the party requesting the personal records and the consumer or the consumer's attorney. CCP §1985.3(g).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.23A B. Employment records

### §4.23A B. Employment records

Code of Civil Procedure §1985.6 requires that certain procedures be followed when serving a subpoena duces tecum that commands a witness to produce employment records. These procedures are meant to protect an employee's privacy by giving notice that specified employment records maintained by a current or former employer have been subpoenaed so that the employee has an opportunity to object or move to quash the proposed subpoena. The mandatory Judicial Council form for giving notice to a consumer or employee that his or her personal or employment records will be subpoenaed is reproduced in §4.59.

If the employee is the subpoenaing party and is the only subject of the subpoenaed records, however, notice and delivery of the other documents specified in CCP §1985.6(b) to the employee are not required. CCP §1985.6(k). If not, see §4.22 for what must be served and when service is required (discussing parallel situation of service on the consumer).

**NOTE:** The procedures in CCP §1985.6 for subpoenaing employment records are virtually identical to those in CCP §1985.3 for subpoenaing consumer records. See CCP §1985.6 and parallel discussion in §§4.21-4.27.

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### C. Custodian of records

### §4.24 1. Generally

Special rules apply when a subpoena duces tecum is served on a custodian of records or other qualified witness of a business that is neither a party to the action nor the place where any cause of action is alleged to have arisen. See CCP §1987.3; Evid C §§1560-1567.

**PRACTICE TIP:** When serving a subpoena duces tecum on a custodian of records of corporations or government agencies, allow plenty of time for documents to be retrieved and copied. Give at least 20 days (the time specified for a notice to a party to produce records). Of course, essential documents should already have been produced during discovery, with counsel stipulating to their authenticity. For further discussion of notice to produce, see §§4.36-4.38. For form of foundational stipulation, see §13.141.

If the custodian of records is required to appear personally, service is effective if the custodian, like any other witness, is personally served and is a resident within the state at the time of service. See CCP §§1987.3, 1989. See also §4.27.

If personal attendance is not requested, the residency requirement under CCP §1989 does not apply and a nonresident custodian of records may be required to produce documents under a subpoena duces tecum. See CCP §1987.3. To enforce compliance on a nonresident custodian, however, the business employing the custodian would have to be subject to California jurisdiction through its activity in the state.

**NOTE:** Because CCP §1987.3 offers no alternative provisions for service by mail, service on a custodian of records who is not requested to appear must still be made personally. On using process servers to effect service of a subpoena duces tecum, see §4.16.

A subpoena duces tecum served under CCP §1987.3 and Evid C §§1560-1567 on a custodian of records residing in California can also require production of records in the custodian's control that are kept outside of California as long as the custodian's business is subject to California jurisdiction. See *Coopman v Superior Court* (1965) 237 CA2d 656, 47 CR 131.

Service of a subpoena duces tecum on a custodian of records residing in California of a nonparty foreign corporation, that does not transact business in California or otherwise subject itself to California's jurisdiction, does not give the court power to compel production of its business records located out of state. *Volkswagenwerk Aktiengesellschaft v Superior Court* (1973) 33 CA3d 503, 507, 109 CR 219 (foreign corporation's amenability to local suit does not signal automatic subjection of its internal affairs to courts of forum, because latter have no jurisdiction over persons or property outside their territory).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.25 2. When custodian's attendance not required

### §4.25 2. When custodian's attendance not required

Records may be subpoenaed without requiring a custodian's personal appearance if certain instructions are followed. Counsel should check the correct box at 3b on the face of the Judicial Council form of subpoena duces tecum when records only are desired. See form in §4.55A.

The subpoenaed records are admissible at trial (and the exception to the hearsay rule for business records is met) if the custodian includes in an affidavit or a declaration accompanying the records that the writings are true and correct copies made in the regular course of business at or near the time of the act, condition, or event. See Evid C §§1271, 1561(a).

**PRACTICE TIP:** Some attorneys send a letter to the custodian of records with the subpoena duces tecum, explaining the procedures that the custodian of records must follow. They may also attach copies of Evid C §§1560-1567, which contain more detailed instructions than those that appear on the Judicial Council subpoena duces tecum form. For sample letter, see §4.57. It is also good practice to draft the affidavit or declaration that the custodian will sign to accompany the records produced. See form of declaration in §4.61.

When service is made on a custodian of records or other qualified witness of a business in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, compliance with the subpoena duces tecum is deemed to be satisfied (provided personal appearance is not required; when required, see §4.27) if the custodian or other qualified witness:

- Within 15 days after receipt, or within the time agreed on by the subpoenaing party and the custodian or other qualified witness, delivers by mail or otherwise a true legible, and durable copy of the business records to the clerk or, to another person described in CCP §2026.010. Evid C §§1560(b)(1) and 1560(b)(3).
- Delivers with the business records an affidavit in the form prescribed by Evid C §1561. Evid C §1560. A declaration may be used in lieu of an affidavit. CCP §2015.5. See form of declaration in §4.61.
- States in the declaration that:
- The affiant is the duly authorized custodian or another qualified witness has authority to certify the records;
- The copy is a true copy of all the records described in the subpoena;
- The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event;
- The identity of the records; and
- A description of the mode of preparation of the records. Evid C §1561(a)(1)-(5).
- States in the declaration, when necessary, that the business does not have the requested records or has only a portion of them and delivers the declaration with the records that the business does have in one of the manners provided in Evid C §1560. Evid C §1561.
- Places "true, legible, and durable copies" of the subpoenaed records in a sealed inner envelope, with the following information clearly written on the outside: The title and number of the action, the custodian's name, and the date of the subpoena. Evid C §1560(b).
- Puts the inner envelope into a sealed outer envelope addressed and mailed to the clerk of the court, to the deposition officer, or to the officer, body, or tribunal conducting the hearing. Evid C §1560(c).

For costs of reproducing records to be paid by the subpoenaing party and procedures for resolving any disputes concerning the amount charged, see §4.28. On subpoenaing records that are also the personal records of a consumer, see §4.21.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.26 3. Alternative procedure when custodian's attendance not required [Deleted]

## §4.26 3. Alternative procedure when custodian's attendance not required [Deleted]

This section has been deleted because an alternative procedure for producing records without a custodian's attendance does not exist.

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### §4.27 4. Requesting custodian's personal attendance

When a custodian of records is a resident of the state at the time of service, personal attendance may be compelled by checking box 3a on the Judicial Council form. CCP §§1987.3, 1989; Evid C §1564. See form in §4.55A.

The mailing procedure described in §4.25 for delivering the documents may not then be used. Evid C §1560. The custodian of records, like any other witness served with a subpoena duces tecum and its supporting affidavit or declaration, must be allowed time for gathering the original documents described in the declaration and traveling to the place of the trial. For witness fees for travel and mileage, and any costs incurred in retrieving the documents, see §4.28.

Although there are no specific time requirements for service of a subpoena on a custodian of records whose personal appearance is required, counsel should allow at least 20 days. See §4.24.

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### §4.28 4. Payment of reasonable costs

The subpoenaing party may be charged with all reasonable costs incurred by the custodian of records for the production of all or any part of business records requested under the subpoena duces tecum. Evid C §1563(b).

**When custodian copies records.** "Reasonable costs" for producing documents include, but are not limited to (Evid C §1563(b)(1)), the following:

- Ten cents ($.10) per page for standard reproduction of documents with a page size of up to 8-1/2 by 14 inches;
- Twenty cents ($.20) per page for copying documents from microfilm;
- The actual cost of reproducing oversize documents or documents requiring special processing;
- Reasonable clerical costs for locating and making the records available to be computed in quarter-hour increments at a maximum rate of $24 per hour per person;
- Actual postage charges; and
- The cost, if any, charged to the witness by a third person for retrieving and returning records held offsite by that person.

**When custodian's attendance is also required.** If the personal attendance of the custodian of records or other qualified witness is required, the witness fee and mileage allowances are the same as for any other witness (presently $35 per day, plus mileage actually traveled, both ways, at 20 cents per mile). The witness fees for traveling and appearing in court must be paid in addition to the costs of the custodian's retrieval and reproduction of the documents. Evid C §1563(c); Govt C §68093. See §4.41.

**Payment due on delivery of records.** Until the records are available for delivery as directed by the subpoena, the subpoenaing party, or the subpoenaing party's deposition officer, need not pay the costs or any estimate of them. Evid C §1563(b)(2). The custodian of records may demand payment of the costs when actually delivering the subpoenaed records, however, and is under no obligation to deliver the records until payment is made. Evid C §1563(b)(2).

**Itemized statement required.** The custodian of records must submit an itemized statement of costs to the subpoenaing party, or the subpoenaing party's deposition officer, setting forth the reproduction and clerical costs incurred. Evid C §1563(b)(3). If the costs exceed those noted above, or the custodian of records refuses to produce the required itemized statement of costs, then on the subpoenaing party's or deposition officer's demand, the custodian must furnish a statement justifying the costs, setting forth his or her actions taken. Evid C §1563(b)(3).

**Petition to reduce amount of costs.** The subpoenaing party may petition the court in which the action is pending to recover or reduce the costs paid to or charged by the custodian of records on the grounds that such costs were excessive or charged in bad faith. See Evid C §1563(b)(4). On procedure for hearing the subpoenaing party's petition to reduce the costs of reproducing the records, and for awarding the subpoenaing party reasonable expenses (including attorney fees), see Evid C §1563(b)(4).

**Payment to custodian required, even if subpoena later quashed.** If a subpoena that has been served to compel production of business records is subsequently withdrawn or is quashed, modified, or limited on a motion made other than by the custodian of records, the custodian is entitled to reimbursement under Evid C §1563(b)(1) for all costs incurred in complying with the subpoena to the time that the subpoenaing party notified the custodian that the subpoena has been withdrawn, quashed, modified, or limited. Evid C §1563(b)(5).

**Custodian's procedure to enforce payment of costs.** If the subpoena is withdrawn or quashed and those costs are not paid within 30 days after demand, the custodian may file in the court where the action is pending a motion for an order requiring payment, and the court must award the payment of expenses and attorney fees in the manner set forth in Evid C §1563(b)(4). Evid C §1563(b)(5).

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### §4.29 D. Public employees

A peace officer may be subpoenaed to appear in a civil trial about an event or a transaction "perceived or investigated in the course of his or her duties" by (1) delivering a copy of the subpoena to the officer personally or (2) delivering two copies to the officer's immediate superior at the public entity that employs the officer or to the agent that the immediate superior has designated to receive service. Govt C §68097.1(a).

A witness under Govt C §68097.1 is defined as an employee of the Department of Justice, including a peace officer or an analyst in a technical field, a California Highway Patrol member or state police officer, a member of the state fire marshal's officer, sheriff, district attorney inspector, probation officer, building inspector, firefighter, or city police officer. Persons employed as "vehicle inspection specialists" are included among California Highway Patrol members, and volunteer firefighters are included in the term "firefighter" and considered to be employed by the public entity for which they volunteer as firefighters. Govt C §68097.

Similarly, other state employees may be subpoenaed to testify at trial concerning matters in which an employee "has expertise gained in the course of his or her duties," either by (1) personal service on the employee or (2) delivery of two copies of the subpoena to the employee's immediate superior or to an agent designated by that immediate superior to receive service. Govt C §68097.1(b).

Subpoenaing public employees described in Govt C §68097.1 must be in accordance with CCP §1989 (*i.e.,* the public employee, to be obliged to be a witness before the court, must reside within the state at the time of service). Govt C §68097.1(c). On procedures for payment by the subpoenaing party of witness fees, salary, and expenses of public employees who testify at trial, see §4.42.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.30 E. Minors

## §4.30 E. Minors

Service on a minor is accomplished by serving the minor's parent, guardian, conservator, or similar fiduciary. CCP §1987(a).

If these people cannot be located with reasonable diligence, service may be made on anyone having the care or control of the minor, a person with whom the minor resides, or a person employing the minor. If the minor is 12 years of age or older, the subpoena must also be served on the minor. CCP §1987(a).

If a minor is not in the custody of a parent or guardian and is under the jurisdiction of the county child welfare department or probation department, regardless of the minor's age, service may be made on the designated agent for service of process for that department. CCP §1987(a).

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### §4.31 F. Concealed witness

If a witness is concealed in a building or vessel to avoid service, any court, judge, or officer issuing the subpoena may, on proof by affidavit of the concealment and the materiality of the witness, order a sheriff of the county to serve the subpoena. CCP §1988. See CCP §2015.5 (declaration may be used in lieu of affidavit).

A sheriff may break into a building or vessel where the witness is concealed for the purpose of serving a subpoena. CCP §1988. For an ex parte application to the court to order the sheriff to serve the subpoena on a concealed witness, see forms in §§4.63-4.66.

**NOTE:** Although CCP §1988 provides that "any officer issuing the subpoena" may order the sheriff to serve it, and it is arguable that an attorney, as an "officer of the court," could issue such an order, there are no cases supporting this interpretation. An ex parte application should be used. If an ex parte application is used, it must comply with Cal Rules of Ct 3.1203(a), which sets forth requirements as to notice (no later than 10:00 a.m. on the court day before the ex parte appearance), content of notice, required documents, affirmative factual showing required, service of papers, and personal appearance requirements. See forms in §§4.63-4.64.

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### §4.32 G. Jailed witness

The court in which an action or other proceeding is pending may order a prisoner's examination in jail by deposition or order the prisoner to appear in court. CCP §1995. If a witness is incarcerated in the county in which the action is pending, production of that witness at the trial may be required. If jailed elsewhere in the state, the witness must be examined when allowed by deposition. CCP §1997. See Pen C §2623 (procedure for depositions of prisoners). The court in which the action is pending has the power to order the temporary removal of the prisoner to appear at the trial, unless it is the small claims court. If the matter is before a judge or other person out of court, or pending in small claims court, a supreme court justice or a superior court judge in the county where the action is pending has the authority to make such an order for the prisoner's production at the trial or proceeding. CCP §1995.

Only a party may make a motion for the temporary removal and production of the prisoner at trial. CCP §1996. An affidavit showing (1) the nature of the action, (2) the testimony expected from the jailed witness, and (3) its materiality to the issues of the case must accompany the motion. See CCP §1996. See also CCP §2015.5 (declaration may be used in place of an affidavit). See forms in §§4.67-4.68.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.33 H. Testimony from person present in courtroom

### §4.33 H. Testimony from person present in courtroom

A person who is already present in court (or before a judicial officer) may be required to testify as if he or she were in attendance under a subpoena issued by the court (or the officer). CCP §1990. To accomplish this, the attorney should ask the trial judge's permission to call the person present to testify.

**CAUTION:** Counsel rarely obtain testimony by this method. Be cautious, however, when relatives or employees of a client or consultants with special knowledge or expertise accompany you to trial. Although much of a consultant's potential testimony is likely to be protected by the attorney work-product privilege, consider asking opposing counsel for a stipulation that an advising consultant or other persons accompanying you to trial will not be called to the stand.

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## §4.34 I. Production of evidence from witness on stand

The court has inherent power to compel a witness on the stand to produce documentary evidence, if admissible, that is in the witness's possession or control and not privileged. See *Oskner v Superior Court* (1964) 229 CA2d 672, 682, 40 CR 621.

**CAUTION:** Avoid asking a witness on the stand for documents that are not immediately at hand. The court may refuse a request for a continuance for the witness to obtain the documents on the ground that a subpoena duces tecum should have been prepared and served beforehand or that the documents should have been obtained during discovery. Request documents from a witness on the stand only when a witness's testimony reveals that important admissible evidence has not yet come to light. Consider asking the judge for a brief recess. Emphasize that this is the first time you became aware of the document.

You may need to lay a foundation (*e.g.,* by interrogating the witness outside the presence of the jury) so that the court can rule on the materiality and admissibility of the requested items and whether they are in the witness's possession or control. See *Barrington v Pacific Elec. Ry.* (1927) 83 CA 100, 104, 256 P 567 (substantial showing required before court could order production of books or papers by one party to be used as evidence for other party).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.35 J. Information to be disclosed by private trusts

## §4.35 J. Information to be disclosed by private trusts

A subpoena may be required for disclosure of information concerning the existence, condition, management, and administration of a private trust. See Fin C §1582(c).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/ V. NOTICE PROCEDURES FOR PARTIES AND RELATED WITNESSES/ A. Notice to attend or notice to attend and produce/§4.36 1. Who may be served; fees and mileage

## V. NOTICE PROCEDURES FOR PARTIES AND RELATED WITNESSES

### A. Notice to attend or notice to attend and produce

### §4.36 1. Who may be served; fees and mileage

Although a subpoena is permissible, it is not necessary to serve a subpoena when the witness is one of the following:

- A party;
- A person for whose immediate benefit an action or a proceeding is prosecuted or defended; or
- An officer, a director, or a managing agent of any such party or person.

Written notice is sufficient and has the same effect as a subpoena. CCP §1987(b)-(c). The notice may include a request that the witness also bring evidence to the place of attendance. See forms in §§4.69-4.70.

If the witness demands witness fees and mileage and is entitled to them, they must be paid before the witness is required to testify. CCP §1987(b). See §4.41.

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### §4.37 2. Time requirements; service

A notice to appear and testify must be served on the party's or person's attorney at least 10 calendar days before the date of attendance. CCP §1987(b). When the notice also requests the witness to produce books, documents, or other things, it must be served at least 20 calendar days before that date. CCP §1987(c).

The witness must be a resident of the state at the time the notice is served. See CCP §1989. A notice has the same territorial reach as a subpoena. See §4.18. Unlike a person being served with a subpoena duces tecum, however, a party can be compelled by notice to produce records or other items even if that evidence is located outside California, as long as it is in the party's possession or control. See §4.15.

In contrast to a subpoena, the notice need not be served personally. The notice is served on the party's or person's attorney. CCP §1987(b).

**NOTE:** The statute provides for service only on a party's or person's attorney and is silent on whether the notice may be served directly on an unrepresented party, a person benefiting from the action, or an officer or agent of the party. See CCP §1987(b). When a party has appeared in propria persona and has no attorney to explain the effect of a notice, it is a good idea to follow the more clearly understood subpoena procedures and arrange for a process server to serve the papers personally. For other situations in which serving a subpoena on a party is advisable, see §4.4.

The usual practice is to serve notice by mail. Although a notice can be served by mail more conveniently and less expensively than a process server hired to serve the notice in person, the notice must be mailed well before the appearance date. See CCP §1013(a) (duty to make any response on a date certain after service by mail must be extended 5 calendar days if address is within California). Thus, the notice for testimony only must be served 15 calendar days before the date of the appearance; if production of documents is also requested, the notice must be served 25 calendar days before the appearance. On service by express mail or other overnight delivery, or by facsimile transmission, see CCP §1013(c), (e) (2 court days added when service by express mail, other overnight delivery carrier, or fax).

**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 and not a court day.

The notice should be mailed to the party's or person's attorney rather than served on the witness directly, unless the witness is not represented by an attorney. See Note above. Counsel should ensure that service by mail is proper in all respects. See, *e.g.,* CCP §1013a(3) (service presumed to be invalid if the method used is deposit in office mail for pickup by the post office in the ordinary course of business, and postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing stated on proof of service). A party to a civil matter has no obligation to appear personally at trial absent properly served notice. See *Doe v Superior Court* (1990) 222 CA3d 1406, 272 CR 474.

The noticing party may apply for a court order permitting a shorter period of service than specified in the statute. See CCP §1987(b)-(c). As an alternative to a court order shortening time, a subpoena or subpoena duces tecum can be served on a party when the notice periods have already expired as long as there is still a "reasonable time" for the witness to prepare and travel to the trial. See §4.17.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.38 3. Contents; no affidavit required to accompany notice to produce

### §4.38 3. Contents; no affidavit required to accompany notice to produce

The notice must state the time and place for the witness to attend the trial. CCP §1987(b). Unlike a subpoena, a form for notice to attend and testify at trial is not provided by the Judicial Council. See sample form of notice in §4.69.

When the requesting party seeks production at trial of books, documents, or other things in the possession or control of a party or other person specified in §4.70, the written notice used in lieu of a subpoena duces tecum must also state (CCP §1987(c)):

- The exact materials or things desired; and
- The fact that they are in the possession or control of the witness.

The notice to attend and produce need not be accompanied by a supporting declaration or affidavit, as is required with a subpoena duces tecum under CCP §1985.5. See CCP §1987(c). Unlike a subpoena, the notice to produce evidence is not a court order as such. It is only when the party giving the notice seeks to enforce it by motion (see §4.51), after written objections to it have been filed, that good cause and materiality must be established. CCP §1987(c). On procedures for objecting to a notice to appear and produce, see §4.50.

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### §4.39 B. Tactical considerations

The opposing party is usually present at the trial and willing to take the stand and testify during trial. Because a party is not *required* to attend trial, however, and a particular officer of a corporate party may not attend at the time needed, a notice to attend should be served on all parties or related witnesses whose testimony is vital. Counsel can call the opposing party to testify as an adverse witness under Evid C §776 in counsel's case-in-chief.

Alternatively, if the opposing party does not attend the trial, counsel can read that party's deposition testimony into evidence. See CCP §2025.620(b) (adverse party may use party's deposition for any purpose; showing of deponent's unavailability not required). Rather than subject the jury to the less interesting task of listening to the deposition being read into evidence, a videotape of the opposing party's deposition should be used if available. Live testimony, however, is more effective than deposition testimony, even by videotape.

Documents and other evidence are normally obtained during discovery with the parties stipulating to their admissibility before trial. On pretrial procedures for inspecting and obtaining documents, and establishing their genuineness through requests for admission, see California Civil Discovery Practice, chaps 8-9 (4th ed Cal CEB 2006). However, when evidence is still needed for trial that has not been supplied by discovery or through counsels' stipulation, the trial attorney must obtain it by subpoena duces tecum or notice.

**NOTE:** Unlike the discovery method used to compel production of documents, electronically stored information, and things, which permits materials to be requested by *category* if reasonably described under CCP §2031.030(c) (*e.g.,* all executed contracts relating to the housing development signed by the defendant contractor), the notice to attend and produce evidence at trial under CCP §1987(c) requires that the *exact* materials or things desired be stated.

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## VI. COSTS AND WITNESS FEES

### §4.40 A. Cost of serving subpoena

The sheriff's fee for serving a witness with a subpoena and any attached affidavit is the amount described in Govt C §26720.9 (currently $30). Govt C §26743. Marshals and constables receive the same fee the sheriff receives for serving a subpoena. Govt C §71266. See Govt C §26721, which also sets the fee for serving or executing any process or notice required by law or the litigants in the amount described in Govt C §26720.9.

All costs of service incurred by a registered process server may be recovered as costs by the successful party unless a motion to strike has been granted. CCP §1033.5(a)(4). On items of cost recoverable by successful party, see §4.44.

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### §4.41 B. Ordinary witness fees and mileage

If the witness demands it, 1 day's witness fee and mileage for travel to and from the court must be tendered to the witness at the same time that the subpoena is served. CCP §1987(a). A party or other person entitled to witness fees who is served with a notice to attend may demand, and must be paid, witness fees and mileage before being required to testify. CCP §1987(b). On procedures for paying the salary and other expenses of public employees who are subpoenaed to testify, see §4.29.

Ordinary witness fees are $35 per day for each day of actual attendance when attendance is legally required. Govt C §68093. Mileage fees are 20 cents per mile for actual mileage traveled, both to and from the place of attendance. Govt C §68093. On ordinary witness fees as an item of recoverable costs, see §27.75.

Any agreement to pay a contingent witness fee based on the content of the witness's testimony or the outcome of the case is against public policy and void. *Pelkey v Hodge* (1931) 112 CA 424, 296 P 908. See Cal Rules of Prof Cond 5-310(B). See also *Van Norden v Metson* (1946) 75 CA2d 595, 599, 171 P2d 485; *Von Kesler v Baker* (1933) 131 CA 654, 21 P2d 1017.

**NOTE:** The California Supreme Court has granted review in *In re Red Light Photo Enforcement Cases* (review granted Sept. 24, 2008, S165425; superseded opinion at 163 CA4th 1314, 78 CR3d 413). The court of appeal held that a private automated traffic enforcement system's procurement of evidence on a contingency fee basis did not prevent or impede the due course of justice.

A party may compensate ordinary witnesses for their loss of time, however, in an amount in excess of the statutory per diem allowance. See Cal Rules of Prof Cond 5-310(b). See also *Crutchfield v Davidson Brick Co.* (1942) 55 CA2d 34, 38, 130 P2d 183 (although practice not commended because of tendency to favor a party paying fees, witness may be compensated for out-of-pocket expenses in amount in excess of statutory per diem allowance).

**NOTE:** Although the statute does not expressly provide this option, the official subpoena form reproduced in §4.55 states at No. 4 that, in addition to demanding witness fees and mileage *at the time of service,* the witness may also request them from the person listed in No. 3, *before the scheduled appearance.*

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.42 C. Public employees

## §4.42 C. Public employees

When serving a trial subpoena on peace officers and other state employees (see §4.29), the server must tender $150 to the person accepting the subpoena for each day of attendance required under the subpoena. Govt C §68097.2. This amount is only a deposit toward the actual expenses incurred by the public entity employing the witness, and any difference is either refunded or billed to the subpoenaing party. See Govt C §68097.2(c)-(d). The subpoenaing party must reimburse the public entity for the full cost of paying the public employee's salary or other compensation and traveling expenses while attending the trial. Govt C §68097.2.

The court will not order the peace officer or other public employee to return to court beyond the date specified in the subpoena unless the party who requests the witness's return first tenders the same sum ($150) to the public entity employing the witness. See Govt C §68097.5.

If the court orders a continuance on its own motion, however, no additional deposit is required before issuing a subpoena ordering an appearance on the continued date. Govt C §68097.2(e).

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### §4.43 D. Expert witness fees

A subpoenaing party must compensate an expert witness for the reasonable and customary hourly fee for the actual time consumed in examination of the expert witness by any party at trial. Govt C §68092.5(a). This section usually applies to an expert designated by another party. The party who designated the expert is responsible for any fee charged for the expert in preparing the testimony and traveling to the site. Govt C §68902.5(a).

The subpoenaing party must tender the expert's fee to the attorney for the party designating the expert, either when the subpoena is served or at the time of appearance. The amount of the fee is based on the anticipated length of time that the expert is required to remain at the trial. If the expert's appearance takes longer than anticipated, the subpoenaing party must pay the balance of the expert's fee within 5 days after receiving an itemized statement from the expert. Govt C §68092.5(a).

Experts under this section include those designated to testify at trial under CCP §2034.210. No expert fees need be tendered for any subpoenaed expert who is a party or an employee of a party. Govt C §68092.5(a). Although treating physicians are not experts "retained" to form opinions for the purpose of testifying at trial (see *Schreiber v Estate of Kiser* (1999) 22 C4th 31, 91 CR2d 293), it is customary and appropriate for subpoenaing parties to pay their regular and customary fees. An expert must be notified by the quickest and most reliable means if the trial is continued or the expert's appearance is canceled before the required attendance. An expert witness who has not been notified is entitled to receive reasonable compensation from the party requiring attendance, even though no testimony was given. Govt C §68092.5(d).

A party who has subpoenaed the appearance of an expert whose hourly or daily fee is thought to be unreasonable may notice a motion for the court to fix a reasonable compensation. The expert must also be given notice of the motion. A declaration showing that a reasonable, good faith attempt was made to achieve informal resolution of each issue to be determined by the court must accompany the motion. The expert or the party who designated the expert must provide certain information to the subpoenaing party and the court, including proof of the fees actually charged and received by the expert for similar services. Govt C §68092.5(c).

The court may fix reasonable compensation for court-appointed experts. Evid C §730. Compensation for all court-appointed experts, with the exception of some court-appointed medical experts, must be apportioned among the parties in a proportion determined by the court. Evid C §731(c). In counties where the board of supervisors so provides, court-appointed medical experts must be compensated from the county treasury. Evid C §731(b).

An express contract entered into between an expert and a party to the action concerning compensation is enforceable and prevails over the requirements set out in Govt C §68092.5(a)-(d). Govt C §68092.5(e).

Expert witness fee agreements contingent on the content of the witness's testimony or the outcome of the case are against public policy and void. See Cal Rules of Prof Cond 5-310(B). On when expert witness fees are recoverable as costs to successful party, see §4.44.

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## §4.44 E. Witness costs recoverable by successful party

Ordinary per diem statutory witness fees and the costs for service of process are allowable costs that can be recovered by the prevailing party against the losing party. CCP §1033.5; *Fay v Fay* (1913) 165 C 469, 475, 132 P 1040.

If a witness who could have been subpoenaed to testify voluntarily attends the trial at a party's request, that party, if successful, is entitled to recover statutory witness fees and mileage as an item of costs. *City of Downey v Gonzales* (1968) 262 CA2d 563, 569, 69 CR 34; *Linforth v San Francisco Gas & Elec. Co.* (1908) 9 CA 434, 437, 99 P 716.

With certain exceptions, compensation for an expert witness is paid by the party requiring the attendance of the expert and is not recoverable by the successful party as an item of costs. Govt C §68092.5(a); Evid C §733. The prevailing party may recover only ordinary statutory witness fees for the witness. Evid C §733.

Exceptions in which expert witness fees are recoverable as costs, in whole or in part, include:

- Compensation apportioned among the parties for court-ordered experts is allowed as an item of costs like any other recoverable costs. Evid C §731(c). See CCP §1033.5(a)(8).
- A party who rejects an offer of compromise in an action other than one in eminent domain—and then fails to obtain a more favorable judgment—may be required to pay a reasonable sum to cover the postoffer costs of the services of the opponent's expert in preparation for or during trial or arbitration. CCP §998(c)(1), (d). In this situation, police officers are deemed experts. CCP §998(f).

Similarly, if a party elects a trial de novo after a judicial arbitration award and the judgment on the trial de novo is not more favorable than the arbitration award, the court must award the other party the reasonable costs of the services of expert witnesses necessary to the preparation or trial of the case, unless those costs would create such substantial economic hardship as not to be in the interest of justice. CCP §1141.21(a)(1)(A). On procedures for recovering costs and obtaining interest after trial, see chap 27.

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## VII. PROCEDURES FOR OBJECTING TO SUBPOENA OR NOTICE

### §4.45 A. Motion to quash or modify subpoena

The procedure for challenging a subpoena or a subpoena duces tecum is a motion to quash the subpoena entirely or to modify it. See form in §4.71. The court may direct compliance with the subpoena on any terms and conditions ordered by the court, including protective orders. CCP §1987.1(a).

A person or the court on its own motion may attack the issuance of the subpoena. CCP §1987.1(a). See *Southern Pac. Co. v Superior Court* (1940) 15 C2d 206, 100 P2d 302.

Under CCP §1987.1(b), a person is:

- A party;
- A witness;
- A consumer under CCP §1985.3;
- An employee under CCP §1985.6; or
- A person whose personal information is sought in connection with an action arising from the person's exercise of free speech.

On a consumer's right to challenge a subpoena seeking personal records, see §4.23.

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### §4.46 1. Grounds

Valid grounds for challenging a subpoena include privilege (*e.g.,* attorney-client privilege, physician-patient privilege, or privilege against self-incrimination). See *Roberts v Superior Court* (1973) 9 C3d 330, 342, 107 CR 309 (psychotherapist-patient privilege). However, officers and agents of corporations, and those holding records of an association in a representative rather than a personal capacity, may not raise the constitutional privilege against self-incrimination as justification for a refusal to produce subpoenaed company or association documents, because the privilege is personal, extending only to natural individuals acting in their private capacity. *Barnes v Molino* (1980) 103 CA3d 46, 51, 162 CR 786.

The courts have also quashed subpoenas on the ground that the subpoenaed testimony or items are inadmissible. See *People v Rhone* (1968) 267 CA2d 652, 73 CR 463 (witness cannot offer relevant testimony); *Spencer v Hibernia Bank* (1960) 186 CA2d 702, 9 CR 867 (matters sought must be competent evidence and admissible at trial); *Pelton Motors, Inc. v Superior Court* (1953) 120 CA2d 565, 261 P2d 275 (subpoena may be quashed for being too broad).

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### §4.47 2. Procedures; timing

A motion to quash or modify a subpoena, as with any other motion, should be made on at least 16 court days' written notice unless an order shortening time is obtained. CCP §1005(b). The motion must be accompanied by a supporting memorandum as well as appropriate declarations and, if served by mail, allow for a more extended notice time. See CCP §§1003-1020; Cal Rules of Ct 3.1113. All papers opposing a motion or reply papers shall be served by statutory means reasonably calculated to ensure delivery to the other party not later than the close of the next business day after the time the opposing papers or reply papers are filed. CCP §1005(c). Code of Civil Procedure §1013, which extends the time within which a right may be exercised, does *not* apply to a notice of motion, papers opposing a motion, or reply papers.

**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 and not a court day.

After a motion to quash has been made, the burden of proving that the requirements of CCP §1985 have been properly met is on the party seeking to compel production. See *Flora Crane Serv. v Superior Court* (1965) 234 CA2d 767, 45 CR 79.

Counsel opposing the subpoena should also consider requesting a protective order. See CCP §1987.1(a) ("the court may make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the witness, consumer, or employee").

**EXAMPLE:** A subpoena duces tecum compelling production of microfilm, computer printouts, and other materials developed by modern technology can create unreasonable and oppressive demands on the witness and violate rights of privacy. Questions may be raised regarding who should bear the expense of extracting and limiting the requested information. To resolve these matters, the person moving to quash or modify the subpoena may include a request for a protective order or for the court to direct compliance only on terms or conditions specifically imposed on the subpoena duces tecum. See CCP §1987.1(a).

If the court finds that a motion was made or opposed in bad faith or without substantial justification, or that one or more of the requirements of the subpoena was oppressive, reasonable expenses including attorney fees may be awarded. CCP §1987.2(a). In actions arising from the exercise of free speech rights on the Internet, the court may award reasonable expenses and attorney fees, if the party prevails in quashing the subpoena served on an Internet service provider and the respondent fails to state a prima facie cause of action. CCP §1987.2(b). On payment to a nonparty witness of reasonable costs incurred for production of business records, see §4.28.

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### §4.48 3. Mandamus when motion denied

If a motion to quash is denied, the appropriate remedy is to file a petition for a writ of mandate with the district court of appeal, seeking an order compelling the trial judge to grant the motion and quash the subpoena. *People ex rel Dep't of Pub. Works v Younger* (1970) 5 CA3d 575, 579, 86 CR 237; *Pelton Motors, Inc. v Superior Court* (1953) 120 CA2d 565, 261 P2d 275.

In *Pitchess v Superior Court* (1974) 11 C3d 531, 535, 113 CR 897, the California Supreme Court held in a criminal case that the burden lay on the party seeking the writ of mandate (the sheriff) to demonstrate that the trial court abused its discretion. This reasoning would seem to apply equally to a civil case in light of the broad discretion given the trial judge in determining such matters. See *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 15 CR 90; *Flora Crane Serv. v Superior Court* (1965) 234 CA2d 767, 792, 45 CR 79; *O'Brien v Superior Court* (1965) 233 CA2d 388, 391, 43 CR 815.

On drafting petition and other procedures for writ of mandate, see California Civil Writ Practice (4th ed Cal CEB 2008).

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### §4.49 B. Refusal to produce subpoenaed items at trial; objections to admissibility

A witness may appear at trial as directed by the subpoena duces tecum and refuse to produce the requested material and object to its admissibility. See *Spencer v Hibernia Bank* (1960) 186 CA2d 702, 717, 9 CR 867. If the court rules, *e.g.,* that the documents must be produced, the witness may refuse to obey the order and risk contempt. See *Paddon v Superior Court* (1923) 65 CA 34, 40, 223 P 91.

If the witness is found in contempt, the court's order may be tested by writ of prohibition in the appellate court. The witness has no right to appeal the contempt order. *La Bella v Kaiser Found. Health Plan* (1977) 72 CA3d 499, 138 CR 212.

Alternatively, the witness served with a subpoena duces tecum may decide to produce the books, documents, or other things and then object to their admission into evidence in order to preserve the point for arguing reversal on appeal. On grounds for objection, see §4.46.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/ C. Written objections to notice to attend and produce; requesting party's motion to compel production/§4.50 1. Procedures for producing party; timing

### C. Written objections to notice to attend and produce; requesting party's motion to compel production

### §4.50 1. Procedures for producing party; timing

If the notice to attend included a request to produce books, documents, or other things, the party or person on whom the notice to attend and produce was made may challenge the notice, or any part of it, with written objections served and filed within 5 days after service of the request to produce or within any other period allowed by the court. CCP §1987(c).

The written objections must include a statement of the grounds for the objections. CCP §1987(c). Such grounds could include, *e.g.,* the attorney-client privilege. See §4.46. See form of objections in §4.73.

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### §4.51 2. Requesting party's procedures; noticed motion

After written objections to a notice to attend and produce evidence are served, the burden shifts to the party seeking production to proceed on a noticed motion. The motion must be accompanied by a declaration showing good cause and materiality of the items to the issues. See CCP §1987(c). On the interpretation of good cause and materiality for a subpoena duces tecum, see §§4.9, 4.11.

**PRACTICE TIP:** To obtain a ruling before trial if time is short, the party seeking production of the documents may have to apply to the court for an order shortening time to hear the motion. See CCP §1005. At the hearing, the court may order production of the items objected to, unless the party or person who has objected establishes good cause for nonproduction, or production under limitations or conditions. CCP §1987(c).

The court may also award attorney fees and other reasonable expenses incurred in making or opposing the motion if it finds that the motion was made or opposed in bad faith or without substantial justification or that one or more of the requirements of the notice to produce was oppressive. See CCP §1987.2(a).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/ VIII. COUNSEL'S OPTIONS WHEN WITNESS DISOBEYS SUBPOENA OR NOTICE/§4.52 A. Contempt proceedings to enforce subpoena

## VIII. COUNSEL'S OPTIONS WHEN WITNESS DISOBEYS SUBPOENA OR NOTICE

### §4.52 A. Contempt proceedings to enforce subpoena

A trial court has inherent power to punish acts or omissions that are contempts of the court's authority. See *In re Shortridge* (1893) 99 C 526, 532, 34 P 227. The legislature has codified, as well as limited, the court's power to use contempt to enforce its lawful orders. CCP §§1209-1222; Pen C §166. See *Pacific Tel. & Tel. Co. v Superior Court* (1968) 265 CA2d 370, 371, 72 CR 177.

Procedural safeguards limit the court's inherent contempt power, *e.g.,* a maximum $1000 fine and 5-day jail sentence can be imposed for civil punitive contempt. See CCP §1218. Because contempt may result in incarceration, the witness in a civil contempt proceeding is entitled to all the rights and protection afforded criminal defendants, except that there is no right to a jury trial. 265 CA2d at 373.

A court may punish as contempt the disobedience of a subpoena or the refusal to be sworn or to testify as a witness. CCP §§1209(a)(9), 1991; *In re Keller* (1975) 49 CA3d 663, 666, 123 CR 223. See also CCP §1985.1 (failure to appear under agreement modifying the terms of a subpoena punishable as contempt).

**Indirect contempt.** When contempt is committed outside the presence of the court (constructive or indirect contempt), an affidavit or a declaration showing the facts constituting the contempt must be presented to the court. CCP §§1211, 1993. See *In re Passalacqua* (1954) 128 CA2d 230, 231, 275 P2d 160; *Hall v Superior Court* (1932) 124 CA 603, 12 P2d 1057. On substituting a declaration for an affidavit, see CCP §2015.5. The declaration or affidavit must show that the subpoenaed witness was personally and properly served. *Chapman v Superior Court* (1968) 261 CA2d 194, 67 CR 842. On procedures concerning indirect contempt, including the court's issuance of an order to show cause or a bench warrant to arrest and bring the witness before the court, see §§16.114-16.122.

**Direct contempt.** In contrast, when the acts constituting the contempt are committed in the immediate view and presence of the court (direct contempt), no affidavit or declaration is required. CCP §1211. See *In re Hallinan* (1969) 71 C2d 1179, 81 CR 1. The contempt order, however, must recite the facts constituting the contempt, and expressly or impliedly indicate that they occurred in the court's immediate view and presence. CCP §1211; *Boysaw v Superior Court* (2000) 23 C4th 215, 221, 96 CR2d 531.

**Hybrid contempt.** A hybrid form of contempt occurs when elements of both indirect and direct forms of contempt are present. See *In re Martin* (1977) 71 CA3d 472, 479 n4, 139 CR 451. Hybrid contempt usually occurs in the court's presence, but it may be excused by matters occurring outside the courtroom (*e.g.,* witness who fails to appear must be given an opportunity to establish an excuse). See *Arthur v Superior Court* (1965) 62 C2d 404, 409, 42 CR 441. For discussion of procedures concerning direct and hybrid forms of contempt, see §§16.99-16.129.

**PRACTICE TIP:** When seeking to have a reluctant witness attend and produce evidence at trial, consider a motion to continue the trial until the missing or uncooperative witness can be encouraged or compelled to attend. On motion for continuance, see §§6.6-6.25 (before trial), 18.57-18.64 (during trial). Contempt proceedings should be used sparingly to coerce testimony, and only as a last resort. A witness is not likely to have a cooperative attitude toward the attorney who urged the judge, *e.g.,* to issue a warrant for the witness's arrest. See CCP §1993.

The basis for contempt may also be a criminal offense (*e.g.,* deceiving a witness with intent to affect the witness's testimony, preparing false documents with intent to use them in trial, willfully preventing or dissuading a person from attending a trial, offering or giving a witness a bribe not to attend a trial, inducing a witness to give false testimony or to withhold true testimony). Criminal contempt is charged and prosecuted like any other misdemeanor offense. *People v Saffell* (1946) 74 CA2d Supp 967, 983, 168 P2d 497.

**Further research:** On distinctions between civil punitive and civil coercive contempt, and misdemeanor criminal contempt, see §§16.103-16.106. For detailed discussion of procedures with respect to criminal and civil contempt, and the penalties that can be imposed, see California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual).

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### §4.53 B. Civil action for damages

An aggrieved party may bring a civil action to recover $500 and "all damages that he or she may sustain" due to the witness's failure to obey a subpoena or court order to appear at trial. CCP §1992. If the subpoena was not properly served, this remedy is not available. *In re Abrams* (1980) 108 CA3d 685, 689, 166 CR 749.

Presumably, a civil action for damages could also be brought against a party or party-affiliated witness for failure to respond to a notice to attend the trial. CCP §1987(b) (notice gives parties same rights to impose sanctions as if subpoena had been served). See §4.5.

**PRACTICE TIP:** In most cases, a civil action for damages is not a realistic alternative, because the action must be brought separately and is likely to take a long time before it is resolved. As with any litigation, the cost of suing a witness who has not appeared at trial is expensive. It is usually wiser to ask the court for a continuance and pursue contempt sanctions if the witness is extremely important to the party's proof or causation. See *New York Times Co. v Superior Court* (1990) 51 C3d 453, 273 CR 98 (court questioned effectiveness of this remedy given the high cost of litigation).

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## §4.54 C. Sanctions for failure to comply with notice to attend and produce

A notice to attend or a notice to attend and produce has the same effect as a subpoena or a subpoena duces tecum served on a witness. The parties have the same rights, and the court may make the same orders, including sanctions, as in the case of a subpoena before the court. CCP §1987(b)-(c).

Nevertheless, a court is unlikely to impose contempt for failure to respond to a notice to attend. No reported California case has held parties in contempt for failure to attend trial, or attend and produce evidence, in response to a notice. It would be unusual for a witness subject to notice (*i.e.,* a party or other person closely affiliated with a party; see §4.36) not to appear at the trial of the case. In any event, other sanctions would be equally or more effective against a party or person who has an interest in the outcome of the trial.

**EXAMPLE:** Examples of sanctions that the noticing party's counsel could request the court to impose include issue sanctions (that an issue be considered established and the sanctioned party prohibited from further litigating that issue), evidence sanctions (that the sanctioned party be prohibited from introducing designated evidence), or terminating sanctions (that the court strike all or parts of the sanctioned party's pleadings, stay the trial until the sanctioned party obeys the notice, dismiss the action, or enter a default judgment against the sanctioned party).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/ IX. FORMS/ A. Subpoena or subpoena duces tecum of witness/§4.55 1. Form: Civil subpoena for personal appearance at trial or hearing (Judicial Council form SUBP-001)

## IX. FORMS

### A. Subpoena or subpoena duces tecum of witness

### §4.55 1. Form: Civil subpoena for personal appearance at trial or hearing (Judicial Council form SUBP-001)

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF/ PETITIONER:<br>DEFENDANT/ RESPONDENT: | |
| **CIVIL SUBPOENA**<br>**For Personal Appearance at Trial or Hearing** | CASE NUMBER: |

**THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of witness, if known)*:**

1. **YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below UNLESS you make an agreement with the person named in item 2:**

| | | | | | |
|---|---|---|---|---|---|
| a. Date: | Time: | ☐ Dept.: | ☐ Div.: | ☐ Room: | |
| b. Address: | | | | | |

2. **IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:**
   a. Name of subpoenaing party or attorney: b. Telephone number:

3. **Witness Fees:** You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them at the time of service. You may request them before your scheduled appearance from the person named in item 2.

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued:

. . . . . .
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PERSON ISSUING SUBPOENA)

_____
(TITLE)

## 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 date on which you are to appear. 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.)

(Proof of service on reverse)



Form Adopted for Mandatory Use
Judicial Council of California
SUBP-001 [Rev. January 1, 2007]

**CIVIL SUBPOENA FOR PERSONAL APPEARANCE AT TRIAL OR HEARING**

CEB

Code of Civil Procedure, §§ 1985,1986,1987
*www.courtinfo.ca.gov*

Print

SUBP-001

| PLAINTIFF/PETITIONER:<br><br>DEFENDANT/RESPONDENT: | CASE NUMBER: |
|---|---|

**PROOF OF SERVICE OF CIVIL SUBPOENA FOR PERSONAL APPEARANCE AT TRIAL OR HEARING**

1. I served this *Civil Subpoena for Personal Appearance at Trial or Hearing* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*:
   b. Address where served:
   c. Date of delivery:
   d. Time of delivery:
   e. Witness fees *(check one)*:
      (1) ☐ were offered or demanded and paid. Amount: . . . . . $ _____
      (2) ☐ were not demanded or paid.
   f. Fee for service: . . . . . $ _____
2. I received this subpoena for service on *(date)*:
3. Person serving:
   a. ☐ Not a registered California process server.
   b. ☐ California sheriff or marshal.
   c. ☐ Registered California process server.
   d. ☐ Employee or independent contractor of a registered California process server.
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b).
   f. ☐ Registered professional photocopier.
   g. ☐ Exempt from registration under Business and Professions Code section 22451.
   h. Name, address, telephone number, and, if applicable, county of registration and number:

**I declare** under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

**(For California sheriff or marshal use only)**
**I certify** that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)



*Copies:* Retain original subpoena and proof of service (reverse side of subpoena form to be completed by officer or

person serving subpoena) for filing with court, *e.g.,* to lay foundation for contempt proceedings (see §4.52); copies for service (one for each party and for witness on whom subpoena to be served); office copies.

*Comment:* Use of this Judicial Council form is mandatory. Cal Rules of Ct 1.30-1.45. See §4.7. On production of business records when appearance of witness not needed, see §4.24. On requirements for subpoena of consumer records, see §4.21.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.55A 2. Form: Civil subpoena (duces tecum) for personal appearance and production of documents and things at trial or hearing and declaration (Judicial Council form SUBP-002)

## §4.55A 2. Form: Civil subpoena (duces tecum) for personal appearance and production of documents and things at trial or hearing and declaration (Judicial Council form SUBP-002)

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| —<br><br>TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF/ PETITIONER:<br><br>DEFENDANT/ RESPONDENT: | |
| **CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and Production of Documents and Things at Trial or Hearing AND DECLARATION** | CASE NUMBER: |

**THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of witness, if known)*:**

1. **YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below UNLESS your appearance is excused as indicated in box 3b below or you make an agreement with the person named in item 4 below.**

| | | | | | |
|---|---|---|---|---|---|
| a. Date: | Time: | ☐ Dept.: | ☐ Div.: | ☐ Room: | |
| b. Address: | | | | | |

2. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, *AND* CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**
3. YOU ARE *(item a or b must be checked)*:
   a. ☐ Ordered to appear in person and to produce the records described in the declaration on page two or the attached declaration or affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
   b. ☐ Not required to appear in person if you produce (i) the records described in the declaration on page two or the attached declaration or affidavit and (ii) a completed declaration of custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose the original declaration of the custodian with the records. Seal the envelope. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and number; your name; and the date, time, and place from item 1 in the box above. (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party listed at the top of this form.
4. **IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE YOU ARE TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:**
   a. Name of subpoenaing party or attorney: b. Telephone number:
5. **Witness Fees:** You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them at the time of service. You may request them before your scheduled appearance from the person named in item 4.

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PERSON ISSUING SUBPOENA)

(Declaration in support of subpoena on reverse) (TITLE)



Form Adopted for Mandatory Use
Judicial Council of California
SUBP-002 [Rev. July 1, 2009]

**CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS AT TRIAL OR HEARING AND DECLARATION**

CEB
Code of Civil Procedure, § 1985 et seq.
www.courtinfo.ca.gov

| PLAINTIFF/PETITIONER: | CASE NUMBER: |
|---|---|
| DEFENDANT/RESPONDENT: | |

The production of the documents or the other things sought by the subpoena on page one is supported by *(check one)*:
☐ the attached affidavit or declaration ☐ the following declaration:

**DECLARATION IN SUPPORT OF CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS AT TRIAL OR HEARING**
**(Code Civ. Proc., §§ 1985,1987.5)**

1. I, the undersigned, declare I am the ☐ plaintiff ☐ defendant ☐ petitioner ☐ respondent ☐ attorney for *(specify)*: ☐ other *(specify)*:
   in the above-entitled action.
2. The witness has possession or control of the following documents or other things and shall produce them at the time and place specified in the *Civil Subpoena for Personal Appearance and Production of Documents and Things at Trial* or *Hearing* on page one of this form *(specify the exact documents or other things to be produced)*:

   ☐ Continued on Attachment 2.
3. Good cause exists for the production of the documents or other things described in paragraph 2 for the following reasons:

   ☐ Continued on Attachment 3.
4. These documents or other things described in paragraph 2 are material to the issues involved in this case for the following reasons:

   ☐ Continued on Attachment 4.

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 ☐ SUBPOENAING PARTY ☐ ATTORNEY FOR SUBPOENAING PARTY)

## 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 the date on which you are to appear. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (form MC-410). (Civil Code, § 54.8.)

(Proof of service on page 3)

Print

SUBP-002

| PLAINTIFF/PETITIONER: | CASE NUMBER: |
|---|---|
| DEFENDANT/RESPONDENT: | |

**PROOF OF SERVICE OF CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS AT TRIAL OR HEARING AND DECLARATION**

1. I served this *Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*:
   b. Address where served:
   c. Date of delivery:
   d. Time of delivery:
   e. Witness fees *(check one)*:
      (1) ☐ were offered or demanded and paid. Amount: . . . . . $ _____
      (2) ☐ were not demanded or paid.
   f. Fee for service: . . . . . $ _____
2. I received this subpoena for service on *(date)*:
3. Person serving:
   a. ☐ Not a registered California process server.
   b. ☐ California sheriff or marshal.
   c. ☐ Registered California process server.
   d. ☐ Employee or independent contractor of a registered California process server.
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b).
   f. ☐ Registered professional photocopier.
   g. ☐ Exempt from registration under Business and Professions Code section 22451.
   h. Name, address, telephone number, and, if applicable, county of registration and number:

**I declare** under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

**(For California sheriff or marshal use only)**
**I certify** that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)



*Copies:* Retain original and proof of service for filing with court, *e.g.,* witness makes motion to quash subpoena (see

§4.45); copies for service (one for each party and for witness on whom subpoena to be served); office copies.

*Comment:* Use of this Judicial Council form is mandatory. Cal Rules of Ct 1.30-1.45. A subpoena duces tecum is invalid unless the declaration in support on the reverse side of the form is filled out, or unless a separate affidavit or declaration is attached (see §4.56). For discussion, see §§4.7-4.13.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.56 3. Form: Declaration supporting subpoena duces tecum (CCP §1985)

## §4.56 3. Form: Declaration supporting subpoena duces tecum (CCP §1985)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | |
|---|---|
| _ _[*Name(s)*]_ _ **Plaintiff(s)** ) | **No. _ _ _ _ _ _** |
| **vs** ) | **DECLARATION OF** |
| _ _[*Name(s)*]_ _ **Defendant(s)** ) | _ _[*NAME*]_ _ **SUPPORTING SUBPOENA DUCES TECUM (CCP §1985)** |

_ _[*Name*]_ _ **declares:**

**1. I am the** _ _[*plaintiff/defendant/attorney for plaintiff/attorney for defendant*]_ _ **in this action.**

**2. I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently to them under oath.**

**3. Trial of this matter is set for** _ _[*date*]_ _ **at** _ _[*time*]_ _ **in department** _ _[*number*]_ _ **of this court, located at** _ _[*address*]_ _**.**

**4. The following issues, among others, are involved in this case:** _ _[*Describe*]_ _**.**

**5.** _ _[*Name of witness*]_ _ **has in** _ _[*his/her*]_ _ **possession or under** _ _[*his/her*]_ _ **control** _ _[*specify matters or things desired to be produced*]_ _**.**

**6. Each item is material to the issues in this case and is admissible in that** _ _[*state materiality to issues*]_ _**.**

**7. Good cause for production of the items exists because** _ _[*give facts showing need for production*]_ _**.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

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

*Copies:* Original (retain for filing with court clerk if, *e.g.,* witness makes motion to quash subpoena); copies for service (one for each party and for witness from whom production is sought); office copies.

*Comment:* Either a separate affidavit or declaration, as illustrated here, must be attached to the subpoena duces tecum form, or the declaration in support of the subpoena duces tecum that appears on the back of the Judicial Council form in §4.55A, must be filled out. CCP §1987.5. For discussion, see §§4.7-4.13.

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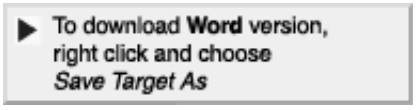
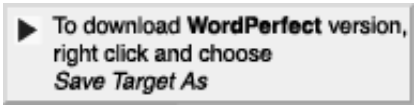
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.57 4. Sample letter accompanying subpoena or subpoena duces tecum

## §4.57 4. Sample letter accompanying subpoena or subpoena duces tecum




[*Attorney's firm letterhead*]

_ _[*Name of witness*]_ _ _ _[*Date*]_ _
_ _[*Address*]_ _

**Re:** _ _[*Title of case*]_ _

**Dear** _ _[*Mr./Ms.*]_ _ _ _[*name of witness*]_ _**:**

**The attached civil** _ _[*subpoena/subpoena duces tecum*]_ _**, which has been served on you, requires you to appear in court and testify** _ _[*and bring with you the records specified in the accompanying declaration*]_ _ **at** _ _[*name of county*]_ _ **Superior Court, department** _ _[*number*]_ _**, located at** _ _[*street address, city*]_ _**, California, on** _ _[*date*]_ _ **at** _ _[*time*]_ _**.**

**Although trial is set to begin on that date, your testimony may not be needed until sometime after trial is underway. To prevent your waiting in court for long periods of time, we have enclosed for your convenience a document in which you acknowledge that you have been served with a subpoena and agree to be "on call" to appear in court within** _ _[*number*]_ _ **hours after our informing you that your testimony is required.**

**Please read, fill in the blanks with regard to your telephone numbers, etc., sign, and return in the preaddressed envelope the acknowledgment of service and agreement to appear "on call." If you have any questions, do not hesitate to telephone either me or** _ _[*name*]_ _ **of our office, who is coordinating the witnesses' appearances in the trial of this matter.**

**Thank you for your prompt assistance and cooperation.**

**Very truly yours,**
__[*Signature of attorney*]__
_ _[*Typed name*]_ _

**Enclosures: Subpoena duces tecum (or subpoena)**
**Supporting declaration**
**Acknowledgment of service and on-call agreement**
**Return envelope**

*Comment:* It is often a good idea to attach a cover letter such as this one to the subpoena or subpoena duces tecum, explaining its purpose and requesting that the witness sign and return the enclosed acknowledgment of service and agreement to appear on call so that a court appearance can be more conveniently made. Include a stamped, self-addressed envelope to expedite return. For discussion, see §§4.7-4.13.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.58 5. Form: Acknowledgment of service of subpoena and agreement of witness to appear on call (CCP §1985.1)

## §4.58 5. Form: Acknowledgment of service of subpoena and agreement of witness to appear on call (CCP §1985.1)

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**ACKNOWLEDGMENT OF SERVICE OF CIVIL SUBPOENA AND AGREEMENT OF WITNESS TO APPEAR ON CALL CCP §1985.1**

**Title of case:** _ _[*Title and number of case*]_ _

**Date and place:** _ _[*Date witness subpoenaed to appear; name of court, department, address*]_ _

**I acknowledge that I have been served with a subpoena issued in the case of** _ _[*title and number of case*]_ _**.**

**I understand that, unless I agree to appear on call, it may be necessary for me to wait for extensive periods in court. I wish to avoid this inconvenience. I also understand that cases often are postponed or settled before the trial date, and I do not wish to appear in court unnecessarily.**

**I therefore agree to appear at such time as may be designated by further oral or written notice from the office of** _ _[*name of attorneys issuing subpoena*]_ _**, notwithstanding the date specified in the subpoena.**

**I understand that** _ _[*name of attorney*]_ _**, as attorney, has control over my appearance, will try to give me as much notice as possible, and will notify me at least** _ _[*number*]_ _ **hours before the assigned time for my testimony.**

**My business telephone number is _ _ _ _ _ _. My home telephone number is _ _ _ _ _ _.**

**I have special plans or engagements on the following dates and hours, which I wish to be considered as inconvenient times for me to appear in court: _____.**

**I agree to notify** _ _[*name of attorney*]_ _ **promptly of any changes in my address or the telephone numbers listed above.**

**Date:** _ _ _ _ _ _ __[S*ignature of witness*]__
_ _[*Typed name*]_ _

*Copies:* It is a good idea to provide both a copy for signature and return to the subpoenaing attorney and a copy for the witness to keep for reference if needed before an appearance is made at the trial.

*Comment:* A cover letter can be useful in explaining the purpose of the above agreement to the witness. See form in §4.57. For discussion of witness's agreement to appear "on call" to testify in court, see §4.20.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/ B. Subpoena of consumer or employment records/§4.59 1. Form: Notice to consumer or employee and objection (Judicial Council form SUBP-025)

## B. Subpoena of consumer or employment records

### §4.59 1. Form: Notice to consumer or employee and objection (Judicial Council form SUBP-025)

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional)*:<br>E-MAIL ADDRESS *(Optional)*:<br>ATTORNEY FOR *(Name)*: | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF/ PETITIONER:<br>DEFENDANT/ RESPONDENT: | CASE NUMBER: |
| **NOTICE TO CONSUMER OR EMPLOYEE AND OBJECTION (Code Civ. Proc., §§ 1985.3,1985.6)** | |

## NOTICE TO CONSUMER OR EMPLOYEE

**TO *(name)*:**

1. PLEASE TAKE NOTICE THAT **REQUESTING PARTY *(name)*:**
   SEEKS YOUR RECORDS FOR EXAMINATION by the parties to this action on *(specify date)*:
   The records are described in the subpoena directed to **witness** *(specify name and address of person or entity from whom records are sought)*:
   A copy of the subpoena is attached.
2. IF YOU OBJECT to the production of these records, YOU MUST DO ONE OF THE FOLLOWING BEFORE THE DATE SPECIFIED IN ITEM a. OR b. BELOW:
   a. If you are a party to the above-entitled action, you must file a motion pursuant to Code of Civil Procedure section 1987.1 to quash or modify the subpoena and give notice of that motion to the **witness** and the **deposition officer** named in the subpoena at least five days before the date set for production of the records.
   b. If you are not a party to this action, you must serve on the **requesting party** and on the **witness,** before the date set for production of the records, a written objection that states the specific grounds on which production of such records should be prohibited. You may use the form below to object and state the grounds for your objection. You must complete the Proof of Service on the reverse side indicating whether you personally served or mailed the objection. The objection should **not** be filed with the court. **WARNING:** IF YOUR OBJECTION IS NOT RECEIVED BEFORE THE DATE SPECIFIED IN ITEM 1, YOUR RECORDS MAY BE PRODUCED AND MAY BE AVAILABLE TO ALL PARTIES.
3. YOU OR YOUR ATTORNEY MAY CONTACT THE UNDERSIGNED to determine whether an agreement can be reached in writing to cancel or limit the scope of the subpoena. If no such agreement is reached, and if you are not otherwise represented by an attorney in this action, YOU SHOULD CONSULT AN ATTORNEY TO ADVISE YOU OF YOUR RIGHTS OF PRIVACY.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF ☐ REQUESTING PARTY ☐ ATTORNEY)

## OBJECTION BY NON-PARTY TO PRODUCTION OF RECORDS

1. ☐ I object to the production of all of my records specified in the subpoena.
2. ☐ I object only to the production of the following specified records:

3. The specific grounds for my objection are as follows:

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE)

(Proof of service on reverse)



Form Adopted for Mandatory Use
Judicial Council of California
SUBP-025 [Rev. January 1, 2008]



CEB
Code of Civil Procedure, §§ 1985.3. 1985.6, 2020.010–2020.510
www.courtinfo.ca.gov

Print

**SUBP-025**

| PLAINTIFF/PETITIONER:<br>DEFENDANT/RESPONDENT: | CASE NUMBER: |
|---|---|

**PROOF OF SERVICE OF NOTICE TO CONSUMER OR EMPLOYEE AND OBJECTION**
**(Code Civ. Proc., §§ 1985.3,1985.6)**

☐ **Personal Service** ☐ **Mail**

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**
2. I served a copy of the *Notice to Consumer or Employee and Objection* as follows *(check either a or b)*:
   a. ☐ **Personal service.** I personally delivered the *Notice to Consumer or Employee and Objection* as follows:
      (1) Name of person served:
      (2) Address where served:
      (3) Date served:
      (4) Time served:

   b. ☐ **Mail**. I deposited the *Notice to Consumer or Employee and Objection* in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed as follows:
      (1) Name of person served:
      (2) Address:
      (3) Date of mailing:
      (4) Place of mailing *(city and state)*:

      (5) I am a resident of or employed in the county where the *Notice to Consumer or Employee and Objection* was mailed.
   c. My residence or business address is *(specify)*:
   d. My phone number is *(specify)*:

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 PERSON WHO SERVED) ▶ (SIGNATURE OF PERSON WHO SERVED)

**PROOF OF SERVICE OF OBJECTION TO PRODUCTION OF RECORDS**
**(Code Civ. Proc., §§ 1985.3,1985.6)**

☐ **Personal Service** ☐ **Mail**

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**
2. I served a copy of the *Objection to Production of Records* as follows *(complete either a or b)*:
   a. ON THE REQUESTING PARTY
      (1) ☐ **Personal service.** I personally delivered the *Objection to Production of Records* as follows:
         (i) Name of person served:
         (ii) Address where served:
         (iii) Date served:
         (iv) Time served:

      (2) ☐ **Mail.** I deposited the *Objection to Production of Records in* the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed as follows:
         (i) Name of person served:
         (ii) Address:
         (iii) Date of mailing:
         (iv) Place of mailing *(city and state)*:

         (v) I am a resident of or employed in the county where the *Objection to Production of Records* was mailed.
   b. ON THE WITNESS
      (1) ☐ **Personal service.** I personally delivered the *Objection to Production of Records* as follows:
         (i) Name of person served:
         (ii) Address where served:
         (iii) Date served:
         (iv) Time served:

      (2) ☐ **Mail**. I deposited the *Objection to Production of Records* in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed as follows:
         (i) Name of person served:
         (ii) Address:
         (iii) Date of mailing:
         (iv) Place of mailing *(city and state)*:

         (v) I am a resident of or employed in the county where the *Objection to Production of Records* was mailed.
3. My residence or business address is *(specify)*:
4. My phone number is *(specify)*:

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 PERSON WHO SERVED) ▶ (SIGNATURE OF PERSON WHO SERVED)



*Copies:* Original (retain for filing with court if necessary later); copies for service (one for consumer, one for witness

or custodian of records for witness, one for each party); office copies.

*Comment:* A copy of the subpoena duces tecum with the supporting affidavit or declaration (and the proof of service to be served on the witness) must be served with the notice to the consumer or employee at least 5 days before serving the witness. See §§4.8, 4.22. If the consumer is a party to the action, the notice and attached documents should be served on the consumer's or employee's attorney of record. See §4.36.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.60 2. Form: Proof of service of notice to consumer of privacy rights (CCP §1985.3) [Deleted]

## §4.60 2. Form: Proof of service of notice to consumer of privacy rights (CCP §1985.3) [Deleted]

The proof of service of notice to consumer or employee is now printed on the back of the mandatory Judicial Council form reproduced in §4.59.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/ C. Custodian of records/§4.61 1. Form: Declaration of custodian of records (Evid C §1561(a))

## C. Custodian of records

### §4.61 1. Form: Declaration of custodian of records (Evid C §1561(a))

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ **Plaintiff(s)** | ) | **No. _ _ _ _ _ _** |
| **vs** | ) | **DECLARATION OF** |
| _ _[*Name(s)*]_ _ **Defendant(s)** | ) | _ _[*NAME*]_ _, **CUSTODIAN OF RECORDS** |
| _____ | ) | **(Evid C §1561(a))** |

_ _[*Name*]_ _ **declares:**

**1. I am the custodian of records of _ _[*name of business*]_ _ and am authorized to certify such records.**

**2. My business address is _ _[*address*]_ _.**

**3. On _ _[*date*]_ _, a subpoena duces tecum with a supporting declaration of _ _[*name*]_ _ was personally served on me in the case of _ _[*name*]_ _ vs. _ _[*name*]_ _, case _ _[*number*]_ _, which was filed in the _ _[*name of county*]_ _ Superior Court, California.**

[*Option 1: Copies of documents*]

**4. The copies enclosed with this declaration are true and correct copies of all the documents described in the supporting declaration of _ _[*name*]_ _, which accompanied the subpoena duces tecum.**

[*Option 2: Original documents*]

**4. The original documents described in the supporting declaration of _ _[*name*]_ _ were made available to representatives of _ _[*name*]_ _, the attorney of record for _ _[*name*]_ _, the _ _[*plaintiff/defendant*]_ _ in this action.**

[*Continue*]

**5. The original records from which copies were made in accordance with the subpoena duces tecum were prepared by _ _[*name of business*]_ _ in the normal course of business at or near the time of the acts, conditions, or events recorded in those documents.**

**6. The records sought are identified as follows: _ _[*description of records*]_ _**

**7. The records were prepared as follows: _ _[*description of the mode of preparation of the records*]_ _**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

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

*Copies:* Original (retain for filing with court clerk if the subpoena duces tecum served on the custodian of records is challenged); copies for service (one for each party and for witness from whom production is sought); office copies.

*Comment:* It is helpful to write a brief letter to the custodian of records to accompany the subpoena duces tecum, explaining that he or she is required by law to furnish a declaration when the records are produced and that the above declaration is attached for his or her convenience to fill out and return with the subpoenaed documents. See §4.25. If the second option at no. 4 is used, the declaration shown in §4.62 must also be filled out.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.62 2. Form: Declaration of person copying records (Evid C §1561(c))

## §4.62 2. Form: Declaration of person copying records (Evid C §1561(c))

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | |
| **vs** | ) | **DECLARATION OF** |
| _ _[*Name(s)*]_ _ | ) | **_ _[*NAME*]_ _ (Evid C** |
| **Defendant(s)** | ) | **§1561(c))** |
| _____ | ) | |

_ _[*Name*]_ _ **declares:**

[*Option 1: Employee of attorney*]

**1. I am employed by** _ _[*name of attorney*]_ _**, the attorney of record for** _ _[*name*]_ _**, the** _ _[*plaintiff/defendant*]_ _ **in this action.**

[*Option 2: Employee of copying service*]

**1. I am employed by** _ _[*name of copying service*]_ _**, which was hired by** _ _[*name of attorney*]_ _**, the attorney of record for** _ _[*name*]_ _**, the** _ _[*plaintiff/defendant*]_ _ **in this action, to provide true copies of documents subpoenaed in this action.**

[*Continue*]

**2. I appeared at the place of business of** _ _[*name of "witness," e.g., company or doctor maintaining personal records of consumer*]_ _**, which was served with a subpoena duces tecum for production of the records that are described in the supporting declaration of** _ _[*name*]_ _**, dated** _ _[*date*]_ _**.**

**3. On** _ _[*date*]_ _**, I received from the custodian of records all the documents for copying, as permitted by Evidence Code section 1561(e), that were described in that supporting declaration of** _ _[*name*]_ _**,** _ _[*except* _ _[*list any documents that were not made available for copying*]_ _]_ _**.**

**4. I then made true and correct copies of all documents that were delivered to me and enclose them with this declaration.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

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

*Copies:* Original (retain for filing with court clerk if subpoena duces tecum served on custodian of records is challenged)); copies for service (one for each party and for witness from whom production is sought); office copies.

*Comment:* When the subpoenaing party's attorney arranges to have the documents copied at the place where the

custodian of records produces those documents, both the custodian's declaration (see form in §4.61) and this declaration of the person who copied those records are required. See §4.26.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/ D. Subpoena of concealed witness/§4.63 1. Form: Ex parte application for order to serve concealed witness (CCP §1988)

## D. Subpoena of concealed witness

### §4.63 1. Form: Ex parte application for order to serve concealed witness (CCP §1988)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **EX PARTE APPLICATION** |
| **vs** | ) | **FOR ORDER TO SERVE** |
| _ _[*Name(s)*]_ _ | ) | **CONCEALED WITNESS (CCP** |
| **Defendant(s)** | ) | **§1988); SUPPORTING** |
| _____ | ) | **MEMORANDUM** |

**_ _[*Name of party*]_ _ requests that the court issue an order under Code of Civil Procedure section 1988 to the sheriff of _ _[*name of county*]_ _ to immediately serve the subpoena dated _ _[*date*]_ _, on _ _[*name of witness*]_ _ at _ _[*address of building or vessel where witness is concealed*]_ _, and to allow the sheriff to break into the _ _[*building/vessel*]_ _ where the witness is concealed to make such service if necessary.**

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

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (file with court clerk); copies for service (one for each party); office copies.

*Comment:* The memorandum in support of the application should cite CCP §1988 and any case authority applicable to the facts. The ex parte application must include an application, a declaration in support of the application, a competent declaration based on personal knowledge, a supporting memorandum, and a proposed order. Cal Rules of Ct 3.1201. The party seeking an ex parte order must notify all parties no later than 10:00 a.m. on the court day prior to the ex parte appearance, absent exceptional circumstances. Cal Rules of Ct 3.1203(a). On ex parte procedures generally, see California Civil Procedure Before Trial, chap 13 (4th ed Cal CEB 2004). For discussion, see §4.31.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.64 2. Form: Supporting declaration of attorney (CCP §1988)

**§4.64 2. Form: Supporting declaration of attorney (CCP §1988)**

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | **_ _[*NAME*]_ _ AND EX PARTE** |
| _ _[*Name(s)*]_ _ | ) | **APPLICATION FOR ORDER** |
| **Defendant(s)** | ) | **TO SERVE CONCEALED** |
| **_____** | ) | **WITNESS (CCP §1988)** |

_ _[*Name*]_ _ **declares:**

**1. I am the** _ _[*e.g., attorney for plaintiff/attorney for defendant*]_ _ **in this action and submit this declaration supporting the ex parte application of** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, or an order under Code of Civil Procedure section 1988 to serve** _ _[*name*]_ _**, a concealed witness.**

**2. I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently to them under oath.**

**3. The following are material issues in this case:** _ _[*Describe*]_ _**.**

**4. Trial of this case is set for** _ _[*date*]_ _ **at** _ _[*time*]_ _ **in department** _ _[*number*]_ _ **of this court, located at** _ _[*address*]_ _**.**

**5.** _ _[*Name of witness*]_ _ **is a material witness in this case in that** _ _[*he/she*]_ _ **has personal knowledge of the following facts relating to the above issues:** _ _[*Describe materiality of expected testimony*]_ _**.**

**6.** _ _[*Plaintiff/Defendant*]_ _ **has caused a subpoena to be issued by the court, dated** _ _[*date*]_ _**, to require this witness to appear at the trial of this case, but repeated efforts to serve the witness have been unsuccessful, as described more fully in the attached declaration of** _ _[*name of private process server*]_ _**.**

**7. I orally notified** _ _[*name of attorney*]_ _**, attorney for** _ _[*plaintiff/defendant*]_ _**, on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, that this application for an order to have the sheriff serve** _ _[*name of witness*]_ _**, a concealed witness, would be made in department** _ _[*number*]_ _ **of this court on** _ _[*date*]_ _**, at** _ _[*time*]_ _**. At the time of giving notice to attorney for** _ _[*plaintiff/defendant*]_ _**, I did not receive any response or indication whether an opposition to this ex parte application would be expected.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

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

*Copies:* Original (file with court clerk); copies for service (one for each party); office copies.

*Comment:* See Cal Rules of Ct 3.1203, which requires notice no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances. See also *Datig v Dove Books, Inc.* (1999) 73 CA4th 964, 87 CR2d 719 (error to grant ex parte application when moving party's attorney failed to establish that attorney had given opponent's attorney minimum 24 hours' notice required under earlier version of Cal Rules of Ct 3.1200-3.1207). The declaration of notice should include the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected. The request for an ex parte order must also 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).

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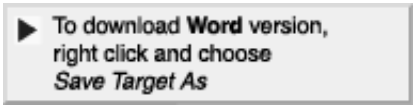
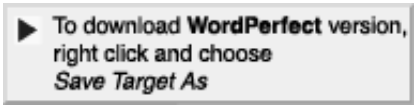
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.65 3. Form: Supporting declaration of process server (CCP §1988)

## §4.65 3. Form: Supporting declaration of process server (CCP §1988)




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | **_ _[*NAME*]_ _ AND EX PARTE** |
| _ _[*Name(s)*]_ _ | ) | **APPLICATION FOR ORDER** |
| **Defendant(s)** | ) | **TO SERVE CONCEALED** |
| **_____** | ) | **WITNESS (CCP §1988)** |

_ _[*Name*]_ _ **declares:**

**1. I have seen this witness in** _ _[*location, e.g., name of building or vessel*]_ _**.**

**2. I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently to them under oath.**

**3. The witness refused to** _ _[*e.g., answer inquiries/come to the door*]_ _ **and stated to declarant on** _ _[*date(s)*]_ _ **that service of the subpoena would not be accepted.**

**4. Declarant has been refused permission by other persons on** _ _[*date(s)*]_ _ **to enter the** _ _[*e.g., building/vessel*]_ _ **and effect service.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

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

*Copies:* Original (file with court clerk); copies for service (one for each party); office copies.

*Comment:* The supporting declarations must prove (a) the fact of concealment and (b) the witness's materiality. CCP §1988. See §4.31. This declaration tends to prove the first element. See form in §4.64, which offers proof of the second element.

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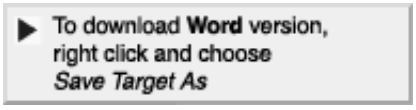
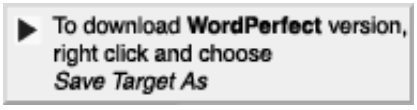
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.66 4. Form: Order for sheriff to serve concealed witness (CCP §1988)

## §4.66 4. Form: Order for sheriff to serve concealed witness (CCP §1988)




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | |
| **vs** | ) | **ORDER FOR SHERIFF TO** |
| _ _[*Name(s)*]_ _ | ) | **SERVE CONCEALED** |
| **Defendant(s)** | ) | **WITNESS (CCP §1988)** |
| _____ | ) | |

**The _ _[*affidavit(s)/declaration(s)*]_ _ of _ _[*name(s)*]_ _ having been submitted, and good cause appearing,**

**IT IS ORDERED that the sheriff of _ _[*name of county*]_ _, California, immediately serve on _ _[*name of witness*]_ _, concealed in _ _[*location, e.g., name of building or vessel*]_ _, located at _ _[*address*]_ _, the subpoena issued by the clerk of the court dated _ _[*date*]_ _.**

**IT IS FURTHER ORDERED that the sheriff may break into the _ _[*e.g., building/vessel*]_ _ where the witness is concealed, if the sheriff considers it necessary to do so.**

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

*Copies:* Original (if ex parte application granted, present to judge for signature, then file with court clerk); copies for service (one for each party and for sheriff who is to serve witness); office copies.

*Comment:* Counsel should check with the sheriff of the county where the witness is to be served to ascertain whether the sheriff needs a certified copy of the order to effect service. On preparing an order for the judge's signature generally, see California Civil Procedure Before Trial §§12.104-12.110 (4th ed Cal CEB 2004).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/ E. Subpoena of witness confined in jail/§4.67 1. Form: Notice of motion and motion for removal and production of prisoner at trial (CCP §§1995-1997)

## E. Subpoena of witness confined in jail

### §4.67 1. Form: Notice of motion and motion for removal and production of prisoner at trial (CCP §§1995-1997)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF MOTION FOR** |
| **vs** | ) | **REMOVAL AND PRODUCTION** |
| _ _[*Name(s)*]_ _ | ) | **OF PRISONER AT TRIAL** |
| **Defendant(s)** | ) | **(CCP §§1995-1997);** |
| | ) | **SUPPORTING MEMORANDUM** |
| **_____** | ) | **Hearing:** _ _[*date; time*]_ _ |
| | | **Dep't:** _ _[*number*]_ _ |
| | | **Hearing judge:** _ _[*if known*]_ _ |
| | | **Action filed:** _ _[*date*]_ _ |
| | | **Trial date:** _ _[*if set*]_ _ |

**To** _ _[*name of each party and attorney(s) of record*]_ _**:**

**PLEASE TAKE NOTICE that on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in department** _ _[*number*]_ _ **of this court, located at** _ _[*address*]_ _**,** _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, will move the court for an order of temporary removal from** _ _[*name of institution*]_ _ **and production of** _ _[*name of witness*]_ _**, a prisoner, to testify during the trial of the above matter on the above date and time, or on any date to which the case may be continued, in the above department of this court. This motion is made under Code of Civil Procedure sections 1995-1997 on the ground that this witness has personal knowledge of** _ _[*e.g., the terms of the contract*]_ _ **and** _ _[*his/her*]_ _ **expected testimony is material to the issues in this case.**

**This motion is based on this notice; all the pleadings, papers, and records in this action;** _ _[*and*]_ _ **the attached supporting memorandum and declaration(s) of** _ _[*name(s)*]_ _**;** _ _[*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 party); office copies.

*Comment:* A supporting memorandum must accompany the motion. Cal Rules of Ct 3.1113. For discussion of serving subpoenas on jailed witnesses, see §4.32.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.68 2. Form: Declaration supporting motion for removal and production of prisoner at trial (CCP §§1995-1997)

## §4.68 2. Form: Declaration supporting motion for removal and production of prisoner at trial (CCP §§1995-1997)

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

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | **_ _[*NAME*]_ _ SUPPORTING** |
| _ _[*Name(s)*]_ _ | ) | **MOTION FOR REMOVAL AND** |
| **Defendant(s)** | ) | **PRODUCTION OF PRISONER** |
| **_____** | ) | **AT TRIAL (CCP §§1995-1997)** |
| | | **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.**

**2. I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently to them under oath.**

**3. The following are material issues in this case:** _ _[*Describe*]_ _**.**

**4. Trial of this matter is set for the above date and time in the above department of this court, located at** _ _[*address*]_ _**.**

**5.** _ _[*Name of witness*]_ _ **is a material witness in this case in that** _ _[*he/she*]_ _ **has personal knowledge of the following facts, which I expect** _ _[*him/her*]_ _ **to testify to:** _ _[*Specify*]_ _**.**

**6. The testimony is material to the issue of** _ _[*specify*]_ _ **in that** _ _[*describe materiality*]_ _**.**

**7.** _ _[*Name of witness*]_ _ **is currently incarcerated in** _ _[*name of institution*]_ _**, in** _ _[*name of county*]_ _**, and is expected to be incarcerated on the date set for trial.**

**8. For these reasons, I request that the court issue an order for the temporary removal and production of** _ _[*name of witness*]_ _ **to testify during the trial of this matter on the above date and time, or on any date to which the case is continued, in the above department of this court.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

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

*Copies:* Original (file with court clerk); copies for service (one for each party); office copies.

*Comment:* The supporting declaration must show (a) the nature of the action or proceeding, (b) the testimony expected from the witness, and (c) its materiality. CCP §1996. See §4.32.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/ F. Notice to party or party-related witness/§4.69 1. Form: Notice to attend trial (CCP §1987(b))

## F. Notice to party or party-related witness

### §4.69 1. Form: Notice to attend trial (CCP §1987(b))

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

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE TO ATTEND TRIAL** |
| **vs** | ) | **(CCP §1987(b))** |
| _ _[*Name(s)*]_ _ | ) | **Dep't:** _ _[*number*]_ _ |
| **Defendant(s)** | ) | **Judge:** _ _[*if known*]_ _ |
| _____ | ) | **Action filed:** _ _[*date*]_ _ |
| | | **Trial** _ _[*date, time*]_ _ |

**To** _ _[*name of each party and attorney(s) of record*]_ _**:**

**PLEASE TAKE NOTICE that under the provisions of Code of Civil Procedure section 1987(b)** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, requires the attendance of** _ _[*name*]_ _ **at the trial of this matter set for the above date and time in the above department of this court, located at** _ _[*address*]_ _**.**

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

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (retain, with proof of service, for filing with court if future motion is made); copies for service (one for each party and, if not a party, for witness to whom notice is directed); office copies.

*Comment:* On when notice to attend is permitted and time requirements, see §§4.36-4.38.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.70 2. Form: Notice to attend and produce evidence at trial (CCP §1987(b)-(c))

## §4.70 2. Form: Notice to attend and produce evidence at trial (CCP §1987(b)-(c))

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE TO ATTEND AND** |
| **vs** | ) | **PRODUCE EVIDENCE AT** |
| _ _[*Name(s)*]_ _ | ) | **TRIAL (CCP §1987(b)-(c))** |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| **_____** | ) | **Judge:** _ _[*if known*]_ _ |
| | | **Action filed:** _ _[*date*]_ _ |
| | | **Trial** _ _[*date, time*]_ _ |

**To** _ _[*name of each party and attorney(s) of record*]_ _**:**

**PLEASE TAKE NOTICE that under Code of Civil Procedure section 1987(b)** _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, requires the attendance of** _ _[*name*]_ _ **at the trial of this matter set for the above date and time in the above department of this court, located at** _ _[*address*]_ _**.**

**NOTICE IS FURTHER GIVEN that under Code of Civil Procedure section 1987(c)**_ _[*plaintiff/defendant*]_ _ **requires that** _ _[*name*]_ _ **bring with** _ _[*him/her*]_ _ **the following books, documents, and things that are in** _ _[*his/her*]_ _ **possession or under** _ _[*his/her*]_ _ **control:** _ _[*List exact materials or things required*]_ _**.**

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

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (retain, with proof of service, for filing with court if future motion is made); copies for service (one for each party and, if not a party, for witness to whom notice is directed); office copies.

*Comment:* The notice to attend and produce must state the exact materials or things desired. CCP §1987(c). For time requirements, see §4.37.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/ G. Objecting to subpoena or notice/§4.71 1. Form: Notice of motion to quash service of subpoena duces tecum (trial) (CCP §§1987.1-1987.2)

## G. Objecting to subpoena or notice

### §4.71 1. Form: Notice of motion to quash service of subpoena duces tecum (trial) (CCP §§1987.1-1987.2)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF MOTION TO** |
| **vs** | ) | **QUASH SERVICE OF** |
| _ _[*Name(s)*]_ _ | ) | **SUBPOENA DUCES TECUM** |
| **Defendant(s)** | ) | **(TRIAL) (CCP** |
| **_____** | ) | **§§1987.1-1987.2);** |
| | | **SUPPORTING MEMORANDUM** |
| | | **Hearing:** _ _[*date; time*]_ _ |
| | | **Dep't:** _ _[*number*]_ _ |
| | | **Hearing judge:** _ _[*if known*]_ _ |
| | | **Action filed:** _ _[*date*]_ _ |
| | | **Trial date:** _ _[*if set*]_ _ |

**To** _ _[*name of party who served subpoena and attorney of record*]_ _**:**

**PLEASE TAKE NOTICE that on the above date and time, or as soon thereafter as the matter can be heard, in the above department of this court, located at** _ _[*address*]_ _, _ _[*plaintiff/defendant/witness or "consumer" within meaning of CCP §1985.3; see §4.21*]_ _, _ _[*name*]_ _**, will** _ _[*specially*]_ _ **appear in this matter to move the court for an order (1) quashing service of the subpoena duces tecum made on** _ _[*plaintiff/defendant/witness*]_ _ **on** _ _[*date*]_ _**, and (2) awarding reasonable attorney fees and expenses incurred in making this motion. This motion is made under Code of Civil Procedure sections 1987.1 and 1987.2 on the ground that the subpoena duces tecum is invalid and defective in that** _ _[*state basis for motion to quash, e.g., service not timely/supporting declaration not served/no showing of materiality or good cause/insufficiency of description/attorney-client privilege*]_ _**. Any opposition to this motion will be made in bad faith or without substantial justification.**

**This motion is based on this notice; all pleadings, papers, and records in this action;** _ _[*and*]_ _ **the attached supporting memorandum and declaration(s) of** _ _[*name(s)*]_ _**;** _ _[*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 and witness on whom subpoena served); office copies.

*Comment:* A supporting memorandum must accompany the motion. Cal Rules of Ct 3.1113. For discussion of motions to quash, see §§4.45-4.48.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.72 2. Form: Declaration supporting motion to quash subpoena duces tecum (trial) (CCP §§1987.1-1987.2)

## §4.72 2. Form: Declaration supporting motion to quash subpoena duces tecum (trial) (CCP §§1987.1-1987.2)

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

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | |
|---|---|
| _ _[*Name(s)*]_ _ **Plaintiff(s)** | **No. _ _ _ _ _ _** |
| **vs** | **DECLARATION OF _ _[*NAME*]_ _ SUPPORTING MOTION TO QUASH SERVICE OF SUBPOENA DUCES TECUM (TRIAL) (CCP §§1987.1-1987.2)** |
| _ _[*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 plaintiff/the defendant/a witness*]_ _, _ _[*name*]_ _**, in this action.**

**2. I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently to them under oath.**

**3. On** _ _[*date*]_ _, _ _[*name*]_ _ **caused a subpoena duces tecum to be served on me personally, requiring me to appear at the trial of this matter at the above date and time in the above department of this court, located at** _ _[*address*]_ _**, and to produce the materials and things described in the subpoena. A copy of the subpoena duces tecum is attached to this declaration and incorporated in it by reference.**

**4.** _ _[*Give facts showing grounds for motion to quash, e.g., service not timely/supporting declaration not served/no showing of materiality or good cause/insufficiency of description/attorney-client privilege*]_ _**.**

[*Add if attorney fees claimed*]

**5.** _ _[*Give facts showing that opposition to motion will be in bad faith or without substantial justification*]_ _**.**

[*Continue*]

**[6.] For these reasons, I ask that the court issue its order quashing service of the subpoena duces tecum** _ _[*and awarding reasonable attorney fees incurred in making this motion*]_ _**.**

**[7.] I have incurred the following expenses in making this motion:** _ _[*List expenses*]_ _**.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

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

*Copies:* Original (file with court clerk); copies for service (one for each party); office copies.

*Comment:* The declaration should be modified if the declarant is a "consumer" within the meaning of CCP §1985.3. See §4.21.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/4 Compelling Attendance and Production of Evidence/§4.73 3. Form: Written objections to notice to attend and produce evidence at trial (CCP §1987(c))

## §4.73 3. Form: Written objections to notice to attend and produce evidence at trial (CCP §1987(c))

▶ 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*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **WRITTEN OBJECTIONS** |
| **vs** | ) | **TO NOTICE TO ATTEND** |
| _ _[*Name(s)*]_ _ | ) | **AND PRODUCE EVIDENCE** |
| **Defendant(s)** | ) | **AT TRIAL (CCP §1987(c))** |
| _____ | ) | |

_ _[*Name of party or person on whom request to produce was made*]_ _ **objects to the production of the following documents described in the Notice To Attend and Produce Evidence at Trial, served on** _ _[*name*]_ _ **by** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, **on** _ _[*date*]_ _, **on the following grounds:**

**1. Item no.** _ _[*e.g., 1*]_ _**:** _ _[*Describe*]_ _**.** _ _[*State ground for objection, e.g., Item no. 1 is subject to the attorney-client privilege*]_ _**.**

**2. Item no.** _ _[*e.g., 3*]_ _**:** _ _[*Describe*]_ _**.** _ _[*State ground for objection, e.g., Item no. 3 is not material to any issue in the case and not admissible into evidence*]_ _**.**

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

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (retain, with proof of service, for filing with court if future motion is made); copies for service (one for each party); office copies.

*Comment:* The party or person objecting to the notice to appear and produce must serve and file written objections within 5 calendar days after being served, unless the court has permitted a longer period. See §4.50.

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# 5

# Preparing Witnesses for Trial

**William J. Elfving**
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## §5.1 I. SCOPE OF CHAPTER; DEFINITIONS

Witness preparation varies from case to case and from witness to witness, depending on the nature of the case, the issues, and the type of witness. There is no one correct method or simple formula. This chapter provides general guidelines for preparing witnesses as well as what the attorney needs to do before meeting with and preparing the witnesses. See §§5.2-5.21.

The following areas are discussed:

- Issues common to preparing lay witnesses are covered in §§5.22-5.47.
- Preparing "parties" (*i.e.,* your client and "party-related witness," including officers, directors, managing agents, or employees of a party) is covered in §§5.48-5.64.
- Preparing lay witnesses who are not parties and are not related to a party is covered in §§5.65-5.69.
- Preparing expert witnesses is covered in §§5.70-5.90.
- Finally, ethical issues you should keep in mind when preparing witnesses (*e.g.,* coaching and potential perjury) are covered in §§5.91-5.96.

On examining witnesses during trial, see chap 11.

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## II. ATTORNEY PREPARATION

### A. Review case

### §5.2 1. Testimonial, documentary, and demonstrative evidence

To effectively prepare each witness, determine:

- The relevancy of each witness's expected testimony and the specific objective you want to achieve for each witness you will call;
- What physical or documentary evidence will be introduced through each witness; and
- Whether there is any law that may render the testimony or other evidence inadmissible.

Therefore, before preparing witnesses to testify, you should have a thorough grasp of all aspects of the case. Review the pleadings, discovery, documentary evidence, witness statements, legal research, and all other relevant material. Pay special attention to each witness's deposition, other discovery responses (*e.g.,* answers to interrogatories), and statements. On preparing and organizing trial material generally, see chap 3.

Be familiar with any tangible items, *i.e.,* property or a product, that may be involved in the litigation to help you form accurate mental images when preparing direct and cross-examination. For example, in an accident case, visit the scene of the accident. If this is not possible, become familiar with the scene through accurate photographs.

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### §5.3 2. Depositions; answers to interrogatories

Review and summarize all depositions before preparing a witness. In particular, the attorney and the witness must become thoroughly familiar with that witness's deposition. This is an excellent method to refresh knowledge of the facts and will help the attorney to recall the demeanor of each witness. Review answers to interrogatories (especially those that make a reference to the witness as a person with knowledge of the facts), and prepare summaries, if needed.

In more complex cases, prepare indexes for quickly locating any impeaching material that contradicts the witness's testimony during the trial. Be certain to review any declarations or affidavits the witness has given, and any declarations or affidavits other witnesses have given about the witness. On summarizing and indexing discovery generally, see §§12.90-12.96.

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## §5.4 3. Complete legal research and pretrial organization

Complete all legal research on the admissibility of evidence before preparing the witnesses. Consider the court's probable rulings on admissibility before deciding (a) the order of witnesses (see §5.20), (b) the sequence for introducing documents into evidence, and (c) the witness examination plans (see §5.19). Be prepared with alternative plans if the court holds certain evidence inadmissible.

In addition, the opening statement, jury instructions, trial brief, elements of the causes of action, and some of the closing argument should be prepared, or at least outlined, before preparing the witnesses, because they will bear on which witnesses you will call and the order in which they will appear.

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### §5.5 4. Consider what writings to use to refresh recollection

When a writing is used to refresh recollection either before or during trial, about any matter on which a witness testifies, the writing must be produced at trial at the request of an adverse party. See *International Ins. Co. v Montrose Chem. Corp.* (1991) 231 CA3d 1367, 282 CR 783; *Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 449, 120 CR 787. The adverse party may "inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness." Evid C §771(b).

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### §5.6 a. Attorney-client privilege

If the writing used to refresh recollection is subject to the attorney-client privilege and that privilege is properly asserted at the first opportunity, the adverse party may be prevented from inspecting it. In *Sullivan v Superior Court* (1972) 29 CA3d 64, 105 CR 241, the court held that no waiver of the privilege occurred when a transcript of a tape-recorded initial conference between the attorney and the client was used to refresh the client's recollection for a deposition and when the privilege was claimed during the deposition.

In *Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 449, 120 CR 787, however, the court held that there was a waiver of the attorney-client privilege when the attorney failed to object at the first opportunity to questions directed to an independent investigator witness who used documents in his file to refresh his recollection before testifying at trial. Counsel's broad objection to allowing inspection of the file, not directed to a specific document claimed to be subject to the privilege, was held insufficient to protect the privilege. The court stated that "the mere fact of allowing a witness to refresh his recollection from a communication by him to his attorney and then calling him as a witness does not necessarily waive the lawyer-client privilege." See also *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 413, 72 CR 74.

For further discussion of Evid C §771 and privileged communications, see Comment, *Evidence Code Section 771: Conflict with Privileged Communications*, 6 Pac LJ 612 (1975). On attorney-client privilege generally, see Jefferson's California Evidence Benchbook, chap 42 (4th ed CJA-CEB 2009).

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### §5.7 b. Work-product protection

Material prepared by an attorney for the case is subject to qualified protection from disclosure to the adverse party as "work-product." CCP §§2018.010-2018.080. See *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1254, 245 CR 682. Also, CCP §2018.030(a) provides that a writing reflecting an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstance. See *Rico v Mitsubishi Motors Corp.* (2007) 42 C4th 807, 815, 68 CR3d 758 (paralegal's case summary and counsel's thoughts and impressions were absolutely privileged).

An opposing party may be able to obtain material subject to the work-product doctrine if that material is used to refresh a witness's recollection and if the witness is called to testify. See *Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 449, 120 CR 787 (work-product protection ceases when report is used to refresh witness's recollection and witness is then called to testify); *Kadelbach v Amaral* (1973) 31 CA3d 814, 821, 107 CR 720 (waiver of work-product protection when statement or recording is used to refresh recollection or is used offensively to cross-examine); Jefferson's California Evidence Benchbook, chap 43 (4th ed CJA-CEB 2009). See also Fed R Civ P 26(a)(2).

**PRACTICE TIP:** In spite of the risk, witnesses are often seen in the public areas of courthouses reviewing documents, including prepared questions and answers, in plain view of opposing counsel and parties. Avoid this practice to prevent the opposing side from demanding production of these documents.

On production of written questions prepared by party or party-related witness while reviewing material before attorney conference, see §5.6.

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## §5.8 B. Select witnesses

If several witnesses have perceived an event or a transaction, select the best one or two to testify. Factors to consider in making this selection include:

- Who best perceived the event;
- Who has the best recollection of the facts surrounding the event;
- Who has the best ability to communicate those facts;
- How sincere or credible the witness is likely to appear to the judge or jury;
- Whether effective impeachment material exists as to a particular witness;
- Whether a particular witness was deposed;
- How well the witness will stand up under cross-examination; and
- Who will be available to testify.

Plan the facts that must be established through each witness. Whenever possible, introduce evidence that will be disputed, as to either foundation or substance, through a witness other than the client. Using the alternative witness avoids the risks of exposing the client to vigorous cross-examination. A nonparty witness is also more likely to be credible because of a lack of motive and interest in the outcome of the case.

**PRACTICE TIP:** For each witness ask yourself: "Is this witness important? Why?" If the witness's testimony is not important or is merely cumulative of that of other witnesses, consider not calling this witness. A short and punchy presentation is usually more effective than a long, repetitive one.

See §5.19 for a witness examination plan.

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### 1. Competency of witness

### §5.9 a. Ability of witness

Some potential witnesses may not be competent to testify. If a witness cannot communicate in an intelligible fashion, either directly or through an interpreter, or is incapable of understanding the duty to tell the truth, the witness is not competent to testify. Evid C §701; *People v Willard* (1983) 155 CA3d 237, 240, 202 CR 100. In *Willard,* the court noted that a motion to voir dire a witness on competency should be denied when the motion is based on counsel's characterization of the witness's prior statements or "when made to inquire into other matters [that] are the proper subjects of cross-examination." 155 CA3d at 240. Temporary confusion or disorientation is not equivalent to incompetency. See *e.g., Sanders Constr. Co. v San Joaquin First Fed. Sav. & Loan Ass'n* (1982) 136 CA3d 387, 395, 186 CR 218 (diabetic witness was found competent even though momentary diabetic confusion and disorientation occurred while testifying).

**NOTE:** A child's competence to testify is challenged and established in the same manner as for any other witness. See *People v Harlan* (1990) 222 CA3d 439, 452, 271 CR 653; *In re Crystal J.* (1990) 218 CA3d 596, 601, 267 CR 105. See §5.11 for discussion of challenging and establishing competency generally. There is no minimum age for a child to testify. Evid C §700; *People v Jones* (1990) 51 C3d 294, 315, 270 CR 611. See §§5.45-5.47 for preparing young witnesses.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/§5.10 b. When witness is judge or juror, or other trier of fact

### §5.10 b. When witness is judge or juror, or other trier of fact

Other witnesses may be considered not competent to testify because of their position, *e.g.*:

- A presiding judge, or a juror who is sworn and impaneled, may not testify in that trial. Evid C §§703-704.
- A person presiding at any judicial or quasi-judicial proceeding, or an arbitrator, cannot testify in any subsequent civil proceeding as to any statement, conduct, decision, or ruling occurring at or in conjunction with the prior proceeding (Evid C §703.5) unless the statement or conduct could:
- Give rise to civil or criminal contempt;
- Constitute a crime;
- Be the subject of investigation by the State Bar or the Commission on Judicial Performance; or
- Give rise to disqualification proceedings under CCP §170.1(a).

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### §5.11 c. Show competence if challenged

A witness's competency is a preliminary fact to be determined under Evid C §405. See discussion of §405 hearings in §7.29; see discussion of burden of proving competency in §11.20.

**PRACTICE TIP:** If you anticipate a challenge to a witness's competency, call that issue to the judge's attention (*e.g.,* through a motion in limine; see chap 7) at the earliest possible time, so that the judge can make arrangements for a hearing.

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### §5.12 2. Personal knowledge of witness

With the exception of expert testimony, make sure the witness is testifying about a matter based on the witness's personal knowledge. Evid C §702(a). "'Personal knowledge' means a present recollection of an impression derived from the exercise of the witness's own senses." Comment to Evid C §702. If a party objects on the ground that a sufficient foundation as to personal knowledge has not been laid, "personal knowledge must be shown before the witness may testify" on the matter. Evid C §702(a).

A witness's personal knowledge is a preliminary fact to be determined under Evid C §403. See discussion of Evid C §403 hearings in §7.27; see discussion of burden of proving personal knowledge in §11.24. The ultimate determination of personal knowledge, however, is left for the jury. Evid C §403(c)(1); Comment to Evid C §403; see *People v Blagg* (1970) 10 CA3d 1035, 89 CR 446. See also 2 Witkin, California Evidence, *Witnesses* §46 (4th ed 2000).

**PRACTICE TIP:** It is usually not enough for the witness to answer yes to the question "Do you know this of your own personal knowledge?" You should ask questions that show how the witness gained the personal knowledge and you should be prepared to establish the personal knowledge of the witness through your examination:

Q: Did you see the defendant enter the intersection?

A: Yes.

Q: Where were you when you saw the defendant?

A: I was in a car directly behind him.

Q: What were you doing?

A: I was stopped at the red light at the intersection, waiting for it to turn green.

Q: What color was it?

If you ask the witness what color the light was first, make sure you then ask, "How do you know the light was red?"

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/§5.13 C. Decide whether to use expert

### §5.13 C. Decide whether to use expert

A witness testifying as an expert may offer an opinion when (Evid C §801(a)):

- The opinion is "[r]elated to a subject that is sufficiently beyond common experience"; and
- The expert's opinion would "assist the trier of fact."

**PRACTICE TIP:** When designating an expert under CCP §§2034.010-2034.730, be sure to provide sufficient notice of the potential subject areas of the expert's testimony. Failure to do so may result in the expert's testimony on a particular subject being excluded. If you need to expand the designated scope of an expert's testimony, move for leave to amend your expert witness declaration as soon as you realize you did not give sufficient notice of all subject areas on which the expert may testify. See *Bonds v Roy* (1999) 20 C4th 140, 83 CR2d 289 (expert witness testimony may be excluded if expert witness declaration did not provide sufficient notice of subject matter); *Easterby v Clark* (2009) 171 CA4th 772, 778, 90 CR3d 81 (evidence's proponent gave notice to opposing counsel 3 months before trial that expert would testify beyond deposition's scope).

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## §5.14 1. When useful to assist trier of fact

Expert opinion may be admitted even when the jurors have some knowledge of the matter if the opinion would assist them. Evidence Code §801 does not limit expert opinion testimony to subjects completely beyond common experience; rather, it limits expert testimony to such subjects "*sufficiently* beyond common experience" that expert opinion would assist the trier of fact. *Smith v Lockheed Propulsion Co.* (1967) 247 CA2d 774, 783, 56 CR 128. Thus, admissibility of expert opinion is a question of degree.

For detailed discussion of expert witnesses, see California Expert Witness Guide (2d ed Cal CEB 1991); Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009). For step-by-step instructions, see Effective Introduction of Evidence in California, chap 24 (2d ed Cal CEB 2000); Handling Expert Witnesses in California Courts (Cal CEB Action Guide May 2008).

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### §5.15 2. When expert opinion is necessary

"If the matter in issue is one within the knowledge of experts *only* and not within the common knowledge of laymen, it is necessary for the plaintiff to introduce expert opinion evidence in order to establish a prima facie case." *Carson v Facilities Dev. Co.* (1984) 36 C3d 830, 844, 206 CR 136, quoting *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 702, 106 CR 1. Failure to do so may result in a nonsuit or a directed verdict.

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### §5.16 3. When expert opinion is unnecessary

A court may exclude expert testimony on an issue that it believes can be resolved by reference to the common experience of the trier of fact.

**EXAMPLE 1:** Knowledge about child molestation, particularly sensitivities of victims and when they report the crime, is sufficiently beyond common experience that an expert's opinion would assist the trier of fact. *People v Dunnahoo* (1984) 152 CA3d 561, 577, 199 CR 796. However, veracity of those who report crimes to police, *e.g.,* a child/victim, is not a matter sufficiently beyond common experience to require expert testimony. *People v Sergill* (1982) 138 CA3d 34, 39, 187 CR 497.

**EXAMPLE 2:** The possibility that a prison inmate would lie is not beyond common experience to require expert testimony. *People v Johnson* (1993) 19 CA4th 778, 785, 23 CR2d 703.

**EXAMPLE 3:** No special expertise is required to show that a driver looking east down the road would have difficulty seeing oncoming westbound traffic when a sign creates an obstruction constituting a dangerous condition. *Carson v Facilities Dev. Co.* (1984) 36 C3d 830, 845, 206 CR 136.

**EXAMPLE 4:** The possibility that there might be a causal relationship between the presence of termites in plaintiff's home and her emotional distress would not require expert testimony. *Godfrey v Steinpress* (1982) 128 CA3d 154, 186, 180 CR 95.

**EXAMPLE 5:** Whether a defendant understood a discussion about protective custody would not require an expert's opinion. *People v Medina* (1990) 51 C3d 870, 886, 274 CR 849.

**EXAMPLE 6:** In the absence of extreme or unusual circumstances, such as a case in which the authenticity of a person's handwriting is the primary issue, jurors can compare handwriting and draw conclusions, with or without expert testimony. *U.S. v Alvarez-Farfan* (9th Cir 2003) 338 F3d 1043, 1045.

**EXAMPLE 7:** Whether a psychotherapist actually believed or predicted that a patient posed a serious risk of inflicting grave physical injury on a readily identifiable victim does not require expert testimony. *Ewing v Northridge Hosp. Med. Ctr.* (2004) 120 CA4th 1289, 1301, 16 CR3d 591.

**EXAMPLE 8:** The jurors in a wrongful termination case do not need expert testimony from a human resources management expert to determine whether the evidence includes "indicators" that the employer retaliated against the employee. *Kotla v Regents of Univ. of Cal.* (2004) 115 CA4th 283, 294, 8 CR3d 898.

**EXAMPLE 9:** Whether the size or shape of a crack in the sidewalk made it dangerous would not require an expert opinion. *Caloroso v Hathaway* (2004) 122 CA4th 922, 928, 19 CR3d 254.

**EXAMPLE 10:** Whether plaintiff's injuries would have been less severe had he been wearing a seat belt while using truck's sleeper berth does not require expert opinion. *Lara v Nevitt* (2004) 123 CA4th 454, 459, 19 CR3d 865.

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### §5.17 D. Consider attorney as witness

Under Cal Rules of Prof Cond 5-210, an attorney who knows or should know that he or she ought to be called as a witness in an action to be heard before a jury is prohibited from acting as an advocate in that matter unless:

- 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.

Rule 5-210 applies only to testimony in jury trials and does not apply (Discussion to Cal Rules of Prof Cond 5-210):

- In hearings before a judge;
- In nonadversarial proceedings, such as testimony before a legislative body; or
- In "circumstances in which a partner or associate in an advocate's firm will be a witness."

Note that Rule 5-210 does not prohibit counsel from acting as an advocate when another lawyer in the advocate's firm will be a witness. See Discussion to Cal Rules of Prof Cond 5-210.

When an attorney is called by the client to testify to matters that the attorney could have learned only because of the existence of the attorney-client relationship, the attorney-client privilege is waived. *People v Dubrin* (1965) 232 CA2d 674, 43 CR 60. The attorney may thereafter be cross-examined on any matter within the scope of his or her testimony elicited during direct examination. See also *People v Mickle* (1991) 54 C3d 140, 184, 284 CR 511.

If the client is the State of California or a governmental entity, counsel should obtain consent from the head of the office or a designee of the head of the office employing the attorney. Although Rule 5-210 does not require that the consent be filed with the court, trial counsel who may be called to testify in a jury trial should be prepared to produce the client's written consent to do so. See §6.113 for consent form.

ABA Model Rules of Prof Cond 3.7 is similar to Cal Rules of Prof Cond 5-210 except that it allows an attorney to act as a trial advocate when the attorney's disqualification would create a substantial hardship on the client.

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### E. Prepare witness trial materials

### §5.18 1. Witness files and information sheets

After deciding which witnesses to call, create and maintain a summary sheet listing certain basic information about each witness. The information should include the witnesses' business and home addresses, their phone and fax numbers, e-mail addresses, and information on their schedule and availability for deposition and trial. It may also include a brief description of their connection to the case, and the gist of their testimony. Place all information on each witness in a separate file or section of the trial notebook. See §3.28.

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## §5.19 2. Witness examination plans

Before preparing each witness, know precisely what is expected to be accomplished through that witness. Use the issue outline (see §3.17) to identify each witness likely to testify on the client's behalf and which documents and demonstrative evidence will be introduced through each witness. Choose the best witness to establish each important fact. See §5.8 on choosing witnesses.

Based on the issue outline and the exhibit files, develop a detailed examination plan for each witness, covering direct and cross-examination and anticipated rebuttal. To prepare the examination plans:

- Note each question either in substance, by key words, or verbatim, together with the expected response.

**PRACTICE TIP:** If you write out questions verbatim you will not have to extemporize during the heat of trial, but you will have to resist the temptation to simply read the questions at trial. See §11.15 on style of questioning.

- Anticipate objections to questions and note the applicable statutes and case law on potential evidentiary problems so that they will be accessible in making any necessary arguments to the court. If a more detailed legal memorandum is required to support your position, keep it in the legal research file (see §3.32) or in a section of the trial notebook. Note the memorandum's location in the plan's margin.
- Note the point in the examination at which an exhibit should be introduced.
- For anticipated rebuttal, make notes from the deposition and other documents that may help rehabilitate the witness or refute evidence that the opposing parties may offer.

Some attorneys write out questions, or outline areas of inquiry, before conferring with the witness. The use of written questions at trial is open to debate. Some attorneys believe their use inhibits spontaneity and may distract counsel's attention from the witness's answers. If you choose not to use written questions, then at a minimum prepare an outline or a checklist of important points to cover, and make sure you are thoroughly familiar with the expected testimony. Never "wing it." Careful preparation is essential.

When required, prepare questions necessary to lay a proper foundation for the introduction of evidence, *e.g.,* demonstrative or documentary evidence. See Effective Introduction of Evidence in California, chaps 11, 13 (2d ed Cal CEB 2000); Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008) for when a foundation is required. Review specific questions with the witness to avoid the embarrassment of having a witness answer a foundational question incorrectly.

When possible, make the questions short and direct, and use simple language (*e.g.,* "before" instead of "prior to"). Choose words for their impact on the trier of fact (*e.g.,* "collision" instead of "accident" in personal injury plaintiff cases). On framing questions generally, see §§11.50-11.62. See also Effective Direct & Cross-Examination §§2.2-2.4, 2.6-2.7 (Cal CEB 1986).

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### §5.20 F. Decide on order of witnesses and timing

In presenting the case, strategically place witnesses who make a good impression to maximize their impact on the trier of fact. It is generally preferable to:

- Open the case with a strong witness;
- Close each day's presentation with a strong witness; and
- Close the case with a strong witness.

Witnesses who do not make a favorable impression may be placed between two strong witnesses or used at a time when the trier of fact is less alert. Trial attorneys generally agree that at certain times of the day jurors are more alert than at other times, but they disagree on what these times are. The less than unanimous consensus appears to be that jurors are more attentive early in the morning, and less so in the middle afternoon. Try to take advantage of this factor in arranging the order of witnesses.

The most effective way to present a case is usually in chronological order. In addition, it is often better to call witnesses that establish liability first, followed by the damage witnesses, so as not to confuse the trier of fact. Nevertheless, structure the order of witnesses to create the greatest impact on the trier of fact.

**NOTE:** Occasionally, a friendly witness, whom you do not want to alienate, may be able to testify only at a particular date or time, and you will need to accommodate the witness's schedule. This problem may complicate your strategic ordering of witnesses, but you will have to balance the witness's needs with your presentation of the case.

Factors to be considered in deciding the sequence of witnesses include:

- Opening with a strong witness, because first impressions are important, and a good lead-off witness can put the case on a firm footing;
- Telling the story chronologically, so that the jury can follow it easily;
- Presenting an important witness at the end of the day or week, in order to leave the jury with a lasting impression (although a countervailing consideration is that the jury may be tired and have difficulty remembering the witness's testimony);
- Placing weaker witnesses in the middle of the proceedings where they will do the least damage, or where any damage can be rehabilitated later by other witnesses;
- Ending the presentation of evidence with a strong witness in order to create an impression that will stay in the jurors' minds as they begin deliberations;
- Presenting a witness whom the opponent is not prepared to cross-examine, thereby catching opposing counsel off guard;
- Presenting witnesses early who can lay the foundation for documents and other important evidence, about which later witnesses will testify;
- Presenting evidence of liability first, followed by expert testimony, and then evidence of damages;
- Calling adverse witnesses, if at all, after friendly witnesses have created a favorable impression (although a countervailing consideration exists if an adverse witness has given favorable deposition testimony; presenting that witness early may demonstrate at an early stage the weakness of the opponent's case); and
- Concluding with a strong witness.

If the client testifies last, he or she will have been able to observe the other witnesses and become more accustomed to the trial atmosphere. The client's recollection about a particular point may be refreshed by the latter stages of testimony. In addition, by testifying about damages in a direct, personal way, the client may leave a strong impression with the trier of fact. On the other hand, when other key witnesses testify first, the opposing attorney may conceive of additional pointed questions to ask the client during cross-examination.

On use of discovery, including presenting testimony by deposition or videotaped deposition, see chap 12. See also Effective Direct & Cross-Examination §2.5 (Cal CEB 1986).

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### §5.21 G. Assure attendance of witnesses at trial

Verify that each witness knows the location, date, and time to appear at trial to give his or her testimony. Make certain that all necessary subpoenas and subpoenas duces tecum, or notices in lieu of them when permitted (see CCP §1987), have been served. On compelling attendance of witnesses and production of evidence generally, see chap 4; on whether to subpoena friendly witnesses, see §4.3.

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## III. PREPARING LAY WITNESSES FOR TRIAL

### A. Witness conference with attorney

### §5.22 1. Timing and location

Meet with each witness you intend to call to testify at trial, and any other witnesses who are willing to meet with you, *e.g.,* witnesses whom you know will be called by the other side. The timing and location of the conferences may depend on the type of witness. However, insist that *all* witnesses, even busy professionals or executives, give adequate time to preparation. Schedule an initial conference with each witness early enough to allow additional meetings, if required.

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### §5.23 2. Single versus group conference; waiver of privileges

Typically, you will meet individually with each witness, but sometimes a group conference will be unavoidable, *i.e.,* you need to meet with a large number of witnesses in a short period of time. Different issues arise concerning the waiver of privileges in group meetings with parties and party-related witnesses as opposed to meetings with nonparty witnesses. See §§5.53, 5.65.

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## B. Conducting the conference

### §5.24 1. Witness gives initial narrative

As a first step, some attorneys find it helpful to encourage the witness to tell what he or she knows in narrative fashion, particularly if the attorney has not met face to face with the party or witness for many months or perhaps years. This is the time to objectively view the client or get to know the witness. By studying the witness's demeanor and style of delivery, you may gain insight for additional areas of preparation of the witness. In addition, the witness may relate something that was overlooked that could help or harm the case.

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### §5.25 2. Attorney directs remainder of conference

When the witness has finished talking, take over and direct the remainder of the conference. The witness should be instructed that his or her attention must now be directed toward actual trial preparation and that paying close attention will make testifying easier. Then begin preparing the witness for trial as explained in §§5.26-5.47.

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## §5.26 C. Preliminary matters

Generally, the more information a witness has about what it will be like in court, the better prepared and less nervous he or she will be. Advise each witness about courtroom procedures, attendance and conduct at trial, and issues covered in §§5.26-5.30. Explain that witnesses may not be allowed in the courtroom before they testify. See §§6.105-6.108.

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### §5.27 1. Goal: Put witness at ease

All witnesses are nervous to some degree. A few may even "freeze" on the stand. Excessive nervousness or freezing will distract a jury from the witness's testimony and may adversely affect credibility. To put them at ease, tell witnesses that it is perfectly normal to be nervous and that they should not be worried about it. Remind the witness that if he or she does not recall something important, you will ask a question designed to elicit the important fact. If the witness is still apprehensive after being prepared, consider encouraging the witness to attend a trial as an observer, which will often help allay fear.

**NOTE:** If the court excludes witnesses from the courtroom before they testify in your case, arrange for the witness to attend a different trial.

When an important witness is well prepared but is still apprehensive, consider conducting and videotaping a mock examination if time and resources permit. You can review the tape with the witness to give positive reinforcement and allow the witness to feel more confident about the process. Be aware, however, that this process might backfire and increase the witness's apprehension, especially if the videotape seems to highlight the witness's weaknesses.

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### §5.28 2. Courtroom basics

Be sure the witness knows the location of the courthouse and how to find the proper courtroom. If possible, explain how the courtroom is physically set up, *e.g.,* where the judge, jury, attorneys, and witness will sit. If desirable, meet the witness at the courtroom sometime before the witness is scheduled to appear in order to make sure the witness is familiar with the layout. Explain where to sit, when to stand, and how to step forward to be sworn.

Tell the witness who will be present during the trial, the roles they play (*e.g.,* the clerk, bailiff, court reporter, spectators), and who will give the oath. Witnesses and clients may want to know who will be present when they testify (*i.e.,* whether the opposing party will be there).

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### §5.29 3. Advise witness what to wear

Discuss with each witness what to wear to court. Usually, conservative attire is appropriate, such as a dark suit and tie for men and a tailored dress for women. Loud clothes and jewelry should be avoided.

A person's usual manner of dress can be altered, but only within limits. It is important for the witness to feel comfortable and natural in what he or she is wearing. A man wearing a suit for the first time may not be a good witness. A witness who feels "out of character" may communicate that to the trier of fact. In addition, it may be preferable for a witness to come to court in work clothes that emphasize the witness's daily activities. Whatever the witness wears, it should be neat and clean to convey proper respect for the court.

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### §5.30 4. Witness demeanor

Witnesses are subject to careful scrutiny by the jurors, both in the courtroom as well as surrounding areas. For example, a witness driving a flashy car while entering the courthouse parking lot may honk at a slow driver who turns out to be a juror. Jurors are especially sensitive to all behavior, on and off the witness stand. Instruct each witness on how to behave while in or near the courthouse. The following instructions might be given:

- Get a good night's rest, have a good meal before coming to court, and do not drink or take tranquilizers or medication unless required to by a doctor. Otherwise, your ability to communicate may be impaired.
- Report to the courtroom and be seated in the spectator section or, if witnesses are excluded, wait outside the courtroom until you are called.
- Do not read, chew gum, sleep, or talk during court proceedings.
- Do not wave or talk to the client or the attorney in the courtroom, hallways, or restrooms. You may appear partial to the client in the jurors' eyes, causing them to discredit your testimony.
- Do not discuss the case in the courtroom, hallways, or bathrooms, because jurors and others may overhear the discussion.
- Do not say anything at any time to a juror in or out of the courtroom. Unauthorized communications with jurors, directly or indirectly, may lead to a mistrial, a new trial, or reversal of a judgment. See, *e.g., People v Honeycutt* (1977) 20 C3d 150, 141 CR 698; *Walter v Ayvazian* (1933) 134 CA 360, 25 P2d 526. See also CCP §§611, 613.
- When seated in court, do not react to favorable or unfavorable testimony. The jury might notice grimaces and smirks.
- Do not pass notes to counsel while in court (although a client at the counsel table may make notes for counsel to read).
- When called to testify during direct examination, do not take any notes or papers to the stand unless the attorney has first reviewed them. See §§5.5-5.7.
- Always be courteous, especially if the opposing attorney is obviously hostile. The trier of fact is likely to be impressed if you stay cool under pressure.
- Do not argue or attempt to advocate a particular position. Be factual, direct, and straightforward. Leave advocacy to the attorney.
- Do not attempt any jokes while testifying; avoid even the mildest obscenity; avoid absolutely any ethnic, gender, or other slurs.
- On completion of your testimony, leave the courtroom. Do not wait for or attempt to talk to the client or the attorney. By leaving the courtroom immediately, you will appear to the trier of fact to be impartial. The jurors may interpret talking to the client or the attorney as bias and discount your testimony.

**NOTE:** This instruction may not always be appropriate. For example, in business litigation, especially when an individual is suing a corporation, it may be essential to have someone from the corporation sitting at the counsel table throughout the trial, preferably a key witness who projects well, to act as a liaison and a human embodiment of the corporate entity. In like manner, in automobile accident cases, many attorneys prefer plaintiff or defendant to remain in the courtroom during trial.

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## §5.31 5. Bringing family and friends to court

In certain cases (*e.g.,* wrongful death actions), it may be appropriate for family members to come to court for all or part of a trial. But as a general rule, instruct a party or party-related witness not to bring family or friends to court to see the witness testify. Any hushed conversations, waves, or winks will be noticed by the trier of fact.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/§5.32 D. General rules for testifying

## §5.32 D. General rules for testifying

Before reviewing the witness's proposed testimony, give the witness the general rules set forth in §§5.33-5.43. These rules are generally applicable to the preparation of any witness, not just a party or a party-related witness.

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### §5.33 1. Tell the truth

The first and most fundamental rule is to tell the truth. In addition to the obvious reasons, it is difficult to trick or trap a witness who tells the truth about everything. Tell the witness, for example, that it is customary, proper, and ethical for a witness to meet with the attorney before testifying. If asked during cross-examination whether such a meeting has occurred, the witness should answer yes. Take the same approach for every issue in the case.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/§5.34 2. Listen carefully to question and think before answering

### §5.34 2. Listen carefully to question and think before answering

Advise the witness to listen to each question carefully and to think and take time before answering. For a witness to think before answering, the witness must first understand the question. Accordingly, the witness should be instructed that it is not a sign of ignorance, weakness, or lack of cooperation to require reasonable clarifications of questions. The witness should be particularly aware of certain types of confusing questions, *i.e.,* questions with double negatives, compound questions, and questions that summarize or characterize the witness's previous testimony.

Additionally, instruct the witness to focus on answering every question accurately.

These admonitions serve four purposes:

- It gives you time to object, if necessary;
- Events at trial may require you to ask questions not previously discussed; only if the witness listens and thinks will the witness answer correctly;
- It avoids the appearance that the testimony was rehearsed; and
- If the witness thinks before answering, slips of the tongue are less likely.

Of course, pausing too long may give the trier of fact the impression that the witness is being too deliberate and is fabricating the testimony on the spot. One purpose of the conference is to establish a question and answer rhythm that flows, appears unrehearsed, and has a logical sequence.

**PRACTICE TIP:** Check local court rules for any rules or policies on instructions to give to witnesses. For example, in Los Angeles Ct R 8.78, attorneys are instructed to tell the witness to wait until the question is complete before answering and then to be responsive to the question.

Occasionally, a witness feels annoyed at having to spend valuable time in court testifying. As a result, the witness may try to hurry the proceedings along, often by trying to outguess counsel and the line of questioning. Such a witness, like other witnesses, must be warned not to anticipate questions and to let the examiner finish each question. Otherwise, the presentation of the case will suffer and the witness will not make a good impression on the trier of fact.

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### §5.35 3. Give complete, responsive answers but do not volunteer information

Advise the witness to answer only the question asked and not to volunteer information. Otherwise, the jurors may be diverted from the essential facts that you want to establish through the witness. Parties and party-related witnesses may especially seek to be helpful by volunteering information. Be sure to advise the witness that unsolicited testimony may be more helpful to the other side.

**PRACTICE TIP:** Again, check local court rules for any rules or policies on instructions to give to witnesses. For example, in Los Angeles Ct R 8.78 attorneys are instructed to tell the witness to be responsive to the question.

In rare situations you may want a witness to talk as much as possible. For example, if the witness has an extraordinarily winning personality, the use of questions permitting maximum self-expression may allow the witness to establish a rapport with the trier of fact. But for most witnesses, short direct questions seeking to elicit short responsive answers are preferable because they give counsel greater control over the presentation of the witnesses' testimony, making it easier for jurors to follow. Moreover, counsel has a greater likelihood of getting a desired response.

**NOTE:** The witness should be instructed not to argue with the opposing attorney when answering questions, because it will divert both the witness and the jury from focusing on the question and the truth in the answer. See §5.30 on witness demeanor.

If the witness is interrupted while answering a question, tell the witness to let the cross-examiner finish what he or she is saying, then courteously indicate that the witness had not finished answering and then calmly complete the answer. When the witness has finished answering, and the answer is accurate and complete, instruct the witness to stop speaking and wait for the next question.

If the cross-examiner appears confused or ignorant about the witness's occupation, or any technical terms used by the witness, it is up to the cross-examiner to ask a question. Instruct the witness not to attempt to educate the cross-examiner.

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### §5.36 4. Admit mistakes

Carefully explain to the witness that correcting one's testimony is not perjury and that a judge or jury will often be impressed by a witness who admits a mistake, even on a crucial point. It is far worse to espouse a point that can be disproved.

To catch any inconsistent statements the witness may have made, review the pleadings, depositions, witness statements, answers to interrogatories and requests for admission, and other documentation. Bring any inconsistencies to the witness's attention so that he or she will be properly prepared to deal with them on direct and cross-examination. For example, in an automobile accident case, a mistake might be corrected on direct examination as follows:

Q: How far from the intersection were you when you first saw the defendant?

A: More than 50 feet.

Q: Have you ever given anyone a statement on how the collision occurred?

A: Yes.

Q: When?

A: On the same day, right after the accident.

Q: To whom did you give the statement?

A: To a police officer.

Q: How far from the intersection did you tell the police officer you were when you first saw the defendant?

A: Five feet.

Q: Why did you say five feet?

A: Because the accident occurred so fast I thought it must have been a very short distance.

Q: Was that wrong?

A: Yes.

Q: Why?

A: It must be because I hit my brakes before the crash and slowed down, and I know it takes time to react, so it must have been more than five feet.

On preparing a witness to testify on direct examination concerning corrections to interrogatory or deposition answers, see §12.10.

**NOTE:** If the witness makes a mistake during direct examination, bring the mistake to his or her attention and correct it before cross-examination, if possible. On examining witnesses generally, see chap 11.

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## §5.37 5. Speak loudly

Tell the witness to speak loudly enough to be heard by the judge and the jury. To confirm that the jury can hear a soft-spoken witness, it may be wise to stand at the far end of the jury box while questioning the witness.

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### §5.38 6. Look at trier of fact, if possible

Instruct the witness to look at, and address his or her testimony to, the trier of fact, if possible. A witness who feels uncomfortable or unnatural doing this may be instructed to look at the examining attorney. Caution the witness never to look at the attorney who has called him or her when being cross-examined, because it may create the impression that the witness is being coached.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/§5.39 7. Answer from personal knowledge; do not guess

### §5.39 7. Answer from personal knowledge; do not guess

Some witnesses are afraid to say "I don't know" or "I don't remember," thinking that each question must have an answer. A skilled cross-examiner can be extremely effective with such a witness by asking and obtaining answers to increasingly ridiculous questions. Inform the witness that there may not be an answer to every question and that if the witness does not in fact know or remember the answer, he or she should say so. For a jury instruction on failure to remember, see CACI 107 (witnesses). On jury instructions generally, see chap 20.

Explain that the witness should testify only about what he or she personally saw or heard. Warn the witness about the dangers of testifying to matters known only by hearsay, *i.e.,* that such matters may be inaccurate and inadmissible. If testifying about a conversation, the witness should make clear whether he or she is paraphrasing or quoting directly. It is rare that a witness will remember a conversation verbatim.

**NOTE:** Remember to instruct the witness that if he or she does not understand the question or has any doubt about it, he or she should ask to have it restated.

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### §5.40 8. Testify "on the record"

Occasionally, during cross-examination, a witness who has been asked seemingly innocuous questions will then be asked a question for which there is no satisfactory answer. The witness then asks "Can we go off the record?" This response is worse than a harmful answer in that it highlights for the trier of fact a troublesome area in the case. Caution the witness against doing this. A witness should give the impression of being a neutral observer, not an advocate. Therefore, each question should be answered to the best of his or her recollection.

**NOTE:** This is more common during a deposition. Be sure to give this instruction to the witness before depositions and trial.

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## §5.41 9. Do not answer over objection

Instruct the witness that, if any attorney objects, the witness should stop talking until:

- The judge rules; and
- The witness is either asked a new question or instructed to answer the original question.

Occasionally, a witness who is impatient, short-tempered, or wants the trial to move more quickly will offer to answer a question over the objection of counsel. Caution the witness against doing this. Moreover, instruct the witness to answer more slowly and deliberately during cross-examination in order to give you time to interpose an objection, if necessary.

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### §5.42 10. Do not become hostile, especially during cross-examination

Warn the witness not to show anger or hostility at any time, and especially not during cross-examination. To help accomplish this, tell the witness that:

- You will object if opposing counsel is harassing him or her;
- The witness should ignore the tone of voice and attitude of the questioner and concentrate on the question;
- The jury will empathize with a witness and think ill of an attorney who badgers or argues with a witness; and
- The jury is interested in what the witness has to say.

Obviously, not showing anger or hostility is easier for some witnesses than others, but if you subject the witness to a skilled, penetrating practice cross-examination before the trial, the actual cross-examination may proceed more easily. See §5.64.

**PRACTICE TIP:** Emphasize that the witness should treat the attorney conducting the cross-examination politely. The witness should answer the questions responsively and not try to match wits with the cross-examiner. Nor should the witness appear to be an advocate for one side.

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### §5.43 11. Comply with court orders or rules

Review with the witness any ruling the judge has made on motions in limine. For example, if the court has ruled that no reference is to be made to certain matters, be sure the witness understands and neither deliberately nor inadvertently violates the court's order.

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### §5.44 E. Assess witness's personality

Evaluate the witness's personality to try to ascertain how his or her testimony will be received by the trier of fact, taking into account whether a bench trial or a jury trial is contemplated. Although it is impossible to change a witness's basic personality for purpose of trial, rough edges can be smoothed and offensive characteristics muted so that the case can be tried on the merits and not on the witness's personality. For example, it may be difficult for the trier of fact to empathize with a plaintiff who appears apathetic, remote, and unable to project. Instruct this type of witness to answer questions firmly and distinctly and not allow his or her voice to trail off at the end of an answer.

Similarly, a judge or jury may be rubbed the wrong way by an extrovert who is loud or cocky—in short, a "know-it-all." The attorney should initially flatter this type of witness by acknowledging his or her intelligence. Thereafter, instruct the witness to talk softly and modestly and not answer questions in a patronizing or condescending manner. Of course, certain witnesses have attractive qualities that the attorney may desire to work with. For example, an extrovert who is likable, pleasant, cheerful, and full of life may be asked questions that permit maximum self-expression.

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## F. Preparing young children as witnesses

### §5.45 1. Putting child at ease

A young child may be very frightened at the prospect of having to testify. Some attorneys, to help alleviate this fear, take the child and parents on a tour of the courtroom in which the trial will take place.

Analyze each child individually to determine how best to prepare that child. Some attorneys prefer merely talking with the child to learn what he or she remembers, while others prefer asking the child questions in a nonleading manner. It is hoped that by asking the child these questions, the child will be put at ease with answering questions. Counsel who use these methods believe that the child will naturally testify as to what he or she knows and that the testimony will not appear rehearsed.

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### §5.46 2. Types of questions

In appropriate circumstances, the court may allow an attorney to ask a child leading questions during direct examination to elicit accurate testimony. See, *e.g., People v Tober* (1966) 241 CA2d 66, 69, 50 CR 228; *People v Goff* (1950) 100 CA2d 166, 223 P2d 27. Similarly, leading questions may be permitted to refresh recollection. See Comment to Evid C §767. However, carefully prepare a young witness to testify and do *not* rely on the court's permitting you to lead the witness simply because the witness is young. Under Evid C §765(b), the court is required to take special care to protect witnesses under age 14 from undue harassment or embarrassment and to restrict unnecessary repetition of questions.

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### §5.47 3. Attorney-client privilege

The attorney-client privilege has been applied to statements made by a minor in response to questions asked by a guardian ad litem at the request of the minor's attorney, either to prepare the minor's answers to interrogatories or to help the attorney prepare for trial. See *De Los Santos v Superior Court* (1980) 27 C3d 677, 166 CR 172 (matters that minor communicates to attorney for purpose of prosecuting or defending action are subject to attorney-client privilege whether guardian obtains knowledge by presence at consultation between attorney and minor or secures information from minor for transmission to attorney). The rationale of *De Los Santos* appears to apply generally when preparing a minor to testify at trial.

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## IV. PREPARING PARTIES AND PARTY-RELATED WITNESSES

### A. Witness preparation before attorney conference

### §5.48 1. Have witness review materials

Parties to the action or party-related witnesses (see definition in §5.1) should review their depositions, any declarations or affidavits they have given, answers to interrogatories, documentary or physical evidence affecting their testimony, and all other discovery material that might be referred to during direct or cross-examination. Many of these witnesses may not have given concentrated thought to the case for some time. A review enables them to refresh their recollection of the facts, thus saving time during the actual conference. Bear in mind, however, that an adverse party may request production of any writing used to refresh memory with respect to matters on which a witness testifies. See Evid C §771. For further discussion, see §§5.5-5.7.

Some attorneys encourage party or party-related witnesses to write down questions that occur to them while reviewing the material to bring to the conference, rather than telephoning when questions arise. This raises the issue of whether these written questions must be produced when requested by an adverse party under Evid C §771. One position is that the questions are nondiscoverable because the questions themselves do not refresh memory and are part of the attorney-client privilege. On attorney-client privilege, see Evid C §§950-962. However, if the questions themselves do refresh the witness's recollection, the court may find them discoverable. See Evid C §771. See also §§5.5-5.7.

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### §5.49 2. When witness should review material

The nature of the case will dictate when the witness should review the materials. In complex cases, it may be desirable to have each key witness complete such a review several weeks before the trial, to allow sufficient time for proper preparation of all witnesses. In less complex cases, the witness may review the material closer to the time of trial. In simpler cases, some attorneys make an appointment about a week before trial for each witness to come to the attorney's office separately, at which time the witness reviews the material in a separate room. Then the attorney meets with the witness to prepare him or her for trial. On attorney conferences generally, see §§5.22-5.25.

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## B. Witness conference with attorney

### §5.50 1. Timing and location

As trial approaches, schedule conferences with each witness you intend to call to testify at trial. The conferences usually take place at the attorney's office. The timing and number of conferences depends on the nature of the case, the number of witnesses, the time required to prepare each witness, and the anticipated length of the trial. In a complex business litigation case, for example, one or more days may have to be devoted to the preparation of each key witness. Insist that *all* witnesses, even busy professionals or executives, give adequate time to preparation. Schedule an initial conference with each witness early enough to allow additional meetings, if needed.

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## §5.51 2. Individual versus group conference

Typically, you will schedule individual conferences with each person you intend to call as a witness at trial. See §5.52 for advantages of individual conferences. You may consider holding group conferences to save time, particularly with a large number of parties or party-related witnesses, but see §5.53 for disadvantages of group conferences.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/§5.52 a. Advantages of separate conference

### §5.52 a. Advantages of separate conference

Generally, preparing each witness individually has the following advantages:

- It allows the attorney to evaluate the relative strengths and weaknesses of each witness;
- It prevents each witness from using such similar language in his or her testimony that they appear to have been coached;
- It avoids clouding a witness's recollection about facts known personally compared to facts heard second-hand;
- It encourages each witness to disclose all he or she knows, when such disclosure might be inhibited by the presence of other witnesses; and
- It ensures that each witness receives sufficient individual preparation.

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### §5.53 b. Group conference: Waiver of privileges

Consider using a group conference to answer questions and review courtroom procedure either before or after all party-related witnesses have been separately prepared. Use great care in conducting this conference so as not to cause a waiver of the attorney-client or work-product privilege.

The attorney-client privilege extends only to communications made in confidence between client and attorney. Evid C §952. Anything you say to the client in preparation for testifying at trial is privileged, but the privilege is waived if the communication is revealed to a third person, unless that third person is:

- Someone who is present to further the client's interest;
- Someone to whom disclosure is reasonably necessary for the transmission of the information to the client; or
- Someone to whom disclosure is reasonably necessary to accomplish the purpose for which the attorney was consulted.

Evid C §952. See also *Cooke v Superior Court* (1978) 83 CA3d 582, 147 CR 915. In addition, the client waives the privilege if he or she discloses a significant part of the confidential communication to third persons, or consents to its disclosure. Evid C §912. See also *Lohman v Superior Court* (1978) 81 CA3d 90, 146 CR 171. On waiver generally, see Jefferson's California Evidence Benchbook, chap 37 (4th ed CJA-CEB 2009).

On special problems when the client is an entity, *e.g.,* a corporation, see *D. I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 36 CR 468; Evidence Benchbook, chap 37. On single versus group conferences for nonparty or nonparty-related lay witnesses, see §5.67.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/§5.54 C. General preparation

### §5.54 C. General preparation

Conduct general preparation for a party or party-related witness as with any lay witness as set forth in §§5.22-5.47, *e.g.,* give the party or party-related witness the general instructions on preliminary matters (see §§5.26-5.31) and the general rules on testifying (see §§5.32-5.43).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/ D. Prepare party or party-related witness for direct examination/ 1. Review witness examination plan/§5.55 a. Choice of witness

## D. Prepare party or party-related witness for direct examination

### 1. Review witness examination plan

### §5.55 a. Choice of witness

You should already know what facts must be established through each witness. See §5.19. However, after talking with the witness (see §5.24), you may choose to prove certain facts through one witness rather than another. For example, you may choose to introduce items of evidence that will be disputed, as to either foundation or substance, through a witness other than your client in order to avoid the risks of exposing the client to vigorous cross-examination.

**EXAMPLE:** In a domestic relations case, an accountant or a business partner, rather than a spouse, might be used to testify on the value of assets. In personal injury litigation, the plaintiff's attorney might use an employer to document lost wages.

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### §5.56 b. Review questions

At this point you may decide whether to write out questions or stick with your outline of areas of inquiry. The questions or outline may need to be revised, based on your initial discussion with the witness (see §5.24), your decision on which witness to use (see §§5.8-5.12), and your evaluation of the witness's personality (see §5.44).

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### §5.57 2. Review law with witness

Consider discussing with the witness aspects of the law that are applicable to the case or to the witness's testimony. Review the legal positions of all parties, not just your client's legal position. The witness's understanding of how his or her testimony fits into the rest of the case may provide a better perspective and make the witness feel more comfortable when testifying at trial.

**EXAMPLE:** In a contract suit involving a dispute about the formation of the contract, you may wish to explain the law on offer and acceptance. Similarly, in domestic relations proceedings, when property is in dispute, you may wish to explain the concept of separate and community property.

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### §5.58 3. Review facts with witness

Review with the witness all aspects of the case that are relevant to his or her testimony (*e.g.,* in a business case, review all *important* documents sent or received by the witness). Make sure that the facts are clear to both attorney and witness, and that both have the same understanding of the facts. Reviewing both favorable and potentially unfavorable aspects of the witness's testimony helps the witness's recollection and may prevent the witness from inconsistencies and errors that could be brought out on cross-examination.

In personal injury litigation, this review may include:

- A visit to the scene of the accident;
- Review of the facts giving rise to the injury;
- Complete review of past medical history;
- Review of the injuries arising from the accident; and
- Review of lost earnings.

**PRACTICE TIP:** A common tactic is to elicit potentially damaging testimony from a friendly witness on direct examination in order to blunt any adverse effect it may have if brought out during cross-examination. A witness's credibility is suspect when the witness can remember only the helpful facts.

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### §5.59 4. Review discovery with witness: Depositions, answers to interrogatories, and admissions

A review with the witness of his or her deposition, answers to interrogatories, and requests for admission will help the witness remember the facts and keep the witness from being trapped on cross-examination, *e.g.,* by inconsistencies, errors, or other misstatements. For the same reasons, review with the witness any verified pleadings and declarations or affidavits the witness has signed.

If deposition testimony has been previously corrected under CCP §2025.520(a)-(f) (see §12.8), many attorneys prepare the witness to testify about the corrections and the reasons for them during direct examination to try to diminish the effect of the corrections on the trier of fact when mentioned during cross-examination of the witness. A corrected deposition transcript, or a deposition transcript that has not been corrected within the time allotted in CCP §2025.520(a)-(f), may be used at trial. See §12.9. Note that when a deposition is recorded both stenographically and by audio or videotape, the stenographic transcript is the official record for the trial and any subsequent hearing or appeal. CCP §2025.510(g).

Similarly, if it is discovered during the witness's preparation that answers given at a deposition or answers to interrogatories are incorrect, many attorneys believe that the witness should be prepared to testify on direct examination about the corrections and the reasons for them. On effective use of discovery during trial generally, see chap 12.

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### §5.60 5. Review documentary and demonstrative evidence with witness

Show all documentary and demonstrative evidence relevant to the witness's testimony, including documents that may be the subject of cross-examination, to the witness and review it in detail. On an adverse party's right to inspect writings used to refresh recollection, see §§5.5-5.7. Having the witness review the evidence before trial may save valuable court time at trial. For example, when laying a proper foundation to introduce documentary evidence, the witness may need to read a 10-page document before being able to say whether it is the document in question. Instead, after having the document marked for identification, laying a foundation might be handled in the following manner:

Q: Have you reviewed this document before?

A: Yes.

Q: Where?

A: With you in your office.

Q: Does your signature appear on this document?

A: Yes.

Q: Where?

A: On the last page.

Q: Is this the contract between you and the defendant?

A: [*After looking at first page, last page, and signature*] Yes.

**NOTE:** Familiarize each witness with the court's exhibit-marking procedures. The witness will then either be prepared to testify on the authenticity of documents to be introduced into evidence or will understand that the exhibit has already been marked.

On examination of witnesses during trial, see chap 11.

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### §5.61 6. Decide whether witness should use notes

It is preferable that witnesses not take notes to the witness stand because the use of notes may distract the jurors and make the testimony less credible. In complex cases, referring to notes or summaries may be unavoidable. Instruct each witness not to take any notes to the stand without your knowledge. Review with the witness any such notes before the witness takes the stand. On production of writings used to refresh recollection, see §§5.5-5.7.

**PRACTICE TIP:** Remind the witness that it is not his or her job to remember all important points, or everything he or she has said in response to a question or in preparation to testify. Rather, it is your job to ask the proper question to cover all important points, and the witness need only answer the questions.

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### §5.62 7. Practice direct examination

After discussing every aspect of the case relevant to the testimony (see §§5.54-5.61), take the witness through a practice direct examination. Some attorneys conduct a practice examination at least twice. The initial examination is done slowly with time for interruptions, comments, questions, and suggestions. Even the most basic preliminary questions, such as address, age, and employment, are asked. Then the examination is redone without the interruptions, as though in court. If a witness will not testify until late in a long trial, it may be necessary to run through the witness's testimony again just before the witness testifies.

**NOTE:** Do not use leading questions. On leading questions generally, see §11.54.

During practice examinations, tell the witness that you might vary the order of the questions or phrase them in slightly different language at trial. Conduct the practice examinations in this fashion to avoid flat, dull testimony, and the appearance of having rehearsed the testimony. The goal of preparation is to help the witness testify in a natural and spontaneous manner.

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## E. Prepare party or party-related witness for cross-examination

### §5.63 1. Attorney preparation

In addition to what has been previously stated about attorney preparation (see §§5.2-5.21), prepare for cross-examination by trying to imagine all the ways in which the witness or the witness's testimony could be attacked. The attorney should try to imagine the methods that opposing counsel may use in mounting such attacks. For example, is the cross-examiner a shouter or soft-spoken? Will he or she try to intimidate the witness or quietly prepare a trap?

A strategy may then be devised to meet, blunt, or avoid the attacks. For example, you may decide to elicit potentially damaging testimony on direct examination to reduce its impact if it is brought out during cross-examination.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/§5.64 2. Witness preparation

### §5.64 2. Witness preparation

In preparing the witness to withstand cross-examination:

- Review all adverse evidence relevant to the witness's testimony and the manner and context in which it is likely to be raised;
- Instruct the witness that, before answering adverse counsel's questions about a document, the witness should ask to see it;
- Subject the witness to a practice cross-examination;
- Conduct the examination in a similar manner to that anticipated at trial;
- Ask questions that force the witness to discuss subject matter out of context;
- Push the witness and attempt to make the witness angry during the examination to simulate what the witness may face during trial; and
- Advise the witness not to be lulled into a false sense of security by a seemingly friendly or soft-spoken cross-examiner.

Anticipate all possible areas of inquiry and prepare the witness for any contingency. For example, although you intend to move in limine to prevent the opposing party from mentioning the witness's felony conviction during trial, prepare the witness to deal with questions about the conviction if the motion is denied. On motions in limine generally, see chap 7.

**PRACTICE TIP:** Some attorneys, not wanting to upset a witness or fearing a loss of confidence, have another attorney in the firm conduct the mock cross-examination.

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## V. PREPARING NONPARTY LAY WITNESSES

### §5.65 A. General preparation; no attorney-client privilege

The basic considerations of preparing parties and party-related witnesses apply to preparing other lay witnesses who are not parties or party-related. Conduct general preparation as with any lay witness as set forth in §§5.22-5.47, *e.g.,* give the general preliminary instructions (see §§5.26-5.31) and the general rules on testifying (see §§5.32-5.43). Review with the witness the relevant law and portions of the case so that he or she grasps the importance of his or her testimony. See §5.57.

Bear in mind, however, that the attorney-client privilege does not apply to communications made between a nonparty lay witness and the attorney during the witness's preparation. See Evid C §952. All discussions between counsel and the lay witness may be brought out at trial.

Contact nonparty lay witnesses well before the trial date to find out their availability. Because neither the attorney nor the client can exert control over such a witness, it may be necessary to prepare the witness at his or her home, in the evening, or on weekends, so as not to antagonize the witness or interfere with the witness's workday.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/§5.66 B. Witness preparation before attorney conference

### §5.66 B. Witness preparation before attorney conference

Send the witness a copy of:

- Witness's deposition, if one was taken; and
- Any statement the witness has given, including verified pleadings, declarations, and affidavits, if the opposition has a copy.

If the opposition does not have a copy of the witness's statement, it may be preferable not to send a copy of it to the witness to preclude opposing counsel from obtaining it under Evid C §771 as a writing the witness used to refresh his or her recollection. If the witness does use the statement to refresh his or her recollection, any work-product privilege that may have attached will have been waived. See §§5.5-5.7.

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### §5.67 C. Individual versus group conference

Generally, prepare the witnesses individually as you would with party and party-related witnesses. See §§5.51-5.52. However, as noted in §5.65, conversations between counsel and a nonparty or non-party-related lay witness are not subject to the attorney-client privilege. See Evid C §952. On attorney-client privilege and other issues arising from single versus group conferences, see §§5.51-5.52.

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### §5.68 D. Witness compensation

Occasionally, a witness's employer will refuse to pay the witness wages for time lost while testifying, or sometimes a witness will insist that he or she cannot afford to lose a day's wages or incur any other expenses to testify. In this situation, a party may, under Cal Rules of Prof Cond 5-310(B), agree to pay the witness:

- Expenses reasonably incurred by the witness in attending or testifying;
- Reasonable compensation for the witness's time lost in attending or testifying; and
- For an expert witness, a reasonable fee (see §5.83).

See Los Angeles County Bar Ass'n Informal Ethical Opinion 1954-6. See also §4.43. Doing so, however, may open the door for broad cross-examination on compensation, *i.e.,* whether the witness is being paid to testify, and possible bias. See *Crutchfield v Davidson Brick Co.* (1942) 55 CA2d 34, 130 P2d 183.

An attorney cannot condition the payment of a witness's fee on the content of the witness's testimony or on the outcome of the case. Cal Rules of Prof Cond 5-310(B). It is important to establish that reimbursement for expenses has already been paid, to avoid giving the impression that the attorney could withhold payment if the witness's testimony were unfavorable. "[A] contract to pay a witness for testifying where the payment is made contingent upon the success of the litigation is against public policy, since such a contract offers an inducement to perjury." *Pelkey v Hodge* (1931) 112 CA 424, 425, 296 P 908.

**NOTE:** For discussion of the prohibition against compensating an expert/consultant with a contingent fee arrangement, see *Ojeda v Sharp Cabrillo Hosp.* (1992) 8 CA4th 1, 10 CR2d 230.

If the witness is to be reimbursed, the subject might be approached on direct examination as follows:

Q: Have we met to discuss your testimony?

A: Yes.

Q: Are you being paid anything to come to court to testify?

A: Yes.

Q: How much?

A: I was paid _ _ _ _ _ _ dollars.

Q: What does that sum cover?

A: It covers _ _ _ _ _ dollars for overnight lodging, _ _ _ _ _ dollars for transportation, and _ _ _ _ _ dollars for lost wages.

Q: Has that sum been paid?

A: Yes.

**NOTE:** Some attorneys choose not to cover the subject on direct examination and simply leave it for cross-examination, believing that the trier of fact will give little weight to the fact that the witness was paid only out-of-pocket expenses.

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### §5.69 E. Direct and cross-examination

The same considerations for preparing party or party-related witnesses apply to preparing nonparty or non-party-related lay witnesses for direct and cross-examination. See §§5.55-5.64. On occasion, counsel may decide not to subject a friendly lay witness to a tough mock cross-examination, so as not to alienate the witness.

It is important to emphasize that the witness not try to be an advocate, but to testify truthfully and in a dispassionate manner. When finished testifying, the witness should leave the courtroom without talking to any party, any witness, or the attorneys. See §5.30.

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## VI. PREPARING EXPERT WITNESSES

### §5.70 A. Expert witness defined

A person is qualified to testify as an expert if he or she has enough special knowledge, skill, experience, training, or education to qualify as an expert on the subject to which the testimony relates. Evid C §720. An expert may testify in the form of an opinion. See Evid C §§721, 801-805. An expert may be a person with an academic background or may be a "lay expert," *i.e.,* someone who qualifies as such by reason of experience, with or without having earned a university degree in a particular area. See, *e.g., People v Smith* (1956) 142 CA2d 287, 298 P2d 540 (laboratory technician with 16 years' experience was qualified to give opinion involving learning and experience in chemistry although he held no university degree in that science).

**NOTE:** The court has power to limit the number of experts called by any party. See Evid C §723. See also *Horn v General Motors Corp.* (1976) 17 C3d 359, 371, 131 CR 78 (fifth expert witness's testimony in product liability action held cumulative and was appropriately excluded).

Sections 5.71-5.90 contain an overview of expert witness preparation for trial. For further discussion, see California Expert Witness Guide, chap 12 (2d ed Cal CEB 1991).

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### B. Attorney preparation

### §5.71 1. Ascertain matters on which opinion is based

Identify all documentation on which the expert bases his or her opinion. When possible, obtain copies of the documentation well before preparing the expert for trial. The documents may include interrogatories, depositions, medical reports, reports of opposing experts, financial data, wage history, blueprints, diagrams, and literature in the field. For matters on which expert testimony may be based, see Comment to Evid C §801; Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009); 1 Witkin, California Evidence, *Opinion Evidence* §30 (4th ed 2000).

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### §5.72 2. Understand terminology and subject matter

To properly prepare the expert, especially for cross-examination, become conversant in the expert's field. To do so, before preparing the expert, talk to other experts, read depositions and court testimony given by the expert in other cases, read the available literature, and actually experiment with any instrumentalities involved. An attorney who lacks a thorough understanding of the terminology and subject matter may be unable to phrase questions precisely enough to elicit the desired opinions. If necessary, before or during preparation, ask the expert for help in learning the terminology and the subject matter of the expert's field.

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### 3. Consider discoverability of expert's file

#### §5.73 a. Attorney work-product protection terminated when expert becomes a witness

Under CCP §2018.030(a), any writing that reflects the attorney's impressions, conclusions, opinions, legal research, or theories is absolutely privileged from discovery. Attorney work-product not in these categories is discoverable if the court determines that denial of discovery would unfairly prejudice the party seeking discovery in preparation for trial or would result in an injustice. CCP §2018.030(b). The work-product doctrine in CCP §§2018.010-2018.080 has been held to protect the work product not only during discovery, but also during testimony at trial. *Kizer v Sulnick* (1988) 202 CA3d 431, 440, 248 CR 712.

Bearing the above in mind, communications between the attorney and an expert hired as a consultant to assist the attorney in preparing the case constitute work product and are subject to the discovery limitations of CCP §§2018.010-2018.080. See *Sanders v Superior Court* (1973) 34 CA3d 270, 109 CR 770 (decided under former CCP §2016); *Scotsman Mfg. Co. v Superior Court* (1966) 242 CA2d 527, 51 CR 511 (same). Under CCP §§2034.010-2034.730, a party is not entitled to discovery of any information about an expert before the expert is actually named as a trial witness. See California Expert Witness Guide §8.18 (2d ed Cal CEB 1991).

**NOTE:** No work-product protection exists under CCP §§2018.010-2018.080 in an action between an attorney and client or former client if the work product is relevant to the issue of the attorney's breach of duty to the client arising from the attorney-client relationship. CCP §2018.080.

After it is reasonably certain that the consultant/expert will be a witness, however, the attorney work-product protection ceases to some extent. Generally, any product of the expert's services that qualifies him or her as an expert witness (*i.e.,* information and opinions, including reports from the expert respecting the subject matter about which the expert will be a prospective witness) is discoverable. See CCP §2034.270; *National Steel Prod. Co. v Superior Court* (1985) 164 CA3d 476, 489, 210 CR 535 (decided under former CCP §2016) discussed in §5.74. However, it is not clear whether the product of the expert's services rendered exclusively in an advisory capacity continues to be subject to the work-product doctrine. See *National Steel Prod. Co. v Superior Court, supra*. But see *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 857, 139 CR 888, in which the court, without distinguishing between the product of an expert's services rendered in an advisory or witness capacity, broadly stated that, once it becomes reasonably certain that the expert/consultant will testify, the attorney work-product protection ceases and the expert's knowledge and opinions are discoverable. It is generally accepted, however, that to the extent the reports embrace counsel's impressions and conclusions, the work-product doctrine gives absolute protection to that information. *Kizer v Sulnick, supra*. See *Shadow Traffic Network v Superior Court* (1994) 24 CA4th 1067, 1079, 29 CR2d 693. See also *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 649, 151 CR 399, criticizing *Brokopp v Ford Motor Co., supra*.

The initial designation of a party as an expert trial witness is not in itself an implied waiver of the party's attorney-client privilege. As long as the expert designation is withdrawn before the party discloses a significant part of a privileged communication, or before it is known to be reasonably certain that the party will actually testify as an expert, the privilege is not waived. However, if the party provides privileged documents or testifies as an expert, *i.e.,* by stating his or her opinion in a declaration or at a deposition, the privilege is waived. *Shooker v Superior Court* (2003) 111 CA4th 923, 930, 4 CR3d 334.

**NOTE:** Under Evid C §721(a), an expert may be cross-examined about matters on which the expert's opinion is based and the reasons for his or her opinion. Once an expert is called to the stand to testify, neither the attorney-client privilege nor the attorney work-product doctrine applies to matters relied on or considered by the expert in forming his or her opinion. *People v Milner* (1988) 45 C3d 227, 241, 246 CR 713.

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### §5.74 b. Expert who serves as both adviser and witness

When an expert's report contains information and opinions given to the attorney both in the expert's capacity as a prospective witness and as an adviser to the attorney in preparation of the case, the report is subject to the work product limitations on discovery of CCP §§2018.010-2018.080. See *National Steel Prod. Co. v Superior Court* (1985) 164 CA3d 476, 489, 210 CR 535 (decided under former CCP §2016). But see *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 857, 139 CR 888 (case discussed in §5.73).

An expert's report is considered to be advisory when it is designed to assist counsel in such matters as preparation of pleadings, the manner of presentation of proof, and cross-examination of opposing party's experts because these matters "are often reflective of the mental processes of the attorney." *National Steel Prod. Co. v Superior Court, supra*. A report that would qualify the author as an expert witness is one that contains the expert's findings and opinions that go to the establishment or denial of a principal fact in issue. *National Steel Prod. Co. v Superior Court, supra*. In *National Steel,* the court set forth the following three-step in camera inspection procedure for the judge to follow when deciding a claim of attorney work-product protection:

- The judge must decide whether the report in whole or in part reflects the attorney's impressions, conclusions, opinions, or legal research. If it does, it is absolutely privileged and cannot be discovered. If the report, or easily severable portions of it, does not reflect such attorney thoughts, the judge goes to the next step. 164 CA3d at 489.
- This and the next step apply only to the portions of the report that are not absolutely privileged. The judge decides which portions of the report are advisory and thus protected by the conditional work-product protection. The portions that are not advisory, if easily severable, are discoverable. 164 CA3d at 490.
- For the advisory portions of the report not subject to the absolute privilege, the judge decides whether good cause for its discovery exists that outweighs its conditional work-product protection. 164 CA3d at 490.

For further discussion of work-product doctrine for an expert hired as a consultant and later designated as a witness, see California Expert Witness Guide §8.16 (2d ed Cal CEB 1991).

On waiver of the attorney's work-product protection when material subject to it is used to refresh an expert's recollection, see §5.75. On procedure for disclosure of expert trial witnesses, demand for simultaneous exchange of information on each party's expert trial witnesses, and production of discoverable reports and writings made by an expert in the course of preparing that expert's opinion, see CCP §§2034.010-2034.730; California Expert Witness Guide, chap 10 (2d ed Cal CEB 1991).

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### §5.75 c. Waiver of attorney work-product protection based on refreshing recollection

If material subject to the work-product doctrine is used to refresh a witness's recollection and if the witness is called to testify, the attorney work-product protection is waived. See *Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 449, 120 CR 787 (work-product protection ceases when report is used to refresh witness's recollection and witness is then called to testify). See California Expert Witness Guide §8.14 (2d ed Cal CEB 1991); Jefferson's California Evidence Benchbook, chap 42 (4th ed CJA-CEB 2009). But see CCP §2018.030(a), which provides that a writing reflecting an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable in any circumstance.

On production of writings used to refresh a witness's recollection generally, see §§5.5-5.7.

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### §5.76 4. Review expert's file

Bearing in mind the discussion in §§5.73-5.75, carefully review all material in the expert's file before preparing the expert. Discuss with the expert in detail any material that is unclear or that appears to be detrimental to the case, to enable you to properly prepare the expert for direct and cross-examination.

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### §5.77 5. Review experiments, models, and demonstrations

Well before trial, verify with the expert the accuracy of any model or diagram the expert intends to use. Perform any planned experiments or demonstrations before trial to ensure that they will work at trial. On admissibility of experiments to support expert's opinion, see California Expert Witness Guide §§9.13-9.14 (2d ed Cal CEB 1991); Effective Introduction of Evidence in California, chap 23 (2d ed Cal CEB 2000); Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009). If a movie or slide projector or like machinery will be used during trial, it should be tested in the courtroom before trial begins. For discussion of documentary and demonstrative evidence generally, see chap 13.

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### C. Prepare expert for direct and cross-examination

### §5.78 1. Review with expert: Qualifications, publications, and other testimony

Review with the expert his or her qualifications to make sure that the expert will qualify as such at trial. For this purpose, the following checklist may be used for an expert with academic credentials:

- Formal education and courses taken, degrees received, and educational honors;
- Continuing education;
- Teaching positions held;
- Professional licenses held (*e.g.,* member of the State Bar, licensed to practice medicine);
- Professional societies;
- Publications;
- Practical experience;
- Employment history; and
- Testimony given in other cases.

On general qualifications to testify as an expert, see Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009). On qualifying expert during trial, see §11.130.

Review every relevant article or book written by the expert and, when feasible, all relevant testimony given by the expert in other cases or proceedings. If anything is discovered that conflicts with the expert's anticipated testimony, discuss it with the expert, and be prepared, if possible, to distinguish it at trial. See §5.90.

In many cases, it is advisable to have the expert witness prepare an up-to-date resume or curriculum vitae for trial. Generally, the summary need not be submitted to the court before the expert testifies. Consult local court rules. Requesting an updated curriculum vitae may reveal new publications that should be reviewed for consistency with the expert's testimony.

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### §5.79 2. Explain applicable law

Explain to the expert all legal theories and defenses relevant to the issues on which the expert will testify. Doing so will help the expert to formulate a learned opinion, to understand the relevancy of his or her testimony, and to avoid being trapped on cross-examination. In addition, explain the relevant legal definitions so that the expert's opinions are not based on an incorrect view of their legal effect.

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### 3. Review opinion

### §5.80 a. Phrasing opinion

Many experts deal in areas that have no absolutes, and are reluctant to express opinions without scientific certainty. When asked an opinion on a critical issue, an expert may say: "Medicine is an inexact science," or "I cannot be sure." Advise the expert that scientific certainty is not required in a court of law before an expert may express an opinion. *People v Jackson* (1971) 18 CA3d 504, 507, 95 CR 919.

The expert's testimony must, however, rise above an expression of mere possibilities. *Jones v Ortho Pharmaceutical Corp.* (1985) 163 CA3d 396, 209 CR 456 (reasonable medical possibility was not enough). See also *Cottle v Superior Court* (1992) 3 CA4th 1367, 5 CR2d 882 (reasonable medical probability was sufficient); *Abuan v General Elec. Co.* (9th Cir 1993) 3 F3d 329 (reasonable degree of medical certainty required). For further discussion see California Expert Witness Guide §§5.1-5.10 (2d ed Cal CEB 1991).

The expert should be encouraged to express his or her opinion in positive terms, if possible, and avoid opinions phrased in terms of "could," "possibly," or "might be reasonable." See, *e.g.*, *Jennings v Palomar Pomerado Health Sys., Inc.* (2003) 114 CA4th 1108, 1115, 8 CR3d 363 ("[I]t just sort of makes sense" that retractor caused infection not admissible expert opinion as to causation). An expert's opinion phrased in probabilities rather than possibilities, however, may be sufficient to meet the burden of proof. See, *e.g., Estate of Rowley* (1967) 257 CA2d 324, 65 CR 139 (medical expert's opinion on probabilities sufficient to support finding of survivorship).

The burden of proof in a civil case is usually by a preponderance of the evidence, unless otherwise provided by law. Evid C §§115, 502; Jefferson's California Evidence Benchbook, chap 47 (4th ed CJA-CEB 2009). On the preponderance-of-evidence standard, see §10.6; 1 Witkin, California Evidence, *Burden of Proof and Presumptions* §§35-37 (4th ed 2000).

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### §5.81 b. Expert opinion on ultimate issue or legal conclusions

Evidence Code §805 provides that "testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of the fact."

**EXAMPLE 1:** In a breach of contract action, an expert could testify to the "custom and usage" in the business even if that testimony embraced the ultimate issue. *Ecco-Phoenix Elec. Corp. v Howard J. White, Inc.* (1969) 1 C3d 266, 271, 81 CR 849.

**EXAMPLE 2:** In a negligence action, an expert could state whether a given operation was a safe practice; if the subject is beyond jurors' common knowledge, the expert may express an opinion on the ultimate fact in issue if the expert has such opinion. *State Compensation Ins. Fund v Operated Equip. Co.* (1968) 265 CA2d 759, 765, 71 CR 531.

**EXAMPLE 3:** In an insurance "bad faith" case, it was not error for plaintiff's experts to give an opinion on whether defendant insurance carrier's conduct constituted bad faith. *Neal v Farmers Ins. Exch.* (1978) 21 C3d 910, 924, 148 CR 389.

On the other hand, a court may preclude an expert witness from testifying on the ultimate issue of fact when the jurors are fully capable of deciding the issue based on their own common experience.

**EXAMPLE 1:** The court excluded expert testimony on whether a road constituted a dangerous condition because the jurors, using their own experience, could decide that issue; thus, expert opinion was not needed on that ultimate question. *Kennemur v State* (1982) 133 CA3d 907, 926, 184 CR 393.

**EXAMPLE 2:** An expert was permitted to testify on general principles of social psychology but was not allowed to give an opinion on a confession's reliability; having educated the jurors, they were as qualified as an expert to make the decision. *People v Page* (1991) 2 CA4th 161, 2 CR2d 898.

**EXAMPLE 3:** Permitting a human resources management expert to testify that certain facts in evidence in a wrongful termination case were "indicators" of employer retaliation was an abuse of discretion; the expert was in no better position than the jurors to evaluate the evidence and, absent unusual facts, jurors in employment discrimination cases can decide a party's motivation for themselves. *Kotla v Regents of Univ. of Cal.* (2004) 115 CA4th 283, 291, 8 CR3d 898.

A court may exclude expert testimony when it relates to legal conclusions. Applying the law to particular facts is a legal question that is not subject to expert opinion. To allow expert opinion in such circumstances would usurp the trial court's duty to instruct jurors on the application of the law to particular facts. *Summers v A.L. Gilbert Co.* (1999) 69 CA4th 1155, 82 CR2d 162 (attorney testifying as expert witness on issues of law usurped judge's responsibility to instruct jury on applicable law); *Downer v Bramet* (1984) 152 CA3d 837, 841, 199 CR 830 (court excluded expert testimony from two attorneys on whether ranch conveyed to husband by his employer constituted deferred compensation or gift). See *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 884, 254 CR 336 (error for attorneys to be called as expert witnesses to give opinions on probable cause element of malicious prosecution tort).

For further discussion on what may properly be the subject of expert testimony, see California Expert Witness Guide §§2.1-2.5, 2.8, 2.10 (2d ed Cal CEB 1991).

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### §5.82 4. Demeanor

Experts are subject to the same personality quirks as other witnesses. An expert who is arrogant and refuses to admit the possibility of reasonable differing opinions may be discredited in the eyes of the trier of fact. The converse is also true. An expert who concedes points that should be defended may not be effective. A balance must be struck between appearing too authoritative and too unsure.

To help achieve this balance, assist the expert in marshaling as many facts as possible to buttress the expert's opinion. However, the expert should not be made to feel that his or her professional reputation depends on the outcome of the lawsuit. The expert witness should appear to the trier of fact to be impartial. Counsel should instruct the expert:

- Not to render opinions outside his or her field of expertise;
- To answer all questions on direct and cross-examination politely and succinctly without being humorous, evasive, or combative; and
- To avoid technical language whenever possible, so that the trier of fact can better understand the testimony. If technical language is necessary, the expert should be asked to define it or to discuss its meaning. For further discussion of witness demeanor, see §5.30.

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### §5.83 5. Compensation

Compensation to be paid an expert for his or her time is usually agreed on before preparing the expert for trial. It is against public policy to condition payment of the expert's compensation on the success of the litigation. *Pelkey v Hodge* (1931) 112 CA 424, 296 P 908. See Cal Rules of Prof Cond 5-310(B). On court-appointed experts and their compensation, see Evid C §§730-733. On the requirement that the party requiring the appearance of another party's expert compensate that expert, and for exceptions, see Govt C §68092.5 (trial or hearing fees) and CCP §§2034.440-2034.460 (deposition fees). See also §4.43.

Instruct the expert to be candid about compensation. Attorneys often attempt to bring out the fact and the amount of compensation during direct examination to avoid the expert's testimony being discredited by its disclosure during cross-examination. On direct examination of expert about compensation, see §11.145.

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### §5.84 6. Review facts and bases for expert's testimony

Evidence Code §§801-804 set forth the permissible bases for an expert's opinion. Under Evid C §801(b), an expert may testify in the form of an opinion based on matters that are:

- Perceived by or personally known to the witness or made known to him or her at or before the hearing, whether or not admissible (including the witness's special knowledge, skill, experience, training, and education);
- Of a type that may reasonably be relied on by an expert in forming an opinion; and
- Not precluded by law from being used as a basis for his or her opinion.

If a portion of the matter relied on by the expert is improper, his or her opinion may nevertheless be admissible if a proper basis remains for the opinion, excluding from consideration the improper portion. Evid C §803. For further discussion of the bases for an expert's opinion, see §§11.134-11.139; California Expert Witness Guide, chap 4 (2d ed Cal CEB 1991); Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009).

Discuss the principles expressed in Evid C §§801-804 with the expert and then critically review all material on which the expert's opinion will be based. (This process helps to prevent objections to the expert's testimony at trial on the ground that the expert's opinion is based on improper matter.) Then review with the expert all facts and assumptions relevant to the expert's testimony, depositions taken of the expert in the present case, the expert's opinion, and all the reasons for the opinion. At trial, during direct examination, the expert may testify as to the reasons for his or her opinion and the matter on which the opinion is based. Evid C §802.

Review with the expert all publications referred to, considered, or relied on by the expert in forming his or her opinion. If they are at all inconsistent with the expert's testimony, discuss the inconsistencies with the expert, and, if possible, distinguish them at trial. See §5.90. During trial, the expert may be cross-examined on the contents of those publications. Evid C §721(b)(1)-(3). See §11.151.

Learn whether the expert has given prior testimony or depositions that may be inconsistent with his or her testimony in your case. If so, prepare the expert to explain the discrepancy.

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## §5.85 7. Using hypothetical questions to elicit opinion

Decide whether it is necessary to use a hypothetical question to elicit the expert's opinion. If it is not necessary, many attorneys prefer not to use such a format. See §11.144.

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### §5.86 a. What facts to use

A hypothetical question may be used to make facts known to an expert who does not possess personal knowledge, to enable the expert to testify in the form of an opinion. See Evid C §801(b). To avoid having opposing counsel object to the hypothetical question, the facts assumed in it must be shown by the evidence. *People v Denman* (1918) 179 C 497, 177 P 461. The question may be framed to accord with your theory of what the material facts are as shown by that evidence, and it need not include all the evidence. *People v Hill* (1897) 116 C 562, 566, 48 P 711. See also *Treadwell v Nickel* (1924) 194 C 243, 228 P 25.

For further discussion, see Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009).

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### §5.87 b. Prepare in advance

Hypothetical questions should be prepared before trial. It is helpful to write them out. The expert may assist in preparing the question to be sure that the question is technically accurate and complete. Review with the expert in detail:

- The hypothetical question;
- Each assumed fact in it;
- The theory on which the question is based;
- The expert's opinion; and
- The expert's reasons for the opinion.

**PRACTICE TIP:** Local court rules or policies may have some requirements concerning hypothetical questions, *e.g.,* that counsel who proposes to ask an expert a hypothetical question first submit the question in writing unless the court directs otherwise. Ascertain before trial whether any local rules or policies cover hypothetical questions and whether the trial judge has any requirements in this regard. See, *e.g.*, Los Angeles Ct R 8.85 (hypothetical questions need not be submitted in writing unless requested by judge).

**PRACTICE TIP:** During the chambers conference, ask whether the trial judge has any requirements on hypothetical questions, *e.g.,* that they be prepared and submitted in advance in written form.

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### §5.88 c. Anticipate questions about expert's prior review of hypothetical question

At trial, the credibility of the expert's testimony may be questioned by the trier of fact if it is not brought out on direct examination that the expert has reviewed the hypothetical question beforehand. Consider bringing this issue out on direct examination in the following manner:

Q: In our discussion last week, did I ask you to assume that certain facts are true?

A: Yes.

Q: What did I ask you to assume as true?

A: [*Expert relates assumed facts.*]

Q: Based on these assumed facts, do you have an opinion on whether the defendant's conduct fell below the standard of care of physicians practicing neurology in this area?

A: Yes.

Q: What is your opinion?

A: [*Expert gives opinion.*]

Q: Would you please explain the reasons for your opinions?

A: [*Expert discusses reasons*.]

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### §5.89 d. Anticipate cross-examination on hypothetical question

Opposing counsel may attempt on cross-examination to discredit the expert's opinion by changing the assumed facts embraced within the hypothetical question so as to conform to the cross-examiner's theory of the case, or to ask the expert whether his or her opinion would be different if one of the assumed facts were lacking. Anticipate the thrust of cross-examination and prepare the expert accordingly. See §5.90.

Hypothetical questions asked on cross-examination containing facts not shown by the evidence are objectionable. See *McCann v Children's Home Soc'y* (1917) 176 C 359, 168 P 355; *MacCoy v Gage* (1918) 38 CA 672, 177 P 296. Wide latitude is permitted in testing an expert's credibility, however, and an exception to the rule (cannot use facts not in evidence) appears to apply when the purpose of the hypothetical is to test the expert's accuracy or competency, as long as the hypothesis in the question is supported by some evidence. *People v Busch* (1961) 56 C2d 868, 874, 16 CR 898 (evidence, although meager, supported hypothesis). For further discussion on use of hypothetical questions on direct and cross-examinations, see §§11.141, 11.147. See also California Expert Witness Guide §§13.9-13.12, 15.29-15.31 (2d ed Cal CEB 1991).

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### §5.90 8. Practice direct and cross-examination

Practice direct and cross-examination with the expert. Arrange questions in a sequence that maximizes the expert's impact on the trier of fact. Verify with the expert that the wording in each question is technically accurate and that you both agree on its meaning. When technical language cannot be avoided, have the expert define it for the trier of fact. See §§11.130-11.145 for the content of direct examination of an expert.

Be sure to anticipate cross-examination of the expert by opposing counsel. An expert may be cross-examined to the same extent as any other witness. Evid C §721(a). In addition, under §721(a), an expert may be fully cross-examined as to:

- The expert's qualifications;
- The subject to which his or her expert testimony relates; and
- The matter on which the expert's opinion is based and the reasons for his or her opinion.

The cross-examiner may also ask about the expert's compensation. Evid C §722(b). See §11.148 for the content of cross-examination of an expert witness.

Carefully review all facts and bases of the expert's opinion (see §5.71), and all assumed facts within any hypothetical question (see §5.86), with a view toward anticipating cross-examination. If the expert is not properly prepared for cross-examination, the expert's testimony may be discredited. The following sample cross-examination in a personal injury case by plaintiff's attorney of defendant's medical expert illustrates this point:

> Q: You testified in answer to a hypothetical question that in your opinion, Mr. _ _ _ _ _ _'s injuries were not caused by the accident but rather by the natural progression of preexisting arthritis.
>
> A: Yes.
>
> Q: It was assumed that he had a flare-up of symptoms without associated trauma a year and a half after the accident.
>
> A: Yes.
>
> Q: I would like to change that assumption. Assume no flare-up of symptoms occurred a year and a half after the accident. Would your opinion change?
>
> A: Yes.
>
> Q: Would it be your opinion that, if there were no sudden flare-ups without trauma, all of Mr. _ _ _ _ _ _'s symptoms would be due to this accident?
>
> A: Yes, that would be a fair way to state it.
>
> Q: Please show me in the medical records where plaintiff complained of a sudden flare-up of symptoms without associated trauma.
>
> A: [*After many minutes of review in silence, with much page flipping*] There are no such entries.

The cross-examiner might then continue to emphasize the point. On cross-examining expert generally, see §§11.146-11.151.

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## VII. ETHICAL CONSIDERATIONS

### A. Potential perjury by client

### §5.91 1. Understand professional rules

An attorney may not knowingly allow a witness to testify falsely. See Bus & P C §6068(d); Cal Rules of Prof Cond 5-200; *In re Branch* (1969) 70 C2d 200, 74 CR 238; *People v Pike* (1962) 58 C2d 70, 22 CR 664. To do so may subject the attorney to criminal prosecution and disciplinary proceedings. See Pen C §127 (subornation of perjury); Bus & P C §§6077, 6106, 6128(a); *In re Branch, supra*; *In re Jones* (1929) 208 C 240, 280 P 964. See also *In re Allen* (1959) 52 C2d 762, 344 P2d 609. "[A]n attorney owes no duty to offer on his client's behalf testimony which is untrue." *In re Branch* (1969) 70 C2d 200, 210, 74 CR 238. See *People v Davis* (1957) 48 C2d 241, 309 P2d 1.

Under Cal Rules of Prof Cond 5-200, an attorney, when presenting a matter to a tribunal:

> (A) Shall employ, for the purpose of maintaining the causes confided to the member, such means only as are consistent with truth;
>
> (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law.

See also Bus & P C §6068(d), which uses similar language.

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### 2. What to do if perjury threatened

#### §5.92 a. Explain ramifications of perjury

An attorney who discovers that a client intends to commit perjury should try to persuade the client not to, explaining the possible ramifications (*e.g.,* adverse impact if perjury is learned on cross-examination, prosecution for perjury). In *People v Brown* (1988) 203 CA3d 1335, 1339 n1, 250 CR 762, the court noted that an attorney must first try to persuade the client to testify truthfully and if unsuccessful the client must be advised of the consequences of perjury and that the attorney will be forced to move to withdraw if the client still intends to testify falsely. See §5.93. However, in *People v Johnson* (1998) 62 CA4th 608, 623, 624, 72 CR2d 805, the court declined to follow *People v Brown* and offered the narrative approach, in which the attorney allows the defendant to take the stand but does not participate. The defendant testifies in a free narrative manner and in the closing argument the attorney does not include any of the defendant's false testimony. In *People v Jennings* (1999) 70 CA4th 899, 83 CR2d 33, the court allowed the defendant's attorney to limit the scope of his direct examination based on the understanding that further questions might result in the defendant testifying falsely. See also *People v Guzman* (1988) 45 C3d 915, 944 n8, 248 CR 467, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409. On ethical considerations after client has already committed perjury during trial, see §§11.155-11.161.

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### §5.93 b. Withdraw from representation

Under Cal Rules of Prof Cond 3-700(B)(2), the attorney's withdrawal is mandatory if the attorney knows or should know that his or her continued employment will result in violating the Rules of Professional Conduct or the State Bar Act (Bus & P C §§6000-6228).

Even if it is unclear whether continued employment will result in a violation of the Rules of Professional Conduct, Cal Rules of Prof Cond 3-700(C) provides in part that the attorney may withdraw if the client "seeks to pursue an illegal course of conduct … insists that the member [of the State Bar] pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act," or if continued employment may "result in a violation of these rules or of the State Bar Act."

If, after you explain the ramifications of perjury to the client (see §5.92), the client still insists on testifying falsely, it appears that the attorney must attempt to withdraw except as discussed in §5.94. Business and Professions Code §6068(e) provides that it is the attorney's duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (For definition of "confidence" and "secret," see §11.153.) Therefore, withdrawal from further representation must be done in such a manner as to avoid foreseeable prejudice to the client's rights. See Bus & P C §6068(d)-(e); Cal Rules of Prof Cond 3-700(A)(2), (B)(2), 5-200. See also Cal Rules of Prof Cond 3-700(C)(1)(b)-(c), (2).

If the client will not consent to your withdrawing from representation, be sure that your motion to withdraw does not disclose that the client intends to commit perjury, because the intention to commit perjury would probably be construed under Bus & P C §6068(e) to constitute at least a "secret" if not a "confidence." See Bus & P C §6068(e); Cal Rules of Prof Cond 3-700(A)(2); Los Angeles County Bar Ass'n Ethical Opinion Nos. 436 (Apr. 15, 1985), 417 (June 15, 1983), 353 (Feb. 12, 1976), 305 (July 25, 1968), 274 (Oct. 25, 1962), 267 (Jan. 26, 1960), 264 (July 30, 1959); §11.153. See also Evid C §§952, 954; *People v Singh* (1932) 123 CA 365, 11 P2d 73; State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 86-87. But see *People v Brown* (1988) 203 CA3d 1335, 250 CR 762 (defense counsel, during in camera hearing on his motion to withdraw, said he had told defendant that, if defendant testified as proposed, counsel would be suborning perjury; court noted that counsel acted according to ethical obligations of member of legal profession).

**NOTE:** An attorney has no duty under California rules to disclose prospective perjury. Although an attorney may have a duty to disclose future crimes, disclosure of future crimes is only permitted when the crime is likely to result in imminent death or substantial bodily harm. See Los Angeles County Bar Ass'n Ethical Opinion Nos. 436 (Apr. 15, 1985) (departure from standard expressed in earlier opinions), 353 (Feb. 12, 1976)).

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### §5.94 c. Refuse to call client as witness

Instead of attempting to withdraw as indicated in §5.93, if the client cannot be dissuaded from committing perjury, consider explaining that you will not call him or her to testify or will only call him or her to testify on matters that he or she will testify to truthfully.

This approach will force the client to choose whether to continue with or terminate your employment. If the client decides to continue your employment, consider not calling the client to testify at trial or only calling him or her to testify on matters that could be testified to truthfully, although the client might argue that you do not have the authority to make a tactical decision as to whether to call a particular witness. However, there is some case law authority to support the position that when the attorney considers it to be detrimental to the client's best interests to call that witness, the attorney can refuse to call him or her even if the client voices opposition in court. See *Blanton v Womancare, Inc.* (1985) 38 C3d 396, 404, 212 CR 151; *Nahhas v Pacific Greyhound Lines* (1961) 192 CA2d 145, 13 CR 299. See also *Linsk v Linsk* (1969) 70 C2d 272, 277, 74 CR 544.

On the other hand, an attorney, unless specifically authorized to do so, cannot impair the client's substantive rights or causes of action. See *Blanton v Womancare, Inc., supra*; *Linsk v Linsk, supra*. Although it is unlikely when dealing with the issue of potential perjury that a court would construe an attorney's refusal to call a witness as an impairment of the client's substantive rights or cause of action, there is no California case on point. However, the safest practice is for counsel to attempt to withdraw (see §5.93) if the client cannot be persuaded not to commit perjury.

Before deciding to call a client to testify only on matters that the client will testify to truthfully, be aware that the client may commit perjury on cross-examination. Consequently, also advise the client against such perjury and discuss with the client beforehand the procedure that you will have to follow if perjured testimony is brought out during cross-examination, *i.e.,* withdraw. See §§5.92-5.93.

**NOTE:** ABA Formal Opinion No. 87-353 (Apr. 20, 1987) is silent on whether disclosure of potential perjury in a withdrawal motion would violate the confidentiality protection of ABA Model Rules of Prof Cond 1.6. However, the opinion notes that, if the attorney is unable to effectively withdraw, he or she can refrain from calling the client to testify if all the testimony will be false. If only some of the testimony will be false, the attorney can call the client to testify and elicit testimony on only the subject matter that will not produce the false testimony. See *Nix v Whiteside* (1986) 475 US 157, 89 L Ed 2d 123, 106 S Ct 988 (attorney dissuaded client from giving false testimony by threatening to disclose intended perjury to court and by stating that he would withdraw if client so testified). Note that neither the ABA Model Rules of Professional Conduct nor *Nix v Whiteside* is binding on California attorneys in state court actions. *People v Guzman* (1988) 45 C3d 915, 944, 248 CR 467, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409; State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 83-71.

On attorney's obligations on discovering that perjury has already been committed, see §§11.155-11.161. For further discussion of the problem of perjury in civil cases, see Martin, *Perjury in Civil Cases*, 4 Cal Law 65 (Dec. 1984). On withdrawal with client's consent, mandatory withdrawal, and permissive withdrawal generally, see California Civil Procedure Before Trial, chap 4 (4th ed Cal CEB 2004).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/§5.95 B. Potential perjury by party-related or other witness

### §5.95 B. Potential perjury by party-related or other witness

An attorney who fails to persuade a party-related (see §5.1 for definition) or other witness not to commit perjury should usually tell the client:

- That the attorney will not call that witness to testify or will question the witness only on matters that the witness will testify to truthfully;
- The consequences of such a witness testifying falsely; and
- That the attorney will be forced to withdraw if the client insists that the witness testify.

If the client still insists that the witness be called, you will have the same options as for a client/witness. See §§5.92-5.93.

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### §5.96 C. Avoid improper coaching

The line between preparing a witness and coaching is often hard to draw. Avoid improperly coaching a witness, *i.e.,* encouraging the witness to tell his or her story in such a way that it may comport more with what you want to prove than with what the witness may actually know from his or her own observations. Similarly, providing the witness with a script for testimony is improper and should be avoided. Although you may help the witness better articulate his or her story, keep in mind that the substance of the witness's testimony must at all times be based on facts known personally by the witness. Any language you suggest to the witness to clarify and accurately reflect what the witness is truthfully trying to say should be language that is natural for that witness.

Coaching a witness may border on subornation of perjury. See Pen C §127. When presenting a matter to a tribunal, an attorney "shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." Cal Rules of Prof Cond 5-200(B). A finding of such an intention is punishable as a misdemeanor under Bus & P C §6068(d). An attorney who engages in such conduct may be subject to disciplinary proceedings or criminal prosecution. See Pen C §127; Bus & P C §§6077, 6106, 6128(a). See also §5.91.

**EXAMPLE:** An attorney who instructed clients to deny that they had children in order to obtain an annulment, and who filed an annulment action alleging that there were no children, was disciplined. *Paonessa v State Bar* (1954) 43 C2d 222, 272 P2d 510.

Even if your conduct does not violate any ethical standard, coaching witnesses may not produce the best results tactically. A coached witness risks losing credibility with the jury if the testimony given appears to be carefully rehearsed. In addition, a good cross-examiner can reveal that the witness's testimony is largely the product of his or her attorney, thus harming the credibility of both the witness and the attorney. For an excellent article on how far counsel can properly go in preparing a witness, see Piorkowski, *Professional Conduct and the Preparation of Witness for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 Geo J Legal Ethics 389 (1987).

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## VII. CHECKLISTS

### §5.97 A. Checklist: Preparing witnesses for trial

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___ 1. Explain the attorney-client privilege to the witness. See §§5.23, 5.51-5.52. If the witness is not a party or party-related witness, the attorney-client privilege will not apply. See §5.65.

___ 2. Have the witness give an initial recitation of the facts in narration form. See §5.24.

___ 3. Review with the witness the nature and purpose of the proceedings. This review should include courtroom procedure and what to expect in court. See §§5.27-5.31.

___ 4. Discuss applicable law. See §5.57.

___ 5. Have the witness review all applicable facts with the attorney. See §5.58.

___ 6. Review with the witness past depositions, answers to interrogatories, all documentary or demonstrative evidence, and all other material that may be referred to in deposition or trial. See §5.59.

___ 7. Practice direct examination. See §5.62.

___ 8. Practice cross-examination. See §5.64.

___ 9. Consider a full dress rehearsal. You may want to have another attorney play the part of the opposition (including objections) so that the witness will get a feel for the purpose.

**CAUTION:** Do not over-prepare the witness. Over-preparation can make the testimony seem prefabricated, too slick, or otherwise artificial. The testimony should be the best possible, but ultimately, it is the witness who testifies, and the witness should be perceived as a real person.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/§5.98 B. Checklist: Instructions to the witness

## §5.98 B. Checklist: Instructions to the witness

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___ 1. Tell the truth. This should always be the first and fundamental rule of testimony.

___ 2. Pay attention at all times.

___ 3. Listen to the question and think before answering. Ask for clarification of any question that you do not fully understand.

___ 4. Give responsive answers. Do not volunteer information, but it is important to answer the questions asked. A nonresponsive witness can appear to a jury as shifty, untrustworthy, or trying to cover up.

___ 5. Ask to see any documents asked about and review them carefully before answering.

___ 6. Do not guess. It is all right to answer "I don't know" or "I don't remember" if that is the case.

___ 7. Admit mistakes, because anyone can make a mistake. Correcting mistakes is not perjury.

___ 8. Speak loudly, slowly, and clearly.

___ 9. Look at the trier of fact, *i.e.,* the jury in a jury trial, or the judge in a bench trial. Although it is natural to look at the examining attorney since that attorney is asking the questions, testimony is given for the benefit of the trier of fact.

___ 10. Do not answer over an objection. If there is an objection, stop answering and wait until instructed to proceed with the answer.

___ 11. Testimony is always "on the record."

___ 12. Do not play lawyer. Do not try to figure out why a question is asked. This will distract from your answering the question fully and accurately.

___ 13. Keep calm. Do not argue.

___ 14. If the attorney appears to be asking harassing questions, remain calm and do not allow yourself to be baited.

___ 15. Be cooperative.

___ 16. Trial motions are strictly procedural and should not be taken personally. Do not view a motion to strike or an objection as an attack on your credibility.

___ 17. Do not take medications before depositions or trial testimony if possible, and, if unavoidable, tell the attorney the effect such medications may have.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/5 Preparing Witnesses for Trial/§5.99 C. Checklist: Preparing expert witnesses

## §5.99 C. Checklist: Preparing expert witnesses

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___ 1. Critically review the facts of the case. Make sure that the expert's opinion has a judicially sound basis.

___ 2. Review the expert's qualifications.

___ 3. Review any relevant works (books, articles, presentations) written or produced by the expert.

___ 4. Review all materials consulted or relied on; every document expert should review before testifying.

___ 5. Review general information to acquire a working knowledge of the subject matter and terminology in the field.

___ 6. Have the expert prepare resume or curriculum vitae.

___ 7. Review with the expert all relevant facts and evidence.

___ 8. Explain the applicable law, including relevant legal theories and defenses.

___ 9. Practice direct examination.

___ 10. Practice cross-examination, anticipating the scope of opposing counsel's examination or cross-examination of expert.

___ 11. Review with the expert all publications or scholarly works that will be referred to.

___ 12. Review with the expert an attorney-client, work product, or other problems or privileges.

___ 13. Review with the expert the location of deposition or trial as well as general decorum, such as what to wear.

___ 14. Review deposition or trial procedures, *e.g.,* where to sit, questions by judge or jurors.

___ 15. Inform the expert as to which parties and attorneys will be present, along with their interest in the litigation.

___ 16. Inform the expert of any habits or idiosyncrasies of other attorneys who will be present at deposition or trial.

___ 17. Review with the expert the contents of the expert's file; review what to bring to deposition or trial and what not to bring.

___ 18. Explain that an expert may express an opinion and the grounds on which such an opinion is permissible.

___ 19. Explain the rules on hypothetical questions.

___ 20. Instruct the expert to answer all questions politely and succinctly without being humorous, evasive, or combative.

___ 21. Instruct the expert not to attempt to render opinions on areas outside his or expertise.

___ 22. Instruct the expert to avoid technical language if possible or to thoroughly explain the meaning of the language if unavoidable.

___ 23. Instruct the expert to be candid about compensation.

___ 24. Instruct the expert on objection procedures and how to respond to objections.

___ 25. Instruct the expert to avoid arguments with other counsel.

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# 6

# Court Conferences and Selected Pretrial Motions

**Stephen H. Marcus**
**Marlene I. Camacho**

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.1 I. SCOPE OF CHAPTER

## §6.1 I. SCOPE OF CHAPTER

The chapter covers trial-related court conferences that take place after the initial case management conference under Cal Rules of Ct 3.720-3.730. See §2.61. These trial-related conferences may occur any time from weeks before trial to the day of trial. The initial case management order may set the date, time, or place of any further case management conferences as well as the final case management conference before trial. See Cal Rules of Ct 3.728. Depending on the trial judge's preference, trial-related conferences may be held in the judge's chambers.

Also discussed in this chapter are nonevidentiary motions or procedures most commonly encountered shortly before or on the day scheduled for trial, *e.g.*:

- Continuing trial (see §§6.6-6.25);
- Challenging the judge (see §§6.26-6.78);
- Dismissing the case (see §§6.79-6.86);
- Amending the pleadings (see §§6.87-6.93);
- Obtaining a judgment on the pleadings (see §§6.94-6.98);
- Bifurcating, severing or changing the order of trial (see §§6.99-6.104); and
- Excluding witnesses at trial (see §§6.105-6.108).

For evidentiary motions in limine, see chap 7. See California Civil Procedure Before Trial, chaps 12-13 (4th ed Cal CEB 2004) for discussion of motions generally.

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## II. CONFERENCES WITH TRIAL JUDGE

### §6.2 A. Types of trial-related conferences

As trial approaches, the trial judge typically holds several conferences with counsel. See §1.26. One or more of these conferences may be devoted to evidentiary motions in limine. See chap 7.

Just before trial, the judge will probably meet with counsel to discuss how matters will be handled at trial. In single assignment courts, some of these matters may be considered at the final case management conference, which some courts refer to as a final issue conference or final status conference. See, *e.g.,* Los Angeles Ct R 7.9(h) (final status conference must be held no more than 10 days before trial date); San Diego Ct R 2.1.15 (trial readiness conference generally held 4 weeks before trial date); Contra Costa Ct R 5(K) (issue conference must be held within 14 days before trial date). In master calendar courts, some of these matters may be considered on the first day of trial.

**PRACTICE TIP:** Because trial-related conferences may be different in each county, it is important to check the local rules for conference requirements. In addition, consult with the particular judge's clerk, because some judges may have their own customary approach to trial-related conferences not reflected in local rules.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.3 1. Final case management conference

## §6.3 1. Final case management conference

Many courts require a final case management conference shortly before trial. One purpose of this conference may include compelling the parties to complete many tasks that would otherwise take up time at trial. See checklist in §6.5.

Local rules establish the date of the final conference before trial and the requirements that the parties must fulfill either before or at the conference, *e.g.,* that counsel

- Meet and confer to stipulate to as many facts as possible and to stipulate to the admissibility of exhibits to which no objection is to be made;
- File trial briefs at the conference; and
- Submit at the time of the conference a joint set of agreed-on jury instructions, as well as sets of additional instructions to which one party objects.

**NOTE:** To produce a set of agreed-on instructions requires counsel to exchange proposed instructions and to meet and confer before the conference.

In Los Angeles Superior Court, the parties must file and exchange at the final conference before trial (Los Angeles Ct R 7.9(h)):

- Lists of premarked exhibits;
- Trial witness lists; and
- A short statement of the case to be read to the jury before voir dire examination.

Many procedures that formerly took place on the day of trial are now handled at the final case management conference, allowing the trial to begin more expeditiously on the trial date.

**JUDICIAL PERSPECTIVE:** At the final case management conference, the judge may require counsel to present at least two sets of finalized jury instructions for the court: one for the judge's file and one for the jurors' deliberations. The court may also require counsel to meet and confer on all of the in limine motions so the judge will know which motions are agreed-on and which will require a ruling.

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## §6.4 2. Chambers conference: Taking care of details for trial

After a scheduled final case management conference, the judge and counsel may find that not all trial-related matters may have been addressed, *e.g.,* the scheduling of witnesses or the judge's daily trial calendar. In this situation, the trial judge may invite all counsel to a chambers conference before trial to take care of the remaining housekeeping details about the conduct of the trial.

Chambers conferences are usually informal and are not reported unless a party requests a reporter. If a portion of the chambers conference will focus on arguments and rulings on motions and stipulations, counsel should request a reporter's presence at this stage of the chambers conference if the judge has not already done so.

**NOTE:** Some judges or attorneys may prefer to have all conferences take place in open court rather than in chambers.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.5 B. Checklist: Questions considered in final conferences

## §6.5 B. Checklist: Questions considered in final conferences

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___ 1. Does the trial judge have any knowledge about any party or witness? Should the judge be disqualified under CCP §170 or the California Code of Judicial Conduct? See §§6.26-6.77 for discussion of disqualifying the judge generally.

___ 2. Should the parties explore settlement possibilities? Generally, the trial judge will not participate in settlement discussions unless the parties agree and waive any disqualification that might arise because of such participation (see Los Angeles Ct R 8.21).

___ 3. Can the issues be narrowed or modified by stipulations or motions?

___ 4. Are there any potential time constraints for a party, counsel, or the judge, *e.g.,* because of other commitments of counsel, a witness, or the court?

___ 5. If not addressed at earlier case management conferences, have issues raised by the pleadings been resolved? *E.g.*:

- ___ a. Have named or fictitious parties been served, dismissed, or answered, or are they in default?
- ___ b. Have any defaults been entered?
- ___ c. Have any causes of action been dismissed?
- ___ d. Have any law and motion, discovery, or summary judgment proceedings resulted in the dismissal or striking of any pleading or portion of a pleading or the adjudication of any factual or legal positions?
- ___ e. Are cross-complaints, setoffs, credits against judgment, liens, or pleadings-in-intervention pending?

___ 6. Is there any indication that the trial should be bifurcated? See §§6.99-6.104 for discussion of bifurcation and other trial ordering motions. *E.g.*:

- ___ a. Should liability be tried separately before damages?
- ___ b. Are there any special defenses (*e.g.,* statute of limitations, prior judgment, another action pending, or other grounds for abatement) that should be tried first?
- ___ c. Are there any equitable defenses (*e.g.,* laches, "unclean hands," waiver, or equitable estoppel) that need to be tried separately?

___ 7. What method for marking exhibits should be used? *E.g.,* use that specified in Los Angeles Ct R 8.60-8.62, or another method if numerous exhibits.

**JUDICIAL PERSPECTIVE:** Check with the clerk of the trial department as well as the judge to determine the judge's preference on marking exhibits.

___ 8. Are there motions in limine that have not been decided? Will judge decide motions before trial or on first day of trial? On motions in limine generally, see chap 7.

___ 9. In jury trials:

- ___ a. What are the proposed areas for voir dire interrogation?

___ b. What should be included in the brief statement outlining the case given by the trial judge to the jurors?

___ c. Are the parties willing to stipulate to fewer than 12 jurors?

___ d. How many alternate jurors, and will they deliberate?

___ e. Should jurors who express a desire to not sit for a long trial be excused?

___ f. How will multiple parties share the jury selection process? How many challenges will each side be permitted?

**NOTE:** See chap 8 for detailed discussion of jury selection issues.

**JUDICIAL PERSPECTIVE:** Be familiar with the particular judge's approach to jury selection. For example, does the judge take charge of jury selection, leave it to the lawyers, or have some variation on these two approaches? Does the judge use a six- or 12-pack system of jury selection or a variation of it? See §8.33 for discussion of different methods of jury selection.

___ 10. What jury instructions does each party propose? See CCP §607a (proposed jury instructions covering the law as disclosed by the pleadings should be submitted before the time the first witness is sworn).

**NOTE:** Practices vary from judge to judge, but many courts prefer to begin discussion of jury instructions in pretrial conferences well before the trial date. See §20.34.

___ 11. Will any party request dismissal of one or more causes of action or parties?

___ 12. Are the parties willing to stipulate to those facts that lack substantial controversy?

___ 13. Will the parties stipulate to waive foundation and other objections regarding exhibits, tests, or experiments?

___ 14. Does any party intend to file motions in limine to exclude specified evidence or references to it? See chap 7 on motions in limine.

___ 15. Are any unusual or critical legal or evidentiary issues anticipated by parties?

___ 16. Does any party plan to move under Evid C §777 to exclude witnesses from the courtroom when they are not testifying? See generally §§6.105-6.108.

___ 17. Does the court intend to order preparation of a daily transcript of the trial proceedings? See Govt C §69953; *Walton v Bank of Cal.* (1963) 218 CA2d 527, 547, 32 CR 856; *Corona Foothill Lemon Co. v Lillibridge* (1936) 12 CA2d 549, 551, 55 P2d 1210. Will parties have "real time" transcription of the proceedings?

**PRACTICE TIP:** If the court does not order a daily transcript, a party can make arrangements with the court reporter to pay for a transcript to be prepared for the party's own use. See *Walton v Bank of Cal., supra*.

___ 18. Does the court intend to limit the length of opening statements, closing arguments, or any other portion of the trial proceedings?

___ 19. Will the court allow reference to exhibits or demonstrative evidence during opening statements?

___ 20. What technology will be used in the courtroom? How will parties share equipment, such as computers and monitors used to show evidence to jurors? On pretrial planning for demonstrations, experiments, photographs, and video recordings to be used at trial, see §13.39.

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## III. MOTION TO CONTINUE THE TRIAL

### §6.6 A. Authority: Cal Rules of Ct 3.1332

Motions concerning trial dates, including continuances, are governed by Cal Rules of Ct 3.1332, which states: "[T]he dates assigned for a trial are firm. All parties and their counsel must regard the date set for trial as certain." Cal Rules of Ct 3.1332(a). In ruling on a motion to continue the trial, the court will look at the factors set forth in Cal Rules of Ct 3.1332(c)-(d). See §6.8.

Given the policy of the Trial Court Delay Reduction Act of 1990 (Govt C §§68600-68620), continuances are unlikely to be granted absent strong showings of good cause. On what is good cause, see §§6.7-6.10.

**NOTE:** Although acknowledging that continuances are disfavored, Rule 3.1332 states that "[e]ach request for a continuance must be considered on its own merits" (Cal Rules of Ct 3.1332(c)) and that in ruling on the request, "the court must consider all the facts and circumstances that are relevant to the determination" (Cal Rules of Ct 3.1332(d)). The change resulted from concern that courts were managing cases inflexibly and refusing to grant continuances "even when the circumstances warranted giving the parties more time." Judicial Council, *Recommendations to Improve the Fair and Efficient Administration of Civil Cases* (Oct. 8, 2003). In light of the changes to the Rule, counsel should evaluate carefully cases that predate the 2004 amendments.

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### §6.7 B. Court has discretion to grant or deny motion

The trial court has wide discretion in deciding whether to grant or deny a continuance, and its decision will be reversed only when an abuse of discretion is clear. *Lynch v Superior Court* (1906) 150 C 123, 88 P 708. Although some older appellate decisions contain language to the effect that courts should be liberal in granting continuances (see, *e.g., Capital Nat'l Bank v Smith* (1944) 62 CA2d 328, 339, 144 P2d 665), Cal Rules of Ct 3.1332 (former Cal Rules of Ct 375) dispels any notion that this policy of liberality is still valid. In *County of San Bernardino v Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 780, 140 CR 383, the court noted that the philosophy of liberality, "if it even existed, is now obsolete."

Nevertheless, judges deciding whether to grant or deny a continuance must balance the need for judicial efficiency against the guiding principle that cases should be decided on their merits; the strong public policy favoring disposition on the merits outweighs judicial efficiency when the two principles collide. *Oliveros v County of Los Angeles* (2004) 120 CA4th 1389, 1394, 16 CR3d 638 (abuse of discretion to deny continuance solely because of its impact on trial court's calendar and without considering all facts, circumstances, and former Cal Rules of Ct 375 (now Cal Rules of Ct 3.1332) factors). See also *Hernandez v Superior Court* (2004) 115 CA4th 1242, 9 CR3d 821 (after plaintiff's counsel died of pancreatic cancer, abuse of discretion not to continue trial and reopen discovery to designate expert witness).

The denial of a continuance is reversible error when the trial court does not show due regard for all the interests involved and when denying the continuance has the practical effect of denying the applicant a fair hearing. *Oliveros,* 120 CA4th at 1394 (continuance requested due to attorney's unexpected scheduling conflict). On the factors the court is to consider, see Cal Rules of Ct 3.1332(c)-(d).

**PRACTICE TIP:** If you must either proceed to trial or face dismissal for failure to prosecute, consider making a motion to sever under CCP §1048(b) in the alternative to the motion to continue (or consider arguing for severance when the motion to continue is heard).

Do not rely on getting the continuance. Be prepared to go to trial if the court denies the motion to continue.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.8 C. Moving party must establish good cause for a continuance

### §6.8 C. Moving party must establish good cause for a continuance

Under Cal Rules of Ct 3.1332(c), a party seeking a continuance must make an affirmative showing of good cause. Circumstances that may indicate good cause include:

- If counsel, parties, or essential lay or expert witnesses are unavailable due to:
- Illness;
- Death; or
- Other excusable circumstances;
- The substitution of trial counsel, but only if there is an affirmative showing that the interests of justice require the substitution;
- The addition of a new party if:
- 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 with 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; and
- A significant, unanticipated change in the status of the case as a result of which the case is not ready for trial.

A trial court abuses its discretion if it rules on a motion for continuance without considering these factors. *Oliveros v County of Los Angeles* (2004) 120 CA4th 1389, 1394, 16 CR3d 638. See Note in §6.6.

**NOTE:** The Rule 3.1332(c) list of factors that may constitute good cause for continuance is "simpler and broader" than that in former Cal Rules of Ct App Div I, §9. Judicial Council*, Recommendations to Improve the Fair and Efficient Administration of Civil Cases* (Oct. 8, 2003).

On motion for continuance or recess made during trial, see §§18.57-18.64. For more detailed discussion, including these statutory grounds, see California Civil Procedure Before Trial §§42.9-42.28 (4th ed Cal CEB 2004).

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### §6.9 1. Unavailability

The unavailability of an essential lay or expert witness, a party, or trial counsel may be good cause for a continuance if the unavailability is because of death, illness, or other excusable circumstances. Cal Rules of Ct 3.1332(c).

**CAUTION:** In *Carl v Superior Court* (2007) 157 CA4th 73, 68 CR3d 566, the court held that the common attorney practice of filing notices of unavailability is an "impermissible infringement of the court's inherent powers" if the practice puts counsel in control of the court's calendar.

The court will decide whether the illness, even of a party, requires the trial to be continued. For example, a party's illness does not mandate a continuance if the trial court concludes that the party is able to attend the trial. *Lewis v Neptune Soc'y Corp.* (1987) 195 CA3d 427, 240 CR 656. If a continuance is requested because a witness is ill, but the testimony to be given by that witness is cumulative, denial of a continuance is not an abuse of discretion. 195 CA3d at 429.

Under normal circumstances, the death or serious illness of a party's trial attorney is good cause for granting continuance of a trial date. *Hernandez v Superior Court* (2004) 115 CA4th 1242, 1247, 9 CR3d 821 (citing former Cal Rules of Ct App Div I, §9; see Note, §6.6).

**NOTE:** A continuance that is too brief may be an abuse of discretion, as may the court's refusal to reopen discovery on granting the continuance. See *Hernandez,* 115 CA4th at 1247 (trial court abused discretion; grant of continuance conflicted with plaintiff's need for spinal surgery and new attorney's trial schedule; refusal to reopen discovery ignored fact that deceased attorney had been too ill with pancreatic cancer to prepare case properly).

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### §6.10 2. Other grounds for continuance

Although the goal of prompt disposition of civil cases weighs against finding that a trial attorney's conflicting trial dates is sufficient reason to continue a trial, the trial court should not automatically deny a motion to continue the trial date made on such a ground. See *Oliveros v County of Los Angeles* (2004) 120 CA4th 1389, 16 CR3d 638 (counsel requested continuance in good faith due to unexpected conflict that arose on eve of trial). The court should weigh all the relevant factors before ruling. 120 CA4th at 1398. See Cal Rules of Ct 3.1332(d), discussed in §6.10A.

The need for further discovery would not ordinarily be considered good cause for a continuance. However, if a new party has been added and, because of this addition, a party has not had a reasonable opportunity to conduct discovery and prepare for trial, then there might be grounds for a continuance under Cal Rules of Ct 3.1332(c)(5). Similarly, a party's "excused inability" to obtain essential evidence despite "diligent efforts" may be good cause necessitating a continuance. Cal Rules of Ct 3.1332(c)(6).

On continuance because of adverse pretrial publicity, see §§2.45-2.49.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.10A D. Factors court must consider

### §6.10A D. Factors court must consider

The court must consider all the facts and circumstances relevant to its determination of whether to grant a motion for continuance. Cal Rules of Ct 3.1332(d). These factors may include:

- The trial date's proximity;
- Any previous continuance, extension of time, or delay of trial;
- The length of the requested continuance;
- Availability of alternate means to address the problem;
- Prejudice to parties or witnesses;
- Whether, if the case is entitled to preferential trial setting, the need for continuance outweighs the need for preference;
- Impact of continuance on the court's own calendar;
- Whether counsel is engaged in another trial;
- Whether all parties have stipulated to a continuance;
- The interests of justice; and
- Any other relevant fact or circumstance.

Judges deciding whether to grant continuances must balance these factors and not focus on just one, such as the impact on the court's own calendar. *Oliveros v County of Los Angeles* (2004) 120 CA4th 1389, 16 CR3d 638 (trial court should also have considered that continuance was requested in good faith due to unexpected conflict and that this was complicated case with many witnesses including experts).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.10B E. Statutory grounds for continuance

## §6.10B E. Statutory grounds for continuance

Statutory grounds for continuance are found in:

- CCP §473(a)(2) (amendment of pleadings);
- CCP §594a (postponement on court's own motion);
- CCP §595 (party, attorney, or principal witness is a member of state legislature);
- CCP §595.2 (written stipulation; see, however, §6.12);
- CCP §595.3 (mining claim);
- CCP §595.4 (absence of evidence; see §§6.14, 6.24); and
- 50 USC App §521 (party in military service).

On motion for continuance or recess made during trial, see §§18.57-18.64. For more detailed discussion, including these statutory grounds, see California Civil Procedure Before Trial §§42.9-42.28 (4th ed Cal CEB 2004).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.11 F. Consider alternatives to motion

### §6.11 F. Consider alternatives to motion

The trial-day continuance motion is a disruptive motion, because it upsets the schedules of parties, witnesses, and the courts. Because continuances are disfavored (see Cal Rules of Ct 3.1332(c)), after determining that the trial should be continued, explore all alternatives to the motion.

**PRACTICE TIP:** Once it is clear that a continuance is necessary, make the motion as soon as possible.

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### §6.12 1. Stipulation to continue

Obtain opposing counsel's written stipulation to continue, if possible. Code of Civil Procedure §595.2 provides in part that in "all cases, the court shall postpone a trial … for a period not to exceed thirty (30) days, when all attorneys of record of parties who have appeared in the action agree in writing to such postponement."

**NOTE:** Despite its mandatory language, CCP §595.2 is directory, not mandatory, and the court may disregard the parties' stipulation. See *Pham v Nguyen* (1997) 54 CA4th 11, 62 CR2d 422 (court did not abuse discretion by denying parties' stipulated request for continuance); *County of San Bernardino v Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 140 CR 383. Especially in cases subject to the Trial Court Delay Reduction Act of 1990 (TCDRA) (Govt C §§68600-68620), judges will probably disregard stipulations for continuances. The better practice is to present the stipulation to the court in the form of an ex parte application to continue the trial. See §6.14.

In cases subject to the TCDRA, the parties may make one stipulation for a continuance of up to 30 days, if made within 30 days after the service of the responsive pleadings and filed with the court. Govt C §68616(d).

See California Civil Procedure Before Trial §42.16 (4th ed Cal CEB 2004) on the policy against continuances.

**JUDICIAL PERSPECTIVE:** Be sure to differentiate between the grounds for a continuance and the guidelines the court uses to determine if a case should be designated a 1-year, 18-month, or 2-year case under the differential case management rules of Cal Rules of Ct 10.900-10.901 and 3.710-3.735.

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### §6.13 2. Suggested alternatives to motion

One of the factors the court will consider in ruling on a motion for continuance is the availability of alternate means to address the problem that gave rise to the request for a continuance. Cal Rules of Ct 3.1332(d)(4). Therefore, before moving to continue, consider substituting other attorneys or witnesses and using depositions for missing witnesses.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.14 G. Seek continuance by filing a noticed motion or ex parte application

### §6.14 G. Seek continuance by filing a noticed motion or ex parte application

A party seeking a continuance of a trial date must make a noticed motion or an ex parte application under Cal Rules of Ct 3.1200-3.1207, whether or not the continuance is contested or stipulated to by the parties. Cal Rules of Ct 3.1332(b).

Supporting declarations must accompany the motion or ex parte application. Cal Rules of Ct 3.1332(b).

**NOTE:** Even when not mandatory, declarations have been said to reflect the policy of encouraging prompt trial of lawsuits. See *Cade v Mid-City Hosp. Corp.* (1975) 45 CA3d 589, 600, 119 CR 571. Moreover, CCP §595.4 specifically requires that a motion for continuance on the ground of absence of evidence must be supported by an affidavit (or declaration under CCP §2015.5) "showing the materiality of the evidence expected to be obtained and that due diligence has been used to procure it." If the motion is based on the absence of a material witness, the court may require the moving party to state what evidence is expected to be obtained from the witness; if the adverse party stipulates that the evidence be considered as offered at trial, the motion for continuance must be denied. CCP §595.4.

Because most trial-day continuance motions will be based on last-minute developments, you will probably lack time to make a noticed motion and will need to use the ex parte application procedures in Cal Rules of Ct 3.1200-3.1207. See California Civil Procedure Before Trial §§13.1-13.14 (4th ed Cal CEB 2004). If by necessity you must make an oral motion (*e.g.,* a witness is involved in a traffic accident on the way to court), make sure that a court reporter transcribes the proceedings in the event the motion is denied and the case is later appealed.

For discussion on procedure generally, see Civ Proc Before Trial §§42.25-42.27. For sample forms of notice of motion and declaration, see Civ Proc Before Trial §§42.31-42.32.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.15 1. Where to make motion or ex parte application

## §6.15 1. Where to make motion or ex parte application

Normally, a trial continuance motion is made in the master calendar department. When cases are assigned to one judge for all purposes under the Trial Court Delay Reduction Act of 1990 (Govt C §§68600-68620), all motions are heard before the assigned judge.

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### §6.16 2. When to make motion or ex parte application

After discovering the need for a continuance, you must give notice and make the motion or ex parte application "as soon as reasonably practical." Cal Rules of Ct 3.1332(b). See also, *e.g., County of San Bernardino v Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 140 CR 383.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.17 H. What to include in motion or application seeking continuance

### §6.17 H. What to include in motion or application seeking continuance

Include in the moving papers:

- A notice of motion;
- Declarations setting forth facts showing due diligence and good cause for the motion (see Cal Rules of Ct 3.1332(b); see §§6.8-6.10B);
- A supporting memorandum; and
- A proposed order that includes the reasons for the continuance.

Set forth in the motion papers a specific time to which the court should continue the trial. The time must be reasonably related to the ground that is the basis for the requested continuance.

In propria persona litigants are not entitled to greater consideration than attorneys. In *Nelson v Gaunt* (1981) 125 CA3d 623, 638, 178 CR 167, disapproved on other grounds in *Douglas v Ostermeier* (1991) 1 CA4th 729, 745 n1, 2 CR2d 594, the court applied former Cal Rules of Ct 224 against an in propria persona litigant: Continuance motions must be in writing, be made promptly on ascertaining the need for the continuance, and make an affirmative showing of good cause.

On preparing motion papers in general, see California Civil Procedure Before Trial, chaps 11-13 (4th ed Cal CEB 2004). For the specific requirements when making an ex parte application, see Cal Rules of Ct 3.1200-3.1207.

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### §6.18 1. Show good cause

Put primary emphasis in the motion papers on the good cause for the continuance, preferably a ground listed in Cal Rules of Ct 3.1332(c). See §§6.8-6.10B. Be specific and detailed in arguing good cause. For example, if a witness is suddenly not available, show why the witness is unavailable, why the witness's testimony is crucial for a fair trial, and when the witness will be available. See CCP §595.4; *Ross v Thirlwall* (1929) 101 CA 411, 415, 281 P 714.

Support the party's position with the best evidence available. For example, when illness is the good cause, obtain a physician's declaration; do not rely on a hearsay declaration by an attorney, or even the ill person, that the person is ill. On insufficient content of a physician's declaration, see *Forney v Brodie* (1934) 3 CA2d 245, 39 P2d 516.

**JUDICIAL PERSPECTIVE:** When arguing witness unavailability, be prepared to tell the court that you gave prompt notice of the trial date to the witness who is now unavailable, and to show that you served a trial subpoena on the witness.

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### §6.19 2. Show due diligence

In considering the motion (or ex parte application) to continue, the court will examine whether the moving party diligently gave notice and made the motion for continuance (or made the ex parte application) as soon as reasonably practical after discovering the need for the continuance as required by Cal Rules of Ct 3.1332(b). If the ground for continuance has unforeseeably arisen at the last minute, a continuance can probably be obtained. See, *e.g., Broadwell v Ryerson* (1948) 85 CA2d 352, 357, 192 P2d 797. If an attorney could have acted sooner but waited, the court is more likely to deny the motion. See, *e.g., County of San Bernardino v Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 140 CR 383.

Be specific and detailed in showing due diligence. Show both why you could not anticipate the ground of continuance and how you were diligent in bringing the matter to court when you discovered the need for the motion. See *Tiffin v Cummings* (1904) 144 C 612, 614, 78 P 23.

If seeking postponement on the ground of absence of evidence, show in the affidavit, among other things, that you used due diligence to procure the evidence. CCP §595.4. On trial court's discretion to excuse requirement of affidavit under CCP §595.4, see *Taylor v Bell* (1971) 21 CA3d 1002, 98 CR 855.

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### §6.20 3. Refute prejudice to opposing party

Anticipate the opposing party's argument that it will be prejudiced; either anticipatorily refute such claims when possible or consider alternatives to alleviate the prejudice. See *City of San Diego v Walton* (1947) 80 CA2d 206, 214, 181 P2d 424.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.21 I. What to include when opposing motion

## §6.21 I. What to include when opposing motion

Opposition papers should include a supporting memorandum and declarations setting forth facts showing, *e.g.*:

- Lack of due diligence or good cause;
- Prejudice if the motion is granted; and
- Evidence of a dilatory motive or lack of good faith.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.22 1. Lack of diligence or good cause

### §6.22 1. Lack of diligence or good cause

Show any facts indicating that the motion for continuance could have been made earlier; in eve-of-trial motions especially, the moving party often will not have exercised due diligence.

Argue against the validity or significance of the good cause proposed by the movant.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.23 2. Prejudice if trial continued

### §6.23 2. Prejudice if trial continued

Set forth with detail and specificity any prejudice the opposing party will suffer; quantify costs whenever possible. Likely sources of prejudice would be:

- The cost of delay (*e.g.,* the cost of again preparing for trial);
- When plaintiff is opposing the motion, the variance between the legal interest rate and the value of the use of the money plaintiff expects to recover;
- Problems in the availability of counsel, parties, or witnesses if the trial is continued; or
- The immediacy of the need for the relief sought, *e.g.,* party is aged or ill.

**NOTE:** If the case was preferentially set for trial under CCP §36, there are limits on continuances that can be granted: The trial must be set to take place within 120 days, and no continuances are permitted except for the disability of a party or attorney or on a showing of good cause; a continuance must be no longer than 15 days; and only one continuance for disability may be granted to any party. For discussion of CCP §36 motions for trial preference, see California Civil Procedure Before Trial §§42.4-42.6 (4th ed Cal CEB 2004).

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### §6.24 3. Suggest alternatives or conditions

Suggest alternatives to resolve the problem causing the continuance request. For example, if the lead trial attorney is ill, suggest that another attorney can conduct the trial (when more than one attorney is handling the case) or, if a witness is unavailable, suggest using the witness's deposition (if it was taken).

If the continuance is sought because a material witness is absent, consider exercising the right under CCP §595.4 to ask the court to require the moving party "to state upon affidavit the evidence which he expects to obtain"; then evaluate whether to stipulate "that such evidence would be given and that it be considered as actually given on the trial" (see CCP §595.4) and thereby defeat the motion for the continuance.

If you have any witnesses already in attendance when the opposing party requests a postponement, consider demanding that the party obtaining the postponement take the deposition of your witnesses in attendance under CCP §596. Any testimony taken under §596 may be read at the trial with the same effect, and subject to the same objections, as if the witness testified at trial. Testimony taken under §596 must comply with deposition requirements in order to be properly admitted at trial. See *Thomas v Black* (1890) 84 C 221, 225, 23 P 1037.

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### §6.25 4. Request expenses if motion granted

If the continuance is granted, ask for expenses. Under CCP §1024, the court may grant expenses caused by a continuance. (See also CCP §473, which permits the court, when an amendment to a pleading or proceeding requires a continuance, to condition the amendment on the payment of the adverse party's costs.) Case law has interpreted costs to include travel and lodging expenses. See *Wilkin v Tadlock* (1952) 110 CA2d 156, 241 P2d 1066; *Fraser v Fraser* (1919) 39 CA 467, 179 P 427. Costs under CCP §1024 do not include attorney fees, however. *Levine v Pollack* (1995) 37 CA4th 129, 43 CR2d 491.

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## IV. DISQUALIFYING THE JUDGE

### §6.26 A. Authority: CCP §§170.1-170.8

Code of Civil Procedure §§170.1-170.8 provide a detailed statutory framework to disqualify a judge if a party questions the judge's impartiality in the matter the judge is hearing. Under CCP §§170.1-170.3, the party who wishes to disqualify a judge must file a written verified statement setting forth the facts that constitute the grounds for the disqualification. See §§6.32-6.39 for grounds. Under CCP §170.6(a)(2), any party or attorney may move to disqualify the judge, based on the party's or attorney's belief that the judge cannot be fair and impartial. See §6.57.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.27 B. Seek to disqualify at earliest opportunity

### §6.27 B. Seek to disqualify at earliest opportunity

Address the issue of disqualification at the earliest possible opportunity, *e.g.,* immediately after discovering facts constituting grounds for disqualification (see §§6.32-6.39 for grounds) under CCP §170.3(c). For peremptory challenges, request disqualification as soon as you know the identity of the judge, and in any event within the statutory limits for your type of case. See §§6.64-6.74. However, a late-named defendant may move to disqualify the judge despite the fact that other parties' time to make a disqualification motion has expired and despite the complex nature of the case. *School Dist. v Superior Court* (1997) 58 CA4th 1126, 68 CR2d 612.

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### §6.28 C. Obtain information about judges before the actual assignment

To ensure meeting the statutory deadlines to request disqualification of a judge, obtain information about the judges who may be assigned to the case before the actual assignment, *i.e.,* before the master calendar department assigns the case to the trial judge or before the matter is assigned to a judge for all purposes.

One practical difficulty may be the lack of information about the judges' backgrounds. The best source of information is often the experiences of counsel who have appeared before the judges. Although no formal repository exists for this type of information, some published sources provide information on the backgrounds of judges. See, *e.g.,* Smith & Thompson, California Courts and Judges (2006 ed).

Computerized research services are potential sources of information about judges' philosophy and past decisions. Counsel may perform a search of all published appellate cases in which a trial judge has been reversed or affirmed on appeal. Reports of bar association committees on judicial evaluation may provide additional information. For example, through the Los Angeles County Bar Association's online Civil Register (http://www.lacba.org/showpage.cfm?pageid=1589), users can find out, *e.g.*, how many motions for summary judgment a particular judge has granted or denied and how many CCP §170.6 challenges have been filed against a particular judge. Some courts also provide information on-line about judges.

These resources seldom provide enough information about a judge's background to discover any conflicts of interest before the trial or hearing. Thus, you may not learn enough information about a judge in time to bring a peremptory challenge under CCP §170.6, but facts that come to light in the chambers conference may lead you to conclude that the judge should be disqualified under CCP §170.3 because of a conflict of interest (CCP §170.1). A judge is required to reveal to the parties any facts that may be grounds for disqualification. CCP §170.3(b).

A judge who learns of facts that may be grounds for disqualification must so inform the presiding judge or the person having authority to assign another judge. CCP §170.3(a). If any conflicts come to light during the chambers conference, the assigned judge should ask the presiding judge to appoint another judge. The judge may also ask that the parties stipulate to waive the disqualification. See §6.41. If the judge does not act, the parties may file a statement of disqualification. See §§6.43-6.48.

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### D. Considerations when deciding whether to challenge judge

### §6.29 1. Disadvantages of challenge

Do not make a decision to seek the disqualification of an assigned judge lightly. Under CCP §§170.1-170.6, the request may be denied and the judge may remain the trier of fact; similarly, although the peremptory disqualification under CCP §170.6 is automatic, a presiding judge may conclude that the peremptory challenge was improperly made or untimely, and the challenged judge may remain. See §6.77. Even if the peremptory challenge is successful, you have no assurance who the next judge will be and you are limited to one peremptory challenge. See generally *Solberg v Superior Court* (1977) 19 C3d 182, 196, 137 CR 460. See §6.60 for the one-challenge rule.

**PRACTICE TIP:** If you become aware of facts indicating that the judge should disqualify himself or herself, and you are not facing an immediate trial, consider writing to the judge (with a copy to opposing counsel) requesting that the judge disqualify himself or herself without your having to file a formal request that becomes part of the public record. The judge may do so, and be appreciative of your not forcing a public record of the matter

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### §6.30 2. Effect of disqualification

A disqualified judge has no power to act in any proceedings in that case after the disqualification, except as provided in CCP §170.4. See §6.54. The challenged judge has limited powers to act after the statement of disqualification under CCP §170.3(c) is filed and until the disqualification is decided. See §§6.49-6.53.

After determining disqualification under CCP §170.1, a judge may ask the parties to agree on another judge who will take over the action or proceeding. CCP §170.3(c)(2). Otherwise, when a judge is disqualified, the presiding judge or other person having authority to assign a new judge will appoint a new judge. CCP §170.3(a), (c)(6).

If the grounds for disqualification are discovered after the judge has made one or more rulings in the proceeding, the judge who replaces the disqualified judge cannot set aside the rulings made up to that time, unless the new judge believes that there is good cause to do so. CCP §170.3(b)(4). But see *Hartford Cas. Ins. Co. v Superior Court* (2004) 125 CA4th 250, 258, 22 CR3d 507 (holding that orders made by judge after grounds for disqualification arose, but before disqualification, must be vacated because judge knew or should have known that disqualification was necessary).

A judge who is disqualified under CCP §170.6 is disqualified for all subsequent proceedings in that action. *Brown v Superior Court* (1981) 124 CA3d 1059, 177 CR 756.

**JUDICIAL PERSPECTIVE:** *Brown* and subsequent cases raise the question of the parties' right to withdraw a CCP §170.6 challenge—which, under some circumstances, counsel might want to discuss with the challenged judge. See Note in §6.61.

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### §6.31 3. Relationship between CCP §§170.3 and 170.6

Code of Civil Procedure §170.3 provides the methods to disqualify a judge for cause. See §§6.32-6.56. Code of Civil Procedure §170.6 provides a peremptory procedure to disqualify a judge. Generally, §§170.3 and 170.6 are considered cumulative remedies. See CCP §170.6(b); *Pacific & Southwest Annual Conf. of United Methodist Church v Superior Court* (1978) 82 CA3d 72, 147 CR 44 (no requirement to challenge under CCP §170.6 before challenge under former CCP §170, or vice versa). A party may thus file both a statement under CCP §170.3(c) and one peremptory challenge under CCP §170.6. See §6.60 for the one-challenge rule.

Although the remedies are cumulative, in practice you may not be able to make both challenges within the statutory deadlines of CCP §170.6. See §§6.64-6.74 for these deadlines. For example, you must make a peremptory challenge to the assignment of a trial judge from a master calendar at the time of assignment before the master calendar judge (CCP §170.6(a)(2)), but normally you will want to make a challenge for cause under CCP §170.3 before using your only peremptory challenge. If you make the §170.3 challenge first, the time period to make a §170.6 challenge would expire before the determination of the §170.3 challenge.

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## E. Disqualification for cause (CCP §170.3)

### §6.32 1. Grounds: CCP §170.1

A judge should be disqualified from sitting or acting as a judge in any action or proceeding if any one of the grounds listed in CCP §170.1 (see §§6.33-6.39) is true.

For a more comprehensive discussion of grounds for judicial disqualification, see generally 2 Witkin, California Procedure, *Courts* §§101-128 (5th ed 2008).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.33 a. Has personal knowledge of disputed facts

### §6.33 a. Has personal knowledge of disputed facts

A judge who has personal knowledge of disputed evidentiary facts about the proceeding should be disqualified. Personal knowledge is imputed when a judge knows that one material witness in the proceeding is likely to be (CCP §170.1(a)(1)(A)-(B)):

- The judge;
- The judge's spouse; or
- A person, or spouse of a person, within the third degree of relationship to either the judge or judge's spouse.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.34 b. Acted as attorney in matter related to proceeding

### §6.34 b. Acted as attorney in matter related to proceeding

The judge should be disqualified if the judge (CCP §170.1(a)(2)(A)):

- Has served as an attorney in the proceeding. Service as an attorney in the proceeding will be imputed to the judge if, within the past 2 years, the judge was:
- In private practice and the judge or an attorney with whom the judge was associated had as a client a party to the proceedings or a party's officer, director, or trustee (CCP §170.1(a)(2)(B)(i)); or
- Associated in private practice with an attorney in the proceeding (CCP §170.1(a)(2)(B)(ii)).
- Acted as the attorney for any party in the present case in any other proceeding involving the same issues. CCP §170.1(a)(2)(A).
- Gave advice to any party in the present proceeding on a matter involved in the proceeding. CCP §170.1(a)(2)(A).
- Served as an attorney for or as an officer of a public agency that is a party to the proceeding, if the judge personally advised or represented the public agency on the factual or legal issues in the proceeding. CCP §170.1(a)(2)(C).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.35 c. Has financial interest in matter related to proceeding

### §6.35 c. Has financial interest in matter related to proceeding

Grounds to disqualify the judge exist if:

- The judge has a financial interest in the subject matter of the proceeding or in a party to the proceeding. CCP §170.1(a)(3)(A).
- A spouse or minor child living with the judge has a financial interest in the subject matter or in a party to the proceeding, *i.e.,* the spouse's or minor child's interests are considered to be the judge's interests for purposes of disqualification. CCP §170.1(a)(3)(B)(i).
- The judge, or the judge's spouse, is a fiduciary who has a financial interest in the subject matter or in the party. CCP §170.1(a)(3)(B)(ii).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.36 d. Is a party or is related to a party

### §6.36 d. Is a party or is related to a party

The judge should be disqualified if any of the following persons is a party to the proceedings (CCP §170.1(a)(4)):

- The judge;
- The judge's spouse; or
- A person, or spouse of a person, within the third degree of relationship to the judge or the judge's spouse.

An officer, director, or trustee of a party is considered a party to the proceedings. CCP §170.1(a)(4).

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### §6.37 e. Is related to an attorney in proceeding

The judge should be disqualified if one of the attorneys in the proceeding is the judge's spouse, or is the judge's or the judge's spouse's:

- Former spouse;
- Child;
- Sibling; or
- Parent.

The judge is also disqualified if one of the above is married to an attorney in the proceeding or is in private practice with an attorney in the proceeding. CCP §170.1(a)(5).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.38 f. Appears to lack impartiality

### §6.38 f. Appears to lack impartiality

The judge should be disqualified if:

- The judge believes his or her disqualification would further the interests of justice (CCP §170.1(a)(6)(A)(i));
- The judge believes there is a substantial doubt about his or her capacity to be impartial (CCP §170.1(a)(6)(A)(ii)); or
- A person aware of the facts might reasonably doubt that the judge would be able to be impartial (CCP §170.1(a)(6)(A)(iii)).

Bias or prejudice against an attorney in the proceedings may be grounds for disqualification for cause. CCP §170.1(a)(6)(B).

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### §6.39 g. Has physical impairment that prevents proper conduct of proceeding

The judge should be disqualified if, by reason of permanent or temporary physical impairment, the judge cannot properly perceive the evidence or conduct the proceeding. CCP §170.1(a)(7).

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### §6.39A h. Has arranged for, or participated in discussions concerning, prospective employment as a dispute resolution neutral

The judge should be disqualified if the matter before the judge includes issues relating to the enforcement of an agreement to submit a dispute to alternative dispute resolution or the appointment of a dispute resolution neutral and the judge has a current arrangement concerning prospective employment as a dispute resolution neutral or is participating in, or within the last 2 years has participated in, discussions regarding prospective employment as a dispute resolution neutral. CCP §170.1(a)(8). See *Rossco Holdings, Inc. v Bank of America* (2007) 149 CA4th 1353, 58 CR3d 141 (judge disqualified for engaging in conversations with dispute resolution providers regarding possible employment).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.40 2. Judge may disqualify self

## §6.40 2. Judge may disqualify self

After determining a disqualification based on one of the grounds in CCP §170.1, a judge has two choices:

- Notify the presiding judge or, if the judge is the presiding judge or the only judge, notify the person having the power to assign another judge and stop participating in the proceeding (CCP §170.3(a)); or
- Make a full disclosure on the record and ask the parties to waive the disqualification. CCP §170.3(b). See §6.41.

On a judge's voluntary declaration of disqualification, see 2 Witkin, California Procedure, *Courts* §122 (5th ed 2008).

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### 3. Parties may waive disqualification

#### §6.41 a. Judge may ask for an express waiver

The judge may ask the parties to expressly waive many of the grounds for disqualification described in CCP §170.1 by signing and filing a waiver. The judge must first disclose the basis for the disqualification on the record. If the parties agree to waive the disqualification, the express waiver, to be effective, must recite the basis for the disqualification and be signed by all parties and their attorneys of record and filed. CCP §170.3(b)(1).

The parties may *not* waive disqualification if the grounds for disqualification are that the judge (CCP §170.3(b)(2)):

- Has a personal bias or prejudice concerning a party;
- Served as an attorney in the matter in controversy; or
- Has been a material witness on the matter at issue.

The judge cannot try to induce the parties to waive the disqualification, and if the parties do not waive, the judge cannot try to find out which attorneys or parties favored or opposed the waiver. CCP §170.3(b)(3).

For further discussion, see 2 Witkin, California Procedure, *Courts* §128 (5th ed 2008).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.42 b. Delay in asserting grounds results in waiver

### §6.42 b. Delay in asserting grounds results in waiver

The parties must assert the judge's disqualification on most of the grounds stated in CCP §170.1 at the earliest practicable opportunity (CCP §170.3(c)(1); see §6.46 for when to file); otherwise, the parties waive the grounds for disqualification by failing to assert them. See *Sacramento & San Joaquin Drainage Dist. v Jarvis* (1959) 51 C2d 799, 336 P2d 530 (former CCP §170(6)); *Caminetti v Pacific Mut. Life Ins. Co.* (1943) 22 C2d 386, 139 P2d 930 (former CCP §170(3)). See also *Develop-Amatic Eng'g v Republic Mortgage Co.* (1970) 12 CA3d 143, 150, 91 CR 193.

Even when judges should recuse themselves, the parties have waived their rights to a challenge if they fail to proceed under CCP §170.3(c). *People v Bryant* (1987) 190 CA3d 1569, 236 CR 96.

**NOTE:** A waiver of the disqualification is prohibited if the judge has a personal bias or prejudice toward a party or if the judge served as an attorney or has been a material witness in the matter at issue. CCP §170.3(b)(2).

The crucial issue in determining the timeliness of a challenge under CCP §170.3(c)(1) appears to be whether the moving party held back the challenge, with knowledge of the disqualifying facts, until the unfavorable ruling was received. See *Woolley v Superior Court* (1937) 19 CA2d 611, 619, 66 P2d 680. Be prepared to demonstrate that you acted expeditiously in raising the issue of disqualification after learning of the disqualifying facts. For further discussion, see 2 Witkin, California Procedure, *Courts* §128 (5th ed 2008).

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### §6.43 4. Challenge by filing a verified written statement

If a judge who should be disqualified fails to proceed as required by CCP §170.3(a) (disqualify self) or §170.3(b) (make full disclosure and ask for waiver), any party who has appeared in the action may file with the clerk a verified written statement objecting to the hearing or trial. CCP §170.3(c).

The statement may be titled "Statement of Objection to Trial Before Judge _____," "Statement of Disqualification," or "Objection to Trial Before Judge _____." Alternatively, the statement may be in the form of a motion to disqualify. See *Hollingsworth v Superior Court* (1987) 191 CA3d 22, 25, 236 CR 193.

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### §6.44 a. What to include in statement

The statement should contain facts, not conclusions. Allegations on information and belief and conclusions are insufficient. See *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 426, 285 CR 659. On a party's statement of disqualification, see 2 Witkin, California Procedure, *Courts* §123 (5th ed 2008).

Be sure to present specific evidence to establish that one of the circumstances found in CCP §170.1(a) exists. For example, show judicial statements or conduct demonstrating that the judge is predisposed to rule against the party no matter what the evidence reveals. See, *e.g., Calhoun v Superior Court* (1958) 51 C2d 257, 331 P2d 648 (trial judge gratuitously filed affidavit opposing defendants' petition for bail pending appeal).

When referring to copious transcripts, cite specific excerpts. Avoid alleging facts that are irrelevant to the issues to be determined at the hearing, including material that is not *legally* indicative of bias or prejudice (*e.g.,* judicial opinions expressed in the context of legal rulings made in the pending proceedings), or referring to inconsequential circumstances that are not probative of bias or prejudice. See *Marriage of Lemen* (1980) 113 CA3d 769, 790, 170 CR 642; *In re Morelli* (1970) 11 CA3d 819, 843, 91 CR 72, overruled on other grounds in *Cedars-Sinai Imaging Med. Group v Superior Court* (2000) 83 CA4th 1281, 1287 n6, 100 CR2d 320.

Include in the statement of disqualification sufficient facts to show that you are filing the statement at the earliest practicable opportunity in order to minimize the possibility that the court will strike the statement as untimely and find that you have waived the objection. See §§6.42, 6.46.

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### §6.45 b. Verify statement

The statement should be verified. See §6.111 for sample statement. A statement in the form of a declaration under penalty of perjury will be considered sufficient. *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 426, 285 CR 659; *Hollingsworth v Superior Court* (1987) 191 CA3d 22, 25, 236 CR 193.

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### §6.46 c. When to file

Under CCP §170.3(c)(1), the attorney must present the written verified statement objecting to a hearing or trial before the judge "at the earliest practicable opportunity" after discovering the facts establishing grounds for disqualification. *In re Steven O.* (1991) 229 CA3d 46, 55, 279 CR 868. A statement of disqualification that is not filed at the earliest practicable opportunity is untimely, and the judge who is the subject of the statement of disqualification may strike it. CCP §170.4(b). See §6.42 on possible waiver if statement not filed in a timely manner. See 2 Witkin, California Procedure, *Courts* §128 (5th ed 2008).

The judge has 10 days to respond to the statement of disqualification. CCP §170.3(c)(3); see discussion in §6.55. If the judge does not strike the statement as untimely within the 10 days, and does not answer or respond, the judge will be deemed to have consented to disqualification even if the statement of disqualification was untimely. *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 422, 285 CR 659. But see *North Beverly Homeowners Ass'n v Bisno* (2007) 147 CA4th 762, 772, 54 CR3d 644 (statutory procedure for disqualification of judges for cause does not apply to statements of disqualification filed after final judgment; therefore, trial judge's failure to answer or strike statement could not be deemed consent to disqualification and did not require that allegations be deemed true).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.47 d. Whom to serve

### §6.47 d. Whom to serve

Serve copies of the statement on all parties who have appeared in the action or their attorneys. Personally serve the judge or the judge's clerk, if the judge is present in the courthouse or in chambers. CCP §170.3(c).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.48 e. Only one request unless additional facts discovered

### §6.48 e. Only one request unless additional facts discovered

A party may file only one statement of disqualification unless subsequent statements clearly state that the facts supporting them occurred or were discovered after the original statement of disqualification was filed. CCP §170.4(c)(3). The challenged judge must dismiss subsequent statements that do not comply with this rule.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.49 5. Judge's authority after statement filed

### §6.49 5. Judge's authority after statement filed

Generally, when a verified statement of disqualification is filed, the challenged judge's ability to proceed is limited to the powers provided in CCP §§170.3 and 170.4. See CCP §170.4(d). See also §§6.50-6.54.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.50 a. Strike statement for no legal grounds

### §6.50 a. Strike statement for no legal grounds

If a statement of disqualification on its face discloses no legal grounds for disqualification, the challenged judge may strike the statement and proceed with the case. CCP §170.4(b). See §6.78 on obtaining extraordinary relief.

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### §6.51 b. Strike statement as untimely

If the statement is not filed at the earliest practicable opportunity, the challenged judge may strike the statement from the record as untimely and proceed with the case. CCP §170.4(b). See §§6.42, 6.46 on timeliness.

If the judge does not strike the statement within 10 days after the statement is filed or served, the judge is deemed to have consented to disqualification under CCP §170.3(c)(4) unless the judge has otherwise filed an answer. *Lewis v Superior Court* (1988) 198 CA3d 1101, 244 CR 328; *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 422, 285 CR 659. But see *North Beverly Homeowners Ass'n v Bisno* (2007) 147 CA4th 762, 772, 54 CR3d 644 (statutory procedure for disqualification of judges for cause does not apply to statements of disqualification filed after final judgment; therefore, trial judge's failure to answer or strike statement could not be deemed consent to disqualification and did not require that allegations be deemed true). See §6.55 for judge's deadline to act.

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### §6.52 c. Proceed if statement was filed after trial or hearing begins

If the statement of disqualification is filed after the trial or hearing has begun, the challenged judge may order that the proceeding continue until another judge finds the challenged judge disqualified. CCP §170.4(c)(1). See §6.56 on determining the disqualification. For purposes of CCP §170.4(c)(1), a trial or hearing begins by the start of voir dire, the swearing of the first witness, or the submission of a motion for decision. If the challenged judge is eventually disqualified, all orders and rulings made after filing of the statement of disqualification will be vacated. CCP §170.4(c)(1).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.53 d. Proceed if statement filed after trial or hearing begins in single-assignment cases

### §6.53 d. Proceed if statement filed after trial or hearing begins in single-assignment cases

If the proceeding is in a single-judge court or has been assigned to a single judge for comprehensive disposition and the proceeding is set for a trial or hearing date 30 or more days in advance, before a judge whose name is known, the trial is considered to have begun 10 days before the date scheduled. If the statement of disqualification is based on any grounds for disqualification known more than 10 days before the scheduled trial date, and the statement is filed 10 days or less before the scheduled trial date, the judge has the choice of continuing with the trial as if it had already begun as provided in CCP §170.4(c)(1) (see §6.52). CCP §170.4(c)(2).

**EXAMPLE 1:** You are in a single-assignment case and you are given a trial date more than 30 days in advance. On the 20th day before trial, you learn that the judge assigned to the case for trial owns stock in the defendant corporation, which is grounds for disqualification under CCP §170.1(a)(3)(A). If you wait until the 9th day before trial to file the statement of disqualification, the trial judge will have the power to order the trial to continue under CCP §170.4(c)(1).

**EXAMPLE 2:** In the same situation as in Example 1, you learn that the judge owns stock in the defendant corporation on the 8th day before trial. Be sure to state this fact in your statement of disqualification, *i.e.,* that you did not have knowledge of the basis for disqualification before the start of the 10-day period. If you file the statement before the trial begins, the judge may proceed only as provided in CCP §170.4(a). See §6.54.

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### §6.54 e. Judge's additional specific powers

Under CCP §170.4(a), when challenged, the judge may:

- Take any action necessary to maintain the jurisdiction of the court until a new judge is assigned;
- Request a judge on whom the parties have agreed to take his or her place;
- Hear and determine purely default matters;
- Issue an order for possession before judgment in eminent domain proceedings;
- Set proceedings for trial or hearing; and
- Conduct settlement conferences.

These powers are in addition to the judge's powers to strike an untimely or legally unfounded statement (CCP §170.4(b); see §6.51) or to continue with a trial or hearing that has already begun (CCP §170.4(c)(1); see §§6.52-6.53).

Because a party may file only one statement of disqualification, unless new facts arise or are learned after the original statement was filed, the challenged judge retains the power to dismiss subsequent statements. Dismissal is mandatory if the new statement is not based on new facts. CCP §170.4(c)(3).

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### §6.55 6. Judge's response

The judge has a choice of responses to the statement of disqualification:

- Get the parties to agree that another judge will take over the action or proceeding, and then ask that judge to replace the challenged judge. CCP §170.3(c)(2).
- File a consent to disqualification within 10 days after the filing or service of the verified statement, whichever is later, and notify the presiding judge or other appropriate person to appoint a replacement judge. CCP §170.3(c)(3).
- File an answer admitting or denying the allegations of the statement and describing additional facts that are material or relevant to the disqualification proceedings; in this event, the clerk must transmit a copy of the answer to each party who has appeared or to their respective attorneys. CCP §170.3(c)(3).
- Do nothing within the 10 days, in effect consenting to the reassignment of the proceeding, in which event the clerk must notify the presiding judge or other appropriate person. CCP §170.3(c)(4). See *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 285 CR 659 (judge disqualified because of inaction).

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### §6.56 7. Determining judge's disqualification

If the challenged judge does not voluntarily excuse himself or herself, a second judge determines whether the challenged judge is disqualified. CCP §170.3(c)(5). The parties have 5 days after the challenged judge files an answer to agree on a judge to hear the disqualification challenge; if they agree within that time, the judge they agree on will hear the matter. CCP §170.3(c)(5).

If the parties cannot agree on a judge to hear the disqualification matter, the clerk will notify the executive officer of the Judicial Council, who will appoint, as quickly as possible, a judge to hear the matter. The judge deciding the disqualification cannot be challenged by a party under CCP §170.3 (cause) or CCP §170.6 (no cause), but that judge may disqualify himself or herself. CCP §170.3(c)(5).

The judge deciding the disqualification matter may base the decision on the statement of disqualification and the challenged judge's answer. CCP §170.3(c)(6). The judge may also request additional written arguments or set the matter for hearing as soon as is practicable, but is not required to do so. See *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 285 CR 659 (party has no right to be heard before judge disqualified). The parties and the challenged judge may argue the matter at any hearing and, for good cause, may introduce evidence on any disputed fact. If the judge decides that the challenged judge should be disqualified, the deciding judge will notify the presiding judge or other appropriate person to appoint a replacement judge. CCP §170.3(c)(6).

The judge deciding the disqualification may also impose sanctions against the party seeking to disqualify the judge if the attempt to disqualify was frivolous or intended solely to cause delay. *Estate of Di Grazia* (1993) 13 CA4th 681, 16 CR2d 621, disapproved on other grounds in *Curle v Superior Court* (2001) 24 C4th 1057, 1069 n6, 103 CR2d 751 (decided under CCP §128.5).

The decision on a judge's disqualification is not appealable, but it may be reviewed by a writ of mandate sought by the parties to the action. CCP §170.3(d). See §6.78.

See 2 Witkin, California Procedure, *Courts* §§126-127 (5th ed 2008) on the effect of a challenge.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/ F. Peremptory challenge under CCP §170.6/§6.57 1. Grounds: Prejudice against party or attorney

## F. Peremptory challenge under CCP §170.6

### §6.57 1. Grounds: Prejudice against party or attorney

Disqualification under CCP §170.6 is mandated if it is established that a judge, court commissioner, or referee "is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding" based on the attorney or client's good faith belief in such prejudice. CCP §170.6(a)(1).

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### §6.58 2. Challenge judge by written or oral motion

A judge's prejudice is conclusively established under CCP §170.6(a)(2) by an oral or written motion supported by an affidavit or declaration or an oral statement under oath. See §6.75 on content of the motion. Only judges, court commissioners, or referees of superior courts may be challenged under CCP §170.6; appellate justices may not. *People v Gonzalez* (1990) 51 C3d 1179, 1247 n44, 275 CR 729.

Section 170.6 requires only that the declarant have a good faith belief that the judge is prejudiced. See *Solberg v Superior Court* (1977) 19 C3d 182, 200, 137 CR 460. Good faith is sufficiently established by the act of verification itself; proof of facts showing actual prejudice is not required. If the affidavit or declaration is timely (see §§6.64-6.74) and in proper form, immediate disqualification is mandatory. *People v Superior Court (Williams)* (1992) 8 CA4th 688, 698, 10 CR2d 873. See *Journey v Superior Court* (1975) 47 CA3d 408, 411, 120 CR 897.

In *People v Whitfield* (1986) 183 CA3d 299, 228 CR 82, the court stated that the procedural requirements of CCP §170.6 should be construed liberally, especially when pro per litigants were involved. The court held that it was error to deny an oral motion to disqualify under §170.6 on merely formal grounds without explaining to the litigants the need to file formal papers.

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### §6.59 a. Where to file

If the motion concerns a judge assigned to a case under a master calendar system, direct the motion to the judge supervising the master calendar. If the motion concerns a case assigned to an all-purpose judge, make the motion to either the assigned judge or the supervising judge. CCP §170.6(a)(2). The code does not address where to make a motion challenging a law and motion judge, but logic dictates that it be made to the assigned law and motion judge or to the supervising judge.

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### §6.60 b. Limitations: One-challenge rule

No party or attorney may make more than one peremptory challenge to disqualify a judge under CCP §170.6 (CCP §170.6(a)(3)), except a party that filed an appeal resulting in the reversal of a final judgment of a trial court. CCP §170.6(a)(2). The right to peremptorily challenge a judge is exhausted not when the motion is filed, but when the change of judge occurs. *Truck Ins. Exch. v Superior Court* (1998) 67 CA4th 142, 78 CR2d 721 (when assigned judge retired, party whose peremptory challenge against that judge had been denied as untimely retained its right to exercise its one peremptory challenge per proceeding and properly challenged next judge assigned to case). In addition, each side is restricted to one challenge in any action or proceeding. CCP §170.6(a)(3). In *Pappa v Superior Court* (1960) 54 C2d 350, 5 CR 703, the court recognized that, when a substantially adverse interest exists between codefendants in a criminal case, each defendant may be treated as a separate side for the purposes of CCP §170.6. See also *People v Escobedo* (1973) 35 CA3d 32, 110 CR 550. The burden of establishing a substantially adverse interest is on the party seeking to be considered as a separate side. See *Welch v Superior Court* (1974) 41 CA3d 50, 53, 115 CR 729.

In *Industrial Indem. Co. v Superior Court* (1989) 214 CA3d 259, 262 CR 544, the court held that parties to "add on" cases in coordination proceedings had no right to challenge a coordination trial judge if their side had already exercised its challenge.

**JUDICIAL PERSPECTIVE:** For purposes of exercising a CCP §170.6 challenge, multiple parties and their counsel should discuss and decide whether they are on the same side or whether they represent adverse interests. Failure of parties to make this decision may result in filed challenges that are binding on parties who do not agree to the particular challenges.

On CCP §170.6 peremptory challenges in coordinated proceedings, see §6.74.

On time limit for seeking extraordinary relief if the CCP §170.6 challenge is denied, see §6.78.

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### §6.61 c. Withdrawing or waiving challenge

After a party properly makes a challenge under CCP §170.6, the party cannot withdraw the challenge. There are various reasons for this rule. See *Stebbins v White* (1987) 190 CA3d 769, 781, 235 CR 656. For example, all parties are entitled to benefit from the challenge, despite any attempt by the challenging party to retract it. *Brown v Superior Court* (1981) 124 CA3d 1059, 1062, 177 CR 756. In addition, when a party exercises a §170.6 challenge, the court's authority to act is immediately terminated, and the statute does not provide for reinstatement of the court's authority merely because one party withdraws the challenge. *Louisiana-Pacific Corp. v Philo Lumber* (1985) 163 CA3d 1212, 1219, 210 CR 368. Furthermore, §170.6 does not allow the party to withdraw or waive the challenge and thereby recover the right to challenge the judge again. See §6.60 for discussion of the one-challenge rule.

**NOTE:** Some courts have allowed a party to abandon the challenge and proceed with the hearing or trial. *Andrisani v Saugus Colony Ltd.* (1992) 8 CA4th 517, 525, 10 CR2d 444, citing *Louisiana-Pacific Corp. v Philo Lumber, supra*. For example, if no other party objects after a party asks to withdraw the challenge, the court may proceed to hear the case. See, *e.g., Stebbins v White, supra*; *Louisiana-Pacific Corp. v Philo Lumber, supra*.

A party may also inadvertently waive the right to enforce a §170.6 challenge by acquiescing to the disqualified judge's hearing of the matter. For example, in *Andrisani v Saugus Colony Ltd., supra,* after a §170.6 challenge, no one objected when the case was inadvertently reassigned to the same challenged judge. The court held that the parties' acquiescence resulted in a waiver of the right to assert the disqualification. 8 CA4th at 526. If a waiver occurs, the party cannot challenge the judgment on appeal based on the disqualification of the judge, and the judgment is not void as being beyond the court's jurisdiction. *Stebbins v White* (1987) 190 CA3d 769, 784, 235 CR 656.

Finally, the challenge is not rescinded or withdrawn by later events. For example, the dismissal from the case of the party that made the challenge does not nullify that challenge, and each remaining party may continue to have it enforced. *Louisiana-Pacific Corp. v Philo Lumber, supra*.

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### §6.62 d. Challenging in a second case

A party is not barred from exercising a challenge to the judge in the second of two related actions, even if that party exercised a CCP §170.6 challenge in the first action, if the claims asserted in the related actions were not identical. When the second action is a continuation of the first, however, a party who exercises a challenge in the first case may be barred from exercising another challenge in the second; and if the same judge is assigned to the second case, the failure to challenge that judge in the first case constitutes a waiver. *City of Hanford v Superior Court* (1989) 208 CA3d 580, 256 CR 274. See *Bravo v Superior Court* (2007) 149 CA4th 1489, 57 CR3d 910.

Generally, however, a party who fails to challenge the judge in the first action does not waive the right to make a timely challenge of the same judge in a subsequent action. *Nissan Motor Corp. v Superior Court* (1992) 6 CA4th 150, 7 CR2d 801.

In *Nissan,* three products liability cases were consolidated before the same judge because they involved allegations of a similar defect. The court held that the three cases were distinct and Nissan could challenge the consolidated judge in the two cases that had not previously been before him. 6 CA4th at 155.

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### §6.63 e. Challenge does not require continuance

Unless good cause is shown or it is required for the convenience of the court, a trial date continuance will not be granted merely because a motion to disqualify is brought. CCP §170.6(a)(4). If a continuance is granted, "the cause or matter shall be continued from day to day or for other limited periods … and shall be reassigned or transferred for trial or hearing as promptly as possible." CCP §170.6(a)(4).

The exercise of a CCP §170.6 disqualification tolls the running of the 5-year period of CCP §583.360 (mandatory dismissal for failure to bring an action to trial) while disqualification is pending. *Hartman v Santamarina* (1982) 30 C3d 762, 768, 180 CR 337.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.64 3. When to make motion

## §6.64 3. When to make motion

When to make the motion challenging the judge depends in part on how the case is assigned to the judge for trial or hearing. Generally, the motion must be made before the trial or hearing begins. See §6.65. Exceptions to this rule occur if, *e.g.,* the parties know which judge will hear the trial before the trial date (see §6.67) or if the case is assigned to one judge for all purposes (see §6.69).

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### §6.65 a. General rule: Before trial or hearing

The general rule is that a CCP §170.6 motion to disqualify must be made before any of the following events occur (CCP §170.6(a)(2)):

- Drawing of the first juror's name;
- Opening statement by plaintiff's counsel, if there is no jury;
- Swearing of the first witness or giving of any evidence, if there is no opening statement; or
- Initiation of trial in any other fashion.

**PRACTICE TIP:** If the motion is directed to a hearing instead of a trial, make the motion no later than the beginning of the hearing. CCP §170.6(a)(2).

One case has held that a §170.6(a)(2) motion is not permitted unless a trial or hearing is pending or unless there is an all-purpose assignment. *Grant v Superior Court* (2001) 90 CA4th 518, 108 CR2d 825.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.66 b. If only one judge

### §6.66 b. If only one judge

Code of Civil Procedure §170.6(a)(2) also provides that if the court is authorized to have, and has, only one judge, a motion to disqualify must be made before the expiration of 30 days after the date the moving party first appears in the action.

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### §6.67 c. If judge known 10 days before hearing: 10-day/5-day rule

If the judge is known at least 10 days before the date set for trial, the motion must be made at least 5 days before trial (the 10-day/5-day rule). CCP §170.6(a)(2). If the case is assigned by the master calendar department for a trial on a future date, the 10-day/5-day rule applies, because the parties knew the judge's identity. See *People v Escobedo* (1973) 35 CA3d 32, 38, 110 CR 550. See also *People v Superior Court (Lavi)* (1993) 4 C4th 1164, 17 CR2d 815, discussed in §6.68.

The court in *Lavi* recognized that there is some confusion concerning the degree of certainty with which a judge must be known for the 10-day/5-day rule to apply. For example, if the trial is assigned to a trial department (rather than to a trial judge), would the trial judge be "known"? The court held that in most cases, the parties will be charged with knowing which judge sits in which courtroom, and that there is always a risk that a particular judge will not be able to hear the case because of, *e.g.,* illness. This type of assignment, however, is sufficiently certain to invoke the 10-day/5-day rule if the case is assigned at least 10 days before trial. 4 C4th at 1183. See also discussion in §§6.68-6.69.

There is some debate about the effect of a continuance on the 10-day/5-day rule. Most courts hold that when a case is set for future trial before a particular department, a CCP §170.6 challenge filed at least 5 days before the continued trial date is timely. See *People v Hall* (1978) 86 CA3d 753, 150 CR 412; *In re Jose S.* (1978) 78 CA3d 619, 144 CR 309. Other courts appear to suggest that a continuance does not extend the time for a party to file a challenge under §170.6. See *Hospital Council v Superior Court* (1973) 30 CA3d 331, 106 CR 247; *People v Kennedy* (1967) 256 CA2d 755, 64 CR 345. *Hospital Council* and *Kennedy* were grounded, however, on the moving parties' failure to comply with the 10-day/5-day rule and the master calendar rule under CCP §170.6(a)(2). See §6.68 for master calendar rule.

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### §6.68 d. If judge assigned by master calendar

If the case is assigned to a trial department from a master calendar, the motion must be made to the judge supervising the master calendar (*i.e.,* in the master calendar department) "not later than the time the cause is assigned for trial." CCP §170.6(a)(2); *People v Escobedo* (1973) 35 CA3d 32, 38, 110 CR 550. The requirements of CCP §170.6 cannot be modified by local court rules. *Wells Fargo Bank v Superior Court* (1988) 206 CA3d 918, 923, 254 CR 68; *Estate of Brown* (1987) 193 CA3d 1612, 1619, 239 CR 147.

Generally, the master calendar rule applies only when "a trial-ready case is assigned to a trial-ready courtroom" for immediate trial. *People v Superior Court (Lavi)* (1993) 4 C4th 1164, 1173 n5, 17 CR2d 815. The rule does not apply when the case is assigned from a master calendar department to a trial department for trial setting at a later date (the 10-day/5-day rule would apply). The court in *Lavi* reasoned that the purpose of requiring an immediate challenge when a master calendar judge assigns a trial-ready case to a trial-ready courtroom is to allow the master calendar court to reassign the case immediately to another judge and to assign another case to the challenged judge. When a master calendar court assigns a case to a courtroom substantially before the trial date, the rationale of the master calendar rule does not apply. In *Lavi*, the master calendar assigned the case to another department for that judge to set a trial date and complete the procedures necessary to ready the case for trial, an assignment for all purposes. 4 C4th at 1181. When the master calendar department assigns a case to a particular department for trial "forthwith," the master calendar rule applies. See *People v Wilks* (1978) 21 C3d 460, 146 CR 364.

There will undoubtedly be further litigation as to when "a trial-ready case is assigned to a trial-ready courtroom." In *Lavi,* the supreme court stated that the courtroom need not actually be idle at the time of the assignment to be trial-ready, but rather that the courtroom be available, or be reasonably expected to become available within a short time, so that the trial may begin. The court suggested that an assignment in the morning for a trial beginning in the afternoon or in the afternoon for a trial beginning the next morning would constitute an assignment to a trial-ready court. 4 C4th at 1177 n8.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.69 e. If judge assigned for all purposes

### §6.69 e. If judge assigned for all purposes

A motion to challenge a judge appointed for all purposes must be made within 10 days after notice of the all-purpose assignment or, if the challenging party had not appeared in the action when the assignment was made, within 10 days after the party's appearance. CCP §170.6(a)(2). Under the Trial Court Delay Reduction Act of 1990 (Govt C §§68600-68620), local courts must adopt rules that allow a party that is assigned to one judge in a direct calendar system 15 days after the party's first appearance to make a CCP §170.6 challenge. Govt C §68616(i). A challenge to a judge in a master calendar court must be made in accordance with CCP §170.6, *i.e.*, at the time the assignment is made. Govt C §68616(i). See §6.68.

**NOTE:** The effect of Govt C §68616(i) is that litigants in a one-judge direct calendar system have 5 more days to file a peremptory challenge than CCP §170.6 authorizes. See discussion of this difference in *La Seigneurie U.S. Holdings, Inc. v Superior Court* (1994) 29 CA4th 1500, 1504, 35 CR2d 175.

**First appearance.** The word "appearance" as used in CCP §170.6 has consistently been interpreted to mean a general appearance. See *La Seigneurie U.S. Holdings, Inc. v Superior Court, supra,* and cases it cites. A special appearance for purposes of challenging service or jurisdiction does not trigger the time to challenge the judge under §170.6. 29 CA4th at 1506. See §6.71.

**Assignment for all purposes.** Code of Civil Procedure §170.6(a)(2) does not explain when an assignment to a judge may be deemed one for "all purposes." In *People v Superior Court (Lavi)* (1993) 4 C4th 1164, 17 CR2d 815, the supreme court adopted a two-prong test to decide whether the assignment is for all purposes (4 C4th at 1180):

- The assignment "must 'instantly pinpoint' the judge whom the parties can expect to ultimately preside at trial"; and
- That judge must be expected to process the entire case, acquiring an expertise in the issues of the case.

*Lavi* further instructs that an all-purpose assignment does not mean that a single judge must handle every matter in a given case, particularly in criminal cases; it is sufficient that, at the time of the all-purpose assignment, "substantial matters remain to be processed … and the assigned judge is expected to process all of those matters from that point on." *People v Superior Court (Lavi)* (1993) 4 C4th 1164, 1180 n13, 17 CR2d 815.

Whether the 10-day limit of CCP §170.6(a)(2) is triggered depends on the mechanism giving notice of the all-purpose assignment. The 10-day time limit does not apply unless the assignment of a case to a single judge for all purposes was made by local court rule or court order. See *Shipp v Superior Court* (1992) 5 CA4th 147, 6 CR2d 685. In *Shipp,* a local policy set forth in writing in the Manual of Procedures for the Family Law Department of the Los Angeles County Superior Court provided for all purpose assignments of dissolution. This formal policy, of which petitioner was aware, was enforceable as a local rule and effected an assignment for all-purposes sufficient to invoke the time for peremptory challenges. 5 CA4th at 151. In contrast, an informal arrangement for calendaring and assigning of cases for all purposes does not invoke the time for challenges. See *Daniel V. v Superior Court* (2006) 139 CA4th 28, 44, 42 CR3d 471 (assignment of juvenile cases under Welf & I C §602 through notices of petition issued by court clerk did not trigger time demands of CCP §170.6(a)(2); court order or written local rule required so that "counsel will not be left guessing when a section 170.6 challenge must be filed"). See also *Jonathon M. v Superior Court* (2006) 141 CA4th 1093, 46 CR3d 798 (in juvenile case, peremptory challenge was timely under *Daniel V.*).

The civil assignment situation is different from the criminal arena, where cases are assigned to a department, rather than a particular judge, to facilitate speedy trial requirements. See *Reygoza v Superior Court* (1991) 230 CA3d 514, 281 CR 390 (local court policy pertaining to civil cases did not override system of assignments in criminal case).

If an action is subject to the Trial Court Delay Reduction Act of 1990 (TCDRA) (Govt C §68600), judicial challenges under CCP §170.6 shall be exercised "within 15 days of the party's first appearance." Govt C §68616(i); see *Fight for the Rams v Superior Court* (1996) 41 CA4th 953, 48 CR2d 851. In reaching this decision, the court in *Fight for the Rams* held that "first appearance" does not mean that the plaintiff must file such a challenge within 15 days of filing the

complaint. Rather, when a direct calendar assignment is made more than 15 days after a complaint is filed, the "first appearance" by plaintiff or defendant who has already responded to the complaint in a direct calendar court coincides with the direct calendar assignment. The court also held that the failure to challenge the assigned judge before hearing and rulings on a demurrer does not eliminate the right to make the challenge. If the judge presides at a hearing "not involving a determination of contested fact issues relating to the merits," a posthearing or postruling challenge is not precluded. CCP §170.6. The ruling on the demurrer was not a determination of contested fact issues relating to the merits.

The same rule applies when a case is assigned to a new all-purpose judge. See *Motion Picture & Television Fund Hosp. v Superior Court* (2001) 88 CA4th 488, 105 CR2d 872. Opinions in the lower courts are in conflict over application of the all-purpose-assignment rule when a case is assigned to a specific department rather than a specific judge. The court in *Lavi* held that this was a question of fact, but that generally the rule would apply if the parties could reasonably ascertain which judge, if any, is regularly assigned to the relevant department and the two prongs of the all-purpose test are met. 4 C4th at 1180 n12. Because the nature of this test is uncertain, it is good practice to assume that the all-purpose-assignment rule will apply to a case assigned to a specific department, rather than a specific judge, unless no particular judge is regularly assigned to that department.

It was not clear previously whether, when mailing a notice of the assignment of an all-purpose or direct-calendar judge under the TCDRA, counsel could count on the 5-day extension of time for mailing under CCP §1013. It is now clear that the 5-day extension of time does apply. *California Bus. Council v Superior Court* (1997) 52 CA4th 1100, 1106, 62 CR2d 7. Older authority had construed former Los Angeles Super Ct R 1104.1 (now Los Angeles Ct R 7.5) to preclude an extension of time for mailing under CCP §1013. See *Swenson v Superior Court* (1988) 202 CA3d 348, 248 CR 340.

**PRACTICE TIP:** Check all appropriate local rules. Procedures for challenging a judge under CCP §170.6 vary among counties, depending on the local rules adopted to implement the TCDRA.

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### §6.70 f. Law and motion judge

Code of Civil Procedure §170.6 has no specific rule for law and motion judges. Language in the section states that "if the motion is directed to a hearing (other than the trial of a cause), the motion shall be made not later than the commencement of the hearing." This language seems to allow peremptory challenges to a law and motion judge to be made up to the time of the hearing. However, other language, in CCP §170.6(a)(2), seems to require a motion under the 10-day/5-day rule (see §6.67) when "the judge … court commissioner or referee assigned to or who is scheduled to try the cause or hear the matter is known at least 10 days before the date set for trial or hearing."

The parties usually know in advance which judge will hear a law and motion matter because, *e.g.,* all law and motion matters are heard in a particular law and motion department, or by the all-purpose individual calendaring (I/C) judge. The courts have held that when a motion is set for hearing in a particular department, and the judge regularly scheduled to sit in that department is known or can be ascertained, the 10-day/5-day rule applies. *People v Superior Court (Lavi)* (1993) 4 C4th 1164, 17 CR2d 815. See §6.68.

When the court issues a tentative ruling, the issuance may be considered the commencement of the hearing for purposes of §170.6 unless the identity of the judge who will hear the motion is not known until after the tentative ruling is issued. See *Kaiser Found. Hosps. v Superior Court* (1987) 190 CA3d 721, 235 CR 630.

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### §6.71 g. If already appeared before judge in case

Generally, when a party seeks to disqualify a judge from presiding over subsequent proceedings in the same case, that challenge will be found untimely. For example, a party cannot challenge the trial judge in postjudgment proceedings if those proceedings constitute a continuation of the original case and involve substantially the same issues. *Astourian v Superior Court* (1990) 226 CA3d 720, 276 CR 657. In *Astourian,* the court found that an order to show cause for contempt for failure to obey a preliminary injunction was a continuation of the original proceedings, and that a CCP §170.6 challenge to the judge who had issued the injunction was untimely.

**Not a determination of contested fact.** If a judge has already presided at a hearing in the matter, but that hearing did not involve a determination of contested facts relating to the merits, a party may still challenge that judge under CCP §170.6. CCP §170.6(a)(2). For example, a §170.6 motion is not precluded when a judge has presided over a demurrer or a motion for judgment on the pleadings, because such a proceeding requires the judge to decide only issues of law, not fact. See generally *Los Angeles County Dep't of Pub. Soc. Servs. v Superior Court* (1977) 69 CA3d 407, 417, 138 CR 43. See also *Swift v Superior Court* (2009) 172 CA4th 878, 883, 91 CR3d 504 (judge's routine discovery rulings, unrelated to merits of action, insufficient to make §170.6 motion untimely); *People v Whitfield* (1986) 183 CA3d 299, 228 CR 82 (hearing on counsel's competency does not constitute determination of contested facts relating to merits for purposes of §170.6).

Nor does ruling on a motion for summary judgment constitute a determination of a contested fact issue for purposes of CCP §170.6, because, in ruling on a summary judgment motion, the judge does not pass on or determine issues of fact, but merely decides whether a triable issue of fact exists. *Bambula v Superior Court* (1985) 174 CA3d 653, 220 CR 223. The court in *California Fed. Sav. & Loan Ass'n v Superior Court* (1987) 189 CA3d 267, 234 CR 413, however, refused to apply *Bambula* to a motion for summary adjudication of issues, at least on the facts of that case. The court characterized the *Bambula* decision as a simple decision on whether a triable issue of fact existed. In *California Fed. Sav. & Loan,* the court decided several complex questions of law. Other courts have declined to follow *California Fed. Sav. & Loan.* See *Zilog, Inc. v Superior Court* (2001) 86 CA4th 1309, 1322, 104 CR2d 173.

A ruling on an ex parte application for a temporary restraining order (TRO) does not constitute a determination of a contested fact issue. A TRO is purely transitory and terminates when a preliminary injunction is issued. *Landmark Holding Group, Inc. v Superior Court* (1987) 193 CA3d 525, 238 CR 475. See also *International Union of Operating Eng'rs v Superior Court* (1989) 207 CA3d 340, 254 CR 782.

**Not a general appearance.** A special appearance by a party to quash service or challenge jurisdiction does not qualify as an appearance for purposes of §170.6. *La Seigneurie U.S. Holdings, Inc. v Superior Court* (1994) 29 CA4th 1500, 1504, 35 CR2d 175. Even if the judge who decides the motion to quash is a judge assigned for all purposes under the Trial Court Delay Reduction Act of 1990, the deadline to challenge the judge does not begin until the party makes its first general appearance. 29 CA4th at 1506.

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### §6.72 h. After appeal

A motion under CCP §170.6 may be made after a reversal on appeal if the judge who heard the earlier proceeding is assigned to the new trial. The motion must be made within 60 days after the party has been notified of the assignment. CCP §170.6(a)(2). See *Stubblefield Constr. Co. v Superior Court* (2000) 81 CA4th 762, 97 CR2d 121. Even if the party has already used a peremptory challenge on another judge before the case was decided at the trial level, an appeal and remand resurrects the right to a peremptory challenge. CCP §170.6(a)(2) (final paragraph); *Pfeiffer Venice Props. v Superior Court* (2003) 107 CA4th 761, 766, 132 CR2d 400.

When the remand does not require the reopening or reconsideration of factual or legal issues already decided by the trial judge, there is no "new trial" for purposes of CCP §170.6(a)(2) and a peremptory challenge will be properly denied. *Paterno v Superior Court* (2004) 123 CA4th 548, 20 CR3d 282 (remand for determination of damages only was not "new trial" and peremptory challenge properly dismissed). But see *First Fed. Bank of Cal. v Superior Court* (2006) 143 CA4th 310, 49 CR3d 296 (remand for determination of amount of attorney fees considered "new trial" because trial judge had previously determined that party was not entitled to fees).

In a coordinated action, a party that successfully challenges a summary judgment ruling on appeal may thereafter exercise a peremptory challenge of the judge notwithstanding Cal Rules of Ct 3.516, which ordinarily allows a party 20 days to challenge a judge assigned to a coordination proceeding. *Jane Doe 8015 v Superior Court* (2007) 148 CA4th 489, 55 CR3d 708.

On CCP §170.6 challenges in coordinated proceedings, see §6.74.

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### §6.73 i. New trial after writ

In *Overton v Superior Court* (1994) 22 CA4th 112, 27 CR2d 274, the court held that the provision of CCP §170.6(a)(2) allowing a challenge if the case is assigned to the same judge after reversal on appeal also applies when a new trial is ordered as part of the relief granted in a writ proceeding. The court construed "appeal" in the statute to include writ proceedings in order to give litigants who obtain a new trial as a result of a writ proceeding the same protections successful appellants have. It reasoned that a judge's potential bias against a party who obtains a new trial in a writ proceeding is just as substantial as it is in an appeal. The court stated that construing "appeal" to include writ proceedings would not result in an abuse of the CCP §170.6 challenge or a dramatic expansion of the right, because new trials resulting from writ proceedings are exceedingly rare.

When a writ proceeding does not result in a new trial, however, a peremptory challenge may not be made under CCP §170.6(a)(2). *State Farm Mut. Auto. Ins. Co. v Superior Court* (2004) 121 CA4th 490, 493, 17 CR3d 146 (peremptory challenge was properly denied because trial judge did not "try" case and earlier writ proceeding on conflict of laws issue will not result in "new trial").

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### §6.74 j. In coordinated proceeding

The parties have 20 days after service of the order assigning a judge in a coordinated proceeding to submit a motion or affidavit challenging the judge under CCP §170.6. Cal Rules of Ct 3.516. All plaintiffs in all the coordinated actions constitute one side for purposes of the one-challenge rule, and all defendants constitute the other side. Cal Rules of Ct 3.516. See *Philip Morris Inc. v Superior Court* (1999) 71 CA4th 116, 122, 83 CR2d 671 (each side in coordination proceeding is entitled to one §170.6 peremptory challenge to disqualify assigned coordination trial judge within 20 days after assignment order).

Even if the judge assigned as the coordination judge has ruled in one or more of the coordinated cases before the coordination, the parties still have 20 days under Cal Rules of Ct 3.516 to file a CCP §170.6 challenge. *Farmers Ins. Exch. v Superior Court* (1992) 10 CA4th 1509, 13 CR2d 449 (former Cal Rules of Ct 1515 took precedence over §170.6). Similarly, even though one judge is assigned as the coordination motion judge, the parties have 20 days under former Rule 1515 when they are served with a subsequent notice appointing the same judge as coordination trial judge. *Stone v Superior Court* (1994) 25 CA4th 1144, 31 CR2d 56.

In *Citicorp N. Am., Inc. v Superior Court* (1989) 213 CA3d 563, 261 CR 668, the court held that the 20-day period to challenge the judge assigned in a coordination proceeding is extended for 5 days under CCP §1013 if the notice of assignment is mailed. The court held that §1013 will extend a time period if service of a document triggers the prescribed time period, but the statute will not extend the time period if some event other than service of a document is the trigger. Because each side in a coordinated proceeding has only one challenge, the parties on each side must consult with one another to decide whether to exercise that challenge. Extending the 20-day period under §1013 when the notice of the assignment was served by mail furthered the purpose of giving the parties the full 20 days to consult and then to act.

On CCP §170.6 challenge after successful appeal of summary judgment in coordinated proceeding, see §6.72.

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### §6.75 4. What to include in motion: Affidavit or declaration to establish prejudice

Any affidavit filed under CCP §170.6 must be in substantially the same form as the affidavit in CCP §170.6(a)(5). Any oral statement under oath, or declaration under penalty of perjury made under §170.6, must also include substantially the same contents as the affidavit in §170.6(a)(5). CCP §170.6(a)(6). See §6.112 for a sample declaration form. Printed forms for making challenges under §170.6 are available in some courts.

The affidavit simply states that the judge is so prejudiced against the party or attorney that the party cannot, or believes that the party cannot, have a fair and impartial trial before that judge. CCP §170.6(a)(2), (5). Good faith is sufficiently established if the affidavit is in proper form and timely filed; proof of facts showing actual prejudice is not required. *People v Superior Court (Williams)* (1992) 8 CA4th 688, 698, 10 CR2d 873.

**PRACTICE TIP:** When using an oral statement instead of a written declaration, *e.g.,* when the case is assigned to a trial department from a master calendar and there is no time for a written declaration (or affidavit), state to the judge supervising the master calendar (*i.e.,* in the master calendar department): "There will be a challenge under CCP §170.6, Your Honor. May I please be sworn?"

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### §6.76 5. Opposing the motion

As explained in §6.58, because disqualification of the judge under CCP §170.6 is automatic after the proper affidavit is filed, opposing the challenge is pointless. Parties may oppose the challenge, however, if they can prove that the party challenging the judge is using §170.6 to exclude persons on racial grounds through invidious discrimination. See discussion and test for this opposition to a §170.6 challenge in *People v Superior Court (Williams)* (1992) 8 CA4th 688, 10 CR2d 873. Similarly, the opposing party may point out to the judge that the challenge is untimely or incomplete.

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### §6.77 6. Judge disqualified and case transferred

If the motion is timely and properly made, the disqualification is automatic, *i.e.,* no further act or proof is required. CCP §170.6(a)(3). See *Journey v Superior Court* (1975) 47 CA3d 408, 411, 120 CR 897. The judge supervising the master calendar assigns another trial judge of the same court, or, if there is no other judge, the chairman of the Judicial Council assigns another judge to try or hear the matter. CCP §170.6(a)(3).

If another party, or the court, objects to the timeliness or propriety of the motion, the master calendar judge or the challenged judge must conduct a hearing to determine, for example, whether the motion is timely. See, *e.g., Shipp v Superior Court* (1992) 5 CA4th 147, 6 CR2d 685; *Andrews v Joint Clerks Port Labor Relations Comm.* (1966) 239 CA2d 285, 294, 48 CR 646.

When a party files a timely CCP §170.6 challenge to the trial judge, the trial judge must disqualify himself or herself from the entire case and transfer it for reassignment. The judge cannot sever, for example, a cross-complaint and reassign only a part of the case to another judge. *Sunkyong Trading (H.K.), Ltd. v Superior Court* (1992) 9 CA4th 282, 11 CR2d 504.

See §6.78 on the time within which extraordinary relief must be sought if the §170.6 challenge is denied.

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### §6.78 G. Availability of extraordinary relief

A judge's decision on whether to disqualify a challenged judge for cause under CCP §170.1 is not reviewable by appeal. CCP §170.3(d). See *People v Barrera* (1999) 70 CA4th 541, 82 CR2d 755 (although judge may not ask parties and attorneys whether they wish to waive disqualification based on judge's having served as attorney in matter, parties aware of basis for disqualification and who choose to waive it are bound by writ requirement of CCP §170.3(d)). Rather, the judge's decision may be reviewed by seeking a writ of mandate from an appropriate appellate court within 10 days after notice to the parties of the decision. Only parties may seek review of the decision, but presumably a party could ask for a writ following a decision to disqualify or not to disqualify. Under former law, the review process apparently was available only to review the denial of a motion to disqualify. Review is available only to a party litigant, not to a disqualified judge. *Curle v Superior Court* (2001) 24 C4th 1057, 103 CR2d 751.

In *People v Brown* (1993) 6 C4th 322, 24 CR2d 710, the supreme court held that a decision denying disqualification is reviewable by appeal from the final judgment when the basis of the appeal is the denial of constitutional due process because of the judge's bias (as opposed to a statutory basis for disqualification). The court suggested, however, that a party who fails to seek writ review of the denial of the disqualification motion may forfeit the right to raise the due process claim on appeal from the final judgment. The court also suggested that when the writ is heard and denied on its merits, the matter may be precluded on appeal by the "law of the case" doctrine. 6 C4th at 336 n11.

Although CCP §170.6 (peremptory challenges) does not provide a deadline to seek a writ contesting a peremptory challenge ruling, the 10-day time limit for a writ in CCP §170.3(d) is generally held to apply to all challenges, not just those for cause. See *People v Hull* (1991) 1 C4th 266, 2 CR2d 526 (CCP §170.3(d) provided exclusive means to review denial of §170.6 challenge); *In re Sheila B.* (1993) 19 CA4th 187, 194, 23 CR2d 482 (§170.3(d) provided sole means to review grant of §170.6 challenge). The court in *Hull* adopted essentially the same reasoning as the Fourth District Court of Appeal used in *Guedalia v Superior Court* (1989) 211 CA3d 1156, 260 CR 99.

The *Guedalia* court also held that the 10-day period for contesting the ruling that denied the challenge began to run when the judge informed the party in open court that the peremptory challenge was untimely. Written notice of the ruling was not required. See California Civil Writ Practice §§16.3, 16.5, 18.73, 18.78 (4th ed Cal CEB 2008) for additional case information.

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## V. DISMISSING CASE

### A. Voluntary dismissal

### §6.79 1. Authority: CCP §581(c)

Under CCP §581(c), a plaintiff may dismiss the entire complaint or any cause of action asserted in it regarding any defendant or defendants with or without prejudice before the start of trial. Unless specifically stated to be with prejudice, a voluntary dismissal under §581(c) before trial begins is without prejudice. See *Neil G. v Superior Court* (1973) 30 CA3d 572, 576, 106 CR 505. A dismissal of an action without prejudice is available at any time under CCP §581(b)(2) by written consent of all parties.

After the trial has begun, dismissal at the plaintiff's request is with prejudice unless all parties consent to a dismissal without prejudice, or, for good cause shown, the court orders a dismissal without prejudice. CCP §581(e); *Davis v Pine Mountain Lumber Co.* (1969) 273 CA2d 218, 227, 77 CR 825.

Under CCP §581(d), the court can dismiss an action with prejudice when, during trial, the plaintiff abandons the action before final submission of the case. Dismissal under §581(d) might be characterized as involuntary.

The rules under the Trial Court Delay Reduction Act of 1990 (TCDRA) do not affect a plaintiff's right to dismiss an action without prejudice before trial. In *Harris v Billings* (1993) 16 CA4th 1396, 20 CR2d 718, the parties entered into an agreement to continue settlement negotiations and allow plaintiff to dismiss the complaint without prejudice to the plaintiff's later right to refile it. The trial court vacated the agreed-on dismissal *without* prejudice and entered a dismissal *with* prejudice, finding that the parties did not have the power to agree to dismiss without prejudice, because the agreement subverted the goals of TCDRA. The Second District reversed, finding that TCDRA did not allow the court to deprive a plaintiff of the statutory right to dismiss an action without prejudice before trial, and holding that the right to voluntarily dismiss was consistent with TCDRA goals (removing cases currently in the court system).

See California Civil Procedure Before Trial, chap 39 (4th ed Cal CEB 2004) on voluntary dismissal. On dismissals when either or both parties fail to appear for trial, see CCP §581(b)(3). On dismissals under CCP §581, see 6 Witkin, California Procedure, *Proceedings Without Trial* §§283-314 (5th ed 2008).

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### §6.79A 2. Right to voluntary dismissal not absolute

Although CCP §581(c) provides that the plaintiff may dismiss without prejudice any time before the "actual commencement of trial," cases have held that other procedures short of trial that "effectually dispose of the case" may cut off plaintiff's right to dismiss without prejudice. *Wells v Marina City Prop.* (1981) 29 C3d 781, 785, 176 CR 104. See, *e.g.*, *Gray v Superior Court* (1997) 52 CA4th 165, 60 CR2d 428 (plaintiff's right to voluntarily dismiss cutoff by commencement of evidentiary proceedings before referee in partition action).

**NOTE:** In such a case, even if the dismissal is allowed, the refiled case may be deemed "related" and assigned to the same judge. See, *e.g.*, Los Angeles Ct R 7.3(d). By extension, this could mean that a peremptory challenge in the second case may be deemed untimely. *Stephens v Superior Court* (2002) 96 CA4th 54, 62, 116 CR2d 616.

Other exceptions to the right to voluntarily dismiss include cases in which the action has proceeded to a determinative adjudication or a decision that is tantamount to an adjudication. See, *e.g., Groth Bros. Oldsmobile, Inc. v Gallagher* (2002) 97 CA4th 60, 70, 118 CR2d 405 (plaintiff failed to file opposition to defendant's demurrer and attempted to dismiss voluntarily after court issued tentative ruling sustaining demurrer; voluntary dismissal invalid); *Cravens v State Bd. of Equalization* (1997) 52 CA4th 253, 60 CR2d 436 (plaintiff failed to file opposition to defendant's summary judgment motion and sought to dismiss voluntarily on day before hearing; voluntary dismissal invalid). But see *Zapanta v Universal Care, Inc.* (2003) 107 CA4th 1167, 132 CR2d 842 (trial court erred in granting defense summary judgment motion after plaintiff had filed voluntary dismissal one day before opposition was due).

In *Franklin Capital Corp. v Wilson* (2007) 148 CA4th 187, 55 CR3d 424, the Fourth District Court of Appeal reviewed the disparate voluntary dismissal cases and proposed a "mere formality" test to harmonize the cases. Under this test, the right to voluntarily dismiss without prejudice is cut off, if (1) the trial court has made a public and formal indication of an intention to dismiss, or (2) the case has fallen into an unwinnable posture and dismissal with prejudice is a "mere formality," regardless of whether the judge has formally indicated such an intention. See also *Gogri v Jack in the Box Inc.* (2008) 166 CA4th 255, 269 n11, 82 CR3d 629 (dismissal with prejudice not mere formality when voluntary dismissal was filed after opposition to summary judgment motion but before tentative ruling).

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### §6.80 3. Using dismissal as a trial tactic

Always analyze the best means of presenting the client's case in the most efficient and persuasive manner possible, and determine the way in which you want the evidence to unfold before the trier of fact. When representing a plaintiff or cross-complainant, it may be best to dismiss certain parties or causes of action in order to eliminate discordant evidence or parties who will engender sympathy and to achieve greater control over the trial presentation. For example, a particular defendant, if not dismissed, may evoke the sympathy of the court or jury and adversely affect the outcome of the claim against the other defendants.

The dismissal of a party or a cause of action may have a deleterious effect on plaintiff's case, either legally or tactically. Carefully analyze the risks of such a course of action along with the benefits. Some typical questions include:

- Do the remaining defendants have sufficient assets to satisfy a judgment?
- Will dismissal of a cause of action or party limit the introduction of evidence helpful to plaintiff's case or will dismissal limit the introduction of damaging evidence by defendants?
- Will dismissal of a party operate as a bar to recovery against other defendants (*e.g.,* dismissal of a primary obligor in a suit against a guarantor)?
- Will dismissal of an out-of-state defendant render that defendant unavailable as a witness at trial or affect the admissibility of the defendant's deposition testimony (*e.g.,* admissions made by a defendant who is no longer a party to the suit may not be admissible)?
- Is the party to be dismissed indispensable?
- Will dismissal of a defendant leave an empty chair for other defendants to blame?
- Will a defendant waive costs in exchange for dismissal on the eve of trial?

In short, conduct a comprehensive review of the tactical and legal considerations pertinent to the pretrial dismissal of parties or causes of action before voluntarily dismissing parties or causes of action under CCP §581.

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### §6.81 4. Filing request to voluntarily dismiss

The plaintiff may file a written request with the clerk, or make an oral or written request to the judge, to dismiss the action before the trial begins. CCP §581(b)(1).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.82 5. When to request dismissal: Before trial

### §6.82 5. When to request dismissal: Before trial

Before a trial begins, the plaintiff may ask the court to dismiss the action. CCP §581(b)(1). A dismissal of an action by written consent of all the parties is available at any time under CCP §581(b)(2). See California Civil Procedure Before Trial §§39.95-39.125 (4th ed Cal CEB 2004).

**PRACTICE TIP:** Make voluntary dismissals before the trial date, if possible. In some situations, however, you may need to voluntarily dismiss one or more causes of action or defendants as late as the time of trial, *e.g.,* when pretrial settlements have just been reached with some defendants. On settlements generally, see Civ Proc Before Trial, chaps 46-50.

Under CCP §581(a)(6), the trial is considered to have started:

- At the beginning of the opening statement or argument of any party or counsel; or
- When the oath or affirmation is administered to the first witness or when any evidence is introduced.

Section 581(a)(6) has been construed to bar a plaintiff from voluntarily dismissing an action when a general demurrer has been sustained and plaintiff fails to amend within the time authorized. *Wells v Marina City Prop.* (1981) 29 C3d 781, 176 CR 104.

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### 6. Effect of dismissal

### §6.83 a. If dismissed without prejudice

A voluntary dismissal without prejudice under CCP §581(c) before the trial begins does not bar another action by the plaintiff in the same cause. See *Neil G. v Superior Court* (1973) 30 CA3d 572, 576, 106 CR 505; 6 Witkin, California Procedure, *Proceedings Without Trial* §§307-310 (5th ed 2008). See also *Crosswhite v American Ins. Co.* (1964) 61 C2d 300, 38 CR 412. Although a dismissal without prejudice does not prevent the plaintiff from filing a new action (see *Crosswhite v American Ins. Co., supra*; *Neil G. v Superior Court, supra*), such a dismissal is considered a termination in defendant's favor and will support an action for malicious prosecution. *MacDonald v Joslyn* (1969) 275 CA2d 282, 79 CR 707.

**NOTE:** Following a dismissal without prejudice, the dismissed party can file a motion to tax costs, unless the parties agree to a waiver of costs. The dismissed party cannot, however, recover attorney fees because there is no prevailing party when a case has been voluntarily dismissed. CC §1717(b)(2).

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### §6.84 b. If dismissed with prejudice

A dismissal with prejudice is res judicata and bars a subsequent action between the same parties on the same claim or same primary right. See *Goddard v Sec. Title Ins. & Guar. Co.* (1939) 14 C2d 47, 92 P2d 804; *Weikel v TCW Realty Fund II Holding Co.* (1997) 55 CA4th 1234, 65 CR2d 25. A dismissal with prejudice is a termination in defendant's favor and will support an action for malicious prosecution. *MacDonald v Joslyn* (1969) 275 CA2d 282, 79 CR 707.

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### §6.85 c. Defendant can recover costs

When a plaintiff dismisses an action under CCP §581(b)(1), whether with or without prejudice, the defendant is the prevailing party under CCP §1032(a)(4) and the plaintiff must pay costs. *Santisas v Goodin* (1998) 17 C4th 599, 606, 71 CR2d 830 (dismissal with prejudice); *International Indus. v Olen* (1978) 21 C3d 218, 221, 145 CR 691 (dismissal without prejudice). See *Adler v Vaicius* (1993) 21 CA4th 1770, 1777, 27 CR2d 32 (defendant was prevailing party even though plaintiff prevailed on TRO before voluntarily dismissing). See also *Santos v Civil Serv. Bd.* (1987) 193 CA3d 1442, 239 CR 14 (court found that party in whose favor voluntary dismissal was entered in administrative mandamus action was prevailing party and, therefore, entitled to costs under CCP §1094.5). See 7 Witkin, California Procedure, *Judgment* §§83-95 (5th ed 2008).

In *Santisas v Goodin, supra,* the California Supreme Court addressed the issue of whether the costs that the defendant may recover in voluntary dismissal cases include the amounts incurred as attorney fees in defending the litigation. The court concluded that in voluntary pretrial dismissal cases, recovery of attorney fees incurred in defending contract claims is barred by CC §1717(b)(2), but that whether attorney fees incurred in defending tort or other noncontract claims are recoverable depends on the terms of the contractual attorney fee provision (17 C4th at 622):

> [A] court may determine whether there is a prevailing party, and if so which party meets that definition, by examining the terms of the contract at issue, including any contractual definition of the term "prevailing party" and any contractual provision governing payment of attorney fees in the event of dismissal.

On defendant's recovery of costs, see chap 26; 7 Witkin, California Procedure, *Judgment* §92 (5th ed 2008).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.86 B. Involuntary dismissal

### §6.86 B. Involuntary dismissal

Code of Civil Procedure §§583.110-583.430 set forth grounds for dismissing an action for failure to prosecute. The procedure to follow for a party seeking a dismissal for delay in prosecution under CCP §§583.410-583.430 is in Cal Rules of Ct 3.1342. For detailed discussion of involuntary dismissals and procedure generally, see California Civil Procedure Before Trial, chap 39 (4th ed Cal CEB 2004).

**PRACTICE TIP:** Dismissal motions under CCP §§583.110-583.430 should be made before the trial date, if possible.

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## VI. AMENDING PLEADINGS

### §6.87 A. Authority (Cal Rules of Ct 3.1324); grounds (CCP §§473, 576)

The procedure for making amendments to pleadings and amended pleadings are governed by Cal Rules of Ct 3.1324. Motions to amend pleadings may be made on the grounds stated in CCP §§473 and 576. See California Civil Procedure Before Trial, chap 16 (4th ed Cal CEB 2004) on amending and supplementing complaints. On moving to amend pleadings to conform to proof during or after trial, see §§18.103-18.123; see forms in §§18.132-18.134.

A party may need to amend pleadings shortly before trial so that the pleading conforms to evidence gathered during trial preparation or in response to a motion for judgment on the pleadings. The court should grant leave to amend before granting a motion for judgment on the pleadings in the following circumstances:

- "[W]hen the facts stated indicate that the party probably has a good cause of action or defense, but that it has been pleaded imperfectly or defectively, and the defects have not been called to his attention by demurrer or by a notice of motion for judgment on the pleadings." *MacIsaac v Pozzo* (1945) 26 C2d 809, 815, 161 P2d 449; *Tiffany v Sierra Sands Unified Sch. Dist.* (1980) 103 CA3d 218, 225, 162 CR 669.
- When the defective pleading was previously upheld against a general demurrer. *Dobbins v Hardister* (1966) 242 CA2d 787, 796, 51 CR 866. For further discussion, see Civ Proc Before Trial §§34.18-34.19.

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### §6.88 B. When to move to amend

Move to amend pleadings under CCP §§473 and 576 as far before trial as possible to avoid the risk of denial. An attempt to amend a pleading on the day of trial may disrupt the trial and prejudice the other party. "[S]uch an amendment [can] cause a radical switch in trial plans." *Deetz v Carter* (1965) 232 CA2d 851, 857, 43 CR 321. The court may deny the motion to amend if it finds that the attorney lacked diligence in moving to amend a pleading after knowing the facts or that the opposing party will be adversely affected. See *Marvin v Marvin* (1976) 18 C3d 660, 667 n2, 134 CR 815; *Bank of America v Goldstein* (1938) 25 CA2d 37, 47, 76 P2d 545; 5 Witkin, California Procedure, *Pleading* §§1201-1208 (5th ed 2008). See also *Roemer v Retail Credit Co.* (1975) 44 CA3d 926, 939, 119 CR 82.

Permission to file an amended pleading on the day of trial is within the court's discretion. *Moss Estate Co. v Adler* (1953) 41 C2d 581, 585, 261 P2d 732. Amendments to the pleadings on the day of trial have also been permitted. See, *e.g., Deetz v Carter, supra*; *Posz v Burchell* (1962) 209 CA2d 324, 25 CR 896. See also *Weingarten v Block* (1980) 102 CA3d 129, 162 CR 701.

Presumably, an oral application to amend pleadings could be granted when the parties appear before the court on the trial date. See *McKee v Mires* (1952) 110 CA2d 517, 242 P2d 954 (no error in permitting amendment to conform to proof when no notice of hearing given); *Karlik v Peters* (1930) 106 CA 126, 288 P 863 (when parties were in court in response to notice of motion for judgment on pleadings, it was not error to grant oral application for leave to file amended complaint even though no notice had been originally given). But see *Hall v Department of Adoptions* (1975) 47 CA3d 898, 121 CR 223.

**JUDICIAL PERSPECTIVE:** With the intensive case management that is the signature of the civil delay reduction program, there must be good cause to amend on a matter of substance before a judge will grant this motion.

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### C. Making noticed motion to amend

### §6.89 1. Using written motion

Make a trial-day motion to amend the pleadings in writing. It is advisable to make it on noticed motion rather than handing it to opposing counsel and filing it with the court immediately before going into the chambers conference. See Cal Rules of Ct 3.1324. The motion may be denied for lack of notice if you proceed without noticed motion. See CCP §473; *Hall v Department of Adoptions* (1975) 47 CA3d 898, 121 CR 223 (at beginning of trial after motion for judgment on pleadings but before ruling on it, court erred by allowing amendment of pleadings without notice as required by §473); *Bank of America v Goldstein* (1938) 25 CA2d 37, 76 P2d 545 (denial of motion to amend answer on morning of trial was not abuse of court's discretion when no notice of hearing on motion had previously been served on plaintiff).

Although CCP §473 authorizes minor amendments without requiring notice to the adverse party, notice is necessary when an amendment concerns a matter of substance. *Estate of Hunter* (1961) 194 CA2d 859, 864, 15 CR 556. In *Hunter,* the court allowed an amended petition for confirmation of sale (a matter of substance), even though no notice under §473 was given, because the adverse party suffered no prejudice. 194 CA2d at 865. On notice of motion procedure generally, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.90 2. Using amended pleadings that supersede original pleadings

### §6.90 2. Using amended pleadings that supersede original pleadings

Although amendments to a pleading are permissible if certain conditions are met (see Cal Rules of Ct 3.1324(a)-(b)), the court may require counsel to prepare an amended pleading that wholly supersedes the original pleading (see Cal Rules of Ct 3.1324(c)). Courts disfavor amendments to a pleading that preserve the original pleading, because the amendments inconveniently require referring to multiple documents. The court's permission is required before making any alterations to the face of a pleading, and any alternation must be initialed by the judge or the clerk. See Cal Rules of Ct 3.1324(d).

**NOTE:** Counsel must comply with Cal Rules of Ct 3.1110 and 3.1302 on the format, and place and manner, of filing motions.

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### D. What to include in supporting papers

### §6.91 1. Notice of motion

The notice of motion to amend a pleading before trial 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;
- Identify any allegations that the moving party proposes to delete from the previous pleading, and specify the location of those deletions by page, paragraph, and line number; and
- State any allegations that the moving party proposes to add to the previous pleading, and specify the location of those additions by page, paragraph, and line number.

In the notice of motion, ask the court to issue an order that both grants leave to amend and deems that the proposed amended pleading included with the motion is filed. This method avoids the problem of having to file the amendment or amended pleading after the court grants your motion to amend. See *Campagna v Market St. Ry.* (1944) 24 C2d 304, 149 P2d 281.

To avoid a continuance based on the opposing party's need to answer a complaint or cross-complaint, ask in the motion (when practicable) that new allegations be deemed denied and that the existing answer be deemed the answer to the new pleading.

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### §6.92 2. Declaration; supporting memorandum and copy of proposed pleading

A separate declaration must accompany the motion to amend a pleading that specifies (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 why the request for amendment was not made earlier.

A supporting memorandum must be filed with the notice of motion. Cal Rules of Ct 3.1113. It may also be appropriate to include the following points in the papers supporting the motion:

- **Good cause.** Show that there is a good reason for the amendment; for example, it is good practice to argue that the claim or defense is one on which the client is likely to succeed (see, *e.g., Richter v Adams* (1941) 43 CA2d 184, 188, 110 P2d 486), and therefore the claim is necessary for a just adjudication.
- **Absence of prejudice.** Show that the opposing party will not be prejudiced by the amendment; for example, the proposed change was revealed to the adverse party during the pretrial phase, no new discovery will be required, or the trial need not be delayed. If you believe that the adverse party will be able to show prejudice through delay or additional discovery burdens, offer ameliorative measures such as voluntarily submitting to discovery, stipulating to a continuance, or even, when the amendment is important enough, paying the adverse party's costs. Under CCP §473, a court may grant leave to amend but condition its order on the trial's continuance and the payment of just costs to the adverse party.

Attach a copy of the proposed amended pleading to the motion papers.

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### §6.93 E. What to include in papers opposing motion

In preparing papers opposing the motion, focus on the converse of the issues discussed in §6.92, *e.g.*:

- **No good cause.** Argue that the amendment is not likely to present a successful issue, and the court should deny the motion. Point out, for example, that the proposed amendment is barred by the statute of limitations (see, *e.g., Huber, Hunt & Nichols, Inc. v Moore* (1977) 67 CA3d 278, 293, 136 CR 603), is demurrable (see, *e.g., Robertson v City of Long Beach* (1937) 19 CA2d 676, 66 P2d 167), is otherwise not legally sustainable, or is a claim or defense on which the proponent is unlikely to succeed. If the moving party contends that the amendment does not substantially alter the pleaded claims and defenses, argue that there is no justification for a last-minute amendment (see *Huber, Hunt & Nichols, Inc. v Moore, supra*).
- **Unjustified delay.** Set forth any evidence showing that the motion could have been brought earlier (see, *e.g., Hayutin v Weintraub* (1962) 207 CA2d 497, 506, 24 CR 761).
- **Prejudice.** Show how the amendment will cause your client prejudice; for example, trial delay (see, *e.g., Huber, Hunt & Nichols, Inc. v Moore, supra*), loss of or difficulty in finding documentary or testimonial evidence (see, *e.g., Hayutin v Weintraub, supra*), or unnecessary duplication of effort. When possible, quantify the prejudice in dollars or set forth the amendment's qualitative effect on the issues, or the need to reopen discovery on new issues raised in the amended pleading.
- **Ameliorating conditions.** Ask that, if the court grants the motion to amend, the court also award you costs, a continuance, or discovery, as appropriate.

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## VII. JUDGMENT ON THE PLEADINGS

### §6.94 A. Authority (CCP §438); grounds for motion

Code of Civil Procedure §438 provides express statutory authority for a motion for judgment on the pleadings, but the procedure was well established by case law and common practice long before the statute was enacted. See, *e.g., Colberg, Inc. v State ex rel Dep't of Pub. Works* (1967) 67 C2d 408, 62 CR 401; *Sofias v Bank of America* (1985) 172 CA3d 583, 586, 218 CR 388. See generally 6 Witkin, California Procedure, *Proceedings Without Trial* §186 (5th ed 2008).

The motion for judgment on the pleadings asks the court to rule that:

- The 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 *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.
- The court does not have subject matter jurisdiction of the cause of action alleged in the complaint. CCP §438(c)(1)(B)(i).

The motion is subject to the same rules and serves the same function as a general demurrer. See *Colberg, Inc. v State ex rel Dep't of Pub. Works, supra*; *Mack v State Bar* (2001) 92 CA4th 957, 961, 112 CR2d 341. The main difference between a motion for a judgment on the pleadings and a general demurrer is that the motion is made after the time to file a demurrer has expired. CCP §438(f). See §6.95 for discussion of when to make the motion.

Before enactment of CCP §438, a motion for judgment on the pleadings could be made, even when the trial judge, or a different judge, had formerly overruled a general demurrer or denied a prior motion for judgment on the pleadings. *Donohue v State* (1986) 178 CA3d 795, 224 CR 57; *Shabrick v Moore* (1961) 195 CA2d 56, 58, 15 CR 310. Code of Civil Procedure §438(g), however, adds the requirement that a material change in the applicable case or statutory law must have occurred since the demurrer if the moving party has already unsuccessfully demurred.

Motions for judgment on the pleadings are discussed in detail in California Civil Procedure Before Trial, chap 27 (4th ed Cal CEB 2004).

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### §6.95 B. When to make motion

A motion under CCP §438 must be made before a pretrial conference order has been entered under CCP §575, or 30 days before the initial trial date, whichever is later. A motion can be made later with court permission. CCP §438(e).

**PRACTICE TIP:** Check local rules on filing dispositive pretrial motions. Check Cal Rules of Ct 3.1110 and 3.1302 on the format, place, and manner of filing motions.

Before the enactment of CCP §438, a motion for judgment on the pleadings could be made at any time before trial, at the start of trial, or even during trial before final judgment is rendered. See *Shabrick v Moore* (1961) 195 CA2d 56, 59, 15 CR 310. Questions remain about whether the former nonstatutory motion for judgment on the pleadings may be made after the time for making the statutory motion has expired. See 6 Witkin, California Procedure, *Proceedings Without Trial* §186 (5th ed 2008).

**JUDICIAL PERSPECTIVE:** Courts usually prefer to have a motion for judgment on the pleadings heard on the law and motion calendar rather than shortly before trial, assuming that option is still viable in light of CCP §438.

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### §6.96 C. Using written noticed motion or oral motion

Motions for judgment on the pleadings before trial are usually made on noticed motion. CCP §438(i)(2). For procedure, see California Civil Procedure Before Trial §§27.8-27.23 (4th ed Cal CEB 2004). Similarly, when contemplating a trial-day motion for judgment on the pleadings, consider making it on noticed motion. In cases assigned to an individual calendaring (I/C) judge, these motions may be heard at the final case management conference or at some other date set by the judge. See §§6.2-6.5.

A trial-day motion for judgment on the pleadings based on the case authority that predates the statute was also allowed to be made orally. See *Morel v Morel* (1928) 203 C 417, 264 P 760; *Budrow v Wheatcraft* (1953) 115 CA2d 517, 518, 252 P2d 637, disapproved on other grounds in *Carney v Simmonds* (1957) 49 C2d 84, 315 P2d 305. No previous notice needed to be given. See *Morel v Morel, supra*. See also *Wagner v Benson* (1980) 101 CA3d 27, 32, 161 CR 516 (parties need not make formal motion; court may dismiss claims on its own motion or on objection to proffered evidence).

On counsel's right to be heard if court sua sponte moves for judgment on the pleadings, see *Moore v California Minerals Prods. Corp.* (1953) 115 CA2d 834, 836, 252 P2d 1005. Code of Civil Procedure §438(b)(2) specifically allows the court, on its own motion, to grant a motion for judgment on the pleadings.

In some cases, a party makes the equivalent of a motion for judgment on the pleadings by objecting to the introduction of all evidence on the attacked pleading at the start of trial. See, *e.g., Miller v McLaglen* (1947) 82 CA2d 219, 222, 186 P2d 48. For discussion of this procedure and whether to make a motion for judgment on the pleadings after such an objection is sustained, see 6 Witkin, California Procedure, *Proceedings Without Trial* §§199-200 (5th ed 2008). The direct approach of moving for judgment on the pleadings is more typical.

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### §6.97 D. If opposing motion

When opposing an unnoticed motion for judgment on the pleadings, consider requesting a continuance to prepare opposition and curative amendments. The court will usually not grant a surprise motion without first giving the opposing party the opportunity to decide whether to stand on that party's pleading or to amend it. See *MacIsaac v Pozzo* (1945) 26 C2d 809, 815, 161 P2d 449. If notice of the motion is given, prepare and offer any curative amendments at the time of the hearing. See *Tiffany v Sierra Sands Unified Sch. Dist.* (1980) 103 CA3d 218, 226, 162 CR 669. For further discussion of opposing the motion, see California Civil Procedure Before Trial §27.14 (4th ed Cal CEB 2004). For remedies if the motion is granted, see Civ Proc Before Trial §27.23.

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### §6.98 E. Court may allow a curative amendment and continue trial

The court has discretion to grant the opposing party leave to amend the pleading if the court finds the pleading insufficient. CCP §438(h)(1); *Hejmadi v AMFAC, Inc.* (1988) 202 CA3d 525, 536, 249 CR 5. In fact, it may be an abuse of discretion *not* to allow leave to amend (*MacIsaac v Pozzo* (1945) 26 C2d 809, 816, 161 P2d 449 (denial of leave to amend would often be "an absolute denial of justice")). In some circumstances, however, the court may properly grant the motion for judgment on the pleadings without leave to amend. See, *e.g., Shabrick v Moore* (1961) 195 CA2d 56, 60, 15 CR 310.

Anticipate that the court may grant a continuance to allow the amendment of pleadings. Under CCP §438(h)(2), the party against whom the motion was granted has 30 days to file an amended complaint or answer. Note, however, that local case management rules may shorten the time to amend.

When moving for judgment on the pleadings, take the following steps to reduce the risk of continuance:

- Provide prior notice to opposing counsel of the intention to move for judgment on the pleadings.
- Be prepared to demonstrate that the failure in the pleading is anchored in the inability to state a claim or defense rather than a mere defect in the manner of pleading it. See, *e.g., Shabrick v Moore, supra*.
- Consider waiting until the opposing party has put on evidence of the claim or defense and then move to strike the evidence in tandem with a motion for judgment on the pleadings. See, *e.g., Davis v City of Santa Ana* (1952) 108 CA2d 669, 674, 239 P2d 656. The court may be less likely to grant a continuance after the trial has begun and less likely to allow the opposing party to amend after the party is locked into a story.

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## §6.99 VIII. MOTIONS TO BIFURCATE, SEVER, AND CHANGE THE ORDER OF TRIAL

Bifurcation, *i.e.,* the trial of an issue or part of an issue before the trial of another issue or part of an issue, and other trial-ordering techniques are trial tools that can shorten trial, simplify issues, meet the convenience of witnesses, or avoid prejudice. They may also serve various tactical objectives related to the overall strategy, such as putting your best foot forward or, conversely, first presenting your adversary's Achilles' heel.

**PRACTICE TIP:** Although counsel may make a motion to bifurcate earlier, subjects that must be addressed by the parties at the initial case management conference include whether the case should be bifurcated. See Cal Rules of Ct 3.727(10).

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## A. Motion to separately try certain defenses first

### §6.100 1. Special defenses not involving merits

Code of Civil Procedure §597 permits trial first of special defenses not involving the merits of a claim, such as statute of limitations, res judicata, another pending action, settlement and compromise, and capacity to sue. It also permits a bifurcation order on a party's or the court's motion. The section does not specify a time limitation on when the motion can be made.

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## §6.101 2. Statute of limitations defense

Code of Civil Procedure §597.5 requires that a statute of limitations defense be tried first in medical malpractice cases if a party or the court makes a motion to that effect. It does not specify a time limitation on when the motion can be made.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.102 B. Motion to try certain issues first

### §6.102 B. Motion to try certain issues first

Code of Civil Procedure §598 permits an order "that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof … except for special defenses which may be tried first pursuant to Sections 597 and 597.5." This is commonly known as the bifurcated trial rule. *Horton v Jones* (1972) 26 CA3d 952, 954, 103 CR 399. The court can order bifurcation on a party's motion, after notice and hearing, no later than the close of the pretrial conference or, when there is no conference, no later than 30 days before the trial date. A sua sponte motion by the court can be made at any time.

**PRACTICE TIP:** If the court is inclined to deny a motion to bifurcate that is made 30 days prior to trial, then counsel should ask the court to deny the motion without prejudice to be renewed at the time of trial. A law and motion judge might not bifurcate a trial that will be heard by another judge, but may be persuaded to defer the issue to the trial judge.

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### §6.103 C. Motion for separate trial

Under CCP §1048(b), the court 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." See *Downey Sav. & Loan Ass'n v Ohio Cas. Ins. Co.* (1987) 189 CA3d 1072, 1086, 234 CR 835 ("whether there shall be a severance and separate trials on issues in a single action is a matter within the discretion of the trial court"). The statute does not specify a deadline for obtaining the severance, but the time limits of CCP §598 probably apply to any motion that could have been made under that statute. See the legislative committee comments to CCP §1048 (§§597-598 were retained because they contain useful procedural details that continue to apply to motions under §1048). Thus, §1048 apparently does not permit a party to make a motion covered by §598 after the pretrial conference, if applicable, or within 30 days of trial. See §6.102. The attorney may argue, however, that, because §1048 is silent on a time limitation, this motion is permitted at any time despite the pretrial conference or 30-day limitation period of §598.

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### §6.104 D. Motion to change order of proof

Evidence Code §320 gives the trial judge discretion to regulate the order of proof "except as otherwise provided by law." Thus, the court, on its own or a party's motion, may grant bifurcation orders and make other trial-ordering decisions in the chambers conference on the day of trial. See §1.11.

**PRACTICE TIP:** If you want an order issued under CCP §598 but have not complied with its time limitations, consider asking the judge in the chambers conference to order bifurcation on the judge's own motion (permissible under §598 at any time), and possibly moving for the same relief under CCP §1048.

For further discussion of CCP §§597-598 and procedure, see generally §§6.99-6.103. On consolidation and severance generally, see California Civil Procedure Before Trial, chap 43 (4th ed Cal CEB 2004).

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## IX. EXCLUDING WITNESSES AT TRIAL

### §6.105 A. Authority: Evid C §777

The trial judge can exclude witnesses from the courtroom while other witnesses are testifying. Evid C §777; Fed R Evid 615. Some local court policies also specifically address this issue. See, *e.g.,* Los Angeles Ct R 8.84; Contra Costa Ct R 5(K)(1)(b) (all witnesses will be excluded from courtroom, unless there is exception under law).

Individual parties to an action and an officer or employee who is the designated trial representative of a corporate party are excepted from any order of exclusion. Evid C §777(b).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.106 B. Purpose: Prevent witnesses from hearing, and being influenced by, other witnesses

### §6.106 B. Purpose: Prevent witnesses from hearing, and being influenced by, other witnesses

An exclusionary motion is made to prevent a subsequent witness from hearing an earlier witness's testimony on the same event or transaction. Later witnesses may, either consciously or subconsciously, be influenced to conform their testimony to the earlier testimony.

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### §6.107 1. Advantages

Excluding the witnesses will prevent the witness from being influenced by listening to other witnesses. In addition, the cross-examination of a witness may be more effective if that witness has not become familiar with counsel's questions and style while listening to that attorney conduct cross-examination on a similarly situated witness.

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### §6.108 2. Disadvantages

Some reasons not to make an exclusionary motion are that:

- Testimony may proceed more rapidly if witnesses have heard the testimony of prior witnesses. For example, an expert who has heard all the testimony from prior witnesses that will be used as a foundation for the expert's opinion will not need a long hypothetical question to elicit the opinion. For expert opinion testimony, see §§11.130-11.151.
- Experts who remain in the courtroom will be available to consult with the attorney about the proper questioning of other witnesses.
- Novice witnesses who observe the procedure of examining earlier witnesses may become more at ease.

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## §6.109 X. MOVING TO DISQUALIFY ATTORNEY

Motions to disqualify trial counsel are usually made long before the first day of trial. See California Civil Procedure Before Trial §§4.52-4.54 (4th ed Cal CEB 2004). Bringing a motion to disqualify counsel on the day of trial may be appropriate if the opposing party substitutes or associates trial counsel on the eve of trial. On conflict of interests generally, see Civ Proc Before Trial, chap 2.

**NOTE:** If trial counsel is to be called to testify on behalf of the client at a jury trial, the testimony will be limited to uncontested matters or the nature and value of legal services rendered, unless counsel has the client's informed written consent permitting counsel's testimony. Cal Rules of Prof Cond 5-210; see §6.113 for form of consent. This rule does not apply to court trials or to the testimony of another member of the trial attorney's firm.

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## XI. FORMS

### §6.110 A. Form: Notice of motion to continue trial

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF MOTION AND** |
| **vs** | ) | **MOTION FOR TRIAL** |
| _ _[*Name(s)*]_ _ | ) | **CONTINUANCE; SUPPORTING** |
| **Defendant(s)** | ) | **MEMORANDUM;** |
| | ) | **DECLARATION(S) OF** |
| | ) | _ _[*name*]_ _ |
| _____ | ) | **Hearing:** _ _[*date; time*]_ _ |
| | | **Dep't:** _ _[*number*]_ _ |
| | | **Hearing judge:** _ _[*if known*]_ _ |
| | | **Action filed:** _ _[*date*]_ _ |
| | | **Trial date:** _ _[*if set*]_ _ |

**TO** _ _[*name(s) of each party*]_ _ **AND THEIR ATTORNEY(S) OF RECORD:**

**PLEASE TAKE NOTICE that on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in department** _ _[*number*]_ _ **of this court, located at** _ _[*address*]_ _**,** _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _ **will move the court for a continuance of the trial of this case from** _ _[*date*]_ _**, to** _ _[*date*]_ _**. This motion is made under** _ _[*e.g., California Rules of Court 3.1332*]_ _ **on the ground that good cause for continuance exists under California Rules of Court 3.1332(c), in that** _ _[*specify facts showing that good cause exists under Cal Rules of Ct 3.1332(c) , e.g., a key witness,* _ _[*name*]_ _*, has suddenly become ill*]_ _**.**

**This motion is based on this notice; all pleadings, papers, and records in this action;** _ _[*and*]_ _ **on the attached supporting memorandum and declaration(s) of** _ _[*name(s)*]_ _**,** _ _[*and on such evidence as may be presented at the hearing*]_ _**.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* See §§6.6-6.20. Make motion as soon as reasonably practical on discovering the need for the continuance. Cal Rules of Ct 3.1332(b). Comply with Cal Rules of Ct 3.1110, 3.1112, and 3.1113 on format of motion. An order shortening time under CCP §1005 for the service of the written notice is required if the notice cannot be served within the time specified in CCP §1005. See California Civil Procedure Before Trial §§12.63-12.65 (4th ed Cal CEB 2004) on shortening time.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.111 B. Form: Written statement challenging judge for cause (CCP §170.3(c)(1))

## §6.111 B. Form: Written statement challenging judge for cause (CCP §170.3(c)(1))

▶ 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*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **STATEMENT OF** _ _[*NAME*]_ _ |
| **vs** | ) | **CHALLENGING JUDGE** |
| _ _[*Name(s)*]_ _ | ) | **UNDER CCP §170.3(c)(1)** |
| **Defendant(s)** | ) | |
| _____ | ) | |

_ _[*Name*]_ _ **declares:**

**1. I am the** _ _[*e.g., plaintiff/defendant/attorney for _ _ _ _ _ _*]_ _ **in this** _ _[*action/special proceeding*]_ _**.**

**2. The Honorable** _ _[*name*]_ _ **is the judge before whom the trial of the action is assigned.**

**3. The judge should be disqualified because** _ _[*specify facts establishing one or more of the grounds listed in CCP §170.1(a), e.g., from March 3, 1999, until June 6, 1999, the judge served as an attorney in this matter*]_ _**.**

**WHEREFORE IT IS RESPECTFULLY REQUESTED THAT the Honorable** _ _[*name*]_ _ **be disqualified under section 170.3 of the Code of Civil Procedure from trying any matter in this action.**

[*Option 1*]

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

[*Option 2*]

**I declare that the foregoing is true of my own knowledge, except as to those matters which are stated therein on my information and belief, and as to those matters I believe them to be true.**

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

*Copies:* Original (filed with court clerk); copies for service (one for each attorney of record and unrepresented party, one for the judge and the judge's clerk); office copies.

*Comment:* See §§6.32-6.48. Requirements for declarations are generally found in CCP §2015.5. The statement must contain facts, not conclusions or allegations on information and belief. See §6.44.

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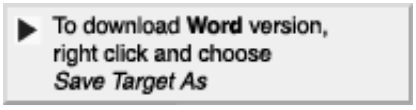
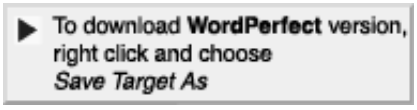
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.112 C. Form: Peremptory challenge and declaration in support of challenge (CCP §170.6)

## §6.112 C. Form: Peremptory challenge and declaration in support of challenge (CCP §170.6)




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **PEREMPTORY CHALLENGE** |
| **vs** | ) | **OF JUDGE UNDER CCP** |
| _ _[*Name(s)*]_ _ | ) | **§170.6** |
| **Defendant(s)** | ) | |
| **_____** | ) | |

_ _[*Name*]_ _ **declares:**

**1. I am the** _ _[*e.g., plaintiff/defendant/attorney for _ _ _ _ _ _*]_ _ **in this** _ _[*action/special proceeding*]_ _**.**

**2. The Honorable** _ _[*name*]_ _ **is the** _ _[*judge/court commissioner/referee*]_ _ _ _[*before whom/to whom*]_ _ _ _[*the trial of the action/a hearing in the special proceeding*]_ _ _ _[*is pending/was assigned*]_ _**.**

**3. The** _ _[*judge/court commissioner/referee*]_ _ **is prejudiced against the** _ _[*plaintiff/defendant/attorney*]_ _ **or against the interests of the** _ _[*plaintiff/defendant/attorney*]_ _**.**

**4. Declarant cannot or believes that** _ _[*he/she/plaintiff/defendant*]_ _ **cannot have a fair and impartial trial or hearing before this** _ _[*judge/court commissioner/referee*]_ _**.**

**WHEREFORE IT IS RESPECTFULLY REQUESTED THAT the Honorable** _ _[*name*]_ _ **be disqualified under section 170.6 of the Code of Civil Procedure from** _ _[*trying/hearing*]_ _ **any matter in this** _ _[*action/special proceeding*]_ _**.**

**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 (filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* See §§6.57-6.75. Challenge may also be made orally. See CCP §170.6(a)(2). See CCP §170.6(a)(5)-(6) for form of declaration or affidavit. Requirements for declarations are generally found in CCP §2015.5.

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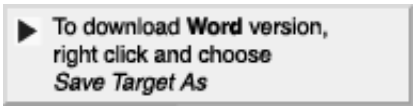
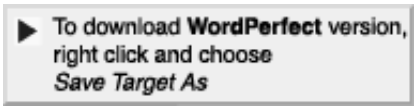
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/6 Court Conferences and Selected Pretrial Motions/§6.113 D. Form: Consent of client to continued representation by attorney who will testify at trial (Cal Rules of Prof Cond 5-210)

## §6.113 D. Form: Consent of client to continued representation by attorney who will testify at trial (Cal Rules of Prof Cond 5-210)




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **CONSENT OF CLIENT TO** |
| **vs** | ) | **CONTINUED** |
| _ _[*Name(s)*]_ _ | ) | **REPRESENTATION BY** |
| **Defendant(s)** | ) | **ATTORNEY (Cal Rules of Prof** |
| **_____** | ) | **Cond 5-210)** |

_ _[*Name*]_ _ **declares:**

**1. I am the** _ _[*e.g., plaintiff/defendant*]_ _ **in this action.**

**2.** _ _[*I/Plaintiff/Defendant*]_ _ _ _[*am/is*]_ _ **represented by** _ _[*name of attorney*]_ _ _ _[*of* _ _[*name of law firm*]_ _]_ _ **as trial attorney.**

**3. On** _ _[*date*]_ _, _ _[*name of attorney*]_ _ **advised me that** _ _[*he/she*]_ _ **ought to be called as a witness on** _ _[*my/plaintiff's/defendant's*]_ _ **behalf and fully advised me as to the possible implications of** _ _[*his/her*]_ _ **acting as both trial attorney and witness on** _ _[*my/plaintiff's/defendant's*]_ _ **behalf.**

**4. On that date,** _ _[*name of attorney*]_ _ **advised** _ _[*me/plaintiff/defendant*]_ _ **that:**

**a.** _ _[*His/Her*]_ _ **effectiveness as an advocate may be diminished if** _ _[*he/she*]_ _ **acts as both trial attorney and witness;**

**b.** _ _[*His/Her*]_ _ **credibility as a witness may be impaired if** _ _[*he/she*]_ _ **acts as both trial attorney and witness;**

**c.** _ _[*His/Her*]_ _ **dual role of trial attorney and witness could adversely affect the outcome of** _ _[*my/plaintiff's/defendant's*]_ _ **case;**

**d.** _ _[*I/Plaintiff/Defendant*]_ _ _ _[*am/is*]_ _ **under no obligation to continue to use** _ _[*him/her*]_ _ **to try this matter; and**

**e.** _ _[*I/Plaintiff/Defendant*]_ _ **could seek the advice of independent counsel on whether to continue to employ** _ _[*him/her*]_ _ **as trial attorney in this action.**

**5.** _ _[*I/Plaintiff/Defendant*]_ _ _ _[*have/has*]_ _ **had a reasonable opportunity to seek the advice of independent counsel on the matter.**

**6.** _ _[*I/Plaintiff/Defendant*]_ _ **desire(s) to continue the employment of** _ _[*name*]_ _ **and consent(s) to** _ _[*his/her*]_ _ **continued representation as** _ _[*my/plaintiff's/defendant's*]_ _ **trial attorney even though**

_ _[*he/she*]_ _ **may also be a witness on** _ _[*my/plaintiff's/defendant's*]_ _ **behalf.**

**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 (to be filed with court clerk, with proof of service in the event opposing party moves to disqualify or at the request of the judge); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* See §6.110. Requirements for declarations generally are found in CCP §2015.5.

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# 7

# Motions in Limine

**Steven E. Schon**

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## §7.1 I. SCOPE OF CHAPTER

This chapter discusses motions in limine used to obtain rulings on evidentiary issues before or during trial, including motions to establish preliminary facts under Evid C §§400-405. Other pretrial motions may sometimes be called "motions in limine," but those motions (*e.g.,* for continuance, challenging the judge) are discussed in chap 6. Motions made during trial are covered in chap 18.

A motion in limine is a motion made either before any evidence is received, or before the evidence that is the subject of the motion is admitted. The term "in limine" is Latin, meaning "at the very start." Although not expressly authorized by statute, the motion is well recognized in the case law. See, *e.g., Akins v County of Sonora* (1967) 67 C2d 185, 197, 60 CR 499; *Clemens v American Warranty Co.* (1987) 193 CA3d 444, 451, 238 CR 339. See 3 Witkin, California Evidence §§368-369 (4th ed 2000). The court's inherent authority to provide for the orderly conduct of its proceedings (CCP §128(a)(3)) and to exclude evidence under Evid C §352 also implies authority for motions in limine.

Motions in limine can be used to:

- Prevent a party from using or mentioning evidence before the jury (see §7.3);
- Compel a party to present a foundation and offer evidence outside the presence of the jury (see §7.4);
- Attack all evidence on a certain point and possibly eliminate that cause of action or issue (see §7.5); and
- Obtain a ruling on the admissibility of evidence (see §7.6).

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## II. WHY TO MAKE A MOTION IN LIMINE

### §7.2 A. Purpose of motion

Motions in limine are commonly used to seek exclusion or admission of *particular* items of evidence on the grounds that the evidence is legally inadmissible or admissible. In contrast, a motion to eliminate a cause of action or entire case at the time of trial is usually raised by motion for judgment on the pleadings (see §§6.94-6.98; see also California Civil Procedure Before Trial, chap 27 (4th ed Cal CEB 2004)), but motions in limine are sometimes used to achieve these broader purposes. See §7.5. For a discussion of the purposes of motions in limine (and their overuse), see *Kelly v New W. Fed. Sav.* (1996) 49 CA4th 659, 669, 56 CR2d 803.

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### §7.3 1. To exclude particular evidence

The greatest value of in limine motions lies in a party's ability to confront prejudicial evidence before it is presented at trial and comes to a jury's attention. Thus, the most common use of the motion is to obtain a ruling excluding particular evidence at trial. In connection with this motion, counsel may request a ruling prohibiting the opposing party from making any mention of the excluded evidence, including reference to the evidence in voir dire, opening statement or in the course of testimony at trial. See *Charbonneau v Superior Court* (1974) 42 CA3d 505, 507, 116 CR 153. If the motion is successful, the jury will remain unaware of potentially prejudicial or inflammatory evidence. This type of motion in limine tries to "avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury." *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 337, 145 CR 47. See §§7.7-7.11 for the advantages and disadvantages of the motion.

If the court grants a motion in limine to exclude evidence, the court's order may be total—that is, the order may bar counsel, the parties, and witnesses from making any mention of or reference to the excluded evidence, or from otherwise using such evidence (*e.g.,* during jury selection). See Los Angeles Ct R 8.92(d); *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 793, 174 CR 348. Alternatively, the court may issue a preliminary order that is temporary or conditional, thus precluding use of the evidence and any reference to it until some future event, for example, until a party introduces foundational evidence, or until the court modifies the order based on circumstances at a later stage.

**PRACTICE TIP:** If you are the proponent of the evidence and the court indicates it will exclude your evidence, request that the court reserve its ruling or entertain a motion to reconsider its ruling at trial, when you can make a more complete foundational showing. See *Charbonneau v Superior Court* (1974) 42 CA3d 505, 514, 116 CR 153. Ask the court to enter a temporary or conditional order, excluding mention of the evidence pending reconsideration at trial. See Los Angeles Ct R 8.92(d). If the court grants your request, be sure to ask the court to reconsider the temporary exclusion order after the foundational facts are produced at trial.

If you are the party moving to exclude the evidence, resist allowing a judge to take everything under submission or reserve ruling on any of the issues raised by the motion in limine. Usually, you need the finality of a decision to chart your course through trial.

**JUDICIAL PERSPECTIVE:** Judges are reluctant to make definitive rulings on motions in limine that appear to be dependent on trial evidence for their resolution.

It is a misuse of a motion in limine to attempt to compel a witness or a party to conform his or her trial testimony to a preconceived factual scenario based on testimony given during pretrial discovery. See *Kelly v New W. Fed. Sav.* (1996) 49 CA4th 659, 672, 56 CR2d 803 (court of appeal reversed and held trial court erred in granting defendants' motion in limine to exclude plaintiffs from producing evidence that they were injured in larger of two elevators or any evidence related to functioning of that elevator). The *Kelly* opinion also suggests that some of the issues raised in motions in limine (*e.g.,* a motion requesting an order that all counsel inform other counsel the day before which witnesses will be called the next day, or a motion requesting that no exhibits be shown to the jury before all counsel and the court see them) would be better resolved by counsel informally at a pretrial conference and not as formal motions in limine. 49 CA4th at 671.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/§7.4 2. To require proponent to establish foundational facts

### §7.4 2. To require proponent to establish foundational facts

Motions in limine to exclude evidence may also be used to require the proponent of evidence to establish the existence of foundational facts necessary for admission.

**EXAMPLE:** Use the motion to require the proponent of expert testimony to show a proper foundation for expert opinion (such as qualification of a proposed expert), or the admissibility of a particular type of test. See, *e.g., People v Kelly* (1976) 17 C3d 24, 130 CR 144 (voiceprint identification excluded); *Cramer v Morrison* (1979) 88 CA3d 873, 886, 153 CR 865 (evidence of paternity test erroneously excluded based on finding that test was unreliable); *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 337, 145 CR 47 (evidence excluded when no proper foundation for expert testimony).

Filing the motion will sometimes require a preliminary fact-finding hearing as contemplated in Evid C §§402-405. See discussion in §§7.25-7.36. See §§7.7-7.11 for advantages and disadvantages of the motion.

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### §7.5 3. To exclude all evidence and thereby eliminate a cause of action or entire case

Motions in limine are sometimes used to achieve broader purposes, *e.g.,* dismissal of the case through the exclusion of evidence. For example, a party might object to the admission of *all* evidence on the ground that the complaint fails to state a cause of action and, therefore, no evidence relating to that cause of action should be admitted. *Clemens v American Warranty Co.* (1987) 193 CA3d 444, 451, 238 CR 339 (no prejudice from granting motion in limine termed "objection to all evidence").

An objection to all evidence is essentially the same as a general demurrer, motion for judgment on the pleadings, or nonsuit. *Mechanical Contractors Ass'n v Greater Bay Area Ass'n* (1998) 66 CA4th 672, 677, 78 CR2d 225; *Edwards v Centex Real Estate Corp.* (1997) 53 CA4th 15, 26, 61 CR2d 518. Motions to dismiss, for nonsuit, or for judgment on the pleadings, and demurrers are based on the failure to state a cause of action or to present evidence to prove a cause of action, not to exclude the evidence. See chap 18 for motions during trial; see §§6.94-6.98 and California Civil Procedure Before Trial, chap 27 (4th ed Cal CEB 2004) for discussion of judgment on the pleadings. On demurrers, see Civ Proc Before Trial, chap 23. On summary adjudication and summary judgment motions to eliminate a cause of action or the entire case, see Civ Proc Before Trial, chap 36.

Nonetheless, the courts have granted in limine motions to exclude all evidence in connection with a motion to dismiss the action or enter judgment for one party. See, *e.g., Newman v Emerson Radio Corp.* (1989) 48 C3d 973, 977, 258 CR 592 (on eve of trial, court granted defendant's motion in limine to exclude plaintiff's evidence on ground that plaintiff's actions based on oral contracts of employment were barred by statute of frauds); *Ladas v California State Auto. Ass'n* (1993) 19 CA4th 761, 769, 23 CR2d 810 (court granted defendant's in limine motion to exclude, on basis of parol evidence rule, all evidence offered by plaintiffs to prove their claims and entered judgment in defendant's favor).

**NOTE:** The trend seems to be moving away from using motions in limine to exclude all evidence of a cause of action or entire case. See *Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1593, 71 CR3d 361 (summary adjudication preferred for addressing statute of limitations issue); Los Angeles Ct R 8.92(b) (motion in limine may not be used in place of motion for summary adjudication or summary judgment); San Diego Ct, Div II, R 2.1.18 (motions in limine must be limited in scope to evidentiary issues when attempts to "unring the bell" would be unduly prejudicial or futile). But see *K.C. Multimedia Inc. v Bank of America Technol. & Operations, Inc.* (2009) 171 CA4th 939, 950, 90 CR3d 247 (noting that *Amtower* "cannot be read as a blanket prohibition" on using in limine motions to decide dispositive issues).

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### §7.6 4. To admit evidence

Although motions in limine are frequently used to exclude evidence, consider making a motion in limine to obtain rulings in advance of trial that particular evidence is admissible. See, *e.g., People v Jennings* (1988) 46 C3d 963, 975, 251 CR 278; *Pugh v See's Candies, Inc.* (1988) 203 CA3d 743, 757, 250 CR 195. Remember, however, that the proponent of evidence is not required to establish admissibility of evidence before trial. The burden remains on the objecting party to request exclusion of evidence, even if it is sensitive and arguably inadmissible. See *Abbett Elec. Corp. v Sullwold* (1987) 193 CA3d 708, 715, 238 CR 496. See §§7.7-7.11 for advantages and disadvantages of the motion.

Consider bringing a motion to admit evidence if you anticipate that opposing counsel will object to the admission of an important exhibit at trial. Also, consider a motion in limine to admit videotaped deposition testimony taken under CCP §2025.220. See CCP §2025.340(m) for the procedures to follow. If particular evidence is likely to be controversial or inflammatory, it is better to know whether you can safely refer to it during opening statement.

If the court grants the motion to admit the evidence, counsel knows before trial that the court will receive the evidence during the trial. If the court denies the motion, counsel may have time to overcome the objection or make arrangements to have other evidence available to prove the point.

**EXAMPLE:** Plaintiff's attorney makes a motion in limine to admit invoices sent to defendant. Defendant's attorney objects to the admissibility of the invoices based on the grounds that additional foundational testimony is required, *i.e.,* the authenticating witness is not the person who prepared the invoices or otherwise has sufficient personal knowledge to authenticate them. If the court denies the motion to admit the evidence, plaintiff's attorney may have time to arrange to have another witness available to authenticate the invoices.

**PRACTICE TIP:** The court's denial of a motion in limine to admit evidence does not necessarily mean that the evidence will be excluded. *Renew the motion at an appropriate time during trial.* Also, when the court has refused to rule on a motion to admit evidence because it believes that additional evidence should be heard before a ruling can be made, try to have the evidence admitted in the usual way at the appropriate point during trial.

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## §7.7 B. Strategies regarding use

Ultimately, you must make a cost-benefit analysis of the use of motions in limine. Making a motion in limine can be expensive, requiring the client to incur the cost of research and briefing. Accordingly, weigh the cost of making the motion against the potential prejudice that the motion seeks to avoid. If moving to exclude evidence, you may wait and object to its introduction at trial; similarly, if you want to admit evidence, simply offer the evidence at trial and face the opposing party's objections then.

It is also important to avoid making a negative impression on the judge as a result of numerous in limine motions. See, *e.g., O'Mary v Mitsubishi Elect. Am., Inc.* (1997) 59 CA4th 563, 578, 69 CR2d 389 (expressing sympathy for claim that deluge of last-minute motions hampered party's trial preparation).

Remember that in limine motions are not as potent a tool in bench trials. Motions in limine typically are most useful when the case is tried before a jury; in a bench trial, the benefit of the motion in limine is less, because the court is less concerned about the effect of erroneously admitting evidence and more confident of its ability to disregard prejudicial or marginally relevant evidence.

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## §7.8 1. Advantages

The principal tactical advantage of the motion in limine is that it reduces the need to raise objections in front of the jury. In addition, a successful motion in limine, or a successful opposition to the motion, will give the winning party a psychological boost and may put the losing party in an even weaker position.

Other advantages of a motion in limine are that it:

- Allows the court an opportunity to reflect on the issues before making a ruling.
- Avoids disturbing the flow of the trial because there will be fewer objections to interrupt the examination of witnesses. If you wait to resolve an issue and object at trial, you may need to approach the side bar to state the basis for your motion or request a hearing outside the jury's presence, giving the jury the impression that you have something to hide.
- Provides the parties an opportunity to brief their positions.
- Familiarizes the trial judge with the issues and highlights critical evidence. For example:
- The motion is particularly useful in counties that follow the master calendar system (see §§2.61-2.65), when the trial judge may be unfamiliar with the case until shortly before trial.
- When a case involves a complex series of facts or law, the motion can educate the court about potential evidentiary problems, so that the court will have an increased awareness and sensitivity to the evidence when it is actually offered.
- Aids in planning for jury selection, opening statements, and the order of presenting witnesses.
- Resolves evidentiary issues before trial begins and thus helps the parties accept or revise the settlement value of their case; *e.g.,* if the court rules to exclude a key piece of evidence, proving an essential element of the case may be more difficult and the party may be more amenable to settlement.
- As a practical matter, a written motion in limine may better preserve your record on appeal because it can be a more thoughtful and complete presentation of your position than a brief oral presentation.

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### §7.9 a. When moving to exclude evidence

An added benefit of a successful motion in limine to exclude evidence is to avoid any chance that the jury will hear any mention of the evidence. For example, if a witness has previously testified to important facts that are hearsay during a pretrial proceeding or deposition, it is much better to make a motion ahead of time. Particularly if the evidence is sensitive, confidential, or privileged, move in limine to exclude it.

Another tactical advantage of a successful motion to exclude evidence is that it places the attorney who opposed the motion unsuccessfully at a severe disadvantage. The court has now ruled to exclude the opponent's evidence and the opponent must continually be on guard to ensure that the ruling is not violated by a remark in the opening statement, by questions put to witnesses, or by answers volunteered by witnesses.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/§7.10 b. When moving to admit evidence

### §7.10 b. When moving to admit evidence

The advantages of bringing a motion in limine to admit evidence are that it:

- Allows the court greater opportunity to consider the issues.
- Avoids surprise at trial by requiring opposing counsel to assert objections to the admissibility of evidence in response to the motion.

If particular evidence is likely to be controversial or inflammatory, learn before trial whether you can safely refer to it during opening statement. If you refer to the evidence during opening statement, or present part of the evidence before opposing counsel objects, you risk the possibility of a mistrial if the court agrees that the proffered evidence should be excluded and the objecting party can establish that the jury has been prejudiced by exposure to the excluded evidence. Although as the proponent of the evidence you need not establish its admissibility before trial, you may prefer making a motion in limine to determine its admissibility in advance of trial to lessen the risk of a mistrial. See §7.6.

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### §7.11 2. Disadvantages

On the negative side, consider the possibility that a motion in limine to admit evidence will educate the opposing party—either by providing an advance look at evidence that the opponent may have been ignorant of, or by providing opposing counsel with a basis for objection not previously considered.

The main disadvantage to using the motion in limine is that it sacrifices surprise. If you are successful in blocking your opponent's evidence, the opponent will have time to devise alternative sources of proof or develop a better foundation for the evidence. If you are successful in a motion to admit evidence, your opponent will similarly have time to discover other ways to exclude that evidence when it is presented at trial.

Certainly, cost is a major disadvantage to bringing a motion in limine compared with orally objecting to the admissibility of evidence at trial. If the judge rules to allow evidence based on the motion in limine, you will probably still want to object to the evidence at trial to preserve the issue for appeal (see §§7.46-7.47), and at that time the judge may be less inclined to a change of mind.

The court's exclusion of important evidence before trial may also negatively impact the settlement value of the case. In fact, if the evidence goes to the heart of the case, denial of the motion to admit evidence may result in an immediate motion to dismiss.

A motion in limine at the outset of the trial, before all the evidence bearing on an issue has a chance to crystallize, may be too early and may impair chances to successfully admit or exclude the evidence. Because a premature motion may result in an adverse ruling, be sure to develop the factual basis and legal theories supporting the claims or defenses, so that the court can have the proper perspective for it to rule.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/§7.12 C. Checklist: Grounds for motion and examples

## §7.12 C. Checklist: Grounds for motion and examples

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There are as many potential grounds for in limine motions as there are possible objections to the introduction of evidence at trial. Motions in limine are commonly brought in an attempt to exclude particular evidence on the grounds that it is legally irrelevant (Evid C §350), or that its probative value is outweighed by the potential for prejudice and undue consumption of time at trial (Evid C §352). Examples of motions in limine include:

___ 1. To exclude unduly prejudicial or confusing evidence under Evid C §352. *O'Gan v King City Joint Union High Sch. Dist.* (1970) 3 CA3d 641, 644, 83 CR 795 (letter containing prior inconsistent statement); *People v Vaiza* (1966) 244 CA2d 121, 127, 52 CR 733 (photographs taken at 7:30 p.m. when crime occurred at 2:00 a.m.).

___ a. Improper reference to opposing counsel as "corporation lawyer." *Seimon v Southern Pac. Transp. Co.* (1977) 67 CA3d 600, 605, 136 CR 787.

___ b. Evidence of the probability or fact of a widow's remarriage as a basis for mitigation of damages in wrongful death action is irrelevant. *Benwell v Dean* (1967) 249 CA2d 345, 348, 57 CR 394.

___ c. A party or a witness's past criminal record (see Evid C §787).

___ d. A party's alien status.

___ e. A settlement offer by a defendant (when offered to establish liability; see Evid C §1152).

___ f. A party's poor health or financial condition, when irrelevant to a fact in issue.

___ 2. To control the order of proof:

___ a. To require proof of foundational facts before reference to particular evidence, such as expert testimony. *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 337, 145 CR 47.

___ b. To prevent reference to demonstrative evidence before admission at trial (*e.g.,* during opening statement). *People v Green* (1956) 47 C2d 209, 215, 302 P2d 307, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 36 CR 201.

___ c. To prevent the plaintiff from rebutting affirmative defenses in advance of the defendant's evidence. *Butler v Stratton* (1949) 95 CA2d 23, 26, 212 P2d 43.

___ 3. To exclude evidence barred by discovery rules or pretrial discovery sanctions:

___ a. To exclude evidence improperly withheld during discovery. See *Thoren v Johnston & Washer* (1972) 29 CA3d 270, 105 CR 276 (excluding testimony from witness whose identity was improperly withheld from answers to interrogatories).

___ b. To exclude testimony from expert witness not disclosed as required by CCP §§2034.260, 2034.280. See *Zellerino v Brown* (1991) 235 CA3d 1097, 1117, 1 CR2d 222. Other grounds to exclude expert witnesses include failing to (CCP §2034.300):

___ (1) Submit an expert witness declaration;

___ (2) Produce discoverable reports and writings; and

___ (3) Make the witness available for pretrial deposition.

___ 4. To preclude evidence of a party's financial condition:

___ a. Evidence of a defendant's financial condition when punitive damages are sought, until presentation of a prima facie case of liability for punitive damages. See CC §3295.

**PRACTICE TIP:** The defendant should ordinarily move to exclude financial evidence before trial to avoid possibly waiving the right to object to the evidence. See CC §3295; *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1241, 1 CR2d 301.

___ b. Evidence of tax consequences. See *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 667, 151 CR 399 (tax consequences of damage award in personal injury action); *DePalma v Westland Software House* (1990) 225 CA3d 1534, 1541, 276 CR 214 (tax consequences mitigating factor in breach of contract action).

___ c. Evidence that the plaintiff in a personal injury case has received collateral source payments, when the collateral source rule applies. See *Morse v Southern Pac. Transp. Co.* (1976) 63 CA3d 128, 138, 133 CR 577 (precluding evidence of disability pension in FELA (Federal Employees Liability Act) action).

___ d. Evidence that a plaintiff is ineligible for collateral source payments, such as workers' compensation. See *Lund v San Joaquin Valley R.R.* (2003) 31 C4th 1, 11, 1 CR3d 412.

___ e. Reference to the fact that the defendant is insured as evidence of liability. Evid C §1155.

___ 5. Evidence of prior accidents, when such evidence is not otherwise admissible. *Ault v International Harvester Co.* (1974) 13 C3d 113, 121, 117 CR 812 (evidence of prior accident admissible to show defective condition, knowledge, or causation); *Simmons v Southern Pac. Transp. Co.* (1976) 62 CA3d 341, 364, 133 CR 42 (evidence of prior accident excluded when not similar to accident in suit).

___ 6. Excluding expert opinions. See, *e.g., Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 884, 254 CR 336 (expert improperly asked for opinion on legal question); *County Sanitation Dist. No. 8 v Watson Land Co.* (1993) 17 CA4th 1268, 1280, 22 CR2d 117 (expert used improper methodology). See §11.135 on proper basis for expert opinion.

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## III. MAKING A MOTION IN LIMINE

### §7.13 A. When to make motion

A motion in limine can be made before trial or at any point during a trial before the admission of the evidence that is the subject of the motion. See, *e.g., Godfrey v Steinpress* (1982) 128 CA3d 154, 168, 180 CR 95 (after the pretrial conference); *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 337, 145 CR 47 (after plaintiff rested case in chief). See §7.24 for opposition to the motion.

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### §7.14 1. To avoid prejudice

Consider making the motion before trial to prevent the proponent of evidence from referring to the disputed evidence during voir dire or opening statement. The trial court may be more reluctant to grant a motion in limine during trial because granting the motion at that time may have a harsh effect on the proponent of the evidence. See *Sacramento & San Joaquin Drainage Dist. v Reed* (1963) 215 CA2d 60, 66, 29 CR 847. For example, the proponent may assert unfair surprise, or argue that foundational or alternative evidence could have been arranged if advance notice of the motion had been given.

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### §7.15 2. As required by local rule

Always consult the local rules of the court in which an action is pending on the procedure to bring a motion in limine. The local rules may dictate the form and content of such motions. See, *e.g.,* Los Angeles Ct R 8.92(a)-(d) (motions must be accompanied by a declaration identifying the matter alleged to be inadmissible and describing the prejudice that will result if the motion is not granted).

If the court requires a written motion, it may require that the motion be served before trial. See, *e.g.,* San Francisco Ct R 6.1 (all motions in limine must be in writing, copies mailed to all parties at least 10 days before date set for trial or hand delivered at least 5 days before trial).

**NOTE:** Historically, most trial judges allowed in-trial motions in limine to be made in chambers as the trial progressed. Most experienced judges still allow this when the issues are not complex. These motions are often less expensive, more efficient, and easier to decide on the spot because the judge has already heard much of the evidence.

The timing of motions in limine may also be affected by whether the court has adopted a single-assignment system (when a case is assigned at the outset to one judge for all purposes) or a master calendar system. See §6.2. In a single assignment system, the judge or local rules may require that the motions in limine be heard at the status conference or another date before trial. See, *e.g.*, Los Angeles Ct R 7.9(h) (for individual calendaring (I/C) cases, motions must be served so that they can be heard at the final status conference).

In a master calendar system, because the motion is directed to the trial judge, the motion in limine is typically not heard until the day set for trial, but even then local rules may set the timing of motions in limine. See, *e.g.*, Los Angeles Ct R 7.9(h) (for master calendar cases, file and serve motions in limine 5 days before the final status conference).

**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 and not a court day.

**JUDICIAL PERSPECTIVE:** In a complex case in which there are numerous potentially determinative motions in limine, counsel and the court may want to set a schedule for receipt of the motions, oppositions, and replies (if allowed) as well as a time for hearing and decision in advance of the trial date, if this is not provided for by local rule.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/§7.16 3. As soon as need for motion is discovered

### §7.16 3. As soon as need for motion is discovered

Although motions in limine should ordinarily be made before or at the outset of trial, counsel may have good reasons to make the motion later:

- The prejudicial effect of evidence may not become apparent until trial;
- The law on admissibility of particular evidence may have recently changed; or
- Your opponent may want to introduce newly discovered evidence or previously unavailable evidence that you move to exclude through a motion in limine.

As soon as the need for such a motion becomes apparent, request a sidebar conference, or request a hearing in chambers. Always make motions in limine outside the presence of a jury. See Evid C §402(b). As with the preliminary chambers conference (see §6.4), make all such motions on the record, whether at sidebar or in chambers, in the presence of a court reporter, to avoid possible misunderstanding and to preserve the record for appeal.

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## B. How to make motion: Oral or written

### §7.17 1. Written motions preferred

As noted, applicable local rules may require that motions in limine be made in writing. If at all possible, whether or not required by local rule, it is good practice to make a written motion, even if the need for the motion does not appear until the trial is underway. A written motion requires greater precision on the point involved and ensures that the legal issues are thoroughly covered. A written motion also provides a written record of each party's position and is likely to result in more serious consideration. In some circumstances, however, time and the expense involved may not permit a written motion.

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## §7.18 2. Oral motions allowed

Even in counties in which the local rules require a writing, most courts will permit oral motions in limine to be made during the course of trial, especially when the need for such a motion was not apparent before trial. The court may prefer a motion in limine out of the presence of the jury. See Evid C §402(b).

When making an oral motion in limine at sidebar or in chambers, ensure that a reporter is present to make a record. If the court prefers off-the-record conferences in chambers, be sure to get objections on the record as soon as possible. Make sure the record allows the appellate court to see a timely and proper request to exclude or admit evidence, the erroneous failure to grant the motion, and resulting prejudice. For further discussion on protecting the record, see chap 15.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/ C. What to include in motion/§7.19 1. State purpose of motion

### C. What to include in motion

### §7.19 1. State purpose of motion

The motion should clearly and concisely set forth the purpose of the motion: For example, to exclude specified evidence, to establish that specific evidence should be admitted, or to establish the order of presentation of evidence.

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### §7.20 2. Identify evidence

Identify in the motion the precise testimony or evidence to be admitted or excluded. If you are the proponent of the evidence, set forth the basis for the belief that the evidence exists and that it will be presented at trial. Make sure to explain what relevant issue the evidence will help prove or disprove.

If moving to exclude evidence, clearly identify a particular, identifiable body of evidence to preserve the record for appeal under Evid C §353 in the event the court denies your motion. Follow the requirements of §353 carefully. Also, put the evidence you want excluded in the proper context so that the judge can decide whether to exclude; that is, give the judge enough background information to make an informed decision. See *People v Morris* (1991) 53 C3d 152, 190, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394; see discussion in §§7.46-7.47.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/§7.21 3. Discuss legal authority

### §7.21 3. Discuss legal authority

Set forth the specific legal ground and the authorities supporting the exclusion or admission of the evidence. Discuss how this legal authority supports your position. In a motion to exclude evidence this statement of a specific legal ground is important to preserve the record for appeal in the event the motion is denied. See Evid C §353; *People v Morris* (1991) 53 C3d 152, 190, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394; see discussion in §§7.46-7.47.

**EXAMPLE:** When attempting to exclude evidence of a privileged communication with a consultant, set forth the legal authorities establishing that these communications are covered by the attorney-client privilege.

For more detailed discussion of the legal authority for evidentiary motions, see chap 10; Effective Introduction of Evidence in California (2d ed Cal CEB 2000); California Trial Objections (Cal CEB Annual).

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### §7.22 4. Explain why court should rule pretrial

Explain why the court should not wait until trial to decide whether to admit or exclude the evidence. For example, that the jury would be unduly prejudiced if the inadmissible evidence is referred to in voir dire.

Try to put the evidentiary question in its appropriate context, even though all the other evidence has not yet been presented. The judge will be more comfortable ruling before trial if you include factual background for the evidence. If the judge denies the motion to exclude the evidence, you will have met the requirements of Evid C §353 for creating the record. See *People v Morris* (1991) 53 C3d 152, 190, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. See also §§7.43-7.47 for discussion of what to do when motion is denied.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/§7.23 D. Format and service of written motion

## §7.23 D. Format and service of written motion

A written motion must comply in format with the California Rules of Court. See Cal Rules of Ct 2.100-2.119, 3.1110-3.1116. A motion in limine filed before or during trial does not need to be accompanied by a notice of hearing. Cal Rules of Ct 3.1112(f). Include a supporting memorandum and a proposed order that specifically references the evidence to be excluded or admitted. To increase chances of winning the motion in limine, keep it short and limit it to a few important issues.

For a motion to exclude evidence, the proposed order should also prohibit the parties and their counsel from mentioning or referring to the excluded evidence at any time during the trial, including during voir dire, opening statement, while testifying, and during closing argument.

Counsel can prepare a separate motion for each item of evidence to be excluded or admitted, and request a separate ruling for each motion. This practice ensures a clear record of the court's ruling for each item of evidence in dispute. For convenience and economy, however, some counsel prefer to combine in a single notice of motion and memorandum several evidentiary issues. If that format is followed, request (and so indicate in the form of the proposed order) that the court rule separately on each item of evidence. It is a good idea in this instance to consecutively number each item you want the court to rule on. For samples of representative motions see §§7.49-7.50.

The timing and place of the filing and service of the motion are at the discretion of the trial judge. Cal Rules of Ct 3.1112(f). Counsel should refer to the local rules for guidance on the form, timing, and manner of service. Local rules may also specify the requirements on the timing of the opposition. Otherwise, follow the rules for service of motions in general (see California Civil Procedure Before Trial §§12.69-12.77 (4th ed Cal CEB 2004)), or consult with the trial judge on form and service requirements.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/§7.24 E. Opposition to motion

## §7.24 E. Opposition to motion

If the motion in limine is made in writing, the court ordinarily gives opposing party an opportunity to respond in writing. Check the local rules or the trial judge's practice, to determine how the judge will handle this. For suggestions on finding out the judge's preferences, see §6.4. If the motion is made orally, the opposing party may ask the court for additional time to brief the issue either orally or in writing.

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## §7.25 IV. PRELIMINARY FACT-FINDING PROCESS DURING MOTION IN LIMINE

Motions in limine may require the court to make a finding of the existence of a preliminary fact to determine the admissibility of the evidence. This raises a "mixed" question of fact and law. The court has the responsibility of deciding all questions of law, including questions on the admissibility of proffered evidence (Evid C §310(a)), whether demonstrative, documentary, or real evidence.

Proffered evidence is evidence that the proponent wishes to have admitted; its admissibility or inadmissibility depends on the existence or nonexistence of a preliminary fact. Evid C §§400-401. See §13.7.

Admissibility questions that require a determination of a preliminary fact can also be raised by objection during trial. See §§15.50-15.60 on objections.

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## §7.26 A. When preliminary fact finding is required

Preliminary facts must be established as a foundation for the admission of certain types of evidence. For example, for a photographic reenactment of an automobile accident (the proffered evidence) to be considered relevant and admissible, the proponent of the evidence must show the preliminary fact—that the reenactment was conducted under the same or substantially similar conditions as those existing when the accident took place. See *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 521, 109 CR 110.

When the existence of a preliminary fact is disputed, the court must determine its existence or nonexistence. Evid C §§310(a), 402(a). When determining the existence of a preliminary fact, the court must follow one of three different procedures, depending on the type of evidence, as set forth in Evid C §403 (see §§7.27, 7.35), §404 (see §7.28), and §405 (see §§7.29, 7.36). The most important difference between §§403 and 405 is:

- Under Evid C §403(b)-(c), the court has the discretion to admit the evidence conditionally, leaving the jury to decide whether the preliminary fact exists; the court instructs the jury to disregard the evidence if it does not.
- Under Evid C §405, the court has exclusive power to decide the issue.

See Jefferson's California Evidence Benchbook, chaps 25, 26 (4th ed CJA-CEB 2009).

Under either Evid C §403 or §405, the pivotal step will be allocating the burden of proof to the party that must establish the existence or nonexistence of the preliminary fact. See §7.31.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/§7.27 1. Evidence Code §403

## §7.27 1. Evidence Code §403

In some situations, the court determines whether there is a prima facie showing of the preliminary fact. If evidence of the fact is sufficient to establish a prima facie showing, the court allows the jury to decide if the preliminary fact existed. Evid C §403(c). See §7.35 for discussion of effect of finding fact under Evid C §403. Evidence Code §403(a) applies:

- When "the relevance of the proffered evidence depends on the existence of the preliminary fact";
- When "the preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony" (Evid C §702 requires witnesses other than expert witnesses to have personal knowledge of the facts that they testify to);
- When "the preliminary fact is the authenticity of a writing;" and
- When "the proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/§7.28 2. Evidence Code §404

## §7.28 2. Evidence Code §404

Another type of preliminary fact is whether evidence is subject to the privilege against self-incrimination. Evid C §§404, 940. This type of preliminary fact question does not occur often in civil cases. See California Criminal Law Procedure and Practice §§49.4, 49.9 (Cal CEB Annual) for detailed discussion.

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## §7.29 3. Evidence Code §405

Evidence Code §405 governs all other types of preliminary facts not governed by Evid C §403 or §404. See §7.36 for discussion of the effect of finding a preliminary fact under Evid C §405. These types of proffered evidence include:

- Claims of privilege (see Evid C §§900-1070);
- Hearsay evidence (see Evid C §§1200-1370) (except for declarant's identity, a §403 issue);
- Secondary evidence to prove the contents of a writing (see Evid C §§1520-1523, 1552-1553);
- Admissions and confessions (see Evid C §§1220-1228.1), *e.g.,* whether a party's confession is inadmissible because it was made during compromise negotiations.

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## §7.30 B. Court conducts hearing when preliminary fact is disputed

When a party disputes the existence of a preliminary fact, the court must determine whether evidence is sufficient to sustain a finding that the fact exists. Evid C §402(b).

The court has discretion under Evid C §402(b) to conduct a hearing on the preliminary fact in the jurors' presence. If opposing the admission of the evidence, counsel should request that the hearing be conducted out of the jurors' presence, to avoid the jury's being prejudiced by hearing the proffered evidence or the court's ruling on the preliminary fact. See generally Jefferson's California Evidence Benchbook, chap 24 (4th ed CJA-CEB 2009).

Some courts have local rules or policies requiring that motions to exclude evidence be made and argued outside the jurors' hearing. See, *e.g.,* Los Angeles Ct R 8.41-8.42. If the hearing takes place outside the jury's presence, request that the court reporter be present to ensure an adequate record on appeal.

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## §7.31 C. Burden of proving preliminary fact

To prevail in a preliminary fact hearing, counsel must distinguish between the situations governed by Evid C §§403 and 405. Under §405, the court must be persuaded of the existence of the preliminary fact that admissibility depends on. Under Evid C §403, the court must admit the proffered evidence merely on the introduction of enough evidence to sustain a finding of the preliminary fact. See Comment to Evid C §402(a).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/§7.32 1. Who has burden in Evid C §403 hearing

### §7.32 1. Who has burden in Evid C §403 hearing

For preliminary facts under Evid C §403, the burden of producing evidence of a preliminary fact's existence rests with the proponent of the proffered evidence. Evid C §403(a). During the hearing on the preliminary fact, counsel opposing the admissibility of evidence should actively try to establish that the evidence is insufficient to sustain a finding that the proffering party has met its burden of proof.

**EXAMPLE:** In the case of a photographic reenactment of an accident scene, as a preliminary fact, the proffering party must establish that the photographic reenactment was conducted under the same or substantially similar conditions as those existing when the accident took place. Although the burden of showing substantial similarity between a reenactment and the underlying occurrence rests on the proponent of the photographic evidence, the proponent will often do little more than point out to the court the conditions depicted in the reenactment that resemble the underlying occurrence.

**PRACTICE TIP:** Opposing counsel should request a preliminary fact hearing and in the course of that hearing demonstrate how the reenactment fails to accurately portray the underlying event (*e.g.,* the time of day is incorrect, the weather was different, the condition of the street has changed). Unless opposing counsel points out the dissimilarities, the court may not focus on important discrepancies.

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### §7.33 2. Who has burden in Evid C §405 hearing

For preliminary facts under Evid C §405, the court will indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law. For example, a person asserting a privilege has the burden of proving that the requisites of the privilege exist, and the opponent of the privilege (the person offering the evidence) has the burden of proving that the privilege is eliminated by an exception or waiver.

See Comment to Evid C §405; California Trial Objections, chap 21 (Cal CEB Annual).

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### §7.34 D. Challenging existence of preliminary fact

When opposing the proffered evidence, be prepared to show that the preliminary fact does not exist. On an appropriate request, counsel opposing the admission of the evidence may be allowed to conduct a voir dire examination of witnesses testifying as to the proffered evidence and to call witnesses to testify against the admission of the evidence. If permission to call the witnesses is denied, make an appropriate offer of proof, *i.e.,* explain to the court what the potential witness would say and how that testimony would show that the preliminary fact does not exist. For further discussion, see §§15.50-15.60.

**PRACTICE TIP:** When a party objects to the preliminary fact foundation and requests a hearing under Evid C §402(b), the party offering the evidence should be vigilant to ensure that the hearing is not used as a device to conduct last-minute discovery, *e.g.,* by exploring collateral issues or inquiring into matters that are not directly relevant to the disposition of the evidentiary issue at hand. Counsel should object to questioning that exceeds the scope of matters that are essential to a ruling on the admissibility of the evidence based on the existence of the preliminary fact.

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## E. Effect of court's finding preliminary fact

### §7.35 1. Evidence Code §403

Under Evid C §403, when the court determines that the evidence is sufficient to sustain a finding of the preliminary fact and the proffered evidence is admitted, the jury ultimately may decide whether the preliminary fact exists. If the court admits the proffered evidence, the court may, and on request must, "instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist." Evid C §403(c)(1). See Comment to Evid C §403. If the proffered evidence is admitted and the court later determines that a jury could not reasonably find that the preliminary fact exists, the court must instruct the jury to disregard the evidence. Evid C §403(c)(2).

The court may admit proffered evidence, subject to the proponent's later providing evidence of the preliminary fact. Evid C §403(b). The court cannot, however, conditionally admit testimony from a witness when the preliminary fact required for admissibility is the witness's personal knowledge of the subject matter of the testimony. Evid C §§403(b), 702 (witnesses other than experts must have personal knowledge of facts they testify to).

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## §7.36 2. Evidence Code §405

The judge alone decides the preliminary fact questions governed by Evid C §405. The jury cannot redetermine the issue, as it can under Evid C §403. See Comment to Evid C §405.

If a preliminary fact determined under Evid C §405 is also a fact at issue in the case, the jury must decide the ultimate issue and the judge is prohibited from telling the jury the court's decision on the existence or nonexistence of the preliminary fact. Evid C §405(b)(1). If the court admits the proffered evidence, the judge cannot instruct the jury to disregard the evidence if the jury decides that the preliminary fact did not exist. Evid C §405(b)(2).

**EXAMPLE:** When hearsay evidence is offered, two preliminary fact questions may be involved:

(1) Whether the declarant actually made the alleged statement. This question is determined under Evid C §403, with the jury ultimately determining whether to admit the evidence.

(2) Whether a proper foundation has been laid so that an exception to the hearsay rule applies. This question is decided by the judge alone under Evid C §405. See Comment to Evid C §405 for examples of matters determined under this section. On hearsay rule and exceptions generally, see Evid C §§1200-1370. See also §§10.18-10.27.

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## §7.37 V. ACTIONS AFTER COURT RULES ON MOTION

The ruling on a motion in limine is interlocutory, *i.e.,* it is not appealable, and the trial judge is free to reconsider, revise, and reverse the ruling during trial.

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### A. Court grants motion

### §7.38 1. To exclude evidence

If the court grants a motion excluding evidence, make sure the order excludes both the evidence and any reference to it. See §7.23. The court should also order counsel for all parties to caution their witnesses to avoid mentioning the excluded evidence. See §7.40 for discussion of effect of violating the order.

If losing the motion in limine precludes presentation of evidence on a critical issue, then a party may stipulate to judgment for purposes of appeal. *Tudor Ranches, Inc. v State Compensation Ins. Fund* (1998) 65 CA4th 1422, 1428, 77 CR2d 574. To be effective, the stipulation must dispose of all claims with prejudice. 65 CA4th at 1429. The court of appeal will review the in limine ruling on an abuse of discretion standard. 65 CA4th at 1431.

**PRACTICE TIP:** Because the court has discretion to reconsider, revise, and reverse its ruling on motions in limine, stipulation to judgment merely to appeal them seems extreme and inadvisable in most cases.

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### §7.39 a. Preserving right to appeal if opposing the motion

When offering evidence that the court excludes, in order to preserve the right to appeal from the order and the record on appeal, make sure you include in your written response to the motion or in an oral offer of proof on the record:

- The substance of the offered evidence, *i.e.,* the general nature of the testimony to be given, or nature of the documentary or other evidence sought to be admitted;
- The purpose of the evidence, *i.e.,* why you are offering the evidence; and
- The relevance to the case.

See Evid C §354(a). See generally §§15.50-15.60.

Include the substance, purpose, and relevance of the excluded evidence in both a written opposition to the motion to exclude, and in the oral offer of proof. During oral argument you can reiterate and expand on the offer of proof on the record and refer to the offer of proof in your written papers. Consider making an offer of proof outside the presence of the jury when the evidence ordinarily would have been introduced at trial.

**PRACTICE TIP:** If the court excludes documentary evidence, ask that the documents be marked for identification as an exhibit or attach copies to the opposition, to ensure that the evidence is included in the record in some fashion. On appeal it will be difficult to demonstrate that the client was prejudiced by the exclusion of evidence without a record to demonstrate what the excluded evidence would have shown.

Consider asking the court to reconsider the ruling, especially if, during trial, facts are developed that support admission of the evidence. See *Charbonneau v Superior Court* (1974) 42 CA3d 505, 507, 116 CR 153 (modification of motion in limine during trial permitted). Evidence excluded in limine may become admissible if a witness or opposing counsel opens the door. Be sure to seize such opportunities and make your record.

**EXAMPLE:** In *Smalley v Batey* (2005) 128 CA4th 977, 984, 27 CR3d 575, the trial court was held to have abused its discretion under Evid C §352 by granting defendants' motion in limine to exclude evidence that the plaintiff in a personal injury action had paid his own medical expenses (evidence was "manifestly relevant" to prove plaintiff's damages and to rebut defendants' insinuation that plaintiff was malingering; collateral source rule irrelevant because insurer did not pay those expenses).

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### §7.40 b. Effect of violating order to exclude

Violation of an order excluding evidence under a motion in limine, whether temporary or permanent, may subject counsel to contempt sanctions. See CCP §1209(a)(5); *Charbonneau v Superior Court* (1974) 42 CA3d 505, 507, 116 CR 153. Violations of orders may also serve as a basis for a mistrial if sufficiently prejudicial. See *Clark v Optical Coating Lab. Inc.* (2008) 165 CA4th 150, 159, 80 CR3d 812 (mistrial granted after repeated violations caused cumulative prejudice). On contempt sanctions, see §§16.99-16.129.

Violation of an order prohibiting reference to excluded evidence may also subject counsel to sanctions or discipline. It is unprofessional conduct, knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury, to "offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments." *Hawk v Superior Court* (1974) 42 CA3d 108, 118, 116 CR 713; see *Simmons v Southern Pac. Transp. Co.* (1976) 62 CA3d 341, 355, 133 CR 42.

**PRACTICE TIP:** After prevailing on a motion in limine to exclude evidence, promptly object to any violation of the order and request that the court instruct the jury to disregard the reference. If the reference to excluded evidence is extremely prejudicial to your case, consider moving for a mistrial (and ask the court to impose the cost of the mistrial on the opposing party). See *Warner Constr. Corp. v City of Los Angeles* (1970) 2 C3d 285, 302, 85 CR 444. Failure to object, to cite opposing counsel for misconduct, or to request a mistrial can result in a waiver of the issue on appeal.

For further discussion on misconduct of counsel, see §§16.66-16.90.

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### §7.41 2. To admit evidence

Similarly, if the court has granted a motion in limine to admit evidence, the party opposing the motion should seriously consider asking the court to reconsider if developments during trial indicate that the evidence should not, in fact, be admitted. On the need to renew an objection to admitting the evidence when opposing counsel tries to introduce it, see §7.46.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/§7.42 B. Court takes motion under submission or makes conditional ruling

### §7.42 B. Court takes motion under submission or makes conditional ruling

The trial judge often takes a motion in limine under submission pending developments at trial. This practice provides the court an opportunity to view the evidence (and its relevance) in the context of the facts as developed at trial and to weigh the effect of a ruling excluding or admitting the evidence.

If the court takes your motion to exclude evidence under submission, request that the court enter an order temporarily excluding the evidence and prohibiting reference to it, so that potentially inadmissible evidence is not referred to (for example, during opening statement) before the court has an opportunity to rule. Then ask the court to rule on the motion at the appropriate point during the trial, when the evidence in question is about to become the subject of testimony.

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### §7.43 C. Court denies motion to exclude evidence

If the court denies your motion in limine to exclude evidence at trial, consider these factors when deciding how to proceed:

- Do you want to renew your objection when the evidence is presented at trial? See §§7.45-7.46.
- Do you want to ask the court and opposing counsel for a stipulation or statement on the record that the objection has been preserved and you need not object at trial? See §7.47.
- Have you already adequately preserved your objection on the record through your motion in limine so that renewing the objection or asking for a stipulation is unnecessary? See *People v Morris* (1991) 53 C3d 152, 190, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394, discussed in §§7.46-7.47.

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### §7.44 1. Renewing objection

When deciding whether to renew the objection at the time of trial, reasons to renew the objection may be:

- To persuade the court to change its mind. See §7.45.
- To ensure that the objection is preserved on the record for appeal. See §7.46.

Reasons not to renew the objection, especially while the jury is present, may be:

- You are reasonably certain the court will not change its ruling;
- Not to appear an obstructionist;
- Not to draw the jury's attention to the evidence; or
- Not to interrupt the flow of the trial.

If deciding to renew the objection, ensure that the record is preserved for appeal, either by an adequate motion in limine, or by a stipulation with the court and parties, or both. See §7.47.

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### §7.45 a. Ask court for different ruling by objecting to evidence at trial

You may be able to persuade the court to make a different ruling when the evidence is offered at trial. At that time, the court can consider the relevance of the evidence in context, its probative value, and its potential for prejudice when the objection is made. See *People v Jennings* (1988) 46 C3d 963, 975 n3, 251 CR 278.

If it is apparent that the court will not change its mind, an objection may unnecessarily draw the jury's attention to the evidence and interrupt the flow of the trial. Be careful, however, to avoid a waiver. Definitely renew the objection if new facts are developed at trial.

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### §7.46 b. Object to preserve record for appeal

If the court denies your motion to exclude evidence, you must decide whether to renew the objection when the evidence is presented at trial, to preserve the objection for appeal. To preserve the objection for appeal, the record must show that a timely objection or motion to exclude or to strike the evidence was made and that the court was aware of the specific ground of the objection or motion. Evid C §353.

Initially, the courts held that when a party unsuccessfully sought exclusion of evidence by a specific motion in limine, the motion served as an objection at trial and renewing the objection to the evidence at trial was not necessary to preserve the issue for appeal. See *Sacramento & San Joaquin Drainage Dist. v Reed* (1963) 215 CA2d 60, 66, 29 CR 847. Later, the California Supreme Court held that objections to the admissibility of evidence generally should be restated at trial, when the evidence is introduced. *People v Jennings* (1988) 46 C3d 963, 975 n3, 251 CR 278. Subsequently, however, in *People v Morris* (1991) 53 C3d 152, 189, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394, the Supreme Court held that a motion in limine serves the function of a timely objection or motion to exclude under Evid C §353 when the motion satisfies the basic requirements of §353, *i.e.*:

- The motion states a specific legal ground for exclusion and that ground is subsequently raised on appeal;
- The motion is directed to a particular, identifiable body of evidence; and
- The motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context.

If a motion in limine does not satisfy each of these requirements, other action must be taken to preserve the evidentiary issue for appeal. 53 C3d at 190.

If you cannot determine whether each requirement set forth in *Morris* was satisfied in your motion, it is safest to renew the objection at trial. See 53 C3d at 191. See §7.44 for discussion of determining whether to object at trial. If you do not want to renew the objection to preserve the record for appeal, consider requesting a stipulation or statement from the court on the record when the motion to exclude evidence is denied. For language of stipulation or statement, see §7.47.

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## §7.47 2. Stipulation or statement to preserve record

If you determine that you do not want to renew your objection to the evidence at trial, the safest method of ensuring that the objection is preserved for appeal is to request a stipulation of counsel or statement by the court on the record. See *People v Morris* (1991) 53 C3d 152, 191, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. The supreme court in *Morris* suggests obtaining a "clear understanding on the record that counsel need not object when the evidence is sought to be introduced during trial so as to preserve the right to argue the point on appeal." 53 C3d at 191 (quoting an earlier edition of this book, California Trial Practice: Civil Procedure During Trial §6.48 (Cal CEB 1982)).

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### §7.48 D. Court denies motion to admit evidence

If the court denies your motion to admit evidence, to preserve the right to appeal from the order, make sure that the court knows the substance and relevance of the excluded evidence. See Evid C §354(a). Thus, to protect the record on appeal, include this information in your motion, or make an offer of proof on the record indicating the general nature of the testimony that would be given, or nature of the documentary or other evidence sought to be admitted, and indicating its relevance to the case. See generally §§15.50-15.60.

In addition, consider asking the court to reconsider the ruling, if during trial facts are developed that support admission of the evidence. See *Charbonneau v Superior Court* (1974) 42 CA3d 505, 507, 116 CR 153 (modification of motion in limine during trial permitted).

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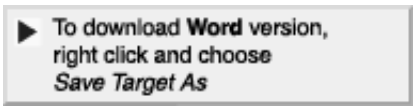
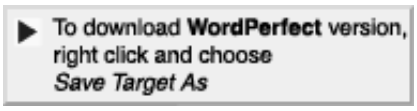
## VI. FORMS AND EXAMPLES

### §7.49 A. Form: Sample motion in limine

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**Attorneys for Plaintiffs**
**Emma Jones, Robert Jones,**
**and Grandmother Jones**

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA**
**SOUTHERN DIVISION**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. H 000000-0** |
| **Plaintiff(s)** | ) | **MOTIONS IN LIMINE AND** |
| **vs** | ) | **SUPPORTING MEMORANDUM** |
| _ _[*Name(s)*]_ _ | ) | **Hearing: 3/1/09; 9:00 am** |
| **Defendant(s)** | ) | **Department: 41** |
| | ) | **Judge William B. Jones** |
| | ) | **Action filing date: 11/1/00** |
| _____ | ) | **Trial date: 3/15/09** |

**INTRODUCTION**

**On November 14, 2005, 18-month-old Felix Jones walked through a wide gap in a deteriorated fence and fell into a swimming pool at a Fremont apartment complex owned by the defendant. He died after being in a coma for over 3 months. Felix was the only child of Mr. and Mrs. Jones, who lived at the apartment complex. He was discovered floating in the pool by his grandmother, Grandmother Jones, who had been caring for him when he wandered away.**

**The parents are suing for general damages for wrongful death, plus over $147,000 in medical bills incurred in the 3 months' hospitalization before Felix's death. Grandmother Jones is suing under a *Dillon v Legg* cause of action.**

**Plaintiffs' First Motion in Limine**

**Plaintiffs move to exclude all references to any spousal abuse or battery incidents involving Robert Jones.**

**Points and Authorities**

**This evidence is irrelevant to either the liability or the damages issues and is therefore inadmissible under Evidence Code §350. Defendants do not contend that domestic violence played a role in the accidental drowning. Also, a parent's love for a child and corresponding grief at the loss of a child has no logical relation to that parent's marital difficulties. Recovery for wrongful death is not restricted to survivors whose life is otherwise without difficulty.**

**This court's order of September 1, 2007, quashed defendant's subpoena for police records, and limited to interrogatories any discovery about domestic violence. Plaintiffs' answers revealed that their deceased child**

**was never the subject of any domestic disputes, was never subjected to physical violence, and was never present during any domestic dispute.**

**Defendants' only purpose in attempting to introduce evidence of domestic violence would be to confuse the issues and create undue prejudice against Robert Jones. Even if there were any probative value in the plaintiffs' history of domestic disputes, exclusion is warranted under the balancing required by Evidence Code §352.**

**Plaintiffs' Second Motion in Limine**

**Plaintiffs move to exclude all references to any criminal proceedings involving any of the plaintiffs or their spouses.**

**Points and Authorities**

**The arguments made in the preceding section apply here as well. Evidence of any criminal proceedings involving plaintiffs or their spouses is inadmissible under Evidence Code §350. It will not help the jury determine responsibility for Felix Jones's death or assess the magnitude of plaintiffs' loss. As Plaintiffs' Answers to Defendants' Interrogatories dated October 11, 2007, revealed, plaintiff Robert Jones's only arrest for domestic disputes occurred in February 2006, after Felix's death.**

**Plaintiffs' Third Motion in Limine**

**Plaintiffs move to exclude all references to the immigration status of any of the plaintiffs or their spouses.**

**Points and Authorities**

**Plaintiffs' immigration status is irrelevant to the issues of liability and damages and therefore inadmissible under §350. Plaintiffs are not seeking to recover any lost financial support the child could have provided. Defendants' only purpose in attempting to inject plaintiffs' status as an issue would be to incite animosity. Again, any conceivable probative value would be far outweighed by the undue prejudice and confusion of issues that would result.**

**Plaintiffs' Fourth Motion in Limine**

**Plaintiffs move to exclude all references to any alleged criminal conduct of any of the plaintiffs or their spouses.**

**Points and Authorities**

**Plaintiffs incorporate by reference the arguments made in support of the second motion in limine. Defendants may call as witnesses persons who have made defamatory and untrue allegations about nonparty members of plaintiffs' family. This evidence is irrelevant, and any possible probative value is far out-weighed by the risk of undue prejudice.**

**Plaintiffs' Fifth Motion in Limine**

**Plaintiffs move to exclude all testimony by witness Mary Smith regarding any statement made by non-accident-witness plaintiff Robert Jones about how the accident happened.**

**Points and Authorities**

**Neither Robert Jones nor Mary Smith was a percipient witness to the death of Felix Jones and neither has any personal knowledge of how the accident happened. Any potential testimony by Mary Smith purporting to repeat statements allegedly made by Robert Jones about how the accident happened therefore have at best limited probative value. Under the balancing required by Evidence Code §352, these statements must be excluded. Introduction of Ms. Smith's testimony can only result in undue consumption of time, because plaintiffs will be required and are prepared to bring in additional witnesses who can testify both to Grandmother Jones's prior consistent statements about how the accident occurred and to Robert Jones's prior consistent statements.**

**Admission of Ms. Smith's testimony would complicate and prolong the trial without adding anything of substance. Even if the alleged statements are deemed admissible against Robert Jones, they would not be admissible against Grandmother Jones. An admission by one litigant is not binding on other litigants. *Nishi v Inoguchi* (1931) 116 CA 398, 2 P2d 864.**

**Plaintiffs' Sixth Motion in Limine**

**Plaintiffs move that defendants be precluded from referring to any comparative negligence on the part of plaintiff Robert Jones or Emma Jones, or both, because defendants have conceded that they have no factual basis to support that affirmative defense.**

**Points and Authorities**

**On January 10, 2009, plaintiffs deposed defendants' designated expert witness, Roger Best. Mr. Best conceded that he had been presented with no facts showing that either plaintiff Robert Jones or plaintiff Emma Jones had been negligent and that he believed they had not been negligent. Without any evidence to support a theory of comparative negligence against these two parties, defendants have no good-faith basis for asserting such an affirmative defense. Fairness requires that they be precluded from clouding the issues by arguing a position for which they cannot present evidence.**

**Plaintiffs' Seventh Motion in Limine**

**Plaintiffs move to exclude any testimony by defendants' expert witness, Roger Best, repeating statements allegedly made by an anonymous municipal employee about the applicability of the Fremont Municipal Code provisions to the defendants' pool.**

**Points and Authorities**

**At his deposition on January 10, 2009, defendants' expert witness Roger Best stated that he had spoken to an employee of the City of Fremont, whose name he could not recall, regarding the applicability of the Municipal Codes governing swimming pools. Mr. Best stated he was told that the apartment swimming pool was governed by the provisions for a "private pool" rather than those for a "two-family or multiple-family development" pool. Plaintiffs anticipate that defendants will attempt to elicit the substance of that alleged conversation in the course of Mr. Best's testimony.**

**There is no basis for allowing this statement to be introduced, because the conversation does not form the basis for any part of Mr. Best's expert opinions. Mr. Best's expert opinions have to do with time and speed estimates relating to the actions of Grandmother Jones and Felix Jones on the day of the accident. Defendants' only purpose in attempting to reiterate the substance of Mr. Best's conversation with the anonymous City of Fremont employee would be to attempt to unfairly create confusion on an otherwise clear and uncontroversial issue, which in turn would complicate and prolong the trial if plaintiffs are forced to bring in rebuttal evidence.**

**Plaintiffs' Eighth Motion in Limine**

**Plaintiffs move to exclude the medical records regarding Grandmother Jones's eyesight as of February 2006.**

**Points and Authorities**

**Defendants disclosed no expert witness on the issue of Grandmother Jones's eyesight. Without an expert, defendants may not attempt to simply introduce medical records concerning her eyesight 3 months after the incident. Understanding these records is not within a lay person's ability; therefore, the records can only create confusion and potential prejudice against Grandmother Jones.**

**The testimony thus far is that Grandmother Jones began experiencing visual difficulties after the accident. Defendants have alluded to problems with Grandmother Jones's vision but have never requested that she submit to an examination of any kind. There is no evidence that Grandmother Jones had any eyesight problems in November 2005.**

**Furthermore, that portion of the records regarding Grandmother Jones's eyesight as of February 2006 would**

**be inadmissible hearsay under Evidence Code §1271, because it represents the opinion of a physician rather than a record of an act, condition, or event of the sort allowed under the business records exception to the hearsay rule. Plaintiffs would be unable to cross-examine the doctor to find out what factors or tests led to the evaluation of Grandmother Jones's vision, the date of onset of any vision difficulties, and whether that doctor was qualified to make the evaluation. *People v Reyes* (1974) 12 C3d 486, 501, 116 CR 217 (psychiatric diagnosis in medical records is not a record of act, condition, or event admissible as business record); *Godfrey v Steinpress* (1982) 128 CA3d 154, 184, 180 CR 95 (doctor's opinion in medical records on cause of headaches is inadmissible hearsay).**

**DATE: _ _ _ _ _ _** **JAMES & ROBERTS**

**_____**
**MARTHA JAMES**
**Attorney for plaintiff**

*Comment:* Comply with Cal Rules of Ct 3.1110-3.1116. A notice of motion is not required. Cal Rules of Ct 3.1112(f). This sample motion in limine combines all motions, facts of the case, and supporting memorandum in one document. Many trial attorneys prefer to submit a separate document for each motion. Others prefer to submit the motions and memorandums in a single document. See discussion in §7.23.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/7 Motions in Limine/§7.50 B. Example: Oral argument on motion in limine

### §7.50 B. Example: Oral argument on motion in limine

D: Before we impanel the jury, Your Honor, I have a few motions in limine. I filed supporting memorandums with the court last week and gave counsel a copy at that time.

My first motion is to exclude any mention by counsel or her witnesses of the fact that one of my clients, Carlos Ramos, is a homosexual, on the ground that to do so would be far more prejudicial than probative. Mr. Ramos's sexual orientation has nothing to do with the merits of this action and mentioning it can only mislead the jury from the material issues of the case. On that basis, I ask that Ms. Morrison be admonished not to bring up that fact and further that she admonish her witnesses not to mention it in court.

P: Your Honor, I gave both the court and counsel my written opposition to this motion to exclude a vital and extremely relevant fact in this case. My client believes that, but for Mr. Ramos's sexual orientation, which caused Mr. Ramos to feel extreme jealousy, his assault on my client and the personal injuries my client suffered would never have occurred.

*Comment:* Obtain a ruling before jury selection so that counsel will know whether to avoid mentioning the information during voir dire or in opening statement. Note that both counsel drew the court's attention to their supporting memorandums and that counsel seeking to exclude the evidence asked the court to have opposing counsel admonish her witnesses not to volunteer the objectionable material.

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# 8

# Jury Selection

**Gary Christopherson**
**Thomas O. Perry**
**Ron A. Northup**

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## §8.1 I. SCOPE OF CHAPTER

This chapter discusses the right to a jury trial (see §§8.3-8.13), how this right can be waived (see §8.15), and what to do if waiver occurs (see §§8.16-8.17). Waiver can occur early in the case when counsel fails to demand a jury in the case management conference statement or at the conference itself. See §2.26. It can also occur later in the case if the demanding party fails to deposit jury fees. CCP §631(d)(5)-(6). On jury trial demand and waiver, see California Civil Procedure Before Trial, chap 41 (4th ed Cal CEB 2004).

This chapter also discusses jury selection, including:

- How to become a juror (see §§8.19-8.23);
- Excuses from jury service (see §§8.24-8.25);
- Summoning a juror (see §§8.26-8.29);
- Methods of jury selection (traditional and "six- or 12-pack" methods; see §§8.32-8.33);
- Voir dire examination by the judge and counsel (see §§8.35-8.42);
- Juror questionnaires (see §§8.43-8.45);
- Hiring a jury consultant (see §8.53);
- Challenging the entire jury for cause (see §8.56);
- Grounds for challenging individual jurors for cause (see §§8.57-8.60);
- Peremptory challenges (see §§8.64-8.72);
- Selection of alternate jurors (see §§8.74-8.77); and
- Illness or disqualification of juror (see §8.78).

Sample forms used in the selection of a jury are included in §§8.81-8.83. For a chapter bibliography, see §8.84. On procedures for demanding a jury trial, and how and when to deposit jury fees, see §§2.25-2.35.

**PRACTICE TIP:** Whether to try your case before a judge or a jury must be decided on a case-by-case basis. More parties are opting for other forms of dispute resolution (*e.g.,* binding arbitration, mediation, and summary trials) because of the costs of a jury trial, the length of time it takes to get a case to a jury despite the trial delay reduction rules, and the uncertain outcome. Discuss the options with your client. See Civ Proc Before Trial §50.4.

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## II. RIGHT TO JURY TRIAL AND WAIVER

### §8.2 A. "Trial jury" defined; number of jurors

A trial jury is "a body of persons selected from the citizens of the area served by the court and sworn to try and determine by verdict a question of fact." CCP §194(p). A jury in a civil case consists of 12 persons or a lesser number agreed on by the parties in open court. Cal Const art I, §16; CCP §220. In limited civil cases, however, the legislature may provide that the jury consist of eight persons or a lesser number agreed on by the parties in open court. See Cal Const art I, §16.

If during trial all the alternate jurors have been excused and another juror drops out, the parties have the option of starting the trial over or stipulating to a decision from the remaining jurors. A party may be precluded from complaining on appeal about a jury of less than 12 jurors if the party (1) stipulated to a lesser number, whether or not in open court, or (2) failed to enter a timely objection to a jury of less than 12 jurors. See *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 944, 218 CR 839 (adverse party's silence alone does not waive right to 12-person jury; however, party cannot complain on appeal of lesser number of jurors if party stipulated to lesser number or failed to enter timely objection to jury of less than 12).

**PRACTICE TIP:** If the parties stipulate to a jury of less than 12 members, this stipulation should be formally entered on the minutes in open court. Obtain your client's consent on this issue.

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### §8.3 B. Determining right to jury trial; gist of action test

The right to a jury trial is guaranteed by Cal Const art I, §16 (former Cal Const art I, §7) and is provided for by statute in CCP §592.

A "jury trial is a matter of right in a civil action at law, but not in equity." *Southern Pac. Transp. Co. v Superior Court* (1976) 58 CA3d 433, 436, 129 CR 912. "[T]he right so guaranteed … is the right as it existed at common law in 1850, first adopted." *C & K Eng'g Contractors v Amber Steel Co.* (1978) 23 C3d 1, 8, 151 CR 323; *People v One 1941 Chevrolet Coupe* (1951) 37 C2d 283, 231 P2d 832. "[W]hat that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact." 37 C2d at 287.

**EXAMPLE 1:** *Crouchman v Superior Court* (1988) 45 C3d 1167, 1179, 248 CR 626 (no right to jury trial in de novo trial on appeal from small claims action).

**EXAMPLE 2:** *Jogani v Superior Court* (2008) 165 CA4th 901, 905, 81 CR3d 503 (right to jury trial because quantum meruit was form of common law writ of assumpsit before 1850).

**EXAMPLE 3:** *Wisden v Superior Court* (2004) 124 CA4th 750, 756, 21 CR3d 523 (right to jury trial exists for fraudulent conveyance action).

**EXAMPLE 4:** *County of El Dorado v Schneider* (1987) 191 CA3d 1263, 1280, 237 CR 51 (no right to jury trial existed as of 1850 in paternity action; therefore, no right exists today).

**EXAMPLE 5:** *Maldonado v Superior Court* (1984) 162 CA3d 1259, 1262, 209 CR 199 (right to a jury trial on appeal from small claims action for unlawful detainer).

In determining whether an action was triable by a jury at common law, the court is not bound by the form of the action and will inquire into the "gist of the action." The "gist of the action" means the nature of the rights involved as determined from the pleadings as a whole and the facts of the case. See *C & K Eng'g Contractors v Amber Steel Co., supra*; *Bank of America v Greenbach* (1950) 98 CA2d 220, 219 P2d 814; *Estate of Cazaurang* (1946) 75 CA2d 217, 170 P2d 694.

If the gist of the action is legal, a right to a trial by jury exists. *People v One 1941 Chevrolet Coupe, supra*. See also *Martin v County of Los Angeles* (1996) 51 CA4th 688, 698, 59 CR2d 303 (right to jury trial exists in equitable indemnity action); *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1383, 1391, 1 CR2d 446.

The type of relief sought usually determines whether the action is legal or equitable. *Raedeke v Gibraltar Sav. & Loan Ass'n* (1974) 10 C3d 665, 672, 111 CR 693. For example, a claim for damages generally establishes that the action is one at law. However, neither the caption of the pleading nor the prayer for relief can conclusively determine whether an action is legal or equitable. *C & K Eng'g Contractors v Amber Steel Co., supra*; *Hutchason v Marks* (1942) 54 CA2d 113, 128 P2d 573. See *Interactive Multimedia Artists, Inc. v Superior Court* (1998) 62 CA4th 1546, 1554, 73 CR2d 462; *Interinsurance Exch. v Savior* (1975) 51 CA3d 691, 694, 124 CR 239; *Paularena v Superior Court* (1965) 231 CA2d 906, 911, 42 CR 366.

The fact that equitable principles may be involved in the case will not bar a jury trial if the case is one in which the common-law courts could and would have granted relief. *Mortimer v Loynes* (1946) 74 CA2d 160, 168, 168 P2d 481 (equitable principles used to establish liability). See also *Bank of America v Lamb Fin. Co.* (1956) 145 CA2d 702, 706, 303 P2d 86.

The constitutional guaranty to the right to a jury trial is not limited strictly to cases in which such a right would have existed at common law in 1850. It extends to cases of a like nature that did not exist then. *People v One 1941 Chevrolet Coupe, supra* (statutory automobile forfeiture proceeding required jury trial when similar type of cause of action existed at common law that was triable by jury). The legislature cannot convert a legal right into an equitable one if it will infringe on the right of trial by jury. 37 C2d at 299.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.4 1. Actions at law entitled to jury trial

## §8.4 1. Actions at law entitled to jury trial

A right to a jury trial exists only as to issues of fact. See CCP §§590, 592; Evid C §§310(a), 312. The court decides issues of law. A jury trial is a matter of right for issues of fact in actions for (CCP §592):

- The recovery of specific real or personal property, with or without damages;
- Money claimed due on a contract;
- Damages for breach of contract; and
- Damages for injuries.

For example, a party is entitled to a jury trial in actions:

- **In ejectment.** *Thomson v Thomson* (1936) 7 C2d 671, 682, 62 P2d 358.
- **To recover damages based on legal malpractice, breach of contract, negligence, and emotional distress.** *Ceriale v Superior Court* (1996) 48 CA4th 1629, 1634, 56 CR2d 353 (damages recoverable even though equitable issues from underlying dissolution proceeding could arise during trial).
- **To recover damages for fraud.** *Peterson v Peterson* (1946) 74 CA2d 312, 320, 168 P2d 474. See also *Hutchason v Marks* (1942) 54 CA2d 113, 118, 128 P2d 573.
- **To recover damages for nuisance.** *Farrell v City of Ontario* (1919) 39 CA 351, 357, 178 P 740.
- **To recover damages for quantum meruit.** *Jogani v Superior Court* (2008) 165 CA4th 901, 905, 81 CR3d 503.
- **To recover damages for trespass.** *Hughes v Dunlap* (1891) 91 C 385, 390, 27 P 642.
- **To recover statutory penalties.** *Feltner v Columbia Pictures Television, Inc*. (1998) 523 US 340, 140 L Ed 2d 438, 118 S Ct 1279, 1284 (copyright owner elects to recover statutory damages under Copyright Act; Seventh Amendment provides right to jury trial on issues pertinent to damage award); *Grossblatt v Wright* (1951) 108 CA2d 475, 239 P2d 19 (Housing and Rent Act of 1947; treble damages recoverable under Act similar to common-law action of debt).

For further discussion, see 7 Witkin, California Procedure, *Trial* §§84-85 (5th ed 2008).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.5 2. Actions in equity not entitled to jury trial

### §8.5 2. Actions in equity not entitled to jury trial

There is no right to a jury trial if the gist of an action is for the enforcement of a right that is only recognized in equity. *Ford v Palisades Corp*. (1950) 101 CA2d 491, 499, 225 P2d 545. See *C & K Eng'g Contractors v Amber Steel Co.* (1978) 23 C3d 1, 8, 151 CR 323.

There was no right to a jury trial in the following actions because they were held to be equitable actions:

- **Cancellation of instrument.** *Porter v Superior Court* (1977) 73 CA3d 793, 800, 141 CR 59 (deed).
- **Injunctive relief only.** *City of Turlock v Bristow* (1930) 103 CA 750, 756, 284 P 962 (to abate nuisance); *Wolford v Thomas* (1987) 190 CA3d 347, 353, 235 CR 422.
- **Reformation of contract.** *Loftus v Fischer* (1896) 113 C 286, 288, 45 P 328.
- **Specific performance of contract.** *Connell v Bowes* (1942) 19 C2d 870, 871, 123 P2d 456; *Walton v Walton* (1995) 31 CA4th 277, 288, 36 CR2d 901.
- **To establish constructive trust.** *Getty v Getty* (1986) 187 CA3d 1159, 1175, 232 CR 603; *Tibbitts v Fife* (1958) 162 CA2d 568, 573, 328 P2d 212.
- **Rescission.** *Bank of America v Greenbach* (1950) 98 CA2d 220, 230, 219 P2d 814. But see *Ford v Superior Court* (1959) 176 CA2d 754, 759, 1 CR 559. See also *NMSBPCSLDHB v County of Fresno* (2007) 152 CA4th 954, 61 CR3d 425 (rescission action is action in equity and not action at law when recovery sought by plaintiff consists entirely of something other than consideration given by plaintiff; thus, plaintiff not entitled to jury trial).
- **Quiet title.** *Peterson v Peterson* (1946) 74 CA2d 312, 322, 168 P2d 474 (no right to jury trial exists in quiet title actions, unless action takes on character of ejectment action to recover possession of property). See *Thomson v Thomson* (1936) 7 C2d 671, 62 P2d 358; *Estate of Phelps* (1990) 223 CA3d 332, 340, 273 CR 2. But see *Arciero Ranches v Meza* (1993) 17 CA4th 114, 125, 21 CR2d 127 (when quiet title action seeks declaration that party is owner of prescriptive easement, party has right to have jury determine whether prescriptive easement exists). See also *Baugh v Garl* (2006) 137 CA4th 737, 40 CR3d 539 (in water rights action, it was undisputed that plaintiffs had right to easement; thus, action at law was not necessary prerequisite for injunctive relief).
- **Promissory estoppel.** *C & K Eng'g Contractors v Amber Steel Co., supra*. See also *A-C Co. v Security Pac. Nat'l Bank* (1985) 173 CA3d 462, 473, 219 CR 62.
- **Shareholders' derivative action.** *Rankin v Frebank Co.* (1975) 47 CA3d 75, 90, 121 CR 348. On right to a jury trial when action includes a prayer for equitable relief to protect a common-law right, see §8.2.

**NOTE:** A trial judge has discretion to submit to a jury an equitable affirmative defense to a legal claim. See *Unilogic, Inc. v Burroughs Corp.* (1992) 10 CA4th 612, 623, 12 CR2d 741 (affirmative defense to claim for conversion was unclean hands).

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### §8.6 3. Legal and equitable issues in same case

When legal and equitable issues have been joined in the same case, the parties have a right to a jury trial on the legal issues as long as the legal issues are severable. *Connell v Bowes* (1942) 19 C2d 870, 123 P2d 456 (right to jury trial of legal issues raised by cross-complaint when complaint stated equitable cause of action and cross-complaint stated legal cause of action); *Selby Constructors v McCarthy* (1979) 91 CA3d 517, 154 CR 164. See *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1383, 1393, 1 CR2d 446 (jury trial properly permitted when defendant bank's cross-complaint and plaintiff's answer created defensive claim for relief on which there was right to jury trial; bank's abandonment of cross-complaint was insufficient reason for bank to claim that plaintiff had no right to jury trial; abandonment did not become evident until close of trial).

**EXAMPLE:** A general contractor brought suit joining two causes of action, one to recover a money judgment for breach of a construction contract and one to enforce a mechanic's lien on the subject property. The defendants answered, alleging affirmative defenses of nonperformance and negligent performance, and also cross-complained on those grounds. The court held that the issues relating to performance of the contract were legal and that a right to a jury trial existed on those issues. The only equitable issues triable by the court alone were those relating to the manner of perfecting the lien. See *Selby Constructors v McCarthy, supra*.

On right to jury trial when action could be brought both at law and in equity, see §8.8. See §§6.99-6.104 on motions to bifurcate and sever. When issues are severed, the court has discretion to order separate juries for separate trials. *Shade Foods, Inc. v Innovative Prods. Sales & Mktg. Inc.* (2000) 78 CA4th 847, 911, 93 CR2d 364.

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### §8.7 a. Order of proof

The order of proof at trial is within the discretion of the trial judge. Evid C §320. When a case involves both legal and equitable issues, the equitable issues are generally tried first by the court without a jury (or with an advisory jury). *Raedeke v Gibraltar Sav. & Loan Ass'n* (1974) 10 C3d 665, 671, 111 CR 693. See §8.8. If the determination by the court on the equitable issues is dispositive of the legal issues, the need for a jury trial on the legal issues is obviated. 10 C3d at 671 (in action seeking legal and equitable relief, plaintiffs waived equitable issues, when court stated its intention to proceed with equitable issues, to avoid risk of forfeiting their right to jury trial if equitable issues were tried first). See also *Nwosu v Uba* (2004) 122 CA4th 1229, 19 CR3d 416 (defendant not deprived of right to jury trial when trial of equitable issues resolved all claims). See §8.13 on advisory jury.

In addition, there is no right to a jury trial on affirmative defenses, including res judicata, that can be tried separately and first. *Windsor Square Homeowners Ass'n v Citation Homes* (1997) 54 CA4th 547, 557, 62 CR2d 818 (trial court properly bifurcated res judicata defense from plaintiff's suit for negligence and ordered that it proceed first as a court trial; court determined that facts underlying the applicability of the res judicata defense are properly tried to the court, and not to a jury, although it is a legal and not an equitable defense).

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### §8.8 b. Concurrent jurisdiction at law and in equity

The right to a jury trial is not defeated when there may be concurrent jurisdiction at law and in equity over an action. *Ripling v Superior Court* (1952) 112 CA2d 399, 452, 247 P2d 117 (right to jury trial upheld when guardian of estate of incompetent brought action against trustee to recover money immediately and unconditionally owed by trustee). Only if the issues to be tried are exclusively equitable in nature will the right to a jury trial be denied. 112 CA2d at 408. See also *Interactive Multimedia Artists, Inc. v Superior Court* (1998) 62 CA4th 1546, 1554, 73 CR2d 462.

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### 4. Jury trial right in specific types of actions

### §8.9 a. Declaratory relief

The fact that an action seeks declaratory relief will not in itself negate the right to a jury trial. *Interinsurance Exch. v Savior* (1975) 51 CA3d 691, 124 CR 239. Rather, the right to a jury trial hinges on whether the issues are legal or equitable in nature. *Interinsurance Exch. v Savior, supra* (insurer's right to jury trial upheld in declaratory relief action seeking declaration of no coverage against its putative insureds). See *State Farm Mut. Auto. Ins. Co. v Superior Court* (1956) 47 C2d 428, 432, 304 P2d 13 (declaratory action cannot be used to circumvent right to jury trial). See also *Escamilla v California Ins. Guar. Ass'n* (1983) 150 CA3d 53, 197 CR 463 (right to jury trial available in declaratory relief, but it was waived in this case).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.10 b. Probate proceedings

### §8.10 b. Probate proceedings

No right to a jury trial exists in probate proceedings in the absence of statutory provision. *Estate of Beach* (1975) 15 C3d 623, 642, 125 CR 570. This rule has been codified as Prob C §825. Probate Code sections authorizing jury trial on demand include Prob C §§1860.5 (termination of limited conservatorship) and 1863 (termination of conservatorship). See also Prob C §1000 (applicability of rules of civil procedure).

A jury trial is not available in will contests (Prob C §8252(b)) or actions to revoke the probate of a will (Prob C §8271(b)). See *Estate of Gardner* (1991) 1 CA4th 995, 2 CR2d 664.

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### §8.11 c. Eminent domain

In eminent domain cases, the right to a jury trial is limited to the amount of the defendant's damages, and all other issues must be decided by the trial judge. Cal Const art I, §19. See also *PG&E v Peterson* (1969) 270 CA2d 434, 75 CR 673.

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### §8.12 d. Inverse condemnation

There is no right to jury trial on the issue of liability in an inverse condemnation action, but a jury may be permitted on the issue of just compensation. *Marshall v Department of Water & Power* (1990) 219 CA3d 1124, 268 CR 559 (action involving fire that property owners and insurers contended was proximately caused by downed power lines; jury permitted only on issue of "just compensation"). See Cal Const art I, §19.

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### §8.12A e. Equitable Indemnity

Although a cause of action for equitable indemnity involves equitable principles, it is a legal action seeking legal relief, namely, monetary damages. Therefore, there is a right to a jury trial in such an action. See *Martin v County of Los Angeles* (1996) 51 CA4th 688, 698, 59 CR2d 303 (underlying wrongful death action; trial court severed cross-complaint and at a bench trial on cross-complaint found county 50 percent at fault; county appealed, claiming its right to jury trial had been violated; court of appeal reversed and held county had right to jury trial).

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### §8.13 5. Advisory jury in equitable actions

When a right to a jury trial does not exist because the issues of fact are equitable in nature, the court may order any such issue to be tried by an advisory jury. CCP §592; *Cutter Labs. v R. W. Ogle & Co.* (1957) 151 CA2d 410, 311 P2d 627. If that occurs, the jury's verdict is advisory only and is not binding on the court. 151 CA2d at 418; *Woolsey v Woolsey* (1932) 121 CA 576, 9 P2d 605 (special and general verdicts rejected by court). In the Advisory Committee Comment (2003) explaining why former Cal Rules of Ct 377 was repealed, the committee stated that the rule contained unduly burdensome procedures, but that:

> The repeal of this 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, the use of an advisory jury.

On specially selected juries, see §1.23.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.14 C. Making demand for jury trial; jury fee deposit

## §8.14 C. Making demand for jury trial; jury fee deposit

There are detailed procedures for how to demand a jury trial and how and when to deposit jury fees. These procedures are discussed in §§2.25-2.35. Failure to comply with these procedures may result in waiver of the right to a jury trial. See §8.15.

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## D. Waiver of jury trial

### §8.15 1. Manner of waiver

The right to a jury trial "may not be waived by implication, but only affirmatively and in the manner designated by CCP §631." *Byram v Superior Court* (1977) 74 CA3d 648, 654, 141 CR 604. The right to a jury trial is waived by:

- Failure to appear at trial (CCP §631(d)(1));
- Written consent (CCP §631(d)(2));
- Failure to announce that a jury is required at the time the cause is first set for trial, if set by stipulation, or within 5 days after notice of setting, if set without notice or stipulation (CCP §631(d)(4));
- Failure to deposit the advance jury fees 25 calendar days before the date set for trial (CCP §631(d)(5); see §§2.31-2.35);
- Oral consent in open court entered in the minutes or docket (CCP §631(d)(3)) (see *Cadle Co. v World Wide Hospitality Furniture, Inc*. (2006) 144 CA4th 504, 50 CR3d 480 (guarantor, through attorney, orally waived jury trial in open court); or
- Failure to deposit the second and subsequent days' jury or jury panel fees and mileage costs (CCP §631(a)(6)).

**NOTE:** In *Grafton Partners v Superior Court* (2005) 36 C4th 944, 32 CR3d 5, the California Supreme Court held that predispute waivers of the right to jury trial are invalid because they are not authorized by CCP §631, which applies only to pending actions. The *Grafton* court found that a waiver in a letter engaging an accounting firm was unenforceable, and that only jury waiver methods prescribed by statute are constitutional under Cal Const art I, §16. 36 C4th at 956 (disapproving *Trizec Props., Inc. v Superior Court* (1991) 229 CA3d 1616, 280 CR 885, to the extent it held "that the right to jury trial may be waived in a manner that is without statutory authorization"). In the absence of the California Legislature's enacting a change in the law, the *Grafton* rule has far-reaching implications because it applies to every type of contractual predispute jury waiver outside the arbitration context. The issue of predispute jury waiver should not be confused, however, with predispute agreement by the parties to transfer a dispute to a referee under CCP §638. See *Woodside Homes of Cal., Inc. v Superior Court* (2006) 142 CA4th 99, 103, 47 CR3d 683 (consensual judicial reference is permitted under CCP §638 and does not run afoul of *Grafton*).

**CAUTION:** Do not waive your client's right to a jury trial without first obtaining your client's informed consent. See concurring opinion in *Blanton v Womancare, Inc.* (1985) 38 C3d 396, 411, 212 CR 151.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.16 2. Relief from waiver within court's discretion

### §8.16 2. Relief from waiver within court's discretion

Although a party may have waived the right to a jury trial, the waiver is not necessarily "for all time" or "forever." See CCP §631(e). See also *Byram v Superior Court* (1977) 74 CA3d 648, 141 CR 604 (inadvertent waiver). The court may, in its discretion and on just terms, allow a trial by jury although there may have been a waiver. CCP §631(e).

To obtain relief from waiver of a jury trial, the moving party must specifically ask the court to grant such relief either by written or oral motion. *Taylor v Union Pac. R.R.* (1976) 16 C3d 893, 899, 130 CR 23 (jury trial right not reinstated; plaintiffs waived jury after trial commenced by failing to deposit fees and failing to ask court for relief from waiver); *March v Pettis* (1977) 66 CA3d 473, 480, 136 CR 3. See also §8.17. The request for relief should be made promptly because delay will be a factor considered by the court in deciding whether to grant relief. *Still v Plaza Marina Commercial Corp.* (1971) 21 CA3d 378, 387, 98 CR 414 (defense counsel waited until morning of trial to seek relief from waiver of jury trial due to failure to deposit fees when defense counsel knew 8 days before trial that fees had not been posted; court found no abuse of discretion in denying relief from waiver).

The court may consider the following factors when determining whether to exercise its discretion and grant relief from waiver:

- Whether any prejudice will be suffered by any party or the court;
- The timeliness of the request for relief from waiver;
- The likely inconvenience to witnesses;
- The risk of an angry and prejudiced jury;
- The possibility of delay in rescheduling the trial for a jury; or
- The lack of funds.

See *Gonzales v Nork* (1978) 20 C3d 500, 143 CR 240. See also *March v Pettis* (1977) 66 CA3d 473, 479, 136 CR 3.

The most crucial of these factors is whether any prejudice will be suffered by any party or the court. *Wharton v Superior Court* (1991) 231 CA3d 100, 282 CR 349. A trial court abuses its discretion as a matter of law when relief from an inadvertent waiver has been denied and there has been no prejudice to the other party as a result of the waiver. *Winston v Superior Court* (1987) 196 CA3d 600, 242 CR 113.

**EXAMPLE 1:** The trial court abused its discretion by denying relief from waiver when counsel inadvertently failed to post jury fees in a timely manner and there was no showing of prejudice to the court or opposing counsel. *Johnson-Stovall v Superior Court* (1993) 17 CA4th 808, 21 CR2d 494 (constitutional guaranties to a jury trial take precedence over housekeeping rules); *Massie v AAR W. Skyways, Inc.* (1992) 4 CA4th 405, 5 CR2d 654; *Wharton v Superior Court, supra*; *Simmons v Prudential Ins. Co.* (1981) 123 CA3d 833, 838, 177 CR 37.

**EXAMPLE 2:** The court abused its discretion by denying relief from default after counsel failed to submit jury instructions in a timely manner and there is no prejudice to the other party. *Cooks v Superior Court* (1990) 224 CA3d 723, 274 CR 113.

Going forward with the jury trial, after waiver, does not by itself amount to prejudice to the opposing party; the opposing party must have suffered prejudice to justify denying relief from waiver. See *Gann v Williams Bros. Realty* (1991) 231 CA3d 1698, 283 CR 128 (relief from waiver was properly denied when plaintiff, who failed to timely post jury fees, did not seek relief until 5 days before trial; opposing party was prejudiced because he had not prepared jury instructions); *Johnson-Stovall v Superior Court* (1993) 17 CA4th 808, 21 CR2d 494 (court of appeal reversed trial court's denial of relief from waiver (also for failure to post fees), holding that defendant had not suffered prejudice; there was sufficient time for preparation of jury instructions, motions in limine, and exhibits; trial date had been continued). Absent prejudice in the waiver context, the constitutional right to a jury trial is paramount. See *Estate of Meeker* (1993) 13 CA4th 1099, 1106, 16 CR2d 825 (court strongly reminded trial courts that adherence to goals of Trial Court Delay Reduction Act of 1990 (Govt C §§68600-68620) cannot justify denial of litigant's constitutional rights).

A court's doubt about whether relief from waiver should be granted will generally be resolved in favor of permitting a

litigant the right to a trial by jury. *Day v Rosenthal* (1985) 170 CA3d 1125, 1177, 217 CR 89. Relief will be denied, however, if (a) the only reason for the demand appears to be the party's change of mind or (b) the demand for a jury is being used as a "pretext to obtain continuances and thus trifle with justice." *March v Pettis* (1977) 66 CA3d 473, 480, 136 CR 3.

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### §8.17 3. Effect of waiver after reversal of judgment

When a judgment is reversed for a trial de novo, the party who has waived the right to a jury in the first trial is not bound by the waiver and may demand a jury for the retrial because the case stands as if it had never gone to trial. See *Frankel v Four Star Int'l* (1980) 104 CA3d 897, 904, 163 CR 902. However, if the cause is remanded on appeal for further proceedings with instructions that evidence already introduced in the first trial be considered by the trial judge in the second trial, a party's original waiver of the right to a jury is binding. *Spaulding v Cameron* (1954) 127 CA2d 698, 702, 274 P2d 177. See *Fidelity & Deposit Co. v Whitson* (1962) 205 CA2d 713, 23 CR 491 (after waiver of jury in original action, no right to demand jury trial for trial of supplemental issue concerning amount of attorney fees to be awarded for services on appeal).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.18 E. Denial of right to jury trial reviewable by writ or appeal

### §8.18 E. Denial of right to jury trial reviewable by writ or appeal

Denial of the right to a jury trial to a party constitutionally entitled to it constitutes reversible error. *People v One 1941 Chevrolet Coupe* (1951) 37 C2d 283, 231 P2d 832 (denial of jury trial required reversal in forfeiture proceedings); *Selby Constructors v McCarthy* (1979) 91 CA3d 517, 527, 154 CR 164 (denial of right reversible error per se); *Olivia N. v National Broad. Co.* (1977) 74 CA3d 383, 141 CR 511. But see *Pacific W. Oil Co. v Bern Oil Co.* (1939) 13 C2d 60, 87 P2d 1045 (denial of right to jury trial held nonprejudicial error). Denial of this right is also an act in excess of jurisdiction, restrainable by prohibition. *Olivia N. v National Broad. Co., supra*; *Paularena v Superior Court* (1965) 231 CA2d 906, 911, 42 CR 366.

An order denying a party's demand for a jury trial is reviewable in two ways:

- On appeal from the judgment. See *C & K Eng'g Contractors v Amber Steel Co.* (1978) 23 C3d 1, 151 CR 323.
- Before judgment by extraordinary writ (prohibition or mandamus).

See *Selby Constructors v McCarthy* (1979) 91 CA3d 517, 154 CR 164 (prejudgment review preferred because it saves time that would be wasted if jury trial was erroneously granted). See also *Southern Pac. Transp. Co. v Superior Court* (1976) 58 CA3d 433, 129 CR 912 (prohibition proper to determine whether trial court's ruling permitting jury trial was erroneous).

A party must object to the court's ruling either denying or granting a jury trial at the time of the court's ruling or must make a timely attack thereafter by motion. CCP §647; *De Castro v Rowe* (1963) 223 CA2d 547, 36 CR 53 (court's order denying jury trial was deemed excepted to and reviewable on appeal because plaintiffs made proper objection). See also *Medeiros v Medeiros* (1960) 177 CA2d 69, 1 CR 696 (court's order denying jury trial to plaintiff was deemed excepted to because plaintiffs demonstrated that they wanted jury trial (*e.g.,* deposited fees and filed motion to determine legal and equitable issues raised by pleadings). See also 9 Witkin, California Procedure, *Appeal* §454 (5th ed 2008).

When no objection is raised, however, or the party claiming error has not otherwise made that party's position on the issue of the right to a jury trial fully known to the court, appellate review of a ruling either granting or denying a jury trial will be denied. See *Taylor v Union Pac. R.R.* (1976) 16 C3d 893, 900, 130 CR 23. See also *Pink v Slater* (1955) 131 CA2d 816, 281 P2d 272.

**PRACTICE TIP:** If the court makes a ruling either granting or denying a request for a jury trial before trial, consider renewing the request for a jury trial before the trial judge to avoid any possibility of being deemed to have acquiesced in the court's action—thus barring appellate review of the claimed error. See *Glogau v Hagan* (1951) 107 CA2d 313, 316, 237 P2d 329. See also *Tyler v Norton* (1973) 34 CA3d 717, 110 CR 307.

A party's right to a jury trial is not waived by proceeding with a bench trial as long as the party has properly objected to the court's erroneous denial of a jury trial. *Cohill v Nationwide Auto Serv*. (1993) 16 CA4th 696, 19 CR2d 924.

See California Civil Writ Practice §§15.26, 16.148 (4th ed Cal CEB 2008); California Civil Appellate Practice §5.32 (3d ed Cal CEB 1996).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/ III. SELECTING PROSPECTIVE JURORS/§8.19 A. Jury service is obligation for all persons; statutory authority

## III. SELECTING PROSPECTIVE JURORS

### §8.19 A. Jury service is obligation for all persons; statutory authority

Trial by jury is "a cherished constitutional right." CCP §191. All qualified persons must have an equal opportunity to be considered for jury service and have an obligation to serve as jurors when summoned. The jury commissioner has the responsibility to manage all jury systems in an efficient, equitable, and cost-effective manner. CCP §191. The rules governing jury selection and jury management are set forth in the Trial Jury Selection and Management Act (CCP §§190-237).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.20 B. Random selection required

## §8.20 B. Random selection required

Everyone selected for jury service must be "selected at random from the population of the area served by the court." CCP §191. See definition of "random" in CCP §194(*l*). The jury commissioner can use a mechanical, electric, or electronic device to make this random selection of jurors. CCP §202. Once the initial random selection of prospective jurors has been made, these jurors are referred to as the "juror pool." CCP §194(e). From this pool, a "trial jury panel" is selected at random by the clerk (or the judge if there is no clerk) and assigned to a particular courtroom. CCP §194(q).

If the jury commissioner provides the court with a trial jury panel list in random order, the court is required to seat the prospective jurors in the same order as is listed. CCP §222. See *People v Bell* (1989) 49 C3d 502, 262 CR 1 (when neutral selection procedures are used to create jury pools, the fact that a particular group may be underrepresented is not a violation of the representative cross-section requirement). See §8.21. Failure of the court or clerk to randomly draw names from the panel to be seated in the jury box may constitute harmless error if no prejudice is shown. The party challenging the jury selection method must show that the method actually prejudiced the ability to select a jury from a representative cross-section. See *People v Mayfield* (1997) 14 C4th 668, 728, 60 CR2d 1 (exclusion of prospective jurors whose last names began with letter in second half of alphabet did not constitute prejudice); *People v Wright* (1990) 52 C3d 367, 276 CR 731 (court failed to use random selection process, but no reversible error resulted because there was no prejudice). See also *People v Visciotti* (1992) 2 C4th 1, 5 CR2d 495 (party may not claim error if procedure utilized did not depart materially from statutory procedures).

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### §8.21 C. Jury pool must be composed of representative cross-section of community

The right to a jury trial drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the United States Constitution and by Cal Const art I, §16. *Williams v Superior Court* (1989) 49 C3d 736, 740, 263 CR 503. This demographic requirement guarantees that a jury will be drawn from a pool that does not systematically or intentionally exclude members of a racial, religious, ethnic, geographic, or other identifiable group. *Holley v J & S Sweeping Co.* (1983) 143 CA3d 588, 192 CR 74. See §8.67 on challenging unrepresentative jury.

The juror pool need not mirror the community's racial, ethnic, or religious makeup because a jury that is selected at random and in compliance with the representative cross-section requirement is assumed to be capable of representing the entire community. *Williams v Superior Court, supra*. See *U.S. v Jackman* (2d Cir 1995) 46 F3d 1240 (use of computer list that omitted two communities in district having highest minority populations violated Sixth Amendment).

To challenge a jury for failure to satisfy the representative cross-section requirement, you must show that:

- The group excluded was a distinctive group in the community (see §§8.67-8.68);
- The group was not fairly represented in the jury pool as compared with the number of such persons in the community; and
- The underrepresentation was due to systematic exclusion.

*Williams v Superior Court* (1989) 49 C3d 736, 741, 263 CR 503, citing *Duren v Missouri* (1979) 439 US 357, 364, 58 L Ed 2d 579, 99 S Ct 664. But see *U.S. v Ortiz* (ED Penn 1995) 897 F Supp 199 (no systematic exclusion found when underrepresentation was attributable to factors outside court's control, such as failure of certain groups to register to vote or to return jury questionnaires).

In determining whether the cross-section requirement has been satisfied, the court will examine whether the jury panel was drawn solely from within the bounds of the particular judicial district where the case was being tried and not from the entire county. *Williams v Superior Court, supra*. This is of concern in larger counties that divide their superior courts into two or more judicial districts. *Williams v Superior Court, supra*.

**NOTE:** The exclusion of ex-felons and resident aliens from juries violates neither the cross-section rule (*i.e.,* the right to a jury drawn from a representative cross-section of the community) nor the equal protection clause of the state and federal constitutions. *Rubio v Superior Court* (1979) 24 C3d 93, 154 CR 734.

See California Criminal Law Procedure and Practice, chap 29 (Cal CEB Annual). See also Druff, *The Cross-Section Requirement and Jury Impartiality*, 73 Cal L Rev 1555 (1985).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.22 D. Juror qualifications

## §8.22 D. Juror qualifications

All persons are eligible and qualified to be prospective trial jurors, except the following persons:

- **Aliens.** Persons who are not citizens of the United States. CCP §203(a)(1).
- **Minors.** Persons under age 18. CCP §203(a)(2).
- **Nonresidents.** Persons who are not domiciled in California or who are not residents of the jurisdiction where they were summoned to serve. CCP §203(a)(3)-(4).
- **Convicts.** Persons convicted of malfeasance in office or a felony or whose civil rights have not been restored. CCP §203(a)(5).
- **Persons lacking English skills.** Persons with insufficient knowledge of the English language. CCP §203(a)(6); *People v Jones* (1972) 25 CA3d 776, 102 CR 277.
- **Current jurors.** Persons who are currently serving as grand or trial jurors in another California court. CCP §203(a)(7).
- **Conservatees.** Persons who are the subject of a conservatorship. CCP §203(a)(8).

A person who is not competent to serve as a juror can be challenged for cause. CCP §§228-229. See §§8.54-8.63 on challenges for cause.

A person cannot be automatically excluded from eligibility for jury service solely because of (CCP §203(a)(6)):

- Loss of sight;
- Loss of hearing;
- A disability that impedes a person's ability to communicate; or
- A disability that impairs or interferes with the person's mobility.

A person with one of these disabilities may be challenged, however, for cause in certain cases in which a juror's senses are needed to determine the case. CCP §228(b). See also §8.58.

A party who does not remove by challenge a juror who has impaired hearing, sight, or power of speech must stipulate to the presence of a sign language interpreter, reader, or speech interpreter, if one is necessary, and prepare proposed jury instructions to that person providing the aid. A person providing these services is not permitted to participate in the deliberations except to facilitate the communication between the juror with a disability and the other jurors. CCP §224. See §21.4.

**NOTE:** Names of qualified jurors drawn from the qualified juror list for the superior court shall be made available in a civil case to the public upon request unless the court determines otherwise. CCP §237(a)(1). However, in a criminal case, personal juror identifying information shall be sealed on the recording of the jury's verdict. CCP §237(a)(2).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.23 E. Exemption from jury service

### §8.23 E. Exemption from jury service

No category of persons is exempt from jury service by virtue of their occupation. CCP §204. For example, attorneys are not exempt from jury service simply because they are attorneys. Under CCP §219(b)(1), however, peace officers (as defined in Pen C §§830.1 and 830.2(a)) may not be selected for voir dire in either civil or criminal cases. Also, under CCP §219(b)(2), peace officers (as defined in Pen C §830.2(a)) may not be selected as jurors in criminal matters. Because CCP §§204 and 219 are contradictory, it is unclear whether the legislature intended peace officers to serve as jurors.

**PRACTICE TIP:** If you are faced with the possibility of having a peace officer on a civil jury, point out to the judge the conflict between these two statutes to avoid a possible mistrial or appeal.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/ F. Excuses from jury service/§8.24 1. 'Undue hardship' defined

## F. Excuses from jury service

### §8.24 1. "Undue hardship" defined

An eligible person may be excused from jury service only for undue hardship on themselves or the public, as defined by the Judicial Council. CCP §204(b). "Undue hardship" is defined by the Judicial Council as:

- **No transportation.** Cal Rules of Ct 2.1008(d)(1).
- **Excessive distance to court.** An excessive distance is one where reasonable travel time from the juror's home to court exceeds one-and-one-half hours one-way. Cal Rules of Ct 2.1008(d)(2).
- **Extreme financial burden.** The court will consider the sources of household income, the availability and extent of income reimbursement, the expected length of jury service, and whether jury service might compromise the person's ability to support his or her family or might disrupt the economic stability of the individual. Cal Rules of Ct 2.1008(d)(3).
- **Undue risk of material injury to property.** The court will consider the nature of the property, as well as the source, duration, and seriousness of the risk, and whether other arrangements can be made. Cal Rules of Ct 2.1008(d)(4).
- **Risk of mental or physical harm.** A juror may be required to provide verification of a mental or physical disability or impairment, its duration, and the reasons for the inability to serve. Cal Rules of Ct 2.1008(d)(5).
- **Juror's services needed.** The prospective juror's services are immediately needed for the protection of public health and safety, and no arrangements can be made to release him or her. Cal Rules of Ct 2.1008(d)(6).
- **Care of others.** The prospective juror is needed to care for a family or nonfamily member, and no comparable substitute care is available without financial burden. Cal Rules of Ct 2.1008(d)(7).
- **Prior jury service.** The prospective juror served on a jury or was summoned and appeared for jury service during the previous 12 months in any federal or state court. The jury commissioner has discretion to establish a period longer than 12 months. Cal Rules of Ct 2.1008(e).

See §§21.16-21.19 for further discussion of excuses from jury service.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.25 2. Jury commissioner hears and rules on excuses

## §8.25 2. Jury commissioner hears and rules on excuses

The jury commissioner hears and rules on all juror's excuses for not serving. CCP §218. The excuse must be in writing and can be ruled on without a personal appearance by the prospective juror. CCP §218.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/ IV. ISSUING JURY SUMMONS/§8.26 A. Service and content of summons

## IV. ISSUING JURY SUMMONS

### §8.26 A. Service and content of summons

A jury summons is served on all persons who are on the randomly selected list of qualified jurors. It either tells the prospective juror the date, time, and place of appearance or provides instructions for how to call the jury commissioner for instructions by telephone.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.27 B. Issuance of immediate summons in emergency situations

### §8.27 B. Issuance of immediate summons in emergency situations

In emergency situations, a jury panel can be completed by immediate summons. CCP §211. An emergency situation is defined as one in which the court has no prospective jurors remaining available for voir dire and the jury commissioner believes that not proceeding with voir dire will put a party's right to trial by jury in jeopardy. In this situation, the court can direct a sheriff, marshal, or constable to summon, serve, and immediately attach a sufficient number of citizens, having the qualifications of jurors, to complete the panel. CCP §211.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.28 C. Failure to respond to summons

## §8.28 C. Failure to respond to summons

If a person fails to respond to the jury summons, the person may be compelled to attend by being arrested. The prospective juror could also be fined, imprisoned, or both after an order to show cause hearing. CCP §209.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.29 D. Fees for jury service

### §8.29 D. Fees for jury service

After a person is selected as a juror, the juror receives a fee for each day's attendance at trial. CCP §215. Jurors must also be reimbursed for mileage for each mile actually traveled in attending court. CCP §215. On procedures for depositing jury fees and current statutory amounts, see §§2.31-2.35.

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## V. VOIR DIRE EXAMINATION

### §8.30 A. Pre-voir dire conference

Before the jury panel is called into the courtroom, a conference should be held so that the trial judge and counsel can confer about the scope of voir dire questions, which questions the judge will ask, and how the judge would like voir dire to proceed. This conference is generally held in the judge's chambers. The judge will also generally ask each side for a list of witnesses and sometimes a short statement of what the case is about so that the judge can tell the jury. The judge may also have the attorneys prepare mini-opening statements to describe to the panel the basic facts of the case and the dispute. On mini-opening statements, see next section and §1.18A.

During the pre-voir dire conference, ask the judge about (1) the method of jury selection that the judge uses, (2) the use of questionnaires, (3) how challenges should be exercised (*e.g.,* does the judge prefer that the challenges be exercised when the cause becomes apparent or when counsel has finished questioning the juror), and (4) any other things counsel would like to know. Also remind the judge that any motions in limine that affect questions that may be asked at voir dire should be ruled on before voir dire. Some judges will postpone ruling on in limine motions pending presentation of evidence at trial. At a minimum, however, most judges will prevent opposing counsel from referring during voir dire to the sensitive issues addressed in these motions during voir dire. On motions in limine, see chap 7.

**PRACTICE TIP:** Check local rules for a list of subjects that will be discussed at the chambers conference. Rules relating to voir dire and other jury matters are often included. See Los Angeles Ct R 8.20.

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## §8.31 B. Seating prospective jurors; mini-opening statements

After the prospective jurors are randomly selected, they become part of the "trial jury panel." CCP §194(q). These prospective jurors are generally seated after the pre-voir dire conference in which issues relating to jury voir dire (*e.g.,* number of jurors, how voir dire will be conducted, when to select alternates) are discussed. See §8.30.

The prospective jurors then undergo voir dire examination, which begins with the judge's asking the trial jury panel to stand, listen to his or her admonishment about answering the questions truthfully, and respond "I do" to the admonition. The admonishment is set forth in CCP §232(a).

**NOTE:** Before voir dire examination of the prospective jurors begins, the judge may permit or require counsel to make brief opening statements. See Cal Rules of Ct 2.1034. These mini-opening statements are becoming more common because some courts and counsel believe that a 2- or 3-minute oral presentation is a better way to educate prospective jurors about the case than a short sanitized statement the court might read to the panel. Mini-opening statements are also considered an effective method to place voir dire questions in context for jurors and thus elicit better responses from jurors during voir dire examinations. See Comment to Cal Rules of Ct 2.1034. For further discussion, see §1.18A.

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## C. Methods of jury selection

### §8.32 1. Traditional method

After the prospective jurors respond to the admonition (see §8.31), the clerk (or judge, if there is no clerk) calls the names of 12 randomly selected prospective jurors from the trial jury panel in the courtroom. Each person takes a seat in the jury box as the clerk calls his or her name and sits in seats designated 1 through 12, starting with seat number 1. The judge questions all 12 prospective jurors. Then plaintiff's counsel begins questioning, followed by defense counsel. The order of questioning may vary, depending on the judge and local rules. See §8.36. This is the traditional method of jury selection; however, some courts follow the "six-pack" method. See §8.33.

**PRACTICE TIP:** Fill in the names of prospective jurors on your jury box form as the jurors' names are called. See §§8.47 (discussion of use of jury box chart), 8.83 (sample jury box chart).

When one of the prospective jurors seated in seats 1 through 12 is excused for cause or by peremptory challenge, that juror is replaced from the remaining jurors in the trial jury panel who have been assigned to the courtroom. As each new prospective juror is seated, voir dire examination of that juror is conducted. If there are any challenges to the trial jury panel as a whole for cause, they should be made before the jury is sworn. See §8.56.

**NOTE:** If a case will take a long time to try, the courts in some counties preliminarily screen prospective jurors before assigning a trial jury panel.

**JUDICIAL PERSPECTIVE:** Although a preliminary screening has benefits, it may reduce the number of jurors who might otherwise be available. Use of mini-opening statements to inform jurors of the dispute's true context and nature reduces the number of hardship requests. Jurors become interested and engaged in the "story" and often find ways to stay on the jury despite prior hardship claims.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.33 2. 'Six-pack' method

### §8.33 2. "Six-pack" method

Some courts use the "six pack" selection method. Under this method, 18 or 24 jurors are seated initially and numbered 1 through 18 or 1 through 24. Under this method, all prospective jurors in the jury panel are randomly given a number. Unlike the traditional method, this is the order in which they will be called into the jury box. Voir dire is conducted on all 18 or 24 jurors. The "jury" consists of numbers 1 through 12. However, once challenges are addressed to any of the jurors numbered 1 through 12, jurors 13 through 18 or 24 may be moved in the order of their numbers into one of the 1 through 12 jury box seats that have been vacated. See Alarcon, *Judicial Opinion: The Thirty Pack,* 22 Cal Litig 3, 45 (State Bar Litigation Section 2009).

Many judges prefer this system. Some counsel also prefer this system because it allows counsel to be certain who the replacement juror will be. This system also allows counsel to exercise peremptory challenges more intelligently.

**EXAMPLE:** Eighteen randomly selected jurors are called by the clerk to sit in the jury box for voir dire. Juror no. 6 is challenged for cause and excused. Juror no. 13 is moved into juror no. 6's seat, and voir dire is conducted on juror no. 13.

The judge has discretion to decide the method that will be used and how seats will be filled if vacated. Ask the trial judge which method will be used and how the "six pack" selection method is managed if it is used.

**CAUTION:** Once voir dire of the 18 or 24 prospective jurors has been completed and challenges for cause have been exercised, be ready to exercise your peremptory challenges quickly because under the "six pack" method there will be very little time between challenges.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.34 D. Purpose and importance of examination

## §8.34 D. Purpose and importance of examination

The primary purpose of the voir dire examination is the "selection" of a fair and impartial jury. *Kelly v Trans Globe Travel Bureau, Inc.* (1976) 60 CA3d 195, 203, 131 CR 488. Selection, however, is not actually the proper word, because counsel has no ability to select favorable jurors—only the ability to strike unfavorable jurors. The only "selection" that goes on is the process of elimination.

The voir dire examination consists of asking the prospective jurors questions:

- To ascertain whether grounds exist for the exercise of a challenge for cause (see §§8.54-8.63). *Kelly v Trans Globe Travel Bureau, Inc., supra*; *Rousseau v West Coast House Movers* (1967) 256 CA2d 878, 64 CR 655, limited on other grounds in *People v Williams* (1981) 29 C3d 392, 174 CR 317.
- To assist counsel in the intelligent exercise of peremptory challenges (see §§8.64-8.72). *People v Williams, supra*.

For discussion of the scope of voir dire, see §§8.39-8.40.

Voir dire examination provides counsel and the court with an opportunity to ascertain possible bias or prejudice in prospective jurors concerning the circumstances of the case. Data and impressions derived from the examination are needed by counsel to intelligently exercise challenges for cause or peremptory challenges. This examination also provides counsel with an opportunity to establish rapport with the jurors. Project an image of fairness and trustworthiness during voir dire because impressions formed during voir dire can be lasting. On techniques to establish rapport with the jurors, see §8.46.

**JUDICIAL PERSPECTIVE:** Jurors are often uncomfortable during voir dire, because they fear being examined on personal matters in a public setting and losing their privacy. Counsel should be sensitive to these concerns in approaching voir dire.

**NOTE:** The Judicial Council of California has approved Standards of Judicial Administration concerning jury selection that can be found in the Appendix to the California Rules of Court. See Cal Rules of Ct, Standards of J Admin 2.25, which provides that, when practical, the trial judge should schedule court business to allow for jury selection uninterrupted by other court business.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.35 E. Questioning by judge and counsel

## §8.35 E. Questioning by judge and counsel

The voir dire examination of prospective jurors may be oral, by written questionnaire, or by both methods and should include all questions necessary to ensure the selection of a fair and impartial jury. Cal Rules of Ct, Standards of J Admin 3.25(a)(1). Voir dire generally takes place in the courtroom with other prospective jurors present. However, voir dire examination can also take place in chambers, if so ordered by the judge. See *People v Rutkowsky* (1975) 53 CA3d 1069, 126 CR 104.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.36 1. Order of questioning

## §8.36 1. Order of questioning

Prospective jurors are generally examined by both the trial judge and counsel. The order of voir dire examination generally proceeds as follows:

- The trial judge examines prospective jurors. CCP §222.5; Cal Rules of Ct 3.1540(b). See §8.37.
- Plaintiff's counsel examines all prospective jurors who have been seated (whether 12, 18, or 24) before similar examination is conducted by other counsel. See §8.38. On the "six pack" selection system, see §8.33.
- The prospective jurors are examined by defense counsel and other counsel. Cal Rules of Ct 3.1540(c).

**NOTE:** The order in which prospective jurors will be examined and other rules for conducting the examination should be worked out with the trial judge before the examination, preferably during the pre-voir dire chambers conference before commencement of the trial (see §8.30).

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### §8.37 2. Examination by trial judge

Judges are authorized by statute to perform the initial juror examination. CCP §222.5. Judges may follow the list of specific questions and areas of inquiry set forth in Cal Rules of Ct, Standards of J Admin 3.25(c)-(d). Cal Rules of Ct, Standards of J Admin 3.25(b). If you want the judge to ask questions that are not substantially similar to those in Cal Rules of Ct, Standards of J Admin 3.25(c) or 3.25(d), submit a list of such questions to the judge at the case management conference before trial. CCP §222.5; Cal Rules of Ct 3.1540(b). At the same time, give copies of the questions to all adverse parties. See, *e.g.,* Los Angeles Ct R 8.20(h).

A judge can excuse a prospective juror sua sponte (on the judge's own motion) and replace the juror. *People v Jimenez* (1992) 11 CA4th 1611, 15 CR2d 268, disapproved on other grounds in *People v Kobrin* (1995) 11 C4th 416, 419, 45 CR2d 895. The judge will generally only excuse a juror sua sponte if good cause appears obvious (*e.g.,* hardship, illness). Typically, the judge will wait for a party to ask that the juror be removed for cause or, if counsel does not say anything, the judge will ask whether there is any objection to excusing the juror and request a stipulation that the juror be excused. To avoid offending the judge and the other potential jurors, do not object to such a stipulation except in rare situations.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.38 3. Examination by counsel

## §8.38 3. Examination by counsel

Wide latitude is given to counsel in asking questions of prospective jurors in a civil case. CCP §222.5. In civil cases, counsel has the right to examine prospective jurors to be able to intelligently exercise both peremptory challenges and challenges for cause. CCP §222.5. See §§8.39-8.40 on permissible scope of voir dire. Section 222.5 also allows for:

- Liberal and probing examination by counsel that is calculated to discover bias or prejudice with regard to the circumstances of a particular case.
- Additional questioning on a topic, even though the topic was included in the judge's examination, as long as the questions are not repetitive or duplicative. See CCP §222.5; Cal Rules of Ct 3.1540(c).

**NOTE:** Questions by counsel need not be submitted to the trial judge before questioning, unless counsel engages in "improper questioning." See CCP §222.5. See also §8.40.

- The use of written questionnaires, which the court is encouraged not to arbitrarily or unreasonably refuse.
- Examination of prospective jurors outside the judge's presence if all counsel stipulate to this step and the court permits it. CCP §222.5; Cal Rules of Ct 3.1540(d).

**NOTE:** When setting limits on the judge's powers, CCP §222.5 uses the word "should" rather than "shall."

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### 4. Scope of voir dire questions

### §8.39 a. Permissible questions

Counsel has the right to examine prospective jurors to ascertain whether grounds exist either for the exercise of a challenge for cause or for peremptory challenges. CCP §222.5.

The constitution guarantees the right to unbiased and unprejudiced jurors. *Lombardi v California St. Ry.* (1899) 124 C 311, 317, 57 P 66. Therefore, counsel can ask questions that may be required to ascertain whether the prospective jurors are free from bias or interest that may affect the verdict. *Rousseau v West Coast House Movers* (1967) 256 CA2d 878, 884, 64 CR 655, limited on other grounds in *People v Williams* (1981) 29 C3d 392, 174 CR 317. See also *Kelly v Trans Globe Travel Bureau, Inc.* (1976) 60 CA3d 195, 131 CR 488 (improper examination by judge). On grounds for the exercise of a challenge for cause, see CCP §229. See also §§8.58-8.60.

Reasonable inquiry of a prospective juror to assist counsel in the intelligent exercise of a peremptory challenge is also proper "whether or not such questions are also likely to uncover grounds sufficient to sustain a challenge for cause." *People v Williams* (1981) 29 C3d 392, 407, 174 CR 317. The trial court, however, has discretion to contain the questioning within reasonable limits. *People v Williams, supra*. To guide the trial courts, the court in *People v Williams* (1981) 29 C3d 392, 408, 174 CR 317 (citing in part from *U.S. v Robinson* (DC Cir 1973) 475 F2d 376), stated that counsel should be allowed to ask questions relating to strong feelings held by the community at large even if these feelings do not create a presumptive bias but could affect deliberations. See also Cal Rules of Ct, Standards of J Admin 3.25(a) (trial judge should permit liberal and probing examination).

**JUDICIAL PERSPECTIVE:** Because many judges routinely set time limits for attorney voir dire, counsel should request the court to ask the jurors a number of submitted questions. Counsel should provide these questions to the court well before selection commences.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.40 b. Improper questioning

### §8.40 b. Improper questioning

There are limitations on the scope of voir dire examination. Certain questions or areas of inquiry are improper. *People v Williams* (1981) 29 C3d 392, 408, 174 CR 317, citing *Rousseau v West Coast House Movers* (1967) 256 CA2d 878, 882, 64 CR 655.

The trial judge generally permits counsel to conduct voir dire examination without requiring prior submission of the questions. CCP §222.5; Cal Rules of Ct, Standards of J Admin 3.25(a)(2). If a particular attorney has engaged in "improper questioning," however, the court will not allow questions without review by the judge. An improper question is any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or applicable law. CCP §222.5.

Certain types of questions and areas of inquiry are improper and should not be permitted by the court except in unusual circumstances. Cal Rules of Ct App Div I, §8(f). These include questions that:

- Precondition the prospective jurors to a particular result;
- Comment on the personal lives and families of the parties or their attorneys;
- Concern the pleadings, the applicable law, the meaning of particular words and phrases; or
- Focus on the comfort of the jurors.

Voir dire questions also may be excluded if they appear to be intended solely to accomplish one of the following improper purposes:

- To educate the jury panel to particular facts of the case;
- To compel jurors to commit themselves to vote in a particular way;
- To prejudice the jury for or against a particular party; or
- To argue the case.

See *People v Williams, supra,* citing *Rousseau v West Coast House Movers, supra*. Such questions may be asked, however, if unusual circumstances arise that lead the trial judge to believe that these questions are necessary to ensure the selection of a fair and impartial jury. Cal Rules of Ct, Standards of J Admin 3.25(f).

A prospective juror is not required to answer voir dire questions that infringe on the right to equal protection. *Bobb v Municipal Court* (1983) 143 CA3d 860, 192 CR 270 (court reversed contempt ruling based on prospective juror's refusal to answer questions put only to female prospective jurors regarding their spouses' occupations).

The court can require that counsel phrase the questions in a neutral, nonargumentative form. A question that is fairly phrased and legitimately directed at obtaining knowledge for the intelligent exercise of peremptory challenges may not be excluded merely because it may indoctrinate or educate the jury. *People v Williams, supra,* citing *Rousseau v West Coast House Movers, supra*.

**JUDICIAL PERSPECTIVE:** If counsel thinks that certain questions are important, but there is danger of an objection either by opposing counsel or the court, the prudent course is to explore the issue with the court at the final status conference or final pretrial conference.

**NOTE:** If a question is reasonable and falls within the permissible scope of voir dire examination, it is error for the trial court to prohibit counsel from asking that question. *People v Williams, supra*; *People v Crowe* (1973) 8 C3d 815, 824, 106 CR 369.

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### 5. Objecting to improper examination

### §8.41 a. Objection to examination by judge

Counsel must object in a timely fashion to any improper voir dire examination by the court. Failure to make a timely objection will preclude subsequent attack on appeal on this issue. *Rousseau v West Coast House Movers* (1967) 256 CA2d 878, 64 CR 655.

**EXAMPLE 1:** The judge improperly attempted to indoctrinate the jury and precondition its determination of facts. See *Kelly v Trans Globe Travel Bureau, Inc.* (1976) 60 CA3d 195, 131 CR 488.

**EXAMPLE 2:** The judge improperly selected the jury foreperson. See *Dorshkind v Harry N. Koff Agency, Inc.* (1976) 64 CA3d 302, 134 CR 344 (trial jury must select its own foreperson).

Reversible error will only be found, however, if there is a showing of prejudice. See, *e.g., People v Hernandez* (1979) 94 CA3d 715, 156 CR 572 (judge erred in not allowing counsel sufficient time for voir dire; however, error was not prejudicial).

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### §8.42 b. Objection to examination by counsel

If counsel asks an improper question during voir dire examination, opposing counsel must satisfy the following two requirements to preserve the right to argue error on appeal.

First, opposing counsel must make a timely and proper objection to the question. See *Neumann v Bishop* (1976) 59 CA3d 451, 468 n3, 130 CR 786; *Hart v Wielt* (1970) 4 CA3d 224, 84 CR 220. See also *Leibman v Curtis* (1955) 138 CA2d 222, 291 P2d 542 (counsel who makes position clear in timely manner reserves automatic exception and need not repeat objection to court's ruling or seek to have it reversed). On making trial objections and protecting the record, see chap 15.

**JUDICIAL PERSPECTIVE:** Trial counsel should remember that when an objection is made during pretrial proceedings, the record on appeal is not protected, unless the same objection is made at trial. Repeated objections and disruption of the trial can be avoided if counsel simply stipulate that objections made and ruled on before trial are deemed made at trial.

**EXAMPLE 1:** "Objection, Your Honor. This area was addressed in our in limine motion."

**EXAMPLE 2:** "Objection, Your Honor. Counsel is making his opening statement and attempting to precondition the jury to his theory of the case."

Second, counsel must request that a curative admonition be given to the jury. *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 320, 74 CR 534.

**EXAMPLE:** "I also ask that the court instruct the jury to disregard the question and any inferences that may be drawn from the question and that counsel be admonished not to continue with this line of questioning."

If you need to object, do not argue the objection in front of the jury. Ask the court whether you can approach the bench. Also request that a court reporter record the sidebar conference regarding the objection.

**EXAMPLE:** "Objection, Your Honor. Plaintiff's counsel's question … constitutes improper voir dire."

**JUDICIAL PERSPECTIVE:** Trial counsel should anticipate all areas in which objections may be necessary and resolve them before trial, either through formal motions in limine or by raising them with the court. Experienced attorneys rarely object in front of jurors. If the objection is sustained, it may appear to jurors that the attorney is trying to keep information from them; if it is overruled, the attorney is a "loser." In either case, it is a distraction for the jurors. Further, when objections are raised before trial, the court has more time to carefully consider and weigh the issues, a luxury that is often not available in the heat of trial.

Object to any type of question that attempts to inject improper considerations into the case (*e.g.,* settlement negotiations, hatred of lawyers, possibility of insurance coverage, racial bias, biblical quotations). Even if voir dire examination has been erroneously limited or permitted over objection, the appellate court will not find reversible error without a showing of prejudice. See, *e.g., People v Hernandez* (1979) 94 CA3d 715, 156 CR 572.

In appropriate circumstances, counsel may also wish to move for a mistrial. The need for a mistrial occurs only rarely, however, and only when the questions are particularly outrageous and the prejudice cannot be cured by an admonition. See *Sabella v Southern Pac. Co., supra*; *Neumann v Bishop, supra*. For further discussion of objections to jury voir dire and assigning misconduct, see California Trial Objections, chaps 6, 29 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/ F. Juror questionnaires/ §8.43 1. Deciding whether to use juror questionnaire

## F. Juror questionnaires

### §8.43 1. Deciding whether to use juror questionnaire

Juror questionnaires are most often used in long, complex cases or those with unusually sensitive issues, in which screening is best done outside the presence of other potential jurors. Some trial judges may be reluctant to approve the use of a questionnaire unless counsel demonstrates a specific need for efficiency. Juror questionnaires are prepared by counsel and approved by the court for use during voir dire. The questionnaire offers the following benefits:

- Shortens voir dire.
- Protects juror privacy (although not confidentiality) for responding to embarrassing questions that he or she may not wish to discuss in open court (*e.g.,* drug or alcohol treatment, crimes, personal finances, political views).
- Elicits more candid responses on issues that a juror might be reluctant to discuss in front of other jurors.

**EXAMPLE:** If race is an issue, you may want to ask the following question: "You may be asked to serve on a criminal case in which the defendant is black. Do you think you can fairly serve on such a jury?" Many jurors will answer honestly about their bias.

- Prevents the juror from being influenced by the responses of other jurors (*e.g.,* if one juror vividly retells an experience, expresses an opinion, or states a prejudicial fact that may taint the entire panel).

**JUDICIAL PERSPECTIVE:** Many judges find that questionnaires do not shorten voir dire but in fact lengthen it, because of the time it takes for jurors to complete them and attorneys to then make copies, review them, and reassemble everyone. Jurors may resent questionnaires and feel that they are being required to take a test. If there is any question about the value of a questionnaire, it should be posed to the court far in advance of trial. A request made a few days before voir dire will almost certainly result in a denial.

If counsel requests a questionnaire, it is within the court's discretion whether prospective jurors will be required to fill it out. The use of questionnaires is allowed by CCP §205(c)-(d) but is not required.

**NOTE:** In some counties, the jury commissioner sends a questionnaire to prospective jurors by mail before jury service to ensure that the prospective juror is qualified to serve. This questionnaire is limited by statute to questions related to juror identification, qualification, and ability to serve as a prospective juror. It can be used only for qualifying prospective jurors and for managing the jury system. CCP §205(a). The answers to this questionnaire are not seen by counsel and cannot be used to assist in courtroom voir dire examination unless otherwise ordered by the court. CCP §205(b). The court cannot hold the prospective juror in contempt for failure to respond, because the questionnaire is not a court order. *Lister v Superior Court* (1979) 98 CA3d 64, 159 CR 280.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.44 2. Preparing juror questionnaire

### §8.44 2. Preparing juror questionnaire

At the final case management conference, ask the court to approve the use of a questionnaire. It is too late to raise this issue at the beginning of voir dire. Also consider asking opposing counsel to stipulate to the use of a juror questionnaire. Often the use of a questionnaire is in the best interests of all parties and it will probably be easier to obtain the court's approval if all parties agree that a questionnaire should be administered and that its content is acceptable.

**PRACTICE TIP:** Check local rules for any requirements about the use of juror questionnaires and when the questionnaires should be submitted. See CCP §205(c). See also Sacramento Ct R 7.00; San Diego Ct, Div II, R 2.1.17.

Before deciding whether to use a jury consultant to help prepare the questionnaire (see §8.53), review the questionnaire prepared by the Judicial Council, titled "Juror Questionnaire for Civil Cases" (CCP §205(c)-(d)). For a copy of this form, see §8.81. This form is intended for use in appropriate civil cases. It may be altered or augmented by the court or counsel as needed.

This Judicial Council form includes instructions on how to use the questionnaire and suggests that the court confer with counsel about voir dire *before* a jury panel is called to discuss how to use the questionnaire, whether any supplemental questions should be prepared, and the extent of the court's and counsel's oral questioning of the jury panel.

The Judicial Council form questionnaire also recommends that:

- Counsel file and serve proposed supplemental questions at least 3 court days before the pre-voir dire conference.
- Counsel arrange for the duplication of completed questionnaires and have the parties share the cost of such duplication.
- The juror questionnaire be given to prospective jurors after they have heard the judge's introductory remarks in the trial court.

After the questionnaire has been prepared, counsel should:

- Give the questionnaire to opposing counsel for review and approval before it is submitted to the judge.
- Obtain court approval.
- Have the questionnaire ready for prospective jurors to fill out when they arrive in the courtroom for jury service.
- Ensure that there is enough time to review the questionnaire answers before beginning voir dire (*e.g.,* have the jurors fill out the questionnaire near the end of a day so that copies can be made for the court and each party and the results can be analyzed overnight).
- Put all completed questionnaires in alphabetical order for quick reference during jury selection.
- Review all completed questionnaires and prepare a short summary of each if possible before beginning oral voir dire. If you do not have time to summarize the questionnaires, highlight critical information so you can easily find such information while examining individual jurors.

**CAUTION:** Juror questionnaires should not replace oral voir dire conducted by the attorneys and the judge. Some prospective jurors who are not comfortable expressing themselves in writing might be excellent jurors.

**JUDICIAL PERSPECTIVE:** If counsel does decide to use a questionnaire, it should be as short and specific as absolutely necessary. Shorter questionnaires are more likely to be permitted by the court, more meaningful, and less time-consuming for all involved.

For further discussion of jury questionnaires, see Berry, *Choices: Selecting Jurors*, 24 Litigation 8 (ABA Fall 1997); Silver, *Mind Reading, Clairvoyance and Jury Questionnaires*, 31 Litigation 3 (ABA Fall 2004).

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### §8.45 3. Jury questionnaires used for voir dire are matters of public record

The information provided in pretrial juror questionnaires completed by jurors for the jury commissioner is not available for public inspection. *Pantos v City & County of San Francisco* (1984) 151 CA3d 258, 264, 198 CR 489.

In contrast, however, juror questionnaires prepared by counsel for use during voir dire are public records and become part of the court's permanent record. *Copley Press, Inc. v Superior Court* (1991) 228 CA3d 77, 89, 278 CR 443. In *Copley,* the court of appeal held that the blanket denial to the press of access to voir dire questionnaires in a death penalty case was unconstitutional but found that, because the trial court had assured prospective jurors that their answers would be treated as confidential, the principles of estoppel barred the release of the questionnaires to the press in this case. In future cases involving juror questionnaires, the court of appeal recommended that superior courts use the following guidelines (228 CA3d at 90):

- Segregate information regarding juror qualifications that is subject to public disclosure from other questions that may not be subject to disclosure;
- Tell potential jurors in the body of the questionnaire that their written responses are not confidential if the juror is called to the jury box but are confidential if they are not called to the jury box for voir dire; and
- Tell potential jurors that they have a right to request an in chambers hearing to discuss their responses to any questions they do not wish to answer in writing.

Access should be provided to the questionnaires in accordance with these guidelines.

**JUDICIAL PERSPECTIVE:** Jurors should be told that if they wish to have any information remain confidential, they should indicate this. They may ask to speak to counsel and the court at side bar, or fill out the portion of the questionnaire that they want to keep confidential on a separate sheet.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.46 G. Practice tips: How to conduct effective voir dire

### §8.46 G. Practice tips: How to conduct effective voir dire

The attorney's goals in conducting effective voir dire include:

- Selecting jurors who are predisposed to rule in your client's favor (or at least are not antagonistic toward your client);
- Presenting yourself and your client in a light favorable to the jury;
- Learning about the backgrounds and attitudes of the jurors; and
- Familiarizing the jury with certain legal and factual concepts, to the extent permitted.

With these goals in mind, consider the following practical suggestions:

- **Preparing for voir dire examination before trial:**
- Determine the types of jurors that you do and do not want. Rather than selecting jurors through stereotypes (*e.g.,* young, female, black, single), decide which attitudes and experiences you want jurors to either have or not have.
- Plan the questions with care and prepare a written outline of these questions. Aimless and repetitive use of stock questions may cause resentment or boredom in prospective jurors. Because two cases are rarely alike, counsel's questions should reflect the facts, theories, and approaches of the particular case.
- Find out the judge's attitude toward voir dire, if you know the judge's identity before trial. Is the judge likely to permit the types of questions you want to ask? Ask the court clerk and attorneys who have tried cases before the judge for such information. Local court rules may also be helpful in this regard.
- Gather information on prospective jurors, if possible. Use jury commissioner's lists, jury books, and other services. On use of jury books to assist in the exercise of peremptory challenges, see §8.72.
- Consider moving in limine to limit areas that the adverse party may inquire about during voir dire examination and trial. See chap 7.

**EXAMPLE 1:** In an automobile accident case, exclude other accidents that the defendant has been involved in.

**EXAMPLE 2:** If you believe that a client's felony conviction will not be admissible, consider moving in limine during the pre-voir dire conference to preclude the adverse parties from mentioning or referring to the client's conviction during voir dire examination and trial. On exclusion of a witness's prior felony conviction, see *People v Castro* (1985) 38 C3d 301, 211 CR 719. On motions in limine, see chap 7.

**JUDICIAL PERSPECTIVE:** If damaging evidence (*e.g.,* a felony conviction) cannot be kept out, consider disclosing it at the very beginning in your mini-opening statement. Once the information is before the jury, its reactions will be easier to assess through direct questions without the need to use hypothetical questions.

- Prepare your client for juror examination. The client should be neatly groomed in clothing that is not unusual or offensive. The client should be as well dressed as possible for a person of his or her occupation and background. Although the client should be attentive during voir dire, he or she should not visibly react or gesture in response to an attorney's questions or a prospective juror's answers. If other persons are attending the trial with the client or on the client's behalf, they should be similarly advised.
- Advise your client that every person in the courthouse (including in the hallways, elevators, and restrooms) may be a potential juror. Thus, the client should be courteous to everyone and refrain from discussing the case anywhere near the courthouse. On preparing witnesses for trial generally, see chap 5.
- **Presenting yourself to the jury:**
- Stand when prospective jurors enter the jury room and when conducting the examination. Standing shows respect for prospective jurors, helps establish good communication with them, and affords a better vantage point from which to judge their reactions.

**JUDICIAL PERSPECTIVE:** Experienced counsel always stand when the jury enters or leaves the court. Jurors notice

this and assume it is a sign of respect. Even if the judicial introduction was perfect, repeating your name and identifying your client is always very helpful. Jurors are subjected to overwhelming amounts of information from the time they first get their summons form.

- Immediately introduce yourself and your client, even if the court has previously done so. The court's introduction may not have been sufficient for jurors to connect the attorney with his or her name and client.
- Speak loudly enough that all the jurors, including those not yet called to the box, can hear distinctly.
- Be courteous, fair, and sincere at all times. Do not be patronizing, and do not cross-examine or embarrass prospective jurors.
- Be a good conversationalist. Ask open-ended questions to explore the juror's personality, attitudes, and predilections. For example, in an action involving a large corporate defendant, ask whether prospective jurors have ever had any unpleasant experiences with large corporations. If one has, ask the juror to discuss these experiences and any conclusions drawn from them.

**JUDICIAL PERSPECTIVE:** A common mistake is to repeat questions that have already been posed by the court during judicial voir dire. Repeating questions that have already been answered can be perceived by jurors as insulting and indicative of a lack of respect for them and their time.

- **Manner of questioning prospective jurors:**
- Consider collective questioning. The court often questions all prospective jurors on the jury panel at one time regarding the nature of prior jury experience and acquaintance with the parties or attorneys. See Cal Rules of Ct, Standards of J Admin 3.25(c)-(d). When appropriate, some attorneys also use this technique to begin their examination. Although collective questioning does not afford counsel an opportunity to observe each juror's reaction, it saves time and may minimize juror boredom. By revealing whether a juror is eager or hesitant to speak in front of others, collective questioning may provide some insight into the prospective jurors' personalities. When a collective question is asked, counsel can introduce it by stating that the whole group is being asked the question to save time, with a request that anyone who wishes to answer in the affirmative (or negative) should raise their hand. If a prospective juror raises a hand, counsel should state for the record the name of that prospective juror and note that fact. Counsel can then ask that prospective juror more specific questions.
- Question each prospective juror separately. Often, the first jurors are questioned most extensively. Each prospective juror, however, should be asked some questions to allow counsel to form an impression of that juror, to establish rapport, and to make each juror feel important.
- Question several prospective jurors completely. Then begin questioning of other prospective jurors. Ask them whether their answers to the questions asked of other jurors are any different. This technique is sometimes used to expedite the voir dire process. Use it with caution, however, because jurors may remain silent when needed information would be learned by individual questions and answers. Also, jurors may not precisely recall all the earlier questions.
- Avoid asking questions that elicit one-word answers. Questions ending with "Do you agree with that?" or "Under these circumstances, could you serve fairly and impartially in this case?" rarely produce much information for the attorney, because prospective jurors will probably supply one-word answers or vigorously assert that they can be fair. Instead, ask open-ended questions that will give prospective jurors an opportunity to express themselves. Note, however, that the court has discretion to permit leading questions to be asked during voir dire examination. *People v Ah Lee Doon* (1893) 97 C 171, 31 P 933.
- **Types of questions to ask:**
- Consider having the judge ask sensitive questions of the prospective jurors in private. Some voir dire questions are sensitive but essential for the client's protection. Counsel may prefer to have the judge ask such questions outside the presence of other jurors (in camera). This step will ensure that the client is not hurt by any adverse reaction that the prospective jurors may have to these questions. An in camera examination will also make jurors feel more comfortable about answering such questions and may preserve juror privacy. See §§8.35, 8.45.
- Consider disclosing significant weaknesses in the case. If the client was drinking alcohol during the events

giving rise to the case, for example, determine the attitude of prospective jurors toward persons who drink alcohol. Disclosing this weakness during voir dire may help you detect juror prejudice toward alcohol drinkers and blunt adverse juror reaction when the weakness is brought out during trial. Some trial attorneys disagree with this approach, however. See Klonoff & Colby, Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials (1990).

**JUDICIAL PERSPECTIVE:** Weaknesses should be disclosed in the mini-opening statement before voir dire questions begin. Counsel can present the weaknesses in the best possible light and eliminate the need to describe them through hypotheticals that may elicit objections from opposing counsel.

- Discover juror bias or prejudice without letting a biased or prejudiced prospective juror influence the other jurors.

**EXAMPLE:** In a medical malpractice case, it is dangerous for an attorney to ask a question such as "Why do you tend to favor doctors in these cases?" or "Why don't you like doctors?" because the attorney runs the risk that the prospective juror, in the presence of other prospective jurors, will relate personal experiences or anecdotes that may score a point for one side or the other before the trial even begins. If you believe possible bias or prejudice in this area should be explored, consider requesting that further examination of the juror be conducted outside the presence of the remaining prospective jurors. The court may also require that this take place in private. On in camera voir dire, see *People v Rutkowsky* (1975) 53 CA3d 1069, 1074, 126 CR 104 (in camera voir dire is appropriate to isolate suspected areas of prejudice from other jurors). See also *People v Fimbres* (1980) 104 CA3d 780, 163 CR 876 (no in camera voir dire required after initial expression of potential bias).

- Carefully examine prospective jurors on points of possible bias, prejudice, or interest. Answers on these issues might affect their ability to be fair and impartial. If the interrogation discloses a juror's familiarity with any of the parties, counsel, or intended witnesses, or with the subject matter at issue, explore whether the juror favors one side and whether additional evidence would change his or her mind. See *Fitts v Southern Pac. Co.* (1906) 149 C 310, 86 P 710; *Lombardi v California St. Ry.* (1899) 124 C 311, 57 P 66; *Leibman v Curtis* (1955) 138 CA2d 222, 226, 291 P2d 542.

**EXAMPLE:** A prospective juror admitted in a personal injury action that he had preconceived ideas about back disability, which he would use in his decision as a juror; that he could not be a fair and impartial juror; and that, before the plaintiff could have a fair trial, plaintiff's counsel would have to introduce evidence to overcome the prospective juror's notions. The trial court denied the challenge for cause and the appellate court reversed. *Leibam v Curtis, supra*. See also *Fitts v Southern Pac. Co., supra*.

- Obtain promises from the jury during voir dire, which you can remind them of during closing argument.

**EXAMPLE:** Ask the jurors for a commitment that their verdict will not be influenced by sympathy for the injured plaintiff.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.47 H. Using jury box chart to organize information

### §8.47 H. Using jury box chart to organize information

Most attorneys find it difficult to remember all the names and facts that are elicited during voir dire examination. Taking notes during the court's or other counsel's questioning will help you remember the jurors' answers. Even sketchy notes can be helpful reminders to eliminate the repetition of previously asked questions.

Decide the method of note-taking before voir dire begins. A jury box chart is often used to help counsel keep track of the prospective jurors' names and challenges exercised. Most courts give counsel a printed form on a single sheet of paper, showing empty boxes corresponding to the court's seating plan. As each prospective juror is called, counsel can enter the name of the prospective juror in the appropriate box. If a prospective juror is excused, the name can be stricken and the new prospective juror's name entered. The form usually contains another space to record challenges for cause and peremptory challenges.

Such a chart can be prepared by counsel if it is not available from the court. The problem with this type of chart is that it quickly becomes messy as jurors are excused and information must either be erased or crossed out. To avoid this problem, some counsel use a looseleaf notebook with one or more pages premarked for each jury seat.

Another alternative is for counsel to prepare a personalized jury box chart. Such a chart can be prepared by writing numbers 1 through 12 in two lines on a large piece of heavy paper (*e.g.,* an 8-1/2 by 13" manila folder) or cardboard. Large post-its may be attached under each number to correspond to the jury box that the potential juror is sitting in. Counsel can write on these post-its impressions about the juror, answers to key questions, and other information about the juror. If a juror is dismissed, the post-it can be removed and replaced with a new one. See §8.83 for sample jury box chart.

**PRACTICE TIP:** Do not attempt to write down everything the prospective jurors say. You can often learn a lot about each juror from watching his or her expressions.

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## I. Particular areas of inquiry

### §8.48 1. Insurance

To avoid the possibility of prejudicial misconduct, attorneys should avoid asking questions related to insurance during the voir dire examination. For example, it is improper and constitutes misconduct for counsel to ask prospective jurors questions that unnecessarily convey the impression that a defendant is insured against liability. *Swift v Winkler* (1957) 148 CA2d 927, 307 P2d 666; *Stevenson v Link* (1954) 128 CA2d 564, 275 P2d 782. See *Sweet v Stutch* (1966) 240 CA2d 891, 50 CR 9 (improper to implant in prospective jurors' minds fact that defendants are insured). See also Evid C §1155 (evidence that a party is insured wholly or partially against liability for the harm suffered is inadmissible to prove negligence). Presumably, it is likewise misconduct for defense counsel to imply that the defendant is not insured. Knowledge that a defendant has liability insurance may make the jurors careless about the amount of any verdict. *Arnold v California Portland Cement Co.* (1919) 41 CA 420, 183 P 171. Such misconduct may be so prejudicial as to constitute reversible error. See *Swift v Winkler, supra*; *Stevenson v Link, supra*. On attorney misconduct generally, see §§16.66-16.90.

Some courts, however, have held that counsel may, in good faith, ask whether the prospective jurors have a financial interest in a particular insurance company as long as the question does not unnecessarily convey the impression that the defendant is insured. *Hart v Wielt* (1970) 4 CA3d 224, 230, 84 CR 220. See *Sweet v Stutch, supra*. See also *Swift v Winkler, supra*; *Stevenson v Link, supra*. This rule has been said to be a rule of necessity to enable the plaintiff to have a fair and impartial jury free from bias. See *Swift v Winkler, supra*.

Other courts have indicated that any reference to insurance on voir dire is impermissible. *Folk v Kilk* (1975) 53 CA3d 176, 190, 126 CR 172 (trial court did not abuse its discretion in refusing voir dire questions relating to insurance); *Scally v PG&E* (1972) 23 CA3d 806, 814, 100 CR 501 (court stated in dictum that when an insurance company is not a party, it is improper to ask prospective jurors any questions about ownership of stock or other financial interest in insurance companies).

The California Civil Jury Instructions (CACI) "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(e). If plaintiff's counsel asks questions to determine possible interest by a prospective juror in an insurance company, defense counsel can ask the judge to read CACI 105 or 5001, or some variant of them, to the jury. See *Gluckstein v Lipsett* (1949) 93 CA2d 391, 209 P2d 98. The reading may help nullify the effect on prospective jurors of any notice that the defendant is insured. On jury instructions, see chap 20.

**PRACTICE TIP:** If you decide that voir dire questions relating to insurance are necessary, draft the questions, serve them on opposing counsel, and present them to the judge at the chambers conference so that you can obtain a ruling before the beginning of voir dire.

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### §8.49 2. Racial or religious background

If a case is such that the prospective jurors' racial or religious background might reasonably have an effect on jury deliberations (whether because of the parties, the intended witnesses, or the subject matter of the suit), consider asking the judge during a chambers conference to question the prospective jurors about these areas to avoid any adverse reaction they may have to such questions being asked by counsel. Interrogation into such subjects, when relevant to the selection of a fair and impartial jury, should be permitted. See *Smith v Smith* (1935) 7 CA2d 271, 46 P2d 232 (religious belief concerning divorce and remarriage could prejudice juror when woman sued her former husband for breach of divorce settlement agreement).

Careful examination of prospective jurors may include exploration for racial, religious, or similar bias or prejudice. *People v Wells* (1983) 149 CA3d 721, 197 CR 163 (appellate court overturned trial court and held that certain questions designed to elicit racial bias were not improper and substantially likely to uncover racial bias or prejudice; counsel for black defendant was permitted to ask prospective jurors why there were so few blacks in professional golf and tennis and as presidents of large corporations and why there has never been black governor of California). See §§8.67-8.70 on discriminatory use of peremptory challenges based on race, gender, and religion.

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## §8.50 3. Type of injury

Voir dire examination should inquire into the juror's knowledge and beliefs relating to the type of injuries involved in the litigation. A prospective juror may have had experience with such injuries and possibly has preconceived ideas about their cause, nature, severity, and duration. Ascertain whether additional evidence would be needed to overcome these ideas, in which case a challenge for cause might be used. See *Leibman v Curtis* (1955) 138 CA2d 222, 291 P2d 542. See also §8.46.

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## §8.51 4. Damages

When a plaintiff is seeking a large award, it is proper to ask whether a prospective juror would be able to award large damages or damages for nonmonetary losses if the evidence warranted. This line of questioning should be permitted because some prospective jurors may be reluctant to award large damages or damages for emotional distress or pain and suffering.

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### §8.52 5. Law

Generally, inquiry during voir dire regarding a prospective juror's knowledge or ignorance of questions of law is improper. *People v Love* (1960) 53 C2d 843, 3 CR 665. Code of Civil Procedure §222.5 provides that an improper question is "one which its dominant purpose is to question the prospective jurors concerning the pleadings or applicable law." See Cal Rules of Ct, Standards of J Admin 3.25(f). It is presumed that the court's instructions will adequately inform the jurors about the applicable law. *People v Love, supra*.

It is proper, however, for counsel to ask a general question about whether a prospective juror will follow the court's instructions. See *People v Williams* (1981) 29 C3d 392, 410, 174 CR 317 (court permitted general question about prospective juror's willingness to apply particular doctrine of law); *People v Tolbert* (1969) 70 C2d 790, 812, 76 CR 445 (questions asked for purpose of ascertaining whether juror would follow instruction to view uncorroborated evidence with caution rather than disbelief held entirely proper); *People v Modell* (1956) 143 CA2d 724, 732, 300 P2d 204 (trial court properly refused to allow opposing counsel to state substance of each instruction and then, for each instruction, to ask prospective jurors whether they would follow that instruction; instead, trial judge allowed counsel to ask jurors whether they would follow instructions of court as a whole, even if they did not agree with them and could put aside their own thoughts regarding law).

**JUDICIAL PERSPECTIVE:** Asking a juror if he or she can follow the judge's instructions is generally not a good practice, because it is unlikely to elicit any useful information and may use up precious goodwill.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.53 J. Using advice of jury consultant

## §8.53 J. Using advice of jury consultant

Trial attorneys differ over whether to employ a behavioral science consultant (also known as a "jury consultant") to assist in jury selection. Some counsel employ psychologists, sociologists, or similar experts to evaluate prospective jurors in a "scientific" and "analytical" approach to jury selection, believing that their insight into human behavior may help obtain a favorable jury verdict.

Jury consultants generally provide the following services:

- A community attitude survey to assist in determining the extent of pretrial publicity, probable attitudes toward the client, and profiles of favorable jurors.
- Trial simulations ("mock" jury trials).
- Voir dire preparation (*e.g.,* formulating oral questions and juror questionnaires).
- Advice on whether to exercise challenges to certain jurors and on formulating voir dire questions.
- Witness evaluation and preparation, including the videotaping and critiquing of witnesses during mock jury trials.
- Selection and use of shadow jurors, who attend the trial every day and report their observations on the impact of witnesses and the evidence.
- Advice on determining dominant themes and issues.
- Posttrial juror interviews.

Because jury consultants are quite expensive, they are generally used only in large civil trials and high profile, well-financed criminal trials. Jury consultants may be found by asking colleagues for recommendations and by consulting the membership directory of the American Society of Trial Consultants.

**JUDICIAL PERSPECTIVES:** If a jury consultant is too expensive, an alternative is to simply have an associate sit in the audience to observe and note juror reactions, such as facial expressions, body language, and other forms of communication that counsel may miss while conducting voir dire.

Although juror attitudes on specific issues may provide a guide to juror behavior, jury decisions may be driven more by evidence than individual characteristics or attitudes. Consequently, the behavioral consultant may be most helpful to an attorney in developing a clear and convincing way to present the evidence to the jury.

**CAUTION:** To protect against discovery of the work performed by trial jury consultants, ask each consultant to sign an engagement letter when they are retained. The engagement letter should expressly state that the consultant is being retained to assist counsel in preparing for trial.

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## VI. CHALLENGES

### A. Challenges for cause

### §8.54 1. Exercised by both counsel and court

A challenge for cause is generally made by a party as authorized by CCP §§225 and 227. However, the trial court also has the power to excuse a juror for cause (sua sponte) absent a challenge by a party. *People v Jimenez* (1992) 11 CA4th 1611, 15 CR2d 268, disapproved on other grounds in *People v Kobrin* (1995) 11 C4th 416, 45 CR2d 895 (juror admitted she would be lenient in criminal case and was properly excused sua sponte by judge). This right is based on the court's duty to ensure selection of a fair and impartial jury. This power should be used sparingly because an excuse for cause absent a challenge by a party is not the usual practice. 11 CA4th at 1621 n3.

After all sides have questioned a group of prospective jurors, the court will generally ask each side if it wants to exercise any challenges for cause or will pass. A challenge should be exercised before the prospective juror is "passed for cause." If a party has no challenges for cause, counsel should state, *e.g.,* "Defendant passes the panel for cause."

Challenges for cause must be exercised before any peremptory challenges and should be exercised as soon as the ground for the challenge is discovered. CCP §226(c). Some judges, however, prefer that challenges for cause be exercised after the entire panel of prospective jurors has been examined.

**PRACTICE TIP:** During the case management conference before trial, ask the judge how challenges for cause will be handled.

The challenges for cause are generally heard orally, although they can be in writing (CCP §226(b)). They are tried by the court. CCP §230. If the judge needs more information from the prospective juror before ruling on the challenge, the court can question the juror and any other person to determine potential bias. CCP §230. The judge decides whether the challenge for cause will be heard outside the hearing of the other jurors (*e.g.,* in chambers or in a side bar conference) or in open court. A court reporter should be present during such questioning.

**PRACTICE TIP:** If you are challenging a prospective juror in open court, do not disparage the juror you are challenging. Simply state the ground supporting the challenge, preferably by citing the Code of Civil Procedure section of the ground. For example, if you think a juror is biased against your client, you might want to state: "Your honor, defendants challenge juror no. 4 for cause, under CCP §229(f)."

**PRACTICE TIP:** Check whether any local rules govern challenges for cause. See, *e.g.,* Los Angeles Ct R 8.32 (challenge should be made outside hearing of prospective jurors).

**JUDICIAL PERSPECTIVE:** Challenges for cause should be conducted outside the jury's hearing. It is potentially disastrous if the challenge for cause is made in front of the juror and it is denied without any additional peremptory challenges available.

The judge can excuse the challenged juror or reject the challenge. If the challenge is rejected, counsel will have the opportunity of using a peremptory challenge to remove the juror later. See §§8.64-8.72. If a juror is excused for cause, a replacement juror will be selected at random by the clerk from the jury trial panel.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.55 2. Number of challenges

## §8.55 2. Number of challenges

There is no limit to the number of challenges for cause that may be exercised under CCP §230. However, peremptory challenges are generally limited to six per side if there are only two sides. For further discussion of number of peremptory challenges, see §8.65.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.56 3. Challenging entire panel for cause

## §8.56 3. Challenging entire panel for cause

In civil actions, a challenge can be made to the entire jury panel for cause. CCP §225(a)(1)-(3). This challenge must:

- Be made before the trial jury is sworn;
- Be in writing; and
- State plainly and distinctly the facts constituting the grounds for the challenge.

CCP §225(a)(1).

Reasonable notice of the challenge must be given by the counsel making the challenge to all parties and to the jury commissioner by service of a copy of the written challenge.

Although this challenge is raised infrequently, it sometimes arises in connection with a challenge for systematic exclusion of a cognizable group (see §§8.67-8.68) or a challenge that the entire jury panel should be dismissed because they were tainted by remarks of other jurors. See *People v Nguyen* (1994) 23 CA4th 32, 28 CR2d 140 (court has discretion to determine whether prospective juror's statement was prejudicial and to deny defendant's motion to dismiss jury panel because of comments during voir dire by one prospective juror who was later peremptorily challenged). See also *People v Martinez* (1991) 228 CA3d 1456, 279 CR 858 (prospective jurors made hostile and derogatory remarks about defendant; trial court did not abuse its discretion in refusing to dismiss entire jury panel as tainted by these remarks, because there was no evidence that persons actually selected for jury were biased by these comments).

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## §8.57 4. Grounds

An individual juror may be challenged for cause. CCP §225. "Cause" means a disqualifying status such as age, residence, citizenship, criminal record, or prior jury service, or a relationship or viewpoint that will prevent the juror from deciding the case impartially and solely on the basis of the evidence admitted at trial and the law presented in the judge's instructions.

A challenge for cause can be made for one of the following reasons (CCP §225):

- General disqualification (see §8.58);
- Implied bias (see §8.59); or
- Actual bias (see §8.60).

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### §8.58 a. General disqualification

A prospective juror may be disqualified for cause under the general disqualification category if the prospective juror falls into one of the following categories:

- The juror is one of those persons who do not qualify for jury service under CCP §203(a) (*e.g.,* is a minor, is not a United States citizen). CCP §228(a). On juror eligibility to serve, see §8.22.
- The juror has a hearing disability or other incapacity that the court believes would preclude the prospective juror from performing the duties of a juror without prejudice to the rights of the challenging party. CCP §228(b). For example, a juror who indicates an inability or unwillingness to follow the law (with respect to the death penalty) may be removed from the jury on the grounds that the ability to follow the law was, at a minimum, substantially impaired. *People v Memrow* (1995) 11 C4th 786, 47 CR2d 219.

**CAUTION:** A prospective juror may be disqualified by impairment only if the disability makes it impossible for the prospective juror to perform the duties of a juror without prejudice to the rights of the challenging party. CCP §228(b). There is no statutory basis for a challenge for cause to a person with a disability who can perform the duties of a juror with the aid of an attendant.

When an individual juror requires a sign language interpreter, reader, or speech interpreter to facilitate communication because of a handicap due to loss of hearing, sight, or power of speech, in any degree, and a party does not cause the juror's removal by challenge, the party is required to stipulate to the presence of that attendant in the jury room during jury deliberations and to prepare and deliver to the court proposed jury instructions to the interpreter. CCP §224.

When the services of a sign language interpreter, reader, or speech interpreter are required during the course of jury deliberations, the court is required to instruct the jury and the attendant that the attendant cannot participate in the jury's deliberations in any manner except to facilitate communication between the deaf juror and other jurors. CCP §224. See §21.4.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.59 b. Implied bias

### §8.59 b. Implied bias

A prospective juror can also be challenged for cause if there is a showing of implied bias by the juror. Implied bias arises when facts demonstrate that a prospective juror is presumed to be biased as a matter of law. CCP §225(b)(1)(B). The grounds for a challenge for implied bias are set forth in CCP §229(a)-(h) as follows:

- The juror is related by blood or marriage to a party or witness;
- The juror is related to any party or officer of a corporate party or is a business partner with either party;
- The juror (1) served as a trial or grand juror on a jury of inquest, (2) was a witness on a previous or pending trial between the same parties or involving the same specific offense or the same cause of action, or (3) served as a trial or grand juror on a jury within the previous year in any criminal or civil action or proceeding in which either party was the plaintiff or the defendant or in a criminal action in which either party was the defendant;
- The juror has an interest in the litigation, with the exception of the juror's interest as a resident, citizen, or taxpayer;
- The juror has an unqualified opinion or belief regarding the merits of the action based on knowledge of material facts;
- The existence of a state of mind in the juror evinces enmity against or bias toward either party;
- The juror is a party to the action set for trial before the panel of which he is a member; or
- The juror entertains "such conscientious opinions as would preclude the juror [from] finding the defendant guilty" (this ground applies only when the offense is punishable by death).

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### §8.60 c. Actual bias

A challenge for cause can be exercised if there is a showing of actual bias by the prospective juror. "Actual bias" is defined as a state of mind of the juror that will prevent the juror "from acting with impartiality and without prejudice to the substantial rights of any party." CCP §225(b)(1)(C). It generally occurs if a prospective juror indicates that he or she cannot be fair and impartial. See *People v Hecker* (1990) 219 CA3d 1238, 1243, 268 CR 884 (juror admitted that he could not decide case strictly on law and evidence); *People v Williams* (1988) 199 CA3d 469, 245 CR 61 (prospective juror made conflicting statements about his ability to remain impartial). See also California Criminal Law Procedure and Practice, chap 29 (Cal CEB Annual) for list of other criminal cases.

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### §8.61 5. Waiver of challenge

When grounds for a challenge for cause exist at the time of the voir dire examination, but the prospective juror is not asked any questions during voir dire related to those grounds, the right to challenge for cause on those grounds has been waived. See *Estate of Jones* (1913) 166 C 108, 135 P 288 (during trial, party discovered that two trial jurors were also members of grand jury, which is grounds for challenge; court denied challenge for cause, however, on ground that objection was made too late); *Davilla v Liberty Life Ins. Co.* (1931) 114 CA 308, 299 P 831 (failure of counsel to fully interrogate juror waived any disqualification); *Ex parte Bracklis* (1921) 52 CA 274, 277, 198 P 659 ("a party cannot sit idly by and take the chances of a favorable verdict and then after verdict raise a point which he should have raised before the juror was sworn").

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### §8.62 6. Concealed bias: Effect on motion for new trial

A party can seek to impeach an adverse jury verdict on the basis of concealment of juror bias during the voir dire examination by filing a motion for new trial. In this motion, the party must show the following:

- Neither the party nor the party's attorney was aware of the juror misconduct until after the verdict was returned; and
- The juror concealed bias or other disqualification by giving a false answer to a voir dire question directed to that point.

See *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 95 CR 516. See also §7.44.

A motion for new trial was granted on the basis of concealment of juror bias and prejudice in the following cases: *Weathers v Kaiser Found. Hosps., supra* (case decided on basis of concealment of juror bias on voir dire although court recognized that additional overt acts of jurors may constitute jury irregularity and misconduct under Evid C §1150); *Smith v Covell* (1980) 100 CA3d 947, 161 CR 377 (juror bias concealed by silence); *Clemens v Regents of Univ. of Cal.* (1971) 20 CA3d 356, 97 CR 589 (undisclosed juror bias and prejudice).

When a party or a party's attorney discovers facts during trial constituting misconduct or irregularity in the proceedings of the jury, this must be promptly brought to the attention of the court or it is waived as a ground for motion for a new trial. *Weathers v Kaiser Found. Hosps., supra*. See §§17.10-17.32 on juror misconduct.

On motions after trial, see chap 25.

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### §8.63 7. Right to appeal ruling on challenge for cause

When a prospective juror is challenged for cause and the challenge is granted, no ground for appeal exists. A party is not entitled to have a particular juror serve; a party is entitled only to a fair and impartial jury. *Dragovich v Slosson* (1952) 110 CA2d 370, 242 P2d 945; *National Sanitary Rag Co. v Lawrence* (1939) 33 CA2d 198, 91 P2d 120.

A right to appeal does exist, however, if a challenge for cause was denied, but only if there was a manifest abuse of discretion. To appeal a decision denying a challenge for cause, the appellant must show that (*People v Morris* (1991) 53 C3d 152, 184, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394):

- A peremptory challenge was used to remove the juror;
- The appellant exhausted all available peremptory challenges or can justify the failure to do so;
- The appellant was dissatisfied with the jury as seated; and
- The appellant's right to an impartial jury was affected.

See also *People v Bittaker* (1989) 48 C3d 1046, 259 CR 630 (court noted that improper denial of a challenge to juror for cause does not necessarily constitute reversible error if party used available peremptory challenges to exclude proposed juror); *Burns v 20th Century Ins. Co.* (1992) 9 CA4th 1666, 1672, 12 CR2d 462 (counsel failed to exhaust peremptory challenges and therefore was precluded from arguing on appeal about composition of jury); *People v Gordon* (1990) 50 C3d 1223, 270 CR 451 (court rejected argument that forcing party to use peremptory challenges to exclude jurors who should have been excluded for cause unconstitutionally deprives party of full complement of peremptory challenges because peremptory challenges are creation of state law and are not constitutionally required).

It has been held reversible error for the court not to grant a challenge for cause when the evidence was clear that a juror favored one side to the extent that it would take additional evidence to overcome his or her feeling of bias, even though, in response to some general questions, the juror may have indicated that he or she would decide according to the evidence. See, *e.g., Fitts v Southern Pac. Co.* (1906) 149 C 310, 86 P 710 (juror admitted being prejudiced against suits for injuries against railroad companies and that it would take some evidence to remove such feelings); *Lombardi v California St. Ry.* (1899) 124 C 311, 317, 57 P 66 (juror stated that he knew plaintiff and plaintiff's family and supposed that he would give plaintiff benefit of any doubt; juror also stated that if plaintiff was entitled to damages, he would give plaintiff benefit of doubt and "would go to the biggest verdict"); *Leibman v Curtis* (1955) 138 CA2d 222, 291 P2d 542 (juror who had administered workmen's compensation insurance program had formed opinions on back injuries that would require introduction of some evidence to overcome).

If voir dire questioning discloses that a juror's impartiality is not affected by prior belief, feeling, or acquaintanceship, the court's ruling denying a challenge for cause will not ordinarily be reversed on appeal. See, *e.g., Scott v McPheeters* (1942) 52 CA2d 61, 125 P2d 868 (denial of challenge for cause sustained when prospective juror who had stated that she had previously known defendant as her family physician indicated that she would be fair and just and would obey court's instructions). See also *People v Duncan* (1960) 53 C2d 803, 3 CR 351 (denial of challenges for cause to four prospective jurors sustained when jurors stated that they had formed opinion of defendants' guilt that would require evidence to overcome, but later in response to questioning by district attorney and judge stated that they would act impartially in spite of their opinions and base verdict solely on evidence and court instructions).

Whether a prospective juror can be fair and impartial must be determined by the trial judge. *Graybill v De Young* (1905) 146 C 421, 80 P 618. See also Cal Rules of Ct, Standards of J Admin 3.25(a)(1). It is within the sound discretion of the trial judge to accept or reject a prospective juror. *Scott v McPheeters, supra*. Denial of a challenge for cause is reversible only when it can be said as a matter of law that the juror was biased. *Graybill v De Young, supra*; *Scott v McPheeters, supra*.

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## B. Peremptory challenges

### §8.64 1. When and how exercised

Peremptory challenges are exercised only after the jury panel is full, the appropriate number of prospective jurors have been seated in the jury box, voir dire examination of them has been completed, and the prospective jurors have been passed by the parties for cause. See CCP §226. See also §§8.54-8.63 for cause challenges. A peremptory challenge is available to strike jurors who were not disqualified by cause. Counsel need not give any reason for exercising a peremptory challenge. *People v Jones* (1998) 17 C4th 279, 70 CR2d 793; *Austin v Lambert* (1938) 11 C2d 73, 79, 77 P2d 849. Counsel may simply state, *e.g.,* "We would like to thank and excuse Ms. Menninger."

The right to exercise peremptory challenges begins with plaintiff's counsel and then alternates between plaintiff and defense counsel until all peremptory challenges have been exhausted or until both sides pass. See CCP §231(d). For the number of peremptory challenges allowed, see §8.65.

As prospective jurors are excused, they are replaced by other prospective jurors who in turn go through the process of voir dire examination (unless they were already questioned under the "six pack" or "twelve pack" method), challenge for cause, and peremptory challenge. When each side passes consecutively (or when the number of peremptory challenges has been exhausted), the jury is sworn unless the court, for good cause, orders otherwise. See CCP §231(e). The selection of alternate jurors to replace discharged jurors is governed by CCP §§233-234. See also §§8.74-8.77.

For further discussion of the issue of peremptory challenges and objections to them, see California Trial Objections, chap 6 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.65 2. Number of challenges depends on number of sides

### §8.65 2. Number of challenges depends on number of sides

When there are only two parties, each party is entitled to six peremptory challenges. CCP §231(c). When there are more than two parties, for the purpose of allotting peremptory challenges, the court is required to "divide the parties into two or more sides according to their respective interests in the issues." CCP §231(c). Each side is then entitled to eight peremptory challenges. CCP §231(c).

When there are several parties on one side, the court is required to "divide the challenges among them as nearly equally as possible." CCP §231. Furthermore, when there are more than two sides, the court is required under CCP §231(c) to

> grant such additional peremptory challenges to a side as the interests of justice may require; provided that the peremptory challenges of one side shall not exceed the aggregate number of peremptory challenges of all other sides.

If a party on a side does not use that party's full share of peremptory challenges, any other party or parties on the same side may use the unused challenges. CCP §231(c).

What constitutes a "side" within the meaning of CCP §231(c) can be difficult to ascertain. The alignment of sides rests in the discretion of the trial judge. The number of sides and the number of peremptory challenges to be exercised by each party and the sequence for exercising them should be determined during the chambers conference with the trial judge before commencement of the voir dire examination. See, *e.g.,* Los Angeles Ct R 8.20(f), 8.33. In some counties, this subject may be addressed at the case management conference. See §§6.2-6.4.

Sometimes parties on the same side will agree that all challenges for that side should be exercised jointly, and the court will permit this. The advantages of using this method include:

- Parties who are looking for the same type of jurors can "compare notes."
- A party may be able to prevent a coparty from exercising a peremptory challenge against a prospective juror that the party wishes to retain.

The disadvantages of using this method include:

- In the eyes of the jury, the conferring parties may give the impression that they will succeed or fail together, and they may be viewed as belonging in the same camp.
- The conferring and whispering that precedes the exercise of a challenge may be distracting and sometimes annoying. Ordinarily, no one likes to be the subject of a whispered conversation carried on by others in the same room.
- The attorneys for the parties may be unable to agree on the exercise of a peremptory challenge.

Because of the disadvantages, some attorneys believe that it is preferable for parties on the same side to exercise their peremptory challenges separately.

**PRACTICE TIP:** Local court policies may address the order of exercising peremptory challenges when there are more than two sides and one side is allotted substantially more peremptory challenges. See, *e.g.,* Los Angeles Ct R 8.33 (ordinarily, the side having a greater number of peremptory challenges should be required to exercise every second challenge (*i.e.,* alternate with each of the other sides rather than rotate the challenge from one side to a second side to a third side)).

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### §8.66 3. Court may not reopen jury selection and permit further peremptory challenges

Historically, trial courts had the discretion to reopen jury selection to permit the exercise of unused peremptory challenges before all alternates were sworn. See former Pen C §1068; *People v Armendariz* (1984) 37 C3d 573, 209 CR 664. The court's discretion was eliminated by the repeal of former Pen C §1068 in 1988 and the legislature's addition of CCP §§226 and 231. The provisions of CCP §226(a) state that "a challenge to an individual juror may *only* be made before the jury is sworn." The California Supreme Court in *People v Cottle* (2006) 39 C4th 246, 255, 46 CR3d 86, interpreted the phrase "the jury is sworn" in §226 as "refer[ring] to the trial jury and not the alternates." Thus, once the jury is sworn, trial courts are barred under CCP §226(a) from reopening jury selection and permitting further peremptory challenges, regardless of whether alternates have been or will be selected and sworn. 39 C4th at 255.

**NOTE:** In federal court, if the court erroneously denies a peremptory challenge to an alternate who becomes the member of a panel, the appellate court will automatically reverse the judgment. See *Medrano v City of Los Angeles* (9th Cir 1992) 973 F2d 1499 (prosecution not permitted to exercise remaining peremptory challenge to remove new alternate juror because it had previously accepted panel; Ninth Circuit Court of Appeals reversed defense verdict and remanded case).

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### 4. Discriminatory use of peremptory challenges prohibited

### §8.67 a. Excluding members of cognizable group

Peremptory challenges may not be used to exclude a racial, ethnic, or other "cognizable group" systematically from jury service in criminal cases. *People v Wheeler* (1978) 22 C3d 258, 148 CR 890, disapproved on other grounds in *Johnson v California* (2005) 545 US 162, 162 L Ed 2d 129, 125 S Ct 2410.

Courts have extended the *Wheeler* rule to civil cases:

- In *Di Donato v Santini* (1991) 232 CA3d 721, 283 CR 751, the court of appeal relied on *Edmonson v Leesville Concrete Co.* (1991) 500 US 614, 114 L Ed 2d 660, 111 S Ct 2077, and *Holley v J & S Sweeping Co.* (1983) 143 CA3d 588, 192 CR 74, in holding that the discriminatory exclusion of female potential jurors in a civil case violated both the Fourteenth Amendment to the U.S. Constitution and the right to a jury drawn from a representative cross-section of the community under Cal Const art I, §§7, 16 as implemented by CCP §§191, 197(a), 204. See *Vansickel v Whike* (9th Cir 1999) 166 F3d 953 (peremptory challenge is state-created right protected by Fourteenth Amendment).
- In *Holley v J & S Sweeping Co.* (1983) 143 CA3d 588, 192 CR 74, the trial court committed reversible error when it failed to require a satisfactory explanation from the civil defendant who peremptorily challenged several members of the plaintiff's racial group.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.67A b. Establishing a prima facie case of discriminatory purpose

### §8.67A b. Establishing a prima facie case of discriminatory purpose

Prior to the United States Supreme Court's decision in *Johnson v California* (2005) 545 US 162, 162 L Ed 2d 129, 125 S Ct 2410, California courts required an objector to demonstrate a "strong likelihood" that the other party's challenges were based on impermissible group bias in order to establish a prima facie case of discriminatory purpose. See *People v Wheeler* (1978) 22 C3d 258, 280, 148 CR 890. *Johnson* rejected *Wheeler*'s "more likely than not" standard as being at odds with *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712, which instructs that a defendant must merely produce evidence sufficient to permit the trial judge to draw *an inference* that discrimination has occurred. 545 US at 168, 162 L Ed 2d at 138. After *Johnson,* the *Wheeler* rule (prohibiting discriminatory use of peremptory challenges) remained intact but *Batson*'s "inference" standard became California's new yardstick for determining discriminatory purpose. See *Rice v Collins* (2006) 546 US 333, 163 L Ed 2d 824, 833, 126 S Ct 969 (applying *Batson*'s standard, Court reversed Ninth Circuit, holding that prosecutor had race-neutral reasons for striking African-American juror from jury panel).

*Johnson* requires California courts to undertake the three-step process described in *Batson* for establishing unlawful discrimination:

- **Step one:** To establish a prima facie case of discriminatory purpose, the objector must demonstrate "that the totality of the relevant facts gives rise to any inference of discriminatory purpose." *Johnson v California* (2005) 545 US 162, 168, 162 L Ed 2d 129, 138, 125 S Ct 2410, quoting *Batson v Kentucky* (1986) 476 US 79, 93, 90 L Ed 2d 69, 85, 106 S Ct 1712.
- **Step two:** Once the prima facie case has been established, the burden shifts to the party seeking to strike the juror "to explain adequately" the identified exclusion. *Johnson v California*, 545 US at 168, 162 L Ed 2d at 138, quoting *Batson v Kentucky* (1986) 476 US at 94, 90 L Ed 2d at 69.
- **Step three:** The court decides (assuming a neutral explanation has been tendered) "whether the opponent of the strike has proved purposeful discrimination." *Johnson v California*, 545 US at 168, 162 L Ed 2d at 138, quoting *Purkett v Elem* (1995) 514 US 765, 767, 131 L Ed 2d 834, 838, 115 S Ct 1769. The opponent of a peremptory challenge must prove purposeful discrimination by a preponderance of evidence. *People v Hutchins* (2007) 147 CA4th 992, 55 CR3d 105.

**PRACTICE TIP:** If the opposing party appears to be striking proposed jurors on the basis of race or some other inappropriate reason, counsel may ask the court to require the opposing party to explain the reasons for the exercise of the challenge. Similarly, when striking a member of a cognizable group from a jury by exercising a peremptory challenge, counsel should be prepared to give the reasons for the challenge and to make a record of reasons for striking the juror other than the juror's membership in the group. See *Yee v Duncan* (9th Cir 2006) 441 F3d 851, 854 (prosecutor failed to articulate clear and reasonably specific neutral explanation for striking juror, and thus failed to meet burden of production under step two of *Batson*'s three-step analysis).

**JUDICIAL PERSPECTIVE:** When asking counsel to explain the reason for a peremptory challenge, the court should be careful to indicate whether or not it is finding a prima facie case of a *Wheeler/Batson* violation. Although the court may find that a prima facie case has not been made, it may nevertheless ask that the reasons for the challenge be stated in order to preserve the record.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.68 c. Cognizable versus noncognizable groups

### §8.68 c. Cognizable versus noncognizable groups

A cognizable group exists if its members share a common perspective arising from their life experience in the group and no other members of the community are capable of adequately representing the perspective of the group allegedly excluded. *People v Cervantes* (1991) 233 CA3d 323, 284 CR 410.

California courts have held that certain groups are "cognizable," *i.e.*, entitled to protection from discrimination based on:

- **Gender.** See, *e.g.*, *Di Donato v Santini* (1991) 232 CA3d 721, 283 CR 751 (discriminatory exclusion of female potential jurors in civil case violated both Fourteenth Amendment and right to have jury drawn from representative cross-section of community under Cal Const art I, §§7, 16 as implemented by CCP §§191, 197(a), 204); *People v Cervantes* (1991) 233 CA3d 323, 284 CR 410 (both men and women are cognizable groups in criminal cases; use of peremptory challenges to exclude all men was improper); *U.S. v De Gross* (9th Cir 1992) 960 F2d 1433 (equal protection principles prohibit exclusion of women jurors in criminal cases solely because of their gender).
- **Race.** See, *e.g., People v Silva* (2001) 25 C4th 345, 106 CR2d 93 (prosecutor's stated reasons for excluding Hispanic jurors showed discriminatory purpose); *Williams v Runnels* (9th Cir 2006) 432 F3d 1102, 1108 (defendant made prima facie showing of discrimination based on statistical disparity of exclusion of potential African-American jurors even though prosecutor had provided race-neutral explanations for other challenges); *Montiel v City of Los Angeles* (9th Cir 1993) 2 F3d 335 (defendants used their peremptory challenges to dismiss all jurors with Spanish surnames; Ninth Circuit reversed verdict for defendants and remanded for new trial). See also *People v Tapia* (1994) 25 CA4th 984, 30 CR2d 851 (Hispanics and Filipino).
- **Sexual Preference.** See *People v Garcia* (2000) 77 CA4th 1269, 92 CR2d 339 (homosexuals have common perspective based on their membership in that community and therefore constitute cognizable class).

The following are case examples in which courts found a group not "cognizable" and thus unprotected. The exclusion of these groups from a jury is constitutionally permissible:

- *People v Marbley* (1986) 181 CA3d 45, 225 CR 918 (use of peremptory challenges to exclude from jury panel all persons between ages 18 and 28 was constitutionally valid).
- *People v Fauber* (1992) 2 C4th 792, 9 CR2d 24 (challenge based on systematic exclusion of hearing-impaired jurors denied; not held to be "distinctive" group).
- *People v McCoy* (1995) 40 CA4th 778, 47 CR2d 599 (persons over age of 70 are not distinctive cognizable group because distinctions between these age groups were too arbitrary and proposed characteristics were too amorphous and ill-defined to satisfy applicable standards for establishing cognizable group).
- *People v Harris* (1989) 47 C3d 1047, 1076, 255 CR 352 (although number of jurors were excused for financial hardship, they were not cognizable class and fact that they were excused did not establish underrepresentation).
- *U.S. v Santiago-Martinez* (9th Cir 1995) 58 F3d 422 (defendant's conviction would not be overturned on grounds that "obese" persons had been excluded from jury; obesity not protected classification).

**NOTE:** The exclusion of ex-felons and resident aliens from juries violates neither the right to have a jury drawn from a representative cross-section of the community nor the equal protection clause of the state or federal constitution. *Rubio v Superior Court* (1979) 24 C3d 93, 154 CR 734.

The fact that a jury contains a sufficient number of members of the cognizable class to provide a representative cross-section of the community does not cure unlawful discrimination in the use of peremptory challenges. *People v Snow* (1987) 44 C3d 216, 242 CR 477. A constitutional violation may exist even when only one of several members of a cognizable group is improperly excluded. *People v Montiel* (1993) 5 C4th 877, 21 CR2d 705. The right to a jury drawn from a representative cross-section of a community does not, however, include the right to have the jury as seated reflect the racial makeup of the community as long as discriminatory practices are not used to exclude

prospective jurors. See *People v Garceau* (1993) 6 C4th 140, 173, 24 CR2d 664.

Exclusion of jurors on grounds of religion may sometimes be justified. In *People v Martin* (1998) 64 CA4th 378, 382, 75 CR2d 147, the court held that a peremptory challenge based on the juror's "relevant personal values" was not improper even though those values may have directly resulted from a specific set of religious beliefs (the juror was a Jehovah's Witness).

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### §8.69 d. Making a *Wheeler/Batson* objection

A *Wheeler/Batson* objection to a party's discriminatory use of peremptory challenges must be timely. *Wheeler* requires that the party making a challenge object before the completion of jury selection. See *People v Morrison* (2004) 34 C4th 698, 709, 21 CR3d 682; *Di Donato v Santini* (1991) 232 CA3d 721, 740, 283 CR 751. Generally, the entire jury panel must be challenged under *Wheeler*. Compare *People v Smith* (1993) 21 CA4th 342, 25 CR2d 850 (jury's finding reversed because trial court only reseated juror after granting *Wheeler* motion), with *People v Williams* (1994) 26 CA4th Supp 1, 9, 31 CR2d 769 (juror reinstatement proper when prosecution made successful *Wheeler* challenge and waived right to have new panel).

Courts have discretion, however, to continue with the trial when counsel has engaged in deliberate misconduct in order to manipulate the jury selection. See *People v Willis* (2002) 27 C4th 811, 118 CR2d 301. In *Willis*, defendant excluded white jurors based on group bias. The prosecution objected to a mistrial on grounds that dismissing the jury would benefit the defendant lawyer's misconduct. The supreme court agreed, holding that a trial judge may use alternative remedies, such as disallowing the challenge or imposing monetary sanctions.

For further discussion of *Wheeler* motions and issues surrounding discriminatory use of peremptory challenges, see California Trial Objections, chap 6 (Cal CEB Annual).

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### §8.70 e. Review on appeal

The trial judge's findings on whether purposeful discrimination has been established should be given great deference. *People v King* (1987) 195 CA3d 923, 241 CR 189. If, however, the trial judge was not sensitive to the manner in which peremptory challenges were used and made no effort to determine whether a prima facie case of discriminatory use of peremptory challenges exists, the trial court's determination is not entitled to deference. *Di Donato v Santini* (1991) 232 CA3d 721, 740, 283 CR 751. The trial judge's ruling will be reviewed under a substantial evidence standard rather than an abuse of discretion standard, because there is no discretion once the trial judge makes a finding on whether purposeful discrimination existed. If discrimination is found, the motion must be denied; if not, it must be granted. See also *People v Jackson* (1992) 10 CA4th 13, 12 CR2d 541. The lack of a transcript of jury selection may lead to a new trial. *Simmons v Beyer* (3d Cir 1995) 44 F3d 1160.

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### §8.71 5. Effect of passing

A party may pass the exercise of a peremptory challenge and, assuming that all other parties do not likewise pass, then exercise that challenge against any prospective juror seated in the jury box (including those seated when the challenge was passed). See *Buckley v Chadwick* (1955) 45 C2d 183, 289 P2d 242. Under CCP §231(d), the passing of a peremptory challenge does not diminish the number of peremptory challenges remaining with a side. When each side passes consecutively, however, the jury will be sworn unless the court for good cause orders otherwise. CCP §231(e).

**PRACTICE TIP:** Deciding whether (and when) to exercise a peremptory challenge is a critical strategic decision. If you pass, the other side has the option of passing and keeping the 12 jurors on the panel. Thus, if your client does not feel comfortable with a particular juror, you should exercise a challenge. If you believe that the opposing party will not want certain jurors on the jury, you may want to pass and let the opposing party exercise the first (or the first two) challenges. This gives you the ability to "control" the jury by exercising the final challenges. Consider who the replacement juror will be. With the "six-pack" or "12-pack" method, you know who the next juror will be. See §8.33.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.72 6. Practice tips: How to exercise peremptory challenges

### §8.72 6. Practice tips: How to exercise peremptory challenges

Experienced trial counsel carefully watch the use of peremptories by both sides. They keep apprised on the apparent caliber of the remaining prospective jurors not yet in the jury box. They try to avoid an adversary's having more unused peremptories, to guard against the adversary's being in a position to excuse jurors thought to be favorable to counsel's own side.

No strategy can ensure selection of the best possible jury for a client. Because so many uncertainties exist, counsel may be tempted to accept the first 12 jurors without exercising a single peremptory challenge. Other attorneys will admit that they often exercise peremptory challenges on the basis of nothing more than intuition or a "hunch." The following suggestions may assist counsel in exercising peremptory challenges:

- Listen carefully to what the prospective jurors say, and watch what they do. Discover clues to a prospective juror's personality and attitudes by observing his or her clothing, manner of walking to the jury box, reading material, and speaking style. Counsel may sense an attitude of sympathy or hostility toward the case, one of the parties, or attorneys.
- Be cautious before accepting an aggressive, opinionated juror. Such a person may dominate the others so that a verdict of 12 (or fewer; see §8.2) is not actually obtained, antagonize fellow jurors, or distract attention from proper deliberation.
- View the juror with leadership personality or quality with caution. His or her views may unduly influence the other jurors.
- Be cautious of a juror who has some expertise by virtue of his or her particular knowledge, training, or background in a matter that may be of some importance in the trial (*e.g.,* a chemical engineer in an explosion case, a nurse in a malpractice case, an attorney in any type of case). If that person's background is shallow, he or she may readily accept a theory or proposition advanced by one side or the other.
- Consider whether the juror has interests in common with any party to the litigation, key witnesses, or counsel. If so, it may be advisable to exercise a peremptory challenge against that juror.
- Decide whether to use a jury book. In some cities, such books are available to both sides for a fee. Usually the book consists of a separate piece of paper for each prospective juror, which contains information such as the juror's name, date of birth, address, marital status, a list of all petitions he or she has signed, and a succinct summary of each case the prospective juror has deliberated and how he or she voted. By checking the data, you may conclude that, as compared with the other prospective jurors, a prospective juror is pro-plaintiff or pro-defendant or is inclined to unusually low or high awards. Evaluate this information in light of the facts and issues presented by the particular case. See *Baugh v Beatty* (1949) 91 CA2d 786, 205 P2d 671 (jury book used by counsel).
- When one side exercises few or no challenges, the other side may be strongly tempted to do likewise, even if it is not altogether happy with the panel. Some attorneys believe that a side exercising few or no peremptory challenges may be perceived as having a strong case, whereas the other side, if it continues to exercise peremptory challenges, may be perceived as having to select carefully the right jurors because it is worried about its case. Despite this risk, warranted challenges should be exercised even if the other side passes.
- If the opportunity exists, consider conferring with the client, out of the presence of the jury (*e.g.,* during a recess), to determine whether the client has any strong feelings for or against any of the prospective jurors seated in the jury box. Clients' reactions are often of paramount value in deciding whether to exercise a peremptory challenge.
- Consider the use of a behavioral consultant in advising on peremptory challenges. On use of behavioral consultants in jury selection, see §8.53.
- If opposing counsel objects to your challenge of a juror, state your reasons for the challenge regardless of whether the objection is overruled or sustained. Otherwise, the appellate court has no record of why you challenged a certain juror.

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## §8.73 VII. ADMINISTERING OATH TO JURORS

After a jury has been selected, the jurors are required to take an oath, in substance, that they and each of them will well and truly try the matter at issue and render a true verdict according to the evidence. CCP §232(b).

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## VIII. ALTERNATE JURORS

### §8.74 A. Grounds for having alternate jurors

When the trial judge believes that the trial is likely to be protracted, or on stipulation of the parties, the judge may direct the calling of one or more additional jurors, to be known as "alternate jurors." CCP §234. Alternate jurors are drawn from the same source, in the same manner, and have the same qualifications as the jurors already sworn. CCP §234. See §8.22. Alternates are necessary in case a member of the jury becomes ill or for some other reason is unable to continue serving.

The number of alternate jurors to be selected should be worked out in the chambers conference with the judge before voir dire examination of the prospective jurors begins.

**PRACTICE TIP:** Check local rules on the selection of alternate jurors. See, *e.g.,* Los Angeles Ct R 8.36.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.75 B. Voir dire examination

## §8.75 B. Voir dire examination

Prospective alternate jurors are subject to the same voir dire examination as the jurors already sworn. CCP §234. Counsel should use the same care and deliberation to select alternate jurors as was used in selecting the other jurors.

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### §8.76 C. Challenges

Prospective alternate jurors are subject to the same challenges as the jurors already sworn. CCP §234. Each side, as provided in CCP §231 (see §8.65), is "entitled to as many peremptory challenges to such alternate jurors as there are alternate jurors called." CCP §234. For example, if the court seats one alternate juror, each side (not party) is entitled to one peremptory challenge.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.77 D. Oath

### §8.77 D. Oath

After the alternate jurors have been selected, they are required to take the same oath as the jurors already selected. CCP §234. For the nature of the oath, see CCP §232, discussed in §8.73.

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## IX. JURY ISSUES ARISING DURING TRIAL

### §8.78 A. Illness or disqualification of juror

The court can discharge a juror at any time, before or after the case is finally submitted to the jury, if a juror becomes ill, is found on a showing of good cause to be unable to perform his or her duties, or requests a discharge for good cause. CCP §234.

If alternate jurors have been selected, the court draws the name of an alternate, who is required to take the discharged juror's place in the jury box. The alternate juror is subject to the same rules and regulations as if he or she were one of the originally selected jurors. CCP §234.

If, at any time before a verdict, a juror becomes unable to perform his or her duty because of sickness, and no alternate juror is available, the court may order the juror discharged, in which event, under CCP §233.

- The trial may proceed before the other jurors with the parties' consent;
- Another juror may be sworn, and trial begins anew; or
- The jury may be discharged, and a new jury either then or afterward impaneled.

See also chap 17 on jury management.

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## §8.79 B. Admonition to jury

Any ex parte communication between the jurors and the judge, counsel, the parties, or the witnesses may constitute serious misconduct. CCP §611. Whenever the jurors are permitted to separate, either during the trial or after the case is submitted to them, the court will admonish the jurors that, among other things, it is their duty not to talk about this case or the people involved in it with anyone, including their families, friends, coworkers, spiritual leaders, advisors, therapists, and persons living in their households. Jurors "must not even talk about the case with the other jurors until after" the trial judge states that the jury's deliberations may begin. CACI 100. In addition, the jury should deliberate only when all jurors are present in the jury room. See CACI 100.

See 7 Witkin, California Procedure, *Trial* §207 (5th ed 2008) on ex parte communication between the court, counsel, the parties, or the witnesses and the jurors. On misconduct of counsel and court, see chap 16. On juror misconduct, see chaps 17, 21.

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## §8.80 C. Substitution of juror during deliberations

The jury must begin deliberations anew when an alternate is substituted for a seated juror after deliberations have begun, even if the alternate was in the jury room during the earlier deliberations. The judge must instruct the jury of this requirement. *People v Proctor* (1992) 4 C4th 499, 536, 15 CR2d 340 (judge's statement that jury should "start from scratch" after substitution of alternate juror satisfied requirement; error was harmless because jury had deliberated only 1 hour before substitution and 2-1/2 days after the substitution); *Vaughn v Noor* (1991) 233 CA3d 14, 284 CR 222 (reversible error not to explicitly instruct jury to "start deliberations anew").

**JUDICIAL PERSPECTIVE:** Some courts permit the attorneys to privately agree on the order of replacement of alternate jurors. This allows for quicker selection of alternates, and provides more information for counsel should a substitution become necessary. In addition, some courts have found that alternates resent being dropped from the trial once deliberations start, having sat through the entire trial. Alternates can be invited by stipulation to remain with the deliberating jurors with the strict admonition that they are not to participate in the deliberations in any fashion.

On an alternate juror's being permitted to sit in the jury room during jury deliberations under stipulation, see *People v Valles* (1979) 24 C3d 121, 154 CR 543. On alternate jurors chosen during deliberations, see §§21.20-21.23.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/ X. JURY ISSUES ARISING DURING TRIAL/ A. Juror questionnaires/§8.81 1. Form: Juror questionnaire for civil cases (Judicial Council form MC-001)

## X. JURY ISSUES ARISING DURING TRIAL

### A. Juror questionnaires

### §8.81 1. Form: Juror questionnaire for civil cases (Judicial Council form MC-001)

# JUROR QUESTIONNAIRE FOR CIVIL CASES

Code of Civil Procedure Section 205(c)-(d)

## Sec. 1. Statutory Authority

This Juror Questionnaire has been drafted under the authority of Code of Civil Procedure section 205(c)-(d) and is intended to expedite jury selection. It is not intended to alter statutes or rules governing the authority of the court or the role of counsel during voir dire.

## Sec. 2. Use Notes for Courts

### A. General

This Juror Questionnaire is intended for use in the court's discretion in appropriate civil cases. Its use in cases of brief duration may not be appropriate. Particular kinds of cases may require that this questionnaire be altered or augmented. The Personal Injury Supplement is intended to be used along with the General Questions in personal injury actions. Judges, in their own discretion, must determine what additional kinds of inquiry are appropriate in any given case.

### B. Pre–Voir Dire Conference

The court should confer with counsel about voir dire before a jury panel is called. At this conference, the court may establish (1) guidelines for the use of the Juror Questionnaire, (2) any supplemental questions to be propounded to the panel by questionnaire, (3) the extent of the court's oral inquiry of the panel, and (4) the extent of oral questioning by counsel. Proposed supplemental questions drafted by counsel should be filed and served at least three court days before the pre–voir dire conference. Arrangements for duplication of completed questionnaires should be confirmed. The parties should share the cost of duplication.

### C. Introduction of Questionnaire to Prospective Jurors

It is suggested that the Juror Questionnaire be used after the court has given its customary introductory remarks and any additional instructions that the court deems appropriate. The court also may wish to tell the panel members that a questionnaire will be used, to encourage complete answers, and to remind them that their answers will be given under penalty of perjury. In introducing the questionnaire, the court should instruct prospective jurors how to proceed if they have difficulty reading or filling out the form.

The court could direct that the Juror Questionnaire be given to prospective jurors by the jury commissioner in the jury assembly room. However, this procedure ordinarily will mean that jurors are not given complete instructions about the type of case they will hear or the identity of participants and witnesses. In addition, jurors who fill out the form before appearing in the trial court may not clearly understand that their answers are given under penalty of perjury. For these reasons, and to avoid the need to have jurors fill out supplemental questionnaires once they have been sent to the trial court, it is strongly recommended that the Juror Questionnaire be used in the trial court setting.

Print

# JUROR QUESTIONNAIRE FOR CIVIL CASES

## Introduction and Instructions

Thank you for coming to court as a potential juror. Before the case can start, a jury must be selected. The judge and the people involved in the case need to know something about you in order to select jurors who can be fair to both sides.

Everyone has attitudes and opinions that are shaped by their life experiences. Sometimes these experiences can make it difficult to look at a certain issue in an unbiased and unemotional way. As a juror, you must return a verdict based on the law and on the facts proved in court, not on emotion or on other views not supported by the evidence. The judge will give you instructions on the law and on how you should go about deciding the case. You must listen to and follow the judge's instructions.

The questions on this form are designed to help the court and the lawyers learn something about your background and your views on issues that may be related to this case. The questions are asked not to invade your privacy, but to make sure that you can be a fair and impartial juror. If there is any reason why you might not be able to give both sides a fair trial in this case, it is important that you say so.

The judge has decided to use this form to save time and to give you a chance to tell the court and the lawyers about yourself.

In portions of this form, you will see the term "significant personal relationship." That term means a former spouse, domestic partner, life partner, or anyone with whom you have an influential or intimate relationship that you would characterize as important.

If there is anything you do not want to talk about in open court, please circle the question number. After you have finished the questionnaire, let the clerk know that you have circled one or more question numbers.

Do not write on the back of any page. Use an additional sheet of paper.

If you are called to the jury box, your answers to this questionnaire become a matter of public record, just as if you had answered the questions aloud in the courtroom.

If you have trouble reading, understanding, or filling out this form, please let the court clerk know.

PLEASE REMEMBER THAT YOU ARE ANSWERING THESE QUESTIONS UNDER PENALTY OF PERJURY. YOUR ANSWERS MUST BE TRUE AND COMPLETE. THANK YOU FOR YOUR HELP IN SELECTING A FAIR JURY.

Print

# JUROR QUESTIONNAIRE FOR CIVIL CASES

## General Questions

PLEASE PRINT ALL ANSWERS LEGIBLY

**FULL NAME:** _____

**1.1 DATE AND PLACE OF BIRTH:** _____

**1.2 AREA, NEIGHBORHOOD, OR COMMUNITY IN THIS COUNTY WHERE YOU CURRENTLY LIVE (DO NOT GIVE YOUR ADDRESS):**

_____

☐ HOUSE ☐ APARTMENT ☐ OWN ☐ RENT

**1.3 AREA, NEIGHBORHOOD, OR COMMUNITY WHERE YOU HAVE LIVED IN THE PAST 10 YEARS (AND DATES):**

_____

_____

_____

**1.4 WHAT IS THE HIGHEST LEVEL OF EDUCATION YOU COMPLETED?**

☐ GRADE SCHOOL OR LESS

☐ SOME HIGH SCHOOL

☐ HIGH SCHOOL GRADUATE

☐ OTHER *(PLEASE EXPLAIN)*:

_____

_____

_____

☐ SOME COLLEGE (MAJOR): _____

☐ COLLEGE GRADUATE (MAJOR): _____

☐ POSTGRADUATE STUDY (MAJOR): _____

☐ TECHNICAL, VOCATIONAL, OR BUSINESS SCHOOL (MAJOR): _____

**1.5 IF YOU PLAN TO ATTEND OR ARE CURRENTLY ATTENDING SCHOOL, DESCRIBE:**

_____

_____

**1.6 IF YOU HAVE TAKEN ANY COURSES OR HAD ANY TRAINING IN MEDICINE OR OTHER HEALTH CARE FIELD, DESCRIBE:**

_____

_____

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**1.7 IF YOU HAVE TAKEN ANY COURSES OR HAD ANY TRAINING IN LAW OR A RELATED SUBJECT, DESCRIBE:**

_____

_____

_____

**1.8 EDUCATIONAL BACKGROUND OF ANY OTHER ADULT WHO LIVES IN YOUR HOME, INCLUDING ANY DEGREES OR CERTIFICATES EARNED:**

_____

_____

**1.9 YOUR PRESENT EMPLOYMENT STATUS *(CHECK ALL THAT APPLY):***

☐ EMPLOYED FULL-TIME ☐ RETIRED ☐ UNEMPLOYED, LOOKING FOR WORK

☐ EMPLOYED PART-TIME ☐ STUDENT ☐ UNEMPLOYED, NOT LOOKING FOR WORK

☐ HOMEMAKER

**1.10 YOUR CURRENT OR MOST RECENT OCCUPATION:**

_____

**1.11 NAME OF YOUR CURRENT OR MOST RECENT EMPLOYER OR, IF A STUDENT, YOUR SCHOOL:**

_____

_____

**1.12 WHAT ARE YOUR SPECIFIC DUTIES AND RESPONSIBILITIES ON THE JOB?**

_____

**1.13 DOES YOUR JOB INVOLVE SUPERVISING OTHER PEOPLE?** ☐ YES ☐ NO

IF YES, APPROXIMATELY HOW MANY? _____

**1.14 ARE YOU INVOLVED IN THE HIRING OR FIRING OF OTHER EMPLOYEES?** ☐ YES ☐ NO

**1.15 ARE YOU INVOLVED IN EVALUATING THE JOB PERFORMANCE OF OTHER EMPLOYEES?** ☐ YES ☐ NO

**1.16 ALL OTHER EMPLOYMENT YOU HAVE HAD (AND FOR HOW LONG):**

_____

_____

_____

**1.17 ALL FULL-TIME EMPLOYMENT OF YOUR SPOUSE OR ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP (AND FOR HOW LONG):**

_____

_____

_____

**1.18 WHAT ARE/WERE THE OCCUPATIONS OF YOUR PARENTS? (IF RETIRED, WHAT DID THEY DO BEFORE?)**

MOTHER: _____

FATHER: _____

Print

**1.19 IF YOU HAVE CHILDREN, PLEASE LIST (INCLUDING ANY CHILDREN WHO DO NOT CURRENTLY LIVE WITH YOU):**

| SEX | AGE | DOES CHILD LIVE WITH YOU? | EDUCATION | OCCUPATION |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |

**1.20 IF YOU OR YOUR CURRENT SPOUSE OR PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP HAS EVER SERVED IN THE MILITARY, PLEASE LIST FOR EACH THE BRANCH OF SERVICE AND DATES OF SERVICE:**

**1.21 WHAT SOCIAL, CIVIC, PROFESSIONAL, TRADE, OR OTHER ORGANIZATIONS ARE YOU AFFILIATED WITH?**

**1.22 DESCRIBE ANY OFFICES YOU HAVE HELD IN ORGANIZATIONS LISTED ABOVE:**

**1.23 DO YOU KNOW ANYONE ON THIS JURY PANEL?**

**1.24 ON HOW MANY CASES HAVE YOU SERVED ON A JURY?**

WHERE DID YOU SERVE ON A JURY?

WHAT KINDS OF CASES DID YOU HEAR WHILE SERVING ON A JURY?

IN HOW MANY OF THOSE CASES DID THE JURY REACH A VERDICT?

IN HOW MANY OF THOSE CASES DID YOU SERVE AS THE JURY FOREPERSON?

WAS YOUR JURY SERVICE A POSITIVE OR NEGATIVE EXPERIENCE?

**1.25 IF YOU HAVE EVER BEEN TO COURT FOR ANY OTHER REASON (EXCLUDING DIVORCE), EXPLAIN:**

Print

**1.26 IF YOU PERSONALLY KNOW ANY JUDGES OR ATTORNEYS OR COURT PERSONNEL, WHAT ARE THEIR NAMES AND RELATIONSHIP TO YOU?**

**1.27 DESCRIBE ANY PROBLEMS (VISION, HEARING, OR OTHER MEDICAL PROBLEMS) THAT MAY AFFECT YOUR JURY SERVICE:**

**1.28 IF YOU OR ANYONE CLOSE TO YOU HAS EVER MADE ANY TYPE OF CLAIM FOR DAMAGES, EXPLAIN:**

**1.29 IF A CLAIM FOR MONEY DAMAGES HAS EVER BEEN MADE AGAINST YOU OR ANYONE CLOSE TO YOU, EXPLAIN THE CIRCUMSTANCES:**

**1.30 IF YOU OR ANYONE CLOSE TO YOU HAS EVER SUED OR BEEN SUED IN ANY TYPE OF LAWSUIT, EXPLAIN:**

**1.31 DO YOU FEEL THAT MONEY DAMAGES AWARDED IN LAWSUITS ARE *(CHECK ONE):***

- ☐ EXCESSIVE
- ☐ OFTEN TOO LARGE
- ☐ ABOUT RIGHT
- ☐ OCCASIONALLY TOO LOW
- ☐ OFTEN TOO LOW
- ☐ OTHER *(SPECIFY):* _____

**1.32 IF YOU HAVE ANY ETHICAL, RELIGIOUS, POLITICAL, OR OTHER BELIEFS THAT MAY PREVENT YOU FROM SERVING AS A JUROR, EXPLAIN:**

**1.33 IF THERE IS ANY MATTER NOT COVERED BY THIS QUESTIONNAIRE THAT COULD AFFECT YOUR ABILITY TO BE A FAIR AND IMPARTIAL JUROR, EXPLAIN:**

Print

# JUROR QUESTIONNAIRE FOR CIVIL CASES

## Personal Injury Supplement

**FULL NAME:** _____

**2.1 IF YOU OR ANYONE CLOSE TO YOU HAS EVER BEEN INVOLVED IN AN ACCIDENT IN WHICH SOMEONE WAS INJURED, EXPLAIN:**

_____

_____

_____

**2.2 PLACE A CHECK MARK ON THE APPROPRIATE LINE(S) IF YOU OR ANYONE CLOSE TO YOU HAS EVER BEEN EMPLOYED IN ANY CAPACITY BY ANY OF THE FOLLOWING TYPES OF BUSINESSES:**

| YOURSELF | OTHER PERSON | |
|---|---|---|
| _____ | _____ | ANY COURT IN THE STATE OF CALIFORNIA |
| _____ | _____ | ATTORNEY, LAW FIRM, OR LAW OFFICE |
| _____ | _____ | CLAIMS ADJUSTMENT, EVALUATION, REVIEW, SETTLEMENT, OR INVESTIGATION |
| _____ | _____ | ACCIDENT INVESTIGATION OR LAW ENFORCEMENT |
| _____ | _____ | DISABILITY, HEALTH, LIFE, CASUALTY, OR ACCIDENTAL INJURY BENEFITS OR PROGRAMS |
| _____ | _____ | ECONOMICS, ACTUARIAL, OR INVESTMENTS |
| _____ | _____ | HEALTH CARE DOCTOR, NURSING, HOSPITAL, DENTAL, PHYSICAL THERAPY, PHARMACY, OR ANY RELATED FIELD |

**2.3 IF YOU CHECKED ANY LINE IN THE PREVIOUS QUESTION (2.2), PLEASE STATE THE RELATIONSHIP OF THAT PERSON TO YOU, THE TYPE AND DETAILS OF THAT EMPLOYMENT, AND THE YEARS OF THAT EMPLOYMENT:**

_____

_____

_____

**2.4 DO YOU HAVE ANY BELIEFS AGAINST AWARDING DAMAGES FOR PERSONAL INJURY, PAIN, OR SUFFERING?**

☐ YES ☐ NO

IF YES, EXPLAIN:

_____

_____

_____

**2.5 DO YOU OR ANY MEMBERS OF YOUR IMMEDIATE FAMILY OR HOUSEHOLD SEE A DOCTOR OR OTHER MEDICAL PRACTITIONER REGULARLY FOR ANY CONTINUING MEDICAL PROBLEM?** ☐ YES ☐ NO

IF YES, EXPLAIN:

_____

_____

_____

Print

# JUROR QUESTIONNAIRE FOR CIVIL CASES

## Verification

I, _____ , DECLARE UNDER PENALTY OF PERJURY
*(PRINT NAME)*
UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING RESPONSES I HAVE GIVEN ON THIS JUROR QUESTIONNAIRE, AND ON ANY ATTACHED SHEETS, ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

.....
(DATE)

▶ _____
(SIGNATURE)



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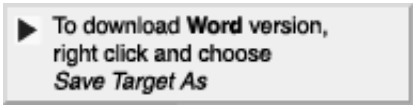
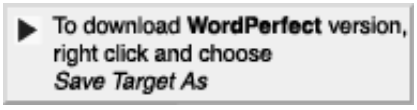
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.82 2. Sample juror questions

## §8.82 2. Sample juror questions




The following are sample questions to be used for a juror questionnaire in a civil case:

1. Are you active in any political organizations or campaigns?

   Yes ___ No ___

2. What do you like to do in your spare time (*e.g.,* participate in sports, watch sports events, read, watch television)?

   _____

3. Would you describe yourself as a leader?

   Infrequently ___ Occasionally ___ Frequently ___

4. What are your occupational goals?

   _____

   _____

5. Do you feel there are flaws in the civil justice system in California?

   Yes, many ___ Some ___ Not many ___ None ___

   If yes, many, or some, please state what they are:

   _____

   _____

6. If you've ever had any personal experience with psychiatrists or psychologists, how did this experience impress you?

   Favorably ___ Unfavorably ___ Does not apply ___

7. Please list all groups or organizations in which you participate or are a member. For example, service clubs, church or church groups, unions or professional organizations, volunteer activities, educational or political groups:

   _____

   _____

   _____

   _____

8. What organizations do you support financially?

   _____

9. What is your political party affiliation?

   Democrat ___ Republican ___ American Independent ___
   Independent ___ Other: _____

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/8 Jury Selection/§8.83 B. Sample jury box chart

## §8.83 B. Sample jury box chart

The following sample jury box chart shows some comments that an attorney might write down after examining prospective jurors in a personal injury action. See §8.47 for discussion of use of jury box chart.

**CAUTION:** The disadvantage of this type of chart is that there may be too much information to write on too little paper. You may want to use a looseleaf binder, with a full page or more allowed for each jury seat.

**JURY BOX CHART**

| 1 | 2 | 3 | 4 | 5 | 6 |
|---|---|---|---|---|---|
| Mother of 4; not working outside home; high school education; doesn't trust lawyers | Insurance defense lawyer; too busy to serve and doesn't want to serve; CHALLENGE | Student studying accounting; age 22 | Prior jury experience; doesn't think jury system can be fair; age 65; CHALLENGE | Retired; lives in Richmond; once brought slip-and-fall suit and lost | Secretary who used to work for big law firm; college graduate; not married |
| 7 | 8 | 9 | 10 | 11 | 12 |
| Has been sued twice in auto accident cases; married, 2 kids; manager of Safeway | Student studying drama at Cal State; lives in Sunset District; no jury service; doesn't want to miss school | Florist; college educated; has never served on jury; lives in Mission District | Divorced; on welfare; suffered serious accident 3 years ago; blames her former employer and doctors; did not sue | Works for Wells Fargo Bank as trainee; single; college educated; been on jury before (criminal case) and voted to convict | Thinks people who sue are gold diggers; hates insurance companies; single; works at Tower Records |

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## §8.84 XI. SELECTED BIBLIOGRAPHY


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- McCormick, Mark. Jury Selection, 2000 Cumulative Supplement (2d ed)
- National Jury Project, Inc. Jurywork: Systematic Techniques (West 1983); Looseleaf, 2006 update
- Starr, V. Hale and Mark McCormick. Jury Selection: An Attorney's Guide to Jury Law and Methods (Little, Brown 1993)
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# 9

# Opening Statement

**Weyman I. Lundquist**

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## §9.1 I. SCOPE OF CHAPTER

This chapter covers a key event in almost every trial: the opening statement. Like a trial itself, the opening statement is a focused exercise requiring a carefully selected theme. It is presented on limited issues so that the trier of fact can understand the case.

The function and importance of the opening statement in a trial, including procedures for cases with multiple parties, are discussed in §§9.2-9.7. Planning the opening statement, developing visual aids, and considering motions in limine and other matters beforehand are discussed in §§9.8-9.15. On delivering the opening statement in a jury trial, see §§9.16-9.34. On delivering the opening statement in a bench trial, see §9.35.

**NOTE:** Before the examination of prospective jurors, the court may permit counsel a mini-opening statement to the jurors. Cal Rules of Ct 2.1034. On mini-opening statements, see §1.18A.

Handling objectionable aspects of the opposing party's opening statement and moving for nonsuit or directed verdict following an opening statement are discussed in §§9.36-9.41. A selected bibliography containing sources of additional reading appears in §9.42.

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## II. DESCRIPTION OF OPENING STATEMENT

### §9.2 A. Purpose and limitations

The opening statement is counsel's opportunity at the beginning of the trial to tell the client's side of the story and outline what will be proved when the evidence is presented during trial. It requires a marshaling of facts in an organized and meaningful way so that the jury understands the dispute giving rise to the trial and its role in resolving that dispute. See *Williams v Goodman* (1963) 214 CA2d 856, 869, 29 CR 877.

Even though the opening statement is not evidence, it prepares the jurors "to follow the evidence and to more readily discern its materiality, force and effect." See *People v Arnold* (1926) 199 C 471, 486, 250 P 168. Counsel should not refer to testimony that will not be received in evidence or inadmissible matters that will prejudice the jury. It is unprofessional conduct to refer to evidence unless there is a good faith and reasonable basis for believing that it will be offered and admitted in evidence. *Hawk v Superior Court* (1974) 42 CA3d 108, 121, 116 CR 713. See *Smith v Covell* (1980) 100 CA3d 947, 958, 161 CR 377. On improper mention of evidence, see §9.22.

Counsel delivering an opening statement should not discuss questions of law. *Williams v Goodman, supra*. In some cases, however, a brief explanation of the law may be needed for the jury to understand the dispute, *e.g.,* if the case is based on violation of a statute. See *De Armas v Dickerman* (1952) 108 CA2d 548, 553, 239 P2d 65 (court had discretion to permit plaintiff's counsel in action for rental overcharges under Housing and Rent Act of 1947 to read excerpts from Act to jury in opening statement). For further discussion, see §9.25.

Argument is not permissible during opening statement. An opening statement has been called an exercise in advocacy that must be accomplished without argument. See *Lafrenz v Stoddard* (1942) 50 CA2d 1, 9, 122 P2d 374. For further discussion, see §9.23.

**PRACTICE TIP:** Although argument is not permitted, experienced counsel use the opening statement to describe the case in a sympathetic light, helping the jurors to understand why they should decide it in the client's favor. The good story teller has an edge. Present the facts in such a manner that there is only one logical conclusion: the one you are advancing. In other words, let the facts argue themselves.

See generally Persuasive Opening Statements & Closing Arguments (Cal CEB 1988). See also 3 Witkin, California Evidence §§23-24 (4th ed 2000).

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## §9.3 B. Importance to trial

The opening statement represents one of the advocate's finest challenges: explaining the facts that constitute the case, without arguing them, in a manner leading to a logical result that the trier of fact can willingly accept. The opening statement is one part of the trial that can be developed and presented virtually any way counsel desires. It should be an interesting and informative story with a trial victory as its objective.

For many experienced trial attorneys, starting to plan the opening statement begins with the client interview. The "story" that makes sense of the facts of the case should not be finally constructed, however, until close to the time of trial. By then most of the evidence is available, the legal theories are current, and counsel has a general sense of what will appeal to the jury. This story should inform, convince, and persuade the jurors. It must be in tune with the times and the audience. For example, if the defendant is a hospital, the national concerns and interests about health care providers should influence counsel's approach during the opening statement.

The opening statement comes at a point in the trial when the judge and jury are receptive and their attention is fresh. They want to know what the case is about, how it fits together, and what will be proved. Because the judge and jury begin to accept or reject the client's cause at this time, the opening statement presents counsel with a unique opportunity to shape their initial impressions of the case. Following the theory of "primacy," some observers believe that jurors form their opinions of the case from what they first hear during the opening statements. The evidence presented at trial merely confirms their original impressions, which is memorialized in their verdict.

Although argument is prohibited, counsel should present the facts in the light most favorable to the client's case. The opening statement can be used to develop a complete picture of the case in the minds of the judge and jury, explain difficult terms that will come up during trial, describe how witness testimony will prove the client's case, and outline what will occur throughout the trial.

In developing your opening statement, take into account known characteristics of citizens in the location where the trial will take place. Include examples from the jurors' daily lives to make the opening statement more understandable, expressive, and interesting. Because of every juror's exposure to mass media, consider discouraging them from basing their expectations of the opening statement and the trial on television dramas.

In addition to creating a favorable atmosphere for the reception of the client's evidence, a clear and concise statement of facts and issues in the opening statement can aid the court in the evidentiary rulings it will be asked to make as the trial proceeds. For example, a full explanation of certain facts can protect against later objections for lack of relevancy because the judge understands how these facts fit into the big picture.

**JUDICIAL PERSPECTIVE:** At the beginning of trial, jurors are overloaded with information (*e.g.,* the basic description of the trial, the names of the attorneys and parties), and their attention span is limited. Every word in an opening statement should thus be carefully considered.

The opening statement also provides counsel with an opportunity to establish credibility with the jurors. If counsel does not appear trustworthy in their eyes, they may doubt the evidence counsel presents at trial.

**PRACTICE TIP:** Be candid with the jury by telling them some of the factual problems in your case. Explain that there will be testimony that could lead to more than one conclusion. Be careful not to make admissions but indicate that there is a logical solution: the one most favorable to your client. Discuss substantial concessions such as liability with your client before trial. Although such concessions may help counsel establish credibility with the jury, they must be carefully weighed to determine their likely effect on minimizing damages.

To maintain the trust established during the opening statement, present evidence during trial that confirms what was outlined to the jury in the opening statement. During closing argument shortly before the jurors retire to deliberate, remind them that the evidence supported all assertions made in the opening statement. On closing argument, see chap 19.

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## III. ORDER OF PRESENTATION

### §9.4 A. Standard procedures

Unless the court for "special reasons" directs otherwise, the plaintiff makes the first opening statement. CCP §§607, 631.7.

A defendant may elect either to make an opening statement immediately after the plaintiff's opening statement or to reserve the right to make an opening statement until after the presentation of the plaintiff's case in chief. See CCP §607. A defendant may also waive the right to make an opening statement altogether, but this step should almost never be taken. See §9.7.

On when a court may find a "special reason" within the meaning of CCP §607 to allow the defendant to open first, see §9.6.

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## §9.5 1. Multiple party litigation

Several considerations must be weighed in determining the sequence of opening statements when there are a number of parties, each represented by separate counsel. If the parties' interests do not conflict, the order may depend on which trial attorney can give the best presentation. When counsel have no preference, statements may be made in the order in which the parties' names appear in the pleadings. The order of opening should be agreed on by counsel; if it is not, the order will be established by the court.

For multiple plaintiffs represented by separate counsel, tactical considerations come into play when one plaintiff's case is stronger than that of the other plaintiffs. Experienced trial counsel usually choose to open with the plaintiff who has the strongest case. Similar tactics apply for multiple defendants with separate counsel. Counsel must determine whether it would be wiser to open with the defendant who has primary liability or with the defendant who has the best defense. Defense counsel must also decide whether some opening statements should be reserved until after presentation of the plaintiff's evidence. See §9.7.

To ensure that the weaker cases of multiple party plaintiffs or defendants do not dilute the stronger ones, counsel with the stronger cases could include something along the following lines in their opening statements:

> I would prefer that you hear my client's case alone, but that is not possible. I want you to consider my client's case in its own right, however, thinking of it as a separate trial entirely different from that of the other parties. As I make my opening statement and closing argument, I will review the evidence that concerns only my client's case. The reason for this is that the evidence presented in the other cases should not influence your judgment of my client's case. I want you to focus on my client's case alone.

If possible, address this problem during the voir dire examination of prospective jurors. During the opening statement, you then need only reaffirm the separate nature of your client's case. On voir dire procedures, see chap 8.

To help jurors understand litigation involving multiple parties or lawsuits with complex issues, some judges permit litigants to deliver ongoing opening statements on what is about to happen at different stages of the trial. For example, in addition to an opening statement at the beginning of trial, a judge may permit a continuation of the opening statement before the parties call their expert witnesses and again before the damages portion of the trial. If ongoing opening statements are permitted, counsel should link the evidence to come with the client's position.

**JUDICIAL PERSPECTIVE:** Judges recognize these continuations of the opening statement as "interim summaries" of the case. Many judges permit these interim summaries and specify an amount of time that counsel may use. A useful technique is to use an interim summary before the presentation of complex matters. Interim summaries are also useful after a break in the trial (*e.g.,* a long weekend).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.6 2. Special situations

## §9.6 2. Special situations

The defense may be allowed to proceed with its opening statement before the plaintiff in certain special situations:

- Under CCP §607, defense counsel may be allowed to open first when the defendant has the burden of proof from the outset, *e.g.,* when all the allegations of a complaint are admitted and the defendant proceeds on its affirmative defenses and cross-complaint. See *Coogan Fin. Corp. v Beatcher* (1932) 120 CA 278, 283, 7 P2d 695.
- Defense counsel normally opens first in an eminent domain proceeding, in which the defendant must present evidence on the issue of compensation first and commence and conclude the argument. See CCP §1260.210(a). Note, however, that under CCP §1260.210(b) neither plaintiff nor defendant has the burden of proof on the issue of compensation except as otherwise provided by statute. On eminent domain generally, see CCP §§1230.010-1273.050. See also Condemnation Practice in California (3d ed Cal CEB 2005).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.7 B. Defendant should not reserve opening statement

## §9.7 B. Defendant should not reserve opening statement

Although defense counsel can reserve the opening statement, deferring it until after the plaintiff's case in chief, it is almost always a poor idea to delay. It is defense counsel's responsibility to ensure that the jurors keep an open mind, and that task is usually best begun at the start of trial.

By making an opening statement directly after the plaintiff's opening statement, defense counsel has a chance to diminish its effect on the jurors. Otherwise, first impressions formed during the plaintiff's opening statement may become reinforced during presentation of the plaintiff's evidence. Jurors are more likely to closely scrutinize the plaintiff's evidence after being warned that the defense will present contradictory evidence. See Walker, *Thibaut & Andreoli, Order of Presentation at Trial*, 82 Yale LJ 216 (1972).

**PRACTICE TIP:** Reserving an opening statement might be appropriate when defense counsel does not want to reveal surprise evidence until after the plaintiff's witnesses have testified. Although modern discovery procedures make such an approach unlikely, they do not rule out the use of surprise evidence that the defense lawyer wishes to conceal at the beginning of trial. Weigh the relative benefits of mentioning such evidence to the jurors or withholding it from them.

Reserved openings might be appropriate in two other situations:

- When by agreement one or more of the defendants in a multiple-party case reserve the opportunity to make an opening statement (see §9.5); or
- When the defense believes that the opening statement may be forgotten in a long, complex trial and that a later presentation will aid the jurors in following the proof.

Most attorneys would agree, however, that counsel should outline the defense position fully and completely at the earliest opportunity. In the interest of surprise, information can still be withheld that counsel does not want to divulge at this early stage.

**JUDICIAL PERSPECTIVE:** Counsel should be cautious about reserving opening statement for a later surprise because this runs the risk of objections to the reserved statement. Counsel should not give up one of the few opportunities to directly address the jurors.

For additional insights on this issue, see Lee, *Opening Statement*, 27 Air Force L Rev 67, 74 (1987).

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## IV. PLANNING OPENING STATEMENT

### §9.8 A. Preparation generally

Counsel should have a thorough grasp of the case before preparing the opening statement. In preparing the opening statement, consider:

- The length of time for the opening statement (see §9.10);
- Whether demonstrative evidence will be used (see §9.11);
- Whether visual aids will be used (see §9.12);
- Whether witnesses should be excluded from the courtroom while the opening statements are made (see §9.13);
- Whether in limine motions concerning the other party's opening statement should be made (see §9.14);
- Whether the opening statement should be transcribed for later use during the trial (see §9.15); and
- How the case can best be presented, bearing in mind that the opening statement must be sufficient to avoid a nonsuit or directed verdict (see §§9.40-9.41).

Learn the judge's ground rules for the opening statement before the trial begins. The opening statement can then be tailored to the time allowed and to any court rulings made about its content. On matters that can be taken up with the judge in chambers conferences before trial, see §§6.2-6.5.

Although an outline or a "key-word list" can help counsel develop an opening statement, both devices should be relied on as little as possible during delivery of the statement. Not everyone can deliver an opening statement without notes, but counsel should try to do so as much as possible. To avoid a mechanical presentation, experienced trial attorneys do not compose a complete opening statement that they might be tempted to memorize before trial or read at trial.

**PRACTICE TIP:** Memorize the first 3 or 4 minutes of the opening statement and refer to an outline for the rest, if necessary. If you feel you need aids, annotate your outline with the significant points you want to cover and place it on the rostrum where you can easily refer to it. Before concluding your opening statement, walk over to the rostrum to review the outline and advise the jury that "there is one more thing to talk about before I sit down" or, if nothing has been omitted, "I think I have covered it all." Then sit down.

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## §9.9 1. Rehearsal techniques

To evaluate the effectiveness of your opening statement, present it to colleagues or acquaintances. Their questions or puzzlement may reveal areas that are insufficient, unclear, or lacking in force. The ability to explain a case simply to a lay person will help counsel to write the opening statement. Videotaping the delivery of the opening statement more than once can also help you evaluate your performance and monitor improvement.

For trials with complex issues, outside experts, focus groups, and mock juries can be used to study all aspects of the opening statement, *e.g.,* language, substance, delivery, style, and dress. With focus groups and mock juries, the effectiveness of different themes for the trial can be tested.

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## §9.10 2. Time limitations

To ensure that you will have sufficient time for the opening statement, advise the court of its approximate length during a chambers conference before trial. Courts usually allocate time for opening statements consistent with the magnitude and complexity of the case. On the court's discretion to fix the length of time for the opening statement, see *Bates v Newman* (1953) 121 CA2d 800, 810, 264 P2d 197.

**JUDICIAL PERSPECTIVE:** However much time is allotted, the opening statement should be as short as possible and contain only what is necessary. Jurors do not like having their time wasted with repetitive or extraneous details. After the jurors have the story of a case, they are adept at filling in the blanks.

**PRACTICE TIP:** Even in complex cases, many experienced trial attorneys limit their opening statements to well under 1 hour because they believe the jury may become bored or unable to absorb information beyond that point. Make the statement long enough to tell your client's story thoroughly but short enough to maintain the jury's attention.

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## B. Developing visual aids

### §9.11 1. Demonstrative or documentary evidence

Presentation of demonstrative or documentary evidence may be an effective tool during the opening statement. Demonstrative evidence includes graphic devices (*e.g.,* charts, graphs, maps, pictures, blow-ups of documents, and models).

As long as it is brief, documentary evidence may be read during the opening statement.

The court has discretion to permit demonstrative or documentary evidence to be presented during an opening statement. See, *e.g., People v Wash* (1993) 6 C4th 215, 24 CR2d 421 (electrophoretic evidence, crime scene photographs, autopsy slides); *People v Fauber* (1992) 2 C4th 792, 826, 9 CR2d 24 (prosecution poster consisting of enlargement of transcript of preliminary hearing testimony of party granted immunity). A court is unlikely to permit the use of such evidence during the opening statement, however, if there is any question of its ultimate admissibility.

**PRACTICE TIP:** Some courts prohibit the use of graphic displays during the opening statement except under certain circumstances. See, *e.g.,* Los Angeles Ct R 8.40 (no chart, graph, map, picture, model, video, or other graphic device may be used unless by stipulation of counsel or by prior leave of court, or unless marked as an exhibit and received in evidence).

To avoid an objection interrupting presentation of demonstrative or documentary exhibits during the opening statement, counsel should try to obtain the opposing party's stipulation beforehand. If there is a dispute, request preliminary rulings from the judge. On motions in limine generally, see chap 7.

To ensure that the court has no objection, it is courteous to advise the judge of the demonstrative or documentary evidence that you want to present. Counsel need not seek the judge's permission, however, to allude to demonstrative or documentary evidence that will be offered later in the trial. See §§9.2, 9.19.

**PRACTICE TIP:** Do not use demonstrative and documentary exhibits during the opening statement unless the case cannot be described without them. Ask yourself whether showing an exhibit during the opening statement could destroy a dramatic moment when it is later revealed during trial. It may be better to arouse the jurors' curiosity about an exhibit by alluding to it rather than showing it during the opening statement.

For detailed discussion of documentary and demonstrative evidence, see chap 13.

**JUDICIAL PERSPECTIVE:** Studies show that visual aids improve the jury's comprehension of the case. If visual aids are available, they should be used in opening statements. All exhibits should be cleared before the trial starts to prevent objections and disruptions in front of the jury. If counsel uses an exhibit only for the opening statement, counsel should inform the jurors that the exhibit is being used only for demonstrative purposes.

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### §9.12 2. Blackboard or pad

Some counsel use a blackboard or a pad with large flip sheets during the opening statement to help outline critical issues, list witnesses, and explain terminology.

**PRACTICE TIP:** Be sure local court rules or policies permit use of blackboards or pads during opening statement. See, *e.g.,* Los Angeles Ct R 8.40 (counsel's use of blackboard or paper for illustrative purposes during opening statement must receive prior court approval).

Some attorneys try to avoid writing on a blackboard or pad during the opening statement, believing that it will detract from what is being said. If a list or other visual aid will be necessary during opening statement, counsel may prepare one before trial presenting various aspects of the case, *e.g.,* names of parties and witnesses, issues, and technical terms. Counsel should clear its use with other counsel and the judge at a pretrial chambers conference to avoid the raising of objections during the opening statement. See, *e.g.,* Los Angeles Ct R 8.40.

**EXAMPLE:** A plaintiff's attorney in a personal injury case can divide a blackboard, pad, flip chart, or computer graphics chart into three sections. The first section outlines the names of lay witnesses and the important facts involved in their anticipated testimony. The second lists the names of medical witnesses and the salient aspects of their testimony. The third is reserved for special and general damages, including economic damages (*i.e.,* out-of-pocket expenses; see CC §1431.2(b)(1)), the elements of noneconomic damages (*e.g.,* pain and suffering, mental anguish; see CC §1431.2(b)(2)), and the plaintiff's life expectancy. The injuries suffered by the plaintiff may also be included in the third section, along with the amount of the verdict that the jury will be asked to return. Alternatively, counsel may wish to explain that the noneconomic damages will be discussed later in the trial and that these sums have already been computed and are reasonable given the plaintiff's injuries and life expectancy. On discussing damages in the opening statement, see §9.33.

Writing on a paper pad may be more practicable than using a blackboard. If opposing counsel erases what was written on a blackboard, counsel may have to re-create it. In addition, an illustration on paper can be easily reexamined if an issue is raised about it. Consider, too, how a computer-assisted graphics outline can be used in an opening statement. On developing computer-assisted exhibits, see §§13.107-13.108.

**JUDICIAL PERSPECTIVE:** Counsel should bring his or her own supplies. Relying on court supplies is both bad form and bad planning because the court may not have the materials. In addition, counsel should consider isolating key exhibits in juror notebooks. Providing jurors with their own copies of key exhibits is a powerful tool. Such exhibits should be restricted to no more than five pieces of paper per side. Anything larger risks having jurors disregard them.

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### §9.13 C. Moving to exclude witnesses

Counsel should decide whether the presence of adverse witnesses in the courtroom during the opening statements could affect their testimony. Even witnesses who are not particularly astute may modify their testimony in response to something heard during the opening statements. They will also be better prepared for cross-examination.

The court may exclude from the courtroom any witness not under examination at that time to prevent the witness from hearing the testimony of other witnesses. Evid C §777. A party, however, cannot be excluded from the courtroom under this section. While a party normally has the right to be present in the courtroom during trial, that right is not absolute. See, *e.g., Province v Center for Women's Health & Family Birth* (1993) 20 CA4th 1673, 1685, 25 CR2d 667 (disfigured plaintiff excluded during liability phase of trial). When a party is not a natural person, an officer or employee designated by the party's attorney is entitled to be present. Evid C §777(b)-(c).

A motion to exclude witnesses from the courtroom during the opening statements should be made during the chambers conference before trial so that delivery of the statements is not interrupted. As a practical matter, if several witnesses will be excluded, it may be necessary to post a "witnesses excluded" sign on the courtroom door. For further discussion of excluding witnesses, see §11.27.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.14 D. Using motions in limine

### §9.14 D. Using motions in limine

In limine motions made before trial can be used to limit matters that opposing counsel may explore during the opening statement.

**EXAMPLE:** If opposing counsel is likely to mention evidence vulnerable to an Evid C §352 objection (*i.e.,* probative value of evidence is outweighed by being unduly time-consuming, prejudicial, confusing, or misleading; see §10.16), a motion in limine can be made to bar opposing counsel from introducing the evidence and referring to it at any time during the trial.

**JUDICIAL PERSPECTIVE:** Motions in limine assist the uninterrupted presentation of a case and avoid objections to opening statements. Objections in the middle of an opening statement suggest to jurors that either the issue is not very critical or counsel lacks preparation and experience. In addition, objections presented in advance will warrant more thoughtful consideration and greater credibility from the judge.

Similarly, such a motion can be made to limit what might be said during the opening statement when punitive damages are involved. See CC §3295(a). See §9.33.

A motion in limine may also be used to educate the judge on difficult legal or factual issues. In these circumstances, counsel's goal may be to obtain a "nonruling" in which the court agrees to rule during trial but in the interim will prohibit reference to the questioned evidence during the opening statement.

**CAUTION:** Check local rules on motions in limine. They may have to be filed in writing a set number of days before trial. See, *e.g.*, Los Angeles Ct R 7.9(h). If the judge will not give a written ruling to a written motion in limine, or if the motion can be made orally, a court reporter should be present to record the motion and ruling to protect the record in the event of an appeal.

On motions in limine generally, see chap 7.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.15 E. Recording opening statement

## §9.15 E. Recording opening statement

Counsel should make certain that the opening statement will be recorded by the court reporter. To ensure that a transcript is available for use at trial, special arrangements must usually be made with the court reporter.

In some limited civil cases (see §23.1), no reporter is furnished, and counsel may be required to make arrangements for one well before trial and pay a daily rate. On requesting a court reporter, see §24.9.

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## V. DELIVERING OPENING STATEMENT TO JURY

### A. Introductory remarks

### §9.16 1. Explaining role of opening statement

Counsel may wish to begin the opening statement by defining it as an outline of the case that the jury can follow to understand the evidence to be presented during trial. Depending on what the trial judge has told the jury about the opening statement, counsel might state:

> Ladies and gentlemen of the jury, this is my first opportunity to talk directly to you about my client's case. You have been selected through the voir dire process, and the judge and the lawyers are satisfied that you can consider this case with an open mind. In this opening statement, I am going to tell you what the case is about from my client's point of view. What I say here will not be evidence, but I will outline what the witnesses will say and what the evidence will be from other sources so that you can understand and follow everything that is presented during the trial.

Most experienced attorneys keep this portion of the opening statement brief and avoid lengthy or involved introductions. The judge can discuss issues about courtroom procedures. Counsel may also wish to explain the jury's civic role in resolving disputes and in deciding this case in particular.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.17 2. Outlining order of trial

## §9.17 2. Outlining order of trial

Because a trial is often a new experience for jurors, some attorneys briefly outline the order of trial if the judge or opposing counsel has not already done this. A brief explanation may help the jurors understand the trial process and build credibility with them. Counsel might state:

> After the attorneys present their opening statements, evidence will be presented that you will consider, weigh, and evaluate. Following this, the attorneys will present their closing arguments, during which I will discuss the conclusions that follow from the evidence and how the law relates to the facts of this case. Then the judge will explain to you the law that applies to the facts in this case, and it will be time for you to deliberate among yourselves. Your responsibility as jurors is to determine the facts of the case and which party's conclusions make the most sense. With this explanation of how a trial progresses, let me now tell you what this case is about.

To prevent the jury from attributing objectivity to the attorney who makes this explanation, counsel for either side may request that the judge outline the order of trial before the opening statements.

**JUDICIAL PERSPECTIVE:** Spending too much time explaining the purpose of the opening statement and the trial process can be patronizing to the jury. The judge should outline the stages of trial so counsel does not have to do this. The judge can use an introductory instruction to outline the progress of the trial and the housekeeping details. See CACI 100-101. If the judge does not want to read the entire instruction, the points can be addressed less formally. Counsel should also be aware of the information already provided to jurors during the summons and orientation procedures. See §9.19.

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## §9.18 B. Form of presentation

It is usually advisable to present the opening statement in narrative form by telling the story of the case from the client's point of view. On establishing a case theme, see §9.26. Decide whether a chronological or some other logical manner of presenting of the facts will be meaningful to the jurors. It is often better to avoid presenting the facts in the order in which the evidence will be introduced during trial because the testimony of witnesses, particularly experts, may not occur in an ideal order, and several witnesses may give testimony on different aspects of the same issue. What is critical is that the opening explanation of the case to come be made in a manner that makes it intelligible to the jurors. On planning the opening statement, see §§9.8-9.15.

State the facts in a clear and positive fashion. For example, it is better to say "The evidence will show...." than "I believe the evidence will show...." Tell what the facts will be rather than simply referring to them in a conclusory way. Use short sentences containing easily understood language. Avoid technical language, if possible, or explain it so that its meaning can be easily understood by the jurors. A visual aid may help. See §§9.11-9.12.

Avoid repetition. Repeated use of a phrase such as "What I say is not evidence, it only describes the evidence" interrupts the narrative flow of the opening statement and weakens it. As an alternative, ask the judge to explain the attorney's role in describing (but not presenting) the evidence during the opening statement. If the judge does this, the attorneys can dispense with such remarks. On introductory remarks, see §§9.16-9.17.

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## §9.19 1. Demeanor and style

A personable, natural style of talking to the jury will make your opening statement more credible. Counsel's manner, dress, voice intonation, gesture, and stance should be appropriate to the nature of the case, the party being represented, and the county in which the case is being heard. These aspects of delivery should not appear to be contrived, but they must be planned before trial.

Keep in mind that times change, as do attorneys. A young attorney is likely to present a different opening statement than an older attorney who has tried many cases. The objective for each should be the same, however: persuading the jury, without arguing, that the client's side of the case is believable and fair.

Because jurors are more apt to trust attorneys who are natural and at ease, counsel should not appear to be patronizing, self-centered, or arrogant. Avoid such phrases as "It will be difficult for you to understand the technical aspects," "Mark my words, my evidence will establish," or "I am going to make certain representations it will be difficult for you to doubt." Do not jeopardize your credibility by immodestly "promising" or "guaranteeing" that the evidence will prove certain facts.

Rather than lecture to the jury, deliver the opening statement in a confident, relaxed, friendly, conversational, and interesting manner. Emphasize important points by varying your tone of delivery, making subtle gestures, and moving slightly closer to the jury box.

**PRACTICE TIP:** Investigate local practice and what the trial judge requires or permits. Some judges expect counsel to obtain the court's permission to speak away from a lectern or counsel table or to speak while seated. Although most courts permit some latitude of movement, many attorneys stay some distance from the jury throughout the opening statement, moving closer to them only as the trial progresses. By closing argument, the jurors' turf will be less sacrosanct, and counsel may move toward them with less caution.

On techniques for rehearsing the opening statement beforehand, see §9.9.

**JUDICIAL PERSPECTIVE:** Different judges prefer different levels of formality. The best source for finding out what level of formality a judge prefers, apart from colleagues, are the bailiff or court attendant. In addition, counsel should ensure that the opening statement is in his or her own style. Counsel should avoid legalese.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.20 2. Personalizing attorney and client

### §9.20 2. Personalizing attorney and client

Reintroduce yourself and your client to the jury. If the client is an entity, an individual associated with the entity (preferably an important witness in the case) should be in court during presentation of the opening statement and stand up while being introduced to the jury.

**PRACTICE TIP:** Consider the best way to identify the client during the opening statement and later during trial. A young child may be described as an infant as well as by name. An individual adult may be referred to by name. A corporate or an institutional client may be alluded to as "we" or "us." Counsel may wish to describe an adverse party less personally, *e.g.,* as "the plaintiff," "the defendant," or "Defendant XYZ Corporation."

**JUDICIAL PERSPECTIVE:** Counsel should stand when jurors enter and exit the courtroom. Jurors notice this sign of respect. Counsel should not use first names or nicknames for parties or witnesses because it appears disrespectful and diminishes the formal nature of the proceedings. Avoid mispronouncing names, because jurors may assume that it is deliberate.

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## §9.21 C. What to avoid

An attorney trying to appear sincere and trustworthy does not want to be admonished by the court for improper argument or other improper matters in the opening statement. Even mild judicial commentary can adversely affect the jury's impression of counsel.

For detailed discussion of what constitutes attorney misconduct (including remedies such as contempt sanctions and moving for mistrial), see chap 16. On procedures for objecting to opposing counsel's improprieties during opening statement, see §§9.36-9.41.

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### §9.22 1. Improper mention of evidence

Confine your remarks during the opening statement to the evidence that you believe "in good faith will be available and admissible." *Hawk v Superior Court* (1974) 42 CA3d 108, 121, 116 CR 713. The opening statement itself is not evidence. See §9.2.

It is misconduct to allude to evidence in the opening statement unless there is "a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence." 42 CA3d at 121. Never mention testimony that you know will not be received in evidence and that will prejudice the jury. See *Smith v Covell* (1980) 100 CA3d 947, 957, 161 CR 377.

An unintentional misstatement of fact may be the basis for the granting of a mistrial or the reversal of a decision. *People v Bolton* (1979) 23 C3d 208, 213, 152 CR 141 (closing argument case). Although the misconduct need not be intentional, the conduct must at least be negligent in light of some legal duty of care. *Matthew Zaheri Corp. v New Motor Vehicle Bd.* (1997) 55 CA4th 1305, 1318 n10, 64 CR2d 705. See also *People v Faught* (1981) 124 CA3d 848, 859, 177 CR 637 (restrained summary of what prosecutor thought evidence would show held not to constitute misconduct, even though detailed evidence was not introduced at trial, because court and counsel agreed to omit detail and limit evidence).

**JUDICIAL PERSPECTIVE:** It is improper for an attorney to state what the other side will say. If counsel is concerned that opposing counsel might do this, he or she should bring it up with the court in advance.

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### §9.23 2. Argument

It is impermissible to argue in the opening statement. See §9.2. A simple rule of thumb is that a statement is proper and not argument if a witness can testify to what is being said. It is important to state facts in a persuasive manner, however.

Counsel should not include inflammatory statements "calculated to blind the jury to the succeeding lack of proof." See *Lafrenz v Stoddard* (1942) 50 CA2d 1, 9, 122 P2d 374. See §9.22. Similarly, appeals to sympathy or prejudice (*e.g.,* comments about the litigants' wealth or poverty if wealth or poverty is not relevant to an issue in the case) are improper. On impropriety of appeals to sympathy or prejudice during trial generally, see §16.73.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.24 3. Overstatement

## §9.24 3. Overstatement

To establish and maintain your credibility, avoid overstating or misstating the facts that will be proved or making promises you cannot keep. Convincing a jury that counsel's version of the case is correct becomes significantly more difficult for an attorney without credibility.

Be alert to overstatement or misstatement by opposing counsel. If facts stated during the opposition's opening statement are not proved during the trial, be sure to point this out to the jury during closing argument. If possible, obtain a transcript of the opposing party's opening statement. See §9.15.

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### §9.25 4. References to law

The opening statement should not discuss the law. See *Williams v Goodman* (1963) 214 CA2d 856, 869, 29 CR 877 (trial court did not err in restricting plaintiff's attempt to discuss the law during opening statement).

A brief reference to the law may be permitted, however, when the jurors will not otherwise understand the significance of the facts counsel intends to prove. Under such circumstances (*e.g.,* a cause of action is founded on a statutory violation), a court might permit counsel to briefly refer to the law in the opening statement. See *De Armas v Dickerman* (1952) 108 CA2d 548, 553, 239 P2d 65 (court had discretion to permit plaintiff's counsel in action for rental overcharges under Housing and Rent Act of 1947 to read excerpts from Act to jury in opening statement).

**PRACTICE TIP:** If you intend to refer to the law in the opening statement, be sure to clear the matter with the judge during the chambers conference before trial. Otherwise, an objection to the reference might be sustained.

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### §9.26 D. Establishing case theme

To provide jurors with a framework to assimilate the evidence, counsel may want to establish a case theme in the opening statement. If a theme is introduced in the opening statement, it should be maintained throughout the trial.

A case theme may be easy for plaintiff's counsel to create. In a breach of contract case, for instance, counsel might state: "This is a case about a broken promise and the people who were hurt by that broken promise." In a personal injury case, the following theme may be appropriate: "This is a case about a boy who will never walk again and how, through no fault of his own, the gift of a normal life and a bright future was taken from him forever."

Creating a case theme may be more difficult for the defense, but counsel should be ready to respond to expected prosecution themes by explaining that, *e.g.,* "there are always two sides to every story" or "an injured person may be responsible for his injuries if he violates safety rules and common sense."

On creating a vivid case theme to capture the jurors' imagination, see Vinson, *Psychological Anchors: Influencing the Jury*, 8 Litig 20 (Winter 1982).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/ E. Stating facts and issues/§9.27 1. Plaintiff's perspective

## E. Stating facts and issues

### §9.27 1. Plaintiff's perspective

Plaintiff's counsel should use the opening statement to create a favorable climate for introduction of the plaintiff's evidence. Describe the facts in terms of the issues of the case so that the jurors will understand the significance of each piece of evidence to be presented during trial. The facts should logically fit into the plaintiff's theory of recovery and suggest that the plaintiff's position is the correct one.

The facts mentioned in the opening statement must be sufficient to constitute a cause of action; otherwise the court may grant a motion for nonsuit at the conclusion of counsel's opening statement. See, *e.g., Addison v Susanville Lumber, Inc.* (1975) 47 CA3d 394, 405, 120 CR 737 (nonsuit granted after opening statement; plaintiff's motion to enlarge opening statement denied). On nonsuits and directed verdicts following opening statement, see §§9.40-9.41. Including too much detail in the opening statement, however, may confuse or bore the jurors. Avoid a tedious recitation of the facts.

**PRACTICE TIP:** Identify witnesses who will be called and briefly summarize their expected testimony. To help jurors quickly understand the significance of exhibits, identify any that will be introduced into evidence later. On trial exhibits generally, see chap 13.

Present the information in a logical manner to prevent the jurors from becoming confused when testimony is received out of order during trial. Witnesses are often not available at ideal times. Even when the appearance of witnesses can be arranged in a logical order, the significance of foundational testimony will not be apparent without explanation during the opening statement. If evidence will be introduced out of order during trial, counsel might say:

> To give you an overall picture of what we will prove, I am going to explain the facts to you as they happened rather than as they will be presented to you. We would like to present our evidence during trial in this same order, but this is not possible because the witnesses have not been able to arrange their schedules to accommodate this.

In referring to foundational statistical information, counsel might state:

> We are going to present accounting testimony and economic proof to establish the damage done to my client through the loss of profits. To reach the economic analysis of loss, thousands of documents had to be reviewed, and we will describe to you how this was done. This background statistical information is the foundation for other important evidence to be presented. Following this statistical information, Dr. Saunders, an economist from the University of California, will tell us what lost profits are and how they should be calculated.

Counsel should draw attention to important evidence and at the same time build credibility with the jury. For example, counsel might state:

> After the first phase of the trial, during which we will develop facts to establish our right to recover, we will prove my client's money losses. To do this, we will first introduce business records that in and of themselves are not very interesting. Dr. Ficht, of Columbia University, will use these records to demonstrate how my client has been damaged to the tune of over two million dollars in lost profits because of the actions of defendant.

By explaining the role that the business records will play in the trial, counsel heightens the jurors' interest in the evidence to come. By admitting that some of the evidence is not very interesting, counsel builds credibility with the jurors.

When one witness's testimony is essential to proving an important issue, counsel might want to whet the jurors' appetite by stating:

> I have discussed the general outline of our case. I have described the testimony of the witnesses who will

take the stand. I hope the trial will become more lively as the witnesses begin to testify. I want to tell you about one special witness whose testimony will be of great importance. That witness is Dr. Midgely. Let me tell you about her. She teaches at the University of Southern California. She has written many articles on the subject I will be asking her about during her testimony. She has testified for other juries a number of times. She is a member of many honorary societies, including the American Medical Association and the Society of Osteopathic Physicians. We expect her to be here on Wednesday afternoon to explain to us….

Although it is sometimes a good idea to point out aspects of the plaintiff's case that refute anticipated defenses, confine your remarks to factual aspects of the plaintiff's evidence that defense counsel is likely to address. Referring to defenses that may not be made might confuse the jury and reveal weaknesses to your opponent. On disclosing weaknesses, see §9.30.

An effective way to anticipate defenses is to demonstrate the trustworthiness of the plaintiff's evidence on key disputed points. It almost always helps to describe the impressive credentials of the principal witnesses, as in the following:

As our expert economist, Dr. Brandon will be called to testify. A professor at Stanford University, she has testified many times before. She will testify on the value of my client's business and how it has been diminished in value by the State's condemning the property it was located on and requiring it to relocate. Her approach to valuation is the same as that in the principal texts written on this subject. The State of California uses this approach in its valuations. This approach is taught in virtually all American colleges and universities.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.28 2. Defendant's perspective

### §9.28 2. Defendant's perspective

In addition to the concerns shared by plaintiff's counsel (see §9.27), defense counsel must try to neutralize any harmful effects made by the plaintiff's opening statement and halt any momentum achieved on the plaintiff's behalf. This is why most defense counsel choose to present their opening statement immediately following the plaintiff's rather than reserving it. See §9.7.

The defense opening statement should create skepticism about the plaintiff's case and develop an affirmative theme of its own. Defense counsel may want to remind the jurors that the opening statement is not evidence and then emphasize that there are two sides to every story. For example, counsel might say:

> Ladies and gentlemen of the jury: Plaintiff's counsel has told you the purpose of an attorney's opening statement, which is to explain how she will seek to prove her client's case. She has told you what she thinks their evidence will establish. However, you are in court to hear both sides of the matter being contested.
>
> When you were chosen from the jury panel, you promised to be fair and remain open-minded during the trial and during deliberations in the jury room when you reach your verdict. Let me now ask you to use that open-mindedness while I review with you what happened and how it happened. With all the facts before you, you will be able to see what really occurred. Here is what our facts will show.

As with the plaintiff's opening statement, defense counsel should state the facts that will be proved in the light most favorable to the defendant's case. For example, defense counsel in a personal injury case might state after a few introductory remarks:

> You are fortunate that the accident was observed by several people. We will call one of them, Police Officer Grant, who was in front of his home and will tell us what he observed: that the plaintiff approached the stop sign at the intersection of Main and Pine, slowed down very slightly but did not stop. He then drove directly in front of the truck driven by Frederick Blomberg, the 53-year-old employee of the defendant.

When the defendant's case is based in large part on cross-examination of the plaintiff's witnesses, it is a good idea to indicate this in the opening statement. For example, defense counsel might say:

> There are few defense witnesses in this case. One reason is that the plaintiff's witnesses can testify to the facts that prove our side of the case. I will ask the plaintiff's witnesses many questions so that you will hear all of these facts come into evidence.

This approach is appropriate when discovery has clarified what the defense can establish during trial. Be careful, however, not to give away cross-examination strategy. In fact, defense counsel may want to alert plaintiff's counsel to some areas of cross-examination but not to others.

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## F. Handling particular problems

### §9.29 1. Evidence of uncertain admissibility

Counsel who is unsure whether certain evidence will be admissible should consider a motion in limine. To protect the record, a court reporter should be present to record counsel's arguments and the court's ruling. Check local court rules for requirements that apply to motions in limine, *e.g.,* whether written motions are required, when they must be filed. On motions in limine generally, see chap 7.

If the judge rules that the evidence is admissible, it can be incorporated into the opening statement. If the judge reserves ruling on the point and the evidence is not critical to the case, it is better not to mention the evidence during the opening statement, because if the judge ultimately rules that the evidence mentioned by counsel during the opening statement is inadmissible, opposing counsel may point out in closing argument counsel's failure of proof.

The risk of this approach, however, is that requesting a pretrial ruling on admissibility may bar the use of that evidence during trial. A judge who is not fully aware of the facts and tends to be restrictive in pretrial rulings may limit what counsel can go into during the opening statement. In some circumstances, it is better to avoid raising evidentiary issues beforehand and use the opening statement itself to explain the relevance of the evidence to come to the judge and to the jury.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.30 2. Disclosing weaknesses; avoid admissions

### §9.30 2. Disclosing weaknesses; avoid admissions

All cases that are tried have some weaknesses. When possible, it is better to be the first person to disclose the weaknesses that the opposing party is likely to dwell on. Jurors are usually impressed when attorneys face up to the weaknesses of their own case before their opponents point them out. Explaining any mitigating factors can also lessen the impact of damaging evidence.

**JUDICIAL PERSPECTIVE:** Credibility is built by projecting a sense of character and integrity, which includes conceding undisputed points and presenting the flaws of the case. Counsel can stipulate to any undisputed evidence and get credit for being reasonable and straightforward.

When disclosing weaknesses, however, take care not to make inadvertent admissions. To make an admission in the opening statement is to invite opposing counsel to seize it during closing argument as a point you were forced to concede. Although an opening statement is not evidence, counsel's unequivocal admission of fact can constitute a binding admission. See *Miller v Johnston* (1969) 270 CA2d 289, 297, 75 CR 699. On judicial admissions made on the record, see §§14.43-14.46.

**PRACTICE TIP:** Note any admissions made during your opponent's opening statement. It may be worthwhile to obtain an early transcript of the opening statement and review it for any admissions or for the exact wording of the admission made. See §9.15. Emphasize the admission your opponent made during your closing argument to strengthen your client's side of the story.

Although a matter that has been admitted need no longer be proved or disproved, do not rely on an opposing counsel's admission in the opening statement, without more, to dispense with the need for evidence on the point. It may be worthwhile to consider asking the court (outside the jury's presence) to preinstruct the jury that the admitted matter is no longer in dispute and for purposes of the trial must be accepted as true. See §14.45. However, it is less risky to go ahead and present evidence to the trier of fact. The trial court or a reviewing court may hold that no admission occurred, that the admission was not binding, or that the admission did not waive the party's right to appeal the point. See, *e.g., Irwin v Pacific Southwest Airlines* (1982) 133 CA3d 709, 714, 184 CR 228 (admission lacked "gravity of a complete relinquishment of rights" under circumstances of case). Note that the facts in *Irwin* involved admission of liability in the opening statement of the damages phase of trial, which the reviewing court held did not preclude the defendant from appealing issues pertaining to liability found earlier on summary judgment.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.31 3. Reading from pleadings

## §9.31 3. Reading from pleadings

Counsel should not read from the pleadings during the opening statement. The language is usually stilted and formal in tone. If the facts alleged in the complaint or answer are important, it is better to simply state what the party said.

Alternatively, an enlargement of the sentence or paragraph could be projected onto a screen for the jury to view as you explain the significance of the facts alleged in the pleading. Check with the court before trial on using visual aids. Keep in mind, however, that your opponent may move to amend the pleadings, even orally, during the trial.

**Further research:** Amending the pleadings before or during trial is discussed in §§6.87-6.93 and 18.103-18.123. On developing visual aids for the opening statement, see §§9.11-9.12; on trial exhibits generally, see chap 13.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.32 4. Explaining special situations

## §9.32 4. Explaining special situations

Inform the jury of any matters that will arise during the trial that may not be familiar to them. For example, if the testimony of a witness will be elicited through an interpreter, explain this to the jury during the opening statement. On interpreters and translators, see §§11.28-11.43.

If testimony will be introduced through depositions and read into the record, explain what depositions are, how the deposition was taken, why deposition testimony is being used (*e.g.,* the witness is unavailable), and how deposition testimony will be introduced during the trial.

When a guardian ad litem has been appointed to represent a minor or an incompetent person under CCP §372, explain the process and the reason for it to the jurors during the opening statement. See California Civil Procedure Before Trial, chap 9 (4th ed Cal CEB 2004).

**JUDICIAL PERSPECTIVE:** Counsel should inquire during voir dire if anyone speaks the language to be interpreted. If any special terminology is used, it should be clearly defined, and if it is important, it should be included in a glossary for each juror. Although counsel or experts might define the uncommon term, the definition will soon be lost to the jurors. In addition, counsel should consider asking the judge to explain to the jurors in advance any anticipated special situations or delays.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.33 G. Discussing damages

### §9.33 G. Discussing damages

Trial attorneys differ on whether damages should be discussed during the opening statement. Some attorneys believe that the jury should know how much is at issue from the outset. Others believe that only facts should be included in the opening statement, to set the stage for a detailed discussion of damages during closing argument.

For example, many plaintiffs' personal injury attorneys prefer not to specify a specific amount for damages in the opening statement because:

- The jurors might be alienated by a seemingly large dollar amount stated at the beginning of trial before they have heard the evidence that justifies the size of the reward that plaintiff's counsel is requesting;
- The opening statement may impair counsel's ability to effectively state a different amount later in the trial if warranted by the evidence that comes in;
- The proof may not live up to the jurors' expectations that arose when they heard the damages amount specified in the opening statement; or
- Defense counsel may be able to use the stated amount to portray the plaintiff as overreaching.

Whether or not plaintiff's counsel decides to specify the exact amount of damages at issue in the trial, the opening statement should provide enough information to indicate the level of damages suffered by the plaintiff. On handling damages in closing argument, see §19.33.

When punitive damages are claimed, defense counsel should move for a protective order to bar the plaintiff's attorney from introducing evidence of the defendant's profits or financial condition until the plaintiff establishes a prima facie case of liability for damages under CC §3294. See CC §3295(b). Defense counsel should also consider moving to exclude any evidence of the defendant's profits or financial condition until the trier of fact returns a verdict for the plaintiff awarding actual damages and finds that the defendant is guilty of fraud, malice, or oppression under CC §3294. See CC §3295(d). Defense counsel should request that references to specific amounts sought in punitive damages be excluded. CC §3295(e). On handling the issue of punitive damages as a motion in limine, see §9.14.

**JUDICIAL PERSPECTIVE:** It is common for plaintiff's counsel to not mention the amount of damages, only to have the defense mention a large figure to shock the jury and create a negative tone for the plaintiff. Counsel should carefully consider this in the opening statement.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.34 H. Concluding opening statement

## §9.34 H. Concluding opening statement

Trial attorneys usually conclude their opening statements by indicating the verdict they desire for their clients. For example, a plaintiff's attorney could say:

> This concludes the outline of my client's case. I am sure you will keep an open mind until all the evidence is in. When you have heard all the evidence, I will ask that you find for my client. Thank you for the interest with which you have followed my remarks.

Similarly, defense counsel might state:

> I have taken somewhat less time to explain the case than my opponent. Ours is a simple story with a few witnesses who will explain what happened so that we can all understand it, just as it happened. After all the evidence is in, my opponent and I will both review the evidence with you, and I will ask you to return a verdict in favor of the defendant. I have enjoyed the opportunity to explain our case to you. Thank you.

**JUDICIAL PERSPECTIVE:** The best closings are short: "Thank you" is all counsel needs to say.

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## §9.35 VI. OPENING STATEMENT IN BENCH TRIAL

It is good practice to give an opening statement in a bench trial if the judge permits it. In spite of legal training and experience, a judge is not immune from forming an impression about a case, and hearing an opening statement may favorably impress the judge with the justness of your client's cause.

An opening statement that raises the issues and outlines the facts that you expect to prove during the trial can assist the judge. A trial judge who has not been assigned the case until immediately before the trial may not be completely familiar with all the issues and the positions of the various parties. A coherent opening statement may clarify certain issues even for a judge who has managed the case from the beginning.

In addition to being presented in a logical and organized manner, the facts should be sufficiently detailed to withstand a motion for nonsuit. See §9.40.

Although many of the same points that apply in a jury trial are also useful in a bench trial, an opening statement for the judge alone should be structured somewhat differently. Counsel need not be concerned with an introduction and other elementary aspects of the opening statement. Mentioning evidence that may not be admitted is also not as much of a concern. For discussion of bench trials generally, see chap 24.

**JUDICIAL PERSPECTIVE:** Although counsel should be prepared to provide a brief opening statement, counsel should ask the judge if he or she would like to hear one before proceeding.

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## VII. PROCEDURES FOR OPPOSING PARTY

### A. Making objections

### §9.36 1. Right to object during opposing party's opening statement

Counsel has an absolute right to interrupt and object to an improper argument made during an opponent's opening statement. *Smith v Covell* (1980) 100 CA3d 947, 957, 161 CR 377. See *Mudrick v Market St. Ry.* (1938) 11 C2d 724, 737, 81 P2d 950.

**EXAMPLE:** It is improper during opening statement for a plaintiff's attorney to comment on the plaintiff's poverty and the defendant's wealth, or to refer to a substance manufactured by the defendant as cancer-producing when cancer is not one of the injuries in question.

Failure to make a timely objection and to request an admonition when opposing counsel has committed misconduct usually precludes counsel from raising the point as error on appeal. See *Neumann v Bishop* (1976) 59 CA3d 451, 477, 130 CR 786. On waiver, see §15.24. After the court admonishes offending counsel, it gives the jury a cautionary instruction to disregard the improper remarks. If the damage caused by the misconduct is irreversible and would prevent the client from receiving a fair trial, counsel should also move for a mistrial. See §§18.82-18.102. On making trial objections and protecting the record, see chap 15.

**JUDICIAL PERSPECTIVE:** The most prepared and effective attorneys anticipate areas of potential damage and obtain rulings in advance, or at least provide the judge with advance warning that an issue of contention is pending. Courts have the ability to respond more thoughtfully to objections and concerns presented in advance of the commencement of trial.

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### §9.37 2. State specific grounds for objection

The grounds for the objection must be specified. See Evid C §353. When an improper statement made during the opening statement is highly prejudicial, a motion for mistrial may be appropriate. See §§9.36, 16.95.

Some of the possible grounds for objection include an attorney's:

- Engaging in argument. See *Lafrenz v Stoddard* (1942) 50 CA2d 1, 7, 122 P2d 374; §9.23.
- Referring to irrelevant matter. See Evid C §350; §10.13.
- Insinuating as facts matters that the attorney knows are not facts and that could not be put into evidence. See *Smith v Covell* (1980) 100 CA3d 947, 957, 161 CR 377; §16.72.
- Referring to inadmissible evidence. See Evid C §352; *Hawk v Superior Court* (1974) 42 CA3d 108, 116 CR 713; §9.22.
- Discussing the law. See *Williams v Goodman* (1963) 214 CA2d 856, 869, 29 CR 877; §9.25.

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### §9.38 3. Handle objections carefully: When not to object

Because the jury may form a negative impression of an attorney who objects too often or whose objections are overruled by the court, particularly at an early stage of the trial, objections should be made during the opponent's opening statement only for good reason. This stigma can be avoided by asking the court to rule on problem areas in motions in limine. See chap 7. Counsel may also raise an objection during the opponent's opening statement in the following manner:

> Your Honor, does this portion of the opening go beyond some of the early rulings made by the court?

When a particularly forceful opening statement is being made and a valid objection is available, consider making the objection both to preserve the record and to break the opening statement's effect. The decision to object should be made with caution, however, because jurors generally do not welcome interruptions and arguments unless counsel wins the ruling or they agree with counsel.

Experienced attorneys sometimes decide not to object to an exaggeration that they can point out during closing argument as an unkept promise. If the objectionable matter is flagrant (*e.g.,* counsel refers to evidence or facts that are clearly inadmissible and prejudicial), however, counsel should object and request the judge to admonish opposing counsel and instruct the jury to disregard the reference. If the matter is highly prejudicial, consider moving for a mistrial. On misconduct of counsel, see §§16.66-16.90. On avoiding waiver of the objection, see §15.24.

**JUDICIAL PERSPECTIVE:** Most experienced trial lawyers rarely object. If an objection concerns a significant matter, it can be better handled in advance through, *e.g.,* an in limine motion. From the perspective of jurors, objections are truly a lose-lose proposition for the objecting lawyer. If the lawyer wins the objection and the evidence is excluded, the jurors wonder what is being kept from them and why. If the objecting lawyer loses, then he or she is considered a loser.

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### §9.39 B. Reserving comments for closing argument

During the opening statement, notes should be taken of what is said by opposing counsel. If something is said that is not later substantiated by the evidence, counsel can point out to the jury during closing argument that opposing counsel has failed to prove what was claimed. If the promise is so exaggerated or flagrant that it amounts to misconduct, counsel should make an objection and request the judge to admonish opposing counsel and instruct the jury. See §§9.24, 16.92-16.93.

It may also be a good idea to obtain an early transcript of the opening statement. See §9.15. If opposing counsel's opening statement seems to have overstepped the proof, ask the court reporter to mark that portion of the transcript (out of the jurors' presence) and have it transcribed. The transcript can be helpful during closing argument when what opposing counsel said during the opening statement can be compared to the evidence proved during trial.

Obtaining a transcript of the opening statement can also be helpful in ascertaining whether any admissions made by opposing counsel can be used later during trial or closing argument. See §9.15.

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### C. Moving for nonsuit or directed verdict after opening statement

#### §9.40 1. Nonsuit

A defendant may move for a judgment of nonsuit after the plaintiff's opening statement. CCP §581c(a). See *Palazzi v Air Cargo Terminals, Inc.* (1966) 244 CA2d 190, 194, 52 CR 817. If the motion is granted, unless otherwise specified in the order for judgment, a judgment for nonsuit is a judgment on the merits. CCP §581c(c).

**JUDICIAL PERSPECTIVE:** These motions are usually anticipated and it is advisable for counsel to have a pocket brief ready to give the judge when making the motion.

A nonsuit may be granted only when it is clear that counsel has undertaken to state all the facts that counsel expects to prove and it is plainly evident that they will not constitute a cause of action. *Rokos v Peck* (1986) 182 CA3d 604, 611, 227 CR 480 (nonsuit affirmed); *Addison v Susanville Lumber, Inc.* (1975) 47 CA3d 394, 398, 120 CR 737 (same). See *Baber v Napa State Hosp.* (1989) 209 CA3d 213, 257 CR 55 (nonsuit reversed).

Nonsuits after opening statements are generally disfavored; in First Amendment or defamation actions, however, they may be a "favored remedy." See *Jensen v Hewlett Packard Co*. (1993) 14 CA4th 958, 965, 18 CR2d 83.

In considering the motion, the court must presume that the plaintiff will prove all of those facts and all favorable inferences reasonably drawn from those facts. *Enterprise Leasing Corp. v Shugart Corp.* (1991) 231 CA3d 737, 747, 282 CR 620 (nonsuit reversed); *Smith v Roach* (1975) 53 CA3d 893, 897, 126 CR 29 (nonsuit reversed). See *Cole v State* (1970) 11 CA3d 671, 90 CR 74 (nonsuit affirmed).

The motion should state the precise grounds on which it is made, with the defects in the plaintiff's case clearly and particularly indicated. *John Norton Farms v Todagco* (1981) 124 CA3d 149, 161, 177 CR 215. In ruling on the motion, the trial court is restricted to considering only the grounds stated in the motion and the precise contents of the plaintiff's opening statement. A nonsuit is improper if the grounds specified in the motion are insufficient even though other good but unstated grounds exist. *Hurn v Woods* (1982) 132 CA3d 896, 900, 183 CR 495.

The parties may stipulate that the trial court may also consider evidentiary exhibits that would probably be offered at trial had the motion not been made. See *Loral Corp. v Moyes* (1985) 174 CA3d 268, 272, 219 CR 836. If the parties stipulate that the trial court may consider such evidence, neither party may argue on appeal that the trial judge improperly relied on the stipulated evidence in ruling on the motion. *John Norton Farms v Todagco, supra*.

A judgment for nonsuit will be reversed when plaintiff's counsel requests permission to enlarge the opening statement but is not given a reasonable opportunity to add essential facts that were omitted from it. *Rodin v American Can Co.* (1955) 133 CA2d 524, 534, 284 P2d 530. But see *Addison v Susanville Lumber, Inc., supra* (trial court's denial of motion to enlarge was upheld and judgment of nonsuit affirmed). The courts generally recognize, however, that a plaintiff should ordinarily be given an opportunity to add to the opening statement after a motion for nonsuit, but that the rule does not apply if plaintiff's counsel never made a request to enlarge the opening statement. See *John Norton Farms v Todagco, supra*. For further discussion of motions for nonsuit after opening statement, see §§18.7-18.34.

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## §9.41 2. Directed verdict

A plaintiff can move for directed verdict after the defendant's opening statement. The criteria for granting a motion for a directed verdict are the same as for the granting of a motion for nonsuit following the plaintiff's opening statement. See *Nuffer v Insurance Co. of N. Am.* (1965) 236 CA2d 349, 45 CR 918. See also §9.40.

A judgment on a directed verdict is a judgment on the merits. See 7 Witkin, California Procedure, *Trial* §420 (5th ed 2008). On procedures for moving for directed verdict, see §§18.35-18.56.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/9 Opening Statement/§9.42 VIII. SELECTED BIBLIOGRAPHY

## §9.42 VIII. SELECTED BIBLIOGRAPHY


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# 10

# Evidence Overview

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## §10.1 I. SCOPE OF CHAPTER

The purpose of this chapter is to provide an overview of evidentiary rules to familiarize trial counsel with common issues that arise when presenting evidence at trial. For more information about each evidentiary rule, see the additional resources listed in each section and in the bibliography in §10.87.

More detailed discussions of using specific types of evidence at trial are found in chaps 11-15. On other problems that should be considered when preparing for trial, see chap 3.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/ II. PREPARE TO USE EVIDENCE AT TRIAL/§10.2 A. Identify evidence to use at trial

## II. PREPARE TO USE EVIDENCE AT TRIAL

### §10.2 A. Identify evidence to use at trial

Begin by analyzing the case and issues you must prove or disprove at trial, then identify the evidence needed to meet those goals. See chap 3 for analyzing the case, preparing an issue outline, and identifying the evidence that will prove your side of the case.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.3 B. Checklist: Steps to prepare for evidentiary issues

## §10.3 B. Checklist: Steps to prepare for evidentiary issues

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Become familiar with the most commonly encountered evidentiary rules by completing the following steps:

___ 1. Read through Evid C §§1-1605.

___ 2. As you read the Evidence Code, identify the code sections that apply to the evidence you will use (see §10.2; see also issue outline in §3.17).

___ 3. Make photocopies of the applicable code sections.

___ 4. Review the annotations of that code section for case law on the evidentiary issues.

___ 5. Review §§10.5-10.86 of this chapter.

___ 6. Skim applicable parts of an evidence benchbook (see §10.87 for bibliography).

___ 7. Review other resources for pretrial preparation and in-court use. (See the bibliography in §10.87. Of particular importance are Effective Introduction of Evidence in California (2d ed Cal CEB 2000) and California Evidentiary Foundations or its federal counterpart, Evidentiary Foundations, which provide model transcripts for introducing specific types of evidence.)

___ 8. Check local rules for any special procedures or evidentiary requirements.

___ 9. Prepare for evidentiary objections at trial by reviewing chap 15 of this book.

___ 10. Prepare a motion in limine (see chap 7), or legal memorandum (see §3.32) containing arguments on the important evidentiary issues.

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## §10.4 C. Review evidence in light of evidentiary rules

Use the sections in this chapter as a checklist to identify potential evidentiary problem areas. For example, do you have the burden of proof on an issue? See §10.6. Is there a presumption that will aid or hinder your proof of a fact? See §§10.8-10.12. Is there a hearsay problem with the anticipated testimony of a witness? See §§10.17-10.27.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/ III. BURDENS AND PRESUMPTIONS/§10.5 A. Consider burdens and presumptions when preparing to present evidence at trial

## III. BURDENS AND PRESUMPTIONS

### §10.5 A. Consider burdens and presumptions when preparing to present evidence at trial

When preparing for trial, keep in mind that there are two types of burdens:

- The burden of proof or persuasion (see §10.6); and
- The burden of producing evidence (see §10.7).

Identify which party has which burden for each issue in the case, and be prepared to satisfy the burden and to object or point out when opposing counsel fails to satisfy the burden. Become familiar with presumptions that place and shift either type of burden onto the parties in the case. See §§10.8-10.12.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.6 B. Burden of proof

## §10.6 B. Burden of proof

The burden of proof is defined as producing a required degree "of belief concerning a fact in the mind of the trier of fact or the court." Evid C §115; see also Comment to Evid C §500. The amount of evidence necessary to satisfy the burden depends on the type of issue; standards range from raising a reasonable doubt about the existence or nonexistence of a fact to establishing the fact by a preponderance of the evidence or by clear and convincing evidence. Evid C §§115, 502. It is up to the factfinder to decide whether the party has met the burden.

In civil cases, the burden is usually by a preponderance, although the law may require that in certain situations proof must be made by clear and convincing evidence. See Evid C §115; *Weiner v Fleischman* (1991) 54 C3d 476, 483, 286 CR 40 (courts must look to constitutional, statutory, or decisional law to determine whether burden of proof is higher than preponderance of the evidence; in oral joint venture case, burden of proof was preponderance of evidence, not higher); see, *e.g.,* CC §3294(a) (clear and convincing evidence required to prove claim for punitive damages).

Generally, each party has the burden of proof as to each fact, the existence or nonexistence of which is essential to the party's claim for relief or defense. Evid C §500. There are four additional situations in which the Evidence Code requires a particular party to carry the burden of proof:

- Claims of a crime or wrongdoing (Evid C §520);
- Claims of failure to exercise the requisite degree of care (Evid C §521);
- Claims of insanity (Evid C §522); and
- Historic locations of rivers, streams, and other bodies of water or authority of the state (Evid C §523).

In addition, certain presumptions shift the burden of proof to the party opposing the existence of the presumed fact. See §10.12.

Tactically, it is important to be aware of burdens of proof because you must be sure:

- Not to assume a burden your client does not have;
- To satisfy the burden when required to do so; and
- That the jury instructions are phrased properly.

**PRACTICE TIP:** Experienced trial counsel usually explain their client's burden of proof to the jury carefully and graphically with analogies to be sure the jurors understand how minimal these standards are. You could say, for example, "Imagine the statue of Justice holding the scales up in her right hand. If the scales are balanced, then each side has an equal amount of evidence supporting their case. If the scales tip ever so slightly to one side, then that side has the preponderance of the evidence, and has met its burden of proof."

**Further research:** See generally Jefferson's California Evidence Benchbook, chap 47 (4th ed CJA-CEB 2009). See CACI 200 (obligation to prove—more likely true than not true) and CACI 201 (more likely true—clear and convincing proof).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.7 C. Burden of producing evidence

## §10.7 C. Burden of producing evidence

Generally, a party with a burden of proof as to a fact has the initial burden of producing some evidence as to the particular fact. Evid C §550(b). Also, if the state of the evidence would require the factfinder to make a finding against a party, the burden to produce evidence is shifted to the party opposing that fact (Evid C §550(a)), *i.e.,* if there is a presumption that a fact is true (see §§10.8-10.12 for presumptions), it is up to the party opposing that fact to produce some evidence that it is not true.

These burdens are delegated according to the pleadings or procedures, or by particular presumptions. See §§10.8-10.12 for presumptions. If the parties question or dispute which party carries these burdens, the trial judge decides, with or without briefs or argument by counsel. A party that does not meet the burden of producing evidence may face a directed verdict in certain situations.

**Further research:** See generally Jefferson's California Evidence Benchbook, chap 47 (4th ed CJA-CEB 2009).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.8 D. Presumptions

## §10.8 D. Presumptions

A presumption is an assumption of facts required by law to be made from another fact or groups of facts. Evid C §600(a). A presumption can also place or shift burdens of proof and burdens of producing evidence among the parties. A presumption is either conclusive or rebuttable. Evid C §601. There are about 40 presumptions in Evid C §§600-670 and elsewhere.

Educate yourself on the presumptions relevant to the specific circumstances of your case because presumptions can, for example, form the basis for motions for directed verdict and can resolve which jury instructions should be given.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.9 1. Conclusive presumptions

## §10.9 1. Conclusive presumptions

Conclusive presumptions require the trier of fact to find the existence of the presumed facts if the conditions of the presumption are met, and the opposing party is not permitted to introduce evidence to contradict or rebut the existence of the presumed facts. See Jefferson's California Evidence Benchbook, chap 48 (4th ed CJA-CEB 2009). Conclusive presumptions found in the Evidence Code include:

- Facts recited in a written instrument (Evid C §622);
- Effect of a party's statement or conduct (Evid C §623); and
- Tenant cannot deny landlord's title (Evid C §624).

**EXAMPLE:** Tenant rented an apartment from landlord. When tenant failed to pay rent, landlord filed an unlawful detainer action. Tenant found out that landlord did not really own the property (it was owned by the landlord's father), but, under Evid C §624, tenant cannot present evidence that would deny landlord's title to the property.

**Further research:** See generally Evidence Benchbook, chap 48.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.10 2. Rebuttable presumptions

## §10.10 2. Rebuttable presumptions

Rebuttable presumptions are further divided into two main groups—those that place the burden of proof and those that place the burden of producing evidence. Evid C §601. See §§10.11-10.12 for an explanation and list of each type.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.11 a. Presumptions concerning burden of producing evidence

## §10.11 a. Presumptions concerning burden of producing evidence

When a presumption affects the burden of producing evidence, the trier of fact assumes the existence of the presumed fact unless the opponent of the fact presents evidence to support a finding of its nonexistence. If the opponent presents such evidence, the trier of fact weighs the evidence and decides the existence or nonexistence of the fact, regardless of the presumption. See Evid C §§603-604.

Presumptions on producing evidence found in the Evidence Code are:

- Money delivered by one person to another is presumed to have been due to the latter (Evid C §631);
- Thing delivered by one person to another is presumed to have belonged to the latter (Evid C §632);
- Obligation given back to debtor is presumed to have been paid (Evid C §633);
- Person in possession of order on himself or herself for the payment of money, or delivery of a thing, is presumed to have been paid the money or delivered the thing (Evid C §634);
- Obligation possessed by creditor is presumed not to have been paid (Evid C §635);
- Payment of past-due rent or installments is presumed from a receipt for later rent or installments (Evid C §636);
- Things possessed are assumed to be owned (Evid C §637);
- Person who exercises acts of ownership over property is presumed to be owner (Evid C §638);
- A judgment, when not conclusive, is presumed to have correctly determined parties' rights, but there is no presumption that the facts essential to the judgment have been correctly determined (Evid C §639);
- A writing is presumed to have been dated correctly (Evid C §640);
- A letter correctly addressed and properly mailed is presumed to have been received in ordinary course of mail (Evid C §641);
- Conveyance by someone having duty to convey real property is presumed to have been conveyed (Evid C §642);
- Authenticity of ancient document at least 30 years old is presumed if specified conditions met (Evid C §643);
- Book purporting to be published by public authority is presumed as such (Evid C §644);
- Book purporting to contain reports of cases is presumed to contain correct reports of such cases (Evid C §645);
- Printed materials purporting to be from particular newspaper or periodical are presumed to be from that source (Evid C §645.1);
- Res ipsa loquitur presumption gives rise to jury instructions on burden of producing evidence (Evid C §646); and
- Return of registered process server establishes presumption of facts stated in return (Evid C §647).

**Further research:** See generally Jefferson's California Evidence Benchbook, chap 48 (4th ed CJA-CEB 2009).

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## §10.12 b. Presumptions concerning burden of proof

A presumption affecting the burden of proof imposes on the party against whom the presumption operates the burden of proving the nonexistence of the presumed fact by meeting the standard of proof required by law for that type of fact. See §10.6 on burden of proof. Evid C §§605-606.

**EXAMPLE:** Counsel presents a copy of the deed showing that *A* is the owner of legal title to real property. Under Evid C §662, *A* is also presumed to own the full beneficial title. The burden then shifts to *B* to prove by clear and convincing evidence that *A* does not own full beneficial title.

Burden of proof presumptions, including those found in the Evidence Code, are:

- Owner of legal title to property is presumed to be owner of beneficial title (Evid C §662);
- Ceremonial marriage is presumed to be valid (Evid C §663);
- Official duty is presumed to be regularly performed (Evid C §664);
- A person is presumed to intend the ordinary consequences of voluntary act (Evid C §665);
- Judicial action is presumed to be a lawful exercise of jurisdiction (Evid C §666);
- Death of person is presumed if that person has not been heard from in 5 years (Evid C §667);
- Unlawful intent is presumed from commission of an unlawful act (Evid C §668);
- Failure of a person to exercise due care is presumed if that person violated a statute, ordinance, or regulation of a public entity, and the violation proximately caused death or injury to person or property (Evid C §§669-669.1);
- City or county enacting building restrictions through ordinances bears burden of proof (Evid C §669.5);
- Copy of a check and of a bank statement showing payment of check by bank creates presumption that check has been paid (Evid C §670); and
- Rebuttable presumption of paternity affecting burden of proof is operative under specified conditions (Fam C §7555).

**Further research:** See generally Jefferson's California Evidence Benchbook, chap 48 (4th ed CJA-CEB 2009).

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## IV. RELEVANCE

### §10.13 A. Generally admissible

Evidence must be relevant to be admissible (Evid C §350), and all relevant evidence is admissible unless a statute provides that it is not admissible. Evid C §351. "Relevant" evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evid C §210. The relevance of most evidence is apparent without reference to other evidence. See California Trial Objections, chap 17 (Cal CEB Annual). In some situations, additional facts are necessary to show relevance, and the burden rests on the proponent of the evidence to provide those facts and to establish relevance. Evid C §403. See generally Jefferson's California Evidence Benchbook, chap 21 (4th ed CJA-CEB 2009). (Note: For the remainder of this chapter, the two books referred to above will be cited as California Trial Objections and California Evidence Benchbook, respectively.)

Two types of evidence are relevant in trial: that which is probative of a witness's credibility (see §10.14) and that which is probative of a disputed material fact or issue (see §10.15) as determined by the substantive law governing the case.

**PRACTICE TIP:** If opposing counsel objects that your evidence is not relevant, you should be able to immediately articulate for the trial judge the precise relevance of each piece of evidence offered. Once a relevant purpose is identified, the burden shifts to the opponent of the evidence to show why it should be excluded.

**EXAMPLE 1:** In a slip and fall case, defendant disputes that he owns the property where plaintiff fell. Plaintiff asks defendant if he purchased insurance on the property. Defendant objects that evidence concerning insurance is not admissible under Evid C §1155 (see §§10.52-10.54). Plaintiff explains to the court that the evidence is relevant to show that defendant is the owner of the property (not to prove negligence or other wrongdoing). Under this analysis, purchasing insurance is an act of ownership that would presume ownership and the burden then shifts to defendant to show why it should be excluded.

**EXAMPLE 2:** In an automobile/truck collision case, plaintiff asks defendant-driver about prior accidents. Defendant, ABC Truck Company, objects. Plaintiff's counsel then says:

"Your Honor, evidence of the defendant's involvement in prior accidents while employed for ABC Truck Company is relevant to plaintiff's negligent entrustment claim against ABC Truck Company. ABC denies that they were negligent in entrusting the operation of the truck to defendant, and this evidence proves that ABC knew or should have known of defendant's incompetence based on these previous accidents."

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### §10.14 B. Credibility and understanding the witness

Relevant evidence includes that concerning the credibility of a witness or hearsay declarant (Evid C §210), plus evidence created solely for the trial or to aid the jurors in understanding a witness's testimony. *People v McDaniel* (1976) 16 C3d 156, 174, 127 CR 467; *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 521, 109 CR 110.

A witness's credibility is always at issue. Evidence Code §780 and its corollary in CACI 107 or 5004, which are identical instructions, provide an excellent guide for analyzing credibility issues. See also BAJI 2.20. Evidence probative of the witness's competency or testimonial capacities is generally deemed relevant. See §§10.62-10.65.

Evidence that goes only *generally* to the witness's credibility, as opposed to the witness's testimonial capacities, is usually strictly limited to brief background information like age, residence, family, job, and outside activities. Trial lawyers like to begin direct examination with this type of general background to warm up the witness and get the jury to like and identify with the witness. When pushed for a specific theory of relevance, the advocate can reply that it provides a standard or base line for testing the witness's demeanor when he gets to important testimony. Another response can be the old standby, "It's just background, Your Honor."

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.15 C. Material fact or issue

### §10.15 C. Material fact or issue

The second type of relevant evidence is that which is probative of a disputed fact or a material issue, also known as "logical" relevance. The keys to ascertaining whether evidence is relevant are the tests of "probative" and "material."

"Probative" means that the evidence tends to make the fact or issue more or less likely to have occurred or be true. The threshold here is very low: "any tendency in reason to prove or disprove." Evid C §210. Common sense is counsel's best tool with this analysis.

"Material" means that the evidence has a relationship to a matter that is provable in the action based on the substantive law governing the case, *i.e.,* the tendency of the evidence to prove or disprove any disputed fact that is of consequence to resolution of this particular action. Evidence that does not relate to a matter at issue is immaterial. See *People v Hill* (1992) 3 CA4th 16, 29, 4 CR2d 258, disapproved on other grounds in *People v Nesler* (1997) 16 C4th 561, 582 n5, 66 CR2d 454.

**PRACTICE TIP:** Consider all the different ways in which an important piece of evidence might be material or logically relevant. Offered for one purpose, it might be inadmissible; offered for another, it might be allowed.

**EXAMPLE:** In a slip-and-fall case, defendant disputes that he owns the property where plaintiff fell. Plaintiff asks defendant if he purchased insurance on the property. This evidence is material because it makes it more likely that defendant is the owner of the property. The evidence is not material to show that defendant is able to pay a judgment, because ability to pay is not an issue at the trial.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.16 D. Court's discretion to exclude relevant evidence

### §10.16 D. Court's discretion to exclude relevant evidence

The court has discretion under Evid C §352 to exclude evidence if its probative value is substantially outweighed by the probability that if it is admitted it will:

- Take too much time; or
- Create a substantial danger of:
- Undue prejudice;
- Confusing the issues; or
- Misleading the jury.

The best time to raise §352 issues is in an in limine motion so that the jury will never hear the evidence. With such issues, it is particularly vital that the judge order opposing counsel to admonish witnesses not to volunteer the offending evidence. See §7.3.

**Further research:** See generally Jefferson's California Evidence Benchbook, chap 22 (4th ed CJA-CEB 2009).

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## V. HEARSAY

### §10.17 A. Hearsay generally not admissible

Hearsay evidence is evidence of a statement (Evid C §1200):

- Made other than by the witness while testifying at the hearing; and
- Offered to prove the truth of the matter stated.

Hearsay is inadmissible except as provided by law. Evid C §1200(b); see Evid C §§1220-1370 for exceptions and exclusions to the hearsay rule.

**NOTE:** Hearsay statements are often characterized as "out of court" statements. This is a shorthand way of saying that the statement was made sometime or somewhere other than by the witness while currently testifying on the stand. Hearsay statements include, of course, statements made in court at another time or in other proceedings, so while the phrase "out of court" is useful, it is not completely accurate.

To decide whether evidence is hearsay, the technical analysis is to ask whether it is:

- A statement (see §10.18);
- Made other than by the witness while testifying on the stand (see Jefferson's California Evidence Benchbook, chap 1 (4th ed CJA-CEB 2009)); and
- Offered to prove the truth of the matter being stated (see §10.19).

As a practical matter, the question counsel should ask is:

- Whom do I want to cross-examine about this statement?

If the answer is someone other than the witness sitting on the stand, then the testimony is probably hearsay. This practical test recognizes that the hearsay objection is ultimately rooted in the right to cross-examine the witness who has personal knowledge of the testimony being offered.

**Further research:** For a complete discussion of hearsay issues, see Evidence Benchbook, chap 1; California Trial Objections, chap 19 (Cal CEB Annual).

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## §10.18 1. Statement defined

A statement is an "oral or written verbal expression" or nonverbal conduct meant to substitute for oral or written verbal expressions. Evid C §225.

An issue can arise as to whether something someone says or does is a hearsay statement. When someone asks a question, for example, is that a statement? Another example is when someone nods his head up and down. The key to determining whether the statement or conduct is an assertion is to ask whether any information was conveyed. If the person nodding his head intended to convey assent, the conduct is considered hearsay. See Jefferson's California Evidence Benchbook, chap 1 (4th ed CJA-CEB 2009).

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## §10.19 2. For truth of matter asserted or stated

The most difficult hearsay analysis is whether the evidence is offered for the truth of the matter stated. If the statement can be offered for any other reason, it is not hearsay.

**EXAMPLE:** The statement, "the bystander said the light was green," is hearsay only if it is offered to prove that the light was green. It is not hearsay if the statement is offered to prove any other material fact, *e.g.,* that the bystander could see, the bystander was or was not colorblind, the light was operating, the bystander was a liar, the bystander could speak, or the witness could hear.

See Jefferson's California Evidence Benchbook, chap 1 (4th ed CJA-CEB 2009).

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## §10.20 B. Nonhearsay statements

If statements do not meet the three criteria in §10.17, they are not hearsay. Generally, nonhearsay statements are offered for purposes other than showing the truth of the matter asserted, including:

**Statements offered to show the effect on the hearer.** Evidence of statements showing the knowledge or belief of someone who heard the statement are not hearsay. See Jefferson's California Evidence Benchbook, chap 1 (4th ed CJA-CEB 2009); California Trial Objections, chap 19 (Cal CEB Annual).

**EXAMPLE 1:** Evidence that *A* said, "The sidewalk is cracked," to a homeowner is hearsay when offered to prove that the sidewalk was cracked at the time of the statement but not hearsay if offered to prove that the homeowner had notice of a dangerous condition.

**EXAMPLE 2:** *B* accompanied *C* into a dangerous place. *B* offers evidence that *C* said, "Come with me, I'm from the public utility," to show that *B* acted reasonably in the circumstances, regardless of the truth of the statement.

**Verbal acts.** Statements to which the law affixes legal consequences are not hearsay. See Evidence Benchbook, chap 1; Trial Objections, chap 19.

**EXAMPLE 1:** Statements offered to show the words of an offer and acceptance of a contract or warranty.

**EXAMPLE 2:** Statements offered to show defamation.

**Circumstantial evidence.** Statements offered to inferentially prove the declarant's state of mind are not hearsay. See Evidence Benchbook, chap 1; Trial Objections, chap 19.

**EXAMPLE 1:** Defendant said, "I am Queen Elizabeth," as evidence of insanity.

**EXAMPLE 2:** Defendant's conflicting statement about his whereabouts at the time of the crime can be shown as evidence of consciousness of guilt.

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## §10.21 C. Exceptions to hearsay rule

If the evidence is hearsay after conducting the three-step analysis explained in §10.17, try to find a hearsay exception or exclusion that would allow the evidence to be admitted. The Evidence Code contains most of the exceptions and exclusions, but other codes and court decisions can also create exceptions to the exclusion of hearsay. See *People v Otto* (2001) 26 C4th 200, 206, 109 CR2d 327. The more important exceptions for use in civil cases are discussed in §§10.22-10.27.

**Further research:** For a complete discussion of the hearsay exceptions, see Jefferson's California Evidence Benchbook, chaps 2-18 (4th ed CJA-CEB 2009); California Trial Objections, chap 19 (Cal CEB Annual).

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### §10.22 1. Admissions or statements attributed to a party

Any statement of a party, if relevant, may be offered *against* that party, but it cannot be offered *by* that party. Evid C §1220. These statements (Evid C §§1220-1227) are further classified as:

**Personal admissions.** These statements, made at any time by a party to a lawsuit, are admissible if they are relevant, typically because the truth of the matter in the statement helps to prove some element of the other party's claim or defense, or disprove some element of the declarant's claim or defense. Note that the statement need not have been against the party's interest when it was made. Evid C §1220. See *Dincau v Tamayose* (1982) 131 CA3d 780, 182 CR 855.

**Adoptive admissions.** These are admissible if a party with knowledge of the context of a statement manifests an adoption of the statement or a belief in the truth of the statement. Evid C §1221. For example, evidence that a party remained silent when introduced as a partner in a firm was admitted to show that the party was in fact a partner. See *J & J Builders Supply v Caffin* (1967) 248 CA2d 292, 56 CR 365.

**Authorized admission.** A party may authorize another to speak for him or her and any statements made by the authorized spokesperson are admissible. The foundational fact of authority to speak about the subject matter must be shown. Evid C §1222. See *Dincau v Tamayose, supra*.

**Statement of declarant whose liability or breach of duty is also in issue.** A statement made by someone whose own liability or breach of duty is in issue can be admitted against a party if that party's liability depends on the declarant's liability. Evid C §1224.

**Statements of minor children.** Children's statements are admissible in actions brought for their own injuries. Evid C §1226.

**Statements of decedents.** These are admissible against plaintiffs in actions for wrongful death. Evid C §1227.

**NOTE:** A judicially created "child dependency hearsay exception" now exists in the following circumstances: The child was not competent to testify and was very young; the child's statement was spontaneous; there was independent evidence consistent with the statement; the child had made the same statement several times; and there appeared to be no motive for the child to lie or exaggerate. See *In re Cindy L.* (1997) 17 C4th 15, 21, 69 CR2d 803; *In re Carmen O.* (1994) 28 CA4th 908, 915, 33 CR2d 848.

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### §10.23 2. Prior statements

In some situations, a witness's prior statements are exceptions or exclusions to the hearsay rule, *e.g.:*

**Prior consistent and inconsistent statements.** Statements that are consistent or inconsistent with a witness's testimony are admissible if offered in compliance with Evid C §§770 and 791. Evid C §§1235-1236; see §§10.74-10.75, 11.111.

**Past recollection recorded.** Statements containing otherwise admissible information are admissible if the witness has no present memory of the information and the proponent complies with Evid C §1237. See §11.69.

**Prior testimony.** In certain situations, such as when the witness is unavailable, prior testimony is admissible. Evid C §§1290-1293; see §12.58.

**Prior identifications.** If the declarant testifies, evidence of a prior identification is admissible if the proponent complies with Evid C §1238.

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## §10.24 3. Exceptions when declarant unavailable

For many hearsay exceptions to apply, the attorney must show that the declarant is unavailable. Unavailability can apply to a witness who is present or even testifying if, *e.g.,* the witness's memory has failed or if the witness asserts a privilege. Evid C §240. See §§10.28-10.44 for privileges.

**Dying declaration.** The key element in a dying declaration is not that the person died, but that the person *thought* he or she was dying. The assertion must concern the cause or circumstances of the anticipated demise. Evid C §1242.

**Declarations against interest.** These are often confused with admissions. The difference is that this exception applies to nonparties who are unavailable and whose statements are so contrary to their pecuniary or penal interest that it is unlikely the statements would have been made if untrue. Evid C §1230. Admissions are statements made by the parties. See §10.22.

**Declaration regarding the infliction of physical injury.** Under this hearsay exception, evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:

- The statement purports to narrate, describe, or explain the infliction or threat of physical injury on the declarant;
- The declarant is unavailable as a witness under Evid C §240;
- The statement was made at or near the time of the infliction or threat of physical injury (however, evidence of statements made more than 5 years before the filing of the current action shall be inadmissible);
- The statement was made under circumstances that would indicate its trustworthiness (trustworthiness is further defined in Evid C §1370(b)(1)-(3)); and
- The statement was made in writing, was electronically recorded, or was made to a law enforcement official.

**NOTE:** In addition to the above conditions, the statement is admissible under this section only if the proponent of the statement tells the adverse party of the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to give the adverse party a fair opportunity to prepare and respond to the statement. Evid C §1370(c).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.25 4. Business records

## §10.25 4. Business records

This exception to the hearsay rule is one of the most useful to civil trial practitioners. The proponent of the evidence must produce a witness (usually the custodian) who can testify to a record's authenticity. The witness must show that the writing was made:

- In the ordinary course of business;
- As a record of an act, condition, or event, to show that the event occurred; and
- At or near the time of the act, condition, or event recorded.

In addition, the source of information and method of preparation must indicate that the writing is trustworthy. Evid C §1271.

**NOTE:** Business records may be admissible as an admission if offered against a party. See §10.22. For a party's own business records to be admissible, the party must meet the requirements of the business records exception.

By following Evid C §§1560-1567, an affidavit of the custodian or other qualified witness can be substituted for trial testimony when the business with the records is neither a party nor the place where the cause of action is alleged to have arisen.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.26 5. Official and public records

### §10.26 5. Official and public records

Official and public records are even easier to admit than business records. The requirements of Evid C §1280 are similar to those of Evid C §1271 for business records. The official record must be:

- Of an act, condition, or event;
- Offered to prove the occurrence of such an act, condition, or event; and
- Made by a public employee within the scope of his or her duty at or near the time of the act, condition, or event. See *MacDonald v Gutierrez* (2004) 32 C4th 150, 153, 8 CR3d 48 ("unsworn" statement by arresting officer admissible in administrative proceeding on driver's license suspension); *Jazayeri v Mao* (2009) 174 CA4th 301, 317, 94 CR3d 198 (poultry condemnation certificates issued by food safety inspectors).

The sources of information and the method and time of preparation must indicate trustworthiness. Evid C §1280(c); *Molenda v DMV* (2009) 172 CA4th 974, 989, 91 CR3d 792 (no abuse of discretion to hold lab report inadmissible because it was not prepared at or near time of event). See Evid C §§1401, 1451-1454 on authenticating official writings.

Special rules apply to certain types of official and quasi-official records, such as:

- Vital statistics (Evid C §1281);
- Findings of presumed death by authorized federal employees (Evid C §1282);
- Findings that a person is missing, captured, or the like (Evid C §1283);
- Church records of family history (Evid C §1315); and
- Marriage, baptismal, and similar certificates (Evid C §1316).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.27 6. List of other hearsay exceptions

## §10.27 6. List of other hearsay exceptions

The Evidence Code provides other hearsay exceptions:

- Spontaneous statements that were made while under the stress of excitement caused by an event (Evid C §1240);
- Contemporaneous statements that were made while the declarant was engaged in an event (Evid C §1241);
- Statements about wills and claims against estates (Evid C §§1260-1261); and
- Judgments (Evid C §§1300-1302).

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## VI. PRIVILEGES

### §10.28 A. Based on statutory or constitutional authority

Privileges exclude otherwise relevant and competent evidence for policy reasons—usually to protect certain relationships. Privileges exist only when they are explicitly provided for by statute or by the United States or California constitutions. Evid C §911; see California Trial Objections, chap 33 (Cal CEB Annual). Privileges are found in Evid C §§900-1070, in the Fifth Amendment to the U.S. Constitution, and in Cal Const arts I and VII.

**Further research:** For a general discussion of privileges, see Trial Objections, chap 33; Jefferson's California Evidence Benchbook, chaps 37-46 (4th ed CJA-CEB 2009). For discussion of each privilege, see the chapters in Trial Objections indicated in §§10.30-10.44.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.29 B. Objecting based on a privilege

## §10.29 B. Objecting based on a privilege

To invoke a privilege, counsel should generally object by stating:

> The question calls for disclosure of confidential communication in violation of the [*state specific*] privilege.

When claiming the privilege on behalf of a client, counsel should further state:

> On behalf of my client, I claim the [*state specific*] privilege and object to the question on that ground.

If the witness is not represented by counsel, counsel should instead say:

> I request that Your Honor advise the witness of the right to refuse to answer on the ground of [*state specific*] privilege.

Sometimes the privilege is based on circumstances other than confidential information. For those privileges, counsel should object by stating the basis of the privilege.

**EXAMPLE 1:** "Examination of this witness by counsel will violate the witness's privilege not to testify against [*his wife/her husband*]. I request that you advise the witness of the right to refuse to answer counsel's questions."

**EXAMPLE 2:** "I ask that Your Honor advise the witness that [*he/she*] need not answer that question, because it calls for disclosure of [*name of news source/unpublished information obtained in gathering information for publication*]." See §10.44 for newsperson's privilege.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.30 C. Privilege against self-incrimination

## §10.30 C. Privilege against self-incrimination

This privilege entitles a witness in a civil case to refuse to give testimony or evidence, *e.g.,* documents, that may tend to incriminate him or her. Evid C §§940, 404; US Const amends V, XIV; Cal Const art I, §15.

This privilege is different from the privilege of a defendant in a criminal action not to be called as a witness and not to testify at all found in Evid C §930. For the privilege to apply, the witness must show that the evidence might result in criminal penalties. See Evid C §404.

**Further research:** See Jefferson's California Evidence Benchbook, chap 46 (4th ed CJA-CEB 2009); California Trial Objections, chap 46 (Cal CEB Annual).

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### §10.31 D. Lawyer-client privilege

This privilege prevents compulsory disclosure of confidential communications between lawyer and client. Evid C §§950-962. The requisites of the privilege are that there be:

- A lawyer-client relationship (Evid C §951);
- A communication between lawyer and client (Evid C §952); and
- The client's expectation of confidentiality (Evid C §952).

The privilege is claimed by the client or the client's representative, including any representative appointed under Prob C §12252. Evid C §§953-954. The attorney has a duty to claim the privilege on the client's behalf. Evid C §955.

The privilege belongs to the original holder and ceases to exist after the holder dies, and his or her personal representative discharges the estate. *HLC Props., Ltd. v Superior Court* (2005) 35 C4th 54, 24 CR3d 199, citing Evid C §§953-954.

**Further research:** See Jefferson's California Evidence Benchbook, chap 42 (4th ed CJA-CEB 2009); California Trial Objections, chap 34 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.32 E. Privilege not to testify against spouse

### §10.32 E. Privilege not to testify against spouse

This privilege allows one spouse not to testify against the other. Evid C §§970-973. The requisites for the privilege to apply are:

- A valid marriage at the time of claiming the privilege (see Evid C §970; *People v Delph* (1979) 94 CA3d 411, 415, 156 CR 422); and
- That the spouse is asked a question calling for an answer "against" his or her spouse in any action (Evid C §970).

**NOTE:** A spouse also has a privilege against being called as a witness by an adverse party in an action in which the other spouse is a party (Evid C §971). See §10.33.

**Further research:** See Jefferson's California Evidence Benchbook, chap 38 (4th ed CJA-CEB 2009); California Trial Objections, chap 41 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.33 F. Privilege not to be called as witness against spouse

### §10.33 F. Privilege not to be called as witness against spouse

This privilege allows one spouse to refuse to be called as a witness by an adverse party in an action in which the other spouse is a party. Evid C §§971-973. The requisites for the privilege to apply are:

- A valid marriage at the time of claiming the privilege (see Evid C §971; *People v Delph* (1979) 94 CA3d 411, 415, 156 CR 422); and
- That the spouse is a party in an action in which the adverse party seeks to call the other spouse as a witness (Evid C §971).

**NOTE:** Remember that spouses have three privileges: one that prevents one spouse from testifying against the other (see §10.32), another that allows the spouse who is already testifying to refuse to answer a question against the other spouse (this section), and one that allows the spouse to refuse to disclose confidential communications (see §10.34).

**Further research:** See Jefferson's California Evidence Benchbook, chap 38 (4th ed CJA-CEB 2009); California Trial Objections, chap 42 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.34 G. Confidential marital communications privilege

### §10.34 G. Confidential marital communications privilege

This privilege prevents compulsory disclosure of confidential communication between husband and wife. Evid C §§980-987. The requisites for the privilege to apply are that:

- A valid marriage existed at the time of the communication (Evid C §980);
- The communication was not in aid of a crime or fraud (Evid C §§980-981); and
- There was an expectation of confidentiality (Evid C §980).

Either spouse can claim the privilege (Evid C §980), but it cannot be claimed in an action by one spouse against the other (Evid C §984(a)).

**Further research:** See Jefferson's California Evidence Benchbook, chap 38 (4th ed CJA-CEB 2009); California Trial Objections, chap 40 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.35 H. Physician-patient privilege

### §10.35 H. Physician-patient privilege

This privilege prevents compulsory disclosure of confidential information transmitted between physician and patient. Evid C §§990-1007. The requisites for the privilege to apply are that:

- A physician-patient relationship must have existed (Evid C §991);
- Information was transmitted between the patient and the physician (Evid C §992); and
- There was an expectation of confidentiality (Evid C §992).

The privilege is claimed by the patient or the patient's representative. Evid C §§993-994. In some circumstances, the physician has a duty to claim the privilege on behalf of the patient. Evid C §995.

**Further research:** See Jefferson's California Evidence Benchbook, chap 39 (4th ed CJA-CEB 2009); California Trial Objections, chap 36 (Cal CEB Annual).

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## §10.36 I. Psychotherapist-patient privilege

This privilege prevents compulsory disclosure of confidential information transmitted between psychotherapist and patient. Evid C §§1010-1027. The requisites for the privilege to apply are that:

- The psychotherapist-patient relationship existed (Evid C §1011);
- A communication occurred (Evid C §1012); and
- An expectation of confidentiality existed (Evid C §1012).

The privilege is claimed by the patient or the patient's representative. Evid C §§1013-1014. In some circumstances, the psychotherapist has a duty to claim the privilege on the patient's behalf. Evid C §1015.

**NOTE:** This privilege applies to many types of professionals who treat mental or emotional problems, not just psychotherapists. See Evid C §1010 (list of professionals to which the privilege applies); *Oleszko v State Comp. Ins. Fund* (9th Cir 2001) 243 F3d 1154 (privilege applies to employees' assistance program counselors).

**Further research:** See Jefferson's California Evidence Benchbook, chap 40 (4th ed CJA-CEB 2009); California Trial Objections, chap 37 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.37 J. Penitent or clergyman privilege

### §10.37 J. Penitent or clergyman privilege

This privilege entitles penitents and the clergy to refuse to disclose penitential communications. Evid C §§1030-1034. The requisites for the privilege to apply are:

- A religious functionary such as a priest or minister (Evid C §1030);
- A penitent (Evid C §1031); and
- A confidential penitential communication (Evid C §1032).

Either the penitent or clergy can claim the privilege. Evid C §§1033-1034.

**Further research:** See Jefferson's California Evidence Benchbook, chap 41 (4th ed CJA-CEB 2009); California Trial Objections, chaps 50-51 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.38 K. Sexual assault victim-counselor privilege

### §10.38 K. Sexual assault victim-counselor privilege

This privilege prevents compulsory disclosure of confidential information transmitted between victim and counselor. Evid C §§1035-1036.2. The requisites for the privilege to apply are:

- A counselor-victim relationship (Evid C §§1035-1035.2);
- A communication between counselor and victim (Evid C §1035.4); and
- The victim's expectation of confidentiality (Evid C §1035.4).

The privilege can be claimed by the victim or the victim's representative. Evid C §§1035.6-1035.8. In some circumstances, the counselor has a duty to claim the privilege on the patient's behalf. Evid C §1036.

**NOTE:** Remember that this privilege applies to many types of professionals who counsel sexual assault victims. See Evid C §1035.2 for list of professionals to which the privilege applies.

**Further research:** See Jefferson's California Evidence Benchbook, chap 41 (4th ed CJA-CEB 2009); California Trial Objections, chap 38 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.39 L. Domestic violence victim-counselor privilege

### §10.39 L. Domestic violence victim-counselor privilege

This privilege prevents compulsory disclosure of confidential information transmitted between a victim of domestic violence and counselor. Evid C §§1037-1037.7. The requisites for the privilege to apply are:

- A counselor-victim relationship (Evid C §§1037-1037.1);
- A communication between victim and counselor (Evid C §1037.2); and
- The victim's expectation of confidentiality (Evid C §1037.2).

The privilege is claimed by the victim or the victim's representative. Evid C §§1037.4-1037.5. In some circumstances, the counselor has a duty to claim the privilege on the victim's behalf. Evid C §1037.6.

**NOTE:** Remember that this privilege applies to many types of professionals who counsel domestic violence victims. See Evid C §1037.1 for list of professionals to which the privilege applies.

**Further research:** See Jefferson's California Evidence Benchbook, chap 41 (4th ed CJA-CEB 2009); California Trial Objections, chap 39 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.40 M. Privilege for official information

## §10.40 M. Privilege for official information

This privilege prevents compulsory disclosure of information that is not open or disclosed to the public and is acquired in confidence by a public employee in the course of duty. Evid C §§1040, 1042-1047. The requisites for the privilege to apply are that:

- Information was acquired by a public employee (Evid C §1040(a));
- The expectation of confidentiality existed (Evid C §1040(a)); and
- Disclosure of the information is forbidden under federal or California statute (Evid C §1040(b)(1)) or for policy reasons (Evid C §1040(b)(2)).

The privilege must be claimed by someone who is authorized by the public entity to do so. Evid C §1040(b).

**Further research:** See Jefferson's California Evidence Benchbook, chap 44 (4th ed CJA-CEB 2009); California Trial Objections, chap 43 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.41 N. Privilege for identity of informer

### §10.41 N. Privilege for identity of informer

This privilege prevents compulsory disclosure of the identity of anyone who informs a law enforcement agency of an apparent violation of California or federal law. Evid C §§1041-1042. The requisites for the privilege to apply are:

- Information about a purported violation of law is known (Evid C §1041(a));
- Disclosure is made to a law enforcement officer or person (as defined in Evid C §1041(b));
- Confidentiality is expected by the informer (Evid C §1041(b)); and
- Revealing the informer's identity is forbidden under federal or California statute (Evid C §1041(a)(1)) or for policy reasons (Evid C §1041(a)(2)).

The privilege must be claimed by someone who is authorized by the public entity to do so. Evid C §1041(a).

**Further research:** See Jefferson's California Evidence Benchbook, chap 45 (4th ed CJA-CEB 2009); California Trial Objections, chap 44 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.42 O. Voter's privilege

## §10.42 O. Voter's privilege

This privilege entitles voters not to disclose how they voted in a public election. Evid C §1050. Under Evid C §1050, the requisites for the privilege to apply are that:

- The election was public and by secret ballot;
- The vote was legal; and
- The voter has not previously disclosed the nature of his or her vote.

Only the voter can claim the privilege. Evid C §1050.

**Further research:** See California Trial Objections, chap 49 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.43 P. Trade secrets privilege

### §10.43 P. Trade secrets privilege

This privilege prevents compulsory disclosure of a trade secret. Evid C §§1060-1063. The requisites for the privilege to apply are that:

- A trade secret must exist (Evid C §§1060-1061); and
- The privilege is necessary to avoid injustice (Evid C §1060).

The privilege may be claimed by the owner of the trade secret, or his or her agent. Evid C §1060.

**Further research:** See Jefferson's California Evidence Benchbook, chap 37 (4th ed CJA-CEB 2009); California Trial Objections, chap 45 (Cal CEB Annual).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.44 Q. Journalist's immunity from contempt

### §10.44 Q. Journalist's immunity from contempt

This privilege entitles persons connected with the media to immunity from being held in contempt for failure to disclose sources and other unpublished information. Evid C §1070. The requisites for the privilege to apply are:

- A connection between the witness and the media (Evid C §1070(a)-(b));
- A source (Evid C §1070(a)); and
- Unpublished information (Evid C §1070(a)).

**Further research:** See California Trial Objections, chap 48 (Cal CEB Annual).

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## VII. EVIDENCE EXCLUDED FOR POLICY REASONS

### §10.45 A. Generally

Based on public policy considerations, many types of potentially relevant evidence are prohibited by statute or case law from being introduced into evidence at trial. For example, to encourage certain conduct by preventing it from having potentially negative subsequent consequences in a lawsuit, the legislature has developed exclusionary rules on evidence of, *e.g.*:

- Subsequent remedial repairs (Evid C §1151; see §§10.46-10.48);
- Conduct during the consultation for mediation services (before hiring a mediator) and conduct during the mediation proceedings (Evid C §§1115-1128); and
- Offers of compromise (Evid C §1152; see §10.49).

**Further research:** For a list of the many statutes not in the Evidence Code that limit or prohibit introduction of various types of evidence at trial, see California Trial Objections, chap 32 (Cal CEB Annual). See also Jefferson's California Evidence Benchbook, chap 36 (4th ed CJA-CEB 2009).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.46 B. Subsequent remedial conduct

## §10.46 B. Subsequent remedial conduct

Subsequent remedial or precautionary measures are taken after occurrence of an event, which, if taken previously, would have tended to make the event less likely to occur. Evid C §1151. Evidence of such measures is inadmissible to prove negligence or culpable conduct in connection with the event. Evid C §1151.

**Further research:** See generally California Trial Objections, chap 32 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 36 (4th ed CJA-CEB 2009); Effective Introduction of Evidence in California, chap 52 (2d ed Cal CEB 2000).

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## §10.47 1. Public policy to encourage repairs

This exclusion is designed to avoid having defendants postpone making repairs or taking desirable precautionary measures from fear that such acts may be used against them as admissions of fault. See *Daggett v Atchison, T. & S.F. Ry.* (1957) 48 C2d 655, 660, 313 P2d 557; *Westbrook v Gordon H. Ball, Inc.* (1967) 248 CA2d 209, 215, 56 CR 422.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.48 2. When admissible

### §10.48 2. When admissible

Evidence Code §1151 does not bar evidence of subsequent remedial conduct if it is admissible for another purpose. Such evidence may be admitted:

- In actions based on strict product liability theories in certain circumstances. See *Schelbauer v Butler Mfg. Co.* (1984) 35 C3d 442, 450, 198 CR 155 (roofing panels; purpose of §1151 inapplicable in strict liability case); *Finn v G. D. Searle & Co.* (1984) 35 C3d 691, 703, 200 CR 870 (Diodoquin, a drug used to treat acrodermatitis enteropathica; no error in trial court's exclusion of postaccident warning label on basis that such information was at best cumulative); *Ault v International Harvester Co.* (1974) 13 C3d 113, 118, 117 CR 812 (defective aluminum gear box in automobile; §1151 held inapplicable to strict liability case, noting that proof of manufacturer's "negligence" or "culpable conduct" is unnecessary, and that public policy reason for rule of encouraging postaccident auto repairs is inapplicable in products liability field, because it is in manufacturer's self-interest to improve and repair defective products); *Santilli v Otis Elevator Co.* (1989) 215 CA3d 210, 263 CR 496 (evidence excluded); *Burke v Almaden Vineyard, Inc.* (1978) 86 CA3d 768, 771, 150 CR 419.
- For purposes of impeachment, presumably subject to a limiting instruction. See *Daggett v Atchison, T. & S.F. Ry.* (1957) 48 C2d 655, 665, 313 P2d 557; *Wilson v Gilbert* (1972) 25 CA3d 607, 615, 102 CR 31.
- When the subsequent safety measure was taken by someone other than the defendant. *Magnante v Pettibone-Wood Mfg. Co.* (1986) 183 CA3d 764, 767, 228 CR 420.

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### §10.49 C. Settlement negotiations

Evidence that someone has already provided or has offered or promised to provide anything (*e.g.,* money or services) to anyone who has sustained or will sustain loss or damages, or who claims to have sustained or will sustain loss or damage, is inadmissible to prove liability for the loss or damage or any part of it. Any conduct or statements made in negotiating or promising to provide is also inadmissible. Evid C §1152. See *Hasler v Howard* (2004) 120 CA4th 1023, 1026, 16 CR3d 217 (trial court properly excluded plaintiff's statements made in offer to compromise).

As a corollary to this rule, evidence that someone has accepted or offered or promised to accept anything in satisfaction of a claim, as well as any conduct or statements made in negotiation of a claim, cannot be used to prove that the claim, or any part of it, is invalid. Evid C §1154.

Similarly, statements made during a mediation before a neutral person to assist parties in resolving a dispute are not admissible. Evid C §§1115-1128.

**Further research:** For an extended discussion of these rules, see California Trial Objections, chap 32 (Cal CEB Annual) (offer to plead guilty); Jefferson's California Evidence Benchbook, chap 36 (4th ed CJA-CEB 2009); 1 Witkin, California Evidence, *Circumstantial Evidence* §144 (4th ed 2000).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.50 1. Public policy to encourage settlement

## §10.50 1. Public policy to encourage settlement

Evidence Code §1152 reflects the public policy of encouraging settlement of disputes. See also Evid C §§1115-1128, prohibiting introduction of conduct and statements during mediation.

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### §10.51 2. When admissible

The proscriptions of Evid C §1152 do not bar all evidence of settlement negotiations. For example, evidence of settlement offers can be introduced in an action for breach of the covenant of good faith and fair dealing or for violation of Ins C §790.03(h). Evid C §1152(b).

Settlement offers may be admitted as evidence to show the offeror's good or bad faith. See *Lemer v Boise Cascade, Inc.* (1980) 107 CA3d 1, 11, 165 CR 555 (good faith); *White v Western Title Ins. Co.* (1985) 40 C3d 870, 887, 221 CR 509 (bad faith). Statements made in "meet and confer" sessions are privileged litigation communications that may not be used as evidence of bad faith. *Amtel Corp. v St. Paul Fire & Marine Ins. Co.* (ND Cal 2006) 421 F Supp 2d 1265, 1273.

Settlement offers may be admitted to show the invalidity of a different claim between parties involving a different primary right. *Zhou v Unisource Worldwide, Inc.* (2007) 157 CA4th 1471, 1478, 69 CR3d 273.

Evidence of a party's willingness to compromise may also be received as an admission when not connected with an offer of compromise. *Moving Picture Mach. Operators Union v Glasgow Theatres, Inc.* (1970) 6 CA3d 395, 402, 86 CR 33.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.52 D. Evidence of liability insurance

## §10.52 D. Evidence of liability insurance

Evidence that a person was insured against loss arising from liability for harm suffered by another is inadmissible to prove negligence or other wrongdoing. Evid C §1155.

**Further research:** See generally California Trial Objections, chap 32 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 36 (4th ed CJA-CEB 2009); 1 Witkin, California Evidence, *Circumstantial Evidence* §133 (4th ed 2000).

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## §10.53 1. Public policy favoring insurance and irrelevance of evidence

This exclusion derives from a combination of considerations, including the public policy favoring the purchase of liability insurance, the general irrelevance of such evidence on issues of fault, and the potential prejudicial effect of such evidence on an insured defendant. See Comment to Evid C §1155; *Staples v Hoefke* (1987) 189 CA3d 1397, 1410, 235 CR 165.

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## §10.54 2. When admissible

The proscription of Evid C §1155 is limited. For example, evidence of insurance may be introduced for purposes other than to prove negligence or wrongdoing, *e.g.,* to impeach (*Hart v Wielt* (1970) 4 CA3d 224, 231, 84 CR 220), or to show that the plaintiff was a malingerer (*Hrnjak v Graymar, Inc.* (1971) 4 C3d 725, 732, 94 CR 623).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.55 E. Character evidence

## §10.55 E. Character evidence

Character evidence is evidence of an emotional, mental, or personality trait that establishes a person's disposition or propensity to engage in a certain type of conduct. See Jefferson's California Evidence Benchbook, chap 35 (4th ed CJA-CEB 2009).

**Further research:** For an extensive discussion of these issues, including sample testimony, see Effective Introduction of Evidence in California, chaps 14-16 (2d ed Cal CEB 2000). See also California Trial Objections, chap 22 (Cal CEB Annual); Evidence Benchbook, chap 35.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.56 1. Types of character evidence admissible

## §10.56 1. Types of character evidence admissible

Unless a statute specifically provides otherwise, counsel may use any admissible evidence to prove a person's character or character trait (Evid C §1100), including:

- Evidence in the form of an opinion;
- Evidence of reputation; and
- Evidence of specific instances of the person's conduct.

Excluded character evidence includes evidence of religion or lack of religion (Evid C §789), evidence of specific prior acts offered only to attack credibility (Evid C §787), and evidence of certain prior felonies (Evid C §788).

Evidence of specific prior acts may not be used to prove the witness's character, nor for the sole purpose of attacking or supporting a witness's credibility. Evid C §787. Evidence of such prior acts may be admissible, however, to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than the witness's disposition to commit such an act. Evid C §1101. Moreover, in a criminal action in which the defendant is accused of an offense involving domestic violence or child abuse, evidence of the defendant's commission of other domestic violence or child abuse is not made inadmissible by Evid C §1101, if the evidence is not inadmissible under Evid C §352. Evid C §1109.

In civil actions involving sexual battery, harassment, or assault, evidence of the plaintiff's prior sexual conduct is admissible only on a limited basis. See Evid C §783.

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## §10.57 2. When admissible

The courts' willingness to accept evidence of a person's character depends largely on the purpose of the evidence. For example, if the evidence is offered to attack a witness's credibility, it may be admitted, but only to the extent that the evidence involves the witness's character traits of honesty or veracity or their opposites. Evid C §780. When the character or reputation of a party is itself a material issue in the action, as in a defamation action, evidence of that reputation or character will probably be admissible, subject to certain statutory exceptions and the court's discretion under Evid C §352.

If character evidence is offered to show that the person acted in a particular way on a particular date because his or her character traits were consistent with that conduct, the evidence will likely be excluded. Evid C §§1101(a), 1104.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.58 3. Using character evidence to impeach

## §10.58 3. Using character evidence to impeach

The credibility of any witness may be attacked or supported by any party, including the party calling the witness. Evid C §785.

Evidence of the witness's traits for honesty or veracity is admissible to attack or support the witness's credibility, subject to certain limitations. Evidence of traits of a witness's character other than honesty or veracity or their opposites is inadmissible to attack or support the witness's credibility. Evid C §786. Evidence of a witness's good character may not be admitted in support of character unless evidence of bad character has been admitted to attack the witness's credibility. Evid C §790.

**Further research:** For an extensive discussion of these issues, including how character may be proved, see California Trial Objections, chaps 22, 23 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 35 (4th ed CJA-CEB 2009). See also Effective Introduction of Evidence in California, chaps 14-16 (2d ed Cal CEB 2000).

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## VIII. SUBSTITUTES FOR TESTIMONY

### §10.59 A. Judicial notice

"Judicial notice" is the court's acceptance of the existence of something as a matter of law or fact without the necessity of formal proof of that matter. Evid C §§451-453; *Post v Prati* (1979) 90 CA3d 626, 633, 153 CR 511. When judicial notice is taken of a matter that would otherwise be decided by the jury, the trial court may, and on request must, instruct the jury to accept the matter so noticed. Evid C §457. See §14.33.

The court *must* take judicial notice of certain matters. Evid C §451 (mandatory judicial notice). See §§14.7-14.14. The court *may* take judicial notice of other matters. Evid C §452 (discretionary judicial notice). See §§14.15-14.24.

**Further research:** See Jefferson's California Evidence Benchbook, chap 49 (4th ed CJA-CEB 2009); Effective Introduction of Evidence in California, chap 31 (2d ed Cal CEB 2000).

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## §10.60 B. Stipulations

A stipulation is an agreement between the parties regarding evidence or legal issues. Stipulations between counsel allow the parties to agree that certain facts or matters are true and, for purposes of the trial, are not in dispute. The effect of counsels' stipulations is that no evidence need be, or can be, offered on the stipulated matter. *Harris v Spinali Auto Sales, Inc.* (1966) 240 CA2d 447, 452, 49 CR 610. See discussion of stipulations in §§14.47-14.52.

Court pretrial rules increasingly require the parties to attempt to stipulate to undisputed matters, including foundational matters, before trial begins. When such stipulations are made, they should be made a part of the court's record. Also, consider whether, when, and how to advise the jury of the stipulation. See Effective Introduction of Evidence in California, chap 51 (2d ed Cal CEB 2000).

**Further research:** See Jefferson's California Evidence Benchbook, chap 21 (4th ed CJA-CEB 2009). See also 1 Witkin, California Evidence, *Hearsay* §§100-101 (4th ed 2000).

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### §10.61 C. Judicial admission

A "judicial" admission is made when a party voluntarily concedes the truth of certain matters during the course of the litigation, usually in the party's pleadings or by counsel's statement on the record at trial. The effect is that the opposing party need not offer proof on the admitted matter, which is deemed to be conclusively established. See §§14.43-14.46.

**NOTE:** "Evidentiary" admissions (*e.g.,* a party's express or adoptive admissions) are exceptions to the hearsay rule and can be admitted into evidence and weighed by the trier of fact along with conflicting evidence. See Evid C §1220. For detailed discussion of evidentiary admissions, see Jefferson's California Evidence Benchbook, chap 3 (4th ed CJA-CEB 2009). For discussion of the distinction between evidentiary and judicial admissions, see Effective Introduction of Evidence in California, chap 10 (2d ed Cal CEB 2000); 1 Witkin, California Evidence, *Hearsay* §§100-101 (4th ed 2000). See also §12.75.

Admissions may also be made during discovery, *e.g.,* at a party's deposition, in answers to interrogatories, or in response to requests for admission. Discovery admissions are usually offered during trial to impeach a witness, although requests for admission may result in an admission conclusively established against the admitting party. See CCP §2033.410. See §12.127. On effective use of discovery during trial generally, see chap 12.

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## IX. WITNESSES

### §10.62 A. Competence

Competence is the qualification of a person to serve as a witness at a particular proceeding or to testify to a particular fact. Everyone, regardless of age, is qualified to be a witness, and no one may be disqualified to testify on any matter unless a specific statutory ground for disqualification applies. Evid C §700.

The statutory grounds for disqualification are set forth in Evid C §§701-704. See §§10.63-10.65. For a more detailed discussion, see §§5.9-5.11.

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### §10.63 1. Incapacity to communicate or understand oath

Under Evid C §701(a), a person is disqualified as a witness if he or she cannot:

- Express himself or herself on the matter so as to be understood, either directly or through an interpreter; or
- Understand the duty of a witness to tell the truth.

The trial court determines capacity, using the procedures in Evid C §405. In a nonjury proceeding, the court may postpone ruling on the issue of capacity until after the witness has testified on direct examination. Evid C §701(b). For discussion of the Evid C §405 procedures, see §7.29.

**Further research:** For an extensive discussion of this subject, see Effective Introduction of Evidence in California, chap 32 (2d ed Cal CEB 2000). See also California Trial Objections, chap 18 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 27 (4th ed CJA-CEB 2009).

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### §10.64 2. Prior disqualifying status

On objection, the judge presiding at a trial is incompetent to testify at that trial. Evid C §703. If the judge's testimony is required and an objection is made, a mistrial will be declared and the action reassigned. Evid C §703(a). Similar provisions apply to the inability of a juror in a pending action to testify in that action. Evid C §704(b).

Generally, a person presiding at any judicial or quasi-judicial proceeding, an arbitrator, or a mediator, cannot testify in a subsequent civil proceeding about the first proceeding, except as to a statement or conduct in the first proceeding that could (Evid C §703.5):

- Give rise to civil or criminal 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 §170.1(a)(1) or §170.1(a)(6) (see §§6.32-6.39 on judge's disqualification under CCP §170.1).

Evidence Code §703.5 does not apply to a mediator in any mediation under Fam C §§3160-3186.

**Further research:** See generally Jefferson's California Evidence Benchbook, chap 27 (4th ed CJA-CEB 2009); Effective Introduction of Evidence in California, chap 32 (2d ed Cal CEB 2000); California Trial Objections, chap 18 (Cal CEB Annual).

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## §10.65 3. Lack of personal knowledge

A witness must have personal knowledge of a matter in order to testify about it, except when offering an opinion as an expert witness. Evid C §702. On objection, such personal knowledge must be shown before the witness testifies on the matter. The showing may be made by the witness's own testimony and demeanor or by other probative evidence. The trial judge decides the sufficiency of this showing for purposes of admissibility. Evid C §403. See §7.27. Even if the evidence is admitted, the court can instruct the jury to disregard the testimony if it finds that the witness did not have personal knowledge. Evid C §403(c). See §7.35.

**Further research:** For discussion of the strategies and procedures for establishing or challenging personal knowledge, see Effective Introduction of Evidence in California, chap 32 (2d ed Cal CEB 2000). See also Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009); California Trial Objections, chap 18 (Cal CEB Annual).

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## §10.66 B. Lay opinion

Nonexpert witnesses may offer an opinion at trial, as long as certain foundational requirements are met, *i.e.,* the opinion is (Evid C §800):

- Rationally based on the witness's perception; and
- Helpful to a clear understanding of the witness's testimony.

The trial judge may also admit nonexpert opinion without regard to these two requirements, to the extent other statutory or decisional law permit. Evid C §800. See Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009).

On direct examination, a lay witness may state the reasons for and basis of his or her opinion, unless the law precludes the witness from using such reasons or matter as the basis for the opinion. Evid C §802. The court may require that the witness be examined on the reasons and basis for that opinion before being allowed to give it. Evid C §802.

A court may exclude nonexpert opinion entirely if it is based in whole or in large part on a matter that is an improper basis for such an opinion. Evid C §803. In that event, the witness may not offer an opinion unless a proper basis remains for the opinion that has not been excluded by the court as improper. Evid C §803.

Before potentially damaging nonexpert opinion testimony—and the reasons for the opinion—may be admitted into evidence, opposing counsel should be alert to the possibility of a motion in limine, or a voir dire of the witness. See chap 7. Plan ahead to lay the groundwork to exclude such opinion if it would be improper under the circumstances. See Evid C §803.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.67 C. Scope of direct and cross-examination

## §10.67 C. Scope of direct and cross-examination

The Evidence Code describes the method and scope of examination of witnesses. Evid C §§760-776. See chap 11 for a more in-depth discussion of examining witnesses.

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## §10.68 1. Direct examination

Direct examination is the first examination of a witness on a matter that is not within the scope of any previous examination of the witness. Evid C §760. Except in special circumstances, counsel may not ask leading questions—*i.e.,* questions suggesting the answer—on direct examination. Evid C §§764, 767. See §§11.47-11.81.

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### §10.69 2. Cross-examination

Cross-examination is the examination of the witness by a party other than the direct examiner on a matter within the scope of the direct examination of that witness. Evid C §761. The classic cross-examination is studded with leading questions, which Evid C §767(a)(2) specifically permits.

Ordinarily, each phase of a witness's examination must be completed before the next phase begins. Evid C §772(b). It is within the court's discretion to permit counsel to interrupt his or her cross-examination to examine the witness on a matter outside the scope of direct (Evid C §772(c)), but counsel should expect an objection and be prepared with a good reason for the interruption.

If a witness is being cross-examined by a party whose interest is not adverse to that witness, the rules of direct examination, not cross-examination, apply. Evid C §773(b). See §11.83. For further discussion of cross-examination, see §§11.82-11.124.

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### 3. Redirect and recross-examinations

### §10.70 a. Redirect examination

After cross-examination, the direct examiner may (but need not) question the witness on any new matter on which he or she was examined by opposing counsel. Evid C §§762, 774. Absent leave of court, a witness cannot be reexamined on the same matters on which the witness has already been examined by the party. Evid C §774. The rules restricting leading questions on direct examination apply equally to redirect examinations. Evid C §767(a)(1). See §§11.126-11.127.

**PRACTICE TIP:** Be careful to elicit all necessary testimony on direct examination, rather than viewing redirect examination as a fallback opportunity. Plan your direct examination to include all the evidence needed to prove your case.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.71 b. Recross-examination

### §10.71 b. Recross-examination

Recross-examination is questioning by the cross-examiner after the close of the redirect examination. Evid C §763. Unless the court permits, a witness may not be reexamined on the same matters covered in cross-examination. Evid C §774. See §11.128.

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## D. Form of the question

### §10.72 1. Judge has control over types of questions

Evidence Code §765 gives the trial judge control of the trial process in order to guarantee speedy determination of the truth, to avoid misleading or confusing the jury, and to preclude harassment of witnesses. Judges may give wide latitude to counsel in the types of questions they may ask, especially on cross-examination. However, it is important to listen carefully and to object to the question when there is a real danger of the witness or factfinder's being misled.

See California Trial Objections, chaps 7-16 (Cal CEB Annual), which are filled with examples of objections to the form of question.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.73 2. Checklist: Objections to form of question

## §10.73 2. Checklist: Objections to form of question

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

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

Use this checklist to help identify questions that are objectionable in form:

___ 1. Leading questions

___ 2. Narrative

___ 3. Vague/general

___ 4. Ambiguous/indefinite/unintelligible

___ 5. Assumes fact not in evidence

___ 6. Undue harassment or embarrassment

___ 7. Argumentative

___ 8. Asked and answered/cumulative

___ 9. Misstating previous testimony

___ 10. Compound

___ 11. Nonresponsive answers

See also chap 11 for discussion of how to formulate questions to avoid these objections.

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## E. Impeachment

### §10.74 1. Consider credibility of witness

A witness's credibility can be called into question by anything that tends to prove or disprove the truthfulness of the witness's testimony. Evid C §780. For example:

- The witness's capacity to perceive, to recollect, or to communicate about the subject of his testimony;
- The extent of the witness's opportunity to perceive;
- The witness's known character for truthfulness;
- Whether the witness has a bias, interest, or other motive;
- The witness's admissions; and
- The witness's statements that are inconsistent with his or her testimony at trial.

Evidence Code §780 includes an extensive list of matters the court or jury may consider in determining credibility. See CACI 107 or 5003, which are identical instructions on witness credibility. See also BAJI 2.20.

See §11.117 for discussion of using character evidence to impeach. See also California Trial Objections, chap 22 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 29 (4th ed CJA-CEB 2009).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.75 2. Prior inconsistent statements--powerful impeachment

## §10.75 2. Prior inconsistent statements—powerful impeachment

Impeachment with a prior inconsistent statement is one of the most powerful ways to cast doubt on the credibility of a witness, not simply as to the matter on which the witness is cross-examined, but, if handled properly, as to the witness's entire testimony. One of the most effective and typical ways of impeaching a witness is through the witness's deposition testimony.

If a witness is to be impeached with a prior inconsistent written statement, counsel must proceed carefully and anticipate objections. Ordinarily, extrinsic evidence of a prior inconsistent statement is admissible only if the witness:

- While testifying, is given an opportunity to explain or deny the inconsistent statement; or
- Has not been excused from giving further testimony in the matter. Evid C §770(a)-(b).

The court may allow a prior inconsistent statement in the "interests of justice" if these two requirements cannot be met. Evid C §770; see Jefferson's California Evidence Benchbook, chap 29 (4th ed CJA-CEB 2009).

All the requirements of authentication (Evid C §1401) and of the secondary evidence rule (Evid C §§1521-1523, 1552-1553) must be met before a prior inconsistent written statement may be used, and counsel must make certain that the statement is truly inconsistent with the witness's testimony. See Effective Introduction of Evidence in California, chap 41 (2d ed Cal CEB 2000) (practical and tactical considerations); California Trial Objections, chap22 (Cal CEB Annual); Evidence Benchbook, chap 29.

A properly authenticated prior inconsistent statement may also be offered for the truth of the matter asserted, not simply to impeach credibility. Evid C §§770, 1235. See §10.23. See also §11.118.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.76 F. Expert witnesses

## §10.76 F. Expert witnesses

Expert witnesses can be used effectively to assist the trier of fact in many different kinds of trials. Before expert testimony may be received, first establish that the person is qualified to so testify (Evid C §720) and then establish that the opinion testimony is itself admissible (Evid C §§801-805). All this is subject to the court's discretionary power, at any time before or during trial, to limit the number of expert witnesses (Evid C §723) or, on its own motion, to appoint its own expert (Evid C §§730-733). See §§11.130-11.151. See also California Expert Witness Guide (2d ed Cal CEB 1991).

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## §10.77 1. Qualifications

The Evidence Code broadly defines what qualifies a person to testify as an expert: "special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates." Evid C §720. The court decides whether a witness is qualified as an expert, and on what topics. Before that ruling is made, opposing counsel may cross-examine a proposed expert on the expert's qualifications. Evid C §§720-721. See California Expert Witness Guide §13.2-13.6 (2d ed Cal CEB 1991).

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### §10.78 2. Eliciting expert witness's testimony

Once qualified as an expert, a witness can testify in the form of an opinion as long as the opinion is (Evid C §801):

- Related to a subject that is "sufficiently beyond common experience" that the opinion would "assist the trier of fact" (Evid C §801(a)); and
- Based on a matter perceived by or known to the expert witness that is the type of matter that an expert on the subject may reasonably rely on. Evid C §801(b).

The second requirement can be met by the expert's own special knowledge, skill, experience, training, and education. The underlying basis for the opinion can be made known to the expert before or even at the hearing, *e.g.,* in a hypothetical question; and the basis for the opinion need not be admissible. Evid C §801(b). See §§11.141-11.144.

The expert witness may testify about the reason for his or her opinion and the basis for it unless the law specifically requires otherwise. Evid C §802. As with nonexpert opinion witnesses, the court has authority to exclude opinion testimony altogether if it is based entirely or largely on a matter that is not the proper basis for such an opinion. Evid C §803. In that event, the witness may not offer an opinion unless a proper basis remains for his or her opinion that the court has not excluded as improper. Evid C §803.

Opposing counsel should be alert to the appropriateness of a motion in limine or a voir dire of the expert if anything suggests that the expert's opinion testimony would be improper.

**Further research:** See California Expert Witness Guide §§14.2-14.7 (2d ed Cal CEB 1991).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.79 3. Ultimate issue

## §10.79 3. Ultimate issue

As long as the testimony is otherwise admissible, an expert may testify as to an opinion that "embraces the ultimate issue" to be decided by the trier of fact. Evid C §805.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.80 4. Cross-examination of expert witness

### §10.80 4. Cross-examination of expert witness

The techniques for cross-examining expert witnesses are addressed in §§11.82-11.124. In addition to being cross-examined to the same extent as any other witness, an expert may be cross-examined as to (Evid C §721):

- His or her qualifications;
- The subject of the testimony; and
- The basis of, and the reasons for, that opinion.

However, an expert witness offering an opinion cannot be cross-examined on the "tenor of any scientific, technical, professional text, treatise, journal or similar publication" unless

- The witness has referred to, considered, or relied on that publication in reaching an opinion;
- The publication has already been admitted in evidence; or
- The publication has been established as a reliable authority by the testimony or admission of the witness, other expert testimony, or judicial notice.

Evid C §721(b)(1)-(3). The reason for restricting cross-examination on publications is clear: to do otherwise might bring before the trier of fact "opinions of absentee authors without the safeguard of cross-examination." Comment to Evid C §721.

**Further research:** See California Expert Witness Guide, chap 15 (2d ed Cal CEB 1991).

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## X. EXHIBITS

### §10.81 A. Substantive and procedural requirements

"Exhibits" are items of physical evidence marked for identification at trial and logged in the court clerk's record. Such evidence is variously referred to as documentary, demonstrative, or real evidence. See §§13.2-13.5.

For an exhibit to be relied on by the trier of fact or argued as evidence by counsel, it must be formally received as evidence by the court. See §§13.45-13.61 for the procedure of introducing exhibits into evidence.

As discussed below, the substantive showing required for exhibits to be introduced includes relevance (see §10.82) and authenticity (see §10.83). Introduction of such evidence may also depend on avoiding the prohibitions of various potential objections, including hearsay rules (see §§10.17-10.27), and Evid C §352 considerations (see §10.86).

For an extensive discussion of handling exhibits at trial, see chap 13.

**Further research:** For a working outline for such issues, see Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008); Effective Introduction of Evidence in California, chaps 11, 12-14, 39 (2d ed Cal CEB 2000).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.82 B. Relevance

## §10.82 B. Relevance

Before an exhibit (whether documentary, demonstrative, or otherwise) can be admitted, it must be found relevant. Evid C §350. See §§10.13-10.16 for definition of "relevance."

For certain types of demonstrative evidence, such as models or accident-reconstruction evidence, relevance will depend on a showing that the conditions reflected in or underlying the evidence are "substantially similar" to those giving rise to the issue to which the evidence relates. See §13.102. Evidence of both the conditions existing at the time of the dispute and the conditions reflected in the proposed exhibit are required.

**Further research:** See Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial), App B (Cal CEB Action Guide April 2008).

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## §10.83 C. Authenticity

An exhibit must be authenticated before it, or before secondary evidence of its contents, may be received in evidence. Evid C §1401. Evidence Code §1400 defines "authentication of a writing" as:

- Introduction of enough evidence to sustain a finding that it is the writing its proponent claims it is; or
- Establishment of such facts by any other means provided by law, *e.g.,* a presumption (see Evid C §§1450-1454 for presumptions on acknowledged writings).

When the exhibit is subsequently altered in a material way, the proponent must account for the alteration. Evid C §1402; see §13.90.

The burden of authenticating an exhibit rests with its proponent. Evid C §403(a). This burden may be satisfied in several different ways, including stipulations, testimony by expert or lay witnesses, admissions by adverse parties, judicial notice, or limited statutory presumptions.

**Further research:** See generally Effective Introduction of Evidence in California, chaps 2, 11 (2d ed Cal CEB 2000); Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial), step 18, App G (Cal CEB Action Guide April 2008).

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### §10.84 D. Proof of content of writing evidence

Evidence Code §§1520-1523 and 1552-1553 govern proof of the content of a writing. The content of a writing may be proved by an otherwise admissible original (Evid C §1520) or by "secondary evidence" (Evid C §1521). The court may exclude secondary evidence if it determines that (1) a genuine dispute exists concerning material terms of the writing and justice requires its exclusion, or (2) admitting the secondary evidence would be unfair. Evid C §1521(a).

The new provisions generally prohibit oral testimony to prove the content of a writing. Evid C §1523. Oral testimony is admissible, however, if the proponent of the evidence does not have possession or control over the original or a copy and (1) the original has been lost or destroyed without fraudulent intent on the part of the proponent; (2) the original was not reasonably procurable; or (3) the document is collateral to the controlling issues, and it would be inexpedient to require production of the original. Evid C §1523(b)-(c).

Oral testimony is also permissible when the writing consists of numerous accounts or other writings that cannot be examined in court without a great loss of time, and the evidence to be presented is "only the general result of the whole." Evid C §1523(d).

Two other Evidence Code provisions address technological advances. Evidence Code §1552 allows a computer printout to represent the computer information or computer program that it purports to represent. If a party introduces evidence that a computer printout is unreliable, the burden shifts to the party introducing the printout to prove, by a preponderance of the evidence, that the printout is an accurate representation. Evid C §1552.

Evidence Code §1553 provides that a "printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to convey." If a party introduces evidence that the printed representation is unreliable, the burden shifts to the party introducing the images to prove, by a preponderance of the evidence, that the printed representation is an accurate representation of the images it purports to represent. Evid C §1553.

The secondary evidence rule does not change the provision that, when statutory production procedures are followed, copies of business records may be used in lieu of originals. Evid C §1562.

**Further research:** For further discussion on the secondary evidence rule, see §§13.122-13.123. On computer-generated evidence, see §13.107. See also California Trial Objections, chap 24 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 32 (4th ed CJA-CEB 2009); 2 Witkin, California Evidence, *Documentary Evidence* §§27-30 (4th ed 2000).

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## §10.85 E. Hearsay evidence

Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Evid C §1200(a). Hearsay evidence is inadmissible unless one of the many statutory exceptions applies. See §§10.17-10.27.

Because an exhibit, especially a writing, contains statements made out of court, the hearsay objection is frequently made to exhibits offered at trial. However, several hearsay exceptions make exhibits containing hearsay admissible. For discussion of the rule and its many exceptions, see §§10.17-10.27. For example, the business records exception to the hearsay rule may apply. See §10.25.

**Further research:** See also California Trial Objections, chap 19 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 11 (4th ed CJA-CEB 2009).

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### §10.86 F. Evidence Code §352

The trial court has broad discretion under Evid C §352 to exclude otherwise admissible evidence when introduction of the evidence would likely consume undue amounts of time, mislead the trier of fact, or be unduly prejudicial. See §10.16. Proffered exhibits are often subject to objection under this section. See §13.117. For example, a photograph may be excluded under §352, even if it is relevant, if it is so gory that its prejudicial effect outweighs its probative value.

**Further research:** For an extensive list of specific cases excluding and admitting various types of evidence under §352, see Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial), App G (Cal CEB Action Guide April 2008). See also California Trial Objections, chap 31 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 22 (4th ed CJA-CEB 2009).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/10 Evidence Overview/§10.87 XI. SELECTED BIBLIOGRAPHY

## §10.87 XI. SELECTED BIBLIOGRAPHY


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# 11

# Examining Witnesses

**Geoffrey L. Thomas**

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## §11.1 I. SCOPE OF CHAPTER

This chapter discusses:

- Preparing to examine witnesses in §§11.2-11.27;
- Use of interpreters and translators in §§11.28-11.43;
- Direct examination in §§11.47-11.81;
- Cross-examination in §§11.82-11.125;
- Redirect and recross-examination and rebuttal and surrebuttal in §§11.126-11.129.
- Examining an expert witness in §§11.130-11.151;
- Ethical concerns when a party or witness commits perjury in §§11.152-11.168.

See chap 5 on preparing witnesses for trial.

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## II. PREPARING FOR EXAMINATION OF WITNESSES

### §11.2 A. Balancing planned examination with flexibility

Most attorneys plan their examination of a witness with some form of a witness outline. The heat of courtroom battle, however, may divert counsel from the planned course of action. Although the examining attorney must be able to capitalize on opportunities created by witnesses' unexpectedly helpful responses, eventually the successful attorney returns to the initial planned strategy.

In short, balance adherence to a planned examination with flexibility during the actual questioning. Although preparation is essential, do not let it undercut the examination's natural spontaneity. To create momentum and an atmosphere of drama, respond to opportunities created by a witness's unanticipated responses. To this end, be prepared to deviate from the planned interrogation and explore contradictions with additional questions before returning to the planned examination. On preparation of witnesses generally, see chap 5.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.3 B. Techniques for communicating with trier of fact

## §11.3 B. Techniques for communicating with trier of fact

Although tactics will vary with each examination, certain techniques for communicating information to the trier of fact are consistent in every situation. Some of these techniques are discussed in §§11.4-11.9.

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## §11.4 1. Educating judge or jury

The courtroom examiner's role is to educate the trier of fact in a manner that will put forth the client's position most favorably, consistent with the facts. The issues in a case may be so familiar to the examining attorney that there is an unwanted side effect: The interrogation may not adequately cover the underlying premises and background facts.

Therefore, begin with the basics, to ensure that the jury (or judge) understands the witness's place in the case's factual landscape. The "basics" include defining any unfamiliar phrases or jargon. Gradually move from familiar to lesser known concepts. Begin and end the examination with attention-grabbing points, if possible.

The clarity of the interrogation is usually directly related to the attorney's ability to phrase questions succinctly. Simple questions invite short answers that will be more easily grasped by the trier of fact. Give the judge or jury sufficient facts about the case to enable them to reach a decision—but do not bury them in exhaustive or repetitive detail. On framing questions, see §§11.50-11.62, 11.104-11.113.

**NOTE:** You may choose to conduct an interrogation differently when the trier of fact is a judge instead of a jury. For example, a judge might be more receptive than a jury to an examination that emphasizes legally significant issues.

**JUDICIAL PERSPECTIVE:** Be prepared for the judge to ask questions when he or she is the trier of fact; judges are more likely to do so during a bench trial than during a jury trial.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/ 2. Reinforcing key points/§11.5 a. Defining events

## 2. Reinforcing key points

### §11.5 a. Defining events

One way to reinforce key points through questioning is by identifying the defining events in the case and then focusing questions on them. A "defining event" is an act or a statement that capsulizes the case or lays bare its essential conflicts.

**EXAMPLE:** If a key term in a contract was uniformly understood by several witnesses to mean something favorable to your client, you should repeatedly return to the negotiation, usage, and interpretation of that term. You may then legitimately use the interpretation to which the witness has testified in framing your next question.

You can greatly enhance the probability that the trier of fact will understand and remember these defining events through repetition of questions to witnesses throughout the trial. On handling objections to cumulative testimony, see §§11.59-11.60.

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### §11.6 b. Themes

Another way to reinforce key points through questioning is to identify one or more themes and focus on facts that demonstrate those themes. Repeat variations on these themes throughout the trial. Certain sets of common facts, elicited from the perspective of different witnesses, can reinforce your main contentions or themes. See §9.26 for further discussion of themes.

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## §11.7 c. Visual aids

Visual aids enhance the ability of the trier of fact to understand and retain key information. Many studies show that jurors remember information better when it is seen as well as heard. Accordingly, consider using graphs, charts, time lines, and pictures in addition to oral testimony. On use of documentary and demonstrative evidence generally, see chap 13.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.8 3. Exploring human interest elements

## §11.8 3. Exploring human interest elements

Particularly in a jury trial, focus on any relevant "human interest" elements. Jurors are interested in hearing human interest stories that help personalize your client's case.

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## §11.9 4. Using examples familiar to jurors

Use illustrations and examples in questions to help clarify abstract concepts, but try to use only familiar illustrations and examples. For example, in framing questions to a witness, consider the jurors' occupations as revealed during voir dire and incorporate them, if possible, into your examination of the witness.

**EXAMPLE:** One juror works at the check-out counter of a supermarket. You are questioning a real estate appraiser about prices being higher for each individual subdivided lot than it would be for the undivided whole parcel. You might chose an analogy of buying fruit by the piece versus by the crate to make your point with an example more familiar to the juror who works at the supermarket. This example might also be more familiar to other jurors who probably buy more fruit than real property.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.10 C. Different types of witnesses

## §11.10 C. Different types of witnesses

Adapt your interrogation style to fit the witness. Witnesses can be grouped into four general categories:

- Friendly witnesses;
- Hostile witnesses;
- Neutral third parties; and
- Expert witnesses.

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## §11.11 1. Friendly witnesses

These witnesses are usually the client and individuals affiliated with the client. When examining a friendly witness, focus the jury's attention on the witness. Do not succumb to the temptation to ask questions that encourage the friendly witness to overstate the facts, because exaggeration ultimately undercuts the credibility of the case. On preparing parties and party-related witnesses, see §§5.48-5.64.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.12 2. Hostile witnesses

## §11.12 2. Hostile witnesses

These witnesses are usually adverse parties and third persons with a grievance against the client, such as a fired employee. When examining a hostile witness, exercise greater control by asking leading questions, when permitted. Also assert control by projecting your voice and moving about the courtroom during the examination if courtroom rules permit. On leading questions, see §§11.54-11.56, 11.111. On tone of questioning, see §§11.99-11.103.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.13 3. Neutral third parties

## §11.13 3. Neutral third parties

Neutral third parties can be particularly credible witnesses. Be especially careful in preparing a third party witness, because your statements to the witness are not protected by the attorney-client privilege. See Evid C §952; §5.65. On preparing nonparty witnesses, see §§5.65-5.69. Courts generally require you to refrain from asking leading questions when examining a neutral third party witness. Nevertheless, exert control with this type of witness by carefully framing your questions to avoid unpredictable and damaging responses.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.14 4. Expert witnesses

## §11.14 4. Expert witnesses

Expert witnesses require special preparation and handling, as addressed in §§11.130-11.151. On preparing experts generally, see §§5.70-5.90.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.15 D. Examiner's questioning style

### §11.15 D. Examiner's questioning style

Use a natural style while questioning. Therefore, do not mimic another lawyer's flamboyant questioning technique, if that is not your natural demeanor; the jury may see that you are role playing and doubt your sincerity and credibility. Examination is more effective if you develop a personal and authentic style of questioning.

Sometimes examining attorneys believe that their role is to intimidate adverse witnesses. But intimidating questions can make some witnesses defensive and less likely to provide useful information. Many attorneys are better off using a more compatible, less confrontational, style of questioning. On cross-examination generally, see §§11.82-11.125.

Some attorneys are self-conscious about the adequacy of their "performance" when conducting a cross-examination. This feeling may arise from a misconception that the cross-examining attorney is expected to elicit sudden, damaging, admissions. In fact, this rarely happens; it is usually sufficient to simply lay the foundation during the examination for later emphasis during closing argument. A personal, natural style of interrogation is successful if it elicits from the witnesses information that enables the judge or jury to reach a decision favorable to your client's cause.

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## E. Examining witness: Basic rules

### §11.16 1. Remember instructions to witness

When preparing the witness to testify, most attorneys give directions or instructions to the witness about testifying. See §§5.32-5.43 [also in appendix at end of this chap] for such instructions. The opposition has also given its witnesses the same, or similar, instructions. For example, a basic witness instruction is to "answer only the question asked, and do not volunteer information."

Be alert to each occasion when an opposing witness violates this or any other basic instruction and use the violation to help your client's case. If a witness volunteers information that reveals something helpful to your case, pursue that information with further questions.

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### §11.17 2. Courtroom decorum

To avoid unpleasant encounters with the trial judge during trial, ask the clerk or the bailiff whether the judge has any particular preferences about courtroom decorum. For example, some judges feel strongly that attorneys should not walk about the courtroom while examining witnesses. They require examination of the witnesses from behind the attorneys' table or from a lectern. Similarly, many judges require court permission each time an attorney wishes to approach a witness. Some of these matters can be covered in a court conference. See §§6.2-6.5.

The area of the courtroom between the judge's bench and counsels' table is known as the "well"; many judges do not want attorneys to walk into the well. Similarly, some judges may have strong views against putting briefcases on tables or using computers to take notes during trial.

**PRACTICE TIP:** Check to see whether there are any local rules or policies on courtroom decorum. See, *e.g.,* Los Angeles Ct R 8.0-8.14.

If the court permits, consider moving about the courtroom on cross-examination, since this creates a more dynamic visual presence. Some physical movement adds variety to the interrogation process. However, this is rarely permitted in federal court, where attorneys are usually required to speak from a podium.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.18 3. What not to do during examinations

## §11.18 3. What not to do during examinations

Certain practices undercut an examiner's credibility and should be avoided. For example, do not:

- Act overly friendly and familiar with witnesses;
- Be rude to the judge;
- Talk down to the jury;
- Attack a sympathetic witness;
- Ask misleading questions;
- Act disappointed at a witness's unfavorable answer;
- Announce that you will be brief, and then go on at length.

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## III. PREEXAMINATION CONSIDERATIONS

### §11.19 A. Competency of witness

A witness's competency, *i.e.,* ability to comprehend and relate events, is a preliminary fact to be determined under Evid C §405. If competency may be an issue, plan to ask the witness questions at the beginning of your examination that establish the witness's competency and include these questions in your outline of questions for that witness. For discussion of competency, see §§5.9-5.11. For discussion of preliminary fact hearings, see §§7.25-7.36.

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## §11.20 1. Objecting party has burden of showing incompetency

If a witness's competency is not established at the beginning of the examination of that witness, opposing counsel may object. The burden of proving incompetence rests on the party who suggests it, *i.e.,* the party objecting to lack of competence foundation. Comment to Evid C §405.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.21 2. Court decides competency as preliminary fact (Evid C §405)

### §11.21 2. Court decides competency as preliminary fact (Evid C §405)

To determine whether a witness is incompetent, the judge may hold a hearing outside the jury's presence (Evid C §402), and, if the court finds that the witness is competent to testify, the jury is not informed of the court's prior hearing or determination. Evid C §405(b)(1). See also 2 Witkin, California Evidence, *Witnesses* §41 (4th ed 2000).

**PRACTICE TIP:** If you anticipate that a witness's competence may be at issue, call that issue to the judge's attention (*e.g.,* through a motion in limine; see §7.29) at the earliest possible time so that the judge can arrange for a hearing.

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### §11.22 3. Guidelines for deciding competency

In determining a witness's competency, the court must follow the following guidelines:

First, temporary confusion or disorientation is not equivalent to a finding of incompetency. See, *e.g., Sanders Constr. Co. v San Joaquin First Fed. Sav. & Loan Ass'n* (1982) 136 CA3d 387, 395, 186 CR 218, in which a diabetic witness was found competent even though he suffered momentary diabetic confusion and disorientation while testifying. The court stated: "Questions regarding competency are almost wholly a matter of trial court discretion" and concluded that it could find no error in the trial court's denial of a request for a determination of competency under the facts. 136 CA3d at 396.

Second, a trial judge may not use subjective assumptions in determining a witness's competency. In *Manguso v Oceanside Unified Sch. Dist.* (1984) 153 CA3d 574, 200 CR 535, the court held that excluding testimony from a teacher's former students was improper because the trial judge had based his ruling on the subjective assumption that students cannot recall childhood events. 153 CA3d at 582.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.23 B. Personal knowledge of witnesses

## §11.23 B. Personal knowledge of witnesses

Generally, ask a witness questions at the beginning of the examination that establish his or her personal knowledge of the matters about to be related by the witness. Because opposing counsel may object if you fail to establish the witness's personal knowledge, include this issue in your list of questions to ask the witness. See discussion of personal knowledge in §5.12.

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## §11.24 1. Party offering testimony has burden of showing personal knowledge

If personal knowledge is not established and opposing counsel objects, "personal knowledge must be shown before the witness may testify concerning the matter." Evid C §702(a). The burden of proving personal knowledge rests on the party who seeks to introduce the testimony. Evid C §403(a).

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### §11.25 2. Court decides personal knowledge as preliminary fact (Evid C §403)

A witness's personal knowledge is a preliminary fact to be determined under Evid C §403. See discussion of preliminary fact hearings in §§11.21-11.23. To make this determination, the judge may hold a hearing outside the jury's presence. Evid C §402(b). If the evidence is sufficient to sustain a finding of personal knowledge, the judge must admit the testimony. Evid C §403(a). The ultimate decision on personal knowledge, however, is left for the jury. Evid C §403(c)(1); Comment to Evid C §403. See *People v Blagg* (1970) 10 CA3d 1035, 89 CR 446. See also 2 Witkin, California Evidence, *Witnesses* §46 (4th ed 2000).

On rules that apply when an expert testifies in the form of an opinion, see Evid C §§801-805, discussed in §§11.135-11.145.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.26 C. Preparation of witnesses generally

## §11.26 C. Preparation of witnesses generally

Preparing witnesses to testify on direct examination differs from preparation for cross-examination. Every witness preparation, however, should include the following:

- A reminder to tell the truth;
- A chronological or other review of the facts of the case;
- A reminder to answer only the question asked; and
- A review of the questions most likely to be asked on both direct and cross-examination.

On witness preparation generally, see chap 5 (see also specific headings in this chapter).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.27 D. Excluding witnesses at trial

### §11.27 D. Excluding witnesses at trial

If you believe that a witness may be influenced by listening to another witness testify, move to have the trial judge exclude that witness, or all witnesses, from the courtroom while the other witnesses are testifying. Evid C §777. See chap 6 on how to make this pretrial motion.

Individual parties to an action and an officer or employee who is the designated trial representative of a corporate party are excepted from any order of exclusion. Evid C §777(b).

**PRACTICE TIP:** Courts routinely grant motions to exclude witnesses at trial, with only a minimal showing, but courts will also almost automatically make the ruling apply to all witnesses on all sides, so be prepared to have your own witnesses excluded if you make the motion.

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## IV. INTERPRETERS AND TRANSLATORS

### A. Deciding when to use interpreters and translators

### §11.28 1. When required

Judicial proceedings must be conducted in English. CCP §185. An interpreter is required when:

- A witness is incapable of understanding English or is incapable of communicating in English so as to be directly understood. Evid C §752(a).
- The written characters in a "writing offered in evidence are incapable of being deciphered or understood directly." Evid C §753(a).
- A witness is deaf or hearing impaired as defined in Evid C §754(a), *i.e.*, a person with a hearing loss that prevents him or her from "understanding language spoken in a normal tone, but does not include an individual who is hearing impaired provided with, and able to fully participate in the proceedings through the use of, an assistive listening system or computer-aided transcription equipment" as provided in CC §54.8. Evid C §754(b).

**NOTE:** When an otherwise valid privilege exists between a deaf or hearing-impaired person and "another person, that privilege is not waived merely because an interpreter was used to facilitate their communication." Evid C §754.5.

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### §11.29 a. Interpreter for party witness

Under Cal Const art I, §14, anyone charged with a crime who cannot understand English "has a right to an interpreter throughout the proceedings." See *In re Raymundo B.* (1988) 203 CA3d 1447, 1453, 250 CR 812 (Cal Const art I, §14 applies to juvenile charged with crime).

In civil cases, however, the court in *Jara v Municipal Court* (1978) 21 C3d 181, 145 CR 847, held that the refusal to appoint an interpreter at public expense to assist non-English-speaking litigants does not violate the constitutional guarantee of due process or equal protection of the law. The court also held that there is no statutory basis for such an appointment (21 C3d at 183) and that language assistance to indigent but represented litigants was available so that there is no need for courts to require appointment of interpreters at public expense to assist litigants. 21 C3d at 185. Compare *Jara* with *Gardiana v Small Claims Court* (1976) 59 CA3d 412, 130 CR 675, on the small claims court's inherent power to appoint an interpreter for indigent parties, which was distinguished in *Jara v Municipal Court, supra*. For a witness's right to an interpreter, see §11.28.

On the other hand, Evid C §754(b) provides that, in any civil or criminal action in which a party or witness is deaf or hearing-impaired, the proceeding must be interpreted in a language that the deaf or hearing-impaired party or witness understands by a qualified interpreter appointed by the court, other appointing authority, or as agreed on.

On compensation and costs of interpreters and translators generally, see §§11.42-11.43.

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### §11.30 b. Using interpreter for more than one purpose

Criminal cases have distinguished between an interpreter appointed for a criminal defendant and an interpreter for a witness. The cases have held that a court's borrowing a defendant's interpreter to translate another witness's testimony constitutes a denial of the defendant's right to an interpreter "throughout the proceedings" in violation of Cal Const art I, §14 unless the defendant waived that right. *People v Aguilar* (1984) 35 C3d 785, 200 CR 908; *In re Dung T.* (1984) 160 CA3d 697, 206 CR 772. On standard of review, see *People v Rodriguez* (1986) 42 C3d 1005, 232 CR 132.

There are no cases deciding whether a similar situation in a civil case, *i.e.,* a party's interpreter borrowed to act as a witness interpreter, would also be a due process violation.

**PRACTICE TIP:** Although the same interpreter can be used for several witnesses during depositions, it is critical that you and your client do not share an interpreter with other parties or witnesses during trial. As a practical matter, you will need access to your own interpreter to be sure that you understand what is going on at trial and in the event of a dispute about key aspects of a witness's testimony.

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## §11.31 2. When permitted

The trial judge has discretion to appoint an interpreter when justice requires. *Gardiana v Small Claims Court* (1976) 59 CA3d 412, 130 CR 675; *People v Holtzclaw* (1926) 76 CA 168, 243 P 894; *People v Walker* (1924) 69 CA 475, 231 P 572. For example, the court may appoint an interpreter to facilitate matters even when the witness appears to have a relatively firm grasp of English. *People v Lacang* (1931) 213 C 65, 1 P2d 7. Similarly, the court may appoint an interpreter even though the witness can read, write, and speak some English. See *People v Santos* (1933) 134 CA 736, 26 P2d 522.

It is an abuse of discretion not to appoint an interpreter if uncontradicted evidence exists that the witness does not speak or understand English. See *Gardiana v Small Claims Court, supra*. However, the court is not required to appoint an interpreter unless the witness or party makes an affirmative showing that the interpreter is necessary. *In re Raymundo B.* (1988) 203 CA3d 1447, 1454, 250 CR 812.

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## B. Choosing an interpreter

### §11.32 1. Certified interpreter preferred

The judge has discretion as to which interpreter to select. *Hsu v Mt. Zion Hosp.* (1968) 259 CA2d 562, 66 CR 659 (no abuse of discretion in selecting court interpreter rather than plaintiffs' interpreter). However, under Govt C §68561, anyone who interprets in a court proceeding using a language designated by the Judicial Council under Govt C §68562(a) must be a certified court interpreter as defined in Govt C §68566 unless good cause for appointment of an interpreter not so certified exists. If the court believes good cause exists, the court must follow the qualification procedures and guidelines adopted by the Judicial Council under Govt C §68561(c). Under Govt C §68561(d), for languages not designated by the Judicial Council, an interpreter in a court proceeding must "be qualified by the court under the qualification procedures and guidelines adopted by the Judicial Council." If a qualified interpreter also passes an English fluency examination offered by a testing entity approved by the Judicial Council, that person must be designated a "registered interpreter." Govt C §68561(d).

In addition, Evid C §754 requires that interpreters for deaf or hearing-impaired persons meet the qualifications of being "certified as competent to interpret court proceedings by a testing organization, agency, or educational institution approved by the Judicial Council as qualified to administer tests to court interpreters for individuals who are deaf or hearing impaired." Evid C §754(f).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.33 2. Finding the right interpreter

### §11.33 2. Finding the right interpreter

If you will arrange for the interpreter (see §§11.34-11.43), be sure to check references, especially with difficult or unusual languages. If at all possible, consult with an attorney who is fluent in the language you want interpreted. Not only is such a person likely to know of several interpreters, but he or she is also in a position from personal experience to know which ones interpret accurately and literally. Do not assume that simply because someone is a court certified interpreter he or she will do an adequate job of contemporaneous, literal translation for the particular witness in your case.

The fact that you have a well-educated and articulate interpreter does not automatically mean that your witness will be able to converse at the same sophisticated level. A problem often arises when witnesses have difficulty expressing themselves in the native language or use slang or colloquial terms that the interpreter may misunderstand. Make sure that your interpreter understands the slang or colloquial terms and that the interpreter will take the initiative to explain these terms.

**PRACTICE TIP:** You must become familiar with the possible problems of interpreting for your witness, *e.g.,* lack of sophistication or use of slang, colloquial terms, or dialect. In addition to finding a competent interpreter, consider learning terms or phrases in the foreign language to help you examine the witness.

When selecting an interpreter, give specific attention to your client's or witness's nationality and region of origin. For example, a problem may arise if your client is a Mexican national and you retain a Chilean interpreter, because although both speak Spanish, the same word may have entirely different meanings in each country. The same problem can arise when the witness and interpreter are from the same country but from different regions of that country.

Keep in mind that there are basically two types of interpreters:

- Those who interpret literally; and
- Those who paraphrase to interpret the essence and meaning of a witness's statement.

There are advantages and disadvantages to both types, but an interpreter who interprets literally is usually preferable. One who interprets literally will not miss any detail that you (in questioning) and the witness (in responding) may consider crucial. On the other hand, the literally interpreted answer may often sound strange to the judge or jury. This result is unavoidable because sentence structure, common usages, and cultural context are important aspects of spoken languages that vary from one language to another. Similarly, your witness may have difficulty understanding a literally interpreted question. Sometimes literal translations of idiomatic expressions produces unintelligible testimony.

The primary advantage of an interpreter who translates only the essence is that the testimony will probably be presented in terms that the judge and jury will understand. This type of interpreter may also pick up on nuances that a literal interpreter might miss. The greatest disadvantage of an interpreter who translates only the essence of or paraphrases a witness's testimony is that, no matter how good an interpreter, this interpreter might disregard or change a term that is crucial to your case.

The best course is to select a literal interpreter who understands the state of mind of the English-speaking listener and will take the initiative to explain an unusual-sounding translation to the judge, jury, or witness, along with the basis of the interpreter's explanation. This method will allow you to correct the interpreter in the unlikely, but critically important, event that the explanation is wrong.

**EXAMPLE:** The interpreter might say, "What the witness literally said was 'I have an ache in my stomach,' but I believe that she means that she was hungry, because in the language spoken where the witness comes from, the statement 'I have an ache in my stomach' means that the person is hungry." If you know that the witness was actually testifying that she had a pain in her stomach, then you can correct the interpreter. Remember to ask follow-up questions if you believe it is necessary to clarify the witness's statement.

After you have chosen an interpreter, practice both direct and cross-examination with the interpreter and witness. Feel free to ask for explanations of any problems the translator is having. Make sure that you have chosen the right

interpreter for the client or witness.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/ C. Procedure for appointment/§11.34 1. Check local rules and lists

### C. Procedure for appointment

### §11.34 1. Check local rules and lists

Arrange to provide an interpreter or translator in advance of trial. See Los Angeles Ct R 8.18. Before doing so, ascertain whether the court has a local rule or policy on interpreters. Under Govt C §68562(g), "[e]ach superior court may adopt local rules to impose additional requirements, standards, examinations, and programs as necessary for equity or to recognize local conditions."

If local rules require a certified court interpreter (Govt C §68562(a)), check with the court to see whether the court has a list of certified court interpreters, and make the arrangements with someone on that list. Similarly, for a language for which use of a certified court interpreter is not required, make arrangements with someone qualified by the court as specified in Govt C §68561(d). If the court maintains a list of court-approved interpreters, contact someone on that list.

Each superior court must keep a current roster of qualified interpreters certified under Evid C §754(f) to interpret for deaf or hearing-impaired persons. Evid C §754(o). Make arrangements with an interpreter on the list if such an interpreter is needed.

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### §11.35 2. Ask court to appoint interpreter

In the absence of a local rule or policy, there are no formal requirements for asking the court to appoint an interpreter or translator. The request may be presented orally or in writing, preferably at the beginning of trial. If the request is made orally, the court reporter should be present to record the request. "[T]he court should conduct an examination on the record to determine whether a court interpreter is needed. After the examination, the court should state its conclusion on the record." Cal Rules of Ct, Standards of J Admin 2.10(b).

If the client is indigent, ask the court to appoint an interpreter or translator at public expense. On compensation and costs of interpreters and translators generally, see §§11.42-11.43.

**PRACTICE TIP:** If you believe that good cause exists under Govt C §68561(c) for the court to appoint someone who is not a certified court interpreter, you will need to establish for the court why you need a noncertified interpreter.

On procedure for interpreters in federal court, see 28 USC §1827; Fed R Civ P 43. See also local federal district court rules.

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### §11.36 3. Objecting to appointment

If you believe that a prospective interpreter or translator lacks the necessary competency or qualifications, object to the appointment (*People v Phillips* (1910) 12 CA 760, 108 P 731) before the interpreter is permitted to act. *People v Aranda* (1986) 186 CA3d 230, 237, 230 CR 498. Ask that the court permit a brief supplemental examination before deciding whether to appoint the interpreter. See Cal Rules of Ct, Standards of J Admin 2.11(b)(3). The question of an interpreter's competence is a factual one for the trial court. *People v Aranda, supra*.

If an interpreter's competence becomes an issue after he or she begins interpreting, object at that time. *People v Aranda, supra*. For court instructions to participants in interpreted proceedings, see Cal Rules of Ct, Standards of J Admin 2.11.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.37 D. Examination with interpreter or translator

## §11.37 D. Examination with interpreter or translator

Anyone serving "as an interpreter or translator in any action is subject to all the rules of law relating to witnesses." Evid C §750. "[I]nterpreters are treated as expert witnesses and subject to the same rules of competency and examination as are experts generally." Comment to Evid C §752.

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## §11.38 1. Interpreter must take oath

The interpreter or translator must take an oath to make a true interpretation or translation. Evid C §751(a), (c). An interpreter or translator employed by the court and certified or registered in accordance with Govt C §§68560-68566 (see §11.32) may file the oath prescribed by Evid C §751 with the court clerk and that "oath shall serve for all subsequent court proceedings until the appointment is revoked by the court." Evid C §751(d).

When a deaf or hearing-impaired person is testifying under oath, the interpreter certified under Evid C §754(f) (see §11.32) must "advise the court whenever he or she is unable to comply with his or her oath" taken under Evid C §751(a). Evid C §751(b).

Moreover, under Evid C §752(a), the interpreter must be sworn to interpret for the witness when the "witness is incapable of understanding the English language or is incapable of expressing himself or herself in the English language so as to be understood directly by counsel, court and jury."

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.39 2. Ask questions of witness, not interpreter

### §11.39 2. Ask questions of witness, not interpreter

"It is the duty of the interpreter to interpret and report to the court every statement made by the witness." *People v Wong Ah Bang* (1884) 65 C 305, 4 P 19. See *People v Shaw* (1984) 35 C3d 535, 542, 198 CR 788.

Phrase your questions directly to the witness as if no interpreter were present. Do not begin a question by saying, "Ask him whether...." Cal Rules of Ct, Standards of J Admin 2.11(b)(1). See *People v Shaw, supra,* in which the court stated: "Counsel and courts are ... cautioned to assure accurate interpretation through the use of direct questions to and answers from the witness requiring verbatim translation in order to avoid the pitfalls of paraphrasing leading to distortion or inaccuracies." 35 C3d at 543.

Keep your examination simple, assuming no special education or sophistication on the part of the witness. Use the same rules you would follow if the witness spoke English, *e.g.,* short questions. See §§11.51-11.62. Ask the witness or the interpreter to explain the witness's slang or colloquial language.

Practice both your direct examination and the anticipated cross-examination with the interpreter and witness. Pay particular attention to the terms of art that will be used during the witness's testimony and the nuances of the witness's demeanor and phrases that give a human element to the testimony.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.40 3. Accuracy of translation

## §11.40 3. Accuracy of translation

If you anticipate that technical terms will be used during the trial, review them in advance with the interpreter or translator to be certain that at the trial the interpretation or translation will be accurate. If another party is providing the interpreter or translator, and you are not familiar with the foreign language, you may want to engage another interpreter or translator to verify the accuracy of the trial interpreter or translator.

The accuracy of the interpretation or translation may be discredited either through cross-examination or by independent proof. See *People v Walker* (1924) 69 CA 475, 231 P 572. Objections to accuracy should be directed to the court and not to the interpreter or translator. "Counsel should ask permission to approach the bench to discuss the problem." Cal Rules of Ct, Standards of J Admin 2.11(b)(2).

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### §11.41 4. Objecting to interpreter

If no objection is raised at trial to issues of the interpreter's qualifications or competency, those issues may not be raised for the first time on appeal. *People v Aranda* (1986) 186 CA3d 230, 237, 230 CR 498 (competency); *People v Reyes* (1976) 62 CA3d 53, 70, 132 CR 848 (qualifications).

When an interpreter has not been sworn to interpret for the witness, failure to make a timely objection on that ground waives the right to assert that error on appeal. See *People v Mora* (1984) 153 CA3d 18, 22, 199 CR 904 (any impropriety in interpreter's failure to take oath waived by failure to make timely objection).

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## E. Compensation and costs

### §11.42 1. Party employs interpreter or translator

In civil cases, the litigants pay the interpreter's or translator's fee. See Govt C §68092(b). The party hiring the interpreter or translator should provide for his or her compensation before trial. See Los Angeles Ct R 8.18.

Fees for persons appointed under Evid C §754 to serve as interpreters for deaf or hearing-impaired persons are charged against the county or other state political subdivision in which the action is pending. In administrative proceedings, the fee is "charged against the appointing board or authority." Evid C §754(i).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.43 2. Court appoints interpreter or translator

### §11.43 2. Court appoints interpreter or translator

When a party has not employed an interpreter or translator, or a party's interpreter or translator has been disqualified, the court in an appropriate case may appoint an interpreter or translator as provided in Evid C §§730-733 (court-appointed experts). Evid C §§752(b), 753(b). When this occurs, the court may fix a reasonable fee for compensation. Evid C §§730, 752(b), 753(b). See also *Gardiana v Small Claims Court* (1976) 59 CA3d 412, 130 CR 675.

Except as otherwise provided in Evid C §731, the compensation fixed by the court under Evid C §730 is in the first instance to "be apportioned and charged to the several parties in such proportion as the court may determine and may thereafter be taxed and allowed in like manner as other costs." Evid C §731(c).

A court's refusal to appoint an interpreter to assist litigants does not violate the constitutional guarantees of due process or equal protection of law, but Evid C §752 provides for the appointment of interpreters to assist witnesses. See *Jara v Municipal Court* (1978) 21 C3d 181, 145 CR 847. A small claims court has the duty to appoint an interpreter for an indigent litigant if it determines that one is necessary. *Gardiana v Small Claims Court* (1976) 59 CA3d 412, 421, 130 CR 675. See also discussion in §11.29.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/ V. SEQUENCE OF PRESENTING EVIDENCE/§11.44 A. Order of proof and phases of examination

## V. SEQUENCE OF PRESENTING EVIDENCE

### §11.44 A. Order of proof and phases of examination

The court has discretion to regulate the order of proof, except as otherwise provided by law. Evid C §320. The usual order of proof in a civil case is:

- Plaintiff produces evidence on plaintiff's part;
- Defendant produces evidence on defendant's part;
- Plaintiff may then offer rebuttal evidence; and
- Defendant may then offer rebuttal (sometimes called surrebuttal) evidence.

See CCP §§607, 631.7; *McLellan v McLellan* (1972) 23 CA3d 343, 353, 100 CR 258.

The examination of each witness ordinarily proceeds in the following phases (Evid C §772(a)):

- Direct examination,
- Cross-examination,
- Redirect examination,
- Recross-examination, and
- Redirect and recross-examination.

Each phase of the examination must be concluded before the next phase begins unless the court for good cause directs otherwise. Evid C §772(b). On examining adverse party or adverse witness under Evid C §776, see §§11.73-11.75. On making an adverse witness your own during cross-examination, see §11.84.

The judge also has discretion to take witnesses out of order for the convenience of counsel or the witnesses. See Evid C §320. Busy witnesses, such as doctors, are typically allowed to testify out of order. The witnesses' convenience, however, must be balanced by the primary objective of presenting the evidence in a logical, easily understood fashion.

The judge may also conditionally admit certain documentary evidence out of order, subject to any necessary preliminary facts being supplied later in the trial. See Evid C §§320, 403(b); *Bates v Tower* (1894) 103 C 404, 37 P 385; *Crosett v Whelan* (1872) 44 C 200. If the preliminary facts are not subsequently established, the opponent may move to strike the evidence. See Evid C §353(a). See also *Estate of Wempe* (1921) 185 C 557, 197 P 949.

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## §11.45 B. Sequence of witnesses; practical considerations

You will probably have already determined the sequence of witnesses. See §5.20. However, be flexible in your plan in order to accommodate witnesses and avoid delaying the trial.

Keep your client available to testify at all times during the trial, because nonparty witnesses may be able to appear only at certain times. To avoid delays, it may sometimes be necessary to put on the nonparty witnesses at specified times and fill in gaps with the client as a witness. However, it assists the jury and the judge to hear a logical progression of the case, and disjointed testimony from the client may hinder the overall presentation.

Although there is no limit on the number of witnesses that may be called, the trial judge will often disallow cumulative testimony, *i.e.,* testimony of witnesses who simply repeat the testimony of prior witnesses. To maintain jury interest, it is usually desirable not to "over-try" the case by belaboring points beyond the jury's attention span. Nonetheless, repetition of certain key facts through different witnesses is an effective means of persuading a jury. They may feel restless on rehearing the same facts, but they will be less likely to overlook them during deliberations.

**PRACTICE TIP:** In business cases, it is often helpful to have business records admitted before trial or early in the proceedings and out of the jury's presence, *i.e.,* before the witness appears who will testify about them. In this way, the witness may refer directly to the records without the delay of having to introduce each one into evidence. Also, the jury will not have to wait for the judge to rule on any objections that may be raised about their admissibility. This can almost always be done by stipulation; be sure to plan ahead.

On use of discovery, including presenting testimony by deposition or videotaped deposition, see chap 10.

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## §11.46 C. Order of evidence with multiple parties

There is no rule concerning the order of presentation of evidence by multiple plaintiffs or defendants in a case. The parties should agree among themselves on the sequence of presenting evidence. If there is a target defendant in the plaintiff's case, it is logical for that defendant's witnesses to go first. On the other hand, if one defendant is particularly sympathetic, it may benefit the entire defense to begin with that defendant's witnesses.

Sometimes one defendant's position conflicts with that of another defendant. For example, peripheral defendants may want to avoid being blamed along with primary defendants, whereas more culpable defendants may want to hide behind the coattails of the relatively innocent defendants. Cooperation is usually possible, however, because most defendants want to avoid disputes among themselves, which would only benefit the plaintiff.

**NOTE:** If the parties cannot agree among themselves on the sequence of presenting evidence, generally the first named plaintiff will proceed, as will the first named defendant, unless the court orders otherwise.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/ VI. DIRECT EXAMINATION/§11.47 A. Planning direct examination to elicit facts

## VI. DIRECT EXAMINATION

### §11.47 A. Planning direct examination to elicit facts

Direct examination is a means of obtaining information from your own witnesses in an orderly manner. The purpose is to elicit facts covering all elements of your client's claims or defenses. This purpose is best accomplished if the attorney follows a few guidelines, such as:

- Make an outline of subjects to be covered, paying particular attention to the sequence of questions (see §5.9);
- Prepare complex or hypothetical questions in advance (see §§5.85-5.87, 11.141-11.144);
- Frame most questions in simple language (see §§11.51-11.53);
- Put the witness at ease with the first few questions;
- Let the more articulate witnesses tell their stories without interruption;
- Keep your role unobtrusive (see §11.15);
- Speak naturally, without haste or temper;
- Usually, do not react to the answers to the questions.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.48 B. Benefits of planning direct examination

## §11.48 B. Benefits of planning direct examination

Testimony that is spontaneous, candid, and natural is more convincing than a rote recitation of prepared answers on direct examination. The attorney who relies on complete spontaneity, however, risks creating confusion. Although an outline of questions can interfere with spontaneity, it has many advantages, such as:

- A logical presentation of the story;
- Efficient use of time;
- The ability to check off the questions asked against the essential facts of the case to be proved, including, *e.g.,* the elements of claims or defenses;
- Assurance that vital evidence is not overlooked under pressure;
- The ability to anticipate and to overcome objections; and
- Assurance that the testimony will open and close on strong points.

Variations from the outline are acceptable, if the questioning is going well, thus permitting spontaneity to occur. For preparation of witness examination plan, see §§3.28-3.30, 5.19.

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### §11.49 C. Attorney's demeanor during examination

Assume a demeanor during direct examination that reflects mastery of the facts. Appear calm and speak distinctly. Do not show reactions of anger, elation, or the like to any answers.

Generally, your primary role will be that of facilitator for the witness, who should have center stage. Stay in the background and permit the witness to testify as fully on his or her own as possible. Use short questions to control the flow of testimony. Ideally, the witness will be sufficiently prepared so as to not require much assistance from the examiner. If the witness forgets a point, however, you may refresh the witness's recollection. See §§11.63-11.68.

Maintain eye contact with the jury. Before testimony begins, some attorneys request their witnesses to occasionally look toward and talk directly to the jury, while testifying. Other attorneys feel that jurors dislike direct eye contact from witnesses, preferring to be observers whose presence is not overtly acknowledged. Stand far enough away from the witness to be sure that the jury can hear everything the witness says.

**PRACTICE TIP:** Local rules may require counsel to remain at or behind the counsel table. See, *e.g.,* Los Angeles Ct R 8.9.

While conducting the direct examination, be aware of the jury in order to evaluate their reaction. If the witness uses a technical term, ask a follow-up question to explain the term. Supplemental questions may deviate from the outline in order to clarify the witness's testimony.

**PRACTICE TIP:** Some attorneys feel it is condescending to ask the witness to "please explain to the jury" a certain term, as if the jury lacked the necessary understanding. A better approach is to ask the witness to "please tell us what that term means."

For discussion of defining technical terms, see §11.53.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.50 D. Avoid problems when framing questions

## §11.50 D. Avoid problems when framing questions

Frame direct examination questions in simple language, avoiding complicated terms and extraneous phrases. In addition, avoid the types of questions discussed in §§11.51-11.62.

Make sure your question is in a form that is specific, especially as to time, place, and person, *e.g.,* "What did the police officer say?" not "What did they say?" A vague question may mislead or confuse the witness, the jury, or both. In final argument, your opponent may argue that an answer to a vague question means something the witness never intended.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.51 1. Compound questions

## §11.51 1. Compound questions

Questions with two or more parts, particularly when each part may elicit a different answer, are subject to objection as being compound questions. See *Godfrey v Miller* (1889) 80 C 420, 22 P 290; see generally California Trial Objections, chap 8 (Cal CEB Annual). See also *Board of Trustees v Schuyten* (1958) 161 CA2d 50, 326 P2d 223.

**EXAMPLE:** The attorney may ask, "Did the car go through the red light and turn left?" The answer to the first part may be "yes" (*i.e.,* the car went through the light), while the response to the second part may be "no" (*i.e.,* the car did not turn left).

Because of the confusion created by multipart inquiries, break compound questions into single units so that conflicting responses are not required.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.52 2. Questions having double negatives

### §11.52 2. Questions having double negatives

Avoid questions containing double negatives.

**EXAMPLE:** "You did not decide that you would not give him the document, is that true?" The witness might respond "Yes," meaning "I did not make that decision," or "No," meaning "I did not give him the document."

**JUDICIAL PERSPECTIVE:** This is a common problem. To be sure the record is clear, listen closely to the answer to a question containing a double negative.

This type of question is objectionable on the ground that it is ambiguous or unintelligible. See generally California Trial Objections, chap 7 (Cal CEB Annual).

You may also wish to avoid questions containing simple negatives, *e.g.,* ending a question with "isn't that true?" See appendix in §11.169 for list of leading questions.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.53 3. Questions having long words or technical phrases

## §11.53 3. Questions having long words or technical phrases

Avoid using polysyllabic or technical words when ordinary words will do just as well. Even such simple lawyerly words as "prior" or "subsequent" should be avoided in favor of "before" and "after."

Sometimes, however, using lengthy or technical terms is necessary, especially when examining expert witnesses. In that situation, immediately clarify the meaning, *e.g.,* "Dr. Jones, would you please explain what you mean by that term?"

Develop your facility to pronounce scientific terms so that they can be articulated easily and without self-consciousness. Alternatively, use abbreviations—referring, for instance, to "TDI" rather than to "toluene di-isocyanate," after making sure that the witness has explained the abbreviation.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.54 4. Leading questions about material matters

## §11.54 4. Leading questions about material matters

A leading question is one that suggests the answer (Evid C §764), such as: "And then you told the defendant that you agreed to his terms, right?" See appendix in §11.169 for list of words and phrases that make a question leading.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.55 a. Not usually allowed on direct examination

### §11.55 a. Not usually allowed on direct examination

Leading questions are generally not permitted on direct examination, particularly if the question focuses on a major element of the claim or defense being presented. Evid C §767. A leading question often calls for a yes or no answer. All the facts are contained within the question, leaving the witness only to agree (as usually occurs) or disagree. Not all questions that call for a yes or no answer are leading, however. *People v Jones* (1911) 160 C 358, 366, 117 P 176.

To convert a leading question into a nonleading question, the suggested answer must be taken out. For example, instead of asking, "Did the automobile then turn to the right?" ask "Which way did the automobile turn?" To avoid objections as "leading" and, equally important, to open up the witness, try to begin each question with "who," "what," "where," "which," "when," "how," "tell us," or "describe for us."

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### §11.56 b. Exceptions: When allowed

Leading questions on direct examination are allowed "under special circumstances where the interests of justice otherwise require." Evid C §767.

**Preliminary matters.** Most courts and opposing counsel both permit and indeed appreciate the use of leading questions on preliminary matters. See Comment to Evid C §767. For example, in a long recitation of a witness's prior employment, it would probably be appropriate to suggest an occasional answer to the witness, in order to move the testimony along, such as: "After serving four years as vice president, did you then become president of the company in 1999?"

**Witness assistance.** Leading questions may be used when the witness is an infant, is mentally impaired, is an expert, or is shown to be hostile. See Comment to Evid C §767. Leading questions may also be used to refresh recollection. See §11.63. See also Comment to Evid C §767.

**Adverse witness.** Leading questions may be used when an adverse party or a person identified with the adverse party is called to testify under Evid C §776. See §§11.73-11.75.

When several parties are on one side, a question often arises whether a party should be allowed to examine a witness called by a co-party under direct examination rules (where leading questions are not allowed) or under cross-examination rules (where they are allowed). Evidence Code §773(a) provides that, when a witness has been called by any party, each other party may cross-examine that witness in the order that the court directs. However, when the interest of the party who seeks to cross-examine the witness is not adverse to the party calling the witness, the cross-examination is subject to direct examination rules, and leading questions are prohibited. Evid C §§773(b), 767. Thus, leading questions that purport to be cross-examination, but are actually friendly questions, are prohibited when two or more parties have similar interests.

On use of leading questions during cross-examination, see §11.111.

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### §11.57 5. Questions calling for narrative answer

A question calling for a narrative answer is open-ended and permits the witness to ramble on indefinitely. For example, an attorney might ask: "Mr. Smith, what is your version of the accident?" The problem with this question is that it permits the witness to testify to relevant as well as irrelevant information, to offer opinions as well as factual testimony, and to answer both a pertinent inquiry and a totally immaterial one. Also, the witness may slip over a key fact that you want to emphasize by a pointed question.

The court nevertheless has discretion to permit a witness to testify in narrative form. See Evid C §765; *Silva v Dias* (1941) 46 CA2d 662, 116 P2d 496. See also *People v Davis* (1907) 6 CA 229, 91 P 810; California Trial Objections, chap 10 (Cal CEB Annual). This type of question may be appropriate on preliminary or foundational matters. For example, a court would probably permit the question: "Would you please state your educational background?" On material matters, however, questions calling for narrative answers are seldom permitted. For further discussion, see Jefferson's California Evidence Benchbook, chap 28 (4th ed CJA-CEB 2009).

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### §11.58 6. Questions assuming facts not in evidence

If, for example, an important issue in a case was whether the plaintiff had orally agreed to buy goods from the defendant, it would be improper to ask: "After you agreed to buy the goods, did you state where you were going?" The introductory part of the question is clearly in dispute and not established by the evidence.

An unwary witness or inattentive counsel may not initially focus on an opening phrase that contains a damaging factual assumption. Thus, a witness may inadvertently answer the main part of the question (about where he was going) without recognizing the tacit admission in the first part of the question. For this reason, such questions are objectionable.

A question that begins: "Isn't it a fact that …" is not only leading but may suggest the existence of an unproven fact. Similarly, a question beginning: "Do you recall that …" or "Did you know that …" based on the attorney's assertion rather than the witness's recollection, may assume facts not in evidence. An attorney may begin a question with the words "Isn't it a fact that …" if the question alludes to facts that are in evidence. *Marcus v Palm Harbor Hosp.* (1967) 253 CA2d 1008, 61 CR 702.

Accordingly, such questions are not permitted on either direct or cross-examination and, in fact, repeatedly using this technique may result in counsel's being held in contempt or cited for misconduct. See, *e.g., Love v Wolf* (1964) 226 CA2d 378, 38 CR 183. See also §§16.66-16.90 on attorney misconduct.

To avoid an objection that the question "assumes a fact" while at the same time directing the witness in the proper direction, use the phrase "if anything" occasionally. For example, "What, if anything, was said about royalties?"

**Rationale:** Even if the witness denies the facts implied or suggested in the questions, the jury is inclined to give those facts some weight. By including the facts in the question, the attorney suggests to the jury another source of information unknown to them that would corroborate the truth of the matters in the question. *People v Pitts* (1990) 223 CA3d 606, 734, 273 CR 757.

**EXAMPLE 1:** An attorney used the "Do you know that.…" technique as a means of bringing before the jury the fact that several California counties had enacted legislation prohibiting the use of a chemical that was the basis of the dispute. The prohibition by certain counties was not then in evidence and was never received in evidence. The attorney was found guilty of misconduct. *Love v Wolf, supra*.

**EXAMPLE 2:** An attorney engaged in a pattern of misconduct to discredit the defendant, including asking questions beginning "Isn't it true that.…." One question insinuated that 21 citizens had testified in another case that defendant had made adjustments to increase visibility at a crossing. *Simmons v Southern Pac. Transp. Co.* (1976) 62 CA3d 341, 133 CR 42. See also the cases discussed in *Simmons*.

**EXAMPLE 3:** Defense counsel asked whether the witness/deputy had spoken to defendant's brother, who was also a deputy. Even though this question alerted the jury to the fact that defendant's brother was a deputy, the question was not improper, because the defense attorney has the absolute right to explore avenues of potential bias with a prosecution witness and the question did not "assume" any facts. *People v Fatone* (1985) 165 CA3d 1164, 1173, 211 CR 288.

For further discussion, see California Trial Objections, chap 15 (Cal CEB Annual). On such questions constituting attorney misconduct, see §16.89.

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### 7. Cumulative or repetitive questions

### §11.59 a. Questions asked of same witness

Because repetitive questions may unduly emphasize the testimony or may consume too much time, the court has discretion not to permit the attorney to ask the same witness essentially the same question more than once. See Evid C §§352, 765, 774. An objection to such a question will lie on the ground that it has been asked and answered. See, *e.g., People v Hatfield* (1933) 129 CA 162, 18 P2d 366; *Depaoli v Claus* (1930) 110 CA 145, 293 P 881. See generally California Trial Objections, chap 11 (Cal CEB Annual). Repetitive questions might also be considered harassment, and an objection could be made based on Evid C §765.

Similarly, a party's attempt to establish every credential and qualification of an expert witness can be objected to on the ground that the evidence is cumulative. See *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 537 n13, 196 CR 82 (court within its discretion in refusing to admit cumulative evidence, including the number of articles written by experts in their field, whether they were editors in their field, and the names of other professional societies to which they belonged). On whether to waive testimony on expert's credentials and qualifications, see §11.132.

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### §11.60 b. Questions asked of different witnesses

Counsel may be prohibited from asking other witnesses a question that seeks to elicit testimony that merely repeats that of previous witnesses on a particular matter. To the extent permitted, however, considerable persuasive power lies in emphasizing key facts through repetition. For discussion of cumulative evidence, see generally California Trial Objections, chap 31 (Cal CEB Annual).

To avoid excessive repetition, the court may specifically limit the number of experts who may be called by any party during the trial, on the ground that it would be cumulative. Evid C §723. See also *Horn v General Motors Corp.* (1976) 17 C3d 359, 131 CR 78; *Estate of Wineteer* (1917) 176 C 28, 167 P 516. The court may nonetheless allow seemingly repetitive testimony, *e.g.,* when the basis of the expert's opinion is different from that of other experts or when the witness is an independent observer and not an expert for a party. See *McGee v Cessna Aircraft Co.* (1983) 139 CA3d 179, 192, 188 CR 542. On expert opinion testimony generally, see §§11.130-11.151.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.61 8. Argumentative questions

### §11.61 8. Argumentative questions

A purported inquiry that is really not a question, but an argumentative statement, is objectionable. *People v Hatfield* (1933) 129 CA 162, 18 P2d 366. Similarly, a question that does not call for a fact but elicits a conclusion or an inference, is objectionable. See *People v Ramey* (1924) 70 CA 92, 232 P 724. See also *Schuh v Oil Well Supply Co.* (1920) 50 CA 588, 195 P 703. A question that calls for an answer in response to an argument contained within the question is also objectionable. *Estate of Loucks* (1911) 160 C 551, 558, 117 P 673. See Evid C §765. Questions can be argumentative in tone as well as in phrasing.

**EXAMPLE 1:** "Was the other witness lying?" or "How can you give such testimony?" (calls for a conclusion or an inference).

**EXAMPLE 2:** "Well, now, can you reconcile the two statements?" (contains an argument).

**EXAMPLE 3:** "How can you remember a date as long ago as that, yet you cannot remember the day of the week?" (contains an argument) (*People v Harlan* (1901) 133 C 16, 21, 65 P 9).

**EXAMPLE 4:** "Do you mean to tell me (followed by a mischaracterization of the witness's testimony)?"; "You weren't very careful, were you?"; "Mr. Smith disagrees with you—who is right, you or he?" (asked to persuade the jury, not to elicit facts).

Avoid asking such argumentative questions during both direct and cross-examination. See also California Trial Objections, chap 14 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 28 (4th ed CJA-CEB 2009).

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### §11.62 9. Questions calling for speculative answer

A question that seeks to elicit a speculative answer is objectionable. See, *e.g., County of San Mateo v Christen* (1937) 22 CA2d 375, 379, 71 P2d 88 (objection on ground that witness's answer would be speculative was sustained in eminent domain proceeding when witness "was asked how much of the top soil on her land had been washed away by reason of the rain being diverted onto it from the road").

Although a witness may give an opinion on a subject, the opinion is inadmissible speculation if it does not meet the requirements of Evid C §§800-801 (*e.g.,* based on personal knowledge of the witness and likely to assist the trier of fact). See generally California Trial Objections, chap 16 (Cal CEB Annual).

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## E. Refreshing witness's recollection

### §11.63 1. Ask more specific question

The stress of testifying in the courtroom may cause even a well-prepared witness to forget a key fact. When this occurs, you may (1) show the forgetful or hesitant witness a document to refresh his or her recollection (see §11.64) or (2) ask a more specific question. Although a follow-up or more specific question may be objected to as "leading" by the adverse attorney, it may at least stimulate the witness's memory so that he or she can then respond to a direct, nonleading question. In any event, the court has discretion to allow leading questions to the extent necessary to revive the witness's recollection. See Comment to Evid C §767. See also *People v Jones* (1963) 221 CA2d 619, 34 CR 618.

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### §11.64 2. Show witness a writing

To refresh a witness's recollection, you may show a writing to the witness, who may testify to any fact now recalled. The writing itself is not introduced into evidence, and the jury may not examine it unless opposing counsel chooses to introduce it or the writing has an independent basis of admissibility. See Evid C §771.

**NOTE:** The need to refresh a witness's recollection may also arise because you wish to "induce" an uncooperative witness to go along with a proposition by showing the witness written corroboration of it.

The following shows how a writing can be used on direct examination to refresh a witness's recollection:

Q. Could you tell us the model of the car?

A. It was an American-made car. I can't remember right now exactly what model it was.

Q. Your Honor, may I approach the witness with a document for the purpose of refreshing his recollection? The document is marked as Exhibit 27 for purposes of identification and has previously been shown to opposing counsel.

Court: Go ahead, counsel.

Q. Let me hand you a document marked as Exhibit 27 for purposes of identification. Please take a moment and read the document to yourself. [Pause while witness reads.] Does the exhibit refresh your recollection as to the model of the car?

A. Yes, it does.

Q. What model was it?

A. It was a 2005 Chevrolet.

At this point, if the document is independently admissible, you may wish to have the witness authenticate it and then offer it in evidence. If the document does not refresh the witness's recollection, consider whether it is possible to have the witness read the document to the jury as past recollection recorded. See §§11.69-11.71.

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### §11.65 3. Types of writings to use to refresh recollection

There is no restriction on the type of writing that may be used to refresh a witness's recollection. For example, such a writing shown to a witness need not have been made by the witness. See, *e.g., People v Goff* (1981) 127 CA3d 1039, 1045, 179 CR 190 (summary of hospital records compiled by doctor and other hospital staff members used to refresh doctor's recollection). It is probable that nonwritings, like an audiotape or a view of evidence, can be used to refresh recollection. See Comment to Evid C §771.

A witness's memory may also be refreshed by a writing that is not admissible into evidence. See *People v Wojahn* (1959) 169 CA2d 135, 141, 337 P2d 192, cited by *In re Berman* (1989) 48 C3d 517, 525, 256 CR 802 (FBI agent used inadmissible recordings and transcripts of telephone conversations to refresh his memory). Memory can also be refreshed through a tape-recorded statement. See *People v Brock* (1985) 38 C3d 180, 197, 211 CR 122.

See also *Frio v Superior Court* (1988) 203 CA3d 1480, 250 CR 819, in which a witness refreshed his recollection from notes he had made from telephone conversations recorded in violation of Pen C §632. The court held that use of such notes to refresh recollection did not violate Pen C §632(d) and that, to the extent the witness's recollection had been refreshed and the witness had a present recollection of those conversations, the witness was not precluded from testifying about them. 203 CA3d at 1492.

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## §11.66 4. When recollection not refreshed

If the witness does not have a present recollection, refreshed or otherwise, the writings and other items used to refresh the witness's recollection might be entered into evidence as a past recollection recorded if they meet the requirements of Evid C §1237. *Frio v Superior Court* (1988) 203 CA3d 1480, 250 CR 819. On past recollection recorded, see §§11.69-11.71.

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### §11.67 5. Production and admissibility of writings used

Whenever writings are used to refresh a witness's recollection, either before or during trial, opposing counsel can require that the writing be produced at trial unless production is excused under Evid C §771(c). Evid C §771(a). If the writing is not produced, the witness's testimony about the matter must be stricken. Evid C §771(a). See *International Ins. Co. v Montrose Chem. Corp.* (1991) 231 CA3d 1367, 282 CR 783 (party sanctioned for refusing to produce documents used to refresh *deponent's* recollection); *People v Goff* (1981) 127 CA3d 1039, 1045, 179 CR 190 (doctor's testimony should have been stricken owing to failure to produce summary of hospital records used to refresh recollection).

If the writing is produced, opposing counsel may cross-examine the witness about it and introduce in evidence only the portion that is pertinent to the witness's testimony. Evid C §771(b). The right to introduce the writing into evidence, however, is not unlimited. Only the parts of the document that are pertinent to the witness's testimony are admissible under §771(b). See Comment to Evid C §771(b).

Similarly, admissibility of such evidence is subject to the court's discretion under Evid C §352, and on occasion the court may exclude the evidence under that section. In addition, certain exclusionary rules may be held to bar admissibility of such documentary evidence. See, *e.g., Box v California Date Growers Ass'n* (1976) 57 CA3d 266, 270, 129 CR 146 (traffic accident report prepared by California Highway Patrol officer that was used at trial to refresh his recollection held inadmissible because of Veh C §20012).

Be aware that, if a writing is subject to the attorney work-product doctrine, showing it to a witness to refresh his or her recollection waives the work-product protection. See *Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 449, 120 CR 787. It is unclear whether the attorney-client privilege is waived by using a document subject to that privilege to refresh the witness's memory. See §5.7.

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### §11.68 6. Previously hypnotized witness

A witness is incompetent to testify about certain facts when the only memory of those facts occurred after the witness had been hypnotized. *Schall v Lockheed Missiles & Space Co.* (1995) 37 CA4th 1485, 44 CR2d 191.

Under *Schall,* a trial court in a civil case when faced with an evidentiary challenge must conduct a hearing (1) to determine whether the witness underwent hypnosis, (2) for the purpose of restoring memory, and (3) if applicable, to determine whether any proposed testimony is about events recalled and related to others before the hypnotic session. 37 CA4th at 1492. Based on the *Kelly* standard (see *People v Kelly* (1976) 17 C3d 24, 130 CR 144; §11.139), the *Schall* court held that the plaintiff in a sexual harassment action was incompetent to testify because her only memory of the employer's conduct occurred after she had been hypnotized by her therapist.

**NOTE:** Although a similar rule is codified in criminal cases in Evid C §795, that section does not apply in a civil case. Section 795 applies only "in a criminal proceeding," and it is error for a court to apply it in a civil action. *Schall v Lockheed Missiles & Space Co., supra.*

The same rule and reasoning that have been applied to hypnosis have also been applied in the civil context to the admissibility of testimony about repressed memories recovered after a witness has been given sodium amytal, a drug commonly known as truth serum. *Ramona v Superior Court* (1997) 57 CA4th 107, 123, 66 CR2d 766.

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## §11.69 F. Past recollection recorded

If a witness has insufficient present recollection of a matter to testify about it but has previously made a written statement about it, the writing may be read into evidence as past recollection recorded. Evid C §1237(b). Such evidence differs from the live testimony of a witness whose recollection has been refreshed. See §§11.63-11.68. Past recollection recorded is an exception to the hearsay rule under Evid C §1237.

The proponent may only read the writing into evidence, whereas an adverse party may introduce the actual writing into evidence. Evid C §1237(b). The original proponent of the evidence, however, may be able to have the writing received in evidence at a later stage in the trial if a foundation for another exception to the hearsay rule is established.

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### §11.70 1. Establish foundation

Before the writing may be read into evidence, the proponent must establish that:

- The witness's recollection is insufficient to testify fully and accurately (Evid C §1237(a)); and
- The writing containing the statement (Evid C §1237(a)):

(1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
(2) Was made (i) by the witness or under the witness's direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
(3) Is offered after the witness testifies that the statement made was a true statement of such fact; and
(4) Is offered after the writing is authenticated as an accurate record of the statement.

To be admissible, §1237(a) also requires that the statement in the writing would have been admissible if the witness had made it while testifying.

With regard to authentication, "[i]f the witness made the writing or read it after it was made, the witness's testimony will authenticate it." Jefferson's California Evidence Benchbook, chap 31 (4th ed CJA-CEB 2009). If the writing was prepared by another person (such as an investigator or insurance adjuster), he or she can be called to testify to help establish this requirement. "Trustworthiness is provided by the witness-declarant testifying that he or she made a true statement of facts he or she knew, and by the person who recorded the statement testifying that he accurately recorded what the witness-declarant said." Evidence Benchbook, chap 31.

For a sample foundation for past recollection recorded, see Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008).

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## §11.71 2. Types of writings to use as past recollection recorded

Unlike documents used to refresh recollection (see §11.65), the types of writings that may be used as "past recollection recorded" are limited (see Evid C §1237) to either a statement written by the witness or under his or her direction (see Evid C §1237(a)(2)) or a writing prepared by another, recording a witness's statement at the time it was made (see Evid C §1237(a)(2)). Either is appropriate, as long as the other conditions of Evid C §1237(a) are met.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.72 G. Examining custodian of records

## §11.72 G. Examining custodian of records

Sometimes you will subpoena the custodian of records of a nonparty for appearance at trial. See §§4.24-4.28. The custodian's only function is to bring business records that you want admitted into evidence.

In examining a custodian, first obtain certain preliminary testimony, such as:

- The name of the custodian's employer;
- The custodian's job title;
- The employer's designation of the witness as the custodian of records; and
- The custodian's receipt of the served subpoena.

Next, lay a foundation to introduce the records into evidence, under the business records exception to the hearsay rule. See Evid C §1271. Such a foundation may be stipulated to by the opposing attorney, or may be established by, *e.g.,* the following questions:

> Did you or someone acting under your direction search for the requested records?
>
> How was the search conducted?
>
> Do these records constitute all the requested records that your employer has?
>
> Are you familiar with your employer's records and recordkeeping procedures?
>
> Please describe those procedures and the mode of preparation of these records.
>
> Are the records that you brought prepared and kept in the ordinary course of business?
>
> Were the entries in these records made at or about the date and time reflected in the records?

Request that the clerk mark the records for identification as exhibits, and then request that the records, or some of them, be introduced into evidence. The opposing attorney may object to the foundation laid for the records' admissibility, which can usually be satisfied by a few supplemental questions to the custodian, verifying the procedures and authenticity of the records. The opposing attorney may then be allowed to cross-examine the custodian.

**NOTE:** Unless opposing counsel stipulates to the foundation for admissibility of the records, you will want the personal attendance of a third party custodian of records; make sure that the subpoena duces tecum contains the clause as specified in Evid C §1564. Evid C §§1560, 1564. See §4.24.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/ H. Examining adverse party or adverse witness/§11.73 1. Who is adverse party or witness

## H. Examining adverse party or adverse witness

### §11.73 1. Who is adverse party or witness

An adverse witness is one identified with an adverse party (Evid C §776(d)(1)-(2)) and includes:

- A person for whose immediate benefit the action is being prosecuted or defended;
- An officer, director, superintendent, member, agent, employee, or managing agent of the adverse party, or of a person for whose immediate benefit the action is being prosecuted or defended; and
- Any public employee of a public entity when the public entity is a party.

Parties represented by the same attorney are deemed to be a single party under Evid C §776(c). A witness does not become adverse merely because the opponent calls the witness first. *People v Spain* (1984) 154 CA3d 845, 852, 201 CR 555 (prosecution called defendant's witness, but defense counsel not allowed to ask leading questions).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.74 2. Why to call adverse party or witness

## §11.74 2. Why to call adverse party or witness

An adverse party or adverse witness may be called to testify for the following reasons:

- The testimony may supply missing evidence, possibly avoiding a nonsuit or directed verdict;
- The presentation may lead the jury to form an unfavorable impression about the adverse witness's testimony early in the trial; and
- The opposition may be caught unprepared, particularly if the adverse party was planning to rely on the testimony of other witnesses who were expected to testify first.

Unfavorable testimony of a party or witness called under Evid C §776 may not generally be considered against the party calling him or her on a motion for nonsuit or directed verdict. See, *e.g., Estate of Lances* (1932) 216 C 397, 14 P2d 768 (directed verdict); *Frazier v Yor-Way Mkt., Inc.* (1960) 185 CA2d 390, 8 CR 335 (nonsuit). But see *Leonard v Watsonville Community Hosp.* (1956) 47 C2d 509, 305 P2d 36 (testimony considered to dispel inference of negligence raised under doctrine of res ipsa loquitur in granting nonsuit to one party).

Among the disadvantages to calling an adverse party or adverse witness are that:

- The presentation may break the orderly sequence of evidence;
- The adverse party or witness may favorably impress the jury;
- Examining an adverse party or witness early, before sufficient facts have developed, may preclude an effective cross-examination; and
- The opposition may use the opportunity to present a portion of its case to the jury at an early stage of the trial.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.75 3. How to conduct examination

## §11.75 3. How to conduct examination

Evidence Code §776 provides that a party may call an adverse party or adverse witness to testify and question that witness as though under cross-examination. Leading questions are therefore permitted. On cross-examination generally, see §§11.82-11.125.

Generally, the other parties can then cross-examine the adverse party or witness examined under Evid C §776(a) except that the attorney for the party/witness or for the party with whom the witness is identified or for a nonadverse party is limited to redirect examination of the witness. Evid C §776(b). On when counsel for these parties may examine the witness by other than redirect examination, see Evid C §776(e). For discussion of redirect examination, see §§11.126-11.127.

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## §11.76 I. Anticipating cross-examination

One function of direct examination is to blunt the effectiveness of anticipated cross-examination. For example, if you know that the opposition is aware of damaging testimony that can be elicited from a witness, it may be helpful to bring out that testimony first in direct examination. The elements of surprise and embarrassment can be minimized and the matter explained in a friendly interrogation.

Furthermore, cross-examination may go more smoothly for the witness if the areas of anticipated cross-examination have already been broached. Having explained the matter during direct examination, without having been limited to a "yes" or "no" response, the witness may not be tempted later to argue with the cross-examiner about the same subjects.

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## J. Preparing for and handling objections

### §11.77 1. Memorandum of law

Before trial, prepare a short memorandum of law on anticipated key objections to testimony or major documents. Then, when an objection arises, you have a ready argument on both the facts and the applicable law, to assist the judge in making a ruling. For further discussion, see §3.32. If the judge concludes that one attorney is better prepared on such important, disputed points of evidence, the judge may be inclined to give that attorney the benefit of the doubt in deciding the point.

**JUDICIAL PERSPECTIVE:** If an issue is worth a memorandum of law, it is worth a motion in limine. This gives the judge more time to read and consider the issue.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.78 2. Preliminary facts

### §11.78 2. Preliminary facts

To avoid an objection that a preliminary fact must be proved before further testimony may be taken from the witness, plan the sequence of witnesses so that those witnesses who can establish preliminary facts testify first. On preliminary facts, see §§7.25-7.36.

If proper sequence is not possible, ask for a stipulation from opposing counsel. If this is not achievable, you might also attempt to persuade the court to receive further testimony conditionally, subject to a motion to strike if the preliminary fact is not later established. See Evid C §§320, 353(a), 403(b). Repeated requests of this type, however, try the patience of both court and jury, particularly if the attorney cannot establish the fact. Avoid having to recall earlier witnesses to establish preliminary facts, if possible.

If the opposing party objects that a preliminary fact must be proved before further testimony from the witness, follow the procedure in Evid C §402 for establishing that fact, out of the jury's presence. On preliminary fact-finding process, see §§7.25-7.36.

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## §11.79 3. Offer of proof

When the court sustains an objection to a question and the evidence sought from that witness cannot otherwise be introduced (*e.g.,* by rephrasing the question), the attorney must generally make an offer of proof in order to preserve the right to argue on appeal that the trial court erred in excluding the evidence. Evid C §354(a); *Marshall v Hancock* (1889) 80 C 82, 22 P 61; *People v Rodrigues* (1969) 274 CA2d 770, 777, 79 CR 240. Make such an offer of proof outside the jury's presence, but request that a court reporter record the request to protect the record on appeal. After the offer of proof, you may argue that the response is relevant, is not hearsay, or otherwise overcomes the basis of the objection.

An offer of proof must indicate that a witness or witnesses are available to testify, and it must disclose the substance, purpose, and relevancy of the evidence sought to be offered. Evid C §354(a); *Moore v Rogers* (1958) 157 CA2d 192, 320 P2d 524.

Offer of proof is discussed in detail in §§15.50-15.60.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.80 4. Prepare alternative theories of admissibility

### §11.80 4. Prepare alternative theories of admissibility

Be prepared, if at all possible, with alternative theories for offering your client's evidence into the record. Then, if the primary means of getting evidence into the record is blocked by a successful objection, you may be able to get the evidence admitted under an alternative theory and/or for a limited purpose.

For example, if the evidence is not admissible because it is hearsay (see Evid C §1200), consider showing that:

- The evidence can come in as impeachment.
- The evidence is not being offered as hearsay (*i.e.,* to prove the truth of the matter asserted) but for the limited purpose of proving that the witness had knowledge of some fact, without regard to its truth.

See, *e.g., Fletcher v Western Nat'l Life Ins. Co.* (1970) 10 CA3d 376, 89 CR 78.

**EXAMPLE:** In an action by an insured against an insurance company for breach of the implied covenant of good faith and fair dealing, offers to compromise a claim were held inadmissible for the purpose of proving liability for that claim. Evid C §1152; CCP §998(b). But the offers were admissible to prove failure to process an insurance claim fairly and in good faith. *White v Western Title Ins. Co.* (1985) 40 C3d 870, 221 CR 509. Compare *White* with *Palmer v Ted Stevens Honda, Inc.* (1987) 193 CA3d 530, 238 CR 363 (in action for breach of oral contract for sale by consignment, litigation tactics inadmissible to show bad faith for purposes of punitive damage award).

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## §11.81 5. Move forward

If you expect an objection, but none is made promptly, be prepared to proceed immediately with further questions before opposing counsel recovers from such inattentiveness and makes a belated objection.

By the same token, if an objection is made and sustained to both the principal and alternative bases for introducing evidence, it is best to move on smoothly to the next question, or subject. Avoid communicating to the jury that you were frustrated in introducing your evidence by delaying further or reacting negatively. If the evidence is crucial, return to the subject later in the examination and try to introduce the evidence in a different context.

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## VII. CROSS-EXAMINATION

### §11.82 A. Planning cross-examination to elicit facts and discredit adverse witnesses

Cross-examination serves two essential purposes: First, it enables you to bring out additional facts favorable to your client that were not established by prior direct testimony (see, *e.g., Jackson v Feather River Water Co.* (1859) 14 C 18). Second, it enables you to bring out facts tending to discredit the witness by showing that the witness's testimony was untrue, biased, or based on faulty memory or perception (see, *e.g., Neal v Neal* (1881) 58 C 287; *Kelly v Bailey* (1961) 189 CA2d 728, 11 CR 448).

**EXAMPLE:** A witness's bias in favor of a party who is also a family member might be brought out in the following manner:

Q. The plaintiff, Joe Smith, is your younger brother, is that correct?

A. Yes.

Q. You love your brother and would never wish to hurt him, right?

A. Yes.

Q. And you would like to see him win this case, is that correct?

A. Yes.

**EXAMPLE:** A character witness testifies about a party's reputation. Pin the witness down about when the subject of the opposing party's character was discussed with others (*e.g.:* "When and where did you hear others discuss the defendant's character?"). If you show that there was no outside discussion with others and that the testimony that purports to be based on reputation in the community is really based on the witness's own personal opinion, you will undermine the impact of the character witness's testimony.

On evidence admissible to prove a person's character or trait of character, see Evid C §§786-790, 1100; Effective Introduction of Evidence in California, chap 18 (2d ed Cal CEB 2000); Jefferson's California Evidence Benchbook, chap 29 (4th ed CJA-CEB 2009).

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## §11.83 B. Scope of cross-examination

Cross-examination of a witness is limited in scope to the witness's direct examination (see §11.85), unless the cross-examination is directed at impeachment. Evid C §§761, 773. In other words, the witness may be cross-examined on any subject matter elicited during his or her direct examination, as well as on his or her credibility. Evid C §§773, 780, 785. When only part of an act, declaration, conversation, or writing is elicited during direct examination, the remainder may be inquired into during cross-examination. Evid C §356.

A party to the action, who is adverse to the party initially calling a witness, may cross-examine the witness in the sequence that the court directs. Evid C §773(a). If the party's interest is not adverse to the party who initially called the witness, however, the examination is subject to the same rules that apply to direct examination. Evid C §773(b).

**EXAMPLE:** If plaintiff *A* calls her accountant as a witness, the accountant would be considered a friendly witness to plaintiff, and defendant could cross-examine the accountant as an adverse witness. But if plaintiff *B* is on the same side as plaintiff *A* (not adverse parties), *B* is limited to conducting a direct examination of the accountant.

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## §11.84 1. Making adverse witnesses your own

The attorney for a party whose case has not yet opened (see §§11.44-11.46) is not permitted to open his or her case in chief in the guise of cross-examining a witness for the adverse party beyond the scope of direct examination. See *Thornton v Hooks* (1868) 36 C 223; *People v Melone* (1945) 71 CA2d 291, 299, 162 P2d 505. See also Evid C §772. Each phase of the witness's examination (*e.g.,* direct examination, cross-examination, redirect examination, recross-examination) must be concluded before the next phase begins, unless the court, for good cause, directs otherwise. Evid C §772(b).

If an attorney does attempt to cross-examine a witness on matters beyond the proper scope of cross-examination (see §11.85), the court, in its discretion, may require the adverse witness to become the witness for the cross-examining party. In this event, the cross-examination is interrupted, and the attorney may question the witness using only direct examination techniques. Evid C §§760, 772; Comment to Evid C §760.

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### §11.85 2. Determining scope of direct examination

The trial court has discretion to decide whether cross-examination is within the scope of the direct examination. *Garcia v Hoffman* (1963) 212 CA2d 530, 536, 28 CR 98. For example, cross-examination has been permitted on relevant matters necessarily implied in the direct examination. *People v Pike* (1962) 58 C2d 70, 90, 22 CR 664. See California Trial Objections, chap 26 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 28 (4th ed CJA-CEB 2009).

A skillful cross-examiner will not restrict questions to a categorical review of matters, dates, and times covered in the direct examination. His or her cross-examination may be directed toward eliciting any matter that tends to overcome or diminish the effect of the witness's direct examination. The trial court has discretion during cross-examination to permit inquiry about a collateral fact when it is directly connected with a question in dispute and essential to its proper determination, or when it affects the witness's credibility. See *Kelly v Bailey* (1961) 189 CA2d 728, 736, 11 CR 448 (decided under former CCP §1868 (which was superseded by Evid C §§210, 350, 352)).

For example, if the expert witness's testimony during direct examination was limited to the discussion of a procedure recommended in book "A," thus ignoring an entirely different procedure recommended in book "B," the cross-examiner might proceed as follows:

Q. The procedure recommended in book "A" is not the only method, is it?

A. No.

Q. Are you familiar with book "B"?

A. Yes.

Q. In fact, an entirely different procedure is recommended in book "B," is that right?

A. Yes.

Q. Yet you did not follow the procedure recommended in book "B," correct?

A. Yes.

For further discussion, see Trial Objections, chap 26.

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## C. Prepare for cross-examination

### §11.86 1. Review file to anticipate direct testimony

Preparing for cross-examination should begin well before trial. Typically, immediate pretrial preparation begins by reviewing pertinent trial exhibits, deposition testimony, answers to interrogatories, responses to requests for admission, and other related documents. Use these materials to anticipate the adverse testimony of key opposition witnesses, and prepare to impeach or otherwise cross-examine those witnesses.

**EXAMPLE:** In discovery, and in related documents, the witnesses may have committed themselves to a certain version of the facts. If any witness deviates from that version during direct examination, you may, during cross-examination, read into the record inconsistent statements from the witness's deposition. Such cross-examination will undermine the witness's credibility and enable you to later argue to the judge or jury the inconsistency of the witness's testimony. For impeachment by prior inconsistent statements, see §§11.118-11.124.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.87 2. Prepare outline

### §11.87 2. Prepare outline

It is usually helpful to prepare an outline of specific questions, or at least subject matter areas, to cover on cross-examination. To do this, review your issue outline, which lists what must be established in the case, as well as what the opposing party must prove. Using these key issues, you should know where to concentrate your cross-examination. On preparing an issue outline, see §§3.17-3.30.

From discovery, you should generally know the identity of witnesses the opposing party will likely call, their probable testimony on direct examination, and their anticipated responses on cross-examination. In preparing to cross-examine these witnesses, list the strongest points you hope to make during cross-examination. Depending on the complexity of the case, you may need to focus on only three or four major areas during cross-examination of each adverse witness. With thorough preparation, you can have at the ready before trial perhaps three-fourths of your total anticipated cross-examinations. The balance will depend on the adverse witness's actual testimony during direct examination, from which you will tailor further cross-examination questions.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.88 D. Deciding whether to cross-examine

## §11.88 D. Deciding whether to cross-examine

Analyze and evaluate the opposing witness's testimony during direct examination. At the same time, ask yourself the following pertinent questions:

- Has the opposing witness hurt my client?
- Do I have facts at my disposal to rebut the damaging testimony?
- Has this witness related well to the jury, or is he or she vulnerable to attack?
- Is there any hope of persuading the witness to change his or her testimony on cross-examination, or will the witness actually underscore the damaging points?
- Is there a prior written inconsistent statement that might force a concession from the witness?
- Are there certain points that must be raised with this witness, as opposed to other, more friendly witnesses?

The process of asking and answering such questions yourself will help you decide whether to cross-examine the opposing witness. Many inexperienced attorneys believe they *must* cross-examine every witness in order to fulfill their self-image as an effective trial lawyer. It is the mark of the experienced trial attorney not to cross-examine a witness who has not harmed that attorney's client. Second, if you do decide to cross-examine the witness, discard any parts of the prepared outline of anticipated cross-examination (see §11.87) that now seem irrelevant or marginal in light of the witness's actual testimony on direct examination.

For example, if the witness's testimony merely relates to a collateral matter, carefully consider whether you should attempt any impeachment. If you are considering whether to impeach the witness with an inconsistent statement, do so only if the inconsistency is significant. A common mistake is to try to succeed on every point raised at trial. If your case is strong enough, it is not necessary to impeach a witness on a collateral matter. The effort to do so may increase the importance of the matter in the eyes of the jury, which could weaken your overall case if the impeachment is unsuccessful.

By analyzing and evaluating the witness's testimony on direct examination, you may also detect new and unanticipated areas of weakness that can be exploited on cross-examination.

On the other hand, see the factors discussed in §§11.89-11.92, which weigh against *any* cross-examination.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/ 1. Disadvantages of cross-examination/§11.89 a. Allows witness to expand testimony

## 1. Disadvantages of cross-examination

### §11.89 a. Allows witness to expand testimony

Permitting a witness to testify during cross-examination may give that witness an opportunity to delve into subjects not fully explored on direct examination. Worse, the witness may repeat and expand on previously given harmful testimony.

If the cross-examiner inadvertently asks a question without knowing the answer, the unexpected response may seriously damage the case.

Sometimes an attorney purposely conducts a very limited direct examination, expecting opposing counsel to embark on an extended cross-examination that brings out damaging testimony. In this situation, if opposing counsel decides to cross-examine the witness and asks a "why" question, or a question opening the door to a whole new line of inquiry, the witness may be permitted to testify about damaging matters that would otherwise have been excluded.

**EXAMPLE:** Plaintiff, injured in a rear-end collision, is forbidden by the court from mentioning that defendant was arrested immediately after the accident for driving under the influence of a narcotic. Defense counsel should avoid any cross-examination that elicits testimony about the arrest, lest the court find that the cross-examining attorney has "opened the door" to the proscribed subject.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.90 b. Creates sympathy for witness

### §11.90 b. Creates sympathy for witness

If the cross-examining attorney adopts a hostile or rude demeanor, the jury may sympathize with the witness. If a witness is rehabilitated on redirect examination (see §§11.126-11.127), an attempt to undermine the witness on recross-examination (see §11.128) may appear to the jury as unfair to the witness.

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### §11.91 c. Reinforces "expertise" of witness

If the witness is an expert who clearly knows more about the subject at hand than the interrogator, cross-examination will highlight this fact to the jury and weaken the cross-examiner's case. In addition, rather than being impeached by the cross-examination, a strong witness may be able to show, through additional testimony on redirect examination, that the witness had a particularly good basis for observing or recollecting the previously testified to facts, thereby further emphasizing his or her credibility. For discussion of redirect examination, see §§11.126-11.127.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.92 d. Risks losing jury's attention

### §11.92 d. Risks losing jury's attention

A lengthy cross-examination, dwelling on immaterial points, risks losing the jury's attention, which may be worse than no cross-examination at all.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/ 2. If you decide to skip cross-examination/§11.93 a. Forces opposing counsel to rely on direct testimony

## 2. If you decide to skip cross-examination

### §11.93 a. Forces opposing counsel to rely on direct testimony

The cross-examining attorney who simply says "No questions" may be following the best course of conduct, particularly when the opposing attorney has conducted a sketchy direct examination. In that event, the court may not permit opposing counsel to reopen direct examination so as to present the additional testimony that opposing counsel erroneously expected to come out during cross-examination. Moreover, the jury may be left with the impression that the cross-examining attorney felt that the direct examination did not harm the case.

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### §11.94 b. Risks making witness look stronger

Some experienced trial attorneys do not agree that it is sometimes advisable to forgo cross-examination. Many jurors expect cross-examination, and not meeting that expectation could make an adverse witness seem stronger than he or she really was. Some attorneys recommend asking at least a few benign questions, even if they are peripheral to the direct testimony. These questions would dispel the risk of any jurors' adverse reaction to no cross-examination at all.

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### §11.95 3. Consider limiting extent of cross-examination

If the objective is to discredit the witness's credibility, it may not be necessary to cross-examine on all possible points of dispute. Such an exhaustive examination may cause the jury to lose interest or sympathize with the witness. Rather, you may be able to reach the objective just as effectively by thoroughly undermining only one or a just few key areas of the witness's testimony. From such a focused example of lack of truthfulness, the jury may decide not believe the witness on any point.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/ E. Conducting examination/§11.96 1. Complete in one session

## E. Conducting examination

### §11.96 1. Complete in one session

Important areas of cross-examination should be either completed before a recess in the trial or reserved until after the recess has occurred. A recess gives an adversary witness an opportunity to collect his or her thoughts, to confer with the opposing attorney, and to become better and more specifically prepared for further cross-examination. The attorney should plan clusters of examination on certain related topics, to avoid interruptions or breaks in the sequence of each topic.

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### §11.97 2. Do not restate that witness is under oath

It is usually unnecessary and counter-productive to remind a hostile witness that he or she is under oath, or to indicate that other witnesses have testified differently. This tactic is likely to engender an objection from opposing counsel that you are being argumentative. Moreover, the witness's tendency may be to become even more firmly entrenched in his or her version of the events. The jury may be more firmly persuaded if they "discover" untruthful answers for themselves, rather than having you belabor the point.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.98 3. Know when to stop

## §11.98 3. Know when to stop

Do not ask one question too many. The problem is knowing where to draw the line. If the witness has already answered as desired in one area of questioning, it is often best not to succumb to the temptation to ask another question in that area. Any attempt to elicit a further answer may result in the witness's simply explaining away an apparent earlier contradiction or providing a damaging fact to dilute a prior reference to facts favorable to your case.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.99 F. Tone of questioning

## §11.99 F. Tone of questioning

Vary your approach during cross-examination, depending on the witness's occupation and personality, the degree of any hostility, whether he or she is an expert or a lay witness, and the goal of the cross-examination. For example, when cross-examining a neutral witness to bring out facts not established by direct testimony, your tone of the questioning may be respectful or even friendly.

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## §11.100 1. When to use aggressive tone

If your purpose is to undermine an opposing witness's testimony as not credible, consider adopting a more aggressive tone. The jury will likely understand that you are doing a necessary job, not simply acting from a lack of tact or dislike for the witness.

On the other hand, if the jury has developed sympathy for the witness, an aggressive cross-examination can harm the case. It is possible (and sometimes even easier) to prove that someone has not told the truth by going about it in a relatively nonaggressive, quiet manner.

Keep in mind the jury's sense of fairness and their sympathy for the underdog. It is risky to assume an overbearing manner. Rather, the best tone is one of civility, while making adverse witnesses understand that the rules do not allow volunteering information, evasive answers, or arguing with the questioner. In this way, you communicate to the witness an air of authority, and to the jury a sense of fairness.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.101 2. Avoid sarcasm or rudeness

### §11.101 2. Avoid sarcasm or rudeness

Although you may be tempted to control a hostile witness with pointed or abrasive remarks, this tactic may have a negative impact on the jury. Further, a witness who comes to dislike the cross-examiner may become more hostile and thus less responsive. Although cross-examination sometimes involves fencing with the witness in an attempt to score points, make every effort to maintain a professional tone throughout the confrontation.

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### §11.102 3. Do not argue

Arguing with the witness only gives him or her a chance either to withdraw prior damaging testimony or to explain it away. Either way, the outcome will be harmful if your goal is to undermine the witness's credibility.

For example, you may be tempted to ask the witness to explain an apparent contradiction: "If you say X, then how can you also say Y?" This type of question is not only argumentative and therefore objectionable, but it will also, if allowed, give the witness a chance to reconcile X with Y and destroy the contradiction you have so carefully established. Also, arguing gives the witness an opportunity to explain the prior answer, thus ceding control of the cross-examination to the witness. See §11.61 for discussion of argumentative questions.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.103 4. When cross-examining family members

### §11.103 4. When cross-examining family members

Because the jury is likely to be sympathetic to a mother, father, or other family member who has been examined on direct, you may decide not to cross-examine that person. Or, if the family member's testimony is not damaging, maintain a moderate tone during cross-examination. The examination should focus on, and perhaps be limited to, questions designed to establish the family member's bias or prejudice. Any direct attack on a family member's testimony should probably be reserved until the closing argument.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.104 G. Framing questions and controlling witness

## §11.104 G. Framing questions and controlling witness

Greater control over the witness is required during cross-examination than on direct examination. For example, you may want to discipline an over-eager, talkative witness by restating the question and requesting more responsive answers. Evasive witnesses can also be controlled by confronting them with their own contradictory testimony.

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## §11.105 1. Use short, easy-to-understand questions

**Questions on cross-examination should generally be short.** If one imagines what the transcript of the trial should look like, each cross-examination question should take up only a line or two of text, followed by a brief response ranging from a simple "yes" or "no" up to perhaps a paragraph of response. Short questions have the advantage of being:

- Less objectionable to opposing counsel;
- Better understood by the jury;
- Less confusing to the witness; and
- More easily corrected, if you make a mistake in forming the short question.

Short questions also help to control the witness. They are analogous to keeping a spirited horse on a tight rein. The shorter the question, the more closely the attorney can control the witness's tendency to run away with his or her answer. Because short questions are narrow in scope, the answers called for are likewise narrow. Such questions give the witness few avenues of escape. If a witness attempts to evade giving a direct answer, the examiner can merely repeat the question, thereby making the evasion clear and forcing the witness to respond. By the same token, avoid unnecessary adjectives and adverbs that could afford the witness or opposing counsel "quibble room."

**PRACTICE TIP:** You will have more control if you can use as questions short declaratory statements that require the witness, by your inflection, to answer "yes." Examples: You opened the door? You walked outside? You met a man? You spoke? He spoke? You said X? He said Y? You saw a car? Chevrolet? Green? Going west?

**Use plain English.** Because your ultimate objective is to inform and convince the jury, it is important to use simple words and phrases that the jury will easily understand. Avoid legal words and phrases, Latin terms, or long words whenever possible.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.106 2. Identify subject before asking question

## §11.106 2. Identify subject before asking question

Announcing a topic or an event before asking the witness a question sometimes helps to orient the judge and jury and helps to keep a witness on a subject. This approach also enables you to set up topics and then make an easy transition to new topics. If the witness wanders off the point, remind the witness of the subject and suggest that you both stick to that topic before going on to something else. In this fashion, you can better control the scope and direction of the cross-examination.

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## §11.107 3. Control pace and sequence of examination

You can control the pace of an adverse witness's testimony. It is sometimes helpful to pose rapid-fire questions, to preclude the witness from using planned or canned responses. Also, you may, unless the trial judge rules otherwise, interrupt a witness who provides nonresponsive answers.

If the witness appears to be giving scripted answers, you may decide to ask seemingly random, rather than sequential, questions. Cross-examination by skipping from subject to subject is a technique that might keep the witness off balance. The inherent danger in using this technique, however, is that in skipping across topics you will also keep the judge and jury off balance. Thus, this technique should not be overused, and if you are inexperienced with basic cross-examination skills, use it sparingly, if at all.

It is probably unwise to instruct the witness to answer a question with only a simple yes or no. The jury may think it is unfair to so narrowly restrict the witness, and a judge will generally permit the witness to explain an answer. But if the witness is truly being evasive, you may move to strike a rambling answer as nonresponsive. In this way, the judge may intervene on your behalf and instruct the witness to answer the question directly without your having to demand, in advance, that the witness answer in a prescribed manner.

**JUDICIAL PERSPECTIVE:** Do not ask the judge to intervene until you have taken some steps to address a witness's evasiveness. The judge may decline your request as premature, and your request may strike the jury as whining.

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### §11.108 4. Avoid questions that permit narrative answers

As a rule, avoid questions beginning with "why" because they allow the witness to give narrative (*i.e.,* lengthy, rambling) answers. If the witness strays from the question in answering, remind the witness that the question was limited to a specific area. Usually, the court will assist the attorney in controlling the witness by allowing the cross-examiner's motion to strike a wandering, nonresponsive answer. On using leading questions, see §§11.54, 11.111.

A "why" question may give the witness a chance to explain his or her position, reemphasize harmful testimony, reconcile contradictions in his or her testimony, and control the pace and scope of the examination. Just as short leading questions help control the witness, open-ended or "why" questions abandon that control and invite the witness to give an often harmful lecture. And if, after a "why" question, you attempt to interrupt the witness and to regain control, the court is unlikely to be sympathetic because you "opened the door."

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.109 5. Know the answer

### §11.109 5. Know the answer

For each question asked, know the answer. Cross-examination is not the time to discover a damaging fact that could hurt the case and embarrass both the interrogator and the client.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.110 6. Choose words that may influence answer

### §11.110 6. Choose words that may influence answer

The way the question is phrased may influence the answer. For example, when challenging a witness's ability to perceive an accident from a distance, you are more likely to elicit a favorable response by asking "How far were you from the accident?" rather than "How close were you to the accident?"

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### §11.111 7. Ask leading questions

Advantages of leading questions are that the cross-examiner is in better control of the questioning and the witness is seen as agreeing with the questions, thus enhancing the credibility of the attorney's case in the jurors' eyes.

Leading questions are permitted during cross-examination. Evid C §767(a)(2). A leading question suggests the answer and can often be answered with a simple yes or no. See Evid C §764. Indeed, many cross-examination questions should be leading. Through such questioning, the attorney attempts to get the witness to agree with the client's version of the facts. This type of questioning can go quickly, because the attorney states a fact in question form and the witness is encouraged to assent to that fact. See appendix in §11.169 for list of words and phrases that make a question leading.

Not all questions should be leading, however, because a change of pace is sometimes necessary to keep the attention of the judge or jury. Thus, if you simply elicit an endless series of affirmative answers to leading questions, the trier of fact may simply be waiting for the next yes answer, and not really listening to the content of the question. Moreover, when you are virtually certain that the witness will provide the desired answer, it is often more credible to have the witness respond fully to a nonleading question. Remember that if you do choose to stray from leading questions, you must do so carefully, because you risk losing control of the witness. For further discussion of leading questions, see §§11.54-11.56.

Do not exaggerate any facts in the leading question. An overstatement may not only show the witness where the examination is headed, but it may undermine your credibility if the witness's response exposes your overstatement to the judge or jury.

Occasionally, a witness (especially a lay witness) may refuse to agree with any leading question for fear that it will help the examiner. In this situation, it may be advantageous to use reverse psychology, *i.e.,* to suggest by your question that you are expecting one answer, when, in fact, you desire the opposite. An alternative approach is to ask questions with obvious answers that will damage the witness's credibility if he or she does not readily agree. Finally, you can state the shortest possible declaratory statements, so as to require the witness to answer affirmatively.

**EXAMPLE:** You opened the door? You walked outside? You met a man? You spoke? He spoke? You said X? He said Y? See §11.105.

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## §11.112 8. Summarize to obtain more specific answers

During either direct or cross-examination, a witness's testimony may be vague or unclear on a particular point, especially if it is detrimental to his or her case. The cross-examiner may wish to concentrate on that vague testimony in order to elicit a more specific response without also enabling the witness to emphasize favorable testimony.

One technique is to ask a question that summarizes the testimony. Usually, such questions begin with a phrase like "Is it fair to say that …" or "You have testified that …" followed by a succinct statement of the previous answers. This type of question is less likely to be subject to objection and is more likely to be effective if the attorney limits the summary to three or four questions, rather than a lengthy stretch of testimony.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.113 9. Avoid repeating questions from direct

## §11.113 9. Avoid repeating questions from direct

A trial attorney is supposed to save for summation the conclusions to be drawn from the cross-examination. Thus, there is usually no point in asking the witness to answer questions that have already been asked on direct examination. Once a fact goes into evidence, it remains there and can be referred to in summation. Repeating questions to elicit the same facts that are already part of the trial record seldom adds to the closing argument ammunition.

Repeat a question only when you want to:

- Impeach the witness by contrasting the trial testimony with his or her prior inconsistent statements;
- Emphasize a good answer that advances your case (but note that repeating the question gives the witness an opportunity to improve on the earlier answer); or
- Focus on key testimony that supports other principal witnesses and that bears repeating for its persuasive impact.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/ H. Grounds for attacking credibility/§11.114 1. Witness's perception, memory, or ability to narrate

## H. Grounds for attacking credibility

### §11.114 1. Witness's perception, memory, or ability to narrate

An attorney may discredit a witness's testimony by asking questions designed to attack:

- The witness's ability to perceive;
- The witness's recollection; and
- The witness's ability to communicate.

See Evid C §780; *People v Bell* (1955) 138 CA2d 7, 291 P2d 150 (witness may be cross-examined on mental disease or mental derangement affecting powers of perception, memory, or narration).

**EXAMPLE 1: Perception.** Did the witness see the event in daylight or in the dark? Was the witness close by or far away? Was the witness distracted or concentrating on the event? Did the witness have any condition that interfered with perception at the time of the event? *People v Smith* (1970) 4 CA3d 403, 84 CR 412 (narcotic addiction); *Silvey v Harm* (1932) 120 CA 561, 8 P2d 570 (intoxication).

**EXAMPLE 2: Recollection.** Does the event stand out clearly in the witness's mind, or is he or she uncertain about precisely what happened?

**EXAMPLE 3: Ability to communicate.** Is the witness's ability to narrate impaired? Has the witness used terms that he or she understands?

**PRACTICE TIP:** When an adverse witness appears to have been rehearsed, you may attack such scripted testimony by showing that the witness has repeatedly discussed the case with the opposing party and the party's attorney.

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### §11.115 2. Witness's bias, interest, or other motive

Counsel may also impeach a witness's credibility during cross-examination by asking questions designed to establish the bias, interest, motive, or prejudice of the witness. Evid C §780(f); see, *e.g., Kelly v Bailey* (1961) 189 CA2d 728, 11 CR 448 (bias and prejudice); *Van Valkenburgh v Oldham* (1910) 12 CA 572, 108 P 42 (motive and interest).

It is always proper to show through the witness, if possible, or by other sources, if necessary, that the witness "has an unusual interest in the outcome of the case." *People v Fatone* (1985) 165 CA3d 1164, 1174, 211 CR 288, citing *People v Sacramento Butchers' Ass'n* (1910) 12 CA 471, 494, 107 P 712.

Ask the witness questions about:

**EXAMPLE 1:** Kinship or familial relationships to show favoritism or hostility; or

**EXAMPLE 2:** Fee arrangements between an opposing party and an expert witness to show a financial interest.

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### §11.116 3. Witness's prior felony conviction

In a civil case, the trial court has discretion under Evid C §352 to admit a prior felony conviction to impeach a witness's credibility. *Robbins v Wong* (1994) 27 CA4th 261, 274, 32 CR2d 337; see Evid C §788. California Constitution article I, §28(f), which provides for impeachment by any felony conviction in criminal cases, does not apply in civil cases. *Robbins v Wong, supra*.

In criminal cases, the statutory and constitutional provisions have been construed to authorize impeachment of a witness by "any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty." *People v Castro* (1985) 38 C3d 301, 306, 211 CR 719. See *People v Collins* (1986) 42 C3d 378, 228 CR 899. If the felony conviction does not involve moral turpitude, the Fourteenth Amendment's due process clause and Cal Const art I, §28(d) prohibit its use. *People v Castro* (1985) 38 C3d 301, 313, 211 CR 719.

Although the moral turpitude test is one appropriate standard for admissibility in a civil case, the requirement in *People v Castro* does not necessarily control in a civil case. *Robbins v Wong* (1994) 27 CA4th 261, 273, 32 CR2d 337, also citing Jefferson's California Evidence Benchbook, chap 23 (4th ed CJA-CEB 2009). See *People v Lang* (1989) 49 C3d 991, 1009, 264 CR 386, *People v Collins* (1986) 42 C3d 378, 228 CR 899, and *People v Castro* (1985) 38 C3d 301, 314, 211 CR 719, for discussion of the moral turpitude requirement.

On a motion under Evid C §352 to preclude impeachment with a prior felony conviction, the trial court must perform the weighing function in §352 (unless the prior conviction is inadmissible as a matter of law). *People v Collins* (1986) 42 C3d 378, 389, 228 CR 899. See also *Chevalier v Dubin* (1980) 104 CA3d 975, 980, 164 CR 118.

**NOTE:** Under Welf & I C §1772, certain convictions are admissible in subsequent civil or criminal proceedings, *e.g.,* certain convictions under Welf & I C §707 and a conviction of a person who is at least 18 at the time he or she committed the offense. In *People v Jackson* (1986) 177 CA3d 708, 222 CR 470, the court held that former Welf & I C §1772 precluded using a conviction to impeach anyone honorably discharged from the Youthful Offender Parole Board's control, who has not been placed in state prison during the period of control.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.117 4. Witness's character

### §11.117 4. Witness's character

A witness's credibility may be attacked by establishing the witness's bad character for honesty or veracity. Evid C §786. However, this type of interrogation is usually done on direct examination through other witnesses, not during cross-examination of the witness whose credibility is being attacked. On manner of proof, see Evid C §§786-787, 1100.

**NOTE:** Except for prior felony convictions (see §11.116), evidence of specific wrongdoing is inappropriate for attacking a witness's credibility. Evid C §§787-788; *Downey Sav. & Loan Ass'n v Ohio Cas. Ins. Co.* (1987) 189 CA3d 1072, 1092, 234 CR 835.

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## §11.118 5. Prior inconsistent statements

An effective method of discrediting a witness is to confront the witness with his or her prior inconsistent statements. See Evid C §780(h). These are prior oral or written statements that contradict testimony given on the stand. Contradictions established by cross-examination are most effective if they are major contradictions about material matters.

Alternatively, you may choose not to interrogate the witness about prior inconsistent statements but let the witness be contradicted by subsequent witnesses. If you elect this approach, before the witness steps down from the stand, ask the judge not to excuse the witness but instead to ask the witness to remain available for later recall in the trial. The witness can be confronted during the subsequent examination, and the jury will have the other witnesses' contradictory testimony well in mind.

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### §11.119 a. Types of statements to use

It is usually more effective to confront an adverse witness with prior inconsistent *written* statements, or statements that have been put in writing, *e.g.,* depositions, rather than prior inconsistent *oral* statements. The reason is that the witness can better explain away any apparent inconsistencies between prior oral statements and the present testimony if there is no written record to impeach the witness.

Typically, inconsistent statements are found in a transcript of the witness's deposition taken before trial. The transcript itself is not offered into evidence; instead, the inconsistent deposition testimony is read into the record. On procedure for offering deposition testimony into evidence generally, see §§12.47-12.53; 3 Witkin, California Evidence, *Presentation at Trial* §158 (4th ed 2000).

You will create a poor impression, however, if you waste time during the trial by thumbing through a deposition transcript to locate the witness's prior inconsistent statement. Avoid such a delay by preparing an outline or index for every deposition that may be used during trial; additionally, you may want to have the exact deposition cite in your notes next to the question. Then, when the adverse witness answers a question during cross-examination that contradicts his or her deposition testimony, the outline or index, or your notes, will enable you to quickly locate the prior inconsistent testimony. For discussion of indexing depositions, see §§12.90-12.96.

It may also be possible to get a partial transcript of the trial testimony and to confront a witness with prior inconsistent testimony from an earlier time in the trial. Whether to use this tactic depends on the length of the testimony and the trial, as well as whether the client has the resources to obtain expedited transcripts.

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### §11.120 b. Extrinsic evidence

Extrinsic evidence of prior inconsistent statements, *e.g.,* a written statement, is admissible when (Evid C §770):

- The witness is given an opportunity to explain or deny the statements while testifying;
- The witness has not been excused from giving further testimony in the action; or
- The interests of justice otherwise require that the inconsistent statements be admitted.

See *McGee v Cessna Aircraft Co.* (1983) 139 CA3d 179, 193, 188 CR 542 (court allowed reading of prior written statement given by passenger witness to FAA because witness was given opportunity to explain inconsistency).

**EXAMPLE:** A witness was unavailable to testify at trial and his testimony was admitted in the form of a videotaped deposition taken in the present case. To impeach the witness, the plaintiff offered a prior inconsistent statement that the witness had made in a deposition taken in a different case. At the videotaped deposition in the present action, plaintiff's counsel did not question the witness about the prior inconsistent statement. The court held that the prior inconsistent statement was inadmissible because the witness had no opportunity to explain or deny the statement and had been "excused" from giving further testimony. *Bossi v State* (1981) 119 CA3d 313, 324, 174 CR 93.

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### §11.121 c. Confirm direct testimony first

As the attorney conducting cross-examination, you should attempt to lock the adverse witness into the testimony elicited on direct examination before you attempt to impeach the witness. See, *e.g., People v Epps* (1981) 122 CA3d 691, 176 CR 332 (defendant denied on direct examination that he kissed victim, a minor female patient; because defendant was asked only about kissing that particular patient, the court ruled that no basis existed to impeach by extrinsic evidence his kissing of other patients).

After the adverse witness is committed to a particular point, you may attempt to impeach the witness by using the inconsistent statement. You may wish to emphasize why the prior statement is more credible, *e.g.,* the witness's attorney was with him or her at the deposition, or there has been ample opportunity to correct the transcript.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.122 d. Read inconsistent statement

### §11.122 d. Read inconsistent statement

When using a prior inconsistent statement to impeach a witness, it is not necessary to show the statement to the witness or disclose to the witness any information about the prior inconsistent statements or conduct. Evid C §769. See also Evid C §768. So if, for example, the witness's deposition contains statements inconsistent with his or her trial testimony, one method of using the deposition is to read into the record questions asked at the deposition and the witness's responses that are inconsistent with his or her trial responses, without questioning the witness further on the point.

Similarly, if prior inconsistent statements are in a document (*e.g.,* a letter), you may offer it into evidence if you comply with Evid C §770. Then, after the document has been admitted, read aloud the inconsistent portion without questioning the witness any further on the point. As long as the witness has not been excused, the extrinsic evidence of the inconsistent statement, *i.e.,* the document, may be admitted. See Evid C §770; §11.121.

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### §11.123 e. Include inconsistency in question

Another impeaching technique is to ask the witness whether he or she made a particular prior inconsistent statement. The question itself should contain the prior statement and should indicate the time, place, and person to whom it was made. See *McLaughlin v Los Angeles Ry.* (1919) 180 C 527, 539, 182 P 44.

**EXAMPLE:** "Did you state to Mr. Jones on Tuesday, December 18, at your office that you 'examined the printing press and it was in good working order'"? If the witness denies having made the statement, or cannot remember making it, prove that the statement was in fact made, by calling other witnesses during your case in chief. See, *e.g., Ehat v Scheidt* (1911) 17 CA 430, 120 P 49.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.124 f. Follow-up

### §11.124 f. Follow-up

When confronted with a contradiction, a witness may become evasive. If the witness's answer is nonresponsive, move to strike it and, if necessary, ask the judge to have the reporter reread the question. After the witness has testified as desired, do not as a rule give the witness any opportunity to close loopholes or explain inconsistencies.

It is not advisable to ask the witness why he or she gave a different statement. Nor should you ask the witness to explain the inconsistency, because the explanation may blunt the stark contradiction between the prior inconsistent statements and the current testimony. Typically, wait until closing argument to emphasize the inconsistency. If on redirect opposing counsel tries to rehabilitate the witness by providing an opportunity to explain the inconsistency, that "defensive" testimony will highlight the existence of the inconsistency and show that it is important to the case.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.125 I. Protecting your witness during cross-examination

## §11.125 I. Protecting your witness during cross-examination

When one of your witnesses is being cross-examined, protect the witness by raising timely objections to improper questions. For example, object to any question that the opposing attorney asks in an intimidating manner that subjects the witness to undue harassment or embarrassment. See Evid C §765. Other improper questions, to which you may object, may include compound questions (see §11.51), questions that assume facts not in evidence (see §11.58), and argumentative questions (see §11.61).

If your witness is intelligent, knowledgeable, and doing well on the stand, there is little need for you to object, even to an otherwise objectionable question. The witness's ability to handle everything thrown by the opposing side's cross-examination with little or no help from you only enhances the witness's credibility in the eyes of the judge and jury. Conversely, your objections can help weaker witnesses by indicating what opposing counsel is doing or by slowing the pace of the examination.

Of course, ill-founded objections risk the ire of both judge and jury. Nonetheless, do not let unfavorable rulings to your objections dissuade you from voicing timely objections needed to protect the record. When the court overrules a seemingly proper objection, do not express anger or frustration. Any such reactive "body language" may impress the jury as a greater setback for your side than would a pose of equanimity.

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## VIII. REDIRECT AND RECROSS-EXAMINATION; REBUTTAL AND SURREBUTTAL

### A. Redirect

### §11.126 1. Deciding whether to conduct redirect examination

Examination of a witness by the direct examiner, after cross-examination has ended, is known as redirect examination. Evid C §762. This examination may not be necessary unless some inconsistency or confusion was created by the cross-examination. In a sense, extensive redirect examination is an admission that the cross-examiner was successful in shaking the witness's testimony.

Although cross-examination is limited to the scope of direct examination (see §11.83), matters brought out in cross-examination sometimes require amplification. Therefore, during redirect examination, you may elicit additional testimony to correct any erroneous impressions or offset any incorrect inferences from the cross-examination. See, *e.g., Myers v Rose* (1938) 27 CA2d 87, 80 P2d 527.

You may also elicit additional testimony on redirect to rehabilitate a witness whose credibility may have been damaged. See, *e.g., Muller v Hale* (1902) 138 C 163, 71 P 81; *People v Shaver* (1898) 120 C 354, 52 P 651.

Redirect examination is not an opportunity to ask questions about matters already covered on direct examination, unless the court specifically permits you to do so. See Evid C §774.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.127 2. Follow same rules as for direct examination

## §11.127 2. Follow same rules as for direct examination

Redirect examination is conducted in the same manner as direct examination, and the same rules apply on the use of leading questions. See Evid C §767(a)(1). See also §11.55. Examination of the witness is generally limited to the scope of the cross-examination. See Evid C §774.

The usual objective of an attorney who has successfully examined a witness on direct examination, and that witness has then survived cross-examination, is to get the witness promptly off the stand. Any prolonged period of redirect examination increases the opposing counsel's time to think of questions for recross-examination that can damage the ultimate impact of the witness.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.128 B. Recross-examination

## §11.128 B. Recross-examination

After redirect examination, the opposing attorney may have another opportunity to question the witness. This is known as recross-examination (Evid C §763), and it is conducted in the same manner as cross-examination. Thus the same rules apply on the use of leading questions. Evid C §767(a)(2). See §11.111.

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### §11.129 C. Rebuttal and surrebuttal

Rebuttal and surrebuttal are different from redirect and recross-examination because they are presented after the defendant's case has been presented. At that time, the parties may offer only evidence rebutting the other side's evidence, unless the court, for good cause, permits the parties to offer more direct evidence on their original cases. CCP §§607(6), 631.7.

Plaintiff's rebuttal evidence constitutes a reply to matters first brought out during defendant's case. Defendant's reply to plaintiff's rebuttal evidence is sometimes called surrebuttal. See *California Wine Ass'n v Commercial Union Fire Ins. Co.* (1910) 159 C 49, 112 P 858.

Many trial attorneys want to put on dramatic evidence at the end of their cases before the jury begins deliberation. However, a party has no right to withhold testimony that should have been offered in the case in chief merely for the purpose of offering it more dramatically in rebuttal. *Lipman v Ashburn* (1951) 106 CA2d 616, 235 P2d 627. You may object to a question on the ground that it does not call for proper rebuttal or surrebuttal evidence but that it calls for evidence that should have been presented during the adversary's case in chief. In this way, you may be able to exclude this late evidence. The court, however, has discretion "to allow, in rebuttal, testimony which should have been offered as a part of the case in chief." *Dawson v Pacific Elec. Ry.* (1918) 177 C 268, 272, 170 P 603. See also *Pontecorvo v Clark* (1928) 95 CA 162, 179, 272 P 591. The court also has discretion on the scope of evidence that may be offered in rebuttal. *Ray v Jackson* (1963) 219 CA2d 445, 33 CR 339; *Johnston v Brewer* (1940) 40 CA2d 583, 105 P2d 365.

For discussion of motions to reopen case in chief, see §§18.65-18.81.

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## IX. EXPERT OPINION TESTIMONY

### §11.130 A. Qualifying expert

To qualify as an expert, a witness must have special knowledge, skill, experience, training, or education on the subject to which his or her testimony relates. Evid C §720(a). See Evid C §801(b) (expert opinion may be based on special knowledge, skill, experience, training, and education). Whether the witness qualifies as an expert is a preliminary fact determined by the trial judge under Evid C §405.

On objection by a party, and before a witness may testify as an expert, the attorney calling the witness must demonstrate that the witness is qualified to be an expert on the subject to which his or her testimony will relate. This qualification may be shown by any otherwise admissible evidence, including the witness's own testimony. Evid C §720(b).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.131 1. What to ask

### §11.131 1. What to ask

To establish the expert's qualifications, ask questions about:

- The expert's past and present occupation (*Michael v Gates* (1995) 38 CA4th 737, 45 CR2d 163);
- The expert's academic background;
- Any publications containing the expert's views;
- Professional societies to which the expert belongs;
- Any awards or honors that would particularly distinguish this expert among his or her peers;
- Any teaching experience;
- Any particular experience with the subject matter of the lawsuit

**NOTE:** Watch for statutory requirements relating to expertise that could prevent an expert from testifying, *e.g.,* Health & S C §1799.110(c), which requires 5 years of experience as an emergency room physician to testify on the standard of care. *Miranda v National Emergency Serv.* (1995) 35 CA4th 894, 41 CR2d 593. But see *Petrou v South Coast Emergency Group* (2004) 119 CA4th 1090, 15 CR3d 64 (expert with substantial emergency room experience within 5 years of alleged malpractice may testify);

- Whether he or she qualified as an expert in other lawsuits covering the subject matter;
- Any physical evidence examined by the expert; and
- Any other tests performed by the expert.

Opposing counsel may likewise conduct a voir dire examination (*i.e.,* challenge the witness's qualifications) in order to object to the adequacy of the foundation being laid for the expert testimony. See generally *Williams v Volkswagenwerk Aktiengesellschaft* (1986) 180 CA3d 1244, 1263, 226 CR 306.

The court has discretion on whether to qualify a witness as an expert. *Huffman v Lindquist* (1951) 37 C2d 465, 234 P2d 34. In making its decision, the court may examine several factors, including:

- The number of experts in the field;
- Whether the testimony offered is generally recognized as the subject of expert testimony (*e.g.,* hypnotically restored testimony, though subject to conflicting rulings, has been deemed not generally accepted in the scientific community; *Schall v Lockheed Missiles & Space Co.* (1995) 37 CA4th 1485, 44 CR2d 191);
- Whether the expert's scientific or work background is sufficient (see, *e.g., Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 120 CR 787 (skill, experience, and training gained "on the job" may be as impressive or as important to judge as academic training in qualifying expert)); and
- Whether the specific training received by the expert relates to the type of testimony being offered (see, *e.g., Osborn v Irwin Mem. Blood Bank* (1992) 5 CA4th 234, 274, 7 CR2d 101 (work in particular field not absolute prerequisite to qualification as expert in that field; qualification may be based on education, special knowledge, and experience)).

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### §11.132 2. Waiving testimony about qualifications

When the attorney calling an expert witness whose credentials are beyond reproach first attempts to elicit testimony from the witness about those credentials, the opposing attorney may offer to stipulate as to the expert's qualifications. The benefit of this stipulation is that no trial time is consumed by the expert testifying as to his or her qualifications.

Some attorneys believe, however, that the jury will give greater weight to the expert's opinion if the jury hears the expert testify as to his or her impressive credentials. The court often instructs the jury to consider the expert's qualifications in deciding what weight to give the expert's opinion. Moreover, when there is conflicting expert testimony, the court often further instructs the jury to consider the relative qualifications of the expert witnesses in weighing their opinions. See, *e.g.,* CACI 219, 221.

**PRACTICE TIP:** Consider not entering into a stipulation waiving testimony of qualifications and eliciting testimony about your expert's qualifications, so that if any conflicting expert testimony emerges, you may argue the supposedly superior qualifications of your expert to the jury. Further, declining to accept a stipulation that is offered in the jury's hearing may emphasize to the jury the importance of your expert's qualifications.

For further discussion, see California Personal Injury Proof §§1.20, 1.22-1.23 (Cal CEB 1970); California Expert Witness Guide §§3.1, 13.5-13.6 (2d ed Cal CEB 1991).

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### §11.133 3. If expert testifies to facts

If the expert's testimony is not opinion but facts within the expert's special knowledge, then the admissibility of the testimony is not governed by Evid C §801. *People v McDonald* (1984) 37 C3d 351, 366, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431. Such factual testimony by the expert is admissible if it meets the requirements of Evid C §720 that the witness is qualified by his or her special knowledge (see §11.131) and of Evid C §351 that the evidence is relevant to the issues. *People v McDonald, supra*.

An expert who also testifies as a percipient witness on matters within the expert's own knowledge is treated as a fact witness during expert witness discovery under CCP §§2034.010-2034.730. *Hurtado v Western Med. Ctr.* (1990) 222 CA3d 1198, 1203, 272 CR 324 (it would invade absolute work-product privilege concerning attorney's thought processes in preparation for trial to require attorney to analyze such witness's anticipated testimony and submit it to opponent in an expert witness declaration). See discussion of expert witness discovery in California Expert Witness Guide, chaps 10-12 (2d ed Cal CEB 1991).

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### §11.134 B. Establish bases for opinion

During direct examination, the expert may testify as to the reason for his or her opinion and the matter on which it is based. Evid C §802. If the expert does not so testify, the trier of fact will have little to go on in determining what weight, if any, to give to the expert's opinion. In addition, if the opposing party objects that the basis for the expert's opinion is improper, the court may exclude the opinion. Evid C §803. If the expert has a proper basis for the opinion, excluding from consideration the improper matter on which the opinion was formerly based, the expert witness may then state the opinion. Evid C §803.

Expert witnesses often rely not only on the facts and materials in evidence in the particular case but also on the material statements of other experts or source materials that are not in evidence. You and your expert should know well in advance the bases for the expert's opinion. On preparing expert witnesses generally, see §§5.70-5.90. The court may exclude the bases of the expert's opinion if it finds that the bases, though probative, would take too much time or would create the dangers of undue prejudice, of confusing the issues, or of misleading the jury. Evid C §352.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.135 1. Proper bases for opinion

### §11.135 1. Proper bases for opinion

Permissible bases for expert opinion evidence are set forth in Evid C §801(b), which provides that an opinion may be based on matters that are:

- Perceived by or personally known to the witness or made known to him or her at or before the hearing, whether or not admissible (including the witness's special knowledge, skill, experience, training, and education);
- Of a type that may reasonably be relied on by an expert in forming an opinion on the subject to which his or her testimony relates (see *Buckwalter v Airline Training Ctr.* (1982) 134 CA3d 547, 554, 184 CR 659 (expert may have to rely on circumstantial evidence if there is little or no direct evidence on which to base an opinion)); and
- Not precluded by law as a basis for the expert's opinion.

Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009). See discussion of these factors in *Marriage of Hewitson* (1983) 142 CA3d 874, 885, 191 CR 392.

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### §11.136 2. Improper bases for opinion

The following are examples of matters on which an expert's testimony cannot be based:

- Speculation. See *Blau v City of Los Angeles* (1973) 32 CA3d 77, 82, 107 CR 727.
- Unproven facts. See *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 145 CR 47.
- Assumptions of fact contrary to the evidence. See *Hyatt v Sierra Boat Co., supra*.
- Assumptions of fact based on insufficient data. See *Korsak v Atlas Hotels, Inc.* (1992) 2 CA4th 1516, 1522, 3 CR2d 833.

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### §11.137 3. If basis is another's opinion

An expert may not base his or her opinion solely on another outside expert's opinion. *People v Campos* (1995) 32 CA4th 304, 308, 38 CR2d 113; *People v Piper* (1980) 103 CA3d 102, 112, 162 CR 833. See California Expert Witness Guide §4.2 (2d ed Cal CEB 1991).

Although an expert may rely on hearsay in forming an opinion and state on direct examination matters relied on, the expert may not testify to the details of those matters if they are inadmissible (*i.e.,* expert may not bring incompetent hearsay before jury under the guise of his or her reasons for the opinion). *Korsak v Atlas Hotels, Inc.* (1992) 2 CA4th 1516, 1524, 3 CR2d 833.

An expert may reasonably rely on reports by other experts (as opposed to the *opinions* of other experts) that are based on their personal observations, tests, or examinations (see, *e.g., Christiansen v Hollings* (1941) 44 CA2d 332, 347, 112 P2d 723) and may rely on reliable books or treatises (see, *e.g., Mann v Cracchiolo* (1985) 38 C3d 18, 37, 210 CR 762). But an expert may not use an unauthenticated lab report as substantive evidence of the expert's ultimate opinion. See *Turner v Burlington N. Santa Fe R.R. Co.* (9th Cir 2003) 338 F3d 1058 (Fed R Evid 703). If the court finds that an outside report on which your expert relied does not provide a reasonable basis for an expert's opinion, the court may rule that your expert's opinion is inadmissible. See *Lockheed Litig. Cases* (2004) 115 CA4th 558, 10 CR3d 34.

**PRACTICE TIP:** If your expert properly relies in part on the opinions of outside experts, establish that fact on direct examination, but do not refer during direct examination to the content of the outside expert's opinion or to any details of it. Expect your expert witness to be cross-examined on the content of any outside experts' opinions. *Mosesian v Pennwalt Corp.* (1987) 191 CA3d 851, 236 CR 778, disapproved on other grounds in *People v Ault* (2004) 33 C4th 1250, 17 CR3d 302. See §11.138. In addition, opposing counsel may call that outside expert on whose opinion your expert relied to testify. See §11.149.

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### §11.138 4. Inadmissible basis subject to cross-examination

If the expert relies on any hearsay in forming his or her opinion (*e.g.,* scientific, technical, or professional books and articles, similar publications, and other out-of-court statements), that information is not admissible on direct examination. Details about the inadmissible matters are admissible on cross-examination, however, if:

- The witness testifies that he or she has "referred to, considered or relied upon such publication in arriving at or forming his opinion";
- Such publication has otherwise been admitted in evidence; or
- The publication has been established as a reliable authority.

Evid C §721(b)(1)-(3). *Intoximeters, Inc. v Younger* (1975) 53 CA3d 262, 273, 125 CR 864; *Gluckstein v Lipsett* (1949) 93 CA2d 391, 209 P2d 98. See also §11.151. Note that Fed R Evid 803(18), permits an expert to be cross-examined on a learned treatise if it is established as reliable authority without requiring that the expert referred to, considered, or relied on it in arriving at or forming the opinion.

A court must exercise its discretion under Evid C §352 to limit to its proper use evidence that is otherwise inadmissible but is offered because it was relied on by an opposing party's expert. For example, in *People v Coleman* (1985) 38 C3d 69, 92, 211 CR 102, it was error to allow the cross-examiner to question the psychiatric expert about the content of letters that the expert partially relied on but that contained highly inflammatory and prejudicial hearsay. See also *People v Parnell* (1993) 16 CA4th 862, 20 CR2d 302 (expert based opinion on defendant's statements made under hypnosis). Instead of excluding inadmissible hearsay in its entirety, the court may appropriately exclude the portions of the hearsay that are not related to the expert's opinion, exclude unduly prejudicial evidence, or instruct the jury to limit their consideration of the evidence. See *People v Coleman, supra*.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.139 5. If opinion based on scientific tests

### §11.139 5. If opinion based on scientific tests

The California courts have continued to hold that expert opinion is admissible if it is based on a new scientific technique or new procedure that is "sufficiently established to have gained general acceptance in the particular field in which it belongs" (formerly called the "*Kelly-Frye* rule," based on the cases *People v Kelly* (1976) 17 C3d 24, 130 CR 144, and *Frye v U.S.* (DC Cir 1923) 293 F 1013). The United States Supreme Court found that the test created by *Frye* had been abrogated in the federal courts by the more flexible standards of the Federal Rules of Evidence. *Daubert v Merrell Dow Pharms., Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786. See *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167 (extending *Daubert* to *all* expert testimony, *i.e.*, testimony based on technical and other specialized knowledge, not only testimony based on scientific knowledge). See also *U.S. v Hankey* (9th Cir 2000) 203 F3d 1160, 1167 (court's "gatekeeping" function applies to all expert testimony). The California Supreme Court, however, forcefully reaffirmed the viability of the traditional rule in *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663 (court noted that *Kelly-Frye* formulation should now more accurately be termed *Kelly* rule).

In *Leahy,* the California Supreme Court explained that "general acceptance" in the scientific community means a "consensus drawn from a typical cross-section of the relevant, qualified scientific community." 8 C4th at 612. The courts have looked for such consensus in scientific journals (*People v Shirley* (1982) 31 C3d 18, 56, 181 CR 243) or they have relied on expert testimony (*People v Brown* (1985) 40 C3d 512, 533, 230 CR 834). See *Roberti v Andy's Termite & Pest Control, Inc.* (2003) 113 CA4th 893, 6 CR3d 827 (trial court erred in applying *Kelly* admissibility test to expert testimony that pesticide caused plaintiff's autism, because testimony was based on techniques generally accepted in medical community; *Kelly* test does not apply even if testimony presents new theory of medical causation); *People v Stoll* (1989) 49 C3d 1136, 265 CR 111 (psychologist's expert opinion on standardized personality tests was admissible because use of standardized tests was generally accepted); *In re Amber B.* (1987) 191 CA3d 682, 236 CR 623 (psychologist's opinion that victim had been sexually abused was inadmissible because it was based on play with anatomically correct dolls—a procedure not yet generally accepted). See also *Wilson v Phillips* (1999) 73 CA4th 250, 86 CR2d 204 (psychologist's testimony on repressed memory phenomenon admissible without hearing on whether theory of repressed memory generally accepted in scientific community, because testimony was expert medical opinion based on personal evaluations of plaintiffs and not scientific evidence). But see *People v Ayala* (2000) 24 C4th 243, 99 CR2d 532 (no need to apply *Kelly* test when procedure isolated physical evidence whose existence, nature, and meaning would be obvious to layman).

**Admissibility of DNA evidence.** The California courts have ruled DNA testing to be admissible evidence. *People v Taylor* (1995) 33 CA4th 262, 40 CR2d 132. In *People v Venegas* (1998) 18 C4th 47, 74 CR2d 262, for example, the court held that the restriction fragment length polymorphism (RFLP) form of DNA analysis, which uses the "modified ceiling" method to calculate the statistical probabilities of a match between the evidentiary samples and the DNA of an unrelated person chosen at random from the general population, is generally accepted in the relevant scientific community and is admissible under the *Kelly* test. See also *People v Hill* (2001) 89 CA4th 48, 107 CR2d 110 (holding DNA kits used by FBI and other agencies survive *Kelly* test).

**NOTE:** In *Venegas,* the court affirmed the reversal of the defendant's conviction because the third prong of the *Kelly* test, which requires that the proponent of the evidence demonstrate that correct scientific procedures were used in the particular case, was not met.

The "unmodified product rule," as applied to DNA forensic analysis, has been held to be generally accepted in the scientific community of population geneticists. *People v Soto* (1999) 21 C4th 512, 541, 88 CR2d 34 (statistical calculations made using unmodified product rule meet judicial standard for admissibility of scientific evidence).

**Other types of blood evidence.** Other aspects of blood evidence have not been as controversial as DNA testing. For example, the California Supreme Court denied review in *People v Morganti* (1996) 43 CA4th 643, 50 CR2d 837, when the court of appeal found no error in the admission of the results of an agglutination inhibition test—a test relied on to detect specific genetic markers in blood. Notably, the court concluded that the affirmance of a scientific technique

in a published appellate opinion could furnish sufficient evidence showing general acceptance of the test or technique in the relevant scientific community. 43 CA4th at 658. The court went on to find, moreover, that the defendant had introduced no credible evidence that there had been a change of the attitude of the scientific community in the acceptability of such evidence since the prior published opinion allowing it. Accordingly, there was no error in the admission of the testimony in this case. See *People v Yorba* (1989) 209 CA3d 1017, 257 CR 641 (approving the admission of evidence based on agglutination inhibition testing).

**Further research:** On the federal test under *Daubert,* and further discussion of the *Kelly* rule and scientific evidence, see §13.109. See also California Expert Witness Guide §§4.12-4.35, 16.5 (2d ed Cal CEB 1991); Jefferson's California Evidence Benchbook, chap 21 (4th ed CJA-CEB 2009).

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## C. Eliciting opinion

### §11.140 1. Ask expert to state opinion

It is a matter of strategy whether to first elicit testimony on the work done and matters considered by the expert or first ask the expert whether he or she has formed an opinion on an issue in the case. The court in its discretion may require that the witness be first examined about the bases for the opinion before the witness may testify in the form of an opinion (see §§11.134-11.139). Evid C §802.

Once the witness states that he or she has an opinion, ask what that opinion is and the reasons for it. A witness who testifies in the form of an opinion during direct examination may state the reasons for the opinion and the basis for the opinion, including the expert's special knowledge, skill, experience, training, and education. Evid C §802.

When an expert's opinion is not based on personal observation, before the expert may testify in the form of an opinion, he or she must state the assumed facts on which the opinion is based. In this way, it becomes clear that the expert has a basis for forming an intelligent opinion and that the opinion applies to the action before the court. Comment to Evid C §802. See also §11.142 for including these assumed facts in a hypothetical question.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.141 2. Hypothetical questions

## §11.141 2. Hypothetical questions

During direct examination, if the expert lacks personal knowledge of all the facts, use a hypothetical question to give the expert sufficient facts to enable him or her to testify in the form of an opinion. See Evid C §801(b).

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### §11.142 a. What facts to use in hypothetical question

Hypothetical questions need not state all the evidence in the case, and they may be framed to agree with the attorney's theory of what the material facts are. *People v Hill* (1897) 116 C 562, 48 P 711. The facts assumed need not be undisputed (*Guardianship of Jacobsen* (1947) 30 C2d 312, 182 P2d 537), but they must be shown by the evidence. *People v Denman* (1918) 179 C 497, 177 P 461; *Sullivan v City & County of San Francisco* (1950) 95 CA2d 745, 214 P2d 82. See *Marriage of Micalizio* (1988) 199 CA3d 662, 673, 245 CR 673 (expert's ultimate conclusion not acceptable if it is based on improper or unwarranted matters).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.143 b. How to ask a hypothetical question

### §11.143 b. How to ask a hypothetical question

The procedure for asking a hypothetical question is to:

- Ask the expert to assume that certain facts (as shown by the evidence) exist;
- Ask whether, on the basis of those facts, the expert has an opinion on an issue concerning those facts;
- After the expert has replied in the affirmative, ask what the opinion is; and
- Have the expert explain that opinion to the trier of fact.

**PRACTICE TIP:** From a tactical point of view, using a hypothetical question has the advantage of offering you the opportunity to summarize for the jury the facts of the case before closing arguments.

When using a hypothetical question, it is helpful to write out the question in advance, with the expert's assistance, so that you and the expert agree on its exact wording. See also *Dincau v Tamayose* (1982) 131 CA3d 780, 798, 182 CR 855. On the other hand, some attorneys prefer a short, more spontaneous hypothetical question, reasoning that a long, written question, prepared with the input of the expert, may be awkward and appear to be a "script." Be careful with this approach, however; spontaneity is never worth getting the question wrong.

Nonetheless, it is permissible to let the jury know that the expert has already seen the hypothetical question so that the jury understands that the expert is not speaking off the cuff. On using hypothetical questions during cross-examination, see §11.147. For further discussion of hypothetical questions, see §5.52. See also California Personal Injury Proof §§1.28-1.30 (Cal CEB 1970).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.144 c. When not to use hypothetical questions

### §11.144 c. When not to use hypothetical questions

When possible, many attorneys avoid using hypothetical questions on direct examination of experts. Instead, these attorneys elicit from the expert the work that he or she has done on the matter before asking the expert's opinion. The reasons for proceeding in this manner are that:

- The expert's credibility may be enhanced in the eyes of the jurors in that they are aware of the extent of the expert's work on the matter;
- The jurors may be less apt to become bored, as they might when listening to a long hypothetical question;
- The jurors may better understand the significance of the expert's opinion; and
- Counsel avoids the common objections to the hypothetical question (*e.g.,* that the facts assumed in the question are not shown by the evidence).

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### §11.145 D. Testimony about compensation and experience as witness

The fact that the expert is being paid for his or her time and the amount of that compensation are often brought out during direct examination. The idea is to blunt any adverse effects that occur if these facts first come out during cross-examination. On cross-examination concerning compensation, see §11.148. In posing a question about the expert's compensation, it is important to make clear that the payment is for the expert's consultation time, not for his or her "testimony." For further discussion, see §5.83.

Similarly, when an expert has testified in other trials, many attorneys attempt to bring out this fact during direct examination. The goal is to suggest that the expert's widespread experience reflects the demand for his or her particular skills. By contrast, if this fact is left for cross-examination, it may be suggested that the expert is a paid witness who makes a large part of his or her living from testifying.

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## E. Cross-examination of expert

### §11.146 1. General rules

Experts may be cross-examined in the same manner as any other witness. Evid C §721(a). See generally §§11.82-11.125. In addition, experts may be cross-examined as to qualifications, the subject to which their testimony relates, the bases for their opinions, and the reasons for their opinions. Evid C §721(a). Educate yourself thoroughly about the area of the expert's special expertise relevant to the case, including becoming thoroughly familiar with the language used and the concepts involved so that you can ask the expert intelligent questions.

Counsel has wide latitude in cross-examining experts as to all matters that test the soundness of the expert's opinion and his or her credibility. See Comment to Evid C §721. See also *Dincau v Tamayose* (1982) 131 CA3d 780, 798, 182 CR 855. You may inquire into privileged communications, if the expert's opinion is based on facts obtained during a privileged communication. *People v Whitmore* (1967) 251 CA2d 359, 59 CR 411.

You may not cross-examine an expert about the content of a scientific, technical, or professional publication unless:

- The expert has referred to, considered, or relied on it in arriving at or forming his or her opinion;
- The publication has been admitted into evidence irrespective of whether the expert referred to, considered, or relied on it in forming his or her opinion; or
- The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

Evid C §721(b)(1)-(3). Comment to Evid C §721(b). Such publications are not generally admissible during the expert's witness's direct examination. See §11.138. On particular areas of cross-examination, see §§11.150-11.151. For further discussion on cross-examination of opposing experts, see California Expert Witness Guide §§15.1-15.31 (2d ed Cal CEB 1991).

On discovery concerning expert witnesses and exclusion of expert's opinion, see CCP §§2034.010-2034.730; California Civil Discovery Practice, chap 11 (4th ed Cal CEB 2006). See also §§2.3-2.7.

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### §11.147 a. Hypothetical questions

Hypothetical questions may be asked during cross-examination even if they were not asked during direct examination. See, *e.g., People v Sutton* (1887) 73 C 243, 15 P 86. If hypothetical questions were used on direct examination, vary the facts in your hypothetical questions to see whether the expert's opinion would change with different facts. See *Dincau v Tamayose* (1982) 131 CA3d 780, 182 CR 855; *Alward v Paola* (1947) 79 CA2d 1, 179 P2d 5. Similarly, "different aspects of the subject may be gone into for the purpose of testing the knowledge of the witness and different phases of the subject embraced within the hypothesis may be developed." *Reynolds v Struble* (1933) 128 CA 716, 18 P2d 690.

Hypothetical questions asked during cross-examination, like those asked during direct examination, must generally assume facts shown by the evidence. *McCann v Children's Home Soc'y* (1917) 176 C 359, 168 P 355; *MacCoy v Gage* (1918) 38 CA 672, 177 P 296. See also §§11.141-11.142. The cross-examiner has wide latitude in testing the expert's credibility, and when the purpose of the hypothetical question is to test the expert's accuracy or competency, the question may contain facts not in evidence. *People v Busch* (1961) 56 C2d 868, 874, 16 CR 898. For further discussion of preparing hypothetical questions on cross-examination, see §§5.85-5.89. See also California Personal Injury Proof §1.30 (Cal CEB 1970).

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### §11.148 b. Compensation and experience as witness

It is a proper subject on cross-examination to ask the expert witness whether he or she received compensation and the amount of compensation. Evid C §722(b). The rationale is that the subject reflects on the expert's credibility and the weight of the testimony. If the expert's living is earned by testifying in court cases, this fact may be brought out during cross-examination. Moreover, if the expert usually or always testifies for one side (*e.g.,* the plaintiff's side), you may bring out this fact to show the expert's bias. At least one court has held that $250 an hour is a reasonable fee for expert testimony and held that the courts have jurisdiction to decide the reasonableness of expert fees. *Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 50 CR2d 493.

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### §11.149 c. Calling rebuttal or other experts

When an expert testifies that his or her opinion is based in part or in whole on the opinion or statement of another person, that other person may be called and examined by an adverse party as if under cross-examination about the opinion or statement. Evid C §804(a). This rule does not apply if the person whose opinion or statement was relied on is a party, a person identified with the party under Evid C §776(d), or "a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert has relied." Evid C §804(b).

Code of Civil Procedure §2034(j), (m) provide that a party may, for purposes of impeachment, call an expert who was not listed or disclosed during expert discovery. Although the impeachment contemplated does not allow the unlisted expert to express an opinion contrary to that of another expert, the unlisted expert can testify that facts relied on by the opponent's expert are incorrect or nonexistent. *Fish v Guevara* (1993) 12 CA4th 142, 15 CR2d 329 (unlisted expert had contrary opinion but no contrary facts on which to base it). See also *Kennemur v State* (1982) 133 CA3d 907, 921, 184 CR 393 (decided under former CCP §2037.5, now CCP §2034.300, CCP §2034.310).

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## 2. Expert cross-examination subjects

### §11.150 a. Checklist: Expert's qualifications and opinion

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___ 1. Is the witness qualified to testify as an expert on the subject?

___ 2. Is the expert's opinion flawed in logic, factual basis, or common sense? If so, attempt to pick apart the opinion during cross-examination.

**EXAMPLE:** If an expert has given an opinion on the bursting point of one type of pipe, the cross-examiner may be able to show that the pipe involved in the case differs from the pipe on which the expert's opinion was based.

___ 3. Is there a legally sufficient basis for the opinion?

**EXAMPLE:** Were material facts omitted from the hypothetical question or were facts not in evidence, so that the opinion was based on a misleading hypothetical question? To establish this point, consider an alternative hypothetical question that assumes other facts more favorable to your client. See §§11.142-11.145.

___ 4. Are there any weak links in the expert's analysis of the problems? If so, expose and exploit those weaknesses during cross-examination.

**EXAMPLE:** You may be able to show that a doctor, although qualified as an expert, (1) performed only one examination of the patient and (2) did not have all the facts necessary to render a complete opinion.

___ 5. Is the expert's field a precise science? If not, consider asking the expert to concede that the field is not a precise science, and that other well-trained experts might reach a contrary conclusion.

___ 6. Does the expert have direct first-hand knowledge of the facts on which the opinion is based? If you find that the expert does not, do not argue with the expert. The time for argument comes at the end of the trial in summation, when you can refer to your own expert's testimony and to the contradictions inherent in the opposing expert's testimony.

___ 7. Has the expert given prior testimony in other proceedings or published any opinions? You may be able to attack the expert's testimony based on such prior statements or opinions, if they are inconsistent with the current testimony.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.151 b. Questions about publications

### §11.151 b. Questions about publications

If you know that there is impeaching material in any scientific, technical, or professional publications, which the expert witness referred to, considered, or relied on in reaching an opinion, have the publications available to show to the expert.

**EXAMPLE:** A scientific text relied on by the expert states that the strength of a particular type of pipe may be weakened if exposed to substance Y, but the expert ignored this point in rendering an opinion at trial. The cross-examiner could discredit the expert's testimony in the following manner:

Q. You found [*substance Y*] to be present on the pipe, is that correct?

A. Yes.

Q. Did you rely on [*scientific text X*] in forming your opinion?

A. Yes.

Q. Does [*scientific text X*] contain authoritative, accurate, and reliable information about the effect of placing [*substance Y*] on this particular type of pipe?

A. Yes.

Q. [*Scientific text X*] indicates in footnote 3 that exposure to [*substance Y*] will have an adverse material effect on the strength of this particular type of pipe, is that correct?

A. I don't recall.

Q. [*Showing expert footnote 3.*] It states in footnote 3 that exposure to [*substance Y*] will have an adverse material effect on the strength of this particular type of pipe. Is that correct?

A. [*Reading.*] Well, yes.

Q. But you did not consider the information in footnote 3 in forming your opinion, did you?

A. No, I did not.

Optional

Q. Do you agree with the statement in the text?

A. Yes.

**NOTE:** If the expert says "yes," the expert's earlier opinion will have been weakened. Even if the expert responds "no," you may stop the cross-examination and then stress in closing argument that the scientific text purportedly relied on by the opposing party's expert, and admitted to be authoritative, contains an opinion directly contrary to the opposing expert's opinion in court. That later argument will likewise weaken the expert's earlier opinion and undermine the opponent's case.

If the expert acknowledges, as in the example above, that certain information was not considered in forming his or her opinion, decide whether to continue cross-examining on the point. One risk of doing so is that the expert may be able to recover with an explanation, thus diminishing the impeaching effect of the testimony. Factors to consider in making this decision include:

- Whether the expert appears forthright, in which event you may elect to continue the line of questioning;
- Whether the expert appears evasive, in which event you may not choose to proceed; and
- Whether additional facts may be used to impeach the expert, in which event you may wish to continue with the examination.

**EXAMPLE:** Cross-examiner decides to continue questioning on this point, and asks:

> Q. If you had considered the information in footnote 3 of [*scientific text X*], your opinion would have been different, correct?
>
> A. Yes.

In asking this type of a question, there is a risk that the expert may answer "no," which would dilute the impeaching nature of the expert's testimony. This is especially so if opposing counsel later asks: "Why would your opinion not be different?" and the expert is able to explain away the seeming analytic blunder.

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## X. ETHICAL CONSIDERATIONS: PERJURED TESTIMONY DURING TRIAL

### A. Know professional rules

### §11.152 1. Duty not to knowingly allow perjury

An attorney who knowingly allows a witness to testify falsely is subject to disciplinary proceedings and criminal prosecution. See *In re Branch* (1969) 70 C2d 200, 74 CR 238. The attorney is precluded from asking questions if the attorney knows that the response will be perjurious. Bus & P C §6068(d); Cal Rules of Prof Cond 5-200; ABA Model Code of Prof Resp DR 7-102(A). See *People v Johnson* (1998) 62 CA4th 608, 619, 72 CR2d 805; *People v Brown* (1988) 203 CA3d 1335, 1339, 250 CR 762. See also §§5.91-5.95.

When presenting a case, an attorney must use "such means only as are consistent with truth" and "not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law." Cal Rules of Prof Cond 5-200; Bus & P C §6068(d). See also Bus & P C §6128(a), which provides that an attorney is guilty of a misdemeanor if he or she intends to deceive the court or any party by using deceit or collusion, or consenting to any deceit or collusion.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.153 2. Duty to keep client's confidences and secrets

### §11.153 2. Duty to keep client's confidences and secrets

If the perjury is committed or threatened by the client, a party-related witness (*i.e.,* officer, director, managing agent, or employee of client), or any other witness called by the attorney during the trial, the attorney who knows the testimony to be false is faced with a dilemma. On the one hand, as an officer of the court, the attorney cannot mislead the judge or jury by false testimony, and on the other hand the attorney must preserve the client's confidence and secrets. The California Rules of Professional Conduct do not provide comprehensive guidance on what course of action the attorney should take when confronted with this situation during trial.

Business and Professions Code §6068(e) states that an attorney must not violate the confidences or secrets of his or her client. Confidences usually means information protected by the attorney-client privilege, and "secrets" refers to other information that the client has asked the attorney not to reveal or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. See definitions in ABA Code Prof Resp DR 4-101(A); the ABA definition of "secret" applied by the State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 86-87.

The state bar has held that Bus & P C §6068(e) requires counsel not to do anything to breach the trust reposed in him or her by the client. See State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion Nos. 86-87, 88-96, 83-74.

**NOTE:** The ABA Code of Professional Responsibility is not binding in California. State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 83-71. (On its effect, if any, in federal court, check the local rules of the district courts.) However, when no direct authority is found in the California Rules of Professional Conduct, statutes, or state court opinions, the ABA Rules on Professional Conduct may be looked at as a collateral source, their persuasiveness depending on their "underlying logic and historical basis." Formal Opinion No. 83-71.

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### §11.154 B. Determine whether perjury was committed

Whether perjury was committed in a particular case may be difficult to ascertain. See State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 83-74, discussing the difficulty in knowing whether a client has committed perjury.

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### C. What to do if perjury committed

### §11.155 1. Request a recess

If the attorney knows that the client, a party-related witness, or any other witness called by the attorney has committed perjury, the attorney, to avoid any appearance of improper conduct (such as giving implied consent to the use of the perjurious testimony), should promptly request a recess in such a manner as not to put the judge, jury, or adverse parties on notice of any wrongdoing. See State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 83-74.

**NOTE:** The committee in Formal Opinion No. 83-74 specifically stated that it was not addressing the attorney's obligation in a jury trial, although if a client committed perjury in a jury trial, the attorney could presumably follow the procedures outlined in that opinion and in §§11.156-11.161.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.156 2. Confer privately with client or witness

### §11.156 2. Confer privately with client or witness

Immediately hold a private conference with your client or witness. Explain your opinion that he or she has committed perjury and the basis for that opinion. The client may be able to offer an acceptable explanation of the testimony that would change your opinion and cure the problem. See State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 83-74.

If you still believe the client or witness committed perjury, explain that if the perjured testimony is not corrected or at least removed from the record (see §11.158), you will be duty-bound to make a motion to be allowed to withdraw from the case. See §§11.159-11.161 on withdrawal. See Formal Opinion No. 83-74.

**NOTE:** In Formal Opinion No. 83-74, the committee stated that it was not addressing the situation in which the perjury was elicited from an officer or agent of a nonhuman client (*e.g.,* a corporation). When perjury is elicited from a party-related witness, or a witness other than the client, the attorney in discussing the matter with the witness and client must consider whether withdrawal or disclosure will be required if the testimony is not rectified. Withdrawal and disclosure are discussed in §§11.159-11.161.

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### §11.157 3. Explain ramifications of correcting testimony

Explain to the client the full ramifications of correcting the perjured testimony. If the client wishes and is allowed to retake the stand, he or she will presumably testify contrary to his or her earlier testimony. The client is then potentially subject to criminal prosecution for perjury and will probably be subject to rigorous cross-examination on his or her memory and credibility. The "correction" may result in the client's losing the case.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.158 4. Try to remove testimony from record

### §11.158 4. Try to remove testimony from record

You may seek, without explanation, a stipulation from opposing counsel that the testimony be stricken. If that stipulation is agreed to, the court may strike the testimony, thus curing the problem.

If this effort is unsuccessful, you will have to move to strike the testimony, stating whatever grounds may exist, without disclosing its perjurious nature without the client's consent. State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 83-74.

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### §11.159 5. Move to withdraw

Consider moving to withdraw if, *e.g.,* the client refuses to rectify the perjurious testimony or is agreeable only to moving to strike the testimony and the motion to strike is denied. See State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 83-74; Bus & P C §§6068(c)-(d), 6128(a); Cal Rules of Prof Cond 3-700(B)(1)-(2), (C) (mandatory and permissive withdrawal), 5-200 (trial conduct). See also Los Angeles County Bar Ass'n Ethical Opinion No. 305.

First, ask the client to consent to withdrawal. You may then move to withdraw based on the client's consent. Second, if the client does not consent, make a motion to withdraw under CCP §284(2). The problem is to find a way to move to withdraw so that in describing the grounds for withdrawal the motion itself does not amount to a disclosure of perjury. See §11.160 on duty not to disclose perjury. A possible ground for withdrawal is that the client has made it unreasonably difficult for you to carry out your duties as an attorney or has asked you to engage in conduct contrary to your judgment and advice. Cal Rules of Prof Cond 3-700(C)(1)(d).

In a criminal case, one court has held that an attorney should permit the witness to testify in a free narrative manner on the basis that the narrative approach best accommodates the competing interests of a criminal defendant's right to testify and an attorney's obligation not to participate in the presentation of perjured testimony. *People v Johnson* (1998) 62 CA4th 608, 629, 72 CR2d 805. Whether the reasoning in *Johnson* applies in a civil action, where a witness's right to testify is not necessarily protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, is unsettled.

The court has discretion to deny an attorney's request to withdraw from a case even if the client intends to commit perjury. See *People v Brown* (1988) 203 CA3d 1335, 1340, 250 CR 762. On ethical considerations when client threatens perjury before trial, see §§5.91-5.94.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/11 Examining Witnesses/§11.160 a. California rule: Do not disclose reason for withdrawal

### §11.160 a. California rule: Do not disclose reason for withdrawal

When moving to withdraw, the attorney cannot compromise the confidentiality of the attorney-client relationship by disclosing to the court or the adverse parties, without the client's consent, the reasons for seeking withdrawal. See Cal Rules of Ct 3.1362(c); Bus & P C §6068(e); State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 83-74; Los Angeles County Bar Ass'n Ethical Opinion No. 305. See also State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion Nos. 88-96, 86-87; Los Angeles County Bar Ass'n Ethical Opinion No. 386.

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### §11.161 b. ABA rules: Disclose perjury

Rule 3.3 of the ABA Model Rules of Prof Cond has been interpreted to require an attorney who knows the client's testimony to be false to disclose the perjury to the court when the client cannot be persuaded to rectify the perjury. ABA Formal Opinion No. 87-353. Under Rule 3.3, the United States Supreme Court held that counsel's disclosure of client perjury is not merely authorized but is required (if the client cannot be dissuaded from committing perjury). *Nix v Whiteside* (1986) 475 US 157, 168, 89 L Ed 2d 123, 135, 106 S Ct 988.

However, neither the ABA Model Rules of Prof Cond nor *Nix v Whiteside* is binding on California attorneys in state court actions. *People v Guzman* (1988) 45 C3d 915, 944, 248 CR 467, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409; State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 83-71. On effect of the ABA Model Rules of Professional Conduct in federal court, check the district courts' local rules.

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### 6. When perjury is of nonparty witness

### §11.162 a. Disclose nonparty perjury

When a witness whom the attorney has called, other than the client or a party-related witness, refuses to rectify perjured testimony, the attorney may not have grounds to withdraw. In this situation, you may have to disclose the witness's perjury to the court when you can do so without revealing the client's confidences or secrets.

See San Diego Ethics Opinion No. 1983-8, which concluded that, when a nonparty witness committed perjury, any attorney with knowledge of it must "at the appropriate time, attempt to rehabilitate, correct or impeach the witness" and, if the witness persists in the perjury, advise the court of the perjury at the earliest time. See also ABA Model Rules of Prof Resp DR 7-102(B)(2), which requires an attorney to reveal fraud perpetrated on the court by anyone other than his or her client.

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### §11.163 b. Do not disclose perjury if confidentiality would be violated

If disclosing the witness's perjury would require revealing a client's confidences or secrets, the attorney may not be obligated to disclose the perjury without the client's consent. Such disclosure may constitute a violation of the attorney's duty under Bus & P C §6068(e). Neither the Business and Professions Code nor the California Rules of Professional Conduct require affirmative disclosure as ABA Model Code of Prof Resp DR 7-102(B) does. See also Los Angeles County Bar Ass'n Ethical Opinion No. 305.

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### §11.164 c. Under ABA rules

Under ABA Model Rules of Prof Cond 3.3 and *Nix v Whiteside* (1986) 475 US 157, 168, 89 L Ed 2d 123, 135, 106 S Ct 988, the attorney would most likely be required to disclose the witness's perjury, even if it did violate the client's confidence. See §11.161.

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### §11.165 d. May need to withdraw

If the client refuses to consent to disclosure of the confidence or secret to enable counsel to rectify and if need be to establish the witness's perjury, counsel may be required to seek withdrawal in the same manner as when the client commits perjury. See Cal Rules of Prof Cond 3-700(B)(2). See also Bus & P C §§6068(c)-(d), 6128(a); Cal Rules of Prof Cond 5-200. See §§11.159-11.161.

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### §11.166 e. Move to strike or for mistrial

If the witness refuses to rectify the perjury and the client consents to disclosure of its confidences or secrets (after the attorney has explained the ramifications), or if no client confidences or secrets will be revealed by the disclosure of the perjury, consider moving (out of the jurors' presence) to strike the testimony. Also consider moving for a mistrial at the same time. Weigh the desirability of continuing with the trial against the possibility that striking a favorable witness's testimony may taint the client's credibility in the judge's or jurors' eyes.

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### §11.167 7. If witness is party-related

When the witness who has committed perjury is a party-related witness (*i.e.,* officer, director, managing agent, or employee of client), the attorney calling that witness is faced with an additional problem. There is no clear guidance on whether you should proceed as if the client committed perjury or proceed as if a nonclient committed perjury. In the attorney-client privilege area, not all communications from party-related witnesses to the attorney are entitled to the privilege. See *D. I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 36 CR 468 (communications made by employee to corporation's attorney may not be entitled to attorney-client privilege). See also *Triple A Mach. Shop v State* (1989) 213 CA3d 131, 261 CR 493. Whether the same reasoning will apply when a party-related witness commits perjury is unsettled.

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### §11.168 8. Do not rely on perjured testimony in argument

If the attorney's motion to withdraw when the client has committed perjury is denied, or if the attorney continues to represent the client when a nonclient witness has committed perjury and withdrawal is not available, the attorney may not argue the perjured testimony to the trier of fact in closing argument. Bus & P C §6068(d); Cal Rules of Prof Cond 5-200; ABA Model Rules of Prof Resp DR 7-102(A). See also *In re Allen* (1959) 52 C2d 762, 344 P2d 609; *In re Jones* (1929) 208 C 240, 280 P 964.

For further discussion, see Martin, *Perjury in Civil Cases*, 4 Cal Law 65 (Dec. 1984); Wolfram, Client Perjury, 50 S Cal L Rev 809 (1977). On potential perjury discovered before trial, see §§5.54-5.55.

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## §11.169 XI. APPENDIX: LEADING QUESTIONS

**Mildly Leading Questions**

Questions beginning with words such as:

- Do
- Did
- Is
- Are
- Was
- Were

**Fairly Leading Questions**

Questions beginning with words such as:

- Don't
- Didn't
- Isn't
- Aren't
- Wasn't
- Weren't

**Blatantly Leading Questions**

Questions beginning with phrases such as:

- Isn't it a fact
- Isn't it correct
- Isn't it true
- Won't you admit
- Won't you concede
- Wouldn't you agree
- Wouldn't you have to say

Questions consisting of a declarative sentence followed by a "tag" such as:

- Right?
- Correct?
- Isn't that true?
- Isn't that correct?
- Isn't that right?

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# 12

# Effective Use of Discovery

**John B. Hook**
**Donald W. Carlson**

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## §12.1 I. SCOPE OF CHAPTER

This chapter covers:

- Using depositions at trial (see §§12.32-12.97), including requirements for stenographically recorded depositions (see §§12.2-12.15) and audio and video recorded depositions (see §§12.16-12.31);
- Using interrogatories at trial (see §§12.98-12.121), including requirements for interrogatories (see §§12.98-12.106);
- Using admissions at trial (see §§12.122-12.134); and
- Checklists and sample forms for using deposition testimony and answers to interrogatories (see §§12.135-12.139).

This chapter does not discuss using pleadings or other documents relevant to the action (*e.g.,* a verified complaint or answer, or declarations or affidavits made under penalty of perjury that were part of pretrial motions) for impeachment or other purposes at trial.

**Further research:** For discussion of the completion of discovery before trial, see §§2.2-2.18. The effect of judicial arbitration on discovery is covered in §§2.19-2.24. On methods of conducting discovery, see California Civil Discovery Practice (4th ed Cal CEB 2006); Obtaining Discovery: Initiating and Responding to Discovery Procedures (Cal CEB Action Guide March 2007); Handling Motions to Compel and Other Discovery Motions (Cal CEB Action Guide December 2009); Handling Depositions (Cal CEB Action Guide February 2007).

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## II. REQUIREMENTS FOR STENOGRAPHICALLY RECORDED DEPOSITIONS

### §12.2 A. General requirements

The officer before whom a deposition is taken must put the witness (deponent) under oath or affirmation. CCP §2025.330(a). Unless the court orders or the parties agree otherwise, testimony and objections at a deposition must be taken stenographically, but statements of counsel made "off the record" with agreement of all counsel need not be recorded. CCP §2025.330(b). The stenographic record of a deponent's testimony must be transcribed unless the parties agree otherwise. CCP §2025.510(a).

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### §12.3 B. Effect of stipulations

The parties and the deponent may waive the reading, correcting, and signing of the transcript. CCP §2025.520(a). Unless otherwise ordered by the court, the parties by written stipulation may (CCP §2016.030):

- Provide that depositions be taken before any person, at any time or place, on any notice, and in any manner;
- Permit these depositions to be used like other depositions; and
- Modify the procedures for other methods of discovery.

On deposition procedures, see California Civil Discovery Practice, chap 5 (4th ed Cal CEB 2006).

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### §12.4 C. Notice and certification requirements by deposition officer

The deposition officer must send written notice to the deponent and all parties attending the deposition when the original transcript of the testimony for each session of the deposition is available for reading, correcting, and signing unless the deponent and the parties have agreed on the record that the reading, correcting, and signing of the transcript has been waived or that it will take place after the entire deposition has been concluded or at some other specific time. CCP §2025.520(a).

The deposition officer must notify the parties who attended the deposition in writing of any changes timely made by the deponent in person. CCP §2025.520(e) (see §12.9). The officer must certify on the original transcript (and on any copy of it made by the officer) that the deponent was duly sworn and that the transcript is a true record of the deponent's testimony and any changes made by the deponent. CCP §2025.540(a).

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## D. Obtaining and using copies of transcripts

### §12.5 1. When to request copies

Any attorney in the case may request the deposition officer or reporter (before, at, or after the taking of the deposition) to send a copy of the deposition transcript as soon as it has been prepared. See CCP §2025.510(c). If, at the time of the request, the deposition transcript will be available to the requesting party before the time the original or copy would be available to any other party, the deposition officer must immediately notify all other parties attending the deposition of the request, and make a copy of the full or partial deposition transcript available to all parties at the same time. CCP §2025.510(d). The copying of depositions, except for internal use or by court order, is prohibited by Govt C §69954(d).

**PRACTICE TIP:** Most attorneys request copies of the transcript at the deposition.

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### §12.6 2. Obtaining copy of transcript before correction

Any party may obtain a certified copy of the transcript within 30 days after notification that the transcript is available for reading, correcting, and signing. See CCP §§2025.510(b)-(c), 2025.520(a)-(f). The deposition officer is required to send written notice to the deponent and all parties attending the deposition that the original transcript is available for reading, correcting, and signing, unless the parties agree otherwise. CCP §2025.520(a). The deposition officer is also required to notify counsel for all parties by sending a copy of the required letter if the deponent has made any changes or refused to approve the transcript. CCP §2025.520(e).

When the deposition transcript is prepared as a rough draft, it may not be certified and may not be used, cited, or transcribed as the certified transcript of the deposition proceedings. This rough draft also may not be used to rebut or contradict the certified transcript of deposition proceedings. CCP §2025.540(b).

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### §12.7 3. Obtaining certified copy

After the period for correction of the deposition, any person may obtain from the deposition officer a certified copy of the deposition transcript for a reasonable charge. CCP §2025.570(a). If a copy is requested, the deposition officer is required to mail notice to all parties attending the deposition and to the deponent advising them:

- That a copy is being sought;
- The name of the person requesting the copy; and
- The right to seek a protective order under CCP §2025.420.

CCP §2025.570(b). This section, however, applies only to recorded testimony taken at depositions occurring on or after January 1, 1998. CCP §2025.570(d).

**PRACTICE TIP:** To keep the original transcript clean and unmarked, make several photocopies of the transcript. Read and make notes on one copy while the deponent reads and marks another. Make additional photocopies from the clean copy as needed.

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## E. Making corrections and changes to transcript

### §12.8 1. When deponent may change record

Within 30 days after written notice from the deposition officer that the original transcript is available for reading, correcting, or signing, the deponent may make changes to the form or substance of any of the answers and either approve the transcript by signing it, or refuse to do so by not signing it. CCP §2025.520(b).

The deponent must make any changes by sending (CCP §2025.520(c)):

- A letter by certified or registered mail (with return receipt requested) to the deposition officer; and
- A copy of that letter by first-class mail to all parties attending the deposition.

The 30-day period may be shortened by the court on a showing of good cause. CCP §2025.520(d). The 30-day period may also be shortened or extended if the attending parties and the deponent agree on the record or otherwise in writing. CCP §2025.520(b).

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### §12.9 2. Deponent's action must be noted on record

If the deponent has not already done so, the deposition officer must enter on the original transcript any action taken by the deponent and indicate the deponent's approval of, or failure or refusal to approve, the transcript on the original transcript. CCP §2025.520(e).

The deponent's failure or refusal to sign the deposition or to send a letter stating approval within the 30-day time period will be noted on the transcript but does not prevent use of the deposition at trial. See CCP §2025.530(d). Unless the transcript is suppressed for gross error, the transcript has the same force and effect as if it were read, corrected, and signed, subject to any changes that the deponent may have timely made. CCP §§2025.520-2025.530.

**Further research:** On motion to suppress and sanctions concerning the motion, see CCP §2025.520(g), (h). See also §12.13.

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### §12.10 3. When correction advisable

Some attorneys believe that by correcting the transcript, the deponent can ensure that the recorded answers are accurate and reflect what the deponent truly knows and believes. When a witness changes testimony at trial, opposing counsel may point out during argument that the witness had the opportunity to make corrections in the deposition before the trial began.

Correcting the transcript:

- Can reduce the possibility that adverse counsel will find deposition testimony that is inconsistent with the deponent's trial testimony;
- Allows the deponent to add facts to a recorded answer so that it is more fully responsive to the question asked;
- May eliminate inaccurate answers that adversely affect the determination of pretrial motions (*e.g.,* a summary judgment motion); and
- May eliminate the appearance of correcting testimony at the last minute.

If the deposition transcript will be used as substitute testimony (*i.e.,* when the witness's deposition testimony will be read into evidence in place of the witness's oral testimony), it is extremely important to make sure not only that the deposition is transcribed correctly, but also that substantive errors are corrected. It may be less important to correct other than truly substantive errors if the deposition will *not* be used as substitute testimony.

Counsel should review the deposition when it is available and send a copy of it to the client or witness for review as soon as possible. If there are errors in what the deponent said, counsel should consider whether it would be beneficial to the case as a whole to make corrections on the deposition record or to wait until trial.

**CAUTION:** When the deponent is a friendly witness but neither the attorney's client nor a client-related witness (*e.g.,* an officer of the entity that the attorney represents), the communications between counsel and the deponent are not subject to the attorney-client privilege. Weigh the benefits to be gained from suggesting to the deponent that the deponent correct the deposition against the possibility that the communications between the deponent and the attorney will be disclosed during trial.

For the attorney's obligations on discovering that a witness intends to commit perjury during trial, see §§5.91-5.95. On the attorney's obligations when perjury is committed during trial, see §§11.152-11.158.

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### §12.11 4. When correction not advisable

Depending on the circumstances and the nature of the error, it may be better for deponent not to correct the transcript and, instead, make any changes or corrections during trial. The preference to not correct the deposition is based on the following beliefs:

- If some corrections are made, it will be more difficult for the deponent at trial to disavow other statements in the transcript that were inadvertently not corrected;
- The burden of ensuring the correctness of *all* answers in the deposition is too great;
- Making changes may highlight troublesome areas that opposing counsel might otherwise miss;
- Opposing counsel can attack the witness's credibility by pointing out any corrections at trial; and
- Opposing counsel may comment during closing argument that the witness's oral testimony cannot be trusted because a number of changes were made to the deposition testimony.

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### §12.12 5. If typographical or transcription errors

When a deposition transcript contains typographical or transcription errors (as opposed to errors in substantive testimony), ask the deposition officer to correct the errors and notify other counsel of the request by letter. Make the request not only to ensure the accuracy of the transcript, but also to ensure that the transcript can be used smoothly at trial.

The deponent may escape characterization as a witness who is given to changing sworn testimony after it has been recorded if the deposition officer makes the corrections. If the deposition officer refuses to make the corrections, the errors may be corrected by stipulation of counsel.

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### §12.13 6. When moving to suppress deposition

If the corrections cannot be accomplished either through the deposition officer or by stipulation, a motion to suppress the deposition may be necessary if the deposition contains gross errors. CCP §2025.520(g). The motion must be "seasonable" and must be accompanied by a declaration stating facts showing a reasonable and good faith attempt to resolve informally each issue presented by the motion. CCP §2025.520(g).

**PRACTICE TIP:** Be reasonable in permitting correction of typographical and transcription errors. The court will impose monetary sanctions if you cannot present substantial justification for making or opposing the motion and no other circumstances exist that make imposition of sanctions unjust. CCP §2025.520(g), (h).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/12 Effective Use of Discovery/§12.14 F. Custody of transcript and when to file

### §12.14 F. Custody of transcript and when to file

The certified deposition transcript is not filed with the court. CCP §2025.550(a). The deposition officer must securely seal it in an envelope or a package, clearly marked with the title of the action and the deponent's name. The deposition transcript is sent to the attorney for the party who noticed the deposition. CCP §2025.550(a). The custodian must store the transcript so that it will be protected against loss, tampering, or destruction. CCP §2025.550(a).

**CAUTION:** Well before trial, check the local rules or policies that apply to your case to determine if you need to file the deposition with the court. Although the use of a deposition transcript at a hearing or trial is not predicated on the filing of the transcript, be aware that local rules of court, pretrial orders, or complex litigation case management orders may require the lodging of transcripts before hearing or trial.

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### §12.15 G. Using enlargements

Some attorneys occasionally use an overhead projector or make an enlarged photograph of a crucial page or passage from a deposition and display the enlargement during cross-examination or closing argument (assuming that the exact pages and line numbers were read to the trier of fact before the close of evidence). The enlargement should not, of course, display inadmissible, confusing, or otherwise objectionable matter.

**CAUTION:** Check local rules, obtain approval from the trial judge, and notify opposing counsel before displaying enlargements in open court. See §§13.35-13.38.

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## III. REQUIREMENTS FOR AUDIO OR VIDEO RECORDED DEPOSITIONS

### A. Notice or agreement for recording deposition

### §12.16 1. General requirements

Depositions may be audio- or video-recorded in addition to stenographic recording if (CCP §2025.330(c)):

- The deposition notice contains a statement of the noticing party's intention to audio or video record the deposition; or
- All parties agree that the testimony may also be recorded by either method.

Examination and cross-examination must proceed as permitted at trial under the provisions of the Evidence Code. CCP §2025.330(d).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/12 Effective Use of Discovery/§12.17 2. When other parties may record

### §12.17 2. When other parties may record

Any other party may make a simultaneous audio or video recording of the deposition at that party's own expense if that party, no less than 3 calendar days before the date for which the deposition is scheduled, serves a written notice of intent to record the deposition testimony on (CCP §2025.330(c)):

- The party or attorney who noticed the deposition;
- All other parties or attorneys who were served with the original deposition notice; and
- Any deponent whose attendance is being compelled by a deposition subpoena under CCP §§2020.010-2020.510.

The notice must be made by personal service under CCP §1011 if given 3 calendar days before the deposition date. CCP §2025.330(c).

**PRACTICE TIP:** If you want to make a simultaneous recording, serve notice at the earliest possible date (more than 3 days before if possible) and coordinate with the original noticing party to ensure that the deposition site can accommodate two or more cameras and operators.

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### §12.18 B. Stenographic transcript is official record

When deposition testimony is recorded both stenographically and by audio or video recording, the stenographic transcript is the official record of that testimony for the purpose of the trial and any subsequent hearing or appeal. CCP §2025.510(g).

**PRACTICE TIP:** Although the parties may agree that a deposition not be recorded stenographically (see CCP §2025.330(b)), it is in your best interest to arrange to have a stenographer present to simultaneously record a video deposition. The added expense is outweighed by the fact that a stenographic transcript is invaluable in reviewing deposition testimony and editing the video. A transcript also serves as a back-up record in case of lost or damaged recordings or camera malfunction. In addition, a stenographic transcript must be prepared at some point before trial if a party intends to use a video deposition under CCP §2025.620 at trial. CCP §2025.340(m).

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### §12.19 C. Requirements for operator

The person operating the audio or video equipment must be competent to set up, operate, and monitor the equipment. CCP §2025.340(b). That person may be an employee of the attorney taking the deposition unless the operator is also the deposition officer. CCP §2025.340(b).

**Further research:** On qualification of deposition officers generally, see CCP §2025.320.

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### §12.20 D. Setup of equipment

If noticing the deposition, be sure that the recording operator arrives at the deposition site at least half an hour before the deposition to allow adequate setup and test time. The operator should be informed of the location of the witness's and the interrogator's chairs in order to correctly place the camera and acoustical equipment. See §12.19.

While the deposition is being recorded, the most prudent practice is to maintain the camera facing and focused on the witness. Except for the beginning of the interrogation, dramatic camera angles and excessive zooming or panning are likely to be distracting or objectionable.

The operator is prohibited from distorting the appearance or demeanor of the participants in the deposition by the use of camera or sound-recording techniques. CCP §2025.340(g). The area in which the deponent's testimony is recorded must be suitably large, adequately lighted, and reasonably quiet. CCP §2025.340(a).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/12 Effective Use of Discovery/§12.21 E. Be prepared for the deposition

### §12.21 E. Be prepared for the deposition

The key to the success of a video deposition is preparation. The effectiveness of video recording can be squandered if there are pauses to formulate questions or a witness leafs through records to refresh recollection of the most fundamental facts. Likewise, the impact of an expert video recorded may be magnified by poorly formulated questions and ill-informed cross-examination.

Prepare for a video deposition with the same care and planning used in preparing for examination or cross-examination of a witness at trial.

**PRACTICE TIP:** If possible, conduct a mock examination of the witness before the deposition. If the mock examination is recorded, review the recording with the witness before the deposition.

In addition to thoroughly preparing the line of questioning, consider how to exploit the visual nature of the video medium. Using exhibits, models, and demonstrations can be particularly helpful in explaining technical testimony. To be effective, however, exhibits and models must be used in such a way that the viewer can easily see the exhibits on the video screen monitor.

Practice using demonstrative evidence before the deposition. To make the most effective presentation, the deponent must be conscious of the position of the camera and microphone when exhibits and models are handled. Consider using in-court models, enlargements of key documents, and charts to supplement video testimony at trial.

**PRACTICE TIP:** Be aware that the microphones are recording all sounds in the deposition room. The impact of a video deposition can be lost if the recording is filled with the sounds of papers being shuffled or charts being moved. Avoid any "off-the-record" conversations unless the video has been stopped; the deponent's microphone may pick up and record such conversations.

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### §12.22 F. Prepare witnesses

Demeanor, tone of voice, and general appearance of the witness are critical in a video deposition. The camera will magnify any nonverbal mannerisms, which may enhance or detract from the deponent's credibility. For example, nervous habits such as hair-pulling, lip-biting, twitching, or making evasive glances or sounds can be extremely distracting. Bring such mannerisms to the witness's attention during preparation so that they are eliminated or reduced.

**PRACTICE TIP 1:** Advise the deponent to avoid excessively long pauses in responding to a question. Although long pauses are generally not reflected in a stenographically recorded deposition, such pauses in a video deposition may reflect adversely on the deponent's testimony.

**PRACTICE TIP 2:** Remind the witness not to slouch, to speak clearly and evenly, to look directly at the examining attorney rather than at the camera, and to dress in a neat, conservative manner in the dark, solid colors and blue tones that appear best on television.

**PRACTICE TIP 3:** Foresee and prevent distractions that would not be on the record in a stenographically recorded deposition, *e.g.,* smoking, telephone calls, or other interruptions.

**PRACTICE TIP 4:** If a deposition will be taken at an expert's place of business, the setting should be organized and "under control," reflecting the authority and standing of the expert as a professional.

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### G. Procedural requirements

### §12.23 1. Identification

The deposition should begin with an oral recorded statement or an on-camera statement written on a sign or poster, including the following (CCP §2025.340(h)):

- The audio or video operator's name and business address;
- The name and business address of the operator's employer;
- The date, time, and location of the deposition;
- The case caption;
- The deponent's name;
- The party's name on whose behalf the deposition is being taken; and
- Any stipulations entered into by the parties.

Counsel for the parties must also identify themselves on the audio recording or on camera. CCP §2025.340(i). The deponent's oath must be administered on the audio recording or on camera. CCP §2025.340(j).

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### §12.24 2. Stipulations

Attempt to secure any stipulations well enough before the deposition to allow time to prepare a concise, plainly worded statement that will be easily grasped by a jury.

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### §12.25 3. Objections

If possible, reach an agreement with opposing counsel that all objections, except for the form of the question or responsiveness, be reserved until trial. This agreement will simplify editing and presentation.

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### §12.26 4. Authentication or foundation

Attempt to group questions on the authentication or foundation of documents at the end of the examination. This step will facilitate deletion of these critical, but probably uninteresting points if the parties are able to stipulate to them at trial.

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### §12.27 5. Statement of conclusion

At the conclusion of the deposition, a statement must be made on the audio recording or on camera that the deposition has ended. CCP §2025.340(*l*). This statement must include (CCP §2025.340(*l*)):

- Any stipulations of the parties regarding the custody of the audio or video recording and exhibits; and
- Any other stipulations concerning other matters that may have arisen.

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### §12.28 6. If more than one unit of electronic storage necessary

If the length of the deposition requires more than one unit of electronic storage, the end of the first unit and the beginning and end of all subsequent units must be announced on the audio recording or on camera. CCP §2025.340(k).

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### §12.29 H. Corrections and changes

If there is no stenographic transcription of the deposition, the deposition officer must send written notice to the deponent and all parties attending the deposition that the recording is available for review unless the deponent and all the parties have waived on the record the right to review or hear the recording. CCP §2025.530(a). Within 30 days after written notice, the deponent (either in person or by a signed letter to the deposition officer) may change the substance of the testimony. CCP §2025.530(b).

The deposition officer must set forth any of the deponent's changes in a writing to accompany the recording, together with either (CCP §2025.530(c)):

- The deponent's signature identifying the deposition as his or her own; or
- A statement of the deponent's failure to supply such signature or to contact the office within the allotted period.

The deposition officer in the writing also must certify "that the deponent was duly sworn and that the … recording is a true record of the testimony given." CCP §2025.540(a). The original audio or video recording may not be altered, edited, or changed in anyway. See CCP §2025.340(m).

If, within the allotted time, the deponent fails to contact the deposition officer or the deponent expressly refuses to identify the deposition, the deposition has the same force and effect as though it had been signed (unless it is suppressed). CCP §2025.530(d)-(e).

**Further research:** On motions to suppress, see CCP §2025.530(e)-(f).

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### §12.30 I. Custody of recording

An audio or video deposition, including a certified recording made by an operator qualified under CCP §2025.340(b), is not filed with the court. CCP §2025.560(a). Rather, the operator must retain custody of the recording, unless the parties agree otherwise, and store the recording "under conditions that will protect it against loss, destruction, or tampering, and preserve as far as practicable the quality of the recording and the integrity of the testimony and images it contains." CCP §2025.560(a). See CCP §2025.340(*l*). See also CCP §2025.560(c).

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### §12.31 J. May review recording

Any party (including one not attending the deposition), or the deponent, may hear the audio or view the video by making a request to the operator and paying a reasonable charge for providing facilities for its hearing or viewing. CCP §2025.560(b).

At the request of any other party to the action (including one who did not attend the deposition), the party who caused an audio or video recording of a deposition must promptly (CCP §2025.510(f)):

- Permit the other party to hear the audio or view the video; and
- Furnish a copy of the audio or video recording to the other party on receipt of payment of the reasonable cost of making the copy.

**NOTE:** There is no mention in CCP §2025.510(f) about paying a reasonable charge for providing facilities for hearing or viewing the audio or video recording as there is in CCP §2025.560(b).

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## IV. USING DEPOSITIONS AT TRIAL

### §12.32 A. Use at trial in general

A deposition can be used at trial against any party (CCP §2025.620):

- Who had due notice of the deposition and did not serve a valid objection under CCP §2025.410(a); or
- Who attended the deposition personally or through an attorney.

Deposition testimony is generally subject to the same limitations and objections as the deponent would be subject to if testifying at trial. Evid C §1291(b). An objection cannot be raised, however, if it is (Evid C §1291(b)):

- Related to the form of the question and was not made during the deposition; or
- Based on competency or privilege that did not exist when the deposition was taken.

**Further research:** See §12.135 for a checklist for using deposition testimony. On testifying on direct examination, see §§11.47-11.81.

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### B. Procedures that affect use at trial

### §12.33 1. Improper notice

Notices of deposition must be given to each party who has appeared in the action. CCP §2025.240(a). A deposition may not be used at trial against a party who was not given due notice of the taking of the deposition and who was neither present nor represented at the deposition. CCP §2025.620. See, *e.g., N.N.V. v American Ass'n of Blood Banks* (1999) 75 CA4th 1358, 1395, 89 CR2d 885.

**PRACTICE TIP:** Make certain at the deposition that all parties (*i.e.,* those in attendance as well those who are not in attendance and should be there) are identified on the record. It is a good idea to attach copies of the notice with proof of service on all parties to the transcript as an exhibit.

The video deposition of a treating or consulting physician or of any expert witness may be used at a hearing or trial if the deponent is available to testify under CCP §2025.220 only if the notice of deposition reserved the right to use the deposition at trial and the party complies with CCP §2025.340(m). CCP §2025.620(d). See §§12.16-12.17.

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### §12.34 2. Effect of stipulations

Stipulations made at a deposition can affect the handling of the transcript and its use at trial. Before entering into any stipulations at a deposition, consider whether a stipulation at the time of the deposition (*e.g.,* a stipulation to certain facts) may later affect what must be proven at trial and how deposition testimony is used at trial. See §12.3.

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### §12.35 3. Effect of objections

A party waives the right to object at trial by failing to raise timely, specific objections at a deposition to (CCP §2025.460(a)-(b)):

- Questions calling for privileged information or work product; or
- Errors or irregularities that might have been cured if promptly presented (*e.g.,* questions relating to the manner of taking the deposition; the oath or affirmation administered; the conduct of a party, attorney, deponent, or deposition officer; or the form of any question or answer).

Objections to the competency of a witness or to the relevance, competency, or materiality of testimony are not waived by failure to object at the deposition. CCP §2025.460(c).

**Further research:** On procedures and tactics in taking and defending depositions, see California Civil Discovery Practice, chap 6 (4th ed Cal CEB 2006). See also Handling Depositions (Cal CEB Action Guide February 2007).

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### §12.36 C. Effect of adding or substituting parties after deposition taken

Depositions that are taken before other parties are added to the action cannot be used against them. See CCP §2025.620. However, substitution of parties (*e.g.,* when a personal representative is substituted for a party who has died) does not affect the right to use depositions previously taken. CCP §2025.620(f). On using depositions taken in another action, see §§12.74-12.77.

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### §12.37 D. General considerations when using at trial

Two primary concerns if the jury is to hear or see deposition testimony are:

- The admissibility of the testimony (*i.e.,* whether the desired use is objectionable under provisions of the Evidence Code or Code of Civil Procedure (see §12.2); and
- When and how to use the deposition to achieve the most favorable effect (see §§12.37-12.44).

Both admissibility and the strategy of when to introduce the testimony depend on whether the deponent is:

- An adverse party (see §§12.46, 12.54-12.57);
- A nonparty (see §§12.58-12.59); or
- Counsel's own client (see §12.45).

In general, any part or all of a deposition may be used against any party who was present or represented at the deposition or who had due notice of the deposition and did not serve a valid objection, if the testimony is admissible under the rules of evidence applied as though the deponent were present and testifying as a witness. CCP §2025.620.

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### §12.38 1. Obtaining stipulation as to admissibility

Admissibility questions and the need to lay a foundation for use of the deposition can sometimes be avoided by obtaining the agreement of all parties to a particular use of the deposition. The agreements may be written stipulations made and filed before or during trial, or may be oral stipulations made on the record.

**CAUTION:** A disadvantage of seeking a stipulation is that it can give advance warning to adverse counsel that there is something damaging in the deposition. If you do not want to provide opposing counsel with advance notice of how you plan to use a deposition, a stipulation is not feasible.

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### 2. Use of depositions by any party

### §12.39 a. To contradict or impeach deponent

A deposition can be used to contradict or impeach the testimony of the deponent as a witness (or for any other purpose permitted by the Evidence Code). CCP §2025.620(a). See §12.137 for sample questions and answers for impeaching with deposition testimony.

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### §12.40 b. On findings of court

Any party may use the deposition of a person or organization, whether or not a party, for any purpose if the court finds that:

- The deponent resides over 150 miles from the place of trial or hearing (CCP §2025.620(c)(1); see §12.59);
- The deponent, without the deposition proponent's procurement or wrongdoing for the purpose of preventing in-court testimony, is (see §12.60):
- Precluded or exempted from testifying on the grounds of a privilege (CCP §2025.620(c)(2)(A));
- Disqualified from testifying (CCP §2025.620(c)(2)(B));
- Dead or unable to attend or testify because of physical or mental illness or infirmity (CCP §2025.620(c)(2)(C));
- Not present at the trial or hearing and the court is unable to compel the deponent's attendance (CCP §2025.620(c)(2)(D)); or
- Not present at the trial or hearing and the deposition's proponent has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process (CCP §2025.620(c)(2)(E)); or
- Exceptional circumstances exist that make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used (CCP §2025.620(c)(3); see §12.61).

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### §12.41 c. If treating or consulting physician or other expert witness

In addition to the general rules regarding using deposition testimony at trial (see §12.32), any party may use at trial a treating or consulting physician or other expert witness's video deposition in lieu of an appearance by the physician or other expert witness, even though the deponent is available to testify. CCP §2025.620(d). To be able to do so, however, the party must comply with CCP §2025.340(m) and the notice of deposition under CCP §2025.220 must reserve the party's right to use the video deposition at trial. CCP §2025.620(d). See §§12.78-12.88.

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### §12.42 d. May use part or all of deposition

Subject to the requirements of CCP §§2025.010-2025.260, a party may offer all or any part of a deposition into evidence. CCP §2025.620(e). If the party introduces only part of a deposition, any party may introduce any other parts relevant to the parts introduced. CCP §2025.620(e). See §12.42.

Consider whether to introduce favorable portions of a deposition when other unfavorable parts might then be introduced. This problem frequently arises when a party desires to offer into evidence part of an adverse party's deposition.

**EXAMPLE:** In litigation between *A* and *B, B*'s deposition contains testimony favorable to *A* but also considerable testimony favoring *B*. Because *B* is an adverse party, *A* may offer portions of *B*'s deposition into evidence (see §§12.55-12.57). If *A* does this, however, *B* can then read into evidence the portions favorable to *B*. If *A* does not read *B*'s deposition, *B* cannot either, because *B* is available to testify (see §§12.58-12.61). Note, however, that the portions of *B*'s deposition that are favorable to *A* may still come before the jury by impeachment if *B*'s testimony on the stand is inconsistent with *B*'s deposition testimony.

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### §12.43 e. Effect of substitution of parties

The substitution of parties does not affect the right to use depositions previously taken. CCP §2025.620(f). On use of depositions taken in another action, see CCP §2025.620(g), discussed in §§12.74-12.77.

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### §12.44 f. Using depositions in subsequent actions

All depositions taken in a former action and otherwise admissible under the Evidence Code may be used in a subsequent action as though originally taken in the subsequent action if (CCP §2025.620(g)):

- The former action was brought in any court of the United States or a state court;
- The depositions were lawfully taken and duly filed in the former action; and
- The current action involves the same subject matter and is between the same parties (or their representatives or predecessors in interest) as the former action.

**NOTE:** The same admissibility rules apply (*e.g.,* hearsay is still hearsay), and if the procedures of CCP §§2025.010-2025.260 are not satisfied, the deposition is inadmissible. *Gatton v A. P. Green Servs.* (1998) 64 CA4th 688, 696, 75 CR2d 523; Evid C §1292.

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## E. Determining appropriateness of offering deposition testimony into evidence

### §12.45 1. For own party

Many attorneys prefer not to use a deposition as substitute testimony during presentation of their party's case (*i.e.,* in place of oral testimony), particularly in a jury trial, because:

- Oral testimony is usually more persuasive to a jury than is deposition testimony (see *Ray v Henderson* (1963) 212 CA2d 192, 195, 27 CR 847); and
- A party's personality is important whenever credibility is at issue (see *Allstate Ins. Co. v King* (1967) 252 CA2d 698, 710, 60 CR 892).

**PRACTICE TIP:** Consider restricting use of a deposition as substitute testimony, if possible, to occasions when the deponent is not available to testify at trial.

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### §12.46 2. For adverse party

Attorneys sometimes wish to use deposition testimony rather than live testimony when an employee or agent of an adverse party has given valuable deposition testimony that may be qualified or explained at trial.

At trial, testimony of an adverse party may be read into evidence or the video shown without calling the witness, or the witness may be called to provide live testimony. Reading the deposition into evidence or showing the video testimony may be more effective than calling the witness to testify because, once called to the stand, the witness may be able to explain any conflicts in the deposition testimony. Although opposing counsel can later call the witness to explain the deposition testimony, this explanation may not be as effective as if it were given under cross-examination.

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## F. Offering deposition testimony into evidence

### §12.47 1. Necessity for offer

When to offer deposition testimony into evidence is primarily a matter of trial strategy. The only requirement is that the testimony be offered before the parties have finally rested. The court may properly refuse to receive deposition testimony in evidence when it is offered after the close of evidence (see *Gillett v Gillett* (1959) 168 CA2d 102, 335 P2d 736) or during closing argument (see *Stafford-Lewis v Wain* (1954) 128 CA2d 614, 276 P2d 157).

Before deposition testimony can be considered as substantive evidence at trial, it must be offered and received in evidence. *Ponce v Black* (1964) 224 CA2d 159, 36 CR 419; *Corbett v Otts* (1962) 205 CA2d 78, 86, 22 CR 849. If deposition testimony is not offered into evidence, an appellate court can disregard a claim of error in its exclusion. See *Corbett v Otts, supra*.

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## 2. Reading deposition into evidence

### §12.48 a. Consider timing

Stenographically recorded depositions are presented to the jury by reading them into evidence. See 3 Witkin, California Evidence, *Presentation at Trial* §158 (4th ed 2000). Reading a deposition into evidence rarely holds juror interest as well as testimony from a live witness.

When deposition testimony will be read as part of a party's case, most attorneys prefer to:

- Open and close the case with live witnesses;
- Offer deposition evidence immediately before or after the testimony to which it relates;
- Offer deposition testimony immediately before the receipt of evidence for which it provides a foundation; or
- Offer the deposition testimony during a lull in the case or when the next witness has not arrived in the courtroom.

Some judges prefer that all reading of depositions be postponed until the end of the party's case or even the end of trial.

**PRACTICE TIP:** Resist this procedure because it may interfere with the orderly presentation of evidence and the jury's understanding of the case. Because listening to deposition testimony can be tedious, intersperse its introduction with oral testimony, if possible, to sustain the jurors' attention. If opposing such a procedure, argue that the jury's understanding of the case will be aided by introduction of deposition evidence at appropriate points throughout the trial.

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### §12.49 b. Manner of reading

So that the testimony is clear to the jury, when reading a deposition, use appropriate vocal inflections to separate questions from answers. Take advantage of the opportunity to stress important portions of the testimony, but read the testimony in a manner that is fair and accurate.

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### §12.50 c. If lengthy passages involved

When lengthy passages or an entire deposition will be read to the jury, various techniques may be employed to try and maintain the jury's interest. Subject to the court's approval, many attorneys put a "reader" on the stand to read the deponent's answers while counsel reads the questions.

**PRACTICE TIP:** An associate of counsel can serve in this capacity, but offers by opposing counsel to assist should usually be refused as it may confuse the jury or detract from the impact of the testimony.

One way to neutralize the jurors' natural preference for oral testimony is by using video depositions. Consider this procedure whenever it is anticipated that a favorable witness to the case may not be able to testify at trial. On video depositions generally, see §§12.16-12.31, 12.78-12.88.

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### §12.51 3. Consider exchanging lists of testimony to be offered

Before offering deposition testimony into evidence (except during cross-examination), the proponent should advise opposing counsel outside the presence of the jury of those portions of the deposition, by page and line number, that the proponent intends to read into evidence. Some attorneys prepare a list of questions and answers, noting page and line references, and submit it to the court and opposing counsel.

**PRACTICE TIP:** If you are not given such a list by opposing counsel, request the court (*e.g.,* during a chambers conference before commencement of trial) to require that such a list be given so that there will be adequate time to reflect on objections and to consider other portions that you might need to introduce.

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### §12.52 4. Request hearing outside jurors' presence

If opposing counsel objects to any of the testimony proposed on lists exchanged, request a hearing with the judge outside the presence of the jurors so that the judge can rule on the objections. See Evid C §402. This procedure enables counsel to know what portions of the deposition can be read or used during the trial without interruption for objections, rulings, or recesses for foundational hearings. The jury can then concentrate on the deposition testimony without being distracted by objections and arguments on admissibility.

**PRACTICE TIP:** Check applicable local rules or policies (*e.g.,* rulings on objections) before offering deposition testimony into evidence.

**Further research:** On special requirements for audio or video depositions, see CCP §2025.340(b), CCP §2025.620(d), discussed in §§12.16-12.31, 12.78-12.88.

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### §12.53 5. Request that judge explain depositions

Ask the trial judge to instruct the jury on the nature of a deposition, *i.e.,* that the deposition testimony was given under oath, and that the testimony should be considered as if it had been given in court. Without such an instruction from the judge, the jurors may give less weight to the deposition testimony than they would otherwise.

Even when a judge explains the nature of depositions to the jury at the outset of the trial, consider asking the judge to repeat the explanation before the deposition is used.

**NOTE:** A deposition cannot be taken into the jury room. CCP §612.

**Further research:** See chap 17 regarding jury management, and chap 21 regarding jury deliberations.

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### §12.54 G. Offering deposition testimony of adverse party

A deposition can be used at trial by an adverse party against any party to the action or anyone who, at the time of taking the deposition, was an officer, a director, a managing agent, an employee, an agent, or a designee (see CCP §§2025.220, 2025.230) of a party. CCP §2025.620(a), (b). The deposition may be used even though the deponent is available to testify, has testified, or will testify at the trial or hearing. CCP §2025.620(b). See generally 3 Witkin, California Evidence, *Presentation at Trial* §153 (4th ed 2000).

Deposition testimony of an adverse party may be used as substantive evidence as well as to contradict or impeach. CCP §2025.620(b); *Alvarez v Felker Mfg. Co.* (1964) 230 CA2d 987, 41 CR 514 (decided under former CCP §2016(d)(2)). It may establish any material fact or a prima facie case or may even prove counsel's whole case. CCP §2025.620(b); *Mayhood v La Rosa* (1962) 58 C2d 498, 24 CR 837 (decided under former CCP §2016(d)(2)). Such a deposition may be used even though the deponent is present and able to testify at trial. CCP §2025.620(b).

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### §12.55 1. Determining who is adverse party

In determining who is an adverse party under CCP §2025.620(b), courts are guided by particular issues and practical considerations rather than by the caption or pleadings. Parties may be adverse to each other on an issue even though one has not filed suit against the other. See *Mahoney v Founders' Ins. Co.* (1961) 190 CA2d 430, 12 CR 114 (decided under former CCP §2016(d)(2)).

Even though one party has cross-complained against another, the parties are not necessarily adverse on all issues.

**EXAMPLE:** Two defendants in a personal injury action each allege that the other is responsible for the accident that caused the plaintiff's injuries, but the deposition testimony of an employee of one defendant might establish that the plaintiff was at fault. Because one defendant's employee is not "adverse" to the codefendant on the issue of the plaintiff's negligence, it is improper to allow the codefendant to introduce the deposition of the employee as substantive evidence to establish the plaintiff's comparative negligence.

Whether an employee of a party is adverse also depends on the relationship at the time the deposition is taken. A person whose deposition was taken while employed by an adverse party is considered to be an adverse party, even if no longer employed by that party at the time of trial. See CCP §2025.620(b); 3 Witkin, California Evidence, *Presentation at Trial* §205 (4th ed 2000). Conversely, an employee who is discharged after the occurrence of the event giving rise to the litigation but before being deposed is not considered to be an adverse party. See *Vivion v National Cash Register Co.* (1962) 200 CA2d 597, 19 CR 602.

**PRACTICE TIP:** You need to decide whether to introduce deposition testimony of an adverse party during cross-examination, if the opportunity arises, or during the presentation of the party's case. The attention level of the jury is usually higher during cross-examination than it is while a deposition is being read aloud during the presentation of a party's case. A witness under cross-examination, however, may be prepared to explain or contradict statements in a deposition or explain away inconsistencies between deposition and trial testimony. While presenting the client's case, if you read portions of a deposition into evidence while the deponent is not on the stand, the adverse party must either ignore the evidence or call the deponent to the stand to explain it, giving you another opportunity to emphasize the statements during cross-examination.

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### §12.56 2. Using deposition testimony during cross-examination

During cross-examination, an attorney may be able to introduce additional testimony from an adverse party's deposition favorable to the position of counsel's client, that was not brought out on direct examination of the adverse party. Similarly, an attorney may confront an adverse party on cross-examination with statements in the party's deposition that are inconsistent with the party's trial testimony.

Relatively minor inconsistencies on peripheral matters may have a cumulative effect, causing jurors to lose confidence in the veracity of the witness. Even when the primary purpose is to introduce the deposition statements as evidence of the matters stated rather than to impeach the accuracy or truthfulness of the party's trial testimony, bringing the statements out during cross-examination highlights them for the trier of fact.

**PRACTICE TIP:** If you do not want to confront the adverse party with the party's deposition testimony during cross-examination, you may ask the party to acknowledge:

- Attendance at the deposition;
- Giving testimony under oath;
- Receiving notice that the transcript had been prepared; and
- Having 30 days to correct, sign, or reject it and either did or did not do so.

If the adverse party refuses to acknowledge these steps, show the witness the letter sent by the deposition officer, or call the officer as a witness.

**NOTE:** Jurors hearing testimony about the taking of the deposition and the deponent's opportunity to correct it may give the inconsistent statements in the deposition greater weight than if the statements were merely read.

When using deposition testimony to impeach a witness during cross-examination, be sure to phrase the questions to track the deposition transcript. Any deviation from the language of the deposition questions will give the witness an out and create an impression with the jury that counsel is trying to trick the witness. The question and answer given at the deposition must be readily available, without having to rummage through the transcript. When receiving an inconsistent answer from the witness, counsel should immediately state, "I wish to read from the witness's deposition, from page x, line x, to page y, line x." After pausing briefly to permit opposing counsel to locate the appropriate page, counsel should simply read the impeaching information. If there was a closing question on each area of examination at the deposition (*e.g.,* "Have you told me everything that was said at the meeting?"), then counsel will be able to counter any attempt by the witness to spring new testimony to explain the inconsistency at trial.

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### §12.57 3. Using deposition testimony during presentation of client's case

During the presentation of a client's case, it may be advisable to offer to read (or play, if audio or video recorded) pertinent portions of an adverse party's deposition into evidence as substantive evidence of the matter stated or to contradict or impeach previous testimony given at trial by the adverse party.

Consider the use of an adverse party's deposition in connection with calling the adverse party under Evid C §776. Note that under §776, a party may call and question an adverse party without being bound by the adverse party's testimony. See *Gerhard v Stephens* (1968) 68 C2d 864, 910, 69 CR 612. See also Evid C §785 ("credibility of a witness may be attacked or supported by any party, including the party calling the witness"); 3 Witkin, California Evidence, *Presentation at Trial* §§202, 356 (4th ed 2000).

**PRACTICE TIP:** Often, the most effective time to read or play portions of an adverse party's deposition is at or near the time other evidence of the matters covered by the deposition has been presented or immediately following presentation of the adverse party's trial testimony. It is sometimes better to open some cases, however, by reading or playing portions of the adverse party's deposition that support elements of the attorney's case, or that damage the opponent's case.

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### §12.58 H. Using deposition as substitute for trial testimony

Generally, it is a good idea to present a client's case through the live testimony of witnesses present at trial. In certain situations, however, the appearance of live witnesses may not be possible or tactically wise. See §§12.45-12.46.

If the foundational requirements are established, read, or played during the presentation of the case, a nonparty witness's deposition is admissible under the rules of evidence. See CCP §2025.620. On the possibility of obtaining a stipulation to obviate the need to show the foundational requirements of CCP §2025.620(c), see §12.38.

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### §12.59 1. If witness lives more than 150 miles from place of trial

A nonparty witness's deposition testimony may be used as substitute testimony during the presentation of the party's case at the trial or other hearing if the 150-mile residency requirement is satisfied. To take advantage of CCP §2025(u)(3)(A), submit proof that the deponent resides more than 150 miles from the place of trial or hearing.

Proof of the deponent's place of residence may be established either by the testimony of a witness who has personal knowledge of the deponent's place of residence or by stipulation. Once such residence is established, counsel need not show that the witness is either unavailable under Evid C §240 or that other exceptional circumstances exist.

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### §12.60 2. If witness unavailable

Inability to attend because of illness (see CCP §2025.620(c)(2)(C)); Evid C §240(a)(3)) can be established through the testimony (or perhaps the affidavit, declaration, or other statement) of an attending or another physician. See *Marriage of Higgason* (1973) 10 C3d 476, 482 n2, 110 CR 897, disapproved on other grounds in *Marriage of Dawley* (1976) 17 C3d 342, 352, 131 CR 3.

A certified copy of a death certificate, or testimony by a witness with personal knowledge of the deponent's illness or death is sufficient. Statements by the deponent in the deposition about the deponent's physical condition are not sufficient. See *Sanchez v Bagues & Sons Mortuaries* (1969) 271 CA2d 188, 193, 76 CR 372.

Proof that the witness is beyond the subpoena power of the court (see CCP §2025.620(c)(2)(D); Evid C §240(a)(4)), or that the proponent exercised reasonable diligence but was unable to procure the witness's attendance by court process (see CCP §2025.620(c)(2)(E); Evid C §240(a)(5)), can be made either by testimony of a witness who has personal knowledge that the witness is absent from the jurisdiction, or by testimony of a process server who tried unsuccessfully to locate the witness.

Proof that the proponent was unable to procure the witness's attendance should include a showing of reasonable diligence in attempting to do so. See CCP §2025.620(c)(2)(E); Evid C §240(a)(5). See *Nizinski v State Bar* (1975) 14 C3d 587, 590, 121 CR 824 (deponent unavailable under Evid C §240(a)(4); parties apparently conceded that deponent was in prison located beyond court's subpoena power); *Cseri v D'Amore* (1965) 232 CA2d 622, 625, 43 CR 36 (defendant learned at trial that absent codefendant had settled with plaintiff; facts concerning unsuccessful efforts to subpoena were "stated to the court" and not controverted). See also *Topanga Corp. v Gentile* (1967) 249 CA2d 681, 690, 58 CR 713 (decided under former CCP §2016(d)(3)). For discussion of a client's unavailability, see §12.69.

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### §12.61 3. If exceptional circumstances

Counsel who wants to read into evidence portions of a deposition of a witness who resides within 150 miles of court (see §12.59) and who does not come within the meaning of an unavailable witness under CCP §2025.620(c)(2) (see §12.60) may ask the judge to permit the deposition to be read on the ground that "exceptional circumstances" make it desirable, in the interests of justice, to do so. See CCP §2025.620(c)(3). See also *Jordan v Warnke* (1962) 205 CA2d 621, 630, 23 CR 300 (decided under former CCP §2016(d)(3); defendant offered deposition, taken by plaintiffs, of defendant's former attorney who defense counsel said was in trial in another city; plaintiff made no effort to subpoena him; admission of deposition was within court's discretion).

A formal application or giving notice is not required before requesting admission of testimony for exceptional circumstances under CCP §2025.620(c)(3).

**PRACTICE TIP:** It is best to move for the admission of deposition testimony as soon as possible after learning of the facts giving rise to exceptional circumstances. Any delay will make it more difficult to persuade a court that use of the testimony is necessary "in the interests of justice." See CCP §2025.620(c)(3). If the ruling is not in your favor, you will have time to find alternative evidence or adduce additional evidence of the witness's unavailability or the exceptional circumstances.

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### §12.62 I. Using deposition to refresh memory

The memory of any witness (whether or not a party to the action) can be refreshed by using a deposition transcript while the witness is on the stand. For example, a witness who was asked on direct examination, "What color was the car?" and answered, "I don't remember," can then be asked to read a specified portion of the deposition and then answer the question again. Counsel might proceed as follows:

> Q: Do you remember going with me to Jon Foster's office on September 16, 2009, and giving a deposition under oath?
>
> A: Yes.
>
> Q: Were the details of the accident fresher in your mind then than they are now?
>
> A: Yes.
>
> Examiner: Your Honor, with your permission, I would like to show the witness this copy of the deposition that he gave on September 16, 2009.
>
> Q: Mr. Sanderson, please read to yourself lines 4 through 11 on page 27 of your deposition. Now, does that refresh your memory about the color of the car that hit you?
>
> A: Yes.
>
> Q: What color was it?
>
> A: Red.

Alternatively, consider proceeding with direct examination and request a recess at an appropriate point. During the recess, show the deposition to the witness. If the witness's recollection is refreshed, elicit the facts on direct examination after the recess. With this approach, consider eliciting from the witness that the witness's recollection was refreshed by looking at the deposition. This type of testimony will contradict any impression that counsel told the witness the correct answer.

**NOTE:** Any deposition, not just that given by the witness, can be used to refresh the witness's recollection.

A more difficult problem is presented when a favorable witness called by the party testifies at trial in a manner that is inconsistent with that witness's deposition testimony. At that time, counsel may elect to impeach the witness by using the deposition to establish a prior inconsistent statement. See Evid C §§780(h), 785.

**PRACTICE TIP:** Avoid emphasizing the impeaching material, as well as possibly destroying the ability to effectively rehabilitate the witness, by requesting a recess before direct examination has been concluded. Use the deposition to refresh the witness's memory during the recess. The witness can then return to the stand, retract the erroneous testimony, and explain why it was originally given. If you use this approach, consider eliciting from the witness that the witness's recollection was refreshed by looking at the deposition to avoid any impression that you told the witness the correct answer.

**Further research:** On refreshing a witness's recollection generally, and on right of adverse party to inspect, cross-examine, and introduce into evidence pertinent portions of writing used to refresh recollection, see §§11.63-11.68.

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### §12.63 J. Using deposition to impeach by showing prior inconsistent statement

A deposition of a witness, whether or not the witness is a party to the action, can be used for impeachment (*i.e.,* to attack the witness's credibility) by showing that the testimony on the stand is not consistent with the deposition testimony or "for any other purpose permitted by the Evidence Code." CCP §2025.620(a). The quoted language is meant to permit the deposition to be used to show both prior inconsistent statements (Evid C §1235) and prior consistent statements (Evid C §1236).

The witness's credibility can be attacked by any party, including the party calling the witness. Evid C §785. During examination, the witness need not be shown the deposition (see Evid C §768(a)) or be given any information concerning it (see Evid C §769). To prove inconsistent statements during the presentation of the case, rather than eliciting them during cross-examination of the witness, request the judge to instruct the witness before he or she leaves the stand that the witness is not excused from giving further testimony in the action and must remain available for recall to testify later.

Extrinsic evidence of prior inconsistent statements is inadmissible unless (Evid C §770):

- The witness while testifying was so examined "as to give him an opportunity to explain or deny the statement";
- The witness has not been excused from giving further testimony in the action; or
- The interests of justice otherwise require the statements to be admitted.

Some judges refuse to permit the reading of deposition testimony to the jury as a prior inconsistent statement unless he or she is first convinced that there is a true contradiction between the trial testimony and the deposition testimony. In this determination, "inconsistency in effect rather than contradiction in express terms is the test." 3 Witkin, California Evidence, *Presentation at Trial* §328 (4th ed 2000). Some judges first review the deposition testimony to see whether it is inconsistent before allowing it to be read to the jury. Others believe that inconsistency is a matter for the jury to decide and allow the deposition to be read without prior review.

**PRACTICE TIP:** Exercise care in objecting in front of the jury that deposition testimony is *not* inconsistent. If the court overrules the objection, it will emphasize to the jury that the deposition testimony contradicts the trial testimony just given by the witness.

**NOTE:** Evidence Code §1235 creates an exception to the hearsay rule for prior inconsistent statements that are offered in compliance with Evid C §770.

**Further research:** For an example of a technique for impeachment by use of prior inconsistent statements during cross-examination, see §§12.64-12.66. On methods of impeachment by use of prior inconsistent statements generally, see §§11.118-11.124. On use of video deposition containing a prior inconsistent statement, see §12.88. On the use of deposition testimony to show prior consistent statements to rehabilitate a witness's credibility, see §12.67. See §12.137 for sample questions and answers for impeaching with deposition testimony.

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### §12.64 1. Pinning down trial testimony

To highlight an inconsistency in deposition testimony, pin the witness down to a definite statement that contradicts the deposition on cross-examination. The danger in doing this, however, is that the witness may recall the deposition statement and tailor testimony to lessen the appearance of inconsistency.

**EXAMPLE:** A witness to an automobile accident testifies on direct examination that both drivers appeared normal after the accident. The witness had previously testified during the deposition that one of them "looked drunk." The cross-examiner might proceed as follows:

Q: Sir, you testified on direct examination that you saw Mr. Takamichi at the scene of the accident and that he appeared normal. Is that right?

A: Yes.

Q: By normal, did you mean that he did not appear to be intoxicated?

A: Yes.

Q: So your present recollection is that Mr. Takamichi appeared not to be intoxicated at the scene of the accident. Is that correct?

A: Yes.

Q: And is that your testimony?

A: Yes.

Now that the witness has been pinned down, the cross-examiner can proceed to establish the inconsistency.

**PRACTICE TIP:** After the witness is committed to an inconsistency, consider whether to first ask a series of questions concerning the time, place, and circumstances of taking the deposition or whether to impeach the witness immediately. See §§12.63-12.66). Some attorneys prefer not to interrupt the flow of cross-examination; they first impeach the witness and then ask questions concerning the time, place, and circumstances of taking the deposition. Other attorneys believe that jurors will give more weight to the impeachment if they are first made aware of the circumstances surrounding the deposition.

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### §12.65 2. Using foundational questions

Although there is no requirement to do so before confronting a witness with a prior inconsistent statement, many attorneys on cross-examination prefer to lay a foundation by asking the witness questions relating to the time, place, and circumstances of taking the deposition.

**PRACTICE TIP:** After the witness has been committed to the inconsistency, you may wish to ask a series of questions concerning the deposition which you believe the witness must answer affirmatively.

Q: Sir, was your deposition taken in this case on June 17, 2009, at my office?

A: Yes.

Q: Were you represented by counsel at that deposition?

A: Yes.

Q: Was your testimony given under oath at that deposition?

A: Yes.

Q: And did I inform you that if you did not understand the question to let me know and I would rephrase it?

A: Yes.

Q: And did I advise you that any inconsistency between your deposition testimony and your testimony at trial could be brought to the attention of the jury?

A: I believe you did. Yes.

If the witness made corrections in his or her deposition transcript or if he or she has signed it, counsel might continue:

Q: Did you later read the transcript of your testimony?

A: Yes.

Q: Did you make any corrections in your testimony?

A: Yes.

Q: Did you sign your deposition transcript?

A: Yes.

The object of this approach is to impress the jury with the seriousness and importance of the deposition testimony and to demonstrate that the deposition testimony was more likely the accurate testimony later changed in anticipation of trial.

**PRACTICE TIP:** Before a deposition is taken, instruct the deponent to ask the examiner to rephrase questions that the deponent does not understand, because inconsistencies between deposition testimony and trial testimony may be brought out at trial. This type of instruction will ensure that the deponent understands what is being asked during the deposition (see California Civil Discovery Practice §§5.32-5.33 (3d ed Cal CEB 1998)) and will respond in the affirmative at trial to the types of questions asked above. If the deponent does not remember the admonitions made by counsel during the deposition, read the relevant portions of the deposition to the jury.

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### §12.66 3. Confronting witness with inconsistency

After the witness has been committed to the inconsistency (see §12.64), confront the witness with the inconsistency, thereby conveying it to the jury. Some attorneys like to confront the witness with an inconsistent deposition statement by first showing the witness the transcript and then reading from it:

> Q: I show you the original transcript of your deposition. [*If signed, ask whether it is the witness's signature*.] Will you now please read to yourself lines 6 through 9 on page 12? [*Hands deposition to witness.*] Were you asked "How did Ms. Kraus appear to you at the scene of the accident?"
>
> A: Yes.
>
> Q: And did you answer: "Well, she looked drunk to me."
>
> A: Yes.

In examining a witness about a prior inconsistent statement made in the deposition, counsel need not show the deposition transcript to the witness (Evid C §768(a)) or give any information concerning the statement to the witness (Evid C §769). It is permissible under Evid C §§768-769 to simply ask the witness whether a specific statement was made at the deposition (without referring to the specific page and line number of the transcript). The impeaching testimony can then be read directly without asking the witness whether he or she so testified. For example, the cross-examiner might confront the witness with the inconsistent deposition statement as follows:

> Q: You stated under oath before this trial that Ms. Kraus looked drunk. Is that right?
>
> A: I did not.
>
> Q: I will read to you from the transcript of your testimony in your deposition at page 12, lines 6 through 9. Question: "How did Ms. Kraus appear to you at the scene of the accident?" Answer: "Well, she looked drunk to me." That was your testimony at your deposition. Is that correct?
>
> A: Yes, it was.

The witness may answer that he or she does not remember giving that testimony, that he or she did not give that testimony, or that the answers must have been inaccurately reported. One way to counter such an explanation is to establish that the witness signed or corrected the deposition transcript.

If the deposition was not corrected or signed, or the witness contends either that the witness overlooked that particular response when signing the deposition, or that the deposition testimony was inaccurately reported, it may be necessary to call the deposition reporter as a witness to testify (*e.g.,* to the steps taken and the accuracy of the transcript). If the witness is expected to disavow the deposition transcript at trial, the deposition reporter should be readily available to testify. Alternatively, because the judge has explained the deposition process to the jury and the jury will understand that counsel is reading testimony previously given by the witness, to avoid giving the witness a chance to disavow or explain prior testimony, simply read the transcript and then proceed with cross-examination.

If the witness denies reading and correcting the deposition shortly after it was taken, ask whether the witness has read the deposition in preparation for the trial. Almost all witnesses will testify that they read the deposition in preparation for trial. The witness then must say that the witness:

- Overlooked the error (implying that it is actually not an error);
- Recognized it but did not call it to anyone's attention (implying either that it is not an error or that the witness intentionally wanted to hide it); or
- Called it to the attention of opposing counsel, who failed to notify other parties or the court.

Some counsel ask the deponent whether "your memory of events at the time your deposition was taken is better then it is now?" Any answer to this question will usually help. If the witness says yes, it strengthens the credibility of the deposition testimony. If the witness says no, it sounds illogical, unreasonable, and therefore untruthful. Other counsel, however, believe that a witness appearing to have a better memory at trial is normal, because the process of preparing for trial often substantially refreshes the witness's recollection.

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## K. Using deposition testimony to rehabilitate

### §12.67 1. By showing prior consistent statement

Deposition testimony of a witness, whether or not a party to the action, can be used to rehabilitate the witness's credibility by showing a previous statement consistent with the witness's trial testimony if:

- Evidence of a prior inconsistent statement was admitted to attack the witness's credibility (*e.g.,* during cross-examination), and the prior consistent statement in the witness's deposition was made before the alleged inconsistent statement (see Evid C §791(a)); or
- There was an express or implied charge that the witness's trial testimony is a recent fabrication or is influenced by bias, or other improper motive, and the prior consistent statement was made before the improper motive allegedly arose (see Evid C §791(b)).

Evidence Code §1236 creates an exception to the hearsay rule for prior consistent statements that are offered in compliance with Evid C §791.

Counsel might attempt to rehabilitate a witness during redirect examination in the following manner:

Q: Mr. Taylor, when I was questioning you earlier, did you testify that the car was blue?

A: Yes.

Q: And then when Mr. Frankenheimer was cross-examining you, you said that on about October 22, 2009, you had told Ms. Wambaugh, an investigator, that you were uncertain about the color of the car. Is that correct?

A: Yes.

Q: Mr. Taylor, do you recall coming to my office some time ago and having your deposition taken?

A: Yes.

Q: Did you make your statement to Ms. Wambaugh before or after you had given that deposition testimony?

A: After.

Q: About how long after?

A: Several months.

Examiner: Your Honor, at this time I would like the witness to read lines 3 through 5 on page 65 of the transcript of his deposition that was taken on February 3, 2009.

Witness: [*Reading from deposition*] Question: "What color was the car?" Answer: "The car was blue."

Q: Was that your testimony at that time?

A: Yes, it was.

Q: Mr. Taylor, can you tell the jury why you said something different to Ms. Wambaugh when you spoke with her?

A: [*Witness states reasons.*]

The last question in this dialogue should be asked only by an attorney who is confident that the witness's answer will add to the witness's credibility.

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### §12.68 2. By additional deposition testimony

When a party introduces a portion of a deposition, any other party may introduce additional portions. CCP §2025.620(e). See §12.42. Thus, when a witness is impeached on cross-examination by reading a portion of the deposition testimony to the jury to show the prior inconsistent statement (see §§12.63-12.66), the party calling the witness may then read other portions of that witness's deposition in an effort to rehabilitate.

Depending on the circumstances, many judges prefer that the rehabilitating testimony not be read until after cross-examination has been concluded (*i.e.,* not until redirect examination). However, when the cross-examiner has impeached the witness by reading a portion of the witness's deposition taken out of context, the effect of the rehabilitating testimony on the jury may be lost if delayed. In this situation, counsel who called the witness should usually object and request permission to read the rehabilitating testimony immediately, so that the jury is not misled:

> Q: Mr. Chun, you testified on direct examination that you had a series of meetings with my client in March 2009, relating to the contract at issue in this suit. Is that correct?
>
> A: That is correct.
>
> Q: You testified in your deposition that you never even met my client until June 2009, two months after the alleged meetings about the contract. Is that correct?
>
> A: I don't remember that, sir.
>
> Q: I refer you to page 32, line 16, of your deposition, where you make the statement that you first met my client in June 2009. That was your testimony. Is that correct?
>
> Opposing counsel: Objection, Your Honor. If counsel will refer to line 2 of the following page, she will see that Mr. Chun corrected his testimony and said that he first met counsel's client in June 2008 instead of June 2009.
>
> Cross-examiner: Your Honor, opposing counsel will have the opportunity to rehabilitate his witness when my cross-examination has been completed.
>
> Opposing counsel: Your Honor, the rehabilitation will be too late by that time to be effective, and the jury may be misled. In fairness to Mr. Chun, I believe counsel should read to the jury the deposition testimony on the following page, where Mr. Chun corrected his answer.
>
> The Court: Counsel, I believe that in fairness to the witness you should read the testimony on the following page, because Mr. Chun corrected himself about the year of the first meeting.

When a witness's deposition contains impeaching testimony and does not contain any rehabilitating testimony that explains it, the witness should be prepared to explain in a forthright manner why the inconsistency exists between the deposition and trial testimony. For example, the witness may be able to say truthfully that the witness misunderstood the question, or did not realize that the answer was incorrect until going over the deposition while preparing to testify at trial. An explanation by the witness that the witness did not understand the deposition question may be ineffective if the witness was asked at the beginning of the deposition to make certain that the witness understood each question before answering.

To elicit why the witness's deposition testimony is inconsistent with the witness's trial testimony, counsel might proceed as follows:

> Q: Ms. Wright, I asked you during direct examination how far away from the intersection Mr. Stone's car was when you first observed it, and your answer was 175 feet. Is that correct?
>
> A: That's correct, sir.
>
> Q: You testified in your deposition, which was read to the jury, that you didn't remember how far the car was from the intersection. You thought it might have been 40 or 50 feet when you first saw it. Do you remember that?
>
> A: Yes, sir. I do.

Q: Can you tell us why your memory is better now than it was when your deposition was taken?

A: Yes, sir. Yesterday I walked past the intersection, which at the time my deposition was taken I hadn't seen for one year. When I was there yesterday, I remembered that the car was just approaching the entrance of the gas station when I first saw it. I paced off the distance from the intersection to the gas station's entrance, and it was 175 feet. Therefore, I believe that the car was about 175 feet away when I first saw it.

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### §12.69 L. Using client's deposition

In this section, the word "client" includes not only counsel's client but also those who, at the time of the taking of the deposition, were directors, officers, employees, and agents of the client (although the latter may not be parties to the action).

The client's deposition can be used by the client's attorney for substitute testimony (*i.e.,* in place of the client's oral testimony) if a showing is made that the client resides more than 150 miles from the place of trial (see §12.59), the client is unavailable (see §12.60), or exceptional circumstances exist that, in the interest of justice, make use of the deposition desirable (see §12.61). CCP §2025.620(c)(1)-(3).

**NOTE:** A deponent is not considered to be unavailable under CCP §2025.620(c)(2) if the deponent's absence (or other ground constituting unavailability) was brought about by the procurement or wrongdoing of the party proposing to use the deposition for the purpose of preventing the witness's testimony in open court.

The client's deposition is seldom used as substitute testimony to establish the client's case, especially in a jury trial. Not only is the jury unable to judge the client's credibility, but the jury may draw unfavorable inferences from a client's nonappearance.

Certain circumstances may make it necessary, however, to use the client's deposition as substitute testimony, *e.g.,* an employee witness of an entity represented by counsel has died, the client is very ill, or the poor demeanor of a client who resides more than 150 miles from the place of trial outweighs the disadvantage of the deponent being absent from the trial.

If the client resides within the 150-mile radius of the place of trial, does not meet the unavailability requirements of CCP §2025.620(c)(2) but is able to attend trial only at great hardship, counsel may wish to use the client's deposition for substitute testimony.

To justify using the deposition in lieu of in-court testimony under CCP §2025.620(c)(3), try to make a showing of exceptional circumstances. See §§12.58-12.61.

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## M. Preserving the record

### §12.70 1. Using objections

The admissibility of deposition testimony at trial is generally subject to the same rules that govern the admissibility of oral testimony. Objections may be made at trial to receiving in evidence all or part of a deposition, as would be made if the witness were present and testifying. CCP §2025.620. Unlike oral testimony elicited at trial, however, some grounds for objection to deposition testimony are waived (*e.g.,* errors in the form of the questions or answers) and, absent a stipulation to the contrary, cannot be raised at trial unless timely objection is made at the deposition. CCP §2025.460(a)-(c). See §12.2.

An attorney may object to deposition testimony when the proponent of the testimony has not laid a sufficient foundation under CCP §2025.620 for its proposed use. Objection may be raised if the deposition is sought to be used against a party who was not present or represented at the deposition or who was given due notice and validly objected to the taking of the deposition. See §§12.37-12.44.

After the party that intends to offer the deposition into evidence has timely notified the court and all the parties to that effect, objections to all or part of the deposition must be made in writing. CCP §2025.340(m).

**PRACTICE TIP:** Find out whether any local court rules or policies require that objections to deposition testimony be made in writing or at any particular time (*e.g.,* before the trial).

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### §12.71 a. How to object

To object to deposition testimony that is offered into evidence, make a timely objection stating the specific grounds for the objection. See Evid C §353(a). A general objection is usually not sufficient to preserve the issue on appeal. See *Estate of Doyle* (1932) 126 CA 446, 14 P2d 909. See also §15.39. Unless objecting to the introduction of the entire deposition (*e.g.,* on the ground that a sufficient foundation has not been laid under CCP §2025.620), object to *specific* questions and answers.

When objecting to portions of a deposition, obtain a ruling on the objectionable matter on the record outside the jury's presence. Unless the proponent has requested a preliminary hearing on admissibility, the objecting party might proceed as follows:

> Proponent: Your Honor, I wish to offer portions of this witness's deposition into evidence.
>
> Opponent: Your Honor, may we approach the bench?
>
> The Court: Yes.
>
> Opponent: [*At sidebar*] Your Honor, I want the questions and answers read outside the jury's presence so that I may object to certain questions and move to strike certain answers. May we adjourn to chambers?

In general, objections to deposition testimony are made in the same manner and on the same grounds as objections to oral testimony. Local rules or policies should be checked, however, for any special requirements on the time or manner for raising objections to deposition testimony. On special requirements concerning audio or video depositions, see CCP §2025.340(m), discussed in §12.22.

**Further research:** On objections to evidence and preserving the record generally, see chap 15. For discussion of permissible objections, see California Trial Objections (Cal CEB Annual).

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### §12.72 b. Objecting to own deposition question

Objection should be made to a deposition question that calls for inadmissible testimony damaging to the client's case —no matter who asked the question.

The argument that an attorney cannot object at trial to a question that he or she asked, or to an answer that he or she received in deposition, overlooks the difference between interrogation at trial and the broader interrogation permitted at a deposition.

Deposition and trial practice differ in purpose, procedure, tactics, and strategy. The Discovery Act (CCP §§2016.010-2036.050) is not intended to limit obtainable information or testimony to that which is admissible at trial. See CCP §2017.010; *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 391, 15 CR 90 (interpreting former CCP §§2016-2035); *Irvington-Moore, Inc. v Superior Court* (1993) 14 CA4th 733, 18 CR2d 49.

An attorney in deposition may ask for hearsay and other inadmissible evidence if it appears reasonably calculated to lead to the discovery of admissible evidence. CCP §2017.010. Good discovery techniques also usually require that counsel elicit information unfavorable to a client. Legislative intent that discovery statutes be liberally construed (see 56 C2d at 377) would be frustrated if an attorney were prohibited from pursuing discovery questions on inadmissible matters at a deposition out of fear that the answers would be admitted against the client at trial.

**Further research:** On admissibility of evidence generally, see chap 10.

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### §12.73 2. When use of deposition denied

The trial judge may deny an attorney's request to read or use part of a deposition transcript. An appellate court need not consider a claim that deposition testimony was erroneously excluded unless the testimony is part of the record on appeal. See *Wulferdinger v Pickwick Stages Sys.* (1930) 105 CA 509, 288 P 93. Merely identifying page and line numbers of the deposition in the record is not enough. *Paulin v Paulin* (1940) 39 CA2d 180, 102 P2d 809.

Generally, when a party offers evidence and an objection to its introduction is sustained, an offer of proof is required to preserve the point so that the claimed error can be raised on appeal. See Evid C §354(a). See also §§15.50-15.60.

**EXAMPLE 1:** In *Beverly Hills Nat'l Bank v Glynn* (1968) 267 CA2d 859, 866 n1, 73 CR 808, a deposition was filed in the trial court but never offered or received in evidence. The court noted that a "deposition not so offered and marked for identification may not be considered on appeal."

**EXAMPLE 2:** In *Wulferdinger v Pickwick Stages Sys., supra,* a deposition was offered into evidence but rejected in the trial court. The deposition was not marked or requested to be marked for identification. The appellate court refused to direct that the deposition be certified as part of the record on appeal.

**PRACTICE TIP:** To protect the record when deposition testimony is offered but not received in evidence, consider doing the following:

- Request that the deposition transcript be marked for identification;
- Specify on the record the portions to be offered by page and line number;
- Read the excluded portions into the record out of the jury's presence; and
- Unless the purpose and relevance is apparent from the context, state on the record the purpose and relevance of the deposition testimony.

This procedure can be followed at the time any objection is sustained to the use of audio or video deposition testimony. In addition, a request can be made that the recorded deposition itself be marked for identification and filed with the court. On the procedure for objecting to audio or video deposition testimony generally, see §12.80.

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## N. Using depositions taken in another action

### 1. Using against party (or successor in interest) to former action

### §12.74 a. When they may be used

All depositions taken in a former action that are admissible under the Evidence Code may be used in a subsequent action as though they were originally taken in the subsequent action if (CCP §2025.620(g)):

- The former action was brought in any court of the United States or a state court;
- The depositions were lawfully taken and duly filed in the former action; and
- The current action involves the same subject matter and is between the same parties (or their representatives or predecessors in interest) as the former action.

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### §12.75 b. Admission under Evidence Code

A previously taken deposition can be used "as permitted by the Evidence Code." CCP §2025.620(g). If prior deposition testimony does not meet the requirements of CCP §2025.620(g) (because, *e.g.,* the prior deposition was not "duly filed"), attempt to admit the prior deposition testimony under Evid C §1291. Evidence Code §1291(a) creates an exception to the hearsay rule for former testimony, which includes a deposition "taken in compliance with law in another action." Evid C §1290.

Evidence of former testimony is not made inadmissible by the hearsay rule if the deponent is unavailable as a witness (Evid C §1291(a)) and if:

- The former testimony is offered against a person who offered it into evidence in his or her own behalf on the former occasion or against the successor in interest of such person; or
- The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given, and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he or she has at the hearing.

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### §12.76 c. Limitations and objections

When deposition testimony taken in another action is offered against a party, an objection to its admissibility may be raised if the party's interest and motive to cross-examine in that action differ from the party's interest and motive to cross-examine in the present action. According to the 1965 Cal L Rev'n Comm'n Comment to Evid C §1291:

> The determination of similarity of interest and motive in cross-examination should be based on practical considerations and not merely on the similarity of the party's position in the two cases.

**EXAMPLE:** In *Wahlgren v Coleco Indus.* (1984) 151 CA3d 543, 198 CR 715, the court excluded former deposition testimony given in an unrelated action because of the practical differences between the deposition and trial proceedings, noting that a deposition normally functions as a discovery device while trial serves to resolve liability issues. At trial, the interest and motive to cross-examine increase dramatically.

Authentication of former testimony is governed by CCP §273. *Wahlgren v Coleco Indus., supra* (trial court acted properly in excluding deposition testimony when plaintiff sought to introduce notarized photocopies of depositions rather than certified copies or duplicate originals).

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### §12.77 2. Using against party who was not party to former action

"A deposition previously taken may also be used as permitted by the Evidence Code." CCP §2025.620(g). Evidence Code §1292(a) may apply in situations in which deposition testimony taken in a former action is sought to be used against a party who was not a party to the former action.

Former testimony (which includes a "deposition taken in compliance with law in another action" (see Evid C §1290(c)) is not inadmissible because of the hearsay rule if (Evid C §1292(a)):

- The declarant is unavailable as a witness (see §12.60);
- The former testimony is offered in a civil action; and
- The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and a motive similar to that which the party against whom the testimony is offered has at the hearing.

The deposition testimony is subject generally to the same limitations and objections as though the deponent were testifying at trial, except that objections based on competence or privilege that did not exist when the deposition was taken cannot be raised. Evid C §1292(b).

**Further research:** For further discussion, see Comment to Evid C §1292. See also *Wahlgren v Coleco Indus.* (1984) 151 CA3d 543, 198 CR 715, discussed in §§12.53, 12.76.

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## O. Using audio or video recorded depositions

### §12.78 1. When appropriate

A video deposition may be quite effective at trial because the medium conveys the deponent's appearance and demeanor as well as the spoken words, and a video will usually receive more attention from the trier of fact than the reading of a cold deposition transcript.

A video deposition may be particularly appropriate when an attorney anticipates that a favorable witness with a good appearance or a hostile witness with a poor demeanor may not be available for trial. Sections 12.15-12.21 discuss various aspects of video depositions that may affect their use or effectiveness at trial. Unless otherwise specified, the discussion also applies to audio recorded depositions.

**Further research:** See §12.136 for a checklist of special considerations if deposition audio or video recorded.

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### §12.79 2. Written notice of intention to offer recorded deposition into evidence required

A party intending to offer an audio or video deposition into evidence under CCP §2025.620 must notify the court and the parties in writing of that party's intent to do so, designating the proposed portions to be offered at the trial (or hearing). CCP §2025.340(m). Under CCP §2025.340(m), this written notice and designation must be made in sufficient time to allow for:

- Objections to be made and ruled on by the trial (or hearing) judge; and
- Editing of the recording, if necessary.

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### §12.80 3. Objections must be in writing

Objections to all or part of the deposition must be made in writing. CCP §2025.340(m). Under §2025.340(m), the court may permit further designations of testimony and objections as justice may require by ordering one of the following:

- That the party offering the deposition recording suppress those portions not designated by any party or ruled to be objectionable.
- That an edited version of the recording be prepared. The original recording, however, must be preserved unaltered.

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### §12.81 4. Admissibility objections

Pay particular attention to admissibility objections based on the adequacy of a party's opportunity to confront and cross-examine the deponent. This problem often arises during complex litigation, *e.g.,* in asbestos actions in which the death of a party deponent occurs before the completion of the deposition. When a party has not been afforded an opportunity to examine or complete the examination of a deponent, deposition testimony has been held inadmissible.

**EXAMPLE 1:** In *Sprague v Equifax, Inc.* (1985) 166 CA3d 1012, 1041, 213 CR 69, plaintiff's counsel, who noticed the deposition, were advised by defendant's counsel after 4 hours of the deponent's testimony that the deponent was returning to Michigan and would not be available the next day to continue the deposition. Although plaintiff's counsel insisted that the deposition continue from day to day as stated in the deposition notice and in accordance with custom for out-of-town witnesses, they ultimately submitted to the deposition's termination under protest, stating on the record that the deponent had not completed his examination. The deponent did not attend the trial. Plaintiff's counsel moved at trial to exclude the deponent's deposition testimony on the ground that the plaintiff was deprived of the right to cross-examine the adverse witness. The appellate court affirmed the trial court's granting of the motion, noting that admission of a deposition is generally within the trial court's discretion.

**EXAMPLE 2:** In *Pollard v Pollard* (1959) 166 CA2d 698, 705, 333 P2d 356, a deposition proceeding was held to perpetuate testimony. After direct examination was substantially completed, the deposition was continued but the deponent died before the deposition could be resumed. The court ruled that the trial court did not abuse its discretion in sustaining an objection to the offering of the deposition into evidence when no cross-examination had taken place and it was unclear whether direct examination had been completed.

**PRACTICE TIP:** To prevent this problem, make every effort to conduct the deposition in one session. If the deposition must be continued, it should be for only a short period—particularly when the deponent is elderly or ill.

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### §12.82 5. Stenographic record necessary

If no previous stenographic transcript was made, the party offering an audio or video deposition under CCP §2025.620 must accompany the offer with a stenographic transcript prepared from the recording. CCP §2025.340(m). Unless otherwise ordered by the judge, the written transcript must be given to the court and opposing parties and the transcript must be marked for identification. The clerk must file a duplicate of the transcript so it can be made part of the record in the event of an appeal. Cal Rules of Ct 2.1040.

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### §12.83 6. Check local requirements

Check local court rules or policies for any time limits, objection limitations, or other requirements on designating portions of an audio or video deposition to be used at trial.

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## 7. Deposition of treating physician or other expert

### §12.84 a. Using deposition in lieu of live testimony

A video deposition of a treating or consulting physician or of any expert may be used in lieu of the live testimony of such a witness at trial even if the deponent is available to testify (CCP §2025.620(d)):

- When the deposition notice reserves counsel's right to use the deposition at trial (see CCP §2025.220(a)(6), CCP §2025.340(m), CCP §2025.620(d)); and
- When the party offering the testimony notifies the court and all parties in writing of:
- The intent to offer the audio or video recording; and
- The parts of the recording to be offered.

The notice to the court and parties must be made in sufficient time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the recording. CCP §2025.620(d). See also §§12.41, 12.84.

**CAUTION:** Audio depositions are not mentioned in CCP §2025.620(d) and thus are not permissible for use in lieu of live testimony.

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### §12.85 b. Conducting discovery deposition before use of expert's deposition

When a video deposition is noticed that will preserve testimony for trial of a treating or consulting physician or any expert (see CCP §§2025.220(a)(6), 2025.620(d)), another party may wish to first conduct a discovery deposition when the circumstances warrant, to ensure effective cross-examination at the videotaping. CCP §2025.420(b).

**PRACTICE TIP:** First attempt to enter into a stipulation for a discovery deposition with all the parties, but if they are unwilling, seek a protective order. CCP §2025.420(b). Because the deponent's testimony at trial will be presented through video rather than live testimony, argue that you must first conduct a discovery deposition in order to be prepared for effective cross-examination during the video recorded deposition.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/12 Effective Use of Discovery/§12.86 8. Requirements for video operator if video used at trial

### §12.86 8. Requirements for video operator if video used at trial

If the deposition of a treating or consulting physician or of any expert witness will be used at a trial or hearing, the person operating the recording equipment (CCP §§2025.340(c), 2025.620):

- Must be authorized to administer an oath; and
- May not be:
- Financially interested in the action; or
- An employee or a relative of any attorney of any of the parties.

These qualifications and restrictions for the operator of the recording equipment may be waived on the record by all parties attending the deposition. CCP §§2025.340(c), 2025.620.

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### §12.87 9. Rules for setting up equipment and handling video recording

If possible, consult with the clerk of the department in which the trial will be held or with the office of court administration to discuss the mechanics of setting up and operating video playback equipment. Courts are becoming increasingly security conscious; metal detectors and briefcase and package searches are common.

**CAUTION:** The magnetic fields of walk-through and hand-held metal detectors may erase or alter audio or video recordings. Become familiar with the trial department's ground rules and courthouse security procedures well before the day of trial to avoid embarrassing delays in setting up audio or video equipment or sustaining damage to the audio or video recording. If necessary, secure a court order from the presiding judge or the trial department to allow the audio or video operator to enter and exit the courthouse through a doorway that will not harm the recorded depositions and will allow easy setup of the monitoring equipment.

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### §12.88 10. Using computer software programs

Although video recorded depositions are a more effective way of presenting testimony than dry transcript readings, they are generally not very effective for impeachment purposes. Unless the precise portions to be used for impeachment and their exact order are known in advance, the fast-forwarding or rewinding necessary to locate recorded portions will be awkward and time consuming. By the time the segment has been located, the jury may have forgotten the inconsistency, and the dramatic effect may be lost.

Counsel should consider using computer software programs, *e.g.,* Trial Director or Summation, for courtroom presentation of videotaped depositions. These programs allow the user to locate deposition testimony by page and line references quickly. Another alternative to the cumbersome process of locating testimony on a video recording is to prepare areas of impeachment that can be presented visually to the jury.

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### §12.89 P. Marking deposition for use at trial

Clearly mark the portions of a deposition that will be read into the record at trial, *e.g.,* by highlighting with a marker so that the reading proceeds smoothly and without hesitation. To minimize interruptions for objections by an adverse party, consider preparing a memorandum of the portions of the deposition intended to be read and giving it to opposing counsel.

Do not offer advance copies of testimony that are intended as impeachment of the deponent. Also, when selecting parts of the deposition to be read, keep in mind unfavorable related testimony because an alert opponent will request an immediate reading of the omitted portions, enhancing their negative impact.

**PRACTICE TIP:** Anticipate which portions of the deposition opposing counsel may offer into evidence. To object to those portions, make a note of the grounds in the transcript so that they can be stated quickly and effectively. Also, mark additional portions of the deposition to read on redirect-examination, recross-examination, or rebuttal.

**Further research:** On the sequence of presenting evidence generally, see §11.2.

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## Q. Determine advisability of summary or index

### §12.90 1. Purpose of summary

For a deposition to be used effectively at trial, know both its substance and the exact location of pertinent testimony by page and line number. Use summaries and indexes of deposition transcripts to ensure that useful passages can be quickly located, thereby avoiding a loss of impact in cross-examination and the embarrassment of thumbing distractedly through a transcript while judge and jury wait impatiently. See §§12.91-12.96.

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### §12.91 2. Form of summary or index

The form of a deposition summary is dictated by the length of the transcript, the complexity of the case, whether the trial attorney or someone else prepares the summary, and the attorney's needs and preferences. Some summaries recapitulate the deponent's testimony while others are little more than skeletal indexes of topics covered. (For convenience, the word "summary" is used here to cover both summaries and indexes.)

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## §12.92 3. Who prepares summary

Preparing a summary of each deposition that might be used at trial usually results in a greater familiarity with the deposition testimony than depending on summaries prepared by others.

There are various opinions on who prepares summaries or indexes in different law firms. In some firms, summaries are prepared by associates or legal assistants rather than the trial attorney. Some firms have associates who specialize in taking depositions and preparing them for use at trial by the firm's trial attorneys.

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### §12.93 4. When to prepare summary

A summary prepared soon after receiving a copy of the deposition transcript can be referred to during the pretrial stages of litigation, including settlement discussions or conferences and used in preparing to make or contest a summary judgment motion.

Be aware that there are various opinions on when it is best to prepare summaries or indexes. Some attorneys:

- Believe that it is a waste of time and money to prepare a summary until fairly certain that the case cannot be settled but will go to trial;
- Think it is helpful to prepare the summary as soon after the deposition as possible while the testimony is still fresh; or
- Prefer to summarize depositions shortly before trial, feeling that will make it easier to remember the deposition testimony during trial.

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### §12.94 5. Index key pages

If only one or two statements in a deposition might be referred to at trial, "index" those statements by sticking a tab on each key page and indicating appropriate lines by penciled marks in the margin. Even if a summary is prepared, indexing the most important pages with tabs may still be a useful guide.

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### §12.95 6. Prepare chronology index

Consider preparing a separate index sheet that gives a rough chronological summary of all possibly significant aspects of the deponent's testimony. This sheet might be kept with other deposition summaries in the trial notebook (see §3.21). The chronology could be based on the order of the deponent's testimony, the order of the actual events, or the order in which the deponent is expected to testify at trial.

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## §12.96 7. When to prepare both summary and index

In complex cases, with numerous and lengthy deposition transcripts, it can be helpful to have both extensive summaries of each deponent's testimony and a separate index showing by page and line number each place where a deponent testified on a relevant topic. This approach is particularly helpful when a deponent testifies on the same subject at different times during the deposition or when several deponents testify on the same subject.

An attorney who expects to conduct a long and detailed cross-examination of a deponent may even have two summaries prepared: one based on the chronology of events and the other based on the subject matter covered by the deponent.

**PRACTICE TIP:** Some attorneys prepare a separate file card for each exhibit that the deponent identified or introduced at the deposition. The card can describe the nature or contents of the exhibit and indicate the page and line numbers where the deponent talked about it.

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### §12.97 R. Requesting copy on computer disk

It is becoming an increasingly common practice to request a computer disk from the court reporter. Most court reporters will make available to all counsel a copy of the disk for a nominal charge. The computerized testimony can then be loaded into a full-size or laptop computer.

The disk may be used for indexing or cross-referencing. Some court reporters offer additional services such as "key word indexing," which selects all testimony in which a particular word or phrase appears. This service is particularly helpful in complex litigation when an attorney wishes to compile all testimony on a particular subject.

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## V. USING INTERROGATORIES AT TRIAL

### A. General requirements

### §12.98 1. Answers must be signed and verified

Interrogatories must be answered under oath, and the answers must be signed by the person making them. CCP §§2030.210(a), 2030.250(a). Interrogatories that are served on a public or private corporation, partnership, association, or government agency must be signed under oath by an officer or agent of that entity. CCP §2030.250(b).

When serving interrogatories, make certain that the responses are not only signed by the person answering the interrogatories but are also verified by that person and not, for example, by counsel for a corporate party, unless counsel signed the responses in the capacity as an officer or agent under CCP §2030.250(b). Otherwise, even if the answering person signed the responses, that person may be able to disclaim the answers at trial. See *LeGrand v Yellow Cab Co.* (1970) 8 CA3d 125, 87 CR 292 (decided under former CCP §2030(a); answer excluded when signing party who did not verify answers claimed that he neither read answers nor knew their content).

**NOTE:** Requiring that the answers be properly verified reduces the possibility that the party will be able to disclaim his or her answers at trial.

If the officer or agent signing the response on behalf of a public or private corporation, partnership, association, or government agency is an attorney acting in that capacity for such a party (CCP §2030.250(b)):

> that party waives any attorney-client privilege and any protection for work product under [CCP §§2018.010-2018.080] during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response.

An attorney who verifies responses to interrogatories may thereby subject himself or herself to being called as a witness by the opposing party and, under certain circumstances, disqualification of counsel may result.

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### §12.99 2. Moving to compel responses

If necessary, the propounding party should move to compel answers under CCP §2030.290(b) if the responding party does not sign a verification. A failure to sign answers to interrogatories under oath would presumably be deemed a failure to respond to the interrogatories, thereby allowing counsel to move to compel under CCP §2030.290(b).

Consider moving under CCP §2030.300 instead within the time period specified in that section, to compel further responses in order to avoid any possible claim of waiver of the right to answers under oath if a court held that CCP §2030.300 applied in the circumstances. For procedure and further discussion of compelling answers and further answers to interrogatories, see California Civil Discovery Practice §§7.107-7.119 (4th ed Cal CEB 2006).

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## §12.100 3. Amending or supplementing answers to interrogatories before trial

Because answers to interrogatories can be used against the responding party at trial, consider amending or supplementing any incorrect or incomplete answers provided by a client before trial. See §12.107. Failing to amend or supplement such answers creates the risk that the evidence intended to be introduced may be limited or excluded, as well as the risk that evidence differing from earlier interrogatory answers may not be believed.

An amended answer to interrogatories may be served without leave of court. The amended answer may cover information subsequently discovered, inadvertently omitted, or mistakenly stated in the previous answer. CCP §2030.310(a). The initial answer may be used by the propounding party or any other party at trial under CCP §2030.410 and the responding party may then use the amended answer. CCP §2030.310(a).

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### §12.101 4. Moving for order to make first response binding

The propounding party may move for an order that the first answer to the interrogatory be made binding on the responding party for the pending action. CCP §2030.310(b). The responding party would normally be able to deny or explain the answer. These possibilities are not available when the answer is made binding on the responding party.

Before an answer will be made binding, the propounding party must first make a good faith attempt to resolve the matter. The motion to have the initial answer binding on the responding party must "be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." CCP §2030.310(b).

For the court to grant the motion, the court must determine the following (CCP §2030.310(c)):

- The initial failure to correctly answer the interrogatory substantially prejudiced the propounding party;
- The responding party failed to show substantial justification for the initial answer; and
- The prejudice to the propounding party cannot be cured by a continuance for further discovery or by permitting the initial answer to be used in the normal manner, which would allow the responding party to deny or explain the initial answer.

**Further research:** See *Gordon v Superior Court* (1984) 161 CA3d 157, 207 CR 327, for an example of prejudice to the propounding party sufficient to justify binding the responding party with an initial answer.

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### 5. Preparing summaries or enlargements

#### §12.102 a. When appropriate

It may be helpful to prepare a summary or an index of the interrogatories and answers that might be needed quickly during trial, *e.g.,* names of percipient and expert witnesses and kinds of exhibits might be listed, and contentions and topics of testimony summarized. In large, complex matters, the interrogatories and responses can be organized by subject matter in a binder, with a subject index for quick reference.

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### §12.103 b. If used to impeach or as admissions

If certain answers to interrogatories will be used for impeachment or as admissions, they can be summarized and indexed separately according to subject matter. The particular interrogatories and answers can also be placed in sequence on a single document. For ease of use at trial, this document might also include a copy of the first page of the set of interrogatories (to show the caption, the propounder, the person asked, and any typed instructions on how to answer) and a copy of the last page of the response (to show the responder's signature and oath or verification).

**PRACTICE TIP:** For a particularly important admission or impeachment of an interrogatory answer, consider using an enlargement (by overhead projector or otherwise) at trial during closing argument. Obtain the court's permission before its use. The enlargement should not display inadmissible, confusing, or otherwise objectionable matters.

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### §12.104 6. Prepare copies for court and opposing counsel

Neither the Code of Civil Procedure nor the California Rules of Court require that a party desiring to use interrogatories or responses to interrogatories first provide the court and opposing counsel with a single document setting forth in sequence the interrogatory and answer that the party plans to use. Many attorneys believe that this procedure should be followed except when the interrogatories and answers are going to be used on cross-examination. Check local jurisdictions for applicable rules and policies. See, *e.g.,* applicable rules in Los Angeles Ct R 8.70-8.72.

Counsel for the responding party who wants to use interrogatories and answers during trial may use copies. An attorney for a responding party who wants to use the originals should request the propounding attorney (or party, if unrepresented) to bring them to court. A request that the propounding party produce the original interrogatories and responses can be included in a CCP §1987(c) notice to produce documents, served at least 20 days before the start of trial. For discussion of such notice, see §§4.36-4.39.

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### §12.105 7. Request production of originals

Counsel who serves a set of interrogatories on behalf of a party (*i.e.,* the propounding attorney) must retain the original interrogatories with the original proof of service form attached and serve copies. See CCP §2030.280. Counsel for the responding party is required to serve the original responses under oath on the propounding attorney (or the propounding party, if unrepresented). See CCP §2030.260(a). Thus, the propounding attorney has possession of the original interrogatories and responses and may bring them to court.

The propounding attorney (or the propounding party, if unrepresented) must retain the original interrogatories, original proof of service, and original responses until 6 months after the action's final disposition. The originals may be destroyed at that time unless the court on a showing of good cause orders that the originals be preserved for a longer period. CCP §2030.280.

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### §12.106 8. Evaluate filing requirements

Interrogatories and answers to interrogatories are not to be filed with the court. The propounding party retains the original interrogatories with the original proof of service and the original sworn responses for 6 months after final disposition of the action, at which time they may be destroyed unless the court, on a party's motion and a showing of good cause, orders that they be retained for a longer period. CCP §2030.280.

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### B. Using interrogatories at trial

### §12.107 1. Use against responding party only

The propounding party or any other party other than the responding party may use at trial any answer or part of an answer to an interrogatory admissible under the rules of evidence *only against the responding party.* CCP §2030.410. See *Castaline v City of Los Angeles* (1975) 47 CA3d 580, 121 CR 786. Compare the permitted use of interrogatories with the broader use of deposition testimony (see §12.32).

**PRACTICE TIP:** Counsel should keep interrogatories short and in plain English so that they can be easily understood by jurors and have maximum impact at trial. Counsel should also ask the trial judge to instruct the jury on the nature of interrogatories, *i.e.,* that the answers were given under oath and should be considered as if they had been given in court.

The fact that the responding party is available to testify, has testified, or will testify is not a valid basis for objecting during trial to the use of the responding party's answer to an interrogatory. CCP §2030.410.

**Further research:** See §12.138 for a checklist for introducing answers to interrogatories or requests for admission.

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### §12.108 2. Check local rules for filing requirements

Although interrogatories and their responses do not have to be filed as a prerequisite to their use at trial (CCP §2030.410), be sure to check local rules and policies for filing requirements.

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## §12.109 3. Offering interrogatory responses into evidence

Interrogatory responses are presented to the jury by reading them into evidence. As with deposition testimony, take care to separate questions and answers so that the testimony is clear to the jury.

Before offering responses into evidence (with the exception of responses to be used on cross-examination), advise opposing counsel of those portions of the interrogatories and responses that counsel intends to offer. If opposing counsel has objections, a hearing can be requested outside the jury's presence to obtain rulings on the objections.

When interrogatory responses have been read into evidence, the proponent can request that the court instruct the jury to consider the interrogatory responses as if the questions had been asked and answered in court.

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### 4. Using answers to restrict presentation of evidence

### §12.110 a. To exclude witness not named in answers

A party may be asked in interrogatories to specify the party's contentions and factual bases for the contentions and to list lay witnesses having knowledge of facts relevant to the subject matter of the action, documents, or other things. See CCP §§2017.010, 2017.210, CCP §2030.010(a), §2030.010(b); California Civil Discovery Practice §§7.39-7.43, 7.50 (4th ed Cal CEB 2006). However, a party usually cannot be compelled to disclose the identity of lay witnesses that the party intends to call to testify. *City of Long Beach v Superior Court* (1976) 64 CA3d 65, 134 CR 468 (disclosure protected under former CCP §2016(b) (now CCP §2018.030(b) as qualified work privilege).

At trial, move to preclude the answering party from calling a witness not named or from introducing any evidence that goes beyond the scope of the answers given to the interrogatories. *Campain v Safeway Stores, Inc.* (1972) 29 CA3d 362, 104 CR 752 (undisclosed claim for loss of earnings and future earnings); *Thoren v Johnston & Washer* (1972) 29 CA3d 270, 105 CR 276 (willful omission of witness's name); *Universal Underwriters Ins. Co. v Superior Court* (1967) 250 CA2d 722, 58 CR 870 (undisclosed contention).

Responses to deposition questions and interrogatories that are merely inconsistent, and could be used for impeachment at trial, do not serve as a basis to exclude testimony without a finding of discovery abuse sufficiently severe to warrant an evidence sanction. *Kelly v New W. Fed. Sav.* (1996) 49 CA4th 659, 672, 56 CR2d 803.

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### §12.111 b. To exclude evidence not in answer

Whether the trial judge will exclude evidence on the ground that it was not mentioned in an answer to an interrogatory depends on such factors as:

- The nature of the information sought;
- The precision with which the question was asked; and
- Whether the party deliberately concealed known facts in its answer.

When the information not mentioned in the answer can be viewed as a good faith omission, or does not otherwise constitute surprise, the court can grant relief from the failure to disclose and allow the evidence to be introduced. See *Singer v Superior Court* (1960) 54 C2d 318, 325, 5 CR 697 (effect of good faith oversight); *Castaline v City of Los Angeles* (1975) 47 CA3d 580, 590, 121 CR 786 (no surprise); *Milton v Montgomery Ward & Co.* (1973) 33 CA3d 133, 140, 108 CR 726 (good faith; no surprise).

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### §12.112 c. To exclude evidence inconsistent with prior answer to interrogatory

Absent significant prejudice to the propounding party, the trial court may allow evidence to be presented that is at variance with prior answers to interrogatories. *Phillips v Cooper Labs.* (1989) 215 CA3d 1648, 264 CR 311. Note that, even if the court grants the party relief, the inconsistent response can be used for impeachment.

**Further research:** On disclosure of information concerning each other's expert trial witnesses and exclusion of an expert's opinion, see CCP §§2034.010-2034.730, discussed in §2.7.

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### §12.113 5. Using answers during presentation of party's case

The adverse party's answers to interrogatories are not often used as substantive evidence during the presentation of the party's case. It is usually more effective to elicit the testimony from the adverse party at trial rather than reading it from an answer to an interrogatory.

Circumstances may arise, however, when it is advisable to read an adverse party's answers to interrogatories into the record during the presentation of his or her client's case, *e.g.,* when it is necessary to establish certain facts as part of the client's case such as the date and place of incorporation, the principal place of business, or the identity of corporate officers, and the adverse party is unlikely to dispute the facts. For discussion of who may be considered an adverse party, see §12.46.

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### §12.114 6. Using answers given in another action

Responses to interrogatories given in another action might be used against the responding party during cross-examination in the present action. For example, if discovery reveals that the opposing party gave answers to interrogatories in another case, attempt to introduce them into evidence as admissions of a party opponent in the present case (see Evid C §1220), or use them for impeachment purposes (see Evid C §780).

**PRACTICE TIP:** These answers may be particularly helpful against a litigious opponent, *e.g.,* you may be able to show by previous answers to interrogatories that the plaintiff has claimed sizable damages for preexisting injuries that the plaintiff presently claims are insignificant.

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## 7. Using answers to impeach

### §12.115 a. Consider benefits

Using answers to interrogatories to contradict what the party has testified to at trial can be extremely effective as impeachment. Although the witness might be able to explain away conflicting deposition testimony by claiming confusion, it is extremely difficult to use that excuse with an answer to an interrogatory. Skillful cross-examining will bring out the fact that the witness had 30 days (or 5 days in an unlawful detainer action) to answer the interrogatory and that the answer to the interrogatory was prepared with the help of counsel.

**NOTE:** When answers to interrogatories are used to establish an inconsistency, they are not only a means of attacking credibility but are also a means of introducing substantive evidence on the matter stated. See Evid C §1235; CCP §2030.410.

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**§12.116 b. Review procedures**

The procedure for impeaching a witness with interrogatory responses is similar to that for impeaching a witness with deposition testimony. See generally §§12.63-12.66. The cross-examiner can first pin down the witness's trial testimony so that its inconsistency with the interrogatory answer can be more clearly seen by the trier of fact. See §12.115. The cross-examiner can then ask the witness foundational questions about the witness's response to the interrogatories, either before or after the witness has been impeached by the response.

A witness need not be shown the answers or be given any information about them before they are used to show the inconsistency. Evid C §§768-769.

After the witness has been committed to his or her testimony, the cross-examiner might proceed as follows:

Q: Now, sir, you were asked certain written questions concerning this lawsuit. Correct?

A: Yes.

Q: And you gave written responses to those questions. Is that correct?

A: Yes, I believe I did.

Q: And you made those responses under oath. Correct?

A: Yes, I did.

Q: And you stated under oath in those responses that you were going 25 miles an hour at the time of the accident. Is that correct?

A: Yes, I did.

A witness may claim not remembering giving written answers to interrogatories or signing a verification. The witness may even attempt to claim that the answer is incorrect. If the witness does not readily recall the response or claims that the answer was incorrect, the cross-examining attorney may need to show the interrogatories and responses to the witness.

The cross-examination of such a witness at trial might proceed as follows:

Q: Now, sir, you were asked certain written questions concerning this lawsuit, and you gave written responses to those questions. Is that correct?

A: I really don't remember.

Q: Well, sir, I will show you this document and ask you to read to yourself interrogatory number 7. Do you now recall being asked how fast you were going at the time of the accident?

A: I have a vague recollection of those questions being asked, yes.

Q: Sir, please read the response to interrogatory number 7. Do you remember giving the response that you were going 25 miles an hour?

A: [*No, I really don't remember giving that response/Yes, but that was an incorrect answer*].

Q: Well, sir, I direct you to the last page of the document I handed you and ask you to read the paragraph entitled Verification. Now, sir, that paragraph says that you swear under penalty of perjury that you read the interrogatories and responses and that the responses were true of your own personal knowledge. Is that correct?

A: Yes, it does say that.

Q: And that is your signature at the bottom of that paragraph. Is that correct?

A: Yes, it is.

Read the interrogatory and answer into the record at some appropriate point during cross-examination if, as in the above example, the witness responds "No, I really don't remember giving that response." (An appropriate time might be after the last answer in the example.)

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### §12.117 8. Using party witness who did not sign verification

Normally, there will be an opportunity to cross-examine the same party who verified the responses. When an entity is being sued, however, the entity may call an officer or agent to testify on its behalf without calling the officer or agent who signed the verification. The officer who is called as a witness may testify in a manner inconsistent with the interrogatory response and, when confronted with the response, disclaim any responsibility for it. In such a situation, the response can still be used in an attempt to impeach the party.

Counsel confronted with this situation might proceed in the following manner:

Q: Now, Mr. Klimesh, you testified that your company tested the widget in 2007. Is that correct?

A: Yes, it is.

Q: Mr. Klimesh, I would like to read your company's response to an interrogatory propounded by plaintiff on June 17, 2009. Interrogatory number 4 asks: "Please state the year that Middletown Engineering Company first began testing the widget." Answer: "2008." Is that correct?

A: Well, I don't know where you got that answer because I never saw that interrogatory, nor did I answer it.

Q: Well, sir, I will show you a document. [*Reads verification and signature out loud.*] Do you know a Mr. Clarke of your company?

A: Yes, I believe I do.

Q: What work did he do for your company during 2008?

A: He was the assistant manager of the engineering department.

Q: And is that the department in charge of testing widgets?

A: Yes, it is.

Q: And is one of the responsibilities of the assistant manager of the engineering department to know what products are being tested?

A: Yes, it is.

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### §12.118 9. Using client's answers

The reason why responses to interrogatories cannot be used on behalf of the answering party is that the responses are self-serving statements and there is no opportunity for cross-examination. See CCP §2030.410; *Estate of Horman* (1968) 265 CA2d 796, 805, 71 CR 780.

Even though responses to interrogatories are not authorized by statute, there may be some circumstances under which the answering party can use them. For example, the responses might be used to refresh the recollection of the answering party (see §§11.63-11.68) or to rehabilitate the party by showing a prior consistent statement (see §§12.67-12.68).

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### 10. Preserving the record

### §12.119 a. Handling objections

The admissibility of interrogatory responses at trial is subject to the same rules governing the admissibility of oral testimony. See CCP §2030.410. At trial, appropriate objections may be made to receiving into evidence all or part of a response as if the witness were present and testifying.

Objections at trial to the introduction of interrogatory responses are generally made in the same manner and on the same grounds as for oral testimony. Check local rules for any special requirements on the use of answers to interrogatories at trial.

**NOTE:** Counsel may not object to the use of an answer to an interrogatory on the ground that the responding party is available to testify, has testified, or will testify at the trial or other hearing. CCP §2030.410.

To preclude a witness from introducing evidence that goes beyond the scope of answers given to interrogatories, first object to the introduction of the evidence. Unless the court has issued a ruling on the evidence in an Evid C §402 hearing, objecting to the evidence should result in a ruling on the objectionable matter outside the presence of the jury:

> Proponent: Your Honor, I now wish to call as a witness Mrs. Edgar.
>
> Opponent: Your Honor, may we approach the bench?
>
> The Court: Yes.
>
> Opponent: [At sidebar] Your Honor, I believe this witness may testify on the issue of Mr. Rutland's injuries. If so, I object because in interrogatory answers this witness was not disclosed as having knowledge of Mr. Rutland's injuries. May we adjourn to chambers?

This example assumes that the objecting attorney knew the substance of the witness's proposed testimony. However, the proposing party may call a witness whose testimony is unknown to the objecting attorney. If the proposing counsel will not voluntarily reveal the nature of the witness's testimony, the objecting attorney can ask the court to determine the nature of the witness's testimony outside the presence of the jury to determine whether there is an objection to it.

**Further research:** On objections to evidence, see §§11.15-11.23. On grounds for objections generally, see California Trial Objections (Cal CEB Annual).

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### §12.120 b. When nonresponding party requests limiting instruction

Because responses to interrogatories are generally admissible against only the responding party (see §12.107), a nonresponding party usually will want to object whenever the opposing party attempts to introduce into evidence an interrogatory response against the nonresponding party.

**EXAMPLE:** In a multiparty lawsuit brought by *A* against *B* and *C*, *A* may wish to introduce *B*'s responses to *A*'s interrogatories. These responses cannot be used against *C,* however, who may want to object to their being introduced against *C*. At the time of objecting, *C* can ask the court for a limiting instruction that would inform the jury that the responses are admitted only as evidence against *B* and cannot be used against *C*.

Sometimes, however, the admission of the interrogatory response, even with the limiting instruction that the response is admissible against only *B,* can cause severe prejudice to *C*. *C* may ask the court to exclude the interrogatory response completely as too prejudicial under Evid C §352.

**Further research:** For further discussion of the limited admissibility of evidence and requesting a limited instruction, see §§15.61-15.64.

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### §12.121 c. Protecting record when response erroneously excluded

When an objection to the introduction of interrogatory responses into evidence is sustained, counsel can protect the record for appeal by:

- Requesting that the interrogatories and responses be marked for identification and specifying on the record by number the interrogatories and responses to be offered; or
- Reading the excluded portions into the record out of the jurors' presence.

Unless the purpose and relevance of the objection is apparent from the context, state the purpose and relevance on the record out of the jurors' presence.

**Further research:** On offers of proof generally, see §§15.50-15.60.

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## VI. USING REQUESTS FOR ADMISSION AT TRIAL

### §12.122 A. General requirements

A party may serve on another party written requests for admission, asking the party served to admit the "truth of specified matters of fact, opinion relating to fact, or application of law to fact" or that certain documents, copies of which are attached to the request (unless copies have already been furnished), are genuine. CCP §2033.010, CCP §2033.060(g), CCP §2033.070.

The party to whom the request for admission is directed must answer each request separately under oath in writing. CCP §2033.210(a). This means that an affirmative statement is required even when the matter is admitted or qualifiedly admitted. CCP §§2033.210(a), (b), 2033.220. An admission made by a party is binding only on that party and only for the pending action. CCP §2033.410.

**Further research:** See §12.138 for a checklist for introducing answers to interrogatories or requests for admission.

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### §12.123 1. When response not timely served

When a response is not timely served, the party requesting the admissions may then make a motion that the genuineness of any document or the truth of any matter on which a request for admission was sought be deemed admitted. CCP §2033.280(b). The court must order the matters deemed admitted unless the responding party serves a proposed response to the admissions that substantially complies with CCP §2033.220 before the hearing on the motion; monetary sanctions are mandatory. CCP §2033.280(c). On motions to compel a further response when the requesting party deems that an answer to a request is evasive or incomplete, or an objection to a request is without merit or too general, see CCP §2033.290.

Failure to serve a timely response waives any objection to the request for admission, including an objection based on privilege or protection of an attorney's work product. CCP §2033.280(a). This waiver may be removed if the party failing to serve a timely response subsequently serves an adequate response and moves the court to be relieved from the waiver. Under CCP §2033.280(a), the court may grant such relief if it finds that:

- The subsequently served response is in substantial compliance with CCP §§2033.210-2033.230; and
- The party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

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### §12.124 2. Withdrawal or amendment of admissions

A party may not withdraw or amend an admission unless the court grants leave to do so after notice to all parties. CCP §2033.300(a). The motion may be made even after the matters are deemed admitted by court order, and even if no timely response has previously been made. *Wilcox v Birtwhistle* (1999) 21 C4th 973, 90 CR2d 260. Under CCP §2033.300(b), the court may grant the motion only if it determines that

> the admission was the result of mistake, inadvertence, or excusable neglect, and that the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits.

**EXAMPLE:** In *Elston v City of Turlock* (1985) 38 C3d 227, 211 CR 416 (decided under former CCP §2033), excusable neglect was established under CCP §473 when plaintiffs' counsel contended that his office was understaffed and that he was unaware of the existence of the misplaced papers until the answers were overdue. The defendants did not allege prejudice due to the delay in receiving the responses or that setting aside admission would prejudice their case.

The trial court may impose conditions when granting the motion to withdraw or amend an admission. See CCP §2033.300(c); *New Albertsons, Inc. v Superior Court* (2009) 168 CA4th 1403, 1421, 86 CR3d 457 (error to deny motion to withdraw admission when it was result of mistake, did not prejudice opposing party, and court had authority to impose conditions).

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### §12.125 3. Requests not filed with court

Requests for admission and responses to them are not to be filed with the court. CCP §2033.270(a). Both the original requests for admission with its proof of service and the original responses are to be retained by the requesting party until 6 months after final disposition of the action, at which time they may be destroyed. On a motion by any party, however, the court may order on a showing of good cause that the 6-month period for preserving the originals be extended. CCP §2033.270(b).

**Further research:** On procedure, time limitations, rules, and motions for requests for admission and responses, see CCP §§2033.010-2033.740; California Civil Discovery Practice, chap 9 (4th ed Cal CEB 2006); Obtaining Discovery: Initiating and Responding to Discovery Procedures (Cal CEB Action Guide March 2007). For forms concerning requests for admission, see California Civil Litigation Forms Manual, chap 30 (Cal CEB 1980).

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### B. Using requests for admission at trial

### §12.126 1. How used

Although CCP §2033.270(a) does not provide for the filing of requests for admission or their responses as a prerequisite to their use at trial, check local rules or policies for their requirements.

Requests for admission that have been admitted can be read into the record at an appropriate time during the trial. Consider requesting that the judge explain requests for admission to the jury and the legal effect of their being admitted.

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### §12.127 2. Admission conclusively establishes admitted matter

A request for admission that is expressly admitted conclusively establishes the admitted matter against the responding party in the pending action (unless the court has permitted withdrawal or amendment of that admission under CCP §2033.300(a)), thereby making other evidence on that point irrelevant. CCP §2033.410.

**Further research:** See generally California Civil Discovery Practice, chap 9 (4th ed Cal CEB 2006). When the genuineness of a document has been admitted, however, objections to the admission of the document into evidence may still be made on hearsay or other grounds.

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### §12.128 3. Admission may preclude introduction of contrary evidence

A party's admission of fact might be referred to as a basis for precluding that party from introducing evidence contrary to the admitted fact. See CCP §2033.410 (admitted matter conclusively established). A motion to preclude might be made in chambers before the evidence is offered, or an objection might be made when the evidence is offered.

**Further research:** See also California Civil Discovery Practice §9.86 (4th ed Cal CEB 2006). On motions in limine before trial, see chap 7. On when to object and protect the record when the evidence is offered, see chap 15.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/12 Effective Use of Discovery/§12.129 4. Admission may not be used in other actions

### §12.129 4. Admission may not be used in other actions

An admission made pursuant to a request for admission is for the purpose of the pending action only and may not be used against the party in any other action. CCP §2033.410. Thus, an admission by a party in one case cannot be used against the party in a related action even if the two actions are joined in one trial.

**EXAMPLE:** In *Shepard & Morgan v Lee & Daniel, Inc.* (1982) 31 C3d 256, 182 CR 351 (decided under former CCP §2033(c)), admission by a general contractor in plaintiff's personal injury action could not be used against the contractor to preclude the contractor from seeking indemnity in a cross-complaint from his subcontractor.

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### §12.130 5. Court may limit scope of use

Although an admission is usually dispositive, in an appropriate case, *e.g.,* when an admission is susceptible of different meanings, a trial court has discretion to limit the scope and effect of an admission and how it is applied. *Fredericks v Kantos Indus.* (1987) 189 CA3d 272, 276, 234 CR 395.

After the matter is admitted, the trial court must determine the scope and effect of the admission; the trial court has broad discretion in determining the admissibility and relevance of the evidence. *Milton v Montgomery Ward* & *Co*., *supra*. A repudiated admission may be used for impeachment in the same manner as a changed response to an interrogatory or a deposition question. See *Jahn v Brickey* (1985) 168 CA3d 399, 405, 214 CR 119.

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### §12.131 C. Recovering expenses for requests

Requests for admission that have been denied are of little use at trial. If at trial the truth of the fact or the genuineness of documents that the responding party denied in the request is proved, the party requesting the admission may move the court for an order requiring the party to whom the request was made to pay the reasonable expenses, including attorney fees, incurred in making such proof. See CCP §2033.420(a).

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### §12.132 1. When court may not award expenses

The court must order payment of expenses unless it finds one of the following (CCP §2033.420(b)):

- An objection was sustained to the request, or a response to the request was waived under CCP §2033.290;
- The party failing to make the admission had reasonable ground to believe that party would prevail on the matter;
- The admission sought was of no substantial importance; or
- Some other good reason existed for the failure to admit.

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### §12.133 2. Timing of motion

The establishment of the proof of the denied fact is a prerequisite to making the motion to recover expenses. This means that the motion must be made in most cases after the proof, *i.e.,* after the trial. *Hillman v Stults* (1968) 263 CA2d 848, 884, 70 CR 295 (construing former CCP §2034(c) in effect at that time).

Neither statutory nor case law establishes limits on how long after trial a "cost of proof" motion may be brought and heard. Prudent practice dictates bringing the motion as soon after trial as possible, while the facts are still fresh in the court's mind.

**PRACTICE TIP:** It is advisable to serve and file the motion before or at the same as serving and filing a memorandum of costs. For time limits on serving and filing a memorandum of costs, see Cal Rules of Ct 3.1700, discussed in chap 27.

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### §12.134 3. Procedure for making motion

Although CCP §2033.420(a) is silent on the procedure for making a "cost of proof" motion, the procedural requirements for such a motion may be governed by CCP §§2023.010-2023.040, which describes the rules for discovery abuse sanction motions. A court would probably consider a failure to admit a fact or the genuineness of a document, without a reasonable basis, to be an "evasive response" to discovery, sanctionable as a misuse of the discovery process under CCP §2023.010. See *Sherman v Kinetic Concepts, Inc.* (1998) 67 CA4th 1152, 1162, 79 CR2d 641 (intentional concealment of material information gives rise on postverdict motion to sanctions, including attorney fees of first trial).

A motion for sanctions must be accompanied by a notice of motion, a supporting memorandum, and a declaration setting forth the facts supporting the amount of monetary sanction sought. CCP §2023.040. The court must provide the responding party with an opportunity for a hearing before sanctions may be imposed. CCP §2023.030. Note that the court must impose monetary sanctions if authorized by any provision in CCP §§2016.010-2036.050 unless it finds that the one subject to the sanction acted with "substantial justification" or that other circumstances make the imposition of sanctions unjust.

**NOTE:** Although CCP §2023.040 continues to refer to "points and authorities," the newly reorganized and renumbered rules of court have replaced that term with "memorandum in support of motion" or simply "memorandum." See, *e.g.*, Cal Rules of Ct 3.1113. For consistency, this text uses the term "memorandum" in place of the term "points and authorities."

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## VII. CHECKLISTS AND SAMPLE FORMS

### §12.135 A. Checklist: Using deposition testimony

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___ 1. **Ascertain whether original transcript is available.** Verify that original transcript is available, to be lodged or filed with court by reporter or custodial attorney when needed and that review, correction, and signing procedures have been completed. CCP §§2025.520-2025.560.

___ 2. **Check local rules.** Satisfy any local court rule or order requiring pretrial disclosure of portions of deposition transcripts to be used.

___ 3. **Review statutory requirements.** It is important to comply with statutory requirements for using a deposition, particularly if the witness is not available at trial. If you do not satisfy these requirements, you risk being unable to use critical deposition testimony at trial.

___ 4. **Verify availability of witnesses.** Comply with the requirement that you exercise pretrial diligence to secure attendance at trial of unavailable witnesses so that depositions can be read. Evid C §§240, 1290-1292; CCP §2025.620(c)(2)(E).

___ 5. **Prepare to prove diligence.** Be prepared to prove by admissible evidence that you have exercised appropriate diligence. Merely stating "as an officer of the court" that you have been diligent in trying to secure an unavailable witness does not make an adequate record and will be rejected by most judges.

___ 6. **Lodge transcript.** Before or when the witness first takes the stand, lodge with court the original deposition transcript with appropriate certification by the court reporter.

___ 7. **Identify transcript.** Before you begin reading prior testimony, briefly identify the transcript for the record and jury.

___ 8. **Ask foundational questions.** Although often unnecessary, consider using foundational testimony to impress the jury with the importance of a prior inconsistency, *e.g.,* that the witness remembers the deposition and knew that he or she was answering under oath.

**NOTE:** Developing foundational questions is extremely useful in underlining the importance of the testimony to be read. Most jurors have never had a deposition taken and do not understand the circumstances under which the testimony was given, *i.e.,* that the witness was under oath and that the deponent was probably represented at the deposition by counsel.

___ 9. **Ask permission to read transcript.** Request permission to read from the transcript (decide whether you should read it yourself, rather than asking the witness to read it).

___ 10. **Ask court to instruct jury.** Consider requesting the court to instruct the jury on the nature and importance of deposition testimony.

___ 11. **Designate portions of transcript.** Announce the portions that you intend to read by inclusive page and line numbers. For sample designation, see §12.139.

**NOTE:** If the testimony is lengthy, ask the court for permission to have someone play the role of the witness when reading the transcript.

___ 12. **Allow time for review.** Pause long enough for the court and opposing counsel to review designated portions for possible objections.

___ 13. **Anticipate objections.** If opposing counsel has any objection to any specific portion, expect it to be made and resolved before that portion of the transcript is read.

___ 14. **Read transcript.** Read the designated portion carefully into the record, prefacing each question with the word "Question" and each answer with the word "Answer."

___ 15. **Do not ask witness to explain.** After you finish reading the designated portion of the transcript, you need not ask the witness to explain discrepancies, to comment on the testimony, or whether his or her recollection has been refreshed.

___ 16. **Do not offer transcript into evidence.** It is generally unnecessary to offer deposition transcript into evidence, and the court will usually reject such an offer.

___ 17. **Refer to deposition during closing argument.** You can read or display previously read deposition testimony during closing argument. *People v Coontz* (1953) 119 CA2d 276, 282, 259 P2d 694.

**NOTE:** Be aware that jurors are not allowed to take deposition transcripts into deliberations. CCP §612.

**Further research:** Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008); Handling Depositions (Cal CEB Action Guide February 2007).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/12 Effective Use of Discovery/§12.136 B. Checklist: Special considerations if deposition is audio or video recorded

## §12.136 B. Checklist: Special considerations if deposition is audio or video recorded

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___ 1. **Notify court and other parties of intent.** If you plan to use audio or video deposition, satisfy the disclosure requirements (see CCP §2025.340(m)). If you intend to introduce all or part of the deposition testimony at trial, notify the court and all parties in writing in "sufficient" time for (CCP §2025.340(m)):

___ a. The trial judge to hear and rule on the written objections of opposing parties; and

___ b. Any editing of the recording.

___ 2. **Ascertain whether all objections have been responded to.** It is advisable to respond to objections in writing, although the Code of Civil Procedure does not discuss the form of response. See CCP §2025.340(m).

___ 3. **Consider possible responses by court.** The court can (CCP §2025.340(m)):

___ a. Rule on objections;

___ b. Allow parties to designate additional testimony to be offered; and

___ c. Allow further objections that the court decides are required in the interests of justice.

___ 4. **If only part of deposition is used.** If you or another party designate only a portion of the recorded testimony for use at trial, the court may order you (or the other party also designating a portion) to:

___ a. Suppress the nondesignated portions; or

___ b. Prepare an edited version of the recording.

**NOTE:** Expect the trial judge to ask you and other counsel to agree to edit the video recording to include only admissible material. Do not expect the judge to play the video and decide which portions to edit.

___ 5. **Preserve original recording.** If the court orders the suppression or editing of a portion of the recording, make sure that the original is preserved unaltered. CCP §2025.340(m).

___ 6. **Prepare stenographic record.** If the recorded deposition was not also stenographically recorded (CCP §2025.340(m)):

___ a. Have the court reporter prepare a stenographic transcript from the audio or video recording;

___ b. Offer the transcript into evidence at trial when recorded testimony is offered.

**Further research:** Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008); Handling Depositions (Cal CEB Action Guide February 2007).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/12 Effective Use of Discovery/§12.137 C. Sample questions and answers: Impeaching with deposition testimony

### §12.137 C. Sample questions and answers: Impeaching with deposition testimony

After asking preliminary questions, counsel may ask the following sample setup questions:

Q: Now, at the time that you made the decision to ride the horse, you knew that you were not a particularly good rider. Correct?

A: Yes.

Q: In fact, you had only been on a horse twice in your entire life before this incident. Correct?

A: Yes.

Q: And the last time you were on a horse before this incident was about 25 years ago, right after you got out of high school. Correct?

A: That's true.

Q: When you got out to the ranch, you were sufficiently concerned about having to ride a horse that you were actually scared, weren't you?

A: I wouldn't say that.

Q: Weren't you scared when you went out to the ranch to ride the horse, Mr. Gray?

A: No.

After reaching for the deposition transcript, counsel can ask the following sample foundational questions:

Q: You recall that your deposition was taken in this matter, don't you?

A: Yes.

Q: That deposition was taken at my offices in San Francisco, right?

A: Yes.

Q: And you came to the deposition with your attorney, Mr. Lee.

A: Yes.

Q: And you understood at that deposition that your testimony there was being given under oath, just as it is here in this courtroom today?

A: Yes.

Q: And after the deposition was taken, you received a letter telling you that it was available for you to read and correct, didn't you?

A: Yes.

Q: And you didn't make any corrections to the transcript, did you?

A: No.

Counsel may then read the following deposition testimony:

Counsel: At this time, your Honor, I would like to read to the jury from Mr. Gray's deposition testimony in this case. I'm referring to the deposition given on April 18, 2005, page 47, lines 10-15.

Counsel pauses. "Question: What was your state of mind as you approached the horse that day? Answer: I was scared."

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/12 Effective Use of Discovery/§12.138 D. Checklist: Introducing answers to interrogatories or requests for admission

## §12.138 D. Checklist: Introducing answers to interrogatories or requests for admission

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___ 1. **Determine whether originals are available.** Confirm that original interrogatories and requests for admission, with corresponding answers and responses, are verified and available for use at trial. CCP §§2030.010-2030.410, CCP §§2033.210-2033.420, CCP §2033.710.

___ 2. **Check local rules for prior disclosure requirement.** Satisfy any local court rule or order requiring prior disclosure of interrogatories or admissions to be used at trial. See, *e.g.*, Los Angeles Ct R 8.70.

___ 3. **Check local rules for format requirements.** If reading multiple interrogatories or requests for admission, you may be required by local rules, orders, or practice to prepare in advance cut-and-paste extracts of the pertinent portions for ease of reading. See, *e.g.*, Los Angeles Ct R 8.70.

___ 4. **Lodge with court.** Lodge interrogatories, requests, and corresponding responses with the court.

**NOTE:** Increasingly, courts are requiring counsel to perform this task before trial begins. For discussion of interrogatories, see §§12.98-12.121; requests for admission, see §§12.122-12.134.

___ 5. **Ask court.** Notify the court of your intent to read portions. Consider requesting a jury instruction on the nature and importance of interrogatory answers or admissions.

___ 6. **Designate portions.** Designate portions to be read by set, interrogatory/admission number, page, and lines.

___ 7. **Wait for review and objections.** Pause to give the court and opposing counsel an opportunity to review designated portions for objections.

___ 8. **Read transcript.** Read designated portions slowly and with emphasis: first read the request, and then (after a pause) the corresponding response.

___ 9. **Formally introduce transcript into evidence.** Many counsel mistakenly believe that responses to discovery requests, such as interrogatories, are automatically in evidence after they are lodged with the court. They cannot be read to the jury, argued during summation, or relied on as supporting evidence unless they are formally introduced into evidence following the procedures outlined above.

**Further research:** Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008); Effective Introduction of Evidence in California, chaps 19, 28, 41 (2d ed Cal CEB 2000).

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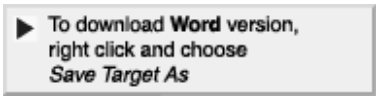
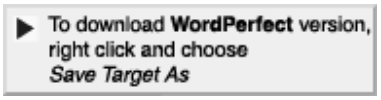
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/12 Effective Use of Discovery/§12.139 E. Sample form: Designation of deposition

## §12.139 E. Sample form: Designation of deposition




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DEFENDANT(S)'S** |
| **vs** | ) | **DESIGNATION OF PORTIONS** |
| _ _[*Name(s)*]_ _ | ) | **OF DEPOSITION** |
| **Defendant(s)** | ) | |
| | ) | |

**DEPONENT: JOHN JONES**

**Vol. I (Sept. 12, 2009)**

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**2:17 thru 2:25**

**3:5 thru 5:15**

**26:9 thru 29:4**

**Vol. II (Sept. 13, 2009)**

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**DEPONENT: SALLY JONES**

**Vol. I (Nov. 14, 2009)**

**1:10 thru 12:12**

**15:1 thru 17:10**

**20:5 thru 25:25**

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

__[*Typed name of attorney*]__
_ _[*Firm name*]_ _
**Attorney for defendant**
_ _[*Name of defendant*]_ _

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# 13

# Trial Exhibits

**Donald F. Miles**
**Peter J. Busch**

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.1 I. SCOPE OF CHAPTER

## §13.1 I. SCOPE OF CHAPTER

Counsel approaching trial must be aware of the many substantive, procedural, and practical aspects of handling evidence at trial. This chapter:

- Provides a pretrial preparation checklist to help determine what exhibits are needed, how to organize them, and how to comply with local pretrial rules regarding exchanging and premarking exhibits and stipulating to admissibility (see §13.14);
- Identifies the procedural guidelines for offering exhibits into evidence and a step-by-step guide to follow in satisfying these guidelines (see §§13.45-13.63);
- Highlights substantive rules for laying a proper foundation for documentary (see §§13.65-13.84), demonstrative (see §§13.85-13.111), and real evidence (see §§13.112-13.113);
- Provides sample questions and answers for use at trial (see §§13.69, 13.92, 13.98);
- Outlines the objections available to the attorney opposing the introduction of such evidence (see §§13.114-13.132) and how to meet such objections (see §§13.133-13.138);
- Provides sample forms (see §§13.140-13.142); and
- Provides a bibliography (see §13.143).

The use of documentary, demonstrative, and real evidence during trial has expanded over the past few decades. Recognizing that jurors often become bored listening to hours of uninterrupted oral testimony and that they are more likely to remember something that has been both seen and heard, skillful attorneys try to involve jurors' senses as much as possible in presenting their cases. Oral testimony of witnesses can be confusing, is subject to contradiction, and can quickly fade from jurors' minds. Physical evidence is less subject to interpretation and usually may be taken into the jury room to refresh jurors' recollection.

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## II. DEFINITIONS

### §13.2 A. Documentary evidence

California law does not clearly distinguish between documentary, demonstrative, and real evidence; the terms are not defined in the Evidence Code.

"Documentary evidence" is used in this chapter to refer to "writings," as defined in Evid C §250:

> handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

"Writing" is thus defined to include all forms of tangible expressions, including audio and video recordings, and motion pictures. See Comment to Evid C §250; *People v Rich* (1988) 45 C3d 1036, 1086 n12, 248 CR 510 (video recordings); *People v Kirk* (1974) 43 CA3d 921, 928, 117 CR 345 (audio recordings); *People v Enskat* (1971) 20 CA3d Supp 1, 3, 98 CR 646 (motion picture).

Documentary evidence is usually, though not necessarily, created during the events giving rise to the dispute. Common examples of documentary evidence are letters, memorandums, and manuals. Documentary evidence can usually be taken into the jury room while the jurors deliberate. For categories of papers and exhibits that may be taken into the jury room, see CCP §612, discussed in §§13.65-13.84.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.3 B. Demonstrative evidence

## §13.3 B. Demonstrative evidence

"Demonstrative evidence" is used in this chapter to refer to material objects or other things that are presented to aid the factfinder in understanding the testimony of trial witnesses. It is evidence offered to explain, illustrate, demonstrate, or reconstruct principles, facts, or events.

Demonstrative evidence is typically, though not always, created or assembled as a result of the legal proceeding itself rather than during the course of the events giving rise to the litigation. Examples of such evidence include photographs, models, charts, courtroom demonstrations, and computer simulations. See Effective Introduction of Evidence in California, chap 39 (2d ed Cal CEB 2000). See also 21 McCormick on Evidence §§212-220 (6th ed 2006). This type of evidence is admissible in the court's discretion (see Evid C §352; Fed R Evid 403) for its probative value in aiding the trier of fact. See §§13.65-13.84 on the admissibility of demonstrative evidence.

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## §13.4 C. Real evidence

A term sometimes used by attorneys, "real evidence" is not defined in the Evidence Code. The term is generally used to refer to tangible items of physical evidence that played a direct role in the disputed events or whose condition or appearance is directly at issue, *e.g.,* the damaged fender of an automobile involved in a collision, the defective electric blanket that caught fire and burned the plaintiff, the gun used in a murder.

The difference between real evidence and demonstrative evidence lies in the purpose for which it is offered. Real evidence is typically a material object (Evid C §140) that is itself at issue (*e.g.,* a murder weapon); demonstrative evidence is a material object or tangible thing offered to illustrate or explain testimony. See §13.3. See also Jefferson's California Evidence Benchbook, chap 21 (4th ed CJA-CEB 2009).

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## §13.5 D. Exhibits

Exhibits are items of physical evidence that are marked for identification during trial and logged in the court clerk's record. An exhibit may be demonstrative, documentary, or real evidence. To be an exhibit, the item need not be formally admitted into evidence. Formal receipt is usually required, however, before the item may be argued by counsel as evidence or be relied on by the trier of fact. For purposes of this discussion, "exhibit" also includes items of physical evidence not yet marked for identification, which counsel intends to use during trial.

On effect of marking an exhibit for identification, see §§13.45-13.49. See §13.94 on how to mark a video recording and a computer disk.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.6 E. Evidence

## §13.6 E. Evidence

"Evidence" is defined by Evid C §140 as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." As noted in Comment to Evid C §140.

> "Evidence" is defined broadly to include the testimony of witnesses, tangible objects, sights (such as a jury view or the appearance of a person exhibited to a jury), sounds (such as the sound of a voice demonstrated for a jury), and any other thing that may be presented as a basis of proof. The definition includes anything offered in evidence whether or not it is technically inadmissible and whether or not it is received.

Some evidence may be received silently by the factfinder (*e.g.,* a jury's view of an accident scene), with no formal record of it made in either the court reporter's transcript or the clerk's record, although the evidence may be argued by counsel and considered by the factfinder in determining the trial outcome. See generally *Downey v Santa Fe Transp. Co.* (1955) 134 CA2d 720, 725, 286 P2d 40 (jury view). On jury views, see §§13.110-13.111. On photographing or videotaping such evidence and marking it for identification to protect the record on appeal, see §§13.76-13.77, 13.118.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.7 F. Proffered evidence

## §13.7 F. Proffered evidence

"Proffered evidence" is evidence that the proponent wishes to have admitted and the admissibility or inadmissibility of which depends on the existence or nonexistence of a preliminary fact. Evid C §401. Proffered evidence may include testimony from a witness who is claimed to be disqualified, testimony or tangible evidence that is claimed to be privileged, and any other evidence to which objection is made. Comment to Evid C §401. See also Evid C §403(a).

If the existence of the preliminary fact is disputed, proffered evidence is generally admitted into evidence only after the court has held a hearing under Evid C §§400-406 to determine the preliminary fact issues (*e.g.,* whether the witness is disqualified, whether the evidence is privileged). Only after the preliminary fact issues have been heard and resolved by the court will the evidence be admitted, assuming that the court finds in favor of the proponent of the evidence. On preliminary fact-finding process generally, see §§7.25-7.36.

The court does have discretion under Evid C §403(c), however, to admit the proffered evidence subject to a motion to strike and to let the jury decide whether the preliminary fact exists. This alternative occurs most often in a court trial. However, if it occurs in a jury trial and the jurors determine that the preliminary fact does not exist, they are instructed to disregard the proffered evidence.

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## III. WAYS TO USE DOCUMENTARY, DEMONSTRATIVE, AND REAL EVIDENCE DURING TRIAL

### §13.8 A. As substantive evidence

The principal use of documentary, demonstrative, and real evidence at trial is as "substantive" evidence, *i.e.,* evidence tending to prove or disprove one of the factual contentions of the case. Once it is properly admitted, substantive evidence may be relied on by the factfinder in reaching its conclusion. For example, the following evidence has been held to be substantive evidence supporting a verdict:

- Photographs used to illustrate testimony and as probative evidence of what the photographs depict. *People v Bowley* (1963) 59 C2d 855, 860, 31 CR 471. See §§13.91-13.93.
- The jury's view of a scene. *Hogue v Southern Pac. Co.* (1969) 1 C3d 253, 258, 81 CR 765; *Downey v Santa Fe Transp. Co.* (1955) 134 CA2d 720, 725, 286 P2d 40. See §§13.110-13.111.
- A courtroom demonstration by a witness of how the defendant pointed a gun. *People v Buttles* (1990) 223 CA3d 1631, 1639, 273 CR 397. See §§13.39-13.41.

See Effective Introduction of Evidence in California, chap 39 (2d ed Cal CEB 2000) on how to introduce particular types of demonstrative and documentary evidence. See also California Expert Witness Guide §§9.15-9.23 (2d ed Cal CEB 1991) on how to use demonstrative evidence with experts at trial.

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## §13.9 B. To refresh recollection

Documentary, demonstrative, and real evidence can be used to refresh a witness's memory that has dimmed over time. Showing a witness an old letter or picture often causes forgotten events to be immediately recalled. The item need not be admissible or admitted to be used for this purpose. Counsel may refresh a witness's memory both before and during trial.

On how to use writings to refresh a witness's recollection and their effect under Evid C §771 generally, see §§9.37, 13.34, 13.124. See also Effective Introduction of Evidence in California, chap 44 (2d ed Cal CEB 2000).

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### §13.10 C. As past recollection recorded

If a witness is unable to recall certain events at trial that the witness previously remembered, a writing recounting the events can be read into evidence as past recollection recorded under Evid C §1237. The witness need not have been the author of the writing.

Past recollection recorded is an exception to the hearsay rule. See Comment to Evid C §1237. See also §§11.69-11.71 on the rules governing past recollection recorded and the procedures for introducing the writing into evidence. For a sample foundation for past recollection recorded, see Effective Introduction of Evidence in California, chap 38 (2d ed Cal CEB 2000); Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial), step 31 (Cal CEB Action Guide April 2008).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.11 D. To impeach

### §13.11 D. To impeach

The use of documentary evidence can play an important role in attacking the credibility of a witness. See Evid C §785. For example, a witness may be impeached during cross-examination through the use of documentary evidence containing:

- A prior inconsistent statement (see Evid C §§780(h), 1202, 1235);
- An admission (see Evid C §§780(k), 1220-1227); or
- A judgment of a felony conviction (see Evid C §§788, 1300).

Documentary evidence from scientific, technical, or professional publications can also be used to cross-examine and impeach an expert witness as long as the testifying expert referred to, considered, or relied on the publication in reaching an opinion; the publication has otherwise already been admitted into evidence; or the publication has been established as a reliable authority. Evid C §721(b). See *Luque v McLean* (1972) 8 C3d 136, 147, 104 CR 443 (cross-examination properly refused because expert did not refer to publication); *McGarity v Department of Transp.* (1992) 8 CA4th 677, 685, 10 CR2d 344 (crash-test report properly excluded and cross-examination of department's expert limited). See §11.51 for a sample question and answer demonstrating how to use a scientific text to impeach an expert.

On cross-examination generally, see §§11.82-11.124. On use of discovery materials for impeachment purposes, see §12.39.

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## §13.12 E. To rehabilitate

Rehabilitation is the presentation of evidence that bolsters the credibility of a witness whose testimony has been attacked. Documentary and demonstrative evidence can be used effectively to rehabilitate a witness because such evidence usually makes a strong impact on a jury.

Evidence Code §791 sets out the conditions under which a witness's prior consistent statement may be used to rehabilitate. A witness's prior consistent statement offered in compliance with Evid C §791 constitutes substantive evidence. Evid C §1236. On rehabilitation of witnesses, see §11.26.

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### §13.13 F. As aid for judicial notice

Documentary evidence is often used to aid the court in taking judicial notice of a matter. A party requesting judicial notice under Evid C §452 is required under Evid C §453(b) to give the court sufficient information to enable it to take judicial notice of the matter. Often this information is documentary evidence. See *People v Maxwell* (1978) 78 CA3d 124, 144 CR 95 (request for judicial notice denied because party failed to furnish court with transcripts needed to take judicial notice of court records). See also Comment to Evid C §453.

The court is required to take judicial notice of certain matters even if it is not requested to do so. Evid C §451. On other matters over which the court has discretion to take judicial notice, see Evid C §452. The rules and procedures pertaining to judicial notice are discussed in detail in chap 14.

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## IV. PRETRIAL PREPARATION OF EXHIBITS

### §13.14 A. Checklist: Pretrial preparation

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___ 1. Decide what exhibits are needed. See §13.15.

___ 2. Identify sources for exhibits. See §§13.16-13.20.

___ 3. Ascertain whether particular exhibits are admissible and in what ways. See §§13.21-13.27.

___ 4. Decide when exhibits should be used. See §§13.29-13.32.

___ 5. Organize exhibits. See §13.28.

___ 6. Prepare witnesses to use exhibits. See §§13.33-13.34.

___ 7. Comply with local mandatory pretrial procedures. See §§13.35-13.38.

___ 8. Make special preparations for in-court demonstrations and experiments. See §§13.39-13.41.

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## §13.15 B. Determining need for exhibits

One of the first steps in preparing for trial is to identify needed exhibits. From the time counsel first takes a case, counsel should be alert to any helpful documentary and real evidence and the need for specially created demonstrative evidence. Evaluate each step of the trial process, including opening statement, direct and cross-examinations of witnesses, closing argument, and appeal. Some evidence (*e.g.,* photographs of injuries or the scene) may be available only if collected at the outset.

Confer with clients, favorable lay witnesses, and expert witnesses in assessing the need for particular exhibits. Consultants specializing in the preparation of demonstrative evidence may also be a valuable source of assistance. Determine whether personal computers and information management software might be useful in preparing exhibits or computer simulations for trial. See §§13.107-13.108.

**CAUTION:** Don't prepare your case with too many visual aids. Overusing demonstrative and documentary evidence may suggest that you are trying to dazzle the jury with gimmicks. The cost of preparing and presenting extensive documentary and demonstrative evidence can also be prohibitive.

**PRACTICE TIP:** See Bernstein, *The Correct Way To Present Exhibits*, 19 CEB Civ Litigation Rep 14 (Feb. 1997), noting that "[t]he law loves the word, but people love pictures" and identifying three common mistakes lawyers make with respect to exhibits: (1) illustrating facts—and usually too many facts—instead of telling the trial story; (2) designing self-explanatory visuals that render the witnesses and lawyer irrelevant; and (3) anticipating the punch line by making the point and then showing it.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.16 C. Identifying sources of exhibits

## §13.16 C. Identifying sources of exhibits

Demonstrative and documentary evidence may come from a variety of different sources. The evidence may have been:

- In existence before the disputed occurrence;
- Created by the occurrence itself;
- Generated by the pleadings;
- Disclosed during pretrial discovery;
- Developed during informal investigation; or
- Prepared especially for the litigation.

Consider all these sources of evidence and keep careful track of the source of each piece of evidence.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.17 1. Formal discovery

## §13.17 1. Formal discovery

The largest source of documentary and demonstrative evidence is the material generated during formal discovery, including interrogatories, depositions, requests for production of documents, requests for physical examinations, requests for rights to inspect premises, broad-based powers of subpoena, and requests for admission. On discovery tools generally, see CCP §§2016.010-2036.050.

**PRACTICE TIP:** Make sure all discovery responses you plan to use at trial have been received from the opposing counsel and verified by the client. When verifications are forgotten and supplied later, they can easily be misfiled.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.18 2. Informal discovery and investigation

## §13.18 2. Informal discovery and investigation

Informal discovery and investigation includes all means of gathering information without invoking formal discovery vehicles. It may include:

- Obtaining information from the client;
- Hiring an investigator to talk with nonparty witnesses and obtain physical evidence; and
- Investigation by the attorney and the attorney's in-house assistants.

**PRACTICE TIP:** Avoid being placed in the position of becoming a witness on the client's behalf. See §13.76.

Informal discovery allows counsel to learn facts relevant to the case without having them simultaneously disclosed to the opposing counsel. It also is often less expensive than formal discovery.

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### 3. Custom-made exhibits

### §13.19 a. Checklist: Need for custom-made exhibit

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In determining whether to have custom-made exhibits prepared and how to prepare them, consider the following practical considerations:

___ 1. **What is the purpose of the exhibit?** The intended use of an exhibit dictates how it should be prepared. For example, if the map's only purpose is to provide the jury with a rough view of a particular geographic setting, a scale presentation may be a substantial waste of time and money. The best exhibit is usually the simplest design that satisfies its intended purpose. For discussion of exhibits prepared to scale, see §13.100.

___ 2. **How will the exhibit be entered into evidence?** Prepare the exhibit with its foundational requirements in mind (*e.g.,* identify witnesses who will be used to lay a foundation, if necessary, and consider having one or more assist in preparing the exhibit). This strategy will ensure the witnesses' ability to vouch for its accuracy. On foundational rules for demonstrative evidence, see §§13.85-13.111.

___ 3. **Is the exhibit economically justified?** Because expensive custom-made exhibits can be excluded at trial, consider alternative ways of illustrating critical testimony (*e.g.,* use enlarged photographs or documents or the opposing counsel's exhibits, if they have been disclosed).

___ 4. **Can opposing counsel use the exhibit against your client?** If so, redesign or discard the exhibit.

**PRACTICE TIP:** If witnesses might be asked to mark on an exhibit that is prepared to scale, consider having transparent overlays prepared to scale so that the witnesses need not mark on the original exhibit. Each witness should mark on the transparency with a different color marker to highlight the differences in testimony. Consider having cutouts or stickers prepared to scale for the witnesses to place on the exhibit. If this technique is used during trial, however, ask the witnesses to trace around the cutouts or stickers to preserve the record in case a cutout or sticker falls off.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.20 b. Common examples

### §13.20 b. Common examples

It has become common practice to create exhibits specifically for the purpose of trial. The most commonly used custom made exhibits are:

- Charts (see §13.100);
- Maps (see §13.100);
- Models (see §13.100);
- Graphs or diagrams of important facts (see §13.100);
- Photographs or video recordings of scenes, exhibits, or people (see §§13.91-13.98);
- Actual demonstrations conducted in the courtroom (see §§13.39-13.41); and
- Demonstrations simulated by a computer (see §13.108).

These exhibits are needed because of the difficulties in explaining or showing certain facts or principles to the jury. Such difficulties may arise from the factfinder's inability:

- To understand complex data;
- To correlate different facts and organize key events chronologically;
- To "view" the scene of an accident or view an object with the naked eye; or
- To bring a bulky piece of real evidence into the courtroom.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.21 D. Determining how evidence can be admitted

## §13.21 D. Determining how evidence can be admitted

Well before trial, consider the various means by which you can lay a proper foundation for admissibility of all exhibits helpful to your client's case. In determining the admissibility of any item of documentary, demonstrative or real evidence, check the following:

- The item's relevance to the facts of the case (see §§13.22, 13.85);
- The item's authentication or foundation (see §§13.65-13.84, 13.85-13.111);
- Whether foundational evidence is needed (*e.g.,* it may not be needed if the adverse party has admitted the authenticity of a document through a request for admission, or opposing counsel has stipulated to admissibility; see §§13.66-13.84, 13.86);
- Whether the item complies with the secondary evidence rule (see §13.122);
- Whether the evidence is inadmissible hearsay (see §13.119);
- Whether the evidence is subject to exclusion under Evid C §352 (*i.e.,* it is unduly prejudicial, misleading, or time-consuming; see §13.117) or other statutes; and
- Which witness will introduce each exhibit (see §§13.33-13.34).

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## §13.22 1. Relevance

Relevant evidence is evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evid C §210. It includes evidence bearing on the credibility of a witness or hearsay declarant. Evid C §210.

Evidence may be relevant even though it is created solely for purposes of trial. See, *e.g., Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 521, 109 CR 110 (film of experiment; experiment must be conducted under substantially similar conditions as those of actual occurrence). See §§13.24, 13.90. Evidence may also be relevant even though its purpose is limited to helping jurors understand a witness's testimony. See, *e.g., People v McDaniel* (1976) 16 C3d 156, 174, 127 CR 467 (court found model bomb prepared by expert, which was substantially similar to bomb that exploded, to be relevant evidence).

The burden of showing relevancy rests on the proponent of the evidence. Be prepared to state all theories of relevancy of a particular exhibit or evidentiary item. Without an adequate explanation, the court may exclude the evidence. See generally Evid C §§350-352.1.

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## §13.23 2. Authenticity

A writing must be authenticated before it, or secondary evidence of its content, may be received in evidence. Evid C §1401. See §13.65 for definition of authentication. To be admissible, the writing must be relevant (see §13.49), comply with the secondary evidence rule (see §13.122), not be inadmissible hearsay, and not be subject to exclusion under Evid C §352 or other statutes.

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## §13.24 3. "Substantial similarity"

Certain types of demonstrative evidence (*e.g.,* evidence of experiments) usually require a preliminary showing to support relevance that the conditions reflected in or underlying the proffered evidence are "substantially similar" to those giving rise to the issue to which the evidence is relevant. See *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 521, 109 CR 110. See also §13.90 for further discussion.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.25 4. Chain of custody

## §13.25 4. Chain of custody

The party offering documentary or demonstrative evidence may need to prove the chain of custody of the evidence to establish identity or to show that the evidence has not been altered. See §§13.26-13.27. This need usually arises when:

- The condition or quality of an item of evidence, as of the time of the event giving rise to the lawsuit, is at issue; or
- No witness is able to say that the item in court is the same item or in the same condition as the item involved in the disputed event.

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### §13.26 a. Burden of proof

The party offering the evidence has the burden of showing that it is reasonably certain that no alteration occurred. In meeting this burden, the party must take into account all circumstances, including the ease or difficulty with which the evidence could have been altered. *People v Riser* (1956) 47 C2d 566, 580, 305 P2d 1, disapproved on other grounds in *People v Chapman* (1959) 52 C2d 95, 98, 338 P2d 428, and in *People v Morse* (1964) 60 C2d 631, 648, 36 CR 201. See 60 C2d at 649 (introduction of bottle and glass with fingerprints permitted over objection because chain of custody had not been broken).

This burden is not absolute, however, and does not require the party to negate any possibility of tampering. 47 C2d at 580. See also *People v Morris* (1991) 53 C3d 152, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394 (copy of letter written by defendant was admissible over defendant's objections that copy was altered or incomplete); *People v Williams* (1989) 48 C3d 1112, 1134, 259 CR 473 (despite mishandling of business cards containing fingerprints, prosecution made proper showing that card had not been tampered with).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.27 b. Procedure to establish chain of custody

### §13.27 b. Procedure to establish chain of custody

The proponent of the evidence must call each person who had possession of the evidence during the crucial period, typically between the date of the disputed event and (1) trial or (2) the testing of the evidence. Testimony from each person is required to establish that the item of evidence is the same or in the same condition as the item involved in the disputed event.

Each witness may be required to testify on the following:

- How, when, and from whom the witness acquired the item of evidence;
- What the witness did with the item while it was in his or her custody;
- Whether the item was in any way modified and, if so, how;
- What the witness did with the item in allowing custody to pass to another person; and
- If the item is present in court, whether it appears to be the same item that was in the witness's custody.

If some link in the chain of possession is not accounted for, the requirement of reasonable certainty may not be met and the court may be required to exclude the evidence. *People v Riser* (1956) 47 C2d 566, 580, 305 P2d 1, disapproved on other grounds in *People v Chapman* (1959) 52 C2d 95, 98, 338 P2d 428, and *People v Morse* (1964) 60 C2d 631, 649, 36 CR 201. If there is mere "speculation that there was tampering," however, "it is proper to admit the evidence and let what doubt remains go to its weight." 47 C2d at 581. See *Wagner v Osborn* (1964) 225 CA2d 36, 42, 37 CR 27.

**PRACTICE TIP:** Avoid chain-of-custody problems by careful pretrial handling of evidence and by obtaining pretrial admissions concerning identity of the evidence. Mark or seal the evidence in such a way that you can later attest, to the court's satisfaction, that the evidence is unchanged. For example, scratch your initials or some other identifying mark on a metal part of the item or seal evidence in an envelope or a sealed container, signed by someone who can identify it later. The testimony of the witness who has marked the item or sealed the evidence should be sufficient to lay the foundation for its admissibility without calling other witnesses.

If you anticipate that the evidence will be subject to a chain-of-custody examination, avoid being the sole custodian of any evidence, unless you wish to risk being called to testify later at trial. If you must take possession of evidence, it should be labeled, stored, and protected to avoid the successful raising of ethical questions at trial.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.28 E. Organizing exhibits

### §13.28 E. Organizing exhibits

In every lawsuit, counsel should adopt a system for organizing and maintaining evidence so that documents and exhibits can be retrieved efficiently during trial. No single, uniform system is ideal for all cases. Instead, the individual circumstances of each case usually require adaptations. For discussion of an approach to organizing trial materials, see chap 3.

**PRACTICE TIP:** Anticipate all important objections. Clip a note to the front of each anticipated exhibit, stating the theory of relevancy or irrelevancy, the basis of admissibility or inadmissibility, and a brief citation of supporting authorities. Prepare a formal written brief to present to the court if the issues involved are complicated or unusual.

To keep track of exhibits during trial, prepare an exhibit log that lists exhibits in the order you plan to introduce them at trial. The log will serve as a ready reference to the status of all documents marked for identification and offered into evidence. During trial, this log should be updated as documents are introduced. Occasionally you should compare the information appearing on the exhibit log with the clerk's record to ensure that they correspond in all details. If there is a discrepancy, the transcript should be checked to determine which record is correct. The exhibit log should be kept in a separate file or in the trial notebook. For a sample exhibit log, see §13.140. See also §3.31.

**PRACTICE TIP:** If any group of documents is such that it tests a juror's attention span, *i.e.,* ten pages or more, prepare a summary of the documents under Evid C §1523(d). See *People v Southern Cal. Edison Co.* (1976) 56 CA3d 593, 605, 128 CR 697 (one-page summary of numerous pages of details supporting large dollar-value damage claim).

When organizing exhibits, verify that all obligations to disclose exhibits during discovery have been fulfilled. Failure of counsel to produce an exhibit that was properly requested by opposing counsel can preclude its admission once trial begins. See CCP §2023.030(c), CCP §2031.320(c), discussed in §13.118. See *Zellerino v Brown* (1991) 235 CA3d 1097, 1 CR2d 222 (failure to disclose experts in timely manner barred testimony at trial); *Thoren v Johnston & Washer* (1972) 29 CA3d 270, 105 CR 276 (willful omission of witness's name from answer to interrogatory barred his testimony at trial). See also *Vallbona v Springer* (1996) 43 CA4th 1525, 51 CR2d 311 (court of appeal affirmed trial court judgment that discovery sanctions imposed at trial, which prohibited defendants from presenting certain evidence due to defendant's noncompliance with discovery, were appropriate under former CCP §2023(b)(2) (now CCP §2023.030(b)).

Such oversights usually may be corrected if they are discovered by erring counsel before trial begins. See *Zellerino v Brown, supra* (court has power under CCP §473 to grant relief from an untimely demand for discovery of expert witnesses). In extreme situations, however, sanctions ranging from exclusion of the exhibit to entry of judgment against the nondisclosing party may be imposed.

As a final step in organizing exhibits, verify that all local mandatory pretrial procedures have been satisfied. See §§13.34-13.38. On completing pretrial procedures generally, see chap 2.

**NOTE:** Many attorneys use personal computers and information management software in their practices and during trial. Software can be used to name and index evidence or exhibits for trial; cross-reference case information by subject matter, date, or name; summarize depositions; and make a record of all documents produced by each party. On organizing trial materials generally, see chap 3.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.29 F. Determining when to use exhibit; tactical considerations

## §13.29 F. Determining when to use exhibit; tactical considerations

An exhibit should be presented in court at the time it will yield the best result. In many instances, this may be as early as the opening statement. For example, counsel should introduce the exhibit early in the trial in the following circumstances:

- It contains information critical to understanding the basic issues in the case;
- More than one witness will need to refer to the exhibit while testifying; or
- Certain testimony in the case depends on having the exhibit already in evidence.

In other circumstances, however, counsel may conclude that the maximum impact or advantage can be gained by withholding the exhibit until rebuttal.

**CAUTION:** If "rebuttal evidence" is essential to proof of your prima facie case, you may be precluded from introducing the evidence by waiting until rebuttal to do so. See CCP §607(3), (6).

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## §13.30 1. During opening statement

If you plan to use documentary, demonstrative, or real evidence during the opening statement, first obtain the court's permission even if the opposing counsel has stipulated to the use of such evidence. Los Angeles Ct R 8.40. If there is any question about admissibility of the evidence, the court will probably deny the request.

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### §13.31 2. During trial

Consider whether the surprise use of an exhibit can be a strategic advantage. Traditionally, attorneys try to withhold disclosure of exhibits they intend to use until the last moment, particularly when opposing counsel is not already aware of an exhibit or may not have anticipated how it will be used at trial. However, with the increase of formal discovery and mandatory disclosure of exhibits at or before the commencement of trial (see §§13.17-13.30), the ability to surprise opposing counsel with an exhibit has greatly diminished.

**WARNING:** If the exhibit is a critical one, consider the risk that surprising opposing counsel could result in the granting of a continuance to prepare a response or the presenting of a motion for a new trial based on misconduct.

Nevertheless, if procedurally possible, early disclosure should be avoided because it gives opposing counsel time to consider possible objections, plan ways of diminishing the impact of the exhibit, and prepare witnesses to answer questions about it. Similarly, premature disclosure of an exhibit to a jury can diminish the dramatic impact of confronting the adverse witness with it.

**PRACTICE TIP:** Consider enhancing the dramatic impact of an exhibit by wrapping it to disguise its identity and carrying it into the courtroom each day in a conspicuous manner. Jurors' curiosity should be sufficiently piqued that, when the exhibit is finally revealed, it will leave an indelible impression on them. Opposing counsel, however, should promptly seek an order requiring that the item be brought into court only when it is actually used. Allowing an exhibit to be displayed before it is admitted into evidence may constitute attorney misconduct. See generally *People v Fusaro* (1971) 18 CA3d 877, 886, 96 CR 368. See also §16.86.

When an exhibit is large, you should calculate when during trial it should be carried into the courtroom. You may want to have a large exhibit admitted into evidence as early as possible. In many instances, large exhibits that have been admitted into evidence remain in the jury's full view from the time they are admitted until after the verdict is returned, unless opposing counsel takes appropriate steps to prevent this. Try to have such an exhibit removed from the jury's view by having it removed from the courtroom or covered up, especially if the exhibit might prejudice the jurors (*e.g.,* an enlarged photograph of the victim's injuries).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.32 3. During closing argument

## §13.32 3. During closing argument

During closing argument, counsel has an opportunity to review the evidence and refer to and explain exhibits that may have been overlooked or not fully understood. The use of documentary, demonstrative, and real evidence during closing argument can make the spoken word more persuasive.

The fact that an exhibit has been received in evidence does not mean that the jurors know its content, appreciate its significance, or even remember it. When a favorable exhibit is important, direct the jurors' attention to it by describing it, referring to its exhibit number, and holding it up or placing it in front of the jurors. Explain to the jury in clear terms why the exhibit demonstrates that your client should prevail.

Consider reading critical portions of the exhibit aloud or having them displayed by enlargement or overhead projector. If the court has agreed under CCP §612 that jurors can take certain exhibits into the jury room, remind the jurors during closing argument that they may inspect these exhibits during jury deliberations. See §21.29 for further discussion of items that the jurors may take into the jury room during deliberations.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/ G. Preparing witnesses to use exhibits/§13.33 1. Review exhibit with witness

## G. Preparing witnesses to use exhibits

### §13.33 1. Review exhibit with witness

Before a favorable witness takes the stand, discuss with the witness each item of documentary, demonstrative, and real evidence the witness will be asked about, indicating the general or specific questions that will be asked and discussing the answers with them. Discuss the significance of each of the questions and answers, so that the witness will understand why questions are being asked on both direct examination and cross-examination.

If the witness will be confronted with exhibits on cross-examination, show them to the witness and discuss areas of anticipated inquiry. It is usually best not to have a favorable witness surprised by any exhibit during direct examination, cross-examination, or redirect examination.

If the witness will participate in a demonstration during trial, the demonstration should be practiced until the witness feels comfortable in conducting it. See §13.34. Thorough witness preparation should make the witness more confident on the stand, better able to deal with unexpected areas of questioning, and less likely to make inadvertent mistakes.

**WARNING:** The witness should not sound so rehearsed that the testimony sounds canned and unconvincing.

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### §13.34 2. Exhibit used to refresh recollection must be produced

In determining which exhibits to show to a witness, consider the effect of Evid C §771, which requires writings used to refresh a witness's memory to be produced on demand of the adverse party unless production is excused under Evid C §771(c). The adverse party may "inspect the writing, cross-examine the witness concerning it, and introduce into evidence such portion of it as may be pertinent to the testimony of the witness." Evid C §771(b). If such a writing is not produced on demand, the witness's testimony on the matter must be stricken. Evid C §771(a). See also *International Ins. Co. v Montrose Chem. Corp.* (1991) 231 CA3d 1367, 282 CR 783 (documents used to refresh deponent's recollection must be produced on request). See §§11.63-11.68 for a more detailed discussion of using exhibits to refresh a witness's recollection.

**CAUTION:** If the writing used to refresh recollection is subject to the attorney work-product privilege, the privilege is waived and the exhibit must be produced at trial at the request of an adverse party who may use it in accordance with Evid C §771. See §5.5. If the writing used to refresh recollection is subject to the attorney-client privilege, however, the law is unclear on whether an adverse party may inspect it and use it in the manner provided in Evid C §771. See §5.6.

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## H. Complying with local mandatory pretrial procedures

### §13.35 1. Exchange of exhibit lists

Local court rules or policies may require counsel to prepare and exchange, before the start of trial, a list of all exhibits that counsel intends to use, except possibly those to be used solely for impeachment or rebuttal. See, *e.g.,* Los Angeles Ct R 7.9(h) (counsel must have exchanged and filed lists of prenumbered exhibits 5 days before final status conference); Mendocino Ct R 5.3(k); Ventura Ct R 8.12(E).

**WARNING:** When an exhibit is not disclosed on the exhibit list, the court may exclude it from the trial unless good cause is shown. *Cottle v Superior Court* (1992) 3 CA4th 1367, 5 CR2d 882 (court excluded evidence of personal injuries based on plaintiffs' failure to provide adequate pretrial disclosure of prima facie case in court's mandated disclosure).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.36 2. Exchange of exhibits

## §13.36 2. Exchange of exhibits

Local court rules or policies may require that counsel exchange or make available to opposing counsel various exhibits before commencement of trial. See, *e.g.,* Los Angeles Ct R 7.9(h).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.37 3. Stipulations on admissibility

## §13.37 3. Stipulations on admissibility

Local court rules or policies may require that counsel meet before the trial date to attempt to work out stipulations waiving foundations for admissibility and objections on evidence they intend to use. Procedures also have been adopted in many courts requiring counsel who have objections to proposed exhibits to advise the court of the objections. See, *e.g.,* Mendocino Ct R 5.5. See §13.141 for Sample Stipulation Regarding Use of Documents at Trial.

When there are written stipulations that certain exhibits can be immediately received in evidence, file these stipulations before trial and request a conference in chambers with the judge and opposing counsel so that the court may formally order the exhibits into evidence. This order may be in writing or may be made orally by the court in the presence of the court reporter. Make sure that the court clerk is aware of the order, so that the clerk's record accurately reflects receipt of the evidence.

**PRACTICE TIP:** Some attorneys prefer to make offers of evidence before the jury for tactical reasons. As a result, the stipulation can provide that the evidence will be admitted only when offered. The stipulation should be filed with the court at the commencement of trial, but the request for the court to act on it can usually be made at an appropriate time during the trial itself.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.38 4. Premarking exhibits

## §13.38 4. Premarking exhibits

Many courts either formally or informally require that anticipated exhibits be marked for identification at a time other than just before a witness is examined about them in court. See Los Angeles Ct R 8.60-8.61. In other counties, informal premarking must be done on the date it is to be used, but before trial commences for that day. See, *e.g.,* Yolo Ct R 15.3. Check local court rules and policies to ascertain whether any similar requirements have been adopted.

**NOTE:** To expedite the trial and permit counsel to better organize their trial papers, consider stipulating that exhibits will be premarked.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/ I. Preparing for demonstrations and experiments; using photographs and video recordings/ 1. Demonstrations and experiments/§13.39 a. Planning required before trial

## I. Preparing for demonstrations and experiments; using photographs and video recordings

### 1. Demonstrations and experiments

### §13.39 a. Planning required before trial

If you plan to have a demonstration or experiment conducted during trial, begin working on the project well before trial. Determine:

- The issues for which a demonstration/experiment will be helpful;
- Exactly what type of demonstration or experiment to conduct;
- How to lay the requisite foundation for admissibility of the demonstration or experiment; and
- The specific witnesses or experts who will be needed to conduct or comment on the demonstration or experiment.

On laying a foundation for admissibility of demonstrations or experiments, see §§13.85-13.111. On preparing witnesses to use exhibits, see §§13.33-13.34.

Logistical problems are often encountered in the use of demonstrations or experiments that are not encountered with other forms of evidence. To avoid such problems, visit the courtroom before trial and before the creation of demonstrative exhibits, if possible, to examine the following:

- **Access to courtroom.** Make sure all demonstrative exhibits and equipment will fit through the doorways and that the court's security services will not create problems.
- **Space in the courtroom.** Make sure there is enough room in the courtroom to display all exhibits so that they can be easily seen and used.
- **Lighting.** Make sure the courtroom lighting is suitable for the types of exhibits or demonstrations that are contemplated. In some courtrooms, dimmed lights will not go on again immediately.
- **Monitor placement.** If video presentations will be made, look for appropriate placement of video monitors. In many instances, two monitors will be required for the jury, a third for the judge, and a fourth for the counsel table.
- **Electrical outlets.** Make sure the courtroom has enough electrical outlets in the right places for video and other electronic equipment. Note where extension cords will be needed.
- **Presence of necessary equipment.** Make certain that any equipment necessary for the demonstration is available and suitable for the courtroom in which the demonstration will be conducted. Check the courtroom for necessary chalkboards, easels, chalk, marking pens, tape, tacks, and other items that counsel intends to use.
- **Size and location of exhibits.** Sit in every seat of the jury box to make sure that the exhibits will be the right size and in the right place to be effective.

**PRACTICE TIP:** Consult local rules and procedures to ascertain whether there are any requirements or prohibitions relating to demonstrations or experiments in the courtroom. See, *e.g.,* Los Angeles Ct R 8.40, 8.74.

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### §13.40 b. Prior notice of demonstration or experiment recommended

If you plan to conduct a demonstration or experiment during trial, inform the court and adverse counsel in advance, *e.g.,* at a pretrial conference in chambers.

On the day you intend to present the demonstration or experiment in court, again advise the court and opposing counsel of counsel's intention before the trial session begins. Opposing counsel may move in limine to exclude the demonstration or experiment. The court also may require that a preliminary hearing on the admissibility of the evidence be conducted outside the jury's presence (see chap 7). Thus, at either of these times, you should be prepared with a brief in support of admissibility of the evidence in case it is needed. On motions in limine, see §§13.130, 13.134. See generally chap 7.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.41 c. Preparations on day of demonstration or experiment

### §13.41 c. Preparations on day of demonstration or experiment

On the day of the demonstration or experiment, arrive at the courtroom as early as possible to do any necessary advance work in setting up the demonstration. A demonstration must be performed professionally and efficiently to be persuasive. Long delays in setting up equipment or problems in making them run can diminish the demonstration's effect and reflect badly on counsel. Move through the demonstration or experiment at a brisk pace, in a manner that is interesting, entertaining, and educational. Use language during the demonstration or experiment that jurors will easily understand.

Be sufficiently comfortable with the demonstration to deal with any unexpected problems. For example, do not be so tied to notes that unexpected developments cause a confusing demonstration. Because demonstrations and experiments typically involve technical terminology and principles beyond common experience, make certain that the jury has been given a full enough explanation of the underlying concepts and language to understand the significance of the evidence.

If a courtroom demonstration may be dangerous, the court may order that the demonstration take place outside the courtroom. In a fuel-tank fire case, for instance, the court may need to move outside the courtroom to watch a fireman demonstrate how a fireman's pick could make holes in a fuel tank.

**PRACTICE TIP:** Make an audio or video recording of the demonstration or experiment performed during trial to make sure there is a complete record on appeal. Obtain court approval for such audiotaping or videotaping.

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## §13.42 2. Photographs and video recordings

Pictures, whether still or moving, are one of counsel's most versatile courtroom tools. They allow the jury to view both very small and very large objects in the comfort of the courtroom. They can illustrate the place where an incident took place or show the type of objects involved in a dispute. They can show the condition of real property before and after certain events, or injuries suffered by a party as they appeared just after an accident. They can bring otherwise dry evidence to life, often holding the jurors' attention more effectively than words.

Video recordings can provide a more dramatic version of events than photographs and illustrate motion in appropriate circumstances. For example, only a video can illustrate moving traffic or flowing water. Of course, counsel planning to use video recordings must provide the necessary equipment and make sure it can be used in the courtroom.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.43 a. Considerations in taking photographs and making video recordings

### §13.43 a. Considerations in taking photographs and making video recordings

Before trial, counsel should be alert for opportunities to use pictures because a good picture can be better than several good witnesses. A photograph is not only more graphic and reliable than verbal testimony, but it also preserves evidence that might not be available at the time of trial because of subsequent repairs.

**EXAMPLE:** In a street defect case in which counsel wants to show the size of a hole or defect in the pavement, an effective method is to take photographs of a yardstick placed in the hole to show its depth and across the top to show its length and width.

Whenever possible, consider accompanying the photographer to the location to be photographed or video recorded. Then you can be certain that the results represent exactly what you want. The manner in which the picture is taken may be important.

**EXAMPLE:** If a picture of a marked crosswalk is desired, a photograph taken from the roof of a building looking down on the crosswalk may benefit the plaintiff's case. The lines of the crosswalk generally stand out clearly, and it appears to be what it was created for: a sanctuary for pedestrians.

While filming, counsel should closely supervise the technician to curb any tendencies to interpret the subject creatively. Ensure that the technician makes a good record of the techniques and equipment used in operating the camera, *e.g.,* the type of camera, lens, and filters; lighting conditions; shutter speeds; and the distance between camera and subject. The technician should be available to testify, if necessary, although such testimony is not usually required.

**CAUTION:** Do not act as your own photographer. If accuracy or fairness of a photograph is questioned, you may be put in the embarrassing position of testifying on the methods used in taking it, the precautions against distortion of perspective, and the photograph's authenticity. A professional photographer or objective third person should take photographs intended for use as evidence.

See §§13.91-13.93 for discussion of how to lay a proper foundation for introduction of a photograph.

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### §13.44 b. Uses for photographs and video recordings at trial

Photographs can be used for many purposes. For example, they may be used to reproduce fingerprints, to compare handwriting when there is a question of forgery, to establish identity, to illustrate similarities or differences in fibers and other materials as seen through a microscope, and to illustrate the results of ballistic tests. Photographs showing vehicle damage, skid marks, road signs, visibility, and distances usually can illustrate a point much better than oral testimony.

Color photographs and slides are also of inestimable value in presenting medical evidence. Contusions, abrasions, and lacerations may be ugly and striking in the early stages of treatment but disappear long before the case comes to trial. A doctor's testimony that a bruise was a certain size and badly discolored makes far less impression than a colored photograph showing that there was a real basis for the patient's complaints and residual problems. When plastic surgery is required (*e.g.,* in a burn case), colored photographs should be taken regularly to show the patient's progress and the surgical work required. Photographs should be taken before and after skin grafting and other reconstructive work is done. Similarly, photographs showing the patient in a cast, in traction, or wearing a neck brace may also be helpful in illustrating treatment and the patient's discomfort.

Aerial photography can be helpful in certain cases to show large sections of highway or land. For example, aerial photographs have been used to show areas affected by air pollution, to show the location of witnesses in proximity to the scene of an accident, or to depict an area of a city for zoning purposes. Aerial photographs can also be used to create three-dimensional models.

**NOTE:** It is best to use a dull finish on photographs that will be enlarged and presented at trial, because it is difficult to mark photographs with a glossy finish. In a case in which intricate details of a photograph are important, however, a glossy photograph should be used because it usually provides finer detail.

Video recordings can also be very useful at trial. For example, they have been used to show "a day in the life" of an injured plaintiff (see §13.95) and the vantage point of a key witness (see *People v Rodrigues* (1994) 8 C4th 1060, 36 CR2d 235).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/ V. HANDLING EXHIBITS DURING TRIAL/§13.45 A. Procedural guidelines for offering exhibits into evidence

## V. HANDLING EXHIBITS DURING TRIAL

### §13.45 A. Procedural guidelines for offering exhibits into evidence

The procedures for using documentary, demonstrative, or real evidence during trial depend somewhat on the nature of the evidence, the court's pretrial procedures, whether foundational prerequisites have been satisfied by stipulation, and whether the exhibit is being used on direct examination or cross-examination.

Although one procedural approach is not suitable for all types of evidence, the guidelines discussed in the following sections can assist counsel in deciding how to offer exhibits into evidence properly and how to use exhibits even if they are not offered into evidence:

- Mark for identification (see §§13.46-13.49);
- Disclose to opposing counsel (see §§13.50-13.51);
- Disclose to judge (see §13.52);
- Demonstrate admissibility of exhibit (see §§13.53-13.54);
- Offer exhibit into evidence (see §13.55);
- Obtain court's ruling on admissibility (see §§13.56-13.57); and
- Disclose substance of exhibit to jury (see §§13.59-13.60).

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## §13.46 1. Mark for identification

The first step in handling an exhibit to be offered into evidence is to have it marked for purposes of identification. See, *e.g.,* Los Angeles Ct R 8.60-8.62. Marking an exhibit for identification, once it is formally logged by the court clerk, places it under the court's custody and control until it is released by court order or destroyed. See CCP §§1952-1952.3; Los Angeles Ct R 8.73.

**PRACTICE TIP:** Make sure all exhibits are marked for identification because once the exhibit is marked, it becomes part of the clerk's record and can be designated as part of the record on appeal.

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### §13.47 a. When to mark

The point during trial when the exhibit should be marked varies from court to court. Traditionally, the court clerk marked an exhibit when a witness was first to be asked about it. While the witness was on the stand, counsel would ask the clerk, in the jury's presence, to mark a particular item "for purposes of identification." All participants in the trial would then wait while the clerk placed an identifying mark on the exhibit and logged it in the clerk's record. Counsel would then take the item back from the clerk, show it to opposing counsel and possibly to the court, and then begin to ask the witness questions about it.

Because this process is generally time consuming and dull, many courts now require that exhibits be premarked, *e.g.,* marked before trial begins or when the court is not in session and before counsel begins questioning the witness. When premarking is not practical or required by the court, however, the court will allow counsel to mark an exhibit in the middle of a witness's examination, *e.g.,* evidence used during cross-examination to respond to unanticipated testimony or to impeach the witness. In such cases, the court will only ask that the clerk tell counsel, before examining the witness, what the number of the new exhibit will be. Actual marking of the exhibit is completed after counsel has examined the witness or during a break in the proceedings. Local court rules or policies may cover this situation. See, *e.g.,* Los Angeles Ct R 8.61.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.48 b. Manner of marking

### §13.48 b. Manner of marking

The specific manner in which an exhibit will be marked depends largely on its individual characteristics and local practice. Generally, two-dimensional exhibits should be marked on their face by using an exhibit stamp, a gummed label, or a written notation. It is good practice to consistently locate the mark as near as possible to the bottom of the exhibit. Using this location speeds up subsequent identification of the exhibit, especially when copies or exhibits are bound together at the top. Make sure, however, that the identification mark does not cover entries in the exhibit.

Although marking an exhibit on the back is not improper, this practice should be used only when absolutely necessary. Although marks on the back of an exhibit may be adequate to identify the original exhibit at trial, difficulties may arise in handling copies at trial and on appeal.

When three-dimensional exhibits are marked, consider using gummed labels and tags wired to the exhibit. The identifying mark should be firmly attached to the exhibit so that constant handling will not remove the mark during trial or afterwards.

**PRACTICE TIP:** Before marking an exhibit, check whether there are any local rules or policies on the manner of marking exhibits. Also make sure that no problems will be created by marking the originals.

**PRACTICE TIP:** Video recordings, CD-ROMs, and computers are used to store images of the documents in large document cases so that the documents can be retrieved onto video screens rather than being physically handled in the courtroom. This practice allows everyone in the courtroom the chance to review the documents at the same time the witness is testifying about them. If exhibits will be handled in this way in your case, ask to have the video recording, computer disk, or compact disks marked as exhibits.

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### §13.49 c. Content of mark

The content of the identifying mark depends on the practice of the individual court. To preserve a record for appeal, however, the exhibit tag should include the following:

- Case name;
- Case number or docket number;
- Sponsoring party;
- Letter or number identification; and
- An indication of whether the exhibit was admitted into evidence or is marked only "for identification."

The exhibit mark may also include the date of marking, the clerk's name, and the court's department number.

Some courts require that numbers (*e.g.,* 1, 2, 3) be used for exhibits offered by the plaintiff and letters (*e.g.,* A, B, C) be assigned to items offered by the defendant. If this system is followed when there are multiple parties on a side, counsel may be required to mark exhibits with a party's name or initials, followed by a number (for exhibits offered by the plaintiff; *e.g.,* "Smith-1") or letter (for exhibits offered by the defendant; *e.g.,* "Jones-A"). For a collection of related or integrated documents (*e.g.,* medical records from a particular hospital), you may be required to mark the entire collection as a single exhibit and then designate each individual document within the group with a subnumber such as "A-1," "A-2."

Courts sometimes require that only numbers be used in large document cases to avoid having exhibits marked with multiple letters. See, *e.g.,* Los Angeles Ct R 8.62. When there are more than 100 exhibits, the number of letters necessary to identify each exhibit quickly becomes burdensome and confusing. For example, a document that could be marked as "Exhibit 150" would be designated as "Exhibit TTTTTT" if letters were used. It is extremely hard for a court reporter to differentiate between "Exhibit W" and "Exhibit Double U," "Exhibit TTTT" and "Exhibit TTTTT," or "Exhibit 40" and "Exhibit Four T."

When only numbers are used, the parties should begin numbering the documents in sequence, starting with different numbers. For example, the plaintiff may be allocated numbers 1-500, and the first defendant numbers 500-1000. In large document cases, the judge may require that counsel meet and number their exhibits together in strict numerical sequence (*e.g.,* "Plaintiff's Exhibit 1-100," "Defendant's Exhibit 101-200").

**NOTE:** Even when specific local rules or policies apply, the parties may be able to stipulate with court approval to another marking system or a judge may prefer that another system be used, *e.g.,* a straight numerical system for all exhibits.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/ 2. Disclose to opposing counsel/§13.50 a. Disclosure before trial

## 2. Disclose to opposing counsel

### §13.50 a. Disclosure before trial

Some local pretrial rules require that counsel make exhibits available to opposing counsel before trial. See §§13.30-13.31 for local rules on the exchange of exhibits.

If local rules do not exist on this issue, consider stipulating with opposing counsel to disclose exhibits before trial. This process could be coupled with an effort to work out stipulations on admissibility of the exhibits. Such stipulations are often discussed at the pretrial conference. See §6.3. In deciding whether to agree to such a stipulation, consider whether some exhibits would be better kept undisclosed, whether the failure to disclose would be preclusive (and, if so, in what circumstances), and whether opposing counsel can be trusted. On stipulations, see §13.37 (use of pretrial stipulations). See also §§13.67 (use with documentary evidence) and 13.86 (use with demonstrative evidence). For Sample Stipulation Regarding Use of Documents at Trial, see §13.141.

**NOTE:** If an exhibit is a writing that will be shown to a witness, all parties to the action must be given an opportunity to inspect it before the witness is asked about it at trial. Evid C §768(b). Even if the exhibit is not a writing, good practice dictates that opposing counsel be given an opportunity to inspect the exhibit so that objections may be made before disclosure. See Los Angeles Ct R 8.64. On an objection for failure to show a writing to other counsel, see §13.125.

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### §13.51 b. Disclosure during trial

If local rules do not require disclosure of exhibits before trial, disclosure to opposing counsel can be delayed until the specific court session at which the exhibit will be used. Disclosure is often accomplished at the same time counsel asks the court clerk to mark the exhibit for purposes of identification (see §13.46). Such disclosure allows opposing counsel to make objections before the jury is aware of the exhibit.

Disclosure could also be delayed by counsel until the moment the exhibit will be used at trial. Although many attorneys routinely use this last method of disclosure, it has certain disadvantages and risks. Because the disclosure takes place during the trial session itself, it necessarily requires an interruption in the proceedings—generally to the annoyance of both judge and jury. If this practice is repeated, the court may intervene to stop it. Additionally, because opposing counsel is entitled to examine the tendered exhibit, offering counsel should expect that the examination will be interrupted by opposing counsel, who may believe that an interruption will help defuse a damaging line of questioning or allow the witness a few moments to think.

**WARNING:** Late disclosure of an exhibit creates the possibility that it will be excluded. If the court perceives that counsel is relying on surprise tactics unfairly, it may resolve close questions of admissibility in favor of exclusion. The court may also find that counsel has overlooked some obligation to disclose the exhibit earlier, such as during discovery or pretrial preparations, thereby warranting the exhibit's suppression. *Martinez v City of Poway* (1993) 12 CA4th 425, 15 CR2d 644, disapproved on other grounds in *Bonds v Roy* (1999) 20 C4th 140, 149 n4, 83 CR2d 289; *Do It Urself Moving & Storage, Inc. v Brown, Leifer, Slatkin & Berns* (1992) 7 CA4th 27, 34, 9 CR2d 396.

In-court disclosure of exhibits also carries an inherent risk of mistrial. Although most documents can be disclosed to opposing counsel in open court without the jury's necessarily becoming aware of their contents, this is not true of other types of exhibits. If such an exhibit is inflammatory or unduly prejudicial, the court may not only exclude it but may also reprimand counsel for misconduct or grant a mistrial because of the jury's exposure to it. On attorney misconduct generally, see chap 16.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.52 3. Disclose to judge

### §13.52 3. Disclose to judge

When questioning a witness about an exhibit, provide the judge with the original exhibit, a copy of it, or both. This practice will give the judge an opportunity to study the exhibit at the same time as the witness is testifying about it. If an exhibit contains sensitive or confidential material or for some other reason may be excluded, judges generally require counsel to disclose the intention to use the exhibit beforehand, so that the court can rule on its admissibility before any prejudice occurs. See Los Angeles Ct R 8.46. See also *People v Fusaro* (1971) 18 CA3d 877, 96 CR 368 (court of appeal cautioned that trial court should not tolerate attorney who deliberately permits jury to see exhibit that is not in evidence).

**PRACTICE TIP:** Before going to court, make enough copies of the documents you plan to introduce so that individual copies can be provided to the court, each attorney, and each juror in certain situations. If you are the interrogating attorney, retain an additional copy so that you will have a copy to use while the witness answers questions about the original. When it is important for a party, a witness, or another person to retain possession of the original document, make one final copy to be substituted for the original (with the court's approval) in the clerk's record.

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## 4. Demonstrate admissibility of exhibit

### §13.53 a. Establish foundational facts

Before an exhibit can be received in evidence, sufficient foundational facts should be developed by counsel to show that the exhibit is admissible. This may be accomplished by showing the court a stipulation from opposing counsel permitting admissibility. See §§13.37 (use of pretrial stipulations), 13.67 (use with documentary evidence), 13.86 (use with demonstrative evidence).

When stipulations are not available and the existence of a preliminary fact is disputed, a preliminary hearing is generally required. At the hearing, the court will determine whether counsel has submitted sufficient evidence to sustain a finding of the preliminary fact necessary for admissibility. Evid C §402(b). The evidentiary rules governing the preliminary hearing are discussed in detail in §§7.25-7.26.

The purpose for authenticating a document or laying the foundation for an exhibit is twofold:

- To prove to the court that the exhibit is admissible; and
- To persuade the jurors to reach a decision in reliance on it.

Thus, the foundation-laying process should not be approached in a perfunctory manner. Instead, make the procedure as interesting as possible—emphasizing the exhibit's important qualities by the timing, tone, and content of the questions. If the exhibit is truly important, act that way about it.

**PRACTICE TIP:** If you wish the jury to ignore an exhibit (*e.g.,* when you disclose an exhibit that is prejudicial to your case merely to diminish the effect of the opponent's use of it), your demeanor should reflect a lack of interest in the exhibit or at least a lack of alarm about its disclosure.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.54 b. Checklist: Procedural steps for establishing foundational facts

## §13.54 b. Checklist: Procedural steps for establishing foundational facts

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To establish foundational facts, you should:

___ 1. Verify that the exhibit has been marked and disclosed to opposing counsel before the witness is asked any questions about it. See §§13.46-13.51.

___ 2. Provide a copy of the exhibit to the opponent and the judge. See §§13.50-13.52.

___ 3. Ask for the court's permission to approach the witness, if required by local rules.

**PRACTICE TIP:** Check local rules to see whether you must first obtain the court's permission to hand the exhibit to a witness. Local practice varies greatly on this. See, *e.g.,* Shasta County Unified R 4.06(c) (counsel must first obtain court's permission before handing exhibits that have been admitted into evidence to jurors in jury box). But see Los Angeles Ct R 8.10 and Sacramento Ct R 7.02, under which counsel need not have the court's permission to approach a witness to show a document or other object, unless the court directs otherwise.

___ 4. Clearly identify the exhibit to be viewed by the witness so that the record accurately reflects which exhibit the witness is looking at.

**PRACTICE TIP:** When identifying an exhibit in court, refer to the exhibit's identifying mark (*e.g.,* "Plaintiff's Exhibit 1") and provide a general description of the exhibit (*e.g.,* "a typewritten letter, dated February 20, 1992"). This description, however, should not disclose the substantive content of the exhibit. See Los Angeles Ct R 8.63.

___ 5. Give the witness an opportunity to look at the exhibit before beginning the questioning.

___ 6. Ask the necessary questions to authenticate the document (see §§13.65-13.84) or to lay a proper foundation for the demonstrative evidence (see §§13.85-13.111) or real evidence (see §§13.111-13.112). For general rules of admissibility, see §§13.21-13.27.

___ 7. Request that the court allow the exhibit to be admitted into evidence. See §13.55.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.55 5. Offer exhibit into evidence

### §13.55 5. Offer exhibit into evidence

Once all the foundational prerequisites have been satisfied, ask the court to admit the exhibit into evidence. This request is described by some as a motion and by others as an offer. In this context, the two terms are synonymous.

Typically, the request takes one of the following forms:

> Your Honor, I ask that Plaintiff's Exhibit 1 be received in evidence

or

> Your Honor, I move that Plaintiff's Exhibit 1 be admitted into evidence.

When the nature of the exhibit is not apparent, consider again describing the exhibit:

> Your Honor, at this time plaintiff offers into evidence Plaintiff's Exhibit 2, a letter from Mr. Hopkins to Ms. Brown, dated April 18, 1995.

When the formal offer is made, the court generally looks at opposing counsel to determine whether there is any objection to the exhibit's being received. If there is no objection or the court determines that those made are without merit, the exhibit will be admitted into evidence.

Exhibits should be offered into evidence as soon as reasonably practicable. When the evidence is self-authenticating, the formal offer can be made in chambers to the court even before the opening statements. See §13.78 on self-authenticating documents. When foundational testimony is necessary, the exhibit should be formally offered as soon as sufficient facts have been established to show prima facie admissibility and to overcome any anticipated objections.

**PRACTICE TIP:** Offer exhibits into evidence individually or in small, logical groups, rather than accumulating a substantial number of exhibits and then offering them into evidence all at once at the end of the party's case. See Los Angeles Ct R 8.65. On reoffering exhibits into evidence en masse, see §13.61.

**WARNING:** Make sure the formal offer and any reoffers of evidence are reflected in the court reporter's transcript. See §§13.56-13.57 on the obligation of an offering party to obtain a definite ruling on admissibility of matter taken under consideration. The exhibit log described in §13.28 is an essential tool in avoiding the disastrous consequences of establishing all prerequisite facts but failing to obtain formal admission into evidence for each exhibit. For a sample exhibit log, see §13.140.

If the court excludes the evidence with a statement that it may be offered later after additional foundational evidence has been presented, the proponent of the evidence must formally reoffer the exhibit before the close of evidence. Failure to make this follow-up offer constitutes a waiver of any error on appeal. *Spanfelner v Meyer* (1942) 51 CA2d 390, 392, 124 P2d 862. On reoffering exhibits generally, see §13.61.

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### 6. Obtain court's ruling on admissibility

### §13.56 a. Court's failure to make immediate ruling

After a specific exhibit has been offered into evidence, make sure the court makes a decision on the record of the exhibit's admissibility. 3 Witkin, California Evidence, *Presentation at Trial* §§387-390 (4th ed 2000). If the court declines to make an immediate ruling on an offer of evidence (*e.g.,* because an objection has been interposed), but indicates that the matter will be taken under consideration (or submission), the parties may not refer to the evidence during the intervening period. In such circumstances, the party offering the exhibit may need to remind the court of the pending offer and of the need for a definite decision. See *Spanfelner v Meyer* (1942) 51 CA2d 390, 392, 124 P2d 862.

The court can make any of the following potential rulings:

- Admit the exhibit for all purposes and against all parties;
- Exclude the exhibit completely;
- Admit the exhibit but limit its use to certain purposes or against certain parties (see Evid C §355; see also §13.120);
- Admit the exhibit but excise portions from it (see §13.122);
- Decline to admit the evidence for a reason that can be remedied with additional foundational evidence; or
- Admit the evidence on a provisional basis, reserving a final ruling on admissibility until later in the trial or subject to a later motion to strike (see *Gribaldo, Jacobs, Jones & Assocs. v Agrippina Versicherunges A.G.* (1970) 3 C3d 434, 443 n6, 91 CR 6; see also §13.57 on provisional admission of evidence).

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### §13.57 b. Provisional admission of evidence

The court, particularly in bench trials, may decide to provisionally admit certain evidence when it believes that the evidence will prove to be admissible but recognizes the need to hear additional testimony. 3 Witkin, California Evidence, *Presentation at Trial* §52 (4th ed 2000). In such a situation, rather than require witnesses to be recalled to the stand after the additional testimony has been heard, the court may allow the exhibit to be used on a provisional basis. This alternative allows the first witness to be asked questions about the exhibit, even though the full foundation for the exhibit's admission will not come until a later witness's testimony.

The practice of provisionally admitting evidence in jury trials has been criticized. California courts have held that the provisional admission of evidence may prejudice a litigant by allowing the jury to hear evidence that is ultimately held inadmissible; such injustice may result in reversal. See *Stanwood v Carson* (1915) 169 C 640, 644, 147 P 562. See also *Estate of Horman* (1968) 265 CA2d 796, 805, 71 CR 780; *Piercy v DeFillipes* (1963) 215 CA2d 284, 289, 30 CR 62.

When evidence is admitted provisionally, counsel on both sides should be prepared either to elicit the necessary additional testimony or to make any requisite motion to strike. Failure of an objecting party to move to strike when evidence has been admitted subject to a motion to strike constitutes a waiver of any claimed error. *Ault v International Harvester Co.* (1974) 13 C3d 113, 117 CR 812 (alleged error waived when defendant failed to move to strike expert's testimony and instead moved for mistrial after plaintiff rested case). For further discussion, see §24.10.

If the court admits evidence provisionally and then fails to make a final ruling, the objection raised is considered to be overruled and the objecting party will be permitted to raise the admissibility of the evidence on appeal. See *Stanwood v Carson* (1915) 169 C 640, 645, 147 P 562; *Clopton v Clopton* (1912) 162 C 27, 32, 121 P 720. For further discussion of provisional admission of evidence, see §13.121.

If the court declines to admit an exhibit, consider whether the decision can be overcome by additional testimony or a different argument. If additional testimony will overcome the basis for exclusion, it should be elicited from the same or a different witness. If you believe that adequate foundation has been shown, the exhibit should be reoffered into evidence, with your explanation of how the additional testimony has cured any earlier deficiency. If the evidence is again excluded, consider making an offer of proof. An offer of proof should also be considered if, at the time of the original exclusion, you conclude that the court's decision is final and incorrect. On offers of proof generally, see §13.138. See also §15.51.

**PRACTICE TIP:** Once the court makes a definitive ruling on admissibility, make sure that it is formally recorded by the court reporter and, in the event of admission, by the court clerk. Record the ruling in your exhibit log. See sample exhibit log in §13.140.

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## §13.58 7. Disclose substance of exhibit to jury

Once an exhibit has been received in evidence, make sure that the jury is aware of the exhibit's contents and significance. There are a number of methods of disclosing exhibits to a jury. The method chosen depends on the nature of the evidence, its importance in the case, time, expense, and the attitude of the court.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.59 a. Read exhibit to jury

### §13.59 a. Read exhibit to jury

Often the exhibit is read aloud to the jury by counsel or a witness. Decide whether the entire exhibit or only selected portions of it should be read. If only selected portions are read, make sure that the editing is not misleading or subject to a legitimate charge of deception. When the entire document is not read, opposing counsel is entitled to have undisclosed portions read if they are material and not otherwise inadmissible. See generally Evid C §771.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.60 b. Show exhibit to jury

### §13.60 b. Show exhibit to jury

Because jurors will remember an exhibit better if they see it as well as hear it, it may be a good idea to show the exhibit to the jury while a witness is being interrogated about it. This can be accomplished by the following methods:

- **Use enlargement of exhibit.** Enlarging an exhibit on slides or by digital means can be particularly effective when counsel will use an exhibit extensively while examining a witness. Whether to use such techniques will depend on the circumstances and the attitude of the court. When enlargements are used, treat them as separate exhibits, which must be properly authenticated and offered into evidence. This rule is particularly important if a witness is asked to make any markings on the enlargement. See §13.94 on admitting a video recording into evidence.
- **Provide jurors with individual copies of exhibit.** Obtain the court's permission before providing individual copies of an exhibit to each juror. Whether the court will allow this step depends on local rules, the judge's attitude, and the circumstances surrounding the exhibit. See Los Angeles Ct R 8.66 (procedures for giving exhibits to jurors for inspection during trial). If the court has not announced its preference already, ask about it during the pretrial conference. Many attorneys, but fewer judges, feel that copies of exhibits should be provided to jurors whenever possible. This practice is particularly useful when many documents will be discussed and questions regarding their admissibility have been resolved before trial. On pretrial stipulations, see §13.37.

**PRACTICE TIP:** When exhibits have been premarked and the parties have stipulated to admissibility, consider providing each juror with an exhibit book of premarked exhibits to refer to while listening to testimony. Each exhibit will be easily accessible to jurors, but jurors may spend more time examining the exhibits than listening to the testimony.

- **Circulate the exhibit itself to the jury.** Because this process is time-consuming, courts are often reluctant to circulate exhibits to the jury when the exhibit is not particularly important or counsel has made numerous such requests. Moreover, some jurors may not be able to examine the exhibit while the witness is being questioned. Nonetheless, this technique can still be used effectively when there are few exhibits or each juror must personally inspect the exhibit to appreciate it. Obtain the court's permission to circulate an exhibit before using this technique in court. If such a request is granted, some courts may require that the requesting party prepare and furnish copies of the exhibit to all the jurors and alternates. See Los Angeles Ct R 8.66. Check whether local rules require that the exhibit be handed to the jury by the court's bailiff or clerk rather than by the attorney or witness.

**PRACTICE TIP:** After examining a witness about a particular exhibit, return the exhibit to the court clerk, the exhibit box, or other place designated by the trial judge. See Los Angeles Ct R 8.73.

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## §13.61 8. Reoffer exhibits into evidence

Before the close of counsel's case in chief, make sure that all exhibits have been offered and received in evidence. Check with the court clerk to see that the record reflects the receipt into evidence of all exhibits offered.

To ensure that all exhibits have been offered into evidence, make an "en masse" offer (or reoffer) of all your exhibits into evidence (out of the jurors' presence), designating each individually for the record (normally by their identifying exhibit letter or number). This offer theoretically eliminates the possibility that counsel has forgotten to make a renewed offer of a particular exhibit into evidence when the original offer was taken under submission (see §§13.43-13.44) or when the court's decision was not clear on the record. It also allows counsel to discuss with the court the specific status of all important exhibits. "En masse" offers of evidence are not favored by many courts, however, and should not be relied on as a way to have exhibits formally received in evidence at the close of counsel's case in chief. See Los Angeles Ct R 8.65.

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## B. Admission of deposition testimony and former testimony

### §13.62 1. Deposition testimony

Attorneys commonly introduce deposition testimony or former testimony of a party or witness at trial. Generally, the method for introducing such evidence is to read it into the record rather than to offer the transcript into evidence. See 1 Witkin, California Evidence, *Hearsay* §267 (4th ed 2000); 3 Witkin, Evidence, *Presentation at Trial* §§153-158 (4th ed 2000). Absent a stipulation or advance ruling, it is generally improper to introduce the entire deposition transcript into evidence without reading it because the deposition generally includes inadmissible questions and answers to which all parties must have an opportunity to object. On using depositions at trial, see §§12.32-12.97. On the use of video deposition testimony and other audio or visual recordings at trial, see Cal Rules of Ct 2.1040.

**PRACTICE TIP:** Bring original deposition transcripts to trial and provide them to the court clerk. Check local rules on this issue.

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### §13.63 2. Former testimony

Portions of testimony from a prior hearing or trial are generally read into evidence. The transcripts of the former testimony can also be admitted into evidence if a certified copy or duplicate original of the former testimony is presented as required by CCP §273. 1 Witkin, California Evidence, *Hearsay* §267 (4th ed 2000). See also *People v Stevenson* (1978) 79 CA3d 976, 990, 145 CR 301 (transcripts of preliminary hearing testimony). Photocopies of former testimony or notary certificates are not acceptable. See *Wahlgren v Coleco Indus.* (1984) 151 CA3d 543, 546, 198 CR 715.

Before reading from a transcript of former testimony, consider marking the transcript for identification so that it is available to be made part of the record on appeal. If an objection to the reading from a transcript of former testimony is sustained, request permission to read those portions that have been excluded into the record, out of the jurors' presence, to protect the record in the event of appeal. See Evid C §§1290-1293 on former testimony exception to hearsay rule. See also *Abbett Elec. Corp. v Sullwold* (1987) 193 CA3d 708, 714 n8, 238 CR 496.

**NOTE:** Code of Civil Procedure §612 specifically prohibits jurors from taking depositions into the jury room during deliberations. See §21.32.

For discussion of use of deposition testimony during trial generally, see chap 12.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.64 VI. DOCUMENTARY EVIDENCE: ADMISSIBILITY REQUIREMENTS

## §13.64 VI. DOCUMENTARY EVIDENCE: ADMISSIBILITY REQUIREMENTS

To be admissible, documentary evidence must be:

- Relevant (see §13.22);
- Properly authenticated or founded (see §§13.65-13.84);
- In compliance with the secondary evidence rule (see §13.122);
- Admissible hearsay (see §13.119); and
- Not excluded under Evid C §352 (*i.e.,* not unduly prejudicial, misleading, or time consuming) or other statutes (see §13.117).

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## §13.65 A. Authentication defined

Any writing must be authenticated before it can be admitted into evidence (Evid C §1401(a)) or before secondary evidence of its contents can be received in evidence (Evid C §1401(b)). The term "writing" has a broad definition, which includes handwriting, typing, photographs, and recordings, among other things. See Evid C §250, discussed in §13.2.

Evidence Code §1400 defines "authentication" as:

- Introducing evidence sufficient to show that it is the writing that the proponent of the evidence claims it to be; or
- Establishing such facts by any other means provided by law (*e.g.,* stipulation).

Whether a writing has been properly authenticated is a preliminary fact issue that is determined by the judge at a hearing under Evid C §403(a). On the preliminary fact-finding process generally, see §§7.25-7.36. Authentication alone, however, does not guarantee that a writing will be admitted into evidence. The writing must be relevant, comply with the secondary evidence rule (see §13.122), not be inadmissible hearsay, and not be subject to exclusion under Evid C §352 or any other statutes. See §13.64.

**CAUTION:** Be sure to object to improper authentication of a document at trial rather than waiting to do so on appeal. Lack of authentication cannot be raised for the first time on appeal if there was no objection at trial. *Interinsurance Exch. v Velji* (1975) 44 CA3d 310, 118 CR 596; *People v Jones* (1970) 7 CA3d 48, 86 CR 717.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.66 B. Methods for authenticating writings

## §13.66 B. Methods for authenticating writings

Authentication is a foundational requirement for most writings that can be satisfied by a stipulation, live testimony, or other methods. Each method is discussed in §§13.67-13.77. Carefully consider which one is preferable for each particular document requiring authentication. Determine this far enough before trial that additional pretrial discovery may be conducted on authentication, if necessary.

**NOTE:** The means of authentication listed in Evid C §§1410-1421 are not the only means by which a writing may be authenticated or proved. See Evid C §§1400, 1410. For example, an exhibit can be authenticated by using facts about the creation of the writing, its discovery or use, or the contents of the writing itself. See, *e.g., Young v Sorenson* (1975) 47 CA3d 911, 915, 121 CR 236 (unverified carbon copy of reporter's transcript authenticated by comparing its contents with clerk's minutes). For additional examples, see Comment to Evid C §1410.

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### §13.67 1. Stipulations

A stipulation between counsel regarding the writings' authenticity will satisfy the authentication requirement (see §13.65). Such a stipulation may be agreed to at any time before trial, *e.g.,* during the usual preliminary conference with the court at the outset of trial or during the trial itself. See also §13.32. For Sample Stipulation Regarding Use of Documents at Trial, see §13.141. It is not appropriate, however, for counsel to stipulate to an exhibit's authenticity in front of the jury. See Los Angeles Ct R 8.43-8.44.

When counsel have agreed to stipulate to the authentication of a document, a record of this agreement should be made by, *e.g.,* a confirming letter, a written stipulation signed by all counsel, a joint oral statement recorded by a court reporter, or a jointly propounded written order ordered by a judge. Such a record eliminates the possibility that opposing counsel will deny the existence of the stipulation at trial or misconstrue its terms. The written stipulation should then be made a part of the formal record. If in writing, it should be filed with the court. If not in writing, the stipulation should be recited by counsel before the court reporter. Even though a stipulation covers all requirements of admissibility, you must still ask the court during trial to receive the exhibits in evidence. See §13.55.

The proponent of an exhibit should ordinarily assume the burden of drafting any stipulation governing admissibility. Opposing counsel who has stipulated to authenticity, but still anticipates making specific objections to admissibility (*e.g.,* hearsay or relevancy), should insist that the stipulation clarify that all such objections have been reserved. For that reason, opposing counsel may wish to undertake the drafting.

**NOTE:** Many judges encourage the use of stipulations when there is no real dispute over a document's authenticity, because the use of stipulations shortens the trial and avoids distracting the judge or jury with peripheral issues.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.68 2. Testimony of witnesses

## §13.68 2. Testimony of witnesses

A writing can be authenticated by the testimony of one or more witnesses. Such testimony may come from:

- The maker of the writing (see §13.69);
- A witness who saw the writing made or executed (see §13.70);
- A witness who is familiar with the writer's handwriting (see §13.71); or
- An expert (see §13.72).

**NOTE:** If a writing is formally witnessed by a subscribing witness, the witness's testimony is not necessary to authenticate the writing "except as provided by statute." Evid C §1411. Even if a statute requires a subscribing witness's testimony to authenticate a writing, the writing may be authenticated by other evidence if the subscribing witness denies or does not recall the writing's execution. Evid C §1412.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.69 a. Maker of writing; sample foundation

### §13.69 a. Maker of writing; sample foundation

The most common manner of authenticating a writing is through the testimony of its maker. The witness should first acknowledge creating the exhibit and then describe what it is. A typical examination to authenticate a letter might proceed as follows:

Q: Let me hand you a document, which has been marked as Plaintiff's Exhibit 1 for purposes of identification. Would you tell us whether you recognize this document?

A: Yes, I do.

Q: What is it?

A: It's the letter I mailed to Mr. Smith immediately after our telephone conversation on September 1, 2008.

Q: Does the letter bear your signature?

A: Yes, it does.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.70 b. Witness who saw writing made or executed; sample foundation

### §13.70 b. Witness who saw writing made or executed; sample foundation

A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness. Evid C §1413. Compare *O'Laskey v Sortino* (1990) 224 CA3d 241, 273 CR 674 (transcript of recording excluded because attorney's declaration that transcript was accurate was insufficient to authenticate recording; however, court implied that recording itself would have been admissible), disapproved on other grounds in *Flanagan v Flanagan* (2002) 27 C4th 766, 776 n4, 117 CR2d 574, with *People v Patton* (1976) 63 CA3d 211, 133 CR 533 (witness's testimony that recording of telephone conversation was accurate and complete, except for initial gap, was sufficient authentication; recording also identified by officer who operated recording machine).

Eliciting testimony from such a witness to authenticate a writing might proceed as follows:

Q: During the course of this meeting, which you attended, was any sort of document prepared?

A: Yes, there was.

Q: Who prepared the document?

A: Ms. Jones.

Q: Did Ms. Jones identify the document when she was preparing it?

A: Yes.

Q: What did she say?

A: She said she was putting together a short memorandum of understanding, which could be signed by both Mr. Smith and Ms. Jones to confirm their agreement.

Q: When you were at this meeting, did you see the document that Ms. Jones prepared?

A: Yes, I did.

After satisfying the requirements of marking the exhibit (see §§13.46-13.49), disclosing the exhibit to opposing counsel (see §§13.50-13.51) and the judge (see §13.52), and obtaining permission to approach the witness (see §13.54), continue as follows:

Q: Let me hand you a document, which has been marked as Defendant's Exhibit D for identification. Do you recognize this document?

A: Yes. It's the memo that Ms. Jones prepared at the meeting.

Q: Did you see Ms. Jones sign her name to this memorandum?

A: Yes, I did.

Q: Is that her signature at the bottom of the memorandum?

A: Yes, it is.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.71 c. Witness familiar with writer's handwriting; sample foundation

### §13.71 c. Witness familiar with writer's handwriting; sample foundation

A writing may be authenticated by a witness with personal knowledge of the author's handwriting. Evid C §§1415-1416. A witness who is not otherwise qualified to testify as an expert may state an opinion about whether a writing is in the handwriting of the supposed writer if the court finds that the witness has personal knowledge of the writer's handwriting. Evid C §1416. Compare *People v Remiro* (1979) 89 CA3d 809, 153 CR 89 (brother held competent to identify sister's handwriting in seized notebook), with *Palma v Leslie* (1935) 6 CA2d 702, 45 P2d 391 (contract improperly authenticated by witness who had not seen contract signed and was unfamiliar with plaintiff's handwriting; court upheld judgment, however, because error was harmless).

A witness may also acquire personal knowledge of the writer's handwriting from the following (Evid C §1416):

- Having seen the supposed writer write;
- Having seen a writing that purports to be in the supposed writer's handwriting and on which the supposed writer has acted or been charged;
- Having received letters through the mail that purport to be from the supposed writer in response to letters addressed and mailed by the witness to the supposed writer; or
- Any other means of obtaining personal knowledge of the supposed writer's handwriting.

Counsel might proceed to authenticate a writing through a witness with personal knowledge of the writer's handwriting as follows:

> Q: During the period from February 2007 until September 2008, were you employed by Mr. Holloway as his secretary?
>
> A: Yes, I was.
>
> Q: During this period, did you become familiar with Mr. Holloway's handwriting?
>
> A: Of course I did.
>
> Q: Did you have occasion to watch him sign his name?
>
> A: Yes.
>
> Q: How often, would you estimate?
>
> A: Hundreds, perhaps thousands of times. Mr. Holloway would usually sign his letters as soon as I gave them to him, so that I could take them right to the mail room.

After satisfying the requirements of marking the exhibit (see §§13.46-13.49), disclosing the exhibit to opposing counsel (see §§13.50-13.51) and the judge (see §13.52), and obtaining permission to approach the witness (see §13.54), continue as follows:

> Q: Let me show you a document, which has been marked as Plaintiff's Exhibit 5 for identification. Please take a look at the handwritten portion at the bottom of the letter and tell us whether you are able to express an opinion on whether it is the signature of Mr. Holloway.
>
> A: Yes, I am.
>
> Q: What is your opinion?
>
> A: It is Mr. Holloway's signature.

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### §13.72 d. Expert authentication

The genuineness of a writing may be proved or disproved by an expert witness. Evid C §1418. The proponent must satisfy the following two prerequisites before asking the expert's opinion on the genuineness of the document or handwriting:

- The witness must be shown to be qualified as an expert by virtue of his or her special knowledge, skill, experience, training, or education. See generally Comment to Evid C §1418. On expert testimony generally, see Evid C §§801-805. See also §§5.70-5.90, 11.130-11.151; California Expert Witness Guide (2d ed Cal CEB 1991).
- The writing that the expert has used for purposes of comparison must have been admitted or treated as genuine by the party against whom the evidence is offered, or it must be otherwise proved to be genuine to the court's satisfaction. Evid C §1418.

Section 1418 "applies to any form of writing, not just handwriting." Comment to Evid C §1418. The Comment points out that experts can compare typewritten specimens and other forms of writing as accurately as handwritten ones. When the writing offered into evidence is more than 30 years old, a court may be satisfied with a lesser degree of proof concerning the writing's authenticity. Evid C §1419. See Comment to Evid C §1419. See also §13.58.

**PRACTICE TIP:** Refuse any offers by opposing counsel to stipulate that the witness is qualified as an expert. Instead, thank opposing counsel for this offer, but explain that it is important for the jurors to hear about the expert's background and qualifications to evaluate the expert's testimony. See §11.131 for a list of questions that counsel should ask to qualify the expert. Once the expert is qualified, have the expert explain step by step how his or her opinion was reached. This will emphasize the expert's competence and buttress the strength of his or her conclusions.

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## §13.73 3. Admitting business records by affidavit

Business records produced by a third party in response to a subpoena duces tecum can be authenticated without requiring the third party to testify at trial on the admissibility of the documents. The third party can satisfy the subpoena duces tecum by delivering copies of the documents requested to the appointed officer at the place designated in the subpoena (Evid C §1560) and by accompanying the documents with an affidavit stating (Evid C §1561(a)):

- That the signatory is the custodian of the records or has the authority to certify their authenticity;
- That they are true copies of the requested documents; and
- That the documents were prepared in the ordinary course of business at or near the time of the events recorded.

If these requirements are satisfied, the third party will not need to testify at trial to authenticate the documents, because the affidavit is held to be admissible at trial and is presumed to be true by Evid C §1562.

The copies produced with the affidavit are then admissible if they otherwise satisfy the requirements of the business records exception to the hearsay rule (Evid C §1271) and would have been admissible had the affiant been present in court. See *Taggart v Super Seer Corp.* (1995) 33 CA4th 1697, 40 CR2d 56. On the business records exception, see §10.25. See also Effective Introduction of Evidence in California, chap 13 (2d ed Cal CEB 2000); California Trial Objections, chap 19 (Cal CEB Annual).

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### §13.74 4. Authentication by trier of fact

The trier of fact can also determine the genuineness of a contested writing by comparing the writing with handwriting that (a) the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) is otherwise proved to be genuine to the court's satisfaction. Evid C §1417. See *Interinsurance Exch. v Velji* (1975) 44 CA3d 310, 318, 118 CR 596 (trial court properly authenticated signature on back of insurance policy by comparing it with signature on front; same person admittedly signed both sides); *Devereaux v Frazier Mountain Park & Fisheries Co.* (1967) 248 CA2d 323, 330, 56 CR 345 (trial court properly authenticated document by comparing signature with signature on certified copy of official document filed with secretary of state).

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### §13.75 5. Writing authenticated by response to communication

A writing's authenticity may be established by evidence that the writing was received in response to a communication sent to the person who is claimed to be the author. Evid C §1420. See *House Grain Co. v Finerman & Sons* (1953) 116 CA2d 485, 492, 253 P2d 1034 (telegram received in reply to telegram addressed to sender was presumed to be genuine and was admissible into evidence without further proof of sender's identity). See also *People v Roland* (1969) 270 CA2d 639, 646, 76 CR 72 (teletype received by investigator in response to request was properly authenticated under Evid C §1420).

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### §13.76 6. Authentication by contents of writing

A writing may be authenticated by evidence that the writing refers to or states matters unlikely to be known to anyone other than the purported author. Evid C §1421. See *McAllister v George* (1977) 73 CA3d 258, 263, 140 CR 702 (dental bill was authenticated by its contents because it referred to matters about which only plaintiff and party who performed dental services would likely have known); *Interinsurance Exch. v Velji* (1975) 44 CA3d 310, 318, 118 CR 596 (information on reverse side of insurance policy could have been supplied only by appellant). See also *People v Fonville* (1973) 35 CA3d 693, 708, 111 CR 53 (surreptitious audio recording referred to details of crime charged; voice identification established through comparison with recording in evidence containing defendant's voice).

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## §13.77 7. Authentication by adverse party's admission

A writing may be authenticated by evidence of an admission by the adverse party. Such an admission may arise either from a specific statement by the adverse party admitting the writing's authenticity (Evid C §1414(a)) or from an action by the adverse party acting on the writing as if it were authentic (Evid C §1414(b)).

Pretrial discovery provides many tools to obtain or discover admissions of authenticity by the opposing party. Admissions may be obtained through interrogatories, deposition questions, and requests for admission.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.78 C. Self-authenticating writings

### §13.78 C. Self-authenticating writings

Several types of writings are considered to be self-authenticating. See §§13.79-13.82. For these writings, a presumption exists that they are authentic. Such writings do not require evidence of authenticity before they are received in evidence.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.79 1. Acknowledged writings

## §13.79 1. Acknowledged writings

A writing other than a will, having an appropriate certificate of acknowledgment, may be received in evidence without formal proof of its authenticity. Evid C §1451. An appropriate certificate of acknowledgment must meet the requirements of CC §§1180-1207, which list the judges and clerks (CC §1180) and notary publics and local officers (CC §1181) authorized to execute certificates of acknowledgment, the form that the acknowledgment must take (CC §§1188-1189), and the type of required seal and signature (CC §1193; Govt C §8207).

The acknowledgment creates a presumption requiring "a finding of authenticity unless the adverse party produces evidence sufficient to sustain a finding that the writing in question is not authentic." Comment to Evid C §1450. If the adverse party produces such evidence, the presumption is dispelled and the trier of fact determines the issue of the authenticity of the acknowledged writing without reference to any presumption created by Evid C §1451. Jefferson's California Evidence Benchbook, chap 31 (4th ed CJA-CEB 2009).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.80 2. Uniform Commercial Code documents

## §13.80 2. Uniform Commercial Code documents

Certain documents are presumed to be authentic and do not require authenticating evidence. Com C §1307. These documents include (Com C §1307(1)):

- A bill of lading;
- A policy or certificate of insurance;
- An official weigher's or inspector's certificate;
- A consular invoice; or
- Any other document authorized or required by the contract to be issued by a third party.

These documents are presumed to be authentic and are admissible as evidence of the facts stated in them in actions arising from the contract that authorized or required the document. Com C §1307(2). The presumption of authenticity is a presumption affecting the burden of producing evidence. Com C §1307(2)(a) and (b).

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## §13.81 3. Official seals or signatures on official writings

Authenticating evidence is not required to determine the genuineness of certain official seals and signatures. Evid C §§1452-1453. For example, under Evid C §1452 a seal is presumed to be genuine and its use is presumed to be authorized if it purports to be a particular seal (*e.g.,* the United States seal or a seal of a nation recognized by the United States). See Evid C §1452, which lists the recognized seals.

Similarly, a signature is presumed to be genuine and authorized if it purports to be the signature, affixed in an official capacity, of a public employee of the United States, a public employee of any public entity in the United States, or a notary public. Evid C §1453.

The presumptions created by these two sections can be rebutted by evidence sufficient to sustain a finding that they are not genuine or authorized. See Comment to Evid C §1452. If the adverse party introduces such evidence, the issue of authenticity is determined by the trier of fact without regard to the presumptions created by Evid C §§1450 and 1453. See Comment to Evid C §1452; Jefferson's California Evidence Benchbook, chap 31 (4th ed CJA-CEB 2009).

On the presumption of authenticity of official signatures on foreign official writings and procedures for authenticating them, see Evid C §1454.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.82 4. Ancient documents

## §13.82 4. Ancient documents

A deed, will, or other writing that purports to create, terminate, or affect an interest in real or personal property is presumed to be authentic under Evid C §643 if it:

(a) Is at least 30 years old;
(b) Is in such condition as to create no suspicion concerning its authenticity;
(c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and
(d) Has been generally acted upon as authentic by persons having an interest in the matter.

This is known as the ancient documents rule. See Comment to Evid C §643. See also §§13.57-13.58.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.83 D. Authenticating altered writings

### §13.83 D. Authenticating altered writings

A writing can be authenticated even if it has been altered or appears to have been altered after its execution, as long as the party introducing the writing accounts for the alteration or appearance of alteration. If a sufficient account is not given of the alteration, the writing may not be received in evidence. Evid C §1402.

The proponent of the evidence may make an appropriate accounting by showing that the alteration (Evid C §1402):

- Was made by another person without the concurrence of the proponent;
- Was made with the consent of the parties affected by the alteration;
- Was otherwise properly or innocently made; or
- Did not change the meaning or language of the writing.

See also *People v Morris* (1991) 53 C3d 152, 205, 279 CR 720 (court upheld admissibility of copy of letter that had missing page on ground that evidence was sufficient to support finding of authenticity), overruled in part on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394; *Consolidated Loan Co. v Harman* (1957) 150 CA2d 488, 310 P2d 450 (continuing guarantee whose addressee was altered from class to one company within class after execution and delivery was held admissible).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.84 E. Exceptions to authentication

## §13.84 E. Exceptions to authentication

Prior use of a writing by an adverse party can obviate the need for counsel to lay any foundation authenticating the writing. For example, authenticating evidence is not required in the following circumstances:

- **Refreshing recollection.** When a writing is used by a witness to refresh his or her recollection either before or while testifying, the adverse party may introduce into evidence any portion pertinent to the witness's testimony. See Evid C §771. The proponent of the writing need show only that the writing was used to refresh the witness's recollection and need not present any other authenticating evidence. Evid C §771. On refreshing recollection generally, see §§13.9, 13.34.
- **Past recollection recorded.** When a party reads a writing into evidence as a past recollection recorded, the adverse party may offer the writing into evidence. See Evid C §1237. There is no requirement under Evid C §1237 that the party present any additional authenticating evidence. On past recollection recorded generally, see §13.10.
- **Prior authentication.** When a writing has already been authenticated by testimony elicited by other parties, or when the writing has already been received in evidence, additional authenticating evidence is not required. Once a writing has been received in evidence, all parties are entitled to use it during trial without further authenticating testimony—unless the writing has been admitted only as to one party or for one purpose. In that event, the court must "restrict the evidence to its proper scope and instruct the jury accordingly." Evid C §355. For further discussion of limited admissibility, see §13.135.

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## VII. DEMONSTRATIVE EVIDENCE: FOUNDATIONAL REQUIREMENTS

### §13.85 A. Foundation varies depending on type of demonstrative evidence

To be admissible, demonstrative evidence must be:

- Relevant (see §13.22, 13.85);
- Properly authenticated or founded (see §13.85);
- In compliance with the secondary evidence rule (see §13.122);
- Admissible hearsay (see §13.119); and
- Not excluded under Evid C §352 (*i.e.,* not unduly prejudicial, misleading, or time-consuming) or other statutes (see §13.117).

The foundation will vary depending on the nature of the demonstrative evidence. For definition of demonstrative evidence, see §13.3. A proper foundation can also be established by obtaining a stipulation or an admission from the opposing party. On methods for laying a foundation for demonstrative evidence, see §§13.86-13.89.

To determine whether there is a proper foundation for demonstrative evidence, a preliminary hearing may be required but only if an objection is raised by motion in limine or at the time such evidence is introduced at trial. On this preliminary fact-finding process generally, see §§7.25-7.36. In many instances, a formal hearing is not conducted, because the nature of the proffered evidence is self-evident.

**EXAMPLE:** If a witness to an accident is asked to mark on an existing diagram of the accident site where the witness was standing, no hearing would be required to lay a foundation, because the testimony itself has established the foundation. The marked diagram can be admitted by exactly the same procedure as if it were not marked. In other situations, however, the preliminary hearing on the admissibility of the evidence may be extensive.

**PRACTICE TIP:** Be prepared to show all elements necessary to establish admissibility of demonstrative evidence and to rebut or explain any theories of inadmissibility offered by the opponent if you want to have demonstrative evidence received in evidence. Conversely, counsel opposing admission of such evidence should be prepared to challenge it vigorously by bringing a motion in limine during the preliminary hearing to either conduct a voir dire examination of the foundational witnesses offered in support of the disputed evidence or offer his or her own witnesses and evidence.

Admissibility of demonstrative evidence is largely within the discretion of the trial court. See *Kraus v Walt Disney Prods.* (1963) 221 CA2d 736, 740, 34 CR 702 (jury view and demonstration of actual operation of turnstile properly permitted); *Odell v Frueh* (1956) 146 CA2d 504, 511, 304 P2d 45 (no abuse of discretion by trial court for permitting evidence of result of controlled experiment).

On foundations required for specific types of demonstrative evidence, see §§13.91-13.111. See also Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008).

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## B. Methods for laying foundation

### §13.86 1. Stipulations

As with documentary evidence, the foundational requirements for the admissibility of demonstrative evidence may be satisfied by stipulation. See §13.67. Unless there is some tactical reason for not disclosing the evidence to opposing counsel before trial, consider seeking such a stipulation. This is particularly important if you want to refer to the evidence in the opening statement. One tactical reason for avoiding such a stipulation is that you may wish to have the foundational evidence received in evidence to enhance the impact and weight of the demonstrative evidence with the trier of fact.

On referring to demonstrative evidence during the opening statement and clearing its use with the judge beforehand, see §§13.30, 13.37. On the procedure for stipulating and protecting the record, see §§13.32, 13.67. See also §13.141 for Sample Stipulation Regarding Use of Documents at Trial.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.87 2. Testimony of witnesses

## §13.87 2. Testimony of witnesses

The most common method of laying a foundation for the receipt of demonstrative evidence is through the testimony of witnesses. This may be testimony of the maker of the evidence, someone familiar with the creation of the evidence, or someone familiar with what the evidence is designed to depict.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.88 3. Admissions by adverse party

## §13.88 3. Admissions by adverse party

If the use of demonstrative evidence at trial is contemplated, be alert to the opportunity to establish the foundational prerequisites for its admissibility by use of admissions of the adverse party. For example, when substantial similarity is a foundational requisite, as in the case of photographic recreation of events (see §13.97), you may be able to obtain admissions about underlying facts of the dispute. Similarly, admissions may be obtained from the adverse party on the reliability of certain types of testing or the authenticity of certain documents. As with documentary evidence (see §13.65), the tools of pretrial discovery can be extremely useful in obtaining such admissions.

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### §13.89 4. Judicial notice

In proffering demonstrative evidence, consider having the court take judicial notice of key preliminary facts. Notice may be taken of facts underlying the dispute, the quality of certain objects, or the reliability of certain scientific processes. See, *e.g., People v MacLaird* (1968) 264 CA2d 972, 975, 71 CR 191 (under Evid C §451(f), court took judicial notice of validity and accuracy of radar devices; expert witness was not necessary to establish this commonly known and accepted proposition). On judicial notice generally, see chap 14.

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### §13.90 C. Substantial similarity

For some types of demonstrative evidence (*e.g.,* evidence of experiments), you may be required to make a preliminary showing that the conditions reflected in or underlying the proffered evidence are "substantially similar" to those giving rise to the issue to which the evidence is relevant. See *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 521, 109 CR 110 (preliminary showing required before introduction of film of accident reconstruction experiment; court found experiment was conducted under substantially similar conditions as when accident took place). Compare *Larramendy v Myres* (1954) 126 CA2d 636, 641, 272 P2d 824 (courtroom demonstration of smoke-producing device permitted), with *Garcia v Hoffman* (1963) 212 CA2d 530, 535, 641, 28 CR 98 (court did not allow results of demonstration regarding distance within which automobile could be stopped when driven at certain speed). See 2 Witkin, California Evidence, *Demonstrative, Experimental and Scientific Evidence* §§38-40 (4th ed 2000). On preliminary fact hearings, see §§7.25-7.36.

"Substantial similarity" does not require that the conditions be absolutely identical. *Culpepper v Volkswagen of Am., Inc., supra* (evidence concerning film of experiment admitted). See *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 550, 138 CR 705 (experimental evidence on automobile brakes admitted), disapproved in part on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 574, 34 CR2d 607. A showing of substantial similarity generally requires evidence of both the conditions existing at the time of the dispute and those reflected in the proffered evidence. For definition of "proffered evidence," see §13.7.

Counsel can aid the court in determining substantial similarity by presenting expert testimony on whether and how any dissimilarities affect the instructional qualities of the proffered evidence. See *People v McDaniel* (1976) 16 C3d 156, 174, 127 CR 467 (model bomb prepared by expert witness and demonstration using this bomb admitted into evidence for limited purpose of aiding jurors in understanding expert's testimony, even though model did not depict device that triggered explosion). Photographic reconstruction or reenactment of events must also be connected to the case by testimony showing that the recreation is substantially similar to the facts of the case. See §13.97.

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## D. Specific types of demonstrative evidence; foundation required

### §13.91 1. Photographs

The admission of photographs into evidence is so common that it is often accomplished by stipulation. See §13.86. When no such stipulation exists, all that is generally required to lay a proper foundation is for a witness (who need not be the photographer) to testify that he or she has knowledge of the facts depicted by the photograph and that the photograph accurately depicts what it purports to show. See *Berkovitz v American River Gravel Co.* (1923) 191 C 195, 201, 215 P 675; 2 Witkin, California Evidence, *Demonstrative, Experimental and Scientific Evidence* §16 (4th ed 2000).

Photographs of the event in dispute will be received in evidence if they are relevant and not unduly prejudicial. See, *e.g., People v Robillard* (1960) 55 C2d 88, 100, 10 CR 167 (photographs of deceased officer's body taken at scene of murder; disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 36 CR 201); *Adams v City of San Jose* (1958) 164 CA2d 665, 667, 330 P2d 840 (photographs of sidewalk at scene of accident). Compare *Robillard* and *Adams* with *People v Love* (1960) 53 C2d 843, 854, 3 CR 665 (photograph showing front view of deceased should not have been admitted when prejudicial effect outweighed probative value of inflammatory evidence). On making an objection under Evid C §352, see §13.117.

Whether a photograph accurately and fairly represents an object or a scene is a question for the trial court; its ruling will be sustained unless an abuse of discretion is apparent. *Adams v City of San Jose, supra*. See *Barone v Jones* (1947) 77 CA2d 656, 661, 176 P2d 392. If a photograph does not accurately and fairly depict what it portrays, it is subject to objection. See *Ehrhardt v Brunswick, Inc.* (1986) 186 CA3d 734, 231 CR 60 (demonstration video excluded because it was inconsistent with testimony of all eye witnesses). Compare *Ehrhardt* with *DiRosario v Havens* (1987) 196 CA3d 1224, 1232, 242 CR 423 (video reenactment admitted despite numerous differences in conditions depicted), and *Anello v Southern Pac. Co.* (1959) 174 CA2d 317, 322, 344 P2d 843 (appellate court criticized introduction of photographs of orange diesel locomotive when engine in collision was black steam locomotive; court reversed for other reasons, thus court did not decide whether introduction of slides constituted reversible error).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.92 a. Sample foundation

## §13.92 a. Sample foundation

A proper foundation for the admission of a photograph can be established as follows:

Q: Let me hand you a document, marked as Plaintiff's Exhibit 10 for purposes of identification. Do you recognize this document?

A: Yes.

Q: Would you tell us what it is?

A: It's a picture I took of my car several days before the accident.

Q: When was this picture taken, if you recall?

A: April 18, 2008. It was on my birthday.

Q: Could you tell us whether Exhibit 10 accurately and fairly depicts the physical condition of your car just before the collision on April 20, 2008?

A: Yes, it does.

Q: Was there any change in the condition of your car between the time that this photograph, Exhibit 10, was taken and the time that the collision occurred on April 20, 2008?

A: No.

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### §13.93 b. Photograph must be substantially similar to disputed event

When a photograph depicts a different object than that involved in the underlying dispute, it may be admitted on a showing of substantial similarity between the object or scene portrayed and the object or scene involved in the dispute. See, *e.g., People v Slocum* (1975) 52 CA3d 867, 891, 125 CR 442 (photograph depicting similar but not identical equipment held admissible). On substantial similarity, see §13.90. A photograph depicting a similar situation usually is not admissible unless its proponent offers proof that what the photograph depicts is substantially similar to the disputed event. See *PG&E v Hacienda Mobile Home Park* (1975) 45 CA3d 519, 530, 119 CR 559 (photographs of power lines at location other than one involved in dispute held inadmissible because there was no evidence of substantial similarity). See also *People v Vaiza* (1966) 244 CA2d 121, 126, 52 CR 733 (trial court erroneously admitted four photographs solely to show lighting conditions at time of a crime when no foundation was laid that the photographs were taken at same hour of morning as incident).

If, however, counsel wishes to offer a photograph of the scene of an accident into evidence, even substantial changes in conditions at the scene depicted in the photograph will not necessarily cause the court to exclude it as long as "the photograph, as explained, will give a correct understanding of the condition existing at the time of the accident." *Barone v Jones* (1947) 77 CA2d 656, 660, 176 P2d 392, quoting from *McNair v Berger* (Mont 1932) 15 P2d 834. On photographic recreation of events generally, see §13.97. On requirement for relevance generally, see §13.22.

**NOTE:** When special lenses or unusual techniques have been used to take the photograph, it may be necessary to have the photographer explain these techniques in court and testify that the picture accurately depicts what it purports to depict. For discussion of why counsel should not be the photographer, see §13.43.

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## 2. Motion pictures and video recordings

### §13.94 a. Foundational requirements

Relevance of motion pictures and video recordings must first be established. See §13.22 on relevancy. After relevance is established, both movies and video recordings must be authenticated before they may be received in evidence because they are "writings" under Evid C §250. Evid C §§1401, 1413. See §§13.65-13.77. As "writings," motion pictures and video recordings may also be subject to the secondary evidence rule embodied in Evid C §§1520-1523. See also Evid C §1553 ("printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent"). For discussion of the secondary evidence rule, see §§13.122-13.123.

A proper foundation can generally be established through testimony that the movie or video accurately depicts what it purports to show (see *People v Dabb* (1948) 32 C2d 491, 498, 197 P2d 1; see also *People v Bowley* (1963) 59 C2d 855, 859, 31 CR 471) or that it depicts facts substantially similar to those in dispute (compare *DiRosario v Havens* (1987) 196 CA3d 1224, 1232, 242 CR 423 (no reversible error in showing video recreating automobile accident, because recording was made under conditions substantially similar to accident conditions), with *People v Boyd* (1990) 222 CA3d 541, 566, 271 CR 738 (insufficient showing that lighting conditions displayed on film were similar to lighting conditions on night of crime). On substantial similarity, see §13.90.

If counsel intends to show movies or video recordings during trial, they should be disclosed in advance because they usually cannot be viewed during a sidebar conference. Once this intent has been disclosed, a preliminary screening can be arranged so that objection can be raised and ruled on out of the jury's presence. Some courts require that this disclosure be made at the beginning of trial. All counsel, the judge, and a court reporter should be present at the screening. Although it is not necessary for the court reporter to report the movie's soundtrack, the ensuing discussion between counsel and the judge about the film should be recorded.

When the soundtrack has dialogue, some courts routinely suggest that a transcript be prepared by the proponent in advance. This is particularly important when the dialogue is difficult to decipher. Counsel offering the motion picture or video should have a copy of the transcript authenticated as accurate and admitted into evidence.

Two evidentiary objections commonly raised to motion pictures or video recordings are the hearsay objection (see §13.119) and an objection under Evid C §352 (see §13.117).

On motion pictures used in connection with experiments, see §13.41.

**PRACTICE TIP:** The video, CD, or laser disk should be marked as the exhibit. If only a portion of the simulation is shown to the jury, the attorney should describe for the record what portion of the recording was allowed (*i.e.,* by reference to the time display or counter on the video or disk playback device). On the manner of marking, see §13.48.

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### §13.95 b. Day-in-the-life films

"Day-in-the-life" films have become an increasingly popular way for a plaintiff to dramatize and illustrate for a jury the impact of an injury on the plaintiff's daily routine. Admission of such films has been permitted on the basis that they corroborate oral testimony regarding the victim's life after the injury. *Lehmuth v Long Beach Unified Sch. Dist.* (1960) 53 C2d 544, 555, 2 CR 279 (movie showing effects on victim's life of tracheotomy and unconscious body movements held admissible even though oral testimony about plaintiff's physical condition was also introduced); *Jones v City of Los Angeles* (1993) 20 CA4th 436, 24 CR2d 528 (plaintiff's day-in-the-life video admissible in trial for damages from automobile accident).

The foundation for these films requires a witness with personal knowledge of the filmed events who can testify that the film is an accurate portrayal of what it shows. This is the same foundation required for other photographic evidence. *Jones v City of Los Angeles, supra* (nurse's testimony that she observed making of "day in the life" video and that it accurately reflected plaintiff's daily routine in nursing home was sufficient to lay foundation for admission of video into evidence). See §13.92. These films are susceptible to exclusion, however, if their prejudicial effects outweigh their probative value. See Evid C §352. But see *Lehmuth v Long Beach Unified Sch. Dist., supra*. Although California courts have not ruled directly on the exclusion of day-in-the-life films under Evid C §352, courts outside California have imposed foundational requirements for day-in-the-life films that are beyond those required for other films.

Out-of-state courts note that additional foundational requirements may be necessary for such films because they have special emotional power, tend to dominate other more conventional evidence, and may unfairly disadvantage a defendant who has no similar opportunity to depict with equal impact times when the plaintiff is not specially disadvantaged. See *Bolstridge v Central Me. Power Co.* (D Me 1985) 621 F Supp 1202, 1204 (film may be admitted only if it conveys information more fully or more accurately than could be obtained from a witness in court); *Thomas v C.G. Tate Constr. Co.* (D SC 1979) 465 F Supp 566, 571 (trial court properly refused to admit video of burn victim receiving physical therapy but did allow still photographs of plaintiff's wounds).

In determining whether the film's probative value outweighs its prejudicial effect, the court will examine whether the film corroborates other testimony that may itself be a basis for admission. See *Lehmuth v Long Beach Unified Sch. Dist., supra*. Out-of-state courts have also examined whether the same information can be introduced through testimony of the plaintiff or the plaintiff's relatives or caregivers or through demonstration in court of special problems faced by the plaintiff. If such information can be obtained through sources other than a film, the film may be considered cumulative and may circumvent the defendant's right to cross-examine. See *Bolstridge v Central Me. Power Co., supra*; *Haley v Byers Transp. Co.* (1967) 414 SW2d 777, 780.

**NOTE:** Because California courts have not addressed this issue directly, litigants are presented with a challenging set of strategic choices. A plaintiff must decide whether to invite a defendant to attend the filming and whether to preserve outtakes and make them available to the court. By denying the defendant access to the full process, the plaintiff risks having the final product excluded because the defendant has no viable way of knowing whether it is fairly representational. The defendant, if invited to attend, faces the dilemma of whether to accept, because the defendant's presence could be deemed to waive objections or to validate the filming process, and there may be little gained by attending. See *Cisarik v Palos Community Hosp.* (1991) 579 NE2d 873, 874 (right to discovery does not give defendant automatic right to be present at a day-in-the-life filming).

Until the issue has been decided in California, the plaintiff should:

- Preserve and make available all film so that any claim by the defendant that the film is not accurate can be addressed during discovery and on cross-examination rather than as a basis for complete exclusion;
- Avoid especially gruesome sequences or sound effects that a court may conclude will unfairly prejudice the jury;
- Make the film as accurate as possible and avoid overstating; and
- Make sure that the witness who will present the film is able to testify fully about the circumstances under which the film was made.

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### §13.96 c. Surveillance films

In the past, motion picture surveillance was often offered into evidence by defense counsel in workers' compensation and personal injury suits to prove that the plaintiff's claimed injuries were exaggerated or nonexistent. This practice, while still common, is not as widespread as it once was, possibly as a result of the expanding rights of privacy (see Cal Const art I, §1; *Cain v State Farm Mut. Auto. Ins. Co.* (1976) 62 CA3d 310, 132 CR 860).

Surveillance films have been excluded from evidence when the recorded activity was fraudulently induced. See *Redner v WCAB* (1971) 5 C3d 83, 93, 95 CR 447. Such fraudulent inducement may entitle a person under surveillance to recover for intentional infliction of physical and emotional injury and punitive damages. See *Unruh v Truck Ins. Exch.* (1972) 7 C3d 616, 102 CR 815. In contrast, the plaintiffs often introduce into evidence so-called day-in-the-life films to demonstrate the extent of their injuries. See, *e.g., Lehmuth v Long Beach Unified Sch. Dist.* (1960) 53 C2d 544, 555, 2 CR 279 (motion picture of plaintiff in hospital). See §13.95.

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### §13.97 d. Photographic re-creation of events

Photographic recordings of a reenactment or reconstruction of relevant events are admissible at trial on a proper showing. Such films or photographs can have a substantial effect on the outcome of the trial because they enable the jury to be on-the-spot observers of the dispute. See, *e.g., People v Dabb* (1948) 32 C2d 491, 197 P2d 1 (reenactment of crime by defendants recorded by sound motion pictures; jury viewed film, in which defendants admitted committing crime in manner depicted).

Assuming relevancy (see §13.22), the general foundational requisite for admitting photographic reenactments or reconstructions is a showing that the facts and conditions portrayed in the film or photograph are the same as or substantially similar to those involved in the dispute. See, *e.g., People v O'Brien* (1976) 61 CA3d 766, 780, 132 CR 616 (posed photographs reconstructing event). But see *People v Boyd* (1990) 222 CA3d 541, 565, 271 CR 738 (court properly excluded video based on dissimilarities in lighting conditions); *People v Vaiza* (1966) 244 CA2d 121, 126, 52 CR 733 (trial court abused discretion in admitting photographs designed to show lighting conditions at scene of crime that were taken many months later and not at same hour of morning as incident). See also 2 Witkin, California Evidence, *Demonstrative, Experimental and Scientific Evidence* §19 (4th ed 2000).

The court may admit a photographic reenactment even if it portrays conditions somewhat dissimilar to conditions at the time of the dispute. Compare *DiRosario v Havens* (1987) 196 CA3d 1224, 1232, 242 CR 423 (video reenactment admitted despite numerous differences in conditions depicted), *Greeneich v Southern Pac. Co.* (1961) 189 CA2d 100, 107, 11 CR 235 (color and sound motion pictures portraying reenactment of defendant's train passing over railroad crossing properly admitted, even though film was shot during day, accident occurred at night, and courtroom distorted sound of train), and *People v Freeman* (1951) 107 CA2d 44, 54, 236 P2d 396 (court properly admitted film of experiment showing lighted matches thrown from moving jeep, even though wind and temperature conditions not identical), with *Ehrhardt v Brunswick, Inc.* (1986) 186 CA3d 734, 740, 231 CR 60 (video reenactment excluded because it was inconsistent with all eyewitness testimony). See also *Anello v Southern Pac. Co.* (1959) 174 CA2d 317, 322, 344 P2d 843 (appellate court criticized trial court's admission of film of orange train approaching crossing when train in dispute was black; reversed on other grounds so court never decided issue of admission of color slides). For further discussion of the foundation required for photographs, see §13.92.

**PRACTICE TIP:** When the photographic evidence is in a motion picture, court and counsel should view the film in chambers to resolve any objections. The court or counsel may also wish to conduct a voir dire examination of foundational witnesses out of the jurors' presence so that a ruling on the film's admissibility can be made. On anticipating sensitive areas of inquiry, see Los Angeles Ct R 8.46.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.98 e. Sample foundation for video recording

### §13.98 e. Sample foundation for video recording

After establishing the video maker's name, occupation, and business address, counsel seeking to have this video received in evidence might ask the witness the following questions to lay a foundation:

Q: How long have you been in the videographics business?

A: 10 years.

Q: Please state your training and experience in this field.

A: In 2007 and 2008 I attended two 4-day seminars at the University of Nevada in Reno on the equipment and techniques of videographic reporting.

Q: During the years that you have been in the videographics business, approximately how many assignments have you completed?

A: Over 500 assignments.

Q: Have any of your assignments involved the taking of videographic pictures for use in legal proceedings?

A: Yes, I have given testimony in a court of law where I have presented videographic footage over 30 times.

Q: Did you take video footage of Mr. Fuller, the plaintiff in this case?

A: Yes, I took it in front of Avenida del Prisa, La Jolla, California, on November 1, 2007, at the defense attorney's request.

Q: What equipment did you use for this purpose?

A: I used a Sony VHS video camera with a six-to-one zoom lens.

Q: Where were you when you took this video footage?

A: I was on the west side of the street, opposite the address that I previously mentioned. I was approximately 100 feet away from the plaintiff. I had the camera on a tripod. The lighting exposure is automatic.

Q: What were the lighting conditions at the time?

A: It was clear daylight and sunshine, about three in the afternoon.

Q: How many minutes of footage did you take?

A: 27 minutes.

Q: Were any splices made in the video?

A: No.

Q: Do you have the video with you in court?

A: Yes. Here it is.

Q: [*Include if video has not already been identified (see §§13.46-13.49)*] Your Honor, may this package be marked as Defendant's next exhibit in order for identification?

Court: It will be marked Defendant's D for identification.

Q: Does Defendant's D for Identification represent all the video footage taken by you of plaintiff on November 1, 2007?

A: Yes.

Q: Have you seen the video footage?

A: Yes.

Q: Is it a fair representation in all respects of the plaintiff's actions on the date mentioned?

A: Yes.

Counsel can now offer the video into evidence, stating:

At this time, Your Honor, we offer Defendant's D into evidence and ask permission to show the recording to the jury.

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## §13.99 3. X rays

The foundational requirement for the admissibility of X rays is similar to that for the admissibility of photographs. See §13.91. Generally, there must be testimony to establish the accuracy of the X ray. See *Sim v Weeks* (1935) 7 CA2d 28, 40, 45 P2d 350.

This requirement is often satisfied by testimony that:

- The X ray is in fact the X ray of the person or object involved in the litigation;
- The X ray depicts a specific portion of the person or object on a particular date; and
- The X ray accurately portrays what it depicts.

This testimony is often presented by the proponent's expert witness who interprets the X ray for the trier of fact. Unlike normal photographs, an X ray's significance depends on an expert's interpretation of it. Without this expert's analysis, the X ray is normally unintelligible to the jury. When the accuracy of an X ray not taken by the expert witness is contested, counsel will probably be required to call a witness familiar with the manner in which the X ray was created, particularly if an unusual technique was used or the X ray depicts an uncommon condition or a nonhuman subject.

X rays that reflect a normal condition other than of the person or object involved in the suit may also be admitted into evidence for purposes of comparison. See, *e.g., DeMartini v McDonnell* (1936) 14 CA2d 405, 58 P2d 170.

**PRACTICE TIP:** X rays are essentially photo-negatives and, as such, they present logistical problems in the courtroom. An illuminating view box is needed for their content to be viewed by the jury. Although many courts now have such equipment available, you should make advance arrangements. Having a positive print made of an X ray is even better than using an X ray alone. This allows the jury to compare the X ray with the positive print. The print can be handled with the ease of a photograph and may be permitted inside the jury room during deliberations. X rays are usually not allowed inside the jury room, because the jurors may misinterpret them or be misled. See §13.139.

**NOTE:** The foundational requirements for X rays are often the subject of stipulation. On stipulations generally, see §13.37.

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## 4. Drawings, diagrams, charts, graphs, maps, and models

### §13.100 a. Foundational requirements

The admissibility of drawings, diagrams, charts, graphs, maps, models, and other such visual aids depends on principles similar to those required for the admissibility of photographs. See 2 Witkin, California Evidence, *Demonstrative, Experimental and Scientific Evidence* §24 (4th ed 2000). On photographs, see §13.92. Visual evidence is acceptable because it is "the pictorial communications of a qualified witness." See *People v Snyder* (1958) 50 C2d 190, 324 P2d 1; *People v Kynette* (1940) 15 C2d 731, 755, 104 P2d 794, overruled on other grounds in *People v Horn* (1974) 12 C3d 290, 301, 115 CR 516. Visual aids may be introduced into evidence to illustrate the scene of an accident or to show the location of objects or places involved in a dispute. See, *e.g., People v Brown* (1988) 46 C3d 432, 442, 250 CR 604 (use of mannequin to illustrate gunshot wounds).

Generally, the requisite foundation can be laid through a witness (or witnesses) testifying that the visual aid accurately and fairly reflects certain facts. In certain instances, a witness's testimony on the accuracy of measurements and proportions depicted by the visual aid may be important to satisfy the foundational requirement.

The proponent may have to overcome an objection that the visual aid is unduly prejudicial, time-consuming, or misleading. See Evid C §352. See also *County of San Mateo v Christen* (1937) 22 CA2d 375, 378, 71 P2d 88 (foundation for model properly laid, but court sustained §352 objection, noting that trial court has discretion in ruling on whether to admit models into evidence because great disparity in size between model and original may be misleading). On objections generally, see §§13.114-13.138.

**NOTE:** Duplicates of an article may also be admitted into evidence for visual aid purposes. See *Smith v McClary* (1938) 28 CA2d 468, 470, 82 P2d 712 (duplicate lid to 100-pound malt can admitted into evidence just as photograph would be).

Although maps, plans, and diagrams need not be prepared to scale to be admissible in most courts, preparing them to scale overcomes objections about their accuracy and fairness. See §13.19. In some courts, however, the visual aid must state on its face whether it is prepared to scale. See, *e.g.,* Los Angeles Ct R 8.75. Some courts also require that permission to use such aids be obtained in advance.

Visual aids such as maps, drawings, and diagrams also may be made by a witness while testifying. If the visual aid accurately reflects what it depicts, it may be received in evidence. Generally, a witness will be allowed to make notes, drawings, or markings if the requested task helps explain the witness's testimony and is not unduly time-consuming, misleading, or destructive to the exhibit's original significance. See generally Evid C §352. Counsel should ask the court's permission before requesting the witness to perform this task.

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### §13.101 b. Medical drawings

A foundation for medical drawings of surgical procedures can be established by the surgeon's testimony that the drawings fairly portray the surgery. The drawings should be made under the surgeon's direction by consultation between the artist and the surgeon. These drawings can be effectively used to convince the trier of fact that cases involving soft-tissue injuries can be serious. One way of demonstrating soft-tissue injury is to present medical drawings showing the bone structure, with acetate overlays to show the soft-tissue structure.

**EXAMPLE 1:** A woman had intractable pain in her arm from a whiplash injury. A series of drawings illustrated surgery involving the severing of sensory nerves in the cervical region to relieve the pain. The first drawing showed the incision; others showed various steps in reaching the nerves, including removal of portions of bone in the spine and severance of the nerve.

**EXAMPLE 2:** A woman swallowed a piece of wire, which was inside a cream puff. An artist's colored drawings illustrated the surgery to remove the wire from her intestines. The first drawing showed the female torso. The first acetate overlay showed the incision made in the abdomen; the next overlay showed the location of the wire in the body.

Because some judges do not permit X rays to be taken to the jury room (see §13.124), it is sometimes helpful to have drawings made illustrating fractures. A foundation can usually be laid for the introduction of the drawings by having the medical witness compare the X rays with the drawings. If the witness testifies that the drawings are a fair reproduction of the fractures shown by the X rays, the drawings may be offered into evidence. The court will usually receive such drawings and permit them to go into the jury room. Once in the jury room, these drawings are a constant reminder during the deliberations of the nature of the injury and medical procedure. On taking exhibits to the jury room, see §§13.139, 21.29.

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### §13.102 c. Models

For models, the foundational testimony required is that the model be substantially similar to that which it illustrates. On how to establish substantial similarity, see §13.90.

**EXAMPLE 1:** A pistol substantially similar to one involved in a robbery was admitted for the limited purpose of illustrating and clarifying a witness's testimony. See *People v Ham* (1970) 7 CA3d 768, 780, 86 CR 906, disapproved on other grounds in *People v Compton* (1971) 6 C3d 55, 60 n3, 98 CR 217.

**EXAMPLE 2:** Demonstration with a model bomb was received in evidence for the limited purpose of aiding the jurors in understanding the expert's testimony, even though the model did not purport to depict the device that actually triggered the explosion involved in the case. See *People v McDaniel* (1976) 16 C3d 156, 175 n13, 127 CR 467.

**EXAMPLE 3:** The trial court admitted a model on the theory that it correctly depicted the appearance of property before it was taken in an eminent domain proceeding. See *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 398, 82 CR 1.

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### §13.103 d. Skeletons

Testimony may be illustrated by skeletons, which fall "within the same category as pictures and diagrams." *Dameron v Ansbro* (1918) 39 CA 289, 298, 178 P 874. On foundational requirements for photographs and drawings, see §§13.91, 13.100, respectively. In the absence of a stipulation, foundational testimony is usually elicited through an expert witness who interprets the skeleton and testifies that it accurately portrays what it depicts. Permitting counsel to use a skeleton to illustrate testimony is within the court's discretion. *Dameron v Ansbro, supra*.

**NOTE:** Personal injury attorneys who use skeletons often during trial can avoid buying a new skeleton for every trial, by obtaining a stipulation or court order that the witness and counsel may use the skeleton without marking it for identification or admitting it into evidence. This way, counsel can regain custody of the skeleton on return of the verdict or entry of judgment.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.104 e. Drawing pad or blackboard

### §13.104 e. Drawing pad or blackboard

While testifying, a witness may be permitted to make notes or drawings on a blackboard or drawing pad to illustrate the testimony. A court may also permit a witness to mark on an exhibit already in evidence. Any location on an exhibit that is referred to by a witness should be marked and identified with a reference to that witness (*e.g.,* all markings by witness Smith should be marked Smith-1, Smith-2; if extensive markings will be made, counsel should use a transparent overlay and grease pencils so that the original is not altered).

**PRACTICE TIP:** It is usually not a good idea for a witness to use a blackboard, because a drawing on a blackboard cannot easily be made part of the formal record. Instead, use a pad mounted on a bulletin board. Most courts make such equipment available as a matter of routine. Once the witness has finished making notes or drawings on the pad, have the piece of paper marked for identification and received in evidence.

If a blackboard must be used, consider having a photograph taken of the witness's notes or drawings. The photograph can be marked for identification and offered into evidence. This helps create a clearer record for purposes of appeal. Opposing counsel can use the same technique if the witness's notes or drawings prove to be important to him or her. Note that when such a photograph is received in evidence, it should be received for the limited purpose of explaining the witness's testimony.

**NOTE:** Counsel who is examining a witness may make a drawing or mark on a drawing under the witness's direction. If the witness testifies on the accuracy of the drawing or marking, it can be received in evidence.

On the requirement for relevancy generally, see §13.22.

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### §13.105 5. Audio recordings

Properly authenticated recordings are admissible as "writings." *Darley v Ward* (1980) 28 C3d 257, 261, 168 CR 481. On definition of writings, see §13.2.

**NOTE:** Authentication alone does not overcome other rules of evidence, *e.g.,* the hearsay rule. There is a difference between a foundational device, such as authentication, and the substantive rules on admissibility of evidence, such as the hearsay rule. *Stockinger v Feather River Community College* (2003) 111 CA4th 1014, 1027, 4 CR3d 385.

An adequate foundation for the admissibility of a recording can be laid through testimony regarding voice identity and accuracy of the recording. The voice-identification witness need not have seen the speaker as his or her voice was recorded. Evid C §§1410-1421. See *People v Fonville* (1973) 35 CA3d 693, 708, 111 CR 53 (identification of voices on recording not necessary for foundation; statements on recording could have been known only by appellant); *People v Sica* (1952) 112 CA2d 574, 588, 247 P2d 72 (police officers identified defendants by voices they were already familiar with and by conversations held with them after arrest). But see *O'Laskey v Sortino* (1990) 224 CA3d 241, 249, 273 CR 674 (transcript of recorded admission excluded for lack of adequate foundation of recording) disapproved in part on other grounds in *Flanagan v Flanagan* (2002) 27 C4th 766, 776 n4, 117 CR2d 574. For a federal case discussing the problem of a recorded conversation not in English, see *U.S. v Fuentes-Montijo* (9th Cir 1995) 68 F3d 352, 355 (holding it is proper for court to instruct the jury not to reject the accuracy of the translation, especially when some of the jurors are bilingual). Where portions of the recording are unintelligible, a properly authenticated transcript may yet be admissible. *People v Polk* (1996) 47 CA4th 944, 955, 54 CR2d 921.

To authenticate a recording, ask the participant in the conversation to listen to the recording and testify that the conversation is truthfully recorded to the best of his or her recollection. *People v Finch* (1963) 216 CA2d 444, 453, 30 CR 901. The court must be satisfied that the recording is substantially complete and correct on material matters before it permits the recording to be played to the jury. *People v Finch, supra*.

**NOTE:** California Rules of Court 2.1040 requires that, if a party offers into evidence an audio recording or sound-and-video recording, an advance written transcript be prepared and marked for identification. A duplicate of this transcript must be filed by the clerk and as part of the clerk's transcript in event of an appeal. Cal Rules of Ct 2.1040. Check local rules for additional requirements. See Stanislaus Ct R 3.26; Fresno Ct R 4.1.2.

The trial court must exercise great care when a recording is unintelligible in part. *People v Mulvey* (1961) 196 CA2d 714, 720, 16 CR 821. In such situations, some judges suggest that the judge, counsel, and jurors be given copies of the audio transcript to follow the recording as it is played. A copy of the transcript should also be admitted into evidence. See *People v Finch, supra* (transcript used during trial but not admitted into evidence).

**WARNING:** California law prohibits making a recording of confidential communications without notice to the other parties to the conversation. Pen C §632; *Coulter v Bank of America* (1994) 28 CA4th 923, 33 CR2d 766. A communication is confidential when there is an objectively reasonable expectation by a party that the conversation is not being overheard or recorded. *Flanagan v Flanagan* (2002) 27 C4th 766, 776, 117 CR2d 574. Evidence obtained from such an illegal recording must be excluded. See Pen C §§630-637.5; *Frio v Superior Court* (1988) 203 CA3d 1480, 250 CR 819. Recordings inadmissible under Pen C §632 may, however, be admitted for the limited purposes of refreshing a witness's recollection or to impeach a lying witness. 203 CA3d at 1496. In *Feldman v Allstate Ins. Co.* (9th Cir 2003) 322 F3d 660, 667, the Ninth Circuit Court of Appeals held that although conversations recorded in violation of Pen C §632 should be excluded, the testimony of participants in those conversations is admissible to the extent those witnesses have an independent recollection of the conversations. Some types of public activities, however, are not deemed confidential for purposes of Pen C §630.

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## §13.106 6. Exhibitions of persons or prosthetic devices

The court has discretion to permit in-court displays or demonstrations of a person's injuries or prosthetic devices. See Comment to Evid C §140. When a courtroom display or demonstration of a person's injuries or prosthetic devices is permitted, the jurors are seeing substantive evidence. See Comment to Evid C §140. For example, a party may exhibit to the jury injuries received. *Sassano v Roullard* (1938) 27 CA2d 372, 374, 81 P2d 213 (scar); *Faras v Lower Cal. Dev. Co.* (1915) 27 CA 688, 697, 151 P 35 (disfiguring and incapacitating burns).

Similarly, a court may permit manipulation of certain parts of a person's body to demonstrate limited physical abilities. *Willoughby v Zylstra* (1935) 5 CA2d 297, 301, 42 P2d 685 (court permitted plaintiff's medical witness to manipulate plaintiff's neck in front of jury and to pinch his cervical vertebrae, which resulted in pain).

Before determining whether to allow such an exhibition or display, the court will consider the following factors:

- Whether the person's present condition is sufficiently similar to his or her condition at the time in dispute that the demonstration would be relevant and assist the jury. See, *e.g., People v Wong* (1973) 35 CA3d 812, 835, 111 CR 314 (criminal defendant not allowed to show jury absence of needle marks on his arms; irrelevant because nearly a year had passed since critical event).
- Whether the requested exhibition would subject the person to undue harassment or embarrassment. See Evid C §765. See also *Leonard v Hume* (1935) 5 CA2d 41, 41 P2d 965.
- Whether the probative value is outweighed by the possible tendency of the demonstration to inflame the jury's passion or prejudice. See §13.117 for discussion of objection under Evid C §352.

In proposing such a demonstration, the feelings of the person to be displayed must be considered. When the process may be embarrassing to the person, the court, or the jury, counsel can request that it be conducted in chambers or in a place other than an open courtroom with only essential persons present. The court, all counsel, and the jurors should be present for the demonstration. Additionally, a court reporter should be present to record the proceedings. The jurors should be instructed that they may not ask questions or do anything other than observe.

**PRACTICE TIP:** Prepare a photographic presentation of the plaintiff's injury in the event the court does not allow a particular exhibition.

For a sample record of how to exhibit personal injuries at trial, see Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial), step 37 (Cal CEB Action Guide April 2008).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/ 7. Computer-generated evidence/§13.107 a. Computer-recorded information and computer programs; objections

### 7. Computer-generated evidence

### §13.107 a. Computer-recorded information and computer programs; objections

A printed representation of computer information or a computer program, or of images stored on a video or digital medium, is presumed to be an accurate representation of the computer information or images that it purports to represent. Evid C §§1552-1553. If a party introduces evidence that the printed representation is inaccurate or unreliable, the party introducing it into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information, or of the images stored on a video or digital medium, that it purports to represent. Evid C §§1552-1553. Section 1552(a) does not apply to computer-generated official records certified in accordance with Evid C §452.5 or §1530. Evid C §1552(c).

**NOTE:** Any printout constitutes an "original" of the data stored in the computer. Evid C §255. To be admitted into evidence, the programs and printouts must be relevant (see §13.22), authenticated (see §13.65), comply with the secondary evidence rule under Evid C §§1520-1523, 1552-1553 (see §§13.122-13.123), not be inadmissible hearsay (see §13.119), and not be excluded by Evid C §352 or any other statutes (see §13.117).

For a brief description of computer- and video-aided presentation of exhibits in the courtroom, see Brosnahan, *The Latest Trial Procedures*, 18 CEB Civ Litigation Rep 342 (Sept. 1996). See also Lee & Page, *Use and Admissibility of 'High-Tech' Evidence*, California Litigation (Summer 1998); Carey, *Using User-Friendly Computer-Generated Demonstrative Evidence To Keep the Jury Awake*, Practical Litigator (July 1998).

When computer-recorded information is offered for the truth of what it contains, the proponent of the computerized evidence may also have to overcome a hearsay objection. On hearsay, see §13.119. Most often, the applicable exception to the hearsay rule will be the business records exception set forth in Evid C §1271.

Under the business records exception, the proponent of the evidence must show that the writing was made in the regular course of business (Evid C §1271(a)) and at or near the time of the act, condition, or event recorded (Evid C §1271(b)). These requirements can be shown by testimony from a witness who knows how and when the computer lists were prepared and the sources of the information in the computer lists. The court, of course, retains broad discretion to determine whether particular evidence meets the standards of trustworthiness established by Evid C §1271. See *People v Matthews* (1991) 229 CA3d 930, 940, 280 CR 134 (computer-generated "rap sheets" inadmissible to prove prior convictions in absence of such testimony); *People v Martinez* (2000) 22 C4th 106, 91 CR2d 687 (court had discretion to admit computer-generated "rap sheets" when foundational evidence established trustworthiness).

The witness requirement (Evid C §1271(c)) and the reliability requirement (Evid C §1271(d)) of the business records exception are commonly satisfied by the testimony of anyone "who generally understands the system's operation and possesses sufficient knowledge and skill to properly use the system and explain the resultant data." *People v Lugashi* (1988) 205 CA3d 632, 640, 252 CR 434.

For computer-based public records, Evid C §1280 can provide the basis of the hearsay exception, which often is considerably easier to establish than other hearsay exceptions. See, *e.g., People v George* (1994) 30 CA4th 262, 273, 35 CR2d 750 (records of jail bunk and locker assignments properly admitted under Evid C §1280 (official records exception)), even though there was no witness testifying about the identity and mode of preparation of the specific document, because the foundational facts may be shown by judicial notice or under the official duty presumption of Evid C §664). See also *Gananian v Zolin* (1995) 33 CA4th 634, 39 CR2d 384, in which the highway patrol officer's sworn report constituted an admissible public employee record under Evid C §1280. The report also contained a deputy sheriff's personal observations, which were admissible over a hearsay objection because they were made in the course of his duty as a police officer to observe facts and report them correctly. But see *People v Campos* (1995) 32 CA4th 304, 309, 38 CR2d 113 (Evid C §§1271 and 1280 do not permit the admission of nontestifying experts' reports or a probation report).

**NOTE:** The party offering computer-generated evidence need not prove the acceptability or reliability of the computer

hardware or software used to generate the evidence or the sufficiency of the computer system's internal maintenance or accuracy checks. *People v Lugashi* (1988) 205 CA3d 632, 638, 252 CR 434. The same is true whether the computer information involves computations or merely retrieval of data. 205 CA3d at 642. See *People v Dorsey* (1974) 43 CA3d 953, 960, 118 CR 362 (mistakes can be taken up on cross-examination).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.108 b. Computer simulations

### §13.108 b. Computer simulations

Use of computer simulations at trial can be used for a wide variety of cases (*e.g.,* car accidents, collisions of boats, construction accidents). The foundational requirements for admitting a computer simulation into evidence are the same as for a photographic reenactment or reconstruction of events. Counsel must show that the facts and conditions portrayed in the simulation are the same as or substantially similar to those involved in the dispute. See §§13.91-13.93. Computer animation is not subject to the scientific evidence limitation of *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144, because it is more similar to drawing on a blackboard than a scientific technique. See *People v Hood* (1997) 53 CA4th 965, 969, 62 CR2d 137.

**EXAMPLE:** A computer simulation was used at trial to reconstruct the path of two vessels that collided outside a port. The computer program was written so that the path of the vessels could be altered by different turning points. The expert manipulated the computer while testifying. The computer simulation was enhanced by using a video camera over the witness's shoulder, and this image was beamed to monitors in the courtroom so that others in the courtroom could see the simulation. The video of the expert witness's computer presentation was marked as an exhibit at trial and designated as an exhibit for appeal. The video was shown with other demonstrative pieces of evidence in arguments before the court of appeal.

**PRACTICE TIP:** Mark the computer simulation as evidence by marking one of the following:

- **Computer disk.** After the computer disk is marked, it can be submitted as evidence to the court. Although the disk is a useless piece of evidence without the computer and the appropriate application software, it could be used in a later proceeding if necessary.
- **Video of computer simulation.** A video of one version of a computer simulation can also be marked as evidence. The advantage of this is that a video provides a readily accessible medium for presentation at trial and an easily viewable medium in any later proceeding.
- **Laser disk.** The computer simulation can also be transferred onto a laser disk, which is just like transferring it onto a video.
- **Video recording of computer simulation presented at trial.** A video of the computer simulation as the witness was testifying about it can be introduced as a separate piece of evidence. This has the advantage of preserving not only the actual simulation presented at trial but also the witness's testimony about that simulation.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.109 8. Scientific evidence

### §13.109 8. Scientific evidence

***Kelly* standard.** Evidence obtained through the use of scientific techniques can only be admitted in the courtroom if the *Kelly* foundational standard is met. *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144; *Frye v U.S.* (DC Cir 1923) 293 F 1013, 1014. Under this standard, the proponent of scientific evidence must satisfy the following three-pronged test (*People v Venegas* (1998) 18 C4th 47, 78, 74 CR2d 262):

- The technique used was sufficiently reliable that it has gained general acceptance in its scientific community or field. *People v Ashmus* (1991) 54 C3d 932, 970, 2 CR2d 112; *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144; *Frye v U.S., supra*. This is sometimes referred to as the "*Kelly*" rule. See 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §42 (4th ed 2000).
- The witness testifying to the substantial reliability of the scientific method is qualified as an expert to give an opinion on the subject. *People v Ashmus, supra*; *People v Kelly, supra*.
- The correct scientific procedures were used. *People v Ashmus, supra*; *People v Kelly, supra*.

***Leahy* decision.** In *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663, a drunk-driving case, the California Supreme Court considered whether the *Kelly-Frye* standard should be modified following the United States Supreme Court's decision in *Daubert v Merrell Dow Pharms., Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786. In *Daubert,* the court held that the rule set forth in *Frye v U.S., supra* (which required a showing that scientific technique used was sufficiently reliable that it had gained general acceptance in its scientific community or field), was abrogated by Fed R Evid 702. Under Rule 702, the expert's testimony must pertain to scientific knowledge and must also assist the trier of fact in understanding the evidence or in determining a fact at issue. Nothing in Rule 702 establishes "general acceptance" (a *Frye* requirement) as a prerequisite to admissibility. See also *Lust v Merrell Dow Pharms., Inc.* (9th Cir 1996) 89 F3d 594, in which the Ninth Circuit affirmed the exclusion of the expert's opinion under Fed R Evid 702 and the granting of summary judgment because of the absence of evidence proving causation.

In *Leahy,* the California Supreme Court refused to apply *Daubert* and held that the *Kelly* formulation should remain a prerequisite to the admission of expert testimony regarding new scientific methods. *People v Leahy* (1994) 8 C4th 587, 591, 34 CR2d 663.

As a result of the court's decision in *Leahy,* the standard governing admissibility of scientific evidence in California state courts is different from the standard applicable in the federal courts.

**NOTE:** District court rulings under the federal *Daubert* test are to be reviewed under the abuse of discretion standard. *General Elec. Co. v Joiner* (1997) 522 US 136, 138, 139 L Ed 2d 508, 514, 118 S Ct 512. The trial court's function is a flexible one, not limited to the factors specifically mentioned in *Daubert*. *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 251, 119 S Ct 1167. Furthermore, *Daubert* applies not only to scientific knowledge, but also to technical or other specialized knowledge. 143 L Ed 2d at 250. California law applying *Kelly*, on the other hand, appears to apply only to new scientific evidence. *Texaco Producing, Inc. v County of Kern* (1998) 66 CA4th 1029, 1048, 78 CR2d 433.

**PRACTICE TIP:** Although the foundational requirements of *Kelly* evolved in the context of criminal cases, you should be prepared to satisfy these prerequisites if you plan to use such evidence in civil cases. See, *e.g., Melaleuca, Inc. v Clark* (1998) 66 CA4th 1344, 1357, 78 CR2d 627 (for expert testimony to be admissible to prove truth of alleged defamatory statements, underlying scientific technique must meet *Kelly* requirements). Additionally, as the development of DNA evidence has shown, the fact a particular scientific technique is rejected in its early stages of development does not mean it will remain inadmissible. See *People v Kelly* (1976) 17 C3d 24, 41, 130 CR 144. The lawyer must therefore remain alert to scientific progress. Conversely, what is generally accepted now may, after further scientific advances, become no longer acceptable.

In addition to establishing the reliability of the scientific technique, it may be necessary to show that the subject matter and conditions of the test are substantially similar to those of the disputed event. This may be necessary, *e.g.,*

when the object tested is different from the one involved in the dispute. On substantial similarity generally, see §13.90.

**General acceptance in scientific community.** Courts have also permitted literature in the scientific field to be used as evidence, not for the actual reliability of the new scientific technique but for its general acceptance in the scientific community. *People v Shirley* (1982) 31 C3d 18, 56, 181 CR 243 (use of hypnosis to restore potential witness's memory not generally accepted as reliable by scientific community); *Schall v Lockheed Missiles & Space Co.* (1995) 37 CA4th 1485, 1492, 44 CR2d 191 (although *Shirley* "arguably" was overruled in criminal context in 1992 by Proposition 8 (Cal Const art I, §28), "*Shirley* precludes hypnotically restored testimony in civil cases"); *People v Davis* (1995) 35 CA4th 1488, 1505, 42 CR2d 6 (use of horizontal gaze nystagmus (HGN) field sobriety test admissible under *Kelly* rule based on general acceptance by relevant scientific community—behavioral psychologists, highway safety experts, criminalists, and specific doctors).

The court of appeal in *Roberti v Andy's Termite & Pest Control, Inc.* (2003) 113 CA4th 893, 901, 6 CR3d 827, held that the trial court erred in applying the *Kelly* admissibility test to expert testimony that pesticide caused plaintiff's autism, because plaintiff's experts based their testimony on research papers and studies in peer-reviewed journals and on the physical examination of plaintiff using techniques that are generally accepted in the medical community. They did not rely on any new scientific technique, device, or procedure that was not generally accepted in the relevant scientific or medical community. Rather, their theory of *causation* (that a particular pesticide caused plaintiff's autism) is not generally accepted in the medical community. The *Roberti* court said the *Kelly* test does not apply even if testimony presents new theory of medical causation.

**Admissibility of DNA evidence.** The California courts have ruled DNA testing to be admissible evidence. *People v Taylor* (1995) 33 CA4th 262, 269, 40 CR2d 132 (use of DNA testing is generally accepted, but more difficult question lies in which statistical inferences may be drawn; after considering numbers and expertise of experts on both sides of the question, National Research Council's "modified ceiling approach" was properly found to be generally accepted in the scientific community). But see *People v Soto* (1999) 21 C4th 512, 88 CR2d 34 ("uniform product rule" used to conduct statistical analysis of DNA evidence is generally accepted scientific method and expert testimony based on same is admissible). See also *People v Brown* (2001) 91 CA4th 623, 110 CR2d 750 (when generally accepted but new scientific method was used to conduct DNA sampling, and evidence showed that analysis was done in accordance with technique, criticisms directed at technique went to weight and not to admissibility, of DNA evidence). On expert testimony on DNA cases, see §11.139. For further discussion of DNA evidence, see California Expert Witness Guide §4.17 (2d ed Cal CEB 1991).

**Other types of blood evidence.** Questions concerning other aspects of blood evidence are not as controversial. See *People v Morganti* (1996) 43 CA4th 643, 50 CR2d 837 (affirmed trial court's finding polymerase chain reaction analysis (PCR) as generally accepted in relevant scientific community when two expert witnesses and extensive documentary evidence also presented at trial, and little opposition in scientific community presented); *People v Yorba* (1989) 209 CA3d 1017, 257 CR 641 (use of two separate chemical and physical tests, electrophoresis and agglutination inhibition, properly allowed by trial court. Relying on *People v Reilly, supra,* the court of appeal stated it was satisfied that electrophoretic testing of dried bloodstains is scientifically reliable and held that the record supports the trial court's conclusion that the scientific community accepts agglutination inhibition as valid and reliable scientific technique).

**Computer animation.** Computer animation is not subject to the *Kelly* test because it is more similar to drawing on a blackboard than a scientific technique. *People v Hood* (1997) 53 CA4th 965, 969, 62 CR2d 137.

**Enhanced and recovered memory issues.** A witness who has been interviewed while under the influence of sodium amytal ("truth serum") is incompetent to testify, and such an interview fails the *Kelly* test. *Ramona v Superior Court* (1997) 57 CA4th 107, 116, 66 CR2d 766. One court has noted in dicta that recovered memory theory is now of questionable scientific basis. *Trear v Sills* (1999) 69 CA4th 1341, 1344, 82 CR2d 281. But see *Wilson v Phillips* (1999) 73 CA4th 250, 86 CR2d 204 (treating psychotherapist's testimony concerning existence of repressed memory syndrome in plaintiff was admissible because it relied on professional's percipient observations of patient and not on scientific opinion or technique).

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## 9. Jury view

### §13.110 a. Foundational requirements

A jury view is a type of demonstrative evidence. The court, on its own motion or on the motion of a party, has discretion to order that the jury view the following places or objects (CCP §651(a)):

- Property that is the subject of the litigation;
- The place where any relevant act occurred; and
- Any object, demonstration, or experiment, if a view is relevant and admissible into evidence and it cannot be viewed in the courtroom with reasonable convenience.

In deciding whether to allow a jury view, the court generally considers the following:

- Whether the need for a view is outweighed by the time to be consumed;
- Whether the conditions of the site are substantially similar to those that existed at the time of the event in dispute;
- Whether changes in the site's condition are of sufficient magnitude that the view will be misleading, confusing, or unduly prejudicial; and
- Whether problems may be encountered with transportation.

See *People v Mooring* (1982) 129 CA3d 453, 460, 181 CR 71. See also §17.9 on jury views.

The fact that the conditions at the site are not identical to those at the time of the disputed event does not foreclose the judge's discretion to allow a view. See, *e.g., City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 414, 82 CR 1; *Kraus v Walt Disney Prods.* (1963) 221 CA2d 736, 740, 34 CR 702. See also *Rau v Redwood City Women's Club* (1952) 111 CA2d 546, 554, 245 P2d 12.

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### §13.111 b. Attendance at and testimony during jury view

The entire court (including the judge, jury, court reporter, counsel, and any necessary officers) must go to the place, property, object, demonstration, or experiment to be viewed. CCP §651(b). A view can be conducted just outside the courthouse (*e.g.,* in a parking lot) if a bulky exhibit is difficult to move into the courtroom. The court is in session throughout the view. CCP §651(b).

At the view, the court may permit the testimony of witnesses. CCP §651(b). The court may also allow experiments to be conducted during the view. *Kraus v Walt Disney Prods., supra*. The proceedings at the viewing must be recorded to the same extent as the proceedings in the courtroom. CCP §651(b). Substantial problems can be created for counsel opposing a jury view by the absence of an adequate record of what occurred during the view. However, when there is a question on appeal regarding the sufficiency of the evidence supporting the verdict, courts tend to give great weight to what the jury might have seen during the view even if it was not recorded. *City of Los Angeles v Kossman* (1969) 274 CA2d 116, 120, 78 CR 849; *Downey v Santa Fe Transp. Co.* (1955) 134 CA2d 720, 725, 286 P2d 40. The same is true for a view by the judge in a nonjury case. *City of Los Angeles v Kossman, supra*; *Downey v Santa Fe Transp. Co., supra*.

**PRACTICE TIP:** When the jury is allowed to participate in a view that cannot adequately be made the subject of a reported transcript, opposing counsel should consider requesting that the view be video recorded, with the recording marked for identification and made part of the court's record.

Ordinarily, the jury will go and return from the view together under the charge of an officer. See Comment to CCP §651. However, the court may permit the jury to assemble at the view and leave separately. When the jury is permitted to separate, the court must admonish them not to talk with anyone about the trial and not to form or express an opinion about the case until it is finally submitted to them. CCP §611. On improper communications of jurors generally constituting misconduct, see §§17.15-17.19.

**NOTE:** An unauthorized view by a juror may constitute juror misconduct. Compare *Maffeo v Holmes* (1941) 47 CA2d 292, 117 P2d 948, with *People v Sutter* (1982) 134 CA3d 806, 184 CR 829 (juror's unauthorized visit to crime scene was misconduct but not prejudicial), and *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 414, 82 CR 1 (juror's solo visit to property was misconduct but not prejudicial). See also §17.13.

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## VIII. REAL EVIDENCE

### §13.112 A. Admissibility requirements

The term "real evidence" is sometimes used by attorneys to refer to tangible items of physical evidence that were directly involved in the event at issue, *e.g.,* the gun in a murder case or the defective product that injured the plaintiff in a personal injury case. This term, however, is not defined in the Evidence Code.

To be admissible, real evidence must be:

- Relevant (see §13.22);
- Properly authenticated (see §13.112); and
- Not excluded as unduly prejudicial under Evid C §352 (see §13.117) or other statutes.

Authentication can be established by testimony from a witness identifying the object as the identical object that the proponent claims it is. If the object is not identical, counsel must establish that it is substantially similar to the original object. See §13.90. If no one witness can establish authenticity, be prepared to present evidence of a continuous claim of custody of the object. See §13.113.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.113 B. Examples of real evidence: wreckage and other objects

## §13.113 B. Examples of real evidence: wreckage and other objects

Wreckage, debris, and other physical objects may be received in evidence when relevant (see §13.22) after a showing has been made that such items are in the same, or a substantially similar, condition as they were in at the time of the occurrence or event giving rise to the lawsuit. This is sometimes accomplished through chain-of-custody testimony establishing that the evidence has not been altered or tampered with. See *Spolter v Four-Wheel Brake Serv. Co.* (1950) 99 CA2d 690, 692, 222 P2d 307 (wheel and axle as evidence in personal injury case). Note, however, that such evidence may be excluded under Evid C §352 when it is overly dramatic, inflammatory, gruesome, or otherwise prejudicial. See §13.117. On chain of custody and laying a foundation, see §§13.25-13.27. On substantial similarity, see §§13.24, 13.90.

Once wreckage or other debris has been received in evidence, it can be extremely useful in helping witnesses to illustrate their testimony. Often, the greatest problem in having wreckage admitted into evidence is bringing the item physically into the courtroom. If this is a problem, consider using photographs, video recordings, models, or a jury view. See San Diego Ct, Div I, R 1.4.2 (court may order photographs substituted for bulky exhibits posing storage problems); Los Angeles Ct R 8.59. On jury views generally, see §§13.110-13.111.

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## IX. MAKING AND MEETING OBJECTIONS

### §13.114 A. Making objections; waiver

An objection to inadmissible evidence must be made in a timely manner and must clearly state the specific ground of the objection. Evid C §353(a). Failure to make a timely, specific objection usually constitutes waiver of a party's right to complain of the erroneous admission of the evidence on appeal. See §15.24. See also 3 Witkin, California Evidence, *Presentation at Trial* §367 (4th ed 2000).

Local rules may require objections to exhibits to be made before trial. When an objection is made after evidence has already been admitted, however, it should be coupled with a motion to strike and a request that the jury be admonished to disregard the evidence. When desirable, counsel may request the court's permission to have a continuing objection to an entire line of questioning. See Comment to Evid C §353. For further discussion of objections and preserving the record, see chap 15.

The primary purpose of objecting to documentary and demonstrative evidence is to exclude improper, damaging evidence and to preserve the record in the event of an appeal. Additional purposes for making objections may include protecting a witness from undue harassment and thwarting inappropriate or unfair trial tactics by opposing counsel.

Decisions on whether to object to particular questions or exhibits can be difficult, primarily because counsel has little time to reflect. On one hand, failure to object constitutes waiver of the objection; on the other hand, frequent objections (particularly to minor deficiencies) tend to waste time, annoy the court and jury, create an appearance of trying to conceal facts, and highlight otherwise unexceptional testimony.

**PRACTICE TIP:** Thorough pretrial preparation will help you recognize possible objections before trial begins and decide whether, when, and how each objection should be made. Despite such preparation, however, you must always expect to be called on repeatedly during trial to make split-second judgments regarding objections. For discussion of an approach to exercising such judgments, see California Trial Objections, chap 4 (Cal CEB Annual).

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## B. Particular objections

### §13.115 1. Irrelevant

Documentary, demonstrative, and real evidence must be relevant to be admissible. See §13.22.

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### §13.116 2. Lack of foundation

The term "lack of foundation" embodies a number of different objections. Generally, such objections are directed at the failure of the evidence's proponent to establish the preliminary facts necessary for admissibility.

**EXAMPLE:** A photograph of a staged recreation of an accident would be objectionable if the testimony of the witness laying the foundation did not establish that the photograph depicted the facts and conditions of the accident with accuracy or substantial similarity. On the foundation required for photographic re-creation of events, see §13.97.

In phrasing such an objection, do not merely state, "Objection: lack of foundation." Instead, specify why the foundation is deficient. If this is not done, the objection will generally not be preserved for appeal by the objecting party. See *Parlier Fruit Co. v Fireman's Fund Ins. Co.* (1957) 151 CA2d 6, 15, 311 P2d 62; *People v Modell* (1956) 143 CA2d 724, 728, 300 P2d 204.

For further discussion, see California Trial Objections, chap 21 (Cal CEB Annual). See also 3 Witkin, California Evidence, *Presentation at Trial* §380 (4th ed 2000).

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### §13.117 3. Unduly prejudicial, misleading, or time-consuming (Evid C §352)

A court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will be unduly prejudicial, misleading, or time-consuming. Evid C §352. The courts often use §352 to control the type and quantity of demonstrative evidence allowed at trial. See, *e.g., Finn v G. D. Searle & Co.* (1984) 35 C3d 691, 703, 200 CR 870 (cumulative evidence); *Horn v General Motors Corp.* (1976) 17 C3d 359, 371, 131 CR 78 (same); *Aguayo v Crompton & Knowles Corp.* (1986) 183 CA3d 1032, 1040, 228 CR 768 (evidence of postaccident warning and addition of safety equipment excluded in product liability actions as cumulative).

Video recordings and motion pictures may also be excluded under Evid C §352 as misleading, even if they are based on substantially similar conditions. See §13.94. As a result, judges are often cautious about receiving video recordings and motion pictures into evidence because an artful technician can manipulate their impact by using telescopic lenses, creating ingenious stage settings, eliminating unfavorable portions of film, and taking shots from angles that obscure objective reality. All of this "may tend to create misleading impressions." *Harmon v San Joaquin Light & Power Corp.* (1940) 37 CA2d 169, 174, 98 P2d 1064.

An Evid C §352 objection can be raised by making a motion in limine before trial or by making an objection during trial. On motions in limine generally, see chap 7. At either time, the objection should be specific. See Evid C §353(a). For example, counsel might state:

> I object to the introduction of _ _[*specify type of evidence*]_ _ and request that the court exclude it under Evidence Code section 352 because _ _[*e.g., its probative value is substantially outweighed by the prejudicial effect/its introduction will be unduly time-consuming and cumulative*]_ _.

The purpose of making an objection under Evid C §352 is to prevent the jury from becoming aware of evidence that would otherwise be disclosed. If the objection is raised during trial, counsel should ask to have the argument heard either at the bench or in chambers. The court reporter should be present to record what is said.

The fact that evidence may prejudice the jury does not necessarily require its exclusion under Evid C §352. If the court determines that the probative value of the evidence outweighs its prejudicial effect, the evidence may be admitted although it may incidentally arouse the passions of the jury. See *People v Seastone* (1969) 3 CA3d 60, 64, 82 CR 907 ("fact that gruesome photos may prejudice a defendant in the eyes of a jury does not, alone, render them inadmissible"). See also *People v Ashmus* (1991) 54 C3d 932, 974, 2 CR2d 112; *People v Milan* (1973) 9 C3d 185, 193, 107 CR 68.

When the court exercises its discretion under Evid C §352, the party favored by the court's ruling should make certain that the record adequately reflects that the court conducted the balancing process stated in Evid C §352. Unless the record shows that the trial court balanced the evidence's probative value against its negative impact, the court's decision may be overturned on appeal. See *People v Montiel* (1985) 39 C3d 910, 924, 218 CR 572 (trial court's decision to admit photographs of murder victim upheld on appeal; judge expressly referred to his discretion, looked at photographs, and listened to argument but did not explicitly state the factors and his assessment in making his decision); *People v Hempstead* (1983) 148 CA3d 949, 955, 196 CR 412 (failure to make record of weighing process not necessarily reversible error). In *Smalley v Batey* (2005) 128 CA4th 977, 984, 27 CR3d 575, the trial court was held to have abused its discretion under Evid C §352 by excluding evidence that the plaintiff in a personal injury action had paid his own medical expenses (evidence was "manifestly relevant" to prove plaintiff's damages and to rebut defendants' insinuation that plaintiff was malingering; collateral source rule irrelevant because insurer did not pay those expenses).

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### §13.118 4. Exhibit not produced in response to discovery request

Counsel may ask the court to prevent the opposing party from offering an exhibit into evidence at trial if the proponent failed to disclose the existence of the exhibit in accordance with a proper discovery request. See CCP §2031.320(c); *Dwyer v Crocker Nat'l Bank* (1987) 194 CA3d 1418, 1431, 240 CR 297 (failure to produce documents during deposition); *Puritan Ins. Co. v Superior Court* (1985) 171 CA3d 877, 217 CR 602 (expert testimony based on failed drive shaft excluded; shaft misplaced before production); *Thoren v Johnston & Washer* (1972) 29 CA3d 270, 105 CR 276 (witness precluded from testifying when witness's name willfully excluded from answer to interrogatory seeking names of witnesses to an event).

For sanctions on failure to comply with discovery generally and procedures, see CCP §§2023.010-2023.040, 2031.320. See also California Civil Procedure Before Trial §22.55 (4th ed Cal CEB 2004). Note that special rules apply to the discoverability of experts and writings concerning their proposed testimony and preparation to testify. See CCP §§2034.010-2034.730. See also *Zellerino v Brown* (1991) 235 CA3d 1097, 1 CR2d 222 (testimony of undisclosed experts excluded).

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### §13.119 5. Hearsay

Hearsay evidence is defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Evid C §1200(a). Such evidence is inadmissible unless an exception to the hearsay rule applies. Evid C §1200(b). The burden is on the party offering the evidence to prove that an exception to the hearsay rule applies. See Evid C §§403, 405. On hearsay exceptions generally, see Evid C §§1220-1350. See also California Trial Objections, chap 19 (Cal CEB Annual).

The hearsay objection is frequently asserted against documentary evidence when it is offered for the truth of the matter asserted but does not meet the requirements for an exception to the hearsay rule. A hearsay objection also is available against certain types of demonstrative evidence. For example, a motion picture or video with a verbal soundtrack might be subject to a hearsay objection. See *People v Edwards* (1991) 54 C3d 787, 819, 1 CR2d 696 (video interview of defendant not admissible under state of mind exception to hearsay rule, because defendant was available to testify and statements were not made under conditions with sufficient indicia of reliability); *People v Moran* (1974) 39 CA3d 398, 406, 114 CR 413 (video of preliminary hearing testimony admitted as "former testimony").

In the event a hearsay objection is sustained, consider having the narrator of the video or motion picture in court and available to testify. For further discussion of hearsay, see §§10.18-10.27.

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### §13.120 6. Privileged

Although most claims of privilege are determined at the discovery stage in civil cases, privileges occasionally arise for the first time at trial. Privileges are set forth in Evid C §§900-1070.

When a privilege objection is raised, the judge determines the claim of privilege as a preliminary fact under Evid C §405. See Comment to Evid C §405. See also Evid C §914 on the same procedure for a presiding officer who is not a judge. The party claiming privilege has the burden of proof on the preliminary facts to show that the matter is subject to the privilege. Conversely, the party offering the evidence has the burden of proof on any preliminary facts to show that an exception to the privilege applies. Comment to Evid C §405. On the preliminary fact-finding process generally, see §§7.25-7.36.

In ruling on a claim of privilege, the court is generally precluded from requiring disclosure of information claimed to be privileged. However, the court may require disclosure to be made in chambers when ruling on official information, the identity of an informer, a trade secret or sexual assault victim-counselor privileges, or disclosure of peace officer personnel records. The only people present in chambers should be the judge, the witness, the person authorized to claim the privilege, and that person's attorney or designated representative. Evid C §§1035.4, 1040-1047, 1060. Evid C §915(b); *Cooke v Superior Court* (1978) 83 CA3d 582, 588, 147 CR 915; *Carlton v Superior Court* (1968) 261 CA2d 282, 293, 67 CR 568. See also *Rubio v Superior Court* (1988) 202 CA3d 1343, 1350, 249 CR 419 (trial court required to review privileged video recordings to determine whether criminal defendant's right to due process outweighs privilege holder's privilege rights).

If the judge determines that the information is privileged, all persons present in chambers (including the judge) are prohibited from ever disclosing the information, except with the consent of a person authorized to permit disclosure. Evid C §915(b).

To defeat a claim of privilege, the following questions should be asked by counsel:

- Can the privilege be asserted? Check the statute and relevant case law to see whether all requisite elements of the privilege exist.
- If the privilege may be asserted, is the person asserting the privilege the proper person to do so? Normally only a holder of the privilege has standing to assert it.
- If the person asserting the privilege is entitled to do so, has that person waived the privilege? If the holder waives the privilege, the right of every other person to claim the privilege is waived also. See Evid C §912.

**NOTE:** Any privilege attached to a communication in writing may be waived when a witness uses that privileged writing to refresh his or her memory. *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 72 CR 74. On using a writing to refresh recollection, see §13.9, 13.124.

After a privilege is successfully asserted, consider asking the court to instruct the jury that exercise of the privilege creates no presumption and that no inference may be drawn from exercise of the privilege regarding the witness's credibility or any matter at issue in the proceeding. See Evid C §913. See also CACI 215-216; BAJI 2.27. These instructions may be requested when the privilege is asserted, when the jury is instructed at the end of the case, or at both times. When such instructions are requested, the court is obligated to give them. Evid C §913(b). On prohibition against counsel and judge commenting on exercise of a privilege, see Evid C §913(a).

For detailed discussion of privileges, see 2 Witkin, California Evidence, *Witnesses* §§59-97 (4th ed 2000); California Trial Objections, chaps 33-51 (Cal CEB Annual); Effective Introduction of Evidence in California, chap 43 (2d ed Cal CEB 2000).

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### §13.121 7. Opinions in writings

Opinions in writings are inadmissible unless the author could express the same opinion in court if called to testify. On opinion testimony generally, see Evid C §§800-805. The objection, if applicable, should be raised before the contents of the document are disclosed to the trier of fact. Frequently, opinion evidence objections are raised in connection with business records. See *Hutton v Brookside Hosp.* (1963) 213 CA2d 350, 355, 28 CR 774.

Under the business records exception to the hearsay rule, business records are admissible if a proper foundation is laid. See *People v Moore* (1970) 5 CA3d 486, 492, 85 CR 194. See also *Springer v Reimers* (1970) 4 CA3d 325, 338, 84 CR 486 (personal observations of attending physician; patient's history used by physician in reaching professional opinions). The business records exception does not, however, permit inadmissible opinions or conclusions to be received in evidence. See *Hutton v Brookside Hosp., supra* (nurse's opinion in medical record that patient was too ill to move was inadmissible); *Hoel v City of Los Angeles* (1955) 136 CA2d 295, 309, 288 P2d 989 (police accident report).

**NOTE:** Writings often contain numerous notations, some admissible and some not. To object to one portion of an exhibit, counsel must object to admission of the entire exhibit based on the inappropriate entry. It then becomes the burden of the exhibit's proponent to suggest a manner in which the inadmissible entry can be excised. On excising objectionable entries, see §13.137.

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## 8. Secondary evidence rule

### §13.122 a. General rule

The secondary evidence rule replaced the best evidence rule. See Evid C §§1520-1523, 1552-1553. The contents of a writing may be proved either by an original (Evid C §1520) or by otherwise admissible secondary evidence (Evid C §1521). The court may exclude secondary evidence if it determines that (1) a genuine dispute exists concerning material terms of the writing and justice requires its exclusion, or (2) admitting the secondary evidence would be unfair. Evid C §1521(a).

Except as otherwise provided by statute, oral testimony to prove the content of a writing is limited. Evid C §§1521(b), 1523(a)-(c). See §13.123.

Several familiar exceptions to the best evidence rule are now available only in criminal cases. See Evid C §1522. On printed representations of computer information or of images stored on a video or digital medium as admissible secondary evidence under Evid C §§1552-1553, see §§10.84, 13.107.

**NOTE:** An original is defined as the writing itself or any counterpart intended to have the same effect by the person executing or issuing it. Either prints or negatives of photographs, as well as a computer printout, are originals. Evid C §255. A "writing" is defined broadly to include all forms of recorded communications and representations, such as photographs, motion pictures, audio and video recordings, as well as handwriting, typewriting, and printing. Evid C §250.

The secondary evidence rule, by its terms, is limited to proof of the content of a writing. Therefore, cases on evidence offered to prove something other than the content of the writing (in which the best evidence rule was held not to apply) are still good law. *Crail v Blakely* (1973) 8 C3d 744, 754, 106 CR 187 (testimony about oral agreement, under which mutual wills would be irrevocable, held admissible); *Ponce v Marr* (1956) 47 C2d 159, 301 P2d 837 (parol evidence on explanation of canceled checks did not violate best evidence rule).

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### §13.123 b. Particular applications and limitations

The use of secondary evidence is subject to the following limitations:

- The proffered secondary evidence must be "otherwise admissible." Thus, testimony must be based on personal knowledge, not be barred by the hearsay rule, and otherwise meet the tests of admissibility. Evid C §1521(a)-(b).
- The writings must still be authenticated under Evid C §1401, because nothing in Evid C §1521 excuses compliance. Evid C §1521(c).
- The court retains discretion to exclude testimony when there is a genuine dispute about the writing's material terms *and* where justice requires exclusion. Evid C §1521(a)(1).
- The court has seemingly broad discretion to exclude evidence when it finds admission "would be unfair." Evid C §1521(a)(2).

Oral testimony is not admissible to prove the content of a writing, except when (Evid C §1523(a)):

- The proponent has neither original nor copy, and the writing has been lost or destroyed without fraudulent intent on the part of the proponent. Evid C §1523(b).
- The proponent has neither original nor copy, and neither is reasonably procurable by subpoena or otherwise. Evid C §1523(c)(1).
- The proponent has neither original nor copy, where the document is collateral to the controlling issues, and production is inexpedient. Evid C §1523(c)(2).

In addition, oral testimony of a writing is permissible if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them "is only the general result of the whole." Evid C §1523(d).

**PRACTICE TIP:** As a rule of thumb, any element of proof that requires more than ten documents to prove should be summarized. See Brockett, *Timing Is Everything*, 17 CEB Civ Litigation Rep 350 (Sept. 1995). Preparing a one-page summary chart may well supplant a thick book of supporting documents. See *People v Southern Cal. Edison Co.* (1976) 56 CA3d 593, 128 CR 697 (one-page summary of costs for putting out fire).

Printed representations of computer or other storage medium are admissible under Evid C §§1552-1553. See §13.107. For further discussion on the secondary evidence rule, see §§10.84, 13.122.

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### §13.124 9. Writing used to refresh recollection not produced at hearing

When a witness has refreshed his or her recollection through a writing either before or during trial, the writing must be produced at the hearing at an adverse party's request unless production is excused. Evid C §771(a). See also *International Ins. Co. v Montrose Chem. Corp.* (1991) 231 CA3d 1367, 282 CR 783 (documents used to refresh deponent's recollection must be produced on request).

If production of the writing is not excused and the writing is not produced, the witness's testimony on the matter must be stricken. Evid C §771(a). Under Evid C §771(c), production of such a writing is excused when (a) it is not in the possession or control of the witness or party who produced the testimony on the matter and (b) it was not reasonably procurable by the party through use of the court's process or other available means.

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### §13.125 10. Writing not shown to other counsel

In examining a witness about a writing, counsel need not show, read, or disclose any part of it. Evid C §768(a). If the writing is shown to the witness, however, all parties must be given an opportunity to inspect the writing before the witness may be questioned about it. Evid C §768(b). If such inspection is not permitted, opposing counsel may object, and the court must allow the inspection of the proffered document before the witness is asked any questions about it. See Evid C §768(b).

Increasingly, local court rules and policies dictate that anticipated exhibits be disclosed to opposing counsel before trial. On mandatory pretrial procedures generally, see §§13.35-13.38. When such local rules have not been satisfied before trial, opposing counsel may have the document excluded from evidence if the proponent of the document cannot show good cause why the exhibit was not previously disclosed.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.126 11. Prohibited documentary evidence

## §13.126 11. Prohibited documentary evidence

Certain types of documentary evidence are inadmissible by statute. These include vehicle accident reports (see Veh C §§20012-20013), coroner's inquest verdicts (see Govt C §27502.2), and records and proceedings of medical staffs and societies (see Evid C §§1157-1157.7).

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## §13.127 a. Vehicle accident reports

Vehicle accident reports prepared under Veh C §20008 by the operator of the vehicle involved, a California Highway Patrol officer, or a city police department officer are inadmissible in any trial arising from the accident, absent a stipulation to the contrary. See Veh C §§20012-20013; *Box v California Date Growers Ass'n* (1976) 57 CA3d 266, 270, 129 CR 146 (accident report prepared by California Highway Patrol officer inadmissible even though officer used report at trial to refresh his recollection); *Zollars v Barber* (1956) 140 CA2d 502, 508, 295 P2d 561 (accident report, made by defendant under former Veh C §488 (now Veh C §20013) properly excluded). But see Evid C §771.

Even though the report itself may not be received in evidence, the information in it may. For example, testimony can be elicited on the content of such a report as long as no hearsay or other objections have been made. See *Sherrell v Kelso* (1981) 116 CA3d Supp 22, 28, 172 CR 667 (court permitted portions of vehicle accident report prepared by police officer to be read into evidence as past recollection recorded).

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### §13.128 b. Coroner's inquest verdicts

Coroner's inquest verdicts or decisions are inadmissible as evidence. Govt C §27502.2. Such an inquest may be held at the request of the city coroner to inquire into the circumstances of a person's death. At the conclusion of the inquest, the inquest jury or coroner must render a verdict or decision "setting forth the name of the deceased, the time and place of death, the medical cause of death and whether the death was by (1) natural causes, (2) suicide, (3) accident, or (4) the hands of another person other than by accident." Govt C §27504. "Such findings shall not include nor shall they make any reference to civil or criminal responsibility on the part of the deceased or any other person." Govt C §27504.

On inadmissibility of a coroner's report to the California Highway Patrol about an accident involving a motor vehicle, see Veh C §§20011, 20013. On procedures applicable to a coroner's request to use privileged communications of a decedent at an inquest, see Govt C §27491.8.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.129 c. Records and proceedings of medical staffs and committees; exceptions

### §13.129 c. Records and proceedings of medical staffs and committees; exceptions

The records and proceedings of medical peer review bodies and of various organized committees that are responsible for evaluating medical care in hospitals and improving the quality of health care are not discoverable and therefore not admissible at trial. Evid C §1157. For a description of these staffs and committees, see Evid C §§1157(a), 1157.5-1157.7.

No one who attends a meeting of these committees is required to testify on what happened there, unless otherwise provided in Evid C §1157; *Fox v Kramer* (2000) 22 C4th 531, 93 CR2d 497. This rule, however, does not prohibit a committee member from voluntarily testifying about the committee's activities. *Fox v Kramer, supra*; *West Covina Hosp. v Superior Court* (1986) 41 C3d 846, 226 CR 132.

**NOTE:** The identities of the evaluating committee members are also protected from disclosure under the privilege of Evid C §1157. *Cedars-Sinai Med. Ctr. v Superior Court* (1993) 12 CA4th 579, 16 CR2d 253.

Discovery and testimony may be permitted, however, under the following exceptions to the prohibition under Evid C §1157.

- If statements were made by a person attending a proceeding or meeting, described in Evid C §1157, who is a party to an action or a proceeding that was reviewed at the meeting. Evid C §1157(c). This exception is known as the "party exception."

**NOTE:** This exception does not, however, permit discovery of records and proceedings of medical staffs by the plaintiffs in medical malpractice actions. *Brown v Superior Court* (1985) 168 CA3d 489, 214 CR 266 (court permitted discovery in medical malpractice action of fact that staff evaluation of physician's competency had been performed); *Schulz v Superior Court* (1977) 66 CA3d 440, 446, 136 CR 67 (hospital staff records containing medical committee investigation reports and peer appraisals not open to discovery); *Matchett v Superior Court* (1974) 40 CA3d 623, 628, 115 CR 317 (court applied Evid C §1157 prohibition in medical malpractice action but noted that hospital's own administration files could be discovered).

- If a person is requesting hospital staff privileges. See Evid C §1157(c). This exception is known as the "privileges exception." Compare *Roseville Community Hosp. v Superior Court* (1977) 70 CA3d 809, 139 CR 170 (discovery permitted in action brought by doctors against hospital for wrongful exclusion from hospital staff privileges), with *California Eye Inst. v Superior Court* (1989) 215 CA3d 1477, 264 CR 83 (privileges exception inapplicable because plaintiff's action was for damages and not action in which plaintiff sought to become or remain hospital staff member).
- If a bad-faith action has been filed against an insurance carrier who refused to accept a settlement offer within policy limits. Evid C §1157(c).
- If the medical, dental, dental hygienist, podiatric, dietetic, psychological, veterinary, or chiropractic society committee exceeds 10 percent of the society's membership, or if any person serves on any of these committees when his or her own conduct or practice is being reviewed. Evid C §1157(d).

For further discussion of this issue, see California Civil Discovery Practice §§3.134-3.141 (4th ed Cal CEB 2006).

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### C. Tactical considerations in making objections

#### §13.130 1. Motions in limine to exclude evidence

If it appears that opposing counsel intends to introduce or refer to improper irrelevant, inadmissible, or unduly prejudicial evidence, consider making a motion in limine to prevent this. See, *e.g., Peat, Marwick, Mitchell & Co. v Superior Court* (1988) 200 CA3d 272, 288, 245 CR 873 (court upheld trial court order precluding evidence and noted that such matters may be brought before court by either pretrial motion or motion in limine); *Charbonneau v Superior Court* (1974) 42 CA3d 505, 507, 116 CR 153.

When possible, the motion should be made before the jury is impaneled. Making the motion in limine to exclude evidence before trial enables counsel to obtain an advance ruling from the court excluding the evidence and barring any reference to it during trial. If counsel has no advance warning of proffered evidence, however, counsel may move in limine during trial (out of the jurors' presence and hearing) to exclude it and to prohibit any reference to it. On motions in limine, see chap 7.

**PRACTICE TIP:** Make the motion in limine in writing. See Cal Rules of Ct 3.1112(f). The court will better understand and be persuaded by a motion supported by a memorandum that it can read and study. The timing and place of filing a motion in limine shall be at the discretion of the trial judge. Cal Rules of Ct 3.1112(f). Counsel should also consult local rules regarding timing and filing requirements.

The motion in limine should request a court order that specifically bars the parties, their attorneys, and witnesses from referring to the inadmissible or prejudicial evidence in the jury's presence at any time during trial—including during voir dire examination, opening statement, examination of witnesses, and closing argument. The order should specifically direct opposing counsel to instruct his or her client and witnesses not to refer to the evidence and to follow the court's order.

On using motions in limine for admitting evidence, see §§7.10, 13.134. See also sample form of motion in §7.49.

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### §13.131 2. Sidebar conferences

Sidebar conferences are discussions between the court and counsel at some point during a witness's testimony that are conducted out of the jury's hearing. They are generally quietly conducted at the side of the court's bench with the jury present. When discussion may be lengthy or sensitive matters will be discussed, counsel may request that the jury be excused or that discussion take place in chambers. The judge may also suggest this.

Whether counsel should request a sidebar conference to discuss an evidentiary objection usually depends on whether prejudice would result from the jury's hearing of the objection or the response it might evoke. A sidebar conference may be necessary when an objection is designed to exclude reference to specific evidence by a witness or when counsel does not want the jurors to hear argument on an objection. When extensive argument is necessary to assert or resolve an objection, or when the court will need to conduct a hearing on preliminary facts as a result of the objection, it may be necessary to request (at the bench) that the jury be excused or that the matter be taken up in chambers. Generally, objections as to the phrasing of a question do not dictate a sidebar conference.

When it appears that a sidebar conference is needed, make an initial objection and request permission to approach the bench. For example, counsel might state: "Objection, Your Honor. May we approach the bench?" If the court refuses permission because the reason for the request is not apparent, indicate that the matter you wish to discuss should be taken up out of the jurors' presence. If the judge again refuses permission, you may have no alternative but to state the objection in open court or to request that the court defer the matter until it can be heard out of the jurors' presence.

At the beginning of a sidebar conference, many judges state for the record that the conference is being conducted out of the jurors' hearing. The court reporter should be present to record all sidebar conferences; if that is not feasible, however, counsel must make a formal record of the objections that were made and the court's ruling on them in order to preserve the issues on appeal. See §§15.12-15.31.

**WARNING:** California Rules of Court, Standards of J Admin 2.20(b)(8), which is part of the Standards of Judicial Administration recommended by the Judicial Council, provides that the trial judge should permit sidebar conferences only when necessary and keep them as short as possible. Counsel should also consult local court rules or policies on sidebar or similar conferences. See, *e.g.,* Los Angeles Ct R 8.41, 8.76-8.77.

For further discussion of sidebar conferences, see §§1.43, 15.48-15.50.

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## §13.132 3. Preserving the record; opposing proof of preliminary facts

When raising evidentiary objections, make certain that the court reporter is present to record all objections and arguments concerning them. Create a record from which the appellate court can find a timely and proper objection, the erroneous overruling of it, and resulting prejudice. On making trial objections and protecting the record, see chap 15.

In many instances, admission of documentary, demonstrative, and real evidence is predicated on a finding of certain preliminary facts. See generally §§7.25-7.36. Counsel objecting to the admissibility of such evidence and opposing proof of the necessary preliminary facts should anticipate that the evidence's proponent will probably not disclose facts showing inadmissibility.

**EXAMPLE:** In seeking permission to use a model car for demonstration purposes during trial, the proponent is likely to emphasize all the similarities, but none of the differences, between the model and its subject (see §13.102). As a result, opposing counsel should make a record of facts favoring exclusion. Opposing counsel should conduct a voir dire examination of the foundational witness before the court receives the evidence and, if necessary, call his or her own witnesses during the preliminary hearing. If permission to call such witnesses is denied, an appropriate offer of proof should be made.

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## D. Meeting objections

### §13.133 1. Anticipating objections; preparation

During the pretrial stages of litigation, try to anticipate ways to overcome possible objections raised by opposing counsel to documentary, demonstrative, and real evidence that you intend to use during trial. Before trial, plan carefully the theories of relevancy you will rely on and the testimony or other foundational evidence necessary to establish admissibility. Care should also be taken that all pretrial procedural requirements have been satisfied. See §§13.35-13.38.

In addition, if you anticipate that opposing counsel will object to an exhibit's admissibility during trial, prepare a written memorandum for the court, explaining why the evidence should be received and citing pertinent authorities. Consider alternative actions to take and other ways to present the evidence if the court ultimately rejects the exhibit.

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### §13.134 2. Motions in limine to admit evidence

Motions in limine are frequently made to exclude evidence from trial. See §13.130. They may also be made to obtain rulings admitting evidence. See, *e.g., People v Jennings* (1988) 46 C3d 963, 975, 251 CR 278; *Pugh v See's Candies, Inc.* (1988) 203 CA3d 743, 757, 250 CR 195. For a detailed discussion of motions in limine, see chap 7.

Such a motion may be made in chambers before the start of trial, thereby allowing the parties to know whether they can safely refer to critical evidence during opening statement. This type of motion also reveals technical objections that opposing counsel intends to make, inadequacies about admissibility of the evidence, and unanticipated foundational testimony that may be necessary for having the evidence admitted. If the motion is successful, counsel knows that the evidence will actually be received during trial. If it is unsuccessful, counsel may have time to overcome the objection or make arrangements to have other evidence available to prove the point (*i.e.,* arrange to have an out-of-state witness fly in for trial to testify).

If a motion in limine to admit evidence is denied, this does not necessarily mean that the evidence will be excluded. The motion can be renewed at an appropriate time during trial if the ground for the objection can be overcome then. A court may refuse to rule on a motion in limine to admit evidence because it believes that additional evidence should be heard before a final ruling can be made. In that situation, counsel can seek in the usual manner to have the evidence admitted at the appropriate point in the trial.

Local court rules or policies increasingly establish pretrial procedures for motions in limine. For further discussion of motions in limine and procedures generally, see chap 7.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.135 3. Offering exhibit for limited purpose

### §13.135 3. Offering exhibit for limited purpose

An exhibit is often admissible as to one party or for one purpose but inadmissible as to another party or for another purpose. In that event, the proponent of the exhibit should be prepared to explain to the court the theory of limited admissibility on which counsel relies in offering the exhibit into evidence. It should be made clear by counsel that the exhibit is offered for that limited purpose. For example, a letter written by one defendant may be admissible as to that defendant but remains inadmissible hearsay as to another defendant.

The court, on request, is required to "restrict the evidence to its proper scope and instruct the jury accordingly." Evid C §355. Even though evidence may be admissible as to one party or for one purpose, it may be excluded under Evid C §352 if the judge finds it so prejudicial that a limiting instruction would not adequately protect a party, and the matter can be proved sufficiently by other evidence. On objections under Evid C §352, see §13.117.

For more detailed discussion of the limited admissibility of evidence, see §§15.61-15.64.

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### §13.136 4. Offering exhibit conditioned on subsequent testimony

The process of accommodating the order of exhibits to be used at trial with the order of witnesses to be called can pose logistical problems. This is particularly true when a witness necessary to laying the foundation for a particular exhibit is not within the control of the party wishing to present the exhibit, or when several witnesses are necessary to provide all the foundational requirements. Opposing counsel may object if counsel questions the first witness about the content of the exhibit before the second witness is called to provide the additional necessary foundation.

**PRACTICE TIP:** To avoid such an objection, raise the problem with the court in chambers before attempting to offer the exhibit into evidence. Explain the logistical problem, outline the theory of admissibility, state the additional facts that will be developed to support that theory, and advise the court of your intention to call sufficient witnesses to establish those facts. Then request that the exhibit be received in evidence on a provisional basis, subject to a motion to strike if the foundational evidence necessary for admissibility is not established. If the court refuses this offer, you may have no alternative but to call witnesses out of order or to introduce the exhibit at another stage in the trial.

When an exhibit has been received on a provisional basis, counsel for both sides should verify before the close of evidence whether the requisite foundational facts have been established. The burden is on the opposing party, however, to move to strike the exhibit when such foundational facts have not been established. See *Ault v International Harvester Co.* (1974) 13 C3d 113, 117 CR 812; *Tarpey v Veith* (1913) 22 CA 289, 295, 134 P 367. 3 Witkin, California Evidence, *Presentation at Trial* §52 (4th ed 2000). In such circumstances, opposing counsel should also move to strike any testimony about the exhibit provided by witnesses during the course of the trial. If the motion to strike is granted, there may be grounds for a mistrial or new trial because of the exhibit's prejudicial effect. On motions for mistrial, see §§16.95, 18.82-18.102. On new trial motions, see §§25.22-25.71.

If opposing counsel makes a motion to strike evidence received on a provisional basis because counsel has overlooked certain facts to establish admissibility before the close of evidence, counsel should request that the court reopen the case for the limited purpose of providing the necessary testimony. On reopening case, see §§18.65-18.81.

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### §13.137 5. Excising objectionable entries in exhibit

Frequently, a writing contains some entries that are admissible and others that are not. Counsel who wishes to have such a writing received in evidence must take steps to excise the inadmissible portions.

One procedure is to bring to the trial the original exhibit, with no portion of it deleted, and copies of the writing with the inadmissible portion excised. Excise the document by using white correcting fluid or by placing a piece of white paper over the inadmissible portion and then photocopying it. The edited copy can then be offered into evidence during trial.

**PRACTICE TIP:** If you have not obtained a stipulation as to admissibility of a writing and an objection is anticipated, discuss the troublesome exhibit with the court outside the jury's hearing before any foundational testimony is elicited. This can be done during a chambers conference before or during trial. If the court rules that the edited copy is admissible, it can be received in evidence while the unaltered exhibit remains part of the record, marked for identification only.

If you are confident that the entire writing, including a questionable entry, should be received in evidence, consider offering the entire exhibit after foundational testimony has been laid. If the court agrees with opposing counsel that a particular entry is objectionable, proposing counsel should then offer the edited copy. In some instances, it is not physically possible to delete the objectionable portions of a writing. The court has discretion to allow counsel to read into evidence the admissible portions but to prevent the exhibit from being displayed to the jury. See Los Angeles Ct R 8.68.

When the court rules that an edited exhibit is admissible, counsel opposing admissibility should consider asking the court to prevent the exhibit from being taken into the jury room during the jury's deliberations. If it is apparent that portions have been deleted from the edited exhibit, the jurors may speculate about the deletions. This can be extremely prejudicial to the party against whom the exhibit was offered.

**PRACTICE TIP:** Some local court rules describe procedures for edited exhibits and their admissibility. See, *e.g.,* Los Angeles Ct R 8.67-8.68.

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### §13.138 6. Offers of proof

When counsel has offered evidence, but the court has excluded it, an offer of proof must be made by counsel to preserve the right to argue on appeal that the trial court erred in excluding the evidence. See Evid C §354(a); *Pugh v See's Candies, Inc.* (1988) 203 CA3d 743, 758, 250 CR 195. In addition to preserving the record, an offer of proof educates the trial judge and may persuade the judge to correct an erroneous ruling.

An offer of proof should be made on the record out of the jury's presence. The offer should identify the "substance, purpose, and relevance of the excluded evidence." Evid C §354(a). An offer of proof that states the substance of facts to be proved, rather than the substance of the evidence, does not comply with §354(a). *United Sav. & Loan Ass'n v Reeder Dev. Corp.* (1976) 57 CA3d 282, 129 CR 113. According to the court, "substance" of the evidence is the testimony of specific witnesses, writings, material objects, or other things presented to the senses, to be introduced to prove the existence or nonexistence of a fact at issue. 57 CA3d at 294.

A general offer of proof is insufficient to preserve the point for appeal. *Stickel v San Diego Elec. Ry.* (1948) 32 C2d 157, 195 P2d 416; *Semsch v Henry Mayo Newhall Mem. Hosp.* (1985) 171 CA3d 162, 167, 216 CR 913; *Moore v Rogers* (1958) 157 CA2d 192, 320 P2d 524.

On procedures for making offers of proof, see §§15.50-15.60. For a sample oral offer of proof, see Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.139 X. EXHIBITS PERMITTED IN JURY ROOM

## §13.139 X. EXHIBITS PERMITTED IN JURY ROOM

The following list describes whether certain types of demonstrative evidence may be taken into the jury room:

- **Maps and diagrams.** Maps and diagrams are generally sent to the jury room. See *Balasco v Chick* (1948) 84 CA2d 802, 809, 192 P2d 76.
- **Models.** Models may be permitted in the jury room, but counsel should consider whether this is tactically wise. Jurors will have an unsupervised opportunity to examine and play with the model, and they may come to different conclusions than the proponent's own witnesses. In addition, the jurors might conduct improper experiments with the model. See generally *Higgins v Los Angeles Gas & Elec. Co.* (1911) 159 C 651, 115 P 313. Note, however, that "it is the duty of the court, by instruction to the jury, to limit and restrict" the use of an exhibit that may be susceptible to improper use. 159 C at 660.
- **Photographs.** Photographs are normally permitted in the jury room. See, *e.g., People v Williams* (1960) 187 CA2d 355, 366, 9 CR 722 (photographs of decedent's nude body). Exceptions may be made, however, if the subject is unduly inflammatory or prejudicial.
- **Motion pictures.** Motion pictures are seldom permitted in the jury room, because a trained person is needed to run projection equipment. If the jurors request to see the film during deliberations, judges sometimes prefer that the showing be conducted in open court. If the judge permits a motion picture to go into the jury room with a trained operator (*e.g.,* the bailiff), the judge should instruct the jury that they may not communicate with or deliberate in front of that person.
- **Audio recordings.** Recordings are increasingly treated like motion pictures because a trained person is needed to operate the recording equipment without damaging the exhibit. The courts have discretion, however, to allow a specified person (*e.g.,* the bailiff) to play the recordings for the jury in the jury room as long as that person does not remain during the actual deliberations. See, *e.g., People v Douglas* (1977) 66 CA3d 998, 1006, 136 CR 358 (bailiff manually operated audiotape under court order; no indication that he was present during jury deliberations). The court may permit transcripts of recordings into the jury room that have been admitted into evidence. See *People v Fujita* (1974) 43 CA3d 454, 473, 117 CR 757; *People v Beverly* (1965) 233 CA2d 702, 717, 43 CR 743.
- **X rays.** Although X rays may be sent to the jury room, they often are not. Because X rays must be explained by an expert, the jurors may misinterpret them. See Los Angeles Ct R 8.67.

**PRACTICE TIP:** Before final argument, discuss with the court in chambers which exhibits will be permitted into the jury room during deliberations. If the court decides not to allow an exhibit into the jury room, you will be able to explain and emphasize it during closing argument. In addition, early consideration gives the parties time to organize voluminous written exhibits into an indexed binder for easy handling by the jury. If the court concludes that certain documents in evidence should be retained by the person with original possession of them, copies may be provided to the jury. See CCP §612.

Whether or not demonstrative evidence will be permitted in the jury room depends on the type of evidence it is and the manner in which it is presented. The court generally will permit exhibits received in evidence to go into the jury room. See CCP §612. There are exceptions, however. See §§21.32-21.34. See also, *e.g.,* Los Angeles Ct R 8.67 (types of exhibits not be permitted in jury room).

The jury may use audio recorders, phonographs, magnifying glasses, or other equipment necessary or helpful in reviewing evidence, even though the apparatus itself is not in evidence, as long as it is provided by the court or with its permission. See, *e.g., People v Douglas, supra* (tape recorder); *People v Manson* (1976) 61 CA3d 102, 214, 132 CR 265 (phonograph); *People v Turner* (1971) 22 CA3d 174, 182, 99 CR 186 (magnifying glasses). When counsel wishes the jury to consider evidence that requires equipment, such equipment should be provided by counsel to the court and opposing counsel sufficiently in advance that any concerns about fairness may be resolved. This way, alternate equipment or means of display may be substituted if necessary.

On juror misconduct during deliberations, see §§21.35-21.43.

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## XI. SAMPLE FORMS

### §13.140 A. Sample exhibit log

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**Sample Exhibit Log Form**

**EXHIBIT LOG**

| *Exhibit No.* | *Description* | *Marked for Identification* | *Offered* | *Admitted* |
|---|---|---|---|---|
| 1 | Financial Stmt of Def. Co. | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.141 B. Form: Sample stipulation regarding use of documents at trial

## §13.141 B. Form: Sample stipulation regarding use of documents at trial

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

**Reed S. Hallinan (112650)**
**GREEN & COE**
**1190 W. 52nd St., Suite 100**
**Middletown, CA 90000**
**(100) 555-5555**
**Attorney for Plaintiff**

**SUPERIOR COURT, COUNTY OF ALAMEDA**

| | | |
|---|---|---|
| **JOAN SMITH** | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **STIPULATION REGARDING** |
| **vs** | ) | **USE OF DOCUMENTS AT** |
| **JOHN JONES, ET AL.,** | ) | **TRIAL** |
| **Defendant(s)** | ) | **Dep't: _ _[*number*]_ _** |
| | ) | **Judge: _ _[*if known*]_ _** |
| _____ | ) | **Trial date: _ _[*if set*]_ _** |

**IT IS AGREED AND STIPULATED among the parties to this action, by and through their counsel, for purposes of trial of this case, that:**

**1. Copies of all documents produced during discovery may be used in lieu of the original document if such copies are complete and legible.**

**a. "Documents produced during discovery" as used in this Stipulation include documents provided by a party or witness in response to a subpoena duces tecum, an interrogatory, a request for admission, or a request for production of documents, or as a deposition exhibit.**

**b. This stipulation applies to all documents produced before the earliest date of signing the stipulation. It also applies to documents produced after the stipulation is signed unless counsel for a party informs all other counsel that document copies are not acceptable. To be effective, such notification must be sent no later than 10 days after this stipulation is filed or the document is produced, whichever is later.**

**2. All documents produced during discovery are deemed authentic. Documents produced after the earliest date of signing the stipulation will be deemed authentic unless notification to the contrary is made in the manner described in subparagraph 1(b).**

**3. All documents produced during discovery are deemed admissible business records or otherwise subject to an exception to the hearsay rule, such as official writings, admissions of a party, etc. This stipulation does not waive a party's right to object to any document as irrelevant, confusing, prejudicial (Evidence Code section 352), or immaterial. Nor does this stipulation bar a party from objecting to portions of the documents as "hearsay within hearsay." Documents produced after the earliest date of signing the stipulation will be deemed admissible as described above unless notification to the contrary is made in the manner described in subparagraph 1(b).**

**4. Interrogatory answers and admissions, if otherwise admissible, may be presented to the jury by reading from true copies of the original documents, without the necessity of calling the person subscribing to or verifying the answers or admissions.**

**5. All parties desire the court to enter an order permitting the filing of interrogatories, requests for admission, depositions, and all responses or objections to interrogatories and requests for admission.**

**SO STIPULATED:**

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

__[*Signature*]__
**GREEN & COE**
**By** _ _[*name of attorney*]_ _
**Attorney for Plaintiff**

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

__[*Signature*]__
**BROWN & WHITE**
**By** _ _[*name of attorney*]_ _
**Attorney for Defendant**

*Comment:* See §13.37.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.142 C. Sample Evidence Memorandum

## §13.142 C. Sample Evidence Memorandum

| | |
|---|---|
| EXHIBIT: | Contract 7/15/05 |
| RELEVANCE: | Written statement of parties' understanding of obligations on July 15, 2005; signed by both sides |
| MANNER OF AUTHENTICATION: | Direct of Rue; Cross of Molton |
| WITNESS TO BE QUESTIONED ABOUT EXHIBIT: | Rue, Molton, Ramsey |
| SOURCE OF THIS EXHIBIT: | Document Production by Molton on October 1, 2008 |
| LOCATION OF ORIGINAL: | Molton file |
| POSSIBLE OBJECTION(S)/RESPONSE: | Document altered; commission amount was erased and changed. Response: not material to dispute (Evid C §1402). Dispute here concerns amount of goods to be delivered, not commission schedule. |

*Comment:* See §13.133 on meeting objections.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/13 Trial Exhibits/§13.143 XII. SELECTED BIBLIOGRAPHY

## §13.143 XII. SELECTED BIBLIOGRAPHY


- Effective Introduction of Evidence in California (2d ed Cal CEB 2000)
- Federal Judicial Center. Reference Manual on Scientific Evidence (2d ed 2000)
- Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008)


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# 14

# Judicial Notice, Admissions, and Stipulations

**Pamela Phillips**

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## §14.1 I. SCOPE OF CHAPTER

This chapter covers judicial notice, attorneys' stipulations concerning facts or testimony, and judicial admissions, all methods of establishing particular matters during the trial as indisputably true. By using these methods, counsel need not present formal proof—and opposing counsel cannot offer conflicting evidence on any matter that has been so established. See §14.6.

Matters that the trial court must take judicial notice of, when requested, are discussed in §§14.6-14.14. On discretionary judicial notice, see §§14.15-14.24. The procedures for requesting (and opposing) the court's taking of judicial notice, and the court's ruling, are covered in §§14.25-14.43. See Evid C §§451-456. On judicial notice taken by the appellate courts, see Evid C §459; discussion in California Civil Appellate Practice §§11.86-11.90 (3d ed Cal CEB 1996). For forms of judicial notice and accompanying instruction to jury, see §§14.54-14.55.

The admissions covered in this chapter are judicial admissions made in a party's pleadings (*e.g.,* the complaint). See §§14.43-14.46. For discussion of admissions made in discovery documents (*e.g.,* in response to requests for admission), see §§12.122-12.134. Evidentiary admissions made during depositions are also discussed in chap 12.

Counsel may stipulate that particular facts are true, or they may agree on the content of testimony a witness would offer, were that witness to testify. For discussion of attorneys' stipulations, see §§14.47-14.52.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/14 Judicial Notice, Admissions, and Stipulations/§14.2 A. Means of establishing undisputed facts

## §14.2 A. Means of establishing undisputed facts

**Evidence inadmissible.** Judicial notice, attorneys' stipulations, and judicial admissions are substitutes for evidence and make proof of the established matters unnecessary. Parties are precluded from presenting contrary evidence disputing any judicially noticed, admitted, or stipulated matters. See Comment to Evid C §457 (judicial notice); *Robinson v Robinson* (1962) 208 CA2d 213, 217, 25 CR 143 (stipulation). On admissions, see §14.43.

**Evidence defined.** "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact. Evid C §140.

**NOTE:** Not only is contrary evidence inadmissible, allegations in a pleading that conflict with a judicially noticed fact must also be disregarded. See *Young v Boy Scouts of Am.* (1935) 9 CA2d 760, 764, 51 P2d 191.

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### §14.3 B. Relevancy requirement

The matter being judicially noticed or admitted, or stipulated to by counsel, must be relevant to the issues being tried. Evid C §350.

Counsel who objects to a request for judicial notice must persuade the court that the requesting party did not meet its burden (see §14.30) or that the matter to be noticed is irrelevant to the issues in the case. See, *e.g., Santos v DMV* (1992) 5 CA4th 537, 7 CR2d 10 (court refused to judicially notice distance between place of arrest and hospital because mere distance gave no information on whether arrival at hospital was immediate or how much time elapsed before blood was drawn); *Behrens v Fogette Mfg. Co.* (1992) 4 CA4th 1567, 7 CR2d 264 (court refused to notice documents showing legislative intent because they reflected personal view of legislator who wrote them and were irrelevant to legislative language, which was clear and unambiguous).

Challenging relevancy is frequently opposing counsel's best argument for opposing judicial notice or for excluding an admission or stipulation. On grounds for objecting to judicial notice, see §14.34.

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### C. Tactical considerations

### §14.4 1. Advantages

**Expedited trial.** Like judicial admissions and stipulations of counsel, the purpose of judicial notice is "to expedite the production and introduction of otherwise admissible evidence." See *Mozzetti v City of Brisbane* (1977) 67 CA3d 565, 578, 136 CR 751. Judicial notice is often superior to a stipulation of counsel, because the *judge* tells the jury that a particular fact is undeniably true, which often carries more weight than an announcement that counsel agree that a fact is true. On preinstruction and instruction of jury, see §§14.33 (judicial notice), 14.51 (stipulation). Judicial admissions enjoy the same advantage. On judge's instructing jury to accept judicial admission as true, see §14.45.

Documentary or demonstrative evidence may aid the court in taking judicial notice of a matter. On sources of information the court may rely on in deciding whether to take judicial notice, see §14.36. On preparing trial exhibits that could be used for this purpose, see generally chap 13.

It is important to gather and present evidence as simply and efficiently as possible, for both the client's and jury's benefit. The more matters that are judicially noticed or admitted (or stipulated to), the fewer matters there are to prove, thus reducing trial expenses. For other ideas on trying cases more efficiently, see chap 1.

**PRACTICE TIP:** A judge may be persuaded to take judicial notice of matters that would be too complex or difficult to prove during trial. Consider the time and effort it would take to introduce evidence to the jury on particular matters, *e.g.,* contradictory eyewitness statements about the weather on the day of the accident. It is worth attempting to persuade the judge that problematic discovery material, for example, could best be handled by judicial notice; this method of admission would prevent opposing counsel from objecting to your proof and from presenting conflicting evidence to the jury.

**Favorable effect on jury.** The judge's telling the jury that a matter is indisputably true may underscore its importance. The risk that the jurors would doubt the proof offered on the matter is minimized.

**More reliable than testimony.** As mentioned in the practice tip above, some matters are difficult to prove through eyewitnesses who may not have noticed certain facts. A stipulation or admission, or judicial notice, is the best way to establish them.

**Defendant's viewpoint.** In some trials, an eyewitness account could be inflammatory or unnecessarily graphic and the judge's statement of the matter to the jury less emotionally charged.

**EXAMPLE:** The judge's statement that "the defendant was intoxicated" may be less damaging than the testimony of a witness who graphically describes the behavior of the defendant while under the influence of alcohol.

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### §14.5 2. Disadvantages

**Jury may not understand complicated matters that are judicially noticed or stipulated.** It may be less effective to have the judge explain certain matters to the jury than to have several witnesses explain different aspects of those matters. If the points that could be the subject of judicial notice or stipulation are complex but vital to the case, it may be worth the time and effort to educate the jury about them during the course of the trial.

**Less impact on jury.** Because counsel cannot offer evidence on an undisputed matter, far less emphasis may be placed on a crucial aspect of the case. It may be more effective to require the opposing party to admit the truth of a matter on the stand. To help the jury remember a particular fact, counsel may want more drama than a judge will give the judicially noticed matter.

**Plaintiff's viewpoint.** A description of the damage or injuries incurred may have much more drama if it is narrated by a witness who was privy to the event, rather than merely stated by the judge. For example, an eyewitness account of an accident is clearly superior to stipulated facts read to the jury during trial.

**CAUTION:** Plaintiff's counsel should almost never stipulate to facts about the client's pain and suffering. Use good judgment on how to present the salient facts of your case to the jury. Do not stipulate to facts if you have a credible, persuasive witness to tell what happened.

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## §14.6 II. JUDICIAL NOTICE

A court taking judicial notice of a matter acknowledges a fact or law to be true. Evid C §§451-453. When a court takes judicial notice of a matter of fact or law, the matter is deemed established in the case. On procedures for requesting and opposing judicial notice, see §§14.25-14.34.

The effect of judicial notice is that no formal proof of the truth or existence of the matter is thereafter required, and any contrary evidence is inadmissible. *Post v Prati* (1979) 90 CA3d 626, 633, 153 CR 511. See 1 Witkin, California Evidence, *Judicial Notice* §§1, 3 (4th ed 2000). See also Jefferson's California Evidence Benchbook, chap 49 (4th ed CJA-CEB 2009).

**Rationale:** The admission of matters by judicial notice is based on the theory that some propositions of law or fact cannot reasonably be disputed and it is therefore unnecessary to introduce evidence to prove them. See *Varcoe v Lee* (1919) 180 C 338, 344, 181 P 223; Evidence Benchbook, chap 49.

**NOTE:** Reviewing courts, as well as trial courts, may take judicial notice. On appellate courts' taking judicial notice, see Evid C §459.

The courts are prohibited from taking judicial notice of any matter not authorized or required by law. Evid C §450. "Law" is defined to include constitutional, statutory, and decisional law. See Evid C §160

**PRACTICE TIP:** When your opponent proposes that judicial notice be taken, your first reaction ought to be to review Evid C §§451-452 to determine whether the statutory requirements for judicial notice have been met. On grounds for objecting to judicial notice, see §14.34.

The court *must* take judicial notice of certain matters. Evid C §451 (mandatory judicial notice). See §§14.6-14.14. The court *may* take judicial notice of other matters. Evid C §452 (discretionary judicial notice). See §§14.15-14.24.

**Judicial notice of discretionary matters made mandatory by request.** After a party requests judicial notice of permissive matters under §452 (after meeting Evid C §453 requirements to give sufficient information to the court and sufficient notice to other parties), the court *must* take notice of those §452 matters. See §§14.26-14.30.

**Additional sources of authority: statutes and cases.** Other sections in various California codes provide specific statutory authority for judicial notice. See, *e.g.,* CC §53; Pen C §§961, 963. See also CCP §430.70 on specifying in a demurrer any Evid C §§452-453 matters that are judicially noticed as grounds for the demurrer.

Decisional law may also authorize or require the court to take judicial notice of a matter. See §14.8.

**PRACTICE TIP:** Do not overlook decisional law as a basis for arguing that the court should take judicial notice of similar matters. See case examples of matters judicially noticed by California courts in §14.53. See also Comment to Evid C §450; 1 Witkin, California Evidence, *Judicial Notice* §9 (4th ed 2000).

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## §14.7 A. Mandatory judicial notice (Evid C §451)

The court must judicially notice matters of law or fact listed in Evid C §451. The matters listed are those that the "court can reasonably be expected to discover and apply … even if the parties fail to provide the court with references to the pertinent cases, statutes, regulations and rules." Comment to Evid C §451.

Although no formal request for judicial notice is necessary for any matter listed under the mandatory provisions of Evid C §452, it is advisable for counsel to call the court's attention to such matters. On procedures for doing so, see §14.25.

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## §14.8 1. California and United States law

A court must take judicial notice of the "decisional, constitutional and public statutory law" of California and the United States. Evid C §451(a). See, *e.g., County of Lassen* (1992) 4 CA4th 1151, 6 CR2d 359 (judicial notice taken of Penal Code provisions on state control and operation of county jails).

Evidence Code §230 defines "statute" to include a treaty and a constitutional provision. A private statute concerns only designated individuals and affects only their private rights. See §14.17. All other statutes are considered to be public (including statutes creating or affecting corporations). See CCP §1898.

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## §14.9 2. California city and county charters

Judicial notice must be taken of "the provisions of any charter described in Section 3, 4, or 5 of Article XI of the California Constitution." Evid C §451(a).

Article XI, §§3-5 concern the adoption and provisions of city and county charters. On discretionary judicial notice of ordinances and other legislative enactments, see §14.18.

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## §14.10 3. Regulations of state and federal agencies

**Government Code.** Judicial notice must be taken of any matter made the subject of judicial notice by certain Government Code provisions listed in Evid C §451(b):

- Rules and amendments of the state personnel board (Govt C §18576);
- Each state agency regulation, or order of repeal of such regulation, duly filed with the Secretary of State (Govt C §11343.6); and
- Each regulation printed or incorporated into the California Code of Regulations and any repeal of a regulation as published in the California Regulatory Code supplement (Govt C §11344.6).

See Comment to Evid C §451. See, *e.g., Environmental Protection Info. Ctr. v Maxxam Corp.* (1992) 4 CA4th 1373, 1382, 6 CR2d 665, in which the court took judicial notice of the revised regulations and changing policies of the California Department of Forestry and Fire Protection, and concluded that the department now took a more active environmental stance.

**Regulation defined.** "Regulation" means rules or standards adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it. Govt C §11342.600. Legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization are not considered regulations. Govt C §11340.9(b). Nor are procedures that govern only the internal management of a state agency, or the forms (or instructions to forms) issued by a state agency deemed to be regulations. See Govt C §11340.9(d).

**United States Code.** The contents of the Federal Register must be judicially noticed. Evid C §451; 44 USC §1507. As specified in the Comment to Evid C §451, documents published in the Federal Register include presidential proclamations and executive orders having general applicability and legal effect. See 44 USC §1505. See, *e.g., Rader v Apple Valley Bldg. & Dev. Co.* (1968) 261 CA2d 308, 312, 68 CR 108 (judicial notice of federal aviation regulations). On permissive notice of regulations of public entities not listed in the Federal Register, see §14.18.

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## §14.11 4. California rules of professional conduct and rules of court

The California Rules of Professional Conduct (enacted under Bus & P C §6076) must be judicially noticed. Evid C §451(c).

Judicial notice is also required for the rules of practice and procedure adopted by the Judicial Council for the courts of California (*i.e.*, California Rules of Court). Evid C §451(c). See Comment to Evid C §451.

**Permissive notice of local court rules.** On the court's discretionary power to take judicial notice of local court rules under Evid C §452(e), see §14.21.

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## §14.12 5. Federal rules of pleading, practice, and procedure

A court must take judicial notice of the rules of pleading, practice, and procedure "prescribed by the United States Supreme Court" for the federal courts. Evid C §451(d). Under this provision, judicial notice of such rules as the Rules of the U.S. Supreme Court and the Federal Rules of Civil Procedure is required.

**Permissive notice of other appellate court rules.** Rules not promulgated by the United States Supreme Court, *e.g.,* rules of the various U.S. courts of appeal, are not required to be judicially noticed under Evid C §451(d). On court's discretionary power to judicially notice such rules under Evid C §452(e), see §14.21.

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### §14.13 6. English words, phrases, and legal expressions

Judicial notice must be taken of the meaning of all English words and phrases and of all legal expressions. Evid C §451(e).

The courts have interpreted §451(e) to include meanings broader than dictionary definitions, *e.g.,* slang or colloquial expressions of a particular group, or words of trade as understood in a particular industry. See *People v Powell* (1934) 1 CA2d 222, 224, 36 P2d 201 (court "not restricted to academic definitions which would render absurd a transaction or conversation and artificially defeat the ends of justice").

Examples of judicial notice taken under this provision include:

- The meaning of English words and phrases and of idioms in the vernacular. See *People v Cunningham* (1950) 99 CA2d 296, 301, 221 P2d 283 (when witness stated that her daughter was "six," court was entitled to infer unit of age referred to was "years").
- The meaning of words unique to a particular industry as applied to that industry. See *Hines v Miller* (1898) 122 C 517, 55 P 401 (shafts, tunnels, levels, etc., signify instrumentalities whereby mines are prospected and developed).

**Judicial notice not mandated for non-English words and phrases.** Non-English words and phrases do not fall within the category of mandatory judicial notice under Evid C §451(e). However, counsel may request judicial notice of their meaning, depending on the words and phrases in question, under Evid C §452(g) or (h). See §§14.23-14.24 (matters that are of common knowledge or verifiable).

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### §14.14 7. Universally known matters

A court is required to take judicial notice of facts and propositions "of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." Evid C §451(f).

**Reasonable person test.** A fact need not be known by everyone to be "universally known" within the meaning of Evid C §451(f). The "universally known" requirement is satisfied if the fact is known among persons of reasonable and average intelligence and knowledge. See Comment to Evid C §451.

**EXAMPLE:** Relying on §451(f), the court took judicial notice of the use of the term "hippies" in a rural area to describe a general external appearance adequate for group identification, but the court refused to take judicial notice that "hippies" would engage in a particular type of behavior at a particular time or place. *People v Coulon* (1969) 273 CA2d 148, 153, 78 CR 95.

**Compare:** Unlike the mandatory provisions of Evid C §451(f), Evid C §452(g)-(h) permits the court to take judicial notice of facts and propositions that are not widely known, yet are indisputable. See §§14.23-14.24.

On right to hearing before court rules on matters of "substantial consequence" to outcome of case when matters to be noticed are under §451(f) or §452, see Evid C §455; discussion in §14.40.

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### §14.15 B. Discretionary judicial notice (Evid C §452)

The court has discretion to take judicial notice of the matters listed in Evid C §452. Even if none of the parties makes a request, the court may take judicial notice of these matters on its own motion as long as it gives the parties a reasonable opportunity to be heard. See §14.35.

**Permissive notice made mandatory by request.** If a party requests that judicial notice be taken of a matter under Evid C §452 and complies with Evid C §453 (*i.e.,* provides sufficient information to the court and reasonable notice to the other parties), the court *must* take judicial notice of the matter. Evid C §453. See §14.26.

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## §14.16 1. Law of sister states

Although California and federal public laws are the subject of mandatory judicial notice (see §14.8), the decisional, constitutional, or statutory law of other states falls under the discretionary provisions of Evid C §452(a). "State" under Evid C §220 includes any United States district, commonwealth, territory, or insular possession. See Comment to Evid C §452.

Decisional law includes intermediate appellate courts of other states. See Comment to Evid C §452. "Statute" as defined by Evid C §230 includes treaties and constitutional provisions.

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## §14.17 2. Resolutions and private acts of United States and California legislatures

Unlike federal and California public statutes, which the court must judicially notice (see §14.8), resolutions and private acts of the United States Congress and of the California Legislature are discretionary with the court. Evid C §452(a).

**NOTE:** Resolutions and private acts of the legislatures of *other states* are not a proper subject for judicial notice under Evid C §452(a), although the Comment to Evid C §452 indicates that they are. Witkin states that the "reference to 'this state' [in §452(a)] supersedes language of an original draft referring to 'any state,'" pointing out that the Comment to Evid C §452 overlooked the change. 1 Witkin, California Evidence, *Judicial Notice* §17 (4th ed 2000). On judicial notice of resolutions and private acts of other states, see §452(c) and discussion in §14.19.

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### §14.18 3. Regulations and legislative enactments of public entities

A court may judicially notice regulations and legislative enactments "issued by … any public entity in the United States." Evid C §452(b). A "public entity" is defined broadly to include a "state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation." Evid C §200. The terms "regulations and legislative enactments" include ordinances and similar legislative enactments because not all public entities legislate by ordinance. Comment to Evid C §452(b).

Section 452(b) permits a court to take judicial notice of federal and California regulations not covered under Evid C §451(b) as well as the regulations of other states, territories, and possessions of the United States. Comment to Evid C §452. This section also allows a court to take judicial notice of city and local ordinances not authorized under §451(b) concerning federal and state entities. See §14.10.

**EXAMPLE:** Although a court may be precluded under §451(b) from judicially noticing regulations implemented by a city, §452(b) expressly includes city actions. *Da Vinci Group v San Francisco Residential Rent Stabilization & Arbitration Bd.* (1992) 5 CA4th 24, 6 CR2d 461 (court judicially noticed four amended versions of rules and regulations implemented by San Francisco Residential Rent Stabilization and Arbitration Board that were in effect at various times during plaintiff's tenancy).

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### §14.19 4. Official acts of legislative, executive, and judicial departments of United States or any state

A court may judicially notice the official acts of the legislative, executive, and judicial departments of the United States or any state. Evid C §452(c).

A wide variety of administrative and executive acts (including records of proceedings, reports, and findings of legislative and administrative committees) falls within this category. Comment to Evid C §452. See, *e.g., Masters v San Bernardino County Employees Retirement Ass'n* (1995) 32 CA4th 30, 37 CR2d 860 (judicial notice taken of by-laws of county retirement association); *City of Sacramento v State Water Resources Control Bd.* (1992) 2 CA4th 960, 3 CR2d 643 (judicial notice taken of minutes of relevant Regional Water Quality Control Board meetings); *Post v Prati* (1979) 90 CA3d 626, 153 CR 511 (judicial notice taken of legislative committee reports and excerpts from testimony given at public hearings).

**Unofficial acts excluded**. Matters that are not "official acts" have been held not to be a proper subject of judicial notice under Evid C §452(c). For example, judicial notice may not be taken of documents prepared by a private party and merely filed with a public entity. *Hughes v Blue Cross* (1989) 215 CA3d 832, 856 n2, 263 CR 850. Nor are internal memorandums of the district attorney's office "official acts" subject to judicial notice. *People v Pinholster* (1992) 1 C4th 865, 4 CR2d 765. See *Quelimane Co. v Stewart Title Guar. Co.* (1998) 19 C4th 26, 45 n9, 77 CR2d 709 (material supplied to counsel by legislative interpretive service not subject to judicial notice).

To aid in their interpretation of official acts, the courts may judicially notice extrinsic related documents. *Estate of Crabtree* (1992) 4 CA4th 1119, 6 CR2d 224 (in construing jurisdictional filing requirements for notice of appeal, court judicially noticed memorandum prepared by its administrative office in support of a draft amendment eventually adopted by Judicial Council).

**Legislative history**. Cases in which courts have taken judicial notice of documents or statements of legislative history or intent include:

- *San Mateo County Coastal Landowner's Ass'n v County of San Mateo* (1995) 38 CA4th 523, 552, 45 CR2d 117 (letter from California Secretary of Resources regarding whether county's action satisfied CEQA);
- *People v Goodloe* (1995) 37 CA4th 485, 493, 44 CR2d 15 (state agency's administrative bulletin interpreting statute on prison terms judicially noticed on administrative interpretation of statute);
- *Joseph v Superior Court* (1992) 9 CA4th 498, 11 CR2d 757 (court judicially noticed statements and comments by state agencies, legislation sponsor, and senate committee);
- *Monterey Peninsula Taxpayers Ass'n v County of Monterey* (1992) 8 CA4th 1520, 11 CR2d 188 (court judicially noticed legislative history to interpret validity of sales tax approved by simple majority of voters, instead of two-thirds majority required by Proposition 13); and
- *Hung v Wang* (1992) 8 CA4th 908, 11 CR2d 113 (court judicially noticed legislative history in evaluating constitutionality of statute).

The following cases illustrate the various forms of legislative history of which courts have taken judicial notice:

- *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1190, 52 CR2d 518 (comments made by state agency to legislature while bill under consideration); and
- *Empire Props. v County of Los Angeles* (1996) 44 CA4th 781, 788, 52 CR2d 69 (report by task force commissioned by legislature as part of legislative history). But see *Quintano v Mercury Cas. Ins. Co.* (1995) 11 C4th 1049, 1062, 48 CR2d 1 (various versions of bill as it made its way through legislature, but not of letters to legislators and governor expressing support or opposition to bill, because they merely expressed individual opinions of authors).

For discussion of court's consideration of extrinsic aids in determining the meaning of a law, see §14.37.

**Statutes that concern private rights**. Private state statutes (*i.e.,* an act that concerns only designated individuals and affects only their private rights) can be included in the "official acts" that a court may judicially notice. See CCP

§1898. However, the acts of cities and other nonstate subdivisions are not the proper subject of judicial notice under Evid C §452(c). *Edna Valley Ass'n v San Luis Obispo Coordinating Council* (1977) 67 CA3d 444, 136 CR 665; *Marino v City of Los Angeles* (1973) 34 CA3d 461, 110 CR 45. But see *Planned Parenthood Shasta-Diablo, Inc. v Williams* (1995) 10 C4th 1009, 1021, 43 CR2d 88 (court stated that law is well settled that trial or reviewing courts may properly take judicial notice of government maps and surveys and held that it was proper to take judicial notice of city maps and surveys showing width of street); *Washington v County of Contra Costa* (1995) 38 CA4th 890, 901, 45 CR2d 646 (county's inspection records and documents submitted to county as part of development).

**PRACTICE TIP:** If any city organizations or nonstate subdivisions can be construed as "public entities," ask the court to take judicial notice of any ordinances or legislative enactments under the judicial notice provisions of §452(b). It is sometimes difficult to meet the requirement that the matter was an "official act" that the court should take judicial notice of under §452(c). See §14.18.

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### §14.20 5. Court records

The records of any California court, or any federal or sister state court of record, may be judicially noticed. Evid C §452(d). See, *e.g., Pruyn v Agricultural Ins. Co.* (1995) 36 CA4th 500, 511, 42 CR2d 295 (proper to judicially notice special verdicts against same defendant on similar negligence claim in insurance coverage action); *Ellenberger v Espinosa* (1994) 30 CA4th 943, 948 n1, 36 CR2d 360 (judicial notice of superior court's file and record on appeal in related case was considered to contradict allegations of complaint); *Stolz v Bank of Am. Nat'l Trust & Sav. Ass'n* (1993) 15 CA4th 217, 19 CR2d 19 (judicial notice taken of prior determination that plaintiff was "vexatious litigant" within meaning of CCP §391; with respect to claim of collateral estoppel, court records are properly noticed for purpose of determining issues raised by pleadings, litigated, and finally decided in that proceeding); *In re John V.* (1992) 5 CA4th 1201, 7 CR2d 629 (judicial notice taken of partial transcript of prior hearing that showed court adopted incorrect plan for foster care); *Hills Transp. Co. v Southwest Forest Indus.* (1968) 266 CA2d 702, 710, 72 CR 441 (court took judicial notice of exhibits incorporated into unverified original complaint, even though verified second amended complaint omitted them).

Similarly, a party may request judicial notice of a court's own records. *Nulaid Farmers Ass'n v LaTorre* (1967) 252 CA2d 788, 791, 60 CR 821. It is improper for a court to take judicial notice of an interpretation of a document submitted by a demurring party based solely on the document, without allowing parties to submit extrinsic evidence. *Fremont Indem. Co. v Fremont Gen. Corp.* (2007) 148 CA4th 97, 114, 55 CR3d 621.

**NOTE:** In 1996, the legislature added Evid C §452.5, specifying special procedures for judicial notice of computer-generated official court records of criminal convictions.

**Procedures**. If a party requests judicial notice of material in a file of the same court in which the matter will be heard, under Cal Rules of Ct 3.1306(c) the party must:

- Specify in writing the part of the court file to be judicially noticed; and
- Arrange with the clerk to have the file in the courtroom at the time of the hearing.

Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested. Cal Rules of Ct 3.1113(l).

**PRACTICE TIP:** Consult local court rules to see if any special local requirements apply. See, *e.g.,* Los Angeles Ct R 9.2. Under Rule 9.2, a party seeking to have judicial notice taken of a matter in a Los Angeles superior court file must file a separate document at least 5 days before the hearing directly in the department where the matter is noticed, setting forth the case name and number and requesting the department clerk to order delivery of the file for the hearing date. Rule 9.2 advises that "[i]t is also good practice to provide the court with a copy of the material to be noticed, on the possibility that the file cannot be located in time for the hearing." If the matter is in another court's file, the requesting party must either (a) subpoena the file for the hearing date or (b) accompany and attach to the moving papers a certified copy of the record or the portion of it to be judicially noticed.

Unless the material is in the court's own file, it is better practice to provide certified copies of court records that you want judicially noticed under Evid C §452(d) and to be sure that the scope of the request is limited, *e.g.:* "Exhibit C is a certified copy of the amended complaint filed on April 30, 2009, in Orange County Superior Court case number _____, in which structural defects are alleged on page 2. Exhibit D is a certified copy of the proof of service of the amended complaint on the defendant on May 5, 2009."

**Grounds for denial of judicial notice request**. Trial courts may properly refuse to take judicial notice of matters in court files when trial counsel has not adequately furnished information to support the request. See, *e.g., Conservatorship of Bones* (1987) 189 CA3d 1010, 234 CR 724 (nothing in record supported county counsel's request for judicial notice other than superior court case number in which alleged conservatorship was established). See §14.29. Judicial notice may also be refused when its purpose is improper. See, *e.g., Cooper Cos. v Transcontinental Ins. Co.* (1995) 31 CA4th 1094, 1105, 37 CR2d 508 (judicial notice of supreme court briefs rejected as effort to ask

court to second-guess supreme court opinion).

**Hearsay limitation**. A court may not take judicial notice of hearsay allegations as true merely because they are part of a court record or file. A court may take judicial notice of the existence of a document in a court file, but not of the truth of allegations asserted there unless the documents (*e.g.,* orders or judgments) are reliable. See *Day v Sharp* (1975) 50 CA3d 904, 914, 123 CR 918.

A court may, however, take judicial notice of allegations in a pleading if they are not offered for the truth of the matter asserted. *Magnolia Square Homeowners Ass'n v Safeco Ins. Co.* (1990) 221 CA3d 1049, 1056, 271 CR 1 (judicial notice of allegations in amended complaint concerning structural defects to prove notice or knowledge of defects).

On judicial notice, see Jefferson's California Evidence Benchbook, chap 49 (4th ed CJA-CEB 2009).

**Judge's findings of fact.** Some courts have viewed a judge's findings of fact in a previous case to be reliable enough to be a proper subject of judicial notice. See, *e.g., In re Tanya F.* (1980) 111 CA3d 436, 168 CR 713 (judicial notice of facts asserted in orders and findings in juvenile court file concerning dependency proceedings). See also *Safeco Ins. Co. v Tholen* (1981) 117 CA3d 685, 173 CR 23 (judicial notice of federal district court judgment and memorandum of opinion and of affirming opinion filed by Fifth Circuit Court of Appeals).

On the other hand, in *Sosinsky v Grant* (1992) 6 CA4th 1548, 8 CR2d 552, the court refused to take judicial notice of the findings of facts reached in a prior case between the parties. The *Sosinsky* court was willing to judicially notice that the judge believed witness A, but not "that A's testimony must necessarily have been true simply because the judge believed A and not B." 6 CA4th at 1565. See also *Kilroy v State* (2004) 119 CA4th 140, 148, 14 CR3d 109; *Lockley v Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 CA4th 875, 884, 110 CR2d 877.

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## §14.21 6. Local, sister state, and federal rules of court

Under Evid C §452(e), the court may take judicial notice of the rules of court of any California court (whether a court of record or not), and of any court of record of the United States or any other state. "State" includes any district, commonwealth, territory, or insular possession of the United States. Evid C §220.

Some overlap exists between Evid C §452(e) and Evid C §451(c)-(d). Judicial notice is mandatory to the extent that the matter falls under §451(c)-(d) (see §§14.11-14.12). Comment to Evid C §452. For example, while the local rules of the Los Angeles County Superior Court are subject to discretionary judicial notice under §452(e), judicial notice of the California Rules of Court adopted by the Judicial Council is mandatory under Evid C §451(c).

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## §14.22 7. Foreign law

A court may take judicial notice of foreign law under Evid C §452(f), which is specified as the law of (1) an organization of nations (such as the European Economic Community), (2) foreign nations, and (3) public entities in foreign nations. See Comment to Evid C §452.

"Law" includes constitutional, statutory, and decisional law. Evid C §160. A "public entity" is defined in Evid C §200 as:

> a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic.

Under Evid C §452(f), all foreign law in whatever form can be the subject of judicial notice by the court. Comment to Evid C §452. See, *e.g., Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 CA3d 840, 852, 176 CR 874 (terms of existing agreements between United States and West Germany).

On court consideration of extrinsic aids to determine meaning of law, see §14.37. On court options when foreign law cannot be easily determined, see §14.39.

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### §14.23 8. Matters of common knowledge

Facts and propositions that are of such common knowledge within the court's territorial jurisdiction that they cannot reasonably be the subject of dispute may be judicially noticed. Evid C §452(g); *In re Michael G.* (1993) 19 CA4th 1674, 24 CR2d 260 (trial court entitled to take judicial notice that public relies on dangers and antidotes listed on label as matter of common knowledge; minor declared ward of court for possession of spray paint containing hazardous substance toluene with intent to inhale for purpose of intoxication). See *Carleton v Tortosa* (1993) 14 CA4th 745, 17 CR2d 734 (advertisements and brochures by private corporation, or its summary of changes in federal regulations, do not contain matters of common knowledge within court's territorial jurisdiction, and no other statutory basis exists for judicial notice of such information); see also *Medina v Hillshore Partners* (1995) 40 CA4th 477, 481, 46 CR2d 871 (it is common knowledge that street gangs claim home territory and prohibit other gangs from that territory and that gang activity spawns violence). See Evid C §450 (judicial notice may not be taken of any matter unless authorized or required by law).

"Territorial jurisdiction" within the meaning of Evid C §452(g) is the county in which a superior court is located. See Comment to Evid C §452.

A fact need not be physically present within a court's territorial jurisdiction for the court to judicially notice it under Evid C §452(g). Rather, §452(g) requires only that common knowledge of the fact exist within the court's territorial jurisdiction. See Comment to Evid C §452.

**EXAMPLE:** The Orange County Superior Court may judicially notice a fact concerning another county (*e.g.,* that a major fire occurred in the Malibu area in the fall of 2009), as long as common knowledge of that facts exists within Orange County and the fact cannot reasonably be the subject of dispute. See *Ogle v Superior Court* (1992) 4 CA4th 1007, 6 CR2d 205 (Kern County Superior Court judicially noticed that defendant's domicile was in Los Angeles County).

The salary level available to a supported spouse in a specific geographical area is not a proper subject for judicial notice in a proceeding to modify spousal support, because it is neither a matter of common knowledge (Evid C §452(g)) nor indisputable information (Evid C §452(h)). *Marriage of Prietsch & Calhoun* (1987) 190 CA3d 645, 235 CR 587.

If common knowledge of a fact exists among a particular group within a court's territorial jurisdiction and the fact cannot be reasonably disputed, the court may judicially notice it under Evid C §452(g) even though the fact may not be common knowledge of everyone within the court's jurisdiction. See, *e.g., Denham v Superior Court* (1970) 2 C3d 557, 564, 86 CR 65 (judicial notice taken under §452(g) of changes in attorneys and law firm representing plaintiff; two changes resulted from appointment of member of firm as commissioner or judge).

If the fact to be judicially noticed is "essential," the court's power should be invoked with caution. The propounding party has the burden of providing the court with sufficient information to establish that the fact is "common knowledge." *Heist v County of Colusa* (1984) 163 CA3d 841, 213 CR 278.

**Compare:** On judge's personal knowledge distinguished from facts and propositions commonly known within the territorial jurisdiction of the court, see Comment to Evid C §451; discussion in §14.41.

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### §14.24 9. Verifiable matters

A court may judicially notice facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination. Evid C §452(h). See *Press-Enterprise v Superior Court* (1994) 22 CA4th 498, 27 CR2d 708 (trial court took judicial notice of newspaper's daily circulation).

Facts need not actually be known to be subject to judicial notice under §452(h) as long as they are indisputable and subject to immediate and accurate verification. See Comment to Evid C §452. See, *e.g., Norbert v Upjohn Co.* (1999) 21 C4th 383, 408, 87 CR2d 453 (taking judicial notice under §452(h) that, by 1989, controversy about drug Halcion had arisen in popular press).

**"Reasonably indisputable accuracy" standard**. Courts have declined to take judicial notice under Evid C §452(h) when the source does not constitute "reasonably indisputable accuracy." See, *e.g., Leibert v Transworld Sys.* (1995) 32 CA4th 1693, 1700, 39 CR2d 65 (unauthenticated internal memorandum within state's department of industrial relations fell short of the reasonably indisputable accuracy standard); *Osborn v Irwin Mem. Blood Bank* (1992) 5 CA4th 234, 7 CR2d 101 (reporter's account of meeting of Centers for Disease Control contained in book not reliable, because facts may have been subject to dispute); *Heist v County of Colusa* (1984) 163 CA3d 841, 213 CR 278 (California Attorney General's advisory letter contained disclaimer of factual basis of its conclusion and could not be relied on as source of "reasonably indisputable accuracy"). See also *Gould v Maryland Sound Indus.* (1995) 31 CA4th 1137, 1145, 37 CR2d 718.

**Recognized sources of verification**. Sources that the court can use for verification include treatises, encyclopedias, and almanacs as well as persons learned in the field. Comment to Evid C §452. The use of such reference books is limited to consultation by the judge and the parties to decide whether to take judicial notice. See, *e.g., Jordache Enters. v Brobeck, Phleger & Harrison* (1998) 18 C4th 739, 748 n6, 76 CR2d 749 (denied request to take judicial notice of biographies of three lawyers in Martindale-Hubbell, a national directory of attorneys and law firms). See also *Honig v San Francisco Planning Dep't* (2005) 127 CA4th 520, 524 n3, 25 CR3d 649 (declining request to take judicial notice of State Bar of California "attorney profile" of party). The reference works are not received in evidence and do not go to the jury room. Comment to Evid C §452.

Facts accepted as established by experts and specialists in the natural, physical, and social sciences may be judicially noticed under Evid C §452(g)-(h) "if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings." Comment to Evid C §452. On impropriety of the court's judicially noticing facts based solely on the judge's personal knowledge, see §14.41.

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## III. JUDICIAL NOTICE PROCEDURES

### A. Party requesting judicial notice

### §14.25 1. No formal request of mandatory matters under Evid C §451 necessary

Counsel need not formally request judicial notice under Evid C §451. The court must take judicial notice of the matters specified in §451, whether or not a party requests the court to do so. *Quelimane Co. v Stewart Title Guar. Co.* (1998) 19 C4th 26, 45 n9, 77 CR2d 709; *Stop Youth Addiction, Inc. v Lucky Stores, Inc.* (1998) 17 C4th 553, 571 n9, 71 CR2d 731.

The court's failure to judicially notice a mandatory matter under Evid C §451 is error, but it may not be reversible error. Comment to Evid C §451. A party may be precluded from asserting the error on appeal because of, *e.g.,* the doctrine of invited error, failure to raise the point in the trial court, or another, similar principle of appellate practice. See Comment to Evid C §452. On protecting the record, see §14.32.

Good advocacy demands that counsel call attention to matters that the court must judicially notice under Evid C §451. Doing so is usually accomplished in the normal course of representation by citing the statutory and decisional laws that apply to the case in memorandums and other supporting papers, the trial brief, and motions in limine, and during oral argument or in conferences with the judge in chambers.

**PRACTICE TIP:** Let the court know of matters requiring judicial notice, and be sure your statement is in writing or on the record. Whenever legal authorities that the court must judicially notice are not immediately available to the judge, attach copies to the brief or supporting memorandum that cites them. For example, a county law library serving a California superior court may not have easy access to federal statutes and United States Supreme Court cases, and it is to your advantage to give the court a convenient means of reviewing your supporting memorandum. Check local rules for requirements that copies of federal cases and other authorities be attached when cited.

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### §14.26 2. Discretionary matters under Evid C §452 may become mandatory upon request

The court must take judicial notice of any matters specified under Evid C §452 if a party (Evid C §453):

- Requests that judicial notice be taken (see §14.27);
- Gives each adverse party sufficient notice of the request to enable each party to prepare to meet the request (see §14.28); and
- Furnishes the court with sufficient information to enable it to take judicial notice (see §14.29).

Even if a party fails to give the court sufficient information (or sufficient notice to other parties), the court still has the discretion to take judicial notice of the matters it *may* notice under §452. Comment to Evid C §453. Denial of a request when a party failed to meet the requirements of §453, however, is also proper. *Whispering Pines Mobile Home Park v City of Scotts Valley* (1986) 180 CA3d 152, 162, 225 CR 364.

**Overlap between discretionary and mandatory matters.** When overlap between the matters listed in Evid C §§451 and 452 occurs (*e.g.,* public statutory law in Evid C §451(a) is also included within official acts of legislative departments in Evid C §452(c)), judicial notice is required even if no request was made. See Cal L Rev'n Comm'n Reports Comment to Evid C Div 4 (discussion of additional examples). It is still a good idea to formally request judicial notice of a matter that overlaps both provisions.

**Compare:** Overlap can also occur within the provisions of §452, but these categories are treated alike, and a request for judicial notice is required. See, *e.g., Weiner v Mitchell, Silberberg & Knupp* (1980) 114 CA3d 39, 45, 170 CR 533 (federal appellate decision and judgment viewed either as official act of U.S. judicial department under §452(c) or record of U.S. court of record under Evid C §452(e)); *People v Terry* (1974) 38 CA3d 432, 439, 113 CR 233 (judicial notice of death certificate as official state act under §452(c) or immediately verifiable fact under Evid C §452(h)).

**PRACTICE TIP:** When a document could fall into more than one category for discretionary judicial notice under Evid C §452, be sure to request judicial notice under each applicable subsection.

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### §14.27 a. Request for judicial notice

No form for requesting the trial court to take judicial notice is specified in Evid C §§450-460. However, Cal Rules of Ct 3.1113(l) requires that any request for judicial notice must be made in a separate document that lists the specific items for which notice is requested. See form in §14.54. Any request must also comply with Cal Rules of Ct 3.1306(c). A request that judicial notice be taken at trial can be in oral or in written form. See *People v Maxwell* (1978) 78 CA3d 124, 130, 144 CR 95 (request for judicial notice made orally).

If the request is made orally, be sure a court reporter is present to record it in order to protect the record in the event of an appeal. See §14.32. For example, if a witness states that she had the conversation on the morning she voted at the polls in the last presidential election, counsel can orally request on the record that the court take judicial notice of that date.

For more complicated matters, it is better to make a written request in advance. See Evid C §453 (sufficient notice to adverse party required). Also, the judge may take the request more seriously if it is in writing. For form, see §14.54; on giving sufficient notice and timing, see §14.28.

It is also a good idea to attach to the request for judicial notice any material that will help the court in its ruling. On giving the court sufficient information, see §14.29. Many trial lawyers also submit a proposed jury instruction with the request for judicial notice, and ask the judge to preinstruct the jury on the judicially noticed matter. See §14.46; form in §14.55.

**PRACTICE TIP:** Check for local court rule requirements. See, *e.g.*, Los Angeles Ct R 9.2 on procedures for requesting judicial notice of the court's own records in writing; discussion in §14.20. Make sure you comply with Cal Rules of Ct 3.1306(c) on the format of the request.

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### §14.28 b. Sufficient notice to other parties; timing

A party requesting judicial notice of a matter under Evid C §452 must give "sufficient notice," through the pleadings or otherwise, to enable the opposing party "to prepare to meet the request." Evid C §453(a). If the notice fails to satisfy this requirement, the court may refuse to judicially notice the matter.

The notice time is not specified; Evid C §453 merely requires reasonable or ample notice, and the reasonableness of the notice given depends on the circumstances of the particular case. Comment to Evid C §453. If a matter of common knowledge comes up during the trial, oral notice at trial would be sufficient to satisfy §453. In more complex matters, advance notice in written form is required. Often, it is reasonable to expect that the notice will be given at or before the time of the pretrial conference.

**PRACTICE TIP:** It is usually a good idea to obtain a court ruling on a request for judicial notice before the trial begins (*e.g.,* during a pretrial chambers conference or with motions in limine). To protect yourself from any claim that you failed to give other parties sufficient notice to enable them to prepare to meet the request, serve the other parties and the court with a written form well before the time the court will rule on the matter. See form in §14.54. If the request is denied, you still have time to present evidence during trial to establish the point. On the requirement that the court advise parties as soon as possible when denying a request, see §14.41. On opportunity to be heard before court judicially notices matters of "substantial consequence," see §14.40.

**Effect of insufficient notice when overlapping mandatory and discretionary matters.** If a matter is subject to judicial notice under both Evid C §§451 and 452 but the party desiring judicial notice fails to comply with the sufficient notice requirement of Evid C §453 (regarding Evid C §452 discretionary matters), the court is required to take mandatory judicial notice of the matter under §451. See Comment to Evid C §452.

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### §14.29 c. Sufficient information to court

A party must furnish the court with "sufficient information" to enable it to take judicial notice of an Evid C §452 matter. Evid C §453(b). If the parties do not provide this information, the court is not required to resort to its own sources of information, but the court *may* conduct independent research in deciding whether to judicially notice a matter. Comment to Evid C §453. On sources of information the court may rely on, see §14.36.

What constitutes "sufficient information" is not defined in Evid C §453 and varies from case to case. The party requesting judicial notice should submit the best information available in the circumstances. See Comment to Evid C §453.

Cases in which a party's failure to supply the court with "sufficient information" resulted in the court's declining to take judicial notice include:

**EXAMPLE 1:** *Willis v State* (1994) 22 CA4th 287, 291, 27 CR2d 413. Judicial notice was held not to be mandatory when the plaintiff simply requested the court to take judicial notice without appending any information. In an action against the state for recovery of community property (*i.e.,* the deceased husband's final payroll amounts), the widow claimed the state erroneously paid his designee rather than her. A certified copy of the State Administrative Manual regulations, which directs payment to the designee only if there are no competing claims, should have been presented to the court.

**EXAMPLE 2:** *Department of Fish & Game v Anderson-Cottonwood Irrig. Dist.* (1992) 8 CA4th 1554, 1568, 11 CR2d 222. A court refused to judicially notice a pending U.S. Department of Administrative Hearing proceeding before the U.S. Department of Commerce because defendant "has given us nothing to notice … has not presented any documentation or declarations" and the purpose in seeking judicial notice was unclear.

**EXAMPLE 3:** *Osborn v Irwin Mem. Blood Bank* (1992) 5 CA4th 234, 7 CR2d 101. A court declined to take judicial notice of a statement in the Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic because the report was not presented to the court.

**EXAMPLE 4:** *Heist v County of Colusa* (1984) 163 CA3d 841, 213 CR 278. A court refused to take judicial notice of a river's navigability because the plaintiff failed to furnish sufficient information to enable it to do so; advisory opinion of the Attorney General containing a disclaimer as to the factual basis of the conclusion was not sufficient.

**EXAMPLE 5:** *Conservatorship of Bones* (1987) 189 CA3d 1010, 234 CR 724. The trial court's refusal to take judicial notice of an alleged conservatorship established for the appellant, who was appealing his involuntary confinement for mental health treatment, was confirmed when nothing in the record supported county counsel's request for judicial notice other than the superior court case number in which the alleged conservatorship was established.

On requirements for requesting judicial notice of court records, see §14.20.

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### §14.30 3. Burden on requesting party

The requesting party has the burden of persuading the judge of the propriety of taking judicial notice under Evid C §452 and of the tenor of the matter to be noticed. See Evid C §454; Comment to Evid C §453. Only matters authorized or required by law can be judicially noticed. Evid C §450.

The degree to which a party must persuade the judge on a particular matter is determined by the §452 subsection authorizing judicial notice of the matter. See Comment to Evid C §453.

**EXAMPLE:** If the matter is a fact of common knowledge under Evid C §452(g), the party must persuade the judge that the fact is of such common knowledge within the court's territorial jurisdiction that it is not reasonably subject to dispute, *i.e.,* no reasonable person having the same information that is available to the judge could rationally disbelieve the fact.

If the matter to be noticed is a city ordinance under §452(b), the party must persuade the judge that a valid ordinance exists and also of its tenor but the judge need not believe that no reasonable person could conclude otherwise. Comment to Evid C §453.

If the requesting party fails to meet its burden, the court may decline to judicially notice the matter. Comment to Evid C §453. See *People v Preslie* (1977) 70 CA3d 486, 495 n8, 138 CR 828 (requesting party has burden to show good cause for not furnishing certified copies of original documents filed in superior court); *Chas. L. Harney, Inc. v State* (1963) 217 CA2d 77, 86, 31 CR 524 (matter to be judicially noticed properly brought to trial court's attention by transmission of certified copies of records involved). For discussion of procedures for requesting judicial notice of court records, see §14.20.

To meet its burden, a court might require the requesting party in an appropriate case to furnish expert testimony to clarify difficult problems. Comment to Evid C §453. See §14.38.

On the court's not taking judicial notice when in doubt, see, *e.g., Barreiro v State Bar* (1970) 2 C3d 912, 925, 88 CR 192 (fact under Evid C §§451-452).

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### §14.31 4. Using exhibit to support request for judicial notice

Consider preparing a demonstrative exhibit to aid the court in taking judicial notice of a matter.

Judicial notice of a matter was requested in the following cases:

- *Colberg, Inc. v State ex rel Dep't of Pub. Works* (1967) 67 C2d 408, 423, 62 CR 401 (extent of tidal influence);
- *People v Sanders* (1969) 268 CA2d 802, 805 n1, 74 CR 350 (effect of stoppage of blood flow to brain);
- *People v MacLaird* (1968) 264 CA2d 972, 975, 71 CR 191 (accuracy of radar devices); and
- *Hom v Clark* (1963) 221 CA2d 622, 638, 35 CR 11 (definition of "alley").

Although exhibits were not provided to the court in each of the above-referenced cases, they illustrate instances in which it would have been helpful for counsel to provide the court with, respectively: a tide chart; a computer-animated demonstration of blood flow to the brain; a chart of how often radar was used and how often it was effective; and a photograph of the street or alley in question. For more information on preparing trial exhibits that could be used for judicial notice purposes, see generally chap 13.

It is important to weigh the expense of developing and producing the exhibit against the strategic importance of obtaining judicial notice of the matter. If the exhibit qualifies as admissible demonstrative evidence, it may be more advantageous to prove the fact to the jury by using the exhibit for its emphasis and persuasive force. On tactical considerations involved in requesting judicial notice, see §§14.4-14.5.

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### §14.32 5. Protecting the record

Counsel frequently request the court to take judicial notice of matters specified in Evid C §451 (in addition to those specified in Evid C §452) to ensure that the matter is raised in the trial court and to protect the record on appeal. See, *e.g., Nedlloyd Lines B.V. v Superior Court* (1992) 3 C4th 459, 11 CR2d 330 (stock purchase agreement containing choice of law provision applying Hong Kong law).

If no request was made in the trial court, an appellate court might hold that:

- The doctrine of invited error applies (*i.e.,* the party invited the error and is thus estopped from asserting that it is reversible error); or
- The point cannot be raised on appeal, because it was not raised in the trial court.

The principles of appellate practice are not abrogated by §451. Comment to Evid C §451. See, *e.g., Conservatorship of Bones* (1987) 189 CA3d 1010, 234 CR 724 (nothing in record supported county counsel's request for judicial notice other than superior court case number in which alleged conservatorship was established; court of appeal refused to take judicial notice of conservatorship). On procedures for requesting judicial notice of court records, see §14.20.

On protecting the record during trial, see chap 15. On estoppel and waiver in appellate courts, see 9 Witkin, California Procedure, *Appeal* §§389-415 (5th ed 2008); California Civil Appellate Practice §§1.56, 5.42-5.45 (3d ed Cal CEB 1996).

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### §14.33 6. Asking for jury instruction

**Right to jury instruction.** A trial court that judicially notices a matter of fact may, and if requested must, "instruct the jury to accept as a fact the matter so noticed." Evid C §457. Judicially noticed matters are binding on the jury. Comment to Evid C §457.

**Right limited to matters of fact.** Although the court may take judicial notice of laws, it need only instruct the jury on a matter that would have been the jury's to determine anyway. The court may decline to give jury instructions on matters of law (that are not matters of evidence). Instructing jurors on matters of law is covered by the general provisions of law governing instruction of juries. Comment to Evid C §457. For complete discussion of jury instructions, see chap 20.

**Preinstruction advisable.** Instructions to jurors are usually given after the parties conclude argument. After the court takes judicial notice of a request to do so, prepare a jury instruction (or better, submit a proposed jury instruction with your written request). It is also a good idea to ask the court to preinstruct the jury during the trial on any matter that has been established by judicial notice as true. In the following example, a judge preinstructs the jury on a judicially noticed fact.

**EXAMPLE:** "You must accept as true that on the night of September 19, 2009, the evening the accident occurred, there was a full moon and the weather was clear. No evidence will be offered by either party during the trial to prove or dispute this fact."

On the courts' growing tendency to preinstruct the jury, see §§20.47-20.50. For form of jury instruction regarding judicially noticed matter, see §14.55.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/14 Judicial Notice, Admissions, and Stipulations/§14.34 B. Grounds for objecting to judicial notice

## §14.34 B. Grounds for objecting to judicial notice

A party may object to the court's taking judicial notice of a matter on one or more of the following grounds:

**For Evid C §451 or §452 matters:**

- The matter is not a proper subject for judicial notice under Evid C §451 or §452. Evid C §450. See §14.6.
- The matter is not relevant. Evid C §§350, 450; *Mozzetti v City of Brisbane* (1977) 67 CA3d 565, 578, 136 CR 751. See §14.3.
- The tenor differs from that suggested by the requesting party. Evid C §454. See §14.30.
- The sources of information relied on by the court to decide the propriety of judicial notice are subject to Evid C §352 (unduly time-consuming, prejudicial, confusing, or misleading). Evid C §454. See §14.36.
- The sources of information relied on by the court to decide the propriety of judicial notice are subject to the rules of privilege. Evid C §454. See §14.36.
- Foreign law (*i.e.,* the law of an organization of nations, a foreign nation, or a public entity of a foreign nation) is the subject of judicial notice and the court received the advice of experts outside of open court, but the advice is not in writing. See §14.39.

**For §452 matters only:**

- The requesting party failed to give sufficient notice to enable the objecting party to meet the request. See §14.28.
- The requesting party failed to give sufficient information to enable the court to take judicial notice of the matter. See §14.29.
- The court records to be noticed contain hearsay that makes them inadmissible under the judicial notice doctrine. See §14.36.

**For Evid C §451(f) (universally known matters) or any §452 matters of "substantial consequence" to case:**

- The objecting party did not have a reasonable opportunity to be heard on the propriety of taking judicial notice of the matter or on the tenor of the matter. Evid C §455(a). See §14.40.
- The objecting party did not have a reasonable opportunity to meet information not received in open court (including the advice of experts), but relied on by the judge in determining the request for judicial notice. Evid C §455(b). See §14.38.

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### §14.35 C. Judicial notice on court's own motion

If the court proposes to take judicial notice of a matter "that is of substantial consequence to the determination of the action" and if that matter falls under Evid C §451(f) (universally known matters) or under any category of Evid C §452 (matters that the court has discretion to judicially notice), the court *must* (Evid C §455):

- Give each party a reasonable opportunity to present information on the propriety of taking judicial notice of the matter and the tenor of the matter to be noticed; *and*
- If any source of information the court resorted to was not received in open court, make that information and its source part of the record, and give the parties a reasonable opportunity to meet the information.

The same procedures are required when a party requests the court to take judicial notice of any §451(f) or §452 matter and the matter is of "substantial consequence" to the determination of the action. Evid C §455. See §14.40.

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## D. Trial court's ruling

### §14.36 1. Sources of information court may rely on

A court may consult or use any source of pertinent information (including the advice of persons learned in the subject matter), whether or not provided by a party, in determining the propriety of taking judicial notice of a matter or its tenor. Evid C §454(a)(1). See, *e.g., Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 CA3d 840, 852, 176 CR 874.

The court has considerable latitude in deciding which sources are trustworthy. Comment to Evid C §454. Except for Evid C §352 (unduly time-consuming, prejudicial, confusing, or misleading) and the rules of privilege, the exclusionary rules of evidence (*e.g.,* hearsay) do not apply to the court's obtaining information from such sources. Evid C §454(a)(2).

**PRACTICE TIP:** Do not object to the source of information (or the advice the court relies on) on the ground that it, *e.g.,* violates the secondary evidence rule. See §13.122. The court is explicitly authorized to use information that would not qualify as admissible evidence in reaching its decision to judicially notice a matter. See Evid C §455. The court is free to consult any reliable source of information it deems helpful, and it may use copies rather original documents if it chooses. It would be error for the court to sustain an objection to a source of pertinent information based on an exclusionary rule of evidence, but it may sustain an objection based on Evid C §352 or privilege. If, *e.g.,* a copy is truly unreliable, object on the ground that the information in the copy (compared with the original document) is "misleading" under Evid C §352. For more examples, see Jefferson's California Evidence Benchbook, chap 49 (4th ed CJA-CEB 2009).

**Compare:** The judicially noticed matter itself must not be hearsay; only the sources of information the court relies on may be hearsay. For example, it is improper for the court to take judicial notice of the truth of hearsay statements in court records. See §14.20.

**PRACTICE TIP: Special requirement for advice on foreign law.** If the court relies on an expert for information and advice when the subject of judicial notice is foreign law (*i.e.,* the law of an organization of nations, a foreign nation, or a public entity in a foreign nation), it is not sufficient to state the source of information on the record. If not received in open court, that advice must be in writing. Evid C §454(b).

On the appointment of experts to advise the court, see §14.38. On the court's determination when foreign law is the subject of judicial notice, see §14.39.

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### §14.37 a. Consideration of extrinsic aids

A court may consider whatever materials it deems appropriate when construing a statute, determining a constitutional issue, or formulating a rule of law. These materials can include legislative history, discussions by experts or scholars in treatises and law reviews, materials that contain controversial economic or social facts or findings that indicate contemporary opinion, and similar materials. Comment to Evid C §450.

**NOTE:** Some commentators use the term "legislative facts" to denote the factual matter in such materials relied on by a court to decide a rule of law that has policy consequences beyond the particular case. California courts have judicially noticed such legislative facts. See Kongsgaard, *Judicial Notice and the California Evidence Code*, 18 Hastings LJ 117 (1966).

Parties moving for judicial notice are not required to demonstrate that statutory language is ambiguous, but the court may determine that the use of legislative history is inappropriate when it finds language unambiguous. To be cognizable, however, legislative history must shed light on the collegial view of the legislature as a whole. See *California Teachers Ass'n v San Diego Community College Dist*. (1981) 28 C3d 692, 170 CR 817. A document is not subject to judicial notice simply because it is located in the file of a legislative committee; a document that appears to reflect only the personal views of an assembly member and has not been communicated to the legislature as a whole is not appropriate for judicial notice as legislative history. *Kaufman & Broad Communities, Inc. v Performance Plastering, Inc.* (2005) 133 CA4th 26, 39, 34 CR3d 520.

**PRACTICE TIP:** *Kaufman & Broad Communities, Inc., supra,* provides a useful list of legislative materials that have been found cognizable and those found noncognizable by courts, and those that are not acceptable to the Third District Court of Appeal. The decision further articulates necessary procedures for seeking judicial notice of legislative history materials in the Third District Court of Appeal.

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### §14.38 b. Appointment of expert

On occasion, the court may need expert advice to enable it to take judicial notice of a matter. In this situation, the court, on its own motion or on the motion of any party, may appoint one or more persons "learned in the subject" to provide the advice it needs. Evid C §460. See Evid C §730 (expert may be called on court's own motion).

Experts appointed under Evid C §460 are appointed and compensated in the same manner as provided in Evid C §§730-733. Normally, when expert advice is required to enable the court to judicially notice a matter, the parties furnish their own experts. See Comment to Evid C §460.

**PRACTICE TIP:** Remember that the exclusionary rules of evidence do not apply to the sources of information or the advice the court resorts to. See §14.36. Unlike a witness giving expert testimony at trial, no expert witness qualifications are necessary before the witness gives information and opinions about the matter that may be judicially noticed. But it is still a good idea to establish your own expert's qualifications, just as if that expert were giving opinion testimony, in order for the judge to feel that the person is credible and reliable. The court then usually consults with the expert outside the jury's presence. You should also ask permission to be present to hear the expert's advice so that you know what has been said. You may also have an opportunity to clarify any points on your client's behalf.

If the matter to be noticed falls under the category of universally known matters under Evid C §451(f), or under any subsection of Evid C §452—and that matter is of "substantial consequence" to the determination of the action—you have a right to present your information and to oppose other information given to the court. Evid C §455. See §14.40 (reasonable opportunity to be heard required).

**Foreign law expert.** If the expert will give information and opinions on foreign law, the testimony must be heard in open court or put in writing. See Evid C §454. For discussion, see §§14.36, 14.39.

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### §14.39 c. When foreign law is subject of judicial notice

If foreign law applies but the court cannot ascertain what that law is, the court may "as the ends of justice require" either (Evid C §311(a)-(b)):

- Apply California law if it is consistent with state and federal constitutions; or
- Dismiss the case without prejudice (or, if the case is on appeal, remand it to the trial court with directions that it dismiss the action without prejudice).

The court should make every effort to verify the foreign law, or other state's law, before it applies California law or dismisses without prejudice under Evid C §311. Comment to Evid C §311.

A party's failure to supply the court with sufficient information to enable it to verify the applicable foreign or other state's law may be a reason the court cannot make such a determination. Comment to Evid C §311.

The court may grant the parties additional time to obtain such information and make it available to the court. If they fail to obtain it and the court is not satisfied that they made reasonable efforts to do so, it can dismiss the action without prejudice. On the other hand, if counsel have made reasonable efforts, all sources of information have been exhausted, and the court cannot determine the foreign law, it may either apply California law, within constitutional limits, or dismiss the action without prejudice. Comment to Evid C §311.

If an expert gives information and opinions on foreign law, the testimony must be heard in open court or put in writing. See Evid C §454. On furnishing the court with sufficient information to enable it to take judicial notice generally, see §14.36.

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### §14.40 2. Judicial notice of matters of "substantial consequence" to the case

**Reasonable opportunity to be heard.** If a party requests judicial notice of a matter "that is of substantial consequence to the determination of the action" and that matter falls under Evid C §451(f) (universally known matters) or under any category of Evid C §452 (matters that the court has discretion to judicially notice), the court *must* (Evid C §455):

- Give each party a reasonable opportunity to present information on the propriety of taking judicial notice of the matter and the tenor of the matter to be noticed; *and*
- If any source of information (including the advice of experts) that the court resorted to was not received in open court, make that information and its source part of the record and give the parties a reasonable opportunity to meet the information.

See, *e.g., Lua v Southern Pac. Transp. Co.* (1992) 6 CA4th 1897, 9 CR2d 116 (in evaluating negligence per se, court judicially noticed Public Utilities Commission Order in decision of California P.U.C., but only after notifying parties of its intention to do so and inviting and receiving their comments); *Estate of Nicholas* (1986) 177 CA3d 1071, 223 CR 410 (judicial notice could not be taken of previous court records containing trust's financial information, because trust's previous financial condition was of substantial consequence to case and no notice was given to parties that judicial notice was to be taken).

On sources of information the court may rely on, see §14.36; on special requirements of foreign law and experts testifying on foreign law, see §§14.38-14.39.

**NOTE:** The same procedures are required when the court proposes to take judicial notice on its own motion of any §451(f) or §452 matter and the matter is of "substantial consequence" to the determination of the action. Evid C §455. See §14.35.

The court is not required to afford each party a reasonable opportunity to be heard for a matter subject to mandatory judicial notice under Evid C §451(a)-(e). See Comment to Evid C §455. Nor is the court required to give each party that opportunity when the matter is not of "substantial consequence" to determination of the action. See Comment to Evid C §455.

**EXAMPLE:** When a "reasonable opportunity" to present information is required depends on the complexity of the matter and its importance to the case. When the existence and validity of a city ordinance is not disputed, no formal hearing is needed to decide the propriety of taking judicial notice of the ordinance and of its tenor. But when a complex question about the foreign law applies to the case, a hearing under §455(a) is mandatory. See Comment to Evid C §455.

**Timing.** In a jury trial, the opportunity to be heard must be given before the jury is instructed; in a bench trial, it must be given before the case is submitted to the court for decision. Evid C §455(a).

Despite the mandatory language of §455(a), the timing in a bench trial can be changed if the *judge* discovers—even after a case is submitted for decision—that judicial notice of a matter should have been taken. The judge may reopen the case to permit the parties to provide relevant information on the matter. See Comment to Evid C §455.

On taking judicial notice at a subsequent proceeding (*e.g.,* a hearing on a motion for new trial) of a matter for which judicial notice was requested during trial, see §14.42.

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### §14.41 3. Court's refusal to take judicial notice

When denying a request to take judicial notice, a trial court must (1) advise the parties at the earliest practicable time and (2) indicate for the record that the request was denied. Evid C §456. This requirement was imposed in order to provide the parties with an adequate opportunity to submit evidence on a matter for which judicial notice was anticipated but not taken. Comment to Evid C §456. But see *Heist v County of Colusa* (1984) 163 CA3d 841, 850, 213 CR 278 (appellate court held it was harmless error for trial court to fail to inform plaintiff of its denial of request to take judicial notice of creek's navigability when plaintiff failed to present evidence on another crucial point).

**Matters outside Evid C §§451 and 452.** The court may not judicially notice a matter that falls outside the categories of Evid C §451 or §452 (*e.g.,* a judge who has personal knowledge of certain facts is not free to take judicial notice of those facts—unless they fall into the permissible categories). Evid C §450 (court cannot take judicial notice of a matter not required or authorized by law). See §14.6.

**Inadmissible or irrelevant information.** If the information to be judicially noticed is not admissible or relevant, or helpful to the trier of fact, the court has the discretion to refuse a request for judicial notice. See, *e.g., Santos v DMV* (1992) 5 CA4th 537, 7 CR2d 10 (court refused to judicially notice distance between place of arrest and hospital because distance gave no information on whether arrival at hospital was immediate or how much time had elapsed before blood was drawn). See §14.3. For other grounds on which the court may refuse judicial notice, see §14.34.

**Standard on appeal.** If a party requests the court to take judicial notice of a matter specified in Evid C §452 and gives notice to each adverse party as required by Evid C §453, the judge's decision not to take judicial notice will be upheld on appeal—unless the reviewing court finds that the party furnished information to the judge that was so persuasive no reasonable judge would have refused to take judicial notice of the matter. See Comment to Evid C §453.

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### §14.42 4. Judicial notice by trial court in subsequent proceedings

Even if a court failed or refused to take judicial notice of a matter during trial, the trial court in a subsequent proceeding may do so. Evid C §458. See Comment to Evid C §458.

The trial judge or another trial judge is not barred from taking judicial notice of the matter in a later proceeding, such as a hearing on a motion for new trial. See *Ponce v Tractor Supply Co.* (1972) 29 CA3d 500, 509, 105 CR 628 (judicial notice of previous default judgment against codefendant taken even though request made after entry of later judgment against requesting party but before judgment became final; collateral estoppel effect).

**CAUTION:** Except for the practical matter of instructing the jury on what has been judicially noticed (see §14.33), the Evidence Code does not limit the taking of judicial notice to any particular stage in a proceeding. If the court fails or refuses to take judicial notice of a matter at the demurrer stage, the court may take judicial notice of that matter at a later stage in the proceeding.

Potential problems exist when opposing counsel contests an earlier ruling on a judicially noticed matter. It is uncertain whether the court's determination is conclusive for the remainder of the trial. If you intend to rely on an earlier court ruling that took judicial notice of a matter (in order to dispense with the need to introduce evidence on the point at trial), you could encounter problems during trial because opposing counsel can argue that the trial judge is not bound by the earlier ruling if it is erroneous. To avoid this problem, request at a chambers conference before trial begins that the judge take judicial notice of the matter, and cite the earlier ruling.

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## IV. JUDICIAL ADMISSIONS

### A. Admissions made in pleadings or on trial record

### §14.43 1. Judicial admissions conclusively establish facts

A "judicial" admission is made when a party voluntarily concedes the truth of certain matters during the course of the litigation, usually in the party's pleadings or by counsel's statement on the record at trial. The effect is that the opposing party need not offer proof on the admitted matter, which is deemed to be conclusively established.

"Evidentiary" admissions (*e.g.,* a party's express or adoptive admissions) are exceptions to the hearsay rule and can be admitted into evidence and weighed by the trier of fact along with conflicting evidence. See Evid C §1220. See §10.22. For detailed discussion of evidentiary admissions, see Jefferson's California Evidence Benchbook, chap 3 (4th ed CJA-CEB 2009).

Unlike "evidentiary" admissions, "judicial" admissions are not evidence. Instead, a judicial admission indisputably establishes the truth of a matter, *i.e.,* no evidence may be admitted on the point. For further discussion of judicial admissions, see 1 Witkin, California Evidence, *Hearsay* §§97-98 (4th ed 2000).

Requests for admission served on a party during discovery may also result in an admission that is conclusively established against the admitting party. See CCP §2033(n). See §12.75. On using admissions and prior inconsistent statements made during depositions to impeach witnesses, see §§12.63-12.66.

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### §14.44 2. Procedures

Look for judicial admissions in the pleadings. Complaints, demurrers, answers, and cross-complaints are the only pleadings permitted in civil actions. CCP §422.10. The pleadings allege the parties' respective claims and defenses for the judgment of the court. CCP §420. See, *e.g., Miller v Lakeside Village Condominium Ass'n* (1991) 1 CA4th 1611, 1623, 2 CR2d 796 (summary judgment case; allegations in plaintiff's complaint constitute judicial admissions conceding truth of matter and removing it from issues).

The pleadings frame the trial issues and govern questions of relevance. Parties are bound by the pleadings they file and may not introduce evidence contrary to their own pleadings. *Fuentes v Tucker* (1947) 31 C2d 1, 5, 187 P2d 752 (error to receive evidence relevant to issue that was removed by party's admission in answer).

**PRACTICE TIP:** It is a good idea to routinely peruse all parties' pleadings before trial, and to amend your pleadings when they contain an unfavorable admission. Although admissions that have been corrected by amendment are no longer conclusive and binding, the amending party should be prepared to explain to the jury the changes made if opposing counsel decides to use the discrepancy between the pleadings for impeachment purposes. For discussion of amending complaints, see California Civil Procedure Before Trial, chap 16 (4th ed Cal CEB 2004); for discussion of amending answers, see Civ Proc Before Trial §§25.70-25.78.

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### §14.45 3. Requesting jury instruction

Any party can ask the court to instruct the jury that the admitted matter has been established as true and that no contrary evidence will be permitted. *Smith v Walter E. Heller & Co.* (1978) 82 CA3d 259, 269, 147 CR 1.

It is also a good idea to ask the court to preinstruct the jury. See §§20.47-20.50.

**PRACTICE TIP:** Before trial, during in chambers conferences with the judge (see chap 6) or motions in limine (see chap 7), call the court's attention to the pleading in which the judicial admission appears and request that the jury be preinstructed to the effect that, for purposes of this trial, the fact or facts involved in the admission must be taken as true. On preparing jury instructions, see chap 20.

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## §14.46 B. Admissions in prior actions

Judicial admissions made in prior civil actions are not treated as indisputably true in later actions. Although admissions in pleadings from other civil actions are not conclusive judicial admissions in a later action, they may be used as evidentiary admissions to impeach a party who cannot explain the prior admission with additional evidence. See *Magnolia Square Homeowners Ass'n v Safeco Ins. Co.* (1990) 221 CA3d 1049, 1061, 271 CR 1 (allegations in complaint on defective structure; declarations not hearsay, because not offered to prove their truth but that party had notice of defects). See §14.43.

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## V. STIPULATIONS

### §14.47 A. Stipulated facts

Fact stipulations between counsel allow the parties to agree that certain facts or matters are true and, for purposes of the trial, are not in dispute. The effect of counsels' stipulations is that no evidence need be, or can be, offered on the stipulated matter. *Harris v Spinali Auto Sales, Inc.* (1966) 240 CA2d 447, 452, 49 CR 610.

Evidence can be received only when it tends to prove or disprove issues in dispute. See Evid C §§210, 350. Because the stipulated matter is conclusively established, any evidence would be irrelevant.

Such stipulations reduce the issues that must be proved at trial and streamline the presentation of evidence. For discussion of stipulations as a means of making trial less expensive and more efficient, see §1.28.

**PRACTICE TIP:** Consider the effect on the jury before stipulating or not stipulating to certain facts. Stipulating to routine facts that would be proved in any event saves time, keeps the jury from becoming bored, and may help make the important evidence stand out better. Reasons to stipulate to damaging facts include shielding the jury from actually hearing an eyewitness testify to evidence that is prejudicial to your client. But be careful in stipulating to matters that are so important that there is very little left of interest to prove at trial. On tactical considerations, see §§14.4-14.5.

**Compare:** Besides stipulating to facts that the parties agree not to dispute during trial, the parties can stipulate to testimony. That is, the parties can agree on the testimony a witness would have given if called to testify in front of the judge or jury. Unlike stipulated facts, which are treated as conclusively true, stipulated testimony means that the testimony is accepted into evidence without the witness actually testifying, but not necessarily that the testimony is undisputed. See §14.52.

Attorneys routinely enter into other stipulations that concern neither the facts nor testimony in the case, but that expedite trial. For example, counsel may agree to certain foundational facts or stipulate that copies of documents rather than originals may be used during trial, bypassing the need to present evidence on background issues. On stipulations used by counsel to introduce exhibits and demonstrative evidence, see §13.86. On stipulations to authenticate documents, see §13.67. See sample stipulation regarding the use of documents at trial in §13.141.

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### §14.48 1. Authority to bind client

Counsel has authority to reach a binding agreement on behalf of a client "in any of the steps of an action or proceeding." CCP §283(1). This code section is generally viewed as counsel's authority to enter into stipulations on the client's behalf in "procedural" matters. See *Linsk v Linsk* (1969) 70 C2d 272, 276, 74 CR 544.

**If substantive right involved, obtain client's express authorization.** Dicta in some cases suggest that counsel is presumed to have the authority to enter into an agreement on the client's behalf, whether or not the matter affects the client's substantive rights. See, *e.g., Marriage of Helsel* (1988) 198 CA3d 332, 339, 243 CR 657. However, a better line of authority holds that, if the stipulation involves substantive rights (*i.e.,* the stipulated fact virtually resolves the litigation), the client may set aside an unauthorized stipulation. See, *e.g., Blanton v Womancare, Inc.* (1985) 38 C3d 396, 407, 212 CR 151; *CPI Builders, Inc. v Impco Technols., Inc.* (2001) 94 CA4th 1167, 1172, 114 CR2d 851 (holding that an attorney is not authorized to impair the client's substantial rights).

**PRACTICE TIP:** Inform the client of any important stipulations entered into before trial. It is also good practice to obtain the client's express written authorization of any stipulation that could affect the client's substantive rights. Some attorneys write a letter informing the client of the stipulations planned or already entered into, with a place at the end of the letter for the client to date and sign an acknowledgment of the disclosed stipulations. The letter should refer to any discussion counsel has had with the client on the stipulations in question.

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## 2. Procedures

### §14.49 a. Timing

Most judges prefer that attorneys' stipulations be prepared in writing ahead of time. The judge can then review and approve the stipulations in chambers conferences before the trial. If for some reason the stipulations are not approved, counsel will be prepared to offer proof on the issue during the trial.

It is often a good idea to seek stipulations with other counsel as part of the overall trial strategy at the preparation stage. See chaps 2 and 3 on completing pretrial procedures and organizing trial materials.

However, even the eve of trial is an appropriate time for trial counsel to consider and seek stipulations. Particularly in simple cases, and perhaps wisely in view of the fact that most cases settle, trial lawyers often wait until very close to trial before deciding how the case will actually be tried. It is at this point, rather than during the discovery process when the reflexive reaction of most litigators is to keep all options open, that the discussion of stipulations can realistically achieve meaningful results. In these circumstances, counsel may agree to stipulated facts in chambers conferences before trial.

After trial is under way, there may be instances in which the desirability of an unplanned-for stipulation becomes obvious; if so, be sure to handle the situation outside the jury's presence.

**PRACTICE TIP:** Local rules may affect the timing and form of the stipulation. See, *e.g.,* Los Angeles Ct R 8.43 (while court is in session, counsel who want to stipulate must request leave to confer with other counsel outside the jurors' hearing).

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## §14.50 b. Form of stipulation

The stipulation itself must be written and signed by counsel or read orally into the record in the court reporter's presence. CCP §283(1). Check for any local rules that may apply to stipulations. See §14.49.

A written stipulation is usually printed on pleading paper. If counsel are agreeing to a fact, the stipulation should state *exactly* and *specifically* the fact that counsel have agreed to is undisputed. See *Harris v Spinali Auto Sales, Inc.* (1966) 240 CA2d 447, 49 CR 610 (to be enforced, terms of stipulation must be definite and certain).

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### §14.51 3. Requesting jury instruction

**Preinstruction advisable.** Prepare a jury instruction for the judge on the stipulated matter. Ask the judge to preinstruct the jury during the trial at the time the stipulated fact is presented. The judge could tell the jury:

**EXAMPLE:** "Counsel have stipulated that the parties entered into a valid contract on September 24, 1999. You must accept this as a fact that has been conclusively proved."

**Limitations.** The court is not bound to give jury instructions on the parties' stipulated legal conclusions. If a stipulation is against public policy or decides a question of law (rather than fact), the court need not accept it or instruct the jury on it. See, *e.g., Marriage of Goodarzirad* (1986) 185 CA3d 1020, 1026, 230 CR 203 (parties cannot stipulate away court's child custody jurisdiction). But the court can uphold stipulations on ambiguous documents because such agreements are treated as matters of fact that the parties in effect agree have been proved. See, *e.g., Estate of Burson* (1975) 51 CA3d 300, 306, 124 CR 105 (agreement on meaning of ambiguities in decedent's will upheld).

**Further research:** On stipulated facts, see CACI 106.

On jury instructions generally, see chap 20. On the growing tendency of courts to permit preinstruction of the jury during the course of the trial, see §§20.47-20.50.

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### §14.52 B. Stipulated testimony

Unlike stipulated facts, stipulated testimony does not render a matter indisputably true. The parties simply agree that the witness would testify in a certain way if called to the stand. The jury need not accept the stipulated testimony as conclusively true, only that the witness would have so testified. See CACI 106. Counsel can still introduce evidence tending to disprove the content of the stipulated testimony.

**Request jury instruction.** Prepare a jury instruction on the stipulated testimony. It is also good practice to request a preinstruction at the time the stipulated testimony is offered during trial. On preinstructing the jury, see §§20.47-20.50. In preinstructing the jury on stipulated testimony, the judge could say:

**EXAMPLE:** "Counsel have stipulated that, if Officer Clyde were called as a witness, she would testify as follows on this subject: 'The collision on the evening of April 12, 1999, caused glass to be scattered across the road. I still observed bits of glass on the street at the accident site at noon the next day.' You must accept that officer's statement as stipulated testimony as if it had been stated here in this courtroom."

**Plaintiff's perspective.** Be cautious about substituting stipulated testimony for eyewitness testimony on matters that may have an emotional impact on the jury and thus may tend to increase damage awards. Most plaintiff's counsel limit stipulated testimony to foundational matters that are not controversial.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/14 Judicial Notice, Admissions, and Stipulations/§14.53 VI. CASE EXAMPLES: MATTERS THAT HAVE BEEN GIVEN JUDICIAL NOTICE IN CALIFORNIA COURTS

## §14.53 VI. CASE EXAMPLES: MATTERS THAT HAVE BEEN GIVEN JUDICIAL NOTICE IN CALIFORNIA COURTS

The California courts have taken judicial notice of a wide variety of matters. A sample list follows.

- Advertising programs. *Gherna v Ford Motor Co.* (1966) 246 CA2d 639, 652, 55 CR 94 (large-scale by automobile manufacturers); *Anthony v General Motors Corp.* (1973) 33 CA3d 699, 706, 109 CR 254 (national advertising for many years by automobile manufacturers, stressing excellence and reliability of products).
- Agreements between counties and private agencies. *Lara v Board of Supervisors* (1976) 59 CA3d 399, 405 n1, 130 CR 668 (22 counties entered into agreements with private agencies under Govt C §26220).
- Assessor's handbook. *Hunt-Wesson Foods, Inc. v County of Alameda* (1974) 41 CA3d 163, 180, 116 CR 160 (property valuation).
- Census data re community size. *People v Jurado* (1981) 115 CA3d 470, 482, 171 CR 509 (newspaper article on pretrial publicity also judicially noticed).
- City charter provisions. *Clark v Patterson* (1977) 68 CA3d 329, 334 n5, 137 CR 275.
- Commission decisions. *Lua v Southern Pac. Transp. Co.* (1992) 6 CA4th 1897, 9 CR2d 116 (Public Utilities Commission decisions and general orders); *Nipper v California Auto. Assigned Risk Plan* (1977) 19 C3d 35, 44, 136 CR 854 (Insurance Commissioner decisions).
- Common knowledge. *Kronen v Pacific Coast Soc'y of Orthodontists* (1965) 237 CA2d 289, 304, 46 CR 808 (doctors or dentists who limit practice to specialty enjoy prestigious position with economic advantages); *Sierra Inv. Corp. v County of Sacramento* (1967) 252 CA2d 339, 344, 60 CR 519 (great bulk of county taxes are paid on or around due date); *Nevens v City of Chino* (1965) 233 CA2d 775, 778, 44 CR 50 (noiseless tape recorders).
- Cost of insurance coverage under assigned risk plan exceeds cost of public liability insurance under ordinary plan. *Hartford Acc. & Indem. Co. v McCullough* (1965) 235 CA2d 195, 206, 44 CR 915.
- Distances and travel time between locations. *City of Anaheim v WCAB* (1981) 116 CA3d 248, 261, 172 CR 92 (it is more difficult, time-consuming, and expensive "for a party to engage in a contested litigation in a tribunal some 95 miles distant from the offices of its attorney and prospective witnesses than in a tribunal only 9 miles away").
- Economic trends. See *San Luis Obispo Bay Prop. v PG&E* (1972) 28 CA3d 556, 564, 104 CR 733 (inflationary or deflationary trend and its effect on real property values in general, but not as it affects value of leasehold interests in specific parcels of land during period in question).
- Ethical code. *Easton v Strassburger* (1984) 152 CA3d 90, 101 n5, 199 CR 383 (Code of Ethics of the National Association of Realtors judicially noticed under Evid C §452(h)).
- Federal law when it supersedes state law. *Prescod v California Unemployment Ins. Appeals Bd.* (1976) 57 CA3d 29, 42, 127 CR 540.
- Geographical features. *Dunbar v Humboldt Bay Mun. Water Dist.* (1967) 254 CA2d 480, 484, 62 CR 358 (existence and features of river).
- Interest rate. *Gamer v dupont Glore Forgan, Inc.* (1976) 65 CA3d 280, 290, 135 CR 230 (prime rate within specified period had been as high as 9 percent).
- Location of local streets within city boundaries. *People v Vega* (1971) 18 CA3d 954, 958, 96 CR 391.
- Maps, official. *Planned Parenthood Shasta-Diablo, Inc. v Williams* (1995) 10 C4th 1009, 43 CR2d 88 (Public Works Department official maps).
- Master lease. *Marina Tenants Ass'n v Deauville Marina Dev. Co.* (1986) 181 CA3d 122, 226 CR 321(when trial court was considering demurrer of defendant landlords, plaintiffs had relied in their pleadings on selected portions of lease).
- Municipal code sections. *Igna v City of Baldwin Park* (1970) 9 CA3d 909, 911, 88 CR 581.

- Necessity of available parking facilities to commercial enterprises in highly developed areas. *City of Los Angeles v Wolfe* (1971) 6 C3d 326, 336, 99 CR 21.
- Official Reports, existence of. *Shaeffer v State* (1970) 3 CA3d 348, 354, 83 CR 347 (California Debris Commission Reports were made, but court will "not, however, take judicial notice that everything said [in reports] is true").
- Patents defining a boundary. *White v State* (1971) 21 CA3d 738, 762, 99 CR 58 (based on survey).
- Permit issued by State Board of Public Health. *Hughes v City of Lincoln* (1965) 232 CA2d 741, 748, 43 CR 306 (permit to municipality for water treatment program including fluoridation).
- Publications, authoritative. *Adoption of Michelle T.* (1975) 44 CA3d 699, 706, 117 CR 856 (child placement, emphasizing importance to child of continuity of parental relationships); *Board of Educ. v Watson* (1966) 63 C2d 829, 836, 48 CR 481 (data in publication titled "California Education," issued by the State Department of Education); *Serrano v Priest* (1971) 5 C3d 584, 591, 96 CR 601 (publications by state officers or agencies); *White v State* (1971) 21 CA3d 738, 742, 99 CR 58 (U.S. Army Corps of Engineers publication titled "Water Resources Development in California").
- Rates established by official act. *Guardianship of Gridley* (1973) 32 CA3d 1053, 1061, 108 CR 200 (Department of Mental Hygiene official acts of establishing rates, and rates themselves).
- Records and contents of the state Assembly Final History and Senate Journal on legislative history of particular statute. *Belli v Roberts Bros. Furs* (1966) 240 CA2d 284, 287, 49 CR 625.
- Records of legislative investigation conducted before a statute is enacted. *People v Arthur Murray, Inc.* (1965) 238 CA2d 333, 343, 47 CR 700.
- Regulations of Department of Social Services. *Scott v County of Los Angeles* (1994) 27 CA4th 125, 144, 32 CR2d 643.
- Resolution of county board of supervisors. *O'Keefe v Atascadero County Sanitation Dist.* (1971) 21 CA3d 719, 728, 98 CR 878 (confirming sanitation district's assessment for improvements).
- Specifications of Department of Public Works & Division of Highways. *A. Teichert & Son, Inc. v State* (1965) 238 CA2d 736, 742, 48 CR 225, disapproved on other grounds in *E.H. Morrill Co. v State* (1967) 65 C2d 787, 792, 56 CR 479.
- State contract, general conditions of. *E. H. Morrill Co. v State* (1967) 65 C2d 787, 794, 56 CR 479.
- Statistical records, regulations, and other official acts of the University of California. *California State Employees Ass'n v Flournoy* (1973) 32 CA3d 219, 233 n10, 108 CR 251.
- Status of organization. *Kozlowsky v Westminster Nat'l Bank* (1970) 6 CA3d 593, 596, 86 CR 52 (bank was national banking association).
- Tariff provisions. *Dollar-A-Day Rent-A-Car Sys. v Pacific Tel. & Tel. Co.* (1972) 26 CA3d 454, 457, 102 CR 651.
- That, "by virtue of the licensing powers of the Board, racing associations have a quasi-monopoly and that the number of tracks in operation at any one time is severely limited." *Greenberg v Hollywood Turf Club* (1970) 7 CA3d 968, 976, 86 CR 885.
- Urban Renewal Handbook regulations. *Duskin v San Francisco Redev. Agency* (1973) 31 CA3d 769, 771 n1, 107 CR 667.
- Zoning ordinances. *City of Los Angeles v Wolfe* (1971) 6 C3d 326, 331 n2, 99 CR 21.

For additional examples, see Jefferson's California Evidence Benchbook, chap 49 (4th ed CJA-CEB 2009); California Personal Injury Proof §20.12 (Cal CEB 1970).

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## VII. FORMS

### §14.54 A. Form: Request for judicial notice at trial (Evid C §§452-453)

▶ 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*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **REQUEST FOR JUDICIAL** |
| **vs** | ) | **NOTICE AT TRIAL (Evid C** |
| _ _[*Name(s)*]_ _ | ) | **§§452-453; Cal Rules of Ct** |
| **Defendant(s)** | ) | **3.1113(l))** |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Judge:** _ _[*if known*]_ _ |
| _____ | ) | **Trial date:** _ _[*if set*]_ _ |

_ _[*Plaintiff/Defendant*]_ _ _ _[*name*]_ _ **requests the court to take judicial notice under Evidence Code sections 452-453, specifically** _ _[*insert appropriate subsection, e.g., Evid C §452(b)*]_ _**, that** _ _[*state matter to be judicially noticed*]_ _**.**

**This request is based on this application and the accompanying information:** _ _[*list attached materials constituting sufficient information to enable the court to judicially notice the matter (see §14.29)*]_ _**; all pleadings, papers, and records in this action;** _ _[*and on such evidence as may be presented at the hearing on the request*]_ _**.**

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

**Respectfully submitted,**
__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (for judge); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* No format is specified in Evid C §452 for requests for judicial notice. However, Cal Rules of Ct 3.1113(l) states that any request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with Cal Rules of Ct 3.1306(c). Cal Rules of Ct 3.1113(l). See also §14.27. Attach sufficient information to enable the court to take judicial notice. It is also good practice to attach a proposed jury instruction for the judge to read to the jury. See form in §14.55, which can be used both for instructing the jury before closing argument and preinstructing the jury earlier during trial.

Give other parties sufficient notice to meet the request and have an opportunity to be heard on the matter to be judicially noticed. See §14.28.

**NOTE:** When the court is *required* to take judicial notice of matters listed under Evid C §451, no request is necessary. See §14.25.

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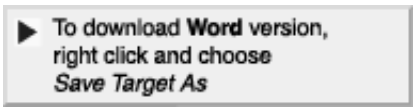
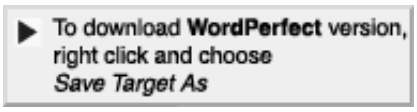
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/14 Judicial Notice, Admissions, and Stipulations/§14.55 B. Form: Proposed jury instruction regarding judicially noticed matter

## §14.55 B. Form: Proposed jury instruction regarding judicially noticed matter




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
_ _[_ _ _ _ _ _ *Judicial District*]_ _

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **PROPOSED JURY** |
| **vs** | ) | **INSTRUCTION REGARDING** |
| _ _[*Name(s)*]_ _ | ) | **JUDICIALLY NOTICED** |
| **Defendant(s)** | ) | **MATTER** |
| _____ | ) | |

**The court has taken judicial notice of the following matter. This means that this matter has been conclusively established as true. You as jurors in this trial are required to accept this matter as indisputable:**

[_ _[*State matter that has been judicially noticed.*]_ _]

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

**Respectfully submitted,**
__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (for judge); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* If a party requests a jury instruction, the court must give an instruction when a *factual* matter has been judicially noticed. It is good practice to submit the proposed jury instruction to the court with the request for judicial notice. Counsel should also consider asking the judge to preinstruct the jury. See §14.33. On jury instructions generally, see chap 20.

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# 15

# Making Trial Objections and Protecting the Record

**Joseph W. Cotchett**

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## §15.1 I. SCOPE OF CHAPTER

This chapter explains the importance of the record and provides suggestions for making and maintaining a clear record (see §§15.4-15.18) and procedures for making objections that will preserve the record (see §§15.19-15.68).

Objections made at particular points during the trial are also discussed in the chapters dealing with those aspects of a trial. See, *e.g.,* objections made during voir dire discussed in chap 8.

As discussed in §15.2, the "record" is created throughout the court proceedings, *e.g.,* during pretrial motions, trial motions, and other proceedings during and after trial. Nonevidentiary pretrial and trial day motions are discussed in chap 6. Evidentiary motions in limine, usually made before trial or on the first day of trial, are discussed in chap 7. Trial motions are discussed in chap 18, and motions after trial are discussed in chap 25.

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## II. UNDERSTANDING THE RECORD AND ITS IMPORTANCE

### §15.2 A. Record defined

The record of the trial court proceedings is most often used when one party appeals the judgment. In almost all cases, the record consists of two items:

- The reporter's transcript of oral proceedings in open court and in chambers (Cal Rules of Ct 8.130); and
- The clerk's transcript, consisting of trial exhibits, copies of pleadings, briefs, court orders, and other papers filed with the clerk during the litigation (Cal Rules of Ct 8.122).

Before trial, the record consists primarily of documents filed with the clerk and few transcripts of proceedings, *e.g.,* law and motion or other preliminary hearings. During trial, the record consists primarily of transcripts of oral proceedings, including testimony (see §§15.13-15.15), objections (see §§15.19-15.44), argument (see §§15.45-15.64), and court rulings (see §§15.65-15.68). It is the responsibility of trial counsel to maintain a clear and concise record.

See California Civil Appellate Practice, chap 9 (3d ed Cal CEB 1996) for a complete discussion of the record on appeal. See also Cal Rules of Ct 8.120 and 8.121.

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## §15.3 B. Importance of record

The advocate's primary objective at trial is to obtain the best result for the client. A crucial factor in achieving this objective is the effective presentation of testimony and exhibits, while maintaining a clear and concise record. Counsel must be alert to making objections and preserving the record.

No experienced trial attorney expects to win every case. When a case is lost, a reviewing court may consider the objections made during trial substantial enough to require a reversal. It is equally important for the winning party to make sure the record supports the court's rulings. Everything possible should be done to create a trial record that will demonstrate to a reviewing court the wisdom (or impropriety) of the trial court's evidentiary or other rulings.

An appellate court cannot speculate on what occurred at trial. It has only the record to look at, and the record must be complete. A judgment cannot be reversed on appeal on the ground of an erroneous ruling unless it appears that the error was prejudicial, *i.e.,* resulted in a "miscarriage of justice." Cal Const art VI, §13. The record should not only contain the prejudicial error but also indicate that it was made known to the trial judge. See *Marshall v Hancock* (1889) 80 C 82, 22 P 61.

**Further Research:** For practical suggestions for ensuring that all relevant matters do become part of the record, including chambers conference and evidentiary issues (including offers of proof, in limine motions, exhibits, nonverbal conduct and vague expressions, and gaining ruling on objections), see Rylaarsdam, *Making and Designating a Record on Appeal*, 18 CEB Civ Litigation Rep 219 (June 1996). For a discussion of how one could and should use evidentiary objections not only to preserve the record, but also to persuade the trier of fact, see McElhinny, *Evidentiary Objections As Tools of Persuasion*, 6 Cal Litigation (Fall 1992). McElhinny suggests that jurors expect articulate objections and that counsel should not shy away from objections, but use them to change the focus of the trial and to gain control over the flow of evidence.

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## §15.4 III. PRETRIAL AND SPECIAL PROCEDURES FOR PRESERVING THE RECORD

Immediately before trial, counsel presents to the court, and the court considers, numerous issues about the procedures to be followed at trial and the evidence that will be presented. These issues are usually considered at pretrial status conferences, at chambers conferences, or in motions in limine. For example, trial counsel and the judge will usually discuss how the judge will handle voir dire during a status or chambers conference. See §6.3. A motion in limine might be made to exclude evidence that one party claims is inflammatory. See §7.3. Each of these issues may form the basis for an appeal, and therefore, counsel must be careful to create a sufficient record of each proceeding.

In addition, use a motion in limine during trial to make a formal record about an evidentiary issue that was unanticipated. See §§15.8-15.10.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.5 A. Conferences with trial judge

## §15.5 A. Conferences with trial judge

Many courts now require a final status conference or final issue conference shortly before trial. See Los Angeles Ct R 7.9(h); San Diego Ct, Div II, R 2.1.15. In addition, immediately before the trial begins, the trial judge is likely, as a matter of routine, to invite counsel into chambers to explore areas of agreement and disagreement, anticipated trial objections, and how certain matters will be handled at trial. See §§6.2-6.5.

Pretrial conferences are probably the most effective means of reducing the number of objections the parties will need to make during a trial. Seasoned attorneys usually request an informal conference with the judge in chambers before trial to discuss any evidentiary or other unresolved questions. This is also a good time to alert the court to any motions in limine that are not yet filed. Some courts may use the pretrial conference to hear arguments on motions in limine or may schedule the arguments to be heard on the same day. See Los Angeles Ct R 7.9(h). Make sure that any argument or decisions are on the record. See §15.6.

**PRACTICE TIP:** Check whether any local court rules or policies or any requirements of the assigned judge apply to or affect a preliminary chambers conference. For example, the court may require the parties to file motions in limine and status conference statements several days before trial begins. See, *e.g.,* Los Angeles Ct R 7.9(h).

**JUDICIAL PERSPECTIVE:** This meeting is critical. Even in a direct calendaring court, the judicial officer generally has not focused his or her undivided attention on the case until this time. Therefore, it is very important that counsel be prepared to clearly sketch out the trial for the judge at this meeting.

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### §15.6 1. Request court reporter

Request that a court reporter be present when evidentiary problems or other matters are discussed in chambers. Be aware that some judges, in an effort to keep the initial chambers conference very informal, do not allow court reporters to be present. In that situation, immediately following the chambers conference, put on the record the matters discussed or ruled on by the judge. Either orally announce these matters while the court reporter records them or prepare a written order. This step reduces the possibility that the parties will later dispute what was said or covered. For discussion of chambers conference before trial generally, see §§6.2-6.5.

**JUDICIAL PERSPECTIVE:** Most judges prefer not to have a court reporter in chambers; however, other judges will have a reporter present during the entire chambers conference.

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### §15.7 2. Preserve issues for appeal

Raising an issue in chambers may improve a party's chances of preserving that issue for appeal. For example, in *Pierce v J. C. Penney Co.* (1959) 167 CA2d 3, 334 P2d 117, the appellate court held that a party's trial objection was sufficient to preserve the issue for appeal because the matter had been thoroughly discussed both in chambers before trial began (where the issues of law and pertinent decisions were discussed and parties stated their respective positions) and at the bench during trial. "Thus, the trial judge had been fully apprised of the respective contentions of the parties with respect to the admissibility of the evidence in question and the specific grounds of the objection." 167 CA2d at 13. See also *People v Morris* (1991) 53 C3d 152, 190, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394 (motions in limine).

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## §15.8 B. Motion in limine

A motion in limine is a motion directed to the court either before the court admits any evidence or before the parties offer the evidence under discussion. See chap 7 on in limine motions. The motion is used to obtain a ruling on evidentiary issues before anyone mentions the subject in front of the jury, or at least to obtain a temporary ruling of exclusion and silence until the court has sufficient legal and factual information to make a final ruling on admissibility.

The motion may be made before trial begins or at any time during trial before the evidence is admitted. If made during trial, argue the motions out of the jury's presence, *e.g.,* in chambers or when the jury is out of the courtroom.

**JUDICIAL PERSPECTIVE:** In accordance with local court rules, such motions are often heard and considered at the final status conference. In many instances, this is the first opportunity that the judge has to concentrate on this particular case. Even if a party is unsuccessful, the lasting effect on the judge can be significant and helpful. By "planting the seed," the party has directed the judge, and that often prompts independent research and concern with the issue.

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### §15.9 1. Make sure motion is on the record

Because the motion may be argued during the final status conference or in chambers during trial, be sure to request that a court reporter be present for the argument and the court's decision. As with other chambers conferences, some judges do not want court reporters to be present in chambers for argument. In that event, put the matters discussed or ruled on by the judge on the record immediately after the chambers conference. Either state the matters orally to be recorded by the court reporter, or prepare a written order to reduce the possibility that the parties will later dispute what was said or covered. For discussion of chambers conference before trial generally, see §§6.2-6.5. For discussion of motions in limine, see §§15.8-15.10, chap 7.

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### §15.10 2. Preserve issues for appeal

Motions in limine are one way to assure that an adequate record is made concerning any evidentiary issue, because it is usually easier to satisfy the basic requirements of Evid C §353 in a well-thought-out motion than when objecting during the heat of trial. See *People v Morris* (1991) 53 C3d 152, 190, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. The written motion also allows time for a written response and a considered ruling by the court.

In *People v Morris, supra,* the supreme court held that a motion in limine serves the function of a timely objection or motion to exclude under Evid C §353 when the motion satisfies the basic requirements of §353, *i.e.*:

- A specific legal ground for exclusion is advanced and subsequently raised on appeal;
- The motion is directed to a particular, identifiable body of evidence; and
- The motion is made at a time before or during trial when the trial judge can decide the evidentiary question in its appropriate context.

If the motion in limine does not satisfy each requirement, an objection satisfying Evid C §353 must be made during the trial to preserve the evidentiary issue for appeal. 53 C3d at 190.

The *Morris* court also suggested that the better practice is for the parties to stipulate to the effect of the court's ruling on the motion in limine or for the court to indicate to counsel not only what the court's ruling is, but whether the court would allow further objection or argument when the evidence is offered. 53 C3d at 190. See §7.46. If a stipulation or a statement by the court is not put on the record, counsel should consider objecting to the evidence when it is presented during the trial to avoid any possibility of waiving the issue in case of an appeal. See 53 C3d at 191 (citing former edition of this book). Do not expect to have a second evidentiary hearing during trial, however, if the court already decided the evidentiary issue in the motion in limine. See generally discussion in §§7.44-7.46.

Motions in limine, including typical uses, are discussed in greater detail in chap 7. For form of motion in limine, see §7.49.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.11 C. Preliminary fact hearing; requiring proper foundation before admission of evidence

## §15.11 C. Preliminary fact hearing; requiring proper foundation before admission of evidence

When the admissibility of certain evidence rests on the existence of a preliminary fact or facts, Evid C §310 requires the trial court to make a preliminary determination according to Evid C §§402-405. See §§7.25-7.26 for discussion of preliminary fact hearings.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/ IV. MAKING A CLEAR RECORD DURING TRIAL/§15.12 A. Conferences, stipulations, and court rulings on the record

## IV. MAKING A CLEAR RECORD DURING TRIAL

### §15.12 A. Conferences, stipulations, and court rulings on the record

Many parts of the case will not become part of the record unless counsel requests that (1) a court reporter be present and (2) the reporter take down all the proceedings. For example, a reporter, unless one is requested, is not usually present at pretrial or chambers conferences. Because important matters, of both a procedural and an evidentiary nature, are frequently resolved at such sessions, ask that a court reporter record any stipulations or orders.

**PRACTICE TIP:** If the court reporter is unavailable to attend the chambers proceedings, be sure to put what occurred at the session on the record in summary fashion when the court reporter is next available. Similarly, it is prudent to put on the record, out of the jury's presence and before the end of that day, what occurred at any bench conference.

**JUDICIAL PERSPECTIVE:** Many judges do not burden their court reporters with placing "side bar" conferences on the record. Also, the judge often will not allow the attorneys to make statements for the record or otherwise invade "jury time."

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.13 B. Transcript of testimony

## §15.13 B. Transcript of testimony

An official transcript is prima facie evidence of the proceedings in a case. CCP §273. The record must be clear and concise for the appellate court to adequately assess the point on appeal.

In substantial cases, many lawyers arrange to have a daily transcript available. This may require arranging with the court reporter to have a standby transcriber, who can transcribe the morning proceedings in the afternoon and the afternoon proceedings in the evening.

**JUDICIAL PERSPECTIVE:** With video recording and electronic recording now being used in some courts, practical problems regarding obtaining transcripts or copies of the recording are still being resolved.

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## §15.14 1. Audible and clear

The reporter cannot take down an answer unless it is audible. It is the lawyer's duty to obtain audible oral answers from witnesses. When a witness nods or gestures instead of answering audibly, counsel can immediately say, "Please give your answer in words so that the court reporter can take down your answer."

Alternatively, counsel can make a statement for the record to fill in testimonial gaps created by the witness's nonverbal responses. Instead of reminding the witness to give oral answers, the examining attorney may turn to the court reporter and say, "Let the record show that the witness, in response to the question, nodded his head in the affirmative." Vague statements such as "about that wide" or "this close" may be comprehensible to those present but meaningless on the record. Counsel or the court should make a clarifying statement on the record.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.15 2. Items to clarify for the record

## §15.15 2. Items to clarify for the record

- **Spell names.** Many names sound alike, yet have various spellings (*e.g.,* Smith, Smithe, Smyth). Ask the witness to spell out the name, or do it for the witness.
- **Recite each digit of numbers.** When dealing with a long number, like that of a savings account, ask the witness to recite each digit, rather than using hundreds or thousands. It is simple enough to say "account number one, four, seven, five, dash, three, zero." References to sums of money and dates should also be stated number by number.
- **Reading testimony.** In reading depositions or previous trial testimony into the record:
- Speak clearly and slowly so that the testimony can be followed.
- It helps to read the words "Question" and "Answer" at the appropriate points.
- When reading deposition testimony, put someone else—preferably someone familiar with the case—in the witness stand to read the answers.
- Provide the reporter with the transcript to refer to when transcribing his or her notes.
- **Provide written transcript for videotaped testimony.** In this age of technology, depositions are often videotaped. If portions of videotaped depositions are shown at trial—which alleviates the monotony of reading deposition testimony and gives the court and the jury a flavor of the deponent's demeanor and body language—provide the court reporter with the written deposition transcript, specifically showing which portions are being used in the video clip. See CCP §2025.260, CCP §2025.340(m). Give this written reflection of the video testimony to the reporter at the time that the video is played at trial, because many reporters find it difficult to or are reluctant to transcribe from the videotape.

**PRACTICE TIP:** Check local court rules first to learn whether there are any local filing requirements on the original written deposition transcript or time requirements for giving a copy to the reporter.

- **Clearly delineate what is off the record.** Counsel and the court may agree that a matter being taken up out of the jurors' presence should go "off the record." This may be confusing to a reporter, because it is often unclear when to stop taking notes and when to begin again. Confusion about when to resume taking notes can be embarrassing to the attorney who later discovers that an important concession or stipulation either did not get on the record, or was included in such a truncated form that it is indecipherable. Give clear indication to the court reporter by saying, "I want to go back on the record now."

For further discussion of reading deposition testimony, see §§12.48-12.50. On showing videotaped depositions, see §§12.16-12.31.

**JUDICIAL PERSPECTIVE:** No matter how much warning is given, lawyers inevitably read far too fast for jurors to understand. Very few lawyers take this valuable opportunity to emphasize testimony with proper consideration and effort.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/ C. Documents and other exhibits/§15.16 1. Clearly mark exhibits for identification

## C. Documents and other exhibits

### §15.16 1. Clearly mark exhibits for identification

To build a trial record that will be understandable and efficient to work with, the court clerk should mark for identification all documentary, real, and demonstrative evidence. Counsel frequently exchange documentary exhibits before trial and premark them to avoid delay in front of the jury. If this has not been done, show exhibits to opposing counsel and judge at the time marking is requested. Provide extra copies when practicable.

**PRACTICE TIP:** Some courts may require that the exhibits be marked before trial. See, *e.g.,* Los Angeles Ct R 7.9(h) (exhibits must be premarked by the time of the final status conference).

After the exhibits are marked, during examination of witnesses, refer to each item both by its identifying letter or number (for purposes of the record) and by its vernacular description (for the jury's benefit).

**EXAMPLE:** Before questioning the witness about a letter, the attorney says: "Let me show you a document that was previously marked as Plaintiff's Exhibit 21. It is a letter dated May 12, 1992, from John Smith to Mary Jones." This statement identifies it by both exhibit number and description.

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### §15.17 2. Offer exhibit into evidence

After laying the necessary foundation, counsel may offer the previously marked exhibit into evidence. It is at this point that even experienced trial lawyers occasionally forget to offer, or move, the exhibit into evidence. Always keep a separate exhibit list with at least two columns, showing for each exhibit that it was marked for identification and whether it was admitted into evidence. It is imperative that the exhibit be completely described for the record. On preparing table of exhibits, see §3.31.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.18 3. Using exhibits during trial

## §15.18 3. Using exhibits during trial

After the exhibit has been admitted:

- Ask the witness to describe it or read portions of it.
- An extremely effective technique in using documentary exhibits is to show blow-ups on a screen so that the jury can see the exhibit as the witness reads from it. Have transparencies made of the document and arrange for equipment to show them. See §§13.32, 13.48.
- Another technique, preferred by some attorneys for the most important documents that may be referred to several times, is to use poster enlargements.

**NOTE:** The court may require that the transparencies or poster enlargements be marked as adjuncts to the original exhibits.

For further discussion of using exhibits at trial, see chap 13.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/ V. MAKING OBJECTIONS DURING TRIAL TO PRESERVE RECORD/ A. Purpose of objections/§15.19 1. To exclude inadmissible evidence

## V. MAKING OBJECTIONS DURING TRIAL TO PRESERVE RECORD

### A. Purpose of objections

### §15.19 1. To exclude inadmissible evidence

The immediate purpose of most objections at trial is to persuade the court to exclude inadmissible evidence. The attorney, not the judge, has the burden of invoking the exclusionary rules of evidence. Even inadmissible evidence, if not objected to, will support a judgment. See *Exley v Exley* (1951) 101 CA2d 831, 226 P2d 662 (letters from probation officer received and relied on by judge in awarding custody).

**EXAMPLE 1:** Hearsay is admissible evidence unless objected to. See *Wicktor v County of Los Angeles* (1960) 177 CA2d 390, 2 CR 352.

**EXAMPLE 2:** Evidence will support a judgment although there was a lack of foundation for its admissibility if no objection. *Bank of America v Taliaferro* (1956) 144 CA2d 578, 301 P2d 393.

If proper objections are not made to inadmissible evidence that is damaging to the case, the objections will be waived. See §15.24.

**JUDICIAL PERSPECTIVE:** The judge often will intercede and prevent flagrant breaches; however, this gets tiresome for the judge and counsel should not count on judicial intercession to protect the record.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/ 2. To prevent other errors at trial/§15.20 a. During opening statement

## 2. To prevent other errors at trial

### §15.20 a. During opening statement

Objections are also used during opening statement to call the court's attention to potential errors. For example, counsel may object that opposing counsel is:

- Arguing his or her case. Argument in opening statement is impermissible. See §9.23.
- Referring to inadmissible evidence. See §9.22.
- Discussing law. See §9.25.

For further discussion on available objections during opening statement, see §§9.36-9.37.

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### §15.21 b. Unqualified witness

A party may object to a witness because no foundation was laid to show that the witness is qualified to testify, *e.g.,* in the form of an opinion (see Evid C §720(a)) or that the witness is competent to testify at all. See Evid C §§700-704. See also §11.19 for witness qualifications; California Trial Objections, chap 18 (Cal CEB Annual).

If the witness's identity is disclosed before trial, counsel should attempt to discover his or her background and qualifications. When the witness is called to testify at trial, counsel may object, in which case the proponent of the testimony would have the burden of laying a foundation for the witness's testifying. For court hearings to establish preliminary facts, see §§7.25-7.26. Counsel who objects to the witness's qualifications may also seek to voir dire the witness at trial. See Trial Objections, chap 20.

For further discussion of witness qualifications, see §§11.19-11.25.

**JUDICIAL PERSPECTIVE:** Many local rules require an exchange of witness lists before trial. Last-minute additions are generally not favored. Another major concern for the court is "overkill" (too many witnesses on the same issue), because cumulative testimony is not favored.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.22 c. During closing argument

### §15.22 c. During closing argument

Failure to object to remarks during closing argument usually waives the issue on appeal. See §19.52. For example, counsel may object that opposing counsel is making an improper argument, such as appealing to passion or prejudice, during closing argument. See §16.73.

For discussion of closing argument, see chap 19. On attorney misconduct generally, see §§16.66-16.90.

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### §15.23 3. To preserve objection on the record for appeal

A proper, timely objection calls the court's attention to improper evidence or procedures. If the court disagrees with the objection, and the objecting party ultimately loses at trial, the record must contain the objection for the court of appeal to be able to consider the error. Evid C §353(a); *Parker v Shell Oil Co.* (1946) 29 C2d 503, 175 P2d 838. See 3 Witkin, California Evidence, *Presentation at Trial* §§371-372 (4th ed 2000).

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## §15.24 B. When objection waived

Failure to object or an insufficient objection waives the defect in the evidence. Generally, counsel who fails to object or who improperly objects to the introduction of evidence cannot urge that admitting the evidence was error. Similarly, counsel who fails to secure a ruling on the objection may be barred from claiming error on appeal. See §15.28. Appellate courts will not consider objections that were not presented to the trial court (see *Russell v Geis* (1967) 251 CA2d 560, 59 CR 569) or that were urged on the wrong grounds. See §15.38.

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## §15.25 1. Failure to get objection on the record

Make sure the objection is on the record. In *People v Boehm* (1969) 270 CA2d 13, 75 CR 590, defense counsel stated that he objected to a question and that he wanted to make his objection at the bench. Counsel then made the objection off the record. The appellate court had nothing before it on which to rule and held that the general objection made on the record was insufficient to preserve the point for review on appeal. See §15.39.

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### §15.26 2. Untimely objection waives error

Waiver occurs when an objection is not made at the earliest opportunity, *i.e.,* object before the question is answered, or, if the question was already answered, raise the objection immediately by moving to strike. See §15.44 on motion to strike. See *Mosesian v Pennwalt Corp.* (1987) 191 CA3d 851, 865, 236 CR 778, disapproved on other grounds in *People v Ault* (2004) 33 C4th 1250, 1272 n15, 17 CR3d 302 (plaintiff waived error of introducing hearsay opinions of outside experts by failing to make timely objection); 3 Witkin, California Evidence, *Presentation at Trial* §372 (4th ed 2000). See also California Trial Objections, chap 4 (Cal CEB Annual).

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### §15.27 3. Invited error: Waiver by offering inadmissible evidence

When a party is responsible for the introduction of evidence, whether through direct or cross-examination, on appeal that party cannot claim that the evidence was erroneously admitted. See *People v Moran* (1970) 1 C3d 755, 762, 83 CR 411 (direct examination); *Zarafonitis v Yellow Cab Co.* (1932) 127 CA 607, 16 P2d 141 (cross-examination). This is known as the doctrine of invited error.

Similarly, a party may be barred from claiming error on appeal when the party objects to evidence when offered, the objection is overruled, but the party then offers the same type of evidence. See *Heiman v Market St. Ry.* (1937) 21 CA2d 311, 69 P2d 178 (plaintiffs objected to motion pictures when offered by defendant, objection was overruled, and later plaintiffs exhibited pictures to jury). The objection is not waived, however, if the objecting party mentions the evidence or examines witnesses about it after the court has overruled the objection. See *Warner Constr. Corp. v City of Los Angeles* (1970) 2 C3d 285, 299 n17, 85 CR 444.

When the court receives hearsay in evidence on direct examination without objection, opposing counsel is entitled to conduct cross-examination on such evidence. Counsel who elicited the hearsay on direct examination may not make a hearsay objection to such cross-examination. See *People v Fatone* (1985) 165 CA3d 1164, 211 CR 288.

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### §15.28 4. Court fails to rule

Once you have objected, be sure the court rules on the objection. Sometimes the court reserves ruling until a later time. It is up to the objecting party to have the court rule before the end of trial; otherwise, the objection may be deemed to have been waived. 3 Witkin, California Evidence, *Presentation at Trial* §389 (4th ed 2000); *Haskell v Carli* (1987) 195 CA3d 124, 129, 240 CR 439. Alternatively, the objection would be deemed overruled. See §15.67.

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### 5. When no waiver

### §15.29 a. Admitting evidence would result in unfair trial

On rare occasions, the trial court may grant a motion for a new trial when erroneous admission of evidence prevented a fair trial, even though counsel did not object to the evidence at the time it was offered. See *Clark v Bradley* (1951) 106 CA2d 537, 235 P2d 439 (prejudicial inadmissible evidence presented to jury through inadvertence of both parties and court).

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### §15.30 b. Change in law

Counsel may fail to object to the admission of evidence based on a reasonable assumption that the evidence is admissible under the law at that time. This failure does not constitute a waiver when a reported appellate decision later holds such evidence to be inadmissible and the objecting party acts in timely fashion to exclude it. *People v Turner* (1990) 50 C3d 668, 703, 268 CR 706; *Marriage of Hewitson* (1983) 142 CA3d 874, 888, 191 CR 392.

**EXAMPLE:** Both parties during a trial in a marital dissolution case relied on the price-earnings ratio method to evaluate their closely held corporation, and such evidence was received without objection. After the trial, an appellate decision decided that it is improper to value a closely held corporation solely by the price-earnings ratio of publicly traded corporations. Either party may request that the court exclude the evidence based on this opinion, and the issue of excluding the evaluation evidence may be considered on appeal. See *Marriage of Hewitson, supra*.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.31 c. Stipulation as to form

### §15.31 c. Stipulation as to form

If counsel objects to the admission of evidence, and after the objection is overruled, stipulates as to the form of the evidence, the objection is not waived. *People v Baciagalupo* (1991) 1 C4th 103, 138, 2 CR2d 335.

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## §15.32 C. Deciding whether to object

Counsel need not object to all evidence that might be objectionable. Deciding whether to object is an important exercise of counsel's judgment and skill. See Easton, *Questions To Ask Yourself Before Objecting*, Practical Litigator (Sept. 1998).

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### §15.33 1. Reasons not to object

Before deciding to object, weigh the various factors, *e.g.:*

- Is the information harmful or helpful? If harmful, how damaging is it?
- Does the potentially objectionable evidence "open the door" to otherwise inadmissible favorable evidence?
- Will an objection serve only to highlight the importance of the information or make the attorney appear to be hiding things from the jury?
- How likely is it that the judge will agree with the objection?
- Is there a viable alternative (see California Trial Objections, chap 4 (Cal CEB Annual))?

Weigh the wisdom of objecting to a certain witness's testimony in front of a jury. For example, a very young or very old witness, or any witness who will evoke sympathy, may present a good image to the jury; carefully consider whether objections to such testimony might alienate the jury.

**PRACTICE TIP:** Whether the case is before a judge or a jury, keep your objections to a minimum, consistent with protecting the clients' interests. Objections consume time and interrupt the pace of a trial, and frequent objections may make an unfavorable impression on the jury. But when appropriate, counsel should object: Cases can be won or lost on crucial objections.

**JUDICIAL PERSPECTIVE:** Many attorneys fail to make appropriate objections because they fear that jurors might regard them as obstreperous, thus putting the client's interests at risk. Judges sometimes voluntarily tell jurors that it is the proper function of an attorney to object when it is appropriate, so if the judge does not do this, counsel should make a request for such a statement. The problem is most apparent when a lawyer is "overmatched."

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### §15.34 2. Alternatives to objecting

Counsel may decide not to object to a witness's answering a question and then demonstrate through cross-examination, or through other evidence, that the witness is wrong. On what constitutes proper impeachment, see §§11.114-11.124. See also California Trial Objections, chap 22 (Cal CEB Annual). Similarly, counsel may decide not to object to evidence, because he or she intends to present evidence that will rebut it.

**EXAMPLE:** Plaintiff testifies that he recognizes the decedent's signature at the bottom of a will. Defendant may decide not to object that there is no foundation for plaintiff's testimony, because defendant intends to present evidence from a handwriting expert that the handwriting was not decedent's.

**CAUTION:** If you decide not to object, remember that you thereby waive the objection on appeal. See §15.25.

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## §15.35 D. Preparing for objections

It is helpful to prepare before trial a short memorandum of law on anticipated objections to testimony or documents. Then when an objection arises, you have a ready argument on both the facts and the applicable law to assist the trial judge in ruling on the objection. For further discussion, see §3.32. A judge who sees that one attorney is better prepared on disputed points of evidence may be inclined to give that attorney the benefit of the doubt in deciding the point.

The number of areas in which "experts" are available requires counsel to be prepared to question their qualifications and, at times, the appropriateness of expert testimony at all. A timely objection to a witness's qualifications must be made before or during trial; it cannot be made for the first time on appeal, even if there is newly discovered evidence to impeach or discredit the witness. *Simmons v Southern Pac. Transp. Co.* (1976) 62 CA3d 341, 367, 133 CR 42. If the witness's identity is disclosed before trial, try to discover the witness's background and qualifications.

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## E. How to object

### §15.36 1. Objection must be timely

The objection must be made in a timely manner; otherwise, the error is waived. Evid C §353(a); see §15.26. Object as soon as it becomes clear that the question is objectionable. In practice, most judges will still consider an objection, even if it is made after or midway through the answer or even several questions and answers later. Tactically, of course, it is better to object before the information is given and the jury has heard the answer.

**NOTE:** If the witness begins or completes the answer before the objection is made, and the judge sustains the objection, move to strike the answer and request that the judge admonish the jury not to consider the answer. See §15.44.

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### §15.37 2. Briefly and specifically state grounds for objection

Merely announcing "I object" is insufficient to create an adequate record for appeal. Although an objection has no required form, it should clearly state the specific ground for the court and the record. Evid C §353(a); see *People v Morris* (1991) 53 C3d 152, 187, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394.

**EXAMPLE:** "Objection, your honor. Counsel has not laid any foundation showing that the witness has personal knowledge of the matter."

**PRACTICE TIP:** Consult local court rules or policies on objections. See, *e.g.,* Los Angeles Ct R 8.76.

**PRACTICE TIP:** Do not start arguing while making your objection. Argument will slow things down and may annoy the judge or jury. Instead, completely and fully state your objection and the grounds for it. Save the argument for a sidebar or other conference. See Los Angeles Ct R 8.76; §15.47.

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### §15.38 a. State correct grounds for objection

Appellate courts have refused to find error when objections that were overruled by the trial court had been urged on the wrong grounds. In *Kinney v County of Contra Costa* (1970) 8 CA3d 761, 87 CR 638, plaintiff's overruled objections concerned lack of foundation. The court held that: "An objection might have been proper on grounds of immateriality or irrelevancy, but no error occurs unless the objection states a proper ground." 8 CA3d at 771. See *People v Boyd* (1990) 222 CA3d 541, 572, 271 CR 738.

**NOTE:** The appellate court will uphold a trial court's sustaining an objection on the wrong ground as long as any valid ground exists to exclude the evidence. See *Philip Chang & Sons v La Casa Novato* (1986) 177 CA3d 159, 173, 222 CR 800.

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### §15.39 b. General objections not usually sufficient

An objection that does not state the specific ground relied on is known as a general objection and usually will not preserve the point for appeal. A classic example can be found in *Bundy v Sierra Lumber Co.* (1906) 149 C 772, 87 P 622, in which a general objection was made to specific testimony of an expert. On appeal, counsel argued that the testimony was on a matter inappropriate for expert testimony. The appellate court refused to consider the point because it had not been raised by a specific objection. See also *Drullinger v Erskine* (1945) 71 CA2d 492, 163 P2d 48.

**PRACTICE TIP:** Avoid general objections such as "prejudicial," "self-serving," "incompetent, irrelevant, and immaterial." "No foundation" is another commonly used objection that is not specific enough. See *People v Modell* (1956) 143 CA2d 724, 729, 300 P2d 204. Judges are now being taught at judge's school to turn to the objector and ask what specific element of the foundation is missing.

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### §15.40 (1) Use general objection to gain time

As a practical matter, experienced trial counsel sometimes do say, "Objection, Your Honor," "That's not a proper question, Your Honor," and similar general phrases when their instincts tell them that opposing counsel has asked an improper question, but they cannot immediately think of the proper objection.

**PRACTICE TIP:** Although the general "I object" will usually not preserve the issue on appeal, it will often gain a few moments of time for you to think of the specific ground for the objection. Sometimes an experienced trial judge will sustain the objection with no further ado because he or she also knows it is an improper question. If not, the judge will ask what the grounds are and a brief discussion of the question may give you time to refer to your list of trial objections and formulate the reasons for objecting. See, *e.g.,* §15.69 for a list of evidentiary objections you can use at trial.

On the court's power to exclude inadmissible matter on its own motion or when an insufficient objection is made, see 3 Witkin, California Evidence, *Presentation at Trial* §392 (4th ed 2000).

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## §15.41 (2) When general objection may be sufficient

A general objection might be sufficient if a question is objectionable from every aspect and the evidence sought to be elicited is not admissible for any purpose. See, *e.g., Short v Frink* (1907) 151 C 83, 90 P 200. To protect the record, however, counsel should normally make specific objections.

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## F. Continuing objection

### §15.42 1. If court allows

A trial court may permit a single statement of the objection to stand as a "continuing objection" to an entire line of questioning or the same class of evidence to save time and save counsel from appearing unduly obstructive in the eyes of the jury. See Comment to Evid C §353; *Balcom v Growers Warehouse Co.* (1921) 55 CA 474, 204 P 39 (objection to all testimony offered by defense tending to contradict receipts).

**PRACTICE TIP:** To make a continuing objection, ask the court to rule that it is not necessary to object each time and that a continuing objection is deemed to be made to the entire line of questioning and the same class of evidence, whether offered by the same or different witnesses. See *W. C. Cook & Co. v White Truck & Transfer Co.* (1932) 124 CA 721, 13 P2d 549.

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### §15.43 2. May be better to repeat objection

When a party, through one or more witnesses, repeatedly asks questions seeking the same or similar objectionable evidence, counsel should object to *each* question, even if the court has previously overruled objections to questions on the same subject.

It is especially important to repeat the objection to the same class of evidence elicited from different witnesses. See *People v Epps* (1981) 122 CA3d 691, 176 CR 332 (continuing hearsay objection did not preserve defendant's objections to testimony of two later witnesses). But see *Moore v Norwood* (1940) 41 CA2d 359, 106 P2d 939. See also *Green v Southern Pac. Co.* (1898) 122 C 563, 565, 55 P 577.

**NOTE:** Of course, an objection that is made and overruled need not be repeated when the question is immediately repeated. *Balcom v Growers Warehouse Co.* (1921) 55 CA 474, 204 P 39.

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### §15.44 G. Move to strike if answer given before court sustains objection

Although an objection should be made as soon as the basis for it appears, and should occur before the witness answers, it is not always possible to interpose the objection between the question and the answer. If the witness responds very quickly, or an unobjectionable question results in an inadmissible answer, state the objection immediately afterward, requesting that the witness's answer be stricken and that the court instruct the jurors to disregard it. On waiver by failure to timely object or move to strike, see §15.26.

There are times when, instead of reserving its ruling, the court will admit evidence subject to a motion to strike. The subsequent motion to strike then becomes mandatory. Unless it is made, the objection is waived. In *Ault v International Harvester Co.* (1974) 13 C3d 113, 117 CR 812, the court held that a defendant who did not move to strike expert witness testimony after it had been admitted over objection subject to a motion to strike, but instead moved for a mistrial after plaintiff rested his case, had waived the alleged error.

**PRACTICE TIP:** Keep a record of each time the court admits evidence conditionally during trial so as not to forget what action, if any, to take later in the trial to preserve the record.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.45 VI. RESPONDING TO OBJECTION

## §15.45 VI. RESPONDING TO OBJECTION

After a party objects, the proponent of evidence can respond as follows:

- Argue that the objection does not apply or is not valid or that the evidence is admissible because of an exception (see §§15.46-15.49);
- Make an offer of proof (see §§15.50-15.60); or
- Ask the court to admit the evidence for a limited purpose (see §§15.61-15.64).

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## §15.46 A. Discussing or arguing objection

The proponent of evidence may argue that the objection does not apply, that the objection is not valid, or that the evidence is admissible because of an exception to the ground stated in the objection. The existence of an exception may raise a preliminary fact issue that the court should decide under Evid C §403 or §405. See chap 7, §15.11.

The proponent may also argue that the evidence can be shown to be properly admissible when other evidence is introduced, and ask the court to admit the evidence, conditioned on additional evidence being produced later in the trial. See §15.66.

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## §15.47 1. Sidebar or chambers conferences

Sidebar conferences between court and counsel are conducted quietly at the side of the court's bench with the jury present but unable to hear what is being said.

**CAUTION:** California Rules of Court, Standards of J Admin 2.20(b)(8), which is part of the Standards of Judicial Administration recommended by the Judicial Council, provides that the trial judge should permit sidebar conferences only when necessary and keep them as short as possible. Counsel should also consult local court rules or policies on sidebar or similar conferences. See, *e.g.,* Los Angeles Ct R 8.41, 8.76-8.77.

When sidebar conferences are permitted, they usually follow an objection during a witness's testimony that counsel wish to argue about out of range of the jury's hearing. If the discussion is meritorious, the judge may suggest (or counsel may request) that the jury be excused or that argument take place in chambers then or at another time. In any event, a court reporter should be present to record the proceedings.

**JUDICIAL PERSPECTIVE:** To avoid delay in trials, many judges do not favor having the reporter at a sidebar conference. If this is the case, request a reporter after the jury departs, and summarize the discussion for the record.

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### §15.48 2. When to use sidebar conference

Whether or not to request a sidebar conference usually depends on whether it is the jury's hearing of the objection itself, or of the response it may evoke, that would cause the prejudice that the objection is designed to prevent. A sidebar conference may be necessary when an objection is designed to exclude reference to specific evidence by a witness, or when counsel does not want the jurors to hear argument on an objection. When extensive argument is necessary to assert or resolve an objection, or when the court will need to conduct a hearing on preliminary facts as a result of the objection, it may be necessary to request (at the bench) that the jury be excused or that the matter be taken up in chambers. Generally, objections on phrasing of a question do not dictate a sidebar conference.

Many trial attorneys do not like to request sidebar conferences in front of the jury, believing that they create the impression that counsel is trying to withhold evidence from the jurors. The effective use of motions in limine before or during trial (see chap 7) out of the jurors' presence can eliminate this concern and reduce the number of sidebar and other conferences needed during trial.

**PRACTICE TIP:** If you anticipate a need for a sidebar conference, try to schedule it for a time when the jury is not present, *e.g.,* in the morning before the jury arrives, during lunch recess, or after the jury has left for the day.

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### §15.49 3. How to request sidebar conference

If you believe a conference is needed, first object and then request permission to approach the bench.

**EXAMPLE:** "Objection, Your Honor. May we approach the bench?"

If the court refuses permission because the reason for the request is not apparent, indicate that the matter should be discussed out of the jurors' presence. If the judge again refuses, you may have no alternative but to state the objection in open court or request that the court defer the matter until it can be heard out of the jurors' presence. At the beginning of a sidebar conference, many judges state for the record that the conference is being conducted out of the jurors' hearing.

**PRACTICE TIP:** Consult local court rules or policies on argument after an objection. See, *e.g.,* Los Angeles Ct R 8.77.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.50 B. Offer of proof

## §15.50 B. Offer of proof

An offer of proof by the proponent of evidence tells the judge that a witness or witnesses are available to testify and also discloses the substance, purpose, and relevancy of the evidence sought to be offered. For what to include in an offer of proof, see §§15.55-15.59.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.51 1. When to consider offer of proof

## §15.51 1. When to consider offer of proof

An offer of proof is made in the following circumstances:

- When an objection to a question is first raised, and the judge has not yet ruled, to persuade the judge to overrule the objection.
- When opposing counsel moves to strike certain testimony, and the judge has not yet ruled, to persuade the judge to deny the motion.
- When a party objects to the introduction of evidence based on a privilege, and the judge has not yet ruled, the party asserting the privilege may need to offer foundational facts concerning the privilege to persuade the court to recognize the privilege and exclude the evidence.
- When the court has just sustained the objection to the introduction of evidence or granted a motion to strike, the offer of proof serves two purposes:
- It enables the judge to reconsider and reverse or revise the ruling; and
- It ensures that the record reflects that the court was adequately informed about the proposed evidence (see §§15.23, 15.56-15.59).

**JUDICIAL PERSPECTIVE:** Offers of proof, if made after due consideration, can be most effective in convincing the court of the need for and appropriateness of the evidence.

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### §15.52 2. Usually required if objection sustained to preserve record

When counsel offers evidence and the court sustains an objection (and the evidence cannot otherwise be introduced, *e.g.,* by rephrasing the question or through another witness), an offer of proof is usually required to preserve the record so that the claimed error by the trial court in excluding the evidence can be considered on appeal. See Evid C §354(a); *Marshall v Hancock* (1889) 80 C 82, 22 P 61; *PG&E v Hacienda Mobile Home Park* (1975) 45 CA3d 519, 119 CR 559.

If an offer of proof is not made (on the record), the party is usually precluded from having the point considered on appeal. See *Marshall v Hancock, supra*. See also *Helfend v Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 1, 84 CR 173. However, in *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 665, 151 CR 399, the court considered the defendant's contention on the merits, but the defendant failed to make an adequate offer of proof.

For circumstances when offer of proof is not required, see §15.53. For further discussion of offers of proof, see California Trial Objections, chap 5 (Cal CEB Annual); 3 Witkin, California Evidence, *Presentation at Trial* §§401-405 (4th ed 2000).

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### §15.53 3. Circumstances when not required

Circumstances in which an offer of proof is not required include:

- When the question itself makes known to the court the substance, purpose, and relevance of the excluded evidence. Evid C §354(a).
- When making it would be futile to do so. Evid C §354(b). Thus, *e.g.,* when "an entire class of evidence has been declared inadmissible or the trial court has clearly intimated that it will receive no evidence of a particular type or class," an offer of proof is not a prerequisite. *Lawless v Calaway* (1944) 24 C2d 81, 91, 147 P2d 604; *Castaneda v Bornstein* (1995) 36 CA4th 1818, 1825, 43 CR2d 10, disapproved on other grounds in *Bonds v Roy* (1999) 20 C4th 140, 149 n4, 83 CR2d 289.

**EXAMPLE 1:** In a contract interpretation case, no offer of proof was required when the court repeatedly ruled that it would not admit extrinsic evidence to interpret the contract and sustained objections to all questions seeking to elicit such evidence. *PG&E v G.W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 36 n1, 69 CR 561.

**EXAMPLE 2:** The trial court denied defendant's in limine request and his renewed request at trial to permit expert psychiatric testimony on defendant's mental state when the offense occurred; defense counsel made no formal offer of proof. The appellate court held that a formal offer of proof was unnecessary because the trial court made it clear that it would not admit evidence of defendant's mental state for any reason. *People v Whitsett* (1983) 149 CA3d 213, 219 n1, 196 CR 647.

**EXAMPLE 3:** No offer of proof was made by plaintiffs on certain proposed testimony of their expert economist witness after the trial court had ruled that related evidence by the witness would not be admitted. The appellate court held that the trial court did not make a blanket ruling and in fact allowed much of expert's testimony; therefore, failure to make an offer of proof constituted waiver of the claimed error. *Ferreira, Inc. v Quik Stop Mkts., Inc.* (1983) 141 CA3d 1023, 1031, 190 CR 778.

**EXAMPLE 4:** When the evidence is offered during cross-examination or recross-examination. Evid C §354(c).

**EXAMPLE 5:** The trial court excluded impeaching deposition testimony that defendant raised during cross-examination. Although the defendant made no offer of proof from the deposition during trial, the appellate court permitted defendant to raise the issue on appeal because no offer of proof was necessary. See *Chavez v Zapata Ocean Resources, Inc.* (1984) 155 CA3d 115, 124, 201 CR 887 (trial court erred in excluding plaintiff's deposition testimony when objection to excluded questions did not state specific legal grounds).

**EXAMPLE 6:** An offer of proof was required during cross-examination when the trial court ruled that the questions were not material and the cross-examiner made no offer of proof or other attempt to explain the relevant purpose of question. *People v Coleman* (1970) 8 CA3d 722, 87 CR 554 (not error to restrict cross-examination by sustaining objection when counsel made no offer of proof and did not explain relevance of question).

**EXAMPLE 7:** When the substance, purpose, and relevance of the excluded evidence is made known to the court by any other means, *e.g.,* a motion in limine or a pretrial conference. Evid C §354(a); see, *e.g., People v McGee* (1947) 31 C2d 229, 187 P2d 706 (question itself, along with discussion with judge, revealed purpose); *People v Duane* (1942) 21 C2d 71, 130 P2d 123 (no need to establish that exclusion of witness was prejudicial when entire record established that witness's testimony would be vital).

For further discussion of offers of proof, see California Trial Objections §§5.4-5.14 (Cal CEB Annual); 3 Witkin, California Evidence, *Presentation at Trial* §§401-405 (4th ed 2000).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.54 4. Make offer on the record, outside jury's presence

### §15.54 4. Make offer on the record, outside jury's presence

The jury should not be present when an offer of proof is made. Request that:

- The offer of proof be made in the judge's chambers;
- The offer of proof be made at a sidebar conference (out of the jurors' hearing); or
- The judge excuse the jury.

Be sure the court reporter is present to make a record during the offer of proof. See *In re Mark C.* (1992) 7 CA4th 433, 8 CR2d 856 (out of jury's presence).

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### §15.55 5. What to include in offer of proof

An offer of proof educates the judge; it must indicate that a witness or witnesses are available to testify and it must disclose the substance, purpose, and relevancy of the evidence sought to be offered. Evid C §354(a); *Moore v Rogers* (1958) 157 CA2d 192, 320 P2d 524. See also *United Sav. & Loan Ass'n v Reeder Dev. Corp.* (1976) 57 CA3d 282, 129 CR 113. Offers of proof must be specific, setting out the actual evidence to be produced, and not merely facts or issues to be addressed or argued, so the trial court is given the opportunity to change or clarify its ruling. *People v Schmies* (1996) 44 CA4th 38, 53, 51 CR2d 185.

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### §15.56 a. Substance of evidence

An offer of proof is insufficient and affords no ground for appeal if it merely refers to conclusions, summaries, or ultimate facts. *Stickel v San Diego Elec. Ry.* (1948) 32 C2d 157, 195 P2d 416. When stating the substance of the evidence, do not just state *facts*, *i.e.,* facts do not constitute evidence. *United Sav. & Loan Ass'n v Reeder Dev. Corp.* (1976) 57 CA3d 282, 294, 129 CR 113. A valid offer of proof must contain *evidence*, *i.e.,* the testimony of specific witnesses, writings, material objects, or other things presented to the senses, to be "introduced to prove the existence or nonexistence of a fact in issue." 57 CA3d at 294.

**EXAMPLE:** Counsel states to the court: "If permitted to testify under oath, Mrs. White would testify as follows…."

After stating the expected testimony, some attorneys, when possible, have the witness verify that he or she would so testify.

To introduce documents or other items, the offer of proof consists of producing those documents or items, marking them for identification, and describing them for the record.

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### §15.57 b. Purpose of evidence

An offer of proof must disclose the purpose of the evidence sought to be offered. Evid C §354(a). For example, in *Moore v Rogers* (1958) 157 CA2d 192, 320 P2d 524, the proponent of the evidence argued that it was offered to show the parties' intention at the time they signed a release.

**NOTE:** The court may admit the evidence for a limited purpose and instruct the jurors to restrict their use of the evidence accordingly. See §§15.61-15.64.

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### §15.58 c. Relevancy of evidence

An offer of proof must disclose the relevancy of the evidence sought to be offered. Evid C §354(a). In *Moore v Rogers* (1958) 157 CA2d 192, 320 P2d 524, the proponent of the evidence argued that the parties' intention at the time they signed a release was relevant to prove an element of fraud.

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### §15.59 d. Availability of evidence

The proponent must show that the evidence is available to be presented to the court. If the objection is made while a witness is on the stand, the proponent has no difficulty in showing that the witness is available. For example, counsel might say: "If Mrs. Jones is allowed to continue testifying, she will say…."

Sometimes, the objection and offer of proof occur when a witness is not on the stand. If the evidence is offered through testimony, two procedures are available to show that the witness is prepared to testify. See *Stickel v San Diego Elec. Ry.* (1948) 32 C2d 157, 195 P2d 416. The attorney may either:

- Produce and question the witness so as to elicit the evidence; or
- Establish that the named witness is available to testify and specify for the court the testimony expected from the witness.

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## §15.60 6. When to renew

Sometimes, an offer of proof must be renewed. This happens when an offer, defective when first made, is later perfected. An offer may be ruled premature because an element of its foundation is missing or because it has been made during the wrong stage of the trial. It is important that counsel renew the offer after having adduced additional evidence; if not, the trial court is free to treat the earlier offer as having been abandoned or waived.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.61 C. Limited admissibility of evidence

## §15.61 C. Limited admissibility of evidence

Evidence may be admissible only for a limited purpose or only as to certain parties. See Evid C §355. This is usually referred to as the "limited admissibility" rule. See California Trial Objections, chap 53 (Cal CEB Annual) for discussion of this type of evidence.

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### §15.62 1. After objection, offering party should state limited purpose

When evidence is admissible only for a limited purpose and the *offering* party does not state that purpose, the opposing party may object. The party offering the evidence must then "state the proper purpose." *Larson v Solbakken* (1963) 221 CA2d 410, 422, 34 CR 450; 1 Witkin, California Evidence, *Circumstantial Evidence* §§30-31, 33 (4th ed 2000).

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### §15.63 2. Objecting party: Ask for exclusion of evidence or limiting instruction

If the only expressed purpose for evidence is an improper one, the opposing party may ask the court to exclude the evidence. *Larson v Solbakken* (1963) 221 CA2d 410, 422, 34 CR 450; 1 Witkin, California Evidence, *Circumstantial Evidence* §§30-31, 33 (4th ed 2000). Even if the party offering the evidence states a proper purpose, the court might sustain an objection under Evid C §352 that the evidence would be too prejudicial, confuse the issues, or mislead the jury. See Comment to Evid C §355.

If there is only a limited purpose for the evidence, the opposing party may ask the court to restrict the evidence to its proper scope and give a limiting instruction to the jury. See Evid C §355. The opposing counsel should make a proper request for a limiting instruction when the evidence is introduced, and not at a later time, thereby providing both clarity for the jury and a clear trial record. Merely objecting to such evidence is not enough; to limit the scope of the evidence a limiting instruction must be requested under Evid C §355. *Dincau v Tamayose* (1982) 131 CA3d 780, 791, 182 CR 855 (no error on admissibility of statements when no request for limiting instruction made under §355).

**EXAMPLE:** Defendant's expert testified as to opinions of other experts, which opinions were hearsay. Assuming that the hearsay was inadmissible, the error was cured in part because the court instructed the jury not to consider the hearsay opinions of outside witnesses for the truth of the matter in those opinions. *Mosesian v Pennwalt Corp.* (1987) 191 CA3d 851, 236 CR 778, disapproved on other grounds in *People v Ault* (2004) 33 C4th 1250, 1272 n15, 17 CR3d 302.

**NOTE:** If the evidence is highly prejudicial, it may not be enough for the court to give the jury a limiting instruction. Under Evid C §352, the trial court may conclude that some or all of the evidence should be excluded. See *People v Coleman* (1985) 38 C3d 69, 211 CR 102 (reversible error to admit over §352 objection contents of highly emotional and inflammatory letters for limited purposes of impeaching defendant's credibility and to explain and challenge basis for psychiatric experts' opinions).

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### §15.64 3. Waiver if failure to request limiting instruction

If the objecting party does not request the limiting instruction, the right to a limiting instruction is waived and the judge has no duty to give it. *Foreman & Clark Corp. v Fallon* (1971) 3 C3d 875, 92 CR 162 (when no express understanding between counsel and court that evidence was limited to particular matter, court could consider it for any purpose); *Daggett v Atchison, T. & S.F. Ry.* (1957) 48 C2d 655, 313 P2d 557 (defendants could not complain on appeal when they failed to request instruction at trial that impeaching evidence was admitted only for that purpose and was not otherwise competent).

If a request for a limited instruction would be futile, however, failure to request a limiting instruction is not a waiver of claimed error. *Warner Constr. Corp. v City of Los Angeles* (1970) 2 C3d 285, 296, 85 CR 444.

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## §15.65 VII. COURT'S RULING

When an objection is made, counsel should make certain that the court rules on the objection and that the ruling is on the record. If the court neglects to rule on the objection, or if the court's ruling is unclear and counsel proceeds without clarification, counsel may be deemed to have waived or abandoned the objection. *People v Jacobs* (1987) 195 CA3d 1636, 1650, 241 CR 550. See *Goodale v Thorn* (1926) 199 C 307, 249 P 11 (when court directed defendant's counsel to proceed after plaintiff's objection and it was not clear what this meant, defendant was precluded from raising point on appeal). See also California Trial Objections, chap 4 (Cal CEB Annual); 3 Witkin, California Evidence, *Presentation at Trial* §389 (4th ed 2000).

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### §15.66 A. Reserved ruling

A court may reserve its ruling on an objection and admit evidence subject to striking it when the court has had a chance to hear other evidence or determine the law on the subject. The court in *Estate of Horman* (1968) 265 CA2d 796, 71 CR 780, criticized this practice because it may work substantial injury to the parties, and the resulting error may be considered of sufficient gravity to require reversal. In *Clopton v Clopton* (1912) 162 C 27, 33, 121 P 720, the court noted that when "such a course is followed … a ruling should be made prior to the conclusion of the trial and in time to enable the party to fully present his case in the light of such ruling." For further discussion of a judge reserving a ruling on an objection, see California Trial Objections, chap 4 (Cal CEB Annual); 3 Witkin, California Evidence, *Presentation at Trial* §387 (4th ed 2000).

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### §15.67 B. If no ruling, considered overruled

When the court reserves its ruling *and* does not rule before conclusion of the trial, the objections raised have been deemed overruled (not waived) and the point concerning the admissibility of the evidence has been permitted to be raised on appeal. See *Stanwood v Carson* (1915) 169 C 640, 147 P 562; *People v Jacobs* (1987) 195 CA3d 1636, 1651, 241 CR 550; *People v Flores* (1979) 92 CA3d 461, 466, 154 CR 851.

**CAUTION:** When the trial court fails to rule on an objection and has not made any decision to reserve ruling, the objecting party must do something to precipitate an actual ruling, or be deemed to have waived or abandoned the issue. See §15.28.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.68 C. After ruling, be careful to preserve objection

### §15.68 C. After ruling, be careful to preserve objection

If the court overrules the objection and the objecting party then offers the same type of evidence, a waiver of the objection can occur, barring that party from claiming error on appeal. See *Heiman v Market St. Ry.* (1937) 21 CA2d 311, 69 P2d 178 (plaintiffs objected to motion pictures when offered by defendant, objection was overruled, and plaintiffs later exhibited pictures to jury).

**NOTE:** Generally, the objecting party will not waive the objection by referring to the objectionable evidence during trial. See *Warner Constr. Corp. v City of Los Angeles* (1970) 2 C3d 285, 299 n17, 85 CR 444.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/15 Making Trial Objections and Protecting the Record/§15.69 VIII. CHECKLIST: EVIDENTIARY OBJECTIONS

## §15.69 VIII. CHECKLIST: EVIDENTIARY OBJECTIONS

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| Objection | Authority |
|---|---|
| Ambiguous or unintelligible | Evid C §765 |
| Compound | Evid C §765 |
| Too general | Evid C §765 |
| Calls for narrative answer | Evid C §765 |
| Asked and answered | Evid C §765 |
| Misquotes a witness | Evid C §765 |
| Leading | Evid C §§765, 767 |
| Argumentative | Evid C §765 |
| Assumes fact not in evidence | Evid C §765 |
| Irrelevant | Evid C §§210, 350-351, 401-402 |
| Witness incompetent: | |
| (1) Cannot express himself or herself so as to be understood | Evid C §701(a) |
| (2) Cannot understand duty to tell the truth | Evid C §701(a)(2) |
| (3) Has no personal knowledge | Evid C §702(a) |
| Hearsay | Evid C §§1200 |
| Opinion of lay witness | Evid C §§800, 802-803 |
| Opinion of expert witness: | |
| (1) Insufficient foundation to qualify witness as an expert | Evid C §§720, 801 |
| (2) Witness is basing opinion on improper matter | Evid C §801 |
| Speculation | Evid C §§702, 801 |
| Improper impeachment | Evid C §§780, 785 |
| Improper rehabilitation | Evid C §§780, 785 |
| Inadmissible secondary evidence | Evid C §§1520-1523, 1552-1553 |
| Cross-examination exceeds scope of direct | Evid C §§761, 773 |
| Cumulative | Evid C §352 |

| | |
|---|---|
| More prejudicial than probative | Evid C §352 |
| Other objections: | |
| (1) Settlement negotiations | Evid C §§1152-1154 |
| (2) Subsequent safety measures | Evid C §1151 |
| (3) Insurance | Evid C §1155 |
| (4) Similar acts or occurrences | Evid C §1101(a) |

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# 16

# Misconduct of Counsel and Court

**Judge James J. Marchiano**

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## §16.1 I. SCOPE OF CHAPTER

An attorney's failure to abide by the proper rules of conduct during trial work hurts the legal system, the client, and the attorney's professional reputation. A breach of ethics by counsel may constitute misconduct warranting a contempt citation or sanctions by a judge, and disciplinary action by the state bar. Misconduct by the court may result in a mistrial or new trial. Misconduct of court or counsel further undermines the public's confidence in the judicial system. It is the duty of all lawyers to aid the court in avoiding error and determining cases in accordance with justice. *Furlong v White* (1921) 51 CA 265, 271, 196 P 903.

This chapter discusses the following:

- Regulations of the legal profession (see §§16.2-16.7);
- Courtroom etiquette and appearance (see §§16.8-16.17);
- Guidelines for ethical conduct of attorneys (see §§16.18-16.52) and judges (see §§16.53-16.65);
- Misconduct of attorneys (see §§16.66-16.90) and judges (see §§16.130-16.142); and
- Remedies for misconduct by attorneys (see §§16.91-16.129) and by judges (see §§16.143-16.147).

**Further research:** Jury management issues, including jury misconduct during voir dire and trial, are discussed in chap 17. Jury deliberations, including misconduct during deliberations, are discussed in chap 21.

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## II. REGULATION OF LEGAL PROFESSION

### A. Regulation of attorneys

### §16.2 1. Under Business and Professions Code

Statutory authority regulating the legal profession is found in Bus & P C §§6000-6228. The duties of an attorney are provided in Bus & P C §6068. Consequences that may result from violating any provision under §§6000-6228 include:

- Violation of a lawyer's oath or duties is a cause for disbarment or suspension. Bus & P C §6103.
- A willful breach of any Rule of Professional Conduct enacted under Bus & P C §6076 is a ground for disciplinary proceedings. See also Bus & P C §6077.
- An attorney who is guilty of deceit or collusion (or consents to deceit or collusion), with intent to deceive the court or a party, is guilty of a misdemeanor. Bus & P C §6128.

The Board of Governors of the State Bar of California is authorized to formulate and enforce rules of professional conduct for all members of the state bar. Bus & P C §6076. A court that has ordered reversal of a judgment based in whole or in part on misconduct, incompetent representation, or willful misrepresentation by counsel must report the matter to the state bar, which will investigate and determine whether initiating disciplinary action against an attorney is appropriate. Bus & P C §6086.7. The court must notify the state bar when sanctions of $1000 or more, and when nonmonetary sanctions, are imposed against an attorney. Bus & P C §6086.7(a)(3).

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## §16.3 2. Under Rules of Professional Conduct

The California Rules of Professional Conduct establish an attorney's civil liability for breach of duty and may even be judicially noticed to establish an attorney's negligence. See *Mirabito v Liccardo* (1992) 4 CA4th 41, 5 CR2d 571; *Day v Rosenthal* (1985) 170 CA3d 1125, 1147, 217 CR 89. A breach of the rules does not automatically give rise to a civil cause of action. See *Noble v Sears, Roebuck & Co.* (1973) 33 CA3d 654, 109 CR 269.

**Further research:** Current Rules of Professional Conduct enacted under Bus & P C §6076 are published in West's Annotated California Codes, Rules of Professional Conduct (vol 23, pt. 3); and Deering's California Codes (Annotated), Rules of Court, State Bar Rules. They are also published in State Bar Publication No. 250.

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## §16.4 3. Regulation by judiciary

The judiciary has inherent power to regulate the profession. See 1 Witkin, California Procedure, *Attorneys* §§339-340 (5th ed 2008). In *Merco Constr. Eng'rs v Municipal Court* (1978) 21 C3d 724, 147 CR 631, the supreme court held that the judiciary's power to govern admissions to the practice of law is provided in Cal Const art VI, §1, which provides that the state's judicial power is vested in the supreme court, the courts of appeal, and the superior courts.

A judge must take appropriate corrective action whenever the judge has personal knowledge that a lawyer has violated a provision of the Rules of Professional Conduct. Code of Judicial Ethics, Canon 3D(2). For example, if a judge were to find in a statement of decision that an attorney had acted fraudulently, the judge would be obligated to send a copy of the decision to the state bar. See 1993 California Judges Association, Ethics Update IX.

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## §16.5 4. Under local rules

Many California courts have adopted local court rules or policies on attorneys' conduct with respect to the jury, witnesses, and the court. Become familiar with local policies or rules that are in effect in the court in which your case is pending. See, *e.g.,* Los Angeles Ct R 8.1-8.17.

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## §16.6 5. Influence of ABA guidelines

The American Bar Association has enacted Model Rules of Professional Conduct. Although they have not been adopted in California, the ABA rules sometimes serve as a guide to California courts in related matters. See *Chambers v Superior Court* (1981) 121 CA3d 893, 898 n3, 175 CR 575. See also *City of Los Angeles v Decker* (1977) 18 C3d 860, 871, 135 CR 647; *Cho v Superior Court* (1995) 39 CA4th 113, 121, 45 CR2d 863.

According to Cal Rules of Prof Cond 1-100, rules of other bar associations may be considered. State Bar Formal Opinion No. 1983-71 explains that, although not binding in California, the ABA rules may be persuasive when no controlling rule of conduct, statute, or court ruling applies in California.

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## §16.7 B. Regulation of judges

The California Judges Association adopted a Code of Judicial Conduct, in Division II of the Appendix to the California Rules of Court, that provides ethical standards for all members of the judiciary. The Code reflects a judicial consensus regarding appropriate behavior and is binding on judges. *Adams v Commission on Judicial Performance* (1994) 8 C4th 630, 34 CR2d 641; *Kloepfer v Commission on Judicial Performance* (1989) 49 C3d 826, 836 n6, 264 CR 100. See §§16.54 and 16.130 for further discussion. The grounds for disqualification of a judge are specified in CCP §§170.1-170.2; the procedure is addressed in CCP §170.3. The procedure for exercising a peremptory challenge to disqualify a judge is found in CCP §170.6. For further discussion of disqualification under CCP §§170.1-170.3, and 170.6, see §§6.26-6.78.

**NOTE:** If the Commission on Judicial Performance, the state agency that investigates misconduct complaints and imposes discipline against judges, has determined that a judge should be disciplined for a certain action, the judge or former judge has 60 days to petition the supreme court to review the determination after the commission notifies the judge or former judge that a determination has been filed or entered in its records or the determination becomes final, whichever event is later. See Cal Rules of Ct 9.60.

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## III. COURTROOM ETIQUETTE AND APPEARANCE

### §16.8 A. Suggestions for courtroom conduct

Requirements of courtroom etiquette for counsel vary from court to court and are enforced by the trial judge. The requirements are seldom considered in appellate decisions, except when breaches of etiquette also constitute misconduct.

In 1956, a memorandum titled "Suggestions for Uniform Formality of Courts and Courtroom Etiquette" was approved by the Conference of California Judges (now called the California Judges Association). Its preamble noted that "great differences in local customs, thought, climatic conditions and court facilities [impede] complete agreement and uniformity of formality and etiquette." Some of these suggestions are discussed in §§16.9-16.15 (with some updating).

**NOTE:** The suggestions in the memorandum are still valid, although not readily available or widely known.

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## §16.9 1. Courtroom demeanor

Attorneys during trial should not exhibit familiarity with witnesses, jurors, or opposing counsel and should avoid the use of first names. In jury arguments, never address a juror individually or by name.

Attorneys should not appear too familiar with the court and should address the court in the third person, as "The court will remember the testimony," not, "You will remember." While on the bench, the judge may be addressed as "Your Honor," never as "You" or "Judge." Invite, do not direct, the court's attention.

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## §16.10 2. Positions in the courtroom

Attorneys should not walk between the judge's bench and the counsel table unless necessary because of the courtroom's layout. During opposing counsel's argument, other counsel should remain seated at the counsel table and listen respectfully. Never get up and walk about, make asides to others, or express personal feelings so as to divert the attention of the court or jury.

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## §16.11 3. Addressing the court

Rise and remain standing while addressing the court or a jury, except when making an objection or statement of only a few words. Stand behind the counsel table or at a lectern to address the court.

After a matter has been argued and submitted and the court has announced its decision, gracefully accept the decision and do not make further comment or argument, unless the court reopens argument on request.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/16 Misconduct of Counsel and Court/ §16.12 4. Addressing the jury

## §16.12 4. Addressing the jury

In addressing the jury, do not crowd the jury box or address the jury in a loud voice or in an undignified manner. Address the jury from a lectern if one is provided and if the judge approves its use. (Ask the bailiff or clerk if the judge allows use of a lectern, or ask the judge directly.)

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## §16.13 5. Opening address

The proper form of an opening statement is "May it please the court," not "If the court please."

**PRACTICE TIP:** Some judges consider such terms unnecessarily formal. Check with other attorneys who have appeared before this judge for information about the judge's preferences or the practice in your area.

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### §16.14 6. Examining witnesses

Examine witnesses from a position behind the counsel table or from a lectern. With the court's permission, it is proper to approach witnesses who are hard of hearing when handling exhibits or to stand at the blackboard when questioning witnesses concerning a map or diagram.

**NOTE:** This suggestion should be observed in all proceedings, including default and probate matters.

**PRACTICE TIP:** Most courts rely on these basic principles. You can't go wrong following these "rules," even when more informality is allowed. Some judges consider asking the court's permission every time you approach a witness to be cumbersome. When in doubt, check with the judge for the preferred procedures.

When you complete examination of a witness, so indicate by stating, "I have no further questions of this witness," which alerts both the court and opposing counsel that you have finished your examination. Do not say, "That is all" or use a similar vague statement, because your statement can be confusing and encourage the witness to leave the stand before opposing counsel has the opportunity to examine the witness.

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### §16.15 7. Making objections

Refrain from interrupting the court or opposing counsel until the statement being made is fully complete, except when absolutely necessary to protect the client's rights on the record. Also, respectfully await the completion of the court's statement or opinion before pointing out objectionable matters. When objection is made to your question, refrain from asking the witness another question until the court has ruled on the objection.

**NOTE:** All objections and arguments should be made to the court rather than to opposing counsel.

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### §16.16 B. Review local court rules

Local court rules or policies may address the conduct of attorneys during trial. Become familiar with local requirements, which may differ from the suggestions discussed in §§16.9-16.15. If you have not been given, or seen posted on the court's website, any local rules or policies on the conduct of a trial, determine what the judge trying the case requires from the judge's clerk or from the trial judge during the initial chambers conference.

**NOTE:** The Judicial Council has preempted local court rules relating to "pleadings, demurrers, ex parte applications, motions discovery, provisional remedies, and form and format of papers." Cal Rules of Ct 3.20.

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### §16.17 C. Guidelines for appropriate attire

Attorneys generally should wear appropriate business attire. A judge has authority to dictate matters of courtroom decorum and behavior that bear on the orderly conduct of courtroom proceedings. See *People v Rainey* (1964) 224 CA2d 93, 97, 36 CR 291. This authority may include a judge's reasonable and proper request regarding attire. For example, in *Rainey* the court held that the trial judge was not guilty of misconduct, nor was defendant prejudiced, when the judge on the first day of trial requested that defendant's female attorney appear without a hat in future sessions. There are limits, however, on a judge's power to dictate proper attire.

**EXAMPLE:** In *Jensen v Superior Court* (1984) 154 CA3d 533, 201 CR 275, an extraordinary writ was brought by an attorney who wore a turban to court. He was refused access to a courtroom by a judge who admitted turbaned lawyers to his courtroom on a showing that the turban was worn for "religious, cosmetic or other, 'legitimate' purpose." Petitioner refused to make that showing. In granting the writ, the appellate court stated that the test for attorneys' courtroom attire "is whether it interferes with courtroom decorum by disrupting justice, *i.e.,* whether it tends to cause disorder or interfere with or impede the functioning of the court." 154 CA3d at 537. The appellate court held that to engage in the practice of law does not require a person to declare the person's faith, or lack of it. "Courtroom inquisition concerning physical condition or cosmetic appearance is an invasion of privacy." 154 CA3d at 541.

**Further research:** For further discussion of counsel's attire during trial, see Anno, *Power of Court to Impose Standard of Personal Appearance or Attire*, 73 ALR3d 353 (1976). On courtroom decorum for parties and witnesses generally, see chap 5. See also Los Angeles Ct R 8.0-8.3, 8.13, 8.17.

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## IV. GUIDELINES FOR ETHICAL CONDUCT BY ATTORNEYS

### A. Consequences of a breach of ethics

### §16.18 1. Business and Professions Code Provisions

Many ethical obligations of attorneys are set forth in Bus & P C §6068 and the California Rules of Professional Conduct. See §§16.2-16.3. In *Marshall v Taylor* (1893) 98 C 55, 62, 32 P 867, the court held that a "trial court should always be alert to prevent an attorney from obtaining advantages in jury trials by the practice of methods not countenanced by the ethics of the profession." This also holds true for nonjury trials.

Attorneys usually conduct themselves in an ethical manner. When a breach of ethics occurs, however, serious consequences may follow. Business and Professions Code §6103 specifically provides that:

> [W]illful disobedience or violation of an order of the court requiring [the attorney] to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.

Similarly, Bus & P C §6077 provides that, for a willful breach of any of the California Rules of Professional Conduct, the Board of Governors of the State Bar may:

- Discipline the attorney by public or private reproval; or
- Recommend to the California Supreme Court that the attorney be suspended from practicing law for not over 3 years.

Commission of an act involving moral turpitude, dishonesty, or corruption may constitute a cause for disbarment or suspension. See Bus & P C §6106. An attorney who is guilty of any deceit or collusion (or consents to deceit or collusion), with intent to deceive the court or a party, is guilty of a misdemeanor. Bus & P C §6128.

When a court has ordered reversal of a judgment based in whole or in part on misconduct, incompetent representation, or willful misrepresentation by counsel, Bus & P C §6086.7 requires the court to report the matter to the State Bar of California for investigation concerning the appropriateness of initiating disciplinary action against the attorney.

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### §16.19 2. State bar proceedings

An attorney must cooperate and participate in any state bar disciplinary investigation or other regulatory or disciplinary proceeding pending against that attorney, subject to constitutional or statutory privileges. Bus & P C §6068(i). Other duties include:

- Complying with membership information reporting requirements (Bus & P C §6068(j));
- Complying with disciplinary probation (Bus & P C §6068(k)) or agreements (Bus & P C §6068(*l*));
- Responding promptly to clients' reasonable status inquiries and keeping clients reasonably informed of significant developments in matters for which the attorney has agreed to provide legal services (Bus & P C §6068(m));
- Providing copies to the client of relevant documents within specified time limits (Bus & P C §6068(n)); and
- Reporting of lawsuits, sanctions, indictments, convictions, and discipline against the attorney and any reversal of judgment because of the attorney's misconduct, or grossly incompetent or willful misrepresentation (Bus & P C §6068(o)).

A breach of ethics may constitute misconduct and result in issuance of a contempt citation (see §§16.99-16.129), sanctions (see §16.94), the granting of a motion for a mistrial (see §16.95) or a new trial (see §16.96), or reversal of a judgment on appeal (see §§16.97-16.98). On misconduct generally, see §§16.66-16.90.

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### B. Ethical conduct in court

### §16.20 1. Maintain respect for court

Although lawyers have a duty to represent their clients zealously within the bounds of law (which includes disciplinary rules and enforceable professional obligations) (see §§16.32-16.43), as officers of the court they also must maintain respect for the court. See Bus & P C §6068(b); *Hawk v Superior Court* (1974) 42 CA3d 108, 126, 116 CR 713. See §16.148 for examples of acts or omissions that are contempts of the court's authority under CCP §1209. See §§16.99-16.129 for a detailed discussion of contempt.

**EXAMPLE:** In *Hawk,* while examining witnesses, an attorney frequently repeated questions after objections to them had been sustained, and after the court admonished him not to repeat questions to which objections had been sustained. The court held that the attorney had violated his duty under Bus & P C §6068(b) to maintain respect for the court and was thus in contempt of court under CCP §1209(a)(3), (5).

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### §16.21 a. Arguing with judge in front of jury

Arguing with a judge or disputing the judge's ruling in front of the jury is usually improper. Justice Kane in the concurring opinion in *In re Grossman* (1972) 24 CA3d 624, 640, 101 CR 176, noted that each lawyer should be conclusively presumed to know that.

For evidentiary objections generally, most courts require that argument on objections beyond a few statements be heard outside the jurors' hearing at the sidebar or, when there will be extended discussion, in chambers. See, *e.g.,* Los Angeles Ct R 8.41-8.43. To be heard on such a matter, counsel can simply ask: "Your honor, may we approach the bench?" To protect the record, the court reporter should be present to record the arguments, whether made at the sidebar or in chambers. On need for a timely and proper objection to avoid waiver, see §§16.91-16.93, chap 11. On making trial objections and preserving the record generally, see chap 15.

**PRACTICE TIP:** When the issue is significant, immediately request the court's permission to approach the bench. If your request is granted, discuss the issue at the sidebar or in chambers and be sure the court reporter is present to record it. If the request is denied, at that time or at the recess, ask for a hearing on the matter during the recess. If the judge permits the hearing, discuss the issue out of the jurors' presence but with the court reporter present.

**NOTE:** If you wait until the next normal recess, you risk prejudicing the client's case in the jurors' eyes.

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### §16.22 b. General scope of advocacy

In protecting the client's interests, counsel has the right to press legitimate argument and to protest an erroneous ruling. *In re Hallinan* (1969) 71 C2d 1179, 1183, 81 CR 1; *Gallagher v Municipal Court* (1948) 31 C2d 784, 794, 192 P2d 905; *McCan v Municipal Court* (1990) 221 CA3d 527, 270 CR 640. An attorney must be given substantial freedom of expression in representing the client. *In re Hallinan, supra*; *Gallagher v Municipal Court, supra*.

According to the court in *Gallagher,* an attorney addressing the court may do the following (31 C2d at 795):

- Combat and strongly contest adverse views expressed by the judge during argument;
- Object and protest against any course that the judge may take, which the attorney thinks is irregular or detrimental to the client's interest, and
- Caution the jurors against the judge's interfering with their function (or with the attorney when addressing the jurors), or against any strong view adverse to the client expressed by the judge on the facts of the case before a jury verdict is reached.

**PRACTICE TIP:** You can use legitimate argument to persuade the judge on questions of law arising during the trial (*e.g.,* on the propriety of asking certain questions or on the admissibility of certain evidence (see Evid C §310)), as long as the judge indicates an open mind on the subject under consideration.

After the court has ruled on the matter, respectfully yield to the court's ruling. *People v McKenzie* (1983) 34 C3d 616, 632, 194 CR 462; *Hawk v Superior Court* (1974) 42 CA3d 108, 130, 116 CR 713; *In re Grossman* (1930) 109 CA 625, 293 P 683; *Hallinan v Superior Court* (1925) 74 CA 420, 240 P 788. If the ruling is adverse, do not resist it or insult the judge; respectfully preserve the point (on the record) for appeal. See *In re Buckley* (1973) 10 C3d 237, 253 n21, 110 CR 121; *Hawk v Superior Court, supra*. Counsel's repeated efforts to introduce evidence that the judge ruled inadmissible was an attempt to gain unfair advantage and is punishable as contempt. *Trans-Action Commercial Investors, Ltd. v Firmaterr, Inc.* (1997) 60 CA4th 352, 70 CR2d 449. However, you have the right to respectfully request that the court reconsider its adverse rulings. *Hawk v Superior Court, supra*.

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### §16.23 c. Attorney's right to argue against, or test validity of, a ruling

Counsel has the privilege (if not the duty) to argue an objection before the trial judge rules on it, unless requested or instructed not to do so by the court.

**EXAMPLE:** In *Bennett v Superior Court* (1946) 73 CA2d 203, 216, 166 P2d 318, the court held that trial counsel's conduct in presenting argument on an objection after the court had ruled on the objection was performed with the court's express consent and did not constitute contempt.

An attorney cannot disregard a court ruling, or advise a client to do so, but can, in good faith, take appropriate steps to test the validity of the ruling. See *Hawk v Superior Court* (1974) 42 CA3d 108, 116, 116 CR 713 (attorney's conduct in advising client to violate lawful court order requiring client's handwriting exemplars to be provided violated attorney's duty under Bus & P C §6068(b) and constituted contempt under CCP §1209(a)(3), (8)).

**EXAMPLE:** Under Cal Rules of Prof Cond 3-210 a member of the state bar:

- Must not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that the law, rule, or ruling is invalid; but
- May take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

**NOTE:** Rule 3-210 became effective after the decision in *Hawk v Superior Court, supra*.

**PRACTICE TIP:** When circumstances warrant, if confronted with what appears to be an invalid court ruling, request the court (out of the jurors' presence and on the record) to stay the ruling, and then test it by appropriate writ.

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### §16.24 d. Judge's duty to protect court's integrity

The court has a right to expect and demand that attorneys conduct themselves in a courteous, professional manner. *In re Grossman* (1972) 24 CA3d 624, 629, 101 CR 176. When aggressive advocacy by counsel gives way to insolence and disrespect toward the court, it is the trial judge's duty to protect the court's integrity. *In re Buckley* (1973) 10 C3d 237, 249, 110 CR 121. On contempt generally, see §§16.99-16.129.

**EXAMPLE:** In *Buckley,* the court held that counsel's statement that "This Court obviously doesn't want to apply the law" constituted an attack on the court's integrity and was held contemptuous on its face.

**Further research:** For further discussion, see Gilmore, *Professional Responsibility Problems and Contempt in Advocacy*, 12 San Diego L Rev 288 (1975). See also Anno, *Attorney's Addressing Allegedly Insulting Remarks to Court During Course of Trial as Contempt*, 68 ALR3d 273 (1976); Anno, *Conduct of Attorney in Connection With Making Objections or Taking Exceptions as Contempt of Court*, 68 ALR3d 314 (1976).

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### §16.25 2. Affirmative duty to inform court of misrepresentation

A misrepresentation to the court, whether negligent or intentional, invokes an immediate, affirmative duty on realization to

> inform the court and to request that it set aside any orders based upon such misrepresentation; also counsel should not attempt to benefit from such improvidently entered orders.

*Datig v Dove Books, Inc.* (1999) 73 CA4th 964, 981, 87 CR2d 719. An attorney's actions must be "consistent with truth," and never misleading to the judge or any judicial officer by any "artifice or false statement of fact or law." Bus & P C §6068(d). See a similar provision in Cal Rules of Prof Cond 5-200. The willful presentation to the court, through pleadings or other means, of facts that counsel knows to be untrue constitutes professional misconduct. See *Paonessa v State Bar* (1954) 43 C2d 222, 272 P2d 510.

The conduct prohibited by Bus & P C §6068(d) and Cal Rules of Prof Cond 5-200 is not necessarily that which successfully misleads the court, but rather that which *tends* to mislead the court. See *Vaughn v Municipal Court* (1967) 252 CA2d 348, 358, 60 CR 575 (misrepresentation of fact for purpose of obtaining a continuance). When actual deception is intended, actual harm need not result to merit disciplinary action against an attorney. *Coviello v State Bar* (1955) 45 C2d 57, 65, 286 P2d 357.

An attorney is prohibited from:

- Misquoting to a judge or a judicial officer the language of a book, statute, or decision (Cal Rules of Prof Cond 5-200(C)); or
- Citing as authority an overruled decision or a statute that has been repealed or declared unconstitutional when counsel knows the authority is invalid, and not disclosing that knowledge (Cal Rules of Prof Cond 5-200(D)).

Deceiving or misleading the court may also take the form of conduct such as concealment. *Daily v Superior Court* (1935) 4 CA2d 127, 40 P2d 936. Reckless misstatements of law and fact, if made for an improper purpose, will expose an attorney to the possibility of being sanctioned. *Fink v Gomez* (9th Cir 2001) 239 F3d 989.

**EXAMPLES:** In *Daily,* a judge who was unfamiliar with the motion calendar, and who was hearing only uncontested matters, sat in for the regular vacationing judge. Attorneys were held in contempt for failing to disclose to the judge, during an ex parte motion to obtain funds deposited in court, that the calendar contained various contested motions concerning the same funds. See also *Sullins v State Bar* (1975) 15 C3d 609, 125 CR 471 (attorney disciplined by public reproof for concealing existence of pertinent letter in connection with petition for court approval of 50-percent contingency fee); *Russell v Dopp* (1995) 36 CA4th 765, 42 CR2d 768 (representation by lawyer not licensed to practice in California is misconduct and fraud on the court, justifying new trial).

**Further research:** See also Code of Judicial Ethics, Canon 3B(3)-(4). On prohibition against citing an unpublished opinion of a court of appeal or a superior court appellate department (and exceptions) see Cal Rules of Ct 8.1115.

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### §16.26 3. Must argue fairly

It is unethical to mislead an opponent by concealing or withholding positions in the opening statement and then expounding on them during closing argument. See generally *McCullough v Langer* (1937) 23 CA2d 510, 525, 73 P2d 649. See also *Cortez v Macias* (1980) 110 CA3d 640, 657, 167 CR 905.

It is improper for plaintiff's counsel to wait for rebuttal argument to argue for an amount of damages when no mention of an amount was made in the opening statement. *Cain v State Farm Mut. Auto. Ins. Co.* (1975) 47 CA3d 783, 121 CR 200. On misconduct in arguing matters not in evidence, see §16.41.

**Further research:** See chap 19 for discussion of closing arguments.

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### §16.27 4. Handling news media releases

In some circumstances, statements by counsel to the news media concerning a pending or anticipated trial may be ethically improper. A party has the right to have a case adjudicated by an impartial jury. Dissemination of information about a case can defeat this right by influencing the judge or jury. The American Bar Association Model Rules of Professional Conduct set forth standards of permissible conduct concerning trial publicity by lawyers dealing with the press. The California Rules of Professional Conduct do not provide comparable standards. At times, particularly in cases that have attracted high publicity, news media releases may constitute misconduct. See §16.39.

On instances of when a publication may constitute contempt by the publisher, see 7 Witkin, California Procedure, *Trial* §§208-209 (5th ed 2008).

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### §16.28 5. Avoid private communications with court

Except for ex parte matters, an attorney must not directly or indirectly communicate with or argue to a judge or judicial officer the merits of any contested matter pending before the judge or judicial officer except (Cal Rules of Prof Cond 5-300(B); see also Code of Judicial Ethics, Canon 3B(7)):

- In open court;
- With consent of all other counsel;
- In the presence of all other counsel; or
- In writing with a copy to all other counsel.

**PRACTICE TIP:** It is very easy to violate this rule, especially regarding procedural questions. Do not talk to or write to a judge about *anything* to do with a case unless you include opposing counsel, or opposing party if unrepresented by counsel.

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### §16.29 6. Avoid gifts to judge or court officials

An attorney should not, either directly or indirectly, give or lend anything of value to a judge, official, or employee of a tribunal, unless the attorney has a personal or family relationship with the judge, official, or employee and they customarily exchange gifts. Cal Rules of Prof Cond 5-300(A). See CCP §170.9 regarding limitations on acceptance of gifts by judges (judge cannot accept gifts whose total value is greater than $250 from any single source in any calendar year). See also *Adams v Commission on Judicial Performance* (1995) 10 C4th 866, 884, 42 CR2d 606 (supreme court held that a judge who received gifts from a lawyer who occasionally appeared before him, even though there was no quid pro quo showing, and who provided legal advice to that lawyer's firm, had engaged in misconduct justifying the judge's removal from the bench).

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### §16.30 7. Be punctual

Be punctual at court during the trial of a case unless you have a valid excuse. *Lyons v Superior Court* (1955) 43 C2d 755, 758, 278 P2d 681 (counsel who had no valid excuse held in contempt for failing to appear in court at announced hour for resumption of trial).

An attorney cannot unreasonably delay a trial for personal matters within the attorney's control. *Lyons v Superior Court, supra*. See also *People v Tabb* (1991) 228 CA3d 1300, 279 CR 480 (court sanctioned counsel under CCP §177.5 for failure to appear on time at scheduled hearing).

**PRACTICE TIP:** If unavoidably detained because of an emergency, be sure to phone the court and explain your delay.

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### §16.31 C. Ethical conduct toward opposing counsel

The adversary process can sometimes lead to intemperate remarks concerning opposing counsel. An attorney must "advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged." Bus & P C §6068(f).

**PRACTICE TIP:** Avoid any unfair or derogatory personal reference to opposing counsel. Remember that the parties are the litigants; even if ill feelings exist between you and opposing counsel, do not let those feelings influence your conduct, attitude, or demeanor.

Personal attacks on opposing counsel can be grounds for contempt. In *Hawk v Superior Court* (1974) 42 CA3d 108, 129, 116 CR 713, the court noted that "[i]t is unprofessional conduct for a lawyer to engage in behavior or tactics purposely calculated to irritate or annoy the court or the prosecutor." After being warned, an attorney in *Hawk* was held in contempt of court on several grounds, including reference to the prosecutor as a "high-priced lawyer." The court held that this behavior was calculated to irritate the prosecutor and to annoy the court, and constituted a violation of counsel's duty to abstain from all "offensive personality." See also *People v Pitts* (1990) 223 CA3d 606, 704, 273 CR 757 (new trial granted for improper conduct, including casting aspersions on opposing counsel).

**PRACTICE TIP:** Even more devastating to your case than a contempt charge may be a judge's explanation to a jury that you have inappropriately tried to sway them by your tactics.

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## D. Ethical conduct toward clients

### 1. Control of litigation

### §16.32 a. Procedural matters

An attorney has authority to bind the client in procedural matters that arise during the course of litigation (*Linsk v Linsk* (1969) 70 C2d 272, 276, 74 CR 544; 1 Witkin, California Procedure, *Attorneys* §244 (5th ed 2008)) through either written or oral stipulations, or by admissions of fact made by counsel in open court (see *Price v McComish* (1937) 22 CA2d 92, 96, 70 P2d 978). Attorneys may bind their clients in any of the steps of an action or proceeding by agreement filed with the clerk, or entered on the minutes of the court, but not otherwise. CCP §283.

Authority to bind the client in procedural matters extends to tactical decisions. See *Duffy v Griffith Co.* (1962) 206 CA2d 780, 787, 24 CR 161 (at trial, counsel "must have and exercise discretion to make such tactical decisions as the exigencies of the combat may dictate").

**EXAMPLE:** In *Diamond Springs Lime Co. v American River Constructors* (1971) 16 CA3d 581, 607, 94 CR 200, trial counsel made a discretionary tactical maneuver sacrificing potential recovery from one adverse party to fortify potential recovery from the other. During closing argument, plaintiff's trial counsel invited the jury to return a verdict solely against one defendant—an implicit invitation to reach a verdict exonerating the other defendant. The court noted that this tactical maneuver did not exceed the attorney's authority (16 CA3d at 607) and held that "plaintiff's request for a verdict against one defendant alone was an effective waiver of its rights to appeal from the verdict exonerating the other defendant" (16 CA3d at 608).

The attorney, not the client, makes the ultimate decision on procedural matters. See *Zurich Gen. Acc. & Liab. Ins. Co. v Kinsler* (1938) 12 C2d 98, 105, 81 P2d 913, overruled on other grounds in *Fracasse v Brent* (1972) 6 C3d 784, 792, 100 CR 385. See also *Giouzelis v McDonald* (1981) 119 CA3d 436, 445, 174 CR 58.

**EXAMPLE:** In *Nahhas v Pacific Greyhound Lines* (1961) 192 CA2d 145, 13 CR 299, counsel represented two plaintiffs in a personal injury action. One plaintiff, who was not an eyewitness to the accident in question and whose only interest was damage to his truck, wished to testify. Counsel refused to call the plaintiff, believing that the subject of damage to the plaintiff's truck had been amply covered and that the subject matters to which plaintiff wished to testify were incompetent, irrelevant, and immaterial, and would prejudice the coplaintiff's case. The appellate court held that an attorney has the prerogative, if not the duty, not to call a witness to testify, even though the client desires the witness to testify, when the attorney believes the testimony would be detrimental to the best interests of the client's case. 192 CA2d at 146.

An attorney has the authority to bind a client in resolving discovery orders. *Young v Rosenthal* (1989) 212 CA3d 96, 116, 260 CR 369.

**Further research:** For examples of procedural matters over which the attorney has ultimate control, and substantive matters over which the client retains ultimate control, see *Linsk v Linsk* (1969) 70 C2d 272, 74 CR 544.

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### §16.33 b. Client's substantive rights

An attorney has no right to impair a client's substantive rights; the client retains ultimate control over them. An attorney may not impair, compromise, settle, surrender, or destroy a client's substantive rights without the client's consent. *Blanton v Womancare, Inc.* (1985) 38 C3d 396, 407, 212 CR 151 (mere retention of services of an attorney does not authorize attorney to enter into binding arbitration agreement on behalf of client in absence of client's consent); *CPI Builders, Inc. v Impco Technols., Inc.* (2001) 94 CA4th 1167, 1172, 114 CR2d 851 (holding that an attorney is not authorized to impair the client's substantial rights); *Romadka v Hoge* (1991) 232 CA3d 1231, 283 CR 878.

**EXAMPLE:** In *Romadka v Hoge, supra,* an attorney mistakenly marked the "with prejudice" section of a voluntary dismissal form that the trial court refused to vacate. The court of appeal held that the dismissal was invalid because the attorney lacked her clients' authority to surrender their substantive rights; there was no reason for the trial court not to have believed the attorney's declaration and testimony that the attorney acted without authority and by mistake.

An attorney must be specifically authorized to settle and compromise a lawsuit; the relationship with the client does not provide an implied authority to bind the client to a settlement. *Levy v Superior Court* (1995) 10 C4th 578, 586, 41 CR2d 878. See *Gauss v GAF Corp.* (2002) 103 CA4th 1110, 127 CR2d 370; 6 Witkin, California Procedure, *Proceedings Without Trial* §120 (5th ed 2008).

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### §16.34 c. Effect of stipulations by counsel

Oral stipulations by counsel can bind the parties even if not entered in the minutes of the court or filed with the clerk if the parties have acted in reliance on the stipulation. *Harding v Collazo* (1986) 177 CA3d 1044, 223 CR 329.

**EXAMPLE 1:** In *Harding,* the court held that the parties were bound to an oral stipulation that a hearing on a demurrer and a motion to strike be taken off calendar in exchange for the in pro per plaintiff's agreement to file an amended complaint by a certain day; plaintiff admitted to the oral stipulation and had received benefits from it, and defendants had given up rights and advantages in reliance on the stipulation.

**EXAMPLE 2:** In *Blanton v Womancare, Inc.* (1985) 38 C3d 396, 212 CR 151, an attorney who had been retained to prosecute a malpractice action entered into a stipulation to have the matter arbitrated without the client's express consent. The nature of the stipulation was such that it could be viewed as either an agreement for judicial arbitration governed by CCP §§1141.10-1141.32 or an agreement for private arbitration governed by CCP §§1280-1288.8. The supreme court held that the attorney had no apparent authority to bind the client by entering into the stipulation. The court noted that (38 C3d at 407):

> [T]he agreement did not constitute a tactical maneuver in pending litigation; rather, it called for a diversion of the dispute from the judicial to the arbitral arena.… [A]n attorney, merely by virtue of his employment as such, has no apparent authority to bind his client to an agreement for arbitration.… When a client engages an attorney to litigate in a judicial forum, the client has a right to be consulted, and his consent obtained, before the dispute is shifted to another, and quite different… forum.

**EXAMPLE 3:** The court in *Marriage of Helsel* (1988) 198 CA3d 332, 243 CR 657, applied *Blanton* to a stipulation between counsel that resolved several disputed issues. The court held that the trial court must determine whether the stipulation "substantially resolved the pending controversy." If so, it may be enforced only if the attorney was authorized to enter into the agreement. 198 CA3d at 340.

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### §16.35 d. Counsel's ethical obligations versus unethical actions authorized by client

Although classified as an "agent" (see 1 Witkin, California Procedure, *Attorneys* §§235-236 (5th ed 2008)), lawyers are also officers of the court with corresponding rights and duties under the legal and ethical rules governing the practice of law. Some actions authorized by the client may be improper to carry out because of counsel's ethical obligations as an officer of the court.

A lawyer may not seek or accept employment to accomplish any of the following objectives (Cal Rules of Prof Cond 3-200):

- Bring a legal action, conduct a defense, assert a position in litigation, or otherwise take steps solely to harass or maliciously injure a person; or
- Present a claim or defense not warranted under existing law, unless the lawyer can support it by good faith argument for an extension, modification, or reversal of existing law.

When confronted by a client who wants to commit perjury, first try to persuade the client to testify truthfully. If unsuccessful, advise the client of the consequences of perjury and that you will be forced to make a motion to withdraw (see §16.37) if the client is still intent on testifying falsely. If the client is adamant, move to withdraw so as not to give implied consent to the use of perjurious testimony in violation of Bus & P C §6128(a). *People v Brown* (1988) 203 CA3d 1335, 1339 n1, 250 CR 762.

**EXAMPLE:** In *Price v Giles* (1987) 196 CA3d 1469, 242 CR 559, the court held that an attorney's claim during jury argument that his own client (defendant) had been less than candid and engaged in collusion with an opposing party constituted misconduct toward his client, even though the client prevailed in the action, and that such conduct deprived plaintiff of a fair trial.

**Further research:** On a client's being bound by ratifying an unauthorized stipulation, see *City of Fresno v Baboian* (1975) 52 CA3d 753, 125 CR 332.

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### §16.36 2. Duty to represent client competently

Do not perform legal services for a client if you know or reasonably should know that you do not possess the ordinary knowledge and skill of lawyers who perform, but do not specialize in, similar services. Cal Rules of Prof Cond 3-110. Failure to represent a client competently may give rise to a malpractice action and subject you to disciplinary proceedings. See, *e.g., Lewis v State Bar* (1981) 28 C3d 683, 170 CR 634.

A lawyer who lacks learning and skills may associate, or when appropriate, consult professionally, with another lawyer who has the requisite knowledge and skill. "Ability" includes the state of being mentally, emotionally, and physically able to perform competent legal services. Cal Rules of Prof Cond 3-110(B). The duties of Rule 3-110 include supervising the work of subordinate attorneys in performing work for a client.

The duty of loyalty to one's client is fundamental. An attorney who offers to sell out a client in return for a large cash payment violates that duty and is properly disqualified. Any fees the attorney may have earned after that offer are impliedly forfeited. *Cal Pak Delivery, Inc. v United Parcel Serv., Inc.* (1997) 52 CA4th 1, 14, 60 CR2d 207. The court has inherent power to control the conduct of its officers, including lawyers, under CCP §128. 52 CA4th at 80.

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### §16.37 3. Duty to represent client within bounds of law

A lawyer has a duty to represent the client zealously, but the representation must be within the bounds of law (which includes disciplinary rules and enforceable professional obligations). See *Hawk v Superior Court* (1974) 42 CA3d 108, 126, 116 CR 713. See also Bus & P C §6068(a), (c)-(d); Cal Rules of Prof Cond 3-700(B)-(C), 5-200.

**When to withdraw.** A lawyer must withdraw from representing a client if the lawyer knows or should know that the client is (Cal Rules of Prof Cond 3-700(B)):

- Bringing a legal action, conducting a defense, asserting a position in litigation, or otherwise taking steps solely to harass or maliciously injure a person or solely out of spite;
- Taking or prosecuting an appeal merely for delay, or for any other reason not in good faith; or

If Rule 3-700(B) does not apply, withdrawal is permissible under Cal Rules of Prof Cond 3-700(C) if 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 an extension, modification, or reversal of existing law";
- Seeks to pursue an illegal course of conduct; or
- Insists that the lawyer pursue an illegal course of conduct or prohibited conduct under the California Rules of Professional Conduct or the State Bar Act

Withdrawal is also permissible under Cal Rules of Prof Cond 3-700(B)-(C) if the lawyer's continued employment is likely to result in a violation of the California Rules of Professional Conduct or the State Bar Act.

**Further research:** On the lawyer's obligations and procedure to follow when confronted with potential or actual perjury by the client or a witness for the client, see *People v Brown* (1988) 203 CA3d 1335, 1339, 250 CR 762. See *People v Guzman* (1988) 45 C3d 915, 941, 248 CR 467, overruled in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409, for the procedure of allowing narrative testimony by a client who wants to commit perjury against counsel's advice in a criminal case. See also chap 5 on preparing witnesses for trial and chap 11 on examining witnesses.

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### §16.38 4. When attorney is witness for client

Attempting to be both advocate and witness impairs an attorney's credibility as witness and diminishes the attorney's effectiveness as advocate. *Comden v Superior Court* (1978) 20 C3d 906, 912, 145 CR 9. In *Comden,* the supreme court interpreted former Cal Rules of Prof Cond 2-111(A)(4) and concluded that the trial court had not abused its discretion in ordering withdrawal of a law firm from representing plaintiffs after it was determined that a member of the firm ought to be called as a witness for plaintiffs at trial.

After the decision in *Comden,* former Cal Rules of Prof Cond 2-111 (now Rule 5-210), was adopted to provide standards for the advocate-witness. If a client's lawyer knows on or after undertaking employment, that it may be necessary to testify on the client's behalf before a jury concerning the subject matter of the employment, the lawyer may continue to represent the client with the client's written consent. Cal Rules of Prof Cond 5-210.

The fact that a lawyer may conceivably be a witness is not dispositive of whether the lawyer will be or should be disqualified. *Smith, Smith & Kring v Superior Court* (1997) 60 CA4th 573, 580, 70 CR2d 507 (lawyer who had represented defendant in underlying case now represented plaintiff's former lawyer in malpractice action; no factual showing that lawyer would be witness; further, being party adverse to plaintiff in both cases fails to show detriment to plaintiff).

**EXAMPLE:** In *Reynolds v Superior Court* (1986) 177 CA3d 1021, 223 CR 258, the court held that the trial court may disqualify counsel under former Cal Rules of Prof Cond 2-111(A)(4) only when it is confronted with manifest interests that it must protect from prejudice. Citing *Lyle v Superior Court* (1981) 122 CA3d 470, 175 CR 918, the court held that when attorneys for a party in a pending proceeding are key witnesses in the litigation and thus subject to disqualification under former Rule 2-111(A)(4), the client's consent to the dual capacity must be given great weight. The court found that the trial court should resolve a close case in favor of the client's right to representation by the attorney of the client's choice. The trial court must also determine whether the proposed testimony by counsel is really necessary or relevant. The appellate court thus held that the trial court erred in granting an attorney's motion to disqualify a former client's current counsel from representing her in an action brought by the attorney to recover fees for work performed in a will contest. The attorney had withdrawn as counsel and had been replaced by current counsel, whom the attorney intended to call as a key witness.

Disqualification may not be warranted when there is no prejudice to the client. In *Brown v DeRugeris* (1979) 92 CA3d 895, 155 CR 301, the court held that the trial court did not commit error by not disqualifying defendant's attorney, who was called as a witness under Evid C §776 and whose testimony did not prejudice the client. See also *Graphic Process Co. v Superior Court* (1979) 95 CA3d 43, 156 CR 841 (disqualification denied in absence of showing that client would be prejudiced by trial counsel's testimony).

**Further research:** See chap 11 on examining witnesses.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/16 Misconduct of Counsel and Court/ §16.39 a. When written consent required

### §16.39 a. When written consent required

Written consent must be obtained after the client (see Cal Rules of Prof Cond 5-210):

- Has been fully advised of the possible effects of the dual role as to the outcome of the client's case; and
- Has had a reasonable opportunity to seek the advice of independent counsel on the matter.

**PRACTICE TIP:** File written consent no later than the beginning of trial.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/16 Misconduct of Counsel and Court/ §16.40 b. When written consent not required

### §16.40 b. When written consent not required

Written consent is not required if the lawyer's testimony relates solely to the following (Cal Rules of Prof Cond 5-210):

- An uncontested matter; or
- The nature and value of legal services rendered in the case.

When a lawyer represents a governmental entity, consent must be obtained from the head of the office (or designee) by which the lawyer is employed and must be consistent with the principles of recusal. Cal Rules of Prof Cond 5-210.

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### §16.41 5. Representing multiple parties

A conflict of interest may occur when a lawyer is asked to represent two parties in the course of litigation. For example, a conflict may arise when:

- An employer and employee disagree over whether the employer ratified the employee's conduct, or whether the employee acted in the course and scope of employment;
- Unnamed partners in a partnership disagree with a named defendant partner; or
- In a comparative fault setting, a father must be named as a defendant regarding his son's injuries in an automobile accident.

Counsel owes a duty to maintain clients' confidence and preserve their secrets. Bus & P C §6068(e); see Cal Rules of Prof Cond 3-310 (avoiding representation of adverse interests). For example, Cal Rules of Prof Cond 3-310(E) prohibits a lawyer from accepting employment adverse to a client or former client without that client's informed and written consent when the lawyer has obtained confidential information material to the employment; Cal Rules of Prof Cond 3-310(B) prohibits an attorney from representing conflicting interests except with the written consent of all parties concerned. See, *e.g., Cal W. Nurseries v Superior Court* (2005) 129 CA4th 1170, 29 CR3d 170 (law firm disqualified because it represented adverse party in another, unrelated matter). In *Apple Computer, Inc. v Superior Court* (2005) 126 CA4th 1253, 24 CR3d 818, a law firm was disqualified as class counsel because a member of the firm was a class representative (plaintiff and his firm's financial interest in recovering attorney fees conflicted with their duty to maximize class's recovery).

When there is an actual, present, simultaneous representation, a more stringent test for disqualification applies. *In re Charlisse C.* (2008) 45 C4th 145, 159, 84 CR3d 597.

**EXAMPLE:** In *Truck Ins. Exch. v Fireman's Fund Ins. Co.* (1992) 6 CA4th 1050, 8 CR2d 228, Cal Rules of Prof Cond 3-310 was strictly construed. The court held that a law firm may not avoid per se automatic disqualification when it concurrently represents clients whose interests conflict by withdrawing from representation of one client in favor of the other. The court distinguished between rules applying to former representation and to concurrent representation. The duty of undivided loyalty owed to each client currently represented causes disqualification, absent the informed written consent from each client whose interests were in conflict.

A conflict of interest may arise whenever a lawyer's representation of one jointly represented client renders representation of the other less effective. See *Spindle v Chubb/Pacific Indem. Group* (1979) 89 CA3d 706, 713, 152 CR 776. In *Spindle,* the court distinguished a "divergence of interest" between jointly represented clients from a "conflict of interest" between them. The court noted that a divergence of interest is not an actionable impropriety, but counsel must disclose to each of the jointly represented clients whatever is necessary for them to make intelligent, informed decisions.

Conflicts may also occur when one client pays for the representation of another client; for example, when a corporation pays for the defense of its employee, when an insurance company pays for the defense of its insured, or when a parent pays for the defense of a child. An attorney must avoid any adverse influence from the party paying the attorney fees and exercise independent judgment on behalf of the client whom the attorney represents. See generally *Lysick v Walcom* (1968) 258 CA2d 136, 65 CR 406; *Pennix v Winton* (1943) 61 CA2d 761, 143 P2d 940. See also *Morrison Knudsen Corp. v Hancock, Rothert & Bunshoft, LLP* (1999) 69 CA4th 223, 81 CR2d 425 (representing insurance underwriters of parent corporation in matters involving parent corporation disqualifies firm from representing party adverse to subsidiary when firm received information substantially related to dispute involving subsidiary and parent and subsidiary had sufficient unity of interest to treat them as one entity for purposes of alleged conflict). But see *Brooklyn Navy Yard Cogeneration Partners v Superior Court* (1997) 60 CA4th 248, 252, 70 CR2d 419 (representation of subsidiary corporation on unrelated matters not per se conflict to representing party adverse to parent unless one corporation is alter ego of other). See also *Federal Home Loan Mortgage Corp. v La Conchita Ranch Co.* (1998) 68

CA4th 856, 80 CR2d 634 (party may not create conflict when none exists merely by filing meritless cross-complaint seeking to make interests of opposing attorney's clients adverse to one another); *Forrest v Baeza* (1997) 58 CA4th 65, 79, 67 CR2d 857 (joint representation of two shareholders of closely held corporation not per se disqualification, when actions of shareholders and corporations so intertwined that any distinction was fictional).

**Further research:** On conflicts of interest in an insurance context, see *Certain Underwriters at Lloyd's, London, v Argonaut Ins. Co.* (ND Cal 2003) 264 F Supp 2d 914; *Dynamic Concepts, Inc. v Truck Ins. Exch.* (1998) 61 CA4th 999, 71 CR2d 882; *Foremost Ins. Co. v Wilks* (1988) 206 CA3d 251, 253 CR 596; *Bogard v Employers Cas. Co.* (1985) 164 CA3d 602, 210 CR 578; *San Diego Navy Fed. Credit Union v Cumis Ins. Soc'y* (1984) 162 CA3d 358, 208 CR 494. See California Civil Procedure Before Trial, chap 2 (4th ed Cal CEB 2004).

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### §16.42 6. Representing client with interests adverse to former client's interests

When an attorney represents a client with interests adverse to those of a former client, disqualification requires a substantial relationship between the former and current representation, so that the attorney would normally have received, through the former representation, confidential information that is material to the current dispute. See *Marriage of Zimmerman* (1993) 16 CA4th 556, 20 CR2d 132; *H. F. Ahmanson & Co. v Salomon Bros.* (1991) 229 CA3d 1445, 280 CR 614.

A former client may seek to disqualify a former attorney as well as the former attorney's new law firm from representation when a substantial relationship exists between the former and current representation. Cal Rules of Prof Cond 3-310(E); *Ochoa v Fordel, Inc.* (2007) 146 CA4th 898, 907, 53 CR3d 277; *City Nat'l Bank v Adams* (2002) 96 CA4th 315, 117 CR2d 125; *Henriksen v Great Am. Sav. & Loan* (1992) 11 CA4th 109, 14 CR2d 184.

**EXAMPLE 1:** The court in *Henriksen* held that a law firm could not continue to represent a client when, during pending litigation, it hired an associate who formerly represented the adverse party in the same proceeding. The associate's disqualification resulted in the law firm's vicarious disqualification, even though the law firm took careful steps to insulate the new associate from any involvement in the current litigation.

**EXAMPLE 2:** In the public sector context, in *City of Santa Barbara v Superior Court* (2004) 122 CA4th 17, 23, 18 CR3d 403, vicarious disqualification of an entire city attorney's office was not required when a private firm attorney who worked on a particular case against the city moved to the city attorney's office but was not involved in the case, had no managerial duties, and an ethical wall was constructed to prevent disclosure of confidential information. The California Supreme Court reached the opposite conclusion in *City & County of San Francisco v Cobra Solutions, Inc.* (2006) 38 C4th 839, 848, 43 CR3d 771. There, the city was in litigation with a company that the city attorney had previously represented while in private practice, and the litigation was substantially related to the prior representation. Under the circumstances, 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 the head of the government law office, the city attorney's entire office had to be disqualified. See also *In re Charlisse C.* (2008) 45 C4th 145, 160, 84 CR3d 597 (affirming reversal of order that disqualified nonprofit law center from representing minor in dependency action because different unit of law center had previously represented minor's mother).

**EXAMPLE 3:** In the criminal arena, the court in *Rhaburn v Superior Court* (2006) 140 CA4th 1566, 45 CR3d 464, concluded the trial court erred by applying a rigid vicarious disqualification rule to situations involving the public defender's office that had previously represented a witness for the prosecution in one case and the victim in another. The court held that because trial counsel did not have a "direct and personal relationship" with the witness (or the victim), the "*direct* acquisition of confidential information need not (and should not) be presumed." 140 CA4th at 1581 (emphasis in original). Under *Rhaburn*'s flexible approach, courts "should evaluate the totality of the circumstances" to determine "whether there is a reasonable possibility that … confidential information" has been obtained. 140 CA4th at 1581. The court identified several factors to be considered, including "the length of time that has elapsed" since the prior representation. 140 CA4th at 1581.

An attorney armed with confidential information who switches sides while litigation is pending may cause the disqualification of the entire new law firm because of the need to maintain the high ethical standards of professional responsibility. See *In re Complex Asbestos Litig.* (1991) 232 CA3d 572, 283 CR 732 (firm disqualified from nine cases, but not from another 11 cases pending in another county). This rule is limited to the receipt of attorney-client information with respect to the prior client, not information gained from other litigation sources, *e.g.,* the subsequent client. *Strasbourger Pearson Tulcin Wolff Inc. v Wiz Technol., Inc.* (1999) 69 CA4th 1399, 1410, 82 CR2d 326.

**Further research:** See California Civil Procedure Before Trial, chap 2 (4th ed Cal CEB 2004).

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## §16.43 7. Avoid emotional involvement

An attorney should avoid any emotional involvement in the client's case that impairs objectivity. An attorney who becomes emotionally involved may become a combatant and no longer see issues objectively or serve the client dispassionately as a counselor. See Bus & P C §6106.8, which prohibits sexual involvement between lawyers and clients.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/16 Misconduct of Counsel and Court/ E. Ethical conduct toward jury/ 1. Communication with or investigation of jurors prohibited/§16.44 a. Before trial

## E. Ethical conduct toward jury

### 1. Communication with or investigation of jurors prohibited

### §16.44 a. Before trial

Before trial of a case, an attorney may not communicate directly or indirectly with anyone known to be a member of the panel from which the jury will be selected. Cal Rules of Prof Cond 5-320(A).

Although a background investigation of the prospective panel is not expressly prohibited by the California Rules of Professional Conduct, an attorney may not directly or indirectly conduct an out-of-court investigation of a juror or a prospective juror in a manner likely to influence that person in present or future jury service. Cal Rules of Prof Cond 5-320(E). All restrictions imposed on an attorney by Cal Rules of Prof Cond 5-320 also apply to communications with or investigations of members of the family of anyone who is either a prospective juror or an actual juror. Cal Rules of Prof Cond 5-320(B).

**NOTE:** If jurors are permitted to separate either during the trial or after the case is submitted to them, the judge must warn them that they may not converse with, or be addressed by, another person on any subject of the trial, or express an opinion about the case until it is finally submitted to them. CCP §611. See §§17.3, 17.6, 21.11.

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### §16.45 b. After trial

After trial, communications with members of the jury are permitted, but an attorney may not ask questions or make comments intended to harass or embarrass jurors or to influence their actions in future jury service. Cal Rules of Prof Cond 5-320(D).

**NOTE:** Attorneys may not provide information to jurors that they were prevented from knowing during the trial.

Trial lawyers often discuss jurors' impressions of the trial with jurors willing to do so after trial. This discussion should remain on a professional level and avoid any adverse comments on the jury's reasoning or results.

**EXAMPLE:** In *Lind v Medevac, Inc.* (1990) 219 CA3d 516, 521, 268 CR 359, the prevailing counsel wrote to the jurors after the trial to discourage them from talking to plaintiff's counsel. The court held that, because prevailing counsel's intention was to chill any attempt to find evidence of jury misconduct, the letter violated former Cal Rules of Prof Cond 7-106 (now Rule 5-320).

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### §16.46 2. Avoid undue solicitude for jurors

It is improper for a trial attorney to curry favor with jurors by undue solicitude for their comfort. For example, during trial it can be improper to discuss in the jury's presence the length of each trial session or the time or place of the jury's retiring. See *Atchison, T. & S.F. Ry. v Southern Pac. Co.* (1936) 13 CA2d 505, 509, 57 P2d 575, disapproved on other grounds in *Klopping v Whittier* (1972) 8 C3d 39, 49, 104 CR 1, and *County of Los Angeles v Faus* (1957) 48 C2d 672, 680, 312 P2d 680.

An attorney who has questions about the length of a trial session or the jury's comfort should discuss the matter out of the jurors' presence, *e.g.,* in the judge's chambers. See also Cal Rules of Ct, Standards of J Admin 3.25(f), which provides that the trial judge should not permit counsel during voir dire examination to question the jurors about their comfort, except in unusual circumstances, to ensure the selection of a fair and impartial jury.

**Further research:** For other examples of improper attempts to influence the jury, see *Whitfield v Roth* (1974) 10 C3d 874, 890, 112 CR 540 (candy and cigars given to jurors when attorney's wife gave birth); *Neumann v Bishop* (1976) 59 CA3d 451, 473, 130 CR 786 (individual jurors addressed by name during argument).

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### §16.47 3. Report juror misconduct

A lawyer must reveal promptly to the court any knowledge of improper conduct by a juror or prospective juror, or by another person toward a prospective juror, a juror, or a member of the juror's family. Cal Rules of Prof Cond 5-320(G).

**PRACTICE TIP:** Bring any such knowledge promptly to the trial judge's attention, with a court reporter present to make a record. The court then can conduct whatever investigation is considered necessary.

Failure to report knowledge of improper conduct may constitute a waiver of any claimed error on appeal. See generally *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 103, 95 CR 516. For further discussion, see §16.82.

**Further research:** On jury management and misconduct, see §§25.22-25.71.

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## F. Ethical conduct toward witnesses

### 1. Compensation of lay and expert witnesses

### §16.48 a. Compensation must not depend on outcome of trial

An agreement to pay a lay or expert witness a fee contingent on the outcome of a lawsuit is void as against public policy. *Pelkey v Hodge* (1931) 112 CA 424, 296 P 908. See Cal Rules of Prof Cond 5-310(B). A contract of this kind offers an inducement to perjury. *Pelkey v Hodge, supra*. Make clear that compensation paid to a lay or expert witness and the witness's testimony are unrelated. See Los Angeles County Bar Ass'n Informal Ethical Opinion No. 1954-6.

**EXAMPLE:** In *Ojeda v Sharp Cabrillo Hosp.* (1992) 8 CA4th 1, 10 CR2d 230, a plaintiff in a medical malpractice case validly contracted with a consulting service to assist the plaintiff's counsel in return for a 20-percent contingency fee from the plaintiff's recovery. The court ruled the agreement did not violate public policy or any rule of conduct and approved a contingency fee to a consulting firm that helped review medical records and obtain expert witnesses. The consulting firm members were not going to testify and did not engage in the practice of law, and counsel retained complete control of the litigation.

**Further research:** For an opinion discussing the professional responsibility of state bar members to see that contingent fees are not paid for the testimony of witnesses, see State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 84-79.

**NOTE:** A plaintiff's attorney cannot be disqualified for hiring the former consultant of defense counsel when the consultant had not received any confidential information from the defense counsel. *Toyota Motor Sales, U.S.A., Inc. v Superior Court* (1996) 46 CA4th 778, 54 CR2d 22.

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### §16.49 b. Reasonable fees and expenses allowed

A witness legally required to attend a civil trial or proceeding is entitled to $35 per day for each day of actual attendance plus 20 cents per mile for mileage traveled both ways. Govt C §68093. A lay witness may be compensated over the statutory amount for any loss of wages and for reasonable expenses incurred, *e.g.,* transportation costs to and from the place of trial and some or all meals away from home. See generally Cal Rules of Prof Cond 5-310(B). Liberal cross-examination concerning this compensation may be permitted. See *Crutchfield v Davidson Brick Co.* (1942) 55 CA2d 34, 130 P2d 183.

An expert witness is entitled to a reasonable fee for professional services. Cal Rules of Prof Cond 5-310(B)(3). The amount of an expert's compensation should be agreed on in advance, to avoid a misunderstanding. Obtain the client's written permission to advance the expert witness fees. Without an express contract between a party and an expert concerning the expert's compensation, the court may fix the compensation under Govt C §68092.5.

A party requiring the testimony of a nonparty expert (or an expert who is not an employee of a party) must pay the reasonable and customary hourly or daily fee for the actual time the witness is examined by any party attending the action or proceeding, not to exceed the fee charged the party who retained the expert, unless the expert donated the services to a nonprofit organization. Govt C §68092.5(a). The court can set the fee for the expert if it determines that the fee demanded by the expert is unreasonable. Govt C §68092.5(c).

Counsel may (except when prohibited by law) advance, guarantee, or acquiesce in payment of the following (Cal Rules of Prof Cond 5-310(B)):

- Expenses that the witness reasonably incurred in attending or testifying,
- Reasonable compensation for the witness's lost time in attending or testifying, and
- A reasonable fee for an expert witness's professional services.

**Further research:** On client's liability for costs generally, see Cal Rules of Prof Cond 4-210. For further discussion of witness compensation, see §§4.40-4.44. See also California Expert Witness Guide (2d ed Cal CEB 1991); Handling Expert Witnesses in California Courts (Cal CEB Action Guide May 2008).

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## §16.50 2. Suppression of evidence or hiding of witnesses prohibited

A lawyer may not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce. Cal Rules of Prof Cond 5-220. Nor may a lawyer advise, or directly or indirectly cause, "a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein." Cal Rules of Prof Cond 5-310(A). See also Pen C §§135, 136.1.

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### §16.51 3. Prepare witnesses to testify at trial

It is acceptable practice to meet with a witness to prepare the witness to testify at trial.

**PRACTICE TIP:** Opposing counsel may try to catch a witness off guard during trial by asking whether the witness has discussed the case with counsel to insinuate improper coaching of a witness. Anticipate this question, and tell each witness that meeting with you in preparation for trial is proper. Advise each witness to testify truthfully about previous discussions of the case with counsel. On witness preparation generally, see chap 5.

An attorney may communicate freely with unrepresented former employees and with unrepresented current employees (other than officers, directors, or managing agents) if the communication does not involve the employee's act or failure to act in connection with the matter that may bind the corporation, be imputed to it, or constitute an admission of fact by the corporation for purposes of establishing liability. Cal Rules of Prof Cond 2-100; *Triple A Mach. Shop v State* (1989) 213 CA3d 131, 140, 261 CR 493. See also *Continental Ins. Co. v Superior Court* (1995) 32 CA4th 94, 37 CR2d 843 (no ethical violation for making contact with two former nonmanagerial employees of corporation, even though there were potential misrepresentations of interrogating lawyer's role in litigation); *Nalian Truck Lines v Nakano Warehouse & Transp. Corp.* (1992) 6 CA4th 1256, 8 CR2d 467 (Rule 2-100's prohibition of contact with employees applies only to persons employed at time of communication).

**EXAMPLE:** In *Bobele v Superior Court* (1988) 199 CA3d 708, 713, 245 CR 144, the court held that the prohibition of former Cal Rules of Prof Cond 7-103 (now Rule 2-100), extends to all employees of a corporation and to former employees who may be current members of the control group that directs the corporation's actions. The court observed that counsel may contact other former employees about facts but not about any privileged communications.

Nothing in Rule 2-100 precludes the parties themselves from communicating with respect to the case. It may be inadvisable, but it is not prohibited. An attorney is not prohibited from communicating with a public officer, board, or committee of a governmental entity. Cal Rules of Prof Cond 2-100(C)(1).

**NOTE:** A lawyer may communicate with a party who is no longer represented by counsel, but at one time did have such representation. *Jackson v Ingersoll-Rand Co.* (1996) 42 CA4th 1163, 1168, 50 CR2d 66.

**Further research:** On prohibition against communicating with party represented by counsel without counsel's express consent, see Cal Rules of Prof Cond 2-100. Note also State Bar Formal Opinion No. 1975-33, adopted by the Committee on Professional Ethics of the State Bar of California, concerning the propriety of defense counsel's communication with plaintiff's physician in pending personal injury action. See Anno, *Right of Attorneys to Conduct Ex Parte Interview with Corporate Party's Non-Management Employees*, 50 ALR4th 652 (1986).

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## §16.52 4. Treatment of opposing witnesses

It is an attorney's duty not to advance a fact prejudicial to the honor or reputation of a party or witness, except as required by the merits of the case. Bus & P C §6068(f). An attorney may not ask a witness questions solely intended to gratify the client's personal ill feelings that are prejudicial to the honor or reputation of a party or witness. See *People v Wyatt* (1909) 11 CA 120, 104 P 12.

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## V. GUIDELINES FOR ETHICAL JUDICIAL CONDUCT

### §16.53 A. Code of Judicial Conduct

The Code of Judicial Ethics contains many ethical standards to guide justices and judges of California courts. For the history of the Code of Judicial Conduct, see *Adams v Commission on Judicial Performance* (1994) 8 C4th 630, 34 CR2d 641; *Kloepfer v Commission on Judicial Performance* (1989) 49 C3d 826, 838 n6, 264 CR 100.

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## §16.54 B. General guidelines in Code of Judicial Conduct

The Code of Judicial Ethics is comprised of six canons that set forth standards of ethical conduct for judges on and off the bench and for candidates for judicial office.

For example, Code of Judicial Ethics, Canon 3B provides that a judge shall:

- Be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law (Code of Judicial Ethics, Canon 3B(2));
- Require order and decorum in proceedings before the judge (Code of Judicial Ethics, Canon 3B(3));
- Be patient, dignified, and courteous to litigants, lawyers, witnesses, jurors, and others with whom the judge deals in an official capacity, and require similar conduct of lawyers and others subject to the judge's direction and control (Code of Judicial Ethics, Canon 3B(4));
- Accord every person legally interested in the proceeding, or the person's attorney, full right to be heard according to law (Code of Judicial Ethics, Canon 3B(7));
- Require lawyers to refrain from manifesting by words or conduct any bias based on race, sex, religion, disability, national origin, age, sexual orientation, or socioeconomic status against parties, witnesses, counsel, or others (Code of Judicial Ethics, Canon 3B(6));
- Initiate or consider ex parte or other communications concerning a pending or impending proceeding only when expressly authorized by law (Code of Judicial Ethics, Canon 3B(7)); and
- Promptly, efficiently and fairly dispose of the court's business, and manage the courtroom to provide litigants the opportunity to have their matters fairly adjudicated (Code of Judicial Ethics, Canon 3B(8)).

Code of Judicial Ethics, Canon 3E(4) also provides that judges should disqualify themselves in a proceeding when their impartiality reasonably might be questioned, or as otherwise required by law.

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### §16.55 C. Judge may obtain expert's advice on the law

Under Code of Judicial Ethics, Canon 3B(7)(a), a judge may obtain a disinterested expert's advice on the law applicable to a proceeding if the judge:

- Gives notice to each party of the person consulted and the substance of the advice, and
- Gives each party a reasonable opportunity to respond.

The Commentary to Code of Judicial Ethics, Canon 3B(7)(a) indicates that the court may obtain the advice of a disinterested expert on legal issues by inviting the expert to file an amicus curiae brief. On a judge committing judicial misconduct by receiving evidence while court is not in session, see §16.67.

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### §16.56 D. Conduct regarding public comments

A judge should not publicly comment on a pending or impending court proceeding in any court and should require court personnel under the judge's control to do the same. Code of Judicial Ethics, Canon 3B(9); *Broadman v Commission on Judicial Performance* (1998) 18 C4th 1079, 1100-1105, 77 CR2d 408 (giving magazine interviews defending decision judge made is misconduct). A judge, however, is not prohibited from making public statements during official duty or from explaining court procedures for public information.

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### §16.57 E. If judge becomes aware of unprofessional conduct

Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, the judge is required to take corrective action. Code of Judicial Ethics, Canon 3D(1). This action may include direct communication with the judge who has committed the violation or a report of the violation to the presiding judge or other appropriate authority. Commentary to Code of Judicial Ethics, Canon 3D.

A court that orders reversal of a judgment based in part or in whole on misconduct, incompetent representation, or willful misrepresentation by counsel must report the matter to the California State Bar to determine whether disciplinary action should be taken. Bus & P C §6086.7. The court must also notify the attorney that the matter has been referred to the state bar for investigation. Bus & P C §6086.7.

The trial court must report to the state bar any judgment against an attorney for fraud, misrepresentation, breach of fiduciary duty, or gross negligence. Bus & P C §6086.8.

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### §16.58 F. Judge's control over course of trial

A judge has broad latitude over the course of a trial, including the conduct of parties and witnesses. See, *e.g.,* Evid C §765. A judge can properly:

- Admonish a witness not to evade a question;
- Ask witnesses questions to explain ambiguous testimony (see generally 3 Witkin, California Evidence, *Presentation at Trial* §§80-81 (4th ed 2000);
- Rebuke an attorney for wrongful accusations against opposing counsel (see §16.28); and
- Maintain courtroom decorum by requiring everyone to remain orderly and quiet.

A judge is not merely a referee between counsel (see *Engineering Servs. Corp. v Longridge Inv. Co.* (1957) 153 CA2d 404, 417, 314 P2d 563), but is charged with eliciting all pertinent facts without undue waste of time. To carry out this duty, a judge may interfere with an attorney whose methods are intentionally or unintentionally dilatory. See *Engineering Servs. Corp. v Longridge Inv. Co., supra*. On prohibition against judge arbitrarily ordering counsel to be seated during examination of witnesses, see *Curran v Superior Court* (1925) 72 CA 258, 265, 236 P 975. But see *Hallinan v Superior Court* (1925) 74 CA 420, 240 P 788, in which the court limited *Curran* to its own facts. *Curran* could not be cited as authority concerning the court's power to limit argument on an objection.

**Further Research:** For further discussion of the judge's ability to impose time limits in a trial, see §1.36.

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### §16.59 G. When judge is trier of fact

When sitting as the trier of fact, the trial judge takes the place of the jury and is subject to the same rules of conduct. One of these rules is to refrain from forming or expressing an opinion about the case before it is submitted to the trier of fact. *Martin v Martin* (1947) 79 CA2d 409, 410, 179 P2d 655. See *Gary v Avery* (1960) 178 CA2d 574, 579, 3 CR 20, in which the court noted that the judge's duty differs from that of jurors with regard to expressing an opinion on any subject of the case before its submission. To have a fair trial, the judge must often express conclusions to advise counsel on how to proceed. Although these expressions might indicate that the judge has a closed mind, this inference cannot always be drawn. 178 CA2d at 579.

When there is direct conflict in the testimony of only two witnesses to the paramount fact at issue, the judge may advise the jury that one witness committed perjury as long as the jury determines the guilty party. *Pomerantz v Bryan Motors, Inc.* (1949) 92 CA2d 114, 119, 206 P2d 440. See also *Kahn v Commercial Union Fire Ins. Co.* (1936) 16 CA2d 42, 60 P2d 177 (comment that certain evidence seems very weak).

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### §16.60 H. Admonishing counsel allowed

To maintain orderly trial procedure and determine justice, a judge may admonish counsel not to interrupt the witnesses before their answers are complete. *Estate of Dupont* (1943) 60 CA2d 276, 289, 140 P2d 866.

A judge may also rebuke counsel for improper remarks regarding opposing counsel. *Tingley v Times Mirror Co.* (1907) 151 C 1, 20, 89 P 1097. In *Hickambottom v Cooper Transp. Co.* (1960) 186 CA2d 479, 485, 9 CR 276, the trial judge's comments directed to plaintiff's counsel during trial were considered to be proper when there had been constant bickering between counsel, constant argument by plaintiff's counsel after the court had made its rulings, and persistent disregard of admonitions by the court to prevent misconduct by counsel. The court noted that the trial court's purpose was to ensure that proper evidence was elicited, and that the trial was conducted with decorum. 186 CA2d at 486.

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## §16.61 I. Commenting on omissions and defects

A judge has a duty to see that the parties receive a fair trial on the merits of the case. *Hoel v City of Los Angeles* (1955) 136 CA2d 295, 307, 288 P2d 989; *Dastagir v Dastagir* (1952) 109 CA2d 809, 816, 241 P2d 656. Thus, it is proper for a judge to call attention to omissions in the evidence or defects in the pleadings that are likely to result in a decision other than on the merits. *Lombardi v Citizens Nat'l Trust & Sav. Bank* (1955) 137 CA2d 206, 209, 289 P2d 823; *Farrar v Farrar* (1919) 41 CA 452, 457, 182 P 989.

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### §16.62 J. Calling or examining witnesses

A trial judge has the power to exercise reasonable control over the mode of interrogation of witnesses (Evid C §765):

- To make the interrogation as rapid, distinct, and effective in determining the truth as possible; and
- To protect witnesses from undue harassment or embarrassment.

A trial judge also has the inherent power to examine witnesses in order to elicit or clarify testimony. *McCartney v Commission on Judicial Qualifications* (1974) 12 C3d 512, 533, 116 CR 260. "The judge's function as presiding officer is preeminently to act impartially." *Cooper v Superior Court* (1961) 55 C2d 291, 301, 10 CR 842. When examining witnesses, a judge may not become an advocate for a party or cast aspersions on or ridicule a witness. *McCartney v Commission on Judicial Qualifications, supra*. Nor may the judge engage in "fatherly" (*i.e.,* gender-biased) questioning. *Catchpole v Brannon* (1995) 36 CA4th 237, 42 CR2d 440. See §16.64. It is not misconduct for the trial judge to ask an expert witness pointed questions, even though the effect may be to benefit one of the parties. *People v Hawkins* (1995) 10 C4th 920, 947, 42 CR2d 636, overruled on other grounds in *People v Blakely* (2000) 23 C4th 82, 89, 96 CR2d 451.

A trial judge also has the power to call witnesses on the judge's own motion and examine them as if they had been called by a party to the action. Evid C §775. This power must be exercised impartially. A judge who shows partiality or bias in calling and examining witnesses is guilty of misconduct. Comment to Evid C §775. See §16.64.

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### §16.63 K. Attempting to settle case

A trial judge may attempt to effect a settlement of a case before trial, make appropriate comments in a settlement context and then later try the case to a jury. A judge's comments in discharging a duty to resolve a case do not necessarily indicate a bias that would prevent the judge's impartiality at trial. *Garcia v Estate of Norton* (1986) 183 CA3d 413, 422, 228 CR 108.

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### §16.64 L. Commenting on evidence

A trial judge may comment on the evidence, the testimony, and the credibility of any witness that in the judge's opinion is necessary for the proper determination of the case. Cal Const art VI, §10. If analyzing testimony or discussing the credibility of witnesses, the judge may discuss only a portion of the evidence or the credibility of one witness. See *People v Friend* (1958) 50 C2d 570, 577, 327 P2d 97, overruled on other grounds in *People v Cook* (1983) 33 C3d 400, 413 n13, 189 CR 159, in which the court noted that a judge's comments should be temperate and fair rather than argumentative or contentious to a degree amounting to partisan advocacy. The court also noted that the judge should make clear that the judge's views are not binding, but advisory only.

A California judge rarely comments on the evidence; but if commenting, the judge must inform the jurors that *they* are the exclusive judges of all questions of fact and of the witnesses' credibility. CCP §608; *Schnear v Boldrey* (1971) 22 CA3d 478, 483, 99 CR 404. The judge may not withdraw evidence from the jurors' consideration or distort testimony. 22 CA3d at 483.

The trial court has broad latitude to comment on the evidence if the trial court does not effectively control the verdict. *People v Rodriguez* (1986) 42 C3d 730, 230 CR 667 (supreme court held that trial court did not err in commenting on evidence in supplemental charge after jury announced it was deadlocked). In commenting on the evidence, a judge is not confined to a colorless recital of the evidence. *Schnear v Boldrey, supra*.

The judge must keep an open mind until after hearing all the evidence. In *People v Rigney* (1961) 55 C2d 236, 241, 10 CR 625, the court discussed CCP §611 and noted that a judge must not defeat its purpose by commenting on the evidence during trial.

**EXAMPLE 1:** An example of improper comment on the evidence by the trial judge can be found in *Lewis v Bill Robertson & Sons, Inc.* (1984) 162 CA3d 650, 208 CR 699, in which the court reversed a jury verdict on the ground of judicial misconduct for commenting on the evidence, even though the trial judge had interspersed his comments with reminders that the jury was the sole judge of the facts and that the trial judge's opinions were not binding. The key issue was whether any defect in the premises had caused appellant's accident. After argument had concluded, the judge told the jury that in his opinion any defect in the property was unrelated to plaintiff's fall. In holding that the judge had committed judicial misconduct, the court noted that the judge not only commented on the crucial issue of proximate cause, but distorted testimony and engaged in partisan advocacy.

A judge may express an opinion on negligence if the comment is appropriate and fair. *Clark v Laughlin* (1977) 68 CA3d 506, 513, 137 CR 354.

**EXAMPLE 2:** In *Clark,* an action for malpractice against an orthodontist, the court held that the judge was allowed to express a fair opinion on negligence and comment on portions of testimony without summing up both favorable and unfavorable evidence. The court also noted that, even if the trial judge's comment was improper, the verdict was supported by such a preponderance of substantial evidence that no miscarriage of justice or reversible error occurred.

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## §16.65 M. Commenting on a privilege

A judge (or counsel) is prohibited from commenting on the exercise of a privilege, and the trier of fact may not draw any inference from the witness's exercise of the privilege concerning the witness's credibility or any matter at issue in the proceeding. Evid C §913. Inferences may be drawn only from the evidence in the case and a party's failure to explain or deny the evidence. See generally Comment to Evid C §913.

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## VI. ATTORNEY MISCONDUCT

### §16.66 A. What constitutes misconduct

Misconduct has been defined to be "a dishonest act or an attempt to persuade the court or the jury by the use of deception or reprehensible methods." *People v Rhinehart* (1973) 9 C3d 139, 154, 107 CR 34, disapproved on other grounds in *People v Bolton* (1979) 23 C3d 208, 213, 152 CR 141. See also *People v Jenkins* (1974) 40 CA3d 1054, 1057, 115 CR 622. A showing of bad faith is not necessarily required to establish misconduct. Misconduct need not be intentional to constitute reversible error. *People v Bolton* (1979) 23 C3d 208, 213, 152 CR 141.

Misconduct may occur at any stage of the trial, *e.g.,* during voir dire examination of prospective jurors, opening statement, examination of witnesses, and closing argument. Misconduct may result any time counsel goes beyond zealously representing the client and indulges in unfair advocacy. For examples of misconduct, see §§16.69-16.89. For examples of acts or omissions constituting contempt of the court's authority under CCP §1209, see §16.148.

**EXAMPLE:** In *People v Goldberg* (1984) 161 CA3d 170, 190, 207 CR 431, the court noted that a prosecutor may argue vigorously "and is not limited to 'Chesterfieldian politeness.'" The court held that a prosecutor's comment to the jury that defense counsel was "trying to get you confused about what some of the issues are" was not outside the bounds of permissible vigor. The court further noted that even if the comment was improper reversal would not be required unless prejudice under the standard enunciated in *People v Watson* (1956) 46 C2d 818, 299 P2d 243, was shown.

It is not misconduct to challenge vigorously the reasonableness of plaintiff's damage request. In *Menasco v Snyder* (1984) 157 CA3d 729, 203 CR 748, comments made by defense counsel that plaintiff's request for damages was "an incredible sum of money" and "ridiculous" did not constitute misconduct.

There is no formula to determine whether improper remarks or conduct by counsel will constitute prejudicial misconduct. This determination depends on the facts and circumstances of each case. The court takes into consideration:

- The nature and seriousness of the remarks and misconduct;
- The general trial atmosphere, including the judge's control;
- The likelihood that the jury will be prejudiced; and
- The effectiveness of an objection or admonition under the circumstances.

See *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 320, 74 CR 534. See also *Scally v PG&E* (1972) 23 CA3d 806, 814, 100 CR 501.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/16 Misconduct of Counsel and Court/ §16.67 B. Effect of misconduct

## §16.67 B. Effect of misconduct

Sometimes, the court can cure the effect of misconduct through an admonition and corrective instruction. See §16.93. Prejudicial misconduct, however, may result in the granting of a mistrial (see §16.95) or a new trial (see §16.96), or the reversal of a judgment on appeal (see §§16.97-16.98).

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### §16.68 C. Court must report misconduct

A court that orders reversal of a judgment based in whole or in part on misconduct must report the matter to the state bar to determine whether disciplinary action should be taken. Bus & P C §6086.7. Depending on the circumstances, counsel may also be held in contempt. See §§16.99-16.129. Attorneys who engage in unfair tactics may impair their credibility and adversely affect their clients' cases before the trier of fact.

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## D. Examples of misconduct

### §16.69 1. Disparaging remarks

Personal attacks by counsel on the character or motive of an adverse party, witness, or counsel constitute misconduct. *Stone v Foster* (1980) 106 CA3d 334, 355, 164 CR 901; *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1247, 1 CR2d 301. Personal attacks should be distinguished from permissible methods of attacking a witness's credibility (see §§11.114-11.124) and proper argument (see chap 19).

**EXAMPLE 1:** In *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 606, 39 CR 721, plaintiff's counsel committed misconduct by, among other things, suggesting to the jury in argument that defendant's expert witness and another defense witness had committed perjury, without any support in the record for the accusations. Some remarks by plaintiff's counsel disparaged defendant (*e.g.,* characterizing defendant as "cheap, inconsiderate[,] inhumane") and also constituted misconduct. 61 C2d at 607.

**EXAMPLE 2:** In *Love v Wolf* (1964) 226 CA2d 378, 38 CR 183, misconduct consisted of vilification and abuse of defense counsel by plaintiff's attorney throughout the trial. Plaintiff's counsel repeatedly referred to one defendant's attorney as "an idiot," a "smart guy," and a "laughing hyena." When defendants' attorney objected to an obvious improper reference concerning his client, plaintiff's counsel replied, "Can I make a statement or two without being interrupted or do I have to floor you, Mr.…?" 226 CA2d at 391. When defendants' attorney complained that he could not see a witness, plaintiff's counsel asked whether the attorney was passing signals to the witness. Counsel representing several defendants were invited by plaintiff's counsel to "step outside and do something about it." Objections they raised were characterized as "asinine" and "hogwash." They were also accused of "suborning perjury" and "sleeping together."

**EXAMPLE 3:** The court in *Simmons v Southern Pac. Transp. Co.* (1976) 62 CA3d 341, 351, 133 CR 42, cited numerous instances of misconduct, *e.g.,* statement by plaintiff's counsel to the jury, without any basis in the record, that defendants lie, cheat, steal, elicit and suggest perjury, and "when they get caught, they go, 'So what?'" The court noted that from the beginning of trial plaintiff's counsel embarked on a campaign of hate, vilification, and subterfuge solely to prejudice the jury against defendant and its employees.

**Further research:** For other examples of this type of misconduct directed toward an adverse party, see the following cases: *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 317, 74 CR 534 (repeated references to defendants as "inhuman," "heartless," and "cheapskates"); *Stone v Foster, supra* (attempts to portray defendant as evil); *Love v Wolf* (1964) 226 CA2d 378, 385, 38 CR 183 (several examples of misconduct, *e.g.,* statement by plaintiff's counsel that "there isn't a bigger con outfit in the world than [defendant]"). See also *Peacock v Levy* (1931) 114 CA 246, 299 P 790 (remarks about counsel's religious beliefs); *Walters v Evick* (1928) 93 CA 1, 268 P 1061 (reviving scandal involving attack on character of plaintiff's counsel). But see *People v Davis* (1995) 10 C4th 463, 540, 41 CR2d 826 (plaintiff's closing argument describing defense strategy as seeking "to attack and smear everybody," referring to psychiatric testimony as "the bottom-of-the-barrel defense," and characterizing defense arguments as attempting to lay a "guilt trip" on the jury, was fair comment and did not cast aspersions on integrity of defense counsel).

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### §16.70 2. Accusations of willful suppression of evidence

It is misconduct for counsel to suggest either directly or indirectly (through hints, suggestions, and insinuations), without support in the record, that an opposing party willfully suppressed evidence. See *Keena v United R.Rs.* (1925) 197 C 148, 156, 239 P 1061 (failure to call witness not willful suppression of evidence); *Weaver v Shell Co.* (1936) 13 CA2d 643, 648, 57 P2d 571 (intimation during argument of suppression of documents). See also *Gackstetter v Market St. Ry.* (1933) 130 CA 316, 325, 20 P2d 93 (implied charges during presentation of evidence that defendant attempted to suppress evidence by concealing codefendant).

Accusations of suppression of evidence, without support in the record, should be distinguished from legitimate comment on the failure to produce witnesses or other evidence without further implication of an intent to suppress facts. See Evid C §§412-413; *Neumann v Bishop* (1976) 59 CA3d 451, 480, 130 CR 786. In *Neumann,* it was held proper for plaintiff's counsel to comment in argument on defendant's failure to produce evidence to rebut (1) testimony offered by plaintiff to show that she did not violate the basic speed law, and (2) evidence showing plaintiff's loss of earnings. See *King v Karpe* (1959) 170 CA2d 344, 347, 338 P2d 979, in which a comment on defendant's failure to produce a former employee, who was an essential element in defendant's case, was held proper. See also *People v Smith* (1971) 22 CA3d 25, 32, 99 CR 171.

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### §16.71 3. Other improper comments

Commenting on an adverse party's failure to produce a witness may be improper. In general, a party has no duty to call any particular witness without a showing of special circumstances. *Neumann v Bishop* (1976) 59 CA3d 451, 481, 130 CR 786. See *Smith v Covell* (1980) 100 CA3d 947, 956, 161 CR 377, in which defense counsel commented during rebuttal argument on plaintiffs' failure to call as witnesses certain doctors who had treated one of the plaintiffs. The implication was that their testimony would have adversely affected plaintiffs' case. The doctors were equally available to subpoena by defendant had his attorney chosen to call them. The appellate court held that defense counsel's comments constituted misconduct.

Suggesting that one's clients would donate a punitive damage award to charity is misconduct. *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1247, 1 CR2d 301.

**Further research:** On commenting during argument on opposing party's failure to produce witnesses or other evidence generally, see §§16.9-16.11.

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### §16.72 4. Insinuating and improper questions and objections

Questions asked not to obtain answers but to present facts, inferences, and suggestions that cannot be supported by the record have been characterized as misconduct. See *People v Hamilton* (1963) 60 C2d 105, 116, 32 CR 4, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 648, 36 CR 201; *People ex rel Dep't of Pub. Works v Lillard* (1963) 219 CA2d 368, 380, 33 CR 189 (even though prosecutor's questions elicited negative answers, nature of questions suggested to jurors that prosecutor had source of information unknown to them that corroborated truth of matters in question).

The dilemma faced by opposing counsel in defending against insinuating tactics is described in *Dastagir v Dastagir* (1952) 109 CA2d 809, 819, 241 P2d 656:

> Unless the court promptly strikes an improper question and rebukes counsel for asking it[,] the damage is done. If opposing counsel objects and the objection is sustained[,] the jury may well speculate on what the answer would have been. If no objection is made the witness' denial still leaves the damaging implication or inference of the question in the record. In such circumstances for opposing counsel to object is generally more damaging than to permit it to be answered without an objection.

Beginning questions on cross-examination with "Do you know that…" or "Do you remember that…," as a means of bringing before the jury matters not in evidence, has been held to constitute misconduct. See *Love v Wolf* (1964) 226 CA2d 378, 390, 38 CR 183. This type of question is not designed to obtain information or test adverse testimony. Rather, it affords cross-examining counsel a device by which counsel's own unsworn statements can be heard by the jury and accepted by them as proof. *People ex rel Dep't of Pub. Works v Lillard* (1963) 219 CA2d 368, 379, 33 CR 189.

Similarly, asking questions that begin with the phrase "Isn't it a fact that" and assume facts not in evidence has been held to be improper. See *Simmons v Southern Pac. Transp. Co.* (1976) 62 CA3d 341, 133 CR 42; *Dastagir v Dastagir, supra*. See also *Estate of Martin* (1915) 170 C 657, 669, 151 P 138 (constant reiteration on cross-examination of questions assuming facts not in evidence, beginning with phrase "Did he ever tell you"). In *Marcus v Palm Harbor Hosp.* (1967) 253 CA2d 1008, 1015, 61 CR 702, however, the court held that counsel's asking during cross-examination an "Isn't it a fact that"-type of question that alluded to facts in evidence was proper.

Arguing the merits of a case on the pretense of objecting to offered evidence and making self-serving, gratuitous remarks is also improper. *Continental Dairy Equipment Co. v Lawrence* (1971) 17 CA3d 378, 384, 94 CR 887. The court noted that gratuitous remarks like the following cannot be condoned as proper conduct (17 CA3d at 384):

> Your Honor, I have been very patient; I suggested [it] as a trick question, Your Honor; I object, Your Honor. I have allowed counsel wide latitude but…; I think I am about to cite counsel for prejudicial error.

**EXAMPLE:** In *Dominguez v Pantalone* (1989) 212 CA3d 201, 214, 260 CR 431, the court distinguished *Love v Wolf* (1964) 226 CA2d 378, 38 CR 183 (60 instances of flagrant misconduct, especially in attempting to insinuate inadmissible evidence through form of questioning), the court held that repeated attempts to have a police officer express his opinion of fault were not prejudicial misconduct, because the court's admonitions to the jury removed any impropriety.

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## §16.73 5. Appeals to jurors' prejudice or sympathy

Attempts by counsel "to appeal to the prejudice, passions or sympathy of the jury are misconduct." *Stone v Foster* (1980) 106 CA3d 334, 355, 164 CR 901. See §§16.74-16.79 for discussion of different types of appeals to prejudice or sympathy.

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### §16.74 a. Wealth or poverty

Whether rich or poor, litigants must be accorded equal justice. Appealing to the jury's social or economic prejudices by reference to a party's wealth or poverty is misconduct if wealth or poverty is not relevant to an issue in the case. *Hoffman v Brandt* (1966) 65 C2d 549, 553, 55 CR 417. In *Hoffman,* misconduct consisted of defense counsel's remarks during closing argument implying that, if the jurors returned a verdict in favor of the plaintiffs, the defendant would have to go to a home for indigents. See also *Du Jardin v City of Oxnard* (1995) 38 CA4th 174, 45 CR2d 48 (defense lawyer, who commented during closing argument that government services would be lost if a plaintiff's verdict was returned, committed prejudicial misconduct).

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### §16.75 b. Corporate status or wealth

It is misconduct to appeal to the jury's sympathy based on the size or status of a corporate defendant. *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 860, 139 CR 888.

**EXAMPLE 1:** In *Brokopp,* misconduct consisted, among other things, of plaintiff's counsel stating during argument, "Save a buck, and that is the only reason I can think of why they would handle things the way they do. These large corporations, in effect, crippled Bob; they took his manhood away from him; they took his privacy from him; they took his body away from him; and they left him in pain." 71 CA3d at 860.

**EXAMPLE 2:** In *Seimon v Southern Pac. Transp. Co.* (1977) 67 CA3d 600, 605, 136 CR 787, it was held misconduct for plaintiff's counsel to deliberately try during argument to portray himself and his client as financial underdogs by statements such as "I represent the little guy."

When punitive damages are at issue, reference to the wealth of the party against whom punitive damages are sought has been held proper. *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1243, 1 CR2d 301; *Roemer v Retail Credit Co.* (1975) 44 CA3d 926, 941, 119 CR 82 (thrust of remarks made by plaintiff's counsel during argument that "defendant is a large, snooping monopoly which makes huge profits by specializing in destroying people's reputations" was legitimate advocacy).

The court, for good cause shown, may grant defendant a protective order requiring plaintiff to produce evidence of a prima facie case for liability before permitting plaintiff to introduce evidence of (CC §3295):

- Defendant's profits gained from wrongful conduct.
- Defendant's financial condition.

Section 3295 was enacted to prevent premature unfair reference to a defendant's wealth. In a punitive damages case, CC §3295(d) provides that on application of any defendant, the court must preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud under CC §3294. This evidence is admissible against only the defendant or defendants found to be liable to the plaintiff and guilty of malice, oppression, or fraud. CC §3295(d). A claim for exemplary damages must not state an amount. CC §3295(e).

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### §16.76 c. Jurors' self-interest

It is misconduct to appeal to the jurors' self-interest as taxpayers to persuade them to mitigate their verdict. *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 861, 139 CR 888 (misconduct for counsel to tell jury during argument "Bob doesn't have to stay at the V.A. Hospital. I don't think that we, the taxpayers, ought to pay for Bob in preference to Ford, if they are liable"). See *Lufkin v City of Bakersfield* (1933) 131 CA 21, 28, 20 P2d 788.

Appeals to jurors' self-interest violate "the fundamental concept of an objective trial by an impartial jury." *People ex rel Dep't of Pub. Works v Graziadio* (1964) 231 CA2d 525, 533, 42 CR 29. See *Du Jardin v City of Oxnard* (1995) 38 CA4th 174, 178, 45 CR2d 48 (statement by attorney implied that a verdict against city would result in jurors' loss of governmental service). See Anno, *Counsel's Appeal to Self-Interest or Prejudice of Jurors as Taxpayers, as Ground for Mistrial, New Trial, or Reversal*, 93 ALR3d 556 (1979).

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### §16.77 d. Military service

It is misconduct to appeal to jurors' sympathy or prejudice by referring to or disparaging the military service of the litigants or their family members. See *Paolini v City & County of San Francisco* (1946) 72 CA2d 579, 587, 164 P2d 916 (improper during examination of plaintiff and argument to remark that plaintiff's two sons were in U.S. Army); *Deibler v Wright* (1931) 119 CA 277, 281, 6 P2d 344 (misconduct to ask questions of plaintiff's father concerning his military service during World War I).

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### §16.78 e. Race, nationality, or religion

Questions or argument of counsel concerning the race, nationality, or religion of a party is improper when irrelevant to the issues in the case. *Kolaric v Kaufman* (1968) 261 CA2d 20, 27, 67 CR 729 (misconduct to ask plaintiff on cross-examination whether she had ever been in a concentration camp). For further discussion, see Anno, *Statement by Counsel Relating to Race, Nationality, or Religion in Civil Action as Prejudicial*, 99 ALR2d 1249 (1965).

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### §16.79 f. "Golden rule" argument

It is misconduct for counsel to suggest during argument that in calculating damages the jurors should place themselves in plaintiff's shoes "and award the amount they would 'charge' to undergo equivalent disability, pain and suffering." *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 860, 139 CR 888. See *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 609, 39 CR 721 ("improper to appeal to the jurors to fix damages as if they or a loved one were the injured party"). This type of argument in effect asks the jurors to become partisan advocates for the injured party instead of unbiased weighers of the evidence. It may also induce the jurors to consider a higher figure than they might otherwise consider. See *Neumann v Bishop* (1976) 59 CA3d 451, 484, 130 CR 786.

Note, however, that a "per diem" argument is proper, *i.e.,* that damages for pain and suffering should be measured in terms of a stated number of dollars for specific periods of time. *Beagle v Vasold* (1966) 65 C2d 166, 53 CR 129. The court in *Beagle* (65 C2d at 172) noted that it is proper for counsel to:

- Tell the jury the total amount of damages sought by plaintiff; and
- Read a complaint, including the prayer, to the jury.

**Further research:** On use of pleadings, see §§16.18, 19.45.

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### §16.80 6. Reference to insurance

Reference to insurance during trial may constitute misconduct. Under Evid C §1155, evidence that a party is insured is inadmissible to prove negligence or other wrongdoing. Thus, asking questions during voir dire examination that unnecessarily convey the impression that defendant is insured has been held to constitute misconduct. See, *e.g., Swift v Winkler* (1957) 148 CA2d 927, 307 P2d 666.

**EXAMPLE 1:** In *Scally v PG&E* (1972) 23 CA3d 806, 814, 100 CR 501, the court held that it is improper to ask prospective jurors any questions about ownership of stock or other financial interest in insurance companies, when an insurance company is not a party to the action. Other courts have held, however, that counsel may, in good faith, ask prospective jurors whether they are interested in a particular insurance company, if the question does not unnecessarily convey the impression that defendant is insured. See *Hart v Wielt* (1970) 4 CA3d 224, 230, 84 CR 220.

**EXAMPLE 2:** In *Neumann v Bishop* (1976) 59 CA3d 451, 130 CR 786, during opening statement, examination of witnesses, and argument, plaintiff's counsel used the term "defense interests," thereby hinting that defendant had insurance. The court noted that prompt objection and admonition could have prevented the reference, but because that did not occur defendants were in no position to urge misconduct on appeal. 59 CA3d at 473.

**EXAMPLE 3:** In *Bigboy v County of San Diego* (1984) 154 CA3d 397, 201 CR 226, plaintiff's counsel inquired during voir dire whether any juror had an interest in an insurance company. The trial judge admonished the jury that the county was uninsured and that insurance coverage was not relevant to the trial. The court of appeal held that the trial court's admonition cured any potential prejudice. The court also noted that the questioning was not prejudicial, because the jurors, as taxpayers, were not likely to inflate a damage award on a "deep pocket theory" against a county.

Evidence of insurance is excluded because it is irrelevant and it may encourage the jury to assume that unlimited funds are available to pay the claim. Experienced attorneys seldom mention insurance; most jurors today generally assume some form of coverage. See *Causey v Cornelius* (1958) 164 CA2d 269, 330 P2d 468, for discussion of jurors' knowledge of insurance.

**Further research:** On admissibility of evidence of insurance when relevant to an issue other than the quality of the insured's conduct, see 1 Witkin, California Evidence, *Circumstantial Evidence* §§134-135 (4th ed 2000).

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### §16.81 7. Reading law to jury

In some circumstances, reading the law to the jury may constitute misconduct. *People v Anderson* (1872) 44 C 65.

**EXAMPLE:** In *Anderson,* the court noted that the practice is objectionable and should not be tolerated. Its effect is usually to confuse rather than to enlighten the jurors. The court recognized that counsel's reading from a textbook or a reported case for purposes of illustration may sometimes be permissible.

The court should promptly stop any effort by counsel to have the jury take the law of the case from a book rather than the court's instructions. 44 C at 66. See *Meyer v Foster* (1905) 147 C 166, 81 P 402 (within court's discretion to refuse to allow counsel to read certain sections of Civil Code to jury during argument). See also *De Armas v Dickerman* (1952) 108 CA2d 548, 239 P2d 65, in which the court held that it was within the trial court's discretion to permit excerpts from the Housing and Rent Act of 1947, which consisted of statements of law applicable to the case, to be read to the jury. For further discussion, see §16.15.

Counsel has the right in argument to discuss pertinent law and its application to the facts of the case. See *Neumann v Bishop* (1976) 59 CA3d 451, 479, 130 CR 786. See also §16.15. For further discussion, see Anno, *Counsel's Right in Civil Case To Argue Law or To Read Lawbooks to the Jury*, 66 ALR2d 9 (1959). On voir dire examination of prospective jurors concerning law, see §8.52.

**Further research:** See chap 19 for discussion of closing arguments.

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### §16.82 8. Motions made in jury's presence

Motions made in the jury's presence to curry favor or to influence a verdict constitute misconduct.

**EXAMPLE:** A motion to amend a complaint in order to increase the amount of damages constituted reversible error in *Sanguinetti v Moore Dry Dock Co.* (1951) 36 C2d 812, 228 P2d 557. The motion was made in the jury's presence after production of the evidence, and the court permitted the complaint to be amended in their presence. The jurors may have surmised that the judge, after hearing the evidence, believed that a higher demand was in order, which then influenced their verdict.

A motion to view premises (see CCP §651) made in the jury's presence is improper. On resisting the motion, opposing counsel may appear to be suppressing evidence. See generally Anno, *Proper Procedure To Guard Party Against Prejudicing Jury by Objecting to Opposite Party's Request for View*, 95 ALR 1505 (1935).

Offers of proof in the jury's presence are also improper. See *Kenworthy v State* (1965) 236 CA2d 378, 397, 46 CR 396. In *People v Francis* (1957) 156 CA2d 1, 6, 319 P2d 103, the court found no error in the trial court's denial of a request to make an offer of proof, because there was no request that the offer be made out of the jury's presence. See *Hrnjak v Graymar, Inc.* (1971) 4 C3d 725, 733, 94 CR 623, in which the court considered an evidentiary issue under Evid C §352, noting that the determination should be made out of the jury's presence. See also *Augustus v Shaffer* (1959) 171 CA2d 160, 167, 340 P2d 37, in which the court stated that it is generally not the best trial practice, and often is error, to ask for a stipulation before a jury.

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### §16.83 9. Calling jurors by name

An issue of prejudicial misconduct can arise when counsel addresses jurors individually by name. In *People v Wein* (1958) 50 C2d 383, 395, 326 P2d 457, overruled on other grounds in *People v Daniels* (1969) 71 C2d 1119, 1140, 80 CR 897, the court noted that arguments should be addressed to the jury as a body. See Los Angeles Ct R 8.16, which prohibits counsel from addressing jurors by first name during voir dire examination and from referring to or addressing jurors by name or occupation during argument. The court in *People v Wein, supra,* also noted that "it does not follow that such conduct is necessarily prejudicial in any given case." See *Neumann v Bishop* (1976) 59 CA3d 451, 474, 130 CR 786.

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### §16.84 10. Conversations with jurors

Conversing with jury members, either collectively or individually, during trial is improper. See Cal Rules of Prof Cond 5-320; *Whitfield v Roth* (1974) 10 C3d 874, 890, 112 CR 540 (conduct was improper and constituted misconduct); *Garden Grove Sch. Dist. v Hendler* (1965) 63 C2d 141, 144, 45 CR 313 (prejudicial error for plaintiff's counsel to talk with the jury foreman). This conduct gives rise to a rebuttable presumption of prejudice. *People v Honeycutt* (1977) 20 C3d 150, 156 n3, 141 CR 698. See *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 185 CR 654. See also Pen C §§95-96.

Try at all times to preserve both the substance of justice and every appearance of propriety. CCP §611; *Maaskant v Matsui* (1942) 50 CA2d 819, 826, 123 P2d 853. See also Los Angeles Ct R 8.37.

**PRACTICE TIP:** If a juror questions you during recess about the case, politely inform the juror that you cannot speak to any member of the jury during the trial and discreetly inform the judge and opposing counsel of the juror's question.

**Further research:** See chap 17 for discussion of jury management and jury misconduct. See chap 21 for discussion of jury misconduct during deliberations.

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### §16.85 11. Reference to inadmissible evidence

Deliberately asking questions calling for inadmissible and prejudicial answers has been held to be misconduct. See *Hawk v Superior Court* (1974) 42 CA3d 108, 128, 116 CR 713 (during cross-examination, prosecution witness questioned in manner designed to bring before jury evidence inadmissible under Evid C §787). For example, when seeking to prove liability it is improper to examine a witness about or otherwise attempt to introduce evidence of an offer of compromise or settlement. See generally Evid C §1152; 7 Witkin, California Procedure, *Trial* §221 (5th ed 2008).

Introducing evidence of a compromise and settlement may be so serious that neither striking the offensive material nor instructing the jury to disregard the matter will cure the error. See, *e.g., Citti v Bava* (1928) 204 C 136, 266 P 954. See also *Tobler v Chapman* (1973) 31 CA3d 568, 575, 107 CR 614. In this case, although the trial judge's admonition was considered sufficient to cure misconduct, the appellate court recognized that telling the jurors during argument that the injured party received compensation from another codefendant who was dismissed from the case constituted prejudicial misconduct. The receipt of compensation demonstrated no liability on the part of the remaining codefendant.

Attempts to place inadmissible evidence before the jury by pursuing a line of inquiry to which an objection has been sustained constitute misconduct. See *Simmons v Southern Pac. Transp. Co.* (1976) 62 CA3d 341, 133 CR 42. See also *Stevenson v Link* (1954) 128 CA2d 564, 574, 275 P2d 782 (misconduct for counsel to ask witness about a prior acquittal in a criminal case when judge in chambers had earlier ruled this evidence inadmissible); *Young v Tassop* (1941) 47 CA2d 557, 565, 118 P2d 371 (misconduct to repeat question after an adverse ruling). On contempt generally, see §§16.99-16.129.

**EXAMPLE:** In *Cote v Rogers* (1962) 201 CA2d 138, 19 CR 767, a wrongful death action, defense counsel committed misconduct by trying to bring before the jury an inadmissible magazine article concerning the accident that gave rise to the lawsuit. The attorney continuously referred to the article while holding a copy of it in his hand during cross-examination of a witness for the plaintiff, and brought the article to the attention of a local newspaper, which published a story about it the next day. See also *Richardson v Employers Liab. Assur. Corp.* (1972) 25 CA3d 232, 102 CR 547, disapproved on other grounds in *Gruenberg v Aetna Ins. Co.* (1973) 9 C3d 566, 580 n10, 108 CR 480, discussed in §16.38.

Hearsay or opinion testimony, which is technically inadmissible under an exclusionary rule, may be considered in support of the judgment when offered and received without objection. *Crocker-Anglo Nat'l Bank v American Trust Co.* (1959) 170 CA2d 289, 299, 338 P2d 617. See Comment to Evid C §140; 3 Witkin, California Evidence, *Presentation at Trial* §§393-395 (4th ed 2000). See also Los Angeles Ct R 8.89, which provides that the court on its own motion should not ordinarily exclude inadmissible evidence unless irrelevant or excludable under Evid C §352.

Through questions during cross-examination of an expert, an attorney may properly indicate familiarity with studies the attorney is referring to during the cross-examination. *People v Jones* (1991) 53 C3d 1115, 1144, 282 CR 465. It is misconduct, however, for an attorney to ask a witness a question that implies a fact, unless the attorney has reasonable grounds to anticipate an answer confirming the fact or is prepared to prove the fact by other means. See *People v Price* (1991) 1 C4th 324, 481, 3 CR2d 106.

**Further research:** On inquiring into settlement during cross-examination to show bias or prejudice, see 1 Witkin, Evidence, *Circumstantial Evidence* §§150-151; 3 Witkin, Evidence, *Presentation at Trial* §272.

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### §16.86 12. Exhibiting prejudicial matter or objects not in evidence

A court will not tolerate an attorney's tactic of deliberately permitting the jury to see exhibits that are not in evidence. See *People v Fusaro* (1971) 18 CA3d 877, 886, 96 CR 368. Thus, allowing jurors to view photographs that have not been admitted in evidence is improper. In *Fusaro,* however, the prosecutor's showing the jurors two photographs before their admission in evidence was considered harmless, because the photographs were later admitted in evidence.

Exposing jurors to a copy of an inadmissible article containing prejudicial headlines constitutes misconduct. See *Richardson v Employers Liab. Assur. Corp.* (1972) 25 CA3d 232, 242, 102 CR 547, disapproved on other grounds in *Gruenberg v Aetna Ins. Co.* (1973) 9 C3d 566, 580 n10, 108 CR 480. In *Richardson,* the article was located on the counsel table in front of plaintiffs' counsel while the jurors were in recess, but remained in view after they returned. See *People v Hernandez* (1977) 70 CA3d 271, 281, 138 CR 675 (while at bench arguing propriety of question asked of defense witness, prosecutor waved witness's "rap sheet" around in front of jury). Similarly, in *Weisbart v Flohr* (1968) 260 CA2d 281, 291, 67 CR 114, it was held misconduct for counsel to use toys that had not been received in evidence to support his argument to the jury.

**EXAMPLE:** In *Bates v Newman* (1953) 121 CA2d 800, 264 P2d 197, plaintiff's counsel made marks on a blackboard before completion of plaintiff's case when some of the jurors were present in the courtroom. Apparently, the material was intended to aid counsel in presenting the opening statement and not to be used as evidence. The trial judge ordered plaintiff's counsel to erase it. In sustaining the trial court's order, the appellate court noted that, because the reception of testimony was not complete, jurors could be misled to believe that the material on the blackboard was evidence in the case. 121 CA2d at 811.

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### §16.87 13. News media releases

Sometimes extrajudicial statements by counsel to the news media regarding an anticipated or pending trial may improperly affect the tribunal's impartiality and constitute misconduct. In *In re Hammond* (1898) 121 C 385, 389, 53 P 899, the court noted that it would be unprofessional for a lawyer representing anyone accused of a crime to attempt to get favorable or unfavorable evidence before a jury through the press. See generally *Sheppard v Maxwell* (1966) 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507; *People v Stroble* (1951) 36 C2d 615, 226 P2d 330, aff'd in *Stroble v California* (1952) 343 US 181, 96 L Ed 872, 72 S Ct 599; *County of Los Angeles v Superior Court* (1967) 253 CA2d 670, 62 CR 435 (discusses several criminal cases that have considered the effect of publicity on an accused's constitutional right to a fair trial before an impartial jury). See also *Cembrook v Sterling Drug Inc.* (1964) 231 CA2d 52, 41 CR 492, on the right to a public trial not including a right to have the news media publicize the trial. In *Cembrook,* the court also discussed the right to use news media advertising to locate witnesses.

**EXAMPLE:** In *People v Stroble, supra,* defendant confessed after being arrested. Even before defendant had completed his statement, the district attorney released details of it to the press. The district attorney also announced his belief that defendant was sane and guilty. 36 C2d at 620. The court characterized this as "flagrant misconduct." 36 C2d at 617. Note that the California standard for measuring the impact of pretrial publicity on criminal trials is whether the publicity results in a reasonable likelihood that a fair trial cannot be held. *People v McKee* (1968) 265 CA2d 53, 58, 71 CR 26. In *Sheppard v Maxwell, supra,* prejudicial publicity was attributed in part to the prosecution's repeatedly making available to the news media evidence that was never offered in the trial—much of which was clearly inadmissible. The U.S. Supreme Court noted that excluding evidence in court becomes meaningless when the news media make it available to the public. 384 US at 360, 16 L Ed 2d at 618.

**Further research:** For further discussion, see Goldhammer, *Playing by the Rules: Free Speech for Lawyers*, 18 CEB Civ Litigation Rep 95 (June 1996); Shapiro, *When the Press Calls: A Lawyer's View*, 5 Cal Litigation (Fall 1991) (for practical tips on press relations in high-profile cases); Anno, Release of Information Concerning Forthcoming or Pending Trial as Ground for Contempt Proceedings or Other Disciplinary Measures Against Member of the Bar, 11 ALR3d 1104 (1967). For rules governing news media cameras in the courtroom, see Cal Rules of Ct 1.150. For discussion of right to a public trial and remedies to dissipate effect of publicity and prejudice, see §§2.36-2.60.

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### §16.88 14. Reading jurors' notes

During trial, it is improper for counsel to read notes taken by the jurors. These notes are confidential. See *Bauguess v Paine* (1978) 22 C3d 626, 636 n6, 150 CR 461; Los Angeles Ct R 8.37-8.38.

In *Bauguess v Paine, supra,* plaintiff's trial attorney requested that a diagram attached to a deposition, which was going to be read, be admitted in evidence. Extra copies of the diagram were admitted in evidence and handed to the jurors. The judge gave these instructions to the jurors (22 C3d at 631):

> These are Xerox copies for your use in following the deposition. They are numbered exhibits 6A through M. So you each have a copy. You are free to write on those documents, take notes. At the conclusion of the reading of this deposition those exhibits will be picked up by the bailiff, deposited with the clerk. At the time the case is submitted to you[,] you will have those available in the jury room during your deliberations. So if you want to mark on them, fine.

After the deposition was read, the bailiff collected the copies. The same procedure was followed for a sketch prepared by the next witness. After another deposition was read, the judge observed jurors taking notes on the diagrams. He again instructed them that they could take notes on the copies, but should not share the notes with anyone until the case was finally submitted. At that time, they could refer to the notes in their deliberations. After the trial had recessed for the day, plaintiff's counsel asked the clerk's permission to examine one of the exhibits containing a juror's notes. This examination ultimately led to the granting of (1) defendants' motion for a mistrial, and (2) defendants' motion for attorney fees for the 2 days of the aborted trial. Plaintiff's counsel was ordered to pay $700 as sanctions.

On appeal, the Supreme Court in *Bauguess* reversed the trial court order awarding attorney fees as sanctions. The court recognized that the trial judge was correct in instructing the jurors to keep their notes confidential. The court concluded, however, that the trial court breached this confidentiality when it admitted them into evidence, and noted that any document admitted into evidence may be inspected at any time by counsel. 22 C3d at 636 n6. As a result of the *Bauguess* case, the legislature passed CCP §128.5 and, later, CCP §128.7, which permit the awarding of reasonable expenses, including attorney fees, as a result of tactics or actions not based on good faith that are frivolous or cause unnecessary delay. See also CCP §177.5 on a judge's power to impose "reasonable money sanctions"; §§16.92-16.129 on remedies for misconduct.

**Further research:** For further discussion generally, see Anno, *Taking and Use of Trial Notes by Jury*, 14 ALR3d 831 (1967). See CALJIC 1.05 for Instruction re Juror's Use of Notes.

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### §16.89 15. Arguing matters not in evidence

During argument to the jury, it is misconduct for counsel to argue matters not in evidence or to assert as fact matters allegedly within counsel's personal knowledge. *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 862, 139 CR 888. Counsel may not invite the jury to speculate on unsupported inferences. *Malkasian v Irwin* (1964) 61 C2d 738, 747, 40 CR 78. See *People v Bolton* (1979) 23 C3d 208, 213 n2, 152 CR 141 (prohibition against using closing argument to introduce new evidence).

It is also improper and misconduct for counsel to argue that the case, or some aspect of it, has judicial approval. *Neumann v Bishop* (1976) 59 CA3d 451, 485, 130 CR 786. However, counsel may argue all reasonable inferences from the evidence. *Brokopp v Ford Motor Co., supra*.

**EXAMPLE:** In *City of Los Angeles v Decker* (1977) 18 C3d 860, 135 CR 647, plaintiff brought an eminent domain action to condemn property for expansion of an airport, a parcel of which belonged to defendant. On the valuation issue, the appraiser who was called during trial by defendant property owners testified that the property could be best put to use for airport-related facilities, especially parking. Two appraisers called by plaintiff testified that it was unlikely that any developer would undertake these developments. Although the city's airport board had determined that airport parking facilities were needed and that defendant's property was suitable for that purpose, the city attorney argued during closing argument that defendant's valuation figure was too high because there was no such need, and that claim of the need was speculative. The jury returned a verdict in favor of plaintiff.

The supreme court in *Decker* held that the city and its attorney had committed misconduct in argument to the jury, requiring a new trial. The court referred to former Cal Rules of Prof Cond 7-105(1) (now Rule 5-200), which:

- Requires an attorney presenting a matter to a tribunal to use means consistent with the truth, and
- Prohibits an attorney from seeking to mislead a judge, judicial officer, or jury by artifice or false statement of law or fact.

The court noted that a government lawyer occupies a position analogous to a public prosecutor and may be under an even higher duty. 18 C3d at 871.

In summation it is permissible to refer to nonevidentiary matters of common knowledge or to illustrations drawn from common experience, history, or literature. *People v West* (1983) 139 CA3d 606, 611, 189 CR 36 (trial court properly prevented counsel from reading aloud newspaper clippings about instances of witness misidentification). References to quotations from the Bible do not constitute misconduct. *Ballou v Master Props. No. 6* (1987) 189 CA3d 65, 76, 234 CR 264.

**PRACTICE TIP:** What is "common knowledge" may be controversial. Check to verify that the trial judge agrees with your appraisal before argument.

**Further research:** On improper appeals to prejudice or sympathy of jurors, see §16.31. For examples of other improper arguments, see *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 74 CR 534; *Love v Wolf* (1964) 226 CA2d 378, 38 CR 183. See also *Cortez v Macias* (1980) 110 CA3d 640, 658, 167 CR 905, in which the court held that the trial court committed error in permitting plaintiff's counsel over objection to argue for the first time in rebuttal closing argument that a specific sum should be awarded as general damages, thereby depriving defendant of an opportunity to challenge that figure.

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## §16.90 E. Anticipating and preventing misconduct

An attorney should try to anticipate possible misconduct on the part of an opponent whenever possible. For example, if opposing counsel indicates, during discovery proceedings or otherwise, an attempt to introduce inadmissible evidence during trial (or evidence excludable under Evid C §352), raise the issue in chambers before trial by a motion in limine asking the court to issue an order barring opposing counsel, the parties, and witnesses from mentioning or referring to such inadmissible evidence or otherwise seeking to introduce it during trial. On motions in limine, see chap 7.

If the court agrees and issues the order, opposing counsel usually must make an offer of proof about the evidence to be produced in the presence of a court reporter to protect the record on appeal. On offers of proof, see §§15.50-15.60. After the order is issued, opposing counsel must first obtain the court's approval before bringing the matter before the jurors (through questioning or otherwise) or run the risk of severe rebuke or a contempt citation. See *Charbonneau v Superior Court* (1974) 42 CA3d 505, 116 CR 153 (contempt).

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## VII. REMEDIES FOR ATTORNEY MISCONDUCT

### A. Action by counsel

### §16.91 1. Timely objection; waiver

Generally, it is essential that you object to misconduct when it occurs. Otherwise, the court usually considers the claimed error based on misconduct to be waived. *Warner Constr. Corp. v City of Los Angeles* (1970) 2 C3d 285, 303, 85 CR 444; *Menasco v Snyder* (1984) 157 CA3d 729, 203 CR 748 (plaintiff's failure to object to alleged misconduct in trial court constituted waiver of right to have matter addressed on appeal).

**EXAMPLE 1:** In *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610, 39 CR 721, the court held that a motion for mistrial by defense counsel at the conclusion of closing argument was not a timely objection for misconduct committed during plaintiff's opening and closing argument.

**EXAMPLE 2:** The court in *Barajas v USA Petroleum Corp.* (1986) 184 CA3d 974, 229 CR 513, held that failure to request a curative admonition resulted in waiver of any error in references by opposing counsel to matters the trial court had ordered not be mentioned.

**EXAMPLE 3:** In *Fleming v Safeco Ins. Co.* (1984) 160 CA3d 31, 42, 206 CR 313, the court held that a claim of misconduct was entitled to no consideration on appeal when the record did not show a timely and proper objection and a request that the jury be admonished.

Requiring a timely objection enables the court to (see, *e.g., Horn v Atchison, T. & S.F. Ry., supra*):

- Admonish the jury;
- Instruct counsel; and
- Forestall accumulation of prejudice by repeated improprieties, thus avoiding the need for a retrial.

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### §16.92 2. Object and assign improper matter as misconduct

The language used to make an objection to misconduct is not subject to any fixed rules, except that it should apprise the court of the impropriety sufficiently to enable a cure by appropriate admonition. See, however, *Cope v Davison* (1947) 30 C2d 193, 202, 180 P2d 873, in which the record showed no assignment of misconduct and the trial court was not asked to instruct the jurors to disregard the challenged remarks. The court held that the issue could not be considered on appeal. See also *Ray v Henderson* (1963) 212 CA2d 192, 195, 27 CR 847 (counsel, whose objection to offered evidence was sustained, did not assign misconduct or ask for jury admonition, thereby precluding consideration of misconduct on appeal); *Cody v Von's Grocery Co.* (1961) 189 CA2d 329, 331, 11 CR 277 (not all improper matters objected to; none cited as misconduct). On need to request curative admonition, see §16.45.

Assign the statement, question, or other improper matter as misconduct, and ask that the court instruct the jury to disregard it. See 3 Witkin, California Evidence, *Presentation at Trial* §386 (4th ed 2000).

When initially objecting to misconduct, do not repeat improper remarks in front of the jurors. Object as follows:

> Objection, Your Honor, I object to counsel's last _ _[*question/remarks*]_ _ and assign _ _[*it/them*]_ _ as misconduct. May we approach the bench?

Outside the hearing of the jury, counsel may state the following:

> I object to counsel's inappropriate and improper remarks concerning _ _[*state improper matter*]_ _. I assign it as misconduct and respectfully request that the court instruct the jurors to disregard it.

You may wish to have opposing counsel reprimanded and admonished against continuing the misconduct. If so, add the following language to the above example:

> I also request the court to reprimand counsel for this misconduct and to admonish _ _[*him/her*]_ _ to discontinue it.

If opposing counsel persists with the misconduct, the judge may be prompted to hold opposing counsel in contempt.

**PRACTICE TIP:** After objecting to the misconduct and requesting that the court instruct the jurors to disregard it, you may gain a tactical advantage by requesting permission to approach the bench *before* requesting that opposing counsel be reprimanded and admonished to discontinue the misconduct. Some judges prefer this procedure. Specify at the bench the question or remarks constituting misconduct and the particular relief desired. The court reporter should be present to protect the record on appeal. The court reporter should be present at the bench to record the discussion. If the judge denies the request at the bench, the jurors will remain unaware of it.

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### §16.93 3. Request admonition to cure misconduct

Ordinarily, the effect of misconduct may be cured by the court's prompt admonition to the jury to disregard it. Only misconduct so prejudicial that an admonishment would be ineffective excuses the failure to request the admonishment. The language used by the judge to reprimand counsel for misconduct and to admonish the jurors is not subject to fixed rules. Generally, the judge's reprimand instructs counsel to stay within the record and the boundaries of relevant evidence; if the conduct is flagrant, the judge can demand that counsel cease. The judge will then instruct the jury to disregard the remark, question, or other improper matter. On occasion, the judge may request counsel to withdraw a particular question or may order an answer stricken from the record. See *Hart v Wielt* (1970) 4 CA3d 224, 234, 84 CR 220; *Barlin v Barlin* (1957) 156 CA2d 143, 145, 319 P2d 87. See also *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 319, 74 CR 534.

If warranted by the misconduct, counsel may wish to offer a specially tailored written instruction to be read by the judge to the jury to directly admonish the jury to disregard certain misconduct.

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### B. Remedies for attorney misconduct

### §16.94 1. Consider requesting sanctions for bad faith or frivolous action

One possible remedy for attorney misconduct is a motion under CCP §128.7 for reasonable expenses, including attorney fees incurred as a result of opposing counsel's tactics or actions not based on good faith that were frivolous or caused unnecessary delay.

**JUDICIAL PERSPECTIVE:** When considering remedies for attorney misconduct, give serious consideration to what you want to accomplish by seeking a remedy. That objective should guide your choice.

Code of Civil Procedure §128.7 applies to complaints filed, or proceedings initiated, on or after January 1, 1995. CCP §128.7(i); *Murphy v Yale Materials Handling Corp.* (1997) 54 CA4th 619, 623, 62 CR2d 865. See §§26.32-26.53.

The focus of CCP §128.7, taken almost verbatim from revised Fed R Civ P 11, is to make every signature by an attorney or unrepresented party on a pleading, petition, written notice of motion, or "other similar paper" a certification "to the best of the person's knowledge, information, and belief," that the action has merit. CCP §128.7(a). See §26.36 for discussion of the scope of certification. California courts may look to federal decisions interpreting Fed R Civ P 11 in interpreting CCP §128.7. See §26.34.

Compare *Operating Eng'rs Pension Trust v A-C Co.* (9th Cir 1988) 859 F2d 1336, 1344 (Fed R Civ P 11 sanctions are proper only in rare and exceptional cases and should be awarded with extreme caution), with *In re Hawaii Fed. Asbestos Cases* (9th Cir 1989) 871 F2d 891, 897 (upholding sanctions against attorney who made summary judgment motion when no legal authority supported attorney's position).

**Further research:** See chap 17 for discussion of jury misconduct during voir dire and trial and chap 21 for discussion of misconduct during deliberations. See §§26.11-26.31 for discussion of §128.5 and §§26.32-26.53 for discussion of §128.7.

The court also retains the power to control the conduct of attorneys appearing before it and to enforce that power by means of disqualification. CCP §128; *Cal Pak Delivery, Inc. v United Parcel Serv., Inc.* (1997) 52 CA4th 1, 9, 60 CR2d 207. See Cal Rules of Ct 2.30 on sanctions that may be ordered after written notice and following an opportunity to be heard.

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### §16.95 2. Consider moving for mistrial

Consider moving for a mistrial if:

- Misconduct is so flagrant that its prejudicial effect cannot be cured by admonition, and
- To proceed would deprive a party of the right to a fair trial.

For example, counsel may state:

> Objection, Your Honor. Counsel is showing the jurors the _ _[*e.g., photograph*]_ _ that you earlier ruled inadmissible. I assign it as misconduct and move for a mistrial on the ground that the misconduct is so prejudicial that a fair trial is not possible.

**Further research:** On motions for mistrial generally, see §§18.82-18.102.

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### §16.96 3. Evaluate moving for new trial

A party can move for a new trial based on irregularity in the proceedings of the court, jury, or adverse party that prevented the party from having a fair trial. CCP §657(1). Counsel's misconduct is considered to be such an irregularity and a ground for a new trial. *City of Los Angeles v Decker* (1977) 18 C3d 860, 870, 135 CR 647. An unfavorable verdict is strong evidence of the misconduct's prejudicial effect. See generally *Garden Grove Sch. Dist. v Hendler* (1965) 63 C2d 141, 144, 45 CR 313; *Kenworthy v State* (1965) 236 CA2d 378, 401, 46 CR 396.

The trial judge has discretion to grant a motion for a new trial even though the judge may have sustained an objection to the misconduct and given a curative admonition. *Baroni v Rosenberg* (1930) 209 C 4, 284 P 1111. The trial judge also may disregard a waiver resulting from a party's failure to object to the misconduct (see §§16.44-16.46) and may grant a new trial when the circumstances warrant. *Malkasian v Irwin* (1964) 61 C2d 738, 747, 40 CR 78.

**Further research:** See §§25.22-25.71 for further discussion of motions for new trial.

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### 4. Determine whether appeal appropriate

### §16.97 a. Objection and request for admonition usually necessary

A claim of misconduct is generally not entitled to consideration on appeal unless the record shows both a timely, proper objection and a request that the jurors be admonished. *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610, 39 CR 721. Without such a request, the matter cannot be considered on appeal if a jury admonition would have removed the effect of the misconduct. *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 319, 74 CR 534.

When the court's admonition does not eliminate the prejudicial effect of misconduct, a party is not precluded from raising the issue on appeal. See, *e.g., Kenworthy v State* (1965) 236 CA2d 378, 396, 46 CR 396. See also *Hoffman v Brandt* (1966) 65 C2d 549, 553, 55 CR 417.

**EXAMPLE:** In *Hoffman,* plaintiff's counsel objected to misconduct during trial and sought to go into chambers to consider proper procedure. After defendant's counsel rejected the offer, the court gave an ineffective admonishment to the jury. On appeal, plaintiffs were not barred from raising the issue of misconduct.

Even without an objection and a request for admonition, a party may still be able to raise the issue on appeal when instances of misconduct are so flagrant and repeated that an objection and admonition would be futile. See *Simmons v Southern Pac. Transp. Co.* (1976) 62 CA3d 341, 355, 133 CR 42; *Peacock v Levy* (1931) 114 CA 246, 299 P 790 (objection futile; court's not acting on objections and requests when made relieved party of duty to object every time). See also *Love v Wolf* (1964) 226 CA2d 378, 392, 38 CR 183.

**EXAMPLE:** In *Love,* the record on appeal showed 60 instances of flagrant misconduct by plaintiff's attorney. Defendants objected many times, but the judge failed to rule on the objections. Plaintiff contended that the issue of misconduct should not be considered, because defendants did not object to each instance of misconduct and request that the jurors be admonished. Holding that the issue could be raised on appeal, the court recognized that multiple objections tend to alienate the jurors, especially when the judge fails to rule on them. The court noted that rectifying repeated and flagrant misconduct by admonition is like trying to "unring" a bell. 226 CA2d at 392.

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### §16.98 b. Standard for setting aside verdict

An appeal based on misconduct during trial will not set aside the judgment unless the error resulted in a miscarriage of justice. Cal Const art VI, §13. The court's determination of a miscarriage of justice does not depend on whether the amount of an award is reasonable. *Garden Grove Sch. Dist. v Hendler* (1965) 63 C2d 141, 144, 45 CR 313.

Misconduct has been held prejudicial requiring reversal when it was reasonable to conclude that a different verdict might have been reached in the absence of the misconduct. See *Garden Grove Sch. Dist. v Hendler, supra*. See also *Stone v Foster* (1980) 106 CA3d 334, 355, 164 CR 901 (misconduct prejudicial when it was impossible to say that jury was not influenced by misconduct in amount of award). Conversely, misconduct has been held minor and nonprejudicial when a party was unable to show that a different result would have been reached. See *Marcus v Palm Harbor Hosp.* (1967) 253 CA2d 1008, 1016, 61 CR 702.

The reviewing court gives great weight to the trial court's determination of the effect of misconduct, *i.e.,* whether it resulted in prejudice. See, *e.g., Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 793, 174 CR 348, in which the trial judge denied a motion for mistrial and a later action for new trial based on misconduct. The rulings implied that the misconduct did not result in prejudice, and they were upheld on appeal. The court in *Stevens v Parke, Davis & Co.* (1973) 9 C3d 51, 72, 107 CR 45, noted that a trial judge is in a better position than an appellate court to determine whether a verdict results wholly, or in part, from attorney misconduct.

Unless clearly incorrect, the trial judge's conclusion in the matter will not be disturbed on appeal. See *Malkasian v Irwin* (1964) 61 C2d 738, 747, 40 CR 78, in which the court indicated that, when a motion for a new trial is granted, the trial court's discretion in granting the motion cannot be disturbed on appeal even when the misconduct is minor or debatable. See *City of Los Angeles v Decker* (1977) 18 C3d 860, 135 CR 647, for an example of a trial court's denial of a motion for a new trial not being upheld on appeal.

The issue of misconduct generally will not be considered on appeal if the record does not show:

- A timely objection; and
- A request for a curative admonition (unless the prejudicial effect of the misconduct cannot be cured by admonition).

See *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 74 CR 534.

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### 5. Contempt citation for misconduct

#### §16.99 a. Contempt defined

A trial court has inherent power to punish as contempt an act that "tends to impede, embarrass, or obstruct the court in the discharge of its duties." *In re Shortridge* (1893) 99 C 526, 532, 34 P 227. See *In re McKinney* (1968) 70 C2d 8, 10, 73 CR 580. Although this power exists independent of statute (see *In re Shortridge, supra*), it has been codified by the legislature. *Nierenberg v Superior Court* (1976) 59 CA3d 611, 616, 130 CR 847. See generally CCP §§128, 177-178, 1209-1222, 1991; Pen C §§166, 1044. See §16.148 for examples of acts and omissions constituting contempt under CCP §1209.

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### §16.100 b. Purpose of contempt

According to the court in *Penfield Co. v SEC* (1947) 330 US 585, 593, 91 L Ed 1117, 1122, 67 S Ct 918, contempt has a dual function:

- Vindication of the public interest by punishment of contemptuous conduct; and
- Coercion to compel the person guilty of contempt to do what the law requires.

Code of Civil Procedure §§1209-1222 are intended to implement the court's inherent power to conduct court business and to enforce its lawful orders. See *Pacific Tel. & Tel. Co. v Superior Court* (1968) 265 CA2d 370, 371, 72 CR 177. If no specific statutory provision applies, the court's power may be exercised. See generally *Corum v Hartford Acc. & Indem. Co.* (1945) 67 CA2d 891, 897, 155 P2d 710.

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### §16.101 c. Limitations on use of contempt power

The court's inherent power to punish contempt has been tempered by procedural safeguards enacted by the legislature. *Bauguess v Paine* (1978) 22 C3d 626, 638, 150 CR 461. Thus, when contempt is committed outside the court's presence, the proceeding must be instituted by an affidavit or declaration. CCP §2015.5, in accordance with CCP §1211; *Fabricant v Superior Court* (1980) 104 CA3d 905, 916, 163 CR 894.

The penalty for each instance of civil contempt is limited to 5 days in jail or a $1000 fine, or both. CCP §1218; *Bauguess v Paine, supra*. In addition, a person, or any agent of that person, who is adjudged guilty of contempt may be ordered to pay the party initiating the contempt proceeding the reasonable attorney fees and costs incurred in connection with the contempt proceeding. CCP §1218.

No order of contempt affecting a county government or its governing body acting under its constitutional or statutory authority may be made, unless the court finds, based on review of evidence presented at a hearing, that the county has the resources to comply with the order of the court; that the county has the authority (without voter approval or without incurring additional indebtedness) to generate additional resources necessary to comply with the court order; or that compliance with the order will not expose the county or any member of its governing body, or any other county officer, to liability for failure to perform other constitutional or statutory duties. CCP §128(f).

**Further research:** For discussion of limitations on who may exercise contempt power, see *Marcus v WCAB* (1973) 35 CA3d 598, 111 CR 101 (limitations concerning court commissioners, referees, and subordinate officers). See also *Rosenstock v Municipal Court* (1976) 61 CA3d 1, 132 CR 59 (no stipulation that court commissioner could act as temporary judge; court commissioner without authority); *Nierenberg v Superior Court* (1976) 59 CA3d 611, 130 CR 847 (limitation on commissioner who acted as judge pro tempore in underlying criminal proceeding; contempt cause distinct from underlying case). On contempt proceedings under CCP §§1209-1221 distinguished from misdemeanor prosecutions for contempt under Pen C §166, see §16.51.

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### §16.102 d. Aggressive advocacy distinguished

An attorney cannot be summarily adjudged in contempt for aggressive, but respectful, advocacy. *In re Buckley* (1973) 10 C3d 237, 253, 110 CR 121. Aggressive advocacy is proper and desirable in an adversary system. *Love v Wolf* (1964) 226 CA2d 378, 393, 38 CR 183. An attorney has a duty to protect the client's interests and has the right to press legitimate argument and protest an erroneous ruling. *Gallagher v Municipal Court* (1948) 31 C2d 784, 796, 192 P2d 905.

A judge must exercise summary contempt power with great caution to avoid stifling the freedom of thought and speech necessary to a fair trial. *In re Buckley* (1973) 10 C3d 237, 249, 110 CR 121. When aggressive advocacy gives way to insolence and disrespect toward the court, however, counsel may be held in contempt. See *In re Buckley, supra*.

**EXAMPLE 1:** In *People v Ward* (2009) 173 CA4th 1518, 1528, 93 CR3d 871, trial counsel was held in contempt for accusing the prosecutor of misconduct in the presence of the jury, after the court ordered him not to do so.

**EXAMPLE 2:** In *Hawk v Superior Court* (1974) 42 CA3d 108, 126, 116 CR 713, trial counsel was held in contempt while examining witnesses for frequently repeating questions after objections to them had been sustained, despite being admonished not to do so.

**EXAMPLE 3:** In *People v Fusaro* (1971) 18 CA3d 877, 887, 96 CR 368, contemptuous conduct consisted of trial counsel's interrupting the trial with frivolous objections, permitting a witness to remain in the courtroom despite an exclusion order, twice returning late to trial after a recess, and using crude and abusive language in a colloquy with the prosecutor.

**EXAMPLE 4:** In *Cooper v Superior Court* (1961) 55 C2d 291, 10 CR 842, the court did not hold counsel in contempt for disregarding the trial judge's admonition to wait until the jury was out of the courtroom before making an objection. The judge gave the admonition while commenting on the evidence when the jury had been recalled to the courtroom after almost 3 weeks of deliberations. For examples of attorney misconduct generally, see §§16.66-16.90.

**Further research:** See also *Charbonneau v Superior Court* (1974) 42 CA3d 505, 116 CR 153 (violation of in limine order); *Thorne v Municipal Court* (1965) 237 CA2d 249, 46 CR 749 (trial counsel's unannounced departure from courtroom during trial).

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### e. Civil and criminal contempt

### §16.103 (1) General distinction

Generally, many factors are relevant in distinguishing the two types of contempt; no single factor is determinative. Criminal contempt is prosecuted by the state and docketed as a criminal matter; civil contempt is initiated by a private party. The main purpose of civil contempt is to benefit a party by providing disincentives to future action by the contemnor rather than providing punishment. Civil contempt will generally order a conditional punishment to secure performance rather than an absolute punishment. The primary purpose of criminal contempt is to uphold the court's authority and dignity and to punish past conduct.

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### §16.104 (2) When civil characterized as criminal

Contempt proceedings instituted under the Code of Civil Procedure are often characterized as criminal in nature. See, *e.g., Phillips v Superior Court* (1943) 22 C2d 256, 257, 137 P2d 838; *Pacific Tel. & Tel. Co. v Superior Court* (1968) 265 CA2d 370, 371, 72 CR 177. Some courts, however, also classify these proceedings as civil contempts. See *United Farm Workers, AFL-CIO v Superior Court* (1968) 265 CA2d 212, 214, 71 CR 513. See also *In re Martin* (1977) 71 CA3d 472, 480, 139 CR 451.

**EXAMPLE:** In *Morelli v Superior Court* (1969) 1 C3d 328, 333, 82 CR 375, the court noted that contempt proceedings are regarded as civil in nature when the primary object is to protect the litigants' rights. The proceedings are regarded as criminal, however, when the object is to vindicate the court's dignity or authority—even though the proceedings arise from, or are ancillary to, a civil action.

This distinction is of limited importance, because CCP §§1209-1222 embrace both classes of contempt, which "are to be investigated and punished in the same manner and in accordance with the same rules." *In re Morris* (1924) 194 C 63, 67, 227 P 914. An example of a contempt proceeding that a court would consider civil in nature might be one to enforce payment of spousal support. See *In re Wilson* (1888) 75 C 580, 583, 17 P 698; 7 Witkin, California Procedure, *Trial* §173 (5th ed 2008).

**NOTE:** Code of Civil Procedure §1209.5, establishing contempt for a failure to comply with a child support order, and establishing a presumption of contempt on proof of noncompliance, was held potentially unconstitutional in *Hicks v Feiock* (1988) 485 US 624, 99 L Ed 2d 721, 108 S Ct 1423. The United States Supreme Court observed that the due process clause requires that in quasi-criminal contempt proceedings the state has the burden of proving guilt beyond a reasonable doubt. The Court also held that whether a contempt proceeding is civil or criminal is a subtle question of state law. On remand, the California Court of Appeal, in *In re Feiock* (1989) 215 CA3d 141, 263 CR 437, held that ability to pay is an affirmative defense that shifted the burden of proof to petitioner. In *Moss v Superior Court* (1998) 17 C4th 396, 428, 71 CR2d 215, the California Supreme Court disapproved this view, holding that a petitioner need only prove a valid order, knowledge, and noncompliance. Inability to pay remains an affirmative defense based on the prohibition against imprisonment for a debt.

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### §16.105 (3) Civil contempt distinguished from misdemeanor criminal contempt

Contempt proceedings under CCP §§1209-1221 should be distinguished from misdemeanor prosecutions under Pen C §166 for the criminal offense of contempt. Certain acts or omissions specified as contempts in CCP §1209 duplicate those specified in Pen C §166. In such instances, contempt proceedings may be brought under CCP §§1209-1222. A misdemeanor prosecution under Pen C §166 affords a defendant the rights of a person charged with a crime, including the right to a jury trial. *Safer v Superior Court* (1975) 15 C3d 230, 239, 124 CR 174.

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### §16.106 (4) When double jeopardy an issue

The distinction of whether contempt proceedings under CCP §§1209-1222 are civil or criminal in nature (see *Morelli v Superior Court* (1969) 1 C3d 328, 82 CR 375) may be important when double jeopardy is an issue.

**EXAMPLE:** In *People v Lombardo* (1975) 50 CA3d 849, 123 CR 755, defendant was found guilty of contempt under CCP §1209(a)(5), (9) for failing to answer questions, sentenced to 5 days in jail, and fined $500. He then was prosecuted for violating Pen C §166. The appellate court noted that the contempt proceeding was criminal in nature because its object was to vindicate the court's dignity and authority. 50 CA3d at 852. The court concluded that the double jeopardy clause of the Fifth Amendment of the U.S. Constitution barred the misdemeanor contempt prosecution brought under Pen C §166.50. 50 CA3d at 854.

The distinction may also be important when coercive incarceration is imposed to compel compliance with a court order under CCP §1219. When the incarceration ceases to serve its coercive function and becomes punitive in nature, it is limited by the 5-day maximum sentence provided by CCP §1218. *In re Farr* (1974) 36 CA3d 577, 584, 111 CR 649. See §16.56.

Many cases seeking to distinguish civil contempt from criminal contempt arise when the contemnor is being prosecuted for criminal contempt, after being subjected to civil contempt. The concept of double jeopardy prevents a subsequent prosecution for the same act of contempt if the court has already imposed contempt sanctions that are criminal in nature. Civil contempt has punitive aspects and may be difficult to distinguish from criminal contempt.

**Further research:** For a review of cases that discuss civil and criminal contempt with respect to double jeopardy, see *People v Batey* (1986) 183 CA3d 1281, 228 CR 787.

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### f. Forms of contempt

### §16.107 (1) Direct contempt

Direct contempt is committed in the immediate view and presence of the court or the judge (in chambers). CCP §1211; *Rosenstock v Municipal Court* (1976) 61 CA3d 1, 6, 132 CR 59; *Nierenberg v Superior Court* (1976) 59 CA3d 611, 616, 130 CR 847.

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### §16.108 (2) Indirect contempt

Indirect contempt, sometimes referred to as constructive contempt, is not committed in the immediate view and presence of the court or the judge (in chambers). CCP §1211; *Nierenberg v Superior Court* (1976) 59 CA3d 611, 130 CR 847; *In re Rosen* (1973) 31 CA3d 71, 73, 106 CR 757, disapproved on other grounds in *Boysaw v Superior Court* (2000) 23 C4th 215, 221, 96 CR2d 531.

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### §16.109 (3) Hybrid form of contempt

A hybrid form of contempt occurs when elements of both direct and indirect contempt are present. See *In re Martin* (1977) 71 CA3d 472, 479 n4, 139 CR 451. See also *Arthur v Superior Court* (1965) 62 C2d 404, 408, 42 CR 441. This type of contempt may arise when contempt is committed in the court's immediate presence, but matters taking place outside the courtroom excuse it. See *Chula v Superior Court* (1962) 57 C2d 199, 207, 18 CR 507 (concurring opinion of Gibson, J.).

**EXAMPLE:** An attorney may fail to appear in court at the scheduled time, causing disruption of the judicial proceedings. The absence from the courtroom occurs in the immediate view and presence of the court. Later, counsel may seek to excuse the conduct by describing matters that occurred out of court for the court to consider in making its determination. See *Arthur v Superior Court, supra*; *Chula v Superior Court, supra*. See also *In re Martin, supra* (statements occurred in immediate presence of court; falsity could be established only by events outside court's presence).

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### g. Procedures for direct or hybrid contempt

#### §16.110 (1) Court has summary power to punish

A court may summarily punish a direct contempt (see §16.107). CCP §1211. See *Hawk v Superior Court* (1974) 42 CA3d 108, 116 CR 713. In exercising its summary power, the court must issue an order reciting the facts adjudging the person guilty and designating the punishment. *In re Hallinan* (1969) 71 C2d 1179, 1180, 81 CR 1. See CCP §1211. The order "must be stated with sufficient particularity, description and detail to show without aid of speculation or reference to any extrinsic document that a contempt actually occurred." *Hawk v Superior Court* (1974) 42 CA3d 108, 125 n16, 116 CR 713. See CCP §1211.

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### §16.111 (2) Hearing may not be required

A hearing is ordinarily not required. *DeGeorge v Superior Court* (1974) 40 CA3d 305, 315, 114 CR 860. Notice and a hearing may be required, however, if the court does not summarily rule on the misconduct but states that it will hold a hearing later. See *In re Karagozian* (1975) 44 CA3d 516, 118 CR 793; *DeGeorge v Superior Court, supra*.

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### §16.112 (3) Judge may warn first or request an explanation

When contempt is based on language that is not insolent, contemptuous, or disorderly in itself or on words that are wholly innocuous, a judge usually must first warn the person before making a summary judgment of contempt. *Hawk v Superior Court* (1974) 42 CA3d 108, 118 n9, 116 CR 713. See *In re Hallinan* (1969) 71 C2d 1179, 1180 n2, 81 CR 1 (antagonistic, insulting, and disrespectful tone of voice); *Gallagher v Municipal Court* (1948) 31 C2d 784, 796, 192 P2d 905 (sneering and contemptuous expression on face; loud, insolent, belligerent, and offensive tone of voice).

A warning may not be necessary for truly egregious behavior. In *DeGeorge v Superior Court* (1974) 40 CA3d 305, 314, 114 CR 860, counsel engaged in a deliberate course of misconduct either to salvage what he perceived to be a losing position or to secure a mistrial. The court held a finding of contempt did not require as a prerequisite an admonition that the conduct was wrong.

"[I]n instances of direct contempt an apology to the judge should be given serious consideration." *In re Buckley* (1973) 10 C3d 237, 257, 110 CR 121. The effect of such an apology, however, lies exclusively in the trial judge's sound discretion. *In re Buckley, supra*; *Hawk v Superior Court* (1974) 42 CA3d 108, 123 n15, 116 CR 713.

In hybrid situations (see §16.109), due process should be satisfied if the judge confronts the person with the charge and offers a reasonable opportunity to explain. *Arthur v Superior Court* (1965) 62 C2d 404, 409, 42 CR 441. Thus, the statutory procedure for direct contempt is proper if an appropriate hearing is conducted on the question of excuse. *In re Martin* (1977) 71 CA3d 472, 479 n4, 139 CR 451. See *Arthur v Superior Court, supra*.

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### §16.113 (4) Written judgment of contempt required

A court must prepare a written judgment of contempt expeditiously. *In re Easterbrook* (1988) 200 CA3d 1541, 1544, 244 CR 652, overruled on other grounds in *People v Romero* (1994) 8 C4th 728, 744, 35 CR2d 270 (written order filed 6 days after court orally pronounced its finding was untimely and ordered set aside).

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### h. Procedures for indirect contempt

### §16.114 (1) Must have notice and opportunity to be heard

The procedure for punishing an indirect contempt is more elaborate than that required for direct or hybrid contempts. See §§16.110-16.113. Due process requires that the person charged with an indirect contempt be given notice and an opportunity to be heard. See *Arthur v Superior Court* (1965) 62 C2d 404, 407, 42 CR 441. See also *Ingold v Municipal Court* (1948) 85 CA2d 651, 193 P2d 808 (due process includes reasonable opportunity to prepare and present defense). The specified procedure (see generally CCP §§1211-1222) must be strictly followed (see *Doyle v Superior Court* (1952) 113 CA2d 880, 249 P2d 298).

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### §16.115 (2) Proceeding initiated with declaration or affidavit

Proceedings to adjudicate an indirect contempt are initiated by presenting an affidavit (or declaration, see CCP §2015.5) to the court, stating the facts that constitute the contempt (or a statement of the facts by a referee, arbitrator, or other judicial officer). CCP §1211. See *Arthur v Superior Court* (1965) 62 C2d 404, 42 CR 441. See also *In re Morelli* (1970) 11 CA3d 819, 829, 91 CR 72, overruled on other grounds in *Cedars-Sinai Imaging Med. Group v Superior Court* (2000) 83 CA4th 1281, 1287 n6, 100 CR2d 320 (certificate of court reporter who was to officiate at deposition considered "a statement of the facts" by judicial officer within meaning of §1211).

The lack of an affidavit of facts will void a contempt proceeding brought under CCP §1211. Due process requires notice of facts to the contemnor in the affidavit; a court transcript of the proceedings in which the judge reviewed the acts of indirect contempt does not suffice for the affidavit. *In re Cowan* (1991) 230 CA3d 1281, 281 CR 740.

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### §16.116 (3) Court issues warrant of attachment or order to show cause

After a proper affidavit has been filed under CCP §1212, the court may issue:

- A warrant of attachment (bench warrant; see *Silvagni v Superior Court* (1958) 157 CA2d 287, 290, 321 P2d 15) to arrest and bring the accused before the court to answer the charge; or
- An order to show cause (the more common procedure).

See *Arthur v Superior Court* (1965) 62 C2d 404, 42 CR 441.

An order to show cause must be served in the same manner as a summons. CCP §1016. Neither a warrant nor an order to show cause may issue except on a proper affidavit or declaration specifying the full facts of the alleged contempt. *Lund v Superior Court* (1964) 61 C2d 698, 713, 39 CR 891. On issuance of a bench warrant after a party's failure to appear in court under an order to show cause, see *In re Morelli* (1970) 11 CA3d 819, 836, 91 CR 72, overruled 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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### §16.117 (4) Accused should serve and file counterdeclaration

A person accused of contempt should serve and file a counteraffidavit (or counterdeclaration), but CCP §§1209-1222 do not expressly require the person to do so.

Although an affidavit (or declaration) initiating the contempt proceeding may be based on information and belief under the hearsay rule, it is insufficient as evidence to sustain a contempt conviction. *Freeman v Superior Court* (1955) 44 C2d 533, 537, 282 P2d 857.

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### §16.118 (5) Affidavits constitute pleadings

The initial affidavit (or declaration) on which the proceeding is based constitutes the complaint; defendant's counteraffidavit (or counterdeclaration) constitutes the answer or plea. *Lyon v Superior Court* (1968) 68 C2d 446, 452, 67 CR 265; *Freeman v Superior Court* (1955) 44 C2d 533, 536, 282 P2d 857.

The issues of fact are framed from the respective affidavits (or declarations), which serve as the pleadings; a hearing must be held on these issues. *Lyon v Superior Court, supra*; *Freeman v Superior Court, supra*. See CCP §1217. Note, however, that the "allegations in the moving party's declaration are deemed admitted if not denied in the defense declaration," and that a hearing is required only on the controverted issues. *Crittenden v Superior Court* (1964) 225 CA2d 101, 107, 36 CR 903. See *In re Larrabee* (1938) 29 CA2d 240, 243, 84 P2d 224 (allegations of affidavit on which order to show cause was based were deemed admitted when there was no answer, counteraffidavit, or other evidence on behalf of accused).

**NOTE:** An affidavit (or declaration) on which an order to show cause is issued may also serve as evidence, but it does not constitute evidence until it is offered and received. *Collins v Superior Court* (1957) 150 CA2d 354, 364, 310 P2d 103. If the affidavit (or declaration) is offered in evidence, the accused may object to any matter stated in it on any legal ground. If it is received in evidence, the accused may cross-examine the affiant (or declarant). *Collins v Superior Court, supra*.

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### §16.119 (6) Hearing procedure

At the hearing, all elements of the charged contempt must be proved by competent evidence. *Hotaling v Superior Court* (1923) 191 C 501, 505, 217 P 73; *Turkington v Municipal Court* (1948) 85 CA2d 631, 635, 193 P2d 795. Because of the quasi-criminal nature of the proceeding, the constitutional rights of the accused must be observed. *In re Martin* (1977) 71 CA3d 472, 480, 139 CR 451. For example:

- The accused is entitled to a presumption of innocence;
- The accused cannot be compelled to testify; and
- The contempt must be proved beyond a reasonable doubt—a mere preponderance of the evidence is insufficient.

*In re Martin, supra*. See *Hotaling v Superior Court, supra*; *Bennett v Superior Court* (1946) 73 CA2d 203, 210, 166 P2d 318.

**Further research:** On the hearing generally, see CCP §1217. On civil versus criminal nature of the proceeding generally, see §16.51.

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### §16.120 (7) Rights of accused

The accused has no right to a jury trial (*Pacific Tel. & Tel. Co. v Superior Court* (1968) 265 CA2d 370, 375, 72 CR 177), but the accused may request the appointment of a public defender when not financially able to employ counsel (see generally Govt C §27706(a)). The accused has the right to:

- Examine documentary evidence (*In re Shackelford* (1953) 116 CA2d 864, 867, 254 P2d 610);
- Cross-examine those who give evidence against the accused; and
- Present evidence in behalf of the accused (*Collins v Superior Court* (1957) 150 CA2d 354, 364, 310 P2d 103).

"[P]resumptions or intendment may not be indulged in to support the contempt order; thus, the findings and judgment are strictly construed in petitioner's favor." *In re Martin* (1977) 71 CA3d 472, 480, 139 CR 451.

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### §16.121 (8) Right to disqualify judge

A person charged with an indirect contempt (see §16.108) has the right to disqualify a judge under CCP §§170-170.5. The procedures for disqualification of a judge are set forth in CCP §170.3. See *Briggs v Superior Court* (1931) 211 C 619, 297 P 3 (applicability of CCP §170). The accused generally has no right to disqualify a judge under §170 for direct contempt. See *Blodgett v Superior Court* (1930) 210 C 1, 9, 290 P 293.

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### §16.122 (9) Judge may defer adjudication of contempt

A judge may defer adjudication of contempt for courtroom misconduct until later in the trial or at the trial's conclusion, unless prompt punishment is required. *Nierenberg v Superior Court* (1976) 59 CA3d 611, 616, 130 CR 847. In these instances, due process requires a new and impartial judge to adjudicate the contempt, if the trial judge has become personally involved with the accused and thus is unfit to adjudicate the contempt charge. *Mayberry v Pennsylvania* (1971) 400 US 455, 463, 27 L Ed 2d 532, 539, 91 S Ct 499; *In re Buckley* (1973) 10 C3d 237, 256, 110 CR 121. See also *In re Martin* (1977) 71 CA3d 472, 479 n4, 139 CR 451, in which the court noted that when the hearing on a direct or indirect contempt is continued to a later date, basic due process requires that it be conducted before a truly impartial judge.

The test for judicial recusal under CCP §170.1(a)(6)(A)(iii) is objective: If a reasonable person would entertain doubts about the judge's partiality, disqualification is mandated. *United Farm Workers of Am. v Superior Court* (1985) 170 CA3d 97, 216 CR 4 (former CCP §170.1(a)(6)(C), now CCP §170.1(a)(6)(A)(iii)).

**EXAMPLE:** In *Aetna Life Ins. Co. v Lavoie* (1986) 475 US 813, 89 L Ed 2d 823, 106 S Ct 1580, the Court held that the judge's refusal to recuse himself from a case in which his interest was direct, personal, substantial, and pecuniary violated federal due process requirements.

**Further research:** On court's entering judgments of contempt during trial but staying execution of judgments pending discharge of the jury, see *Hawk v Superior Court* (1974) 42 CA3d 108, 115 n2, 116 CR 713.

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### i. Penalty for civil contempt

#### §16.123 (1) In general

The penalty for civil contempt is 5 days in jail, a $1000 fine, or both. CCP §1218; *Bauguess v Paine* (1978) 22 C3d 626, 150 CR 461. In addition, a person, or any agent of that person, who is adjudged guilty of contempt may be ordered to pay the party initiating the contempt proceeding the reasonable attorney fees and costs incurred in connection with the contempt proceeding. CCP §1218.

Anyone who is adjudged guilty of misdemeanor contempt under Pen C §166 may be punished by imprisonment in a county jail for not over 6 months or by a fine not over $1000, or both. Pen C §19.

The court may order incarceration "in lieu of payment of a fine imposed for contempt." *In re Ciraolo* (1969) 70 C2d 389, 399, 74 CR 865 (proper to sentence person guilty of contempt to 3 days in jail and assess $200 fine; in case of default, person to serve additional 10 days). On prohibition against incarcerating indigent instead of requiring payment of a fine imposed for contempt, see *In re Siegel* (1975) 45 CA3d 843, 120 CR 8, overruled on other grounds in *People v Romero* (1994) 8 C4th 728, 744, 35 CR2d 270.

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### §16.124 (2) Separate contemptuous acts

When separate contemptuous acts are committed, the contemner may be fined for each offense in the amount specified in CCP §1218. *Donovan v Superior Court* (1952) 39 C2d 848, 855, 250 P2d 246. In *Vaughn v Municipal Court* (1967) 252 CA2d 348, 351 n1, 60 CR 575, an attorney, who was adjudged guilty of 2 counts of contempt, was committed to 5 days in jail and fined $500 on each count—the jail sentences to run concurrently. On a witness's refusal to answer a series of questions as constituting only one contempt, see *In re Keller* (1975) 49 CA3d 663, 123 CR 223.

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### §16.125 (3) Failure to perform an act

When contempt consists of the failure to perform an act that is in the power of the accused to perform, the court may imprison the accused until the act is performed. CCP §1219. In that event, the act must be specified in the warrant of commitment. CCP §1219. The court's power under §1219 is coercive rather than penal in nature. See *In re Keller* (1975) 49 CA3d 663, 670, 123 CR 223; *In re Farr* (1974) 36 CA3d 577, 583, 111 CR 649. When the commitment ceases to be coercive and becomes punitive, it is limited by the 5-day maximum sentence of CCP §1218. 36 CA3d at 584.

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### §16.126 (4) Recalcitrant witness

An adverse party may sometimes protect against a recalcitrant witness by seeking contempt. See *In re Keller* (1975) 49 CA3d 663, 670, 123 CR 223. If the witness refuses to testify fully, the testimony may be disallowed in whole or in part. When the witness's testimony is necessary for the prosecution or defense, however, a party's only recourse is to request that (49 CA3d at 670):

- The court exercise its coercive power under CCP §1219 to jail the witness while the trial is in progress;
- The court exercise its power to punish the witness under CCP §1218; or
- The witness be prosecuted for violating Pen C §166(a)(6).

A court may not "imprison or otherwise confine or place in custody the victim of a sexual assault or domestic violence crime for contempt when the contempt consists of refusing to testify concerning that sexual assault or domestic violence crime." CCP §1219(b).

Procedures for sanctions if a minor under 16 years of age refuses to take an oath or to testify are specified in CCP §1219.5.

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### j. Stay of sentence

### §16.127 (1) When stay required

Despite the CCP §1211 provision for summary punishment for contempt, under CCP §§128 and 1209 the sentence for contempt must be stayed "pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order" if the order affects an attorney, agent, investigator, or anyone acting under the attorney's direction, in the preparation and conduct of an action or proceeding.

The execution of any sentence for contempt against a victim of a sexual assault is stayed pending the filing within 3 judicial days after a petition for extraordinary relief testing the lawfulness of the contempt order. CCP §128(d).

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### §16.128 (2) When stay not required

No stay of execution of sentence is required when the conduct giving rise to contempt is proscribed by Bus & P C §6068(b), concerning an attorney's duty to respect the courts and judicial officers. CCP §§128, 1209.

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### §16.129 k. Appealability of judgment of contempt

The judgment and orders made in contempt cases are final and conclusive. CCP §1222. They are not appealable. CCP §§904.1(a)(1), 904.2(a)(2); *Hawk v Superior Court* (1974) 42 CA3d 108, 115 n3, 116 CR 713. The judgment and orders may be reviewed, however, by certiorari, habeas corpus (see *In re Buckley* (1973) 10 C3d 237, 259, 110 CR 121), or prohibition (see *Charbonneau v Superior Court* (1974) 42 CA3d 505, 507 n1, 116 CR 153).

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## VIII. JUDICIAL MISCONDUCT

### §16.130 A. When judge fails to meet standards of conduct

Judicial misconduct may arise when a judge fails to meet appropriate standards of judicial behavior. For example, a judge:

- Must be courteous to the litigants, witnesses, and lawyers. Code of Judicial Ethics, Canon 3B(4).
- Must be open minded. See *Hansen v Hansen* (1965) 233 CA2d 575, 584, 43 CR 729.
- Must be impartial. See *Haluck v Ricoh Electronics, Inc.* (2007) 151 CA4th 994, 60 CR3d 542; *Davis v Pezel* (1933) 131 CA 46, 50, 20 P2d 982; Code of Judicial Ethics, Canon 3B.
- May not indulge in individual idiosyncrasies while administering justice. *Etzel v Rosenbloom* (1948) 83 CA2d 758, 765, 189 P2d 848. See Code of Judicial Ethics, Canon 3B.
- Must refrain from engaging in gender-biased conduct. *Catchpole v Brannon* (1995) 36 CA4th 237, 42 CR2d 440. See Code of Judicial Ethics, Canon 3B(5).
- Must refrain from affecting for personal reasons a case pending in another court. *Broadman v Commission on Judicial Performance* (1998) 18 C4th 1079, 77 CR2d 408.

Prejudicial misconduct arising from a judge's failure to meet these standards can result in the declaration of a mistrial, the granting of a new trial, or reversal on appeal. See *Etzel v Rosenbloom, supra,* in which the appellate court suggested that trial judges heed Socrates' admonition: "Four things belong to a judge; to hear courteously, to answer wisely, to consider soberly, and to decide impartially." See §§16.53-16.65.

**NOTE:** A judge can be publicly censured for engaging in "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" under Cal Const art VI, §18(c)(2) even though the conduct did not occur while the court was in session or while the judge was on the bench conducting the business of the court. *In re Gordon* (1996) 13 C4th 472, 474, 53 CR2d 788 (conduct included making sexually suggestive remarks to and asking sexually explicit questions of female staff members, referring to staff member by crude and demeaning names, and other such actions).

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## B. Examples of judicial misconduct

### §16.131 1. Judicial intemperance

Insulting remarks, ridicule, or disparagement of counsel, parties, or witnesses on the part of the judge constitute judicial misconduct.

**EXAMPLE 1:** *McCartney v Commission on Judicial Qualifications* (1974) 12 C3d 512, 533, 116 CR 260 (casting aspersions on or ridiculing witnesses during judge's examination).

**EXAMPLE 2:** *Webber v Webber* (1948) 33 C2d 153, 156, 199 P2d 934 (disparaging remarks, *e.g.,* telling counsel to "go ahead and wash your dirty linen").

**EXAMPLE 3:** In *People v Harmon* (1992) 7 CA4th 845, 9 CR2d 265, defense counsel complained that the trial judge turned his back to the attorney during defense counsel's argument to the jury. The court of appeal indicated that partiality may be shown by wordless conduct such as a gesture, a look of disbelief, or a bored closing of eyes. Counsel failed, however, to make a timely objection, and the record did not show that disrespect was inferred by anyone except the defense attorney.

**EXAMPLE 4:** *Etzel v Rosenbloom* (1948) 83 CA2d 758, 761, 189 P2d 848 (disparaging remarks, *e.g.,* "If you don't want the jury to know the truth, I will sustain your objection").

Judicial intemperance should be distinguished from the court's power to exercise reasonable control over the proceedings and ensure the orderly administration of justice. On the court's inherent power generally, see *Cooper v Superior Court* (1961) 55 C2d 291, 10 CR 842.

**Further research:** See generally 7 Witkin, California Procedure, *Trial* §244 (5th ed 2008). See also *Kloepfer v Commission on Judicial Performance* (1989) 49 C3d 826, 264 CR 100, for other examples of judicial intemperance, including berating counsel and failure to remain objective and to protect litigants' rights.

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### §16.132 2. Prejudging case

It is misconduct for a judge to prejudge a case or an issue in it.

- *Webber v Webber* (1948) 33 C2d 153, 199 P2d 934 (plaintiff's presentation of evidence on need for suitable support allowance became meaningless in face of trial judge's prejudgment against her).
- *Pratt v Pratt* (1903) 141 C 247, 74 P 742 (judge expressed moral indignation about allowing child to testify against parent, and virtually threatened to prejudge father's testimony unless child was withdrawn as witness).
- *Carlsson v Carlsson* (2008) 163 CA4th 281, 77 CR3d 305 (judge ended trial before husband finished presenting evidence, infringing on husband's right to full and fair hearing).
- *McVey v McVey* (1955) 132 CA2d 120, 281 P2d 898 (preconceived and declared aversion of trial judge to action for separate maintenance (now legal separation) regardless of plaintiff's proof).
- *Rosenfield v Vosper* (1941) 45 CA2d 365, 114 P2d 29 (inappropriate for judge to advise defendants' counsel to tell clients that it would be in their best interest to settle for $7500; advice given in chambers before defendants presented any witnesses, indicating that judge was not open minded).

When the law affords more than one remedy, a party must determine which remedy to pursue, no matter how much the judge disapproves. *McVey v McVey, supra*. When a party properly pursues more than one remedy, the judge may not assert that the party should not have brought the action or asked for the relief. Although a trial judge may not approve of a statute or precedent governing a decision, the judge has a duty to enforce it in a proper case. 132 CA2d at 123.

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### §16.133 3. Showing partiality

It is misconduct for a judge to show partiality toward a party. See, *e.g., Haluck v Ricoh Electronics, Inc.* (2007) 151 CA4th 994, 60 CR3d 542; *Davis v Pezel* (1933) 131 CA 46, 50, 20 P2d 982. Even the appearance of partiality or prejudice on the part of a judge may constitute misconduct. See, *e.g., Ward v DeMartini* (1930) 108 CA 745, 750, 292 P 192 (while plaintiff testified about where she lived, judge remarked, "I know she lived a respectable and reputable life wherever she lived").

A judge is not, however, a "mere functionary whose sole purpose is to preserve order and lend ceremonial dignity to the proceedings" (*Martin v Martin* (1947) 79 CA2d 409, 410, 179 P2d 655) or a mere referee presiding over a contest of wits between counsel (see *Miller v Republic Grocery, Inc.* (1952) 110 CA2d 187, 192, 242 P2d 396). Thus, although a judge may not properly try a case when he or she has formed partisan opinions from outside sources, a trial judge will normally and properly form opinions on the law, evidence, and witnesses from presentation of the case. Expressing critical or disparaging remarks after that presentation is not misconduct. *Pacific & Southwest Annual Conf. of United Methodist Church v Superior Court* (1978) 82 CA3d 72, 84, 147 CR 44, citing *Haldane v Haldane* (1965) 232 CA2d 393, 395, 42 CR 828.

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### §16.134 4. Interfering with witnesses

Unreasonable interference by a judge with counsel's examination of witnesses is misconduct. See 7 Witkin, California Procedure, *Trial* §249 (5th ed 2008).

- *Pratt v Pratt* (1903) 141 C 247, 250, 74 P 742 (judge interrupted defense counsel's examination of defendant's daughter and virtually threatened to prejudge defendant's testimony unless daughter was withdrawn as witness).
- *Murr v Murr* (1948) 87 CA2d 511, 517, 197 P2d 369 (judge nagged counsel about taking too much time in trying case and wasting court's time).

A judge may, however, suggest a shortening or condensing of testimony. See *Hageman v O'Brien* (1914) 24 CA 270, 277, 141 P 33. In *Hageman,* a nonjury trial, it was not error for the judge to suggest that testimony be shortened and condensed. This did not constitute a denial of the right to offer evidence.

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### §16.135 5. Improper examination of witnesses

A judge has power to examine witnesses (see §16.60) but cannot become the advocate for a party "or under the guise of examining witnesses comment on the evidence or cast aspersions or ridicule on a witness." *People v Rigney* (1961) 55 C2d 236, 241, 10 CR 625. Also, while counsel is asking proper questions, a trial judge ordinarily should refrain from taking over the questioning of witnesses, and instead permit counsel to develop the case. See *Hart v Farris* (1933) 218 C 69, 76, 21 P2d 432. See also *People v Rigney, supra* (judge should examine witnesses only when it appears that counsel will not elicit relevant and material evidence). See also *People v Ferguson* (1981) 126 CA3d Supp 22, 30 n4, 179 CR 437 (footnote to case indicated that trial judge should have asked a question the prosecuting deputy failed to ask; court analyzed series of cases regarding judge's "duty" to ask questions).

Particularly in a jury trial, a judge has a duty to exercise a high degree of patience with counsel and witnesses. *Hays v Viscome* (1953) 122 CA2d 135, 264 P2d 173. Jurors are quick to observe the court's attitude toward the parties and their counsel, and be influenced by it. 122 CA2d at 143. Thus, conduct by a judge that might be considered prejudicial in a jury trial may not be considered prejudicial in a nonjury trial. See, *e.g., Seidenberg v George* (1946) 76 CA2d 306, 309, 172 P2d 891 (judge's remarks to speed up nonjury trial justified by record). But see *Murr v Murr, supra*.

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### §16.136 6. Coercing waiver of substantive or procedural right

Coercing a party into waiving an important substantive or procedural right constitutes misconduct on the part of a judge. See, *e.g., Broadman v Commission on Judicial Performance* (1998) 18 C4th 1079, 77 CR2d 408 (inducing a criminal defendant to waive right to prompt sentencing hearing without disclosing judge's true purpose is willful misconduct); *Pratt v Pratt* (1903) 141 C 247, 74 P 742 (coercing party to withdraw daughter as witness even though testimony she offered was competent and proper).

Coercion can arise in a subtle way. For example, the judge may suggest in the jury's presence a course of action so pleasing to them that counsel is compelled to accept it. See, *e.g., Shippy v Peninsula Rapid Transit Co.* (1925) 197 C 290, 240 P 785 (improper interrogation of jurors by judge at close of evidence to determine how many jurors felt reasonably satisfied that they could determine facts without argument or jury instructions; plaintiff's waiver of argument considered involuntary).

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### §16.137 7. Compelling settlement

A trial judge may not coerce a party to effect a settlement. See *Rosenfield v Vosper* (1941) 45 CA2d 365, 114 P2d 29. Before defendants had presented any evidence in *Rosenfield,* a nonjury trial, the trial judge advised their attorney that it would be in their best interests to settle for $7500. The appellate court held this advice to be improper because it indicated that the judge could not hear defendant's witnesses with an open mind. In reversing a judgment favoring plaintiff in a greater amount, the court noted (45 CA2d at 371):

> [A]lthough efforts on the part of a trial judge to expedite proceedings and to encourage settlements out of court are ordinarily to be commended, such efforts should never be so directed as to compel either litigant to make a forced settlement.

Distinguishing what constitutes a reasonable and proper suggestion of compromise or alternative relief from what constitutes coercing a party into settlement may be difficult. 7 Witkin, California Procedure, *Trial* §252 (5th ed 2008). For cases in which judges' suggestions and comments concerning settlement have been considered proper, see *Gardner v Mobil Oil Co.* (1963) 217 CA2d 220, 31 CR 731, and *Empire Steel Bldgs. Co. v Harvey Mach. Co.* (1954) 122 CA2d 411, 416, 265 P2d 32.

**EXAMPLE 1:** In *Gardner v Mobil Oil Co., supra,* the trial judge stated, in essence, on the third day of a 5-day nonjury trial that plaintiffs had not yet made a prima facie case. He then inquired whether settlement was possible. During the settlement discussion that followed, the judge commented that, based on the case presented so far, plaintiffs did not appear to have suffered any financial loss from their dealings with defendant. The judge also suggested a settlement figure. He indicated, however, that his mind was still open regarding a decision in the case.

**EXAMPLE 2:** In *Empire Steel Bldgs. Co. v Harvey Mach. Co., supra,* the trial judge called the parties into chambers, before plaintiff had finished presenting evidence, and suggested that they effect a compromise. The judge indicated that "it looked as though there was a contract" at that point in the trial. 122 CA2d 416 (no showing of coercion; at conclusion of trial, defendant followed judge's suggestion to amend cross-complaint to pray for divorce).

**Further research:** See Anno, *Propriety and Prejudicial Effect of Suggestion or Comments by Judge as to Compromise or Settlement of Civil Case,* 6 ALR3d 1457 (1966).

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### §16.138 8. Receiving evidence when court not in session

A trial judge may not receive evidence when court is not in session. *Gimbel v Laramie* (1960) 181 CA2d 77, 85, 5 CR 88.

**EXAMPLE:** In *Gimbel* (a nonjury trial), the trial judge advised counsel after the case was submitted for decision that he had submitted a photograph, which had been received in evidence, to a friend who was an amateur photographer. Although the photograph purportedly showed a defective steering wheel, the photographer was unable to detect any damage. The judge offered counsel an opportunity to have expert photographers examine the picture and testify concerning it. The appellate court noted that plaintiff could have moved at this point for a mistrial, because the judge's actions constituted a denial of due process. The judge's friend had testified as an unsworn witness when the court was not in session, he was not subject to cross-examination, and he performed the function of an expert without qualifying as such. Rather than moving for a mistrial, however, plaintiff requested permission to reopen the case, which the court granted. The appellate court held that, by electing to reopen the case rather than moving for a mistrial, the attorney had waived the right to a new trial or reversal of the judgment on that ground. The court noted that an attorney who elects to introduce additional evidence to counteract evidence wrongfully received by the court may not reserve an objection to the evidence in the event of an adverse judgment. 181 CA2d at 86.

**Further research:** On trier of fact (judge or jury) leaving courtroom to receive evidence when court is in session, see CCP §651.

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### 9. Coercing jury verdict

### §16.139 a. Telling jury they must agree

Because individual jurors hold the exclusive right to agree or not agree on a verdict, it is improper for a judge to tell them that they must agree. *Cook v Los Angeles Ry.* (1939) 13 C2d 591, 594, 91 P2d 118. In addition, a judge may not hurry the jurors' deliberations by coercive threats or disparaging remarks or coerce them into bringing a verdict within an unreasonably short time. *Cook v Los Angeles Ry., supra*. See *Duehren v Stewart* (1940) 39 CA2d 201, 209, 102 P2d 784 ("court commits error only when by instruction or conduct the jury is coerced into an agreement").

**EXAMPLE:** In *Cook v Los Angeles Ry., supra,* the court held coercive a trial judge's instruction to jurors indicating that he did not consider plaintiff was entitled to recover, and that the jurors should take no more than ten additional minutes to deliberate. 13 C2d at 593.

In *Mahoney v San Francisco & San Mateo Ry.* (1895) 110 C 471, 476, 42 P 968, when the jury stood 8-3, the judge improperly indicated that:

- The trial had been particularly expensive for plaintiff, who was not well off;
- Plaintiff required at least 9 votes for a verdict; and
- He would cheerfully do anything to help one of the three jurors come to a conclusion, *e.g.,* reread a portion of the charge.

The appellate court remarked that it "must have appeared to the jury that the court was insisting that the three, or one of them, should yield to the eight." 110 C at 479.

A trial judge may not, by means of thinly veiled threats or intimidation, coerce a jury into returning a verdict to which it would not otherwise have agreed. *Langdon v Superior Court* (1923) 65 CA 41, 223 P 72. This coercion usurps the jury's function in determining the facts of the case. In this situation, the jury's verdict actually represents a verdict by the judge. 65 CA at 43.

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### §16.140 b. Distinguish proper advice

A distinction should be drawn between coercing the jury and properly advising it of its powers and function. It is not improper for a trial court to advise jurors of the importance of reaching a verdict and of considering one another's arguments with open minds rather than obstinately adhering to first impressions. *Cook v Los Angeles Ry.* (1939) 13 C2d 591, 91 P2d 118. A judge may insist that the jurors obey the instructions on the law in arriving at a verdict. See *Redo y Cia v First Nat'l Bank* (1926) 200 C 161, 165, 252 P 587 (court refused to accept jury's verdict and instructed jury to retire and return verdict conforming with instruction on lawful limit of liability).

**EXAMPLE 1:** In *Pandolfo v Jackson* (1936) 12 CA2d 232, 235, 55 P2d 550, the court held that the trial judge did not commit error in inquiring about the status of the deliberations after only 3 hours. The judge asked the foreman how many ballots had been taken and how the jurors stood numerically, without asking which side the jury favored. Similarly, even though a jury indicates that it cannot agree on a verdict, it is not misconduct for a judge to send them out for further deliberations. See *Pisani v Martini* (1933) 132 CA 269, 274, 22 P2d 804.

**EXAMPLE 2:** In *Inouye v Pacific Southwest Airlines* (1981) 126 CA3d 648, 179 CR 13, when the jurors were unable to reach a verdict in this case, the judge instructed them that the case would have to be retried if they did not reach a verdict. The judge also instructed the jurors to listen to the other jurors' arguments and distrust their own judgment if a large majority took a different view of the case. In holding that the instructions were not coercive under the circumstances, the court stated (126 CA3d at 651):

> [A]ny coercive effect should be determined by reading the instruction as a whole in light of the surrounding circumstances. Only when the instruction has coerced the jurors into surrendering their conscientious convictions in order to reach agreement should the verdict be overturned.

**NOTE:** Including the above remarks in a jury instruction in a criminal case would be error. See *People v Gainer* (1977) 19 C3d 835, 139 CR 861. In *People v Moore* (2002) 96 CA4th 1105, 1120, 117 CR2d 715, however, the court's instructions were found not to be erroneous because they did not suggest that a verdict must be reached and, while instructing jurors to consider each other's views, also instructed them to base their verdict solely on the evidence and not to abandon a deeply and conscientiously held position simply to compromise.

A court may question the jury about its numerical division if the questioning is not otherwise divisive. *People v Morris* (1991) 53 C3d 152, 227, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. Also, when a jury cannot agree on a first issue of a special verdict, the court may ask the jury to skip over that question and consider the second issue if the second issue can dispose of the entire action. *Santiago v Firestone Tire & Rubber Co.* (1990) 224 CA3d 1318, 1335, 274 CR 576. For further discussion on deadlock during jury deliberations, see §21.14.

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### §16.141 10. Communicating with jurors during deliberations

Jurors may require the court officer to bring them into court if, during deliberations, they disagree on the testimony or wish to be informed on a point of law. CCP §614. The court must give them the required information in the presence of, or after notice to, the parties or counsel.

**EXAMPLE 1:** In *Nelson v Southern Pac. Co.* (1937) 8 C2d 648, 655, 67 P2d 682, the court held that it was improper for the trial judge to communicate with the jury after they retired by sending them a message by the bailiff without the presence of counsel. The court noted that any method of communication other than that authorized by CCP §614 goes to the substance of the right of trial by jury and is considered to be prejudicial except in exceptional circumstances.

**EXAMPLE 2:** In *Tice v Pacific Elec. Ry.* (1939) 36 CA2d 66, 96 P2d 1022, communication to the jury in the absence of counsel, or without an express stipulation, is irregular and should be avoided; under the facts of the case, however, no prejudicial error was shown.

When the jury has retired for deliberation and returns to the court for clarification of testimony, the trial judge need not be present in the court while testimony previously received in evidence is read to the jury. CCP §614.5.

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### §16.142 C. No formula for determining misconduct

No formula governs which judicial comments constitute misconduct. Each case must be examined in relation to its own facts. See *Weil v Weil* (1951) 37 C2d 770, 786, 236 P2d 159; *Gary v Avery* (1960) 178 CA2d 574, 579, 3 CR 20.

**EXAMPLE:** In *Anderson v Mothershead* (1937) 19 CA2d 97, 101, 64 P2d 995, a personal injury action, expert testimony on the extent of plaintiff's injuries conflicted. When instructing the jury, the trial judge stated:

> [I]f [defendant] isn't liable, then no matter how terribly [plaintiff] may have been injured, [defendant,] of course, would not be liable. It would be a terrible and a sad thing, but one for which he could not be compelled to pay.
>
> The appellate court held that use of the words "a terrible and a sad thing" was improper because the jury would naturally apply them to plaintiff's injuries and believe that the court regarded them as "terrible."

**EXAMPLE 2:** In *Chapman v Pacific Elec. Ry.* (1927) 85 CA 69, 74, 258 P 1006, it was held improper for the court to state in the instructions that the amount claimed by plaintiff was absurd.

**EXAMPLE 3:** In *Iloff v Purity Stores, Ltd.* (1960) 178 CA2d 1, 2 CR 735, plaintiff brought an action for personal injuries in a slip-and-fall accident. The crucial issue was the condition of the floor. After plaintiff and an eyewitness testified that the floor was slick and oily, the store's managing agent was called to testify under CCP §2055 (now Evid C §776). He testified that the floor was in good condition and free of cracks. When plaintiff's counsel asked the witness again whether there were any cracks or recesses, the court stated that the witness had already answered counsel a dozen times. The court further said, "These floors are all right. I will vouch for that." 178 CA2d at 4. The appellate court held this to be error because it was improper for the judge to indicate his views during trial on so vital an issue.

When a judge comments on the evidence (see Cal Const art VI, §10), the comment should be expressly labeled as the judge's opinion, and the jurors should be advised that they may disregard it. *People v Rigney* (1961) 55 C2d 236, 241, 10 CR 625. Questions by the judge are not so labeled. When a judge's question conveys an opinion of a witness's credibility, the jurors may form their opinions before the case is submitted to them (see CCP §611) by substituting the judge's opinion for their own. Thus, a judge may not ask questions that convey an opinion on a witness's credibility to the jury. *People v Rigney, supra*.

When ruling on an objection to the admissibility of evidence, or on a motion to strike, it is not unusual for a judge to announce, for guidance of counsel, the reason for the ruling. *Ries v Reinhard* (1941) 47 CA2d 116, 120, 117 P2d 386. It is not improper for a trial judge to give reasons for such rulings if they are not expressed in language, or in a manner, that is prejudicial. *Woods v Pacific Greyhound Lines* (1949) 91 CA2d 572, 575, 205 P2d 738; *McCullough v Langer* (1937) 23 CA2d 510, 521, 73 P2d 649. See *Lewis v Crenshaw* (1920) 47 CA 781, 784, 191 P 72 (trial judge spoke laconically, decisively, and with great brevity in expressing rulings; no prejudice shown).

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## IX. REMEDIES FOR JUDICIAL MISCONDUCT

### A. Action by counsel

### §16.143 1. Object to misconduct or assign misconduct as error

To protect the record, object to judicial misconduct when it occurs, or assign the misconduct as error. Otherwise, the error is considered to be waived and the point cannot be considered on appeal. See *People v Geier* (2007) 41 C4th 555, 613, 61 CR3d 580; *Marini v Department of Alcoholic Beverage Control* (1960) 177 CA2d 785, 787, 2 CR 714; *Karwoski v Grant* (1938) 30 CA2d 171, 178, 85 P2d 944. See also *Estate of Golden* (1935) 4 C2d 300, 310, 48 P2d 962 (no objection, motion, other action to strike, or request for curative instruction; any exception to trial judge's improper remark must be taken when remark is made or some time before close of trial). But see *Haluck v Ricoh Electronics, Inc.* (2007) 151 CA4th 994, 60 CR3d 542 (failure to object does not preclude review when objection and admonition would not cure prejudice caused by misconduct, or would be futile); *Catchpole v Brannon* (1995) 36 CA4th 237, 42 CR2d 440 (no requirement to object to gender bias on part of judiciary, which affects public interest in due administration of justice).

Even if the case is tried without a jury, an objection or assignment of misconduct as error usually is required. See, *e.g., Rios v Chand* (1955) 130 CA2d 833, 840, 280 P2d 47 (no assignment of prejudice or misconduct at time of alleged improper judicial remarks).

An assignment of misconduct as error might take the following form: "Your Honor, I respectfully object to your Honor's remarks and assign them as error." Depending on the circumstances, counsel might also request that the objectionable matter be stricken, that the judge give an admonition to the jurors to cure any harm caused by the misconduct, or both.

**EXAMPLE:** In *Forte v Schiebe* (1956) 145 CA2d 296, 301, 302 P2d 336, the court held that defendant did not forfeit the right to urge judicial misconduct on appeal, although no objection was made to allegedly prejudicial remarks of the trial judge and no request was made that the jury be admonished to disregard them. A special admonition apparently would not have cured the harm. Moreover, it appeared from the record that defendant's request that the jury be admonished would have been denied. See *Etzel v Rosenbloom* (1948) 83 CA2d 758, 762, 189 P2d 848. See also *Estate of Golden, supra*.

Any statement or other action of the court in commenting on or summarizing the evidence is deemed excepted (objected) to. CCP §647. See *Delzell v Day* (1950) 36 C2d 349, 223 P2d 625.

**NOTE:** Not all improper judicial actions cross the threshold of misconduct, but they still require the lawyer to be prepared to preserve objections on the record. See Haratani, *Coping with Hostile Judges*, Practical Litigator (May 1997).

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### §16.144 2. Request curative admonition

In conjunction with an objection or assignment of error, no request is required that the judge instruct the jurors to disregard the judge's own misconduct to preserve the point for appeal. *Delzell v Day* (1950) 36 C2d 349, 223 P2d 625. In fact, requesting that the court admonish the jury to disregard the improper remarks may only serve to emphasize the words in the jurors' minds. 36 C2d at 351. But see *Miller v Western Pac. R.R.* (1962) 207 CA2d 581, 607, 24 CR 785 (injured party relieved of duty to assign judicial misconduct as error (and to request that trial court instruct jury to disregard it) only when admonition would not remove prejudicial effect of judge's remarks or conduct).

Judicial misconduct may be cured by the court's giving an appropriate admonitory instruction. See, *e.g., Richman v San Francisco, Napa & Calistoga Ry.* (1919) 180 C 454, 458, 181 P 769; *Germ v City & County of San Francisco* (1950) 99 CA2d 404, 416, 222 P2d 122.

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### B. Review remedies available

### §16.145 1. Consider moving for mistrial

If misconduct appears so prejudicial that it cannot be cured by admonition, and to proceed would deprive a party of the right to a fair trial, consider moving for a mistrial. See *Etzel v Rosenbloom* (1948) 83 CA2d 758, 765, 189 P2d 848. See §16.95.

**Further research:** On motions for mistrial, see §§18.82-18.102.

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### §16.146 2. Evaluate moving for new trial

Judicial misconduct is an "irregularity in the proceedings" under CCP §657(1) and, if prejudicial, is the basis for granting a new trial. See generally *Gay v Torrance* (1904) 145 C 144, 78 P 540. See also *Webber v Webber* (1948) 33 C2d 153, 163, 199 P2d 934. See §16.96.

Judicial misconduct that violates a party's right to due process requires reversal without determination of actual prejudice. See *Carlsson v Carlsson* (2008) 163 CA4th 281, 292, 77 CR3d 305 (judge summarily terminated trial before party finished presenting evidence).

**Further research:** On motions for new trial, see §§25.22-25.71.

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### §16.147 3. Determine whether appeal appropriate

A party may seek reversal of a judgment based on judicial misconduct. See, *e.g., Delzell v Day* (1950) 36 C2d 349, 223 P2d 625; *Haluck v Ricoh Electronics, Inc.* (2007) 151 CA4th 994, 60 CR3d 542. See also *McCarthy v Mobile Cranes, Inc.* (1962) 199 CA2d 500, 509, 18 CR 750 (denial of party's right to cross-examine adverse witness in consolidated action; former Cal Const art VI, §4-1/2 (currently §13) did not cure error). On absence of affidavit supporting motion for new trial based on judicial misconduct not preventing point being raised on appeal, see *Webber v Webber* (1948) 33 C2d 153, 199 P2d 934. On Cal Const art VI, §13, being held inapplicable to acts constituting reversible error per se, see 9 Witkin, California Procedure, *Appeal* §§453-458 (5th ed 2008).

**Further research:** See chap 17 for discussion of jury misconduct. See chap 21 for discussion of misconduct during deliberations.

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## §16.148 X. EXAMPLES OF ACTS OR OMISSIONS THAT ARE CONTEMPTS OF COURT'S AUTHORITY

The following acts or omissions are contempts of the court's authority (CCP §1209):

- Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.
- A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.
- Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service.
- Abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court.
- Disobedience of any lawful judgment, order, or process of the court.
- Rescuing any person or property in the custody of an officer by virtue of an order or process of the court.
- Unlawfully detaining a witness, or a party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial.
- Any other unlawful interference with the process of proceedings of a court.
- Disobedience of a subpoena duly served or refusal to be sworn or answer as a witness.
- When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action, to be tried at the court, or with any other person, in relation to the merits of the action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.
- Disobedience by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after the action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

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## §16.149 XI. EXAMPLES OF REMEDIES FOR MISCONDUCT OF COUNSEL

The following remedies, or an effective combination of them, may be invoked for misconduct of counsel during trial. See §§16.66-16.90 for discussion of attorney misconduct, and §§16.92-16.129 for discussion of remedies for misconduct.

- An objection to the misconduct.
- A request that offending counsel be reprimanded and admonished to cease the objectionable conduct (see §16.92).
- A demand that offending counsel withdraw the argument or remark.
- A request for an admonition to the jury to disregard the objectionable material (see §16.93).
- A motion for the granting of a mistrial (see §16.95).
- A request to reopen the party's case when opposing counsel has made a flagrant misrepresentation of fact during closing argument.
- A motion for the granting of a new trial (see §16.96).
- Reversal on appeal, regardless of the corrective steps taken in the lower court, on the ground that counsel's conduct was so prejudicial as to be not correctable (see §§16.97-16.98).
- Citation of counsel for contempt after continued warning (see §§16.99-16.129).
- Sanctions up to $1500 under CCP §177.5 for violation of court orders (see *People v Tabb* (1991) 228 CA3d 1300, 279 CR 480, applying §177.5 to both civil and criminal cases; see also *Caldwell v Samuels Jewelers* (1990) 222 CA3d 970, 272 CR 126).
- The granting of a motion under CCP §§128.5, 128.7 for reasonable expenses, including attorney fees incurred as a result of opposing counsel's tactics or actions not based on good faith that were frivolous or caused unnecessary delay.

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# 17

# Jury Management

**Stephen A. McFeely**
**Judge James J. Marchiano**

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/17 Jury Management/§17.1 I. SCOPE OF CHAPTER

## §17.1 I. SCOPE OF CHAPTER

This chapter addresses the practical issues that arise after a citizen is selected for jury service and is compelled to report to court. These issues include:

- Jury management during voir dire (see §§17.2-17.4), including misconduct during voir dire (see §17.4);
- Jury management during trial (see §§17.5-17.9);
- Juror misconduct during trial (see §§17.10-17.14), including communication of facts from sources outside the evidence (see §§17.10-17.14), improper communications (see §§17.15-17.19), and inattentiveness during trial (see §§17.20-17.22); and
- Remedies for misconduct (see §§17.23-17.32), including how to object (see §§17.23-17.24), requesting replacement of jurors (see §17.25), moving for mistrial (see §17.26) or moving for new trial (see §§17.27-17.32).

Jury deliberations, including misconduct during deliberations, are discussed in chap 21. Jury selection is covered in chap 8, and jury instructions in chap 20. Motions for new trial are covered in more detail in chap 25.

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## II. JURY MANAGEMENT DURING VOIR DIRE

### §17.2 A. Managing prospective jurors

The jury commissioner manages the jury system, and the trial judge manages the prospective jurors assigned to the trial department. CCP §§191, 222, 222.5.

In most counties, prospective jurors (veniremen) gather in a jury assembly room. Before the prospective jurors are called to a courtroom (department), jury commission staff members take roll and outline the procedures that prospective jurors will follow. See CCP §214. When a particular department or courtroom needs a jury, a call goes to the jury assembly room. A designated number of prospective jurors is then selected at random and sent to the requesting department.

After the prospective jurors arrive at the designated courtroom, the trial judge is responsible for them. The trial judge may direct the clerk, bailiff, marshall, or other courtroom attendant (depending on local court practice) to greet the jurors and to take roll. Either outside the courtroom or after the prospective jurors are seated, the courtroom attendant will instruct them not to talk, eat, drink, or chew gum in the courtroom (and may also instruct them on the trial judge's rules).

**PRACTICE TIP:** Jury management issues may be handled differently in some courts. Although most judges address practical issues with counsel before trial, it is also good practice to seek out an attorney who has conducted a trial before the judge handling your case and discuss the judge's approach to jury management and other practical issues.

**Further research:** For discussion of improving jury procedures, see §§1.15-1.23. For a discussion of the jury selection process, see chap 8.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/17 Jury Management/§17.3 B. Jurors given introductory information about voir dire process

### §17.3 B. Jurors given introductory information about voir dire process

**Judge gives introductory speech.** The judge usually welcomes the jurors and thanks them for their willingness to serve. The judge next states the name of the case, explains whether the case is civil or criminal, and reads a brief, neutral statement of the dispute, usually in a form that has been agreed on and prepared by counsel. The judge then identifies and introduces the parties, if present, as well as the attorneys. The judge also reads a list of witnesses whom the parties expect might be called. The trial judge may permit short opening statements by counsel to the panel before examination of prospective jurors begins. Cal Rules of Ct 2.1034. These actions are all directed toward identifying early in the process a prospective juror who knows something about the case or is familiar with the parties, the attorneys, or prospective witnesses and should be disqualified.

**JUDICIAL PERSPECTIVE:** A short opening statement—or "mini-opening statement"—can be a useful tool for counsel. For further discussion of mini-opening statements, see §1.18A.

**Selection for voir dire.** The clerk randomly selects prospective jurors for voir dire until the jury panel is complete. See CCP §222. Before examination of the panel assigned for voir dire, the prospective jurors swear, under penalty of perjury, to "accurately and truthfully answer" all questions on qualifications and competency to serve as trial jurors. CCP §232(a). Twelve names are then called for initial questioning by the judge and attorneys. See CCP §222.5. For detailed discussion of jury selection, see chap 8.

**NOTE:** Judges use a variety of procedures for jury selection, including the "six pack" method in which 18 jurors are seated for voir dire (12 in the jury box and 6 outside it). When a juror is excused, a replacement is taken from the extra six potential jurors (the "six pack").

All prospective jurors must pay attention during voir dire. The judge often explains that, because questions are repetitive, jurors can save time by listening and being prepared with answers when they are selected for voir dire. For a discussion of the juror's obligation to pay attention at all stages of the proceedings, and of inattentiveness as misconduct, see §§17.20-17.22.

**JUDICIAL PERSPECTIVE:** Many judges direct jurors who are not in the original draw to listen carefully and to volunteer their responses if they are called to replace a seated prospective juror. This technique can help counsel identify which jurors are listening and tracking the issues being discussed.

**Admonished not to discuss case.** Before the first break during voir dire, the court usually admonishes the prospective jurors for the first time, instructing them not to discuss the jury selection or anything about the case, not to form or express any opinion about the case until it is submitted to them, as well as to avoid news coverage of the case and any independent investigation. CCP §611. See §17.6.

**JUDICIAL PERSPECTIVE:** Many judges have expanded the admonition to include discussions by means of electronic media (*e.g.,* blogs, texting), and one-way expressions that may not constitute a "discussion."

**Take oath after selection.** After the jury is selected, the jurors take an oath to render a verdict based only on the evidence and the instructions given. CCP §232(b). See chap 8 for discussion of jury selection.

**NOTE:** The identity of jurors is not normally subject to seal in a civil action. CCP §237(a)(1). In a criminal case, however, the court's record of personal juror identifying information must be sealed upon the recording of a jury's verdict. CCP §237(a)(2); see *Erickson v Superior Court* (1997) 55 CA4th 755, 758, 64 CR2d 230.

**Preinstruction.** Immediately after jurors are sworn, the court may preinstruct them regarding the elements of the charges or claims, their duties and conduct, the order of proceedings, the procedure for submitting written questions for witnesses, if allowed (see Cal Rules of Ct 2.1033), and the legal principles governing the proceeding. Cal Rules of Ct 2.1035. On preinstructions, see §1.21.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/17 Jury Management/§17.4 C. Juror misconduct during voir dire: Concealment of bias

### §17.4 C. Juror misconduct during voir dire: Concealment of bias

A juror's concealment of bias on voir dire examination constitutes misconduct. *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 95 CR 516. See *Clemens v Regents of Univ. of Cal.* (1971) 20 CA3d 356, 97 CR 589 (during voir dire examination, juror concealed bias and prejudice against persons, including plaintiff, who prosecute medical malpractice litigation). "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution." *In re Hitchings* (1993) 6 C4th 97, 110, 24 CR2d 74 (concealment by juror of greater knowledge of case than revealed on voir dire was misconduct because record showed that juror's prior knowledge was crucial to defense); *Lombardi v California St. Ry.* (1899) 124 C 311, 317, 57 P 66. See also *Tapia v Barker* (1984) 160 CA3d 761, 206 CR 803 (juror failed to disclose possible prejudice toward plaintiff's ethnic background).

Whether concealment of relevant information or background constitutes reversible error depends on two major factors (see cases listed below):

- Whether the concealment was intentional; and
- Whether the facts not divulged were similar to any matters in issue.

**EXAMPLE 1:** Concealment unintentional: *People v Dyer* (1988) 45 C3d 26, 59, 246 CR 209; *Jutzi v County of Los Angeles* (1987) 196 CA3d 637, 654, 242 CR 74; *People v Kelly* (1986) 185 CA3d 118, 120, 229 CR 584.

**EXAMPLE 2:** Concealed facts not directly relevant to those in dispute in the trial: *Jutzi v County of Los Angeles, supra*; *People v Kelly, supra*.

**EXAMPLE 3:** Concealment intentional and concealed matters directly relevant to the case: *Ovando v County of Los Angeles* (2008) 159 CA4th 42, 71 CR3d 415; *People v Blackwell* (1987) 191 CA3d 925, 236 CR 803; *Tapia v Barker, supra*.

It is up to the court to determine whether voir dire questions are relevant and unambiguous enough to determine whether concealment is intentional. In *Wiley v Southern Pac. Transp. Co.* (1990) 220 CA3d 177, 188, 269 CR 240, a juror concealed his bias (the juror had been sued in a similar incident) against plaintiff during voir dire, but mentioned it during deliberations. The court noted that the trial court must determine whether the voir dire questions were relevant and unambiguous enough to enable it to determine whether the concealment was intentional and whether the juror knew of the facts elicited. The court found that a new trial was properly granted because the commonly used general voir dire question sufficed to elicit the responses needed, and the juror's misconduct was thus intentional.

A new trial may be granted under CCP §657(1)-(2) if, during voir dire examination, a juror conceals a state of mind that could prevent the juror from acting impartially. See *People ex rel Dep't of Pub. Works v Curtis* (1967) 255 CA2d 378, 388, 63 CR 138.

**JUDICIAL PERSPECTIVE:** Jurors sometimes forget to mention certain details or concerns during questioning, and then find themselves uncertain how to raise the issue later. The judge should inform the jurors that if at any time, even during the trial, they realize that they have a response to a question raised in voir dire that they did not bring up for any reason, they should tell the bailiff so that the information can be given to the judge.

**Further research:** On concealment of bias by silence, see *Lindemann v San Joaquin Cotton Oil Co.* (1936) 5 C2d 480, 496, 55 P2d 870, discussed in §17.23; *Smith v Covell* (1980) 100 CA3d 947, 161 CR 377, discussed in §17.11. See also *Clemens v Regents of Univ. of Cal., supra* (prospective jurors' duty to volunteer information during voir dire examination).

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## III. JURY MANAGEMENT DURING TRIAL

### §17.5 A. Jurors assemble in jury room or outside courtroom

Trial jurors usually report each day to the jury deliberation room assigned to their particular courtroom. When courts lack separate jury rooms, the jurors may be instructed to assemble outside the courtroom while trial matters or other cases are handled outside their presence. Trial courts should set up a system for receiving and responding to juror complaints. See Cal Rules of Ct, Standards of J Admin 10.51.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/17 Jury Management/§17.6 B. Jury permitted breaks during trial

## §17.6 B. Jury permitted breaks during trial

Usually, the judge allows a short morning break and a short afternoon break. Because smoking is not permitted in the courts, jurors must leave the building to smoke during a break. See Cal Rules of Ct 10.504. Jurors usually receive a lunch break during the trial.

**PRACTICE TIP:** Check the custom of the court in your case for such things as whether jurors are reimbursed for their meals during trial, or whether there are any lunch breaks at all. In some state courts, trial begins at 8:30 a.m. and continues until early afternoon without a lunch break so that the judge can spend some time each afternoon on matters unrelated to the ongoing trial.

In longer trials, the trial judge should consider scheduling trial days to permit jurors time for personal business. See Cal Rules of Ct, Standards of J Admin 2.20(b)(9).

The court must admonish the jurors that, if permitted to separate from other jurors, they (CCP §611):

- Are not allowed to communicate with anyone, including each other, about the subject of the trial; and
- Have the duty not to form or express an opinion to anyone on any subject of the trial until the case is submitted to them.

**PRACTICE TIP:** Before trial begins, the judge typically meets with counsel to discuss the trial proceedings and solicits from trial counsel a stipulation that the admonition to the jurors at each break or separation need not be given. There is little reason not to enter into such an agreement. Even with the stipulation, most trial judges repeat the admonition periodically, usually at the end of the trial day. Judges also often caution juries, on break or separation, to "remember the admonition."

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/17 Jury Management/§17.7 C. Jurors may take notes during trial

### §17.7 C. Jurors may take notes during trial

Jurors must be permitted to take notes during the proceedings. At the beginning of a trial, the court must inform jurors of their right to take notes and provide them with note-taking materials. Cal Rules of Ct 2.1031. On juror note-taking, see §1.19. The court will remind jurors of their responsibility to pay attention and advise them that note taking should not interfere with the jurors' ability to listen to the evidence. Jurors may use their notes during deliberations but cannot remove their notes from the courtroom until they are discharged. For discussion of the use of juror notes during deliberations, see §21.30. See also CALJIC 1.05.

**NOTE:** The court should allow jurors to submit written questions for witnesses during trial. If such questions are allowed, the court must give counsel an opportunity to object to them outside the jury's presence. Cal Rules of Ct 2.1033. On juror questions, see §1.20.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/17 Jury Management/§17.8 D. When jury may see physical evidence or exhibits

### §17.8 D. When jury may see physical evidence or exhibits

If an exhibit admitted into evidence is one that the jury can quickly observe or easily handle, such as a photograph, the jury will usually be permitted to pass the exhibit among themselves after it is admitted. Counsel must obtain leave of court, however, before giving the jury copies of documents (or blowups or transparencies of documents) to read.

**JUDICIAL PERSPECTIVE:** Often counsel will ask the court if they can "publish" the exhibit and, if permitted, submit it to the jurors immediately to be passed around. Because some judges find this disruptive, it is advisable to raise the issue in advance with the court.

Trial judges should encourage counsel in complex civil cases to include key documents and exhibits in notebooks that the jurors may use to assist themselves during trial. Cal Rules of Ct 2.1032. On juror notebooks, see §1.19A.

**PRACTICE TIP:** To avoid delay and disruption of the proceedings, deliver to the jury, after it begins deliberations, documents that must be read, or exhibits that the jury will examine in detail.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/17 Jury Management/§17.9 E. Jury may view the scene on motion of party or court

### §17.9 E. Jury may view the scene on motion of party or court

When a view would properly aid the trier of fact in determining the case, the court may order a view of:

- Property that is the subject of litigation (CCP §651(a)(1));
- The place where any relevant event occurred (CCP §651(a)(2)); or
- Any object, demonstration, or experiment that cannot reasonably be viewed in the courtroom, when the viewing is relevant and admissible in evidence in the case. CCP §651(a)(3).

Court is considered in session throughout the viewing. CCP §651(b). The entire court, including the judge, bailiff, and court reporter, accompanies the jury to the view site. CCP §651(b). For a discussion of consideration of facts based on personal knowledge or improper observations, see §17.11.

**JUDICIAL PERSPECTIVE:** Judges generally do not favor jury views, which are expensive and present logistical difficulties. Before requesting one, consider the problems inherent in taking a large group of people into an area over which there is little control.

Jury views are discussed in §1.32. For discussion of fact-finder views in bench trials, see §24.4.

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## IV. JURY MISCONDUCT DURING TRIAL

### §17.10 A. Receiving or communicating facts from sources outside evidence

It is misconduct for jurors during trial to communicate to other jurors facts obtained outside the evidence presented at trial. See *Smith v Covell* (1980) 100 CA3d 947, 952, 161 CR 377. Facts brought in by the jurors from sources outside the evidence may improperly influence the jury's verdict. See *Lankster v Alpha Beta Co.* (1993) 15 CA4th 678, 682, 18 CR2d 923 (discussed in §17.12). However, the communication by one juror to the remaining jurors, during deliberation, of her written statement composed over a weekend is not communication of facts or sources outside the evidence, and is not otherwise improper. *Bormann v Chevron USA, Inc.* (1997) 56 CA4th 260, 264, 65 CR2d 321.

**NOTE:** The rule requiring all evidence to be received in open court gives each party full knowledge of the evidence, and it enables each party to object to the evidence by cross-examination, to test it, or otherwise to respond as appropriate.

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### §17.11 1. Facts based on personal knowledge or observations may be improper

Because facts from sources outside the evidence provide no opportunity for the opposing party to explain or refute, they are patently unfair, and it is improper for the jury to consider them. See *Andrews v County of Orange* (1982) 130 CA3d 944, 957, 182 CR 176, disapproved on other grounds in *People v Nesler* (1997) 16 C4th 561, 582 n5, 66 CR2d 454. In *Andrews,* the court held that prejudicial statements made by a juror during viewing of a home, and a report by a juror during deliberations of independently obtained information, constituted misconduct.

**Discussion of similar injury.** In *Smith v Covell* (1980) 100 CA3d 947, 952, 161 CR 377, a juror improperly discussed his own injury, which was similar to the plaintiff's, with other jurors. Receipt of information by jurors from sources outside the evidence was cited in the motion for new trial, both as evidence of concealed bias (see §17.4) and as an objective fact that may have improperly influenced the jury's verdict.

**Opinion of nonjuror.** In *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 106, 95 CR 516, a juror phoned a physician for an opinion on the effect of the disease involved in the suit and communicated that opinion to other jurors. See also *Jones v Sieve* (1988) 203 CA3d 359, 367, 249 CR 821 (juror communicated to other jurors his own experience on pivotal issue).

**Independent viewing of evidence.** In *Tunmore v McLeish* (1919) 45 CA 266, 187 P 443, a personal injury action arising from a collision between a motorcycle and an automobile, two jurors carefully examined the motorcycle during a recess before it was introduced into evidence, and one of them stated to the other that the plaintiff's wife could not have seen the speedometer from her place on the rear seat at the time of the accident. Because of the force of impact, however, the speedometer was not in the same position during the jurors' examination that it was in before the accident. No evidence was introduced during the trial on the speedometer's position before the collision. In holding the jurors' conduct improper, the court noted that the jurors were not only taking evidence outside the court without the parties' knowledge, but were "taking evidence along new lines which the plaintiff had no opportunity to explain or refute." 45 CA at 268.

**JUDICIAL PERSPECTIVE:** Jurors may occasionally observe parties or witnesses outside the courtroom in the courthouse building, parking lot, or other public areas. If counsel is concerned that jurors have observed some behavior or interaction that they might take into account in forming their opinions about the evidence, it would be wise to let the court know and request an additional admonition.

**Consulting dictionary.** In *Glage v Hawes Firearms Co.* (1990) 226 CA3d 314, 323, 276 CR 430, the court held that jurors committed misconduct when they checked a dictionary for a definition of "preponderance." Because the verdict was 9 to 3 and the offending jurors were in the majority, the court held that there was sufficient basis to find that the jurors were impermissibly influenced. See also *People v Karis* (1988) 46 C3d 612, 642, 250 CR 659 (error for jurors to consult dictionary, although error held nonprejudicial in this case).

**Collateral sources of income; race.** The court held in *Tapia v Barker* (1984) 160 CA3d 761, 206 CR 803, that the jury's discussion of reducing the amount of the verdict because of collateral sources of income constituted misconduct, despite the absence of any evidence of collateral sources. In reversing the verdict, however, the court relied primarily on the "insidious" discussion of plaintiff's race during jury deliberations, which also constituted misconduct.

**Juror's statements in nature of expert opinions.** In *McDonald v Southern Pac. Transp. Co.* (1999) 71 CA4th 256, 263, 83 CR2d 734, during deliberations the court found misconduct in statements that contradicted trial evidence and were in the nature of expert opinions by a juror who was a career professional in the relevant field. By contrast, it is not improper for a juror to express an opinion on a technical subject, even if informed by his or her own life experience, including specialized expertise, as long as the opinion is based on trial evidence. *In re Malone* (1996) 12 C4th 935, 963, 50 CR2d 281.

**PRACTICE TIP:** Jurors are able to search the Internet to find information about the case, including parties, counsel, and similar or related litigation. To prevent this improper activity, courts should instruct jurors not to search the Internet for this information. Although some counsel are reluctant to ask for this instruction out of fear that it will

suggest the idea to the jurors, counsel should ask for the instruction in order to have a remedy if a juror later conducts a improper search.

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## §17.12 2. Considering facts not in evidence creates presumption of prejudice

**Presumption of prejudice.** The jury's consideration of facts not in evidence creates a presumption of prejudice. In *Lankster v Alpha Beta Co.* (1993) 15 CA4th 678, 18 CR2d 923, plaintiff sued a grocery store when her hand was caught in a turnstile. The jurors found the store not liable after they discussed their observation over the weekend that different stores had different clearances for turnstiles. The jurors' investigations constituted misconduct that led to reversal because the defendant failed to rebut a presumption of prejudice. However, it is not misconduct for a juror to draw on his or her own experience during deliberations. See *Grotemeyer v Hickman* (9th Cir 2004) 393 F3d 871, 879 (juror's past personal experience is not extrinsic evidence and may be appropriate part of jury's deliberations).

**Presumption rebuttable.** In *DiRosario v Havens* (1987) 196 CA3d 1224, 1235, 242 CR 423, in which the jury foreman stated that a judge had the power to reduce the amount of a verdict, the court held that the conduct was presumptively prejudicial misconduct but upheld the trial court's denial of a new trial, noting that the foreman's statement was a correct statement of the law. The court also stated that the trial court's denial of the new trial motion amounted to a determination of the controverted facts in favor of the prevailing party and a rebuttal of the presumption of prejudice. See also *Jones v Sieve* (1988) 203 CA3d 359, 365, 249 CR 821 (prejudicial misconduct presumed when one juror consulted reference volume for definition of central issue in trial and another related her personal experiences with medical condition at issue in trial).

**When evidence erroneously admitted.** In *People v Clair* (1992) 2 C4th 629, 668, 7 CR2d 564, although the jury was to receive an edited tape recording and transcript, through a court clerk's error, the jury received an unedited version. The court held that the clerk's error was not jury misconduct and that the prejudicial effect of the error was to be judged as any other erroneously admitted evidence.

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### §17.13 3. Unauthorized viewing outside courtroom is improper

A juror's unauthorized visit to the scene of an accident or other viewing of matters that are the subject of the litigation outside the courtroom is improper, except as authorized by CCP §651. See, *e.g., People v Sutter* (1982) 134 CA3d 806, 184 CR 829 (jurors' unauthorized view of crime scene not prejudicial when scene was not at issue in trial); *Anderson v PG&E* (1963) 218 CA2d 276, 32 CR 328 (jurors' unauthorized view of scene of fire not reversible error, because no prejudice was shown). See also §17.12.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/17 Jury Management/§17.14 4. Reading or listening to news media accounts of trial is improper

### §17.14 4. Reading or listening to news media accounts of trial is improper

It is improper for jurors to receive impressions about the case from sources other than the evidence, because jurors take an oath that they will render a true verdict according to the evidence. See CCP §232(b).

**Newspapers.** It is misconduct for a juror to read newspaper accounts of the trial on which the juror is sitting. The juror misconduct raises a presumption that may be rebutted by a showing that no prejudice resulted from the misconduct. *People v Hardy* (1992) 2 C4th 86, 5 CR2d 796; *People v Lessard* (1962) 58 C2d 447, 454, 25 CR 78.

**EXAMPLE 1:** In *People v Hardy, supra,* the court held that jurors' reading of newspaper accounts of the trial judge's opinions on some aspects of the criminal law process, during the time they were jurors in that judge's courtroom, constituted misconduct and raised a presumption of prejudice. The court held, however, that the presumption of prejudice was rebutted because the newspaper accounts were generalized arguments on the criminal justice system as a whole, with no specific references to the defendants or to their case.

**EXAMPLE 2:** The court in *People v Jenkins* (1987) 196 CA3d 394, 401, 241 CR 827, disapproved on other grounds in *People v Brown* (1993) 6 C4th 322, 24 CR2d 710, found that jurors' reading of a newspaper account of the ambush killing of a witness to the trial was presumed to be prejudicial, especially in conjunction with a drastic increase in courtroom security. The court held, however, that both the trial court's admonition and jurors' statement that they were unaffected rebutted the presumption.

**EXAMPLE 3:** In *People v Holloway* (1990) 50 C3d 1098, 269 CR 530, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394, a juror who read a newspaper account of the defendant's prior conviction did not disclose that information until after the verdict. The court held that this action was prejudicial misconduct, even though the trial court had gone to great pains to prevent misconduct and the juror had not communicated the information to other jurors.

**EXAMPLE 4:** In *People v Pinholster* (1992) 1 C4th 865, 4 CR2d 765, the court found no prejudice when jurors, while sitting on a capital case, read an account of another capital case although the article contained extraneous legal information about reversal and appeal; the court held that the judge's admonition was sufficient.

**EXAMPLE 5:** In *People v Von Villas* (1995) 36 CA4th 1425, 1432, 43 CR2d 233, the court found that although it was misconduct to read newspaper headlines on the verdict in a closely related case, it was not necessarily prejudicial.

**Television programs.** Like reading newspaper accounts of the trial, or matters related to the trial, viewing television accounts of the trial, or matters related to the trial, raises a rebuttable presumption of prejudice. *Elsworth v Beech Aircraft Corp.* (1984) 37 C3d 540, 208 CR 874.

**EXAMPLE 1:** In *Gorman v Leftwich* (1990) 218 CA3d 141, 147, 266 CR 671, a medical malpractice case, two jurors saw a television program on medical malpractice but because neither juror had set out to see the program, and no allegations were made that the program influenced their decision, the court held that no misconduct occurred.

**EXAMPLE 2:** In *Elsworth v Beech Aircraft Corp., supra,* the California Supreme Court affirmed a jury verdict against an aircraft manufacturer for defective design despite evidence that, immediately before the jury began its deliberations, two jurors had watched a *60 Minutes* broadcast that criticized the safety record of light aircraft. The court initially noted that the jurors had not deliberately sought to obtain evidence outside the courtroom but had inadvertently watched a popular television program that discussed the subject in a general way. The court analogized *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 185 CR 654, in which the court found no jury misconduct when, during trial, a juror who was a paralegal attended a class in which a lecturer coincidentally discussed a prior verdict against Ford in which punitive damages had been awarded.

**Presumption of prejudice rebuttable.** The court in *Elsworth v Beech Aircraft Corp., supra,* noted that, even if the

jurors' viewing of the program constituted misconduct and created a presumption of prejudice, the presumption was rebutted by the evidence. A juror's affidavit supporting the motion for new trial stated that "two jurors indicated that they had seen the program" (37 C3d at 557), but the affiant was uncertain about one juror's identity, and there was no indication that either juror saw the entire program. The two jurors' actual statements and the circumstances under which they were made lacked specificity. The appellate court reviewed the transcript of the broadcast and was unable to conclude whether it favored plaintiffs' or defendant's case. The court concluded that any misconduct was unlikely to have influenced the verdict improperly.

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## B. Improper communications among jurors or with others

### §17.15 1. When jurors discuss case among themselves before submission

It is improper for jurors to discuss the case among themselves before it is submitted to them. *Monaghan v Pacific Rolling Mill Co.* (1889) 81 C 190, 22 P 590; *Smith v Brown* (1929) 102 CA 477, 484, 283 P 132. A juror who forms and expresses an opinion before submission of the case violates "the prescribed protocol for the performance of his duties." *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 429, 82 CR 1.

A juror may, however, remark to himself or herself as a witness leaves the stand, "That fellow is not to be believed." *Gary v Avery* (1960) 178 CA2d 574, 579, 3 CR 20. Such a remark does not imply that a juror reached a verdict on the fact at issue but only that the testimony did not establish the fact in the juror's mind. 178 CA2d at 579.

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### §17.16 2. When jurors communicate with others about trial

A juror's conversing with counsel, a party, a witness, or other person during trial or after the case is submitted constitutes misconduct. See, *e.g., Garden Grove Sch. Dist. v Hendler* (1965) 63 C2d 141, 144, 45 CR 313 (plaintiff's counsel talked during recess with juror who later became jury foreman); *Bell v State* (1998) 63 CA4th 919, 929, 74 CR2d 541 (juror experiment outside court with other person); *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 429, 82 CR 1 (improper communications between juror and witness, but no showing that misconduct was prejudicial). See also *In re Hitchings* (1993) 6 C4th 97, 24 CR2d 74 (writ of habeas corpus granted after convicted defendant uncovered evidence that juror had discussed case with co-workers during trial).

**JUDICIAL PERSPECTIVE:** All parties should be aware of the practice of texting, and the court should explicitly prohibit texting about the trial. It may be necessary to have all jurors give up their cell phones to the bailiff or court attendant for safekeeping during the trial sessions.

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## §17.17 3. Improper communications create presumption of prejudice

Although jury misconduct may arise from improper communications, the misconduct creates only a presumption of prejudice, which may be overcome by a showing that there was no actual prejudice. In *People v Goldberg* (1984) 161 CA3d 170, 207 CR 431, the court held that jurors' discussions with jurors in a codefendant's trial was misconduct, but the presumption of prejudice was overcome by proof that no prejudice actually occurred.

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### §17.18 4. When communications improper but not prejudicial

Improper conversations may be nonprejudicial or harmless error and thus not justify a new trial. In *People v Vinson* (1981) 121 CA3d 80, 175 CR 123, the court held that ordering a new trial was error when a juror and the judge met privately in the judge's chambers in an improper communication, but there was no prejudice and the error was harmless beyond a reasonable doubt. Similarly, in *People v Chavez* (1991) 231 CA3d 1471, 283 CR 71, the court held that, although a conversation between a police officer witness and a juror was evidence of possible improper communication and the trial court should have held a hearing, failure to do so was harmless when defense counsel indicated to the court that they were satisfied with the officer's explanation of the conversation. See *People v Loot* (1998) 63 CA4th 694, 74 CR2d 324 (juror's lighthearted inquiry about whether prosecutor was single and available was misconduct, but not prejudicial).

Brief conversations with witnesses unrelated to the trial may not be misconduct. See *People v Goff* (1981) 127 CA3d 1039, 1045, 179 CR 190. The court noted that the essence of juror misconduct (as defined in Pen C §96) involves communications relating to the trial. 127 CA3d at 1046. See also *City of Los Angeles v Lowensohn* (1976) 54 CA3d 625, 127 CR 417 (juror approached witnesses, but they refused to discuss case). In *People v Miranda* (1987) 44 C3d 57, 115, 241 CR 594, the supreme court affirmed the trial court's determination that a juror's outside contact with a criminal defendant's girlfriend (juror asked her for a date) did not affect either the jury's impartiality or its consideration of any issue in the trial. See also discussion of *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 415, 185 CR 654, in §17.21 (juror inattentiveness under the circumstances held not prejudicial).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/17 Jury Management/§17.19 5. Juror may be held in contempt for improper communications

## §17.19 5. Juror may be held in contempt for improper communications

A juror may be found in contempt of court for improperly discussing the merits of the action with a party or any other person (or receiving communications from a party or other person regarding the action) without disclosing these actions immediately to the court. CCP §1209(a)(10).

**Further research:** See 7 Witkin, California Procedure, *Trial* §§330-333 (5th ed 2008).

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### C. Inattentiveness during trial

### §17.20 1. Jurors have duty to listen carefully

Jurors have a duty to listen carefully during presentation of the evidence. Failure to pay attention, *e.g.,* by reading novels or doing crossword puzzles is misconduct. *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 410, 185 CR 654. Litigants are constitutionally entitled to a complete and thoughtful consideration of the merits of their case. 32 C3d at 411.

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### §17.21 2. Inattentiveness may or may not be held prejudicial

A new trial may be granted if jurors have failed to pay attention and the misconduct is shown to be prejudicial to the losing party. See CCP §657(2). Prejudice exists if, absent proven misconduct, it is reasonably probable that the complaining party would have obtained a more favorable result. *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 415, 185 CR 654.

Prejudice occurs only if the court can infer "from the bare fact of the jurors' diverting activities that they had prejudged the outcome of the case and closed their minds to further consideration of the evidence." 32 C3d at 415. In *Hasson,* some jurors worked on crossword puzzles and one juror read a novel during the presentation of evidence. Although concluding that they had committed misconduct by failing to pay attention, the court held that the misconduct was not prejudicial under the record before it.

The court in *Hasson* also discussed the requirement that declarations to impeach a jury verdict and counterdeclarations to support it must contain proof of overt conduct, conditions, events, and statements rather than the jurors' mental processes or reasons for assent or dissent. See Evid C §1150. The court noted that the instances of misconduct demonstrated in the case were not serious enough to improperly influence the verdict. 32 C3d at 417. See §17.31 for further discussion of declarations to impeach the verdict.

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### §17.22 3. Court must be notified of any juror inattentiveness

Juror inattentiveness, like any other juror misconduct, must be called to the court's attention. See §17.23. A party who claimed that a juror had fallen asleep waived the right to complain on a motion for new trial by not calling the matter to the court's attention when it occurred. *Kershaw v Tilbury* (1932) 214 C 679, 8 P2d 109. The trial court was not required, however, to hold a formal hearing to determine if jurors were dozing off during the proceedings in *People v De Santis* (1992) 2 C4th 1198, 9 CR2d 628. When the claim was made, the trial judge stated that he had been watching the jurors in question, and concluded that they were awake, one with eyes closed but twiddling his thumbs. See also *People v Espinoza* (1992) 3 C4th 806, 12 CR2d 682 (counsel's speculation that juror might be asleep was insufficient to apprise trial court of good cause to discharge juror and did not obligate court to conduct further inquiry).

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## V. REMEDIES FOR JUROR MISCONDUCT

### §17.23 A. Object to any misconduct or irregularity

Promptly object and notify the court of any misconduct or irregularity in the proceeding, otherwise the court will consider the misconduct or irregularity to have been waived as a ground for a motion for a new trial. See *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 103, 95 CR 516 (juror phoned physician for opinion on effect of disease involved in suit and communicated opinion to other jurors); *Kershaw v Tilbury* (1932) 214 C 679, 691, 8 P2d 109 (defendant's failure to notify attorney that juror fell asleep during trial considered waiver of objection).

Even if juror misconduct during trial is merely suspected, counsel should promptly call the situation to the court's attention. The court can then cure the misconduct by appropriate admonition or other remedy. See *Newton v Thomas* (1955) 137 CA2d 748, 769, 291 P2d 503 (counsel should have called to court's attention suspicion that juror had taken unauthorized papers into jury room as soon as he realized it had occurred).

In upholding the trial court's denial of defendant's action for a new trial, the supreme court in *Lindemann v San Joaquin Cotton Oil Co.* (1936) 5 C2d 480, 496, 55 P2d 870, noted that on discovering misconduct defendant's counsel had a duty to:

- Ask the court to reopen jury examination;
- Elicit the facts; and
- Offer a challenge to the offending juror.

In *Lindemann,* a juror remained silent when asked on voir dire examination if she knew of, or was acquainted with, the plaintiff. During recess on the first day of trial, defendant's counsel discovered that the juror knew the plaintiff. Before court was reconvened that day, defendant's counsel notified the trial judge but did nothing more.

The court in *Lindemann* stated: "It would obviously be improper to permit a party knowing of misconduct to withhold action and gamble on the outcome before making complaint." 5 C2d at 496. See also *City of Los Angeles v Lowensohn* (1976) 54 CA3d 625, 127 CR 417 (juror in eminent domain proceeding approached condemnor's counsel and appraiser with questions, but appraiser and counsel refused to discuss case with juror; no abuse of discretion by trial court in refusing to discharge juror or grant motion for mistrial). See §§17.2-17.4 for discussion of jury management during voir dire.

**NOTE:** To avoid undue prejudice, call juror misconduct to the court's attention *out of the jurors' hearing or presence.*

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### §17.24 B. Request admonition

After counsel informs the court of known or suspected juror misconduct, the court will try to determine the facts on its own. Whether or not the judge rules that juror misconduct occurred, counsel may label it as misconduct after the judge examines the juror (out of the other jurors' presence).

After notifying the court of a juror's misconduct, if the misconduct is of the type that can be cured by an admonition from the judge, consider requesting that the judge give an appropriate admonition to the offending juror, and to the other jurors if warranted under the circumstances. See *People v Goff* (1981) 127 CA3d 1039, 1046, 179 CR 190.

Objections are waived if counsel accepts the court's admonitions as satisfactory. See *Romo v Southern Pac. Transp. Co.* (1977) 71 CA3d 909, 139 CR 787. In *Romo,* a juror was excused after informing the judge that she was biased against plaintiff's attorney and that she and other jurors blamed plaintiff's attorney for delays in trial. The trial proceeded with eleven jurors on stipulation of counsel, and the judge admonished jurors that delays were not either party's fault. Any objection was waived because plaintiff's attorney agreed he would be satisfied with the trial court's admonition to the jury. See also *People v Pinholster* (1992) 1 C4th 865, 4 CR2d 765 (no prejudice found when jurors in death penalty case read account of another capital case although article contained extraneous legal information about reversal and appeal; judge's admonition considered sufficient).

**PRACTICE TIP:** To avoid any question of waiver, if you are not satisfied that the court's admonition truly cures the misconduct or irregularity, discuss the nature of the admonition with the judge, and, if necessary, note on the record (for purpose of appeal), that you are concerned that the admonition does not completely cure the misconduct. (Always choose your words carefully to avoid offending the judge.) In addition, consider requesting that the judge poll jurors to ensure their understanding of the admonition. For example, if jurors improperly consulted a dictionary and the court admonished them not to consider any definition other than that found in jury instructions, the court could conduct a special poll asking whether individual jurors followed the jury instruction definition or used some other source.

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### §17.25 C. Request replacement with alternate if necessary

Depending on the prejudicial effect of the juror's misconduct, consider requesting that the court replace the offending juror with an alternate (assuming that alternate jurors are available). If an alternate is not available, consider moving for a mistrial. See §17.26. Failure to move to excuse the juror for cause and substitute an alternate may be considered a waiver of the claimed error. See *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 82 CR 1.

The court may discharge jurors and replace them with alternates (if available) on a showing of good cause that they are unable to perform their duties. CCP §234. A juror who refused to deliberate or to explain her viewpoints and who indicated that she had made up her mind before trial was properly discharged. *People v Feagin* (1995) 34 CA4th 1427, 40 CR2d 918. In *Garden Grove Sch. Dist. v Hendler* (1965) 63 C2d 141, 145, 45 CR 313, the supreme court held that the trial judge had discretion to dismiss a juror who spoke to plaintiff's counsel during a recess, and that the judge erred in not granting defendants' motion to excuse the juror and replace him with an alternate. The opinion was silent about the nature of the conversation. See also *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 427, 82 CR 1, in which the court interpreted the *Garden Grove* opinion to mean that a juror who converses with counsel may be unable to perform the juror's duties.

The court in *Pleasant Hill* held that the facts before it did not dictate a categorical extension of the same principle to a juror who converses with a *witness.* The court noted that communication between a witness and a juror in a civil action is generally held not to be a ground for setting aside a verdict or granting a new trial unless the communication prejudiced the juror against a party.

**EXAMPLE 1:** In *People v Hecker* (1990) 219 CA3d 1238, 1245, 268 CR 884, a juror saw the defendant at church during a trial recess and stated to the court that she could no longer decide the case without reference to the encounter. The trial court properly excused her and substituted an alternate.

**EXAMPLE 2:** In *People v Lopez* (1993) 13 CA4th 1840, 17 CR2d 317, the court replaced a juror with an alternate when the juror attempted to use the law library to research arson and financial gain during an arson trial and attempted to inquire about types of arson from the defense expert. Although the juror indicated he could be impartial and follow the law, the court's decision to excuse the juror was not an abuse of discretion.

See also *People v Green* (1995) 31 CA4th 1001, 38 CR2d 401 (court discharged juror after poll revealed her uncertainty about proposed verdict and court learned she knew defendant's family; court had power to reconvene the jury and require additional deliberations).

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### §17.26 D. Consider moving for mistrial

Consider moving for a mistrial when a juror's misconduct appears to be so prejudicial that neither an appropriate court admonition nor replacement of the juror with an alternate will cure the misconduct. Failure to move for a mistrial may be considered a waiver of the claimed error. In *People v Goff* (1981) 127 CA3d 1039, 1045, 179 CR 190, the trial judge ruled that conversations between the juror and a witness, unrelated to the trial, were nonprejudicial. The court noted that any error was waived because, although counsel objected, counsel did not move to have the juror excused for cause and substituted with an alternate or move for a mistrial.

If the motion for a mistrial is denied, request the court to give an appropriate admonition to the offending juror (and to other jurors, if warranted).

When a juror's misconduct is prejudicial and an alternate is unavailable, a mistrial should be declared unless the parties consent to have the trial proceed with the remaining jurors. See CCP §233. See also *Romo v Southern Pac. Transp. Co.* (1977) 71 CA3d 909, 139 CR 787 (parties stipulated that trial could proceed with 11 jurors). On moving for mistrial, see §§18.82-18.102.

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## E. Consider moving for new trial

### §17.27 1. When misconduct discovered after verdict

Juror misconduct often is not discovered until after a verdict has been rendered. After the verdict, the appropriate remedy is to move for a new trial rather than to appeal. See *Ovando v County of Los Angeles* (2008) 159 CA4th 42, 57, 71 CR3d 415 (juror's intentional concealment of knowledge of police corruption scandal was prejudicial misconduct; court properly ordered new trial); *Province v Center for Women's Health & Family Birth* (1993) 20 CA4th 1673, 25 CR2d 667 (misconduct constituted grounds for motion for new trial when juror revealed after deliberations that another juror had read relevant news accounts; trial court's denial of motion for new trial reversed). See §17.29 for discussion of using declarations to show that neither the party nor the party's attorney was aware of the misbehavior until after the verdict.

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### §17.28 2. Three-step inquiry by court

When a party seeks a new trial based on jury misconduct, the court undertakes a three-step inquiry (*People v Perez* (1992) 4 CA4th 893, 6 CR2d 141):

- The court must first determine whether the affidavits supporting the motion are admissible under Evid C §1150(a).
- If the evidence is admissible, the court must determine whether the facts establish misconduct.
- Finally, assuming misconduct, the court must determine whether the misconduct was so prejudicial as to warrant a new trial.

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### §17.29 3. Preparing support for motion

**Prepare the record.** Generally, an appellate court will not review matters that are not contained in a properly prepared record on appeal. See 9 Witkin, California Procedure, *Appeal* §§330-335 (5th ed 2008).

**Use declarations in support.** To place the facts of the juror's misconduct into the trial record, counsel must use declarations (or affidavits) in support of a motion for a new trial. Declarations that should have been, but were not, filed in the trial court in support of a motion for a new trial will not be considered on appeal. See *Ballard v Uribe* (1986) 41 C3d 564, 224 CR 664 (plaintiff cross-appealed after denial of motion for new trial in negligence case; court declined to consider merits of juror misconduct claim because plaintiff had not supplied adequate record); *Crespo v Cook* (1959) 168 CA2d 360, 363, 336 P2d 31.

**PRACTICE TIP:** Although raising the issue of misconduct during trial may be sufficient to preserve the matter for appeal, consider also bringing a motion for new trial if there are evidentiary gaps in the trial court record. The motion will provide an opportunity to fill those gaps with declarations or other evidence to facilitate meaningful appellate review.

If declarations are in conflict, consider requesting a formal evidentiary hearing. In *People v Hedgecock* (1990) 51 C3d 395, 272 CR 803, the court endorsed a formal evidentiary hearing when the declarations were in conflict and only a hearing could resolve the conflict. But see *People v Cabrera* (1991) 230 CA3d 300, 306, 281 CR 238, in which the court stated that, for strong policy reasons, the *Hedgecock* procedure should be invoked sparingly.

**"No knowledge" declarations.** In *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 103, 95 CR 516, the court ruled that a party moving for a new trial under CCP §657(1)-(2) based on juror misconduct discovered after the verdict is rendered must present "no knowledge" declarations (or affidavit), *i.e.,* declarations showing that neither the party nor the party's attorney was aware of the misbehavior until after the verdict. Counsel and the client should file separate "no knowledge" declarations. 5 C3d at 105. In *Weathers,* an attorney's declaration was upheld as substantially complying with the "no knowledge" rule when it stated unequivocally that "both the plaintiffs and their attorneys lacked prior knowledge of the jury misconduct raised in the motion for a new trial." 5 C3d at 105. On requirement of "no knowledge" affidavit when alleged juror improprieties occur before jury deliberations begin, see *Krouse v Graham* (1977) 19 C3d 59, 82, 137 CR 863; *Weathers v Kaiser Found. Hosps., supra*.

**When "no knowledge" declarations unnecessary.** "No knowledge" declarations (or affidavits) on a motion for a new trial are not necessary when the alleged juror misconduct occurs after jury deliberations have begun. *Krouse v Graham, supra*. In such a case, "no knowledge" declarations are unnecessary because counsel could not have been aware of misconduct occurring during the jury's secret deliberations.

**Grounds for new trial when jurors involved.** Two grounds for new trial concerning actions by jurors are (CCP §657(1)-(2)):

- Irregularity in jury proceedings that prevented a party from having a fair trial, and
- Juror misconduct.

**Further research:** On showing required and denial of the motion in the absence of prejudice, see *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 414, 185 CR 654. On likelihood that the same acts of misconduct cited both as concealment of bias and as objective fact will improperly influence the jury's verdict, see *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 104, 95 CR 516.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/17 Jury Management/§17.30 4. If conduct improper but not prejudicial

### §17.30 4. If conduct improper but not prejudicial

If a juror's conduct was improper but unlikely to have been prejudicial, a new trial may not be required.

**EXAMPLE 1:** *People v Karis* (1988) 46 C3d 612, 250 CR 659 (use of dictionary definition was harmless in context of case);

**EXAMPLE 2:** *People v Lessard* (1962) 58 C2d 447, 454, 25 CR 78 (reading newspaper account of trial or issues was improper, but motion for new trial denied);

**EXAMPLE 3:** *Jutzi v County of Los Angeles* (1987) 196 CA3d 637, 242 CR 74 (discussion of juror's prior experiences did not warrant new trial);

**EXAMPLE 4:** *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 185 CR 654 (juror can have some general knowledge and have done some reading on topics or parties involved in litigation; new trial not justified when juror was not paying full attention during trial, *e.g.,* by working on crossword puzzle);

**EXAMPLE 5:** *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 427, 82 CR 1 (improper conversation with witness on unimportant subjects did not warrant new trial);

**EXAMPLE 6:** *People v Barton* (1995) 37 CA4th 709, 43 CR2d 671 (juror's repeated contact with defendant's uncle was plainly misconduct, but contact would only be to the detriment of the prevailing party; therefore, no prejudicial error).

When juror misconduct seems to be of a material nature, a presumption of prejudice arises.

**EXAMPLE 1:** *Smoketree-Lake Murray, Ltd. v Mills Concrete Constr. Co.* (1991) 234 CA3d 1724, 286 CR 435 (court held that it was misconduct for juror to use kitty litter and a box in jury room to demonstrate effect of pouring concrete over sand with impressions in it, based on information juror had learned in the family business);

**EXAMPLE 2:** *Tapia v Barker* (1984) 160 CA3d 761, 765, 206 CR 803 (juror failed to disclose possible prejudice toward plaintiff's ethnic background);

**EXAMPLE 3:** *People v Feagin* (1995) 34 CA4th 1427, 40 CR2d 918 (juror who refused to deliberate or to explain her viewpoints and who indicated she had made up her mind before trial was properly discharged).

But see *People v Green* (1995) 31 CA4th 1001, 38 CR2d 401 (juror's statement made at the beginning of deliberations, that he knew defendant was guilty as soon as he looked at him, is not per se prejudgment of evidence but open to trial court's discretionary analysis of the credibility of the juror's statements).

The misconduct must be substantial.

**EXAMPLE 1:** *Andrews v County of Orange* (1982) 130 CA3d 944, 954, 182 CR 176, disapproved on other grounds in *People v Nesler* (1997) 16 C4th 561, 582 n5, 66 CR2d 454 (prejudicial statements by juror during viewing of home, and report by juror during deliberations of independently obtained information, constituted misconduct);

**EXAMPLE 2:** *People v Dorsey* (1995) 34 CA4th 694, 40 CR2d 384 (juror stepping out of jury room while jury deliberated committed misconduct and was properly discharged; continuing deliberations during juror's absence was also improper).

Like other presumptions, the presumption of prejudice is subject to rebuttal.

**EXAMPLE 1:** *Lankster v Alpha Beta Co.* (1993) 15 CA4th 678, 18 CR2d 923 (jurors conducted independent investigations that constituted misconduct leading to reversal because defendant failed to rebut presumption of prejudice);

**EXAMPLE 2:** *Hasson v Ford Motor Co., supra* (juror inattentiveness, under the circumstances, held not prejudicial).

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### §17.31 5. Impeaching jury's verdict

The only improper influences that may be proved to impeach a jury's verdict are those open to sight, hearing, and the other senses that are subject to corroboration. Evid C §1150. The court in *In re Stankewitz* (1985) 40 C3d 391, 397, 220 CR 382, discusses the general principles concerning impeaching a jury's verdict with jurors' declarations. See also *People v Hutchinson* (1969) 71 C2d 342, 350, 78 CR 196.

Proof of the subjective reasoning of individual jurors is not permitted. See *Krouse v Graham* (1977) 19 C3d 59, 137 CR 863; *People v Hutchinson, supra*. On motions for new trial generally, see §§25.22-25.71.

Juror declarations (or affidavits) impeaching the verdict must be based on and contain objective proof of overt acts, rather than proof of an individual juror's subjective reasoning process. See Evid C §1150. See also §22.32.

**Further research:** On the issue of evidence admissible under Evid C §1150 to impeach a verdict, see *In re Stankewitz* (1985) 40 C3d 391, 220 CR 382; *People v Sanchez* (1998) 62 CA4th 460, 475, 72 CR2d 782; *Mesecher v County of San Diego* (1992) 9 CA4th 1677, 12 CR2d 279; *Cove, Inc. v Mora* (1985) 172 CA3d 97, 218 CR 7. See also *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 185 CR 654.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/17 Jury Management/§17.32 6. If motion denied

### §17.32 6. If motion denied

If a motion for a new trial is denied, a party may appeal from the judgment (see CCP §906; *Fogo v Cutter Labs.* (1977) 68 CA3d 744, 748, 137 CR 417) and have the issue of juror misconduct reviewed on appeal (see, *e.g., Smith v Covell* (1980) 100 CA3d 947, 161 CR 377). On appealing from a court order granting a new trial, see CCP §§904.1(a)(4), 904.2(a); discussion in §25.68.

**PRACTICE TIP:** If you called the court's attention to juror misconduct during trial (see §§17.23-17.24), presumably, you should be able to have the issue reviewed on appeal without first moving for a new trial. The alleged misconduct and the court's ruling are part of the trial record and form part of the record on appeal. However, do not pass up the opportunity to persuade the trial judge by moving for a new trial based on the alleged misconduct and the judge's error in denying appropriate relief, *e.g.,* refusal to replace a juror with an alternate or to grant a mistrial.

**Further research:** See §§25.22-25.71 for discussion of motions for new trial.

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# 18

# Motions During Trial

**Randall B. Christison**

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## I. SCOPE OF CHAPTER

### §18.1 A. Motions covered

This chapter discusses the following motions that may be made during trial:

- Motion for nonsuit. See §§18.7-18.34.
- Motion for directed verdict. See §§18.35-18.56.
- Motion for continuance (temporary or indefinite recess) during trial. See §§18.57-18.64.
- Motion to reopen case. See §§18.65-18.81.
- Motion for mistrial. See §§18.82-18.102.
- Motion to amend pleadings to conform to proof. See §§18.103-18.123.

When the motion can be made orally, suggested wording appears in boldface type under the procedures for making the particular motion. See, *e.g.,* form language in §§18.25 (nonsuit) and 18.50 (directed verdict). Forms of motions that may be submitted to the court in written form appear in §§18.124-18.134.

Except for the motion for directed verdict and, rarely, the motion for mistrial, the motions discussed in this chapter can be made during a bench trial as well as a jury trial. The motion for judgment under CCP §631.8, which is made exclusively in a bench trial after the close of a party's evidence, is discussed in the bench trial chapter. See §§24.14-24.29.

Evidentiary motions in limine are covered in chap 7. Motions to continue (postpone) the trial before it begins are discussed in §§6.6-6.25. Other pretrial motions are discussed in chap 6. On posttrial motions made after a verdict is rendered, see chap 25.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.2 B. Chart: Trial motions

## §18.2 B. Chart: Trial motions

This chart lists motions that can be made during trial, with cross-references to sections in this book and other books where each motion is discussed. Several motions that are ordinarily made well before trial or in limine, but can also be made during trial under certain circumstances, are discussed in the places indicated.

| | |
|---|---|
| Motion to determine good faith of settlement with joint tortfeasor (CCP §877.6) | Ordinarily a pretrial motion, this motion can be made on shortened notice for good cause if the settlement occurs during trial. CCP §877.6(a). See California Civil Procedure Before Trial, chap 50 (4th ed Cal CEB 2004). |
| Motion for judgment on the pleadings | See §§6.94-6.98. Ordinarily a pretrial motion (see Civ Proc Before Trial, chap 27), this motion can be made any time before final determination of an action. |
| Plaintiff's request for voluntary dismissal (CCP §581) | See §§6.79-6.86. |
| Motion to disqualify counsel | See §6.109 on moving to disqualify counsel who will be or has been called as a trial witness. |
| Motion in limine to exclude or limit evidence | See chap 7. |
| Motion to strike evidence at trial | See §15.44. See also California Trial Objections, chap 52 (Cal CEB Annual). |
| Motion to establish preliminary facts | See §§7.25-7.36. |
| Motion to prohibit mention of claim for punitive damages or inquiry into defendant's financial records before plaintiff establishes prima facie case | See §§8.12, 8.28. |
| Motion to preinstruct jury | See §§20.47-20.50. |
| Motion to allow jury to take instructions into jury room | See §§16.26, 17.21. |
| Request for use of special verdict or special findings | See §§16.39, 18.6-18.14. |
| Motion for interpreter | See §§11.28-11.43. |
| Motion to exclude witnesses and admonish them not to discuss testimony | See §§6.105-6.108. |
| Motion for jury view | See §12.48. Ordinarily made in limine, the motion is not subject to a timing restriction under CCP §651. |
| Motion for continuance (postponement) of trial | See §§6.6-6.25. |

| | |
|---|---|
| Motion for continuance (temporary or indefinite recess) during trial | See §§18.57-18.64. |
| Motion for nonsuit | See §§18.7-18.34. |
| Motion for directed verdict | See §§18.35-18.56. |
| Motion for judgment in bench trial | See §§24.14-24.29. |
| Motion to reopen case | See §§18.65-18.81. |
| Motion for mistrial | See §§18.82-18.102. |
| Motion to amend pleadings to conform to proof | See §§18.103-18.123. |
| Motion to appoint expert witness (Evid C §730) | See Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009). |
| Motion to produce writing used to refresh memory (Evid C §771) | See Evidence Benchbook, chap 28. |
| Motion to reexamine witness (Evid C §774) | See Evidence Benchbook, chap 28. |
| Motion to recall excused witness (Evid C §778) | See Evidence Benchbook, chap 28. |
| Motion to exclude privileged information (Evid C §916(a)) | See Evidence Benchbook, chap 37. |
| Motion for judgment when jury has been discharged without verdict (CCP §630) | See §§18.40-18.41. |
| Motion to quash or modify subpoenas (CCP §1987.1) | See §4.45. |

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## II. PROCEDURES FOR MAKING TRIAL MOTIONS

### A. Form of motion

### §18.3 1. Usually oral; when written papers advisable

Because it is often impossible to anticipate the need for a trial motion, the motions discussed in this chapter are usually made orally. Formal notice of a motion is not customarily given or required for motions made during trial. See, *e.g., Morel v Morel* (1928) 203 C 417, 418, 264 P 760 (motion for judgment on pleadings; notice not required for motion made in open court after trial has commenced).

If the issues are complicated, counsel can ask the court for a brief recess in which to prepare written authorities. Most judges are reluctant to protract a trial but, if the motion is critical, may grant counsel's request for a reasonable time to prepare argument or may set a later date for arguing the motion while the trial proceeds on other issues.

Although time may not permit the drafting of an extensive written memorandum to support a trial motion, counsel should organize a concise argument and cite to relevant authorities. When key cases are dispositive, it is a good idea to furnish copies to the court and opposing counsel.

If counsel can anticipate a trial motion, providing the court with written supporting papers may substantially advance the client's position. This written material can take the form of a portion of the trial brief, an early motion in limine, or a memorandum of law presented to the judge when making the motion that may or may not include the motion itself in writing. The court may be more inclined to take even abbreviated papers seriously, and those documents may also protect the record on appeal.

Any written memorandum in support of a motion should conform as much as possible to generally accepted format and filing rules. See Cal Rules of Ct 3.1110-3.1116, 3.1300, 3.1302. On drafting motion papers, see California Civil Procedure Before Trial, chaps 11-13 (4th ed Cal CEB 2004).

**NOTE:** Although use during a trial is unlikely, it may be possible in a given situation to make a telephone appearance motion. Cal Rules of Ct 3.670.

In bench trials, the motion can be made in open court at the appropriate time. In jury trials, counsel may make certain motions in open court and then ask permission to approach the bench so that argument may be heard out of the jury's hearing or, in cases of extended discussion, in chambers or in the courtroom after the jury has been excused.

**PRACTICE TIP:** Local rules can significantly vary the procedure for motions made during trial. Some local rules of court require that specified motions be made as well as argued outside the jury's hearing. See, *e.g.,* Los Angeles Ct R 8.47 (motions for judgment on the pleadings, directed verdict, and mistrial must be made and argued outside jury's hearing). Even when no such requirement exists, it is a good practice to ask to approach the bench for the purpose of making a motion in order to avoid an adverse effect on the jury if the motion is denied. It is also a good idea to become familiar with the particular judge's preferences in these matters. Information about courtroom procedures may be requested during the chambers conferences before trial. For a checklist for covering trial motion procedures and other useful points with the trial judge, see §6.5.

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### §18.4 2. Making a Record

When the motion is made orally, special care should be taken to communicate both for the court and for the record the specific grounds for the motion, or to state that written papers containing this information are being filed with the clerk. Any supporting documents should indicate that the motion was made orally on the record at a particular time and date. Even though the trial court exercises considerable discretion in ruling on motions during trial, a favorable ruling may be reversed for lack of sufficient basis in the record to support the order. See, *e.g.,* §18.34 (nonsuit). For further discussion on protecting the record, see chap 15.

It is good practice to request a minute order from the clerk after the judge rules on the motion or, if written authorities have been drafted, to prepare a written form of order for the judge to sign before filing it with the court. Otherwise, counsel may not recall certain orders later in the trial, and it may not be feasible to search the court transcript for the ruling.

In camera hearings during trial to limit testimony, or to test privileges, are a well-recognized and useful adjunct to trial proceedings. The fact such a proceeding is used, however, does not relieve counsel from the duty to make and protect the record.

**PRACTICE TIP:** Be alert to making a record and requesting the reporter's presence. Individual judges vary in their preferences on hearing motions at the sidebar, in chambers, or in open court with the jury excused. Counsel should ensure that the motion itself is part of the record. If argument takes place later in chambers, it may be necessary to repeat for the record a motion previously made at the bench outside the court reporter's hearing. If a written motion is presented, let the record reflect that the motion is being submitted in writing and consider summarizing its main points in the court reporter's presence. Ensure that the court's ruling is memorialized in a minute order or in the reporter's transcript.

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## §18.5 B. Timing

Failure to make trial motions at the proper time can waive the right to raise the point on appeal. The time for making some trial motions, such as motions for nonsuit or directed verdict, is dictated by statute or customary practice.

Other motions, such as motions for continuance, require a showing that counsel made them as soon as the grounds for the motion became known and must be made in a timely fashion. *County of San Bernardino v Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 783, 140 CR 383. Otherwise, counsel waives the right to make the motion later in the trial or to raise the point on appeal.

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## §18.6 C. Opposing party's options

Although trial motions are not easy to anticipate, opposing counsel may be able set out a legal opposition before trial in a memorandum of law to be produced when the need arises. Counsel's trial notebook or even the trial brief sometimes addresses the same issues as the motion and contains legal authorities that can be used to oppose it.

As an alternative, counsel can ask the court for a brief recess to prepare an argument, and perhaps written authorities, in opposition to the motion. See §18.3.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/ III. MOTION FOR NONSUIT/§18.7 A. Checklist: Procedures for making or opposing motion

## III. MOTION FOR NONSUIT

### §18.7 A. Checklist: Procedures for making or opposing motion

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Moving Party

___ 1. Request hearing outside presence of jury but on record. See §18.24.

___ 2. Make oral statement of specific grounds. See §18.25.

___ 3. Identify absence of material element or existence of fact constituting opponent's failure to establish a prima facie case. See §18.15.

___ 4. Ensure that record shows that opponent had opportunity to request reopening. See §18.28.

___ 5. Ensure that record reflects that opponent had opportunity to request amending pleadings, if appropriate. See §18.16.

___ 6. Consider preparation of written memorandum in support of motion. See §18.26.

___ 7. Consider possible negative reaction by trial court and appellate courts' reluctance to affirm judgments of nonsuit. See §18.20.

___ 8. Consider using nonsuit motion to challenge only some causes of action or some parties. See §18.11.

Opponent

___ 1. Identify substantial evidence creating issue. See §18.19.

___ 2. Request expansion of opening statement or reopening of evidence. See §§18.27-18.28.

___ 3. Request amendment to pleadings. See §18.16.

___ 4. Consider limiting motion to some cause of action or some parties. See §18.11.

___ 5. If motion granted, move to have order not granted on merits. See §18.10.

___ 6. If motion granted, move to preclude reference to a dismissed party. See §18.29.

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## B. Nature of Motion

### §18.8 1. Nonsuit is equivalent to involuntary dismissal

A nonsuit order dismisses a party's action (or cross-action) when, after the opening statement or the presentation of evidence, the party fails to establish a prima facie case. CCP §581c; *Doria v AFL-CIO* (1961) 196 CA2d 22, 32, 16 CR 429.

A motion for nonsuit is sometimes termed a demurrer to the evidence because it concedes the truth of the facts of the plaintiff's proposed or admitted evidence, and any inferences reasonably drawn from them, but contends that those facts, as a matter of law, do not sustain the plaintiff's case. *Stein-Brief Group, Inc. v Home Indem. Co.* (1998) 65 CA4th 364, 369, 76 CR2d 3.

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## §18.9 2. Purpose: to eliminate nonmeritorious actions or remedy correctable defects

The primary purpose of the motion is to eliminate the time and expense of presenting the defendant's evidence when the plaintiff's case has no merit. *Howard v General Petroleum Corp.* (1951) 108 CA2d 25, 29, 238 P2d 145.

In addition to the goal of ending a nonmeritorious case promptly, a nonsuit motion following the opening statement is designed to call attention to correctable defects. *Hamilton v Gage Bowl, Inc.* (1992) 6 CA4th 1706, 1710, 8 CR2d 819.

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### §18.10 3. Court decides whether nonsuit judgment is adjudication on merits

The court has discretion to determine whether the nonsuit judgment is an adjudication on the merits. Unless the court specifies otherwise, the judgment is deemed to be on the merits. CCP §581c(c); *Paddleford v Biscay* (1971) 22 CA3d 139, 142, 99 CR 220.

The court's failure to specify may be error, although a court of appeal may correct the judgment. *American Broad. Co. v Walter Reade Sterling, Inc.* (1974) 43 CA3d 401, 406, 117 CR 617.

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## C. Partial nonsuit

### §18.11 1. Dismisses action on some issues

The court may grant a motion for nonsuit on some issues in the action; the trial then proceeds on the remaining issues. CCP §581c(b). Final judgment is entered at the end of trial, based both on the matters determined at trial and the court's ruling on the motion for nonsuit. CCP §581c(b).

**PRACTICE TIP:** Partial nonsuit is a practical remedy for a defendant when the plaintiff asserts several legal theories but produces evidence supporting only one or two causes of action. For example, nonsuit was used to advantage in *Rokos v Peck* (1986) 182 CA3d 604, 611, 227 CR 480 (nonsuit granted after opening statement against one of two plaintiffs on one of three causes of action when plaintiff's counsel unable to augment statement of facts in response to the motion).

The court may grant a nonsuit for one party without affecting the other parties. *Kidron v Movie Acquisition Corp.* (1995) 40 CA4th 1571, 1582, 47 CR2d 752 (nonsuit as to one defendant); *Brimmer v California Charter Med., Inc.* (1986) 180 CA3d 678, 683, 225 CR 752 (nonsuit granted for three of four defendants).

If the court grants nonsuit to a codefendant in a personal injury or property damage action, the remaining defendants may not, over the plaintiff's objection, defend the action by asserting the fault of the former codefendant. CCP §581c(d).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.12 2. Preparing written order after judgment of partial nonsuit

## §18.12 2. Preparing written order after judgment of partial nonsuit

If a judgment of partial nonsuit under CCP §581c(b) has been granted on some but not all of the issues, request the court to state its ruling fully, if appropriate, and prepare a written order for the judge's signature on those issues.

Although it is usually a better practice for prevailing counsel to draft the order when a motion for partial judgment is granted, counsel can instead request the court to issue a minute order of its ruling, which may then be incorporated into the order of final judgment at the end of trial. See §18.32.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.13 3. Allows appellate review only after final judgment

### §18.13 3. Allows appellate review only after final judgment

Issues on which partial nonsuit is granted or denied are not subject to appellate review until final judgment is entered. CCP §581c(b).

**NOTE:** This was not true for cases decided under the former statute, which was amended in 1980. See former CCP §581c(b).

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### D. Test for granting motion: "Sufficient substantiality"

### §18.14 1. No evidence of "sufficient substantiality" to support judgment

Courts have established rules to protect plaintiffs from the drastic effect of granting motions for nonsuit. *Timmsen v Forrest E. Olson, Inc.* (1970) 6 CA3d 860, 868, 86 CR 359. A judgment of nonsuit after the opening statement is warranted only when the court concludes from all the asserted facts and inferences that no evidence of "sufficient substantiality" will support a judgment in favor of the plaintiff. *Willis v Gordon* (1978) 20 C3d 629, 633, 143 CR 723; *Timmsen v Forrest E. Olson, Inc., supra*.

The court must accept as proved all facts that counsel says will be proved and must "indulge every legitimate inference in favor of the plaintiff.... The evidence offered in the opening statement … must be substantial evidence, sufficient to support a judgment." *Hays v Vanek* (1989) 217 CA3d 271, 288, 266 CR 856. See *Cole v State* (1970) 11 CA3d 671, 678, 90 CR 74. When the motion is made after opening statement, the court must assume the plaintiff will be able to prove all favorable facts alleged. *Aspen Enter., Inc. v Bodge* (1995) 37 CA4th 1811, 1817, 44 CR2d 763.

**CAUTION:** Presumptions (which are not evidence) favoring the defendant (*e.g.,* presuming that defendant obeyed the law) may not be considered. See Evid C §600; *Engelman v Consolidated House Movers* (1955) 135 CA2d 237, 243, 286 P2d 988.

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### §18.15 2. Make motion when opening statement either does not state cause of action or establishes affirmative defense

A defendant should make a motion for nonsuit if the opening statement of the facts that the plaintiff expects to prove:

- Does not state a cause of action; or
- Establishes an affirmative defense as a matter of law.

See, *e.g., Olivia N. v National Broad. Co.* (1981) 126 CA3d 488, 178 CR 888 (plaintiff's opening statement failed to allege facts establishing "incitement" needed to state personal injury cause of action for broadcast negligence); *Russell v Soldinger* (1976) 59 CA3d 633, 642, 131 CR 145 (contract described in opening statement was contrary to public policy).

Courts have traditionally considered a nonsuit at the close of an opening statement to be a disfavored motion. *Galanek v Wismar* (1999) 68 CA4th 1417, 1424, 81 CR2d 236 (recognizing opening statement may not present full version of plaintiff's case). Nevertheless, a nonsuit order at this stage is sometimes appropriate. See, *e.g., Hoff v Vacaville Unified Sch. Dist.* (1998) 19 C4th 925, 930, 80 CR2d 811. See also *Jensen v Hewlett Packard Co.* (1993) 14 CA4th 958, 971, 18 CR2d 83 (nonsuit after opening statement was proper when there was neither a showing of causation of an injury nor of a libelous statement).

If the plaintiff's theory in the opening statement does not give rise to liability as a matter of law, the defendant is entitled to a judgment of nonsuit. See, *e.g., Calrow v Appliance Indus.* (1975) 49 CA3d 556, 559, 122 CR 636 (defendant's employer could not be liable under factual circumstances described in opening statement). Before such a motion is granted, however, it must be clear that counsel has stated all the facts that the plaintiff expects to prove and has had full opportunity to enlarge or reopen the opening statement. *Rodin v American Can Co.* (1955) 133 CA2d 524, 535, 284 P2d 530.

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### §18.16 3. Make motion when variation between pleading and proof

Unlike a motion for judgment on the pleadings (see §§6.94-6.98), a motion for nonsuit tests the sufficiency of the evidence rather than the sufficiency of the pleadings. *Nelson v Specialty Records, Inc.* (1970) 11 CA3d 126, 89 CR 540.

A motion for nonsuit should be made, however, if there is a material variance between the pleading and the proof. *Lewis v South San Francisco Yellow Cab Co.* (1949) 93 CA2d 849, 852, 210 P2d 62 (judgment of nonsuit affirmed when plaintiff's cause of action based on set of facts different in general scope or meaning from that pleaded; no request to amend complaint to conform to proof). Compare *CC-California Plaza Assocs. v Paller & Goldstein* (1996) 51 CA4th 1042, 1051, 59 CR2d 382 (error to grant motion for nonsuit where there is substantial conflict in evidence).

**NOTE:** It is the responsibility of trial counsel to bring any substantial conflict in the evidence to the court's attention.

The court may then grant the opposing party's motion to amend the pleadings to conform to proof. See §18.104. If the evidence was presented, notice was given to the parties and the trial court, and the issue was clearly tendered, the motion for nonsuit may be properly denied and a motion to amend the pleadings granted. *Pierce v PG&E* (1985) 166 CA3d 68, 81, 212 CR 283.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.17 4. Make motion after presentation of evidence when evidence insufficient

### §18.17 4. Make motion after presentation of evidence when evidence insufficient

A defendant's motion for nonsuit after presentation of evidence should be granted if:

- The plaintiff presents insufficient evidence on any essential element of the case.

**EXAMPLE 1:** *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 703, 106 CR 1 (by neglecting to produce expert testimony on standard of care required, plaintiff failed to establish prima facie showing of negligence).

**EXAMPLE 2:** *Unilogic, Inc. v Burroughs Corp.* (1992) 10 CA4th 612, 627, 12 CR2d 741 (nonsuit properly granted when plaintiff failed to show substantial evidence of actual loss or unjust enrichment from misappropriated trade secrets, even though other elements of claim were established).

**EXAMPLE 3:** *Helm v K.O.G. Alarm Co.* (1992) 4 CA4th 194, 5 CR2d 615 (nonsuit properly granted when plaintiff failed to proffer expert testimony to effect that had a malfunctioning alarm installed by defendant worked properly, plaintiff's damages would have been mitigated because police would have interrupted burglary and arson of plaintiff's home). But see *Mast v Magpusao* (1986) 180 CA3d 775, 778, 225 CR 689 (expert testimony unnecessary when case was one of ordinary negligence supported by matters of common knowledge).

**EXAMPLE 4:** *Brimmer v California Charter Med., Inc.* (1986) 180 CA3d 678, 684, 225 CR 752 (no probative evidence presented that defendant psychiatrists had participated in decision to involuntarily detain plaintiff).

**EXAMPLE 5:** *Mikialian v City of Los Angeles* (1978) 79 CA3d 150, 163, 144 CR 794 (plaintiff's evidence failed to establish necessary element of duty of care in negligence action).

**EXAMPLE 6:** *James v St. Elizabeth Community Hosp.* (1994) 30 CA4th 73, 35 CR2d 372 (nonsuit properly granted when plaintiff's expert on standard of care found unqualified to render opinion).

**EXAMPLE 7:** *Castaneda v Bornstein* (1995) 36 CA4th 1818, 1825, 43 CR2d 10, disapproved on other grounds in *Bonds v Roy* (1999) 20 C4th 140, 149 n4, 83 CR2d 289 (when expert opinion erroneously excluded, propriety of nonsuit turns on whether exclusion ruling was also erroneous).

- An affirmative defense is established that defeats the cause of action.

**EXAMPLE 1:** *Nally v Grace Community Church* (1988) 47 C3d 278, 291, 253 CR 97 (action against clergyman for malpractice in failing to prevent suicide; defendant held to have no duty to victim on which to base liability for his death).

**EXAMPLE 2:** *Williams v Foster* (1989) 216 CA3d 510, 522, 265 CR 15 (trial court error to deny nonsuit; law imposed no duty on adjacent owner to remedy sidewalk defect).

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### §18.18 5. Court may not weigh evidence when ruling on motion

When ruling on a motion for nonsuit (unlike a motion for new trial), a judge may not weigh the evidence or consider the credibility of the plaintiff's witnesses. The judge is not bound, however, to accept testimony that is inherently improbable. *Neblett v Elliott* (1941) 46 CA2d 294, 305, 115 P2d 872.

The court must also disregard unfavorable evidence introduced by the defendant under Evid C §776. *Miller v Dussault* (1972) 26 CA3d 311, 316, 103 CR 147. In ruling on a motion for nonsuit, the question of what inferences may permissibly be drawn from the facts is a question of law for the court. An inference may not be illogically or unreasonably drawn, nor can an inference be based on mere "possibility, suspicion, imagination, speculation, supposition, surmise, conjecture or guesswork." *Kidron v Movie Acquisition Corp.* (1995) 40 CA4th 1571, 1580, 47 CR2d 752.

**NOTE:** The judge is not permitted to consider presumptions, which by definition are not evidence. See Evid C §600; 7 Witkin, California Procedure, *Trial* §410 (5th ed 2008).

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### §18.19 6. Opposing party must ensure that evidence is adequate to support verdict

To avoid a judgment of nonsuit, the plaintiff's attorney must present evidence that is of "sufficient substantiality" to support a verdict. *O'Keefe v South End Rowing Club* (1966) 64 C2d 729, 733, 51 CR 534; *Goldstone v Merchants' Ice & Cold Storage Co.* (1899) 123 C 625, 627, 56 P 776.

When the evidence creates nothing more than a mere conjecture or surmise, it is insufficient. *Abreu v Svenhard's Swedish Bakery* (1989) 208 CA3d 1446, 1457, 257 CR 26.

A "scintilla of evidence" is not sufficient to allow a case to go to the jury. See *Nally v Grace Community Church* (1988) 47 C3d 278, 291, 253 CR 97; *Mikialian v City of Los Angeles* (1978) 79 CA3d 150, 144 CR 794.

A motion for nonsuit will not be granted when:

- There is a substantial conflict of evidence, some evidence tends to sustain the plaintiff's case, or different conclusions can reasonably be drawn from the plaintiff's evidence. See *Golceff v Sugarman* (1950) 36 C2d 152, 153, 222 P2d 665. If, however, the evidence shows that one of two defendants is culpable, but fails to show which one, a judgment of nonsuit should be granted because there is insufficient evidence to support a verdict. *Garcia v Joseph Vince Co.* (1978) 84 CA3d 868, 873, 148 CR 843.
- The plaintiff's evidence reasonably supports an inference that would give rise to the defendant's liability if accepted by the jury. See *Leonard v Watsonville Community Hosp.* (1956) 47 C2d 509, 515, 305 P2d 36. However, when the plaintiff relies without direct proof on an inference that a fact exists, and clear uncontradicted evidence shows that the fact does not exist, the nonexistence of the fact is established as a matter of law, and nonsuit may be granted. To dispel the plaintiff's inference, the evidence must be "clear, positive and uncontroverted." *Dimond v Caterpillar Tractor Co.* (1976) 65 CA3d 173, 185, 134 CR 895.

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### §18.20 7. Consider appellate consequences; courts reluctant to affirm nonsuit motions

The appellate courts are reluctant to affirm judgments of nonsuit after opening statements. See, *e.g., Lingenfelter v County of Fresno* (2007) 154 CA4th 198, 209, 64 CR3d 378; *Baber v Napa State Hosp.* (1989) 209 CA3d 213, 216, 257 CR 55; *Loral Corp. v Moyes* (1985) 174 CA3d 268, 272, 219 CR 836.

Likewise, the trial courts are understandably reluctant to take a case from the jury by granting a motion for nonsuit. See, *e.g., Campbell v General Motors Corp.* (1982) 32 C3d 112, 117, 184 CR 891 ("courts traditionally have taken a very restrictive view of the circumstances under which nonsuit is proper"); *Kopfinger v Grand Cent. Pub. Mkt.* (1964) 60 C2d 852, 855, 37 CR 65 (error to grant nonsuit if evidence was sufficient to support verdict in plaintiff's favor).

If there is reasonable doubt that the plaintiff's evidence may be sufficient to make a case, the court must let the case go to the jury. *Golceff v Sugarman* (1950) 36 C2d 152, 222 P2d 665; *Agnew v Parks* (1959) 172 CA2d 756, 774, 343 P2d 118.

Counsel should make such a motion only after careful consideration of the consequences on appeal if it is granted. See, *e.g., Mahannah v Hirsch* (1987) 191 CA3d 1520, 1526, 237 CR 140 (judgment of nonsuit affirmed when plaintiff produced no substantial evidence that defendant pathologists had violated any legal duty to plaintiff); *Freeman v Lind* (1986) 181 CA3d 791, 807, 226 CR 515 (judgment of nonsuit reversed for one defendant and affirmed for others).

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### §18.21 8. Failing to grant judgment may be reversible error

Judicial reluctance to grant judgments of nonsuit should not be interpreted as an obligation to deny such motions. If the defendant's motion specifies a ground for a judgment of nonsuit, and the plaintiff is unable to correct the defect, the court has a duty to grant a judgment of nonsuit.

To do otherwise would needlessly incur the cost and delay of proceeding further with a case of no merit. See *O'Keefe v South End Rowing Club* (1966) 64 C2d 729, 746, 51 CR 534; *McGoldrick v Porter-Cable Tools* (1973) 34 CA3d 885, 888, 110 CR 481; *Howard v General Petroleum Corp.* (1951) 108 CA2d 25, 29, 238 P2d 145. The failure to grant a judgment of nonsuit that should have been granted is reversible error. *Williams v Foster* (1989) 216 CA3d 510, 522, 265 CR 15.

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## E. Timing

### §18.22 1. Jury trial: Motion can be made after either opening statement or presentation of evidence

A defendant may move for a judgment of nonsuit only after, and not before, the completion of plaintiff's opening statement, or after the presentation of plaintiff's evidence. CCP §581c(a). If the motion is denied, the defendant has not waived the right to present evidence. CCP §581c(a).

Although it is not ordinary practice, motions for nonsuit also have been made at other times during trial. See, *e.g., Luca*s *v County of Los Angeles* (1996) 47 CA4th 277, 284, 54 CR2d 655 (motion allowed after all evidence and before argument to the jury); *King v Hercules Powder Co.* (1918) 39 CA 223, 224, 178 P 531 (motion made after presentation of plaintiff's evidence and renewed after presentation of both parties' evidence). Older cases permitting a nonsuit motion during presentation but before completion of plaintiff's evidence are no longer valid. See CCP §581c(a).

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### §18.23 2. Bench trial: Motion can be made only after plaintiff's opening statement

In a bench trial, a motion for nonsuit may be made only after the plaintiff's opening statement. CCP §581c(a). See *Lingenfelter v County of Fresno* (2007) 154 CA4th 198, 204, 64 CR3d 378. The appropriate motion for a defendant to make after the completion of the plaintiff's evidence in a bench trial, when that evidence is insufficient, is a motion for judgment under CCP §631.8. See §§24.14-24.29.

When the issue is a close one, it may be inadvisable to move for nonsuit in a bench trial. On appellate courts' reluctance to affirm judgments of nonsuit, see §18.20. A judge who will grant a motion for nonsuit may be likely to decide in the defendant's favor in any event. The motion should be made, however, when the plaintiff's opening statement clearly shows a lack of liability and the time and expense of the trial justifies the motion.

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## F. Procedures for moving party

### §18.24 1. Make motion outside jury's presence

In jury cases, counsel should ask the court for permission to approach the bench in order to make the motion. Counsel should check local rules, which may require a motion for nonsuit and any argument to be made outside the jury's hearing.

The court then may excuse the jury from the courtroom, hear the motion in chambers, or in rare instances permit argument at side bar outside the hearing of the jury. Counsel should be certain that the court reporter is present and able to hear what is said. On making a record, see §18.4.

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### §18.25 2. Oral motion: Specify grounds

Counsel must specify the grounds on which the motion is made, in order to afford the plaintiff the opportunity to cure any defects. *Loral Corp. v Moyes* (1985) 174 CA3d 268, 272, 219 CR 836.

Even if the trial court grants the motion, it may be reversed on appeal if counsel or the court has not stated on the record the specific elements lacking in the plaintiff's case. *Timmsen v Forrest E. Olson, Inc.* (1970) 6 CA3d 860, 868, 86 CR 359 (inadequate statements of grounds by defendant, *e.g.:* it is too general to say, "The evidence is insufficient to prove the allegations in the complaint").

A ground not advanced will generally not be considered on appeal. *Loral Corp. v Moyes* (1985) 174 CA3d 268, 273, 219 CR 836. See *Lawless v Calaway* (1944) 24 C2d 81, 94, 147 P2d 604. For further discussion, see §18.33.

An oral motion for nonsuit may be stated as follows:

> Defendant, _ _[*name*]_ _, moves for a judgment of nonsuit. The motion is made on the grounds that _ _[*specify deficiency of opening statement or evidence*]_ _.

If more than one defect in the plaintiff's case will provide independent grounds for a judgment of nonsuit, the following form can be used:

> Defendant, _ _[*name*]_ _, moves for a judgment of nonsuit. This motion is made on _ _[*e.g., three*]_ _ grounds, each of which independently entitles defendant to the granting of the motion: _ _[*Specify grounds*]_ _.

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### §18.26 3. Draft written supporting papers when issues complicated

A motion for nonsuit is usually made orally, although it may also be submitted in writing. It is sometimes difficult for trial counsel to prepare a written motion for nonsuit before the close of the plaintiff's evidence or opening statement because counsel does not know what proof the plaintiff will offer.

In many instances, however, defense counsel can anticipate the grounds for a motion for nonsuit based on the known weaknesses of the plaintiff's case and can prepare a written memorandum for submission at the appropriate time. Often the motion itself is made orally, accompanied by written supporting papers. Although oral citation of authorities can suffice when arguing the motion, a written supporting memorandum is more likely to convince the trial judge to grant the motion when the legal questions are complicated and to protect the record on appeal. See §§18.19-18.20.

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### G. Procedures for opposing party

### §18.27 1. Supplement opening statement; waiver

When a defendant has made a motion for nonsuit after the plaintiff's opening statement, the plaintiff's counsel may elect to stand on the opening statement as presented, arguing that the grounds for the motion are insufficient. The plaintiff also has the right to supplement the opening statement with any additional facts counsel expects to prove during trial, unless the plaintiff clearly cannot state a case. See *Cole v State* (1970) 11 CA3d 671, 674, 90 CR 74 (court gave plaintiff "full opportunity to state all facts he expected to prove"); *Rodin v American Can Co.* (1955) 133 CA2d 524, 534, 284 P2d 530 (nonsuit reversed when plaintiff was denied opportunity to expand opening statement).

**PRACTICE TIP:** If plaintiff requests that the opening statement be reopened or enlarged and the trial court denies this request, plaintiff's counsel should make sure a reporter is present to record the request and denial. The appellate court will presume a motion was properly granted if the record does not show the error. *Hodges v Mark* (1996) 49 CA4th 651, 657, 56 CR2d 700.

A plaintiff's attorney who fails to request an opportunity to enlarge or reopen the opening statement, however, waives this right. *John Norton Farms v Todagco* (1981) 124 CA3d 149, 162, 177 CR 215 (no error in trial court's ruling without expansion of opening statement when plaintiff did not ask to enlarge it; case reversed on other grounds). On motion to reopen, see §§18.65-18.81.

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### §18.28 2. Move to reopen after presentation of evidence; waiver

In response to a motion for nonsuit after the close of the plaintiff's evidence, counsel may stand on the evidence as presented or move to reopen the case to offer new evidence. On motion to reopen, see §§18.65-18.81.

It is reversible error for the court to grant a motion for nonsuit after refusing the plaintiff the opportunity to reopen for introduction of further evidence to remedy any deficiencies. *Eatwell v Beck* (1953) 41 C2d 128, 134, 257 P2d 643. See *Charles C. Chapman Bldg. Co. v California Mart* (1969) 2 CA3d 846, 858, 82 CR 830 (motion for judgment under CCP §631.8).

Counsel must affirmatively seek such an opportunity, however, or the court may assume that the plaintiff has no further evidence to offer. *Consolidated World Inv. v Lido Preferred, Ltd.* (1992) 9 CA4th 373, 381, 11 CR2d 524 (although court errs if it fails to permit reopening of evidence, any error is waived if plaintiff fails to make an offer of proof of additional evidence that would be presented or how that evidence would cure defects). See also *Carrier & Braddock, Inc. v S.W. Straus & Co.* (1931) 213 C 508, 513, 2 P2d 811; *John Norton Farms v Todagco* (1981) 124 CA3d 149, 162, 177 CR 215. On offers of proof, see §§15.50-15.60.

A party who indicates that the court need not consider a given issue waives the right to raise this issue on appeal. *Carmichael v Reitz* (1971) 17 CA3d 958, 968, 95 CR 381.

**PRACTICE TIP:** In evaluating any additional evidence that could be offered, distinguish whether the new material is merely cumulative (which is insufficient) or would actually help cure the stated deficiencies. When the plaintiff chooses to stand on the previous presentation, counsel's principal argument to the court is that the case has sufficient support to go to the jury.

Even if the court denies the plaintiff's motion to reopen, the plaintiff's counsel should ensure that the case is supported by evidence that is not merely speculation or conjecture. *Abreu v Svenhard's Swedish Bakery* (1989) 208 CA3d 1446, 1457, 257 CR 26. On ensuring that evidence is adequate to support a plaintiff's verdict, see §18.19.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.29 3. If motion granted, request court order: Remaining parties cannot shift blame to dismissed party

## §18.29 3. If motion granted, request court order: Remaining parties cannot shift blame to dismissed party

Code of Civil Procedure §581c(d) effectively prevents defendants in multiple party actions from shifting blame to a party no longer in the action. When one of several defendants obtains a dismissal by a motion for nonsuit based on lack of liability in an action for property damage or personal injury, the plaintiff can, by objecting, prevent the remaining defendants from commenting or attempting to attribute fault to persons dismissed from the case.

If a defendant prevails on a motion for nonsuit, plaintiff's counsel should move immediately for an order precluding any reference to the dismissed party rather than wait to object under CCP §581c(d) when another defendant attempts to shift blame to the dismissed defendant. Such a motion should be made outside the jury's hearing.

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### H. Effect of granting motion; costs; appeal

### §18.30 1. Operates as adjudication on merits

Unless the court otherwise specifies in its order, a judgment of nonsuit operates as an adjudication on the merits. CCP §581c(c). When the motion is granted, the judgment is made by written order, signed by the judge, and filed like any other dismissal of an action. CCP §581(d).

**Compare:** Unlike a judgment under CCP §631.8 in a bench trial (see §§24.14-24.29), a statement of decision is not required and cannot be requested after a judgment of nonsuit. See *Nelson v Specialty Records, Inc.* (1970) 11 CA3d 126, 142, 89 CR 540; *Cullen v Spremo* (1956) 142 CA2d 225, 231, 298 P2d 579.

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## §18.31 2. Prevailing party entitled to costs

A defendant who has been granted a judgment of nonsuit is entitled to costs and necessary disbursements under CCP §§1031-1034. *Matson v Fortuna High Sch. Dist.* (1921) 54 CA 586, 202 P 167. On recovering costs, see chap 27.

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## §18.32 3. Appeal from judgment after motion granted

A dismissal order following nonsuit is a final judgment, depriving the court of the power to change it except by motions to vacate (see §§25.72-25.77) or for new trial (see §§25.22-25.71).

The trial court's order granting a motion for nonsuit is not appealable, but an appeal may be taken from the written judgment of dismissal filed in the action. *Graski v Clothier* (1969) 273 CA2d 605, 607, 78 CR 447.

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## §18.33 4. Upholding judgment correctly decided on merits

To prevent reversal on technical grounds, a reviewing court ordinarily will uphold the trial court's judgment if it was correctly decided on the merits, even though the reasons relied on by the court were wrong. *Lawless v Calaway* (1944) 24 C2d 81, 93, 147 P2d 604.

A judgment of nonsuit will not be upheld, however, if a party neglected to specify the grounds for the motion, thereby denying the opponent the opportunity to correct defects during the trial. See §18.25. Any unspecified grounds will be considered only if the defect could not have been remedied even though the moving party had called it to the plaintiff's attention. *Carson v Facilities Dev. Co.* (1984) 36 C3d 830, 839, 206 CR 136.

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### §18.34 5. Reversal if sufficient evidence supports judgment for plaintiff

When reviewing conflicting evidence after a jury has rendered a verdict, the appellate court must affirm the trier of fact's decision if any substantial evidence supports the prevailing party. When considering the same conflicting evidence after a judgment of nonsuit, the appellate court must reject any contradictory evidence against the plaintiff and reverse the judgment of nonsuit if any sufficient evidence supports a judgment for the losing party (the plaintiff). See *Carson v Facilities Dev. Co.* (1984) 36 C3d 830, 839, 206 CR 136; *Stonegate Homeowners Ass'n v Staben* (2006) 144 CA4th 740, 745, 50 CR3d 709.

Because of this standard of review, motions for nonsuit granted after opening statement or after presentation of the plaintiff's evidence are more likely to be reversed on appeal than verdicts reached by the trier of fact. Before a judgment of nonsuit can be disturbed, however, there must be some substance to the plaintiff's evidence over which reasonable minds could differ; proof that raises mere speculation, suspicion, surmise, guess, or conjecture is not enough to sustain the burden. *Abreu v Svenhard's Swedish Bakery* (1989) 208 CA3d 1446, 1457, 257 CR 26. See §18.19.

**NOTE:** A nonsuit granted for the wrong reason but correct on other grounds will be affirmed. *Devins v United Servs. Auto. Ass'n* (1992) 6 CA4th 1149, 1156, 8 CR2d 263.

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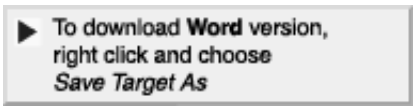
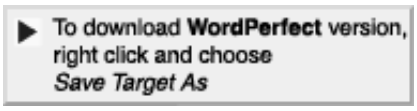
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/ IV. MOTION FOR DIRECTED VERDICT/§18.35 A. Checklist: Procedures for making or opposing motion

## IV. MOTION FOR DIRECTED VERDICT

### §18.35 A. Checklist: Procedures for making or opposing motion




Moving Party

___ 1. Determine legal basis for motion, including local rules. See §18.36.

___ 2. Request hearing outside presence of jury but on record. See §18.49.

___ 3. Identify absence of material element of claim or defense or facts establishing claim or complete defense. See §18.36.

___ 4. Make oral statement of specific grounds. See §18.50.

___ 5. Consider preparation of written supporting memorandum. See §18.51.

___ 6. Consider motion directed to some causes of action or some parties. See §18.39.

___ 7. Consider whether record should reflect that opponent has opportunity to reopen evidence. See §18.53.

Opponent

___ 1. Identify substantial evidence creating jury issue. See §18.42.

___ 2. Request reopening of evidence. See §18.53.

___ 3. Request amendment to pleadings. See §18.104.

___ 4. Request that ruling be made only regarding specified parties or specified causes of action. See §18.39.

___ 5. If granted, request that finding not be made on merits. See §18.54.

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### B. Nature of Motion

### §18.36 1. Make motion when evidence insufficient to support other party's case

A motion for directed verdict asks the court to instruct the jury to return a verdict against the nonmoving party. Either the plaintiff or the defendant may make the motion at the close of the other party's evidence. A party does not waive the right to a jury trial by making a motion for directed verdict. CCP §630(a).

The motion for directed verdict is particularly useful in cases in which the law favors the moving party, but the jury's sympathy may favor the other side. After the motion is made, the trial court's function is to determine whether there is sufficient evidence to support a verdict for the nonmoving party. If the only reasonable conclusion is that the evidence is insufficient, the court should grant the motion. *Dailey v Los Angeles Unified Sch. Dist.* (1970) 2 C3d 741, 745, 87 CR 376; *Estate of Lances* (1932) 216 C 397, 400, 14 P2d 768.

Directed verdict motions are well established in practice (see *Bias v Reed* (1914) 169 C 33, 38, 145 P 516), and they are specifically authorized by CCP §630(a). Under CCP §630(b), the court is authorized to grant a motion for directed verdict on some issues before proceeding to trial on the remaining issues. On partial directed verdict, see §18.39.

**NOTE:** California no longer has a requirement comparable to Fed R Civ P 50, which provides that a motion for directed verdict is a prerequisite to a motion for judgment notwithstanding the verdict. See *People v Mapp* (1983) 150 CA3d 346, 350, 198 CR 177.

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### §18.37 2. Compared with motion for nonsuit

A motion for directed verdict, like a motion for nonsuit, is equivalent to a demurrer to the evidence. *Hilliard v A. H. Robins Co.* (1983) 148 CA3d 374, 394, 196 CR 117. The court's power to direct a verdict is the same as its power to grant a nonsuit. The test for granting each motion is the same, and decisions that discuss the standard for granting nonsuits also apply to motions for directed verdicts. *Estate of Lances* (1932) 216 C 397, 400, 14 P2d 768. On motion for nonsuit generally, see §§18.7-18.34.

Unlike a nonsuit motion, a directed verdict motion may be made by any party for a verdict to be directed in the moving party's favor. A previous denial of nonsuit does not prevent the court from later granting a defendant's motion for directed verdict. *Fuchs v Southern Pac. Co.* (1935) 5 CA2d 409, 412, 42 P2d 704.

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### §18.38 3. Jury's obligation to return verdict

If the jury refuses the court's instruction to return a verdict, the court may enter judgment without the jury's assent. *Umstead v Scofield Eng'g Constr. Co.* (1928) 203 C 224, 226, 263 P 799.

The court may also accept a verdict signed by the foreperson alone (*Gaskill v Pacific Elec. Ry.* (1916) 30 CA 593, 598, 159 P 200) or by any juror under a court order (*Reay v Reay* (1929) 97 CA 264, 271, 275 P 533). The court may hold any uncooperative jurors who refuse to return the appropriate verdict in contempt. *Estate of Sharon* (1918) 179 C 447, 460, 177 P 283.

**CAUTION:** Granting a motion for directed verdict can violate the constitutional right to trial by jury if the evidence is sufficient to permit the jury to decide on a legitimate question of fact. *Singleton v Hartford Fire Ins. Co.* (1930) 105 CA 320, 326, 287 P 529; *Butler-Veitch, Inc. v Barnard* (1926) 77 CA 709, 716, 247 P 597.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.39 C. Motion for partial directed verdict

## §18.39 C. Motion for partial directed verdict

Under CCP §630(b), if the evidence supports the granting of a motion for directed verdict for some but not all of the issues in the action, the court must grant the motion on those issues, and the action must proceed on the remaining issues.

No final judgment may be entered before completing the rest of the case, but the final judgment must reflect the directed verdict ordered by the court. CCP §630(b).

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### D. Motion for judgment under CCP §630(f) after discharge of jury

#### §18.40 1. Judgment based on directed verdict test

If the jury has already been discharged, the court can order judgment in favor of a party on its own motion or a party's motion as long as the test for a motion for directed verdict is met. CCP §630; *Miesen v Bolich* (1960) 177 CA2d 145, 155, 1 CR 912 (hung jury discharged; §630 motion properly granted, under directed verdict standard); *Thompson v Atchison, T. & S.F. Ry.* (1950) 96 CA2d 974, 977, 217 P2d 45 (same).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.41 2. Time requirements: Notice within 10 days of jury's discharge

## §18.41 2. Time requirements: Notice within 10 days of jury's discharge

A motion, either by a party or by the court sua sponte, under CCP §630 must be noticed within 10 days after the jury is discharged. The court's power to act expires 30 days after the jury is discharged. CCP §630(f).

Failure of the court to act timely operates as a denial of the motion. For forms regarding this motion, see §§18.127-18.128.

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### E. Test for granting motion

#### §18.42 1. Other party's evidence not "sufficiently substantial"

The grounds for granting a motion for directed verdict are the same as those for granting a motion for nonsuit. See *Estate of Lances* (1932) 216 C 397, 400, 14 P2d 768. See also *Metzenbaum v ROS Assocs.* (1986) 188 CA3d 202, 208, 232 CR 741 (directed verdict for defendant affirmed).

The court may grant a defendant's motion when no evidence of "sufficient substantiality" supports a verdict for the plaintiff, disregarding conflicting evidence and giving the plaintiff's evidence, and every legitimate inference drawn from it, all the weight to which it is entitled. *Center Found. v Chicago Ins. Co.* (1991) 227 CA3d 547, 551, 278 CR 13; *De La Rosa v City of San Bernardino* (1971) 16 CA3d 739, 743, 94 CR 175 (directed verdict for defendant reversed).

A plaintiff's motion for directed verdict may be granted when the evidence supports the plaintiff's case and no substantial evidence exists to support the defense. *Walters v Bank of Am. Nat'l Trust & Sav. Ass'n* (1937) 9 C2d 46, 49, 69 P2d 839 (directed verdict for plaintiff affirmed); *Kostecky v Henry* (1980) 113 CA3d 362, 377, 170 CR 197 (partial directed verdict for plaintiff affirmed).

**PRACTICE TIP:** Make a motion for directed verdict when the issue is resolvable as a matter of law. If the issue on the proffered facts is resolvable as a matter of law, the court is under a duty to grant a directed verdict. *Blanchard v State Farm Fire & Cas. Co.* (1991) 2 CA4th 345, 350, 2 CR2d 884.

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### §18.43 2. Motion inappropriate when evidence substantially conflicts

If there is a substantial conflict in the evidence, the court does not have the power to direct a verdict and the case must be permitted to go to the jury. *Estate of Fleming* (1926) 199 C 750, 754, 251 P 637; *Short v Nevada Joint Union High Sch. Dist.* (1985) 163 CA3d 1087, 1096, 210 CR 297 (directed verdict for defendant reversed).

Because the "scintilla of evidence" doctrine has been rejected in California, however, there need not be a complete absence of conflict in the evidence but rather the absence of a substantial conflict. *Conservatorship of Everette M.* (1990) 219 CA3d 1567, 1573, 269 CR 182; *Jensen v Leonard* (1947) 82 CA2d 340, 353, 186 P2d 206.

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### §18.44 3. Make motion when nonexistence of essential fact established as matter of law

If the evidence raises an inference that a fact exists and either party offers uncontradicted evidence that the fact does not exist, the nonexistence of the fact is established as a matter of law. The evidence must be so persuasive, however, that it cannot rationally be disbelieved.

If the fact was necessary to establish an essential element of the plaintiff's case or a defense, the motion for directed verdict may be granted. *Engstrom v Auburn Auto. Sales Corp.* (1938) 11 C2d 64, 70, 77 P2d 1059; *Teich v General Mills, Inc.* (1959) 170 CA2d 791, 794, 339 P2d 627 (stating rule for nonsuit and directed verdict).

**NOTE:** In at least one case, the court suggested that the prudent course for a court is to deny the directed verdict motion in favor of granting a later motion for judgment notwithstanding the verdict. *Beavers v Allstate Ins. Co.* (1990) 225 CA3d 310, 328, 274 CR 766. On motion for judgment notwithstanding the verdict, see §§25.2-25.21.

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### §18.45 4. Evidence viewed in light favorable to nonmoving party

Although the court considers all evidence on a motion for directed verdict when it is brought at the end of a trial, the evidence is viewed, as in a motion for nonsuit, in the light most favorable to the nonmoving party. See §18.14.

Unlike a motion for new trial, the court may not weigh the credibility of witnesses when considering a motion for directed verdict. It may consider only the effect of their testimony after conceding the truth of it. *Stevens v Parke, Davis & Co.* (1973) 9 C3d 51, 69, 107 CR 45; *Alexander v State* (1984) 159 CA3d 890, 896, 205 CR 758; *Miller v Dussault* (1972) 26 CA3d 311, 316, 103 CR 147. On new trial motions, see §§25.22-25.71.

The court is not bound, however, to accept testimony that is inherently improbable. *Jensen v Leonard* (1947) 82 CA2d 340, 353, 186 P2d 206 (inherently improbable testimony, from mentally ill witness, not substantial evidence).

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### §18.46 5. Evidence unfavorable to nonmoving party cannot be considered

If the nonmoving party examined a moving party's witness as an adverse witness under Evid C §776, the court may not consider evidence unfavorable to the nonmoving party produced by that moving party's witness. *Miller v Dussault* (1972) 26 CA3d 311, 316, 103 CR 147.

The fact that a trial court might grant a new trial on evidence that it judges to be unreliable does not justify granting a directed verdict on the same evidence. *Estate of Caspar* (1916) 172 C 147, 150, 155 P 631; *Urland v French* (1956) 141 CA2d 278, 282, 296 P2d 568; *Weck v Los Angeles County Flood Control Dist.* (1947) 80 CA2d 182, 190, 181 P2d 935. On motion for new trial, see §§25.22-25.71.

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## F. Timing

### §18.47 1. Making motion at close of presentation of evidence

Unless the court specifies an earlier time for making a motion for directed verdict, any party may move for a directed verdict after all parties have completed the presentation of their evidence in a jury trial. CCP §630(a). Ordinarily, a motion for directed verdict is made at this time. On making motion at other times, see §18.48.

Although the court has discretion to hear a motion for directed verdict any time before submission of the case to the jury (*Gibson v Southern Pac. Co.* (1955) 137 CA2d 337, 346, 290 P2d 347), moving for directed verdict before full presentation of evidence may deny the adverse party a full opportunity to present the case (*Bias v Reed* (1914) 169 C 33, 37, 145 P 516).

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### §18.48 2. Making motion at other times

The court may also grant a motion for directed verdict at the following times:

- After submission to the jury, if the jury is unable to reach a verdict. *Perrine v PG&E* (1960) 186 CA2d 442, 446, 9 CR 45.
- After the defendant's opening statement, if it is clear that the defendant has stated all facts expected to be proved and has had an opportunity to enlarge the opening statement. *Topanga Beach Renters Ass'n v Department of Gen. Servs.* (1976) 58 CA3d 188, 192, 129 CR 739 (improperly granted because some factual issues remained that could potentially defeat plaintiff's case); *Nuffer v Insurance Co. of N. Am.* (1965) 236 CA2d 349, 363, 45 CR 918 (directed verdict for plaintiff after presentation of plaintiff's case and defendant's opening statement; defendant's opening statement determined to be complete statement of facts defendant expected to prove).
- After the plaintiff's opening statement. Because the grounds for nonsuit and directed verdict are the same, some courts have permitted the defendant to move for a directed verdict after the plaintiff's opening statement (see *Hartford Acc. & Indem. Co. v Bank of America* (1963) 220 CA2d 545, 34 CR 23), but conventionally a motion for nonsuit is made under CCP §581c. On motion for nonsuit after opening statement, see §18.15.
- At any time on the court's own motion. See *Golden v Conway* (1976) 55 CA3d 948, 953, 128 CR 69 (reversed owing to existence of factual issues).

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### G. Procedures for moving party

### §18.49 1. Make motion outside jury's presence

The motion for directed verdict is usually made orally after a request to approach the bench at the conclusion of the evidence. Local rules may require that the motion be made outside the hearing of the jury. See, *e.g.,* Los Angeles Ct R 8.47.

The judge may excuse the jury or retire with counsel to chambers to hear argument on the motion. The motion and the specific grounds for making it, as well as counsel's argument, should take place in the court reporter's presence. On making a record, see §18.4.

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## §18.50 2. Oral motion: Specify grounds

Unless counsel specifies the grounds on which the motion is made, and unless the court gives the grounds on which a judgment is based, a directed verdict can be reversed on appeal. See *Timmsen v Forrest E. Olson, Inc.* (1970) 6 CA3d 860, 868, 86 CR 359 (nonsuit case); 7 Witkin, California Procedure, *Trial* §§425-426 (5th ed 2008). By pointing out the specific grounds supporting the motion, counsel allows the opposing party the opportunity to introduce further evidence to correct any defects in the case.

Although no particular form of motion for directed verdict is required, an oral motion such as the following can be used:

> _ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, moves that the Court direct a verdict in favor of the _ _[*plaintiff/defendant*]_ _ on the following grounds, each of which independently entitles _ _[*plaintiff/defendant*]_ _ to the granting of the motion: _ _[*Specify*]_ _.

If the description of the deficiencies of the opponent's evidence is lengthy, counsel should delineate each additional defect in the opponent's case for the record with an introductory phrase such as, "The motion for directed verdict is further made on the separate and independent ground that …."

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## §18.51 3. Written supporting memorandum desirable when issues complicated

Although supporting papers are preferable and may assist in persuading the judge, a written memorandum in support of the motion is not required and may be difficult to produce if counsel is not sure that a motion for directed verdict can be made until all the opposing party's evidence is heard.

Counsel should try, however, to submit a supporting memorandum when the motion is made or argued if the issues are complicated and the grounds for making the motion can be anticipated from weaknesses in the opposing party's case. If the motion itself is also written, counsel should state this on the record when the motion is argued or submitted. For form of written motion, see §18.129.

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## H. Procedures for opposing party

### §18.52 1. Argue that moving party failed to adequately specify grounds

Counsel for the opposing party should ensure that the moving party states the specific grounds for the motion. A specific statement of grounds permits the opposing party to offer additional evidence to correct any deficiencies in the case.

If the grounds for the motion are not specified, opposing counsel can request that the court require the moving party to state any objections specifically and completely or ask that the motion be denied on that ground. As with a motion for nonsuit, it is error to grant the motion when the grounds have not been specifically stated. *Timmsen v Forrest E. Olson, Inc.* (1970) 6 CA3d 860, 868, 86 CR 359 (nonsuit case). See §18.25.

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### §18.53 2. Ask to reopen case; waiver

The opposing party may stand on the evidence as presented and explain to the court why the evidence is sufficient. If any available evidence has been overlooked, however, the opposing party may ask the court for permission to reopen the case to introduce it. On motion to reopen, see §§18.65-18.81.

If a motion to reopen is not made, the court will assume that counsel has no further evidence to present, and the right to reopen will be waived. See *Carrier & Braddock, Inc. v S.W. Straus & Co.* (1931) 213 C 508, 513, 2 P2d 811 (nonsuit case); *Tuller v Arnold* (1893) 98 C 522, 523, 33 P 445 (same).

It is error not to allow counsel to reopen the case if requested, unless the deficiency clearly cannot be remedied, *e.g.,* the proposed evidence is redundant of admitted evidence or simply asks differently phrased questions of the same witnesses. See *Eatwell v Beck* (1953) 41 C2d 128, 133, 257 P2d 643 (nonsuit case); *Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 794, 172 CR 342 (court denied motion to reopen before directing verdict when proposed evidence covered same areas counsel thoroughly contested during trial).

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## I. Effect of granting motion; costs; judgment

### §18.54 1. Operates as adjudication on merits

Unless the court rules otherwise, a directed verdict operates as an adjudication on the merits. CCP §630(c). It is effective without any assent of the jury. CCP §630(e). See §18.38.

Such a verdict is res judicata on the issues of the case (unless the court has ordered that the directed verdict is not on the merits). CCP §581c(c). See 7 Witkin, California Procedure, *Trial* §420 (5th ed 2008).

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### §18.55 2. Prevailing party entitled to costs

The order directing a verdict results in a judgment and consequently carries costs. *Matson v Fortuna High Sch. Dist.* (1921) 54 CA 586, 202 P 167 (granting costs on judgment of nonsuit).

The prevailing party on a motion for directed verdict, like any party with an action dismissed in that party's favor, may file a cost bill under CCP §§1031-1034. On recovering costs generally, see chap 27.

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### §18.56 3. Order of judgment

The order of judgment must be in writing, signed by the judge, entered in the clerk's register, and filed in the action. See CCP §581d. See form in §18.130.

As with other successful motions, the prevailing party normally prepares the judgment for the judge's signature and ensures that the clerk enters and files the judgment. On judgments generally, see chap 23.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/ V. MOTION FOR CONTINUANCE/§18.57 A. Checklist: Procedures for making or opposing motion

## V. MOTION FOR CONTINUANCE

### §18.57 A. Checklist: Procedures for making or opposing motion

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Moving Party

___ 1. Determine legal basis for motion. See §18.62.

___ 2. Advise court and counsel of situation at earliest opportunity. See §18.60.

___ 3. Prepare declarations (or subpoena witnesses) as needed. See §18.61.

___ 4. Prepare a written memorandum in support of motion if time permits. See §18.61.

___ 5. Consider alternatives to continuance (*e.g.,* witnesses out of order). See §18.59.

___ 6. Consider cost liability for motion. See §18.64.

Opponent

___ 1. Investigate evidentiary basis for motion, particularly timeliness and diligence. See §18.63.

___ 2. Prepare counterdeclarations (or subpoena witnesses) as needed. See §18.61.

___ 3. Identify prejudice to be caused by continuance. See §18.58.

___ 4. Identify absence of good cause or delaying tactics. See §18.60.

___ 5. Identify costs to be incurred if motion granted. See §18.64.

___ 6. Consider alternatives to continuance. See §18.63.

Either Party

___ 1. If motion granted, seek order that subpoenas remain in effect. See chap 4.

___ 2. If witness not available in future, request that deposition be ordered. See §18.63.

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### B. Nature of motion

### §18.58 1. Disfavored

Judicial policy does not favor continuances before or during trial. Cal Rules of Ct 3.1332(c). See *County of San Bernardino v Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 783, 140 CR 383. In spite of the seemingly obligatory language of CCP §595.2, which provides for a 30-day continuance upon stipulation of the parties, the statute is directory only. It does, however, reflect the legislature's policy of allowing brief continuances when the parties extend professional courtesy to one another, which the courts should, if possible, accommodate. *Pham v Nguyen* (1997) 54 CA4th 11, 15, 62 CR2d 422 (criticizing *County of San Bernardino v Doria Mining & Eng'g Corp., supra*).

A motion for continuance made after the trial has begun asks that the progress of the trial be interrupted and a future time or date set for resumption. Such a motion is rarely granted. Nonetheless, emergencies during trial may compel counsel to move for a continuance. On grounds for making motion, see §18.60.

**PRACTICE TIP:** It is particularly difficult to obtain a continuance after trial has started—when a courtroom, judge, reporter, and other resources have been dedicated to resolving the case. It is important to be aware, however, that it is technically possible to obtain a continuance during trial. In extreme circumstances, consider this motion or another viable alternative for meeting an emergency during trial. For possible alternatives, see §18.59.

The increasing concern for prompt disposition of civil actions is reflected in a widespread disinclination toward granting continuance motions. See, *e.g.*, Cal Rules of Ct 3.1332(c) (court may grant a continuance only on affirmative showing of good cause); 7 Witkin, California Procedure, *Trial* §9 (5th ed 2008). On the other hand, changes made to the California Rules of Court in 2004 reflect concern that some courts have taken an inflexible and overly rigid approach to continuances (discussed in Note, §6.6). See *Oliveros v County of Los Angeles* (2004) 120 CA4th 1389, 1394, 16 CR3d 638 (abuse of discretion to deny continuance solely because of its impact on trial court's calendar; strong public policy favoring disposition on merits outweighs judicial efficiency when two principles collide). On pretrial motions for continuance, see §§6.6-6.25.

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### §18.59 2. Consider alternatives

If the emergency or surprise can be resolved in a relatively short period of time, it is better to ask the court for a recess rather than to move for a continuance. Many trial judges are amenable to reasonable requests for a recess, even when it will merely facilitate presentation of a case. A recess is often only a matter of hours, involving minimal interference with the court calendar and the progress of a trial.

Other alternatives may be preferable to a motion for continuance. For example, if the reason for the continuance is that a witness is unavailable, consider using the existing deposition of that witness in lieu of testimony, particularly if the deposition was videotaped. This alternative is less desirable than presenting the witness in person, but a videotaped deposition may help ameliorate the deficiency.

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### §18.60 C. Satisfying grounds for continuance

A continuance before or during trial must not be granted except on a showing of good cause under Cal Rules of Ct 3.1332(c). See *Jurado v Toys 'R' Us, Inc.* (1993) 12 CA4th 1615, 1617, 16 CR2d 158 (error for trial court to deny motion for continuance to plaintiff's attorney, who showed good cause by subpoenaing essential medical expert witnesses, both of whom disobeyed subpoenas); *Young v Redman* (1976) 55 CA3d 827, 832, 128 CR 86 (defendant's business trips during trial did not constitute good cause for continuance). For further discussion of continuance motions made before trial, see §§6.6-6.25. See also California Civil Procedure Before Trial, chap 42 (4th ed Cal CEB 2004).

**PRACTICE TIP:** Not only must you show good cause, you must also make the motion as soon as reasonably practical on discovering that a continuance is needed. Cal Rules of Ct 3.1332(b). Additionally, you must show that the situation could not have been reasonably foreseen. See *Hays v Viscome* (1953) 122 CA2d 135, 141, 264 P2d 173 (reversing trial court's denial of continuance when party legitimately surprised by opponent's failure to call expected witness; time needed to locate counsel's own witness).

An order denying a continuance will be overturned on appeal only if clear abuse can be shown. *Vann v Shilleh* (1975) 54 CA3d 192, 196, 126 CR 401 (abuse of discretion when trial court's ruling denying continuance was arbitrary, capricious, and contrary to interests of justice; attorney withdrew at last minute). See *Crosby v Martinez* (1958) 159 CA2d 534, 541, 324 P2d 26 (reversal of judgment denying short continuance to allow plaintiff to produce witness to refute damaging, incompetent, and unanticipated hearsay admitted over plaintiff's objection); *Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co.* (1996) 47 CA4th 464, 54 CR2d 888 (expert witness had stroke; continuance properly denied when expert's deposition testimony was available for use at trial; court allowed former party witness to testify on same matters and forbade opposition to make any comment on absence of independent expert). See also §6.7; California Trial Objections, chap 54 (Cal CEB Annual). See also 7 Witkin, California Procedure, *Trial* §§10-12 (5th ed 2008).

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## D. Procedures for moving party

### §18.61 1. Written noticed motion or ex parte application; supporting declarations

Motions for continuance must be made on written notice or by ex parte application under Cal Rules of Ct 3.1200-3.1207. Cal Rules of Ct 3.1332(b). Because most reasons for requesting a continuance during trial are not foreseeable, however, the motion is usually made orally. Whether oral or written, the motion must conform to Cal Rules of Ct 3.1332.

**PRACTICE TIP:** When it is practicable to obtain them within a short time, give the court written declarations showing that an unforeseen emergency has developed and that no available means exist to meet it short of a trial continuance. For medical emergencies, present declarations of treating doctors to the court and opposing counsel when the motion is made or argued, or offer to submit them shortly after argument. See *Jurado v Toys 'R' Us, Inc.* (1993) 12 CA4th 1615, 1618, 16 CR2d 158 (when court accepts lawyer's representations without affidavit, requirement is excused by implication).

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## §18.62 2. Making oral motion

It is good practice for both the motion and argument to be made outside the jury's presence. An oral motion can take the following form:

> _ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, moves for continuance of this trial on the ground that _ _[*e.g., a key witness,* _ _[*name*]_ _, has suddenly become ill]_ _. We request _ _[*e.g., that the trial be recessed until* _ _[*time*]_ _ on _ _[*date*]_ _, when the witness should be able to testify]_ _.

After making the motion, specifically state the following:

- The grounds for the motion;
- When the emergency or the reason for the motion arose;
- When the need for a continuance first became known; and
- The unsuccessful measures short of continuance already taken to meet the situation.

For medical emergencies, submit (or, if there is no time, offer to obtain) declarations of treating physicians. If the motion is based on the unavailability of a witness, explain the nature of the testimony to be given to show its materiality and the fact that no substitute witness is readily available.

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### E. Procedures for opposing party

### §18.63 1. Suggest alternatives or conditions to continuance

In arguing against the motion, suggest alternative solutions to the problem short of a continuance whenever appropriate. For example, if trial counsel or a witness is ill, ask the court to substitute another attorney or witness instead of continuing the trial (see Cal Rules of Ct 3.1332(d)(4)) or ask the court to condition the continuance on the moving party's consent to the taking of depositions of witnesses who are present at the trial.

Depositions may be taken before the judge or clerk of the court in which the case is pending or before a notary public. Testimony may be read from the deposition when the trial resumes, subject to the same objections as if the witnesses had been produced. CCP §596. See *Taylor v Bell* (1971) 21 CA3d 1002, 1008, 98 CR 855 (continuance conditioned on testimony of then-present witness to be given by deposition). On requesting that a witness's travel expenses to return to the trial and other costs be paid by the moving party, see §18.64.

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### §18.64 2. Ask for payment of costs

When appropriate, emphasize the costs that will be incurred if a continuance is granted and request that the moving party pay the costs that will be incurred by the other parties due to the continuance. If possible, these costs should be identified and quantified for the court. For form that can be adapted for this purpose, see §27.129.

The court may condition a continuance on the moving party's payment of the adverse party's costs due to the postponement of trial. CCP §1024. See Cal Rules of Ct 3.1332(d)(10). These items are not regulated by general statutes defining costs, and the court has discretion to order compensation to the opposing party for expenses incurred in preparing for the now-continued trial. CCP §1024. See, *e.g., Inman v Fremont Med. Ctr.* (1975) 49 CA3d 169, 173, 122 CR 372 (trial court's order conditioning continuance on payment of court costs for impaneling jury affirmed); *Wilkin v Tadlock* (1952) 110 CA2d 156, 158, 241 P2d 1066 (party seeking continuance ordered to pay parties' transportation costs to and from employment outside state). The trial court, however, lacks authority to condition a grant of continuance on plaintiff's payment of attorney fees to defendant. *Levine v Pollack* (1995) 37 CA4th 129, 43 CR2d 491.

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## VI. MOTION TO REOPEN CASE

### §18.65 A. Checklist: Procedures for making or opposing motion

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Moving Party

___ 1. Determine legal basis for motion. See §18.66.

___ 2. Prepare written memorandum in support of motion if time permits. See §18.78.

___ 3. Describe new evidence to be presented and show good cause for granting motion. See §18.70.

___ 4. State grounds showing diligence in seeking evidence; inadvertence, surprise, or excusable neglect in presenting evidence; and relevance and materiality of proposed evidence. See §18.71.

___ 5. Be prepared to rebut claim of prejudice or allegation of delaying tactics. See §18.79.

Opponent

___ 1. Investigate evidentiary basis, particularly timeliness and diligence. See §18.66.

___ 2. Evaluate whether new evidence is cumulative of evidence already presented. See §18.80.

___ 3. Identify absence of good cause or delaying tactics. See §18.70.

___ 4. Identify prejudice to be caused by reopening. See §18.67.

___ 5. Request continuance to meet new evidence that will be presented. See §18.60.

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## B. Nature of motion

### §18.66 1. Motion asks for opportunity to offer new evidence

A motion to reopen is a request to reopen a party's case in chief. In contrast to evidence presented merely in rebuttal, in which a party is limited to the issues raised by the opponent, a motion to reopen asks that the moving party be permitted to offer new evidence to establish the elements of a cause of action or a defense.

A motion to reopen may be made when counsel believes that essential evidence has been omitted. This realization may come because the opponent makes a motion for nonsuit or directed verdict, counsel is surprised at trial, or evidence was inadvertently omitted or previously unavailable.

**PRACTICE TIP:** Before making a motion to reopen, be sure that the new evidence is clear and substantial. Otherwise, matters presented after reopening may adversely affect the trier of fact by appearing to weaken or confuse your case.

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### §18.67 2. Within court's discretion

Normally, a plaintiff or defendant can only offer rebutting evidence after its case in chief has been presented, "unless the court, for good reason, in furtherance of justice, permits them to offer evidence upon their original case." CCP §607(6). See Evid C §320 (court has discretion to regulate order of proof).

A decision to reopen is within the trial court's discretion. *Marriage of Olson* (1980) 27 C3d 414, 422, 165 CR 820 (denying motion); *Western Specialty Co. v Clairemont Constr. Co.* (1962) 204 CA2d 532, 537, 22 CR 536 (denying motion).

It is an abuse of discretion to deny a motion to reopen when a different result on further hearing was likely if the party had been permitted to reopen and present the evidence. *Estate of Horman* (1968) 265 CA2d 796, 807, 71 CR 780 (inadvertence coupled with surprise by delayed rulings of court).

No abuse of discretion exists, however, if the moving party does not show that a different result would follow from the introduction of further evidence. *Ensher, Alexander & Barsoom, Inc. v Ensher* (1964) 225 CA2d 318, 325, 37 CR 327; *Fry v Sheedy* (1956) 143 CA2d 615, 623, 300 P2d 242. The court may correctly deny a motion to reopen when it finds that the proffered evidence is merely cumulative. *Malibou Lake Mountain Club, Ltd. v Robertson* (1963) 219 CA2d 181, 186, 33 CR 74.

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## §18.68 3. Bench trial: Reopening alternative to new trial

After a bench trial, the court can reopen the case instead of granting a new trial for the introduction of additional evidence. CCP §662. Even if the court does not specifically vacate prior findings and judgment, its order to reopen has the effect of vacating the earlier judgment. *Taormino v Denny* (1970) 1 C3d 679, 684, 83 CR 359.

The signing of a judgment constitutes a denial of a reopening motion. *Silver v Schwartz* (1956) 142 CA2d 92, 96, 297 P2d 1018. For further discussion, see §24.13.

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### §18.69 4. Reopening on court's own motion

The court may also reopen a case on its own motion. *Taylor v Bell* (1971) 21 CA3d 1002, 1007, 98 CR 855. For example, it may do so following a suggestion to the parties that they explore a new theory. *Baker v City of Palo Alto* (1961) 190 CA2d 744, 755, 12 CR 425.

In *Coit Drapery Cleaners, Inc. v Sequoia Ins. Co.* (1993) 14 CA4th 1595, 1611, 18 CR2d 692, the trial judge, hearing one part of a case as a bench trial, considered evidence adduced in the jury trial phase but only after oral statement of the court's ruling. The judge gave notice to the parties of his consideration of that evidence and then ruled contrary to his previous ruling. Although such a procedure is unorthodox, it is nothing other than a sua sponte reopening of evidence—well within the trial court's discretion. See §18.67.

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### C. Requirements

### §18.70 1. Grounds: Good cause required

The moving party must show good cause for granting a motion to reopen. *Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 793, 172 CR 342; *Pocock v Deniz* (1955) 134 CA2d 758, 761, 286 P2d 466.

Failure to be sufficiently specific and clear is itself a ground for denial. *Sample v S.H. Kress & Co.* (1961) 190 CA2d 503, 508, 12 CR 198 (unnamed witness to describe door's operation in general terms; court properly held alleged testimony claim to be too vague).

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## §18.71 2. Showing of due diligence

Failure to show due diligence in procuring evidence during the case in chief, or in offering a satisfactory explanation for not previously introducing it, justifies a denial of a motion to reopen. *Stewart v Cox* (1961) 55 C2d 857, 866, 13 CR 521; *De Angeles v Roos Bros.* (1966) 244 CA2d 434, 441, 52 CR 783. See *Giomi v Viotti* (1956) 144 CA2d 714, 718, 301 P2d 597 (court found a failure of diligence because counsel did not determine which of two similarly named persons was the proper witness).

In some cases, the courts have held that a party must show that evidence was either unknown or unavailable. See *Malibou Lake Mountain Club, Ltd. v Robertson* (1963) 219 CA2d 181, 185, 33 CR 74. See also *Foster v Keating* (1953) 120 CA2d 435, 437, 261 P2d 529 (court stated that counsel should defer expiration of damages issue until relationship of party decided; when court found that damages had not been proved, reversible error to deny reopening).

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## D. Timing

### §18.72 1. Asking to reopen case after motion for nonsuit or directed verdict

When a party asks to reopen the case in response to a motion for nonsuit or directed verdict, the purpose of the motion to reopen is to supply additional evidence correcting the deficiencies enumerated by the opposing party. Unless a case clearly cannot be stated, it is error to grant the motion for nonsuit after refusing the plaintiff the chance to remedy the defects of the case. See *Eatwell v Beck* (1953) 41 C2d 128, 133, 257 P2d 643.

The court may deny a motion to reopen and direct a verdict, however, when the evidence to be presented after reopening is merely cumulative, covering the same areas counsel thoroughly litigated during trial. *Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 794, 172 CR 342. See *Sample v S.H. Kress & Co.* (1961) 190 CA2d 503, 508, 12 CR 198 (denial of motion to reopen proper when nonsuit would still result even if additional facts were proved).

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## §18.73 2. Making motion immediately after oversight or surprise; waiver

**Waiver.** If the motion to reopen is made because of an oversight by the moving party or surprise during trial, the motion should be made as soon as practicable or counsel may waive any objection on appeal. *Morris v Williams* (1967) 67 C2d 733, 760, 63 CR 689; *Christina v Daneri* (1937) 22 CA2d 190, 193, 70 P2d 983 (inadvertently omitted evidence).

**If surprised, new evidence cannot be merely cumulative.** The court retains jurisdiction to reject a claim of inadvertence if the proposed effort is merely of differently phrased questions of prior witnesses who had been thoroughly examined on the same subjects as proposed. *Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 794, 172 CR 342. See also *Ulwelling v Crown Coach Corp.* (1962) 206 CA2d 96, 127, 23 CR 631 (proposed evidence would merely be cumulative).

**False allegation of surprise.** Counsel cannot claim inadvertence or excusable neglect when that is not the case. See *Rosenfeld, Meyer & Susman v Cohen* (1987) 191 CA3d 1035, 1053, 237 CR 14, in which an examination of the trial briefs disclosed that the parties knew of the issues involved and that counsel's assertion of mistake based on an alleged misunderstanding of who bore the burden of proof was untrue. The motion was properly denied because the failure was not due to inadvertence or excusable neglect but, instead, the informed and knowing choice of trial counsel.

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## §18.74 3. Making motion after argument

A case may be reopened after argument in a jury trial at the court's discretion. *Nelson v Douglas Pedlow, Inc.* (1955) 130 CA2d 780, 783, 279 P2d 823; *Eatwell v Beck* (1953) 41 C2d 128, 134, 257 P2d 643.

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### §18.75 4. Making motion after submission in bench trial

The motion may be made in a bench trial after the case has been submitted for decision. *Taylor v Bell* (1971) 21 CA3d 1002, 1007, 98 CR 855; *Alvak Enters. v Phillips* (1959) 167 CA2d 69, 74, 334 P2d 148. This is true even if considerable time has elapsed since submission of the case for decision. *Marriage of Hahn* (1990) 224 CA3d 1236, 1240 n3, 273 CR 516 (motion properly granted even though made 3 months after announcement of a tentative decision, but before entry of judgment).

A considerable delay can militate against the granting of the motion. *Minnick v California Dep't of Corrections* (1979) 95 CA3d 506, 526, 157 CR 260 (trial court did not err in denying defendant's motion to reopen made 5 months after case submitted for decision, as "made by afterthought and much too late"); *Stowmen v Monroe* (1963) 219 CA2d 302, 33 CR 305 (motion could have been, but was not, made for a considerable time between submission of case and entry of judgment). See *In re T.M.R.* (1974) 41 CA3d 694, 702, 116 CR 292.

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### §18.76 5. Reopening case after judgment in bench trial

When a new trial motion is made, a case may be reopened in a bench trial even after judgment, with the same effect as if the case had been reopened after submission but before findings were filed or judgment was rendered. CCP §662. For further discussion, see §24.13.

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## E. Procedures for moving party

### §18.77 1. Oral motion during trial

When a motion to reopen is made during trial, it is typically made orally and without notice. In a jury trial, counsel should make a motion outside the jury's presence, accompanied by an offer of proof of the evidence to be produced. On handling offers of proof, see §§15.50-15.60.

No particular form of motion to reopen is required. A clear statement of the motion, why good cause exists for granting it, and the nature of the proposed evidence is satisfactory. Counsel should explain why the evidence was not previously introduced despite due diligence.

For an oral motion to reopen, counsel can use wording such as the following:

> _ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, moves to reopen the case to present further evidence on the issue of _ _[*describe*]_ _. Good cause exists for granting this motion because _ _[*describe reason, explain why evidence was not previously presented, and demonstrate due diligence in bringing motion*]_ _. The nature of the evidence that _ _[*plaintiff/defendant*]_ _ wishes to introduce consists of _ _[*describe*]_ _.

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### §18.78 2. Written motion after submission in bench trial

When the motion is made in a bench trial after the matter has been submitted for decision, it can be made by written motion with a supporting memorandum and declarations. If the case has been submitted and counsel for the parties are no longer present in the courtroom, it may also be necessary to notice the motion. See *Alvak Enters. v Phillips* (1959) 167 CA2d 69, 75, 334 P2d 148 (noticed motion to reopen; additional evidence presented solely by affidavits).

The declaration should state what the moving party expects to prove, the character of the proposed evidence, the diligence exercised to introduce the evidence during trial, and the reasons justifying failure to offer it at that time. *Westerholm v 20th Century Ins. Co.* (1976) 58 CA3d 628, 634, 130 CR 164; *Malibou Lake Mountain Club, Ltd. v Robertson* (1963) 219 CA2d 181, 185, 33 CR 74.

Before asking the court to set aside the submission of a case in a bench trial, the moving party should be sure that any motion to reopen will present only new evidence—not evidence that is merely cumulative. *Malibou Lake Mountain Club, Ltd. v Robertson, supra*; *Virtue v Flynt* (1958) 164 CA2d 480, 489, 330 P2d 879. See *Diamond Springs Lime Co. v American River Constructors* (1971) 16 CA3d 581, 604, 94 CR 200 (proposed evidence not related to cause of dam failure; denial of reopening proper). For written form of motion to reopen, see §18.131.

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## F. Procedures for opponent

### §18.79 1. Motion for nonsuit or directed verdict pending

**Choosing not to oppose motion.** When a motion for nonsuit or directed verdict is pending, counsel may not wish to oppose a motion to reopen. It may be error for the court not to permit the case to be reopened unless the defect clearly cannot be remedied. Compare *Eatwell v Beck* (1953) 41 C2d 128, 133, 257 P2d 643 (error for refusal to reopen), with *Sample v S.H. Kress & Co.* (1961) 190 CA2d 503, 508, 12 CR 198 (no error for refusing to reopen).

**Opposing motion when defect cannot be corrected.** In some cases, however, counsel may wish to oppose the motion to reopen made in response to a motion for nonsuit or directed verdict if the opposing party clearly cannot correct the defect and if the court specifically states this point on the record. See, *e.g., Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 793, 172 CR 342 (directed verdict); *Sample v S.H. Kress & Co., supra* (nonsuit).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.80 2. Motion to reopen after submission

### §18.80 2. Motion to reopen after submission

Counsel opposing a motion to reopen after submission of the case in a bench trial may wish to support any opposition with a written memorandum. Although opposing counsel's argument depends on the particular factual situation, an essential point may be that good cause does not exist for reopening the case.

**PRACTICE TIP:** Pay particular attention to the thoroughness and admissibility of the moving party's declaration of facts on which the motion to reopen is based. A declaration is often vulnerable to the argument that the "newly discovered" evidence would not have been overlooked had the moving party's counsel exercised due diligence. In some instances, the declaration may also make it appropriate to argue that the evidence that the moving party seeks to present is cumulative in nature.

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### §18.81 G. Appeal after judgment only

An order denying a motion to reopen is not appealable and is reviewable only on appeal from the judgment. *Litvinuk v Litvinuk* (1945) 27 C2d 38, 43, 162 P2d 8; *Pete v Henderson* (1957) 155 CA2d 772, 774, 318 P2d 720; *Kallgren v Steele* (1955) 131 CA2d 43, 47, 279 P2d 1027.

The ruling on the motion will not be disturbed on appeal unless the trial court clearly abused its discretion. *Marriage of Hahn* (1990) 224 CA3d 1236, 1240, 273 CR 516.

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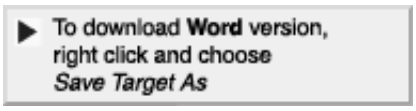
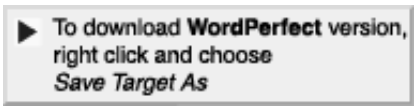
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/ VII. MOTION FOR MISTRIAL/§18.82 A. Checklist: Procedures for making or opposing motion

## VII. MOTION FOR MISTRIAL

### §18.82 A. Checklist: Procedures for making or opposing motion




Moving Party

___ 1. Object immediately to offending conduct or prejudicial event. See §18.88.

___ 2. Reserve motion to be heard at earliest opportunity outside presence of jury. See §18.91.

___ 3. Make oral statement of specific grounds. See §18.92.

___ 4. Identify specific offending conduct or prejudicial event. See §18.92.

___ 5. Specify how conduct or event prevents party from receiving a fair trial. See §18.85.

Opponent

___ 1. Determine opponent's diligence and whether waiver has occurred. See §18.97.

___ 2. Point out how conduct or event has not caused incurable damage. See §18.83.

___ 3. Advance less-drastic solutions (*e.g.,* recess, admonition to jury). See §18.96.

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### B. Nature of motion

### §18.83 1. Asks to terminate trial

A motion for mistrial requests the court to end the trial before its conclusion for error or irregularity too substantial to correct. Grounds for mistrial may be any misconduct or irregularity that prevents a party from receiving a fair trial. Typically, the error is one whose prejudicial effect on the jury is not curable through admonition. See *Clemente v State* (1985) 40 C3d 202, 217, 219 CR 445 (counsel improperly referred to matter not in evidence, but error cured by admonition).

Substantial irregularities include the illness of a juror when no alternate is available (CCP §233) or the jury's failure to return a verdict (CCP §616). See, *e.g., Estate of Bartholomae* (1968) 261 CA2d 839, 842, 68 CR 332 (court granted mistrial when jury returned special verdicts on only two of three issues to be decided). On other irregularities as grounds for mistrial, see California Trial Objections, chap 56 (Cal CEB Annual).

Counsel, jurors, witnesses, spectators, or the court may be responsible for misconduct or irregularities that result in a mistrial. On misconduct of counsel and court during trial, see chap 16. On juror misconduct, see chap 17.

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### §18.84 2. Consider alternatives

Because the result is so significant, counsel should consider alternatives to a motion for mistrial. If, for instance, the court erroneously admits certain evidence, a motion to strike may be adequate to preserve the issue for later motions or for appeal. *Mosesian v Pennwalt Corp.* (1987) 191 CA3d 851, 865, 236 CR 778, disapproved on other grounds in *People v Ault* (2004) 33 C4th 1250, 1272 n15, 17 CR3d 302.

Other alternatives to a motion for mistrial include counsel's request that the court admonish the jurors and instruct them to disregard what has occurred. When appropriate, counsel can also ask that the court impose sanctions or a contempt citation on offending counsel. See §§16.94, 16.99.

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### §18.85 C. Grounds: Preventing fair trial

In most situations, the trial court has discretion to grant or deny motions for mistrial. See, *e.g., Santiago v Firestone Tire & Rubber Co.* (1990) 224 CA3d 1318, 1335, 274 CR 576 (jury could not agree on question 1 of a special verdict; no injustice in instructing jury to answer question 2; answer would be dispositive).

Any misconduct or irregularity that irreparably prejudices a party's chances of receiving a fair trial is grounds for a mistrial. The court may properly deny the motion if it is satisfied that no injustice will result from the complained-of activity. The most common grounds for a motion for mistrial are misconduct by a juror, counsel, a spectator, or a trial witness that the court in its discretion determines to be irreparably prejudicial. On misconduct of counsel, court, and jury as grounds for mistrial, see chaps 16-17, 21.

**NOTE:** Many motions for mistrial are often based on the same grounds as those supporting a motion for new trial. See CCP §657(1)-(2); §§25.22-25.71.

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## §18.86 1. Statutory grounds

Mistrials *must* be granted when:

- The judge presiding at the trial testifies as a witness over a party's objection. Evid C §703(b). Calling the judge to testify is considered to be a consent to the granting of a motion for mistrial, and objecting to the judge as a witness is considered to be a motion for mistrial. Evid C §703(c).
- A juror testifies over the objection of a party. Evid C §704(b). Calling a juror to testify is considered to be a consent to the granting of a motion for mistrial, and objecting to a juror as a witness is considered to be a motion for mistrial. Evid C §704(c).
- A juror becomes ill, no alternate is available, and the parties will not stipulate to less than a full jury panel rendering the verdict. CCP §233.
- A jury is discharged without rendering a verdict, or is prevented from giving a verdict by accident or other cause, and the court declines to enter judgment under CCP §630. CCP §616.
- A person previously presiding over the case testifies as a witness at the trial, with certain exceptions. See Evid C §703.5.

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### §18.87 2. Judge unable to complete trial

If a judge is unable to complete either a bench trial or a jury trial when any issues require court findings, a mistrial must be granted. A party is entitled to a decision on the facts of a case by the same judge who heard the evidence. *Guardianship of Sullivan* (1904) 143 C 462, 468, 77 P 153 (one judge heard evidence; second judge heard argument; third judge entered judgment).

The death of a judge generally requires a mistrial. *McAllen v Souza* (1937) 24 CA2d 247, 250, 74 P2d 853 (judge died before entering final judgment). But see *Leiserson v City of San Diego* (1986) 184 CA3d 41, 48, 229 CR 22 (deceased judge's executed intended decision properly confirmed by presiding judge under CCP §635).

**NOTE:** A judge's power to complete a trial in superior court is terminated when the judge is appointed to the appellate court. *Reimer v Firpo* (1949) 94 CA2d 798, 801, 212 P2d 23. On events establishing a judge's vacancy from office, see Govt C §1770.

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## D. Timing

### §18.88 1. Prejudicial effect from cumulative errors or irregularities

Frequently, the cumulative effect of an adversary's prejudicial remarks throughout trial, rather than one act of misconduct, may compel counsel to move for mistrial. In this instance, counsel should object on the record immediately after each impropriety, request an admonition and instruction to the jury, and move for mistrial if the misconduct continues. See *Barajas v USA Petroleum Corp.* (1986) 184 CA3d 974, 985, 229 CR 513 (objection to one but not other repeated acts of misconduct constituted waiver of right to mistrial).

**PRACTICE TIP:** Be sure to object not just once, but each time a repeated act of misconduct occurs. Otherwise, your rights to mistrial and to preserve your objection on appeal may be waived. See §18.102. On procedures for objecting and requesting admonitions, and moving for mistrial, see §18.90.

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### §18.89 2. Single act of misconduct or serious irregularity

If a grievous error occurs that in the trial attorney's judgment incurably prejudices the case, preventing the client from having a fair trial, a motion for mistrial should be made immediately after the misconduct or irregularity takes place. In most courts, the motion must be made outside the jury's presence. On procedures for making a motion for mistrial, see §§18.90-18.95.

Only misconduct so prejudicial that an admonishment would be ineffective excuses the failure to request such admonition. *Lewis v Bill Robertson & Sons, Inc.* (1984) 162 CA3d 650, 654, 208 CR 699 (court's prejudicial comment on evidence constituted incurable error). See §18.86 on mandatory grounds for mistrial.

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## E. Procedures for moving party

### §18.90 1. Objection on record and request for admonition; waiver of right to mistrial

Counsel should object immediately on the record to the protested action, assign it as misconduct or error, and promptly request the judge to give the jury a curative admonition. On making motion for mistrial, see §18.92.

If counsel delays making an objection or fails to object, the right to move for mistrial later in the trial may be waived. *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610, 39 CR 721 (failure to make timely objections and request jury admonitions waived right to mistrial after plaintiff's closing argument). See *Whitfield v Roth* (1974) 10 C3d 874, 892, 112 CR 540 (counsel sent cigars and candy to jury room to celebrate birth of his child; misconduct curable and failure to object was waiver).

Objection to one but not other repeated acts of misconduct may also constitute a waiver of the right to mistrial. *Barajas v USA Petroleum Corp.* (1986) 184 CA3d 974, 985, 229 CR 513 (reference to excluded evidence in contravention of court order).

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### §18.91 2. Motion for mistrial and argument outside jury's presence

A motion for mistrial is almost always made orally. Some courts require that the motion for mistrial itself as well as the argument take place outside the jurors' hearing. See, *e.g.,* Los Angeles Ct R 8.47.

Even if not required by local rules, it is good practice for counsel both to make the motion and to request that argument take place outside the jurors' hearing so that any prejudicial effect will not be further compounded. The judge may hear the motion and argument at the bench, retire with counsel to chambers, or recess the jury and proceed with argument in the courtroom. Counsel should request the court reporter's presence if the judge has not already done so.

**PRACTICE TIP:** Before making a motion for mistrial, be sure that it is something you want the court to grant. Evaluate the possibility that your opponent is deliberately trying to scuttle the trial if his or her case is not going well. Asking for sanctions or a contempt citation may be a wiser course. See §§16.94, 16.99.

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## §18.92 3. Oral motion: Specify grounds

Although no particular form is required, the grounds for a motion for mistrial must be clearly and specifically stated. For example, counsel may move for mistrial on the ground that an admonition to the jury cannot cure the prejudicial effect of the misconduct or error, stating specifically why the prejudicial effect cannot be cured.

Counsel may use a form of oral motion such as the following:

> _ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, objects to _ _[*describe act, occurrence, or irregularity*]_ _ and assigns it as _ _[*misconduct/error*]_ _. _ _[*Plaintiff/Defendant*]_ _ moves for mistrial on the ground that the _ _[*act/occurrence/irregularity*]_ _ is so prejudicial that a fair trial is not possible. The prejudice cannot be cured by an admonition to the jury or by cautionary instructions because _ _[*specify*]_ _.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.93 4. Admonishment of jury after motion denied; protecting the record

### §18.93 4. Admonishment of jury after motion denied; protecting the record

If the motion for mistrial is denied, counsel should renew the request that the court admonish the jury.

**PRACTICE TIP:** Be sure that your request for admonition is on the record. The court's ruling on the mistrial motion should also be entered in the record. You may also wish to request a minute order from the court clerk.

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## §18.94 5. Proceeding with trial after motion taken under submission

Some judges proceed with the trial after argument on a motion for mistrial, taking the motion under submission until a decision can be made on the effect of the prejudicial conduct or irregularity on the jury.

In this event, counsel should request the court to admonish the jurors to disregard the improper conduct or irregularity. Counsel should renew the motion taken under submission before the close of evidence to avoid waiver of the motion. Any delay in giving an admonition would only compound the prejudicial effect of the complained-of irregularity.

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## §18.95 6. Moving for mistrial in bench trial

A motion for mistrial is rare in a bench trial, but it should be considered when there is irregularity or misconduct on the part of the trial judge. Unlike a jury, a judge is usually presumed to be capable of overlooking prejudicial remarks from counsel or witnesses when reaching a decision on the merits.

If a mandatory ground for mistrial occurs (*e.g.,* the death of the trial judge after submission, but before decision, in the case; see §18.86), counsel should make the motion for mistrial in writing. *Rose v Boyson* (1981) 122 CA3d 92, 97, 175 CR 836 (judge sitting without jury elevated to appellate court after judgment but before findings signed; court noted power of parties to stipulate otherwise). See *Reimer v Firpo* (1949) 94 CA2d 798, 801, 212 P2d 23.

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## F. Procedures for opposing party

### §18.96 1. Suggest alternative means to cure prejudice

Generally, opposing counsel can suggest less drastic means than mistrial to cure any prejudice. Mistrials can result in substantial additional expense for both the courts and the parties if the case is retried. Normally, a prompt admonition is considered sufficient to cure any prejudicial effect. See *Clemente v State* (1985) 40 C3d 202, 217, 219 CR 445; *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610, 39 CR 721.

In some instances, a continuance (or recess) may make a mistrial unnecessary. See, *e.g., Schnear v Boldrey* (1971) 22 CA3d 478, 482, 99 CR 404 (when several jurors became ill, judge continued trial instead of discharging jury and declaring mistrial).

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### §18.97 2. Argue when appropriate that motion was not made immediately following misconduct

If, *e.g.,* a motion for mistrial is based on juror misconduct (counsel for moving party overhears jurors discussing the case before deliberation), the motion for mistrial must be made immediately. Otherwise, opposing counsel can argue that the right to a mistrial is waived, because a party should not be permitted to gamble on the outcome of the case before moving for relief.

Opposing counsel can also ask the court for a brief recess in which to research authorities if counsel believes that this would help persuade the court to deny the motion. If the court seems inclined to grant the motion, another alternative is to request that the matter be taken under submission until it becomes clear whether prejudice has resulted.

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## G. Effect of court's ruling: Motion granted

### §18.98 1. Deciding when case will be retried

When a jury is discharged without rendering a verdict, or is prevented from rendering a verdict by accident or other cause, the case may be retried immediately or at a future time. CCP §616.

Some judges call a conference among counsel immediately after a mistrial has been declared, covering questions of possible settlement or retrial of the case and the name of the judge who may preside at the trial. For example, if a mistrial was declared because of the deliberate misconduct of an attorney seeking a way out of a losing case, the judge may wish to disqualify himself or herself from retrial of the case.

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## §18.99 2. Reinstate case to trial calendar

After an order for mistrial has been granted, the case may be dropped from the trial calendar. If this happens, it is generally the plaintiff's counsel's responsibility to ensure a trial date, whether by making a motion to specially set for trial, invoking a fast-track procedure in accordance with local rules, or choosing some other method.

Although no statute authorizes preference for cases in which a mistrial has been declared, as a practical matter such cases often receive an early retrial date. If the court chooses to do so, however, it may commence the new trial immediately after declaring a mistrial. See §18.98.

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### §18.100 3. Order not appealable

An order granting a motion for mistrial is the same as having no trial at all. When a mistrial is declared, the finder of fact has made no determinations or final judgment from which to take an appeal. See *Reimer v Firpo* (1949) 94 CA2d 798, 801, 212 P2d 23 (motion granted).

Although the order granting a mistrial is not directly appealable, there are some circumstances under which it may be reviewed by extraordinary writ, *e.g.,* when the jury has already reached its verdict. See *Heavy Duty Truck Leasing, Inc. v Superior Court* (1970) 11 CA3d 116, 119, 89 CR 598 (court of appeal issued peremptory writ of mandate requiring trial court to enter judgment on jury verdict and vacate its order for mistrial).

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## H. When motion denied

### §18.101 1. Appellate review from judgment

An order denying a motion for mistrial is not directly appealable, but it may be reviewed on appeal from the judgment. *Hartman v Gordon H. Ball, Inc.* (1969) 269 CA2d 779, 75 CR 618; *Warner v O'Connor* (1962) 199 CA2d 770, 774, 18 CR 902.

When a motion for mistrial is denied, a later appeal may be based on the erroneous ruling itself or for failure to grant a new trial for trial irregularities, jury misconduct, or the like. See CCP §657(1)-(2); discussion in §§25.22-25.71.

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### §18.102 2. Waiver on appeal

Failure to object, delay in making an objection, or failure to seek jury admonitions when prejudicial conduct occurs may constitute waiver on appeal. See, *e.g., Neumann v Bishop* (1976) 59 CA3d 451, 468, 130 CR 786 (improper argument). On moving for mistrial during argument, see §19.54.

A timely objection and request for admonition are necessary to preserve the issue on appeal. As long as an objection is made, however, making a motion for mistrial is not required to reverse a verdict on appeal.

Generally, an admonition in jury trials will cure all but extreme cases of error. *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610, 39 CR 721. The record on appeal must show that counsel made a timely objection and request for admonition of the jury, but that the admonition was insufficient to cure the prejudice. See *Whitfield v Roth* (1974) 10 C3d 874, 892, 112 CR 540; *Lewis v Bill Robertson & Sons, Inc.* (1984) 162 CA3d 650, 654, 208 CR 699; *Love v Wolf* (1964) 226 CA2d 378, 392, 38 CR 183 (extreme misconduct; repeated attorney misconduct not cured by admonition).

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## VIII. MOTION TO AMEND PLEADINGS TO CONFORM TO PROOF

### §18.103 A. Checklist: Procedures for making or opposing motion

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Moving Party

___ 1. Evaluate whether issues already tried or to be tried are different than those in pleadings. See §18.104.

___ 2. If there is a variance, prepare amended pleading or amendment to pleading or ask court for permission to interlineate small amendments on face of pleading. See §18.115.

___ 3. If challenged, explain how opposing party had notice of issues in dispute and that proposed amendment does not change issues or evidence to be presented. See §18.106.

___ 4. Show that amended pleading or amendment is in furtherance of justice. See §18.117.

Opponent

___ 1. Determine whether amended pleading or amendment raises new issues after close of evidence. See §18.105.

___ 2. Show departure from facts originally pleaded and lack of notice. See §18.109.

___ 3. Identify prejudice that amended matter will cause in maintaining the action or defense on merits. See §18.106.

___ 4. Show that moving party's motion was not timely made. See §18.113.

___ 5. Argue that allowing the amended pleading or amendment to be filed is not in furtherance of justice. See §18.120.

___ 6. If granted, ask for continuance to meet the new issues and evidence and ask for reimbursement for costs incurred from continuance. See §18.110.

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### B. Nature of motion

### §18.104 1. Amendments liberally granted during trial

Amendments to pleadings made during trial are governed by the same general rule of liberality that allows amendments before trial, so that disputed issues may be decided on the merits. *Hooper v Romero* (1968) 262 CA2d 574, 580, 68 CR 749. See Cal Rules of Ct 3.1324. The courts have discretion to permit amendments to pleadings to conform to proof "on such terms as may be just." CCP §469.

Amendments to answers are usually granted with liberality because a defendant denied leave is permanently deprived of the defense. *Gould v Stafford* (1894) 101 C 32, 34; *Dunzweiler v Superior Court* (1968) 267 CA2d 569, 576, 73 CR 331.

On amending pleadings before trial, see §§6.87-6.93. For full discussion of pretrial changes to pleadings, see California Civil Procedure Before Trial, chap 16, §§25.70-25.79 (4th ed Cal CEB 2004).

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## §18.105 2. Denial of amendments that raise new issues after close of evidence

Motions to amend pleadings to conform to proof are often made because issues that have already been tried are different from those in the pleadings. On contents of motion to amend pleadings, see Cal Rules of Ct 3.1324.

The court tends to deny amendments to conform to proof when those amendments raise new issues after the close of evidence. *Trafton v Youngblood* (1968) 69 C2d 17, 31, 69 CR 568; *Lavely v Nonemaker* (1931) 212 C 380, 385, 298 P 976.

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### C. Curing immaterial variances

### §18.106 1. Showing no prejudice to other party

Amendments during trial most often arise when there is a variance between a pleading and the proof presented at trial, *i.e.,* the pleading alleges one thing and the proof shows another. See *Stearns v Fair Employment Practice Comm'n* (1971) 6 C3d 205, 212, 98 CR 467.

Case law has minimized the effect of variance, and motions to amend pleadings to conform to proof are generally granted as long as they do not prejudice the rights of the other party. *Trafton v Youngblood* (1968) 69 C2d 17, 31, 69 CR 568; *Quezada v Hart* (1977) 67 CA3d 754, 761, 136 CR 815, disapproved on other grounds in *Holliday v Jones* (1989) 215 CA3d 102, 112, 264 CR 448.

If the variance is slight, or one that has not misled the adverse party to his or her prejudice, the court may direct the fact to be found according to the evidence, or order an immediate amendment, without costs. CCP §470. See, *e.g., Zander v Texaco, Inc.* (1968) 259 CA2d 793, 802, 66 CR 561 (court's findings conformed to factual issues tried but at variance with pleadings).

The motion may be denied, however, when the amendment raises a disfavored plea, was insufficient to state a cause of action or defense, changed a cause of action, or contradicted an admission.

Under CCP §475, the court must disregard any error or defect that does not affect the substantial rights of the parties. *Lever v Garoogian* (1974) 41 CA3d 37, 41, 115 CR 856 (defect in answer to complaint not reversible error when plaintiff had notice of defense from defendant's answers to plaintiff's requests for admission).

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### §18.107 2. General rule: Amendments limited to causes of action in complaint

As a general rule, a party's recovery is limited to the causes of action set out in the complaint. See *Howard v Schaniel* (1980) 113 CA3d 256, 265, 169 CR 678. Likewise, a party's defense generally is limited to proof of issues raised by the answer. These restrictions give the other party notice of the scope of proof that will be presented at trial. See 5 Witkin, California Procedure, *Pleading* §1209 (5th ed 2008).

If an objection is sustained as being outside the pleadings, the court has no duty to aid counsel or to amend the pleadings sua sponte. Counsel must affirmatively move for relief. *R.E. Tharp, Inc. v Miller Hay Co.* (1968) 261 CA2d 81, 85, 67 CR 854.

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### §18.108 3. Exception: New causes of action permitted when based on same set of facts

The courts generally permit amendments that state a different cause of action or a new defense if the proposed recovery or defense is based on the same general set of facts. *Godfrey v Steinpress* (1982) 128 CA3d 154, 174, 180 CR 95 (cause of action added by amendment did not alter factual issues or presentation of evidence).

**PRACTICE TIP:** Whenever possible, point out to the court that your proposed amendment does not alter the issues in the case or have an effect on the evidence presented by either side. See, *e.g., Brady v Elixir Indus.* (1987) 196 CA3d 1299, 1303, 242 CR 324, disapproved on other grounds in *Turner v Anheuser-Busch, Inc.* (1994) 7 C4th 1238, 1251, 32 CR2d 223 (reversible error to deny amendment to conform to proof when facts admitted in trial were admissible under unamended complaint and adversary not prejudiced).

It is error for a trial court to permit an amendment alleging facts entirely outside the existing causes of action. *Earp v Nobmann* (1981) 122 CA3d 270, 286, 175 CR 767, disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 219, 266 CR 638.

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## D. Curing material variances

### §18.109 1. Variance has misled other party

A material variance is defined as one that has actually misled the adverse party to his or her prejudice in maintaining the action or defense on the merits. CCP §469.

Even material variances may be cured by an amendment to conform to proof if they do not represent a complete departure from the general set of facts originally pleaded. *Union Bank v Wendland* (1976) 54 CA3d 393, 400, 126 CR 549; *General Credit Corp. v Pichel* (1975) 44 CA3d 844, 849, 118 CR 913.

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### §18.110 2. Ordering continuance (recess) or vacating submission of court case; waiver

The court can correct a material variance by ordering an amendment to the pleadings on terms it considers just. CCP §469. Such terms may include ordering a continuance for the opposing party to meet the evidence.

In a bench trial, the order granting leave to amend the pleadings may vacate submission of the case to permit the opposing party to introduce additional evidence. See *Mountain States Creamery Co. v Tagerman* (1952) 39 C2d 355, 357, 246 P2d 21.

Substantial variance may also be cured under the theory that the issues were already tried, and that counsel had notice during trial and waived any prejudicial effect by failing to object to evidence or moving for nonsuit when the variance between the pleadings and proof became apparent. See 5 Witkin, California Procedure, *Pleading* §1214 (5th ed 2008).

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### §18.111 E. Failure of proof

If the claim or defense is unproved—not merely in some particulars, but in its general scope and meaning—it is considered to be a failure of proof rather than a case of variance under CCP §469 or §470. CCP §471. *Hunt v Smyth* (1972) 25 CA3d 807, 829, 101 CR 4 (trial court properly disallowed proposed amendment unsupported by evidence and not timely made).

The absence of a fact vital to the proposed defense constitutes a complete failure of proof that a pleading amendment cannot cure. See *Johnston v County of Yolo* (1969) 274 CA2d 46, 51, 79 CR 33.

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## F. Timing

### §18.112 1. Motion may be granted at any time

The court may allow any pleading to be amended at any stage of the proceedings as long as it is in "furtherance of justice." CCP §§576, 473.

**EXAMPLE 1:** *Enterprise Leasing Corp. v Shugart Corp.* (1991) 231 CA3d 737, 750, 282 CR 620 (motion after opening statement erroneously denied).

**EXAMPLE 2:** *Kamm v Bank of Cal.* (1887) 74 C 191, 198, 15 P 765 (at close of plaintiff's evidence pending motion for nonsuit).

**EXAMPLE 3:** *Walsh v Hooker & Fay* (1963) 212 CA2d 450, 454, 28 CR 16 (after conclusion of argument).

**EXAMPLE 4:** *Valencia v Shell Oil Co.* (1944) 23 C2d 840, 848, 147 P2d 558 (after submission of case).

**EXAMPLE 5:** *Foster v Keating* (1953) 120 CA2d 435, 444, 261 P2d 529 (after announcement of intended decision).

Pleadings may be conformed to proof even after judgment. See §18.133.

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### §18.113 2. Making timely motion; tactics

Counsel should normally make the motion at the earliest possible time because prejudicial delay is a ground for denial. See §§18.106, 18.109.

**PRACTICE TIP:** The best practice is to move to amend the pleadings as soon as it becomes clear that they should be amended. If possible, the motion should be made before trial begins.

In certain situations all the necessary information may not be available or the amendment may be so minor or technical (*e.g.,* the spelling of a name when the person's identity is not in dispute) that a motion to amend may be legitimately delayed. *McKee v Mires* (1952) 110 CA2d 517, 523, 242 P2d 954 (affirming trial court's discretion to permit amendment to complaint, even when made at "conclusion of case" or "after submission of the cause"). See *Hulsey v Koehler* (1990) 218 CA3d 1150, 1159, 267 CR 523 (affirmed trial court's denial of plaintiff's motion to amend to add defense when counsel realized existence of defense on reading deposition transcript 2 days before trial).

**CAUTION:** An amendment that raises new issues or requires a reopening of evidence will normally be denied without a strong showing of diligence and justification. If it is granted, the adverse party should be allowed to meet the amendment and with any new evidence.

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## §18.114 3. Conforming pleadings to proof after judgment

Pleadings may also be amended to conform to proof after judgment (*Babcock v Antis* (1979) 94 CA3d 823, 830, 156 CR 673, disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 775 n6, 98 CR2d 1) but only if the judgment is first vacated under CCP §473 or a new trial motion or other basis exists. *Young v Berry Equip. Rentals, Inc.* (1976) 55 CA3d 35, 38, 127 CR 200; *King v Unger* (1938) 25 CA2d 632, 635, 78 P2d 255. See *Jahn v Brickey* (1985) 168 CA3d 399, 402, 214 CR 119 (in posttrial motion, judgment vacated to amend complaint by interlineation to substitute figures in prayer for damages).

On vacating judgment to amend pleadings after trial, see §§25.72-25.77.

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## G. Procedures for moving party

### §18.115 1. Methods of amending pleadings

A pleading may be amended by:

- An amendment to the pleading;
- An amended pleading; or
- Alterations on the face of the pleading.

An amendment to the pleading specifically itemizes, line by line, the changes made in the original pleading. See, *e.g., McKee v Mires* (1952) 110 CA2d 517, 522, 242 P2d 954 (amendment to conform to proof designated line, page, and paragraph of complaint to be amended).

Unlike an amendment to the pleading, an amended pleading wholly supersedes the original pleading. See, *e.g., Cohen v Superior Court* (1966) 244 CA2d 650, 657, 53 CR 378.

The correct procedure for amendments by alteration on the face of the pleading includes receiving prior permission from the court and requesting the court or clerk to initial all alterations. See Cal Rules of Ct 3.1324. Amendments made by interlineating or otherwise making alterations on the face of the pleading are not allowed unless the court gives permission and the court or clerk initials the alterations. Cal Rules of Ct 3.1324.

Although minor changes of several words can be interlineated into an original pleading, an "amendment to the pleading" can be inconvenient and confusing because it requires reference to multiple documents. The courts frequently prefer that an "amended pleading" be drafted to wholly supersede the original pleading.

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### §18.116 2. Oral motion: Submit written amendment

A motion to amend pleadings to conform to proof is usually made orally during trial. If the motion is granted, the order allowing the amendment is not equivalent to the amendment itself. *Campagna v Market St. Ry.* (1944) 24 C2d 304, 308, 149 P2d 281; *People ex rel Dep't of Pub. Works v Vallejos* (1967) 251 CA2d 414, 416, 59 CR 450.

It is good practice to submit the proposed amendment to the court with copies for the opposing party at the time of making the motion or, if this is not possible, after the motion is granted. The opposing party may request the right of approval as to form before it is filed. See form of amendment in §18.134.

If the motion can be anticipated, written supporting papers may be prepared. On occasion, counsel may wish to make the motion itself in writing. See forms of motion to amend and court order in §§18.132-18.133.

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### §18.117 3. Arguing motion

In arguing the motion, the moving party should state why the evidence presented during trial is sufficient to justify the proposed amendment. To avoid the need for an answer, counsel amending a complaint can request that new allegations be deemed denied and the existing answer be deemed the answer to the amended pleading. See *Valencia v Shell Oil Co.* (1944) 23 C2d 840, 848, 147 P2d 558 (issues presented by amended complaint already tried with defendants presenting their evidence on disputed issues). It would be error for an amendment to be made and judgment entered without further hearing. *Reidy v Collins* (1933) 134 CA 713, 722, 26 P2d 712.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/ H. Procedures for opposing party/§18.118 1. Before motion made: Object on grounds of relevancy or move for nonsuit

## H. Procedures for opposing party

### §18.118 1. Before motion made: Object on grounds of relevancy or move for nonsuit

If evidence is offered during trial that differs from the pleadings, and no motion to amend the pleadings has yet been made, counsel may immediately object on grounds of relevancy. Evid C §350. When there is a variance between the pleadings and the proof, defense counsel may also choose to move for nonsuit at the close of the plaintiff's case. CCP §581c. On nonsuit, see §§18.7-18.34.

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### §18.119 2. Failure to challenge variance; waiver

A failure to challenge evidence at variance with the pleadings may result later in the trial in a waiver of counsel's objections to the moving party's amending the pleadings to conform to proof. *Quezada v Hart* (1977) 67 CA3d 754, 761, 136 CR 815, disapproved on other grounds in *Holliday v Jones* (1989) 215 CA3d 102, 112, 264 CR 448. On doctrine of substantial variance cured by trial, see 5 Witkin, California Procedure, *Pleading* §1214 (5th ed 2008).

A variance may be disregarded when the action has been fully and fairly tried on the merits as though the variance had not existed. See, *e.g., Hayes v Richfield Oil Corp.* (1952) 38 C2d 375, 382, 240 P2d 580 (variance not prejudicial when unpleaded theory of recovery fully litigated by parties).

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### §18.120 3. Arguing against motion when made; grounds

Once a motion to amend the pleadings has been made, the opposing party may object on grounds such as the following:

- Good cause does not exist for granting leave to amend.

**EXAMPLE 1:** *Hartman v Shell Oil Co.* (1977) 68 CA3d 240, 251, 137 CR 244 (denial of motion to amend to conform to proof affirmed when evidence before jury did not support proposed affirmative defense).

**EXAMPLE 2:** *Brautigam v Brooks* (1964) 227 CA2d 547, 560, 38 CR 784 (leave to amend erroneous when amendment proposed a defense already withdrawn before jury selection).

- The moving party has not shown due diligence in making the motion.

**EXAMPLE 1:** *Bedolla v Logan & Frazer* (1975) 52 CA3d 118, 135, 125 CR 59 (amendment not sought until fourth day of trial).

**EXAMPLE 2:** *Stockton v Ortiz* (1975) 47 CA3d 183, 194, 120 CR 456 (plaintiff delayed without good cause in making motion to add new theory of liability).

- Granting the motion would unduly prejudice the opposing party in maintaining the action or defense on the merits.

**EXAMPLE 1:** *Earp v Nobmann* (1981) 122 CA3d 270, 286, 175 CR 767 (error to permit amendment alleging facts entirely outside cause of action), disapproved in part on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 219, 266 CR 638.

**EXAMPLE 2:** *Richter v Adams* (1937) 19 CA2d 572, 577, 66 P2d 226 (plaintiff prejudiced at close of trial by amended complaint setting forth defense not originally pleaded and introduced over plaintiff's objection).

- The statute of limitations has run and the relation-back doctrine does not apply.

**EXAMPLE 1:** *Barrington v A. H. Robins Co.* (1985) 39 C3d 146, 155, 216 CR 405 (amended complaint erroneously dismissed based on trial court's failure to apply relation-back rule to that complaint).

**EXAMPLE 2:** *Dominguez v City of Alhambra* (1981) 118 CA3d 237, 244, 173 CR 345 (untimely government tort claim).

- The amendment is based on evidence to which an objection was properly made at trial.

**EXAMPLE:** *Cota v County of Los Angeles* (1980) 105 CA3d 282, 293, 164 CR 323 (denial of motion at end of trial when court previously excluded evidence related to amendment).

- The amendment contradicts an admission or stipulation.

**EXAMPLE:** *Roemer v Retail Credit Co.* (1975) 44 CA3d 926, 939, 119 CR 82 (unjustifiably long delay and amendment in conflict with stipulated facts).

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## I. Effect of granting motion

### §18.121 1. Opposing party's request to produce evidence

When the motion is granted, it is often not necessary for the opposing party to request time to plead and produce further evidence. If the complaint has been amended, the original answer on file is generally adequate to state a defense against any new allegations. In this instance, either counsel can ask the court to rule that the new allegations be deemed denied.

If the amendment raises new issues that the opposing party has not heard, however, counsel for the opposing party should request an opportunity to respond and produce further evidence. See *Reidy v Collins* (1933) 134 CA 713, 723, 26 P2d 712 (judgment reversed; appellant had no opportunity to be heard on new issues raised by amended complaint to conform to proof filed after submission).

In a bench trial, the court may vacate submission to give the adverse party time to gather additional evidence to rebut allegations in a plaintiff's amendment to conform to proof. *Mountain States Creamery Co. v Tagerman* (1952) 39 C2d 355, 356, 246 P2d 21.

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### §18.122 2. Granting opposing party continuance and costs

If appropriate, counsel for the opposing party may request that the court grant a continuance to meet the contentions of the amended pleading, and require the moving party to pay any costs resulting from a postponement. See CCP §473; *Oakes v McCarthy Co.* (1968) 267 CA2d 231, 262, 73 CR 127 (1-week continuance and deposition properly ordered even though amendments merely elaborated on issues previously pleaded).

The court may order costs otherwise not recoverable. *Williams v Myer* (1907) 150 C 714, 718 (fees for jurors, witnesses, defendants' expenses of attending trial, attorneys); *Fuller v Vista del Arroyo Hotel* (1941) 42 CA2d 400, 402, 108 P2d 920 (defendant who raised new defense ordered to pay all expenses plaintiff had incurred to date). But see *DeCesare v Lembert* (1983) 144 CA3d 20, 23, 192 CR 354 (recovery of attorney fees inappropriate on motion for continuance).

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### §18.123 3. Abuse of discretion test on appeal

If timely and appropriate objections to a variance between the pleadings and proof have been made during the trial, the issues are preserved on appeal in the event of an adverse judgment. See *Richter v Adams* (1937) 19 CA2d 572, 577, 66 P2d 226 (judgment against plaintiff who repeatedly, yet unsuccessfully, objected to introduction of evidence at variance with defendants' pleadings; reversed). See also *Union Bank v Wendland* (1976) 54 CA3d 393, 400, 126 CR 549 (error to deny leave to amend pleadings; appellate court adopted amended theory and reversed on merits).

A ruling will not be reversed on appeal, however, unless abuse of discretion can be shown. *Godfrey v Steinpress* (1982) 128 CA3d 154, 174, 180 CR 95. See *Trafton v Youngblood* (1968) 69 C2d 17, 31, 69 CR 568 (clear abuse required for reversal); *Bedolla v Logan & Frazer* (1975) 52 CA3d 118, 135, 125 CR 59 (only manifest or gross abuse of discretion required for reversal). See also CCP §§473 (providing for amendments of pleadings generally), 576 (providing for amendments to pleadings or pretrial orders).

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## IX. FORMS

### A. Motion for nonsuit

### §18.124 1. Form: Motion for judgment of nonsuit (CCP §581c)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ **Plaintiff(s)** | ) | **No. _ _ _ _ _ _** |
| **vs** | ) | **MOTION FOR JUDGMENT OF NONSUIT (CCP §581c); SUPPORTING MEMORANDUM** |
| _ _[*Name(s)*]_ _ **Defendant(s)** | ) | |
| _____ | ) | |

**Defendant, _ _[*name*]_ _, moves under Code of Civil Procedure section 581 for judgment of nonsuit against plaintiff, _ _[*name*]_ _. This motion is made on the ground that _ _[*specify deficiencies of plaintiff's opening statement or evidence*]_ _.**

**This motion is based on all pleadings, papers, and records in this action; the evidence presented at trial; and the attached supporting memorandum.**

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

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* Motions for nonsuit are usually made orally. If defense counsel anticipates making the motion and prepares it in written form, the motion should be presented immediately after the plaintiff's opening statement or after presentation of the plaintiff's evidence. In this instance, counsel should state on the record that the motion is made by submission of written papers. If the motion is made orally, any written supporting memorandum should be presented when the motion is made or argued. See §18.26.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.125 2. Form: Judgment of nonsuit (after opening statement) (CCP §581c)

## §18.125 2. Form: Judgment of nonsuit (after opening statement) (CCP §581c)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **JUDGMENT OF NONSUIT** |
| **vs** | ) | **(CCP §581c)** |
| _ _[*Name(s)*]_ _ | ) | |
| **Defendant(s)** | ) | |
| **_____** | ) | |

**The motion of defendant, _ _[*name*]_ _, for judgment of nonsuit under Code of Civil Procedure section 581c was heard on _ _[*date*]_ _ during the _ _[*jury/bench*]_ _ trial of this action. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.**

**After opening statement, in which counsel for plaintiff, _ _[*name*]_ _, stated all the facts that _ _[*he/she*]_ _ intended to prove, counsel for defendant moved for (1) judgment of nonsuit on the ground that _ _[*state specific deficiency*]_ _ and (2) costs.**

**IT IS ORDERED that:**

**1. Defendant recover judgment on the merits against plaintiff;**

**2. The complaint on file in this action be dismissed; and**

**3. Defendant recover against plaintiff costs in the amount of _ _[*dollar amount*]_ _, with interest at an annual rate of _ _[*e.g., 10*]_ _ percent from the date of entry of this judgment until paid.**

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

*Copies:* Original and copy (present to judge for signature, then file with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* A motion for nonsuit may be made in a jury or a bench trial after the plaintiff's opening statement. See §18.22.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.126 3. Form: Judgment of nonsuit (after close of evidence) (CCP §581c)

## §18.126 3. Form: Judgment of nonsuit (after close of evidence) (CCP §581c)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **JUDGMENT OF NONSUIT** |
| **vs** | ) | **(CCP §581c)** |
| _ _[*Name(s)*]_ _ | ) | |
| **Defendant(s)** | ) | |
| _____ | ) | |

**The motion of defendant, _ _[*name*]_ _, for judgment of nonsuit under Code of Civil Procedure section 581c was heard on _ _[*date*]_ _ during the jury trial of this action. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.**

**After counsel for plaintiff, _ _[*name*]_ _, presented plaintiff's evidence and testimony, and plaintiff rested, counsel for defendant moved (1) for judgment of nonsuit for insufficiency of plaintiff's proof in that _ _[*state essential defects of plaintiff's evidence*]_ _ and (2) for costs.**

**IT IS ORDERED that:**

**1. Defendant recover judgment on the merits against plaintiff;**

**2. The complaint on file in this action be dismissed; and**

**3. Defendant recover against plaintiff costs in the amount of _ _[*dollar amount*]_ _, with interest at an annual rate of _ _[*e.g., 10*]_ _ percent from the date of entry of this judgment until paid.**

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

*Copies:* Original and copy (present to judge for signature, then file with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* A motion for nonsuit may be made in a jury trial after the close of the plaintiff's evidence. See §18.22. On making a motion for judgment under CCP §631.8 at this point in a bench trial, see §§24.14-24.29.

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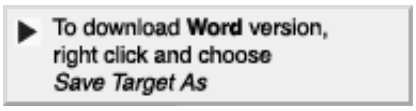
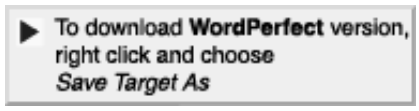
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/ B. Motion for judgment after discharge of jury/§18.127 1. Form: Notice of motion for judgment (CCP §630(f))

## B. Motion for judgment after discharge of jury

### §18.127 1. Form: Notice of motion for judgment (CCP §630(f))




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | |
|---|---|
| _ _[*Name(s)*]_ _ | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | **NOTICE OF MOTION FOR** |
| **vs** | **JUDGMENT (CCP §630(f));** |
| _ _[*Name(s)*]_ _ | **SUPPORTING** |
| **Defendant(s)** | **MEMORANDUM;** |
| _____ | **DECLARATION OF** |
| | _ _[*NAME*]_ _ |
| | **Hearing:** _ _[*date; time*]_ _ |
| | **Dep't:** _ _[*number*]_ _ |
| | **Hearing judge:** _ _[*if known*]_ _ |
| | **Action filed:** _ _[*date*]_ _ |
| | **Trial date:** _ _ _ |

**PLEASE TAKE NOTICE that** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, moves under Code of Civil Procedure section 630(f) that the court issue an order for judgment in** _ _[*his/hers/its*]_ _ **favor on** _ _[*date must be within 30 days after jury's discharge*]_ _**. This motion is based on section 630(f): If** _ _[*plaintiff/defendant*]_ _ **had moved for directed verdict during trial, it should have been granted on the grounds that** _ _[*specify*]_ _**, as set forth in detail in the attached supporting memorandum and declaration of** _ _[*name*]_ _**.**

**This motion is based on all pleadings, papers, and records in this action; the evidence presented at trial;** _ _[*and*]_ _ **the attached supporting memorandum and declaration of** _ _[*name*]_ _**; and any evidence received at the hearing.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* Counsel's declaration should set forth the date on which the jury was discharged and state that the notice was given within 10 days as required by CCP §630(f) and shown in the attached proof of service. The hearing should be noticed within 30 days after the jury's discharge, at which time the court's power to act under §630(f) expires. See §§18.40-18.41.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.128 2. Form: Order for entry of judgment (CCP §630(f))

## §18.128 2. Form: Order for entry of judgment (CCP §630(f))

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | |
|---|---|
| _ _[*Name(s)*]_ _ **Plaintiff(s)** | **No. _ _ _ _ _ _** |
| **vs** | **ORDER FOR ENTRY OF JUDGMENT (CCP §630(f));** |
| _ _[*Name(s)*]_ _ **Defendant(s)** | **Hearing:** _ _[*date; time*]_ _ |
| | **Dep't:** _ _[*number*]_ _ |
| | **Hearing judge:** _ _[*if known*]_ _ |
| | **Action filed:** _ _[*date*]_ _ |
| | **Trial date: _ _ _** |

**The motion of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, for judgment under Code of Civil Procedure section 630(f) was heard at the above date and time during the _ _[*jury/court*]_ _ trial of this action. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.**

**IT IS ORDERED that:**

[*Option 1: Plaintiff*]

**1. Plaintiff recover judgment on the merits against defendant, _ _[*name*]_ _, in the amount of _ _[*dollar amount*]_ _, with interest at an annual rate of _ _[*e.g., 10*]_ _ percent from the date of entry of this judgment until paid; and**

**2. Plaintiff recover against defendant costs in the amount of _ _[*dollar amount*]_ _.**

[*Option 2: Defendant*]

**1. Plaintiff recover nothing from defendant; and**

**2. Defendant recover against plaintiff costs in the amount of _ _[*dollar amount*]_ _.**

[*Continue*]

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

*Copies:* Original and copy (present to judge for signature, then file with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* The order of judgment may be attached to the moving papers, presented to the judge during argument if counsel prevails on the motion, or drafted and submitted to the court after the order has been granted. For further discussion, see §§18.40-18.41.

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## C. Motion for directed verdict

### §18.129 1. Form: Motion for directed verdict (CCP §630)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | |
|---|---|
| _ _[*Name(s)*]_ _ | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** ) | **MOTION FOR DIRECTED** |
| **vs** ) | **VERDICT (CCP §630);** |
| _ _[*Name(s)*]_ _ ) | **SUPPORTING** |
| **Defendant(s)** ) | **MEMORANDUM;** |
| **_____** ) | **DECLARATION OF** |
| | _ _[*NAME*]_ _ |

_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, **moves under Code of Civil Procedure section 630 that the court direct the jury to return a verdict in** _ _[*his/her/its*]_ _ **favor. This motion is made on the grounds that** _ _[*specify*]_ _**.**

**This motion is based on all pleadings, papers, and records in this action; the evidence presented at trial;** _ _[*and*]_ _ **the attached supporting memorandum and declaration of** _ _[*name*]_ _ _ _[*; and any evidence received at the hearing*]_ _**.**

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

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* A motion for directed verdict is usually made orally. If counsel anticipates making the motion and prepares it in written form, counsel should present the motion at the customary time for making the motion and state on the record that the motion is made by submission of written papers. Whether the motion is oral or written, any written supporting memorandum should also be presented at the time the motion is made. See §18.51.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.130 2. Form: Judgment on directed verdict (CCP §630)

## §18.130 2. Form: Judgment on directed verdict (CCP §630)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **JUDGMENT ON DIRECTED** |
| **vs** | ) | **VERDICT** |
| _ _[*Name(s)*]_ _ | ) | |
| **Defendant(s)** | ) | |
| _____ | ) | |

**The motion of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, for directed verdict under Code of Civil Procedure section 630 was heard on _ _[*date*]_ _ during the jury trial of this action. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.**

**After _ _[*e.g., presentation of both plaintiff's and defendant's evidence*]_ _, counsel for _ _[*plaintiff/defendant*]_ _ moved for directed verdict on the grounds that _ _[*specify*]_ _. The court directed a verdict on the merits in favor of _ _[*plaintiff/defendant*]_ _, and the jury returned the verdict accordingly.**

**IT IS ORDERED that:**

[*Option 1: Plaintiff*]

**1. Plaintiff recover judgment on the merits against defendant, _ _[*name*]_ _, in the amount of _ _[*dollar amount*]_ _; and**

**2. Plaintiff recover against defendant costs in the amount of _ _[*dollar amount*]_ _, with interest at an annual rate of _ _[*e.g., 10*]_ _ percent from the date of entry of this judgment until paid.**

[*Option 2: Defendant*]

**1. Plaintiff recover nothing from defendant; and**

**2. Defendant recover against plaintiff costs in the amount of _ _[*dollar amount*]_ _.**

[*Continue*]

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

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* For discussion of directed verdict motions, see §§18.35-18.56.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.131 D. Form: Notice of motion to reopen case (CCP §607(6))

## §18.131 D. Form: Notice of motion to reopen case (CCP §607(6))

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | |
|---|---|
| _ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)** | **No. _ _ _ _ _ _** **NOTICE OF MOTION AND MOTION TO REOPEN CASE (CCP §630(6)); SUPPORTING MEMORANDUM; DECLARATION OF** _ _[*NAME*]_ _ **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _ |

**PLEASE TAKE NOTICE that on the above date and time, or as soon thereafter as the matter can be heard, _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, will move under Code of Civil Procedure section 607(6) to reopen the case and request an order setting aside submission of the case to allow the introduction of additional evidence. This motion is made on the grounds that _ _[*specify, e.g., material oral and documentary evidence*]_ _ were not presented at the trial because _ _[*state reason, e.g., evidence was newly discovered*]_ _. The oral evidence consists of _ _[*describe*]_ _ on the issue of _ _[*identify*]_ _. The documentary evidence consists of _ _[*describe*]_ _ on the issue of _ _[*identify*]_ _.**

**This motion is based on all pleadings, records, and papers on file in this action; and the attached supporting memorandum and declaration of _ _[*name*]_ _.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* If a motion to reopen has been made after submission of the case in a bench trial, it should be a noticed motion, and a supporting memorandum and a declaration must be attached. See Cal Rules of Ct 3.1113. If the parties are still before the court, the motion need not be written. On making oral motion to reopen, see §18.77.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/ E. Amending pleadings to conform to proof/§18.132 1. Form: Motion for leave to amend pleadings to conform to proof

## E. Amending pleadings to conform to proof

### §18.132 1. Form: Motion for leave to amend pleadings to conform to proof

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **MOTION FOR LEAVE TO** |
| **vs** | ) | **AMEND PLEADINGS TO** |
| _ _[*Name(s)*]_ _ | ) | **CONFORM TO PROOF;** |
| **Defendant(s)** | ) | **SUPPORTING** |
| **_____** | ) | **MEMORANDUM;** |
| | | **DECLARATION OF** |
| | | _ _[*NAME*]_ _ |

_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, **moves the court for an order granting leave to amend the pleadings to conform to proof. This motion is made under Code of Civil Procedure section** _ _[*e.g., 469/470/473/576*]_ _ **on the ground that there is a variance between the pleadings and the proof in that** _ _[*identify allegations in pleading at variance with proof*]_ _**.**

**This motion is based on all pleadings, papers, and records in this action; the evidence presented at trial;** _ _[*and*]_ _ **the attached supporting memorandum and declaration of** _ _[*name*]_ _**;** _ _[*any evidence received at the hearing*]_ _**; and the attached** _ _[*identify proposed amendment to pleading or amended pleading*]_ _**.**

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

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* This motion is usually made orally. Counsel may prepare a written supporting memorandum. See §18.116. A declaration should state facts showing that amending the pleadings would further justice. The proposed amendment to the pleading or the proposed amended pleading should be attached as an exhibit to the moving papers. See §18.115.

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## §18.133 2. Form: Order granting leave to amend

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **MOTION FOR LEAVE TO** |
| **vs** | ) | **AMEND PLEADINGS TO** |
| _ _[*Name(s)*]_ _ | ) | **CONFORM TO PROOF;** |
| **Defendant(s)** | ) | **SUPPORTING** |
| **_____** | ) | **MEMORANDUM;** |
| | | **DECLARATION OF** |
| | | _ _[*NAME*]_ _ |

**The motion of** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, for leave to amend the pleadings to conform to the proof under Code of Civil Procedure section** _ _[*e.g., 469/470/473/576*]_ _ **was heard on** _ _[*date*]_ _ **during the** _ _[*jury/court*]_ _ **trial of this action. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

**IT IS ORDERED that the** _ _[*identify amendment to pleading or amended pleading*]_ _ **be filed, a copy of which was** _ _[*e.g., presented to the court during argument on this motion*]_ _**, and that the** _ _[*identify original pleading*]_ _ **be thus amended.**

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

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* The order may be attached to counsel's supporting papers, submitted to the court after the motion is granted during argument, or later drafted and submitted for the judge's signature when the amendment is filed. See §18.115.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/18 Motions During Trial/§18.134 3. Form: Amendment to pleading

## §18.134 3. Form: Amendment to pleading

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **AMENDMENT TO** _ _[*TITLE* |
| **vs** | ) | *OF PLEADING*]_ _ |
| _ _[*Name(s)*]_ _ | ) | |
| **Defendant(s)** | ) | |
| **_____** | ) | |

**Having obtained leave of the court to amend the** _ _[*identify pleading*]_ _ **on file in this action to conform to proof,** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, amends the pleading as follows:**

[*Specify amendments such as the following*]

**1. Deletes paragraph _ _, lines _ _, on page _ _.**

**2. Substitutes the following new paragraph:** _ _[*State language of amendment*]_ _**.**

[*Continue*]

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

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* If alterations of the original pleading are extensive, counsel should file an entirely different or amended pleading superseding the original pleading. On methods of amending pleadings, see §18.115.

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# 19

# Closing Argument

**Mary E. Alexander**

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## §19.1 I. SCOPE OF CHAPTER

This chapter covers the closing argument that is presented to the jury at the end of the trial. It is also good practice to give a closing argument at the end of a bench trial. At a bench trial, unlike a jury trial, a closing argument is permitted only at the judge's discretion. See §19.8. On planning the argument and its content, see §§19.9-19.22.

The latitude permitted during argument is discussed in §§19.23-19.33. For techniques that can be used in delivering the closing argument, see §§19.34-19.38. On arguing damages in personal injury trials, see §§19.39-19.50.

Procedures for objecting and protecting the record during the opposing party's closing argument are discussed in §§19.51-19.55. For a checklist that can be used for spotting impermissible arguments, see §19.56. A checklist of grounds for objections that can be made during opponent's closing argument appears in §19.57.

Because the judge usually gives jury instructions immediately following the argument, it is a good idea to refer to those instructions during closing argument. On jury instructions, see chap 20.

Most experienced trial attorneys also make a point of echoing the themes they presented to the jury during their opening statement and "delivering" on the promises they made at the beginning of trial. On opening statement, see chap 9.

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## II. GENERAL ISSUES

### §19.2 A. Right to argue in jury trial; waiver

In California, a litigant has the right to make a closing argument in a jury trial. CCP §607(7); *Shippy v Peninsula Rapid Transit Co.* (1925) 197 C 290, 294, 240 P 785; *Hodges v Severns* (1962) 201 CA2d 99, 114, 20 CR 129. The discretion of the trial judge plays no part in whether closing arguments may be given to the jury. *Shippy v Peninsula Rapid Transit Co., supra*.

The trial court judge may, however, limit the number of attorneys who argue (if a party has more than one attorney) and determine the order of their appearance. *In re Estate of Gird* (1910) 157 C 534, 108 P 499; *Potapoff v Mattes* (1933) 130 CA 421, 425, 19 P2d 1016. See §§19.5-19.7. The judge may also set and enforce reasonable time limits on the attorneys' closing arguments. *Eley v Curzon* (1953) 121 CA2d 280, 263 P2d 86. See §19.13.

Each side has the right to waive closing argument. *Kenny v Trust Oil Co.* (1963) 215 CA2d 305, 307, 29 CR 909; *Kling v Crown Fin. Corp.* (1944) 63 CA2d 33, 35, 146 P2d 54; *McCullough v Langer* (1937) 23 CA2d 510, 523, 73 P2d 649. Because of its importance, however, closing argument should never be waived. See §19.9. Most trial attorneys believe that closing argument is essential to win the case or minimize losses.

**NOTE:** In a trial without a jury, counsel does not have a right to argue, and the court has discretion either to grant or to deny argument. *Guardianship of Baby Boy M.* (1977) 66 CA3d 254, 278, 135 CR 866; *Oil Workers Int'l Union v Superior Court* (1951) 103 CA2d 512, 581, 230 P2d 71. For further discussion, see §19.8. On bench trials generally, see chap 24.

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## B. Argument and rebuttal argument

### §19.3 1. Plaintiff's counsel

Plaintiff's closing argument consists of two parts: the opening argument and the concluding (or rebuttal) argument after defendant's argument. The plaintiff's rebuttal argument is limited to matters already raised in the plaintiff's opening argument or the defendant's responding argument. The plaintiff has the burden of proof and the duty to present the whole case that the plaintiff relies on in the opening argument before the jury hears the defendant's responding argument. See *Ravettino v San Diego* (1945) 70 CA2d 37, 160 P2d 52.

It is improper for plaintiff's counsel to attempt to raise new issues in the plaintiff's closing argument that defense counsel has no opportunity to rebut. If defense counsel does not object to new issues raised during rebuttal, however, the point may not be raised for the first time on appeal. See *Cain v State Farm Mut. Auto. Ins. Co.* (1975) 47 CA3d 783, 800, 121 CR 200.

If the plaintiff deliberately presents a limited argument and postpones discussion of certain aspects of the case until rebuttal, the court could consider the opening argument not to have been presented in good faith.

**EXAMPLE:** If plaintiff's counsel does not discuss a specific amount of damages in the opening argument, the plaintiff may be precluded from discussing this subject during rebuttal. In *Cortez v Macias* (1980) 110 CA3d 640, 167 CR 905, the court found that it was error to permit plaintiff's counsel, over objection, to argue in rebuttal for the first time that a specific sum should be awarded as general damages.

Because most of the defendant's arguments can be anticipated well before the argument stage of trial, plaintiff's counsel should be prepared for rebuttal before hearing opposing counsel's argument. If taken by surprise, however, it is important to appear calm about any unexpected argument presented by the defense and address the jury on these points during rebuttal.

**PRACTICE TIP:** Present your strongest points during your opening argument. Consider visual aids to help the jury fully understand and remember the most important issues. See §19.12. It is risky to assume that defense counsel will raise points that you may want to address on rebuttal. Even when you are able to argue important points as part of your rebuttal, they may be viewed as an afterthought by a jury that has already been convinced by defense counsel's argument. You may also be prevented from presenting any rebuttal at all if the defendant waives closing argument. Write down key words during the defendant's closing argument to remind yourself of additional or unanticipated points you want to cover in rebuttal. Use your concluding argument to rebut any damaging points raised in defense counsel's argument and highlight evidence that supports the plaintiff's position regarding those points.

**JUDICIAL PERSPECTIVE:** Check to see if the court will limit the time for argument. If the time is limited, plaintiff's attorney must carefully monitor the time so as not to use up the time that may be necessary for rebuttal.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.4 2. Defense Counsel

## §19.4 2. Defense Counsel

As defense counsel, your task is to raise as many doubts as possible about the plaintiff's case. Describe how the plaintiff has failed to meet the burden of proof by pointing out the weaknesses in the plaintiff's argument, the witnesses who are not entirely credible, and the evidence that leaves room for doubt. Use analogies and graphics to help illustrate your points. On using visual aids, see §19.12.

If the plaintiff's case is clearly unconvincing or incomplete, defense counsel could also consider waiving closing argument. The advantages to such a strategy are that plaintiff's counsel will not be able to present a rebuttal argument and the jury may conclude that the plaintiff's case was not worthy of comment. Most defense counsel believe, however, that a closing argument is essential to summarize the evidence and persuade the jury to return a verdict for the defense. On the right to argue and waiver, see §19.2.

**JUDICIAL PERSPECTIVE:** A tactic used successfully by defense counsel in preparing the closing argument was to review the opening statement of the plaintiff attorney and state forcefully how the jury was misled by plaintiff's counsel and the plaintiff.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.5 C. Order of argument

## §19.5 C. Order of argument

In a two-party case, plaintiff's counsel usually presents closing argument first because the plaintiff has the burden of proof. CCP §607(7); *McCullough v Langer* (1937) 23 CA2d 510, 524, 73 P2d 649. After the defense argues, the plaintiff presents a rebuttal argument, which is limited to countering subject areas and arguments made by the defense. Plaintiff's counsel should present a complete argument on all issues, including damages, before the defense argument. If plaintiff's counsel does not cover damages and the defense does not mention damages in its closing, the plaintiff may not be permitted to discuss damages in rebuttal. See §19.3.

The defense may argue first when it has the burden of proof on an issue, *e.g.,* when (1) the statute of limitations issue is tried first in bifurcated trials, (2) the defense admits all the facts of the plaintiff's case but relies on an affirmative defense, or (3) there is a substantial counterclaim. *Coogan Fin. Corp. v Beatcher* (1932) 120 CA 278, 7 P2d 695.

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## §19.6 1. Multiple plaintiffs or defendants

When multiple plaintiffs are represented by different counsel, each attorney may make a closing argument. If one attorney represents all the plaintiffs, there will be only one argument. CCP §607(7). Similarly, when there are multiple defendants, each counsel may have a separate argument. If all defendants are represented by one attorney, there will be only one defense argument. CCP §607(8).

The court has discretion to decide the order in which the arguments are presented. Some judges allow the arguments to proceed in the same order in which the parties presented evidence. Counsel may also request a particular order. Generally, the court will require that all the plaintiffs' attorneys present their arguments, followed by defense counsel's argument, followed by plaintiffs' counsel's rebuttal. Rebuttal is usually presented in the same order as the plaintiffs' opening argument.

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## §19.7 2. When more than one attorney represents a party

If more than one attorney represents a party, the number of attorneys allowed to argue is at the court's discretion. *Potapoff v Mattes* (1933) 130 CA 421, 426, 19 P2d 1016. Usually, only one attorney is allowed to argue for each side, but the court may allow one attorney to argue liability and another to argue damages. Or the court may allow one plaintiff's attorney to give the opening argument and another the rebuttal. See §19.3.

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## §19.8 D. Argument in bench trials

In a bench trial, counsel does not have a right to argue, and the court has discretion either to grant or to deny argument. *Guardianship of Baby Boy M.* (1977) 66 CA3d 254, 278, 135 CR 866; *Oil Workers Int'l Union v Superior Court* (1951) 103 CA2d 512, 581, 230 P2d 71. But see *Gillette v Gillette* (1960) 180 CA2d 777, 781, 4 CR 700, in which the court observed that a court's disallowance of argument in some cases might be error.

Because argument can be beneficial during bench trials, counsel should try to persuade the court to allow closing arguments. Argument before the court should be structured and presented somewhat differently than argument before a jury. In bench trials, attorneys are usually permitted more leeway in discussing the applicable law than in jury trials. For example, technical legal language may be used because judges, unlike most jurors, are schooled in legal terminology. Even when it is not necessary to define the meaning of terms, such as "preponderance of the evidence," or explain legal theories or defenses, such as "comparative fault," counsel should nonetheless carefully argue how these concepts apply to the facts in the case.

**PRACTICE TIP:** Make the issues clear to the judge by presenting the facts from your client's perspective and in an order that highlights your reasoning. To assist the judge in weighing the evidence, distinguish the most important evidence from less credible evidence and explain how certain facts relate to others. Persuade the judge in your argument by emphasizing how the law supports your contentions. Knowing how the judge has ruled in the past can also guide you in presenting your client's case and result in a more effective argument.

For further discussion of bench trials, see chap 24.

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## III. PLANNING AND PREPARING ARGUMENT

### §19.9 A. Importance of closing argument

Closing argument provides counsel with an opportunity to restate the primary issues of the trial, summarize the evidence from the client's perspective, and explain the law on which the jury's decision must be based. The ideal closing argument is simple, clear, and presented with confidence. On delivering closing argument in bench trials when the judge is the trier of fact, see §§19.8, 24.12. See also *Mediterranean Constr. Co. v State Farm Fire & Cas. Co.* (1998) 66 CA4th 257, 266, 77 CR2d 781 (summary judgment case, noting that authorities asserting no right to oral argument are "more stale than seasoned" and "without explanation or analysis").

At the beginning of closing argument, outline the major issues of the case and briefly explain the law as it relates to the events giving rise to the trial, including the burden of proof. Because the judge will instruct the jurors to base their verdict on the evidence presented during trial, explain that "evidence" refers to facts brought out in the witnesses' testimony and in the documents, records, exhibits, and objects shown to the jury during the trial.

Reconstructing the facts on which your case is based can have a tremendous impact on the jury, especially if you emphasize the significance of the events for those involved.

**PRACTICE TIP 1:** Use vivid language to help the jurors imagine your client's emotions during the events giving rise to the trial. Instead of blandly stating that your client lost the use of her legs in an accident, describe the events in story form: "Mary Hall drove to the park that sunny afternoon for a bicycle ride with her friends, hoping to experience the beauty of the outdoors. As Mary rode her rented bicycle down the slope in that serene and awe-inspiring place, the brakes failed and she plunged over a cliff. Her life changed forever when her head struck the branch of a tree. She lay there unconscious, broken, never to walk again."

**PRACTICE TIP 2:** Describe the essential points made by witnesses during examination and cross-examination. Remind jurors of the meaning and significance of the documentary and demonstrative evidence presented during the trial. Listing key facts on a blackboard or pad may be useful for emphasis. On using visual aids, see §19.12. Plaintiff's counsel should also explain the damages suffered by the client as a result of the events giving rise to the trial.

**PRACTICE TIP 3:** Only a little time is usually required to refute opposing counsel's position. It is better to concentrate on your side of the story in order to persuade the jury to adopt your client's view of the evidence.

Remind the jurors that, as the sole judges of the facts, they are responsible for weighing the evidence and the witnesses' credibility during their deliberations. Despite the expertise of the judge and counsel for both parties, the law requires a jury made up of a diverse group of citizens to decide the standard of behavior expected in a community. Closing argument is counsel's opportunity to persuade the jury that justice requires a verdict in the client's favor.

**JUDICIAL PERSPECTIVE:** Closing argument is the single most valuable opportunity for the lawyer to communicate directly with the jury. Throw away the scholarly pages, look the jurors in the eye, and speak directly to them. Jurors have a limited attention span. Sincerity and clarity are far more important than a boring review of the evidentiary portion of the trial. This is the time for communication.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.10 B. Structuring argument

## §19.10 B. Structuring argument

A strong closing argument can persuade jurors to argue for your side in the jury room during deliberations. A typical outline of a closing argument is shown below, with cross-references to discussion of each topic in this chapter. Because each case is different, some of these topics should be more fully developed than others.

- Statement of the case (see §19.14);
- Summary of the facts and issues (see §19.15);
- Burden of proof (see §19.16);
- The law (see §19.17);
- Evidentiary basis, including witness testimony, for liability or nonliability (see §19.19);
- Refutation of other side's contentions (see §19.17);
- Jury instructions (see §19.18);
- Damages (see §19.20);
- Verdict forms (see §19.21); and
- Final five minutes and request for verdict (see §19.22).

Most plaintiff's attorneys agree that liability must be won before closing argument and that the primary goal of the closing is to convince the jury to award damages. Nonetheless, liability must be discussed. Defense counsel usually concentrate on refuting liability and only secondarily argue damages. On approaching the subject of damages during argument from both the plaintiff's and defendant's viewpoint, see §§19.39-19.50.

**Further research:** See Persuasive Opening Statements & Closing Arguments (Cal CEB 1988).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.11 C. Deciding objectives

## §19.11 C. Deciding objectives

Depending on what has occurred during the trial, consider the following objectives when outlining your closing argument:

- Communicating the most favorable case for your client by (1) presenting the essentials of the case, (2) clarifying any misleading or irrelevant issues that have developed during trial, and (3) emphasizing the important items of evidence that support your client's position;
- Explaining the significance of any impeaching testimony;
- After explaining the law in easily understood language, pointing out its application and relation to the evidence;
- Subject to the court's approval, reviewing important jury instructions to be given or that were given, if the court instructed the jury before argument (see CCP §607 (court may alter order of proceedings)); and
- Reviewing the verdict forms (if the court permits).

For further discussion, see §§19.18 (jury instructions), 19.21 (verdict forms).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.12 D. Using visual aids

### §19.12 D. Using visual aids

When planning your argument, carefully consider using visual aids. Visual aids can be created in many forms. Consider the intended purpose of each visual aid, the kind of evidence to be represented, and whether the jury can easily understand it. On relying on visual aids during argument, see §19.37. See Chu, *Making the Most of Closing Argument—Don't Bore the Jury with Words, Remind Them with Pictures*, Practical Litigator (Sept. 1998).

The court usually permits counsel to use a blackboard or large paper pad to list key points to be covered during closing argument. Trial lawyers use blackboards or pads to diagram an accident, calculate damages, or outline the chronology of events based on the testimony from different witnesses. When using a blackboard or pad, it is best to write down phrases that create visual images, because the jury will retain these the longest. Some lawyers write on the blackboard or pad as they speak; others prepare a list or other items ahead of time. One disadvantage to both methods is the ability of opposing counsel to comment on or modify the written entries you have made. On use of blackboards and pads during opening statement, see §9.12.

During closing argument, counsel can refer to and use documentary and demonstrative evidence that has already been received in evidence. Many trial judges also routinely permit counsel to use visual aids during argument (*e.g.,* enlargements or transparencies) that have not been received in evidence if they illustrate matters directly in evidence.

**PRACTICE TIP:** Consult local court rules or policies concerning visual aids to be used during argument. See, *e.g.,* Los Angeles Ct R 8.74, which provides that graphic devices such as a chart, summary, or model must be prepared and shown to adversaries before argument. If the adversary requests, the device must remain available for reference and be marked for identification. Even in the absence of a local rule, check with the court clerk to see what equipment can most conveniently be used in the particular courtroom and whether the judge requires any special procedures before the visual aid can be presented to the jury during closing argument.

If enlargements, transparencies, or computer monitors are to be used, the underlying document or other evidence should be admitted during trial to prevent opposing party's objection, or counsel should seek prior court approval to show the item during argument. Projecting documents or diagrams onto a screen that the entire jury can see permits counsel to call the jurors' attention during argument to significant portions of the visual exhibit.

Counsel may also be permitted to illustrate and explain argument with charts, summaries, or models that were not received in evidence but depict evidence that has been admitted or represents reasonable inferences or conclusions from the evidence. Photographs and other pictorial exhibits can make a lasting impression in the minds of jurors.

**EXAMPLE 1:** In a breach of contract case, project essential portions of a contract or another critical document onto a screen, so that the jury can see the language in dispute while the attorney argues.

**EXAMPLE 2:** In a medical malpractice case, show medical charts and photographs of injuries.

**EXAMPLE 3:** In an asbestos case, enlarge the photograph of a pathology slide, showing an asbestos fiber imbedded in lung tissue.

For tactical reasons, counsel may not wish to reveal the contents of a visual aid to the jury before its use in argument. To avoid any objection, however, counsel should be sure to clear the use of visual aids not received in evidence with the court and opposing counsel before argument. If an objection is raised and sustained early enough, counsel may still have time to prepare other visual aids that will overcome any further objection. On the rules of admissibility for trial exhibits, see chap 13.

If the court sustains an opponent's objection to the use of an exhibit during argument, counsel's credibility could be damaged in the eyes of the jurors and the failed attempt to present the exhibit could lessen the impact of an otherwise effective closing argument. Similarly, illustrating closing argument with inadmissible items may be grounds for reversal on appeal. See *Weisbart v Flohr* (1968) 260 CA2d 281, 67 CR 114 (misconduct for attorney to use toys, which had not been admitted into evidence, to support closing argument). On objecting to improper use of visual aids during opponent's closing argument, see §19.55.

**JUDICIAL PERSPECTIVE:** Visual aids during closing argument often assist jurors; however, they should either be aids the jury has seen before or something prepared by you before argument. If you take the time to write something new on the blackboard or on an overhead, you will lose eye contact with your "audience" and you may lose the attention of some of the jurors.

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## §19.13 E. Managing time limits

The trial court has discretion to set the amount of time allocated to argument. *Bates v Newman* (1953) 121 CA2d 800, 809, 264 P2d 197; *Bell v Kelly* (1925) 73 CA 189, 238 P 719. Before any argument, the trial judge will usually discuss with counsel the amount of time thought necessary for argument.

The amount of time that plaintiff's counsel should allocate to opening and rebuttal argument depends on the content and complexity of the individual case. In general, however, opening argument should take at least two-thirds of the time allowed for both the opening and rebuttal. On argument and rebuttal argument, see §19.3.

**PRACTICE TIP:** Some attorneys try to pressure other counsel into agreeing to limit the length of closing argument. It is almost never a good idea to stipulate to an abbreviated time for argument. The longer counsel has to argue (within reasonable limits), the more opportunity there is to sway the jury. To maintain credibility and the jury's attention, however, use the time for argument effectively. The length of argument cannot make up for a lack of clarity, cohesion, or thoroughness. When planning your closing argument, keep in mind any time allotment set by the court and try to strike a balance between covering all important points and maintaining the jury's interest. Many jurors have been conditioned by television to have short attention spans and to expect frequent breaks.

Some judges believe that argument should be limited or waived because of court time constraints. Counsel should not consent to this approach and, if necessary, put objections on the record. On the right to argue, see §9.2. On making trial objections and protecting the record, see chap 15.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/ IV. CONTENT OF CLOSING ARGUMENT/§19.14 A. Statement of case

## IV. CONTENT OF CLOSING ARGUMENT

### §19.14 A. Statement of case

Counsel's statement of the case during closing argument should be a concise factual statement of what the evidence proves. Many attorneys think of this statement as the case theme. See §9.26.

**EXAMPLE 1:** Plaintiff's counsel could say: "Mary Hall rode her rented bicycle down the hill without any warning that the brakes did not work. She lost the use of her legs and will remain on a breathing machine for the rest of her life after an accident that Parker Corporation could have prevented."

**EXAMPLE 2:** Defense counsel could say: "Sometimes, accidents are the fault of the person who was hurt. On a dare from her friend, the plaintiff careened down a steep mountain full of trees and rocks to see whether she could beat the bus to the parking lot. She never rode the safe, marked pathways that were developed over years of effort by my client."

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## §19.15 B. Summary of facts and issues

In the summary of facts and issues during closing argument, outline the most important aspects of the case. Recount only the critical facts or issues. Plaintiff's counsel should establish five or six salient points concerning the defendant's factual liability. Defense counsel should undermine these points by emphasizing facts that show why the defendant is not at fault.

Both sides should emphasize evidence supporting their client's viewpoint. Anticipate the arguments that opposing counsel is likely to make during closing argument. Discuss problem areas in a light that is favorable to your client or explain why they do not undermine your position.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.16 C. Burden of proof; preponderance of evidence

## §19.16 C. Burden of proof; preponderance of evidence

Carefully explain to the jury the meaning and significance of "burden of proof" and "preponderance of the evidence." Both concepts must be clearly understood for the jury to carry out its duty as trier of fact. The jurors cannot weigh the evidence properly without understanding the standard that applies to all facts that must be decided.

Evidence Code §115 defines "burden of proof" as a party's obligation to establish, through evidence, a requisite degree of belief about a fact in the jurors' or judge's mind. Unless otherwise provided by law, the minimum degree of proof required to satisfy the burden of proof in a civil case is by a preponderance of the evidence. Evid C §§115, 500. See CACI 200 (more likely to be true than not true). In contrast, the burden of proof for punitive damages is "clear and convincing" evidence. See CACI 3940, 3947.

Proof by a preponderance of the evidence requires that a party convince the jurors or judge that a fact's existence is more probable than not. Evid C §500. Unless otherwise provided by law, a party has the burden of proof on the existence or nonexistence of each material fact essential to the party's claim or defense. Evidence introduced by the opposing party may help satisfy a party's burden of proof. See CACI 200. See also *Perrotti v Sampson* (1958) 163 CA2d 280, 282, 329 P2d 310. On burden of producing evidence, see Evid C §§110, 550.

If no evidence is presented on an issue, the jury must find against the party who had the burden of proof on that issue. For a jury instruction on burden of proof, see CACI 200. Similarly, if the evidence is evenly balanced on a material issue, the jury must find against the party who had the burden of proof on that issue. See CACI 200.

**Plaintiff's perspective:** Explain to the jury that "preponderance of the evidence" means "the party who is required to prove something need prove only that it is more likely to be true than not true." See CACI 200. You must convince the jury that the preponderance of evidence clearly shows that a verdict should be entered in the plaintiff's favor. Recount important testimony to illustrate why the jury should reach such a verdict.

**Defendant's perspective:** The requirement of the burden of proof demands that the plaintiff prove that the defendant is likely to be liable. Evid C §500. Emphasize that the defendant cannot be held liable if the evidence is evenly balanced. See CACI 200.

**Further research:** On the burden of proof and the burden of producing evidence generally, see Jefferson's California Evidence Benchbook, chap 47 (4th ed CJA-CEB 2009); 1 Witkin, California Evidence, *Burden of Proof and Presumptions* §§67-98 (4th ed 2000).

**JUDICIAL PERSPECTIVE:** The burden of proof is often discussed by the court, not counsel. The court may give an initial explanation of the concept of burden of proof, and later will address it more fully. Therefore, counsel often will need to touch on it only when they feel that it is necessary.

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## D. The law

### §19.17 1. Parties' rights and duties

**Plaintiff's perspective:** Focus on the idea of the plaintiff's right to pursue activities or work without injury. Then systematically show how this right was violated. Make the jury understand how important it is to protect a person's right to safely live and work from infringement by another.

**Defendant's perspective:** The defense position in a personal injury case rests on proof that the defendant was not negligent or that any negligence did not harm the plaintiff. Emphasize to the jury that for the plaintiff to recover, the injury must be clearly linked to the defendant's negligence and that, in this case, it is not. When comparative negligence is an issue, argue that any recovery for the plaintiff must be limited by the extent of plaintiff's own negligence.

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### §19.18 2. Jury instructions

The California Civil Jury Instructions (CACI) "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(e). Instructions from the Book of Approved Jury Instructions (9th ed 2002) (BAJI) are no longer "approved." On jury instructions, generally, see chap 20.

Although counsel has a right to discuss the law and apply it to the facts of the case, instructing the jury is the court's duty. *Neumann v Bishop* (1976) 59 CA3d 451, 479, 130 CR 786; *Gotcher v Metcalf* (1970) 6 CA3d 96, 100, 85 CR 566.

If the judge instructs the jury before argument, counsel can refer to the instructions during the argument. See CCP §607 (statutory order of proof is to charge jury after closing argument). If the jurors will be instructed after argument, the court may allow counsel to tell them how the judge will instruct them. For further discussion, see §19.30.

**PRACTICE TIP:** Be sure to avoid any conflicts with the judge during argument. Although you can explain the law and bearing of the testimony, charging the jury on the law is the judge's responsibility. Because many judges jealously guard this prerogative, even correct statements of the law may annoy them. If you have any doubts about the judge's predilections, raise this issue during the chambers conference when the jury instructions are settled. Explain the approach you would like to take and obtain the judge's approval to refer to the jury instructions and discuss the law during your argument.

**JUDICIAL PERSPECTIVE:** Many judges take a dim view of counsel reading instructions to the jury. Counsel can make far better use of the limited attention span of the jurors by addressing the factual aspects of the case and leaving the reading of the instructions to the court. Some courts provide the jurors with photocopies of the instructions, which they can read along with the judge.

Whether the jury will get a copy of the written instructions when they retire for deliberation is no longer solely within the court's discretion. See CCP §612.5. When the jury retires to deliberate, the court must advise the jury of the availability of written jury instructions. The court has the discretion to provide the jury with a copy. If the jury requests it, the court must supply a copy of the written instructions. CCP §612.5.

If you want the jury to have a copy of the instructions, request that a copy be given to the jury. To reduce the possibility of prejudice or confusion, the attorney requesting that written instructions be given to the jury should prepare "clean" copies of the applicable instructions. The instructions should omit any reference to the party requesting them and any brackets, blank spaces, footnotes, or case citations. On jury instructions generally, see chap 20.

**NOTE:** If instructions are sent into the jury room, some trial attorneys believe that a separate set of instructions should be made for each juror. This will minimize the chance that a dominant juror might misquote or misconstrue an instruction.

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## E. Witness testimony and key evidence

### §19.19 1. Problem witnesses

Although a witness may have been involved in activities of an unlawful or a generally disapproved nature, during argument counsel can explain to the jury that the testimony is reliable regardless of how the witness acted in the past. Explain that the witness is in court to provide evidence for the trial and that past activity is not an issue before the court. Remind the jury of any facts brought out during examination or cross-examination that tend to prove the witness's reliability.

On impeaching the credibility of witnesses, see §§11.114-11.124.

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## §19.20 2. Damages

The discussion of damages during closing argument can have a significant impact on the outcome of the case. Plaintiff's counsel should emphasize the consequences of the defendant's liability on the plaintiff, arguing that a substantial award of damages will reflect the seriousness of the defendant's wrongful act. The defense should try to mitigate the emotional effect of the plaintiff's discussion of damages on the jury by arguing that the defendant is not responsible for the plaintiff's injuries.

Plaintiff's counsel may quote a lump sum or per diem figure for damages or suggest another method of calculating damages. Explain that the law intends the jury's verdict to deter not only the defendant but all others from similar conduct in the future. Impress on the jury that its verdict will benefit and protect all citizens. Defense counsel should argue that society cannot afford to compensate individuals for every accident that happens, especially when the individuals themselves are at fault, or that it is unjust to require a defendant to pay for damages caused by another.

**WARNING:** Be careful not to make punitive damage arguments in the compensatory damage phase of a case. After showing how the defendant's negligent or reckless conduct led to the plaintiff's injuries, plaintiff's counsel should argue for a damages award that merely compensates the client for those injuries. On elements and procedures required before a prima facie case of malice, oppression, or fraud can be made and punitive damages can be argued, see CC §§3294-3295.

Even when punitive damages are at issue, plaintiff's counsel should explain how they are reasonably related to the injury or to the compensatory damages award. *Gagnon v Continental Cas. Co.* (1989) 211 CA3d 1598, 1603, 260 CR 305. See, *e.g.*, *Johnson v Ford Motor Co.* (2005) 35 C4th 1191, 29 CR3d 401 ($10 million punitive damages reduced to $53,000 level when compensatory damages were about $18,000); *Simon v San Paolo U.S. Holding Co.* (2005) 35 C4th 1159, 29 CR3d 379 (punitive damages of $1.7 million reduced to $50,000 when compensatory damages were $5000); *Century Sur. Co. v Polisso* (2006) 139 CA4th 922, 966, 43 CR3d 468 ($2 million punitive damages award was reasonably related to $622,911 in compensatory tort damages). See also *State Farm Mut. Auto. Ins. Co. v Campbell* (2003) 538 US 408, 155 L Ed 2d 585, 123 S Ct 1513 (three factors for determining whether punitive damage award is "grossly excessive" in relation to interests of "punishing unlawful conduct and deterring its repetition"); *Roby v McKesson Corp.* (2009) 47 C4th 686, 101 CR3d 773 (applying *State Farm Mut. Auto. Ins. Co.* factors and concluding that 1:1 ratio between punitive and compensatory damages was required).

Defense counsel should emphasize that a higher burden of proof (*i.e.,* clear and convincing evidence) must be met before punitive damages may be awarded and argue that the defendant's conduct was not "vile" or "despicable." See CACI 3940, 3947. It is also a good idea to review the jury instruction on punitive damages carefully with the jury to show how the facts do not support a finding of "malice," "oppression," "despicable conduct," or "fraud."

A punitive damage award based in part on a jury's desire to punish a defendant for harming persons not before the court (*i.e*., nonparties) amounts to a taking of "property" from the defendant without due process. *Philip Morris USA v Williams* (2007) 549 US 346, 166 L Ed 2d 940, 127 S Ct 1057. See also *Holdgrafer v Unocal Corp*. (2008) 160 CA4th 907, 934, 73 CR3d 216 (admittance of unconstitutional evidence of similar oil spills required new trial for punitive damages).

**NOTE:** If the defendant elects to bifurcate the trial, the discussion of damages may be affected. See §6.99.

On arguing damages in personal injury trials, see §§19.39-19.50.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.21 F. Verdict form

## §19.21 F. Verdict form

In most cases, the jury returns a general verdict finding for one side or the other. See CCP §624. The court can also ask the jury to make special findings of fact in response to interrogatories designed to test the general verdict. See §22.5. Alternatively, the court may direct the jury to reach a "special" verdict on the factual issues of the trial, while it draws the legal conclusions and reaches a decision. CCP §625). On the tactical considerations involved in deciding which verdict form to request the court to use, see §§22.15-22.17.

When the jury will return special findings of fact or a special verdict, both counsel should discuss the verdict form carefully with the jury during closing argument. It is essential for the jury to understand the questions being asked. If a special finding of fact is inconsistent with a general verdict, the former controls the latter, and the court must give judgment accordingly. CCP §625. See §22.25. See sample verdict forms in §§22.36-22.37, 22.39, 22.41.

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## §19.22 G. Conclusion: Final five minutes

The last few minutes are the most critical part of your entire closing argument. Argument during the final 5 minutes requires brevity, conciseness, and specific emphasis on all key points. Raising the emotional pitch at this time may inspire the jury to hand down a verdict in favor of your client.

Whether you are arguing for the plaintiff or defendant, the conclusion of your closing argument should impress the jurors with the significance of their responsibility. They should leave the courtroom for their deliberations with the conviction that your client's case deserves serious deliberation and that a verdict for your side will resolve the dispute fairly.

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## V. LATITUDE PERMITTED DURING ARGUMENT

### §19.23 A. Comment on evidence; inferences

Counsel has wide latitude during argument to discuss all facets of the case. *Tischoff v Wolfchief* (1971) 16 CA3d 703, 94 CR 299; *Risley v Lenwell* (1954) 129 CA2d 608, 659, 277 P2d 897. Counsel may argue every material issue in the case on which evidence has been introduced. *King v Kaplan* (1949) 94 CA2d 697, 699, 211 P2d 578. All reasonable inferences drawn from the evidence may be brought to the jury's attention. *Beagle v Vasold* (1966) 65 C2d 166, 176, 53 CR 129.

Any legal theory that the evidence will reasonably support can be presented. *West v Johnson & Johnson Prods., Inc.* (1985) 174 CA3d 831, 220 CR 437; *Fleming v Flick* (1934) 140 CA 14, 35 P2d 210. Counsel can also express opinions based on fair deductions or reasonable inferences from the evidence. *Rogers v Foppiano* (1937) 23 CA2d 87, 94, 72 P2d 239.

It may be difficult to persuade the jury of an argument unless it is based on testimony and evidence clearly established during trial. Do not overreach or stretch the facts to advance an argument.

**EXAMPLE:** It is better for counsel to say, "The evidence shows, in my opinion, that plaintiff suffered serious injuries" than to say, "In my opinion, plaintiff suffered serious injuries."

No rule requires that counsel be absolutely logical in argument. *Miller v Pacific Constructors, Inc.* (1945) 68 CA2d 529, 551, 157 P2d 57. However, counsel may not misstate the evidence or invite the jury to speculate on unsupported inferences. *Malkasian v Irwin* (1964) 61 C2d 738, 745, 40 CR 78; *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 139 CR 888. Even using brief hypothetical examples during closing argument that are not based on the evidence, but not purporting to rely on extra-judicial evidence, is not misconduct. *People v Davis* (1995) 10 C4th 463, 538, 41 CR2d 826. If evidence has been admitted for a limited purpose, however, counsel may not argue inferences beyond the scope of the limited purpose. *Granville v Parsons* (1968) 259 CA2d 298, 303, 66 CR 149.

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## §19.24 1. Credibility of witnesses

Counsel has the right to comment on the credibility of witnesses. *Baker v Market St. Ry.* (1932) 123 CA 688, 694, 11 P2d 912. Counsel may also draw any inference concerning a witness's credibility of which the evidence is reasonably susceptible. *McCullough v Langer* (1937) 23 CA2d 510, 521, 73 P2d 649.

Counsel may fairly argue from the evidence that a witness has either misstated the facts or lied under oath. *Rogers v Foppiano* (1937) 23 CA2d 87, 94, 72 P2d 239. But deliberate unwarranted attacks on a witness's credibility or motives are unjustifiable.

**EXAMPLE:** In *Price v Giles* (1987) 196 CA3d 1469, 242 CR 559, the defense attorney claimed during closing argument that his client had committed perjury and engaged in collusion with the plaintiff. Although the defendant prevailed in the action, the court found that this statement constituted misconduct and deprived the plaintiff of a fair trial.

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### 2. Opposing party's failure to produce witnesses or other evidence

#### §19.25 a. When comments are allowed

Some trial conditions properly allow counsel to discuss opposing counsel's avoidance of calling certain witnesses or presenting certain evidence. When a party offers weaker or less satisfactory evidence than is within the party's power to produce, it is permissible for that evidence to be viewed with mistrust. Evid C §412. See CACI 203. Similarly, in determining what inferences to draw from the evidence or facts against a party, the trier of fact may consider the party's (1) failure to explain or to deny by testimony the evidence or facts against the party or (2) willful suppression of evidence relating to such evidence or facts. Evid C §413. See CACI 205, 214.

The opposing party's failure to produce rebuttal evidence may also allow counsel to call this to the attention of the jury. If evidence tends to prove a material fact against a party, it would be reasonable to try to produce contradictory evidence in order to disprove it. Otherwise, it may be inferred that the evidence was prejudicial to counsel's contentions. Evid C §§412-413. See CACI 107, 203-205, 213-214.

**EXAMPLE 1:** In *Neumann v Bishop* (1976) 59 CA3d 451, 480, 130 CR 786, a personal injury action, the court held that plaintiff's counsel had properly commented during argument when he pointed out defense counsel's failure to produce evidence to rebut (1) testimony offered by the plaintiff showing that she did not violate the basic speed law and (2) evidence showing a computation of her loss of earnings.

**EXAMPLE 2:** In *King v Karpe* (1959) 170 CA2d 344, 338 P2d 979, it was not error for the court to allow plaintiff's counsel to comment on the defendant's failure to produce a former employee. The employee had taken notes dictated by a veterinarian. Later, these notes were recopied for the sake of legibility, but discrepancies appeared that were the basis of the conflict in the veterinarian's testimony.

**EXAMPLE 3:** In *Schmidt v Union Oil Co.* (1915) 27 CA 366, 149 P 1014, the court found that it was within the legitimate range of argument for plaintiff's counsel to comment on the failure of the defendant to produce two employees and one former employee who signed the test report of oil that the defendant introduced into evidence.

When the record warrants, counsel may comment on the fact that the opposing party purposely withheld evidence. See Evid C §413. Compare *Freitas v Peerless Stages, Inc.* (1952) 108 CA2d 749, 239 P2d 671 (plaintiff's insinuation that defendant's bus company had willfully withheld evidence by not producing a passenger whose name and address the bus driver had obtained at the time of the accident was not error), with *Ferrate v Key Sys. Transit Lines* (1958) 165 CA2d 391, 331 P2d 991 (distinguishing that case from *Freitas, Ferrate* court found no evidence of willful suppression, because no evidence was presented that would allow inference to be drawn that bus driver knew names of any witnesses).

Under Evid C §413, failure to call a witness does not necessarily constitute a willful suppression of evidence. See *Neumann v Bishop* (1976) 59 CA3d 451, 480, 130 CR 786; *Davis v Franson* (1956) 141 CA2d 263, 270, 296 P2d 600. In general, a party has no duty to call any particular witness to testify unless special circumstances are shown. *Neumann v Bishop, supra*. Counsel must exercise discrimination in selecting witnesses. Assuming good faith and honesty, an attorney may disbelieve a potential witness or think that the witness is "inaccurate or prejudiced or otherwise disqualified to testify." *Davis v Franson, supra*. When it is within a party's power to call a witness to disprove or elucidate facts, however, failure to do so may give rise to an inference that the testimony would be prejudicial. See Evid C §§412-413; *Keena v United R.Rs.* (1925) 197 C 148, 157, 239 P 1061.

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### b. When comments are prohibited

### §19.26 (1) Witnesses available to both sides

Comment during argument on the opposing party's failure to call a witness is improper when the witness is available to both sides. *Smith v Covell* (1980) 100 CA3d 947, 161 CR 377; *Patton v Royal Indus., Inc.* (1968) 263 CA2d 760, 768, 70 CR 44. For example, because the following witnesses were available by subpoena, the courts have held that they were equally available to both sides:

- The plaintiff's treating physicians (see *Smith v Covell* (1980) 100 CA3d 947, 956, 161 CR 377);
- A witness to an accident (see *Davis v Franson* (1956) 141 CA2d 263, 270, 296 P2d 600); and
- An officer who investigated an accident but did not witness it (see *Provencio v Merrick* (1970) 5 CA3d 39, 42, 84 CR 882).

Similarly, when a witness is equally available to both the plaintiff and defendant, no inference may be drawn against either because the other party calls the witness. *Gibson v Kennedy Extension Gold Mining Co.* (1916) 172 C 294, 305, 156 P 56. See *Gillett v Gillett* (1959) 168 CA2d 102, 108, 335 P2d 736.

An employee of a party, however, is not considered to be equally available to both sides. When the record warrants, comment on the opposing party's failure to produce such a witness is proper. See *King v Karpe* (1959) 170 CA2d 344, 338 P2d 979; *Schmidt v Union Oil Co.* (1915) 27 CA 366, 373, 149 P 1014. A different rule applies to former employees. See *Fleming v Safeco Ins. Co.* (1984) 160 CA3d 31, 42, 206 CR 313 (error for plaintiff to imply that defendant could have produced nonresident former employee who was equally available to both parties; however, error waived because the defendant did not object to the plaintiff's argument).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.27 (2) Exercise of privilege

### §19.27 (2) Exercise of privilege

Commenting on a witness's exercise of the privilege not to testify or to disclose evidence is prohibited. Counsel may comment on the evidence or on a party's failure to explain or deny evidence but not on the exercise of the privilege itself. Evid C §913(a). Unless the comment is prejudicial and the opposing party objects, however, the error will be waived.

**EXAMPLE 1:** In *People v Ford* (1988) 45 C3d 431, 247 CR 121, a brief and mild reference to a defendant's failure to testify, unaccompanied by any suggestion that an inference of guilt should be drawn, was held to be harmless error.

**EXAMPLE 2:** In *People v Bittaker* (1989) 48 C3d 1046, 1104, 259 CR 630, counsel's comment that the opponent could have called a witness, when that witness's testimony was privileged, was improper. It did not constitute reversible error, however, because there was no objection.

No negative presumption arises because a privilege is exercised, nor may the jury draw any inference from its exercise on the witness's credibility or any other matter at issue in the case. See Evid C §913(a). At the request of a party who may be adversely affected because a jury may draw an unfavorable inference from the exercise of a privilege, the court must instruct the jury as provided in Evid C §913(b). See CACI 215 (exercise of a communication privilege), 216 (exercise of a witness's right not to testify). See also BAJI 2.27 (no unfavorable inference from exercise of a privilege).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.28 3. Evidence admitted for limited purpose

### §19.28 3. Evidence admitted for limited purpose

When evidence has been admitted for a limited purpose, it is improper "to argue inferences for which the evidence is inadmissible." *People v Love* (1961) 56 C2d 720, 730, 16 CR 777, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 36 CR 201.

**EXAMPLE:** When evidence of settlement and dismissal is admitted during cross-examination for the limited purpose of showing prejudice, defense attorneys can cause reversible error when they argue that evidence for the improper purpose of establishing a dismissed witness's liability. *Shepherd v Walley* (1972) 28 CA3d 1079, 1083, 105 CR 387; *Granville v Parsons* (1968) 259 CA2d 298, 66 CR 149. The court may conduct a hearing outside the presence of the jury under Evid C §§402-403 to determine whether to permit evidence of dismissal and settlement for the limited purpose of impeachment. *Granville v Parsons, supra*. On limited admissibility of evidence, see §§15.61-15.64.

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### §19.29 4. Reading evidence taken at former trial or hearing

If testimony from a former trial has not been entered into evidence, counsel cannot read from the transcript. *Shaff v Baldwin* (1951) 107 CA2d 81, 86, 236 P2d 634. There is a hearsay exception, however, for former testimony given in a former trial or a hearing of the same action. See Evid C §§1290(a), 1291.

Reading portions of depositions taken in the same case during closing argument, which have not been read into evidence, is also improper. *Shaff v Baldwin, supra*.

Counsel may read any part of the testimony of the current case, however. For example, it is permissible for counsel to read a transcript of the testimony of a key witness during closing argument. See *People v Coontz* (1953) 119 CA2d 276, 282, 259 P2d 694. On techniques for presenting key portions of the trial transcript to the jury, see §19.38.

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### §19.30 B. Discussing the law and jury instructions

Counsel has a right to discuss the pertinent law and its application to the facts of the case as long as it does not differ from the jury instructions to be given by the judge. *Neumann v Bishop* (1976) 59 CA3d 451, 479, 130 CR 786; *Gotcher v Metcalf* (1970) 6 CA3d 96, 100, 85 CR 566.

It is reversible error for the court to refuse to allow counsel to exercise this right. *Beaird v Bryan* (1966) 244 CA2d 836, 53 CR 428. However, the court can exercise reasonable control over discussion of legal principles. *Hodges v Severns* (1962) 201 CA2d 99, 114, 20 CR 129 (judge may properly insist that counsel not tell jury how judge will instruct them in the law).

The court has the discretion to permit counsel to read from the jury instructions during argument. *People v Calpito* (1970) 9 CA3d 212, 222, 88 CR 64. Generally, appellate courts look with disfavor at counsel's reading jury instructions. Their view is based on the fact that instructing the jury is the judge's prerogative. See *Regus v Gladstone Holmes, Inc.* (1962) 207 CA2d 872, 878, 25 CR 25; *People v Conley* (1955) 134 CA2d 580, 285 P2d 693. However, counsel may obtain the court's permission to read jury instructions, or request that the court provide a written copy of the instructions to the jury during deliberations. See §19.18.

Reading from statutes follows similar rules. *De Armas v Dickerman* (1952) 108 CA2d 548, 553, 239 P2d 65 (court permitted counsel to read to jury excerpts from Housing and Rent Act of 1947). See also *Bohme v Southern Pac. Co.* (1970) 8 CA3d 291, 87 CR 286, disapproved on other grounds in *Lund v San Joaquin Valley R.R.* (2003) 31 C4th 1, 11, 1 CR3d 412.

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## §19.31 C. Referring to matters of common knowledge

Reference may be made during argument to matters of common knowledge that are not in evidence, *e.g.,* historical facts or well-known events. *People v Love* (1961) 56 C2d 720, 730, 16 CR 777, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 36 CR 201; *People v Mendoza* (1974) 37 CA3d 717, 725, 112 CR 565.

Alternatively, counsel who foresees problems and wishes to avoid opposing counsel's interrupting closing argument with objections should request the court to take judicial notice of universally known or indisputable facts under Evid C §§451-452. On procedures for requesting judicial notice, see chap 14.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.32 D. Reading from books and newspapers

### §19.32 D. Reading from books and newspapers

There are three conflicting lines of authority on whether counsel can read to jurors from books, newspapers, poems, and the like about matters of common knowledge during closing argument. One line of cases, allowing this view, is typified by *People v Woodson* (1964) 231 CA2d 10, 15, 41 CR 487. In *Woodson,* the appellate court decided that the trial court should have permitted counsel to read a newspaper article about a mistakenly convicted defendant. Counsel intended this article to illustrate his argument that convictions based on mistaken identity are not unusual.

The second line of cases, rejecting this view and holding that it is generally improper during argument for counsel to read from books or newspapers that have not been admitted into evidence, is typified by *People v Mendoza* (1974) 37 CA3d 717, 725, 112 CR 565 (court prohibited counsel from reading newspaper clippings about unrelated specific crimes). See *People v Palmer* (1984) 154 CA3d 79, 203 CR 474 (counsel prohibited from reading from newspaper articles about specific unrelated crimes). See also *People v Polite* (1965) 236 CA2d 85, 92, 45 CR 845. These decisions reflect the fear that jurors may have difficulty distinguishing between expert opinions in evidence (which are subject to cross-examination) and the opinions of authors that only counsel has read.

The third line of cases takes the position that the trial court has discretion to decide whether to permit counsel to read from a newspaper or magazine not in evidence. If objection is raised on the ground that the article contains improper material, the court should ask counsel to indicate on the record (out of the jurors' hearing) which portions counsel intends to read. In determining whether to permit the material to be read, the court considers the following factors:

- Its relation to matters of common knowledge;
- Its relevance to the case; and
- The likelihood that the material will tend to confuse the jury.

*People v West* (1983) 139 CA3d 606, 610, 189 CR 36. See *People v Travis* (1954) 129 CA2d 29, 37, 276 P2d 193 (error for court to prohibit counsel from reading from book, magazine, or newspaper solely on ground that it has not been received in evidence).

Under the discretionary view, counsel may read the writings of philosophers, patriots, statesmen, and judges who have formulated thoughts or sentiments better than counsel could. See *Ballou v Master Props. No. 6* (1987) 189 CA3d 65, 234 CR 264 (biblical references made by plaintiff's counsel during closing argument did not improperly appeal to jury's passions and did not require reversal). See also *People v Guzman* (1975) 47 CA3d 380, 392, 121 CR 69.

**PRACTICE TIP:** If reading from material not in evidence during closing argument seems to be a valuable and persuasive technique for your case, request judicial notice of the matter under Evid C §§451-452 beforehand. This will enable you to confront objections when there is still time to thoroughly support your view, and you will avoid having to deal hastily with opposing counsel's objections during the argument itself. On procedures for requesting judicial notice, see chap 14.

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## §19.33 E. Referring to pleadings

Counsel may refer to the pleadings on file in the case during closing argument. When the content of a pleading has been received in evidence during trial, as either an admission or for impeachment, counsel may discuss it during argument. *Broffman v Newman* (1989) 213 CA3d 252, 261 CR 532. On judicial admissions, see chap 14.

Counsel, however, cannot read from dismissed causes of action of a complaint. See *Cahill Bros. v Clementina Co.* (1962) 208 CA2d 367, 383, 25 CR 301 (trial court committed error in permitting pleading to be read, because no foundation for admissibility of dismissed cause of action had been laid during trial).

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## VI. TECHNIQUES FOR DELIVERING ARGUMENT

### §19.34 A. Demeanor and language

To be persuasive, closing argument should be based on the evidence, the law, and sound logical reasoning. It should reveal the strength of the client's case and any weakness in the adversary's case. To reinforce jurors' positive feelings, many trial lawyers refer to their own client by name and the opposing party as "plaintiff" or "defendant." Most experienced trial lawyers use notes sparingly because shuffling paper and constantly looking down at notes interfere with the attorney's ability to communicate effectively with the jury.

Counsel should use language that the jurors can easily understand. When speaking, avoid phrases such as "plaintiff's theory" or "defendant's contention." Instead, counsel should simply say, "We will take a few minutes to explain the plaintiff's position" or "the defendant's conduct." Emotional table-pounding and shouting should be avoided because such behavior appears to be immature and may irritate the jurors. Counsel, however, should use voice and body movements to emphasize important points.

Everything counsel does and says during closing argument should be designed to persuade the jury. Use the principles of "primacy" and "recency" when timing the presentation of major points:

- The principle of primacy maintains that listeners will tend to believe most of what they hear first.
- The principle of recency maintains that listeners will tend to remember longest what they hear last.

Following these principles, counsel should begin and end the closing argument with the strongest arguments and weave specific issues into the body of the argument for maximum effect. Focus on key issues by selecting meaningful, vivid, and persuasive words to describe your client's view of the case and to encourage the jury to reach a favorable verdict during deliberations.

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## §19.35 B. Dealing with inattentive jurors

Occasionally a juror will drift off to sleep during argument. The arguing attorney should not let the juror know that he or she has been observed. Instead, try to regain the juror's attention through tone of voice and body movement. For example, counsel might walk over to the jury box, raise his or her voice, use hand gestures, or refer to an exhibit by tapping on it with a pointer.

If this fails, counsel may ask to approach the bench and request a brief recess to speak to the judge in chambers about the problem. Raising objections to this type of juror misconduct at the first logical break in counsel's argument should be considered timely enough for the purpose of avoiding waiver and preserving the issue for appeal.

The court reporter should be present during the chambers discussion, so that counsel can object to the juror's misconduct on the record. Counsel might request that the judge tell the juror that the drowsiness has been observed and remind the juror of the duty to devote full attention to the trial. Some attorneys hesitate to make this request, however, for fear of upsetting or offending the juror. Instead of requesting that the juror be admonished, counsel might request that the juror be replaced by an alternate juror, if one is available. This option is appropriate when the juror's misconduct is particularly egregious.

If the problem seems serious enough, and no alternate juror is available, consider moving for a mistrial. On procedure and grounds for moving for mistrial, see §§18.82-18.102.

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### §19.36 C. Appealing to jury "leaders"

Starting with voir dire and continuing throughout the trial, try to identify the jury leaders who will most likely influence the deliberations of other members of the jury. After you identify them, consider what their motivation and interests might be and direct portions of the closing argument to them.

Observe the jury leaders' facial expressions and body language. Are they leaning forward, nodding approval, or smiling? These actions tend to show receptivity or agreement with the points being made. If they look puzzled, confused, or dazed, slow down and try to explain matters more simply. Use easy to understand analogies and examples, which may appeal to those you have identified as the jury leaders, and focus on persuading them to see a few key issues in the case from your client's point of view.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.37 D. Relying on visual aids

### §19.37 D. Relying on visual aids

Psychological studies show that most people remember only a small percentage of what they hear. Their recollection increases, however, of what they both hear and see. Because many people are poor listeners, effective visual aids can also help counsel maintain the jurors' attention and persuade them of counsel's argument.

**PRACTICE TIP:** Use visual aids during your argument to help jurors understand and remember important points. Explain a point carefully, then show it visually. Check local rules and the judge's customary practice concerning use of visual aids during closing argument.

On planning and developing visual aids for your closing argument, see §19.12. On objecting to the improper use of visual aids in opponent's closing argument, see §19.55.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.38 E. Using trial transcript

## §19.38 E. Using trial transcript

During argument, it is more effective to quote from the record verbatim rather than paraphrasing it. Be careful, however, not to read lengthy quotations and risk boring the jurors or causing them to be less attentive during argument.

Point out any unfulfilled promise made by opposing counsel in the opening statement or repeat briefly key portions of important eyewitness or expert testimony. Arrangements can be made with the court reporter before trial for an early transcript of opposing counsel's opening statement and daily transcripts of witness testimony.

Comment on opposing counsel's failure to fulfill specific promises of proof made in his or her opening statement is particularly effective when, *e.g.,* plaintiff's counsel has grossly exaggerated the case and then failed to produce sufficient evidence to back up all the claims. If this happens, defense counsel should emphatically charge that opposing counsel failed to fulfill promises made during the opening statement. An attack of this type may cause the jurors to lose confidence in the plaintiff's entire case, even though the promises may relate to nonessential information. The unfulfilled promises should not be immaterial, however, because plaintiff's counsel may be able to point this out in the rebuttal argument and, in turn, raise questions about defense counsel's credibility.

When attacking the credibility of witnesses by pointing out discrepancies in their testimony, an effective technique is to enlarge this portion of the trial transcript and project it on a screen in front of the jury. By literally showing the inconsistent testimony to the jurors, counsel helps ensure that they will remember it during deliberations. On planning to use, and relying on, visual aids during closing argument, see §§19.12, 19.37. On reading from the transcript of a former trial or hearing on the same action, see §19.29.

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## VII. ARGUING DAMAGES IN PERSONAL INJURY TRIALS

### §19.39 A. Plaintiff's counsel

When closing argument reaches the subject of damages in a personal injury case, plaintiff's counsel frequently write the following categories on a pad or a blackboard and then list the amounts for each. Some trial lawyers prefer to write this material clearly and legibly on the pad or blackboard before commencing argument. This technique helps remind counsel to discuss each item, eliminates the need to refer to notes, and ensures that all calculations are correct. Check local rules for any requirements on using blackboard or pad during closing argument. On using visual aids during argument, see §§19.12, 19.37.

- Medical expenses to date and all future medical expenses reasonably certain to occur and supported by the evidence, *e.g.,* expenses for the hospital stay, physicians, X rays, physical therapy, nurses, a wheelchair, and medications (see §19.40);
- Loss of earnings to date (see §19.41);
- Loss of earnings in the future (see §19.42);
- Impairment of earning capacity (see §19.42);
- Physical injuries (see §19.43); and
- Pain and suffering, including mental suffering and distress, *e.g.,* anxiety, humiliation, frustration, loss of social prestige, and loss of enjoyment of life (see §19.44).

Plaintiff's counsel should list specific dollar amounts attributable to each item in the first three categories ("economic" damages). Many attorneys also suggest a figure for the jury to consider for the final three items ("noneconomic" damages). See CACI 3902. See also *Evangelatos v Superior Court* (1988) 44 C3d 1188, 246 CR 629 (economic and noneconomic damages must be asserted with regard to percentage of defendant's liability). For additional discussion of damages in closing argument, see §19.20.

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### §19.40 1. Medical expenses

Plaintiff's counsel frequently show the jury each medical bill or statement entered into evidence and then point to the corresponding figure listed on the pad or blackboard. Counsel should also explain the significance of each bill or category of bills (*e.g.,* for physical therapy).

**EXAMPLE:** If the doctor for the defense testified that the plaintiff suffered no injury, plaintiff's counsel can argue that the defense doctor only examined the plaintiff once, but that the plaintiff's treating doctor saw the plaintiff ten times, as shown by the testimony and medical bills entered into evidence. The implication is that the treating doctor is a more reliable source of information about the plaintiff's injuries.

When medical bills are small and the time between treatments long, emphasize that this does not lessen the seriousness of the plaintiff's injuries, because many painful injuries do not require frequent visits to a physician. In some cases, the patient does not visit the physician, because nothing can be done to help relieve the patient's pain.

Before the plaintiff can recover for prospective damage in a personal injury case, counsel must establish that the loss is reasonably certain to occur in the future. There must be testimony from a physician about future care to a reasonable degree of certainty. See CC §3283; *Roedder v Lindsley* (1946) 28 C2d 820, 172 P2d 353.

If the plaintiff needs continued medical care, services, and supplies, recount any testimony or evidence that establishes that plaintiff "is reasonably certain to need in the future" medical care and a reasonable cost for that care. See CACI 3903A. Emphasize the economist's testimony or other evidence presented during trial on the present cash value of this type of care.

Remind the jury that this is the plaintiff's only day in court and that the plaintiff cannot come back in the future if the money for medical care (or wage loss) is insufficient. Argue that there must be full and complete compensation now.

**Further research:** On costs of future medical care, see 6 Witkin, Summary of California Law, Torts §1670 (10th ed 2005). On reducing the value of future medical care to present cash value, see Johns, California Damages—Law and Proof §§1.87-1.92 (5th ed 1996).

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## 2. Wage loss

### §19.41 a. Past wage loss

Present the past loss of wages and the evidence supporting it. See CACI 3903C. Refer to testimony from supervisors and co-workers establishing the plaintiff's satisfactory work record before the injury.

Show how the plaintiff's injuries prevented the plaintiff from working and, if the defense has implied this, that it is implausible that the plaintiff deliberately wanted to stay at home and lose money. See *Handelman v Victor Equipment Co.* (1971) 21 CA3d 902, 906, 99 CR 90; *Swanson v Bogatin* (1957) 149 CA2d 755, 758, 308 P2d 918.

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### §19.42 b. Impairment of earnings capacity; future wage loss

Even when there is no proof of earnings or income before or after the injury, loss of earning power can be inferred from the nature of the injury and damages can be awarded for the loss of the plaintiff's ability to earn money after the injury. See *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 656, 151 CR 399.

Consider discussing the impairment of the plaintiff's earnings capacity by describing the potential effect of the injury on plaintiff's ability to find and keep a job. If the plaintiff is currently unemployed, suggest that the injury may prevent the plaintiff from competing with healthy workers for the same job. If the plaintiff is employed, explain how an impairment might affect the plaintiff's ability to work up to the standards of healthy workers.

Cite statistics presented by an economist during trial, *e.g.,* showing that people with disabilities earn a significant percentage less than other people in the same career. Remind the jurors of economic testimony explaining how the present cash value of the plaintiff's lost future earnings capacity was calculated. See *Henninger v Southern Pac. Co.* (1967) 250 CA2d 872, 883, 59 CR 76; *Deshotel v Atchison, T. & S.F. Ry.* (1956) 144 CA2d 224, 229, 300 P2d 910. For jury instructions on loss of earnings and loss of future earning capacity, see CACI 3903C-3903D.

When a plaintiff has established a good earnings record, many attorneys prefer to argue in terms of loss of future earnings rather than future earnings capacity because specific dollar amounts may reasonably be used. They restrict their discussion of future earnings capacity loss to cases in which the plaintiff has no proven earnings record, *e.g.,* an injured child. Discuss the testimony of expert witnesses called to substantiate the plaintiff's loss of future earnings.

**Further research:** On calculating loss of earnings capacity, see Johns, California Damages—Law and Proof §§1.11-1.30 (5th ed 1996). On impairment of earnings capacity as an element of general damages for pleading purposes, see 5 Witkin, California Procedure, *Pleading* §937 (5th ed 2008).

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## §19.43 3. Physical injuries

The extent, type, and nature of the plaintiff's physical injuries should be explained thoroughly so that the jury can appreciate their seriousness. Use of detailed diagrams and charts, entered into evidence during the testimony of physicians or shown to other counsel and approved by the judge before argument, can be effective when discussing injuries. On using visual aids during closing argument, see §§19.12, 19.37.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.44 4. Pain and suffering

## §19.44 4. Pain and suffering

Plaintiff's counsel must help the jurors properly evaluate damages for pain and suffering. Counsel can begin by pointing out that no evidence or testimony presented can automatically translate the client's injuries into a dollar amount. Because the law offers no measuring stick to value pain and suffering, jurors must use their own good judgment. The only guideline is that jurors must use their "judgment to decide a reasonable amount based on the evidence and [their] common sense." See CACI 3905A. Be sure the jury understands CACI 3905A, emphasizing again that the law prescribes no definite standard or method of calculation to ensure adequate compensation for pain and suffering.

To persuade the jurors to give a fair award for pain and suffering, ask them to imagine the shocking reality of constant pain and its effect on a person over time. Explain that this trial is the plaintiff's only chance to receive adequate compensation for his or her injuries, past and future. Some attorneys remind the jurors of any promises made during voir dire examination to return an award that is based fairly on the evidence, without giving consideration to the size of the award. Because the law requires that each item of damage be compensated in a "reasonable" amount, suggest that damage figures for each category listed in §19.39 be decided separately, and that the items be added up only after they have all been decided. Alternatively, instead of specifying a dollar range for pain and suffering, suggest that the jury multiply the plaintiff's economic damages total by some multiple. On per diem methods of calculating general damages, see §19.46.

**Further research:** For jury instructions on damages generally, see CACI 3900-3905A, 3920-3932, 3940-3949, 3960-3963.

**JUDICIAL PERSPECTIVE:** Damages for pain and suffering must be personalized for the jurors. For example, plaintiff's counsel could remind jurors that long after they have performed their civic duty the plaintiff will be suffering with each step.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.45 a. Golden rule argument prohibited

### §19.45 a. Golden rule argument prohibited

Any argument that suggests that the jury place themselves in the plaintiff's situation (known as the "golden rule" argument) is objectionable. It is misconduct for counsel to suggest that the jurors place themselves in the plaintiff's shoes "and award the amount they would 'charge' to undergo equivalent pain and suffering." *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 860, 139 CR 888.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.46 b. Per diem argument permissible

### §19.46 b. Per diem argument permissible

As one method for evaluating compensation for pain and suffering, counsel may wish to illustrate reasonable compensation by arguing that damages should be measured in terms of a fixed amount of money per day, month, or year. "Per diem" arguments are permissible. *Beagle v Vasold* (1966) 65 C2d 166, 53 CR 129.

**EXAMPLE:** In a case in which the plaintiff is likely to suffer irreparable injury, use the BAJI tables for the plaintiff's life expectancy. Write the remaining life expectancy figure on a pad or blackboard, representing the probable number of years that the plaintiff will live with the injury. Next, suggest to the jury that a certain dollar figure per day is reasonable compensation for the plaintiff's pain and suffering. Then, multiply the dollar-per-day figure by the number of days left in the plaintiff's life to arrive at a reasonable value for damages.

Some counsel who use a per diem argument suggest a dollar range for pain and suffering rather than one figure. Other attorneys, believing that a per diem calculation does not appeal to certain jurors, suggest a total figure that is fair and reasonable. See §19.44.

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## §19.47 6. Final remarks on damages

At the end of closing argument, many plaintiff's attorneys add up all the figures listed on the pad or blackboard to reach a fair and reasonable total for the plaintiff's compensation. Some counsel request that the jurors award this entire sum, particularly when the plaintiff's case is strong and the injuries are substantial. Others ask only that the jury return a verdict that is fair, reasonable, and consistent with the evidence.

In cases in which proof of liability is marginal but the injuries are substantial, some attorneys discuss the elements of the plaintiff's pain and suffering without using any specific amount or per diem argument. These attorneys do not ask the jurors to award a specific sum but leave it up to the jurors to decide a reasonable amount. For jury instructions on damages generally, see CACI 3900-3905A, 3920-3932, 3940-3949, 3960-3963.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.48 B. Defense counsel

## §19.48 B. Defense counsel

One method of undermining the plaintiff's claim of damages is to concentrate on the facts of the incident causing the injury, *e.g.,* a slight impact. Defense counsel may be able to persuade the jury that the plaintiff's injuries are nonexistent, or less severe than claimed. See *Menasco v Snyder* (1984) 157 CA3d 729, 203 CR 748.

In cases in which the plaintiff has been severely injured, defense counsel must decide whether to discuss damages at all. If the plaintiff's estimation of damage is reasonable, many defense lawyers limit their argument to liability. Because the jurors' sympathy may be with the severely injured plaintiff, argument over damages risks turning them against the defendant. Many defense attorneys in this situation, however, believe that it is essential to discuss damages because they can give a more realistic perspective than the plaintiff's attorney on what amount should be awarded, particularly if it is likely that the jury will return a plaintiff's verdict.

Although the defense may appear to be conceding liability by discussing damages, counsel can counter this impression by stating something along the following lines:

> I doubt that you will be discussing damages, because it is clear that my client is not liable for the plaintiff's injuries, but I would not be a responsible attorney if I did not address the issue of damages. What plaintiff's counsel has said is wrong.

If plaintiff's counsel has unreasonably calculated damages or exaggerated the extent of injuries, defense counsel must discuss damages to cast doubt on the plaintiff's figures. Consider presenting an alternative calculation of damages to counter the plaintiff's and to explain why the plaintiff's calculation is incorrect or exaggerated. Point out inconsistencies in the testimony of the plaintiff and the plaintiff's witnesses concerning the nature and extent of the injuries and then show how this testimony conflicts with what defense medical experts found.

**JUDICIAL PERSPECTIVE:** Except in the most serious injury cases, the plaintiff is almost always vulnerable to the scrutiny of defense counsel regarding exaggeration, both of treatment and alleged suffering. The defense lawyer has to carefully gauge the case but should not be afraid in the appropriate situation to show why the plaintiff's damage figures are exaggerated.

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## §19.49 1. Admitted liability

When the defendant's legal liability is clear, but the plaintiff's request for damages is out of proportion to the injuries received, some defense attorneys admit liability. They then try the case on the issue of damages and the injuries suffered by the plaintiff. These attorneys believe that if they contested obvious liability, the defense would merely create more sympathy for the plaintiff that could actually encourage the jury to award higher damages.

As a variation on this same theme, if there is any damaging evidence of the plaintiff's own negligence, the defense will admit negligence when the defendant's liability is clear, and then argue the plaintiff's comparative negligence in order to substantially reduce the award.

**JUDICIAL PERSPECTIVE:** Arguing plaintiff's comparative negligence has proven to be a very successful strategy. When defense counsel does not have to argue a weak or nonexistent "no liability" position, credibility remains with the defense and will more likely be listened to and be believed by the jurors.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.50 2. Doubtful liability

## §19.50 2. Doubtful liability

When liability is unclear, but the injuries are severe, defense counsel should focus on liability. The jury's sympathy may be with the severely injured plaintiff, but the defense attorney should argue that an injured plaintiff may not recover from the defendant until the defendant is legally found to have caused the injuries.

Many defense attorneys also argue the reasonableness of damages when confronted with a severely injured plaintiff even if there is doubtful liability. Remind the jurors to set aside their emotions because the law requires that they not allow their verdict to be influenced by "bias, sympathy, prejudice, or public opinion." CACI 100. Point out any weaknesses or exaggeration of the damages the plaintiff's attorney has calculated and requested the jury to award.

**JUDICIAL PERSPECTIVE:** A constant reminder by defense counsel to the jurors that they are "judges" and should not be swayed by emotion is extremely important.

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## VIII. PROCEDURES FOR OPPOSING PARTY

### A. Making objections during argument

### §19.51 1. Tactical considerations

One of the most difficult tactical choices to make during trial is whether to make objections, particularly during opposing counsel's closing argument. The law requires a clear objection and request for a curative admonition if an issue is to be preserved for appellate review. See *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610, 39 CR 721. The dilemma of when to make an objection requires counsel to determine which issues are actually worth preserving for appeal.

Because jurors usually react unfavorably to objections when another attorney is delivering closing argument, it is unwise to interrupt an opponent except for the most egregious of violations. Objections often drive the offending evidence further into the jurors' minds, even when the objections are sustained and the judge admonishes the jury to disregard the improper statement.

**PRACTICE TIP:** Because the decision to object should be deliberate rather than reactive, do not simply police your opponent's closing argument for minor or unintentional improprieties. Develop a strategy for objection that is tailored to the case. Both evidence presented at trial and evidence ruled as inadmissible can guide you in anticipating matters that may surface as objectionable points during your opponent's argument. As an alternative if you represent the plaintiff, consider whether you will be able to cure the problem effectively during rebuttal argument. See §19.3.

For additional suggestions and procedures for making trial objections and protecting the record, see chap 15.

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### §19.52 2. Timely objection and request for curative admonition; waiver

Usually, counsel must immediately object to any improper argument made by opposing counsel and then request the court to admonish the jurors to disregard it. See *Clemente v State* (1985) 40 C3d 202, 219 CR 445 (any prejudice caused by isolated remarks made by plaintiff's counsel during closing argument regarding the extent of plaintiff's injuries was eliminated by the trial court's proper admonishment to the jury to disregard such remarks). Any motion for a mistrial must also be made at the time of the objection or shortly afterwards. See §19.54.

If a timely objection is not made, the objection is considered to have been waived. See *Conservatorship of Gordon* (1989) 209 CA3d 364, 257 CR 365 (counsel did not timely object to an argument made during closing). If counsel waits until opposing counsel has concluded argument, any claimed error is usually waived. See *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610, 39 CR 721 (court determined that attorney must object and ask for admonition to preserve issue for appeal).

**PRACTICE TIP:** If opposing counsel repeats an objectionable remark, you may be able to overcome the original waiver if you failed to object earlier. Object to both remarks, and ask the judge to admonish the jury with regard to both comments.

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## §19.53 3. How to make objections

Because it is not always possible to anticipate and raise an objection before any objectionable comment is made, object as soon as possible after the violation has occurred. Stand, state the objection, and wait until the court rules on the objection before sitting down. Be prepared to state the grounds for the objection and to argue its merits. For a checklist of grounds for objections, see §19.57.

If argument regarding the merits of the objection is required, request that it be made outside the jury's presence. Ask the judge to tell the jury that argument on the merits of an objection concerns applicable law, not facts, so that the jury will not feel left out of the discussion.

Although repetitive objections may suggest to the jury that counsel is trying to obstruct the discovery of truth, they sometimes must be made. For example, repetitive objections must be made when counsel's argument continues along a forbidden path, when counsel tries to use several visual aids not previously admitted into evidence, or when counsel does not fairly summarize the evidence. On objecting to visual aids, see §19.55.

**JUDICIAL PERSPECTIVE:** When objections are sustained there is a double victory. The offender gets "off track" and out of "sync" and the jurors lose confidence in what is being said because the court has ruled that this was improper.

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### §19.54 B. Moving for mistrial

When opposing counsel's improper argument is so prejudicial that the misconduct cannot be cured by any action of the trial judge (*e.g.,* admonishing the jury to disregard it), counsel should move for a mistrial. For checklist of remedies that can be requested after opposing counsel's misconduct, see §16.149.

Request for a mistrial should be made at the time the attorney objects and asks the judge to assign the impropriety as misconduct. See §§16.91-16.93. Failure to object in a timely fashion or to move for a mistrial will preclude the issue from being reviewed on appeal. *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610, 39 CR 721 (defense counsel did not make any objections during plaintiff's counsel's opening or closing argument but instead moved for a mistrial at the conclusion of argument; court held that objections were waived).

**PRACTICE TIP:** If your motion for a mistrial is denied, be sure that the court gives the jury a curative admonition to avoid any possible argument of waiver on appeal. Both the motion for mistrial and the request for admonition should be made on the record in the court reporter's presence.

Moving for a mistrial should not be made lightly. If the motion is granted, the plaintiff's case will probably be retried months later. Witnesses may be unavailable, and a retrial will create more costs. For detailed discussion of mistrial, see §§18.82-18.102.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.55 C. Protecting the record when improper visual aids permitted during closing argument

### §19.55 C. Protecting the record when improper visual aids permitted during closing argument

Counsel should object to the improper use of visual aids during argument. If the court overrules your objection, ask that each visual aid be marked for identification to present a clear record for appeal. If the visual aid cannot be readily marked (*e.g.,* a picture drawn on a blackboard), consider having it photographed out of the jurors' presence with an instant-developing camera, and the photograph marked for identification purposes.

**EXAMPLE:** Counsel drew a prejudicial diagram on a pad or blackboard, and opposing counsel timely objected and moved for a mistrial. The judge assigned the impropriety as misconduct and gave a curative admonition to the jury but denied the motion for mistrial. To give the appellate court a clear record of what transpired in the trial court, opposing counsel photographed the diagram and had it marked for identification.

Local rules, and sometimes judges in the absence of a local rule on the subject, require visual aids such as charts or illustrations that counsel plans to use during argument to be shown to other counsel and approved by the court well before argument. On planning to use, and relying on, visual aids during closing argument, see §§19.12, 19.37.

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## IX. CHECKLISTS

### §19.56 A. Checklist: Spotting impermissible arguments

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The following arguments constitute misconduct when stated during the closing argument:

- Arguing for a large amount of punitive damages by suggesting that the money awarded would go to consumer groups. *Notrica v State Compensation Ins. Fund* (1999) 70 CA4th 911, 952, 83 CR2d 89.
- Arguing inferences for evidence that was admitted for a limited purpose only. Evid C §355.
- Arguing facts not in evidence or asserting as fact matters within counsel's personal knowledge. *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 862, 139 CR 888.
- Arguing the importance of a court-excluded document and asking the jury to draw negative inferences because the document was not admitted in evidence. *Hansen v Warco Steel Corp.* (1965) 237 CA2d 870, 877, 47 CR 428.
- Alluding to personal knowledge of a case. *Garden Grove Sch. Dist. v Hendler* (1965) 63 C2d 141, 45 CR 313. But see *Jutzi v County of Los Angeles* (1987) 196 CA3d 637, 653, 242 CR 74, in which defense counsel, responding to the plaintiff's claim that the case did not involve the defendant's physician-employee, implied that the physician would be incriminated if there were an award for the plaintiff. The court held that, taken in context, the defense attorney's comment was not misconduct, because it was an appropriate response to the plaintiff's claim.
- Arguing facts not justified by the record and suggesting that the jury could speculate about unsupported inferences. *Malkasian v Irwin* (1964) 61 C2d 738, 747, 40 CR 78.
- Referring to verdicts of other juries. *Menchaca v Helms Bakeries, Inc.* (1968) 68 C2d 535, 544, 67 CR 775.
- Referring to judgments given in similar cases. *Salgo v Stanford Univ. Bd. of Trustees* (1957) 154 CA2d 560, 579, 317 P2d 170.
- Expressing a personal belief in the credibility of a witness. *People v Roberts* (1966) 65 C2d 514, 520, 55 CR 412, modified on another point in *In re Roberts* (1970) 2 C3d 892, 87 CR 833 (counsel may comment on witness's credibility in light of all evidence, but counsel may not say "I believe him").

**NOTE:** This misconduct may not be reversible error. See *People v Jenkins* (1987) 196 CA3d 394, 406, 241 CR 827, disapproved on other grounds in *People v Brown* (1993) 6 C4th 322, 336 n12, 24 CR2d 710. In *Jenkins,* counsel stated that her familiarity with the facts led her to believe that a witness was lying. The court ruled that although this statement was misconduct, the case was not reversible on appeal, because no objection was made and a timely admonition to the jury would have cured the harm.

- Referring to a party's wealth or poverty, unless it is directly relevant to an issue in the case, such as punitive damages. See the following cases:
- *Du Jardin v City of Oxnard* (1995) 38 CA4th 174, 45 CR2d 48 (making comments during closing argument that government services would be lost if a plaintiff's verdict was returned was plainly and inherently prejudicial misconduct; opponent's immediate objection and request for admonition preserved issue on appeal);
- *Dumas v Stocker* (1989) 213 CA3d 1262, 262 CR 311 (even though punitive damages were at issue, plaintiff counsel's reference to defendant's substantial financial holdings, without first establishing defendant's net worth at trial, was prejudicial);
- *Seimon v Southern Pac. Transp. Co.* (1977) 67 CA3d 600, 605, 136 CR 787 (plaintiff's counsel improperly tried to convey the image that he and his client were financial underdogs, by making statements such as "I represent the little guy");

- *Roemer v Retail Credit Co.* (1975) 44 CA3d 926, 119 CR 82 (reference to defendant's wealth was held to be proper because punitive damages were at issue); and
- *Love v Wolf* (1964) 226 CA2d 378, 389, 38 CR 183 (improper for plaintiff's counsel to argue that the jury should allow large damages because the defendant was rich or because it could well afford to be held to absolute liability as the price for marketing chloromycetin).

- Requesting that the jurors place themselves in the "plaintiff's shoes" (known as the "golden rule" argument). See §19.45. Counsel may not ask the jury to "award such damages as they would 'charge' to undergo equivalent pain and suffering." *Beagle v Vasold* (1966) 65 C2d 166, 182 n11, 53 CR 129; *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 609, 39 CR 721; *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 860, 139 CR 888.

**NOTE:** Counsel may argue that damages for pain and suffering should be awarded on a "per diem" basis (*i.e.,* a certain amount of money per day or per hour). See §19.46.

- Appealing to prejudice based on a party's race, religion, ethnicity, or nationality when it is irrelevant to the issues. See *Kolaric v Kaufman* (1968) 261 CA2d 20, 27, 67 CR 729, a personal injury action, in which defense counsel improperly asked the plaintiff during cross-examination whether she had been in a concentration camp. Later, during argument, defense counsel improperly argued that he had rarely seen such evidence of sheer greed: Plaintiff and her husband had emigrated to this country and in return for its protection, peace, and opportunities, "[t]hey have made a mockery of our judicial system and have abused doctors and hospitals...." 261 CA2d at 25.
- Appealing to the sympathy or prejudice of the jury by referring to or disparaging a party's war record. *Paolini v City & County of San Francisco* (1946) 72 CA2d 579, 587, 164 P2d 916; *Deibler v Wright* (1931) 119 CA 277, 281, 6 P2d 344.
- Appealing to jurors' self-interest to persuade them to enlarge or mitigate their verdict. *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 861, 139 CR 888.
- Commenting that the defendant is insured against liability, when arguing negligence or other wrongdoing. See Evid C §1155; *Neumann v Bishop* (1976) 59 CA3d 451, 469, 130 CR 786.
- Referring during argument on liability to settlements between the plaintiff and others concerning the same claim pending against the defendant. See the following cases:
  - *Shepherd v Walley* (1972) 28 CA3d 1079, 1083, 105 CR 387 (improper for defense counsel to refer to a settlement between plaintiff and co-named defendant who had been dismissed, stating, "I think that gives us a pretty good idea of who the plaintiff thinks was responsible and liable"); and
  - *Brown v Pacific Elec. Ry.* (1947) 79 CA2d 613, 614, 180 P2d 424 (proof of defendant's settlement with a third person, for injuries caused by same accident in which plaintiff's claim arose, was held inadmissible as evidence of defendant's liability; defense counsel improperly asked defendant: "Did the Pacific Electric Railway [codefendant] make a settlement with you for the injuries you sustained?").

**NOTE:** See Evid C §1152 on inadmissibility of offers of compromise or settlements to prove liability for loss or damage. Reference may be made to a settlement, however, to show the bias or prejudice of a witness. For example, pretrial "sliding scale" settlements can be disclosed to show that the bias of a defendant who previously settled is at issue. See CCP §877.5(a)(2).

- Referring to the remarried name of a party's widow in a wrongful death case. *Cherrigan v City & County of San Francisco* (1968) 262 CA2d 643, 69 CR 42.
- Addressing a juror individually by name. *Neumann v Bishop* (1976) 59 CA3d 451, 473, 130 CR 786.
- Implying that if opposing counsel uses inconsistent theories, he or she does not believe in the case. *People v Bell* (1989) 49 C3d 502, 537, 262 CR 1.
- Arguing the income tax consequences of compensatory damages, unless taxes are at issue. *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 151 CR 399.
- Implying that the court endorses one party's allegations. *Cassim v Allstate Ins. Co.* (2004) 33 C4th 780, 798, 16 CR3d 374.

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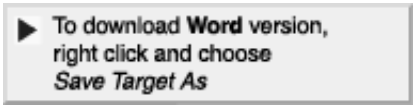
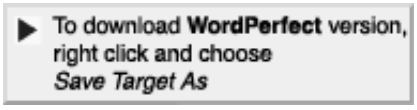
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/19 Closing Argument/§19.57 B. Checklist: Grounds for objections during closing argument

## §19.57 B. Checklist: Grounds for objections during closing argument




The following are grounds for objection during closing argument. Depending on how flagrant opposing counsel's comments are, interrupt with an objection and specify the grounds for your objection (which may be taken from the list below). Then ask the judge to give the jury a cautionary instruction. See §§19.52-19.53. If you believe your client's right to a fair trial has been irreparably damaged, move for a mistrial. See §19.54. For additional remedies for opposing counsel's misconduct, see the checklist in §16.149.

- Refers to facts not in evidence or from counsel's own knowledge.
- Calls for speculation on unsupported inferences.
- Refers to other verdicts.
- Refers to counsel's opinion of a witness's credibility.
- Refers to the wealth or poverty of a party.
- Appeals to the jury's prejudice through race, religion, nationality, or war record.
- Appeals to the jury's self-interest to enlarge or reduce the verdict.
- Refers to the defendant's insurance.
- Refers to a prior settlement.
- Addresses jurors by name.
- Refers to inconsistent theories and suggests that opposing counsel does not believe in the case.
- Refers to income tax consequences of damages award.
- Refers to a collateral source.
- Refers to the remarried name of a party's widow in a wrongful death case.

*Comment:* For full discussion of each ground for objection, see California Trial Objections (Cal CEB Annual).

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# 20

# Jury Instructions

**James A. Richman**

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# I. OVERVIEW

## §20.1 A. Scope of chapter

This chapter discusses the procedures, rules, and tactics for preparing, submitting, and giving both form instructions (see §§20.12-20.19) and attorney-drafted jury instructions (see §§20.20-20.29).

The California Civil Jury Instructions (CACI), which are approved by the Judicial Council, are the official instructions for use in California and their use is strongly encouraged. Cal Rules of Ct 2.1050(e). Counsel submitting a BAJI instruction should follow the procedures for forms not previously approved by the court, *i.e.,* include at the bottom of any BAJI instruction submitted a citation of authorities supporting the statement of law in the instructions. Cal Rules of Ct 2.1055(d).

A checklist of how to prepare effective instructions is included. See §20.2.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.2 B. Checklist: How to draft effective instructions

## §20.2 B. Checklist: How to draft effective instructions

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___ 1. Review CACI, BAJI and other form instructions *before* drafting instructions to see whether any of them fit the issues in the case. Make sure to check for recent revisions of CACI, BAJI or other form instructions in the pocket part. See §§20.12-20.19.

___ 2. Prepare instructions well in advance of trial so that you have the opportunity to focus your attention on them and avoid drafting last-minute instructions. See §20.9.

___ 3. Review pleadings and discovery *before* drafting instructions to determine what the issues are. Reread the complaint, answer, any cross-complaints and answers, the pretrial conference order (if one was entered), answers to all contention interrogatories, all requests for admission, and any orders on any motions to see if any of the pleaded issues have been removed from the case. See §20.9.

___ 4. Ascertain who bears the burden of proof on each issue or element of each claim and affirmative defense, and prepare burden of proof instructions. See CACI 200. See also BAJI 2.60. See also §20.12.

___ 5. When drafting original instructions, use simple language, cite authority accurately, and read the instructions to nonattorneys to make sure the jurors can understand them. See §§20.21-2.24.

___ 6. Prepare a list of CACI, BAJI and originally drafted instructions you plan to give in the case and compare this list with the substantive issues involved. Make sure all instructions necessary to cover the substantive issues are ready to submit.

___ 7. Organize all proposed instructions into a sequence that makes sense for your case rather than ordering them by number. See §§20.30-20.31 for sequence considerations.

___ 8. Review all instructions to make sure the authority cited is accurate. See §§20.24-20.28.

___ 9. Remove instructions that are repetitive or cumulative and that do not accurately recite controlling law. See §§20.60-20.70.

___ 10. Proofread and edit all instructions for clarity and conciseness. See §§20.21-20.22.

___ 11. When certain instructions are essential to your case, be prepared to offer alternative instructions if the trial judge refuses your initial proposal. This is critical on appeal because the court of appeal will ask you what instruction you offered as an alternative. See §§20.32-20.33.

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## §20.3 C. Jury instructions are statements of law

Traditionally, the trial judge reads the jury instructions to jurors at the conclusion of the case—although many judges now also read some of the instructions at the beginning, or during, the trial. See §§20.47-20.50. This process is called "instructing" or "charging" the jury. See CCP §607(9).

In charging the jury, the judge may state all matters of law the judge thinks the jurors will need to reach a verdict. CCP §608; see §§20.37-20.51 for further discussion of court's duties.

Once instructed on the law, the jury must apply these legal principles to the facts to reach a verdict. *Duff v Schaefer Ambulance Serv.* (1955) 132 CA2d 655, 283 P2d 91. See also *Carlson, Collins, Gordon & Bold v Banducci* (1967) 257 CA2d 212, 64 CR 915 (court properly let jury decide meaning of fee agreement under applicable principles of law).

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## §20.4 1. Jury must follow court's proper instructions

Each juror takes an oath to render a true verdict according to the evidence and the court's instructions. See CCP §607.

**NOTE:** Admonitions to the jury during trial regarding conduct or testimony should be distinguished from instructions. *People v Pitts* (1990) 223 CA3d 606, 883, 273 CR 757 (no error for court to give instructions that reminded jury of limiting admonitions given to them at time certain evidence was admitted.)

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.5 2. Counsel's duty to submit proposed instructions

## §20.5 2. Counsel's duty to submit proposed instructions

In every jury trial, a complete and comprehensive set of jury instructions covering the law as disclosed by the pleadings should be submitted by counsel to the judge and served on opposing counsel. CCP §607a; *Finn v G. D. Searle & Co.* (1984) 35 C3d 691, 701, 200 CR 870; *Willden v Washington Nat'l Ins. Co.* (1976) 18 C3d 631, 636, 135 CR 69; *Roberts v Ford Aerospace & Communications Corp.* (1990) 224 CA3d 793, 804, 274 CR 139.

**PRACTICE TIP:** Check local rules and any pretrial orders on the form and submission of jury instructions.

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## §20.6 3. Waiver for party's failure to submit instructions; exception

A party who fails to request a specific proper instruction on a particular issue has generally waived the right to have the jury instructed on that issue. *Jarvis v Southern Pac. Transp. Co.* (1983) 142 CA3d 246, 255, 191 CR 29. See also *McCloud v Roy Riegels Chems.* (1971) 20 CA3d 928, 935, 97 CR 910.

If a party fails to specifically request jury instructions on material issues and the controlling legal principles, the court's failure to instruct the jury on those matters may be reversible error. See *Agarwal v Johnson* (1979) 25 C3d 932, 951, 160 CR 141, disapproved on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 88 CR2d 19. See §20.37 for more detailed discussion of court's duty to instruct on "controlling legal principles."

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## D. Parties' right to jury instructions

### §20.7 1. Instructions permitted on all theories of case

A party is entitled to correct, nonargumentative instructions on every theory of the case advanced by that party that is supported by substantial evidence. The trial court may not force a litigant to rely on abstract generalities, but must instruct the jury in specific terms that relate the party's theory to the particular case. *Soule v General Motors Corp.* (1994) 8 C4th 548, 572, 34 CR2d 607. See also *Morey v Vanucci* (1998) 64 CA4th 904, 915, 75 CR2d 573 (party's theory of case must be supported by substantial evidence before court obligated to instruct jury on that theory).

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## §20.8 2. Instructions on alternative theories or defenses allowed

Jury instructions based on alternative theories or defenses raised by the pleadings are allowed because each party is entitled to have the jury instructed on all issues raised in the pleadings. *Petersen v Rieschel* (1953) 115 CA2d 758, 765, 252 P2d 986; *Brown v Yocum* (1931) 113 CA 621, 623, 298 P 845.

**PRACTICE TIP:** If at all possible, avoid presenting instructions on alternative theories, because they might confuse the jury. Consider including a protective instruction stating that double recovery is not permitted even if plaintiff is able to prove the case on two alternative theories.

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## E. Tactical considerations

### §20.9 1. Instructions help plan case

A review of jury instructions at the beginning of a case will tell the trial attorney what the law is, what the attorney's burden of proof is, and what elements are part of each cause of action. The instructions are a road map for pleading and discovery because they tell the attorney where he or she must end up.

Plaintiff's counsel can use key jury instructions to assist in drafting pleadings and discovery and in preparing trial briefs. Defense counsel should review applicable jury instructions on receipt of the complaint to assist in shaping dispositive motions such as demurrers or motions for summary judgment.

**PRACTICE TIP:** Keep copies of applicable jury instructions in a separate, readily accessible, file. As the case develops, add new instructions to the file. After you have prepared a general list of proposed jury instructions in one civil case, you will find that many of the instructions can be used over and over again in other civil cases.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.10 2. Opening statement; prepare jury for key instructions

## §20.10 2. Opening statement; prepare jury for key instructions

After preparing the opening statement, an experienced trial attorney will know which jury instructions will likely be given. The phrasing and structure of the factual discussion in the opening statement should anticipate these instructions and give the jury a chance to hear the important "buzz" words from the instructions.

Avoid a direct reference to the instructions early in the trial, because it would probably draw an objection, particularly if the instructions are not ultimately given. See Persuasive Opening Statements & Closing Arguments §2.14 (Cal CEB 1988).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.11 3. Final argument: Use exact language of key jury instructions

## §20.11 3. Final argument: Use exact language of key jury instructions

Use the exact language of key jury instructions in the final argument to alert the jurors to the instructions the judge will read to them. Doing so provides an opportunity to reargue the specifics of the case in the very language of the instructions. Incorporate the most favorable instructions into the closing argument to break up the monotony of the instruction-reading process.

**PRACTICE TIP:** If you are going to discuss jury instructions in closing argument, enlarge the key instructions or make them into transparencies to display on an overhead projector. Jurors can then read the instructions while you are discussing them and, by seeing the written words, the jurors will be better able to remember their content and importance. Use the precise words that the judge will read to the jury in the enlargement of the instructions. See chap 9 on opening statement and chap 19 on closing argument. See also Persuasive Opening Statements & Closing Arguments §2.14 (Cal CEB 1988).

**JUDICIAL PERSPECTIVE:** If you plan to discuss jury instructions in your final argument, check with the judge first because some judges feel that the instructions are the judge's domain.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/ II. PREPARING FORM INSTRUCTIONS/§20.12 A. What are CACI instructions?

## II. PREPARING FORM INSTRUCTIONS

### §20.12 A. What are CACI instructions?

The best place to begin in preparing a set of jury instructions in a civil case is to review the Judicial Council California Civil Jury Instructions ("CACI"), which are the official, approved instructions for California. See Cal Rules of Ct 2.1050(e). Although the CACI jury instructions are organized differently from the BAJI instructions that trial lawyers have used over the years, the Judicial Council's CACI instructions are usually followed by notes to the sources and authorities on which a particular instruction is based. This CEB publication also references, when available, similar BAJI instructions. The acronym "BAJI" is taken from the first edition of the Book of Approved Jury Instructions, published in 1938. This book is now in its ninth edition and is titled California Jury Instructions, Civil, even though it is usually referred to as BAJI. BAJI instructions are also available on computer disks. However, BAJI is no longer officially "approved." See Cal Rules of Ct 2.1050(e).

CACI (and BAJI) contain instructions of a general nature that apply to all types of trials, as well as instructions on substantive law and damages:

**General law instructions:**

- General instructions, *e.g.,* instructions on the court's and jury's respective duties, terminology, and designation of parties in the pleadings (CACI 100-110; see also BAJI 1.00-1.25);
- Instructions on evidence and guides for its evaluation and interpretation, *e.g.,* instructions on direct and circumstantial evidence and weighing conflicts, witnesses' credibility, and expert testimony (CACI 107, 200-221, 5003-5004; see also BAJI 2.00-2.43);
- Burden of proof and degree of proof instructions (CACI 200-201; see also BAJI 2.60-2.62 and Note below);
- Cautionary instructions (CACI 5000-5001; see also BAJI 15.20-15.22);
- Instructions on manner of jury deliberations (CACI 5001; see also BAJI 15.30-15.31);
- Instructions on jury's duties and functions (CACI 5001; see also BAJI 15.30-15.40); and
- Concluding instructions (CACI 5006-5008; see also BAJI 15.50-15.60).

**NOTE:** In cases with several causes of action, decide whether it is preferable to have one instruction for each claim. Review each cause of action, and then determine which party has the burden of proof on that claim and what the burden of proof is for that claim.

**Substantive law instructions:**

- Negligence law (*e.g.,* negligence per se, special doctrines such as res ipsa loquitur and the good Samaritan rule, professional negligence) (CACI 400-403, 405-407, 411-422, 430-435, 450-453, 460-463, 500-518, 600-604, 700-712, 730-731, 800-806, 900, 902-903, 905-908, 1221; see also BAJI 3.00-6.67);
- Owners and occupiers of land (CACI 1000-1011, 2021; see also BAJI 8.00-8.60);
- Intentional torts (*e.g.,* defamation, libel, slander) (CACI 1300-1305, 1400, 1402-1404, 1407-1409, 1500-1501, 1503-1505, 1520, 1701-1708, 1720-1723, 1800-1809, 1820-1821, 2200-2204, 3020, 3023-3027, 3100-3108, 3112-3116; see also BAJI 7.00-7.94);
- Product liability (CACI 1200-1207, 1220-1222, 1224, 1230-1233, 1240-1243, 3210-3211, 3220-3221, 3241; see also BAJI 9.00-9.90);
- Contractual relationships (CACI 300-325, 330-337, 350-361, 2400-2424, 2430-2433; see also BAJI 10.00-10.96);
- Statutory actions (CACI 423, 1100-1103, 1111-1112, 1120-1121, 1123, 2900-2901, 2903, 2920-2921, 2926, 2940-2942, 3500-3506, 3509-3515; see also BAJI 11.00-11.99);
- Employment discrimination (CACI 2500-2505, 2520-2526, 2540-2545; see also BAJI 12.00-12.26);
- Fraud and deceit (CACI 1900-1908, 1920-1924; see also BAJI 12.30-12.57);

- Implied indemnity (CACI 3800-3801; see also BAJI 12.60-12.69);
- Emotional distress (CACI 1600-1605, 1620-1623; see also BAJI 12.70-12.88);
- Insurance company obligations (CACI 2330-2335; see also BAJI 12.90-12.98); and
- Vicarious responsibility (CACI 410, 720-724, 3600-3602, 3700-3712, 3720-3726; see also BAJI 13.00-13.97).

**Damages instructions:**

- Compensatory damages (CACI 3900-3901; see also BAJI 14.00-14.02);
- Measure of damages (CACI 3903A-3903D, 3903J-3903K, 3903M, 3920-3922. See also BAJI 14.10-14.52);
- Punitive damages instructions (CACI 3940-3949);
- Miscellaneous damages instructions (CACI 3904, 3921-3932. See also BAJI 14.60-14.76); and
- Determining damages under comparative negligence (CACI 3960. See also BAJI 14.90-14.91).

**Concluding instructions:**

- Multiple parties (CACI 103, 217; see also BAJI 15.00-15.03.1);
- Cautionary instructions (CACI 5000-5001; see also BAJI 15.20-15.22); and
- Jurors' duties (CACI 5001; see also BAJI 15.30-15.40).

CACI includes various special verdict forms (VF-400—VF-402, VF-500—VF-502, VF-700—VF-701, VF-704, VF-1000—VF-1001, VF-1200—VF-1206, VF-1208, VF-2900—VF-2901, VF-3100—VF-3107, VF-3700). BAJI also has special verdicts forms (BAJI 16.00-16.93) and several appendices, including a life-expectancy table and a present-value table.

**NOTE:** When using CACI, BAJI or any other form book, always check the pocket parts and read the Use notes at the end of the printed instructions for any recent changes.

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## B. Approved form instructions preferred in state court

### §20.13 1. Judicial Council recommends use of CACI

The California Civil Jury Instructions (CACI) "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050.

When a judge decides to instruct the jury on a subject covered by CACI, "it is recommended that the judge use the Judicial Council instruction" unless "a different instruction would more accurately state the law and be understood by jurors." Cal Rules of Ct 2.1050(e). Only when the latest edition of the CACI instructions does not contain an instruction that the judge determines the jury needs, or when a CACI instruction cannot be modified to submit the issue properly, should a non-CACI instruction be given, and it should be "accurate, brief, understandable, impartial, and free from argument." See Cal Rules of Ct 2.1050(e).

As long as the topic is covered in CACI, the Judicial Council "endorses" the use of CACI instructions. Cal Rules of Ct 2.1050(b). The goal of the CACI instructions is to improve the quality of a jury's decisions by making the law understandable to the average juror. Cal Rules of Ct 2.1050(b). That is, the CACI instructions seek to accurately state the law in plain English so that the law is more comprehensible and less confusing to jurors during their deliberations. Cal Rules of Ct 2.1050(e).

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## §20.14 2. Counsel must complete form instructions properly

CACI instructions often indicate by brackets or blanks that information must be filled in or deletions made so that the instruction follows the facts of the particular case. If counsel omits any required information, the court may refuse the instruction as incomplete. On format of proposed jury instruction when submitting to court, see §20.17.

In ruling on the formerly court-approved BAJI instructions, appellate opinions have held that the trial judge may refuse to give an instruction that is missing any required fact. *Shaw v Pacific Greyhound Lines* (1958) 50 C2d 153, 158, 323 P2d 391; see *Roberts v City of Los Angeles* (1980) 109 CA3d 625, 630, 167 CR 320 (defense counsel waived right to have jury instructed on its legal theory by repeatedly refusing court's request to correct defective instructions).

The court may not, however, refuse to give an instruction because of small oversights. See *Laird v Moss* (1959) 173 CA2d 48, 53, 342 P2d 463 (trial court improperly refused instruction containing a blank; court should have corrected instruction and given it because the jury was thus not instructed on a material issue).

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### §20.15 3. Form instructions generally upheld on appeal

It is good practice to use approved form instructions when applicable because they are generally upheld on appeal. On occasion, however, approved form instructions (BAJI) have been disapproved and subsequently modified. See 7 Witkin, California Procedure, *Trial* §273 (5th ed 2008).

**EXAMPLE 1:** The California Supreme Court disapproved the proximate cause instruction and held that the trial court committed prejudicial error by giving it. *Mitchell v Gonzales* (1991) 54 C3d 1041, 1052, 1 CR2d 913. See discussion of *Mitchell* in §20.79.

**EXAMPLE 2:** BAJI 2.62, covering clear and convincing evidence for punitive damages, has been criticized as misleading, but never found so misleading as to require reversal. See, *e.g., Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1164, 74 CR2d 510; *Mattco Forge, Inc. v Arthur Young & Co*. (1997) 52 CA4th 820, 847, 60 CR2d 780; *Roberts v Ford Aerospace & Communications Corp.* (1990) 224 CA3d 793, 274 CR 139. But see criticism of BAJI 2.62 in CACI 201.

**EXAMPLE 3:** The court in *National Med. Transp. Network v Deloitte & Touche* (1998) 62 CA4th 412, 425, 72 CR2d 720, found the giving of BAJI 6.37.3, governing the duration of accountants' employment and duty to their clients, to constitute prejudicial error requiring reversal.

It is essential to scrutinize even official, approved form instructions to ensure that they state the law properly and completely. Because CACI is the approved form of jury instructions, it is probable that, like BAJI, some of the CACI instructions will be tested on appeal and on occasion will be disapproved.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.16 4. Restrictions on certain jury instructions must be observed

## §20.16 4. Restrictions on certain jury instructions must be observed

Before using a form instruction, investigate whether there are any restrictions on its use; if so, be sure to observe them. Restrictions are usually stated in the comments following the instruction. For example, the following two CACI jury instructions contain restrictions:

**EXAMPLE 1:** CACI 320, *Interpretation - Construction Against Drafter*. This instruction directs the jury to interpret the meaning of a contract against the party who drafted it. But it should only be read when the jury is deadlocked. The purpose of this restriction is to allow the jury to interpret the contract using all other avenues before it is given this tool.

**EXAMPLE 2:** CACI 2403, *Breach of Employment Contract - Unspecified Term - Implied-in-Fact Promise Not to Discharge Without Good Cause.* The instruction should only be read when an employee is basing his or her claim of wrongful discharge on an implied covenant not to terminate except for good cause. If the jury finds that there is an express at-will agreement, the jury cannot find an implied contrary understanding. In addition, only those factors that apply to the facts of the particular case should be read.

**PRACTICE TIP:** If CACI instructions do not cover all the issues in the case, review other form instructions (see §20.28 for list of sources of form instructions) or draft your own original instructions (see §§20.20-20.29).

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### C. Procedure for requesting jury instructions

### §20.17 1. Format of request

All proposed jury instructions, whether CACI instructions or "special instructions," must be submitted like any other court paper in the format specified by Cal Rules of Ct 2.100-2.119. Cal Rules of Ct 2.1055(a)-(b). For detailed information on how to prepare instructions, see §20.20.

The document proposing CACI instructions should be titled "_ _[*Plaintiff, Defendant, etc.*]_ _'s Request and Index for Jury Instructions," and contain the usual caption of court, case, and number. See §20.81 for sample request and index for jury instructions.

The set of proposed jury instructions must include an index that identifies each CACI instruction by its name and reference number. Cal Rules of Ct 2.1055(b)(2). In the index, indicate whether it is an exact copy of the CACI instruction, an exact copy except for the deletion or other handling of bracketed material or blanks, or a modified version of CACI. Make a notation such as the following:

- "CACI No. _ _ _ _ _ _ (exact copy)" (when the instruction is an exact copy of a CACI instruction);
- "CACI No. _ _ _ _ _ _ (exact copy except adaptations)" (when the instruction is a copy of a CACI instruction except for integration or deletion of bracketed material, or the filling-in of blanks); or
- "CACI No. _ _ _ _ _ _ (as modified)" (when the instruction is modified other than by filling in the blanks or striking bracketed items).

For an example of an index and request for jury instructions, see §20.81. See also Cal Rules of Court 2.1055(b)(3). Each proposed instruction, including CACI instructions, must be on a separate page, contain the number and title of the instruction at the top of the first page of the instruction, and be prepared without any blank lines or bracketed material so that it can be read directly to the jury. Cal Rules of Ct 2.1055(c). See §20.20.

On other procedures, see §20.19.

No jury instructions can be requested simply by number references in civil cases. This applies to CACI form instructions and to those from the Book of Approved Jury Instructions (9th ed 2002) (BAJI). See Cal Rules of Ct 2.1055(c). No citation to authorities is required for the CACI instructions, however. Cal Rules of Ct 2.1055(d).

The requested jury instructions must be loosely bound. Cal Rules of Ct 2.1055(b)(4). See §20.20.

**PRACTICE TIP:** Before reading the instructions, the court often asks the parties to meet and confer and give the court a set of instructions on which they agree, a set sought by one side as to which there is objection, and a set sought by the other side as to which there is objection. The parties typically agree on the basic instructions (e.g., basic introductory and concluding instructions, burden of proof, standard elements of a claim) and focus their disagreement on the important points.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.18 2. Number of copies required

## §20.18 2. Number of copies required

Prepare enough copies of the request for jury instructions to serve on all opposing counsel and to provide at least one copy to the court. It is helpful to have several full sets of instructions with the required index of all instructions on top. Having extra copies facilitates modifications during jury instruction conferences with court and other counsel. See §20.17 for format of proposed jury instructions.

On time for submission of instructions generally, see §§20.34-20.36.

**JUDICIAL PERSPECTIVE:** Some courts make copies of all instructions in their final form for each juror to read along with the judge; however, most do not.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.19 D. Modification of form instructions; notification to court required

## §20.19 D. Modification of form instructions; notification to court required

Frequently, form instructions must be modified so that they properly instruct the jury on the facts of the particular case. When making a substantive modification to an official, approved CACI instruction and the issue is important enough, refer to the modification in the trial brief or in a motion in limine. Any issue of importance should be in the trial brief, even if not couched in the language of a proposed instruction.

Make certain that the authority for the modification is included on the instruction and have copies of these authorities available for the judge to review. These requirements do not apply if counsel is simply filling in blanks or selecting alternative clauses in the CACI instruction. A modified CACI instruction should also be listed in the required index and state on its face: "CACI NO. _ _ _ _ _ _, as modified." See §20.17.

**PRACTICE TIP:** Even though some jury instructions, no matter how clearly stated, may be difficult for jurors to understand, be careful in modifying or adding explanatory language to them simply for that reason because some judges may refuse to modify an approved CACI instruction. As an alternative to modifying the instruction that you feel is difficult to understand, you can always explain it verbally to the jury during closing argument.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/ III. DRAFTING ORIGINAL INSTRUCTIONS/§20.20 A. Format requirements

## III. DRAFTING ORIGINAL INSTRUCTIONS

### §20.20 A. Format requirements

All proposed jury instructions, whether approved by the court (*e.g.*, CACI instructions) or specially prepared by counsel, must be submitted to the court in the form and format set out in Cal Rules of Ct 2.1055(b)-(d). For discussion of CACI instructions, see §20.17. For a sample format for proposed jury instructions, see §20.81. Rule 2.1055(e) prohibits local court rules from requiring that jury instructions be submitted in any manner other than those set out in subsections (b), (c), and (d).

Be sure to submit written instructions. See *Howarth v Maroney* (1964) 228 CA2d 116, 126, 39 CR 260 (criticizing oral instructions). This is particularly important if the original instructions you submitted in writing are changed or altered orally at the instruction conference. If this occurs, make the changes in writing and resubmit the instructions in their final form. If a court reporter has not made a record of the changes made, note why the modifications occurred.

All jury instructions, including those drafted by counsel, must be attached to the request for proposed jury instructions and must meet specific requirements. They must:

- **Comply with rules governing papers to be filed.** *E.g.*, 8-1/2 by 11 inch pleading paper must be used, the body of the instruction reflecting statement of law must be double spaced. Cal Rules of Ct 2.1055(b)(1); see Cal Rules of Ct 2.100-2.119.
- **Have a cover page including the case caption and identifying the party proposing the instructions.** See Cal Rules of Ct 2.1055(b)(2).
- **Have an index.** The index must list all the proposed instructions, identify approved jury instructions by their numbers, and number special jury instructions consecutively. The index must include a checklist that the court may use to indicate whether the proposed instruction was:
- Given as proposed;
- Given as modified;
- Refused; or
- Withdrawn. See Cal Rules of Ct 2.1055(b)(3). For example of an index, see §20.81.
- **Not be firmly bound, to make renumbering easy.** See Cal Rules of Ct 2.1055(b).

Each proposed jury instruction should in the following format:

- **Be on separate pages.** Each jury instruction must be on a separate sheet of paper. CCP §607a. Cal Rule of Ct 2.1055(c)(1).
- **Be typewritten.** "Typewritten" includes papers prepared on computers and printed out on a separate sheet of paper (CCP §607a).
- **Include the instruction number, the title of the instruction, and identify the party requesting the instruction at the top of the first page of the instruction.** For example, the top of the instruction might read: "Plaintiff _ _[*name*]_ _; Instruction No. _ _[*number*]_ _." Indicating just below this the nature of the instruction allows the court and counsel to refer to the content of an instruction in a shorthand form even though it is not required (*e.g.,* in an action based on interference with contractual relationships, the nature of the instruction might be "ELEMENTS OF INTERFERENCE"). (This heading is not read to the jury as part of the instruction.) See Cal Rules of Ct 2.1055(c). See also *Connor v Pacific Greyhound Lines* (1951) 104 CA2d 746, 758, 232 P2d 500. See §20.83 for sample instruction.
- **Be prepared without any blank lines or unused bracketed portions.** Cal Rules of Ct 2.1055(c)(3).
- **Cite authorities.** Citations supporting the statement of law in the instruction should appear below the body of the instruction. No citation is required for CACI instructions. Cal Rules of Ct 2.1055(d).

**NOTE:** No particular form of citation is required, but it is generally good practice to follow the system used by the California Supreme Court (see Jessen, Edward W., California Style Manual (4th ed 2000) or The Blue Book

Uniform System of Citation (18th ed 2005).

- **Be numbered consecutively.** Cal Rules of Ct 2.1055(b).

On preparing jury instructions that will be taken into the jury room, see §20.56.

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## B. Language of instructions

### §20.21 1. Simple language preferred

Proposed jury instructions should be "accurate, brief, understandable, impartial and free from argument." Cal Rules of Ct 2.1050(e). They should contain accurate statements of law set forth in easy-to-understand terms and be as brief, concise, and clear as possible to avoid misleading the jury (see *Guerra v Handlery Hotels, Inc.* (1959) 53 C2d 266, 272, 1 CR 330).

**CAUTION:** When attempting to simplify jury instructions, do not oversimplify. Balance the need for simplicity against the need for instructions that state the law correctly. See §20.24.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.22 2. Avoid technical language

## §20.22 2. Avoid technical language

Use nontechnical language in jury instructions and use well-established, easily understood words. *Nichols v Nelson* (1927) 80 CA 590, 598, 252 P 739. Avoid complex words, Latin phrases, and terms of art whenever possible. Use short sentences that present the concepts in everyday terms.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.23 3. Gender-neutral language required

## §20.23 3. Gender-neutral language required

All jury instructions must be written in gender-neutral language. Cal Rules of Ct 2.1058. Counsel must recast instructions based on case opinions, when necessary, to meet this requirement.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.24 4. Proposed instruction must state law properly

## §20.24 4. Proposed instruction must state law properly

Proposed jury instructions can cover only the following issues (CCP §607a):

- The law as disclosed by the pleadings;
- Questions of law developed by the evidence that were not disclosed by the pleadings; and
- Issues raised during argument that were not covered by instructions given or refused.

Counsel submitting proposed jury instructions must believe they properly state the law. *People v Davenport* (1966) 240 CA2d 341, 347, 49 CR 575. The court has a duty to reject a proposed instruction that incorrectly states the law. *Werkman v Howard Zink Corp.* (1950) 97 CA2d 418, 427, 218 P2d 43. Similarly, the court may refuse to give proposed instructions that are misleading or incomplete statements of the law. *Levy-Zentner Co. v Southern Pac. Transp. Co.* (1977) 74 CA3d 762, 782, 142 CR 1. If the court gives an instruction that is incorrect in the law, it can lead to reversible error. *Pappert v San Diego Gas & Elec. Co.* (1982) 137 CA3d 205, 211, 186 CR 847. This is true even if a party withdraws an objection to an erroneous instruction. *Huffman v Interstate Brands Corp.* (2004) 121 CA4th 679, 706, 17 CR3d 397 (when instruction involves misstatement of law on burden of proof, not invited error to withdraw objection to instruction).

A party does not have a right to have the jury instructed in any particular phraseology. *Byrum v Brand* (1990) 219 CA3d 926, 939, 268 CR 609; *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 335, 145 CR 47. If the court correctly gives the substance of the law, a party may not complain on the ground that the party's requested instructions were refused. *Hyatt v Sierra Boat Co., supra*. See *Dodge v San Diego Elec. Ry.* (1949) 92 CA2d 759, 763, 208 P2d 37.

**NOTE:** It is good practice to limit the subject matter of each instruction to one point of law, keeping in mind that repetitious instructions can be a source of error. See §§20.63-20.64. On objectionable instructions generally, see §§20.60-20.70.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.25 C. Sources of law for jury instructions

## §20.25 C. Sources of law for jury instructions

Although jury instructions are generally based on statutory law and court opinions, do not overlook other sources, *e.g.,* treatises, hornbooks, form books containing instructions, and the various restatements of law, when drafting original instructions. See §20.28.

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## §20.26 1. Statutes: Verbatim quotations preferred to paraphrasing

As a rule, when a proposed jury instruction is based on a statute, quote the statute verbatim; do not paraphrase or restate it in different language. See *Reilly v California St. Cable R.R.* (1946) 76 CA2d 620, 629, 173 P2d 872; *Formosa v Yellow Cab Co.* (1939) 31 CA2d 77, 84, 87 P2d 716. It may be error to depart from the strict language of a statute when it declares a rule of law (7 Witkin, California Procedure, *Trial* §268 (5th ed 2008)), but it is legitimate to "ellipse out" surplus language as long as the statute's meaning is not altered.

If the code language is confusing or couched in legal terms, explanatory or definitional instructions may be necessary and should be given. See *Lourence v West Side Irrig. Dist.* (1965) 233 CA2d 532, 538, 43 CR 889 (court of appeal criticized giving of instruction quoting from California Constitution without any explanatory instructions; court noted that jurors should be given instructions in statute's language only if they would have no difficulty understanding it without guidance from court); *Formosa v Yellow Cab Co., supra* (no error in refusal to give explanatory instructions when Vehicle Code language was clear). See also *Harris v Belton* (1968) 258 CA2d 595, 609, 65 CR 808 (trial court properly modified nearly verbatim quotations of state and federal health codes, and deleted unnecessary definitions, to clarify instruction for jury).

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### §20.27 2. Court opinions: Verbatim excerpts not recommended

It is not a good idea to take excerpts from judicial opinions and indiscriminately change them into jury instructions, because the result can be instructions that contain misleading or improper statements of the law as they apply to the specific case. *Drake v Dean* (1993) 15 CA4th 915, 924, 19 CR2d 325 (instruction quoting appellate opinion accurately was prejudicial because it was procedurally inapposite case and its use was misleading in this case). See *Fierro v International Harvester Co.* (1982) 127 CA3d 862, 867, 179 CR 923 (direct quotations from opinions rarely produce satisfactory jury instructions); *Ernest W. Hahn, Inc. v Sunshield Insulation Co.* (1977) 68 CA3d 1018, 1023, 137 CR 732 (proposed instruction containing definition of "active negligence" from California Supreme Court opinion properly refused).

Even when a statement in an opinion is made a general rule, it is drafted with the particular case in mind and may not apply in another case. *Tait v City & County of San Francisco* (1956) 143 CA2d 787, 792, 300 P2d 74. See *Reagh v San Francisco Unified Sch. Dist.* (1953) 119 CA2d 65, 73, 259 P2d 43. See also *Merritt v Reserve Ins. Co.* (1973) 34 CA3d 858, 876 n5, 110 CR 511.

When the facts of a cited case are substantially similar to facts in the case being tried, counsel may still want to use a verbatim excerpt from a judicial opinion as a basis for a proposed jury instruction. See *Kline v J. C. Penney Co.* (1957) 153 CA2d 717, 720, 314 P2d 989 (upholding use of proposed jury instruction taken verbatim from appellate opinion involving similar underlying facts; court noted that quotation in proposed jury instruction appeared applicable to substantially similar set of facts and was not indiscriminate use of excerpt from another decision). See also *Sprague v Equifax, Inc.* (1985) 166 CA3d 1012, 1049, 213 CR 69 (court held that instructions that included language from appellate opinions were proper because they were not argumentative or dangerously vague and would not mislead jury).

**JUDICIAL PERSPECTIVE:** The conference at which jury instructions are discussed, particularly non-CACI instructions, is a critical part of the trial. Counsel should be prepared to argue their position without delay, hesitation, or uncertainty.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.28 3. Miscellaneous: Form books, program materials, hornbooks, dictionaries

## §20.28 3. Miscellaneous: Form books, program materials, hornbooks, dictionaries

Sample jury instructions that include authorities can be found online, in form books, practice books, and program materials. The following is a partial list of such sources in California:

- The approved CACI instructions may be found in pdf format at the California courts' website: http://www.courtinfo.ca.gov.
- BAJI covers general instructions, substantive law instructions, and damage instructions.
- California Forms of Jury Instructions (2d ed 1996) includes general instructions and form instructions for breach of contract, business torts, claims arising from debtor-creditor relations, real property actions, and other civil topics usually not found in BAJI.

If unable to locate applicable form instructions, statutes, or court opinions, consider checking treatises, hornbooks, and dictionary definitions. These sources, however, although recognized, may not be accepted as readily by judges.

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## §20.29 D. Effect of parties' failure to comply with format and content requirements

The court may refuse proposed instructions, except those required by law, that fail to comply with statutory requirements or court rules. The California Judicial Council Advisory Committee report on changes to Cal Rules of Ct 2.1055 states that the court should note the reason for the refusal on the record. The report also states that the court would have the option of indicating the reason for refusal on the jury instruction index. Judicial Council, *Jury Instructions: Format for Proposed Instructions* (Nov. 17, 2003). On index requirement, see Cal Rules of Ct 2.1055(b)(2), discussed in §20.20. On refusal of jury instruction, see §§20.44-20.46.

Although the court ordinarily has no duty to instruct in the absence of a party's specific request, there is an exception to this rule when there is a complete failure to instruct on a material issue and a controlling legal principle. *Agarwal v Johnson* (1979) 25 C3d 932, 951, 160 CR 141, disapproved on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 88 CR2d 19; *Paverud v Niagara Mach. & Tool Works* (1987) 189 CA3d 858, 863, 234 CR 585, disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 574, 34 CR2d 607. It is therefore the duty of the court to properly instruct the jury on such controlling legal principles even if the parties submitted faulty or inadequate instructions. *Lysick v Walcom* (1968) 258 CA2d 136, 157, 65 CR 406. See §20.6.

The court also has a duty to craft its own instructions when the jury has expressed confusion and when modifying proffered instructions will not cure the problem. *Smith v David* (1981) 120 CA3d 101, 109, 176 CR 112.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/ IV. ORGANIZING JURY INSTRUCTIONS/ A. Sequence of instructions/§20.30 1. Organize instructions in logical order

## IV. ORGANIZING JURY INSTRUCTIONS

### A. Sequence of instructions

### §20.30 1. Organize instructions in logical order

Jury instructions logically fall into sequential order as well as into categories of subject matter. Therefore, the jury's understanding of the instructions may be enhanced if the instructions are given in a logical sequence.

**PRACTICE TIP:** Compile the instructions in the most logical order and ask the court to give the instructions in that order. Although the court has the final word on the sequence of instructions, a thoughtful presentation can save the court's time and persuade the judge to give the proposed instructions as compiled. See §20.31.

For example, counsel might group proposed jury instructions in the following order, rather than in sequential order of CACI numbers:

- Introductory instructions;
- Duties of the court;
- Duties of jurors;
- Evidence and witnesses;
- Burden of proof;
- Issues and substantive law (including damages); and
- Concluding instructions.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.31 2. Judge has discretion to give instructions in particular order

## §20.31 2. Judge has discretion to give instructions in particular order

The order in which the trial court reads instructions to the jury is within the court's discretion. *Ritchey v Watson* (1928) 204 C 387, 390, 268 P 345; *Nungaray v Pleasant Valley Lima Bean Growers & Warehouse Ass'n* (1956) 142 CA2d 653, 661, 300 P2d 285. In fact, when instructions are given to the jury, an instruction is generally included that tells the jury to consider the instructions as a whole—regarding each in light of all the others. See CACI 5000.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/ B. Using instructions in the alternative/§20.32 1. Prepare alternative instructions on important legal issues

## B. Using instructions in the alternative

### §20.32 1. Prepare alternative instructions on important legal issues

Many attorneys prepare alternative instructions for important points of law that can be stated in various ways without error. When submitting instructions, counsel can submit a proposed instruction that presents the most favorable view of the law for the client together with proposed backup instructions. To preserve the record for appeal, indicate on the alternative instruction the reason the less favorable instruction is submitted as an alternative to another instruction.

**EXAMPLE:** On the bottom of the first proposed alternative instruction, the following notation can be made: "Plaintiff's instruction No. 20 is submitted as an alternative to plaintiff's instruction No. 19 because [insert reason]. No. 20 is only to be given if No. 19 is rejected. Both should not be read."

Counsel may make similar notations for additional alternative instructions.

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### §20.33 2. Doctrine of invited error may bar alternative instruction

Under the doctrine of invited error, a party cannot complain to the court of appeal of an error induced by the party's own conduct. *Mary M. v City of Los Angeles* (1991) 54 C3d 202, 225, 285 CR 99. See also §§20.75-20.78 for further discussion of this doctrine. Thus, a party cannot seek reversal if the court gave an improper instruction which that party requested. *Stevens v Owens-Corning Fiberglas Corp.* (1996) 49 CA4th 1645, 57 CR2d 525 (court of appeal affirmed judgment and held that defendant was barred by the doctrine of invited error from arguing that the jury was prohibited from awarding lost pension benefits as economic damages to decedent's estate because defendant had invited the error based on the jury instructions it submitted); *Miller v Kennedy* (1987) 196 CA3d 141, 146, 241 CR 472.

The application of the doctrine of invited error can be barred if the party preparing the instructions prepares proposed alternative instructions. See *Huebotter v Follett* (1946) 27 C2d 765, 167 P2d 193; *Electronic Equip. Express, Inc. v Donald H. Seiler & Co.* (1981) 122 CA3d 834, 856, 176 CR 239 (although appellant offered an alternative instruction, appellant did not object to court's definition, so error was waived). See §20.32.

**PRACTICE TIP:** Consider submitting alternative instructions to highlight your concern about a particular point of law. Experienced trial lawyers sometimes refrain from submitting alternative instructions until the judge refuses to give their first proposed instruction at the time for settling instructions. However, this move can be risky because under CCP §607a instructions dealing with the law as disclosed by the pleadings that are submitted after the first witness is sworn are technically considered late, and the judge has discretion to refuse to give them on that ground. See §20.35. Also, if an instruction is offered late, the judge may not give the instruction the consideration it deserves. Before you delay presenting alternative instructions, try to find out whether the judge will refuse to consider proposed alternative instructions tendered at a later time. On time for submission and service of instructions generally, see §§20.34-20.36.

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## V. TIME REQUIREMENTS

### §20.34 A. Time for submission depends on subject matter of instruction

Jury instructions must be submitted to the court in accordance with the time requirements of CCP §607a or as required by local rules or the particular practices of the court. These requirements vary depending on the subject matter of the instruction:

**Issues disclosed by pleadings.** Instructions covering the law as disclosed by the pleadings must be delivered by counsel to the trial judge and served on opposing counsel *before the first witness is sworn*. CCP §607a.

**Issues developed by the evidence.** Instructions on questions of law developed by the evidence that are not disclosed by the pleadings may be delivered to counsel and served on opposing counsel *after the first witness is sworn and before commencement of argument*. CCP §607a.

**Issues raised during argument.** Instructions on issues raised during argument that were not covered by instructions given or refused may be submitted on request of counsel to the court and served on opposing counsel *following argument*. CCP §607a.

A party is entitled to instructions on presentation of slight evidence, even if the evidence is "opposed to the preponderance of the evidence." *Bernal v Richard Wolf Med. Instruments Corp.* (1990) 221 CA3d 1326, 1338, 272 CR 41, disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 574, 34 CR2d 607. See also *Bihun v AT&T Info. Sys., Inc.* (1993) 13 CA4th 976, 992, 16 CR2d 787 (party entitled to have instruction on willful suppression of evidence when only circumstantial evidence showed suppression of two relevant personnel files), disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 25 CR2d 109.

**PRACTICE TIP:** In addition to the requirements of CCP §607a, local practice varies on the time to submit jury instructions. For example:

- San Diego Ct, Div II, R 2.1.16 provides for delivery to the trial judge of all jury instructions on the "scheduled trial date."
- Los Angeles Ct R 7.9(h) requires that jury instruction requests be filed and exchanged at least 5 days before the final status conference.
- San Francisco Ct R 6.4 requires counsel to deliver proposed instructions to the judge on the day of assignment to trial department. Within 2 court days thereafter, counsel must meet and confer and notify judge which instructions are agreed on.

**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 and not a court day.

**PRACTICE TIP:** Become familiar with the individual practices and policies of the trial judge on the time to submit instructions because individual practices vary. Check with the court clerk to learn when the judge trying the case wants proposed instructions submitted. For additional ideas, see discussion of chambers conferences in §§6.2-6.4.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.35 B. Late submission of jury instructions within court's discretion

### §20.35 B. Late submission of jury instructions within court's discretion

The court has discretion to give or refuse late jury instructions despite the time requirements of CCP §607a. See *Wilson v Gilbert* (1972) 25 CA3d 607, 613, 102 CR 31; *Young v Carlson* (1954) 128 CA2d 743, 746, 276 P2d 23.

Nevertheless, try to submit proposed jury instructions on time and not rely on the court to exercise this discretion. §§20.44-20.46.

**JUDICIAL PERSPECTIVE:** Obviously, there can be certain unforeseen circumstances that require late submission of jury instructions and most experienced judges will recognize such cases and allow them when appropriate.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.36 C. Serving proposed instructions

## §20.36 C. Serving proposed instructions

Proper service of jury instructions is usually accomplished by delivering a copy of the proposed instructions to opposing counsel at the same time they are delivered to the trial judge, either in chambers or in court.

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## VI. COURT'S RESPONSIBILITY ON JURY INSTRUCTIONS

### A. When sua sponte instructions are required

### §20.37 1. Sua sponte defined

Instructions given on the court's own motion are called sua sponte instructions. In a civil case, the court ordinarily has no duty to give an instruction on a subject if none is proposed by the parties. *Pool v City of Oakland* (1986) 42 C3d 1051, 1066, 232 CR 528; *Willden v Washington Nat'l Ins. Co.* (1976) 18 C3d 631, 636, 135 CR 69. The court's duty to instruct sua sponte arises only if the parties fail to provide instructions on "controlling legal principles" that are raised by the pleadings. *Herbert v Lankershim* (1937) 9 C2d 409, 482, 71 P2d 220; *Paverud v Niagara Mach. & Tool Works* (1987) 189 CA3d 858, 863, 234 CR 585, disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 574, 34 CR2d 607. See §20.6.

If the parties fail to provide instructions on "controlling legal principles," the court must instruct sua sponte on these issues. The court's failure to do so may be reversible error. *Paverud v Niagra Mach. & Tool Works, supra* (reversible error when court failed to instruct on superseding cause).

**JUDICIAL PERSPECTIVE:** Naturally judges prefer that counsel provide the instructions; however, most courts are ready to step forward and give instructions when necessary.

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### §20.38 2. Court has discretion to instruct

On its own motion, a court may instruct the jury on all matters of law necessary for the jurors to arrive at a verdict and can add any additional instructions to those proposed. CCP §§607a, 608; *Alwood v City of Los Angeles* (1956) 139 CA2d 49, 65, 293 P2d 69; *Jennings v Arata* (1948) 83 CA2d 143, 146, 188 P2d 298. The court is also free to modify jury instructions. See *Byrum v Brand* (1990) 219 CA3d 926, 939, 268 CR 609.

**PRACTICE TIP:** Do not rely on the court to give an instruction that has not been requested. A party who fails to request specific proper instructions is precluded on appeal from complaining about the trial court's failure to instruct on that issue unless a controlling legal principle was involved. See *Paverud v Niagara Mach. & Tool Works* (1987) 189 CA3d 858, 863, 234 CR 585 (court has no duty to instruct jury without specific request to do so unless counsel completely failed to instruct on material issue and on controlling legal principle), disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 574, 34 CR2d 607.

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## §20.39 3. Form of sua sponte instructions

There are no statutory rules for the form that instructions proposed by the court (sua sponte instructions) should take, except that, on a party's request, the court must put all court-proposed, or sua sponte, instructions in writing. CCP §608.

Even without a request, the court should put its instructions in writing both for counsel's use and benefit and for the court's own use in giving instructions to the jurors. See *People v Danielson* (1992) 3 C4th 691, 13 CR2d 1, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409; *Howarth v Maroney* (1964) 228 CA2d 116, 126, 39 CR 260 (criticizing court's practice of giving extemporaneous oral instructions).

The language and applicability of the sua sponte instructions should be discussed among counsel and the judge. This discussion usually occurs at the chambers conference. The court decides whether to redraft the instructions, modify them, or keep them as written. The instructions then become part of the total package of instructions the court will give the jury.

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## B. Correcting or modifying erroneous instructions

### §20.40 1. Generally no duty to modify or correct

The trial court generally has no duty to modify or correct erroneous, misleading, or incomplete instructions as long as the jury is properly instructed on the law. See *Orient Handel v United States Fid. & Guar. Co.* (1987) 192 CA3d 684, 698, 237 CR 667 (citing *Wank v Richman & Garrett* (1985) 165 CA3d 1103, 1113, 211 CR 919). See *Fleming v Safeco Ins. Co.* (1984) 160 CA3d 31, 40, 206 CR 313 (instruction requested was incomplete and misleading; trial court had no duty to give instruction or modify it on its own motion).

The court has discretion to either reject defective instructions (see *Rogers v County of Los Angeles* (1974) 39 CA3d 857, 862, 114 CR 540) or to correct or modify them (see *Byrum v Brand* (1990) 219 CA3d 926, 939, 268 CR 609. A party proposing instructions has the responsibility to see that those instructions are correct. See *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 335, 145 CR 47.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.41 2. Exception

## §20.41 2. Exception

The court has a duty to correct instructions in the following circumstances:

- When the parties propose incomplete jury instructions;
- When the court does not propose its own instructions; and
- When the jury will not be instructed on controlling legal principles if the court does not correct or modify the proposed instructions.

*Herbert v Lankershim* (1937) 9 C2d 409, 482, 71 P2d 220. See *Smith v David* (1981) 120 CA3d 101, 109, 176 CR 112 (trial court had duty to modify proffered instructions when jury asked questions during their deliberations that indicated confusion, and minor modifications of instructions would have made them usable). See also *Kelly v Trans Globe Travel Bureau, Inc.* (1976) 60 CA3d 195, 204, 131 CR 488 (trial court had duty to give proposed instruction or to modify it by eliminating surplusage).

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### C. Hearing and ruling on instructions

### §20.42 1. Court's duties at chambers conference before final argument

Under CCP §607a, the trial court, if requested by counsel, must accomplish the following duties regarding jury instructions before the final argument begins:

- Decide which proposed instructions to give, refuse, or modify;
- Decide which instructions to give in addition to those proposed; and
- Advise counsel of all instructions that will be given.

See also CCP §609.

These duties are generally carried out at the chambers conference, which is held outside the jury's presence to settle the instructions before final argument. See §6.2. At this conference, counsel and the judge discuss which instructions to give and how they should be phrased. Ultimately, the judge decides which instructions to give, refuse, or modify.

**NOTE:** Before the conference, all counsel should meet and review their instructions and decide which instructions they agree on. If this is done, the chambers conference can proceed more efficiently because the court can focus primarily on the instructions on which counsel disagree.

Counsel must be wary, however, about agreeing (often at the judge's request) to modify his or her proposed instructions or to giving instructions proposed by the adverse party. If counsel agrees, this may constitute a waiver of the right to argue error on appeal. See *Orient Handel v United States Fid. & Guar. Co.* (1987) 192 CA3d 684, 699, 237 CR 667 (aggrieved party must request proper instruction in order to complain of failure to instruct on particular issue.) See also *Bernal v Richard Wolf Med. Instruments Corp.* (1990) 221 CA3d 1326, 1337, 272 CR 41 (oral objection and orally proposed modification to jury instructions preserve error for appeal), disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 574, 34 CR2d 607.

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### §20.43 2. Court reporter should be present at chambers conference

Request that a court reporter be present at the chambers conference, although it is not required that one attend. Then, if any question arises on appeal as to what argument counsel presented to the court regarding particular instructions, the record is preserved. The court usually determines at this conference which verdict and special finding forms, if any, will be submitted to the jury.

Some trial judges refuse to allow lengthy conferences on instructions to be recorded. If this occurs, request at the close of the conference that counsel be permitted to state their objections on the record and file any proposed modifications or alternative instructions with the clerk. In the unlikely event this option is not available, prepare and file a short formal pleading noting specific objections and attaching any proposed, revised, or alternative instructions. If an inadequate record is made and counsel moves forward, counsel may find that significant claims of instructional error are deemed irrelevant by an appellate court. For further discussion of protecting the record, see §20.58.

Very few courts subject their reporters to the burden of reporting the often spirited and sometimes informal colloquy of a chambers discussion. It is essential, however, that counsel note their particular concerns on the record later.

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## §20.44 3. Court's refusal of instruction

A judge may refuse to give proposed instructions for lateness, for defects in format (see §20.29), or for any other reason unless the proposed instruction is "required by law" (*i.e.,* an instruction on a controlling legal principle; see §20.61).

If an instruction is required by law, the court cannot refuse it even if it is late or has format defects. See *Ng v Hudson* (1977) 75 CA3d 250, 257, 142 CR 69 (trial judge entered minute order refusing plaintiff's oral request for BAJI instruction; court of appeal held refusal was prejudicial error necessitating reversal because refusal of instruction meant jury would not be instructed on material issue), disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 574, 34 CR2d 607.

The former requirement that the judge endorse the reason for refusal on each refused instruction has been repealed. See Cal Rules of Ct 2.1055. Instead, the trial court may indicate the reason for the ruling on the index submitted with all proposed jury instructions (see Cal Rules of Ct 2.1055(b)) or may note the information on the record. Judicial Council, *Jury Instructions: Format for Proposed Instructions* (Nov. 17, 2003) (endorsement requirement was unduly burdensome; better and more common practice is to note the information on the record; court has option of indicating its ruling on the index).

**PRACTICE TIP:** Counsel should monitor the disposition of proposed instructions to make certain the judge provides a reason for the refusal on the record or in the index, to ensure that the appellate record is accurate and complete.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.45 a. Court need not endorse reason for refusal on instruction

## §20.45 a. Court need not endorse reason for refusal on instruction

The judge is not required to endorse on the proposed instruction the reason for refusing the instruction. See Cal Rules of Ct 2.1055. See §20.29.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.46 b. Consequences of court's failure to endorse

### §20.46 b. Consequences of court's failure to endorse

Although the judge is not required to endorse on the proposed instruction the reason for refusing the instruction (see Cal Rules of Ct 2.1055; §20.29), to ensure that the appellate record is accurate and complete, counsel should monitor the disposition of proposed instructions to make certain the judge provides a reason for the refusal.

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## D. Instructing jury during trial

### §20.47 1. Timing within court's discretion

Traditionally, courts have given instructions to the jury after final argument. CCP §607(9). Lately, however, an increasing number of judges give some instructions earlier in the trial or at various stages during the trial. See Los Angeles Ct R 8.51 (gives counsel option of having instructions read at different times during trial).

Doing so is called "preinstructing" the jury and is within the trial judge's discretion. See *McShane v Cleaver* (1966) 247 CA2d 260, 265, 55 CR 427 (court impliedly sanctioned preinstruction before opening statement in absence of objection that it violates CCP §607(9)). Compare *McShane* with *Kelly v Trans Globe Travel Bureau, Inc.* (1976) 60 CA3d 195, 203, 131 CR 488 (appellate court found trial judge's preinstruction was error because it misled jury on applicable legal principles; but court also noted that preinstruction during voir dire may be desirable if it is fair and accurate).

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## §20.48 2. Before deliberations

"Preinstruction" has been permitted during voir dire and throughout trial as long as the instructions are not prejudicial. For example, some judges give selective instructions of a general nature at the beginning of trial before the presentation of any evidence. These may include, *e.g.,* instructions on the judge's role, the jury's role, issues to be determined, methods of judging witnesses' credibility, types of evidence (*e.g.,* circumstantial or direct), the significance of counsel's statements, and the effect of court rulings. See *McShane v Cleaver* (1966) 247 CA2d 260, 265, 55 CR 427.

**PRACTICE TIP:** Before trial begins, determine whether the trial judge plans to preinstruct and consider whether to ask for or to oppose preinstruction. Preinstructing the jury on the law of the case *before* evidence is presented (and possibly during the trial) can be prejudicial and objectionable. Before evidence is introduced, the court and counsel do not ordinarily know what issues will go to the jury.

In addition, if instructions are given on various theories, the jury may give undue weight to evidence that is admitted afterwards. When confronted with this situation, object if preinstruction may be prejudicial. Failure to make a timely objection waives the right to challenge the propriety of giving such instructions on appeal. *Westover v City of Los Angeles* (1942) 20 C2d 635, 639, 128 P2d 350 (judge instructed jury on certain principles of law in general terms before commencement of trial, believing that clarification of law before hearing evidence would be helpful to them). See *Linder v Cooley* (1963) 216 CA2d 390, 394, 31 CR 271.

**PRACTICE TIP:** Ascertain whether there are any local court rules or policies on preinstruction. See Los Angeles Ct R 8.51 for list of issues permissible for preinstruction and rules on when preinstruction can occur (*i.e.,* instructions, except concluding instructions, are permitted before final argument begins).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.49 3. During trial

## §20.49 3. During trial

Some judges give selected instructions to the jury as the need arises *during* trial. For example, before deposition testimony is presented, some courts instruct the jurors (1) on the nature of a deposition and (2) that they must consider deposition testimony as if it had been given in court. When evidence is admitted for a limited purpose or against a particular party, the court may also instruct the jury at the time it is admitted.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.50 4. Immediately before final argument

## §20.50 4. Immediately before final argument

Some judges prefer to instruct before final argument. If a judge is inclined to do this, defense counsel should ensure that the judge saves some instructions for after plaintiff's concluding argument. Otherwise, plaintiff's concluding argument will be the last thing that the jury hears before deliberations.

On preinstructing in a criminal case, see *People v Valenzuela* (1977) 76 CA3d 218, 142 CR 655; *People v Chung* (1997) 57 CA4th 755, 758, 67 CR2d 337.

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## §20.51 5. Case examples of reversible error by court relating to jury instructions

**EXAMPLE 1:** Court's refusal to permit rereading of *all* instructions on negligence was reversible error on appeal when court only permitted rereading of some instructions. *Davis v Erickson* (1960) 53 C2d 860, 863, 3 CR 567.

**EXAMPLE 2:** Question from jury indicated confusion on two issues for which no instructions had been offered or given; court's failure to give appropriate instructions on these issues after learning of confusion was reversible error. *Bartosh v Banning* (1967) 251 CA2d 378, 387, 59 CR 382.

**EXAMPLE 3:** Court's refusal to give instruction proposed by defendant, which would have responded to question by jury, and court's subsequent decision to reread an instruction that had already been given and that provided no help constituted reversible error because court failed to provide legal guidance on the confusing issue. *Sesler v Ghumman* (1990) 219 CA3d 218, 227, 268 CR 70. But see §20.37 on court's ordinarily having no duty to give an instruction if none is proposed by a party.

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## VII. REINSTRUCTION OF JURY DURING DELIBERATIONS

### §20.52 A. Permitted only if requested by jury

If the jurors disagree during deliberations on any part of the testimony or wish to be informed on any point of law in the case, they may request to be brought into court and provided with additional information. CCP §614. Such information may include rereading instructions or testimony or reading newly proposed instructions.

Strict compliance with the mandatory language of CCP §614 is required, and failure to comply with the jury's request to reread instructions is reversible error. *Davis v Erickson* (1960) 53 C2d 860, 3 CR 567 (jury's request for rereading of all instructions on negligence proper in negligence action; court's failure to do so was prejudicial error); *Asplund v Driskell* (1964) 225 CA2d 705, 712, 37 CR 652 (court accurately interpreted jury's request to reread certain instructions on negligence and proximate cause while refusing to reread all general instructions on negligence).

The court must provide additional instructions if the jury indicates confusion on the law. *Smith v David* (1981) 120 CA3d 101, 109, 176 CR 112; *Kelly v Trans Globe Travel Bureau, Inc.* (1976) 60 CA3d 195, 204, 131 CR 488.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.53 1. Meet with judge before reinstruction

## §20.53 1. Meet with judge before reinstruction

When the jury asks for information on a point of law during its deliberations, first meet with the judge out of the jury's presence to learn precisely how the judge will respond.

**PRACTICE TIP:** If you have any objections, ask the judge to allow you to state them on the record out of the jury's presence rather than requiring you to object in front of the jury. Also object to protect the record, if (a) the judge deviates from the instructions that the judge stated he or she would give or (b) what is said or presented to the jury is prejudicial. A court need not respond to a juror's question during deliberations that would require the court to develop new instructions if the question involves philosophical, moral, or irrelevant issues. *Ashcraft v King* (1991) 228 CA3d 604, 617, 278 CR 900.

After the jurors are brought into court, they must be given the requested information in the presence of the parties or counsel or after notice to them. The judge need not be present while testimony previously received into evidence is read to the jury. CCP §614.5.

**JUDICIAL PERSPECTIVE:** Often a conference with counsel outside the presence of the jury is sufficient to modify or clarify the troubling language, thus avoiding the need to reassemble the jurors in the courtroom.

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## §20.54 2. Court can give omitted instructions sua sponte

A party is not entitled to have jury instructions reread that are not requested by the jury. *Gray v Wagner* (1969) 272 CA2d 671, 77 CR 608. If an instruction was inadvertently omitted, a court on its own motion may recall the jury to give that instruction. See *Weirum v RKO Gen., Inc.* (1975) 15 C3d 40, 50, 123 CR 468.

To avoid the danger of overemphasizing such an instruction, the court may (a) admonish the jurors not to attach any particular emphasis to the fact that it is reading an instruction that was inadvertently omitted in the initial reading of the instructions, or (b) reread all the instructions. *Weirum v RKO Gen., Inc., supra*.

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## §20.55 B. Court can assist in jury deliberations

In breaking a jury deadlock, the court may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence and with an open mind, and ask the jury whether it has specific concerns that, if resolved, might assist them in reaching a verdict. Cal Rules of Ct 2.1036(a). If the court finds that further action might assist the jury, the judge may give additional instructions or clarify previous instructions. Cal Rules of Ct 2.1036(b). See also *People v Guilmette* (1991) 1 CA4th 1534, 1542, 2 CR2d 750 (when jury requests reinstruction, court may, but need not, provide clarifying instructions); *People v Thomas* (1991) 231 CA3d 299, 282 CR 258 (court may require jury to consider whether it needs further instruction). Through reinstruction, the court can amplify certain issues and define the terms in key instructions. The court may also assist the jury at impasse by permitting counsel to make additional closing arguments. Cal Rules of Ct 2.1036(b)(3).

When a jury is unable to agree on the first issue of a special verdict, the court may ask the jury to skip over that question and consider the second issue, if that issue could be dispositive of the entire action. *Santiago v Firestone Tire & Rubber Co.* (1990) 224 CA3d 1318, 1335, 274 CR 576.

On the jury's request, the court must send a copy of written instructions into the jury room. CCP §612.5; see §20.56.

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## §20.56 C. Counsel's preparation of jury instructions to go to jury room: "Clean" copy preferred

The court is required to tell the jury at the time they retire for deliberations that a written copy of all jury instructions is available. CCP §612.5. The court has discretion to give the jury a written copy of the written instructions at any time; however, the court *must* supply a copy of the written instructions if the jury requests them.

When a copy of written instructions will be sent to the jury room, make certain that no instruction contains the case number, title, citation of authorities, history, or proposing party's name. In addition, stricken portions should be totally obliterated and additions completely legible. See Los Angeles Ct R 8.52. It is preferable that the jury sees clean copies of the instructions without obvious deletions or additions. If possible, have new copies of the instructions printed out if the jury insists on seeing them. On making copies for each juror, see §21.31.

**PRACTICE TIP:** If one instruction is to be sent to the jury room, request that all instructions be sent to prevent undue emphasis on some instructions. If fewer than all instructions are sent into the jury room, the record should show which ones were sent.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/ VIII. PREPARING OBJECTIONS TO OPPONENT'S JURY INSTRUCTIONS AND THOSE PREPARED BY THE COURT/§20.57 A. When and how to object

## VIII. PREPARING OBJECTIONS TO OPPONENT'S JURY INSTRUCTIONS AND THOSE PREPARED BY THE COURT

### §20.57 A. When and how to object

Carefully examine the instructions proposed by opposing counsel as well as those the court intends to give on its own motion. Although many of these instructions will be unobjectionable, others will be contrary to the client's interest. If possible, prepare an objection to each such instruction. Objections should be made in writing if time permits, but objections are generally made orally because of time constraints.

The most common objections to improper instructions are discussed in §§20.60-20.70.

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## §20.58 B. Protecting the record

A complete record is necessary before the instructional error will be considered on appeal. See *Null v City of Los Angeles* (1988) 206 CA3d 1528, 1534, 254 CR 492. Appellant has the burden of presenting a sufficiently complete record to establish that any alleged errors were not invited by appellant. See *Gulliford v Pierce County* (9th Cir 1998) 136 F3d 1345, 1348 (holding objection to jury instruction, by proposing legally accurate jury instruction and orally stating objection at trial, adequately preserves record on appeal).

Be prepared to object to every instruction that counsel does not agree with and to state precisely the reason for the objection despite the protection of CCP §647. See §§20.73-20.74 on the automatic exception rule under §647. If the instruction fails to properly state the controlling law, is incomplete, or needs to be qualified or modified, offer a correct instruction to make sure that all grounds of error are preserved.

Counsel must preserve the trial record by ensuring that:

- The proposed instructions are proper;
- The form requirements are met;
- The party originating or proposing the instruction is documented in the record; and
- The disposition of each instruction (given, refused, modified, or withdrawn) is accurately reflected, including all modifications that were made, and who requested them. See form instructions in §§20.82-20.83.

**CAUTION:** In *Phillips v Noble* (1958) 50 C2d 163, 168, 323 P2d 385, plaintiff claimed court modifications of two instructions rendered them uncertain and erroneous, but the record did not include the instructions in the form requested by plaintiff. The supreme court held that plaintiff, as appellant, had failed to satisfy the burden of presenting a sufficiently complete record to establish that he had not invited the error.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.59 C. Proper documentation of error

## §20.59 C. Proper documentation of error

Document on the record other aspects of the trial that bear on the issue of reversible error. For example, find out:

- Whether the jury came back for reinstruction. If so, request that the instructions given to the jury be preserved. Also, confirm how often the jurors came back for reinstruction, what they asked about, and whether they were confused. This can be done orally. Check with the clerk to see how minutes of jury deliberations are created, get a copy of the minutes, and put them into the record. In addition, ask the court to poll the jury on each issue.
- The length of the jurors' deliberations and their final split on the verdict. The closer the case, the more likely a court of appeal will find that an error in instructions was reversible. A bare minimum verdict (*e.g.,* 9-3 or 6-2) is evidence that error in jury instruction was significant. *LeMons v Regents of Univ. of Cal.* (1978) 21 C3d 869, 876, 148 CR 355; *Robinson v Cable* (1961) 55 C2d 425, 428, 11 CR 377.

After getting the answers to these questions, make sure this information is in the record.

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## D. Objectionable instructions

### §20.60 1. Inaccurate statements of law

Instructions that do not accurately state the substantive law must be objected to and generally constitute grounds for reversal as long as they create prejudice. *Sexton v Brooks* (1952) 39 C2d 153, 245 P2d 496; *Osborn v Mission Ready Mix* (1990) 224 CA3d 104, 115, 273 CR 457. Modifications that render BAJI instructions less confusing under the facts of the case are proper. *Martinez v Vintage Petroleum* (1998) 68 CA4th 695, 702, 80 CR2d 449. It may even be error to deny modification in a proper case. *Gutierrez v Cassiar Mining Corp.* (1998) 64 CA4th 148, 155, 75 CR2d 132.

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## 2. Argumentative instructions

### §20.61 a. Defined

It is error for the court to give an argumentative instruction. *Slayton v Wright* (1969) 271 CA2d 219, 238, 76 CR 494. An instruction is argumentative if it goes too elaborately into the facts relied on by a party instead of stating rules of law. *Slayton v Wright, supra*.

An argumentative instruction is improper because it unduly emphasizes a portion of the evidence and in effect puts the court in the position of making an argument to the jury. In addition, it misleads the jury. If the court mentions certain testimonial facts, the jury may believe that the court considers them to be important or true. *Slayton v Wright, supra*. See also *Wank v Richman & Garrett* (1985) 165 CA3d 1103, 1113, 211 CR 919 (argumentative, incomplete, and slanted instructions properly rejected).

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### §20.62 b. Instruction should state rules of law, not argue evidence

In the instruction, state the rules of law in general terms, and do not elaborate on matters of evidence. *Slayton v Wright* (1969) 271 CA2d 219, 76 CR 494; *Fibreboard Paper Prods. Corp. v East Bay Union of Machinists* (1964) 227 CA2d 675, 718, 39 CR 64.

The court should not require a party to rely on abstract generalities in presenting its legal theory of the case to the jury but should instruct the jury on vital issues in terms that relate to the case before it. *Sesler v Ghumman* (1990) 219 CA3d 218, 225, 268 CR 70 (court of appeal held that trial court committed reversible error when it refused to give defendant's specific instruction that defined duty in context of facts in the case and instead gave more general BAJI instruction). Giving an instruction embodying a general rule does not justify refusing a more specific instruction that applies the rule to the particular circumstances of the case. *Sesler v Ghumman, supra*. On the court's generally having no duty to modify or correct instructions, see §20.37.

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### 3. Repetitive instructions

### §20.63 a. Defined

It is error to give an instruction that unduly emphasizes issues, theories, or defenses "by repetition or by singling them out or making them unduly prominent." *Dodge v San Diego Elec. Ry.* (1949) 92 CA2d 759, 764, 208 P2d 37. See *Taha v Finegold* (1947) 81 CA2d 536, 545, 184 P2d 533 (16 instructions to jury on duties of plaintiff; only 3 instructions on duties of defendant). See also *Smith v Shankman* (1962) 208 CA2d 177, 187, 25 CR 195.

The trial court can refuse to give a proposed instruction if it merely repeats other instructions. *Deaile v General Tel. Co.* (1974) 40 CA3d 841, 853, 115 CR 582. Hearing a series of instructions on the same point of law, with slight modifications, can prejudice the jury, which may conclude that the court considers this particular point to be of special importance.

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### §20.64 b. Reversible error results only if instruction caused prejudice

Giving repetitious instructions constitutes reversible error only if the instructions unduly emphasize issues, theories, or defenses. *Fibreboard Paper Prods. Corp. v East Bay Union of Machinists* (1964) 227 CA2d 675, 39 CR 64. By itself, repetition of a proposed instruction rarely constitutes reversible error. *Stone v Foster* (1980) 106 CA3d 334, 350, 164 CR 901. See *Sprague v Equifax, Inc.* (1985) 166 CA3d 1012, 1046, 213 CR 69 (appellant contended that quantity of instructions on conspiracy overemphasized that theory; court of appeal held no error if instructions are consistent with case's length and complexity, but cautioned jury from inferring that emphasis on conspiracy theory was intended). Compare *Sprague* with *Taha v Finegold* (1947) 81 CA2d 536, 544, 184 P2d 533 (court found prejudicial error based on cumulative effect of erroneous instructions—giving formula instructions, overemphasizing plaintiff's duties, and repeating certain instructions).

On the court's generally having no duty to modify or correct instructions, see §§20.40-20.41. On submitting alternative instructions, see §§20.32-20.33.

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### 4. Formula instructions

### §20.65 a. Defined

A formula instruction directs the jury to return a verdict in favor of a party if the jury decides that certain facts are true. Such an instruction often purports to state the facts applicable to the disposition of a particular matter followed by a statement such as the following: "If you find the stated facts to be true (or to exist), then you will find for plaintiff (or defendant)."

For examples of formula instructions, see *Murrell v State ex rel Dep't of Pub. Works* (1975) 47 CA3d 264, 268 n2, 120 CR 812 (trial court did not err in rejecting both formula instructions). See also 7 Witkin, California Procedure, *Trial* §313 (5th ed 2008).

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### §20.66 b. Formula instructions criticized

Courts have frequently criticized the use of formula instructions. See *Fibreboard Paper Prods. Corp. v East Bay Union of Machinists* (1964) 227 CA2d 675, 719, 39 CR 64; *Tice v Pacific Elec. Ry.* (1939) 36 CA2d 66, 71, 96 P2d 1022. Formula instructions may unduly emphasize a party's case, and incomplete formula instructions often mislead the jury. *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 58, 118 CR 184. Giving such instructions often amounts to an argument rather than a fair discussion of the law. *Dodge v San Diego Elec. Ry.* (1949) 92 CA2d 759, 764, 208 P2d 37. Such instructions are also hazardous because of their possible effect on the jury. They invite an affirmative (*i.e.,* favorable) response to the formula, in much the same way as a leading question suggests the answer desired by the questioner.

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### §20.67 c. Exception: Formula instruction permitted if certain criteria satisfied

Formula instructions do not constitute prejudicial error if they state all the essential legal elements involved in a case or if other specific instructions cover elements omitted from the formula instruction. Compare *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 58, 118 CR 184 (no reversal, because omitted element covered by another instruction (see also *Godfrey v Steinpress* (1982) 128 CA3d 154, 180, 180 CR 95)), with *Hubbard v Calvin* (1978) 83 CA3d 529, 534, 147 CR 905 (court found reversible error because formula instruction was based on incorrect premise, even though correct instruction was given in another part of instructions).

To determine whether giving an alleged formula instruction constitutes prejudicial error, the proper test is whether the instruction states all legal elements essential to a recovery and whether the omitted elements are covered by other, specific instructions. *Bertero v National Gen. Corp., supra*. As a method of implementing a discovery issues sanction under former CCP §2023(b)(2) (now CCP §2023.030(b)), the court may properly use instructions directing that a particular fact or issue has been demonstrated. *Vallbona v Springer* (1996) 43 CA4th 1525, 1548, 51 CR2d 311.

For further discussion, see 7 Witkin, California Procedure, *Trial* §§313-314 (5th ed 2008).

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## §20.68 5. Conflicting or contradictory instructions

It is error for the court to give conflicting or contradictory instructions on a material point because it cannot be determined which instruction the jury followed in reaching its decision. *Lewis v Franklin* (1958) 161 CA2d 177, 185, 326 P2d 625. Giving conflicting instructions often warrants reversal. See *Westberg v Willde* (1939) 14 C2d 360, 371, 94 P2d 590.

If an erroneous instruction is given, it generally cannot be cured by giving a correct instruction if the result is a clear conflict in the instructions. Under this situation, it is impossible to know which instruction the jury followed to reach a verdict. *Francis v City & County of San Francisco* (1955) 44 C2d 335, 341, 282 P2d 496; *Hargrave v Winquist* (1982) 134 CA3d 916, 926, 185 CR 30. See *Ferguson v Nakahara* (1941) 43 CA2d 435, 442, 110 P2d 1091 (prejudicial effect of instruction containing principle of law that is materially incorrect ordinarily not cured by another instruction that correctly states law).

**NOTE:** It is not error for the court to give correct instructions on inconsistent causes of action or defenses even though they are in conflict. See *Petersen v Rieschel* (1953) 115 CA2d 758, 765, 252 P2d 986.

For further discussion, see 7 Witkin, California Procedure, *Trial* §308 (5th ed 2008). On the court's generally having no duty to correct or modify instructions, see §20.40.

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### §20.69 6. Irrelevant instructions

A jury instruction, even if it is a correct statement of the law, may still be improper if it is unrelated to the issues raised by the pleadings or unsupported by the evidence. *Levy-Zentner Co. v Southern Pac. Transp. Co.* (1977) 74 CA3d 762, 783, 142 CR 1; *Harpst v Kirkpatrick* (1972) 26 CA3d 482, 487, 102 CR 621.

Jury instruction is unwarranted if, as a matter of law, not even slight or inconclusive evidence supports it. *Wilkinson v Bayshore Lumber Co.* (1986) 182 CA3d 594, 227 CR 327. Such an instruction is likely to mislead the jury and constitute prejudicial error. *Traxler v Varady* (1993) 12 CA4th 1321, 1328, 16 CR2d 297 (court properly rejected instruction as overbroad because party offered instruction citing several regulations as basis for negligence per se instruction but only two regulations were applicable); *Dierks v Mitsubishi Motors Corp.* (1989) 208 CA3d 352, 256 CR 230 (trial court properly denied requested jury instructions on strict liability and negligence when all of plaintiff's evidence and argument had been solely on design defect theories); *DeGeorge v Crimmins* (1967) 254 CA2d 544, 547, 62 CR 394. See also 7 Witkin, California Procedure, *Trial* §307 (5th ed 2008).

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## §20.70 7. Fact-assuming instructions

A fact-assuming instruction assumes as true a fact introduced in the trial on which there is conflicting or contrary evidence. Sometimes this instruction takes the form of the court's telling the jury that a certain fact has been established.

Giving such an instruction is improper because it is the jury's responsibility to determine the facts of the case, not the court's. *Clement v State Reclamation Bd.* (1950) 35 C2d 628, 644, 220 P2d 897 (error to instruct jury as a matter of law on question of fact when there was conflicting evidence). However, if facts are admitted or uncontradicted and the jury can draw only one conclusion from the evidence, it is not error to instruct the jury on those facts. *Smith v American Sur. Co.* (1957) 148 CA2d 131, 134, 306 P2d 489 (agency instruction); *Heple v Kluge* (1952) 114 CA2d 473, 481, 250 P2d 694 (same).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/ IX. CORRECTING INSTRUCTIONAL ERRORS DURING TRIAL/§20.71 A. Erroneous instruction can be corrected by subsequently given correct instruction

## IX. CORRECTING INSTRUCTIONAL ERRORS DURING TRIAL

### §20.71 A. Erroneous instruction can be corrected by subsequently given correct instruction

Counsel can correct an error caused by an incorrect or misleading instruction by a subsequent correction of the instruction as long as the correction establishes for the jury that it must disregard the former incorrect instruction. *Slayton v Wright* (1969) 271 CA2d 219, 238, 76 CR 494. The error may not be prejudicial if the court gives other correct precautionary instructions. *People v Morris* (1988) 46 C3d 1, 41, 249 CR 119, disapproved on other grounds in *In re Sassounian* (1995) 9 C4th 535, 543 n5, 37 CR2d 446. See also *Jones v Toyota Motor Co.* (1988) 198 CA3d 364, 371, 243 CR 611 (quoting *LeMons v Regents of Univ. of Cal.* (1978) 21 C3d 869, 148 CR 355, and holding error harmless).

**EXAMPLE:** Where the court inadvertently omitted part of a jury instruction while reading it to the jury, it properly rectified the problem by pointing out the written instruction to the jury and telling the jury to review the instruction carefully. *Jensen v BMW of N. Am., Inc.* (1995) 35 CA4th 112, 41 CR2d 295.

If, however, the subsequently given correct instruction produces a clear conflict and it cannot be determined which instruction the jury followed in reaching its verdict, the incorrect instruction cannot be cured and may constitute reversible error. *Slayton v Wright, supra*.

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## §20.72 B. Incomplete or incorrect instruction can be cured by another instruction

Jury instructions must be considered in their entirety. *Douglas v Southern Pac. Co.* (1928) 203 C 390, 396, 264 P 237. Even though a selected passage of an instruction may be subject to criticism, if the instructions in their entirety state the law of the case clearly and fairly, they are unobjectionable as a whole. For example, incorrect instructions may be cured in the following manner:

- An error in one instruction might be cured by another instruction when it does not result in a clear conflict on a material point (*i.e.,* a correct specific instruction on a subject will often cure an incorrect general instruction not expressly dealing with the subject unless it is clearly shown that the jury was misled). See *Sebrell v Los Angeles Ry.* (1948) 31 C2d 813, 817, 192 P2d 898; *Saltzen v Associated Oil Co.* (1926) 198 C 157, 161, 244 P 338; *Dabis v San Francisco Redev. Agency* (1975) 50 CA3d 704, 709, 122 CR 800.
- If a single instruction omits an essential element but is otherwise correct, the omission will ordinarily be cured if another instruction provides the omitted element. *Miller v Schell* (1957) 149 CA2d 346, 351, 308 P2d 445; see *Ferguson v Nakahara* (1941) 43 CA2d 435, 443, 110 P2d 1091.

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## X. INSTRUCTIONAL ERROR ON APPEAL

### A. Automatic exceptions and objections

### §20.73 1. Defined

A party is protected by CCP §647 if the party fails to object to a proposed erroneous instruction or fails to propose a correct instruction during trial. Under §647, the party will be permitted to raise that error for the first time on appeal. This is referred to as an "automatic exception or objection."

An erroneous instruction is considered to be excepted to, and a specific objection is not required to preserve the point on appeal. *Mock v Michigan Millers Mut. Ins. Co.* (1992) 4 CA4th 306, 334, 5 CR2d 594; *Continental Airlines v McDonnell Douglas Corp.* (1989) 216 CA3d 388, 406, 264 CR 779. See *Beck v Kessler* (1965) 235 CA2d 331, 334, 45 CR 237. This is true even when the party claiming on appeal that an instruction was erroneous had not proposed a correct instruction on the same subject. *Mock v Michigan Millers Mut. Ins. Co., supra*; *Enis v Specialty Auto Sales* (1978) 83 CA3d 928, 939, 148 CR 255.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.74 2. Limitations on CCP §647

### §20.74 2. Limitations on CCP §647

Despite the broad language of CCP §647, which suggests that instructional errors are never waived, appellate courts have held that several types of instructional error *can* be waived. For example, a party *must* state a specific objection if an instruction as originally proposed or after modification is substantively correct but is too general, unclear, or incomplete. *People ex rel Dep't of Transp. v Salami* (1991) 2 CA4th 37, 42 n2, 2 CR2d 833; *United States Roofing, Inc. v Credit Alliance Corp.* (1991) 228 CA3d 1431, 1446, 279 CR 533.

When the instruction needs additional language or qualifying language, counsel must:

- Object despite the language of §647; otherwise, the error will be deemed waived. See *Agarwal v Johnson* (1979) 25 C3d 932, 948, 160 CR 141, disapproved on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 88 CR2d 19; *Delia S. v Torres* (1982) 134 CA3d 471, 480, 184 CR 787, disapproved on other grounds in *Christensen v Superior Court* (1991) 54 C3d 868, 905. See also *Bernal v Richard Wolf Med. Instruments Corp.* (1990) 221 CA3d 1326, 1337, 272 CR 41 (oral objection and orally proposed modification to jury instructions preserved error for appeal), disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 574, 34 CR2d 607.
- Request an instruction that is more specific, clear, or elaborate in order to preserve the right to challenge the instruction on appeal. *Mock v Michigan Millers Mut. Ins. Co.* (1992) 4 CA4th 306, 334, 5 CR2d 594; *Murrell v State ex rel Dep't of Pub. Works* (1975) 47 CA3d 264, 270, 120 CR 812; *Downing v Barrett Mobile Home Transp.* (1974) 38 CA3d 519, 523, 113 CR 277 (appellate court held plaintiff's failure to request amplification of incomplete instruction and to propose instruction concerning it precluded plaintiff from complaining about instruction on appeal); 7 Witkin, California Procedure, *Trial* §260 (5th ed 2008).

In the absence of both an objection and a proposed alternative instruction that presents a correct statement of the law, an argument on appeal that the jury was not correctly apprised of the full import of the controlling law may come too late. See *Pacific-Southern Mortgage Trust Co. v Insurance Co. of N. Am.* (1985) 166 CA3d 703, 714, 212 CR 754.

**PRACTICE TIP:** Before relying on the automatic exception rule of CCP §647, make sure that a purportedly erroneous instruction is, in fact, an instruction. In *Hercules Powder Co. v Automatic Sprinkler Corp.* (1957) 151 CA2d 387, 400, 311 P2d 907, the court held that the trial court's statement to jurors in response to their confusion over whether they would have to sign two verdict forms was not an instruction but a statement on the form of the verdict and therefore did not fall within ambit of §647; the defect was waived by lack of objection to it.

On counsel's duty to submit instructions, see §20.5. On the court's generally having no duty to correct or modify instructions, see §20.40.

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## B. Doctrine of invited error

### §20.75 1. Defined

When a party's own conduct induces or invites the commission of an instructional error, the party is estopped from asserting that error as a ground for reversal on appeal. This rule is known as the "doctrine of invited error." *Mary M. v City of Los Angeles* (1991) 54 C3d 202, 225, 285 CR 99; *Redevelopment Agency v City of Berkeley* (1978) 80 CA3d 158, 166, 143 CR 633; *Mozzetti v City of Brisbane* (1977) 67 CA3d 565, 573, 136 CR 751. See generally 9 Witkin, California Procedure, *Appeal* §389 (5th ed 2008).

Under this doctrine, a party cannot complain on appeal about an erroneous instruction if it was:

- Offered by that party. See *Miller v Kennedy* (1987) 196 CA3d 141, 146, 241 CR 472 (requesting erroneous jury instruction is invited error unless further objection is made after request); *Gherman v Colburn* (1977) 72 CA3d 544, 567, 140 CR 330. See also 7 Witkin, Procedure, *Trial* §316.
- Given by the court on its own motion, or at the opposing party's request, and the appealing party proposed a substantially similar instruction to the one given. *Mary M. v City of Los Angeles, supra*; *Weirum v RKO Gen., Inc.* (1975) 15 C3d 40, 50, 123 CR 468; *Smith v Americania Motor Lodge* (1974) 39 CA3d 1, 7, 113 CR 771; 7 Witkin, Procedure, *Trial* §316.
- Inconsistent with, or contradictory to, other correct instructions given at the other party's request. *Treadwell v Nickel* (1924) 194 C 243, 271, 228 P 25; 7 Witkin, Procedure, *Trial* §316. See also *Gherman v Colburn, supra*.
- Jointly submitted by coparties. In this situation, neither party may claim error, because it comes within the doctrine of invited error. See *Gherman v Colburn, supra*. A party, however, is not barred by the doctrine of invited error from attacking on appeal the giving of an erroneous instruction independently submitted by a coplaintiff or codefendant. See *Colbert v Borland* (1957) 147 CA2d 704, 713, 306 P2d 53.

**NOTE:** The doctrine of invited error does not apply if the court error involved using improper verdict forms and not the defective instructions requested by the appellant. *Demkowski v Lee* (1991) 233 CA3d 1251, 1357, 284 CR 919. See chap 22 on verdict forms. Further, the doctrine might not apply if the court error involved jury instruction that misstated the law on the burden of proof, even if counsel withdrew his objection to the erroneous instruction. *Huffman v Interstate Brands Corp.* (2004) 121 CA4th 679, 706, 17 CR3d 397.

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## §20.76 2. If proper alternative instructions are requested, doctrine of invited error not a bar

When a party submits certain instructions with a request that they be given only if other instructions requested at the same time are refused, the doctrine of invited error does not bar that party from urging on appeal that the court should have given the refused instructions even though the conditionally submitted instructions were given. *Huebotter v Follett* (1946) 27 C2d 765, 769, 167 P2d 193. See *Christensen v Bocian* (1959) 169 CA2d 223, 228, 336 P2d 1018 (withdrawal of previously requested instructions). On alternative instructions generally, see §20.8.

Similarly, when an instruction is given that was requested by a party only after the court erroneously refused to give another previously submitted instruction, the party is not estopped on appeal from raising the trial court's error in refusing to give the originally requested instruction. *Winkler v Southern Cal. Permanente Med. Group* (1956) 141 CA2d 738, 746, 297 P2d 728.

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## §20.77 3. Party may object to own instruction when no instruction should be given

Counsel may face a situation in which the opposing party proposes an instruction on a point, but counsel believes that no instruction on that issue is proper. This objection should be raised at the preargument chambers conference for settling instructions and put on the record.

Counsel's primary position should be that no instruction is proper. Counsel's secondary position should be that, if some instruction on this issue will be given, the proposed instruction is improper. Counsel must decide whether to propose an instruction on the point or to rely on the primary position. It is a difficult decision, but a party who submits a jury instruction may still complain about it when the party was merely acquiescing in the trial court's determination reached over the objection.

This rule follows the theory that a party does not waive error by trying to make the best of a bad situation. *Mary M. v City of Los Angeles* (1991) 54 C3d 202, 213 n4, 285 CR 99 (defendant properly objected to court's requirement to submit instruction on theory defendant believed was erroneous, but defendant could not attack specific language in instruction that defendant had drafted).

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## §20.78 4. Unidentified instruction constitutes invited error

The doctrine of invited error makes it especially important that the record identify each instruction and its source. Indicate by each instruction the name of the party who requested it or that the court gave it on its own motion, because on appeal an unidentified instruction is presumed to have been given at the appellant's request. *Lynch v Birdwell* (1955) 44 C2d 839, 847, 285 P2d 919; *Morehouse v Taubman Co.* (1970) 5 CA3d 548, 559, 85 CR 308.

Thus, an appellant is considered to have invited error with an unidentified instruction and is consequently precluded from complaining about it. *Lynch v Birdwell, supra*.

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### C. Prejudicial error must be shown

### §20.79 1. Defined

Instructional error can result in a new trial or a reversal of judgment only if the error is shown to be prejudicial. To be prejudicial, the court must conclude, after examination of the entire case, that the error complained of resulted in a miscarriage of justice (Cal Const art VI, §13) and that a different result was probable if that instruction had not been given. CCP §475; *Blake v E. Thompson Petroleum Repair Co.* (1985) 170 CA3d 823, 834, 216 CR 568.

In determining whether instructional error resulted in a "miscarriage of justice," the court must examine:

- Whether it seems probable that a jury's verdict was based on the erroneous instruction;
- Whether the instruction resulted in prejudice; and
- Whether the reviewing court would have to speculate on the basis of the verdict.

*Vistica v Presbyterian Hosp.* (1967) 67 C2d 465, 471, 62 CR 577.

To determine whether prejudicial error occurred and whether a different result would have been probable under CCP §475, courts generally use the following criteria:

- The degree of conflict in the evidence on the crucial issue;
- Whether the jury asked for a reading of the erroneous instruction or of related evidence;
- The closeness of the jury's verdict;
- Whether closing argument contributed to the instruction's misleading effect; and
- The effect of other instructions in remedying the error.

See *Mitchell v Gonzales* (1991) 54 C3d 1041, 1054, 1 CR2d 913 (court noted that there was no precise formula to determine prejudicial effect of instructional error, listing above criteria, and held that trial court erred in giving jury instruction incorporating term "proximate cause," reasoning that it was conceptually and grammatically deficient and that it was reasonably probable that jury was confused by the instruction).

**EXAMPLE 1:** *Gutierrez v Cassiar Mining Corp.* (1998) 64 CA4th 148, 159, 75 CR2d 132 (error in refusing requested instruction was prejudicial when plaintiff's attorney, having successfully argued against requested instruction on rationale that its theory was something for argument, not instruction, did about-face on final argument, telling jury theory was "irrelevant," not approved by any instruction, and therefore outside given law they were sworn to follow).

**EXAMPLE 2:** *Caldwell v Paramount Unified Sch. Dist.* (1995) 41 CA4th 189, 206, 48 CR2d 448 (jury instruction that erroneously required jury to apply shifting burdens of proof in employment discrimination case was not prejudicial error and was accurate statement of underlying substantive law).

**EXAMPLE 3:** *Bromme v Pavitt* (1992) 5 CA4th 1487, 1509, 7 CR2d 608 (court followed five-step analysis of *LeMons* court and held that it was not reversible error to give jury instruction disapproved by supreme court).

**EXAMPLE 4:** *Jones v Toyota Motor Co.* (1988) 198 CA3d 364, 371, 243 CR 611 (applying *LeMons v Regents of Univ. of Cal.* (1978) 21 C3d 869, 876, 148 CR 355, court held that trial court's error was harmless when it incorrectly instructed jury on significance of minor's blood-alcohol level; such evidence was only marginally relevant to case's critical issue).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.80 2. Examples of reversible error based on erroneous instructions

## §20.80 2. Examples of reversible error based on erroneous instructions

- The court of appeal reversed the judgment on grounds that the trial court committed reversible error when it gave an erroneous burden of proof instruction. *Nizam-Aldine v City of Oakland* (1996) 47 CA4th 364, 54 CR2d 781 (instruction erroneously placing burden of proving truth of claimed defamatory statements).
- It was prejudicial for the trial court to define professional standards in a way that a party's good cause defense was not encompassed in any other instruction, thus foreclosing both primary issue of liability and primary defense in an otherwise close case. *National Med. Transp. Network v Deloitte & Touche* (1998) 62 CA4th 412, 434, 72 CR2d 720.
- The appellate court could not ascertain whether the jurors based their verdict on the erroneous instruction or to what extent it might have influenced them in arriving at a verdict. See *Gibson v State* (1960) 184 CA2d 6, 10, 7 CR 315; *LeMons v Regents of Univ. of Cal.* (1978) 21 C3d 869, 877, 148 CR 355.
- The trial court refused to give instructions covering a party's theory of the case that was supported by substantial evidence. See *Barrett v Bank of America* (1986) 183 CA3d 1362, 229 CR 16. In deciding whether a trial court erred in refusing to give a requested instruction, the appellate court should view the evidence in a light most favorable to the appellant. *Bernal v Richard Wolf Med. Instruments Corp.* (1990) 221 CA3d 1326, 1338, 272 CR 41, disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 574, 34 CR2d 607; *Gonzales v Carmenita Ford Truck Sales, Inc.* (1987) 192 CA3d 1143, 1148, 238 CR 18; *Ng v Hudson* (1977) 75 CA3d 250, 254, 142 CR 69.
- Refusal to give the concurrent causation jury instruction (BAJI 3.77), when at least two theories of causation existed in the case and a simple modification by interlineation would have addressed the objection, was reversible error. *Logacz v Limansky* (1999) 71 CA4th 1149, 84 CR2d 257. Note that approved CACI 431 parallels BAJI 3.77.

**NOTE:** In reviewing the instructions for error, the appellate court will interpret the instructions "in a manner that will support rather than defeat a judgment." *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 817, 174 CR 348. See also *Little v Stuyvesant Life Ins. Co.* (1977) 67 CA3d 451, 465, 136 CR 653.

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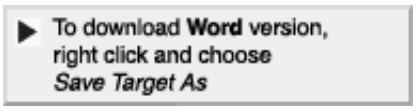
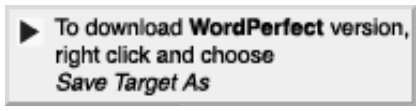
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/ XI. JURY INSTRUCTION FORMS/§20.81 A. Form: Sample request for jury instructions and index

## XI. JURY INSTRUCTION FORMS

### §20.81 A. Form: Sample request for jury instructions and index




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No.** _ _ _ _ _ _ |
| **Plaintiff(s)** | ) | _ _[*PLAINTIFF/* |
| **vs** | ) | *DEFENDANT(S)*]_ _ |
| _ _[*Name(s)*]_ _ | ) | _ _[*INSERT NAME*]_ _**'S** |
| **Defendant(s)** | ) | **REQUEST AND INDEX FOR** |
| _____ | ) | **JURY INSTRUCTIONS** |
| | | **Dep't:** _ _[*number*]_ _ |
| | | **Judge:** _ _[*if known*]_ _ |
| | | **Trial date:** _ _[*if set*]_ _ |

_ _[*Plaintiff/Defendant*]_ _**,** _ _[*name*]_ _**, requests that the following attached CACI instructions be given:**

[*List proposed CACI instructions by number and title, e.g.:*]

**CACI 100 (exact copy) Preliminary Admonitions.**

**Given as proposed**_____

**Given as modified**_____

**Refused**_____

**Withdrawn**_____

**CACI 200 (exact copy except adaptations) Obligation to prove _____ more likely true than not true).**

**Given as proposed**_____

**Given as modified**_____

**Refused**_____

**Withdrawn**_____

**In addition, _ _[*plaintiff/defendant*]_ _ requests that the court give the following attached special instructions and any other instructions that may be proposed during trial:**

[*List special instructions by number and title here, e.g.:*]

**Special Instruction No. 1—Trespass**

**Given as proposed**_____

**Given as modified**_____

**Refused**_____

**Withdrawn**_____

**Special Instruction No. 2—Damages for Unreasonable Interference With Easement**

**Given as proposed**_____

**Given as modified**_____

**Refused**_____

**Withdrawn**_____

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original; copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* Check Cal Rules of Ct 2.1055 for the requirements for the form and format of proposed jury instructions. See §§20.17, 20.20. Copies of both CACI instructions and special instructions prepared by counsel should be attached to this request. If counsel has modified a CACI instruction, include "as modified" next to the CACI number requested. See §20.19. On format and content of attorney-drafted instructions, see §§20.20-20.29. For a sample instruction prepared by counsel, see §20.83.

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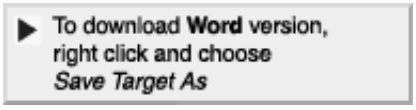
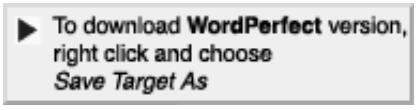
## §20.82 B. Form: Sample CACI instruction




**CACI 430**

**CAUSATION: SUBSTANTIAL FACTOR**

**A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.**

**GIVEN AS REQUESTED _____**

**GIVEN AS MODIFIED _____**

**REFUSED _____**

**WITHDRAWN _____**

**_____**
**Judge**

**CACI 430**

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/20 Jury Instructions/§20.83 C. Form: Sample special instruction

## §20.83 C. Form: Sample special instruction

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

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

A proposed jury instruction prepared by defense counsel in an action for interference with contractual relations might look like this:

**DEFENDANT'S SPECIAL INSTRUCTION NO. 1**

**DEFINITION OF BEST EFFORTS**

**A contract may require one party to use its best efforts to accomplish a goal or to proceed in a certain manner. The term "best efforts" appears most frequently when the parties wish to require a party to attempt to meet a goal but do not which to bind them to accomplish the goal. As long as the required amount of effort is made, the performing party will not be in breach of the contract, even if the goal is not actually achieved. Whether the party used its best efforts is something you will have to decide.**

**The obligation of best efforts has diligence as its essence. Whether a party used its best efforts is determined by a comparison of what the party actually did to what the efforts of a reasonable person of the same kind in the same circumstances would have made.**

**In this case, the plaintiffs and defendant were contractually obligated to use their best efforts as specified in the Distributor Agreement. The plaintiffs contend that defendant breached the Distributor Agreement by failing to use its best efforts and that it therefore did not breach the agreement. Defendant also contends that plaintiffs did not use their best efforts as specified in the Distributor Agreement.**

***United States Ecology, Inc. v State of California* (2001) 92 CA4th 113, 136, 111 CR2d 689; *Bloor v Falstaff* (SD NY 1978) 454 F Supp 258, 256, aff'd (2d Cir 1979) 601 F2d 609; *Van Valkenburgh, Nooger & Neville, Inc. v Hayden Publ'g Co.* (1972) 330 NYS2d 329, 281 NE2d 142; *First Union Nat'l Bank v Steele Software Sys. Corp.* (Md App 2003) 838 A2d 404, 456; E. Allan Farnsworth, Farnsworth on Contracts, §7.17c at 388 (2d ed 1998); E. Allan Farnsworth, On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law, 46 U Pitt L Rev 1, 7 (1984).**

**GIVEN AS REQUESTED _____**

**GIVEN AS MODIFIED _____**

**REFUSED _____**

**WITHDRAWN _____**

**_____**
**Judge**

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# 21

# Jury Deliberations

**Stephen A. McFeely**
**Stephanie L. Berman**

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## §21.1 I. SCOPE OF CHAPTER

This chapter discusses jury deliberations, including:

- Logistical considerations affecting the deliberative process, such as custody of the jury, location and scheduling, requirements for jurors with disabilities, costs for jurors' meals, and outside communications (see §§21.2-21.8);
- The nature of the deliberative process, such as disposition of alternates, admonitions, stipulations to streamline the process, and length of deliberations (see §§21.9-21.14);
- The effects of absence or illness of jurors, and when and how jurors may be discharged (see §§21.15-21.19);
- The process for selecting alternate jurors (see §§21.20-21.23);
- Handling jurors' requests for information during deliberations (see §§21.24-21.28);
- Materials allowed or prohibited in the jury room (see §§21.29-21.34); and
- Jury misconduct during deliberations (see §§21.35-21.43).

**Further research:** Jury management, juror misconduct during trial, remedies for jury misconduct, and moving for new trial based on juror misconduct are discussed in chap 17. Jury selection is covered in chap 8, and jury instructions in chap 20. Motions for new trial are discussed in detail in chap 25.

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## II. LOGISTICAL CONSIDERATIONS

### §21.2 A. Custody of jury during deliberations

The jury may decide a matter submitted to it in court or retire for deliberations. CCP §613. When they retire, the jurors must be kept together in a convenient place under an officer's charge. CCP §613. The officer, historically a deputy sheriff or bailiff, must prevent outsiders from speaking to or communicating with the jurors and must return the jurors to the court when they have agreed on a verdict. CCP §613. The purpose of these rules is to allow the jury to deliberate in secret.

Cost considerations are requiring California counties to replace bailiffs in civil courtrooms with non-law-enforcement personnel, usually called courtroom attendants. Courtroom attendants perform all responsibilities of the "officer" described in CCP §613.

The jury officer coordinates communications between the jury and the court, but any communications by the jury officer must be limited to asking jurors if they have reached a verdict. CCP §613. The officer should make this inquiry only on the court's request and should not attempt to hurry the deliberative process. *Leonard v Hume* (1935) 5 CA2d 41, 43, 41 P2d 965 (no undue influence by bailiff); see *People v Hutchinson* (1969) 71 C2d 342, 346, 78 CR 196. The officer must not communicate to any outsider the state of jury deliberations or any verdict agreed on. CCP §613.

Anyone who listens to or observes the jury's deliberations is guilty of a misdemeanor. Pen C §167. Although a violation of the jury's secret deliberations is a criminal offense and may constitute misconduct, the presumption of prejudice may be rebutted.

**JUDICIAL PERSPECTIVE:** If a jury asks for a readback of testimony, the judge should ask the attorneys to confer with the court reporter to agree on the precise testimony to be read back. If there is a disagreement, the judge must settle it. The judge should ask the attorneys if they will *stipulate* that the court reporter may read the appropriate testimony back to the jurors, including alternates, in the jury deliberation room. Any request for readback is limited to those jurors formally deliberating, and the substitution of an alternate juror requires deliberations to begin anew. See *People v Proctor* (1992) 4 C4th 499, 537, 15 CR2d 340; *People v Collins* (1976) 17 C3d 687, 694, 131 CR 782, superseded by statute on other grounds as stated in *People v Boyette* (2002) 29 C4th 381, 462 n19, 127 CR2d 544. See §21.10. Before deliberations begin again, the court reporter must leave.

**EXAMPLE:** In *People v Oliver* (1987) 196 CA3d 423, 435, 241 CR 804, a court reporter reread testimony in the jury room and was present during some deliberations. The appellate court held that although this action constituted misconduct, the presumption of prejudice was effectively rebutted because the reporter did not participate in any way in the deliberations.

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## §21.3 B. Location and schedule for deliberations

All courts must be equipped with a jury deliberation room, which must be designed to minimize intrusion and have suitable furnishings and supplies, including restroom facilities for female and male jurors. CCP §216.

There are no strict rules concerning the schedule for a deliberating jury. In civil cases, the judge usually requires jurors to be present and to deliberate during the court's normal hours. At the judge's discretion, the jury may deliberate past normal business hours if the jury indicates to the court that it is close to reaching a verdict. Usually, there are no deliberations on weekends or holidays.

**NOTE:** Civil juries are usually not sequestered during the deliberative process.

During deliberations the trial judge may proceed with other matters. The deliberating jury takes precedence, however, and the judge must remain available and "open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged." CCP §617.

The number of breaks (including smoking breaks) is generally within the discretion of the jury. The jury also determines whether to break for lunch or continue the deliberative process. See §21.11 for discussion of the admonition given by the judge at breaks.

**JUDICIAL PERSPECTIVE:** Jurors communicate better when they have control of their schedule. Jurors should be advised that they can set their own breaks and hours and they do not have to conform to the trial calendar. This must be coordinated with the bailiff or court attendant. In addition, many courts and litigators find it helpful to provide lunch for the jurors on the last day of trial. Ideally, counsel should share the costs, but judges must never put any pressure on parties to provide this meal. Jurors should be told that lunch has been arranged, with no credit given to any party. This small technique has been useful in initiating communications between jurors. See §21.5.

The courts strongly discourage the consumption of alcoholic beverages during both the trial and the deliberative process. *People v Allen* (1986) 42 C3d 1222, 1265, 232 CR 849. See §21.6 for discussion of smoking and §21.39 for discussion of consumption of alcoholic beverages.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.4 C. Service providers appointed for jurors with disabilities

## §21.4 C. Service providers appointed for jurors with disabilities

Persons with disabilities are eligible for jury service. CCP §203(a)(6). If a person who is deaf, hearing impaired, blind, visually impaired, or speech impaired is selected as a juror, the court will appoint a service provider if needed to facilitate communication. CCP §224.

An appropriate service provider includes a sign-language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. CCP §224(b). The county in which the action is pending must pay the interpreter's fee. Evid C §754(i). The court must instruct the jury and the service provider that the service provider is not to participate in the jury's deliberations except to facilitate communication between the juror with disabilities and the other jurors. CCP §224(b).

After a juror with disabilities is impaneled, any party who did not challenge the juror with disabilities must stipulate to the service provider's presence in the jury room and must prepare and deliver to the court proposed jury instructions for the service provider. CCP §224(b).

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## §21.5 D. Payment for jury's meals; recovery of costs for meals

The trial court has inherent power to provide jurors with food (and lodging, if necessary). *Bloniarz v Roloson* (1969) 70 C2d 143, 148, 74 CR 285; *Hart Bros. Co. v County of Los Angeles* (1938) 31 CA2d Supp 766, 770, 82 P2d 221. It is improper to tell jurors who is paying for the meals. See, *e.g.,* San Francisco Ct R 7.0. If the meals are paid for by the prevailing party, the expense is recoverable as a cost of suit. CCP §1032; *Gibson v Thrifty Drug Co.* (1959) 173 CA2d 554, 556, 343 P2d 610. See chap 27 for discussion of recovery of costs.

**JUDICIAL PERSPECTIVE:** If the parties provide jurors with refreshments, the parties must not tell the jurors which party is paying for them. Any designations of the sources of the items should be carefully screened.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.6 E. Smoking prohibited

## §21.6 E. Smoking prohibited

Smoking is prohibited in all court facilities, including the jury room. Cal Rules of Ct 10.504. Consequently, smokers must exit the building for breaks and smoke outside the courthouse. Absent a stipulation, the admonition required by CCP §611 (discussed in §21.11) may be necessary, even for smoking breaks.

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## F. Outside communications discouraged

### §21.7 1. Using cellular telephones

As the use of cellular telephones and personal digital assistants (PDAs) becomes more common, jurors may attempt to take telephones into the jury room, but such practices should be discouraged. Using telephones in the jury room violates the secrecy of the deliberations, is distracting to other jurors, and may lead to improper communications by the juror using the telephone. *People v Fauber* (1992) 2 C4th 792, 837, 9 CR2d 24 (finding no misconduct, but expressing court's disapproval of practice of allowing cellular phones into jury deliberation room). See §21.36 for discussion of improper communications during deliberations, and §§17.20-17.22 for discussion of inattentiveness as misconduct.

**JUDICIAL PERSPECTIVE:** Some cellular phones can be used as laptop computers, and jurors may use them for many purposes, including taking notes and electronic research. The court should advise jurors that they may not research any matter relating to the trial. Judges should also advise jurors they cannot send text messages, even to each other, during the trial, or play electronic games. In addition, jurors should be explicitly advised that they cannot engage in blogging or other discussions online about the trial until it is fully concluded.

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### §21.8 2. Using beepers

Although beepers do not pose the potential problems with improper communications that cellular telephones do, beepers have the same potential to "distract jurors," which the court impliedly warned against in *People v Fauber* (1992) 2 C4th 792, 837, 9 CR2d 24. See §21.7.

**NOTE:** If you anticipate that jurors' use of cellular telephones or beepers may be a problem, consider discussing the matter with opposing counsel and the judge to arrive at a solution. One solution would be to have the courtroom attendant take custody of any cellular telephone or beeper; if someone tries to contact a juror, the courtroom attendant could determine whether the matter is an emergency or could be handled on a break. At the beginning of trial, jurors should be given the court phone number to provide to people who may need to contact them, and be advised that such contacts are permissible.

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## III. JURY'S DELIBERATIVE PROCESS

### §21.9 A. Jury chooses foreperson

The jury must choose a foreperson or "presiding juror." The court may not select a foreperson, because to do so might give other jurors the impression that the opinion of the court's assignee should be given undue weight. *Dorshkind v Harry N. Koff Agency, Inc.* (1976) 64 CA3d 302, 308, 134 CR 344.

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## §21.10 B. Disposition of alternates

Alternate jurors are generally not allowed in the jury room during deliberations. *Vaughn v Noor* (1991) 233 CA3d 14, 22, 284 CR 222. Counsel may stipulate to the presence of alternate jurors in the jury room during deliberations. *People v Valles* (1979) 24 C3d 121, 125, 154 CR 543. Alternates should be instructed not to participate in the jury's deliberations in any manner except by silently paying attention, unless required to take the place of an original juror. 24 C3d at 128.

Because alternates may be needed to substitute for one of the deliberating jurors, they must remain in the custody of the sheriff or marshall. CCP §234. The court may excuse alternate jurors on its own, or counsel may stipulate to allow them to leave and then request the court to approve. See CCP §234. Court and counsel often agree to allow the alternates to leave, particularly if the deliberations are expected to be lengthy, but they must remain available and within reasonable distance to permit their timely return.

**JUDICIAL PERSPECTIVE:** Many attorneys stipulate to having alternates present during deliberations, but some alternates may find it too difficult to remain strictly observers during deliberations. Jurors should be advised that if they cannot remain aloof during the deliberations, they may be released and remain on-call. In addition, if a seated juror is facing a time conflict that might effect deliberations, counsel and the court might consider switching the juror with an alternate, and keeping the time pressured juror as an alternate.

If alternates are permitted to leave, the court should admonish them and advise them that they could be recalled at any time and that they should not discuss the case or read news accounts of the trial until they are advised by the court that the jury has been discharged. See §21.11 regarding the admonition.

**PRACTICE TIP:** Be sure to request the admonition if the court does not automatically give it, or include it in the stipulation releasing alternates. Be sure to obtain the phone numbers of provisionally released alternates in case they are needed.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.11 C. Judge admonishes jury at separations

### §21.11 C. Judge admonishes jury at separations

On each separation, the court must admonish the jury (CCP §611):

- Not to speak with others or confer among themselves on any subject relating to the trial; and
- That it is their duty not to form or express an opinion until the case is submitted to them.

Courts usually give this admonition at the close of each day of deliberation. In the absence of stipulation, the admonition is also required during each break in the deliberations (including comfort and meal breaks). See §21.12.

**JUDICIAL PERSPECTIVE:** It is extremely disruptive for the judge to have to admonish the jury at each break. Accordingly, stipulations to do away with the requirement are the rule rather than the exception.

A juror may, however, ponder a case alone during deliberations, outside the presence of the other jurors. *Bormann v Chevron USA, Inc.* (1997) 56 CA4th 260, 65 CR2d 321 (on weekend break, juror prepared 2½-page typed statement of her views on evidence and, on return to deliberations, read her statement to other jurors; held not to constitute misconduct).

**NOTE:** In *People v Engelman* (2002) 28 C4th 436, 121 CR2d 862, the California Supreme Court disapproved CALJIC 17.41.1, which requires jurors to immediately report a juror's refusal to deliberate, or intent to disregard the law or to decide the case on an improper basis. The court reasoned that the instruction, given immediately before the jury withdraws to begin deliberations, could be misunderstood and used as a tool for some jurors to browbeat others. 28 CA4th at 445. See also *People v Barnwell* (2007) 41 C4th 1038, 1054, 63 CR3d 82 (discussing *Engelman*).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.12 D. Counsel may stipulate to streamline deliberations

### §21.12 D. Counsel may stipulate to streamline deliberations

The court often solicits stipulations designed to streamline the deliberative process. Counsel can usually agree to most ministerial stipulations, *e.g.,* that the court need not admonish the jury, as required by CCP §611, each time the jury takes a break. See §21.11.

Despite pressure from the trial judge to agree to a stipulation, it is important to distinguish those stipulations that are practical from those that may give away a tactical advantage. For example, a stipulation that the §611 admonition not be given at every break carries little risk. In contrast, counsel should avoid a stipulation permitting the court reporter to reread testimony to the jury in the jury room, because it is beneficial to observe the jurors' reactions to the evidence. Counsel's observations might provide some insight about what is happening in the jury room.

**JUDICIAL PERSPECTIVE:** This is a rare request. The judge may feel that because the presentation of evidence has concluded, observance of the jurors' reactions, though enlightening, is too late to be "beneficial" or a "tactical advantage." Moreover, the courtroom will probably be in use for jury selection or other matters in another case. In presiding over many hundreds of cases I can recall only one or two criminal cases and no civil cases in which the attorneys did not stipulate to court reporter readback in the jury room. There is also the additional cost of being present for what may be hours of read-back and the need to remain in the courtroom during deliberations for potential additional requests for readback. Disputes in read-back can be resolved by phone, which relieves the attorney from having to be immediately physically available. It also increases the burden on the court to stop all other matters being conducted.

Counsel should be cautious about stipulating to a less than full jury. Stipulation to a smaller jury should not be made without client consent. See §21.23 on continuing with less than a full 12-person jury. Although you may wish to cooperate and to be economical, if the trial has not gone well or you believe another trial would be advantageous (*e.g.,* a key witness would be available the second time around) such a stipulation could be a mistake.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.13 E. Jurors must deliberate with open minds

### §21.13 E. Jurors must deliberate with open minds

After jurors receive the case, their verdict should be arrived at "through deliberations which are the common experience" of all of them. *Griesel v Dart Indus.* (1979) 23 C3d 578, 584, 153 CR 213, overruled on other grounds in *Privette v Superior Court* (1993) 5 C4th 689, 21 CR2d 72. The judge usually instructs the jurors on their duty to deliberate. See CACI 5001.

A juror's violation of this duty to deliberate constitutes misconduct. See *Enyart v City of Los Angeles* (1999) 76 CA4th 499, 90 CR2d 502 (defendant city entitled to new trial when jurors expressed negative bias against city and police officers during deliberations, but concealed such bias during voir dire). See §§21.35-21.43.

Jurors should understand that they are not partisans or advocates. At the start of deliberations, jurors should not express emphatic opinions, but should first consider the views of other jurors. It is proper for a court to advise a jury "of the duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions." *Cook v Los Angeles Ry.* (1939) 13 C2d 591, 594, 91 P2d 118. But see *Vomaska v City of San Diego* (1997) 55 CA4th 905, 909, 64 CR2d 492 (jurors' verdict after 10 to 15 minutes was not failure to discuss evidence or issues). See also CACI 5009 (predeliberation instructions).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.14 F. Length of deliberations varies; jury deadlock

### §21.14 F. Length of deliberations varies; jury deadlock

Jury deliberations do not have a set length of time. A long, complicated trial may be resolved in an hour. See, *e.g., Vomaska v City of San Diego* (1997) 55 CA4th 905, 64 CR2d 492 (jury reached verdict after 10-15 minutes); *Lussier v San Lorenzo Valley Water Dist.* (1988) 206 CA3d 92, 253 CR 470 (verdict after 44 minutes did not suggest insufficient deliberation). In contrast, a trial that requires only a few days of evidence and argument may require a week for a jury to resolve.

If the jury indicates that it cannot arrive at a verdict, the trial judge usually has the panel return to the courtroom and asks the foreperson whether further deliberations might result in a verdict. The court may also ask each juror if, in the juror's individual opinion, the jury is hopelessly deadlocked and whether further deliberations are likely to produce a verdict.

To determine the seriousness of the deadlock, the court may ask the foreperson about the number of ballots taken and the time the votes were cast. A court may also question the jury concerning its numerical division, if the questioning is not otherwise coercive. *People v Rodriguez* (1986) 42 C3d 730, 776 n14, 230 CR 667.

It is within the court's discretion to request the jury to try again to reach a verdict. To help break a deadlock, the court may ask the jurors whether they have specific concerns that, if resolved, might assist them in reaching a verdict. Cal Rules of Ct 2.1036(a). The court may also ask jurors whether they need further instruction and may require them to deliberate on that question. *People v Thomas* (1991) 231 CA3d 299, 303, 282 CR 258.

If the court finds that further action might assist the jury, it may give additional instructions, clarify previous instructions, reopen closing arguments on the specified issues, or any combination of these measures. Cal Rules of Ct 2.1036(b). On court assistance in jury deliberations, see §20.55.

**JUDICIAL PERSPECTIVE:** The ability of counsel to personally respond to a juror's question during deliberations is a useful tool. Unless the juror's question is one that can be easily answered by a written response, counsel should orally answer the jury. The types of answers agreed on by the court and all parties are usually so bland that they fail to address the concern of the jurors. These responses often insult jurors by simply directing them to an unhelpful instruction. If counsel has the opportunity to respond orally, there is technically no rebuttal available, because it is only a response to a request from a juror and not a formal argument.

**Special verdict.** When a jury cannot agree on the first issue of a special verdict, the court may ask the jury to skip over that question and consider the second issue, if that second issue could be dispositive of the entire action. *Santiago v Firestone Tire & Rubber Co.* (1990) 224 CA3d 1318, 1335, 274 CR 576.

***Allen* instruction.** Sometimes, but usually after at least one previous trip to the courtroom to discuss the jury's deadlock, trial courts may employ an "*Allen* instruction" (named after *Allen v U.S.* (1896) 164 US 492, 41 L Ed 528, 17 S Ct 154). An *Allen* instruction informs the jury that if they cannot reach a verdict, the matter must be retried at considerable cost and inconvenience to the parties and the witnesses, and that there is no reason to believe that another jury will be better able to decide the case. See CACI 5013 (deadlocked jury admonition).

**NOTE:** Trial judges have sometimes added that the jurors in the minority may want to reconsider their position. In *People v Moore* (2002) 96 CA4th 1105, 1120, 117 CR2d 715, the court's instructions were found not to be erroneous because they did not suggest that a verdict must be reached and, while instructing jurors to consider each other's views, also instructed them to base their verdict solely on the evidence. See also *People v Whaley* (2007) 152 CA4th 968, 982, 62 CR 3d 11 (court's suggestion that deadlocked jurors consider reverse role playing not improper because suggestion was directed to all jurors, not just jurors in minority). In civil cases, while risky, the instruction is improper only if it coerces jurors into abandoning their individual positions. See *Inouye v Pacific Southwest Airlines* (1981) 126 CA3d 648, 651, 179 CR 13.

**JUDICIAL PERSPECTIVE:** The judge questioning jurors about further deliberations should be careful to remind them *not* to tell him or her how they are divided. Moreover, in the view of some judges, an *Allen* instruction tends to

dissuade the minority from holding to their view.

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## IV. WHEN JUROR ABSENT OR ILL, OR GOOD CAUSE FOR DISCHARGE

### §21.15 A. All jurors must be present to deliberate

Deliberations may not begin until all jurors are in place and may not continue during the absence of any juror. CCP §613. Because smoking is prohibited in jury rooms (see §21.6), deliberations cannot continue during any smoking break.

Any unauthorized separation during deliberations may be grounds for a mistrial. See *Estate of McKenna* (1904) 143 C 580, 589, 77 P 461; *Andrews v County of Orange* (1982) 130 CA3d 944, 959, 182 CR 176, disapproved on other grounds in *People v Nesler* (1997) 16 C4th 561, 66 CR2d 454. The burden of showing that a juror's absence was prejudicial rests on the party seeking a mistrial. *McDowd v Pig'n Whistle Corp.* (1945) 26 C2d 696, 699, 160 P2d 797.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.16 B. When court may discharge juror

## §21.16 B. When court may discharge juror

Before the jury returns a verdict, the court may discharge a juror if (CCP §233):

- The juror becomes sick; or
- On good cause shown, the juror is otherwise unable to perform jury duties.

The court will select an alternate juror, if available, to take the discharged juror's place. CCP §§233-234.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.17 C. Hearing to determine good cause to discharge

### §21.17 C. Hearing to determine good cause to discharge

The hearing to determine whether there is good cause to replace a juror with an alternate is summary in nature and scope. See CCP §§233-234. Although it is not a full, adversarial hearing, the proceeding must be complete enough to determine good cause. The trial judge may question a juror in chambers or in open court in the absence of other jurors. The judge has the discretion to determine if the facts demonstrably show that the juror in question cannot further perform the duties of a juror. *People v Van Houten* (1980) 113 CA3d 280, 287, 170 CR 189.

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### D. Review factors affecting court's willingness to discharge

### §21.18 1. When juror ill

The stage of the deliberations and the availability and number of alternates will affect the court's willingness to discharge a deliberating juror who is ill. If the jury has been deliberating for some time and believes it may be close to a verdict, or if few alternates remain, the court may suspend deliberations pending the recovery of an ill juror. If deliberations have only recently begun or several alternates are available, the court will more readily discharge an ill juror and replace the regular juror with an alternate.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.19 2. Discharge for other reasons

### §21.19 2. Discharge for other reasons

Although discharge for reasons other than illness are infrequent, the court has the discretion to discharge and these discharges are infrequently disturbed on appeal. Examples of grounds for replacing jurors unable to perform their duties are:

- Emotional upset (see *People v Collins* (1976) 17 C3d 687, 691, 131 CR 782, superseded by statute on other grounds as stated in *People v Boyette* (2002) 29 C4th 381, 462 n19, 127 CR2d 544 (juror unable to cope with experience of jury duty));
- Inability or unwillingness to follow the court's instructions; or
- Inability to follow or participate in the jury's deliberations.

A juror need not participate in deliberations in a literal sense. There is no requirement that each juror articulate a viewpoint. See *Vomaska v City of San Diego* (1997) 55 CA4th 905, 911, 64 CR2d 492 (jurors not obligated to discuss issues already decided). Thus, a juror's failure to speak during deliberations does not, by itself, imply incompetence or an unwillingness to discharge the juror's obligation as a juror.

**NOTE:** As a practical matter, courts rarely discharge jurors for inability to perform their duties, and only then after extensive questioning. This is particularly true when there are no alternates, and the discharge of a juror will effectively result in a mistrial.

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## V. WHEN ALTERNATE JUROR MUST BE USED

### §21.20 A. How chosen

When an alternate juror is to be chosen, and more than one is available, the court either selects by:

- Lot, *i.e.,* by drawing names (see CCP §234); or
- Another prearranged method, *e.g.,* before the trial begins, many courts designate alternates by numbers; when replacement becomes necessary, they select alternates in sequential order.

**JUDICIAL PERSPECTIVE:** The better method is to tell the alternate jurors at the beginning of the trial that if one of them is needed, he or she will be chosen by lot. This method tends to keep all the alternates alert and involved. In some courts, attorneys privately stipulate, with the court's agreement, to the order of replacement and when the alternates are selected. The alternates themselves should never be told of this order of replacement, but they should be advised that each one could be substituted into the case at any time. This technique provides certainty for counsel and comfort for later jurors who are unlikely to be seated. In addition, some courts permit the selection of 14 jurors, and alternates are selected at random after the trial ends. With this approach complications can arise if, *e.g.,* a juror who has taken the best notes is excused after deliberations have started or a newly designated alternate is a natural leader and foreperson. This nondesignation of alternates is also a violation of CCP §234.

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### §21.21 B. Deliberations must begin anew

Any time that a deliberating juror is replaced, the deliberations must begin anew, even if a partial verdict has been reached. CCP §233. The court must instruct the jury to disregard all past deliberations. See *People v Proctor* (1992) 4 C4th 499, 536, 15 CR2d 340; *Griesel v Dart Indus.* (1979) 23 C3d 578, 584, 153 CR 213, overruled on other grounds in *Privette v Superior Court* (1993) 5 C4th 689, 21 CR2d 72 (verdict must be reached through deliberations that are common experience of all jurors arriving at verdict). See also CACI 5014 (substitution of alternate juror).

The trial court must give extremely clear, direct instructions on the need to begin new deliberations. See *Vaughn v Noor* (1991) 233 CA3d 14, 22, 284 CR 222, in which the court held that it was insufficient, and therefore error, merely to instruct the jury, regarding the liability decision they had already reached, that they would have to "tackle that issue anew." Instructions requiring the jury to start deliberations anew are obligatory, even when the alternate has been present in the jury room during the deliberations and the jury has reached a decision on liability and lacks only a decision on damages at the time of the substitution. 233 CA3d at 21.

When deliberations have failed to begin anew, prejudice must be shown for a jury verdict to be reversed on appeal. In determining prejudicial error, the appellate court will consider whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *People v Watson* (1956) 46 C2d 818, 836, 299 P2d 243. See also *Griesel v Dart Indus.* (1979) 23 C3d 578, 585, 153 CR 213 (instruction to continue with deliberations was error, because of "closeness of case, the composition of the nine jurors returning the verdict and the comparison of time spent deliberating" before and after alternate juror was seated), overruled on other grounds in *Privette v Superior Court* (1993) 5 C4th 689, 702 n4, 21 CR2d 72.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.22 C. Possible actions if alternate juror unavailable

### §21.22 C. Possible actions if alternate juror unavailable

If no alternate jurors are available and a juror becomes unable to serve (see §21.23 for discussion of continuing with less than a full jury):

- The court may discharge the jury and try the action again after impaneling a new jury (CCP §233); or
- With the consent of all parties (CCP §233):
- The trial may proceed with only the remaining jurors, or
- Another juror may be sworn and the trial started over (*i.e.,* a new trial date will be given).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.23 D. Continuing with less than full jury

### §21.23 D. Continuing with less than full jury

If a deliberating jury loses a member who cannot be replaced because no alternate jurors are available, a mistrial is required. See CCP §233 ("the cause may again be tried"). All the parties may consent, however, to continue the trial with only the remaining jurors. CCP §233.

The parties may also agree on the vote required for a party to prevail.

**EXAMPLE:** When a 12-person jury loses one member, the parties may stipulate that 9-2 is sufficient for a verdict. The parties may even stipulate that fewer than 9 votes will result in a verdict. For example, if a 12-person jury loses two members, the parties may agree that a vote of 8-2 will prevail, to avoid retrying the case. Without an agreement, however, the case must be retried.

The decision on whether to stipulate to a less than a full jury is difficult and requires a lawyer's best judgment. Factors to consider include:

- The way the case "went in" (such as whether there was any surprise testimony or all factors were as expected),
- The status of the testimony that will provide new or additional material for impeachment,
- The costs of another trial,
- The importance of any jury request for read-back of testimony during deliberations, and
- Any questions about the law or the instructions during deliberations.

The pros and cons of retrial include whether the opposition will be better prepared later. If a mistrial is declared, then both parties have the right to designate new expert witnesses. *Beverly Hosp. v Superior Court* (1993) 19 CA4th 1289, 1294, 24 CR2d 238. In the end, the decision rests on an ultimate guess about what this group of jurors is likely to do and whether the client would be better served by a second trial.

**PRACTICE TIP:** Consider the length of time before the case can be retried, and balance the length and expense of another trial with the risks inherent in a less than a full jury. Be sure to obtain your client's consent before stipulating to a less than a full jury.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/ VI. WHEN JURORS REQUEST INFORMATION DURING DELIBERATIONS/§21.24 A. Jury requests information through bailiff or designated court officer

## VI. WHEN JURORS REQUEST INFORMATION DURING DELIBERATIONS

### §21.24 A. Jury requests information through bailiff or designated court officer

To assist their deliberations, jurors may request further information, such as rereading of testimony or instructions, additional instructions on the law, additional argument, or further evidence. The court must respond to jurors' questions or requests for information whenever the jury is deliberating. See §21.3. Counsel for all parties must be notified of any request and be given an opportunity to be present if additional information is given to the jury. CCP §614.

Communications from the jury to the court during deliberations should always be through the bailiff or court officer. CCP §614.

**NOTE:** Although not strictly necessary, almost all trial judges require that the jury's requests be in writing. If in writing, requests are less subject to interpretation or debate and are more easily entered into the record of the trial.

The trial judge must preserve and deliver to the clerk, for inclusion in the record, all written communications received from the jury or any individual juror, as well as any written communications sent by the judge to the jury or any individual juror. Cal Rules of Ct 2.1030. The trial judge must also ensure that oral communications with the jury are recorded. Cal Rules of Ct 2.1030. The jurors' request for additional information should be considered on the record. See Los Angeles Ct R 8.55. On receiving the request from the jury, the trial judge and counsel may consult on an appropriate response, including having the attorneys address the question in reopened argument. Any result of these discussions should also be on the record.

**WARNING:** Although parties sometimes stipulate that the judge or court reporter may provide a response to the jury in the jury room, see discussions in §§21.2 and 21.12 on impact of court reporter's presence in the jury room.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.25 B. When jurors request that testimony be reread

## §21.25 B. When jurors request that testimony be reread

Jurors often wish to have the testimony of a particular witness or testimony on a particular subject matter reread. During deliberations the jury has the right on request to rehear testimony and instructions. See *People v Frye* (1998) 18 C4th 894, 1007, 77 CR2d 25.

The easiest requests to honor are those for testimony of a witness or witnesses on a particular subject. More difficult to respond to are requests for more generic topics (for example, all testimony on the question of the color of the traffic light at the intersection). The court usually requires that counsel assist the court reporter in finding the particular passage or passages that will respond to the request. After all parties agree to the selected testimony, it is reread in the jury room with only the jurors and the court reporter present.

It is now becoming more common for a trial to be recorded, not by a court reporter, but either electronically or on videotape. Although more time and effort is usually required to locate the requested passages in these circumstances, the request should be honored as if the proceedings were recorded by a court reporter.

Counsel may request that testimony other than that specifically requested by the jury be read to put the request of material in context. There is no right to such a reading, however. *Asplund v Driskell* (1964) 225 CA2d 705, 714, 37 CR 652.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.26 C. When instructions may be reread and further instructions added

## §21.26 C. When instructions may be reread and further instructions added

Jurors may request a further instruction on the law, which may take the form of either rereading previous instructions or creating new instructions. Written jury instructions are available and eliminate most requests for simple reiterations of instructions. Jurors may ask that the written instructions be clarified, however, or even ask additional questions. See §21.31 for discussion of requirement that jurors be given copies of jury instructions if they request.

**JUDICIAL PERSPECTIVE:** It is strongly recommended that each juror be given an individual copy of the final jury instructions. When jurors have their own copies, they can review and absorb the instructions at their own pace. This lessens the risk and embarrassment of slowing the process down or confronting the foreperson with a demand to review an instruction. It also reduces requests for further explanations of the law. Counsel should avoid requesting the court to read a previously given instruction. If the instruction did not help the first time, it is unlikely that a rereading will clarify.

If the request for a particular instruction or group of instructions indicates a problem for the case, consider suggesting to the trial judge that other, balancing, instructions also be reread but be aware that the trial judge is not required to honor a request for additional, balancing instructions.

If the jury has questions on any point of law not covered by the instructions, the court must provide additional guidance. Unless it is something common (for example, further elucidation on the concept of preponderance of the evidence), the court must consult with counsel on an appropriate response.

**PRACTICE TIP:** Take an active role in any further instruction that will be submitted to the jury. It is a significant opportunity to influence a key instruction on a point of law.

**Further research:** See chap 20 for a discussion of jury instructions.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.27 D. Requests to view the scene will be rejected

## §21.27 D. Requests to view the scene will be rejected

After deliberations begin, jurors sometimes request that they be allowed to view the scene of an important event in the evidence (for example, a traffic accident). Because this viewing amounts to the introduction of new evidence after the matter has been submitted (and may engender requests for reargument), courts routinely reject them. This also applies to electronic views of a scene (*e.g.,* Google "street view"). For further discussion, see §§13.110-13.111, 24.6.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.28 E. Requests for collateral aids will be rejected

### §21.28 E. Requests for collateral aids will be rejected

Sometimes jurors request collateral materials to assist them in their deliberations, such as a dictionary to help with an undefined term or an encyclopedia to expand their knowledge of an area. Because these materials are not admitted into evidence, giving them to the jury is improper. *People v Karis* (1988) 46 C3d 612, 642, 250 CR 659 (error for jurors to consult dictionary); *Glage v Hawes Firearms Co.* (1990) 226 CA3d 314, 323, 276 CR 430 (jurors committed misconduct when they checked a dictionary for definition of preponderance).

Exceptions are items that are not evidence themselves, but that would assist in the deliberative process, *e.g.,* measuring devices. These items may be supplied to the jury at the trial court's discretion, depending on the circumstances. Care must be taken, however, that the aids do not lead to improper experiments. See §21.35.

**JUDICIAL PERSPECTIVE:** The court should admonish the jurors not to use electronic devices to conduct Internet research.

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## VII. WHEN JURORS REQUEST MATERIALS IN JURY ROOM DURING DELIBERATIONS

### A. Materials Allowed

### §21.29 1. Documents or exhibits admitted into evidence

Any documents admitted into evidence (excluding depositions, see §21.32) are usually available to jurors during deliberations. CCP §612. The court has the discretion to make documents or exhibits unavailable to the jury if it determines that they should not be taken from the person who possesses them. CCP §612. See also *Powley v Swensen* (1905) 146 C 471, 483, 80 P 722; *People v Balestieri* (1914) 23 CA 708, 712, 139 P 821. The court also has discretion not to allow certain papers in the jury room. *Powley v Swensen, supra*. For example, the court might not allow access to exhibits if the exhibits are numerous and reading through them would take the jury a great deal of time. Reading through all the exhibits might be considered distracting, rather than conducive, to the deliberation process.

**JUDICIAL PERSPECTIVE:** Judges will sometimes resist sending into the jury room a large blowup of a document when the effect might be to emphasize its importance. Counsel should therefore be ready with the actual document, or a true and correct copy of it, which can be substituted for any large blowup used during the trial. Counsel should also advise the jurors that these blowups will not be automatically provided to them during deliberations.

Jurors may use an exhibit to aid them in weighing the evidence and reaching a conclusion on a contested matter. They may conduct experiments within the parameters of the offered evidence. *People v Bogle* (1995) 41 CA4th 770, 777, 48 CR2d 739. An experiment that falls outside the purview of the evidence constitutes the taking of evidence without the parties' knowledge and denies the injured party an opportunity to meet, answer, or explain the evidence. See *Higgins v Los Angeles Gas & Elec. Co.* (1911) 159 C 651, 660, 115 P 313.

If the exhibit is one the jury can experiment with, the court should instruct the jury that the jury's use of the exhibit during deliberations must be confined to the purpose for which it was admitted during trial. *Higgins v Los Angeles Gas & Elec. Co., supra*. See also *People v Conkling* (1896) 111 C 616, 627, 44 P 314 (misconduct when jurors took rifle outside and fired it to determine powder patterns). See §21.35.

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### §21.30 2. Juror's notes and juror-drawn diagrams

Although the judge will usually instruct the jury that a juror's recollection supersedes notes, jurors are allowed to carry into the jury room the notes they wrote during testimony or other trial proceedings. CCP §612; see *Ferner v Casalegno* (1956) 141 CA2d 467, 475, 297 P2d 91 (juror notes of counsel's arguments may be taken into jury room). Diagrams drawn by a juror based on the presented evidence are also permitted in the jury room during deliberations. *Wagner v Doulton* (1980) 112 CA3d 945, 950, 169 CR 550. See §17.7.

**JUDICIAL PERSPECTIVE:** A juror's notes are for his or her personal use only, to assist the note taker's own personal recollection. See CACI 102. See also CALJIC 1.05.

Notes taken by any person other than a juror are *not* permitted in the jury room. CCP §612. For example, in *Conger v White* (1945) 69 CA2d 28, 41, 158 P2d 415, the court held that it was improper for the jury to take into the jury room a large sheet of paper, not admitted into evidence, on which plaintiff's counsel had made calculations.

Courts are required to permit note-taking and to provide materials for note-taking. Cal Rules of Ct 2.1031. The jurors must leave the notes in court at the end of each court session. The bailiff collects them and puts them in a safe place and returns them the next day to the jurors. At the end of trial, jurors may request to take their notes with them. Unclaimed notes are destroyed.

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### §21.31 3. Jury instructions allowed if sanitized

When the jury retires for deliberations, the court must advise the jury that a written copy of the instructions is available. The jury must be provided with a written copy of the jury instructions if it requests one. CCP §612.5. Even if the jury does not request a copy of the jury instructions, it is within the court's discretion to provide the jury with a copy. CCP §612.5. See §20.56.

Copies of jury instructions given to the jury should be sanitized so that references to the party requesting the instructions and other prejudicial references are deleted. See *People v Beach* (1983) 147 CA3d 612, 625, 195 CR 381. Omitted instructions should be completely obliterated. See, *e.g.,* Los Angeles Ct R 8.52 (requesting party's title, citation, and identity should be removed before instructions are given to jury).

**PRACTICE TIP:** Printed-out, individual copies of jury instructions, on two-sided paper, are superior to detached pages with obliterations. Because the current technology is simple and fast, there is no excuse to provide jurors with the old version of detached pages with obliterations. Computer programs can produce copies of jury instructions in booklets that run the instructions consecutively, with the names of the parties included and customized headings provided.

**Further research:** See chap 20 for a more detailed discussion of jury instructions.

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### B. Materials not allowed

### §21.32 1. Deposition transcripts or videotapes

Deposition transcripts are not permitted in the jury room because they may contain inadmissible evidence. See CCP §612; *Higgins v Los Angeles Gas & Elec. Co.* (1911) 159 C 651, 656, 115 P 313. Exhibits attached to the depositions, however, may be permitted if they have been admitted into evidence. See CCP §612; *Cockrill v Hall* (1888) 76 C 192, 196, 18 P 318.

If a deposition transcript is accidentally taken into the jury room, the court will determine whether it has had a prejudicial effect on the jury. See *Brandwein v Rodriguez* (1955) 133 CA2d 433, 436, 284 P2d 130. See also *Davenport v Waite* (1959) 175 CA2d 623, 627, 346 P2d 501 (no prejudicial effect when transcript of defendant's deposition testimony was taken into jury room, because deposition testimony was consistent with defendant's trial testimony).

Even though jurors are not permitted to take deposition transcripts into the jury room, they have a right to have any portion of a deposition that was read at trial reread; the testimony became evidence when it was read in court. See *Smith v Shankman* (1962) 208 CA2d 177, 184, 25 CR 195; *James v Key Sys. Transit Lines* (1954) 125 CA2d 278, 285, 270 P2d 116.

Pretrial videotaping of some witness's testimony for use at trial has become common practice. After these videos are shown at trial, they are evidence and are in the record. Although juries sometimes request to review videos, some trial judges may decline on the grounds that the videos and the testimony contained in them can take on too much prominence in a juror's mind and can also take too long to replay. The use of videotaped testimony may also create problems if objections have rendered portions inadmissible. Counsel should review what is being presented in advance.

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## §21.33 2. Pleadings not received into evidence

In keeping with the basic rule that the jury may not take inadmissible materials into the jury room, the jury should not be permitted to take pleadings into its deliberations. See *Powley v Swensen* (1905) 146 C 471, 483, 80 P 722 (practice of allowing pleadings into jury room not advisable). Pleadings admitted into evidence, however, as with other materials admitted into evidence, are available to jurors during deliberations. CCP §612; *McLean v Crow* (1891) 88 C 644, 648, 26 P 596.

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## §21.34 3. Other items not permitted in jury room

Even though exhibits admitted into evidence may generally be taken into the jury room, check local rules to learn whether there are any rules regarding items not permitted in the jury room.

A local rule might specify items not permitted in the jury room as exhibits that (1) are inherently dangerous (*e.g.,* toxic materials), (2) require expertise to understand (*e.g.,* X-rays), (3) are inflammatory or prejudicial (*e.g.,* a bloody shirt), or (4) include as an integral part inadmissible matter. See, *e.g.,* Los Angeles Ct R 8.67.

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## VIII. JURY MISCONDUCT DURING DELIBERATIONS

### §21.35 A. Conducting improper experiments

It is improper for jurors to conduct experiments that "put them in possession of evidence not offered at trial." *Wagner v Doulton* (1980) 112 CA3d 945, 950, 169 CR 550. See also *People v Wilson* (2008) 44 C4th 758, 829, 80 CR3d 211. The jury's use of exhibits is governed by the fundamental rule that all evidence must be taken in open court. *Higgins v Los Angeles Gas & Elec. Co.* (1911) 159 C 651, 656, 115 P 313.

Each party must have knowledge of the evidence brought against it to be able to meet and answer that evidence. See *Smoketree-Lake Murray, Ltd. v Mills Concrete Constr. Co*. (1991) 234 CA3d 1724, 1749, 286 CR 435 (misconduct for juror to use kitty litter and box in jury room to demonstrate effect of pouring concrete over sand with impressions in it).

Certain experiments conducted in the jury room within the parameters of the offered evidence have been held proper. For example, in *Wagner v Doulton, supra,* in the jury room, a juror made a diagram of the accident scene involved in the suit, based solely on the evidence. The court held that the juror's action did not constitute misconduct, because the diagram was a pictorial representation of the juror's idea of the testimony heard during trial. See also *People v Bogle* (1995) 41 CA4th 770, 778, 48 CR2d 739 (juror use of key to open safe was permissible experiment).

It is also misconduct for a juror to conduct an experiment outside the jury room. See *Lankster v Alpha Beta Co.* (1993) 15 CA4th 678, 682, 18 CR2d 923 (juror made measurements at store similar to accident scene); *People v Phillips* (1981) 122 CA3d 69, 81, 175 CR 703 (juror's home experiment consistent with evidence presented at trial constituted prejudice, but it did not require reversal).

**EXAMPLE 1:** In *Locksley v Ungureanu* (1986) 178 CA3d 457, 223 CR 737, plaintiff, a pedestrian, was injured when hit by a car driven by defendant. After the trial began and before deciding on the verdict, a juror drove his car with one eye covered to simulate defendant's physical condition. The juror voted for defendant in an 11-1 verdict for defendant. The appellate court affirmed the trial court's denial of a new trial based on its determination that even if the juror's experiment was misconduct, it would not have prejudicially affected the outcome of the case.

**EXAMPLE 2:** In *People v Castro* (1986) 184 CA3d 849, 229 CR 280, a jail inmate was convicted of arson that occurred during a jail riot. The only evidence of the defendant's guilt was the testimony of a guard who had observed the defendant during the riot through 7-power binoculars at a distance of 75 to 100 yards. The appellate court held that defendant was entitled to a new trial on the basis that it was prejudicial misconduct when a juror conducted, during deliberations, an experiment with binoculars at home to determine whether the guard could have identified defendant as he had alleged. The juror reported his findings to the other jurors, who thus received evidence, developed outside the courtroom, that the defendant was unable to meet or answer.

A jury's experiment based on evidence received during trial is not misconduct. An experiment that does not generate any new evidence and is simply a reenactment of the offered evidence is permissible. *People v Cumpian* (1991) 1 CA4th 307, 317, 1 CR2d 861.

**EXAMPLE:** In *People v Cumpian, supra,* the jurors strapped a duffel bag to their torsos in a fashion similar to that described by witnesses during the trial. The jurors wanted to determine whether the accused could easily remove the duffel bag to avoid arrest for theft. If the bag was easily removable, the jury could conclude the accused intended to escape with the stolen bag. The court held that the jury's reenactment of the evidence did not constitute receipt of evidence outside the courtroom under the circumstances. It was merely an experiment directed at the proffered evidence. The court drew a distinction between impermissible experiments outside of deliberations and experiments in the jury room that amount to no more than a careful examination of the evidence presented in court. This case catalogues various cases involving jurors' experiments.

When an exhibit that will go to the jury room may be susceptible to improper use, the court must limit or restrict its

use by instruction to the jury. *Higgins v Los Angeles Gas & Elec. Co.* (1911) 159 C 651, 660, 115 P 313.

**Further research:** For further discussion of the topic of this section, see Anno, Propriety of Juror's Tests or Experiments in Jury Room, 31 ALR4th 566 (1984).

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## §21.36 B. Improper communications during deliberations

Depending on the nature of the conversations, it may be misconduct if a juror converses with counsel, a party, a witness, or other person during trial or after the case is submitted. See, *e.g., Iwekaogwu v City of Los Angeles* (1999) 75 CA4th 803, 89 CR2d 505 (juror discussed case with spouse and reported spouse's view to other jurors; no prejudice found from juror misconduct); *Garden Grove Sch. Dist. v Hendler* (1965) 63 C2d 141, 144, 45 CR 313 (plaintiff's counsel talked during recess with juror who later became jury foreman); *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 426, 82 CR 1 (improper communications between juror and witness, but no showing that misconduct was prejudicial). See also *In re Hitchings* (1993) 6 C4th 97, 24 CR2d 74 (writ of habeas corpus granted after convicted defendant uncovered evidence that juror had discussed case with coworkers during trial).

An attorney connected to the case may not communicate, either directly or indirectly, with any juror. Cal Rules of Prof Cond 5-320(B). It is also inappropriate for an attorney not connected with the case to communicate about a case with a juror. Cal Rules of Prof Cond 5-320(C).

Although jury misconduct can arise from improper communications, the misconduct creates only a presumption of prejudice, which may be overcome by a showing that there was no actual prejudice. *People v Goldberg* (1984) 161 CA3d 170, 193, 207 CR 431. See §§17.10-17.19.

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### §21.37 C. Resorting to chance or using quotient to arrive at verdict

Code of Civil Procedure §657(2) specifies the following as a basis for granting a new trial:

> whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance…

For example, it is misconduct for jurors to arrive at a verdict by flipping a coin (*Donner v Palmer* (1863) 23 C 40, 47), drawing lots (*Levy v Brannan* (1870) 39 C 485, 489), throwing dice, or resorting to any other type of gaming (see *Wilson v Berryman* (1855) 5 C 44). In *Dixon v Pluns* (1893) 98 C 384, 387, 33 P 268, the court defined "chance" as "hazard, risk, or the result or issue of uncertain and unknown conditions or forces." Verdicts arrived at in this manner are often called "chance" verdicts. See also CACI 5009.

Similarly, it is misconduct for jurors to arrive at a quotient verdict in determining the amount of damages to award. See *Chronakis v Windsor* (1993) 14 CA4th 1058, 1066, 18 CR2d 106 (in personal injury case, juror affidavits showed verdict on economic damages had been a quotient verdict arrived at by chance). To arrive at a quotient verdict, each juror selects a sum to award and then the jurors' sums are added together and the aggregate is divided by the number of jurors. The quotient is returned as the verdict. See *Dixon v Pluns, supra*; *Wilson v Berryman, supra*. Compare *Iwekaogwu v City of Los Angeles* (1999) 75 CA4th 803, 819, 89 CR2d 505 (no quotient verdict when jury selected and voted on several suggested figures); *Fredrics v Paige* (1994) 29 CA4th 1642, 35 CR2d 246 (court of appeal affirmed trial court's denial of motion for new trial based on assertion that jury rendered quotient verdict).

In *Ham v County of Los Angeles* (1920) 46 CA 148, 154, 189 P 462, the court noted that jurors' agreement in advance to adopt an average, without further discussion or deliberation, is fatal to a verdict. A quotient verdict is considered a chance verdict within the meaning of CCP §657(2). See *Dixon v Pluns, supra*; *Ham v County of Los Angeles* (1920) 46 CA 148, 153, 189 P 462.

If jurors do not agree to be bound by a quotient figure, and afterwards discuss and vote on whether to adopt or reject the sum, the verdict will not be considered a chance verdict and will be upheld (assuming that there is substantial evidence in the record to support the numbers). See *Bardessono v Michels* (1970) 3 C3d 780, 794, 91 CR 760. See also *Mirabito v San Francisco Dairy Co.* (1934) 1 C2d 400, 35 P2d 513, in which the appellate court upheld the verdict of nine jurors who, in order to return a verdict for plaintiff to avoid deadlock on the amount of damages, agreed that a single vote would be taken on two amounts and that the amount voted by the majority would be returned as the unanimous verdict of the jury.

**Further research:** For further discussion of chance and quotient verdicts, see *Glass v Gulf Oil Corp.* (1970) 12 CA3d 412, 96 CR 902; 7 Witkin, California Procedure, *Trial* §§380-381 (5th ed 2008).

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### §21.38 D. Improper calculations to include attorney fees

In a personal injury or wrongful death action, jurors' agreement to increase a verdict in favor of plaintiff by an amount that they estimate plaintiff will pay in legal fees constitutes misconduct. See *Krouse v Graham* (1977) 19 C3d 59, 81, 137 CR 863. In *Krouse,* the Supreme Court vacated the trial court's order denying defendant's motion for a new trial, and directed the trial court to reconsider the motion and admit four juror declarations that the trial court previously had ruled inadmissible. See also *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 415 n8, 185 CR 654 (discussing the *Krouse* decision). Under CACI 3964, jurors are explicitly instructed not to consider attorney fees or court costs.

**EXAMPLE 1:** In *Moore v Preventive Medicine Med. Group, Inc.* (1986) 178 CA3d 728, 740, 223 CR 859, a medical malpractice action, a juror's declaration stated that a juror asked what amount of any award plaintiff would have to pay as attorney fees. Another juror stated that plaintiff probably would have to pay 40 percent of any award in attorney fees. The appellate court held that these statements during deliberations were not juror misconduct, because they did not indicate an express agreement between the jurors was reached and the statements were not extensively discussed.

**EXAMPLE 2:** In *Tramell v McDonnell Douglas Corp.* (1984) 163 CA3d 157, 209 CR 427, the court, citing *Krouse v Graham, supra,* found misconduct when evidence indicated that several jurors impliedly agreed to increase the verdict to compensate the plaintiff for attorney fees and income taxes. Compare *Tramell* with *Ferreira, Inc. v Quik Stop Mkts., Inc.* (1983) 141 CA3d 1023, 1033, 190 CR 778, in which the verdict was upheld despite affidavits showing that the jury used a comparative fault formula to reduce its award.

**EXAMPLE 3:** In *Thompson v Friendly Hills Reg'l Med. Ctr.* (1999) 71 CA4th 544, 84 CR2d 51, defendant moved for a new trial, submitting declarations from three jurors alleging that the jury had inflated damages by one-third to cover plaintiff's attorney fees. Plaintiff opposed the motion with declarations from other jurors denying any such agreement. The trial court granted a motion for new trial, and plaintiff accepted a remittitur. The court of appeal reversed the new trial order and reinstated the original verdict, finding that the jurors' declarations "taken as a whole" did not show an agreement to inflate the verdict and noting that plaintiff's closing argument asked for the amount awarded and did not include a claim for attorney fees.

In *Iwekaogwu v City of Los Angeles* (1999) 75 CA4th 803, 820, 89 CR2d 505, the court, citing *Tramell v McDonnell Douglas Corp., supra,* found that it was permissible for the trial court to include questionable activity by the jury as one of the reasons for concluding that damages awarded by the jury were excessive. Although the court concluded that there was questionable activity by the jury, it held that no act of juror misconduct precluded the city from receiving a fair trial.

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### §21.39 E. Consumption of alcohol may be misconduct

Whether consumption of alcohol constitutes juror misconduct depends on whether the alcohol renders the juror incapable of competently performing a juror's duties. See *People v Hedgecock* (1990) 51 C3d 395, 420, 272 CR 803.

In *People v Allen* (1986) 42 C3d 1222, 1265, 232 CR 849, the Supreme Court held that the trial court's comment to the jury that "if you want to have something to drink, that's up to you," when the court informed the jury that they would be sequestered for the evening and their dinner would be paid for by the state, was insufficient to establish juror misconduct in a criminal prosecution. The comment was made to the jury after rebuttal argument but before instructions were given, and there was no evidence that any juror consumed alcohol during the trial or became intoxicated or unable to completely perform jury duties. 42 C3d at 1266. Although the Supreme Court in *Allen* discouraged jurors' consumption of alcoholic beverages by jurors, during either the presentation of evidence or deliberations, the court stated that the mere consumption of alcoholic beverages by jurors is not a ground for reversal per se "in the absence of some showing or some reasonable ground to suspect that the consumption of alcohol actually affected the jurors' capacity to competently perform their duties." 42 C3d at 1266.

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## §21.40 F. Discussion of improper topics

Evidence of jury discussions on improper topics is admissible as overt acts, provided the evidence is not directed at the juror's subjective reasoning process. See, *e.g., DiRosario v Havens* (1987) 196 CA3d 1224, 1238, 242 CR 423 (statements between jurors regarding court's authority to reduce excessive jury award are overt acts that are admissible on motion for new trial; motion denied in this case). See also *In re Stankewitz* (1985) 40 C3d 391, 397, 220 CR 382 (juror used own experience as law enforcement officer on question of law); *Glage v Hawes Firearms Co.* (1990) 226 CA3d 314, 323, 276 CR 430 (juror consulted dictionary for definition of word).

During deliberations in *Gorman v Leftwich* (1990) 218 CA3d 141, 147, 266 CR 671, jurors discussed whether a defendant had malpractice insurance and concluded that he did. The court held that this was not misconduct, because the jurors did not agree to base their decision on the insurance discussion. In *Garfoot v Avila* (1989) 213 CA3d 1205, 1211, 261 CR 924, the court held inadmissible, evidence showing juror affidavits that stated the jury had used a per diem method to arrive at pain and suffering damages and then reduced them to present value. The court held that only evidence that the jury used an expressly prohibited method to arrive at damages (*e.g.,* by chance) would be admissible.

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## §21.41 G. Mistakes in law by jurors

Depending on the circumstances, jurors' mistakes in the law during deliberations may be misconduct. In *Ford v Bennacka* (1990) 226 CA3d 330, 335, 276 CR 513, the court held that a series of declarations stating that jurors thought that plaintiff's 50-percent negligence required a defense verdict, contrary to law, were not objective, verifiable incidents but at the most were deliberative errors in the jurors' mental processes and did not amount to misconduct.

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### §21.42 H. Misconduct to show bias

Consideration of a party's or witness's race or gender, or other characteristics, like marital status or sexual orientation during deliberations, constitute misconduct. See *Tapia v Barker* (1984) 160 CA3d 761, 206 CR 803 (juror failed to disclose possible prejudice towards plaintiff's ethnic background).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.43 I. When smoking by jurors a problem

## §21.43 I. When smoking by jurors a problem

The alleged intimidation of nonsmoking jurors by smoking jurors, without more, does not constitute juror misconduct, but bears only on the jurors' mental process. *People v Cox* (1991) 53 C3d 618, 695, 280 CR 692, overruled on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209.

**NOTE:** This should be less of a problem now that smoking is banned from court facilities (see §21.6), but the issue may occur in other circumstances (*e.g.,* during lunch).

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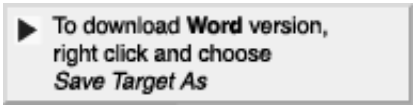
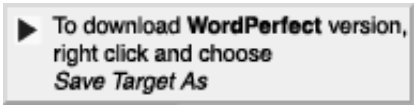
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/21 Jury Deliberations/§21.44 IX. CHECKLIST: REMEDIES FOR MISCONDUCT DURING DELIBERATIONS

## §21.44 IX. CHECKLIST: REMEDIES FOR MISCONDUCT DURING DELIBERATIONS




Remedies for jury misconduct include:

___ 1. Object to the misconduct or irregularity in the proceedings (see §17.23).

___ 2. Request appropriate admonition(s) from the judge (see §17.24).

___ 3. Request replacement of juror with alternate (see §§21.20-21.23).

___ 4. Move for mistrial (see §§17.26, 18.82-18.102).

___ 5. Move for new trial (see §§17.27-17.32, 25.22-25.71).

**Further research:** Remedies for juror misconduct are discussed in detail in §§17.23-17.32. See chap 16 for discussion of misconduct of counsel and court.

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# 22

# Verdicts

**Arthur L. Sherwood**

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## §22.1 I. SCOPE OF CHAPTER

A verdict is the jury's means of delivering and formally recording its resolution of the disputed issues in a case. A jury may return either a general or a special verdict. CCP §624. See §22.2.

On procedures and timing for submitting verdict forms, see §§22.8-22.11.

On drafting verdict forms of various kinds, see §§22.12 (general verdicts), 22.13 (general verdicts with special findings), 22.14 (special verdicts).

Examples of written verdict forms appear in §§22.35-22.41.

The process by which a jury is instructed in reaching its verdict is discussed in chap 20. On directed verdicts, see §§18.35-18.56. On impeaching the verdict based on the jury's improper conduct, see §§17.10-17.22.

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## II. GENERAL AND SPECIAL VERDICTS

### §22.2 A. Authority; definitions

Before drafting verdict forms, familiarize yourself with the principal authorities discussed in this chapter: CCP §§613, 619, 624, 630, and Cal Rules of Ct 3.1580.

By rendering a general verdict, the jury pronounces generally in favor of plaintiff or defendant. With a special verdict, the jury makes findings on the relevant facts, and the court draws the conclusions of law. CCP §624.

**PRACTICE TIP:** Before deciding on the verdict form that you will request the court to give to the jury, assess your client's position and the facts of your case, including the likelihood that the jury will render a verdict in your favor. The prevailing party has a much better chance of defending a general verdict on appeal, but a special verdict forces the jury to think before it acts. On when verdict forms must be submitted to the court, see §22.11. For further discussion on when to use particular verdict forms, see §§22.15-22.17.

The court has the discretion to direct the type of verdict the jury will deliver, in either of two forms (CCP §§624-625):

- A general verdict in favor of a party, with or without special findings on particular questions of fact; or
- A special verdict finding on the facts only.

On the issue of punitive damages, special verdicts are mandatory. CCP §625. See §22.14.

**WARNING:** Be sure you know the difference between a "special verdict" and a "general verdict with special findings," which can differ significantly in their effect on your case, and avoid the unintentional or incorrect use of these terms. See §§22.4-22.6. Unfortunately, CCP §625 uses "special verdict" and "special finding" in an interchangeable and confusing manner, as do some court opinions. See, *e.g., Li v Yellow Cab Co.* (1975) 13 C3d 804, 824 n18, 119 CR 858.

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### §22.3 B. Compared with judgment

A verdict is not the same as a judgment. Pronouncing judgment is a judicial act that must be performed by a judge. Unless the court grants a posttrial motion affecting the verdict (*e.g.,* judgment notwithstanding the verdict; see §§25.2-25.21), the judgment of a court sitting with a jury must conform to the jury's intention. *Telles v Title Ins. & Trust Co.* (1969) 3 CA3d 179, 187, 83 CR 444 (trial judge erroneously modified jury's verdict on allocating damages among joint tortfeasors).

If motions after trial do not result, *e.g.,* in an order for a new trial or judgment notwithstanding the verdict, judgment is entered based on the verdict. See §22.23. Because the verdict is not a judgment or an order, the verdict itself is not appealable. For discussion of judgments, see chap 23.

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### C. General verdicts

### §22.4 1. Without special findings

A general verdict, if otherwise valid, includes an implicit finding in the prevailing party's favor on every fact or issue essential to support the jury's conclusion. *Henderson v Harnischfeger Corp.* (1974) 12 C3d 663, 673, 117 CR 1.

This is the reason that a general verdict is not easily overturned on appeal. When several causes of action have been tried and a general verdict is returned for plaintiff without referring to any specific causes of action, that verdict can be upheld on appeal if the evidence supported the verdict on any of the causes of action. *Codekas v Dyna-Lift Co.* (1975) 48 CA3d 20, 24, 121 CR 121. See *Louisville Title Ins. Co. v Surety Title Guar. Co.* (1976) 60 CA3d 781, 786, 132 CR 63.

Similarly, when there is more than one defense theory, a finding in defendant's favor on a general verdict implies a finding in defendant's favor on whichever defense theory is supported by the evidence. *McCloud v Roy Riegels Chems.* (1971) 20 CA3d 928, 935, 97 CR 910.

**PRACTICE TIP:** Consider the advantage that using a general verdict form could ultimately have on your case. Is it likely that the other side will appeal if you win? California appellate courts have long shown judicial deference to general verdicts. See discussion of California law on general verdicts in *Niles v U.S.* (ND Cal 1981) 520 F Supp 808, 812, aff'd (9th Cir 1983) 710 F2d 1391 (requiring general verdicts to be upheld if sufficient evidence supports at least one of the prevailing party's alternative theories). On other advantages of using general verdict forms, see §22.15.

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### §22.5 2. With special findings

The court may direct the jury, if it reaches a verdict for or against a particular party, to then respond to special interrogatories. CCP §625. The jury's response to those interrogatories, its "special findings," test the validity of the general verdict by verifying that the jury found appropriately on an essential fact or a material issue that is either favorable or fatal to a party's case. *Hurlbut v Sonora Community Hosp.* (1989) 207 CA3d 388, 403, 254 CR 840; *Masonite Corp. v PG&E* (1976) 65 CA3d 1, 11, 135 CR 170. See 7 Witkin, California Procedure, *Trial* §353 (5th ed 2008).

**PRACTICE TIP:** Some local rules require that special findings and special verdict forms be drafted to require the jury to answer yes or no, or to state a simple percentage or sum. On drafting verdict forms, see §§22.12-22.14.

Special findings may be requested by a party or ordered on the court's own initiative. The court's discretion in instructing the jury to make special findings will not be overturned on appeal unless abuse is shown. *Gherman v Colburn* (1977) 72 CA3d 544, 588, 140 CR 330 (no abuse). See *Gorman v Leftwich* (1990) 218 CA3d 141, 152, 266 CR 671 (court's refusal to permit special verdict on future damages in medical malpractice action was abuse of discretion).

**NOTE:** Unlike special verdicts (see §22.6), special interrogatories need not address all issues, because they are accompanied by a general verdict in favor of one party or another.

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### §22.6 D. Special verdicts; required for punitive damages

When returning a special verdict, the jury determines the ultimate facts of the case, and the court renders the legal consequences of those facts (and the judgment). CCP §624; *Muffett v Royster* (1983) 147 CA3d 289, 300, 195 CR 73. Nothing must remain for the court to do but to draw conclusions of law. *All-West Design, Inc. v Boozer* (1986) 183 CA3d 1212, 228 CR 736.

**WARNING:** If the special verdict answers do not resolve all the factual issues, the special verdict cannot properly provide a foundation for a judgment. *Myers Bldg. Indus. v Interface Technol., Inc.* (1993) 13 CA4th 949, 960, 17 CR2d 242 (inherent in special verdict is risk that not all ultimate issues will be decided, resulting in defective verdict). See *Falls v Superior Court* (1987) 194 CA3d 851, 854, 239 CR 862. On disadvantages of using special verdict forms, see §22.17. On drafting special verdict forms, see §22.14.

When the jury cannot reach a consensus on one issue in a special verdict, it is permissible for the jury to then consider the next dispositive issue. See *Contreras v Goldrich* (1992) 10 CA4th 1431, 1434, 13 CR2d 394 (jury unable to reach verdict on negligence, but did determine that, even if it found there had been negligence, it was not the legal cause of injury).

A special verdict is mandatory in all cases in which the issue of punitive damages is presented to the jury. A plaintiff is not entitled to punitive damages as a matter of law. *Brewer v Second Baptist Church* (1948) 32 C2d 791, 801, 197 P2d 713. The jury must find that the defendant committed a tort and that the tortious act was conducted with malice, fraud, or oppression. See *Myers Bldg. Indus. v Interface Technol., Inc., supra*. The special verdict form must separate punitive damages from compensatory damages, *i.e.,* the jury must assess those amounts separately. CCP §625; *All-West Design, Inc. v Boozer, supra*.

Other than on the issue of punitive damages, the trial judge has discretion to require that a special verdict be used in any trial. CCP §625. The court's decision on what verdict form should be used will not be overturned on appeal unless the losing party can show abuse of discretion. See *Gorman v Leftwich* (1990) 218 CA3d 141, 150, 266 CR 671 (court's refusal to permit special verdict concerning future damages in medical malpractice action was abuse of discretion).

**NOTE:** In the past, special verdicts were mandatory in will contests tried before a jury, but the provisions for jury trial of will contests have been eliminated. Any contested issue of fact that affects the validity of a will must now be tried and determined by the court. Prob C §8252(b).

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### §22.7 E. Written verdicts required

The verdict must be in writing and signed by the foreperson. CCP §618. The verdict must be clear and unambiguous as to who has won and who has lost. A verdict that finds against defendant *A* but that is silent about defendant *B* is not a verdict in favor of defendant *B*; it is a failure to find on the issue of defendant *B*'s liability. *Walters v Marler* (1978) 83 CA3d 1, 20, 147 CR 655, disapproved on other grounds in *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 507, 198 CR 551. On defective verdicts, see §§22.24-22.28.

Counsel usually prepare forms that the court submits to the jury so that they can be filled out by the foreperson. On drafting considerations, see §22.12-22.14; for sample forms, see §§22.35-22.41.

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## III. PREPARING VERDICT FORMS

### §22.8 A. Checklist

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___ 1. Check local rules and the trial judge's practice on drafting, serving, and submitting verdict forms (see §22.10).

___ 2. Consider and determine what type of verdict form is most advantageous:

___ a. General verdict (see §22.15);

___ b. General verdict with special findings (see §22.16); or

___ c. Special verdict (see §22.17).

___ 3. Draft form of verdict to be proposed, and consider or draft associated jury instructions (see §§22.9, 22.12-22.14).

___ 4. If punitive damages are to be presented to the jury, prepare required special verdict forms (see §22.6).

___ 5. Serve on other counsel and submit the proposed verdict forms with the court (sometimes as early as the in-chambers conference before trial or before closing arguments) (see §22.10).

___ 6. Consider whether changes or modifications are necessary or advisable and, if so, make an appropriate request to the court to modify the forms (see §22.10).

___ 7. Review proposed verdict forms served by the opposition or suggested by the court (see §§22.18-22.19).

___ 8. Attempt to resolve with opposing counsel any conflicts in proposed verdict forms, or preserve on the record the objections you have to the court's forms (see §22.19).

___ 9. If conflicts cannot be resolved, prepare written or oral objections to the opposition's forms and argument supporting your proposed forms (see §22.18).

___ 10. File written position with the court and argue the issues on the record (see §§22.18-22.19).

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### §22.9 B. Procedures

Counsel for each party should prepare proposed verdict forms, along with proposed jury instructions on the verdict. Verdict forms must be consistent with the jury instructions given by the court. See *Demkowski v Lee* (1991) 233 CA3d 1251, 1262, 284 CR 919 (verdict form failed to segregate damages for workers' compensation and personal injury, thereby preventing double recovery).

As a part of its jury instructions, the court will decide which verdict forms will be given to the jury and direct the jury on their use, including any special findings that must be made. Some courts hold a conference on all proposed jury instructions and verdict, and findings forms before closing argument. See, *e.g.,* Los Angeles Ct R 8.24. On court's discretion to decide verdict forms, see §22.2. On jury instructions, see chap 20.

**PRACTICE TIP:** Label the forms that you draft and submit to the court, *e.g.,* "General Verdict with Special Findings" or "Special Verdict." When the jury is asked to respond to interrogatories so that it can make special findings, it is particularly important to remove any ambiguity about whether the jury will return a general or a special verdict. Otherwise, it may be left to appellate counsel with little or no record on the issue to argue which type of verdict forms were actually intended and used. See §§22.4-22.6, 22.12-22.17.

Check local rules for any requirements on general or special verdict forms. On drafting considerations for different types of verdict forms, see §§22.12-22.14.

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## §22.10 1. Submission and Service

Counsel should learn of any particular practices or requirements of the trial judge before submitting verdict forms. If the judge prefers the parties to submit verdict forms as early as the in-chambers conference or before evidence is introduced, counsel should remain cognizant of opportunities to adjust the verdict form. This step is sometimes missed as a result of the pressures of trial.

Check local rules for any procedures for modifying verdict forms before they are given to the jury. See, *e.g.,* Los Angeles Ct R 8.27 (judge to advise parties on the record outside jurors' hearing if substantive changes are made in jury instructions and verdict and findings forms). Consider too the possibility of seeking modifications to verdict forms submitted by other parties. On objecting to verdict forms, see §§22.18-22.19. When the jury retires to deliberate, the verdict forms that the trial judge has decided are appropriate will be sent to the jury room for the jurors' use.

If counsel wants the jury to make special findings (either to test a general verdict or because the jury is rendering a special verdict), Cal Rules of Ct 3.1580 requires service on all parties of copies of the proposed special interrogatories that are presented to the judge. See §§22.13-22.14. Even when counsel prepares general verdict forms, it is good practice to circulate the proposed forms to other counsel for approval before submitting them to the trial judge.

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### §22.11 2. Timing

Although local rules may dictate when verdict forms must be submitted to the court, as a practical matter, all verdict forms should be settled before final argument. The parties' counsel may then appropriately refer to the forms during argument. But see *Pressler v Irvine Drugs, Inc.* (1985) 169 CA3d 1244, 1251, 215 CR 807 (party complied with court direction that party's proposed interrogatories be submitted after general verdict given to see whether they were necessary).

Generally, however, it is too late to request accompanying special interrogatories after the jury has returned a general verdict. *Vivion v National Cash Register Co.* (1962) 200 CA2d 597, 602, 19 CR 602 (court cannot require jury to make special findings after general verdict rendered). Under Cal Rules of Ct 3.1580, a party seeking special findings must submit the proposed interrogatories to the trial judge before closing argument (unless otherwise ordered by the court).

**PRACTICE TIP:** Local court rules or policies frequently require that verdict forms be submitted at a particular point in the trial, which may be earlier than the beginning of closing argument. See, *e.g.,* Los Angeles Ct R 8.95 (proposed special verdict and finding forms to be submitted before jury instruction conference).

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## C. Drafting considerations

### 1. General verdicts

### §22.12 a. Without special findings

The form used for a general verdict should permit the jury to express any permissible conclusions that may be reached under the evidence and the court's instructions. *Fransen v Washington* (1964) 229 CA2d 570, 574, 40 CR 458.

Counsel should take care that a general verdict form minimizes opportunities for confusion and does not convey a preference for any party that would risk the trial court's rejecting it or that would provide a basis for appeal. See *Mish v Brockus* (1950) 97 CA2d 770, 776, 218 P2d 849 (when verdict unintelligible and inconsistent, court should have sent jury back to jury room with instructions to clarify). On defective verdicts, see §§22.24-22.32.

For a form of the court's instructions to the jury in connection with the use of a general verdict form, see §22.35. See general verdict forms for two-party and multiparty lawsuits in §§22.36-22.37.

**PRACTICE TIP:** It is often better strategy to use a single general verdict form, even if the trial is of more than one action in a consolidated trial. See, *e.g., Manufacturers' Fin. Corp. v Pacific Wholesale Radio, Inc.* (1933) 130 CA 239, 245, 19 P2d 1013 (using separate verdicts in consolidated cases confused jurors). When the trial is consolidated and there are multiple parties, take special care in drafting the verdict form to avoid confusion and to clearly and unambiguously present all possible outcomes.

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### §22.13 b. With special findings

When the court instructs the jury to provide a general verdict with special findings, counsel usually drafts special interrogatories that are included with the general verdict form. It is counsel's responsibility to formulate the appropriate special interrogatories. The trial judge is not obligated to draft special interrogatories or verdict forms. See *Mesecher v County of San Diego* (1992) 9 CA4th 1677, 1686, 12 CR2d 279. See also *Finn v G. D. Searle & Co.* (1984) 35 C3d 691, 701, 200 CR 870. On procedures when counsel disagree on the special interrogatories to present to the jury, see §22.18.

If the two are inconsistent, special findings override a general verdict. CCP §625. See §22.25. Because they control, special interrogatories must be carefully drafted. For a court to enter judgment on the findings, they must be specific enough to show absolute irreconcilability to a contrary general verdict. *Curtis v State* (1982) 128 CA3d 668, 689, 180 CR 843.

**PRACTICE TIP:** If possible, draft multiple interrogatories so that the answer to one interrogatory determines whether the next interrogatory is to be answered. As an example, see form in §22.39. This technique should help you draft each interrogatory based on a single fact and not assume the existence or nonexistence of other disputed facts in the particular interrogatory.

If multiple parties are involved, it is often useful to refer to a party by name as well as to that party's position in the lawsuit (*e.g.,* "Defendant Smith"). When there are multiple defendants and issues of comparative fault with both economic and noneconomic damages, it is important to have the jury separately specify the amount of each type of damage. For a special verdict form that can also be used for a general verdict with special findings, see §22.41.

The substance of the questions must be within the issues framed by the pleadings and the questions should be phrased to elicit answers that are supported by at least some of the evidence. The interrogatories should call for plain and direct answers, usually "yes" or "no."

Each interrogatory should be unambiguous and readily understandable, avoiding technical language or references, if possible. *Law v Northern Assur. Co.* (1913) 165 C 394, 405, 132 P 590. The number and detail of special interrogatories, however, should not be so great as to risk jury confusion or to waste jury time. See, *e.g., Wyler v Feuer* (1978) 85 CA3d 392, 405, 149 CR 626.

Special interrogatories that test a general verdict do not need to address all the issues in the case. Special interrogatories should deal with ultimate facts rather than specific evidentiary matters or legal conclusions. The following examples have been discussed in cases:

**EXAMPLE 1:** Numerous detailed interrogatories laced with legal conclusions resulted in inconsistencies and confusion. *Wyler v Feuer* (1978) 85 CA3d 392, 404, 149 CR 626.

**EXAMPLE 2:** Deposition-style questions that sought to demonstrate the jury's inconsistent subjective thought processes were improper. *Gherman v Colburn* (1977) 72 CA3d 544, 588, 140 CR 330.

**EXAMPLE 3:** Special interrogatories were inappropriate when they were not within the issues or did not involve a question of law. *Vallejo & N. R.R. v Home Sav. Bank* (1914) 24 CA 166, 174, 140 P 974.

**EXAMPLE 4:** Questioning whether particular representations were material was improper. *McEwen v New York Life Ins. Co.* (1914) 23 CA 694, 697, 139 P 242.

**EXAMPLE 5:** "Did the plaintiffs sell and deliver certain goods?" was a sufficiently factual interrogatory. *Napa Valley Packing Co. v San Francisco Relief & Red Cross Funds* (1911) 16 CA 461, 468, 118 P 469.

When drafting special interrogatories, it is important to label the verdict form clearly as, *e.g.,* "General Verdict with Special Findings" as opposed to "Special Verdict," which has quite a different effect. See §§22.6, 22.17.

For examples of special verdict forms that may also be used as special interrogatories testing a general verdict, see CACI VF-500—VF-502, VF-700—VF-701, VF-704, VF-1000—VF-1001, VF-1200—VF-1206, VF-1208, VF-2900—VF-2901, VF-3100—VF-3107, VF-3700. See also BAJI 16.01-16.93.

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### §22.14 2. Special verdicts

The form of interrogatories used for a special verdict can be the same as those used for special findings that accompany a general verdict. The substance of the questions must be within the issues framed by the pleadings, and the questions should be phrased to elicit answers that are supported by at least some of the evidence. The questions must call for ultimate facts, not evidentiary facts or conclusions of law, and must cover all ultimate disputed issues of fact raised by the pleadings. See also discussion in §22.13.

A special verdict is usually in the form of a series of questions to which the jury provides answers. Admitted or undisputed facts should be omitted. See *Babcock v Omansky* (1973) 31 CA3d 625, 630, 107 CR 512, overruled on other grounds in *Canal-Randolph Anaheim, Inc. v Wilkoski* (1978) 78 CA3d 477, 485, 144 CR 474. Like special interrogatories accompanying a general verdict, the questions should not be compound or assume facts not in evidence. They should be as simple and clear as possible, and should call for plain and direct answers, preferably "yes" or "no." They should be drafted insofar as possible so that the answer to one interrogatory determines whether the next interrogatory is to be answered.

This technique should help counsel draft each interrogatory based on a single fact and not assume the existence or nonexistence of other disputed facts in the particular interrogatory. See CACI VF-500—VF-502, VF-700—VF-701, VF-704, VF-1000—VF-1001, VF-1200—VF-1206, VF-1208, VF-2900—VF-2901, VF-3100—VF-3107, VF-3700. See also BAJI 16.01-16.93.

**WARNING:** When drafting special verdict interrogatories, make sure that an affirmative answer establishes a conclusion of fact as established by the evidence and does not merely reiterate the evidence. See CCP §624. See form in §22.41.

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## D. Tactical issues; when to use

### 1. General verdicts

### §22.15 a. Without special findings

The use of general verdicts usually results in the jury's reaching a decision more quickly than it would if it had to discuss and vote on several specific findings. It may also make it easier for the jury to reach a verdict when the jury members have different reasons for arriving at the same outcome, and it allows greater leeway for the jury to act on emotional or other sympathetic reasons in favor of one party.

For these reasons and sometimes for others, plaintiffs often prefer a general verdict while defendants prefer special interrogatories. But generalizations do not always apply, and counsel should carefully consider the potential effects of the several verdict forms possible on a particular case. See §§22.16-22.17.

A general verdict is more easily defended on appeal because it will be upheld if the evidence was sufficient to justify the verdict on any theory. For this reason, general verdicts tend to favor the prevailing party. Conversely, counsel representing a party who appears to be losing the trial should consider requesting special findings. Any important findings in a losing party's favor may form a basis for appeal or, if they are inconsistent with the verdict, may cause the court to enter judgment in accordance with the findings. On verdicts that are defective because of inconsistent findings, see §22.24.

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### §22.16 b. With special findings

Whether counsel should request special findings to accompany a general verdict is a tactical issue that requires evaluating the impact they may have on the case. Special interrogatories structure the jury's decision-making process and act as a powerful device for organizing its deliberations.

Unlike special verdicts, which require findings on every fact essential to the case (see §22.17), counsel may select special interrogatories that focus the jury's attention on critical elements that should be considered before reaching a general verdict. Special interrogatories may be useful when an element of a claim or defense should be given particular weight, if multiple plaintiffs or defendants could result in significantly different or confusing decisions on liability or damages, or if some other factor should be emphasized to assist the jury in its truth-finding process.

**EXAMPLE:** If a claim can be proved or disproved on either of two factual theories, A or B, a general verdict will be upheld if sufficient evidence supports either theory. If the jury establishes on special findings that it based its general verdict on finding A and not on finding B, an appeal can focus on the propriety of finding A. Then if finding A was inappropriate, a reversal may result, even if evidence existed to support finding B, which the jury rejected.

Defendants have traditionally favored special findings in cases in which inflammatory factors could influence the jury to ignore the law through prejudice or sympathy. Well-framed interrogatories can direct the jury's attention to the essential issues and away from irrelevant, although persuasive, emotional issues.

However, special findings may also benefit plaintiffs. For example, when a defendant or a defendant's position might have an undue emotional appeal to a jury, special interrogatories may focus the jury's attention on the appropriate issues or provide a check on the general verdict outcome. Special interrogatories may educate the jury if they highlight the specific requirements that must be met before a defendant can prevail on an affirmative defense.

A plaintiff's verdict may be better able to withstand a motion for new trial or an appeal, particularly in lengthy or complex cases, if the jury has made special findings. See *Li v Yellow Cab Co.* (1975) 13 C3d 804, 824, 119 CR 858 ("special verdicts or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards"). But see the contrary judicial opinion in *Hathaway v Spiro* (1985) 164 CA3d 359, 367, 210 CR 421 (use of special findings should be discouraged because of problem of inconsistencies).

Special interrogatories can be useful in isolating the critical issues on appeal. *Murrell v State ex rel Dep't of Pub. Works* (1975) 47 CA3d 264, 271, 120 CR 812. See also *McCloud v Roy Riegels Chems.* (1971) 20 CA3d 928, 936, 97 CR 910 (jury returned general verdict without making special findings). Because it was unable to ascertain on appeal which of two defense theories the jury had accepted, the *McCloud* court strongly urged the use of "special verdicts" in the interests of judicial economy. Although it did not distinguish special verdicts under CCP §624 from general verdicts accompanied by special findings under CCP §625, the court's comments on special verdicts would apply equally well to a general verdict tested by special interrogatories.

Special interrogatories may also be helpful in personal injury actions in which a settlement offer under CCP §998 has been rejected. If the jury decides personal injury and other damages separately, plaintiff's counsel may have an opportunity to obtain prejudgment interest on the personal injury damages under CC §3291, if the personal injury portion of the verdict exceeds the §998 offer. See, *e.g., Morin v ABA Recovery Serv.* (1987) 195 CA3d 200, 240 CR 509, disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 25 CR2d 109 (holding that CC §3291 "does not authorize the award of prejudgment interest on punitive damages"). For discussion of effect of §998 offers on costs, see §§27.51-27.66.

**PRACTICE TIP:** A division between personal injury damages and economic damages may have tax consequences, which should be evaluated. As with any special interrogatories, consider whether forcing the jury to determine the specific answers will help or hurt (a) the chances of a favorable outcome or the total amount of the verdict or (b) the chances of defending the verdict on a posttrial motion or appeal.

The responses to special interrogatories may also affect the extent to which the case outcome will have collateral estoppel effects in future litigation. Counsel should consider the potential impact on subsequent lawsuits from factual findings in the current case. For example, a general verdict might be rendered in a case on the basis that a product was either defective in design or negligently used. A general verdict, without more, may not collaterally estop the defendant manufacturer from contending, in later cases, that the product had no design defects. See CCP §1911;

*Brake v Beech Aircraft Corp.* (1986) 184 CA3d 930, 941, 229 CR 336; *Walnut Creek Aggregate Co. v Testing Eng'rs* (1967) 248 CA2d 690, 698, 56 CR 700. If the jury renders a special finding that there was a design defect, collateral estoppel may apply, precluding relitigation of that issue in a subsequent suit.

**WARNING:** A special interrogatory should be used only if it is easy to determine whether its answer is consistent or inconsistent with the general verdict. See *Wyler v Feuer* (1978) 85 CA3d 392, 404, 149 CR 626; *Weisenburg v Molina* (1976) 58 CA3d 478, 487, 129 CR 813. On defective verdicts, see §§22.24-22.28.

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## §22.17 2. Special verdicts

Special verdicts that omit a necessary factual finding may prevent the entry of judgment or invalidate any resulting judgment. Because they increase the likelihood of reversal on appeal, special verdicts are seldom used unless required. See §22.2.

For a sample form of the court's instructions to the jury in connection with the use of a special verdicts, see CACI 5012, reproduced in §22.40.

**NOTE:** Most courts and counsel prefer to use a general verdict form with special findings rather than a special verdict. See §22.16.

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## IV. OBJECTING TO FORM OF VERDICT

### §22.18 A. When to object: Chambers conference

Counsel should ask to examine any verdict and special interrogatory forms prepared by the court or other counsel before the court instructs the jury. Local rules may address this issue. See, *e.g.,* Los Angeles Ct R 8.24 (any verdict or findings forms that the trial judge intends to use on the court's own motion should be delivered to counsel).

**PRACTICE TIP:** When reviewing verdict and findings forms, look carefully for significant ambiguities, phrases that could confuse the jury, disadvantageous preferences in the form of the interrogatories, and internal inconsistencies. Be sure that they appropriately cover the issues tried and do not erroneously depart from jury instructions on the law that applies to the case. Consider seeking the advice of appellate counsel before the final opportunity to raise objections to the verdict forms. That advice may lead to preserving additional issues for appeal. On making trial objections and protecting the record, see chap 15.

Objections must be heard and any necessary corrections made before the forms are submitted to the jury. Counsel who disagree with proposed verdict forms or special interrogatories should present alternative forms to other counsel and to the trial judge. Objections are usually made during the conference in the judge's chambers in which the jury instructions and verdict forms are settled. Serving requests for special findings on all counsel is required. Cal Rules of Ct 3.1580. See §22.10.

**PRACTICE TIP:** Local rules may also impose a "meet and confer" requirement on counsel to voluntarily withdraw, modify, or stipulate to verdict forms prior to the conference with the judge. See, *e.g.,* Los Angeles Ct R 8.24.

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### §22.19 B. How to preserve record; waiver

If any disagreements about the verdict forms cannot be resolved by the parties, the trial judge usually hears formal argument in the presence of the court reporter, then rules on the objections and proposed forms. See, *e.g.,* Los Angeles Ct R 8.24.

Counsel should request this or a similar procedure to avoid waiving objections to the verdict forms used. An objection to a verdict form not made in a timely fashion may result in a waiver of the objection for appeal purposes. *Orient Handel v United States Fid. & Guar. Co.* (1987) 192 CA3d 684, 700, 237 CR 667. On making trial objections and protecting the record, see chap 15.

Any objections to the form of a special interrogatory testing a general verdict must be made before the interrogatory is submitted to the jury; otherwise, the objections will be considered to be waived. See *Olson v Arnett* (1980) 113 CA3d 59, 66, 169 CR 629; *Bank of Santa Ana v Molina* (1969) 1 CA3d 607, 624, 81 CR 885.

Similarly, any objections to the form of a special verdict must be made before the special verdict is submitted to the jury, or the objections will be found to have been waived. *Olson v Arnett, supra*. See *Mesecher v County of San Diego* (1992) 9 CA4th 1677, 1680, 12 CR2d 279 (county's deliberate submission of inconsistent verdict forms constituted waiver of objection).

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## V. RETURN OF VERDICT

### §22.20 A. Delivery of verdict

When at least three-quarters of the jurors (*i.e.,* nine of the twelve) have agreed on a verdict, the jury foreperson signs the verdict form. CCP §618. If the verdict was reached during a court recess or adjournment, the court may direct the jury to submit the written verdict in sealed form. CCP §617. The verdict may also be received on a holiday. CCP §134(2).

**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 and not a court day.

When the verdict is ready to be entered, the jury returns to the courtroom. The foreperson usually gives the signed verdict to the bailiff. Then the clerk reads the verdict to the jurors followed by an inquiry to the jury, such as: "Is this your verdict?" See CCP §618. If the jury is not polled, the verdict is entered in the court minutes. See §§22.22-22.23.

**PRACTICE TIP:** Some trial courts specify additional procedures when the verdict is returned, *e.g.,* that the foreperson give all signed and unsigned verdict forms to the bailiff for delivery to the judge, who then examines them for correctness before the clerk reads them into the record. See Los Angeles Ct R 8.56.

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### §22.21 1. Number of jurors needed for verdict

In civil cases, three-quarters of the jurors (*i.e.,* nine of the 12) must vote in favor of a verdict. Cal Const art I, §16; CCP §618. This number must agree on all matters essential to the verdict. However, any nine jurors may decide any question submitted to them. See *Resch v Volkswagen of Am., Inc.* (1984) 36 C3d 676, 682, 205 CR 827. In *Resch,* the court affirmed the defense verdict in which three jurors who disagreed on a finding that a defect existed voted on another finding that this defect was not a substantial factor in causing plaintiff's injuries. The court reasoned that, if the jury had simply been asked for a general verdict, there would have been nine jurors voting in favor of defendant and that the parties are entitled to have all twelve jurors deliberate on each issue.

As an example, in contrast to the *Resch* situation, suppose nine jurors find that there was a manufacturing defect and a different nine jurors find that the defect was the proximate cause of plaintiff's injury, *i.e.*, only seven of the nine finding a defect also found proximate cause. In this situation, there would not be nine jurors in favor of a general verdict for the plaintiff. *Stoner v Williams* (1996) 46 CA4th 986, 994, 54 CR2d 243, addresses questions left undecided in *Resch*. In *Stoner,* a fraud case, jury instructions included a modified BAJI 2.60 instruction identifying the elements of plaintiff's fraud cause of action. During deliberations, the jury sent the trial judge a note asking "do a minimum of 9 jurors need to agree that the same allegation had been proven or could some agree that one has been proven and others a different one as long as 9 agree that at least one has been proven?" The trial court instructed the jury that it was not necessary that the same nine jurors agree to the same items listed on BAJI 2.60 as long as nine or more agreed that all the elements of the cause of action had been met. The court of appeal, relying by analogy to criminal cases, affirmed.

**NOTE:** The California Civil Jury Instructions (CACI) have been approved by the Judicial Council as the official instructions for use in California. Cal Rules of Ct 2.1050(e). See CACI 200, which parallels BAJI 2.60 discussed in *Stoner v Willliams, supra*.

For other scenarios, see *Juarez v Superior Court* (1982) 31 C3d 759, 762, 183 CR 852 (if same nine jurors find defendant negligent and find such negligence was proximate/legal cause of plaintiff's injury, a different nine jurors may then provide basis for apportionment of damages for comparative negligence purposes). See *Mitchell v Gonzales* (1991) 54 C3d 1041, 1 CR2d 913, on legal cause (the substantial factor test) requirement in all negligence cases.

**WARNING:** Counsel must object to the trial court's improperly instructing the jury on the number of jurors that must agree on the same theory in order to reach the verdict; otherwise, waiver may occur. See *Orient Handel v United States Fid. & Guar. Co.* (1987) 192 CA3d 684, 700, 237 CR 667 (failure to object to special verdict form questions in trial court precluded appeal on issue of number of jurors needed to agree).

On making trial objections and protecting the record, see chap 15.

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### §22.22 2. Polling jury; waiver

When the verdict is returned, any party may request that the jury be polled. CCP §618. The court or the clerk polls the jury by asking each juror separately if it is his or her verdict, *e.g.:* "Is the verdict as read your personal verdict?" Or, for a general verdict with special findings or a special verdict: "Is the response to that question (or issue) your personal response?" See Los Angeles Ct R 8.56.

If the poll discloses that an insufficient majority is in favor of the verdict (*i.e.,* more than one-quarter (or more than three of the twelve jurors) state that it is not their verdict), the jury must be sent back to the jury room for further deliberations. CCP §618; *Van Cise v Lencioni* (1951) 106 CA2d 341, 347, 235 P2d 236. But see *Keener v Jeld-Wen, Inc.* (2009) 46 C4th 247, 257, 92 CR3d 862 (silence of juror whom court inadvertently neglected to poll did not constitute disagreement with verdict; verdict stood with only eight polled jurors in agreement). On the jury's reconsideration of a verdict, see §22.30.

During the polling process, the judge, on his or her own initiative or at a party's request, may question a juror to clarify that juror's vote. See, *e.g., Marinucci v Bryant* (1957) 151 CA2d 298, 302, 311 P2d 622; *Fulton v Huguet* (1952) 113 CA2d 692, 696, 248 P2d 954. The court may not inquire into the juror's process of evaluation or deliberation except for the express purpose of clarifying the verdict. *Tri-Delta Eng'g v Insurance Co. of N. Am.* (1978) 80 CA3d 752, 758, 146 CR 14 (trial court erred by questioning jurors after discharge on what they intended verdict to be).

If a party fails to challenge the regularity of the verdict by requesting the court to poll the jury when the verdict is returned, that party waives the right to complain later on appeal about any infirmity that would have been evident from a poll. *Henrioulle v Marin Ventures, Inc.* (1978) 20 C3d 512, 521, 143 CR 247 (special verdict); *Keener v Jeld-Wen, Inc.* (2009) 46 C4th 247, 262, 92 CR3d 862 (failure to object to incomplete polling at time constitutes waiver of defect); *Silverhart v Mount Zion Hosp.* (1971) 20 CA3d 1022, 1029, 98 CR 187 (general verdict).

This principle does not apply, however, when the verdict itself is inconsistent. *Remy v Exley Produce Express, Inc.* (1957) 148 CA2d 550, 554, 307 P2d 65 (jury held one defendant negligent for plaintiff's injuries but not negligent for another party's injuries, an impossibility under facts of that case). On inconsistent verdicts, see §§22.24-22.26.

**NOTE:** When a directed verdict has been returned, polling the jury is unnecessary and inappropriate. See *Estate of Sharon* (1918) 179 C 447, 460, 177 P 283. On directed verdicts, see §§18.35-18.66.

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### §22.23 B. Entry of verdict in minutes

Entry of the verdict must be made in the minutes of the court. After the verdict is received, the court clerk is required to specify the time of trial, specify the names of the jurors and witnesses, and set out the verdict at length in the court minutes. CCP §628.

Special verdicts and special findings accompanying a general verdict must be filed with the clerk and entered in the minutes. CCP §625. If a special verdict is returned, the judgment based on that verdict, or an order reserving the case for further argument or consideration, is entered. CCP §628.

Within 24 hours after receiving the verdict in a jury trial, the clerk must enter judgment in conformity with the verdict, unless the court orders otherwise. See CCP §664. On judgments, see chap 23.

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## VI. DEFECTIVE VERDICTS

### §22.24 A. Internal inconsistencies in verdict

A verdict may be defective if, given the applicable law, it has material internal inconsistencies. These defects usually occur when there are multiple parties. On inconsistencies between a general verdict and special findings testing that verdict, see §22.25.

**EXAMPLE:** In an automobile accident case against a car manufacturer, the jury awarded plaintiff $7.5 million after rendering special verdicts that the vehicle was negligently, but not defectively, designed. The court of appeal reversed and remanded for a new trial based on an inconsistent verdict. A finding of negligent design is precluded if the jury finds no defect in design. *Lambert v General Motors* (1998) 67 CA4th 1179, 79 CR2d 657.

A verdict against a defendant who can be only secondarily liable, *e.g.,* on a respondeat superior basis, and in favor of a defendant who is primarily liable, is fatally inconsistent. *Brown v Regan* (1938) 10 C2d 519, 522, 75 P2d 1063. A similar rule applies to plaintiffs. See *Morris v McCauley's Quality Transmission Serv.* (1976) 60 CA3d 964, 970, 132 CR 37 (when plaintiff *A*'s rights are derivative of those of plaintiff *B*, a verdict in favor of *A* but no recovery for *B* is fatally inconsistent).

When a defendant who is found liable may also be found liable on some independent basis, the verdict may not be inconsistent. See *McCullough v Langer* (1937) 23 CA2d 510, 516, 73 P2d 649 (verdict upheld in favor of defendant employee/nurse but against defendant employer/doctor who negligently supervised plaintiff's treatment). On judicial interest in upholding verdicts, see §22.33.

When two defendants should both be legally liable or not liable if certain facts are found, a verdict is inconsistent if it is in favor of one and against the other. See *Campbell v Zokelt* (1969) 272 CA2d 315, 319, 77 CR 561 (verdict in one plaintiff's favor but not the other's for injuries from single accident caused by defendant's alleged negligence is inconsistent); *Remy v Exley Produce Express, Inc.* (1957) 148 CA2d 550, 554, 307 P2d 65 (jury held one defendant negligent for plaintiff's injuries but not negligent for another party's injuries, an impossibility under facts of that case).

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### B. Special findings inconsistent with general verdict

### §22.25 1. Judgment must be in accord with special findings

When a special finding is fatally inconsistent with the general verdict, the court must give judgment in accordance with the special finding. CCP §625; *Bond v DeWitt* (1954) 126 CA2d 540, 544, 272 P2d 561.

The courts are reluctant, however, to conclude that an irreconcilable inconsistency has occurred. *Tavaglione v Billings* (1993) 4 C4th 1150, 1157, 17 CR2d 608; *Curtis v State* (1982) 128 CA3d 668, 689, 180 CR 843. See *Hathaway v Spiro* (1985) 164 CA3d 359, 210 CR 421 (plaintiffs made unopposed motion to dismiss two defendants, thereby making verdict consistent). See §25.33.

For the court to enter a judgment based on a special finding that is contrary to the general verdict, the special finding itself must unquestionably require a judgment different from the general verdict. *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 540, 138 CR 705, disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 574, 34 CR2d 607; *Weisenburg v Molina* (1976) 58 CA3d 478, 486, 129 CR 813.

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### §22.26 2. Procedures for entering judgment on findings

If the difference between a special finding and the general verdict cannot be reconciled, the party in whose favor the findings have been made should move to enter judgment on the findings.

Counsel must make the motion before judgment is entered on the general verdict. Otherwise, the only remedy in the trial court is a motion for new trial. See, *e.g., Olson v Arnett* (1980) 113 CA3d 59, 66, 169 CR 629; *Bank of Santa Ana v Molina* (1969) 1 CA3d 607, 624, 81 CR 885. On objecting to and curing inconsistencies before jury's discharge, see §22.30.

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### §22.27 C. Partial verdict

A verdict must be complete as to the parties before judgment can be entered on a claim between those parties. A verdict that is specific for some but not all defendants may indicate the jury's failure to determine all issues. See, *e.g., Walters v Marler* (1978) 83 CA3d 1, 20, 147 CR 655, disapproved on other grounds in *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 507, 198 CR 551; *Keller v Smith* (1933) 130 CA 128, 131, 19 P2d 541.

A verdict must also be complete as to the issues submitted to it. A jury must resolve all the ultimate facts presented to it in a special verdict form. A "partial" verdict finding negligence based on a special finding of negligence cannot be entered by itself if the jury has not decided the causation and damage issues. See *Falls v Superior Court* (1987) 194 CA3d 851, 855, 239 CR 862 (mistrial necessary when jury, by special verdicts, found negligence and causation but was deadlocked on percentage of fault and damages). But see *Contreras v Goldrich* (1992) 10 CA4th 1431, 13 CR2d 394 (jury deadlocked on negligence but decided that defendant's negligence was not a legal cause of plaintiff's injury; verdict held to be complete).

If the jury has not been discharged, it should be ordered to retire and attempt to complete or correct a partial verdict. On jury's reconsideration of verdict, see §22.30. If the jury was deadlocked or excused, the issues regarding the omitted defendants may have to be retried. See *Irelan-Yuba Gold Quartz Mining Co. v PG&E* (1941) 18 C2d 557, 571, 116 P2d 611. On motion for new trial based on jury's verdict, see §25.46.

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### §22.28 D. Irregularities and ambiguities

If a written verdict form returned by the jury includes unnecessary or surplus language, and the unnecessary language is immaterial to the verdict, it may be disregarded. *Kirby v Adcock* (1953) 116 CA2d 570, 571, 253 P2d 700; *Keating v Zumwalt* (1949) 91 CA2d 845, 847, 206 P2d 10. See *Floyd v Laws* (9th Cir 1991) 929 F2d 1390, 1397 (surplus information given in jury verdict in violation of instructions may be ignored).

**EXAMPLE:** When the jury improperly tries to apportion damages among joint tortfeasors, the court may treat that language as surplusage and uphold the verdict for plaintiff without ordering a new trial. *Aitken v White* (1949) 93 CA2d 134, 142, 208 P2d 788.

A verdict that is incomplete or ambiguous can be clarified by the judge when the verdict is announced, or the judge may direct the jurors to return to the jury room to eliminate the ambiguities in the verdict. CCP §619. See §§22.29-22.30. A verdict with improper grammatical construction may stand if the verdict's meaning is reasonably clear. *Grover v Morrison* (1920) 47 CA 521, 532, 190 P 1078.

If the jury has already been discharged, a verdict that is ambiguous, inconsistent, or incomprehensible requires a new trial. See *Woodcock v Fontana Scaffolding & Equip. Co.* (1968) 69 C2d 452, 457, 72 CR 217; *Stillwell v Salvation Army* (2008) 167 CA4th 360, 84 CR3d 111. On motions for new trial, see §§25.22-25.71.

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## E. Curing defective verdict

### §22.29 1. Judge's clarification of verdict

When the jury delivers a verdict that is insufficient or does not cover the issues submitted, the judge may have the jury correct it under the advice of the court or send the jury back to the jury room to correct it. CCP §619. The trial judge is obligated to require the jury to correct or clarify a verdict needing correction or clarification. See *Brown v Regan* (1938) 10 C2d 519, 524, 75 P2d 1063; *Mish v Brockus* (1950) 97 CA2d 770, 776, 218 P2d 849. On sending jury out to reconsider its verdict, see §22.30.

The trial judge may question the jurors in court to clarify the verdict. See *Marinucci v Bryant* (1957) 151 CA2d 298, 302, 311 P2d 622; *Fulton v Huguet* (1952) 113 CA2d 692, 696, 248 P2d 954. There are limits, however, to a trial judge's power to interrogate jurors. It is improper for a trial judge to try to influence or coerce a verdict. *Crowe v Sacks* (1955) 44 C2d 590, 598, 283 P2d 689; *Tri-Delta Eng'g v Insurance Co. of N. Am.* (1978) 80 CA3d 752, 758, 146 CR 14. Check local rules for any procedures affecting correction of the verdict. See §22.30.

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### §22.30 2. Jury's reconsideration of verdict

Instead of questioning the jurors in an effort to cure a defective verdict (see §22.29), the court may return the jury to the jury room and order further deliberations to clarify or correct an uncertainty or ambiguity. CCP §619; *Sherwood v Rossini* (1968) 264 CA2d 926, 928, 71 CR 1; *Fibreboard Paper Prods. Corp. v East Bay Union of Machinists* (1964) 227 CA2d 675, 732, 39 CR 64.

**PRACTICE TIP:** Local rules may spell out additional procedures for correcting a verdict. See Los Angeles Ct R 8.56 (trial judge should call counsel to the bench to discuss inquiries to be directed to foreperson and the possible return of the verdict forms with instructions to clarify, complete, or revise them).

If the jury is sent out for further deliberations on a verdict that has not yet been entered, the jury, in reconsidering the issues, is free to change the verdict. See, *e.g., Crowe v Sacks* (1955) 44 C2d 590, 598, 283 P2d 689; *Toon v Pickwick Stages* (1928) 95 CA 370, 374, 272 P 797.

Any clarification or correction of a jury verdict should be made before the jury is discharged and the verdict recorded. See, *e.g., Sparks v Berntsen* (1942) 19 C2d 308, 313, 121 P2d 497. The courts have been reluctant to recall jurors after their discharge to clarify or correct a verdict. See *People v Thornton* (1984) 155 CA3d 845, 855, 202 CR 448.

Recall of a recently discharged jury is permissible if there is no reason to believe that the jurors were subjected to events or matters that could influence their decision in the case after their discharge. See *Estate of Woehr* (1958) 166 CA2d 4, 14, 332 P2d 818; *People v Powell* (1950) 99 CA2d 178, 181, 221 P2d 117. However, a court has no jurisdiction to correct a defective verdict once the jury has been discharged when the jurors could have been influenced after their discharge (*e.g.,* discussing the case with counsel for the parties or others) and are out of the court's "control." *People v Hendricks* (1987) 43 C3d 584, 597, 238 CR 66.

**NOTE:** After polling, if no more than one-quarter of the jury disagrees with the verdict, and if the verdict is not ambiguous or inconsistent, the jury cannot properly be sent back for further deliberations. The verdict is complete and the jury must be discharged from the case. CCP §618; *Resch v Volkswagen of Am., Inc.* (1984) 36 C3d 676, 682, 205 CR 827. On polling the jury after delivery of the verdict, see §22.22.

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### §22.31 3. Procedures; waiver

Counsel should call any defect in the verdict to the trial judge's attention before the jury is discharged, because any correctable error evident at that time may be waived if no objection is made. See *Henrioulle v Marin Ventures, Inc.* (1978) 20 C3d 512, 521, 143 CR 247; *Keener v Jeld-Wen, Inc.* (2009) 46 C4th 247, 269, 92 CR3d 862 (objection to incomplete polling must be timely made; court cannot cure defect after jury is discharged).

Failure to raise an objection to a jury's verdict does not automatically result in a waiver. See *Saxena v Goffney* (2008) 159 CA4th 316, 328, 71 CR3d 469 (no waiver because defendant had no obligation to ensure that defective verdict addressed plaintiff's battery); *DuBarry Int'l v Southwest Forest Indus.* (1991) 231 CA3d 552, 565 n17, 282 CR 181 (waiver only if element of negligence or culpability exists). A waiver will not occur when the failure to object was not the result of a desire to reap a "technical advantage" or engage in a "litigious strategy," in which case the court may have to interpret an ambiguous verdict. *Woodcock v Fontana Scaffolding & Equip. Co.* (1968) 69 C2d 452, 456 n2, 72 CR 217. See §22.33.

Waiver will *not* occur when there is a fatal inconsistency, error, or confusion in the jury verdict itself. *Morris v McCauley's Quality Transmission Serv.* (1976) 60 CA3d 964, 972, 132 CR 37.

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### §22.32 F. Impeaching improper verdict

The courts have recognized the desirability of preserving the secrecy of jury deliberations, protecting jurors from the pressures of dissatisfied litigants and from corrupt jurors' destroying a proper verdict, and avoiding unnecessary relitigation. See §22.33. On jury deliberations, see chap 21.

After the verdict has been entered and the jury discharged, however, counsel may properly question consenting jurors on the possibility that the verdict was improperly reached. A verdict may be improper if it is based on guess, conjecture, speculation, chance, quotient, or other juror misconduct. See CCP §657(2); CACI 5001; *Oldenberg v Sears Roebuck & Co.* (1957) 152 CA2d 733, 741, 314 P2d 33. See also BAJI 15.33. A verdict may be impeached on the basis of affidavits that describe jurors' overt conduct that is open to corroboration, but not by the mental processes by which the jurors determined the verdict. See *In re Stankewitz* (1985) 40 C3d 391, 398, 220 CR 382; *Ford v Bennacka* (1990) 226 CA3d 330, 334, 276 CR 513; *DiRosario v Havens* (1987) 196 CA3d 1224, 1238, 242 CR 423. On motion for new trial based on juror misconduct, see §§25.30-25.32. See also §§21.35-21.43.

**EXAMPLE:** The classic example of an improperly reached verdict is *Ham v County of Los Angeles* (1920) 46 CA 148, 189 P 462, in which nine jurors agreed that each would write the amount of damages he or she thought was appropriate on a slip of paper and that they would then render a verdict for damages at the average of those nine numbers. No further discussion or voting took place. That process was found to result in an improper quotient verdict, and a new trial was ordered.

It is not improper, however, for the jury to use an averaging or quotient calculation as part of its discussions, as long as there is no agreement beforehand to be bound by the result and if there is further discussion and deliberation about the propriety of the final number as the jury's verdict. *Bardessono v Michels* (1970) 3 C3d 780, 794, 91 CR 760; *Balkwill v City of Stockton* (1942) 50 CA2d 661, 672, 123 P2d 596.

A verdict is also improper if it includes in its damage assessment items that are not properly recoverable as damages. See, *e.g., Kruse v Graham* (1977) 19 C3d 59, 81, 137 CR 863 (improper for jury to agree to increase award by one third as compensation for attorney fees); *Tramell v McDonnell Douglas Corp.* (1984) 163 CA3d 157, 172, 209 CR 427 (improper discussion to raise verdict amount to compensate for attorney fees and taxes).

When it becomes clear that the jury improperly reached its verdict, counsel for the losing party should file the required "no-knowledge" affidavits (see §25.62) and move for new trial. On motions for new trial, see §§25.22-25.71.

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### §22.33 G. Judicial interest in upholding verdicts

Avoiding court time and effort in retrying cases is in the interest of judicial administration, and whenever possible appellate courts interpret verdicts to uphold them. See, *e.g., Clark v McClurg* (1932) 215 C 279, 285, 9 P2d 505 (verdicts should be liberally construed and not reversed because of their form); *Crain v Sumida* (1922) 59 CA 590, 594, 211 P 479 (verdict can be made sufficiently certain by reference to pleadings, evidence, or record).

Courts may even strain to find some analysis to uphold a verdict. See, *e.g., Chance v Lawry's, Inc.* (1962) 58 C2d 368, 382, 24 CR 209 (concluding that error may have been on the portion of verdict not appealed); *Stefanuto v Market St. Ry. Co.* (1938) 24 CA2d 565, 566, 75 P2d 1089 (possibility that jury could have concluded that defendant/employee was not driver of car causing accident meant that verdict against corporate employer, the vehicle owner, was not inconsistent with verdict in favor of defendant/employee).

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## §22.34 VII. FORMS: VERDICTS AND JURY INSTRUCTIONS ON VERDICTS

The following forms are examples only. Counsel must consider the needs of the particular case. Forms for submission to the jury are usually prepared on pleading paper, without any identification of the party preparing the form.

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## A. General verdicts without special findings

### §22.35 1. Form: Jury instruction

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**Jury Instruction**

**When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.**

**If there is more than one verdict to decide, for example, a verdict on the complaint and a verdict on the cross-complaint, the same jurors do not have to agree on each verdict. Any nine jurors are sufficient.**

**As soon as you have agreed on a verdict, the presiding juror must date and sign the form and notify the clerk or the bailiff.**

[*At the bottom of the jury instruction form, include the following*]

**GIVEN AS REQUESTED _____**

**GIVEN AS MODIFIED _____**

**REFUSED _____**

**WITHDRAWN _____**

**_____**
**Judge**

*Comment:* For complete predeliberation instructions, see CACI 5001. On preparing proposed verdict forms along with proposed jury instructions on the verdict, see §22.9. For discussion of general verdict forms and when to use, see §§22.4, 22.15.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/22 Verdicts/§22.36 2. Form: General verdict form (CACI VF-5000--two-party lawsuit, single cause of action)

## §22.36 2. Form: General verdict form (CACI VF-5000—two-party lawsuit, single cause of action)

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**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | |
|---|---|
| _ _[*Name(s)*]_ _ ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** ) | **JURY VERDICT** |
| **vs** ) | **Hearing:** _ _[*date; time*]_ _ |
| _ _[*Name(s)*]_ _ ) | **Dep't:** _ _[*number*]_ _ |
| **Defendant(s)** ) | **Hearing judge:** _ _[*if known*]_ _ |
| **_____** ) | **Action filed:** _ _[*date*]_ _ |
| | **Trial date:** _ _[*if set*]_ _ |

**Select one of the following two options:**

**_____ We find in favor of _ _[*name of plaintiff*]_ _, and against _ _[*name of defendant*]_ _, and award damages to _ _[*name of plaintiff*]_ _ in the amount of $_ _ _ _ _ _.**

**_____ We find for _ _[*name of defendant*]_ _ and against _ _[*name of plaintiff*]_ _.**

**Date: _ _ _ _ _ _** **_____**
**Presiding Juror**

**CACI VF-5000**

*Comment:* This general verdict may be used in an action with one plaintiff and one defendant. The two possible verdicts may be given to the jury as separate forms. On drafting general verdict forms, see §22.12.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/22 Verdicts/§22.37 3. Form: General verdict (one plaintiff, two defendants, cross-complaint)

## §22.37 3. Form: General verdict (one plaintiff, two defendants, cross-complaint)

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**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **JURY VERDICT** |
| **vs** | ) | |
| _ _[*Name(s)*]_ _ | ) | |
| **Defendant(s)** | ) | |
| _____ | ) | |

**VERDICT ON COMPLAINT**

[*Either*]

**We, the jury in the above-titled action, find for _ _[*name of plaintiff*]_ _, and against _ _[*name of defendant*]_ _ and _ _[*name of defendant*]_ _, and assess damages in the sum of $_ _ _ _ _ _.**

[*or*]

**We, the jury in the above-titled action, find for _ _[*name of plaintiff*]_ _, and against _ _[*name of one defendant*]_ _, and assess damages in the sum of $_ _ _ _ _ _. We further find for defendant _ _[*name of other defendant*]_ _.**

[*or*]

**We, the jury in the above-titled action, find for _ _[*name of defendant*]_ _ and _ _[*name of defendant*]_ _.**

[*Continue*]

**Date: _ _ _ _ _ _** _____
**Presiding Juror**

**VERDICT ON CROSS-COMPLAINT**

[*Either*]

**On the cross-complaint, we, the jury in the above-titled action, find for _ _[*name of cross-complainant*]_ _, and against _ _[*name of cross-defendant*]_ _, and assess damages on the cross-complaint in the sum of $_ _ _ _ _ _.**

[*or*]

**On the cross-complaint, we, the jury in the above-titled action, find for _ _[*name of cross-defendant*]_ _.**

[*Continue*]

**Date: _ _ _ _ _ _** _____
**Presiding Juror**

*Comment:* This general verdict form may be used in a trial with one plaintiff, two defendants, and a cross-complaint against a cross-defendant, or modified for use in any multiple-party case. The form presupposes joint and several liability on the part of the defendants found liable. If liability is not joint and several, or if comparative negligence doctrines apply, the verdict forms must specify damages against each potentially culpable party. See, *e.g.,* CACI VF-1200, VF-1204. See also BAJI 16.10. On special verdict forms for comparative implied indemnity among defendants, see BAJI 16.72-16.73, which have no counterpart in CACI. The general verdict form must include all possible verdicts the jury might render. See §22.12.

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## B. General verdicts with special findings

### §22.38 1. Form: Jury instruction

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**GENERAL VERDICT WITH SPECIAL FINDINGS**

**At least nine of you must agree on a verdict and answer questions as instructed. However, the same jurors do not have to agree on the verdict and on each question. Any nine jurors are sufficient. As soon as you have agreed on a verdict and answered questions as instructed, the presiding juror must date and sign the form***[s]* **and deliver them to the _ _[***clerk/bailiff/judge***]_ _.**

[*At the bottom of the jury instruction form, include the following*]

**GIVEN AS REQUESTED _____**

**GIVEN AS MODIFIED _____**

**REFUSED _____**

**WITHDRAWN _____**

**_____**
**Judge**

*Comment:* For discussion of special findings for testing general verdicts and when to use, see §§22.5, 22.16.

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## §22.39 2. Form: Special findings on general verdict

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**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| **_ _[*Name(s)*]_ _** | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **SPECIAL FINDINGS ON** |
| **vs** | ) | **GENERAL VERDICT** |
| **_ _[*Name(s)*]_ _** | ) | |
| **Defendant(s)** | ) | |
| **_____** | ) | |

**We, the jury in the above-titled action, having determined our general verdict, find the following in response to the special interrogatories submitted to us:**

**1. Was _ _[*name of defendant*]_ _ negligent?**

**Answer: Yes _ _ _ No _ _ _**

**If you answered "no" to question 1, sign and return this verdict.**

**If you answered "yes" to question 1, answer question 2:**

**2. Was the negligence of _ _[*name of defendant*]_ _ a proximate/legal cause of injury to _ _[*name of plaintiff*]_ _?**

**Answer: Yes _ _ _ No _ _ _**

**If you answered "no" to question 2, sign and return this verdict.**

**If you answered "yes" to question 2, answer question 3:**

**3. What is the total amount of damages suffered by _ _[*name of plaintiff*]_ _ as a result of the accident?**

**Answer: $_ _ _ _ _ _**

**Date: _ _ _ _ _ _** **_____**
**Presiding Juror**

*Comment:* For discussion of special findings for testing general verdicts and when to use, see §§22.5, 22.16.

When used, special findings testing a general verdict should be attached to the general verdict form. See CACI verdict forms VF-400—VF-402, and VF-3700. See also BAJI 16.00; §§22.13-22.14. The California Civil Jury Instructions (CACI) "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050.

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## C. Special verdicts

### §22.40 1. Sample Form: Jury instruction (CACI 5012)

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

**INTRODUCTION TO SPECIAL VERDICT FORM**

**I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. At least nine of you must agree on an answer before you can move on to the next question. However, the same nine or more people do not have to agree on each answer.**

**When you are finished filling out the form[s], your presiding juror must write the date and sign it on the bottom. Return the form[s] to [me/the bailiff/the clerk] when you have finished.**

**CACI 5008**

[*At the bottom of the jury instruction form, include the following*]

**Given as proposed**_____

**Given as modified**_____

**Refused**_____

**Withdrawn**_____

_____

**Judge**

*Comment:* For discussion of special verdicts and when to use, see §§22.6, 22.17.

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**§22.41 2. Form: Special verdict**

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**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| **_ _[*Name(s)*]_ _** | **)** | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | **)** | **SPECIAL VERDICT** |
| **vs** | **)** | |
| **_ _[*Name(s)*]_ _** | **)** | |
| **Defendant(s)** | **)** | |
| **_____** | **)** | |

**We, the jury in the above-titled action, find the following special verdict on the questions submitted to us:**

**Question 1: Were any of the defendants negligent? Answer "yes" or "no" after the name of each defendant.**

**Defendant _ _[*name*]_ _ Yes _ _ _ No _ _ _**

**Defendant _ _[*name*]_ _ Yes _ _ _ No _ _ _**

**If you answered "no" to question 1 as to all defendants, sign and return this verdict. No further questions should be answered. If you answered "yes" to question 1 as to any defendant, then answer question 2.**

**Question 2: For each defendant for whom you answered "yes" in response to question 1, was such negligence a cause of injury to the plaintiff? (Enter the name of each defendant where the answer to question 1 was "yes" and answer "yes" or "no" after the name of each such defendant.)**

**Defendant _ _[*name*]_ _ Yes _ _ _ No _ _ _**

**Defendant _ _[*name*]_ _ Yes _ _ _ No _ _ _**

**If you answered "no" to question 2 as to all defendants listed there, sign and return this verdict. No further questions should be answered. If you answered "yes" to question 2 as to any defendant, then answer question 3.**

**Question 3: Without taking into consideration the reduction of damages due to the negligence of the plaintiff, if any, what do you find to be the total amount of damages, including economic and noneconomic damages, if any, suffered by the plaintiff and caused by the accident involved here?**

**(a) Economic Damages $_ _ _ _ _ _**

**(b) Noneconomic Damages $_ _ _ _ _ _**

**Total $_ _ _ _ _ _**

**If you answered "no damage" or "zero" to question 3, sign and return this verdict. No further questions should be answered. If you answered question 3 with an amount of money, answer question 4.**

**Question 4: Was the plaintiff negligent?**

**Yes _ _ _ No _ _ _**

**If you answered "no" to question 4, do not answer question 5. Instead, go directly to question 6. If you answered "yes" to question 4, answer question 5.**

**Question 5: Was the negligence of the plaintiff a cause of any of the damage to the plaintiff?**

**Yes _ _ _ No _ _ _**

**Question 6: Assuming that 100% represents the total negligence that was the cause of the plaintiff's damage, what percentage of this 100% is due to the contributory negligence of the plaintiff and what percentage of this 100% is due to the negligence of the defendant(s) and all other persons?**

**To plaintiff: _ _ _ %**

**To defendant _ _[*name*]_ _: _ _ _ %**

**To defendant _ _[*name*]_ _: _ _ _ %**

**Other person(s) _ _[*identify*]_ _: _ _ _ %**

**_____: _ _ _ %**

**_____: _ _ _ %**

**Date: _ _ _ _ _ _** **_____**
**Presiding Juror**

[*At the bottom of the special verdict form, include the following*]

**Given as proposed_____**

**Given as modified_____**

**Refused_____**

**Withdrawn_____**

**_____**
**Judge**

*Comment:* See CACI verdict forms VF-400—VF-402, VF-3700. The above form is derived from BAJI 16.00. For discussion of special verdicts and when to use, see §§22.6, 22.17.

In addition to this negligence form, CACI and BAJI include special verdict forms for:

- Medical malpractice (CACI VF-501—VF-502; see also BAJI 16.01, 16.01.1);
- Owner/occupant liability (CACI VF-1000; see also BAJI 16.02);
- The peculiar risk doctrine (see BAJI 16.04);
- Comparative fault (CACI VF-1200, VF-1204; see also BAJI 16.10);
- Negligence and product liability (CACI VF-1204—VF-1208; see also BAJI 16.11, 16.12, 16.13);
- FELA (Federal Employees Liability Act) negligence (CACI VF-2900; see also BAJI 16.20);
- Violation of the Safety Appliance Act (CACI VF-2901; see also BAJI 16.20.1);
- Public entity liability (CACI VF-1100—VF-1101; see also BAJI 16.30);
- Fraud and misrepresentation (CACI VF-1900—VF-1903; see also BAJI 16.50, 16.50.1, 16.50.2, 16.50.3);
- Vicarious responsibility (principal/agent) (CACI VF-3700; see also BAJI 16.60);
- Vehicle permissive user (CACI VF-700—VF-702; see also BAJI 16.60.1);
- Comparative implied indemnity (see also BAJI 16.72, 16.73); and
- Employee injury claims with workers' compensation issues (see also BAJI 16.75).

CACI or BAJI special verdict forms can be used for special interrogatories testing a general verdict. See CACI VF-400—VF-402, VF-3700; §22.14. See also BAJI 16.00.

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# 23

# Judgments

**Richard A. Fond**
**Ellen R. Rosen**

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- B. Ways to obtain judgment with or without trial §23.2

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## I. SCOPE OF CHAPTER

### §23.1 A. Judgment after trial

This chapter covers the procedures for obtaining entry of judgment after trial based on either a jury verdict or the court's decision after a bench trial. Considerations involved in drafting proposed judgments to accompany statements of decision after a bench trial are covered in detail in §§24.34-24.50.

Judgment as a result of successful motions during trial for nonsuit or for directed verdict is discussed in chap 18. For other ways of obtaining judgment, including judgment without trial, see §23.2.

This chapter is written from the perspective of a litigant who expects to prevail and whose concerns, after prevailing, are twofold: (1) enforcing the judgment and (2) making sure the judgment is immune from challenges advanced on appeal. The chapter focuses on the following broad questions, any or all of which a litigant is likely to ask:

- What is a judgment and how does it differ from other rulings that appear similar? See §§23.3-23.5.
- How is a judgment prepared and entered? See §§23.19-23.28. For procedures that focus on jury trials, see §§23.20-23.22. For procedures that focus on bench trials, see §§23.23-23.26.
- What are the substantive factors affecting the validity and enforceability of a judgment? See §§23.6-23.12.
- What are the formal requirements affecting the validity and enforceability of a judgment? See §§23.13-23.18.
- What can be done with a judgment once it has been obtained? On correcting and modifying judgments, see §§23.29-23.31.
- What is the effect of entry of judgment on subsequent proceedings? See §§23.32-23.36.

Sample forms appear in the final section of the chapter. See §§23.37-23.42.

For discussion of the procedures for enforcement of money judgments, see Debt Collection Practice in California (2d ed Cal CEB 1999).

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## §23.2 B. Ways to obtain judgment with or without trial

The following list outlines various ways that judgments can be obtained with or without a trial, or without a complete trial (*e.g.,* when a motion during trial eliminates the need to try the case further). Cross-references to discussion in this chapter, other chapters of this book, and other sources are included for each subject listed.

- Judgment based on jury verdict. See §§23.20-23.22.
- Judgment based on statement of decision in bench trial. See §23.24.
- Judgment obtained in bench trial when statement of decision not requested or waived. See §23.25.
- Judgment for dismissal when a party fails to appear at trial. See California Civil Procedure Before Trial, chap 39 (4th ed Cal CEB 2004).
- Judgment for default on party's failure to answer complaint (CCP §§585-587). See Civ Proc Before Trial, chap 38.
- Judgment for nonsuit. See §§18.7-18.34.
- Judgment on directed verdict. See §§18.35-18.56.
- Judgment notwithstanding the verdict. See §§25.2-25.21.
- Summary judgment (CCP §437c). See Civ Proc Before Trial, chap 36.
- Stipulated (or consent) judgments. See Civ Proc Before Trial, chap 48.
- Judgment of dismissal under CCP §581d following an order sustaining a demurrer without leave to amend (CCP §§430.10-430.80). See Civ Proc Before Trial, chaps 23 and 39.
- Judgment on the pleadings (CCP §438). See §§6.94-6.98.
- Judgment confirming award of arbitrator (CCP §1141.23; Cal Rules of Ct 3.827). See Civ Proc Before Trial, chaps 37 and 45.
- Judgment by confession (CCP §§1132-1134). See Debt Collection Practice in California §7.20 (2d ed Cal CEB 1999).
- Judgment on submitted controversy (CCP §§1138-1140). See Civ Proc Before Trial, chap 48.
- Acceptance of an offer to allow judgment (CCP §998). See Civ Proc Before Trial, chap 47.
- Motion to enter judgment on a previously agreed-to settlement (CCP §664.6). See Civ Proc Before Trial, chap 48.
- Judgment against surety (CCP §996.440(d)). See CCP §§995.010-996.560.
- Judgment for contribution among joint tortfeasors (CCP §§875-880). See 8 Witkin, California Procedure, *Enforcement of Judgment* §482 (4th ed 1997).
- Judgment for contribution among joint judgment debtors (CCP §§881-883). See 8 Witkin, Procedure, *Enforce Judgment* §§479-481, 483.
- Motion to vacate judgment and enter new judgment (CCP §663). See §§25.72-25.77.

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## II. DISTINGUISHING TYPES OF JUDGMENTS FROM OTHER SIMILAR RULINGS

### §23.3 A. Final and interlocutory judgments, appealable

A judgment is the final determination of the rights of the parties in an action or a proceeding. CCP §577.

The term "final judgment" is used in several senses but most often to designate a judgment that terminates litigation between parties. In this sense, a judgment is "final" when it terminates the litigation between the parties and leaves nothing to be done but to enforce, by execution, what has been determined. See *Civic W. Corp. v Zila Indus.* (1977) 66 CA3d 1, 12, 135 CR 915.

**EXAMPLE:** A trial court judgment enforcing an administrative tribunal's final order is a final judgment because nothing is left to be done except enforce the judgment. *ALRB v Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 703, 238 CR 780.

Only a final judgment *on the merits* can serve as the basis for invocation of the doctrines of res judicata or collateral estoppel. See *French v Rishell* (1953) 40 C2d 477, 254 P2d 26; *Romadka v Hoge* (1991) 232 CA3d 1231, 283 CR 878; *Rebco Dev. v Superior Court* (1977) 67 CA3d 13, 136 CR 351. For further discussion, see §23.35.

An "interlocutory" judgment, by contrast, is only a provisional determination of certain issues and requires further judicial action. Most interlocutory judgments (*i.e.,* those that are not appealable) may be modified by the court before entry of the final judgment. *Travelers Ins. Co. v Superior Court* (1977) 65 CA3d 751, 760, 135 CR 579.

**EXAMPLE:** A verdict on completion of the liability phase of a bifurcated trial is not a final order or appealable until final judgment in the case. *Plaza Tulare v Tradewell Stores, Inc.* (1989) 207 CA3d 522, 254 CR 792.

Some interlocutory decrees must be challenged by means of a writ petition, rather than on appeal. For example, although a determination that a settlement has been made in good faith under CCP §877.6 is an interlocutory decree, a defendant wishing to challenge the good faith determination must do so through a petition for writ of mandate under CCP §877.6(e). *O'Hearn v Hillcrest Gym & Fitness Ctr., Inc.* (2004) 115 CA4th 491, 498, 9 CR3d 342. The defendant may not wait and appeal the good faith settlement determination following a final judgment. See California Civil Procedure Before Trial §50.28 (4th ed Cal CEB 2004).

A judgment labeled "interlocutory," may actually be "final." See *Price v Slawter* (1959) 169 CA2d 448, 451, 337 P2d 914. Similarly, a judgment may be final even though it shares some characteristics of an interlocutory order, such as the following:

- The trial court retains the ability to modify it in some aspects (see *Sontag Chain Stores Co. v Superior Court* (1941) 18 C2d 92, 94, 113 P2d 689; *Civic W. Corp. v Zila Indus., supra*);
- The judgment is conditional (see *Taper v City of Long Beach* (1982) 129 CA3d 590, 181 CR 169; discussion in §23.4); or

A distinction must be made between acts that constitute compliance with a final judgment, on the one hand, and a judgment requiring further judicial action, on the other. See *Kinoshita v Horio* (1986) 186 CA3d 959, 231 CR 241 (trial court's order for sale that must later be confirmed, or direction that receiver's accounting be prepared and later approved, held to be "interlocutory").

Another basis for distinguishing final from interlocutory judgments is appealability. See CCP §904.1. There can be no final judgment until all the matters in litigation are determined. *Kinoshita v Horio, supra*. In an action involving multiple parties, a judgment that leaves no issues to be determined as to any one party is appealable. See *Justus v Atchison* (1977) 19 C3d 564, 568, 139 CR 97, disapproved on other grounds in *Ochoa v Superior Court* (1985) 39 C3d 159, 171, 216 CR 661.

All judgments that leave issues to be resolved are therefore interlocutory. A court order (*i.e.,* a direction that a judge makes in writing) is generally not appealable. Statutory exceptions, however, allow certain interlocutory judgments and court orders to be appealable. See list in CCP §§904.1 (unlimited civil case; see CCP §88), 904.2 (limited civil case; see CCP §85). For example, a sanctions order of over $5000 is an appealable matter. CCP §904.1(a)(11)-(12). Sanctions of a lesser amount are reviewable by petition for an extraordinary writ at the discretion of the court of appeal or after final judgment. CCP §904.1(b). An order granting an injunction is appealable, but the right of appeal does not bar the right to seek a writ if appeal is not an adequate remedy. CCP §904.1(a)(6); *Board of Police Comm'rs v Superior Court* (1985) 168 CA3d 420, 214 CR 493. For complete discussion of appealability, see California Civil Appellate

Practice, chap 3 (3d ed Cal CEB 1996).

In another sense, a judgment is "final" as to the issues it resolves only when the judgment is immune from review. In this sense, a judgment is not "final" as long as an appeal is pending, the time to file a notice of appeal has not yet expired, or a motion for new trial is pending. See *Southern Pub. Util. Dist. v Silva* (1956) 47 C2d 163, 165, 301 P2d 841; *Jennings v Ward* (1931) 114 CA 536, 300 P 129.

**NOTE:** The term "decree" usually describes a judgment made in an equitable proceeding, but because both legal and equitable proceedings are now heard in the same court, there is no longer any particular significance to the term.

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## §23.4 B. Conditional, alternative, and deficiency judgments

**Conditional judgments.** Although a judgment must be definite, it need not be unconditional. The court may render a judgment in which relief is granted to the prevailing party only after specified conditions designed to protect the rights of the losing party have been met. *Seeger v Odell* (1941) 18 C2d 409, 115 P2d 977. Generally, the purpose of a conditional judgment is to avoid a forfeiture.

**NOTE:** A conditional judgment is, by its nature, usually interlocutory and requires further judicial action. See §23.3. When the condition affects only the right to enforce the judgment, however, a judgment is final even if it is called "interlocutory" or "conditional."

**Alternative judgments.** A final judgment may be framed in the alternative. A common example is the typical judgment in an action for the recovery of personal property, which provides that the plaintiff is entitled to immediate possession of specific property or the value of the property in the event possession cannot be had. For a sample form of alternative judgment, see §23.39.

**Deficiency judgments.** A deficiency judgment is a money judgment for the amount of a debt that remains unpaid after a lien securing the debt was foreclosed. CCP §580a. A number of statutes prohibit a secured creditor from obtaining a deficiency judgment, thereby forcing the creditor to satisfy the debt solely from the security. See CCP §§580b, 580d, 726; CC §1812.5. For detailed discussion of deficiency judgments and antideficiency rules, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 4-5 (4th ed Cal CEB 2009).

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### §23.5 C. Separate judgments and "single judgment" rule

Although there are many exceptions, the general rule is that there can be only one final judgment in an action, *i.e.,* a single judgment rather than separate judgments. See, *e.g., Nicholson v Henderson* (1944) 25 C2d 375, 153 P2d 945.

If there are only two parties to an action, or if the interests of all parties on each side are united, only one judgment is proper regardless of the number of separate causes of action set forth in the complaint. *Bank of America Nat'l Trust & Sav. Ass'n v Superior Court* (1942) 20 C2d 697, 128 P2d 357.

Similarly, a defendant held liable in a bifurcated trial must wait until the completion of all stages of the trial before a single judgment is entered "as if all the issues in the case had been tried at one time." CCP §598. *Lauderdale v U & I Equipment Co.* (1969) 271 CA2d 140, 76 CR 483.

Generally, a ruling on a cross-complaint is not sufficiently independent to allow a separate judgment. *Sjoberg v Hastorf* (1948) 33 C2d 116, 199 P2d 668. When an action involves cross-demands between the same parties and both the plaintiff and the cross-complainant prevail, a single net judgment should be rendered. *Moss Constr. Co. v Wulffsohn* (1953) 116 CA2d 203, 253 P2d 483. A separate judgment is within the trial court's discretion, however, when the plaintiff's and cross-complainant's interests are not identical. *Howe v Key Sys. Transit Co.* (1926) 198 C 525, 246 P 39. See *National Elec. Supply Co. v Mount Diablo Unified Sch. Dist.* (1960) 187 CA2d 418, 9 CR 864.

The single judgment rule applies to negligence cases if neither the plaintiff nor the defendant is insured. *Jess v Herrmann* (1979) 26 C3d 131, 137, 161 CR 87. When both parties are insured, however, the insurer of each must pay the damages awarded to the other; therefore, there must be separate judgments. *Jess v Herrmann, supra*.

Whenever there is an action involving separate and independent claims against two or more defendants, the "single judgment" rule does not apply and the court determines whether a single judgment or separate judgments are appropriate. *Rauer v Hertweck* (1917) 175 C 278, 165 P 946; *Stafford v Yerge* (1956) 139 CA2d 851, 294 P2d 721. In an action against several defendants, the court may render judgment against one or more of them, leaving the action to proceed against the others. CCP §579.

**PRACTICE TIP:** When there are several plaintiffs or defendants, be prepared to address the issue of a "single judgment" versus more than one separate judgment. See CCP §579.

Similarly, in an action against two or more defendants whose liability is joint, several, or joint and several, the court may properly render several judgments. This rule applies to actions in contract as well as to actions in tort. CCP §410.70. On joint and several judgments, see §23.32.

When two or more defendants are named in an action on a contract and some of them do not appear because they are not served, the court may proceed "against such of the defendants as are served as if they were the only defendants." CCP §410.70. When read together with CCP §§578-579, §410.70 enables a court to render several judgments against the defendants who are served.

Code of Civil Procedure §§410.70 and 579 also apply to actions in which some but not all of the defendants have defaulted. Entry of a default judgment may be taken "against one or more of the defendants" in an action on a contract. CCP §585(a). Therefore, it is generally proper for a court to render a default judgment against one or more defendants, even though other defendants have answered and are awaiting a trial on the merits. See *Taylor v Socony Mobil Oil Co.* (1966) 242 CA2d 832, 51 CR 764. This is a matter for the court's discretion, however. See CCP §579; *Morehouse v Wanzo* (1968) 266 CA2d 846, 72 CR 607.

**CAUTION:** If the defendants are jointly liable on the same obligation, as in the case of a partnership and its partners, it is error for the court to enter the default judgment of one defendant while the action remains pending against the others. *Mirabile v Smith* (1953) 119 CA2d 685, 260 P2d 179. To do otherwise might result in inconsistent adjudications of joint liability.

Separate default judgments on cross-complaints are permitted. See CCP §585(e). There must be a factual basis for the judgment, however, and the court must find that a separate judgment on the cross-complaint would not substantially delay the final disposition of the action between the parties. CCP §585(e).

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## III. SUBSTANTIVE FACTORS AFFECTING VALIDITY AND ENFORCEABILITY OF JUDGMENTS

### §23.6 A. Lack of jurisdiction

A final judgment by a court of general jurisdiction bears a presumption of validity and is not subject to collateral attack. A "collateral attack" on a judgment is an indirect attack, made in a proceeding brought for some purpose other than directly challenging the judgment. A collateral attack will lie only for jurisdictional defects in the judgment. See *Marriage of Hanley* (1988) 199 CA3d 1109, 1120, 245 CR 441, overruled on other grounds in *Leadford v Leadford* (1992) 6 CA4th 571, 575 n5, 245 CR 441. The burden is on the party attacking the judgment to show lack of jurisdiction. *Craney v Low* (1956) 46 C2d 757, 298 P2d 860.

A court may lack jurisdiction to render a judgment for either of two distinct reasons: (1) The court may lack jurisdiction over one of the parties to the action or the subject matter of the action; or (2) the court may lack the power to grant a particular type of relief under any circumstances. In either case, a judgment rendered by a court in excess of its jurisdiction is void and subject to collateral attack. See *Hunter v Superior Court* (1939) 36 CA2d 100, 112, 97 P2d 492. On the jurisdictional requirement that must be met before a temporary judge tries a case, see §23.18.

Nonjurisdictional errors are not the appropriate targets of a collateral attack. For example, a judgment that violates a statute is reversible on appeal but is not void and therefore not subject to collateral attack. *Armstrong v Armstrong* (1976) 15 C3d 942, 126 CR 805; *Estate of Gardiner* (1941) 45 CA2d 559, 114 P2d 643.

For detailed discussion of the substantive law of jurisdiction, see California Civil Procedure Before Trial, chaps 6-7 (4th ed Cal CEB 2004).

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## B. Death or dissolution of party

### §23.7 1. Before action

A dead person cannot properly be joined as a defendant in a civil action; any claim against a decedent must be pursued against the personal representative of the estate. It follows that a judgment in an action brought against a dead person is void because the decedent was never a party to the action. *Conlin v Blanchard* (1933) 219 C 632, 28 P2d 12. But see *Estate of Wise* (1949) 34 C2d 376, 210 P2d 497 (in heirship proceedings in which jurisdiction is in rem, *Conlin* rule does not apply).

A different rule applies in the case of a corporation or partnership. After dissolution, corporations and partnerships continue to exist for the purpose of winding up their affairs; they cease to exist as viable legal entities only when they have been wound up. *MacMillan Petroleum Corp. v Griffin* (1950) 99 CA2d 523, 222 P2d 69 (corporation). Many litigants, and even some courts, erroneously speak of dissolution and winding up as interchangeable terms. Dissolution represents only the first step in the process of winding up, and corporations and partnerships in dissolution may prosecute and defend actions. Corp C §§6720(a) (corporations).

The partners of a dissolved partnership continue to be liable for partnership obligations incurred before dissolution, and a partnership in dissolution properly can be joined as a party defendant. *Braun v Woollacott* (1900) 129 C 107, 61 P 801. See also *Cotten v Perishable Air Conditioners* (1941) 18 C2d 575, 116 P2d 603.

A corporation whose powers have been suspended (*e.g.,* for nonpayment of taxes) can still be a party if it later perfects or reinstates its corporate status. *Peacock Hill Ass'n v Peacock Lagoon Constr. Co.* (1972) 8 C3d 369, 105 CR 29. See *Traub Co. v Coffee Break Serv., Inc.* (1967) 66 C2d 368, 57 CR 846 (suspension of corporation's powers for nonpayment of taxes after filing of cross-complaint but before judgment neither deprived court of jurisdiction nor rendered its judgment void). See also *Color-Vue, Inc. v Abrams* (1996) 44 CA4th 1599, 1603, 52 CR2d 443; *Benton v County of Napa* (1991) 226 CA3d 1485, 1489, 277 CR 541.

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### §23.8 2. During action, before judgment

The death of a party during the course of an action but before the verdict or decision raises the question of whether the action survives the death. See 3 California Decedent Estate Practice, chap 32 (2d ed Cal CEB 2009).

If the action survives, it is stayed until the appointment of the decedent's personal representative. The court must allow the action to be continued by or against the personal representative if a motion to that effect is made. CCP §§377.31, 377.41.

Code of Civil Procedure §669 provides that the court may render judgment notwithstanding the death of a party "after trial and submission of the case to a judge sitting without a jury for decision or after a verdict upon any issue of fact." Unlike other judgments, one entered against a deceased party is not a lien on his or her real property. The judgment merely serves to liquidate a claim payable in the course of the administration of the decedent's estate. Prob C §§9300-9304.

Given the court's inherent power to render judgment nunc pro tunc (retroactively), and the absence from CCP §669 of language limiting that power, judgment in a case in which one of the parties dies may be entered nunc pro tunc as of a date before his or her death if, at the time of death, the action was in condition for the entry of final judgment. *Norton v City of Pomona* (1935) 5 C2d 54, 62, 53 P2d 952. See also *Cadlo v Metalclad Insulation Corp.* (2007) 151 CA4th 1311, 61 CR3d 104 (in personal injury case in which plaintiff died 2 days after jury verdict, court did not abuse its discretion in entering judgment retroactive to day after verdict and 1 day before plaintiff died). But see *Williamson v Plant Insulation Co.* (1994) 23 CA4th 1406, 1413, 28 CR2d 751, a personal injury case in which the court of appeal held that a trial judge could not enter judgment nunc pro tunc in order to save the deceased plaintiff's damages for pain and suffering. See also *Sullivan v Delta Air Lines, Inc.* (1997) 15 C4th 288, 300, 63 CR2d 74 (citing *Williamson* dictum with approval).

On the situation of a corporation being suspended during the pendency of an action, see *Traub Co. v Coffee Break Serv., Inc.* (1967) 66 C2d 368, 57 CR 846.

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### §23.9 3. After judgment

The death of a party after judgment does not affect the judgment's validity or enforceability:

- On the death of a judgment creditor, the unsatisfied portion of any judgment in his or her favor becomes an asset of the probate estate, which may be enforced by the personal representative of the estate. *Widener v Hartnett* (1938) 30 CA2d 165, 85 P2d 925. See also *Collison v Thomas* (1961) 55 C2d 490, 11 CR 555. This rule applies even where the judgment is on appeal. *Sullivan v Delta Air Lines, Inc.* (1997) 15 C4th 288, 63 CR2d 74 (explaining the common law and statutory bases of the rule).
- On the death of a judgment debtor, an unsatisfied judgment must be filed and presented as a claim against the estate if payment is to be obtained during the course of administration. Prob C §§9300-9304. Under Prob C §9300, after the death of the decedent, all judgments against the decedent are payable in the course of administration of the decedent's estate and must be filed in the same manner as other claims.
- Regarding a corporation's suspension while a judgment is on appeal, see *Peacock Hill Ass'n v Peacock Lagoon Constr. Co.* (1972) 8 C3d 369, 105 CR 29; *Rochin v Pat Johnson Mfg. Co.* (1998) 67 CA4th 1228, 1236, 79 CR2d 719 (corporation's powers suspended in 1981 but revived in 1998 while appeal pending).

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### §23.10 C. Bankruptcy proceedings

Section 362 of the United States Bankruptcy Act provides that, when a bankruptcy petition is filed, all civil actions against the bankrupt or debtor are automatically stayed, except those actions enumerated in 11 USC §362(b). 11 USC §362. To continue the pending civil action, the creditor must obtain relief from the stay in accordance with the Rules of Bankruptcy Procedure. See Rules of Bankr Proc 4001.

In view of the automatic stay provisions of the Bankruptcy Code, a civil judgment against a bankrupt or debtor is void if the bankruptcy court has not granted relief from the stay. If the defendant is the debtor, the plaintiff will have to obtain relief from the stay in order to prosecute the action. Once relief is obtained, the trustee can defend the action under Rules of Bankr Proc 6009. If the plaintiff is the debtor, however, the bankruptcy trustee has the power to prosecute the debtor's action. Rules of Bankr Proc 6009.

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### §23.11 D. Death or disability of judge

A party is entitled to a decision from the judge who heard the evidence. *Armstrong v Picquelle* (1984) 157 CA3d 122, 203 CR 552; *David v Goodman* (1952) 114 CA2d 571, 250 P2d 704. When a trial judge dies or becomes disabled before making a decision, a mistrial must be declared. See *Reimer v Firpo* (1949) 94 CA2d 798, 212 P2d 23. If a temporary judge trying a case by stipulation dies, the trial court may not assign the case to another temporary judge without again obtaining the parties' consent. *Kim v Superior Court* (1998) 64 CA4th 256, 75 CR2d 468 (case discussion in §23.18).

This does not mean, however, that a party is entitled to have the judge who heard the evidence sign the judgment. The presiding judge (or a judge designated by the presiding judge) may sign the formal judgment or order conforming to the minutes, when the decision of the court has been entered in the minutes and the judge who heard or tried the case is unavailable. CCP §635.

**EXAMPLE 1:** In *Leiserson v City of San Diego* (1986) 184 CA3d 41, 229 CR 22, the court held that the presiding judge properly entered judgment in conformity with a statement of intended decision filed by a judge who died before the hearing on the plaintiff's objections to the decision had been completed. According to the court, the intended decision provided a complete and adequate basis for appellate review, and there was no indication that a modification of the decision was contemplated or even considered.

**EXAMPLE 2:** In *Swift v Daniels* (1980) 103 CA3d 263, 162 CR 863, the trial judge became incapacitated after expressing the intended decision but before making findings and conclusions. The court concluded that the presiding judge lacked the authority to sign findings and conclusions and a judgment.

**Compare:** With a motion for new trial, CCP §661 allows a new judge to rehear the matter and change the conclusions of law and modify the judgment of the original judge. *Kelly v Sparling Water Co.* (1959) 52 C2d 628, 343 P2d 257. Similarly, with a default judgment, under CCP §473, a second motion to set aside a default can be heard by another judge if new evidence becomes available. *Rambush v Rambush* (1968) 267 CA2d 734, 73 CR 268.

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### §23.12 E. Disqualification of judge

A judge may be disqualified for cause (CCP §170.1) or by peremptory challenge (CCP §170.6). If the judge erroneously fails to disqualify himself or herself, any judgment that the judge thereafter renders is void. *Solberg v Superior Court* (1977) 19 C3d 182, 190, 137 CR 460; *Estate of Cuneo* (1963) 214 CA2d 381, 29 CR 497. Similarly, a judgment rendered by a judge subsequently disqualified for cause is void. See *Tatum v Southern Pac. Co.* (1967) 250 CA2d 40, 58 CR 238. See also *North Beverly Homeowners Ass'n v Bisno* (2007) 147 CA4th 762, 772, 54 CR3d 644 (statutory procedure for disqualification of judges for cause does not apply to statements of disqualification filed after final judgment).

For discussion of the various circumstances in which a judge may be challenged for cause and the procedures governing both peremptory challenges and challenges for cause, see §§6.26-6.78.

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## IV. FORMAL REQUIREMENTS AFFECTING VALIDITY AND ENFORCEABILITY OF JUDGMENTS

### §23.13 A. Basic requirement of certainty

A judgment finally determines the rights of the parties. CCP §577. There is no prescribed form for a judgment. *Avakian v Dusenberry* (1936) 15 CA2d 55, 58 P2d 1306.

To be legally sufficient, however, a judgment must show that the issues raised in the action have been determined in favor of one of the parties. *Oppenheimer v Deutchman* (1958) 161 CA2d 501, 326 P2d 883.

Lack of certainty in a judgment is a ground for reversal. *Kittle v Lang* (1951) 107 CA2d 604, 237 P2d 673. Whatever the nature of a judgment, it must be sufficiently certain to enable the prevailing party to enforce it and to permit the defeated party to comply with the judgment's requirements. *Imperial Cas. & Indem. Co. v Sogomonian* (1988) 198 CA3d 169, 243 CR 639; *Marriage of Knickerbocker* (1974) 43 CA3d 1039, 118 CR 232.

The judgment must clearly specify which party obtained the judgment and the party against whom the judgment was rendered. *Seaboard Sur. Corp. v Superior Court* (1931) 112 CA 248, 249, 296 P 633; *Shriver v Superior Court* (1920) 48 CA 576, 584, 192 P 124. It is a correctable clerical error if a judgment fails to specify the name of the party against whom judgment was rendered. See *LaMar v Superior Court* (1948) 87 CA2d 126, 131, 196 P2d 98, disapproved on other grounds in *Phelan v Superior Court* (1950) 35 C2d 363, 371, 217 P2d 951. On correcting judgments, see §§23.29-23.31.

**PRACTICE TIP:** When drafting the judgment, make certain that the name of each judgment debtor is recited fully and spelled correctly and that all aliases or fictitious names used by each judgment debtor are shown on the face of the judgment. Doing so could prove invaluable in later efforts to enforce the judgment. On drafting a proposed judgment in a bench trial, see §23.26. For sample forms of judgment, see §§23.37-23.40.

A money judgment must show either that a certain sum is due to one party from another or that the plaintiff takes nothing. *Ferrara v Jordan* (1955) 134 CA2d Supp 917, 918, 286 P2d 589. The amount of the judgment must be "computed and stated in dollars and cents, rejecting fractions." CCP §577.5.

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### §23.14 B. Avoid incorporation of documents by reference

Technically, any document may be incorporated into a judgment either expressly or by reference. Whether or not part of the permanent records of the court, the document thereby becomes an operative part of the judgment. *Flynn v Flynn* (1954) 42 C2d 55, 265 P2d 865. See *Jackson v Jackson* (1967) 253 CA2d 1026, 62 CR 121. Local court rules, however, frequently prohibit the incorporation of documents into judgments.

**PRACTICE TIP:** Even if not prohibited by local rule, avoid "riders" because they make the judgment incomplete on its face. If the incorporated document is lost or destroyed, the meaning of the judgment may be rendered fatally uncertain. Even if the judgment is based on a written stipulation that is already a part of the court's files, the judgment should be drafted so that the terms of the stipulation are clearly recited on the face of the judgment itself. In the case of a stipulated judgment, the consensual terms of the stipulation should be restated as a directive (*e.g.,* "Defendant shall…" replaces "Defendant agrees to…").

The risk of encountering difficulties in enforcing a judgment increases, even if the judgment incorporates other court documents, *e.g.,* a property settlement agreement incorporated into a judgment in a marital dissolution proceeding. Ascertaining the terms of the judgment may become something other than what it should be: a ministerial function. To minimize the risk of delays in enforcement, the party drafting a judgment should assume that enforcement of the judgment will require the cooperation of a court clerk who knows nothing about the judgment other than the terms appearing on its face.

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### C. Additional requirements for special types of judgments

### §23.15 1. Injunctions

An attorney drafting a judgment granting injunctive relief should recognize that the injunction will be construed strictly against the party seeking to enforce it. An injunction must not be uncertain or ambiguous but must specify clearly what the defendant may and may not do. *In re Berry* (1968) 68 C2d 137, 155, 65 CR 273. See *People v Pacific Land Research Co.* (1977) 20 C3d 10, 141 CR 20 (preliminary injunction forbidding spending or transferring money in payment of land "sold without complying with the requirements of the Subdivided Land Law" sufficiently precise). But see *Continental Baking Co. v Katz* (1968) 68 C2d 512, 534, 67 CR 761 (language of injunction can be interpreted in light of record).

Constitutional considerations of due process require that the prohibited conduct be stated in definite terms, so that a person of common intelligence need not guess at the meaning of those terms. *Pitchess v Superior Court* (1969) 2 CA3d 644, 651, 83 CR 35. See *KGB, Inc. v Giannoulas* (1980) 104 CA3d 844, 164 CR 571 (injunction forbidding defendant to appear in "any design substantially similar" to radio station KGB chicken costume held "presumptively void because it is too uncertain to be a valid conduct regulation").

The injunction must also not be too broad. See, *e.g., Johnson v Farmer* (1940) 41 CA2d 874, 882, 107 P2d 959. But see *People v Columbia Research Corp.* (1977) 71 CA3d 607, 139 CR 517 ("fact that the terms of the injunction are sometimes broader than is necessary to restrain the precise act engaged in by [defendant] does not make it void"). For detailed discussion of injunctions, see California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004).

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### §23.16 2. Recovery of property

**Personal property.** The fundamental requirement of certainty (see §23.14) is especially important when the judgment provides for the recovery of personal property. Particular care should be taken to describe personal property with a degree of certainty sufficient to identify it for the purpose of a writ of possession.

**PRACTICE TIP:** Describe personal property in such a way that it can be distinguished from other, similar property. Remember that the sheriff or marshal who will enforce the judgment, by levying the writ of possession, will be a stranger to the action, with no means to identify the property other than the writ. Serial numbers and other identifying features are an invaluable aid to the enforcement of judgments for the recovery of personal property.

**Real property.** Similarly, if the judgment affects real property, that property must be described with such certainty that a stranger can clearly identify the particular property affected. *Newman v Cornelius* (1970) 3 CA3d 279, 83 CR 435. But see *Daluiso v Boone* (1969) 269 CA2d 253, 75 CR 287, and *Morris v George* (1943) 57 CA2d 665, 135 P2d 195, in which the courts found the judgments to be enforceable even though their property descriptions were not as detailed as those in conveyances.

**PRACTICE TIP:** When drafting a judgment affecting real property (the title to which is evidenced by a document), include mandatory language directing that any documents necessary to transfer title be executed by the proper party or, if the obligated party fails to comply within a specified period of time, by the court clerk.

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### §23.17 3. Installment judgments

A judgment providing for the recovery of money in installments should state clearly, in addition to the full amount of the judgment, the amount of each installment payment and either (a) the due date of each payment or (b) the frequency, duration, and commencement date of the payments. This specificity facilitates execution on the judgment in the event of a default.

**PRACTICE TIP:** If a judgment provides for payment at future times, use specific dates. For example, "April 1, 2010," is preferable to less precise references such as, "30 days after the entry of this judgment." A specific date is never a matter of interpretation.

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### §23.18 D. Judgments rendered by temporary judges or commissioners

As long as the procedures of Cal Rules of Ct 2.831(a)-(b) are met, a judgment made by a temporary judge is entitled to the same presumption of regularity as a judgment made by a permanent judge of the same court. *Estate of Kent* (1936) 6 C2d 154, 163, 57 P2d 901. Temporary judges are authorized to hear and decide cases under Cal Const art VI, §21, which provides that, if the parties agree and the court orders, a case may be tried by a member of the State Bar who is sworn and empowered to adjudicate the case to final determination.

The parties must stipulate that a case may be tried by a temporary judge. If the parties stipulate to a temporary judge who dies while trying their case, the trial court may not assign the case to another temporary judge without again obtaining the parties' consent. *Kim v Superior Court* (1998) 64 CA4th 256, 75 CR2d 468 (delegation of judicial power is constitutionally limited; trial court exceeded its authority in appointing another temporary judge over party's objections). See CCP §639 (enumerating statutory grounds for involuntary, court-ordered reference). On using special masters and referees, see §1.14.

The parties' stipulation must be in writing, include the name and office address of the State Bar member agreed on as the temporary judge, and be submitted for approval to the presiding judge or a supervising judge of a branch court. Cal Rules of Ct 2.831(a). The order designating the temporary judge must be endorsed on the stipulation. The temporary judge must take and sign the oath of office, and certify that he or she is aware of and will comply with Code of Judicial Ethics, Canon 6 and these rules. The oath and certification must be attached to the stipulation and order of designation. After the stipulation, order, certification, and oath are filed with the court, the temporary judge may try the case. Cal Rules of Ct 2.831(b).

In addition to the oath and certification, the temporary judge must—no later than 5 days after appointment—disclose to the parties any matter subject to disclosure under canon 6 of the Code of Judicial Ethics, and any significant personal or professional relationship the temporary judge has or has had with a party, attorney, or law firm in the instant case, including any other proceedings in the past 24 months in which the temporary judge has been privately compensated by one of the parties, attorneys, or law firms.

The California Supreme Court has held, however, that the procedures of Cal Rules of Ct 2.831 are directory rather than mandatory. *In re Richard S*. (1991) 54 C3d 857, 865, 2 CR2d 2 (failure to enter trial court order appointing a referee as the temporary judge until after the hearing was not a jurisdictional error). For example, if the parties agree on the record to use a temporary judge but fail to sign the written stipulation required by Rule 2.831, that failure is not jurisdictional. *In re Robert S.* (1988) 197 CA3d 1260, 243 CR 459. See also *In re Lamonica H.* (1990) 220 CA3d 634, 644, 270 CR 60.

**PRACTICE TIP:** If a temporary judge will try the case, be sure that all procedures for filing a written stipulation, order, and oath meet the requirements of Cal Rules of Ct 2.831. Including all these documents in the court record before the trial will help eliminate problems later.

Parties who appear and take part in a proceeding may stipulate to the appointment of a temporary judge without the consent of the absent, nonlitigating parties. *Sarracino v Superior Court* (1974) 13 C3d 1, 118 CR 21.

The signature by attorneys, without the signature by their clients, to a stipulation is sufficient to invest a temporary judge with jurisdiction to hear a case. *In re Horton* (1991) 54 C3d 82, 93, 284 CR 305. See also *Marriage of Crook* (1991) 235 CA3d 30, 35, 286 CR 537 (attorney's signature is sufficient to consent to trial by temporary judge; neither client's knowledge nor signature is necessary).

The procedures for assigning temporary judges do not apply when a court commissioner is selected to act as a temporary judge. Cal Rules of Ct 2.831(a). A commissioner may act as a temporary judge if appointed for that purpose or by written consent of an appearing party. See CCP §259(d) (no compensation other than compensation as commissioner permitted).

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## V. ENTRY OF JUDGMENT

### §23.19 A. Entry as clerical act

A judgment must be entered before it is effective for any purpose. CCP §664. On measuring the time for appeal, filing a motion for new trial, and other matters based on the date of entry of judgment, see §23.33-23.36. On notice of entry, see §23.28.

Judgment must be entered by the clerk in conformity with the verdict after a jury trial or with the court's decision after a bench trial. CCP §664. Entry of judgment is a clerical act in which the clerk, depending on the particular county's method of record keeping, does one of the following (CCP §668.5):

- Makes a microfilm copy of the judgment;
- Enters the judgment into the court's register of actions; or
- Enters the judgment in the court's electronic data-processing system.

The clerk then places the original judgment in the case file. The date of filing the judgment with the clerk constitutes the date of entry. CCP §668.5.

If the court is one that still maintains a judgment book, the clerk enters the judgment in the judgment book instead of entering judgment by one of the methods described in CCP §668.5. See CCP §668.

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### §23.20 B. Procedures in jury trial

The entry of the judgment gives effect to the decision of the trier of fact. In cases tried by a jury, the judgment must be entered in conformity with the verdict. CCP §664. See *Telles v Title Ins. & Trust Co.* (1969) 3 CA3d 179, 83 CR 444. On time requirements for entering judgment, see §23.21.

Entry of judgment after a jury trial is a routine matter for the court clerk, and trial counsel are not usually involved in the process unless the judge asks the prevailing party to submit a judgment for entry. See CCP §664.5(a). See form of judgment on verdict in §23.37.

Whether the judge's clerk fills out a court form of judgment or accepts counsel's form of judgment, the clerk usually has the judge sign the judgment. See §23.27. Then the clerk files the document in the case file and copies or enters the information into the court's record-keeping system. CCP §668.5. See §23.19.

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## §23.21 1. Time requirements for entry

The judgment after a jury trial must be entered by the clerk within 24 hours after the verdict is rendered, unless the court orders the case reserved for argument or further consideration, or grants a stay. CCP §664

Judgment must be entered even if one of the parties has made a motion for judgment notwithstanding the verdict (JNOV) and the motion is pending. CCP §664. On JNOV motions, see §§25.2-25.21.

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### §23.22 2. Judgment on special verdict

A jury may render either a general or a special verdict. A general verdict consists of a general pronouncement by the jury on all or any of the issues, in favor of either the plaintiff or the defendant. CCP §624. See §§22.4-22.5.

A special verdict consists only of conclusions of fact drawn by the jury from the evidence, leaving to the court the task of determining the appropriate conclusions of law, which constitute the judgment. CCP §624. See §22.6.

On receipt of a verdict, general or special, the clerk must make an entry in the minutes of the court, listing the time of trial, the names of all jurors and witnesses, and the verdict at length. CCP §628. For a special verdict, the minute entry must include either (a) the judgment rendered on the verdict, if the judge has given it, or (b) the order reserving the case for argument or further consideration. CCP §628.

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### §23.23 C. Procedures after bench trial

In cases tried without a jury, the judgment must be entered in conformity with the decision of the court. CCP §664. A judgment after a bench trial must be entered "immediately" by the clerk on the filing of the court's decision or judgment. CCP §664; Cal Rules of Ct 3.1590. On entry of judgment, see §23.19.

Procedures concerning the proposed judgment and entry of judgment in cases in which the court issues a statement of decision are discussed in §23.24. On judgment after a bench trial in which a statement of decision is not requested or is waived, see §23.25.

Until the judgment is entered, the judge is free to change the court's decision even after a statement of decision is filed explaining the factual and legal basis for the decision. *Phillips v Phillips* (1953) 41 C2d 869, 264 P2d 926; *Marriage of Hafferkamp* (1998) 61 CA4th 789, 793, 71 CR2d 761; *Marriage of Micalizio* (1988) 199 CA3d 662, 245 CR 673. For further discussion, see chap 24. For complete discussion of trial without a jury, the court's tentative decision, and the procedures and timing for drafting of the statement of decision, see chap 24.

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### §23.24 1. When statement of decision requested

After the court announces its tentative decision (see §§24.30-24.33), any party may request the court to issue a statement of decision explaining the factual and legal basis for its decision. CCP §632. On when statement of decision must be requested or it is waived, see §24.35.

Within 10 days after the announcement or service of the tentative decision, a party may request a statement of decision to address the principal controverted issues; these issues must be specified in the request. See Cal Rules of Ct 3.1590(d). On the procedures and timing for requesting and drafting a statement of decision, see §§24.34-24.50. On drafting the proposed judgment, see §23.26.

Any party may, within 15 days after the proposed statement of decision and proposed judgment have been served, serve and file objections to the proposed statement of decision and proposed judgment. Cal Rules of Ct 3.1590(g).

The judge may order a hearing on the proposals and objections to the proposed statement of decision or the proposed judgment. Cal Rules of Ct 3.1590(k).

Although not a judgment, the statement of decision, like former findings of fact, may help to interpret ambiguous or uncertain provisions in the judgment. See *Mayes v Sturdy N. Sales, Inc.* (1979) 91 CA3d 69, 82, 154 CR 43, disapproved on other grounds in *Applied Equip. Corp. v Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 521 n9, 28 CR2d 475.

**NOTE:** If the trial was completed within 1 day, Cal Rules of Ct 3.1590 do not apply. See §24.37.

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### §23.25 2. When statement of decision not requested or waived

If no party requests or is ordered to prepare a statement of decision and a written judgment is required, the court must prepare and serve a proposed judgment on all parties within 20 days after the announcement or service of the tentative decision. Cal Rules of Ct 3.1590(h). On drafting a proposed judgment, see §23.26.

The court may also order a party to prepare, serve, and submit the proposed judgment to the court within 10 days after the date of the order. Cal Rules of Ct 3.1590(h).

Within 10 days after service of the proposed judgment, any party may then serve and file objections to the proposed judgment. Cal Rules of Ct 3.1590(j). The court may hold a hearing concerning the proposals and objections to the proposed judgment. Cal Rules of Ct 3.1590(k).

The judgment signed and filed by the court in this manner constitutes the decision on which judgment is entered under CCP §664. Cal Rules of Ct 3.1590(*l*). The clerk must enter the judgment in conformity to the judgment signed by the judge, immediately on its filing. CCP §664.

If the trial was completed within 1 day, or less than 8 hours over more than 1 day, a request for statement of decision must be made before the matter is submitted for decision; the statement of decision may be made orally on the record in the presence of the parties. Cal Rules of Ct 3.1590(n). See §24.37.

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### §23.26 3. Drafting proposed judgment

After a bench trial, the court has discretion to prepare a proposed judgment or to direct counsel to draft the proposed judgment. See Cal Rules of Ct 3.1590. The court usually delegates the task of preparing the proposed judgment to counsel for the prevailing party.

**PRACTICE TIP:** To avoid uncertainty about who will prepare the proposed judgment, ask the court to clarify before the end of trial who will produce the initial draft of the proposed judgment and any statement of decision. Check local rules for guidelines or requirements on drafting a proposed judgment. See, *e.g.,* Los Angeles Ct R 8.96.

**Drafting considerations.** In drafting a proposed judgment, counsel should consider the points such as the following, most of which are based on the form of judgment recommended in Los Angeles Ct R 8.96.

- Clearly show the full names of the parties for whom, and against whom, the judgment is rendered, including their capacities as plaintiffs, defendants, cross-complainants, and cross-defendants. See §23.13.
- Refer to such full names as they appear in the pleadings, or obtain an order amending the pleadings in respect to such names. See §§18.103-18.123.
- Leave a blank space for insertion of any costs (including attorney fees if appropriate), as follows: "and costs in the sum of _ _[*dollar amount*]_ _." See forms of judgment in §§23.37-23.38.
- Leave a blank space for insertion of any interest accrued before the signing and filing of the judgment since the clerk computes such interest, with illustrative wording as follows: "the principal sum of ($25,000) plus interest at the rate of 8 percent from January 1, 2006, to date hereof in the sum of _ _[*dollar amount*]_ _, a total sum of _ _[*dollar amount*]_ _."
- Refrain from attaching "riders" to the judgment, except in rare instances. See §23.14. Riders include external documents containing legal descriptions of real property or schedules of financial data. If such matters are appropriate in a judgment, they must be placed in the body of the judgment, above the judge's signature line, rather than incorporated by reference.
- Use language describing any liability of opposing parties to be "joint and several" unless otherwise decided by the court. See §23.32.

For a detailed discussion of attorney fees awards, recovering costs, and obtaining interest, see chaps 26-27. On procedures requesting and drafting a proposed statement of decision, see §§24.34-24.50.

Counsel preparing the proposed judgment should take particular care to protect the judgment against future challenges. A judgment may not go beyond the issues raised in the action. *Jew Fun Him v Occidental Life Ins. Co.* (1948) 88 CA2d 246, 250, 198 P2d 711. Because of this rule, relief available on default is limited to that prayed for in the complaint. CCP §580(a). See *Becker v S.P.V. Constr. Co.* (1980) 27 C3d 489, 493, 165 CR 825. If the judgment goes beyond the litigated issues, it is void. *In re Wren* (1957) 48 C2d 159, 308 P2d 329. In limited civil actions, certain types of relief may not be granted, *e.g.,* a permanent injunction, except as authorized by law, or relief exceeding the maximum amount in controversy permitted for a limited civil case. See CCP §580(b).

**PRACTICE TIP:** In drafting the judgment, remember that the rules for determining the meaning of any other writing apply to judgments. *Colvig v RKO Gen., Inc.* (1965) 232 CA2d 56, 65, 42 CR 473. The attorney preparing the judgment may be the one who will have to enforce it or defend it on appeal. Take special care to create a document free of ambiguity because any ambiguities in the judgment will be resolved against the drafter.

If enforcing the judgment becomes necessary, the attorney for the prevailing party must deal with court personnel and clerks whose only knowledge of the terms of the judgment comes from the face of the judgment itself. A clerk may be unwilling or unable to issue a writ of execution on a judgment that fails to set forth the precise obligations of the losing party. For further discussion, see §23.13 (basic requirement of certainty).

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### §23.27 D. Judge's signature required

If a written judgment is required, the court must sign and file the judgment within 50 days after the announcement or service of the tentative decision, whichever is later, or if a hearing was held, within 10 days after the hearing. See Cal Rules of Ct 3.1590(*l*); *Marriage of Hafferkamp* (1998) 61 CA4th 789, 793, 71 CR2d 761.

Although judgments are in fact signed by judges, it is also common for a judgment to be announced by the court and entered in the minutes. For cases on announcement of judgment, see *In re Steiner* (1955) 134 CA2d 391, 398, 285 P2d 972.

If the judge who tried the case is unavailable, but that judge was able to reach a decision and it is recorded in the court minutes, the formal judgment or order conforming to the minutes may be signed by the presiding judge of the court. CCP §635. On death or disability of judge before decision rendered as grounds for mistrial, see §23.11.

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### §23.28 E. Notice of entry of judgment

Except in a small claims action, a case involving certain family law matters specified in CCP §664.5(a), or an action in which the prevailing party is not represented by counsel, the party who submits the judgment for entry must also prepare a notice of entry. That party must mail a copy of the notice to all parties who have appeared in the action, and then file the original notice of entry and a proof of service by mail with the court. CCP §664.5(a). In most actions, the judge asks the prevailing party (if represented by counsel) to submit the judgment for entry.

**PRACTICE TIP:** As the attorney for the prevailing party, for your own and your client's protection, always give written notice to the losing party promptly on entry of judgment. Even if the clerk delays or fails entirely to give the required statutory notice, the prevailing party's notice will start the running of the time to appeal under Cal Rules of Ct 8.104(a) (60 days from the clerk's or party's service of notice of entry, rather than 180 days from entry of judgment if no notice). See *Sharp v Union Pac. R.R.* (1992) 8 CA4th 357, 9 CR2d 925 (notice of appeal filed more than 60 days from defendant's mailing of endorsed copy of judgment held to be untimely, even though copy of judgment never received by appealing party).

If the prevailing party is not represented by counsel, the clerk of the court must give notice to all parties who have appeared in the action "promptly upon entry of judgment" and place a certificate of such mailing in the case file. CCP §664.5(b).

No particular form of notice of entry of judgment is required. Any notice in writing that informs the losing party that judgment was entered is sufficient. For example, an endorsed copy of the judgment showing the date of its entry in the judgment book has been held to be sufficient notice. See *National Advertising Co. v City of Rohnert Park* (1984) 160 CA3d 614, 206 CR 696.

For purposes of the time within which the notice of appeal must be filed, Cal Rules of Ct 8.104(a)(1) requires a single, self-sufficient document that satisfies all the rule's conditions, either a "Notice of Entry," so entitled, or a file-stamped copy of the judgment or appealable order showing the date on which the document was served. The clerk may satisfy the single-document requirement by attaching a certificate of mailing to the "Notice of Entry" or to the file-stamped judgment or appealable order. *Alan v American Honda Motor Co.* (2007) 40 C4th 894, 55 CR3d 534. See also *Sunset Millenium Assocs., LLC v Le Songe, LLC* (2006) 138 CA4th 256, 41 CR3d 273 ("Notice of Entry" language on 13th page of 14-page minute order insufficient to trigger appeal period; rules mandate that document actually be entitled "Notice of Entry"). Note that Rule 8.104(a) does not require that the document served indicate when an appealable judgment or order was entered, but only requires notice of when the judgment or order was filed. *Estate of Crabtree* (1992) 4 CA4th 1119, 1123, 6 CR2d 224. For a sample form of notice of entry, see §23.40.

The notice of entry also affects the time to file a notice of intention to move for new trial under CCP §659 (see §23.33) and to vacate the judgment under CCP §663a. On motion to vacate judgment, see §§25.72-25.77.

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## VI. CORRECTING AND MODIFYING JUDGMENTS

### §23.29 A. Power to correct clerical mistakes but not judicial error

Every court has statutory and inherent power to correct clerical mistakes in its judgments or orders as entered to conform to the judgments or orders that were actually made. CCP §473. This power exists independent of the statute. *In re McGee* (1951) 37 C2d 6, 229 P2d 780 (appellate court); *Bastajian v Brown* (1941) 19 C2d 209, 214, 120 P2d 9 (trial court).

By contrast, judicial error (*i.e.,* an erroneous decision) in a judgment cannot be corrected after entry; judicial error can be rectified only by attack on the judgment. *Lankton v Superior Court* (1936) 5 C2d 694, 55 P2d 1170.

To ascertain whether an error is clerical or judicial in nature, a party need determine only whether the judgment entered was the judgment that the court intended to render. *Gill v Epstein* (1965) 62 C2d 611, 44 CR 45, diapproved on other grounds in *Manta Mgmt. Corp. v City of San Bernardino* (2008) 43 C4th 400, 412 n8, 75 CR3d 353; *Lankton v Superior Court, supra*. An error made in entering judgment is a clerical error, while an error made in rendering judgment is a judicial error. *In re Candelario* (1970) 3 C3d 702, 705, 91 CR 497. See *Aspen Int'l Capital Corp. v Marsch* (1991) 235 CA3d 1199, 1204, 286 CR 921 (correcting inadvertent omission of costs and attorney fees from California judgment, when provided by Colorado judgment, was ministerial function that could be performed by court clerk).

An error may be clerical even though made by the judge rather than by the clerk. If a judge mistakenly signs a judgment different from the one intended, the mistake is a clerical error that may be corrected. *Bastajian v Brown* (1941) 19 C2d 209, 120 P2d 9; *Hennefer v Butcher* (1986) 182 CA3d 492, 227 CR 318; *Sampson v Sapoznik* (1954) 124 CA2d 709, 269 P2d 209.

The courts have sometimes gone to great lengths to define an error as "clerical" and therefore correctable. See, *e.g., Pettigrew v Grand Rent-A-Car* (1984) 154 CA3d 204, 201 CR 125 (defendant moved under CCP §473 to modify judgment to statutory limits of Veh C §17151; court affirmed trial court's granting of motion, holding that entry of judgment of $150,000 when $15,000 was maximum amount permitted by statute was "clearly" not result of judicial reasoning but rather error in judgment made through inadvertence and, thus, clerical error).

If the error to be corrected appears on the face of the record, the correction may be made on the court's own motion. *Mills Sales Co. v Gonzales* (1956) 146 CA2d Supp 899, 304 P2d 274 (court upheld as "clerical" error what appeared to be judicial mistake simply because judge who changed his mind characterized his mistake as "clerical").

When extrinsic evidence is required because the error is not apparent from the face of the record, notice should be given even though the law on the question of the necessity of notice is unclear. See *Estate of Costa* (1951) 37 C2d 154, 231 P2d 17 (no notice required); *Burnam v DeLong* (1947) 81 CA2d 559, 184 P2d 705 (notice required). Counsel should also consider whether additional evidence is needed, *e.g.,* a declaration of the clerk to show that the error was clerical. See §25.78.

After a judgment has been entered, the trial court may not use its power to correct clerical errors to substantially modify it or materially alter the parties' rights. *Rochin v Pat Johnson Mfg. Co.* (1998) 67 CA4th 1228, 1237, 79 CR2d 719; *Craven v Crout* (1985) 163 CA3d 779, 209 CR 649 (trial court entered lump-sum judgment and had no jurisdiction to grant motion to amend judgment to provide for periodic payments of future damages; party seeking periodic payment of future damages must move court before entry of any judgment, which includes damages in action, to stay entry of that judgment until periodic payment schedule has been formulated).

Consent of the parties to vacate a judgment does not give the court the power to act when that power is not otherwise provided. See *Southern Cal. White Trucks v Teresinski* (1987) 190 CA3d 1393, 236 CR 159 (trial court erroneously vacated judgment after postverdict settlement).

When an appeal is perfected from a judgment or part of it, the power of the trial court to enforce, modify, or vacate any portion of the judgment embraced by the appeal is suspended. CCP §916(a); *Elsea v Saberi* (1992) 4 CA4th 625, 5 CR2d 742.

Code of Civil Procedure §473 imposes no time limitations on the court's power to correct clerical errors; such corrections may be made at any time. *Pettigrew v Grand Rent-A-Car, supra* (court modified judgment 2 months after motion for new trial and judgment NOV was denied).

The courts have held that CCP §473 relief is available to correct judgments after judicial arbitration proceedings conducted under CCP §§1141.10-1141.30 (CCP §1141.23; see *Alvarado v City of Port Hueneme* (1982) 133 CA3d 695, 184 CR 154) as well as after nonjudicial arbitration proceedings (see *MJM, Inc. v Tootco* (1985) 173 CA3d 598, 219 CR 100).

On procedures for making motion to correct clerical error, see §§25.78-25.83. For forms, see §§25.99-25.100. On motion to vacate the judgment, see §§25.72-25.77.

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### §23.30 B. Correction of errors nunc pro tunc

A clerical error in a judgment may be corrected nunc pro tunc (retroactively) as of the date of the original entry. *Young v Gardner-Denver Co.* (1966) 244 CA2d 915, 53 CR 522.

A party may make a motion to correct the clerical error nunc pro tunc under CCP §473. See, *e.g., Estate of Goldberg* (1938) 10 C2d 709, 76 P2d 508 (judgment nunc pro tunc made 35 years after original judgment); *People v Landon White Bail Bonds* (1991) 234 CA3d 66, 76, 285 CR 575 (by nunc pro tunc order, trial court changed judgment entered 8 months earlier by inserting another defendant's name in judgment; change held to be proper correction to express trial court's true intentions, which had been ambiguous).

An order nunc pro tunc may not be used to correct judicial error or inadvertence or to show what the court should have done. See *Bell v Farmers Ins. Exch.* (2006) 135 CA4th 1138, 1145, 38 CR3d 306 (because record did not disclose inadvertent error, judgment could not be changed by motion nunc pro tunc); *Tokio Marine & Fire Ins. Corp. v Western Pac. Roofing Corp.* (1999) 75 CA4th 110, 118, 89 CR2d 1 (nunc pro tunc order may not be used to add general contractor's insurer as judgment debtor when insurer was not defendant in action and no alter ego relationship existed between general contractor and insurer). Rather, it should correct a clerical error by placing on the record what was actually decided by the court but was incorrectly recorded. See *Marriage of Padgett* (2009) 172 CA4th 830, 91 CR3d 475 (original order stated that court would retain jurisdiction over ex-husband's pension; error after his death for trial court to issue nunc pro tunc order awarding interest in pension to ex-wife); *Hamilton v Laine* (1997) 57 CA4th 885, 67 CR2d 407 (court of appeal reversed trial court's order that materially changed original order).

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### §23.31 C. Modification to bind alter ego of judgment debtor

If, following entry of judgment against a corporate defendant, supplemental proceedings disclose evidence sufficient to establish that the corporation had an alter ego, the judgment may be modified by making the alter ego an additional judgment debtor, even if that person or entity had not been a party to the action. *Ukegawa Bros. v ALRB* (1989) 212 CA3d 1314, 261 CR 420; *Thomson v L.C. Roney & Co.* (1952) 112 CA2d 420, 246 P2d 1017.

**EXAMPLE:** In *Dow Jones Co. v Avenel* (1984) 151 CA3d 144, 198 CR 457, the court held that an amendment of a summary judgment to add judgment debtors (an individual and a corporation who were alter egos of the judgment debtor) was proper. The court also held that the postjudgment debtors were not entitled to a jury trial of their alter-ego liability, because the issue was equitable in nature and was within the province of the trial court. There was no denial of due process in holding the alter-ego judgment debtors liable without a trial on the merits because the judgment of liability against the original defendant necessarily included liability against its alter egos.

The availability of this summary relief does not extend to cases in which the original judgment was obtained by default. *NEC Electronics, Inc. v Hurt* (1989) 208 CA3d 772, 256 CR 441 (reversal of trial court's order granting plaintiff's motion to amend default judgment against corporation to add corporation's chief executive officer and sole shareholder as additional judgment debtor).

**Rationale:** When a judgment is by default, the defendant did not have an opportunity to present a defense and amending the judgment would violate due process. *Motores de Mexicali v Superior Court* (1958) 51 C2d 172, 331 P2d 1. See also *Oyakawa v Gillett* (1992) 8 CA4th 628, 632, 10 CR2d 469, in which the court held that a judgment creditor may not use the alter-ego theory to add a wife as a judgment debtor to a judgment entered against her husband.

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## VII. EFFECT OF ENTRY OF JUDGMENT ON SUBSEQUENT PROCEEDINGS

### §23.32 A. Effect on enforcing judgment against defendants: Joint and several judgments

An obligation imposed on several persons may be (1) joint, (2) several, or (3) joint and several. CC §1430. An obligation imposed on more than one person is presumed to be a "joint" liability, with certain exceptions referred to in CC §1431.

Practically speaking, the exceptions are the rule. Civil Code §§1659 and 1660 provide that most joint obligations are in fact joint and several. An obligation is joint and several when all the parties who join in a promise receive *some* consideration (CC §1659) or when the promise is made in the singular but executed by several people (CC §1660). If the parties are jointly and severally liable, a creditor has the option of suing one or more of the parties separately or all of them together.

An obligation is "several" if each of the obligors agrees only to pay a particular sum. Under such an obligation, it is as if a series of individual agreements were consolidated into a single document. See *Herz & Co. v Solt* (1937) 23 CA2d 178, 180, 72 P2d 251.

**PRACTICE TIP:** The judgment should clearly state on its face whether the liability imposed on multiple parties is joint and several or merely several. Unless the trial judge clearly directs that the judgment be several, the attorney responsible for drafting the judgment should include "joint and several" language in the proposed judgment submitted to the court for signature. The following language is sufficient: "Judgment in favor of Plaintiff, _ _[*name*]_ _, and against defendants, _ _[*name*]_ _ and _ _[*name*]_ _, jointly and severally, in the amount of _ _[*dollar amount*]_ _." The effect of such language is to hold all judgment debtors responsible to the judgment creditor for the full amount of the judgment.

For further discussion of drafting judgments, see §23.26.

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### §23.33 B. Effect on motion for new trial

For practical purposes, the entry of judgment initiates the period during which any party dissatisfied with the judgment may file a notice of intention to move for a new trial, *i.e.,* whichever date is earliest: (1) within 15 days of the clerk's mailing of notice of entry of judgment, (2) within 15 days of service by any party of notice of entry of judgment, or (3) within 180 days after entry of judgment. CCP §659.

**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 and not a court day.

**CAUTION:** Although the controlling statute, CCP §659, also permits the filing of such a notice "before the entry of judgment" (*i.e.,* after the court's statement of decision or the jury's verdict), the case law describes this as a "dangerous trap to the uninformed attorney." *Ehrler v Ehrler* (1981) 126 CA3d 147, 152, 178 CR 642. Attorneys should be wary of filing the notice of intention to move for new trial if *instead* of a statement of decision, the court has only issued its "tentative decision" or "intended decision," which the court is free to change. Examining the terms used in §659, the *Ehrler* court concluded that a notice of intention to move for a new trial filed after an "intended decision" in a bench trial but before the entry of judgment is "premature" and thus "void and of no effect." See also *Bunton v Arizona Pac. Tanklines* (1983) 141 CA3d 210, 190 CR 295, involving a notice filed after a jury trial but before rendition of the verdict. On motion filed prematurely, see §25.54.

For detailed discussion of motions for new trial, see §§25.22-25.71.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/23 Judgments/§23.34 C. Effect on filing of appeal

### §23.34 C. Effect on filing of appeal

Under Cal Rules of Ct 8.104(a), a notice of appeal must be filed on or before the earliest of the following dates:

- 60 days after the date of service by the clerk of the court of a written "notice of entry" of judgment;
- 60 days after the date of service of a written "notice of entry" of judgment by any party on the party filing the notice of appeal; or
- 180 days after the date of entry of judgment.

**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 and not a court day.

A file-stamped copy of the judgment may be used in place of the document titled "notice of entry." Cal Rules of Ct 8.104(a).

A premature notice of appeal filed before entry of judgment, but after its rendition, is nonetheless valid and is considered to have been filed immediately after entry of the judgment. Cal Rules of Ct 8.104(e)(1). On filing the notice of appeal before the entry of judgment, see California Civil Appellate Practice §§7.38-7.43 (3d ed Cal CEB 1996).

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### §23.35 D. Res judicata and collateral estoppel effect

Only a final judgment can serve as the basis for invocation of the doctrines of res judicata or collateral estoppel. See *French v Rishell* (1953) 40 C2d 477, 254 P2d 26; *Romadka v Hoge* (1991) 232 CA3d 1231, 283 CR 878; *Rebco Dev. v Superior Court* (1977) 67 CA3d 13, 136 CR 351.

When a plaintiff prevails, the causes of action merge into the judgment. When the defendant prevails, the judgment constitutes a bar to any further suit on the same cause of action. *Busick v WCAB* (1972) 7 C3d 967, 104 CR 42.

A merger is the substitution of rights and duties under the judgment for those under the agreement or cause of action sued on. *Flynn v Flynn* (1954) 42 C2d 55, 265 P2d 865. The judgment absolves the parties from performing except as provided in the judgment. *Caughlin v Blair* (1953) 41 C2d 587, 262 P2d 305.

This doctrine, known as res judicata or "claim preclusion," bars a party from relitigating the identical cause of action in a second lawsuit. *Safeco Ins. Co. v Tholen* (1981) 117 CA3d 685, 173 CR 23. The rationale for res judicata is that the party to be affected, or some other party in privity with that party, has litigated or has had an opportunity to litigate the same matter in a former action in a court of general jurisdiction and should not be permitted to litigate again.

**Compare:** Res judicata is distinguishable from collateral estoppel or "issue preclusion." Collateral estoppel operates on *issues* rather than causes of action. A prior judgment operates as an estoppel or a conclusive adjudication of the issues in a second suit that was actually litigated and determined in the first action. *Taylor v Hawkinson* (1957) 47 C2d 893, 306 P2d 797.

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### §23.36 E. Duration and renewal measured from entry

The duration and renewal of judgments are measured from the date of entry. Once entered, a judgment is enforceable for 10 years from the date of its entry. CCP §683.020. If a judgment is payable in installments, a separate 10-year period runs from the date each installment is due. CCP §683.030.

**NOTE:** Judgments entered under the Family Law Act and those entered against certain public entities are governed by separate enforcement and renewal provisions. See, *e.g.,* Fam C §§272, 290-292, 5100, 5103-5104; Govt C §§965.5, 970.1.

The 10-year period may be extended by filing an application for renewal of judgment. CCP §683.130. This application may be filed any time before the 10-year period of enforceability expires. On procedures for renewing judgments, see CCP §683.120.

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## §23.36A VIII. REGISTRATION OF SISTER STATE JUDGMENT

The 1974 Sister State Money Judgments Act (CCP §§1710.10-1710.65) provides the registration system for the enforcement of judgments rendered in other states. To obtain a California judgment, the judgment creditor need file only:

- An application, under penalty of perjury, that includes all the information required by CCP §1710.15(b); and
- An authenticated copy of the sister state judgment.

See §23.40 for the application form approved by the Judicial Council.

The application is filed in the trial court of the county where any judgment debtor resides. See CCP §1710.20(b).

If no judgment debtor is a California resident, the application may be filed in any county. CCP §1710.20(b). On the filing of the application, the clerk must enter a judgment in the same manner as any other superior court judgment. CCP §1710.25. See §23.41 for the form approved by the Judicial Council for notice of entry of judgment on the sister state judgment. Sister state judgments must be given full faith and credit as long as the rendering court has jurisdiction. *Washoe Dev. Co. v Guaranty Fed. Bank* (1996) 47 CA4th 1518, 55 CR2d 479. A sister state judgment may not be set aside under CCP §473. *Liquidator of Integrity Ins. Co. v Hendrix* (1997) 54 CA4th 971, 976, 63 CR2d 240.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/23 Judgments/ IX. FORMS/§23.37 A. Form: Judgment on verdict in jury trial

## IX. FORMS

### §23.37 A. Form: Judgment on verdict in jury trial

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **JUDGMENT ON VERDICT IN** |
| **vs** | ) | **JURY TRIAL** |
| _ _[*Name(s)*]_ _ | ) | |
| **Defendant(s)** | ) | |
| _____ | ) | |

**This action came on regularly for trial on _ _[*date*]_ _, in Department _ _[*number*]_ _ of the Superior Court, the Honorable _ _[*name*]_ _ presiding. _ _[*Name*]_ _ appeared as attorney for _ _[*plaintiff/defendant*]_ _, and _ _[*name*]_ _ appeared as attorney for _ _[*defendant/plaintiff*]_ _.**

**A jury of 12 persons was impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and the arguments of attorneys, the jury was instructed by the court and retired to consider its verdict**

[*Add if appropriate*]

_ _[*with directions to return a verdict on special interrogatories*]_ _**.**

[*Continue*]

**After returning into court and being called, the jurors answered to their names and rendered their verdict in writing in words and figures as follows: _ _[*State verdict*]_ _.**

[*Option 1: General verdict*]

**IT IS ADJUDGED that:**

[*Add if verdict for plaintiff was given*]

**1. Plaintiff, _ _[*name*]_ _, recover judgment on the merits against defendant, _ _[*name*]_ _, in the amount of _ _[*dollar amount*]_ _, with interest at an annual rate of _ _[*e.g., 10*]_ _ percent from the date of entry of this judgment until paid; and**

**2. Plaintiff recover against defendant costs in the amount of _ _[*dollar amount*]_ _.**

[*Add if verdict for defendant was given*]

**1. Plaintiff, _ _[*name*]_ _, recover nothing from defendant, _ _[*name*]_ _; and**

**2. Defendant recover against plaintiff costs in the amount of _ _[*dollar amount*]_ _.**

[*Continue*]

[*Option 2: Special verdict*]

**The jury, finding that _ _[*recite verbatim from jury's findings*]_ _,**

**IT IS ADJUDGED that:**

[*Add if judgment for plaintiff given*]

**1. Plaintiff, _ _[*name*]_ _, recover judgment on the merits against defendant, _ _[*name*]_ _, in the amount of _ _[*dollar amount*]_ _, with interest at an annual rate of _ _[*e.g., 10*]_ _ percent from the date of entry of this judgment until paid; and**

**2. Plaintiff recover against defendant costs in the amount of _ _[*dollar amount*]_ _.**

[*Add if judgment for defendant given*]

**1. Plaintiff, _ _[*name*]_ _, recover nothing from defendant, _ _[*name*]_ _; and**

**2. Defendant recover against plaintiff costs in the amount of _ _[*dollar amount*]_ _.**

[*Continue*]

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

*Copies:* Original (present to judge for signature, then file with original proof of service); conformed copies for service (one for each attorney of record and unrepresented party); one office copy; one copy for client, if desired.

*Comment:* On filing judgment with clerk constituting entry of judgment in most counties, see §23.19 (entry as clerical act). On procedures for judgment after a jury trial, see §§23.20-23.22. On recovering costs and obtaining interest generally, see chap 27.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/23 Judgments/§23.38 B. Form: Judgment after bench trial

## §23.38 B. Form: Judgment after bench trial

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **JUDGMENT AFTER BENCH** |
| **vs** | ) | **TRIAL** |
| _ _[*Name(s)*]_ _ | ) | |
| **Defendant(s)** | ) | |
| _____ | ) | |

**This action came on regularly for trial on _ _[*date*]_ _, in Department _ _[*number*]_ _ of the Superior Court, the Honorable _ _[*name*]_ _ presiding. _ _[*Name*]_ _ appeared as attorney for _ _[*plaintiff/defendant*]_ _, and _ _[*name*]_ _ appeared as attorney for _ _[*defendant/plaintiff*]_ _.**

**A jury trial was waived. The court heard and considered the testimony, the documentary evidence, and the argument of counsel. The matter having been submitted for decision, and**

[*Option 1: Statement of decision requested*]

**the court having issued its statement of decision,**

[*Option 2: Statement of decision not requested or is waived*]

**a statement of decision _ _[*not having been requested/having been waived*]_ _,**

[*Continue*]

**IT IS ADJUDGED that:**

[*Option 1: Judgment for plaintiff*]

**1. Plaintiff, _ _[*name*]_ _, recover judgment on the merits against defendant, _ _[*name*]_ _, in the amount of _ _[*dollar amount*]_ _, with interest at an annual rate of _ _[*e.g., 10*]_ _ percent from the date of entry of this judgment until paid; and**

**2. Plaintiff recover against defendant costs in the amount of _ _[*dollar amount*]_ _.**

[*Option 2: Judgment for defendant*]

**1. Plaintiff, _ _[*name*]_ _, recover nothing from defendant, _ _[*name*]_ _; and**

**2. Defendant recover against plaintiff costs in the amount of _ _[*dollar amount*]_ _.**

[*Continue*]

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

*Copies:* Original (present to judge for signature, then file with original proof of service); conformed copies for service (one for each attorney of record and unrepresented party); one office copy; one copy for client, if desired.

*Comment:* On court's methods for entering judgment into the court's records or data-processing system, see §23.19 (entry as clerical act). On procedures for judgment after a bench trial, see §§23.23-23.26. On recovering costs and

obtaining interest generally, see chap 27.

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## §23.39 C. Form: Alternative judgment for plaintiff in bench trial

▶ 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*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ALTERNATIVE JUDGMENT** |
| **vs** | ) | **FOR PLAINTIFF IN BENCH** |
| _ _[*Name(s)*]_ _ | ) | **TRIAL** |
| **Defendant(s)** | ) | |
| _____ | ) | |

**This action came on regularly for trial on _ _[*date*]_ _, in Department _ _[*number*]_ _ of the Superior Court, the Honorable _ _[*name*]_ _ presiding. _ _[*Name*]_ _ appeared as attorney for _ _[*plaintiff/defendant*]_ _, and _ _[*name*]_ _ appeared as attorney for _ _[*defendant/plaintiff*]_ _. A jury trial was waived. The court heard and considered the testimony, the documentary evidence, and the argument of counsel. The matter having been submitted for decision, and**

[*Option 1: Statement of decision requested*]

**the court having issued its statement of decision,**

[*Option 2: Statement of decision not requested or is waived*]

**a statement of decision _ _[*not having been requested/having been waived*]_ _,**

[*Continue*]

**IT IS ADJUDGED that:**

**1. Plaintiff, _ _[*name*]_ _, recover from defendant, _ _[*name*]_ _, the following personal property: _ _[*Describe*]_ _.**

**2. If recovery of the personal property described above cannot be had, plaintiff recover from defendant the amount of _ _[*dollar amount*]_ _, which is deemed to be the value of that property.**

**3. Whether or not recovery of this property can be had, plaintiff recover from defendant the amount of _ _[*dollar amount*]_ _ as damages for the wrongful detention of that property; plus the amount of _ _[*dollar amount*]_ _ as interest to the date of this judgment; plus interest on the value of the property at an annual rate of _ _[*e.g., 10*]_ _ percent from the date of entry of this judgment until paid, or the property is delivered; and costs in the amount of _ _[*dollar amount*]_ _.**

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

**_____**
**Judge**

*Copies:* Original (present to judge for signature, then file with original proof of service); conformed copies for service (one for each attorney of record and unrepresented party); one office copy; one copy for client, if desired.

*Comment:* For discussion of alternative judgments, see §23.4. On recovering costs and obtaining interest generally, see chap 27.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/23 Judgments/§23.40 D. Form: Notice of entry of judgment or order

## §23.40 D. Form: Notice of entry of judgment or order

Print

**CIV-130**

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional)*:<br>E-MAIL ADDRESS *(Optional)*:<br>ATTORNEY FOR *(Name)*: | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF/PETITIONER:<br>DEFENDANT/RESPONDENT: | |
| **NOTICE OF ENTRY OF JUDGMENT OR ORDER**<br>*(Check one):* ☐ **UNLIMITED CASE** (Amount demanded exceeded $25,000) ☐ **LIMITED CASE** (Amount demanded was $25,000 or less) | CASE NUMBER: |

**TO ALL PARTIES :**

1. A judgment, decree, or order was entered in this action on *(date)*:

2. A copy of the judgment, decree, or order is attached to this notice.

Date:

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY) (SIGNATURE)



Form Approved for Optional Use
Judicial Council of California
CIV-130 [New January 1, 2010]



www.courtinfo.ca.gov
CEB

Print

CIV-130

| PLAINTIFF/PETITIONER: | CASE NUMBER: |
|---|---|
| DEFENDANT/RESPONDENT: | |

**PROOF OF SERVICE BY FIRST-CLASS MAIL**
**NOTICE OF ENTRY OF JUDGMENT OR ORDER**

***(NOTE: You cannot serve the* Notice of Entry of Judgment or Order *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 Entry of Judgment or Order* 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 Entry of Judgment or Order* 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)



*Copies:* Original (file with court with original proof of service); conformed copies for service (one for each attorney of record and unrepresented party); one office copy; one copy for client, if desired.

*Comment:* For additional requirements for special types of judgments, see §§23.15-23.17. On court clerk's mailing of notice of entry, see §23.28.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/23 Judgments/§23.41 E. Form: Application for entry of judgment on sister state judgment

## §23.41 E. Form: Application for entry of judgment on sister state judgment

Print

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: TELEPHONE NO.: | ***FOR COURT USE ONLY*** |
|---|---|
| ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br><br>DEFENDANT: | |
| **APPLICATION FOR ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT**<br>☐ **AND ISSUANCE OF WRIT OF EXECUTION OR OTHER ENFORCEMENT**<br>☐ **AND ORDER FOR ISSUANCE OF WRIT OR OTHER ENFORCEMENT** | CASE NUMBER: |

Judgment creditor applies for entry of a judgment based upon a sister-state judgment as follows:

1. Judgment creditor *(name and address)*:

2. a. Judgment debtor *(name)*:

   b. ☐ An individual *(last known residence address)*:

   c. ☐ A corporation of *(specify place of incorporation)*:

      (1) ☐ Foreign corporation
      ☐ qualified to do business in California
      ☐ not qualified to do business in California

   d. ☐ A partnership *(specify principal place of business)*:

      (1) ☐ Foreign partnership which
      ☐ has filed a statement under Corp C ~~15700~~ 15800
      ☐ has not filed a statement under Corp C ~~15700~~ 15800

3. a. Sister state *(name)*:

   b. Sister-state court *(name and location)*:

   c. Judgment entered in sister state on *(date)*:

4. **An authenticated copy of the sister-state judgment is attached to this application.** Include accrued interest on the sister-state judgment in the California judgment (item 5c).
   a. Annual interest rate allowed by sister state *(specify)*:

   b. Law of sister state establishing interest rate *(specify)*:

5. a. Amount remaining unpaid on sister-state judgment: . . . . . $
   b. Amount of filing fee for the application: . . . . . $
   c. Accrued interest on sister-state judgment . . . . . $

   d. Amount of judgment to be entered *(total of 5a, b, and c)*: . . . . . $ _____

*(Continued on reverse)*

Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

6. ☐ Judgment creditor also applies for issuance of a writ of execution or enforcement by other means before service of notice of entry of judgment as follows:
   a. ☐ Under CCP 1710.45(b).
   b. ☐ A court order is requested under CCP 1710.45(c). Facts showing that great or irreparable injury will result to judgment creditor if issuance of the writ or enforcement by other means is delayed are set forth as follows:

☐ continued in attachment 6b.

7. An action in this state on the sister-state judgment is not barred by the statute of limitations.
8. I am informed and believe that no stay of enforcement of the sister-state judgment is now in effect in the sister state.
9. No action is pending and no judgment has previously been entered in any proceeding in California based upon the sister-state judgment.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except as to those matters which are stated to be upon information and belief, and as to those matters I believe them to be true.

Date:

. . . . . (TYPE OR PRINT NAME)

▶ _____ (SIGNATURE OF JUDGMENT CREDITOR OR ATTORNEY)



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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/23 Judgments/§23.42 F. Form: Notice of entry of judgment on sister state judgment

## §23.42 F. Form: Notice of entry of judgment on sister state judgment

Print

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: TELEPHONE NO.: | *FOR COURT USE ONLY* |
|---|---|
| ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | CASE NUMBER: |
| **NOTICE OF ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT** | |

1. TO JUDGMENT DEBTOR *(name)*:

2. YOU ARE NOTIFIED
   a. Upon application of the judgment creditor, a judgment against you has been entered in this court as follows:
      (1) Judgment creditor *(name)*:
      (2) Amount of judgment entered in this court: $
   b. This judgment was entered based upon a sister-state judgment previously entered against you as follows:
      (1) Sister state *(name)*:
      (2) Sister-state court *(name and location)*:
      (3) Judgment entered in sister state on *(date)*:
      (4) Title of case and case number *(specify)*:

3. **A sister-state judgment has been entered against you in a California court. Unless you file a motion to vacate the judgment in this court within 30 DAYS after service of this notice, this judgment will be final.**

   **This court may order that a writ of execution or other enforcement may issue. Your wages, money, and property could be taken without further warning from the court.**

   **If enforcement procedures have already been issued, the property levied on will not be distributed until 30 days after you are served with this notice.**

Date: Clerk, by _____, Deputy

[SEAL]

4. ☐ NOTICE TO THE PERSON SERVED: You are served
   a. ☐ as an individual judgment debtor.
   b. ☐ under the fictitious name of *(specify)*:
   c. ☐ on behalf of *(specify)*:

   Under:
   - ☐ CCP 416.10 (corporation)
   - ☐ CCP 416.20 (defunct corporation)
   - ☐ CCP 416.40 (association or partnership)
   - ☐ other:
   - ☐ CCP 416.60 (minor)
   - ☐ CCP 416.70 (conservatee)
   - ☐ CCP 416.90 (individual)

*(Proof of service on reverse)*

Form Approved by the Judicial Council of California
EJ-110 [Rev. July 1, 1983]
Form Approved for Optional Use

**NOTICE OF ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT**

CCP 1710.30, 1710.40
1710.45

Print

## PROOF OF SERVICE

*(Use separate proof of service for each person served)*

1. I served the Notice of Entry of Judgment on Sister-State Judgment as follows:
   a. on judgment debtor *(name)*:

   b. by serving ☐ judgment debtor ☐ other *(name and title or relationship to person served)*:

   c. ☐ by delivery ☐ at home ☐ at business
      (1) date:
      (2) time:
      (3) address:

   d. ☐ by mailing
      (1) date:
      (2) place:

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 415.20(a))
   c. ☐ **Substituted service on natural person, minor, conservatee, 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, postage prepaid) 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 an address outside California (by first-class mail, postage prepaid, requiring a return receipt) 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" was completed as follows:
   a. ☐ as an individual judgment debtor.
   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) ☐ other:
      ☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
      ☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (individual)
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. ☐ California sheriff, marshal, or constable.
   b. ☐ Registered California process server.
   c. ☐ Employee or independent contractor of a registered California process server.
   d. ☐ Not a registered California process server.
   e. ☐ Exempt from registration under Bus. & Prof. Code 22350(b).
   f. Name, address and telephone number and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

***(For California sheriff, marshal, or constable use only)***

I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

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# 24

# Bench Trials

**Gary T. Lafayette**
**Susan T. Kumagai**

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## §24.1 I. SCOPE OF CHAPTER

This chapter highlights the law, procedures, and rules that are unique to trial without a jury. On the strategies to consider before waiving a jury and choosing a bench trial, see §24.3. Procedural steps and order of proof are discussed in §§24.7-24.13. On the judge's role as the trier of fact, see §§24.4-24.6; on the court's tentative decision, see §§24.29-24.32. Requesting and drafting statements of decision are discussed in §§24.34-24.50. On bench trials in which a statement of decision was not requested, see §§24.51-24.52.

Trial motions that may be made in either a jury trial or a bench trial (*e.g.,* motion to reopen, nonsuit) are covered briefly in §§24.11 and 24.13, and fully in chap 18. The motion for judgment under CCP §631.8 that may be made only in a bench trial after the opposing party has presented evidence is covered in detail in §§24.14-24.28.

On drafting proposed judgments after trial without a jury, see §23.26. Entry of judgment and the factors affecting the validity and enforceability of judgments are also discussed in chap 23. On moving to disqualify the judge before trial, see §§6.26-6.78. On preparing for trial generally, see chap 3.

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## II. GENERAL ISSUES

### §24.2 A. When bench trial required

There is no right to a jury trial when:

- The causes of action being tried are wholly "equitable" instead of "legal"; or
- The parties have waived the right to a jury trial.

Otherwise, each party is entitled to a trial by jury. For discussion of the distinction between equitable and legal causes of action, see §§8.3-8.6. Occasionally, a court will order an issue of fact to be tried by a jury in an equitable action. See CCP §592. In these circumstances, the jury's verdict is advisory only. See §8.13. On waiver of jury trial and relief from that waiver, see §§8.15-8.16.

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### §24.3 B. Tactical considerations

Trial by a judge instead of a jury can have important consequences, not all of them predictable. It is even more important in a bench trial, for example, to disqualify the judge for cause or exercise the right of peremptory challenge based on the judge's prejudice against a party or an attorney. See CCP §§170.3, 170.6 and discussion in §§6.26-6.78.

Consider whether the features and risks of a bench trial would be appropriate to your case and advantageous to your client:

- **Earlier trial date.** Bench trials are usually given earlier calendar dates than jury trials. The earlier a case goes to trial, the more likely it is that witnesses can be located and will be available to testify, and their memories are likely to be fresher. An earlier trial date, however, does not always ensure an earlier judgment. In a bench trial, the judge may take the case under submission and delay judgment for weeks or months. Because the judge is not concerned with jurors' schedules, the trial itself could be spread out over a longer period of time as the trial judge squeezes the trial between other duties and activities.
- **More predictable outcome.** Because a judge's predilections have a greater impact on the outcome of a bench trial than on a jury trial, counsel's familiarity with the judge's rulings in similar cases may help predict the outcome of the case. If possible, gather this information early so that you can adjust your case presentation and key your arguments accordingly. In some counties, you may not know who the trial judge is until the first day of trial. Various sources of information on judges include colleagues who have previously tried cases before the judge and biographical information in handbooks, such as Arnold, California Courts and Judges Handbook (7th ed 1995) or Chiang, California Courts and Judges (1999). Valuable guidance can also be found in the profiles of judges that appear regularly in newspapers such as the Los Angeles Daily Journal, The California Lawyer, and The Recorder. Trial court judges occasionally sit on appellate panels and may have published opinions in California Appellate Reports and California Reporter. Both Lexis and Westlaw access cases by the judge's name.
- **More streamlined trial.** Bench trials usually take less time than jury trials. There are no delays to impanel or instruct the jury or to remove the jury while evidentiary and procedural matters are argued. Counsel need not focus on jury reactions during trial, and the judge may permit more flexibility in the order of proof, both of which tend to save time.
- **Easier case presentation.** The judge's familiarity with the law makes presenting a case with complex legal issues less difficult. For example, in multiparty actions, a judge is less likely to confuse the individual rights that must be decided separately. When explaining technical factual issues, counsel may also be able to forgo the expensive trial exhibits in a bench trial that would have to be prepared for a jury. Similarly, if the major factual issue is the valuation of a closely held business or real property subject to leases, or the applicability of a technical defense, a judge may be better able than a jury to sort out and follow expert testimony.
- **Potential cost savings.** Many of the above factors can translate into cost savings for your client. Even eliminating jury fees and mileage reimbursements can help. See §§2.31, 4.41. However, if the judge extends a bench trial over time, the cost savings will be eroded as counsel is forced to review the status of the case and "reprepare" each time trial is resumed.

On the advantages of a bench trial in avoiding the adverse impact of publicity, see §6.50. For further comparison of bench and jury trials, see California Civil Procedure Before Trial §41.8 (4th ed Cal CEB 2004).

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### C. Judge's role

### §24.4 1. Fact-finding function

As in a jury trial, the judge in a bench trial decides all questions of law (including but not limited to questions on the construction of statutes and other writings, the admissibility of evidence, and other rules of evidence). Evid C §310. See CCP §591.

In addition, the judge in a bench trial assumes the jury's function as the trier of fact. The fact-finding role gives the judge significant control over trial proceedings. This role includes ascertaining the credibility of witnesses and deciding how much weight to give their testimony. *Bullock's, Inc. v Security-First Nat'l Bank* (1958) 160 CA2d 277, 285, 325 P2d 185.

The judge's fact-finding role imposes a duty not to prejudge the issues but to keep an open mind until all evidence is presented. *Rosenfield v Vosper* (1941) 45 CA2d 365, 371, 114 P2d 29. For example, the judge should not urge counsel for one party to settle the case before or during trial based on a prejudgment of the evidence. Until all the evidence is in, the judge should not express any conclusions about the case. See *Pacific & Southwest Annual Conf. of United Methodist Church v Superior Court* (1978) 82 CA3d 72, 86, 147 CR 44. After hearing evidence, however, a judge may give counsel an expression of any conclusions up to that moment in order to encourage settlement discussion. *Pacific & Southwest Annual Conf. of United Methodist Church v Superior Court, supra*.

In a bench trial, a judge may do any or all of the following:

- Partially or totally disregard a witness's testimony on the belief that it is inaccurate or uncertain, or that the witness is biased, or because too much time has elapsed. *Tom Thumb Glove Co. v Han* (1978) 78 CA3d 1, 5, 144 CR 30.
- Indicate a belief that a party has testified falsely. *Keating v Superior Court* (1955) 45 C2d 440, 444, 289 P2d 209.
- Resolve conflicting evidence, including inconsistent witness testimony (*Howard v Howard* (1954) 128 CA2d 180, 184, 275 P2d 88), and draw, or refuse to draw, inferences from the evidence (*Davis v Kahn* (1970) 7 CA3d 868, 874, 86 CR 872).

On the more prominent role of judicial notice in bench trials, see §24.5. On the judge's viewing of evidence outside the courtroom, see §24.6. On reasons and procedures for disqualifying a judge, see §§6.26-6.78.

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### §24.5 2. Taking judicial notice

Judicial notice allows a matter of law or fact that is relevant to a case to be considered proved without having to present evidence. *Fosselman's, Inc. v City of Alhambra* (1986) 178 CA3d 806, 812, 224 CR 361; *Mozzetti v City of Brisbane* (1977) 67 CA3d 565, 578, 136 CR 751.

Judicial notice requirements are the same whether the case is tried before a jury or a judge. See Evid C §§451-453. In a bench trial, however, the judge may permit greater procedural informality, *i.e.,* by simply taking judicial notice on the record without need of a written request from counsel or by being more inclined to take judicial notice on the court's own motion. The attorneys may also be more amenable to the court's taking judicial notice of matters of fact or law. In a jury trial, counsel may feel that the significance of certain matters needs to be explained through witnesses' testimony before the jury can fully understand or appreciate them. In a bench trial, neither the judge nor the parties need be concerned about instructing the jury to accept the judicially noticed matter as indisputably true. See Evid C §457.

For a complete discussion of procedures for taking judicial notice, and the mandatory and permissible matters that may be judicially noticed, see chap 14.

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### §24.6 3. Viewing evidence outside courtroom

In either a bench or a jury trial, a party may request (or the court on its own motion may order) a view of relevant evidence outside the courtroom. The court must find that such a view would be proper and would aid the trier of fact in deciding the case. CCP §651(a).

The judge may view the property that is the subject of the litigation; the place where any relevant event occurred; and any object, demonstration, or experiment that is pertinent, admissible in evidence, and not reasonably obtainable in the courtroom. CCP §651(a). The judge may permit testimony of witnesses at the view. CCP §651(b).

The court remains in session throughout the view proceedings, and the entire court, including the judge, the court reporter, and all other necessary court officials, must witness the property, place, object, demonstration, or experiment being viewed. Proceedings at the view must be recorded to the same extent as proceedings in the courtroom. CCP §651(b).

If a trial judge views the premises that are an issue in the lawsuit, that view furnishes independent evidence of anything disclosed by a visual inspection. See *Fosselman's, Inc. v City of Alhambra* (1986) 178 CA3d 806, 812, 224 CR 361.

Some judges grant an out-of-court view more readily in a bench trial because the mechanics are easier without a jury. Other judges, who may feel they can or should decide the case on oral testimony and documentary evidence alone, may be less inclined to grant an out-of-court view. On out-of-court views in jury trials, see §§13.110-13.111.

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## III. TRIAL PROCEDURES

### §24.7 A. Order of proof

The order of civil trial proceedings is the same for bench and jury trials and, in both, the court has discretion to change this order and to eliminate or curtail some of the steps. CCP §§607, 631.7. See, *e.g., McLellan v McLellan* (1972) 23 CA3d 343, 353, 100 CR 258. Judges often change the order in bench trials to save time and to avoid having to recall witnesses.

In a bench trial, the procedural steps for impaneling and instructing the jury are eliminated and the usual procedures are as follows:

- The case is called, and counsel for all parties identify themselves and their clients.
- If there is a pretrial order fixing the parties' factual and legal contentions, the judge reads it. Otherwise, the court reviews the trial briefs and lists of witnesses.
- The judge asks whether counsel want to make any stipulations, admissions, or amendments to the pretrial order.
- The judge, with counsels' advice or stipulation, sets the order in which the issues will be tried. In fixing this order, the judge's goal is usually to reduce the length of trial. See *Ransom v Ransom* (1963) 215 CA2d 258, 262, 30 CR 53.

**EXAMPLE:** In a personal injury case, the trial judge frequently directs that the issue of liability be tried first, obviating the need for the court to receive evidence on the issue of damages if no cause of action is established against the defendant. See, *e.g., Murphy v Hartford Acc. & Indem. Co.* (1960) 177 CA2d 539, 542, 2 CR 325. On bifurcation and other trial-ordering techniques, see §§1.11-1.14.

- Plaintiff and defendant may make opening statements. CCP §607(1)-(2). Most judges encourage opening statements to get a preview of what is to come. On opening statements in bench trials, see §9.35. On motion for nonsuit following plaintiff's opening statement, see §24.11.

**JUDICIAL PERSPECTIVE:** Opening statements in a bench trial will tend to be considerably shorter and more focused on the key factual and legal issues than opening statements in a jury trial.

- Plaintiff presents the plaintiff's evidence. CCP §607(3). Plaintiff may call defendant as an adverse witness under Evid C §776. See §§11.73-11.75.
- Defendant may cross-examine plaintiff's witnesses, and each cross-examination may be followed by redirect examination, recross-examination, and subsequent redirect and recross-examinations as necessary. Evid C §772.
- The trial judge may examine plaintiff's witnesses to clarify or supplement the evidence. See Evid C §775.
- Plaintiff rests.
- Defendant may make motions, *e.g.,* for judgment under CCP §631.8 or to strike evidence to which objections were made and reserved for the judge's ruling. See §§24.14-24.29. Plaintiff may also make motions, *e.g.,* to amend pleadings to conform to proof. See §§18.103-18.123.
- The judge rules on the motions or reserves ruling on them. If the judge does not grant defendant's motion for judgment, the case proceeds.
- Defendant may make an opening statement, if not previously given after plaintiff's opening statement. CCP §607(4). On opening statements in bench trials, see §9.35.
- Defendant presents the defense. Defendant may call plaintiff as an adverse witness under Evid C §776. See §§11.73-11.75. Defendant may also recall witnesses originally called in plaintiff's case in chief. However, a witness once examined cannot be reexamined on the same matter without leave of court. Evid C §774.
- Plaintiff may cross-examine defendant's witnesses and each cross-examination may be followed by redirect examination, recross-examination, and continuing and subsequent redirect and recross-examinations as necessary. Evid C §772.
- The trial judge may examine defendant's witnesses to clarify or supplement the evidence. See Evid C §775.
- Defendant rests.
- Plaintiff and defendant may make motions, *e.g.,* for judgment under CCP §631.8. See §§24.14-24.28. On making other trial motions, see §§24.11, 24.13.

- The judge rules on the motions or reserves ruling on them. If the judge does not grant plaintiff's or defendant's motion for judgment, the case proceeds.
- Plaintiff may present a rebuttal case to counter any new matters raised by defendant's case in chief. Defendant may then present a rebuttal case (sometimes called a surrebuttal), limited to refuting new matters raised in plaintiff's rebuttal case. This process may continue, with the scope of examination becoming progressively limited. See CCP §607(6); Evid C §320.
- The court may allow the parties to admit evidence on their case in chief after each side has presented its case in chief if good cause is shown and if it is in the furtherance of justice. CCP §607(6).
- The parties rest.
- Closing arguments are given, to the extent permitted by the judge. CCP §607(7)-(8). The judge may indicate the points on which argument is desired. See §24.12.
- The judge may immediately announce the tentative decision; but more often, the judge orders the cause submitted and asks or allows counsel to submit further briefs. See §24.8.
- After the judge renders a tentative decision, either or both parties may request a statement of decision. See §§24.33-24.43.
- If a statement of decision is requested, the judge signs and files it, and judgment is entered. See §24.44.
- The judgment is entered by the court clerk. See §24.27.
- The prevailing party files a cost bill, and if necessary, the nonprevailing party brings a motion to tax costs. On recovering costs, see chap 27.

**NOTE:** A judge has the authority to exercise control over all the proceedings connected with the litigation. *People v Ponce* (1996) 44 CA4th 1380, 1387, 52 CR2d 422. This authority includes imposing reasonable time limits on portions of the trial. See §1.36 for further discussion of court-imposed time limits.

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## §24.8 B. Submitting trial briefs

It is important to prepare a trial brief on all relevant legal, factual, and evidentiary issues. The brief should focus on the trial issues that will be disputed.

**PRACTICE TIP:** Counsel should check local court rules as well as investigate, through colleagues and court clerks, the practices of the judge who may preside at the bench trial to learn the best time to file trial briefs. Individual judges may ask for trial briefs and supplemental memorandums at any time during a bench trial.

**Pretrial briefs.** Occasionally, lawyers view a bench trial as a less formal proceeding and do not file briefs. A trial brief can be far more important in a bench trial, and the judge may view counsel who appears for trial without a brief, except in the simplest of cases, as unprepared or uninterested—particularly if opposing counsel submits a trial brief. On preparation and content of trial briefs, see §§3.49-3.53.

**PRACTICE TIP:** Even if not required, it is good practice to serve and file a trial brief in enough time for the judge to review it before the final status or chambers conference in the case. Because chambers conferences are often shorter in a bench trial (see §24.9), the trial brief is your first and best opportunity to educate and persuade the judge of the merits of your client's position. If the chambers conference has been set before the first day of trial, be sure to print the conference date under the caption so that the brief can be tracked by court staff and made available to the judge before that time.

**Posttrial briefs.** Trial briefs may also be submitted after trial. See, *e.g., Haupt v La Brea Heating & Air Conditioning Co.* (1954) 125 CA2d Supp 888, 890, 270 P2d 125, overruled on other grounds in *Zenker-Felt Imports v Malloy* (1981) 115 CA3d 713, 720, 171 CR 482.

**PRACTICE TIP:** When the judge either requests or permits briefs to be filed after trial, establish a posttrial schedule with the judge, fixing specific periods for their submission. Doing so will avoid any misunderstandings that you failed to submit a timely brief. See, *e.g., Wells v Coca Cola Bottling Co.* (1956) 140 CA2d 218, 220, 294 P2d 955 (if posttrial brief is not submitted for long period, in this case 8 months, judge may properly conclude that right was waived and proceed to decision).

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### §24.9 C. Chambers conference

Chambers conferences with counsel and the judge before the trial are usually much shorter in bench trials. Motions in limine on prejudicial evidence that might inflame the jury, or other matters that should arguably be withheld during a jury trial, are of course not in issue. However, the chambers conference is still a good opportunity to underscore the important claims or defenses that counsel will argue during the trial and to inform the court of any special requests that counsel plans to make during the trial (*e.g.,* an out-of-court view of relevant evidence).

**PRACTICE TIP:** Be sure that a court reporter will be available during the chambers conference if it becomes necessary to put any matters on the record. In limited civil actions, counsel may need to request the presence of a court reporter.

As in a jury trial, it is a good idea to become informed during the chambers conference of the judge's "housekeeping" rules in effect during the trial. Although the judge may relax these rules more than if a jury were present, and though many matters can be handled informally during the trial without having to argue outside the jurors' hearing, it is still good practice to take a list of questions to the conference about the judge's preferences in handling evidentiary and other matters during the trial.

**PRACTICE TIP:** Questions of minor importance or of a mechanical nature should be addressed to the judge's clerk. For a list that is used in jury trials that can be modified for a bench trial chambers conference, see §6.5.

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### §24.10 D. Objecting to evidence

Because of the few people present and a frequently low-key atmosphere, many lawyers think of bench trials as less formal. But counsel must ensure that the bench trial's informality does not create an insufficient record on appeal. Failure to object on the record to otherwise admissible evidence in either a bench or jury trial waives the right to urge the inadmissibility of that evidence on appeal. Evid C §353; *In re Lynna B.* (1979) 92 CA3d 682, 703, 155 CR 256.

This rule also applies to questions asked by the judge. *People v Corrigan* (1957) 48 C2d 551, 556, 310 P2d 953 (jury trial). Without a jury, however, evidentiary issues can be argued without dismissing the jury and without trips to the bench or the judge's chambers, thus saving considerable time.

In the absence of a jury, the judge may be inclined to conditionally accept much evidence subject to a motion to strike. Or counsel may make a single "continuing" objection to an entire line of questioning or to the same class of evidence. The risk on appeal is that if the judge forgets to rule on the motion or objection, the record may be incomplete.

**PRACTICE TIP:** To avoid waiver, it is crucial to secure rulings on motions to strike or continuing objections that the trial judge held in abeyance. Maintain a log and take thorough notes to avoid any oversights on evidentiary rulings. Remind the court that certain issues need to be resolved and the decisions put on the record so that there are explicit rulings indicating the court's rejection of incompetent evidence. On making trial objections and protecting the record, see chap 15.

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### §24.11 E. Making trial motions

**Nonsuit.** In a bench trial, a defendant may move for nonsuit at the conclusion of the plaintiff's opening statement. CCP §581c(a); *Gonsalves v City of Dairy Valley* (1968) 265 CA2d 400, 403, 71 CR 255. A motion for nonsuit is properly granted only if the court decides that the evidence is not of sufficient substantiality to support a plaintiff's verdict, even if all the evidence presented in the plaintiff's favor is presumed true. See *Willis v Gordon* (1978) 20 C3d 629, 633, 143 CR 723. In moving for nonsuit, defendant does not waive the right to offer evidence if the motion is not granted. CCP §581c(a).

The motion for nonsuit must state the precise grounds on which it is made, with the defects in plaintiff's opening statement or case in chief clearly and specifically shown. Only the grounds specified by counsel may be considered by the court of appeal. *Saunders v Taylor* (1996) 42 CA4th 1538, 1542 n2, 50 CR2d 395. On form of oral motion, see §18.25. For a thorough discussion of the procedures and law on motions for nonsuit, see §§18.7-18.34.

In a bench trial, a party may not move for nonsuit at the close of the other party's case in chief; the correct motion is a motion under CCP §631.8. *Ford v Miller Meat Co.* (1994) 28 CA4th 1196, 1200, 33 CR2d 899; *Commonwealth Mem., Inc. v Telophase Soc'y* (1976) 63 CA3d 867, 869 n1, 134 CR 58.

**Motion for continuance.** Counsel for any party can request a continuance or a recess during the trial. Grounds for a motion for continuance include the illness of a party or a key witness. For discussion of specific grounds and procedures for making and opposing the motion, the potential costs incurred by the moving party, and alternatives to a continuance for resolving the problem, see §§6.6-6.25, 18.57-18.64.

**Other trial motions.** The motion for judgment in a bench trial (CCP §631.8), made exclusively in trials without a jury at the close of either party's evidence, is discussed in detail in §§24.14-24.28.

On motion to amend the pleadings to conform to proof, see §§18.103-18.123. On motion to reopen the case on the ground that new evidence has become available, see §24.13. On procedures generally for making motions during trial, see §§18.3-18.6.

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### §24.12 F. Closing argument at court's discretion

Closing argument in a civil bench trial is not a right but a privilege granted at the judge's discretion. *Gillette v Gillette* (1960) 180 CA2d 777, 781, 4 CR 700. A judge who permits closing argument has broad discretion to limit its scope and length. *Board of Educ. v Cooper* (1955) 136 CA2d 513, 527, 289 P2d 80; *Larson v Blue & White Cab Co.* (1938) 24 CA2d 576, 578, 75 P2d 612.

**PRACTICE TIP:** If you think oral argument will benefit your client, be prepared to persuade the judge why argument will be useful in the particular case. When the judge is willing to listen to final argument, you should not ordinarily waive it. An articulate, well-reasoned argument can have a positive effect on the judge's decision. On the differences in arguing to the judge instead of to a jury, see §19.8.

If oral argument is limited or not allowed, counsel may ask to argue the case to the judge in trial briefs. In bench trials, judges also frequently request counsel to submit briefs after trial. See §24.8.

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### §24.13 G. Reopening case

A motion to reopen is a request to present further elements of proof in a party's case after that party has rested. The motion is commonly made after a motion for nonsuit or directed verdict when it comes to a party's attention that an essential element of the case was not argued or put into evidence. See §§18.65-18.81.

**NOTE:** In a jury trial, the motion must be made before the jury is discharged and may be made even after closing argument. See *Nelson v Douglas Pedlow, Inc.* (1955) 130 CA2d 780, 783, 279 P2d 823. See §18.74. In a bench trial, a motion to reopen can be made not only during trial but also after the case has been submitted, after the court has reached a tentative decision, or even after judgment has been entered. See, *e.g., Marriage of Hahn* (1990) 224 CA3d 1236, 1240 n3, 273 CR 516 (trial court properly granted motion to reopen even though motion was made 3 months after tentative decision but before entry of judgment).

Counsel must show good cause to reopen a case. *Ensher, Alexander & Barsoom, Inc. v Ensher* (1964) 225 CA2d 318, 326, 37 CR 327. Grounds for reopening include surprise or inadvertent omission despite due diligence. See, *e.g., Malibou Lake Mountain Club, Ltd. v Robertson* (1963) 219 CA2d 181, 185, 33 CR 74; *Lyons v Lyons* (1961) 190 CA2d 788, 791, 12 CR 349. The new evidence to be presented must not be merely cumulative. *Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 794, 172 CR 342.

The judge also has inherent power to reopen a case on the court's own motion when the interests of justice require it. *Taylor v Bell* (1971) 21 CA3d 1002, 1007, 98 CR 855. Granting or denying a motion to reopen is within the trial court's sound discretion and will not be reversed without a clear showing of abuse and prejudice. *Estate of Horman* (1968) 265 CA2d 796, 806, 71 CR 780.

When a motion for a new trial is made in a bench trial, the judge may reopen the case as an alternative to granting the motion. CCP §662. A case may be reopened to hear only the issues the judge deems appropriate. See, *e.g., Western Electroplating Co. v Henness* (1959) 172 CA2d 278, 280, 341 P2d 718. An order to reopen vacates any earlier findings and judgment, even if the order does not expressly make this statement. *Taormino v Denny* (1970) 1 C3d 679, 684, 83 CR 359. For a form that can be used when requesting the judge to reopen a case, see §18.31.

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## IV. MOTION FOR JUDGMENT

### §24.14 A. Checklist: Procedures for making or opposing motion for judgment

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This checklist outlines the procedural steps for both making and opposing a motion for judgment under CCP §631.8. For discussion of motion, see §§24.15-24.29.

Moving Party

___ 1. Determine legal basis for motion. See §24.15.

___ 2. Consider preparing written supporting memorandum. See §24.23.

___ 3. Make oral statement of specific grounds. See §24.22.

___ 4. Argue merits of case, showing why weight of evidence supports motion. See §24.17.

___ 5. Let record reflect either that opponent has opportunity to reopen or that court decided opponent had no new evidence present. See §24.13.

___ 6. Consider asking for partial judgment on some but not all issues in the action. See §24.19.

___ 7. If court is inclined to deny motion, urge instead that court reserve ruling and weigh opponent's evidence while trial proceeds. See §24.20.

Opponent

___ 1. Argue merits of case, showing why weight of evidence supports denial of motion. See §24.17.

___ 2. If own witnesses called under Evid C §776, ascertain whether court is considering such evidence and, if so, seek opportunity to rebut and rehabilitate. See §24.24.

___ 3. Consider requesting reopening of case. See §24.13.

___ 4. Consider requesting amendment of pleadings. See §24.11.

___ 5. If granted, request judgment be deemed not on the merits. See §24.25.

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### B. Nature of motion

### §24.15 1. Any party can move for judgment

In bench trials, any party can move for judgment at the conclusion of the opposing party's case. CCP §631.8(a). The defendant usually makes the motion after the plaintiff's case has been presented. A plaintiff/cross-defendant can also make the motion at the conclusion of the other party's evidence on a cross-complaint. CCP §631.8(a).

Bringing the motion does not waive the right to present a defense or rebuttal evidence if the motion is denied. CCP §631.8(a).

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### §24.16 2. Purpose: to eliminate need to present own evidence

**Defendant's perspective.** The purpose of a motion for judgment is to eliminate the moving party's need to present evidence. *Rodde v Continental Ins. Co.* (1979) 89 CA3d 420, 423, 152 CR 500. By making the motion at the end of plaintiff's case, defense counsel may be able to avoid the expense of presenting a defense if the court decides that plaintiff failed to meet the burden of proof. *Kirk Corp. v First Am. Title Co.* (1990) 220 CA3d 785, 806, 270 CR 24.

**Plaintiff's perspective.** If plaintiff's counsel makes the motion, it may eliminate the need for plaintiff to produce further evidence in rebuttal when defendant has clearly failed to present a valid defense. A party permitting its own witness to testify out of order is not thereby prevented from bringing a motion at the end of the adverse party's case. *Eddy v Gallaway* (1970) 11 CA3d 185, 191, 89 CR 491.

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### §24.17 3. Compared with nonsuit or new trial motions

When ruling on a motion for nonsuit, the court must grant all inferences in favor of the nonmoving party. A motion for judgment requires that the court weigh the evidence. See §24.18. On motions for nonsuit, see §§18.7-18.34.

Unlike a new trial motion, which the court can grant only on a showing of specific grounds and which serves only to set aside the prior proceedings, a motion for judgment is on the merits and requires only the weighing of evidence. However, a judgment under CCP §631.8 can be challenged through a motion for a new trial under CCP §657, in which case the court again weighs the evidence. If the motion for a new trial is granted after a judgment under CCP §631.8, the trial court has in effect found that the motion for judgment was erroneously granted. *Watt v Kantel* (1970) 13 CA3d 249, 253, 91 CR 449. On motions for new trial, see §§25.22-25.71.

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### C. Judge's ruling

### §24.18 1. Duty to weigh evidence

A motion for judgment requires the court to sit as a trier of fact with the discretion to disbelieve witnesses or disagree with experts' opinions. *Jordan v City of Santa Barbara* (1996) 46 CA4th 1245, 1255, 54 CR2d 340; *Kirk Corp. v First Am. Title Co.* (1990) 220 CA3d 785, 806, 270 CR 24. The court's failure to weigh the evidence is reversible error per se, and its failure to demonstrate a weighing of the evidence normally leads to reversal. *Greening v General Air-Conditioning Corp.* (1965) 233 CA2d 545, 551, 43 CR 662.

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### §24.19 2. Judge can consider any party's evidence

In ruling on a party's motion for judgment under CCP §631.8(a), the court may consider all evidence received, as long as the nonmoving party has a chance to rebut any evidence the nonmoving party deems unfavorable that was presented when the nonmoving party called the moving party's witnesses under Evid C §776. CCP §631.8(a); *People v Mobil Oil Corp.* (1983) 143 CA3d 261, 275, 192 CR 155.

**EXAMPLE:** Under former law, if defendant made the motion, the court could not consider evidence introduced out of order by plaintiff in calling defendant's witnesses to the stand under Evid C §776. See *Miller v Dussault* (1972) 26 CA3d 311, 316, 103 CR 147. Since a 1978 amendment to CCP §631.8, the court may consider §776 evidence, but plaintiff also must be given an opportunity to rebut any evidence that came in when defendant's witnesses testified under §776 that plaintiff's counsel deems adverse. Plaintiff must also be permitted to rehabilitate the testimony of any witnesses whose credibility was attacked during defendant's cross-examination. See CCP §631.8(a). This right to present evidence in rebuttal or rehabilitation arises, however, only if the court in its discretion considers all evidence received, including §776 evidence, when ruling on the motion. CCP §631.8(a). See *People v Mobil Oil Corp.* (1983) 143 CA3d 261, 272, 192 CR 155.

For discussion of this issue from the opposing party's point of view, see §24.25.

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## §24.20 3. Granting partial judgment

The court may grant partial judgment if the evidence supports the granting of a judgment to some but not all of the issues in the action. CCP §631.8(b). In that event, final judgment is not entered, and trial proceeds on the remaining issues.

Final judgment is awarded in accordance with the earlier ruling for partial judgment as well as for the matters determined at trial. CCP §631.8(b).

**JUDICIAL PERSPECTIVE:** Even if counsel feels that his or her motion for judgment under CCP §631.8 should be granted in its entirety, it is nearly always advisable to request, in the alternative, partial judgment on those issues or causes of action for which the opposing party most clearly failed to present sufficient evidence to support a judgment in its favor.

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### §24.21 4. Deferring the ruling

After a motion for judgment is made, CCP §631.8 explicitly authorizes the court to decline to render any judgment until all the evidence has been presented. See *People v Mobil Oil Corp.* (1983) 143 CA3d 261, 275, 192 CR 155. This may ensure a more complete record if the case is appealed, thus lessening the chances of reversal.

**PRACTICE TIP:** If your defense or rebuttal will be long and expensive and if the other party has not met the burden of proof, consider urging the judge when you make the motion not to defer a ruling until after your presentation of evidence. Your main argument is that a deferral of the ruling, although authorized, would defeat the purpose of this remedy.

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### §24.22 D. Timing

A motion for judgment may be made only in a bench trial at the close of the other party's evidence. As a practical matter, this means that the motion for judgment is usually made by defendant at the close of plaintiff's case; for plaintiff to make the motion at the end of defendant's case is rarely worth the effort because the trial is almost over by that time.

A motion for judgment may not be made after a plaintiff's opening statement. Instead, defendant must move for nonsuit to challenge plaintiff's case after the opening statement. See §§18.7-18.34.

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### E. Procedures for moving party

#### §24.23 1. Oral motion

A motion for judgment under CCP §631.8 is usually made orally in open court, without notice or written supporting memorandum. No specific form of oral motion for judgment is required. The motion could be worded as follows:

> Your Honor, the defendant moves for judgment under Code of Civil Procedure section 631.8 on the ground that an essential element is missing from the plaintiff's claim, namely, _ _[*specify*]_ _.

Counsel should state the grounds clearly, showing the court why the other party has failed to prove a case and why judgment should be granted in the moving party's favor.

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### §24.24 2. Written motion with supporting memorandum

In some circumstances, counsel may choose to submit the motion in writing, with supporting papers. After evaluating the weaknesses in the opponent's case, counsel may anticipate making the motion, and the court may be more readily persuaded with a written supporting memorandum—especially if complex legal issues are involved.

If the motion is made in writing, note this fact on the record at the time the papers are submitted to the court. For written version of this motion, see form in §24.53.

**JUDICIAL PERSPECTIVE:** A short succinct written motion is strongly recommended. If defense counsel wishes to make an oral motion at the conclusion of plaintiff's case, but intends to support it with a written supporting memorandum not yet prepared, he or she should not ask the judge to stop the proceedings. Instead, defense counsel should proceed to present his or her evidence while asking the judge to defer ruling on the CCP §631.8 motion until the written materials can be presented (in a day or two), and then to consider the motion nunc pro tunc, on the evidence produced up to the conclusion of plaintiff's case. The judge may wish to invite the plaintiff to submit a simultaneous brief in opposition to the motion.

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### §24.25 F. Procedures for opposing party

The party opposing the motion must be given an opportunity to present additional evidence to rebut any evidence received by the court that the opposing party deems adverse. CCP §631.8(a). This situation usually arises when the plaintiff has called adverse defense witnesses under Evid C §776 during the plaintiff's case in chief. See §24.18.

Counsel opposing the motion must also be permitted to rehabilitate the testimony of a witness whose credibility has been attacked by the party moving for judgment. CCP §631.8(a). But see *People v Mobil Oil Corp.* (1983) 143 CA3d 261, 272, 192 CR 155 (additional evidence permissible only if court considers, not merely hears, moving party's evidence).

**PRACTICE TIP:** Whenever possible, opposing counsel should affirmatively seek to present rebuttal evidence and to rehabilitate witnesses whose credibility was damaged during cross-examination. Otherwise, the court is likely to follow the nonsuit rule and assume that counsel has no further evidence to present. See *John Norton Farms v Todagco* (1981) 124 CA3d 149, 162, 177 CR 215.

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### G. Effect of granting motion

### §24.26 1. Adjudication on merits

When the motion for judgment is granted, it operates as an adjudication on the merits, unless the court in its order for judgment specifies otherwise. CCP §631.8(c).

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### §24.27 2. Statement of decision required

If the court grants the motion for judgment, it must make a statement of decision as provided in CCP §§632 and 634. CCP §631.8(a). See *Kirk Corp. v First Am. Title Co.* (1990) 220 CA3d 785, 805, 270 CR 24. Ordinarily, the court requests the prevailing party to draft a proposed statement of decision with the other party having the right to object and to request changes or additions. For procedures on statement of decision, see §§24.34-24.50.

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### §24.28 3. Entry of judgment; Costs

Like any other judgment, a judgment under CCP §631.8 must be entered by the court clerk in conformity with the court's decision. CCP §664. See §23.19.

The party in whose favor a judgment is entered may file a cost bill under CCP §§1031-1032. On recovering costs, see chap 27.

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### §24.29 4. Substantial evidence test on appeal

An appeal from a judgment given under CCP §631.8 is subject to the substantial evidence standard. If the trial court draws reasonable inferences from the facts, or resolves conflicts of evidence in favor of its deductions for those made by the trier of fact. *Rodriguez v North Am. Rockwell Corp.* (1972) 28 CA3d 441, 447, 104 CR 678.

Because the appellate court views the evidence in a light most favorable to the prevailing party (the respondent), the trial court's decision must be affirmed on appeal if supported by substantial evidence. *Torrey Pines Bank v Hoffman* (1991) 231 CA3d 308, 317, 282 CR 354; *Swanson v Skiff* (1979) 92 CA3d 805, 810, 155 CR 280. See California Civil Appellate Practice §§5.16-5.22 (3d ed Cal CEB 1996).

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## V. TENTATIVE DECISION

### §24.30 A. Required after bench trial

The court must issue a tentative decision after a bench trial on a question of fact. Cal Rules of Ct 3.1590(a). A tentative decision is an informal indication of the court's contemplated judgment. The tentative decision is not a judgment; it is not binding on the court and may be modified or changed at any time. Cal Rules of Ct 3.1590(b).

In the tentative decision, the court may (Cal Rules of Ct 3.1590(c)):

- Offer the proposed statement of decision, subject to a party's objection;
- Indicate that it will prepare a statement of decision;
- Order a party to prepare a statement of decision; or
- Direct that the tentative decision become the statement of decision unless, within 10 days after announcement or service of the tentative decision, a party specifies those principal controverted issues concerning which the party is requesting a statement of decision or makes proposals not included in the tentative decision.

**NOTE:** Although CCP §632 and Cal Rules of Ct 3.1590 use the term "tentative decision," most of the available case law was decided under former provisions requiring an "intended decision." The tentative decision has a similar scope and application, and case law interpreting intended decisions applies to tentative decisions. Some courts still refer to the "intended decision" or use other similar terms. See, *e.g., Wolfe v Lipsy* (1985) 163 CA3d 633, 209 CR 801 (memorandum of intended decision); *People v Casa Blanca Convalescent Homes, Inc.* (1984) 159 CA3d 509, 206 CR 164 (memorandum of intended ruling).

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### §24.31 B. Function of tentative decision

The primary purpose of a tentative decision is to explain the judge's reasoning and to enunciate the legal principles applied by the judge to reach a conclusion. See *South Bay Irrig. Dist. v California-American Water Co.* (1976) 61 CA3d 944, 995, 133 CR 166; *Packer v Sillas* (1976) 57 CA3d 206, 218, 128 CR 907.

A tentative decision cannot be invoked to contradict or impeach the court's judgment. *Carroll v Puritan Leasing Co.* (1978) 77 CA3d 481, 491, 143 CR 772; *Neumeyer v Crown Funding Corp.* (1976) 56 CA3d 178, 186 n3, 128 CR 366, disapproved on other grounds in *Liodas v Sahadi* (1977) 19 C3d 278, 287, 137 CR 635. A tentative decision is not an appealable order, because it is not a judgment, a decision, or any other type of statement binding on the court. Cal Rules of Ct 3.1590(a); *Estate of Pieper* (1964) 224 CA2d 670, 675, 37 CR 46.

For collateral estoppel purposes, however, an intended decision can be used to determine what issues were litigated in an action. See *Carroll v Puritan Leasing Co.* (1978) 77 CA3d 481, 492, 143 CR 772.

Whether or not a statement of decision was requested, a memorandum of a tentative decision cannot be considered part of the record on appeal. Any reference to a tentative decision to support allegations of error is improper. See *Marriage of Ditto* (1988) 206 CA3d 643, 646, 253 CR 770. On requesting a statement of decision, see §§24.34-24.35.

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### §24.32 C. Tentative decision may be oral or written

The announcement of the tentative decision may be an oral statement, entered in the minutes. If made in open court, in the presence of all parties who appeared at trial, no notice to the parties is required. The tentative decision may also be made as a written statement filed with the clerk. Cal Rules of Ct 3.1590(a).

If the tentative decision was not given orally in open court in the presence of all the parties, the clerk must mail a copy of the minute entry or the written tentative decision to all parties. The clerk must also mail to all parties a copy of any modifications or changes made after an announced tentative decision. Cal Rules of Ct 3.1590(a).

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### §24.33 D. Tentative decision in municipal courts [Deleted]

The rules for the municipal courts have been repealed. See former Cal Rules of Ct 501-598. The superior and municipal courts in all California counties were unified, and matters that were traditionally within the municipal courts' jurisdiction are now identified as "limited civil cases" in the superior trial courts.

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## VI. STATEMENT OF DECISION

### §24.34 A. Requesting statement of decision

After the court announces its tentative decision after a bench trial (see §§24.29-24.32), any party may request the court to issue a statement of decision explaining the factual and legal basis for its decision on the principal controverted issues at trial. CCP §632. The requesting party must specify the controverted issues that the party is requesting a statement of decision on. CCP §632. A statement is not required when only legal, not factual, issues are in dispute. See §24.52.

Code of Civil Procedure §632 also applies to administrative mandamus proceedings in which the trial court exercises independent judgment in reviewing the record. *Cooper v Kizer* (1991) 230 CA3d 1291, 1301, 282 CR 492. The procedures for requesting, submitting, and objecting to the statement of decision are in Cal Rules of Ct 3.1590.

If a statement of decision is not requested, the judgment rests on the findings implicit in the order and will be upheld if any substantial evidence sustains it. *Elzey v Metropolitan Builders, Inc.* (1971) 16 CA3d 71, 72, 92 CR 461. Even when there is one clear and sufficient finding on which the judgment can rest, it will be concluded that the court did rest its judgment on that finding, and the others may be disregarded. *Republic Indem. Co. v Empire Builders Corp.* (1985) 167 CA3d 1163, 1167, 213 CR 787. To avoid implied factual findings after a bench trial, a party must request a statement of decision under CCP §632 and, under CCP §634, bring any omissions or ambiguities in the statement of decision to the trial court's attention. *Fladeboe v American Isuzu Motors Inc.* (2007) 150 CA4th 42, 58, 58 CR3d 225.

**PRACTICE TIP:** It is almost always a good idea to request a statement of decision, but particularly when you know that the court is likely to grant judgment against your client and an appeal is likely. Failure to request a statement of decision results in an assumption that the trial court made the findings necessary to sustain the judgment. *Michael U. v Jamie B.* (1985) 39 C3d 787, 793, 218 CR 39.

The court's failure to prepare a statement of decision after a proper request under CCP §632 is reversible error per se. See *Marriage of McDole* (1985) 176 CA3d 214, 219, 221 CR 734, disapproved on other grounds in *Marriage of Fabian* (1986) 41 C3d 440, 451 n13, 224 CR 333; *Marriage of S.* (1985) 171 CA3d 738, 748, 217 CR 561, which were remanded to the trial court for preparation of the statement. See §24.50.

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### §24.35 1. Time limit

**Trials concluded within 1 day.** For bench trials concluded within 1 calendar day or less than 8 hours over more than 1 day, the request for a statement of decision must be made *before* submission of the matter for the court's decision. CCP §632; Cal Rules of Ct 3.1590(n). See *Architects & Contractors Estimating Serv. v Smith* (1985) 164 CA3d 1001, 1005, 211 CR 45 (request made 5 days after trial untimely); *Milligan v Hearing Aid Dispensers Examining Comm.* (1983) 142 CA3d 1002, 1004 n3, 191 CR 490 (request made nearly 3 weeks after trial was untimely).

A matter is "submitted" when either of the following first occurs: (1) The court orders the matter submitted; or (2) the final paper is required to be filed, or argument is heard, whichever is later. Cal Rules of Ct 2.900(c).

A request for a statement of decision is timely when made after the court announces its tentative ruling but before counsel completes argument in response to the ruling. *Social Serv. Union, Local 535 v County of Monterey* (1989) 208 CA3d 676, 256 CR 325. See also *Marriage of Ananeh-Firempong* (1990) 219 CA3d 272, 268 CR 83.

**Trials lasting more than 1 day.** The triggering event for requesting a statement of decision for bench trials lasting more than 1 day is the trial court's issuance of its tentative decision. The request must be "made" within 10 days after the court announces its tentative decision. CCP §632. The court clerk may mail a copy of the minute entry or the court's tentative decision. See *Hutchins v Galanda* (1990) 216 CA3d 1529, 265 CR 596. A request is not considered "made" under CCP §632 when it is deposited in the mail; instead, it is considered "made" when it is received by the court. See *Staten v Heale* (1997) 57 CA4th 1084, 1091, 68 CR2d 35 (plaintiff's request for statement of decision deemed untimely because it was not considered "made" until it was received by the court and that was beyond allowable time period). If a memorandum of tentative decision is served by mail in California, CCP §1013(a) has been construed to extend this period by 5 more days. See *Marriage of McDole* (1985) 176 CA3d 214, 221 CR 734, disapproved on other grounds in *Marriage of Fabian* (1986) 41 C3d 440, 451 n13, 224 CR 333.

It is reversible error per se for the trial court to ignore a timely request for a statement of decision. *Miramar Hotel Corp. v Frank B. Hall & Co.* (1985) 163 CA3d 1126, 1129, 210 CR 114. The request for a statement of decision is timely if the court receives it on the tenth day after the notice of intended decision is announced, even if the file is stamped after that date. *Gordon v Wolfe, supra* (request on which clerk noted receipt in handwriting at 5:03 p.m. on tenth day held timely).

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### §24.36 2. Written request advisable

Code of Civil Procedure §632 does not state whether the request for a statement of decision must be in writing, and there is a conflict in the case law on this issue. See *Marriage of Ananeh-Firempong* (1990) 219 CA3d 272, 283, 268 CR 83, relying in part on *Marriage of Reilley* (1987) 196 CA3d 1119, 242 CR 302 (court held that request under CCP §632 can be oral or written for trials that are concluded within 1 day or within 8 hours if more than 1 day). See also *Whittington v McKinney* (1991) 234 CA3d 123, 285 CR 586. But see *Martinez v County of Tulare* (1987) 190 CA3d 1430, 1434, 235 CR 851, with which the *Ananeh-Firempong* court specifically disagreed. In *Martinez,* the court held that the request for a statement of decision must be in writing unless otherwise agreed, or unless the trial is completed within 1 day.

**PRACTICE TIP:** Until this conflict is resolved, it is better practice to make the request for a statement of decision in writing.

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### §24.37 B. Trials concluded in 1 day: Statement of decision may be oral

In trials completed within 1 day, or less than 8 hours over more than 1 day, the court has discretion to announce its statement of decision orally on the record in the presence of the parties. CCP §632.

This is not always advisable, however, and counsel should consider requesting the court that a written statement be prepared. See §24.43 for applicable discussion on oral statements in trials lasting longer than 1 day.

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### C. Trials longer than 1 day

### §24.38 1. Who prepares statement

In court trials lasting longer than 1 day, the court can either prepare a proposed statement of decision itself or designate a party to prepare it. Cal Rules of Ct 3.1590(f).

The court's tentative decision may have stated whether a statement of decision, if one is requested, will be prepared by the court or by an ordered party. Cal Rules of Ct 3.1590(c). See §24.29.

Ordinarily, the court requests the prevailing party to draft a proposed statement of decision.

**JUDICIAL PERSPECTIVE:** Because many judges prefer to write their own statements of decision, it would be wise to ask the judge how he or she wants to handle it. If you are the prevailing party after the tentative decision you may want to volunteer to prepare the statement of decision.

On failure to submit a timely statement, see §24.42.

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### §24.39 2. Parties' proposals on content

After a party has requested a statement of decision, any party may make proposals about its contents. CCP §632. Such proposals must be made within 10 days after the date of request for a statement. Cal Rules of Ct 3.1590(e). Within 10 days after announcement or service of the tentative decision, whichever is later, any party that appeared at trial may request a statement of decision to address the principal controverted issues; these issues must be specified in the request. Cal Rules of Ct 3.1590(d).

Alternatively, the court may have directed in its tentative decision that it be the statement of decision, unless within 10 days a party specifies controverted issues or makes proposals not covered in the tentative decision. Cal Rules of Ct 3.1590(c). See §24.29.

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### §24.40 3. Time limit for preparing statement

A party that has been directed by the court to draft the statement of decision must, within 30 days after the announcement or service of the tentative decision, prepare and serve a proposed statement and proposed judgment to the court. Cal Rules of Ct 3.1590(f). On proposed judgment, see §24.41.

A court choosing to prepare the statement has 30 days after the announcement or service of the tentative decision to prepare and serve a proposed statement and proposed judgment to all the parties. Cal Rules of Ct 3.1590(f).

**NOTE:** The time periods in Cal Rules of Ct 3.1590 are subject to extension or, for good cause shown, relief from noncompliance. See Cal Rules of Ct 3.1590(m).

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### §24.41 4. Proposed judgment also required

The party who prepares the proposed statement of decision must also draft a proposed judgment, and serve and submit it at the same time as the statement. Cal Rules of Ct 3.1590(f). On drafting proposed judgment, see §23.26.

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### §24.42 5. Failure to timely submit statement

If the proposed statement and judgment are not served and submitted within the 30 days after the announcement or service of the tentative decision, any other party who appeared at the trial may within 10 days (1) prepare, serve, and submit a proposed statement and judgment; or (2) serve on all other parties and file a notice of motion for an order that a statement of decision was waived. Cal Rules of Ct 3.1590(f). See *Jordan v Malone* (1992) 5 CA4th 18, 21, 6 CR2d 454.

The court rules are not clear on when a requested statement not timely filed is to be considered waived. Under Cal Rules of Ct 3.1590(m), the court may extend the time to prepare, submit, and serve the statement and may, at any time before entry of judgment, for good cause shown, excuse noncompliance with the time requirements.

Thus, the rules imply, but do not specify, that a requested statement may be considered waived by the party charged with preparing it if that party has not timely filed the statement and the court refuses to grant an extension. The rules also suggest, however, that a motion to consider a requested statement waived is required and that mere failure to submit a statement may not automatically result in its waiver. See Cal Rules of Ct 3.1590(f). Presumably, the court could act on its own motion to consider a requested statement waived.

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### §24.43 6. Written statement advisable

The statement of decision must be in writing unless the trial lasts less than 1 day (see §24.37) or the parties agree otherwise. CCP §632. Oral remarks will suffice only if they explain the factual and legal basis for the court's decision on the principal controverted issues. *Social Serv. Union, Local 535 v County of Monterey* (1989) 208 CA3d 676, 679, 256 CR 325.

If a timely request for a statement of decision has been made, the court's use of a transcript of the oral pronouncement of decision is insufficient and is reversible error. *Whittington v McKinney* (1991) 234 CA3d 123, 129, 285 CR 586 (although record showed that party expressly waived right to written statement).

**PRACTICE TIP:** If you represent the prevailing party in a trial longer than 1 day, never agree to an oral statement of decision. Even in a shorter trial, in which the statement may be oral at the court's discretion, consider requesting on the record your client's preference that it be in writing. Except in the simplest of trials, an oral statement on the record will rarely memorialize the court's decision as well as a written statement prepared by a party or the court. It may be better simply not to request a statement of decision if an oral statement seems sufficient. To request a statement of decision suggests that the requesting party (usually the prevailing party) wishes to protect the record in the event of appeal. This objective is accomplished more adequately and thoroughly in writing.

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### §24.44 D. Contents

The statement of decision must explain the factual and legal bases for the court's decision on the principal controverted issues listed in the request. CCP §632. See *Nunes Turfgrass, Inc. v Vaughan-Jacklin Seed Co.* (1988) 200 CA3d 1518, 1525, 246 CR 823; *Miramar Hotel Corp. v Frank B. Hall & Co.* (1985) 163 CA3d 1126, 210 CR 114. A material issue of fact underlying the judgment but not disputed at trial need not be included in the statement.

**EXAMPLE:** If the parties stipulate to facts indispensable to the judgment, these issues may be excluded from the statement of decision.

Because the burden is on the party to specify the controverted issues on which a statement of decision is desired, a trial court can make findings on those specified issues only, *i.e.,* on fewer than all the material issues in dispute in the case. *Harvard Inv. Co. v Gap Stores, Inc.* (1984) 156 CA3d 704, 709 n3, 202 CR 891. In a statement of decision, a trial judge is not required to find on immaterial issues or to make findings outside the pleadings. *In re Cheryl E.* (1984) 161 CA3d 587, 207 CR 728.

The court is not required to discuss each question listed in a party's request or to make an express finding on every factual matter controverted at trial. The court's statement of decision is adequate if it "sufficiently disposes of all the basic issues in the case." *Bauer v Bauer* (1996) 46 CA4th 1106, 1118, 54 CR2d 377. The court's statement of decision need only state ultimate rather than evidentiary facts. *Hellman v La Cumbre Golf & Country Club* (1992) 6 CA4th 1224, 1230, 8 CR2d 293. The trial court has the discretion to decide which issues are the "principal controverted issues" and need not discuss other issues unnecessary to the decision. *Vukovich v Radulovich* (1991) 235 CA3d 281, 294, 286 CR 547 (trial court found lack of subject matter jurisdiction, rendering discussion of the remaining issues moot).

It is reversible error, however, for the trial court to fail to make findings requested by a party on material disputed issues. *People v Casa Blanca Convalescent Homes, Inc.* (1984) 159 CA3d 509, 206 CR 164. See *Harvard Inv. Co. v Gap Stores, Inc.* (1984) 156 CA3d 704, 711, 202 CR 891. For example, a statement of decision must be provided on the issue of damages even if liability is admitted. The defendant has the right to specification of the components of an award so that they can be reviewed under the substantial evidence rule. *Gordon v Wolfe* (1986) 179 CA3d 162, 224 CR 481.

**PRACTICE TIP:** In drafting a proposed statement of decision, ascertain which issues are controverted and, of those issues, which can be considered principal to the court's decision. Use the pleadings to take stock of the issues in the case as narrowed or expanded at trial. List the elements of causes of action on which a party is determined to have prevailed, as well as the elements of any affirmative defenses that were raised. If the less flattering disputed issues are not squarely handled in the statement, you may succeed in building reversible error into an otherwise favorable result. Reflect on how best to organize the statement, *e.g.,* the factual and legal bases for the decision may be merged into one narrative or set forth separately. Whatever approach is taken, the objective is clarity of the factual and legal issues that the court decided. The appellate courts seem to be looking for a narrative statement that is comprehensible and does not avoid material issues. The more conclusionary or cryptic the statement, the more likely it is that a court of appeal will find it inadequate. On appellate review, see §24.50.

The court's tentative decision may be adopted as its statement of decision if the document fairly and completely sets forth the factual and legal bases for the decision. See *Wolfe v Lipsy* (1985) 163 CA3d 633, 209 CR 801 (called "memorandum of intended decision"). In *In re Rodrigo S.* (1990) 225 CA3d 1179, 276 CR 183, the court held that when a party's proposed statement of decision was adopted as the court's tentative decision and no objection to it was made, the tentative decision properly became the court's statement of decision.

A judge who has disqualified himself or herself after hearing a bench trial, however, may not issue a statement of decision, even if it would mean merely adopting the tentative decision. *Geldermann, Inc. v Bruner* (1991) 229 CA3d 662, 280 CR 264.

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### §24.45 E. Objections

Other parties have the right to object and to request additions, deletions, or amendments to the proposed statement of decision. Failure to object to the proposed statement of decision waives the right to claim ambiguities or omissions in the statement on appeal except for legal errors on its face. *United Servs. Auto. Ass'n v Dalrymple* (1991) 232 CA3d 182, 186, 283 CR 330. See §24.50.

Any party may, within 15 days after the proposed statement of decision and proposed judgment have been served, serve and file objections to the proposed statement of decision and proposed judgment. Cal Rules of Ct 3.1590(g).

**NOTE:** There are no statutory guidelines on the form and content of objections. The wording of former Cal Rules of Ct 232(d) stated that objections should include (a) proposed counterfindings and conclusions, (b) an alternative form of judgment, or (c) a request for further or specific findings. While it is best to avoid the former terms, such as "findings and conclusions," they may suggest useful ideas for framing proposals and objections under the current rule.

**Waiver.** Failure to make timely objections to another party's proposed statement of decision will usually prevent raising those objections for the first time on appeal. In *Marriage of Arceneaux* (1990) 51 C3d 1130, 1138, 275 CR 797, the court held that failure to bring defects in the statement of decision to the trial court's attention constitutes a waiver of any objection. For further discussion, see §24.50.

**PRACTICE TIP:** Review the proposed statement of decision for gaps and ambiguities and call them to the attention of the trial court in your objections. If you are concerned about a waiver, it may be difficult to avoid listing every single disputed issue. Request clarification or additional findings and make your objections specific. Try to avoid minutiae and confine the objections to those dispositive issues that are likely to have a favorable impact on the appellate court's perspective.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/24 Bench Trials/§24.46 F. Hearing

### §24.46 F. Hearing

The judge may order a hearing on proposals for or objections to a proposed statement of decision or a proposed judgment. Cal Rules of Ct 3.1590(k). The use of permissive language implies that the judge has complete discretion regarding oral argument on these issues.

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### §24.47 G. Court's signing and filing

As soon as the judge signs and files the statement of decision and judgment, the court clerk must "immediately" enter judgment in conformity with the court's decision. CCP §664. See §23.19.

If a written judgment is required, the court must sign and file the judgment within 50 days after the announcement or service of the tentative decision, whichever is later, or, if a hearing was held, within 10 days after the hearing. Cal Rules of Ct 3.1590(*l*).

**NOTE:** A judge is required to decide submitted matters within 90 days. Cal Const art VI, §19; Govt C §68210. Failure of a judge to do so, however, does not afford a basis on which to attack the decision. *Hassanally v Firestone* (1996) 51 CA4th 1241, 1245, 59 CR2d 625.

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### §24.48 H. Effect in bifurcated trial

When a factual issue is tried by a trial court separately and before trial of other issues, the trial judge must announce the tentative decision on the issue tried, and when requested, issue a statement of decision as prescribed by Cal Rules of Ct 3.1590. Cal Rules of Ct 3.1591. A judge may proceed with the second portion of the bifurcated trial, however, even if the statement of decision has not yet been issued on the first portion. Cal Rules of Ct 3.1591.

The statement of decision must still be requested within the statutory period after the tentative decision on the first portion of the trial is announced. See §24.35. But no proposed judgment may be issued until the other issues are tried, except for an interlocutory judgment or a separate judgment that could otherwise be properly entered before the final judgment in the action is determined. Cal Rules of Ct 3.1591.

In a bifurcated bench trial, a party is entitled to have the same judge try all portions of the trial that depend on the weighing of evidence and issues of credibility, absent a stipulation to a different judge or a waiver. If the judge is unavailable to try the second phase of a bifurcated trial, a mistrial must be declared. *European Beverage, Inc. v Superior Court* (1996) 43 CA4th 1211, 1216, 51 CR2d 147. If issues are tried by different judges, each judge must follow the procedures in Cal Rules of Ct 3.1590 for the issues tried by that judge. The proposed judgment must be prepared by the judge who tries the final phase. Cal Rules of Ct 3.1591. On motions to bifurcate trials generally, see §§6.99-6.103.

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### §24.49 I. Modifying or vacating statement of decision

The trial judge can change, add to, or vacate the statement of decision instead of granting a motion for new trial. CCP §662. The purpose of §662 is to avoid the unnecessary delays and expenses associated with a new trial. *Oliver v Boxley* (1960) 181 CA2d 471, 478, 5 CR 468. Section 662 also allows the trial judge to grant relief from judgment by reopening the case, modifying or vacating the judgment, or granting a partial new trial. On motion for a new trial, see §§25.22-25.71.

When a motion to vacate judgment is granted based on the ground that there is an erroneous legal basis for the original decision not consistent with or not supported by the facts, the statement of decision must be amended and corrected if the judgment is set aside. CCP §663. On motion to vacate judgment, see §§25.72-25.77. On reopening case, see §§18.65-18.81.

In some circumstances, a statement of decision may be required when a court rules on a motion to amend a judgment to add a judgment debtor as a defendant on an alter ego theory. *Gruendl v Oewel Partnership, Inc.* (1997) 55 CA4th 654, 660, 64 CR2d 217.

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### §24.50 J. Appellate review: Statement that does not resolve principal issues

If a party does not call omissions or ambiguities in the statement of decision to the attention of the trial court, it will be presumed that the trial court resolved the controverted issue or the ambiguity in favor of the prevailing party. CCP §634; *Marriage of Arceneaux* (1990) 51 C3d 1130, 1138, 275 CR 797. See *Aviointeriors SpA v World Airways, Inc.* (1986) 181 CA3d 908, 914, 226 CR 527.

On the other hand, if the record shows that the omission or ambiguity was brought to the trial court's attention before entry of judgment or in conjunction with the motions for new trial or vacating judgment, any controverted issues or ambiguities not resolved by the statement will *not* be inferred as having been decided in favor of the prevailing party. On objections and proposals concerning proposed statement of decision, see §24.45.

**PRACTICE TIP:** If you are counsel for the prospective appellant, specifically request that the statement of decision address each controverted issue that your client may wish to raise on appeal. Failure to request that a particular issue be addressed will preclude raising the sufficiency of the trial court's findings on that issue on appeal. If the party designated to prepare the statement fails to do so, request the trial court to compel that party to prepare the statement and judgment, or request permission to personally prepare the statement and judgment in order to perfect the right to appeal from an appealable, final judgment or order. See §23.34.

If the defect is on the face of the statement, however, there is no waiver. *United Servs. Auto. Ass'n v Dalrymple* (1991) 232 CA3d 182, 283 CR 330 (court held that award of attorney fees in situation not authorized by statute is such a defect and need not be preserved on appeal by filing objection to statement).

A failure to request a statement of decision does not waive review if the court expressly refuses to make a finding or orally states a finding on the record that precludes a presumption that it made every finding necessary to support an award. *Reid v Moskovitz* (1989) 208 CA3d 29, 255 CR 910.

When the trial court fails to make findings on a material issue that would fairly disclose the trial court's determination, reversible error may result. See *Hellman v La Cumbre Golf & Country Club* (1992) 6 CA4th 1224, 1230, 8 CR2d 293, citing *Marriage of Garrity & Bishton* (1986) 181 CA3d 675, 686, 226 CR 485. If the judgment is otherwise supported, however, that failure is harmless error unless the evidence is sufficient to sustain a finding in the complaining party's favor that would have the effect of countervailing or destroying other findings. 6 CA4th at 1230.

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## VII. NO STATEMENT OF DECISION

### §24.51 A. Procedures when statement of decision not requested or waived

For a trial lasting longer than 1 day that requires a written judgment, and a statement of decision was not requested or was waived, the court has discretion either (1) to prepare and serve a proposed judgment on all parties that appeared at the trial within 20 days after the announcement or service of the tentative decision, or (2) to order a party to prepare, serve, and submit the proposed judgment to the court within 10 days after the date of the order. Cal Rules of Ct 3.1059(h). On time requirements and procedures for drafting, objecting to, and having a hearing on the proposed judgment, see §§23.24-23.25.

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### §24.52 B. When party is not entitled to statement of decision

**No question of fact was tried.** A statement of decision is not required after trial when only legal, not factual, issues are in dispute. *San Francisco Unified Sch. Dist. v San Francisco Classroom Teachers Ass'n* (1990) 222 CA3d 146, 152, 272 CR 38. See *Earp v Earp* (1991) 231 CA3d 1008, 283 CR 43.

**Motion proceedings.** Because a statement of decision is required only when a disputed question of fact is submitted to the court for trial, CCP §632 does not apply to motions. *Lavine v Hospital of the Good Samaritan* (1985) 169 CA3d 1019, 1026, 215 CR 708.

**Preliminary injunction hearings.** An evidentiary hearing on a preliminary injunction is not a trial within the meaning of CCP §632, and no statement of decision is required. *People v Landlords Prof. Servs.* (1986) 178 CA3d 68, 223 CR 483.

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## VIII. FORMS

### §24.53 A. Form: Motion for judgment under CCP §631.8

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

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **MOTION FOR JUDGMENT** |
| **vs** | ) | **(CCP §631.8); SUPPORTING** |
| _ _[*Name(s)*]_ _ | ) | **MEMORANDUM** |
| **Defendant(s)** | ) | |
| **_____** | ) | |

**_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, moves for judgment under Code of Civil Procedure section 631.8 and requests the court to issue a statement of decision under Code of Civil Procedure section 632. This motion is made on the ground that _ _[*specify*]_ _.**

**This motion is based on all pleadings, papers, and records in this action; the evidence presented at trial; and the attached supporting memorandum and declaration of _ _[*name*]_ _ _ _[*; and any evidence received at the hearing*]_ _.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (presented to judge with evidence of service, *e.g.,* a statement on the record to the effect that all attorneys of record and unrepresented parties have been served in open court or a written proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* A motion for judgment under CCP §631.8 is usually made orally. See §24.22. If you anticipate making the motion and prepare it in written form, note on the record that the motion is made by submission of written papers. Whether the motion is oral or written, any written supporting memorandum should be presented at the time the motion is made. On statement of decision, see §§24.34-24.50.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/24 Bench Trials/§24.54 B. Form: Judgment on motion under CCP §631.8

## §24.54 B. Form: Judgment on motion under CCP §631.8

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ **Plaintiff(s)** | ) | **No. _ _ _ _ _ _** |
| | ) | **JUDGMENT ON MOTION** |
| **vs** | ) | **UNDER CCP §631.8** |
| _ _[*Name(s)*]_ _ **Defendant(s)** | ) | |
| _____ | ) | |

**The motion of** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, **for judgment under Code of Civil Procedure section 631.8 was heard at the above date and time during the bench trial of this action. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

**After** _ _[*e.g., presentation of plaintiff's evidence*]_ _**, counsel for** _ _[*plaintiff/defendant*]_ _ **moved for judgment on the grounds that** _ _[*specify*]_ _**. The court granted the motion for judgment in favor of** _ _[*plaintiff/defendant*]_ _**.**

**Satisfactory proof having been made, and good cause appearing,**

**IT IS ORDERED that:**

[*Option 1: Judgment for plaintiff*]

**1. Plaintiff recover judgment on the merits against defendant,** _ _[*name*]_ _**, in the amount of $_ _ _ _ _; and**

**2. Plaintiff recover against defendant costs in the amount of $_ _ _ _ _.**

[*Option 2: Judgment for defendant*]

**1. Defendant recover against plaintiff,** _ _[*name*]_ _**, judgment on the merits in the amount of $_ _ _ _ _;**

**2. The complaint on file in this action be dismissed; and**

**3. Defendant recover against plaintiff costs in the amount of $_ _ _ _ _.**

[*Continue*]

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

*Copies:* Original and copy (present to judge for signature, then file with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* On statement of decision, see §§24.34-24.50.

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# 25

# Motions After Trial

**John S. Gilmore**

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.1 I. SCOPE OF CHAPTER

## §25.1 I. SCOPE OF CHAPTER

Motions after trial attacking the judgment or verdict require careful consideration and, in many instances, strict adherence to procedural rules and time requirements. This chapter covers:

- Motions for judgment notwithstanding the verdict (JNOV) (see §§25.2-25.21);
- Motions for new trial (see §§25.22-25.71);
- Motions to vacate and enter a different judgment (see §§25.72-25.77);
- Motions to correct a clerical error (see §§25.78-25.83); and
- Other postjudgment proceedings and motions, *e.g.,* involving public entities, medical malpractice actions (see §§25.84-25.89).

Motions for judgment when the jury is discharged without rendering a verdict (CCP §630(f)) are discussed in §25.9 and §§18.40-18.41.

On motions to vacate default and judgment by default, motions to vacate based on extrinsic fraud or mistake, or attack by independent action, see California Civil Procedure Before Trial §§38.62-38.86 (4th ed Cal CEB 2004). See also 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* (5th ed 2008).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/ II. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)/ A. Description and use/§25.2 1. Motion for JNOV tests sufficiency of evidence presented during trial

## II. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)

### A. Description and use

### §25.2 1. Motion for JNOV tests sufficiency of evidence presented during trial

The statutory motion for judgment notwithstanding the verdict (JNOV) authorizes a trial court to grant judgment in favor of a party against whom the jury has rendered a verdict whenever a motion for directed verdict should have been granted if that motion had been made. CCP §629; *Beavers v Allstate Ins. Co.* (1990) 225 CA3d 310, 327, 274 CR 766. The denial of a party's motion for directed verdict does not prevent the court from later granting a motion for JNOV. See *Teich v General Mills, Inc.* (1959) 170 CA2d 791, 794, 339 P2d 627.

A JNOV motion may be granted only when no substantial evidence supports the jury's verdict. It is the equivalent of reversal of a judgment for insufficiency of the evidence as a matter of law. See *McCoy v Hearst Corp.* (1991) 227 CA3d 1657, 1663, 278 CR 596. In effect, a JNOV motion tests whether the facts in evidence constitute a prima facie case or a defense as a matter of law. For purposes of the motion, all facts supporting the verdict are presumed true. See §25.5.

Tactically, a motion for JNOV is usually made at the same time as a motion for new trial. See §25.10.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.3 2. Motion for directed verdict not required beforehand

### §25.3 2. Motion for directed verdict not required beforehand

A motion for directed verdict is not a prerequisite to a JNOV motion. See CCP §629. Even if a motion for directed verdict was denied earlier, the court can still grant a motion for JNOV. See §25.2.

**CAUTION:** When researching motions for JNOV, counsel should distinguish cases decided before 1963. A 1963 amendment abrogated the former requirement that a motion for directed verdict be made to preserve the right to make a motion for JNOV.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.4 3. Who can move for JNOV

## §25.4 3. Who can move for JNOV

The motion may be made by a party or by the court on its own motion after the verdict has been rendered. CCP §629.

Either defendant or plaintiff may move for JNOV. See CCP §629; *Moore v City & County of San Francisco* (1970) 5 CA3d 728, 734, 85 CR 281.

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## B. Grounds for motion

### §25.5 1. Jury verdict not supported by substantial evidence

The grounds for granting a JNOV motion are the same as those for granting a motion for directed verdict. See §§18.35-18.56. The motion may be granted only when no substantial evidence supports a jury's verdict. See *Teich v General Mills, Inc.* (1959) 170 CA2d 791, 794, 339 P2d 627.

To grant the motion, the court must use the following test: The court finds that there is no substantial evidence to support the verdict, even when it gives the prevailing party's evidence and the legitimate inferences drawn from that evidence all the value to which they are legally entitled, and disregards conflicting evidence on behalf of the moving party. See *Quintal v Laurel Grove Hosp.* (1964) 62 C2d 154, 159, 41 CR 577; *McFarland v Voorheis-Trindle Co.* (1959) 52 C2d 698, 703, 343 P2d 923; *Reynolds v Willson* (1958) 51 C2d 94, 99, 331 P2d 48.

Viewed from another perspective, the court must deny the motion when it finds that "substantial evidence" supports the verdict (with evidence and reasonable inferences that can be drawn from the evidence) viewed in the light most favorable to the prevailing party, while disregarding conflicting evidence on behalf of the party making the motion. See *Hauter v Zogarts* (1975) 14 C3d 104, 110, 120 CR 681; *Arthur v Avon Inflatables, Ltd.* (1984) 156 CA3d 401, 406, 203 CR 1; *Castro v State* (1981) 114 CA3d 503, 507, 170 CR 734.

The party opposing a JNOV motion may rely on favorable portions of testimony elicited from the cross-examination of adverse witnesses under Evid C §776. *Casetta v United States Rubber Co.* (1968) 260 CA2d 792, 799, 67 CR 645; *Reynolds v Natural Gas Equip.* (1960) 184 CA2d 724, 731, 7 CR 879. The evidence or reasonable inferences drawn from it must be presumed true because any conflicting evidence must be resolved in favor of the party opposing a JNOV motion. See *Hauter v Zogarts, supra*; *Castro v State, supra*; §25.6.

The motion should be granted when the evidence does not support a special finding of either legal cause or damages. If that is the case, there would also be no substantial evidence to support even a general verdict. *Sukoff v Lemkin* (1988) 202 CA3d 740, 744 n3, 249 CR 42 (mere probability that event would have happened does not support claim for damages). On special verdicts and special findings supporting a general verdict, see chap 22.

**PRACTICE TIP:** If any substantive evidence supports an award for punitive damages, a JNOV motion must be denied. But counsel should consider a motion for new trial on the ground of excessive damages. See *Teitel v First Los Angeles Bank* (1991) 231 CA3d 1593, 1603, 282 CR 916 (court suggested JNOV appropriate when amount of damages not in dispute). This is one example of why experienced trial lawyers usually move for JNOV and for new trial at the same time. See §25.10.

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### §25.6 2. No other reasonable conclusion may be drawn from evidence; judge cannot weigh evidence

The motion may be granted only when as a matter of law no other reasonable conclusion is legally deducible from the evidence, and any other holding would be so lacking in evidentiary support that a reviewing court would be compelled to reverse. *Sukoff v Lemkin* (1988) 202 CA3d 740, 743, 249 CR 42; *Valdez v J.D. Diffenbaugh Co.* (1975) 51 CA3d 494, 513, 124 CR 467; *Moore v City & County of San Francisco* (1970) 5 CA3d 728, 733, 85 CR 281; *Spillman v City & County of San Francisco* (1967) 252 CA2d 782, 786, 60 CR 809.

In considering the evidence, the court may not *weigh* it. *Quintal v Laurel Grove Hosp., supra*. It must *accept* the evidence tending to support the verdict as true—unless it is "inherently incredible" on its face. *Borba v Thomas* (1977) 70 CA3d 144, 152, 138 CR 565. Similarly, the court may not judge the credibility of witnesses. *Hale v Farmers Ins. Exch.* (1974) 42 CA3d 681, 690, 117 CR 146, disapproved on other grounds in *Egan v Mutual of Omaha Ins. Co.* (1979) 24 C3d 809, 822, 169 CR 691.

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### §25.7 3. Genuine verdict required

A motion for JNOV assumes that "a verdict has been rendered." CCP §629. The motion is not proper when the verdict is so incomprehensible, contradictory, or unintelligible that the jury's intent cannot be ascertained. See *Hallinan v Prindle* (1934) 220 C 46, 55, 29 P2d 202.

The court needs a verdict on which a motion for JNOV can be entertained. *Mish v Brockus* (1950) 97 CA2d 770, 776, 218 P2d 849.

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### §25.8 a. When verdict defective

If the jury returns an ambiguous or defective verdict, the proper remedy is to request—before the jury is discharged—the trial court to send the jury out for further deliberations to correct the verdict. See CCP §619. On curing verdicts, see §§22.24-22.31. If counsel makes no objection to a verdict that could have been cured before the jury's discharge, waiver may have occurred. *Woodcock v Fontana Scaffolding & Equip. Co.* (1968) 69 C2d 452, 456 n2, 72 CR 217. On waiver, see §22.31.

When the jury has been discharged and waiver has *not* occurred, the trial judge may interpret an ambiguous verdict "from its language considered in connection with the pleadings, evidence and instructions." An appellate court may also attempt to determine a correct interpretation of the verdict, if possible, but reversal is required when a "hopeless ambiguity" exists. *Woodcock v Fontana Scaffolding & Equip. Co., supra* (verdict held not ambiguous); *Telles v Title Ins. & Trust Co.* (1969) 3 CA3d 179, 187, 83 CR 444 (trial court erroneously interpreted verdict).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.9 b. Motion for judgment under CCP §630(f)

### §25.9 b. Motion for judgment under CCP §630(f)

When the verdict is inconsistent or ambiguous after the jury is discharged, and grounds existed to grant a motion for directed verdict if one had been made, a motion for judgment can be made under CCP §630(f). See §§18.40-18.41 and form in §18.127.

**NOTE:** After the jury has been discharged, defects in the verdict may also become apparent that provide grounds for a motion for new trial. On impeaching the verdict on the ground of jury misconduct, see §§25.30-25.32.

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### C. Procedures

### §25.10 1. Move for JNOV and new trial at same time

It is almost always to a party's advantage to move for JNOV and new trial simultaneously. A motion for JNOV does not extend the time for filing and serving a notice of intention to move for new trial (CCP §629), and simultaneously moving for new trial allows the court flexibility to grant or deny either motion. The code synchronizes the procedures for both motions. See CCP §629 (JNOV motion must be made within same period specified in CCP §659 for filing notice of intention to move for new trial). See also *Catania v Halcyon S.S. Co.* (1975) 44 CA3d 348, 350, 118 CR 513; *Espinoza v Rossini* (1966) 247 CA2d 40, 45, 55 CR 205.

If the trial court grants both motions, the order granting the motion for new trial is effective if judgment entered on the order granting JNOV is reversed on appeal. See CCP §629 (4th paragraph). Because of the narrow scope of the trial court's power on motions for JNOV, orders granting the motion are frequently reversed. If the trial judge has also granted a new trial, a motion on which the court has broader discretion, then that order stands and the case will be retried.

The court may also grant the JNOV motion on one or more issues, and new trial on other issues. When there are several issues, such as liability and damages (or negligence, intentional conduct, and damages), the trial court is free to grant JNOV on one or more issues and new trial on the others. For example, the trial court has the power to grant JNOV on a single issue such as punitive damages. *Beavers v Allstate Ins. Co.* (1990) 225 CA3d 310, 332, 274 CR 766. See §25.18.

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### §25.11 2. All issues must be determined before motion may be made in bifurcated trial

In bifurcated trials (see CCP §598), motions for JNOV, like motions for new trial, cannot be made until all issues in the bifurcated trial have been determined. The court does not have jurisdiction to enter JNOV if the plaintiff wins the liability phase, and an unsuccessful defendant cannot make the motion until after the trial on damages is concluded. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 458, 20 CR 321; *Meyser v American Bldg. Maintenance, Inc.* (1978) 85 CA3d 933, 937, 149 CR 808; *Mays v Disneyland, Inc.* (1963) 213 CA2d 297, 299, 28 CR 689.

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### §25.12 3. Written motion required

A written motion for JNOV is required. See CCP §§629, 659; *Younesi v Lane* (1991) 228 CA3d 967, 971, 279 CR 89, disapproved on other grounds in *Van Beurden Ins. Servs., Inc. v Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 CA4th 51, 63, 61 CR2d 166 (oral motion invalid). As with other motions, a supporting memorandum must be attached. Cal Rules of Ct 3.1113(a). It is also good practice to submit a proposed order with the moving papers. For forms of motion and order, see §§25.90-25.91.

**PRACTICE TIP:** It is also a good idea to speak with the judge's clerk about filing the papers and the date of the hearing. Unlike law and motion matters, a motion for JNOV is generally heard by the trial judge. On notice and other time requirements, see §25.13.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.13 4. Time requirements

### §25.13 4. Time requirements

A motion for JNOV is subject to strict time limitations: It must be made within the period allowed under CCP §659 for filing and serving notice of intention to move for new trial. CCP §629. The motion for JNOV must be filed either:

- Before the entry of judgment; or
- Within 15 days of the date the court clerk mailed notice of entry of judgment under CCP §664.5, within 15 days of service of written notice of entry of judgment by any party, or within 180 days after the entry of judgment—whichever is earliest.

**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 and not a court day.

See *Palmer v GTE Cal., Inc.* (2003) 30 C4th 1265, 135 CR2d 654, discussed in §§25.52, 25.53.

Filing a motion for JNOV does not stay entry of judgment (CCP §664), nor does it extend the time for filing and serving a notice of intention to move for new trial (CCP §629). See *Pratt v Vencor, Inc.* (2003) 105 CA4th 905, 909, 129 CR2d 741.

Counsel for a party moving for JNOV must give at least 16 court days' notice of the hearing, and an additional 5 calendar days' notice if service is by mail when the place of mailing and the place of address are in California. See CCP §1005(b). All papers opposing the motion must be filed and served at least 9 court days before the hearing unless the court orders a shorter time. CCP §1005(b). Opposition and reply motion or reply papers must be served by personal delivery, facsimile transmission, express mail, or other statutory means reasonably calculated to ensure delivery to the other party not later than the close of the next business day after the time the opposing papers or reply papers are filed. CCP §1005(c). Code of Civil Procedure §1013, which extends the time within which a right may be exercised, does *not* apply to a notice of motion, papers opposing a motion, or reply papers.

When one or more parties have made motions for JNOV and for new trial, the hearing is set by the court clerk at the same time. CCP §§629, 661. Hearing both motions together conserves preparation and travel time of counsel and allows the trial judge to concentrate on all the issues at a single hearing. See §25.10.

If the party moving for JNOV also serves notice of intention to move for new trial, an additional 15 days must be allowed for other parties to file their notices of intention to move for new trial. For further discussion of time requirements on motions for new trial, see §§25.52-25.56.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.14 5. Motion made by court subject to different filing and notice requirements

### §25.14 5. Motion made by court subject to different filing and notice requirements

When the trial court moves for JNOV, it need give only 5 days' notice. CCP §629. The court is not bound by the time requirements of CCP §§629 and 659, and may make the motion at any time before its power to rule on a new trial motion expires. CCP §629.

The court has the power to rule on a motion for new trial for 60 days after the clerk or a party mails a notice of the entry of judgment, whichever notice is mailed earlier, or, if no notice has been given, 60 days after the first notice of intention to move for new trial was filed. CCP §660.

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### D. Trial judge's ruling on motion

### §25.15 1. After deadline for filing and serving new trial motion

Whether the court or a party moves for JNOV, the court is prohibited from ruling on the JNOV motion until the time for the parties' filing and serving a motion for new trial has run. CCP §§629, 659. See §25.13.

If a motion for new trial is also filed, both motions must be ruled on at the same time. CCP §629. This provision, however, is directory rather than mandatory, so that separate rulings on each motion made within the requisite time period constitute substantial compliance. *Espinoza v Rossini* (1966) 247 CA2d 40, 45, 55 CR 205.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.16 2. Before time to rule on new trial motion expires

### §25.16 2. Before time to rule on new trial motion expires

The court must rule on the motion for JNOV before the time for ruling on the motion for new trial has expired. CCP §629, 660; *Sturgeon v Leavitt* (1979) 94 CA3d 957, 961, 156 CR 687.

The court has the power to rule on a motion for new trial for 60 days after the clerk or a party mails a notice of the entry of judgment, whichever notice is mailed earlier, or, if no notice has been given, 60 days after the first notice of intention to move for new trial was filed. CCP §660.

A "ruling" on the motion is defined as an order that is:

- Entered in the permanent minutes of the court; or
- Signed by the trial judge and filed with the clerk.

CCP §660; *Catania v Halcyon S.S. Co.* (1975) 44 CA3d 348, 350, 118 CR 513.

**PRACTICE TIP:** Be sure the court rules on the motion as defined above before the 60-day period expires. If the court has not ruled on the motion for JNOV within that period, the effect is a denial of the motion. CCP §§629, 660.

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### §25.17 3. Process judgment form without delay

If the motion is granted, it is good practice to present a form of judgment to the court for signature as soon as possible after the "ruling" is made. See §25.16. When that judgment is signed and entered after the applicable time period has run (see §25.14), CCP §660 is not violated as long as the order appears in the permanent minutes of the court. See *Catania v Halcyon S.S. Co.* (1975) 44 CA3d 348, 350, 118 CR 513.

It is important for the prevailing party to process the form of judgment without delay because the court is entitled to reconsider its order before the entry of judgment on the order, if the time within which the court must rule on the motion has not expired. See CCP §629; *Jach v Edson* (1967) 255 CA2d 96, 99, 62 CR 925. For form of judgment, see §23.37.

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### §25.18 4. Order granting JNOV may be limited to certain issues

An order granting JNOV may be limited to certain issues. See *Mason v Mercury Cas. Co.* (1976) 64 CA3d 471, 134 CR 545 (motions for JNOV and new trial granted on punitive damages issue only); *Gordon v Strawther Enters.* (1969) 273 CA2d 504, 516, 78 CR 417 (liability only; damages to be determined by court or jury).

If judgment on the jury verdict was for the defendant, the trial court cannot grant a plaintiff's motion for JNOV and assess damages when they are unliquidated. But the court can grant the motion for JNOV on liability and order a new trial on damages if plaintiff's counsel has also moved for a new trial. See *Spillman v City & County of San Francisco* (1967) 252 CA2d 782, 786, 60 CR 809.

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## E. Review on appeal

### §25.19 1. Merits of ruling on motion can be reached on appeal from judgment

An order granting a motion for JNOV is not appealable. See *Horton v Jones* (1972) 26 CA3d 952, 956, 103 CR 399 (motion for JNOV denied after liability phase of bifurcated trial; no appellate jurisdiction, even with parties' consent, because no final judgment).

The merits of that ruling may only be reached on appeal from the resulting judgment. See *Jordan v Talbot* (1961) 55 C2d 597, 602, 12 CR 488 (no showing that JNOV was entered); *Herman v Shandor* (1970) 8 CA3d 476, 479, 87 CR 443 (JNOV not entered).

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### §25.20 2. Judgments notwithstanding the verdict are frequently reversed

When motions for JNOV are granted, the judgments entered are as vulnerable on appeal as the judgments entered on motions for nonsuit and directed verdict. On nonsuit and directed verdict motions generally, see chap 18. The appellate court uses the same test as the trial court, reading the record in the light most advantageous to appellant, resolving all conflicts in that party's favor, and giving appellant the benefit of all reasonable inferences in support of the jury's original verdict. *Quintal v Laurel Grove Hosp.* (1964) 62 C2d 154, 159, 41 CR 577; *Estate of Wochos* (1972) 23 CA3d 47, 50, 99 CR 782; *McCown v Spencer* (1970) 8 CA3d 216, 226, 87 CR 213. See §25.5.

Judgments notwithstanding the verdict are often reversed on the ground, contrary to the trial court's determination, that there was sufficient evidence to support the jury's verdict. See, *e.g., Henrioulle v Marin Ventures, Inc.* (1978) 20 C3d 512, 515, 143 CR 247 (JNOV reversed because exculpatory clause in residential lease found unenforceable); *Teitel v First Los Angeles Bank* (1991) 231 CA3d 1593, 1603, 282 CR 916 (JNOV reversed and judgment reinstated; remanded to reconsider portion of motion for new trial).

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### §25.21 3. Denial of motion will be upheld on appeal if substantial evidence supports verdict

The scope of appellate review of a trial court's denial of motion for JNOV is to determine whether there is any substantial evidence, whether contradicted or uncontradicted, that supports the jury's conclusion, and, if so, to uphold the trial court's denial. *Pusateri v E. F. Hutton & Co.* (1986) 180 CA3d 247, 250, 225 CR 526. See *Smith v ACandS, Inc.* (1994) 31 CA4th 77, 87, 37 CR2d 457, disapproved on other grounds in *Camargo v Tjaarda Dairy* (2001) 25 C4th 1235, 1245 n10, 198 CR2d 617 (denial reversed; insufficient evidence of causation). See §25.5.

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## III. MOTION FOR NEW TRIAL

### A. Description and use

### §25.22 1. Motion appropriate only if injustice occurred

A motion for new trial requests the trial court to reexamine an issue of fact or law. See CCP §§656-662.5, 914; *Malkasian v Irwin* (1964) 61 C2d 738, 745, 40 CR 78.

When a new trial is ordered, the court must have examined the entire cause, including the evidence, and concluded that a miscarriage of justice occurred. Cal Const art VI, §13. The error must be prejudicial, *i.e.,* a different result would have been probable if the error had not occurred. See CCP §475 (no presumption that an error is prejudicial; both prejudice and substantial resulting injury must be shown); *Olinger v Pacific Greyhound Lines* (1935) 7 CA2d 484, 488, 46 P2d 774. See also *Mercer v Perez* (1968) 68 C2d 104, 111, 65 CR 315 (ruling for new trial assumes finding that miscarriage of justice occurred); *English v Lin* (1994) 26 CA4th 1358, 1364, 31 CR2d 906 (alleged juror misconduct that does not result in actual prejudice does not warrant new trial). For further discussion, see 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§131-132 (5th ed 2008).

A party may raise legal theories in a new trial motion that were not relied on during trial to urge that the judgment was against the law or inconsistent with the facts, as long as the new theory presents a question of law to be applied to undisputed facts in the record. *Hoffman-Haag v Transamerica Ins. Co.* (1991) 1 CA4th 10, 15, 1 CR2d 805.

Grounds for the motion are statutory only. *Fomco, Inc. v Joe Maggio, Inc.* (1961) 55 C2d 162, 166, 10 CR 462. See CCP §§657-657.1, 914; §§25.26-25.50. Because the court does not have inherent power to grant a new trial, statutory requirements must be followed precisely. *Mercer v Perez* (1968) 68 C2d 104, 118, 65 CR 315 (procedural steps for making and ruling on motion are mandatory and must be strictly followed). See *Cembrook v Sterling Drug Inc.* (1964) 231 CA2d 52, 66, 41 CR 492. But see *Shapiro v Prudential Prop. & Cas. Co.* (1997) 52 CA4th 722, 726, 60 CR2d 698 (granting new trial on damages where plaintiff did not move for new trial, but did move to correct the verdict and for partial JNOV; court of appeal found that these motions "placed the issue of a new trial before the court").

Waiver of the grounds for a new trial may have occurred if counsel did not properly object to the error during trial, move to strike, or request the court to admonish the jury if prompt action could have cured the misconduct or error. On making trial objections and protecting the record, see chap 15.

A new trial motion may be used to challenge decisions made in many types of actions or special proceedings, not just to attack the verdict or decision rendered in a jury or bench trial. A motion for new trial is appropriate after a judgment of dismissal, nonsuit, directed verdict, or a ruling sustaining a demurrer to the complaint. See *Carney v Simmonds* (1957) 49 C2d 84, 88, 315 P2d 305. A motion for a new trial can also be granted after judgment on the pleadings. *Olson v County of Sacramento* (1969) 274 CA2d 316, 79 CR 140.

**CAUTION:** Carefully analyze the effect of a motion for new trial with regard to default judgments. Under some circumstances, a motion for new trial may be used to attack default judgments for excessive damages, or when the judgment (or decision) was against the law, if all jurisdictional time requirements can be met. See *Misic v Segars* (1995) 37 CA4th 1149, 1154, 44 CR2d 100. See also California Civil Procedure Before Trial §38.62 (4th ed Cal CEB 2004).

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### §25.23 2. Compared with motion for JNOV

Unlike a motion for JNOV, a motion for new trial does not seek reversal of the judgment and entry of a new and different judgment at the trial court level. Instead, the purpose of a motion for new trial is to order retrial of some or all of the issues because of a miscarriage of justice. See Cal Const art VI, §13; §25.22.

If a party moves for both JNOV and a new trial, the court must rule on both motions at the same time. CCP §629. See *La Manna v Stewart* (1975) 13 C3d 413, 417, 118 CR 761. On motions for JNOV, see §§25.2-25.21.

The trial court's discretion in ruling on a motion for new trial, and the grounds it may consider, are much broader than its discretion and the grounds it may consider when ruling on a motion for JNOV: The latter is effectively limited to instances in which no substantial evidence supports the verdict. *Yarrow v State* (1960) 53 C2d 427, 436, 2 CR 137. See §25.5.

The trial court has statutory power under CCP §629 to move on its own motion for JNOV (see §25.14), but only an aggrieved party may move for a new trial. *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 919, 114 CR 622; *Healy Tibbitts Constr. Co. v Employers' Surplus Lines Ins. Co.* (1977) 72 CA3d 741, 754, 140 CR 375; *Smith v Superior Court* (1976) 64 CA3d 434, 134 CR 531. See CCP §657.

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### §25.24 3. Partial new trial

A new trial may be granted on some issues and not others, in whole or in part. CCP §657. Available options include granting new trial on some issues and not on others, such as damages only. CCP §662.5. See *Liodas v Sahadi* (1977) 19 C3d 278, 285, 137 CR 635 (complete new trial if any doubt that new trial should be limited to damages).

**PRACTICE TIP:** Make clear to the court exactly what you are asking for. If a new trial on all the issues would not be in your client's best interest, be sure the court understands that you are not requesting an entire new trial. Your written motion should make it clear that you are moving for a partial new trial (*e.g.,* on the issue of damages only).

When a motion for new trial is made after a bench trial decision, the judge may change or add to the statement of decision, modify or vacate the judgment, grant a new trial on all or part of the issues or, instead of granting new trial, simply vacate and set aside the decision or judgment and reopen the case for further proceedings. See CCP §662; *Oliver v Boxley* (1960) 181 CA2d 471, 476, 5 CR 468. On bench trials, see chap 24.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.25 4. Motion in bifurcated trial

## §25.25 4. Motion in bifurcated trial

A motion for new trial may not be made until all issues in a bifurcated case have been determined. For example, the plaintiff may move for a new trial if the defendant wins the liability phase, but the defendant must await damage results if the plaintiff prevails on liability. *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 460, 20 CR 321; *Mays v Disneyland, Inc.* (1963) 213 CA2d 297, 28 CR 689.

In bench trials, the motion is premature unless all issues have been tried. Cal Rules of Ct 3.1591. When separate issues are tried before different judges, each judge must hear and decide the new trial motion on the issues tried before that judge. Cal Rules of Ct 3.1591. On nullity of prematurely filed motion, see §25.54.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.26 B. Grounds for motion

## §25.26 B. Grounds for motion

Grounds for a motion for new trial are contained in CCP §§657-657.1 and 914 as follows:

- Irregularity in the proceedings of the court, jury, or adverse party, or any order of court or abuse of discretion by which any party was prevented from having a fair trial. CCP §657(1). See §§25.27-25.29.
- Jury misconduct. CCP §657(2). See §§25.30-25.32.
- Accident or surprise that ordinary prudence could not have prevented. CCP §657(3). See §§25.33-25.35.
- Newly discovered evidence, material for the moving party, that could not have been discovered with reasonable diligence and produced at trial. CCP §657(4). See §§25.36-25.37.
- Excessive or inadequate damages. CCP §657(5). See §§25.38-25.43.
- Insufficient evidence to justify the verdict or other decision. CCP §657(6). See §§25.44-25.45.
- Verdict or decision against the law. CCP §657(6). See §§25.46-25.47.
- Error in law occurring at the trial and excepted to by the moving party. CCP §657(7). See §§25.48-25.49.
- Inability to obtain a transcript because of the court reporter's death or disability or loss or destruction of the reporter's notes. CCP §§657.1, 914. See §25.50.

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## §25.27 1. Irregularity in proceedings or abuse of discretion (CCP §657(1))

A new trial may be granted for irregularity in the proceedings of the court, jury, or adverse party, or be based on any court order or abuse of discretion that prevented a party from having a fair trial. CCP §657(1).

"Irregularity" has been interpreted broadly to mean any overt act of the trial court, the jury, counsel, or an adverse party, amounting to misconduct, that violates a party's right to a fair and impartial trial. *Price v Giles* (1987) 196 CA3d 1469, 242 CR 559 (defense counsel's claim during jury argument that his own client had not been candid and had colluded with an opposing party constituted misconduct toward his client, even though client prevailed, and it deprived plaintiff of fair trial); *Gotcher v Metcalf* (1970) 6 CA3d 96, 100, 85 CR 566 (reaffirming necessity of miscarriage of justice). See *People ex rel Dep't of Pub. Works v Hunt* (1969) 2 CA3d 158, 172, 82 CR 546. For further discussion and examples of misconduct by court or counsel, see chap 16.

Although jury "irregularity" could include problems unrelated to jury misconduct (see §§25.30-25.31), the CCP §657(1)-(2) grounds of jury "irregularity" and "misconduct" overlap. For discussion and examples of jury misconduct during trial, see chap 17; during jury deliberations, see chap 21.

**TACTICS:** Whenever a motion for new trial is based on any action or impropriety of the jury, assert both grounds: jury irregularity (CCP §657(1)) and jury misconduct (CCP §657(2)). See, *e.g., Williams v Bridges* (1934) 140 CA 537, 540, 35 P2d 407 (false denial by juror of knowledge of case on voir dire).

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### §25.28 a. Prompt objection to impropriety may cure prejudicial effect and avoid waiver

Counsel should object promptly to misconduct by opposing counsel, another party, or the court; otherwise, the error may be waived. *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 319, 74 CR 534. It is rare that the court, when acting promptly and instructing the jury to disregard counsel's misconduct, cannot correct the prejudicial effect of an impropriety. *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610, 39 CR 721.

Evidentiary rulings that are patently unfair or that constitute an abuse of discretion are grounds for granting a new trial. See *Townsend v Gonzalez* (1957) 150 CA2d 241, 249, 309 P2d 878 (admission of irrelevant evidence is grounds for new trial only if moving party was prejudiced).

A new trial may be granted based on the rulings of another judge of the same court that did not occur during trial. *Sandco Am., Inc. v Notrica* (1990) 216 CA3d 1495, 1507, 265 CR 587 (discovery orders prevented party from having fair trial).

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### §25.29 b. New trial proper after flagrant misconduct even when party failed to object

When there are extreme and repeated instances of misconduct that the court either cannot correct or refuses to recognize, prejudicial misconduct may be present regardless of objections, admonitions, or their absence. *Hoffman v Brandt* (1966) 65 C2d 549, 55 CR 417; *Garden Grove Sch. Dist. v Hendler* (1965) 63 C2d 141, 45 CR 313; *Simmons v Southern Pac. Transp. Co.* (1976) 62 CA3d 341, 133 CR 42; *Love v Wolf* (1964) 226 CA2d 378, 38 CR 183.

When the trial court grants a motion for new trial after flagrant and repeated instances of misconduct, and the offended party failed to object at the trial, the appellate court will not use that failure to overturn the order for new trial unless the order was a clear abuse of discretion. See *Malkasian v Irwin* (1964) 61 C2d 738, 747, 40 CR 78; *Miller v National Am. Life Ins. Co.* (1976) 54 CA3d 331, 346, 126 CR 731.

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### 2. Jury misconduct (CCP §657(2))

#### §25.30 a. Jury misconduct raises rebuttable presumption of prejudice

Litigants are entitled to an unbiased and unprejudiced jury. US Const amend VII; Cal Const art I, §16; *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 416, 185 CR 654; *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 110, 95 CR 516. On selecting an impartial jury, see chap 8.

When jury misconduct has been shown, a rebuttable presumption of prejudice arises. *In re Hamilton* (1999) 20 C4th 273, 295, 84 CR2d 403 (juror concealing relevant facts or making false answers during voir dire examination). See *Jones v Sieve* (1988) 203 CA3d 359, 365, 249 CR 821 (juror consulted reference volume for definition of central issue in trial and another related her personal experiences with medical condition at issue in trial); *Young v Brunicardi* (1986) 187 CA3d 1344, 232 CR 588 (judgment reversed based on retired police officer's representations to fellow jurors that defendant could not be negligent if he was not cited for Vehicle Code violation). See also *Hasson v Ford Motor Co., supra* (presumption not conclusive and may be rebutted by showing of lack of prejudice).

A motion for new trial based on juror misconduct must be based on a juror's overt acts that are objectively ascertainable, not on a juror's declaration setting forth his or her subjective reasoning process to impeach the verdict. *Locksley v Ungureanu* (1986) 178 CA3d 457, 223 CR 737 (assertions in same declaration that juror conducted experiments outside deliberations, however, could be considered in evaluating claim of juror misconduct). See *Enyart v City of Los Angeles* (1999) 76 CA4th 499, 90 CR2d 502 (defendant city entitled to new trial when jurors expressed negative bias against city and police officers during deliberations, but concealed such bias during voir dire).

A new trial will not be granted on the ground of jury misconduct when the misconduct was of such a trifling nature that it could not have been prejudicial to the moving party, and when it appears that the fairness of the trial was not affected by the alleged impropriety. *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 430, 82 CR 1. For examples of jury misconduct, see chap 17.

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### §25.31 b. Appellate review of entire record may rebut presumption of prejudice

When a review of the entire record rebuts the presumption of prejudice arising from a showing of jury misconduct, a motion for new trial on this ground may be denied. *Moore v Preventive Medicine Med. Group, Inc.* (1986) 178 CA3d 728, 223 CR 859 (issue raised by juror during deliberations regarding personal experience not covered in voir dire); *Wagner v Doulton* (1980) 112 CA3d 945, 169 CR 550 (juror made diagram; found to be based on evidence); *Kritzer v Citron* (1950) 101 CA2d 33, 36, 224 P2d 808 (no prejudice shown when juror discussed case with physician but did not discuss information learned with other jurors or vote on verdict). See *Andrews v County of Orange* (1982) 130 CA3d 944, 960, 182 CR 176, disapproved on other grounds in *People v Nesler* (1997) 16 C4th 561, 66 CR2d 454 (review of entire record revealed that juror prejudgment and other misconduct resulted in miscarriage of justice requiring new trial).

Criteria for trial court examination of the entire record includes the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued. *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 185 CR 654; *Glage v Hawes Firearms Co.* (1990) 226 CA3d 314, 276 CR 430.

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### §25.32 c. Waiver for failure to advise court of jury impropriety

Failure to advise the court of jury impropriety, when counsel or a party knew in time to remedy the impropriety, waives the right to complain; a party may not remain silent, gambling on the outcome. *Sepulveda v Ishimaru* (1957) 149 CA2d 543, 547, 308 P2d 809. On advising the court promptly of any jury impropriety, see §17.23; on jury misconduct during trial generally, see chap 17.

Jurors who read newspaper accounts of the trial violate their obligation not to receive information from sources outside the evidence. *People v Lessard* (1962) 58 C2d 447, 25 CR 78. For further discussion of the significance of juror exposure to media reports related to the trial, see §17.14.

**PRACTICE TIP:** If juror misconduct becomes known during trial, it does not necessarily require a new trial as long as the court-on its own, or at the request of counsel-gives appropriate instructions and admonitions, and requires jurors to state at the time the verdict is rendered that they were not influenced by the misconduct. *People v Barton* (1995) 37 CA4th 709, 715, 43 CR2d 671.

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### 3. Accident or surprise (CCP §657(3))

### §25.33 a. Unexpected condition, diligence, and prejudice required

Counsel who asserts this ground in a motion for new trial must show that:

- An unexpected accident occurred;
- Diligence was exercised; and
- The accident was prejudicial, *i.e.,* but for the accident or surprise, a different and more favorable result could reasonably have been expected.

See *Wade v De Bernardi* (1970) 4 CA3d 967, 84 CR 817; *People ex rel Dep't of Pub. Works v Hunt* (1969) 2 CA3d 158, 168, 82 CR 546.

Accident or surprise necessary to warrant a new trial must be more than inadvertence or mistake. The accident or surprise must be a condition or situation in which a party is unexpectedly placed without being negligent and which ordinary prudence could not have guarded against. See CCP §657(3).

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### §25.34 b. Disfavored ground

The ground of accident or surprise is not favored. *Kauffman v De Mutiis* (1948) 31 C2d 429, 189 P2d 271 (counsel failed to move for continuance after nonappearance of witness; order for new trial reversed); *Whitehill v United States Lines, Inc.* (1986) 177 CA3d 1201, 223 CR 452 (plaintiff's counsel refused trial court's offer to recess trial to depose defendant's surprise expert witness in order to obtain rebuttal evidence; denial of plaintiff's motion for new trial on ground of surprise affirmed). See *Garcia v County of Los Angeles* (1986) 177 CA3d 633, 223 CR 100.

Counsel must call the court's attention to the surprise as soon as it becomes apparent, rather than gambling on a favorable verdict before informing the court and only then attempting to remedy the situation. *People ex rel Dep't of Pub. Works v Hunt* (1969) 2 CA3d 158, 168, 82 CR 546.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.35 c. Case examples

### §25.35 c. Case examples

Examples of surprise that have been held to provide sufficient grounds for granting a motion for new trial include the following:

- Complaint amended at conclusion of trial; party claiming surprise required to defend an entirely different issue. *Lavely v Nonemaker* (1931) 212 C 380, 298 P 976.
- Unexpected introduction of unrecorded deed that moving party had no knowledge of. *Delmas v Martin* (1870) 39 C 555.
- Undisclosed expert witness unexpectedly called; moving party not prepared to cross-examine expert on use of improper calculations. *City of Fresno v Harrison* (1984) 154 CA3d 296, 300, 201 CR 219. But see *Stanchfield v Hamer Toyota, Inc*. (1995) 37 CA4th 1495, 44 CR2d 565 (no abuse of discretion in permitting expert to testify because there was enough time for expert to be redeposed before trial).
- Complete change of witness's testimony relied on to prove material fact that could not be proved by other testimony. *Whitfield v Debrincat* (1937) 18 CA2d 730, 64 P2d 960.

Examples in which the surprise was held *not* to be sufficient ground for a new trial include the following:

- Failure to assert ground of surprise promptly. *State ex rel Dep't of Pub. Works v Donovan* (1962) 57 C2d 346, 351, 19 CR 473.
- Plaintiff's expert changed testimony on witness stand; no showing that adverse testimony substantially affected outcome. *Wade v De Bernardi* (1970) 4 CA3d 967, 971, 84 CR 817.
- Lack of diligence. *People ex rel Dep't of Pub. Works v Hunt* (1969) 2 CA3d 158, 168, 82 CR 546; *Estate of Nessel* (1958) 164 CA2d 798, 803, 331 P2d 205.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/ 4. Newly discovered evidence (CCP §657(4))/§25.36 a. Evidence must be likely to produce different result

### 4. Newly discovered evidence (CCP §657(4))

#### §25.36 a. Evidence must be likely to produce different result

For counsel to assert this ground successfully, three separate elements must exist:

- The evidence must be new evidence, *i.e.,* different from and not cumulative of the evidence produced at trial. *Cameron v Crocker-Citizens Nat'l Bank* (1971) 19 CA3d 940, 947, 97 CR 269.
- The evidence must be material, *i.e.,* likely to produce a different result. *Plancarte v Guardsmark, LLC* (2004) 118 CA4th 640, 647, 13 CR3d 315 (employee's attorney fees paid by employer did not constitute ratification of employee's alleged wrongful acts). See also *Sherman v Kinetic Concepts, Inc.* (1998) 67 CA4th 1152, 1161, 79 CR2d 641; *Baron v Sanger Motor Sales* (1967) 249 CA2d 846, 859, 57 CR 896.
- Counsel must have exercised reasonable diligence. *Fomco, Inc. v Joe Maggio, Inc.* (1961) 55 C2d 162, 165, 10 CR 462 (matter of public record); *Andersen v Howland* (1970) 3 CA3d 380, 83 CR 308 (newly formed expert opinion). But see *Doe v United Air Lines* (2008) 160 CA4th 1500, 1509, 73 CR3d 541 (expert's declaration on mental disorder not tendered diligently).

The single most important reason for denying a motion for new trial on this ground is counsel's failure to seek the new evidence with reasonable diligence. See, *e.g., Lewis v Agricultural Ins. Co.* (1969) 2 CA3d 285, 292, 82 CR 509 (witness could have easily been found before trial).

**NOTE:** Newly discovered impeachment evidence, if it is not cumulative, may be sufficient grounds for a new trial. *Lostritto v Southern Pac. Transp. Co.* (1977) 73 CA3d 737, 743, 140 CR 905 (witnesses with testimony contrary to plaintiff's position). But see *Bostard v Bostard* (1968) 258 CA2d 793, 798, 66 CR 348 (impeachment or contradictory evidence insufficient).

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### §25.37 b. Ground disfavored

Because judicial policy encourages litigants to exhaust every reasonable effort to produce all existing evidence on their behalf at trial, the courts disfavor the ground of newly discovered evidence. See *South Santa Clara Valley Water Conserv. Dist. v Johnson* (1964) 231 CA2d 388, 407, 41 CR 846.

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### 5. Excessive or inadequate damages (CCP §657(5))

### §25.38 a. Conditional order for new trial may be granted

The trial court has discretion to grant a conditional order for new trial on the ground of excessive or inadequate damages. CCP §662.5. When excessive damages are asserted, the order can specify that the motion be denied if the party in whose favor the verdict was rendered consents to a reduction of damages. CCP §662.5(b). The United States Supreme Court has held that punitive damage awards are permissible only when a meaningful posttrial review protects defendants from excessive awards. *Honda Motor Co. v Oberg* (1994) 512 US 415, 129 L Ed 2d 336, 114 S Ct 2331.

When inadequate damages are asserted, the order can specify that the motion be denied if the party against whom the verdict was rendered consents to an additional amount as set by the court. CCP §662.5(a).

The court has no power to order a reduction or an addition without a party's consent; if the court changes a jury verdict, it exceeds its jurisdiction. *Campain v Safeway Stores, Inc.* (1972) 29 CA3d 362, 366 n1, 104 CR 752 (new trial granted on damages only).

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### §25.39 b. Court has duty to weigh evidence

In considering a motion for new trial on this ground, the court has the responsibility to weigh the evidence on damages. The court has a positive duty to keep the verdict in line with the facts if, under the evidence, it believes that the verdict is excessive. *Handelman v Victor Equipment Co.* (1971) 21 CA3d 902, 909, 99 CR 90; *Thompson v John Strona & Sons* (1970) 5 CA3d 705, 85 CR 350. This duty applies equally to a damages award that the trial court believes is inadequate. See *Sanchez v Hasencamp* (1980) 107 CA3d 935, 166 CR 118; *Black v County of Los Angeles* (1976) 55 CA3d 920, 934, 127 CR 916; *San Francisco BART Dist. v Fremont Meadows, Inc.* (1971) 20 CA3d 797, 803, 97 CR 898.

The trial court, after independently assessing the evidence, must conclude that the trier of fact clearly should have reached a different result. *Fortman v Hemco, Inc.* (1989) 211 CA3d 241, 259 CR 311 ($23 million award not excessive in light of $16 million future medical expenses); *Bigboy v County of San Diego* (1984) 154 CA3d 397, 201 CR 226 (trial judge's "personal opinion" based on ranges of awards in other cases does not show that jury should have reached different verdict here). But see *Washington v Farlice* (1991) 1 CA4th 766, 777, 2 CR2d 607. See also *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1255, 1 CR2d 301 (appellate court reduced compensatory damages and then reduced punitive damages to same compensatory-to-punitive ratio of damages jury had awarded).

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### §25.40 c. Motion may be granted on issue of damages when liability correctly determined

It is proper for the court to grant a new trial on some issues and not others. *Little v Superior Court* (1961) 55 C2d 642, 12 CR 481. A limited order granting new trial only on the damages issue is improper when the question of liability is close and may not have been determined completely *Thompson v Keckler* (1964) 228 CA2d 199, 209, 39 CR 267. Even if judgment is rendered in plaintiff's favor except for an inadequate amount of damages, it may be prejudicial to limit new trial to the issue of damages alone. 228 CA2d at 209, 39 CR at 273.

When it appears that liability was correctly determined, a new trial limited to damages may be granted if it is clear that no injustice will result. *Torres v Automobile Club of S. Cal.* (1997) 15 C4th 771, 776, 63 CR2d 859. When a limited retrial might prejudice either party, the court may resolve any doubts by granting a complete new trial. *Liodas v Sahadi* (1977) 19 C3d 278, 285, 137 CR 635 (error in damages instructions necessarily required trier of fact to consider liability as well as damages on retrial).

A new trial may also be granted on a portion of the damages issues, such as punitive damages. *Miller v National Am. Life Ins. Co.* (1976) 54 CA3d 331, 345, 126 CR 731. See *Brewer v Second Baptist Church* (1948) 32 C2d 791, 801, 197 P2d 713 (limited retrial ordered on appeal); *Bullock v Phillip Morris USA, Inc*. (2008) 159 CA4th 655, 696, 71 CR3d 775 (new trial on punitive damages only).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.41 d. Use of remittitur to reduce excessive damages limited

### §25.41 d. Use of remittitur to reduce excessive damages limited

Code of Civil Procedure §662.5 limits the use of a remittitur to reduce excessive damages. A remittitur may not be used to reapportion liability among parties. *Schelbauer v Butler Mfg. Co.* (1984) 35 C3d 442, 198 CR 155 (improper for trial court to grant motion for new trial, subject to condition that, if plaintiff consented to reduction of verdict reflecting contributory negligence of both plaintiff and his employer, motion would be denied).

A new trial on apportionment of responsibility only may be appropriate in comparative negligence cases. See *O'Kelly v Willig Freight Lines* (1977) 66 CA3d 578, 136 CR 171.

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### §25.42 e. Appellate court may review conditional order under CCP §662.5

When a conditional order under CCP §662.5 is granted, and the party against whom it is made consents to additur or remittitur, appeal may be taken from the judgment entered. The appellate court will examine the trial court's stated grounds and its specification of reasons. See CCP §657. See §25.67.

**NOTE:** The issue of excessive damages is preserved on appeal by bringing a new trial motion on that ground. *Saari v Jongordon Corp.* (1992) 5 CA4th 797, 807, 7 CR2d 82.

Attacking damages as excessive or inadequate must be done in the trial court and cannot be raised for the first time on appeal. *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 918, 114 CR 622.

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### §25.43 f. Denial of motion difficult to overturn

Denial of a motion for new trial on grounds of excessive or inadequate damages is usually quite difficult to overturn on appeal. See, *e.g., Seffert v Los Angeles Transit Lines* (1961) 56 C2d 498, 507, 15 CR 161 (excessive damages claimed; denial upheld); *DiRosario v Havens* (1987) 196 CA3d 1224, 242 CR 423 (same); *Sherwood v Rossini* (1968) 264 CA2d 926, 931, 71 CR 1 (inadequate damages claimed; denial upheld).

However, cases in which a denial of a motion for new trial was reversed include *Cunningham v Simpson* (1969) 1 C3d 301, 308, 81 CR 855 (excessive damages; denial of new trial reversed); *Little v Stuyvesant Life Ins. Co.* (1977) 67 CA3d 451, 469, 136 CR 653 (excessive punitive damages; denial of new trial reversed); and *Wetherbee v United Ins. Co. of Am.* (1968) 265 CA2d 921, 933, 71 CR 764 (excessive punitive damages of $500,000; denial of new trial reversed). Note that in *Wetherbee v United Ins. Co. of Am.* (1971) 18 CA3d 266, 95 CR 678, an award of $200,000 on retrial was affirmed.

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### 6. Insufficiency of evidence (CCP §657(6))

### §25.44 a. Court must reweigh evidence

The trial court has the power to set aside a verdict or decision not warranted by the evidence. CCP §657; *Perry v Fowler* (1951) 102 CA2d 808, 229 P2d 46 (order for new trial upheld despite jury in retrial having returned same verdict as original jury).

In ruling on the evidence, the trial court reweighs the evidence. The judge may review conflicting evidence, determine its sufficiency, draw reasonable inferences from the evidence, and consider the credibility of witnesses. A motion for new trial should be granted if the jury's verdict appears to be against the weight of the evidence. *Valdez v J.D. Diffenbaugh Co.* (1975) 51 CA3d 494, 512, 124 CR 467 (order for new trial on insufficiency of evidence affirmed).

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### §25.45 b. Order granting motion on this ground usually affirmed on appeal

This ground is frequently asserted and a new trial granted on insufficiency of the evidence is usually affirmed on appeal, as long as the statutory requirements for stating grounds and supplying an adequate specification of reasons are followed. *Romero v Riggs* (1994) 24 CA4th 117, 121, 29 CR2d 219. On statement of grounds, see §25.66. On specification of reasons, see §25.67.

An order granting a new trial on this ground may be reversed only if there is no substantial evidence in the record to support the order. *Locksley v Ungureanu* (1986) 178 CA3d 457, 223 CR 737; *Valdez v J.D. Diffenbaugh Co.* (1975) 51 CA3d 494, 512, 124 CR 467.

**NOTE:** On appeal, the trial court's evaluation of witnesses' credibility is particularly significant when the higher court considers the sufficiency of the evidence. *Meiner v Ford Motor Co.* (1971) 17 CA3d 127, 94 CR 702.

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### 7. Verdict or decision against law (CCP §657(6))

#### §25.46 a. Same test as for directed verdict and motion for JNOV

A general verdict is against law only when it is unsupported by any substantial evidence, *i.e.,* when the entire evidence justifies a directed verdict against the party in whose favor the verdict was returned. *Sanchez-Corea v Bank of America* (1985) 38 C3d 892, 215 CR 679; *Marriage of Beilock* (1978) 81 CA3d 713, 728, 146 CR 675; *Hilts v County of Solano* (1968) 265 CA2d 161, 177, 71 CR 275; *Kralyevich v Magrini* (1959) 172 CA2d 784, 789, 342 P2d 903.

A verdict or decision against law is not widely used as a ground for a motion for a new trial, but it can apply to situations in which:

- There was a failure to make a finding on a material issue;
- The findings are irreconcilable or hopelessly inconsistent; or
- The evidence is not in conflict on any material point but is insufficient as a matter of law to support the verdict or decision.

See *Tagney v Hoy* (1968) 260 CA2d 372, 376, 67 CR 261.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.47 b. Court may not reweigh evidence

### §25.47 b. Court may not reweigh evidence

This ground is not appropriate when the trial court has weighed conflicting evidence. *Bray v Rosen* (1959) 167 CA2d 680, 683, 335 P2d 137. Compare the ground of insufficiency of the evidence, in which the court has a duty to weigh the evidence. See §25.44.

A verdict is against law and contrary to jury instructions when the evidence on the point at issue is not in conflict and there are no facts under which the instruction warrants the verdict. *Morris v McCauley's Quality Transmission Serv.* (1976) 60 CA3d 964, 132 CR 37 (inconsistent verdicts); *Kaiser Cement & Gypsum v Allis-Chalmers Mfg. Co.* (1973) 35 CA3d 948, 958, 111 CR 210 (new trial reversed).

**NOTE:** A motion for new trial based on an error in the jury instructions is contemplated in the "error of law" ground. See §§25.48-25.49. A "verdict or decision against the law" assumes that the law in the jury instructions was correct.

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### 8. Error in law (CCP §657(7))

### §25.48 a. Motion granted only when court's rulings in error

A trial court has no power to grant a new trial unless there was, as a matter of law, error in its rulings. *Ramirez v USAA Cas. Ins. Co.* (1991) 234 CA3d 391, 397, 285 CR 757 (trial court properly ordered new trial when it realized that its ruling on interpretation of duty of insurance company was incorrect). Errors in law include improper admission or exclusion of evidence, misdirection of the jury, and errors of procedure. *Bice v Stevens* (1954) 129 CA2d 342, 277 P2d 106 (improper exclusion of evidence).

Counsel commonly assert this ground when errors in jury instructions have occurred. *Dabis v San Francisco Redev. Agency* (1975) 50 CA3d 704, 710, 122 CR 800 (order for new trial reversed because instruction correct as matter of law). A motion for new trial may be granted on this ground when the trial court failed to instruct the jury on each party's theories of the case that were supported by substantial evidence. See *Fish v Los Angeles Dodgers Baseball Club* (1976) 56 CA3d 620, 633, 128 CR 807, disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 574, 34 CR2d 607; *Kimball v Whetzel* (1970) 10 CA3d 836, 89 CR 373. On jury instructions generally, see chap 20.

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### §25.49 b. Waiver for failure to assert error of law

If appropriate action to cure certain errors of law is not taken during trial, the right to appeal the error may be waived. See Evid C §§353-354 (necessity to object or move to strike erroneous evidence); *Taylor v Union Pac. R.R.* (1976) 16 C3d 893, 130 CR 23 (counsel failed to request trial court to withdraw previously granted waiver of jury trial).

Although instructions submitted by a party are deemed excepted to without an objection from opposing counsel (see CCP §§646-647), an instruction that is correct in law may not be attacked as too general or incomplete on appeal unless the aggrieved party requested an additional or qualifying instruction in the trial court. See *Agarwal v Johnson* (1979) 25 C3d 932, 160 CR 141, disapproved on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 88 CR2d 19.

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### §25.50 9. Inability to obtain transcript (CCP §§657.1, 914)

On appeal, a new trial may be ordered when it is impossible to have a phonographic report of the trial transcribed because of the stenographic reporter's death or disability, or because the reporter's notes were lost or destroyed. CCP §§657.1, 914. A new trial ordered on this ground must be granted on all the issues. Section 914 does not authorize a new trial on some of the issues only. *Hennigan v United Pac. Ins. Co.* (1975) 53 CA3d 1, 7, 125 CR 408.

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### §25.51 C. Tactical considerations

After an adverse result, counsel and client should evaluate whether to move for a new trial, considering such questions as:

- Is the motion necessary to protect issues on appeal, such as excessive or inadequate damages?
- If jury irregularity or misconduct is suspected, what investigative methods should be used to confirm it?
- What additional costs and fees will be incurred by making and prevailing on the motion?
- If the motion is granted in whole or in part, what is the probability of a favorable result on retrial?
- If the motion is lost, what preliminary recommendations can counsel make regarding appeal?

Some trial attorneys note potential errors during trial in a trial notebook or other record. If the trial was a jury trial, the foreperson or other jurors often consent to an interview about their deliberations and the particular points the jury relied on and rejected in reaching its verdict. Contact with jurors even after trial, however, should be made with care. See Cal Rules of Prof Cond 5-320(D) (attorney must not ask questions or make comments intended to harass or embarrass juror after discharge); *Lind v Medevac, Inc.* (1990) 219 CA3d 516, 520, 268 CR 359 (improper letter to jurors). On obtaining jurors' declarations, see §25.60.

Documents supporting a motion for new trial must be carefully prepared. If the motion is made, counsel should gather affidavits or declarations, and draft a supporting memorandum for the trial judge.

Do not assume that the trial court clerk has properly calendared hearing and ruling dates. It is a good idea to telephone periodically to follow up on the progress of the motion and to confirm the hearing date. On time requirements, see §§25.52-25.56.

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### D. Time requirements

### §25.52 1. When notice of intention to move for new trial must be filed

The court clerk's notice of entry of judgment under CCP §664.5 commonly starts the running of two dependent time periods:

- The 15-day period for filing the notice of intention to move for a new trial (CCP §659); and
- The 60-day period within which the court must rule on the motion (CCP §660).

**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 and not a court day.

Notice of intention to move for a new trial must be filed and served on all adverse parties (CCP §659):

- Before entry of judgment (*i.e.,* after statement of decision of verdict but before judgment is entered); or
- On whichever of the following dates is earliest:
- Within 15 days after the date of the clerk's mailing of a CCP §664.5 notice of entry of judgment, or other appropriate notice of order;
- Within 15 days after service by any party of notice of entry of judgment; or
- Within 180 days after entry of judgment.

Written notice of entry of judgment is satisfied by serving a copy of the file-stamped judgment. *Palmer v GTE Cal., Inc.* (2003) 30 C4th 1265, 1277, 135 CR2d 654 (document served on party who moves for new trial need not be separate document entitled "notice of entry of judgment").

Notice of intention to move for new trial is deemed to be a motion for new trial on all grounds stated in the notice. CCP §659.

After a party files a notice of intention to move for new trial, every other aggrieved party has 15 days after the notice is served to file and serve notice of intention to move for new trial. See CCP §§657, 659. See checklist in §25.57.

**PRACTICE TIP:** In contemplating filing a notice of intention to move for new trial, calendar 15 days after (a) the clerk's mailing of a notice of entry of judgment under CCP §664.5, (b) service by another party of notice of entry of judgment, or (c) service by another party of notice of intention to move for new trial, whichever is earliest. In computing the time period, exclude the first day and include the last day. CCP §12; *Douglas v Janis* (1974) 43 CA3d 931, 935, 118 CR 280.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.53 2. When court must rule on motion

### §25.53 2. When court must rule on motion

The court must rule on a motion for new trial, whatever date is earlier (a) within 60 days after the court clerk mails the notice of entry of judgment under CCP §664.5, (b) within 60 days after a party serves written notice of entry of judgment on the moving party, or (c) if no notice was given, then 60 days after the first notice of intention to move for new trial was filed. CCP §660.

When a notice of intention to move for new trial is filed before the notice of entry of judgment (see §§25.52, 25.54), the 60-day period in which the court must rule on the motion runs from the filing date of the first notice of intention to move for a new trial. CCP §660; *Bunton v Arizona Pac. Tanklines* (1983) 141 CA3d 210, 190 CR 295. See checklist in §25.57.

Avoid forcing the court into a hasty decision, which would leave it little time to rule on the motion for new trial after hearing and argument. The following scenario may be illustrative:

**EXAMPLE:** The clerk mails the notice of entry of judgment under CCP §664.5, and 15 days later, the moving party files its notice of intention to move for new trial. The moving party then obtains a 20-day extension, extending the usual 10-day period under CCP §659a, to file supporting declarations that are filed on the 30th day after the notice of intention was filed. The adverse party files opposing declarations and a supporting memorandum within 10 days. The clerk gives a 5-day notice of hearing under CCP §660, which in effect compels the court both to hear and to rule on the motion on the 60th day. See *Desherow v Rhodes* (1969) 1 CA3d 733, 82 CR 138 (court hearing and minute order signed on 60th day; harmless clerical error that order not entered until 2 days later).

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### §25.54 3. Prematurely filed notice has no effect

Notice of intention to move for new trial filed prematurely (*e.g.,* before all issues have been decided in a bifurcated trial or before a verdict or decision has been rendered) is a nullity. See Cal Rules of Ct 3.1591 (bifurcated trial); *Mays v Disneyland, Inc.* (1963) 213 CA2d 297, 28 CR 689 (liability issue decided in plaintiff's favor in bifurcated trial; defendant's motion premature). See §25.25.

The notice, if filed before judgment is entered and before the court makes its statement of decision or the jury renders its verdict, is of no effect. *Bunton v Arizona Pac. Tanklines* (1983) 141 CA3d 210, 190 CR 295 (jury trial); *Ehrler v Ehrler* (1981) 126 CA3d 147, 152, 178 CR 642 (bench trial).

Although the notice of intention to move for new trial may be filed before entry of judgment, it may not be filed before the jury reaches a verdict. *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 20 CR 321.

In a bench trial, the notice is not premature if a statement of decision was requested and is signed and filed. *Ehrler v Ehrler, supra*; *Ruiz v Ruiz* (1980) 104 CA3d 374, 378, 163 CR 708 (both cases based on former "findings of fact and conclusions of law" instead of current "statement of decision"). However, a notice of intention to move for new trial is premature if the court has only announced its "tentative" decision, which may be changed. See *Ehrler v Ehrler, supra* (under former law, "intended" decision). On court's not being bound by tentative decision, see §24.30. On statement of decision, see §§24.34-24.50.

When the parties have not requested or waived a statement of decision in a bench trial, the court simply files the judgment. Until the judgment is filed, notice of intention to move for new trial is premature. See *Krug v John E. Yoakum Co.* (1938) 27 CA2d 91, 96, 80 P2d 492 (judgment need only be filed, not entered). In a county that keeps a "judgment book" (rather than copying documents onto microfilm or recording them in the court's electronic data-processing system), entry of judgment does not occur until the clerk records the judgment in the judgment book. CCP §668. But in most counties today, filing the judgment with the court clerk constitutes entry. CCP §668.5. See §23.19.

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### §25.55 4. Court's specification of reasons to be filed after ruling

After ruling on a motion for new trial, the court must file its specification of reasons within 10 days after the order is filed. CCP §657. See also *Fergus v Songer* (2007) 150 CA4th 552, 566, 59 CR3d 273 (minute order granting motion for new trial constitutes determination of motion within meaning of CCP §660 and begins 10-day period). The statutory time period for the court's specification of reasons is jurisdictional. See §25.56.

The 10-day period after the ruling within which the court's specification of reasons must be filed is *in addition* to the 60-day period within which the court must rule on the motion. See §25.53 (discussing 60-day period). See checklist in §25.57.

**EXAMPLE:** If the order is filed on the 60th day, there is no requirement that the court's specification of reasons be filed during the 60-day period as long as the 10-day period is met; additional time, up to 10 days beyond the 60-day period, is allowed for that purpose. *Fortenberry v Weber* (1971) 18 CA3d 213, 220, 95 CR 834.

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### §25.56 5. Time limits are jurisdictional

The 60-day period within which the court must rule on the motion is jurisdictional. *Siegal v Superior Court* (1968) 68 C2d 97, 101, 65 CR 311. An automatic stay in bankruptcy as to a party not involved in the motion for new trial does not extend the court's 60 day jurisdictional time limit to make its order. *Frieberg v City of Mission Viejo* (1995) 33 CA4th 1484, 39 CR2d 802. Any order made beyond that time is reversible per se. *Mercer v Perez* (1968) 68 C2d 104, 118, 65 CR 315. It cannot be made later nunc pro tunc. *Siegal v Superior Court, supra*.

Similarly, the time limit for the trial court to act on a motion for JNOV or a motion for a new trial is not tolled during the period between the date a party filed a peremptory challenge under CCP §170.6 and the date of a later order striking the challenge, when the first judge accepted disqualification immediately, on the same day the challenge was filed. *Davcon, Inc. v Roberts & Morgan* (2003) 110 CA4th 1355, 2 CR3d 782. Because the trial court's decision act on the motion for JNOV or new trial was made after it lost jurisdiction, the decision was a nullity. 110 CA4th at 1362.

The filing requirements for notice of intention to move for new trial are also mandatory and jurisdictional. CCP §659. The time for filing cannot be extended by the court or waived by the parties. CCP §659. The provisions of CCP §1013 extending the time for exercising a right or doing an act when service is by mail do not apply to a party intending to move for new trial. CCP §659.

A defective notice cannot be amended after the time for filing a notice has expired. *Faeh v Union Oil Co.* (1951) 107 CA2d 163, 236 P2d 667. Any order granting a new trial after an untimely notice of intention to make the motion is void. *Douglas v Janis* (1974) 43 CA3d 931, 935, 118 CR 280.

The 10-day time period for the court to file its specification of reasons after ruling on the motion is also jurisdictional. *La Manna v Stewart* (1975) 13 C3d 413, 118 CR 761. On specification of reasons, see §25.67. See checklist in §25.57.

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## E. Procedures

### §25.57 1. Checklist: Motion for new trial

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A motion for new trial requires strict adherence to statutory requirements. Key procedural points as well as detailed time lines are associated with the making and ruling on a motion for new trial, including the following (cross-references to chapter discussions are shown after each item listed below):

___ 1. File notice of intention to move for new trial (CCP §659; see §25.52):

___ a. Before entry of judgment (*i.e.,* after statement of decision or verdict but before judgment is entered); or

___ b. Whatever date of the following is earliest:

___ (1) Within 15 days after the date of the clerk's mailing of a CCP §664.5 notice of entry of judgment, or other appropriate notice of order;

___ (2) Within 15 days after service by any party of notice of entry of judgment; or

___ (3) Within 180 days after entry of judgment.

___ 2. Notice of intention to move for new trial is deemed to be a motion for new trial on all grounds stated in the notice (CCP §659; see §25.52).

___ 3. Four grounds for new trial must be supported by declarations or affidavits (or by the court minutes): irregularity in the proceedings or abuse of discretion, jury misconduct, accident or surprise, and newly discovered evidence (CCP §658; see §25.60).

___ 4. Set date for hearing (after conferring with judge's clerk and checking local rules); the hearing must be held within the court's power to rule on the motion, which is 60 days, computed as the earliest date after (CCP §660; see §25.64):

___ a. The clerk's mailing of a CCP §664.5 notice of entry of judgment;

___ b. Service on the moving party of written notice of entry of judgment; or

___ c. In the absence of notice of entry of judgment, 60 days after the filing of the first notice of intention to move for new trial.

___ 5. Order granting new trial must be entered within 60 days of the earliest time set forth in the first item above (CCP §660; see §25.56).

___ 6. Court's specification of reasons for granting new trial must be made and entered within 10 days after court's order granting a motion for new trial (CCP §657; see §25.55).

___ 7. When a new trial is granted on some or all of the issues, the court must specify the ground or grounds on which it is granted and the court's reason or reasons for granting the motion on each ground stated. CCP §657. See §25.67.

___ 8. If the motion for new trial is granted on grounds of excessive/inadequate damages or insufficiency of the evidence, the court must first weigh the evidence, including reasonable inferences drawn from the evidence, and be convinced from the entire record that the court or jury should have clearly reached a

different decision or verdict. CCP §657; see §25.67.

___ 9. When motion granted in an unlimited civil case (see CCP §88), notice of appeal from order granting new trial must be filed within the usual provisions of Cal Rules of Ct 8.104(a)-(b) (see §25.68).

___ 10. When motion denied in an unlimited civil case (see CCP §88), there is no appeal from order denying new trial, and appeal must be taken from the judgment (see §25.69). Notice of appeal from the original judgment must be filed within 30 days after either:

___ a. Entry of the order denying the motion; or

___ b. Denial by operation of law, but in no event later than 180 days after entry of judgment whether or not a motion for new trial has been determined. Cal Rules of Ct 8.108(b).

___ 11. When motion granted in a limited civil case (see CCP §85), the time to appeal to the appellate division of the superior court from an order granting new trial is the earliest of (see §25.68):

___ a. 30 days after mailing notice of entry of the order by the clerk;

___ b. 30 days after service of notice of entry of the order by a party; or

___ c. 90 days after entry of the order. Cal Rules of Ct 8.800, 8.804(23), 8.822(a).

___ 12. When motion denied in a limited civil case (see CCP §85), the order denying motion for new trial is not appealable, and appeal must be taken from the judgment. Assuming that notice of intention to move for new trial was valid, the notice of appeal must be filed within (see §25.69):

___ a. 15 days after entry of the order denying the motion;

___ b. 15 days after denial of the motion by operation of law; or

___ c. 90 days after entry of judgment. Cal Rules of Ct 8.800, 8.804(23), 8.823(b)(1).

___ 13. Cross-appeals from the judgment should be filed by a party not moving for a complete new trial, or by a party in whose favor the motion for new trial is granted, in order to protect rights if the court's order granting new trial is reversed on appeal (see Cal Rules of Ct 8.108(d), 8.823(f); §25.70).

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### 2. Preparing the motion

### §25.58 a. Notice of intention to move for new trial must state grounds

Notice of intention to move for new trial must state all applicable grounds on which the moving party relies. Failure to do so can be fatal to both the motion and any appeal. See CCP §§657, 659; *Malkasian v Irwin* (1964) 61 C2d 738, 745, 40 CR 78 (new trial may be granted only on grounds stated in motion).

When the notice of intention omits a ground but, within the time for filing the notice, further documents are filed asserting the missing ground, that ground will not be lost. See *Galindo v Partenreederei M.S. Parma* (1974) 43 CA3d 294, 301, 117 CR 638. However, a missing ground cannot be validly supplied by a document, such as a supporting memorandum, filed *after* the statutory period for filing the notice has run. *Wagner v Singleton* (1982) 133 CA3d 69, 72, 183 CR 631.

It is good practice for counsel to set out all grounds listed in CCP §657 in the notice of intention to move for new trial. Information on some grounds may not be known at the time of filing (*e.g.,* irregularities or misconduct not occurring in counsel's presence, or newly discovered evidence). Some grounds also overlap and the distinction between them is not always clear.

**EXAMPLES:** Both jury irregularity (CCP §657(1)) and jury misconduct (CCP §657(2)) should be asserted when a jury impropriety is under attack. When the question is one of law (*e.g.,* improper admission or rejection of evidence, misdirection of the jury, errors in trial procedure), the grounds should include the following statements: (a) orders of court and abuse of discretion prevented the moving party from having a fair trial (CCP §657(1)), (b) the verdict or decision was against law (CCP §657(6)), and (c) an error of law occurred (CCP §657(7)). If insufficiency of the evidence or excessive or inadequate damages are asserted, counsel should raise and argue another ground not subject to the adequate specification of reasons required on appeal. See CCP §657. See §25.67.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.59 b. Supporting memorandum must be filed within 10 days after notice is filed

### §25.59 b. Supporting memorandum must be filed within 10 days after notice is filed

A party moving for new trial must serve on all other parties and file with the court a supporting memorandum within 10 days after the filing of the notice. Cal Rules of Ct 3.1600(a). The court may deny the motion without a hearing on the merits if the moving party fails to serve and file the supporting memorandum within this time period. Cal Rules of Ct 3.1600(b).

An adverse party must serve and file any reply supporting memorandum within 10 days after receiving service of the moving party's memorandum. See Cal Rules of Ct 3.1600(a).

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### 3. Supporting affidavits or declarations

#### §25.60 a. When required

Four grounds for a motion for new trial must be supported by affidavits: (1) irregularity in the proceedings or abuse of discretion, (2) misconduct of the jury, (3) accident or surprise, or (4) newly discovered evidence. CCP §658. Declarations may be used in the place of affidavits. CCP §2015.5.

When the moving party relies wholly on facts appearing on the face of the record, however, such affidavits or declarations are unnecessary. See *Webber v Webber* (1948) 33 C2d 153, 163, 199 P2d 934 (trial court irregularities). Instead, the motion can be supported by the minutes of the court or a portion of the trial transcript, if available. On time requirements for filing supporting affidavits or declarations, see §25.61.

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### §25.61 b. Must be filed within 10 days after notice is filed

Any affidavits or declarations must be filed within 10 days after filing the notice of intention to move for new trial. CCP §659a. Although the notice of intention to move for new trial must be filed within the statutory period (see CCP §659; §25.52), the notice should not be filed until it is reasonably certain that declarations can be obtained within the 10-day period after the notice is filed.

The 10-day requirement for filing affidavits and declarations is not jurisdictional. *Clemens v Regents of Univ. of Cal.* (1970) 8 CA3d 1, 21, 87 CR 108. But the court need not grant an extension. See *Maple v Cincinnati, Inc.* (1985) 163 CA3d 387, 209 CR 451 (order granting new trial reversed; affidavits not filed within 10-day period, no extension given). To be safe, the 10-day period should be calendared and followed unless an extension is obtained. A maximum 20-day extension for filing affidavits or declarations can be obtained by written stipulation or court order on a showing of good cause. CCP §659a. *Erikson v Weiner* (1996) 48 CA4th 1663, 56 CR2d 362 (20-day rule mandatory).

The other parties have 10 days after the moving party has served affidavits to serve their own counteraffidavits. CCP §659a.

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### §25.62 c. Jury irregularity or misconduct declarations may not reflect subjective reasoning

Affidavits or declarations supporting evidence of jury irregularity or misconduct pose particular difficulties. Overt acts and statements may be used; subjective reasoning processes may not. See Evid C §1150(a). Opposing counsel should object to juror declarations that discuss the jury's subjective reasoning process. See *Cove, Inc. v Mora* (1985) 172 CA3d 97, 218 CR 7.

The moving party and counsel must affirmatively show that both were ignorant of the impropriety. *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 103, 95 CR 516; *Wiley v Southern Pac. Transp. Co.* (1990) 220 CA3d 177, 269 CR 240. These "no knowledge" affidavits must be filed within the 10-day period prescribed by CCP §659a. *People v Southern Cal. Edison Co.* (1976) 56 CA3d 593, 601, 128 CR 697. See §25.61.

In some circumstances, counsel's affidavit alone is sufficient. *Weathers v Kaiser Found. Hosps., supra*. But see *People v Southern Cal. Edison Co., supra*. In any event, when the facts of the alleged misconduct occur after jury deliberations have commenced, and counsel and the moving party could not possibly have known of the alleged misconduct before the verdict, "no knowledge" affidavits are unnecessary. *Krouse v Graham* (1977) 19 C3d 59, 82, 137 CR 863.

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### §25.63 d. When jury declarations necessary

Juror declarations are usually necessary if the verdict was reached by lot or chance; if one or more jurors concealed bias or prejudice on voir dire; or if statements were made, or conduct, conditions, or events occurred, within or without the jury deliberation room, that were of a character likely to have improperly influenced the deliberations and the resulting verdict. See Evid C §1150. On juror misconduct during trial, see chap 17; during deliberations, see chap 21.

**PRACTICE TIP:** Prepare declarations carefully. Even if oral testimony would be helpful at the hearing on the motion, there is no right to take oral testimony from jurors unless the opposing party does not object, or so stipulates. *Bardessono v Michels* (1970) 3 C3d 780, 91 CR 760 (no objection); *Maple v Cincinnati, Inc.* (1985) 163 CA3d 387, 209 CR 451.

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### §25.64 F. Hearing (CCP §661)

The court sets the hearing date, and the court clerk, not a party, is required to give notice of that date. CCP §661; *Jones v Evans* (1970) 4 CA3d 115, 118, 84 CR 6. Unless the parties waive the right to a hearing, the court must notice and hear a motion for new trial. *Avery v Associated Seed Growers, Inc.* (1963) 211 CA2d 613, 626, 27 CR 625.

After the time to file counteraffidavits has run (see CCP §659a; §25.61), the clerk must give the parties 5 days' notice by mail of the time for oral argument, if any. The trial judge usually hears the motion and has discretion to permit oral argument. Although most judges permit the parties to argue, the court is not obligated to allow oral argument at the hearing. CCP §661. See *Kimmel v Keefe* (1970) 9 CA3d 402, 408, 88 CR 47.

Oral testimony from witnesses is not usually permitted, and testimony is presented by affidavit or declaration. See *Linhart v Nelson* (1976) 18 C3d 641, 134 CR 813. If oral testimony is heard without objection, however, there is no jurisdictional error. *Bardessono v Michels* (1970) 3 C3d 780, 793, 91 CR 760. See also *People v Hedgecock* (1990) 51 C3d 395, 414, 272 CR 803.

At the hearing, the parties may refer to the pleadings and orders in the court's file. When the motion is made on the minutes (on the record), references may also be made to any depositions and documentary evidence that were offered at the trial and to the trial transcript. CCP §660.

When a judge other than the trial judge hears the motion, the hearing must be held no later than 10 days before the time to rule on it expires. CCP §661. After having heard and determined the motion, a judge may authorize another judge in the same court to sign the new trial order. *Dell'Oca v Bank of New York Trust Co.* (2008) 159 CA4th 531, 545, 71 CR3d 737.

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### §25.65 G. Trial judge's ruling on motion

Granting a new trial on all or some of the issues is within the trial court's discretion and will not be reversed on appeal without a clear showing of abuse. *Jiminez v Sears, Roebuck & Co.* (1971) 4 C3d 379, 387, 93 CR 769; *Marshall v Brown* (1983) 141 CA3d 408, 414, 190 CR 392. The abuse of discretion standard does not apply, however, if the affidavit or other evidence on which the new trial order is made furnishes no basis for the exercise of that discretion. *DeFelice v Tabor* (1957) 149 CA2d 273, 275, 308 P2d 377. See *Horowitz v Noble* (1978) 79 CA3d 120, 137, 144 CR 710.

In making its ruling, the judge may reexamine any fact issues in the case or any decision by a jury, court, or referee. The trial court may disbelieve witnesses, including experts, reweigh evidence, and draw reasonable inferences contrary to those drawn by the jury. See *Meiner v Ford Motor Co.* (1971) 17 CA3d 127, 94 CR 702; *Perry v Fowler* (1951) 102 CA2d 808, 229 P2d 46.

If the court denies a motion for new trial, no particular language for the order is required. See CCP §657. If the court fails to rule on the motion for a new trial within the applicable 60-day period, the motion is deemed denied. CCP §660.

In ruling on the motion after a court trial, the court may—in terms that are just—modify either the statement of decision or the judgment, and grant a new trial on all or some of the issues. CCP §662.

Instead of granting a new trial, the court has the power to vacate and set aside the statement of decision or judgment, and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after its submission and before the decision was filed or judgment rendered. CCP §662. Any judgment entered under §662 is then subject to motion for new trial under CCP §§657, 659. See *Gossman v Gossman* (1942) 52 CA2d 184, 198, 126 P2d 178. No statement of grounds or specification of reasons is required to support a judge's order under §662. See *LaBorne v Mulvany* (1974) 43 CA3d 905, 917, 119 CR 596.

When the court reporter's notes are missing, the trial court may recall a witness to aid the judge in reconstructing a settled statement. If the court is unable to obtain a stipulation or an agreed or settled statement, it must then order a new trial. *Weinstein v E.F. Hutton & Co.* (1990) 220 CA3d 364, 368, 269 CR 443.

A final order granting or denying a new trial exhausts the trial court's jurisdiction for all purposes except to correct clerical errors or provide relief under CCP §473. A trial court lacks jurisdiction to hear another new trial motion. See *Wenzoski v Central Banking Sys.* (1987) 43 C3d 539, 237 CR 167. A notice of appeal filed while the trial court retains jurisdiction under rules relating to motions for JNOV or new trial does not deprive the trial court of jurisdiction. *Foggy v Ralph F. Clark & Assocs.* (1987) 192 CA3d 1204, 238 CR 130.

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### §25.66 1. Statement of grounds

When the court grants a motion for new trial on all or some of the issues, the order must state the grounds on which the court relies. CCP §657. See *Treber v Superior Court* (1968) 68 C2d 128, 136, 65 CR 330. The court is prohibited from directing a party's attorney to prepare the order. CCP §657.

Grounds in the court's order should be stated as closely as possible to the statutory language of CCP §657(1)-(7). See *Mercer v Perez* (1968) 68 C2d 104, 111, 65 CR 315; *Aced v Hobbs-Sesack Plumbing Co.* (1961) 55 C2d 573, 12 CR 257.

**PRACTICE TIP:** If the trial judge inadequately states a ground for granting a new trial, try to cure any deficiencies before expiration of the 60-day period within which the court must rule on the motion. If the order does not state an important ground for the decision, immediately call that omission to the court's attention and try to obtain a clarification. However, the order may not be fatally defective if your notice of intention to move for new trial states grounds that may be supported on appeal. The trial court's failure to state *any* ground for granting a new trial does not render the order void, but it does render it defective, and the reviewing court can still affirm the order if it should have been granted on any ground listed in the notice of intention to move for new trial.

An exception exists for motions granted on grounds of insufficiency of the evidence, or excessive or inadequate damages. The reviewing court cannot affirm the order on either of these grounds unless the ground is stated in the order. *Sanchez-Corea v Bank of America* (1985) 38 C3d 892, 906, 215 CR 679.

The trial court has jurisdiction to order a new trial on issues not included in the motion for new trial if they are so interwoven with the issues on which a new trial would be granted that excluding them would be unfair to another party. *Pelletier v Eisenberg* (1986) 177 CA3d 558, 223 CR 84. Subject to CCP §657, the court may grant a motion for new trial on any ground set forth in the notice of intention to move for new trial even if the moving party does not urge that ground in supporting papers or oral argument. *Neal v Montgomery Elevator Co.* (1992) 7 CA4th 1194, 9 CR2d 497.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.67 2. Specification of reasons

### §25.67 2. Specification of reasons

When the court grants a motion for new trial on some or all of the issues, the court must specify the ground or grounds on which it is granted and the court's reason or reasons for granting the motion on each ground stated. CCP §657. The court's specification of reasons may be included in the order granting the motion or in a separate document filed within 10 days after the order is filed. CCP §657. See also *Fergus v Songer* (2007) 150 CA4th 552, 566, 59 CR3d 273 (minute order granting motion for new trial constitutes determination of motion within meaning of CCP §660 and begins 10-day period).

The 10-day requirement is a statute of limitations, and a specification filed after that time is null. *Ballou v Master Props. No. 6* (1987) 189 CA3d 65, 234 CR 264; *Swanson v Western Greyhound Lines, Inc.* (1969) 268 CA2d 758, 74 CR 383. The court has no power to amend its specification of reasons after the 10-day period has expired by nunc pro tunc order or otherwise. *Mercer v Perez* (1968) 68 C2d 104, 121, 65 CR 315.

Substantial compliance arguments have been accepted by the appellate courts, however, when the trial court made detailed written specifications in its ruling on an invalid oral motion for new trial and the parties agreed to accept them in the court's ruling on a subsequent written motion. *Herman v Shandor* (1970) 8 CA3d 476, 480, 87 CR 443. But see *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 698 n8, 106 CR 1 (reasons stated in denial of motion for JNOV referred to in part of order granting new trial held not adequate).

The court's specification of reasons must be written; reasons given orally are inadequate. *La Manna v Stewart* (1975) 13 C3d 413, 421, 118 CR 761; *Worden v Gentry* (1975) 50 CA3d 600, 123 CR 496. See *Steinhart v South Coast Area Transit* (1986) 183 CA3d 770, 228 CR 283 (reference to transcript inadequate). If the court grants a motion for new trial without a written specification of reasons, it is necessarily erroneous because "*full* and timely compliance" with CCP §657 is required. *Stewart v Truck Ins. Exch.* (1993) 17 CA4th 468, 484, 21 CR2d 338 (emphasis in original).

The court is prohibited from delegating its responsibility to prepare the specification of reasons to an attorney for a party. CCP §657. However, counsel should immediately call any defects to the court's attention in writing before the 10-day period has expired.

If a new trial motion is granted on the ground of insufficiency of the evidence or extensive or inadequate damages, the trial court's specification of reasons must briefly identify that portion of the record that convinced it that the jury (or the court itself in a bench trial) clearly should have reached a different result. CCP §657. See *Scala v Jerry Witt & Sons* (1970) 3 C3d 359, 367, 90 CR 592. The specification must refer to all issues in dispute. *Devine v Murrieta* (1975) 49 CA3d 855, 122 CR 847 (order failed to discuss proximate cause); *Previte v Lincolnwood* (1975) 48 CA3d 976, 987, 122 CR 194 (order failed to discuss fraud issues).

Although no hard and fast rule can be made on the proper content of the specification of reasons, ultimate facts standing alone are inadequate. Such statements as "the defendant was not negligent" (*Scala v Jerry Witt & Sons* (1970) 3 C3d 359, 368, 90 CR 592) and "inadequate damages were awarded to plaintiff" (*Krueger v Meyer* (1975) 48 CA3d 760, 121 CR 814) are unacceptable.

The specification of reasons must include more than a mere restatement of the grounds. *Scala v Jerry Witt & Sons* (1970) 3 C3d 359, 370, 90 CR 592.

**EXAMPLE:** If the court disbelieves a witness, based on the witness's demeanor or manner, it should so state, but it need not go into further detail. *Meiner v Ford Motor Co.* (1971) 17 CA3d 127, 140, 94 CR 702. Comments by the supreme court in *Mercer v Perez* (1968) 68 C2d 104, 115, 65 CR 315, illustrate adequate specifications: If the ground is "irregularity in the proceedings" caused by counsel's referring to insurance, the judge should state that the reason for the ruling was counsel's misconduct in making that reference; if the ground is "misconduct of the jury" through its resorting to chance, the judge should specify this improper method of deliberation as the reason; if the ground is that the decision is "against the law" because of failure to find on a material issue, the judge should so state and identify that issue. For more examples, see *Romero v Riggs* (1994) 24 CA4th 117, 29 CR2d 219. See also *Resort Video, Ltd. v Laser Video, Inc.* (1995) 35 CA4th 1679, 1695, 42 CR2d 136.

When grounds for granting a motion for new trial are insufficiency of the evidence or excessive or inadequate damages, the order is reversible if the specification of reasons is inadequate. CCP §657; *Silberg v California Life Ins. Co.* (1974) 11 C3d 452, 462, 113 CR 711; *Stevens v Parke, Davis & Co.* (1973) 9 C3d 51, 60, 107 CR 45; *Stewart v Truck Ins. Exch.* (1993) 17 CA4th 468, 21 CR2d 338. However, appellate courts will not reverse an order granting a new trial in these circumstances if the ruling can be affirmed on another ground. See *Sanchez-Corea v Bank of America* (1985) 38 C3d 892, 215 CR 679; *Marriage of Beilock* (1978) 81 CA3d 713, 728, 146 CR 675; *Estate of Sheldon* (1977) 75 CA3d 364, 370, 142 CR 119.

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## H. Review on appeal

### §25.68 1. Order granting motion

An order granting new trial is appealable. Appeal is premature when all causes of action are not determined. *Cobb v University of S. Cal.* (1996) 45 CA4th 1140, 53 CR2d 71. Appeal from an "unlimited civil case" (see CCP §88) is to the court of appeal. CCP §904.1(a)(4). Appeal from a "limited civil case" (see CCP §85) is to the appellate division of the superior court. CCP §904.2(e).

Appeal from an order granting a new trial in an unlimited case is governed by the usual time for filing notice of appeal (60 days after clerk's or party's service of notice of entry of judgment, or 180 days after date of entry itself). Cal Rules of Ct 8.104(a).

Under Cal Rules of Ct 8.800, 8.804(23), and 8.822(a), the time to appeal to the appellate division of the superior court from an order granting new trial in a limited civil case is the earliest of:

- 30 days after the clerk mails notice of entry of the order (CCP §664.5);
- 30 days after a party serves notice of entry of the order; or
- 90 days after entry of the order.

On when the order is deemed entered, see Cal Rules of Ct 8.822(b).

The standard of review on appeal is abuse of discretion. *People v Ault* (2004) 33 C4th 1250, 1271, 17 CR3d 302.

With certain exceptions (see below), a new trial order will be affirmed on appeal if it should have been granted on any ground stated in the notice of intention to move for new trial, whether or not the ground is included in the order or the court's specification of reasons. CCP §657; *Shaw v Pacific Greyhound Lines* (1958) 50 C2d 153, 323 P2d 391; *Marriage of Beilock* (1978) 81 CA3d 713, 146 CR 675.

**CAUTION:** The exceptions to this rule occur when grounds for a new trial motion are (1) insufficiency of the evidence or (2) excessive or inadequate damages. These two grounds *must* be stated in the court's order and supported by an adequate specification of reasons. CCP §657. See §25.67. However, if one of these grounds is the only ground stated in the notice of intention, an order granting the motion is proper without stating the ground. *La Manna v Stewart* (1975) 13 C3d 413, 118 CR 761.

When the order for a new trial cannot be affirmed due to an inadequate specification of reasons for the ground of insufficiency of the evidence or excessive or inadequate damages, the court of appeal will look to other grounds stated in the notice of intention in an effort to affirm the trial court's order. *Treber v Superior Court* (1968) 68 C2d 128, 132, 65 CR 330.

If no other grounds were stated (or, if stated, are not supported by the record), the new trial order must be reversed. *Mercer v Perez* (1968) 68 C2d 104, 119, 65 CR 315. See *Sanchez-Corea v Bank of America* (1985) 38 C3d 892, 906, 215 CR 679 (defendant did not meet its burden; order granting defendant's motion for new trial reversed).

If a new trial motion is granted on the ground of juror misconduct and there is conflicting evidence on this issue, the absence of a statement of reasons requires the appellate court to independently review the trial court's order. *Oakland Raiders v National Football League* (2007) 41 C4th 624, 640, 61 CR3d 634.

When the trial court fails to file an adequate specification of reasons, counsel should notify the court in writing with suggested amplification before the 10-day mandatory time period has run. See *La Manna v Stewart, supra*. If the court fails to cure the inadequacy after notice from counsel, the appropriate remedy is either:

- Writ of mandate when within the 10-day period; see *LaBorne v Mulvany* (1974) 43 CA3d 905, 916, 119 CR 596; or
- Appeal when the 10-day period from the filing of the order has run; see *Treber v Superior Court* (1968) 68 C2d 128, 135, 65 CR 330.

The party obtaining an order granting a new trial that is appealed should cross-appeal from the original judgment in

the event the order granting a new trial is reversed due to the trial court's failure to meet the adequate specification requirement. See Cal Rules of Ct 8.108(d); *La Manna v Stewart* (1975) 13 C3d 413, 425, 118 CR 761; *Smith v Circle Inn* (1977) 73 CA3d 86, 140 CR 566. On time for filing a cross-appeal in a limited civil case, see Cal Rules of Ct 8.823(f).

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### §25.69 2. Order denying motion

**Unlimited civil cases.** An order denying a motion for new trial is not appealable, although the order may be reviewed on appeal from the judgment. CCP §§906, 904.1; *State ex rel Dep't of Pub. Works v Donovan* (1962) 57 C2d 346, 351, 19 CR 473. The standard of review on appeal of a denial of a motion for new trial is independent review. *Whitlock v Foster Wheeler, LLC* (2008) 160 CA4th 149, 158, 72 CR3d 369.

When the trial court denies a motion for new trial in an unlimited civil case (see CCP §88), and notice of intention to move for a new trial was timely, notice of appeal from the original judgment must be filed within 30 days after either:

- Entry of the order denying the motion; or
- Denial by operation of law, or in no event later than 180 days after entry of judgment whether or not the court has ruled on the motion.

Cal Rules of Ct 8.108(b); see *Howard v Lufkin* (1988) 206 CA3d 297, 253 CR 422.

**Limited civil cases.** An order denying a motion for new trial is not appealable, but it may be reviewed on appeal from the judgment. See CCP §§906, 904.2.

When a motion for new trial is denied in a limited civil case (see CCP §85), and the notice of intention was valid, *i.e.,* met statutory requirements, notice of appeal from the original judgment must be filed within:

- 15 days after entry of the order denying the motion;
- 15 days after denial of the motion by operation of law; or
- 90 days after entry of judgment.

Cal Rules of Ct 8.823(b)(1). On time for filing a cross-appeal when a new trial order is granted in a limited civil case and it is appealed, see Cal Rules of Ct 8.823(f).

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### §25.70 3. Party prevailing on motion should file cross-appeal

When an order granting new trial is appealed, the unsuccessful party on the original judgment who prevailed on the motion for new trial should file a cross-appeal within 20 days after notice of the appeal as protection from a reversal of the order. Cal Rules of Ct 8.108(f). See *Mercer v Perez* (1968) 68 C2d 104, 124, 65 CR 315. In a limited civil case, the time for filing a cross-appeal is 10 days after the trial court clerk's notice of the first appeal. Cal Rules of Ct 8.823(f).

Otherwise, if an order granting a new trial is reversed, the original judgment is automatically reinstated. *Stevens v Parke, Davis & Co.* (1973) 9 C3d 51, 63, 107 CR 45. But see *Teitel v First Los Angeles Bank* (1991) 231 CA3d 1593, 282 CR 916 (JNOV reversed, judgment reinstated, remand to reconsider portion of motion for new trial). All parties to the appeal should designate the appropriate record.

**CAUTION:** It is extremely important to file timely notices of appeal from all adverse judgments when appropriate, and not to rely on an appeal from a motion granting a limited new trial. On notices of appeal and cross-appeals generally, see California Civil Appellate Practice, chap 7, §§8.21-8.36 (3d ed Cal CEB 1996).

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### §25.71 4. When moving party should appeal original judgment

If motion for new trial is denied, and the moving party's notice of intention is held to be invalid (*e.g.,* because of failure to meet statutory time requirements), the 30-day extension to appeal the original judgment may be inoperative, and the usual period to file a timely appeal will have already expired. See Cal Rules of Ct 8.104, 8.108(b), 8.822-8.823; *Ramirez v Moran* (1988) 201 CA3d 431, 247 CR 117. But see *Wenzoski v Central Banking Sys.* (1987) 43 C3d 539, 237 CR 167.

To protect against this contingency, a moving party who is in doubt about the validity of the notice of intention to move for new trial should consider appealing the original judgment within the required time period after the entry of judgment. See Cal Rules of Ct 8.104, 8.822; *Neff v Ernst* (1957) 48 C2d 628, 634, 311 P2d 849. See §25.38.

The trial court retains jurisdiction to hear and determine the motion for new trial if an appeal was taken from the judgment. *Neff v Ernst, supra*; *Foggy v Ralph F. Clark & Assocs.* (1987) 192 CA3d 1204, 238 CR 130. If motion for new trial is granted, the judgment is vacated and the appeal from the judgment becomes ineffective. *Neff v Ernst, supra*.

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## IV. MOTION TO VACATE AND ENTER DIFFERENT JUDGMENT

### A. Description and use; grounds

### §25.72 1. Appropriate when original judgment is contrary to facts found by court or jury

The statutory motion to set aside and vacate the judgment and enter another and different judgment enables the trial court to correct an original judgment that is improper because it is contrary to the facts found by the court or jury. CCP §663. The motion is available only when:

- The judgment is based on an erroneous decision in a bench trial inconsistent with or unsupported by the facts; or
- The judgment or decree is inconsistent or unsupported by a jury's special verdict.

CCP §663; *Simac Design, Inc. v Alciati* (1979) 92 CA3d 146, 153, 154 CR 676 (uncontroverted facts). See *County of Alameda v Carleson* (1971) 5 C3d 730, 738, 97 CR 385; *Shapiro v Prudential Prop. & Cas. Co.* (1997) 52 CA4th 722, 728, 60 CR2d 698.

The motion cannot be used to attack the legal basis for the court's decision. When the court's statement of decision or the jury's verdict is not supported by sufficient evidence, motions for JNOV and new trial are appropriate. See *Ramirez v Moran* (1988) 201 CA3d 431, 434, 247 CR 117 (motion that was based on excusable neglect of a party and newly discovered evidence was improperly designated as motion to vacate judgment; construed as motion for new trial). However, when a question of law can be applied to undisputed facts in the record, a party may raise new legal theories not relied on during trial to urge that the judgment be vacated because it was against the law or inconsistent with those facts. *Hoffman-Haag v Transamerica Ins. Co.* (1991) 1 CA4th 10, 15, 1 CR2d 805.

A motion to vacate and enter a different judgment is proper when the statement of decision or verdict is supported by the evidence but the court's judgment or decree is incorrect and needs to be changed. If a judgment has been modified under a motion for new trial (CCP §662) following a court trial, a motion to vacate the judgment and enter a different one under §663 may be appropriate. *Howard A. Deason & Co. v Costa Tierra, Ltd.* (1969) 2 CA3d 742, 758, 83 CR 105.

Setting aside a default or a void judgment under CCP §473, or under the court's inherent powers, is discussed in California Civil Procedure Before Trial, chap 38 (4th ed Cal CEB 2004). On motions for equitable relief from judgments entered through extrinsic fraud or mistake, see 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§215-242 (5th ed 2008). When a judgment is void, it is subject to collateral attack by means of a postjudgment motion to vacate or to set aside as void. *Residents for Adequate Water v Redwood Valley County Water Dist.* (1995) 34 CA4th 1801, 1805, 41 CR2d 123; *In re Marriage of Brockman* (1987) 194 CA3d 1035, 1040, 240 CR 96.

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### §25.73 2. Party's substantial rights must be materially affected

The motion is granted only when a party's substantial rights have been materially affected; it is not granted to correct minor errors. A motion to vacate is applicable only to a final judgment and not to an interlocutory order or judgment. See 9 Witkin, California Procedure, *Appeal* §§135-136, 138-139 (5th ed 2008).

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### §25.74 3. Moving party need not be original party to action

An aggrieved party moving to vacate judgment under CCP §663 need not be an original party to the action. But the party must be one whose interests or rights are injuriously affected by the judgment. *County of Alameda v Carleson* (1971) 5 C3d 730, 738, 97 CR 385; *People v Hy-Lond Enters.* (1979) 93 CA3d 734, 750, 155 CR 880; *Simac Design, Inc. v Alciati* (1979) 92 CA3d 146, 153, 154 CR 676.

To intervene in a lawsuit, an aggrieved party may use a motion to vacate a judgment or a motion for new trial, but only if that party has an "immediate, pecuniary, and substantial interest" in the judgment. *Lippman v City of Los Angeles* (1991) 234 CA3d 1630, 1634, 286 CR 406. The possibility that a party will be bound by the judgment does not satisfy this standard. A party must be immediately bound by the judgment at the time the party moves to intervene. See *Tomassi v Scarff* (2000) 85 CA4th 1053, 102 CR2d 750.

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## B. Procedures

### §25.75 1. Noticed motion required

The procedures for moving to vacate and enter a different judgment are set forth in CCP §663a. A party intending to make the motion must file a notice of motion with the clerk and serve the notice on the opposing party.

Counsel must designate grounds for the motion and specify the particulars in which the court's decision or judgment are inconsistent with the facts of the case or verdict. CCP §663a. A supporting memorandum must be filed and served with the notice of motion. Cal Rules of Ct 3.1113(a).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.76 2. Timing

### §25.76 2. Timing

Under CCP §663a, a notice of motion to vacate and enter a different judgment must be filed and served either:

- Before entry of judgment; or
- Within 15 days of the date the court clerk mailed notice of entry of judgment under CCP §664.5, within 15 days of a party's service of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest.

**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 and not a court day.

Code of Civil Procedure §1013, extending the time to exercise a right when service is by mail, does not apply to a motion to vacate and enter a different judgment. CCP §663a.

A motion to vacate brought more than 6 months after the judgment is a collateral and not a direct attack on the judgment. If the court that entered the original judgment still has jurisdiction, its ruling is final and conclusive, even if wrong and contrary to statute. *Adoption of Matthew B.* (1991) 232 CA3d 1239, 1268, 284 CR 18.

A party who filed an untimely motion to vacate a judgment under CCP §663 cannot obtain relief under CCP §473 because CCP §473 does not apply to a party's failure to take a jurisdictional step, such as filing a timely motion for new trial. *Advanced Bldg. Maintenance v State Com. Ins. Fund* (1996) 49 CA4th 1388, 1393, 57 CR2d 310.

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### §25.77 C. Trial judge's ruling; appeal

A motion to vacate must be heard and determined by the judge who presided at the trial unless that judge has died, is unable to hear it, or is absent from the county at the time noticed for hearing. Cal Rules of Ct 3.1602.

Following a change of venue, the court of coordinate jurisdiction has the same power as the original court to vacate the orders of the court of original venue. *Greene v Superior Court* (1961) 55 C2d 403, 405, 10 CR 817.

**NOTE:** There is no time limit within which to hear and rule on the motion. See CCP §§663-663a. However, the trial court's power to enforce, modify, or vacate a judgment is suspended when a notice of appeal is filed. *Elsea v Saberi* (1992) 4 CA4th 625, 629, 5 CR2d 742.

The order granting a motion to vacate and enter a different judgment may be reviewed on appeal in the same manner as a special order made after final judgment; an order denying the motion is also directly appealable. CCP §§663a, 904.1(a)(2); *Howard v Lufkin* (1988) 206 CA3d 297, 303, 253 CR 422. But see contrary dicta in *Clemmer v Hartford Ins. Co.* (1978) 22 C3d 865, 151 CR 285 (reference to such order as "being nonappealable"). See also discussion of *Clemmer* in *Howard v Lufkin, supra,* and in *Forman v Knapp Press* (1985) 173 CA3d 200, 218 CR 815.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/ V. MOTION TO CORRECT CLERICAL ERROR/ A. Description and use; grounds/§25.78 1. Motion appropriate to conform record to actual judgment or order

## V. MOTION TO CORRECT CLERICAL ERROR

### A. Description and use; grounds

### §25.78 1. Motion appropriate to conform record to actual judgment or order

Every court has both statutory and inherent power to correct clerical errors in its records to conform to a judgment or an order that was actually made. CCP §473; *In re McGee* (1951) 37 C2d 6, 8, 229 P2d 780 (appellate court); *Bastajian v Brown* (1941) 19 C2d 209, 214, 120 P2d 9 (trial court).

A motion to correct clerical error is appropriate if a form of judgment fails to coincide with the substance intended at the time of rendering the judgment. *Estate of Eckstrom* (1960) 54 C2d 540, 545, 7 CR 124.

**NOTE:** The clerical error need not appear on the face of the record. *Culligan v Leider* (1944) 65 CA2d 51, 57, 149 P2d 894. If it does not, however, counsel should consider whether additional evidence is needed, *e.g.,* a declaration of the clerk or the court itself to show that the error was clerical. See *In re Roberts* (1962) 200 CA2d 95, 97, 19 CR 147.

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### §25.79 2. Motion may not be granted to remedy judicial error

The court may annul judgments or vacate orders that were inadvertently made as long as they were not a result of the judicial error. See *Estate of Doane* (1964) 62 C2d 68, 71, 41 CR 165; *Conservatorship of Tobias* (1989) 208 CA3d 1031, 1034, 256 CR 525. The court cannot correct a judicial error or enter a judgment or an order that was never made. *Siegal v Superior Court* (1968) 68 C2d 97, 101, 65 CR 311.

Judicial error is present when the court misconstrues the evidence, misapplies the law applicable to the facts disclosed by the evidence, or was misled by counsel. *Lankton v Superior Court* (1936) 5 C2d 694, 695, 55 P2d 1170. Judicial errors must be rectified by attack on the judgment. *Phillips v Trusheim* (1945) 25 C2d 913, 156 P2d 25 (order granting motion to vacate judgment was reversed).

The distinction between clerical and judicial error turns on whether the error was inadvertently made in recording the judgment or was made in rendering the judgment itself. *In re Candelario* (1970) 3 C3d 702, 705, 91 CR 497; *Ukegawa Bros. v ALRB* (1989) 212 CA3d 1314, 1318, 261 CR 420; *Conservatorship of Tobias, supra*.

**EXAMPLE:** A motion to correct clerical error can be made when (1) an order is entered by a clerk that was not intended by the court, (2) the court failed to express its actual intention in the order actually made, (3) an irregularity occurred that made the order or judgment premature, or (4) the court was ignorant of some fact that was material to its action. See cases cited in *Stevens v Superior Court* (1936) 7 C2d 110, 113, 59 P2d 988.

The court cannot correct judicial error by entering a judgment or an order that was never rendered by the judge. *Siegal v Superior Court, supra*.

For further discussion on correcting and modifying judgments, see §§23.29-23.31. For forms of motion and order, see §§25.99-25.100.

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### B. Procedures

### §25.80 1. Timing: Clerical error may be corrected at any time

A motion to correct a clerical error may be made at any time. *Carpenter v Pacific Mut. Life Ins. Co.* (1939) 14 C2d 704, 707, 96 P2d 796. The motion may be made even after the judgment or order has been appealed. *Culligan v Leider* (1944) 65 CA2d 51, 56, 149 P2d 894 (trial court ordered that record be corrected while appeal was pending in appellate court).

Clerical error in an order concerning a motion for new trial may not be corrected, however, after the 60-day jurisdictional time period within which to rule on a motion for new trial has elapsed. *Siegal v Superior Court* (1968) 68 C2d 97, 101, 65 CR 311. On motion for new trial, see §§25.22-25.71.

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### §25.81 2. Notice

Clerical error may be corrected by the court without notice on its own motion, by a party on properly noticed and supported motion, or by a party by extraordinary writ. *Carpenter v Pacific Mut. Life Ins. Co.* (1939) 14 C2d 704, 707, 96 P2d 796.

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### §25.82 3. Nunc pro tunc orders

A judgment or an order containing a clerical error may be corrected nunc pro tunc. See *Carpenter v Pacific Mut. Life Ins. Co.* (1939) 14 C2d 704, 707, 96 P2d 796. The purpose of a nunc pro tunc order is to correct the judgment or order to reflect the judgment or order actually made. *Estate of Eckstrom* (1960) 54 C2d 540, 544, 7 CR 124.

**EXAMPLE:** In *Ukegawa Bros. v ALRB* (1989) 212 CA3d 1314, 261 CR 420, an administrative board's order misidentifying the subject of the order as a corporation rather than as a general partnership was corrected nunc pro tunc. The court held that the error was clerical, not judicial, and because the trial evidence demonstrated that the corporation was the alter ego of the general partnership, the board retained the power to correctly name the party at any time. For further discussion on correcting judgments nunc pro tunc, see §23.30.

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### §25.83 C. Trial judge's ruling; appeal

The court has full power to determine the character of the error. Without a clear showing to the contrary, its conclusion is final. In considering whether the error is clerical or judicial, the court must determine whether the judgment or order expresses its original decision. *Estate of Doane* (1964) 62 C2d 68, 71, 41 CR 165; *Carpenter v Pacific Mut. Life Ins. Co.* (1939) 14 C2d 704, 708, 96 P2d 796. In this function, the court has the right to rely on its own memory, bench notes, memorandum decisions, and minute orders. *Bastajian v Brown* (1941) 19 C2d 209, 215, 120 P2d 9 (findings of fact contrary to minute order). See *Carpenter v Pacific Mut. Life Ins. Co.* (1939) 14 C2d 704, 709, 96 P2d 796.

If there is contrary evidence, however, the court's correction of an alleged error setting forth the history of its thoughts and entries in bench notes may not be conclusive on appeal. *Stevens v Superior Court* (1936) 7 C2d 110, 113, 59 P2d 988 (court's recitals disregarded); *Estate of Sloan* (1963) 222 CA2d 283, 293, 35 CR 167 (judicial, not clerical, error); *Estate of Harris* (1962) 200 CA2d 578, 590, 19 CR 510 (insufficient statement by court).

The question on appeal is, essentially, what order in fact did the court originally intend to make? *Estate of Careaga* (1964) 61 C2d 471, 474, 39 CR 215.

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## VI. SPECIAL POSTJUDGMENT MOTIONS

### A. Postjudgment procedures involving public entities

### §25.84 1. Settlement conference may be held after judgment

In certain actions against public entities, Govt C §962 provides for a postjudgment settlement conference, which must be held on request of a defendant public entity. That request must be made within the time to request a new trial. See §25.52.

The conference must not occur until *after* determinations of motions for new trial, JNOV, remittitur, and additur, but it must occur *before* a hearing on any motions under Govt C §§984 and 985 (see §25.85). Govt C §962.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.85 2. Posttrial order may regulate payment of awards

## §25.85 2. Posttrial order may regulate payment of awards

Government Code §§984 and 985 provide for a posttrial order allowing periodic payments of large money awards and offset of collateral-source payments. Under Cal Rules of Ct 8.104(c)—applicable only to actions in which Govt C §984 applies—a defendant public entity's election to make periodic payments must be made within 60 days after entry of judgment or 30 days after notice of entry of judgment, whichever is earlier.

If a hearing is required, it must be calendared within 30 days after the election was made. Timely filing of an election extends time for filing notice of appeal to 180 days after entry of judgment or 90 days after notice of entry of judgment, whichever is earlier, subject to extensions under Cal Rules of Ct 8.108 (motions for new trial, vacation of judgment, or JNOV).

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## B. Posttrial motions in medical malpractice actions

### §25.86 1. Medical malpractice damages subject to periodic payments

Under the Medical Injury Compensation Reform Act (MICRA), judgments for medical malpractice damages are subject to periodic payments of that portion of the judgment attributable to future damages. See CCP §667.7; *Salgado v County of Los Angeles* (1998) 19 C4th 629, 80 CR2d 46; *Gorman v Leftwich* (1990) 218 CA3d 141, 152, 266 CR 671 (periodic payment provision properly raised by postverdict motion; no surprise because matter was raised in defendant's answer to complaint and in request for jury instructions); *Hrimnak v Watkins* (1995) 38 CA4th 964, 982, 45 CR2d 514 (directions to trial court on procedure).

The defendant should request a stay of entry of judgment immediately after an adverse verdict is rendered. See *Craven v Crout* (1985) 163 CA3d 779, 784, 209 CR 649. If a stay is denied, a motion to vacate judgment is appropriate under CCP §663. A plaintiff's attorney may also wish to request a stay of entry of judgment until the amount and method of payment of attorney fees have been determined. See *Nguyen v Los Angeles County Harbor/UCLA Med. Ctr.* (1995) 40 CA4th 1433, 48 CR2d 301.

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### §25.87 2. Postverdict motion may reduce damages

A postverdict motion may be used to reduce damages to the ceiling figure for noneconomic damages under MICRA. See CC §3333.2; *Salgado v County of Los Angeles* (1998) 19 C4th 629, 80 CR2d 46. When a plaintiff has been found comparatively at fault in a malpractice action, an award of noneconomic damages is reduced first by the percentage of plaintiff's fault, and then capped by MICRA. *McAdory v Rogers* (1989) 215 CA3d 1273, 264 CR 71; see also *Atkins v Strayhorn* (1990) 223 CA3d 1380, 1391, 273 CR 231 (CC §3333.2 applied after plaintiff's award reduced by comparative negligence).

In *Gilman v Beverly Cal. Corp.* (1991) 231 CA3d 121, 126, 283 CR 17, the court analyzed the interplay between MICRA and Proposition 51 (CC §§1431.1-1431.5), which imposed several (rather than joint) liability on multiple tortfeasors, making a defendant liable for noneconomic damages according to its share of fault. The *Gilman* court held that when apportionment of defendant liability is at issue (unlike in *McAdory* and *Atkins*, which concerned plaintiffs' comparative negligence), the trial court must apply the MICRA cap of CC §3333.2 first to the noneconomic damage award and then determine the prorata liability of each defendant. 231 CA3d at 128. *Gilman*'s method for applying the MICRA cap was followed in *Mayes v Bryan* (2006) 139 CA4th 1075, 1100, 44 CR3d 14 (in wrongful death action in which all but two healthcare defendants settled before jury deliberations, court reduced noneconomic damages verdict of $3 million to $250,000 MICRA cap, and then apportioned amount owing by nonsettling defendants according to their share of liability under Proposition 51).

Whether the plaintiff is entitled to postjudgment interest on periodic payments for future economic or noneconomic loss depends on the facts of the case. See *Schiernbeck v Haight* (1992) 7 CA4th 869, 874, 9 CR2d 716 (no entitlement to interest).

Aside from MICRA considerations, a defendant may forfeit claims that damages awarded at trial must be reduced post-verdict. See *Greer v Buzgheia* (2006) 141 CA4th 1150, 46 CR3d 780 (defendant failed to request verdict form containing separate entry for plaintiff's past medical expenses).

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### §25.88 C. Writ of error coram vobis

Writ of error coram vobis may be available to order another court to correct factual errors, but only if no other remedy is available. *Betz v Pankow* (1993) 16 CA4th 931, 941, 20 CR2d 841 (writ denied, remittitur afforded appropriate remedy); *Monsan Homes, Inc. v Pogrebneak* (1989) 210 CA3d 826, 831, 258 CR 676 (writ denied because party had power to correct record under CCP §1008 motion for reconsideration). See 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §4 (5th ed 2008).

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### §25.89 D. Writ of error coram nobis

The seldom used writ of error coram nobis is directed to the trial court to remedy an error of fact, as opposed to an error of law. Compare *Rollins v City & County of San Francisco* (1974) 37 CA3d 145, 112 CR 168 (writ upheld), with *Monsan Homes, Inc. v Pogrebneak* (1989) 210 CA3d 826, 831, 258 CR 676 (writ denied), and *Philippine Export & Foreign Loan Guar. Corp. v Chuidian* (1990) 218 CA3d 1058, 1090, 267 CR 457 (writ denied). See also *Los Angeles Airways, Inc. v Hughes Tool Co.* (1979) 95 CA3d 1, 156 CR 805 (writ denied), which questioned the holding and reasoning of *Rollins v City & County of San Francisco, supra*.

Writ of error coram nobis lies to correct error committed by the same court that is hearing the writ. For discussion, see California Civil Writ Practice §15.44 (4th ed Cal CEB 2008); 3 Witkin, California Procedure, *Actions* §75 (5th ed 2008).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/ VII. FORMS/ A. Motion for JNOV/§25.90 1. Form: Notice of Motion for JNOV (CCP §629)

## VII. FORMS

### A. Motion for JNOV

### §25.90 1. Form: Notice of Motion for JNOV (CCP §629)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF MOTION AND** |
| **vs** | ) | **MOTION FOR JUDGMENT** |
| _ _[*Name(s)*]_ _ | ) | **NOTWITHSTANDING THE** |
| **Defendant(s)** | ) | **VERDICT (CCP §629);** |
| _____ | ) | **SUPPORTING MEMORANDUM** |
| | | **Hearing:** _ _[*date; time*]_ _ |
| | | **Dep't:** _ _[*number*]_ _ |
| | | **Hearing judge:** _ _[*if known*]_ _ |
| | | **Action filed:** _ _[*date*]_ _ |
| | | **Trial date:** _ _ _ |

**To each party and attorney of record:**

**PLEASE TAKE NOTICE that on _ _[*date*]_ _, at _ _[*time*]_ _, or as soon thereafter as the matter can be heard, in Department _ _[*number*]_ _ of this court, located at _ _[*address*]_ _, _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, will move the court for judgment in _ _[*plaintiff/defendant*]_ _'s favor, notwithstanding the verdict rendered by the jury on _ _[*date*]_ _.**

**This motion is made on the grounds that the evidence is not sufficient to support the jury's verdict, the verdict is erroneous as a matter of law, and, if a motion for directed verdict had been made during trial, it should have been granted.**

**This motion is based on this notice; all pleadings, papers, and records in this action; evidence presented at trial; and the attached supporting memorandum.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* This motion is often made in conjunction with the motion for new trial. See §25.10. If the motion is made by the court, it is good practice for counsel to file memorandum supporting their respective positions. A declaration is often unnecessary when the motion is based on matters in the trial record and the judge's own knowledge, rather than on extraneous facts brought in by declaration.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.91 2. Form: Order Granting or Denying JNOV (CCP §629)

## §25.91 2. Form: Order Granting or Denying JNOV (CCP §629)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No.** _ _ _ _ _ _ |
| **Plaintiff(s)** | ) | **ORDER** |
| **vs** | ) | _ _[*GRANTING/DENYING*]_ _ |
| _ _[*Name(s)*]_ _ | ) | **JUDGMENT** |
| **Defendant(s)** | ) | **NOTWITHSTANDING THE** |
| _____ | ) | **VERDICT (CCP §629)** |
| | | **Hearing:** _ _[*date; time*]_ _ |
| | | **Dep't:** _ _[*number*]_ _ |
| | | **Hearing judge:** _ _[*if known*]_ _ |
| | | **Action filed:** _ _[*date*]_ _ |
| | | **Trial date:** _ _ _ |

**The motion of** _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _**, for judgment notwithstanding the verdict came on regularly for hearing on** _ _[*date*]_ _**. Appearing as attorneys for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**. Good cause appearing,**

**IT IS ORDERED that**

[*Either*]

**judgment be entered in favor of** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, notwithstanding the jury's verdict entered on** _ _[*date*]_ _**, as follows:** _ _[*State language of judgment*]_ _**.**

[*or*]

**the motion is denied.**

[*Continue*]

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

*Copies:* Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* As with other motions, it is good practice to submit a proposed order to the court with the motion for JNOV. See §25.12.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/ B. Motion for new trial/§25.92 1. Form: Notice of intention to move for new trial (jury trial) (CCP §§657-661)

**B. Motion for new trial**

**§25.92 1. Form: Notice of intention to move for new trial (jury trial) (CCP §§657-661)**

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF INTENTION TO** |
| **vs** | ) | **MOVE FOR NEW TRIAL (CCP** |
| _ _[*Name(s)*]_ _ | ) | **§§657-661)** |
| **Defendant(s)** | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | | **Hearing judge:** _ _[*if known*]_ _ |
| | | **Action filed:** _ _[*date*]_ _ |
| | | **Trial date:** _ _ _ |

**To each party and attorney of record:**

**PLEASE TAKE NOTICE that in Department _ _[*number*]_ _, at a time that shall be set by the court under Code of Civil Procedure section 661 so that the motion will be heard and determined on or before _ _[*last date ruling can be made before court loses jurisdiction; see §25.53*]_ _, _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _, will move the court to set aside the jury's verdict rendered on _ _[*date*]_ _,**

[*Add if appropriate*]

**to vacate the judgment entered on _ _[*date*]_ _, in _ _[*plaintiff/defendant*]_ _'s favor,**

[*Continue*]

**and to grant _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _ a new trial on the following issues: _ _[*List issues to be relitigated*]_ _.**

**This motion is made on the following grounds, each of which materially affected the substantial rights of _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _, who was thereby prevented from receiving a fair trial:**

**1. Irregularity in the proceedings of the court;**

**2. Irregularity in the proceedings of the jury;**

**3. Irregularity on the part of the _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _;**

**4. Improper orders of the court;**

**5. Abuse of discretion by the court;**

**6. Misconduct of the jury;**

**7. Accident or surprise, or other acts that ordinary prudence could not have guarded against;**

**8. Newly discovered evidence, material to the moving party, that could not have been discovered with reasonable diligence and produced at trial;**

**9. _ _**[*Excessive/Inadequate*]**_ _ damages;**

**10. Insufficiency of the evidence to justify the verdict;**

**11. The verdict is against law;**

**12. Error in law occurring at the trial and excepted to by the moving party;**

**13. Inability to obtain the trial transcript because of _ _**[*state reason, e.g., destruction by fire of the court reporter's notes*]**_ _.**

**The _ _**[*e.g., 1st, 2d, 3d, 4th, 5th, 6th, and 7th grounds specified above*]**_ _ will be supported by the minutes of the court and by declarations to be served and filed hereafter. All other grounds are based on the minutes of the court.**

**The motion is also based on this notice; all pleadings, papers, and records in this action; the evidence presented at trial; and the attached supporting memorandum.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for _ _**[*name*]**_ _**

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* State all grounds that might apply because, if not stated in the notice, they may not be asserted at the hearing. See §25.58. Code of Civil Procedure §1013, extending time when service is by mail, is inapplicable. CCP §659. Any declarations or affidavits should be served on all other parties and filed with the court within 10 days after serving the notice of motion. CCP §659a. See §25.60. Counsel who does not attach a supporting memorandum to the notice must do so within 10 days after filing the notice; otherwise, the motion may be denied without a hearing on the merits. Cal Rules of Ct 3.1600(b).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.93 2. Form: Notice of intention to move for new trial (bench trial) (CCP §§657-662)

## §25.93 2. Form: Notice of intention to move for new trial (bench trial) (CCP §§657-662)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF INTENTION TO** |
| **vs** | ) | **MOVE FOR NEW TRIAL (CCP** |
| _ _[*Name(s)*]_ _ | ) | **§§657-662)** |
| **Defendant(s)** | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | | **Hearing judge:** _ _[*if known*]_ _ |
| | | **Action filed:** _ _[*date*]_ _ |
| | | **Trial date: _ _ _** |

**To each party and attorney of record:**

**PLEASE TAKE NOTICE that in Department _ _[*number*]_ _, at a time that shall be set by the court under Code of Civil Procedure sections 661 and 662 so that the motion will be heard and determined on or before _ _[*last date ruling can be made before court loses jurisdiction; see §25.53*]_ _, _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _ will move the court to set aside the judgment entered in _ _[*plaintiff's/defendant's*]_ _ favor and to grant _ _[*plaintiff/defendant*]_ _ a new trial on all issues.**

**As an alternative, _ _[*plaintiff/defendant*]_ _ will move the court to modify and change its statement of decision, to vacate the judgment, and to enter a new judgment in favor of _ _[*plaintiff/defendant*]_ _ and against _ _[*plaintiff/defendant*]_ _.**

**As another alternative, _ _[*plaintiff/defendant*]_ _ will move to set aside the statement of decision and judgment and reopen the case for further proceedings, including introduction of additional evidence with the same effect as if the case had been reopened after submission and before a decision had been filed or judgment rendered.**

**This motion is made on the following grounds, each of which materially affected the substantial rights of _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _, who was thereby prevented from receiving a fair trial:**

**1. Irregularity in the proceedings of the court;**

**2. Irregularity by the _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _.**

**3. Improper orders of the court;**

**4. Abuse of discretion by the court;**

**5. Accident or surprise, or other acts that ordinary prudence could not have guarded against;**

**6. Newly discovered evidence, material to the moving party, that could not have been discovered with reasonable diligence and produced at trial;**

**7. _ _**[*Excessive/Inadequate*]**_ _ damages;**

**8. Insufficiency of the evidence to justify the decision;**

**9. The decision is against law;**

**10. Error in law occurring at the trial and excepted to by the moving party;**

**11. Inability to obtain the trial transcript because of _ _**[*state reason, e.g., destruction by fire of the court reporter's notes*]**_ _.**

**The _ _**[*e.g., 1st, 2d, 3d, 4th, 5th, and 6th grounds specified above*]**_ _ will be supported by the minutes of the court and by declarations to be served and filed hereafter. All other grounds are based on the minutes of the court.**

**The motion is also based on this notice; all pleadings, papers, and records in this action; _ _**[*plaintiff/defendant*]**_ _ _ _**[*name*]**_ _'s specification of controverted issues, proposal of content of statement of decision, request for statement of decision, proposed statement of decision; the evidence presented at trial; and the attached supporting memorandum.**

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

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for _ _**[*name*]**_ _**

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* Counsel should attached the documents indicated in the final paragraph of this motion. For discussion, see §§24.34-24.50.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.94 3. Form: Order granting motion for new trial

## §25.94 3. Form: Order granting motion for new trial

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ORDER GRANTING MOTION** |
| **vs** | ) | **FOR NEW TRIAL** |
| _ _[*Name(s)*]_ _ | ) | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| _____ | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | | **Action filed:** _ _[*date*]_ _ |
| | | **Trial date:** _ _ _ |

**The motion of** _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _ **came on regularly for hearing on** _ _[*date*]_ _**. Appearing for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**. Good cause appearing,**

**IT IS ORDERED that the** _ _[*verdict/decision*]_ _ **rendered in this action on** _ _[*date*]_ _**,**

[*Add if appropriate*]

**and the judgment entered on** _ _[*date*]_ _**,**

[*Continue*]

**be vacated and set aside, and that** _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _ **be granted a new trial on**

[*Either*]

**all issues.**

[*or*]

**the following issue(s):** _ _[*State issue(s) to be relitigated*]_ _**.**

[*Continue*]

**This motion is granted on the following ground(s):** _ _[*List each ground supporting the granting of the motion with a specification of reasons the motion was granted on each ground*]_ _**.**

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

*Copies:* Original (prepared and signed by judge to be filed in court file); copies for service (one for each attorney of record and unrepresented party).

*Comment:* The court may not direct an attorney for a party to prepare either the order containing a statement of grounds or the specification of reasons. See §§25.66-25.67. However, counsel should promptly call any defects in the order to the court's attention in writing. If the specification of reasons is not included in the order, the court must file it within 10 days after the order is filed. CCP §657. For the record on appeal, the language stating each ground

supporting the granting of the motion should be as close as possible to the statutory language of CCP §§657(1)-(7), 914.

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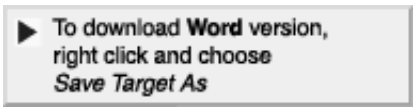
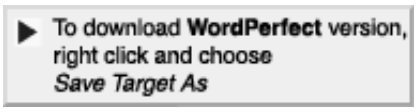
**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.95 4. Form: Order denying motion for new trial

## §25.95 4. Form: Order denying motion for new trial




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ORDER DENYING MOTION** |
| **vs** | ) | **FOR NEW TRIAL** |
| _ _[*Name(s)*]_ _ | ) | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| _____ | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | | **Action filed:** _ _[*date*]_ _ |
| | | **Trial date:** _ _ _ |

**The motion of _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _ came on regularly for hearing on _ _[*date*]_ _. Appearing as attorneys for the parties were _ _[*list attorneys and indicate parties represented*]_ _. After presentation of declarations, evidence, and other arguments of counsel, it appears to the court that the motion for new trial should be denied.**

**IT IS ORDERED that _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _'s motion for new trial is denied.**

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

*Copies:* Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* If the motion is denied, no particular requirements on either the grounds or a specification of reasons for the order are in force. See CCP §657. Any party may appeal from the original judgment after the entry of the order denying the motion or denial by operation of law when a valid notice of intention has met statutory requirements. See Cal Rules of Ct 8.108(b), 8.823(b); §25.69.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/ C. Motion to vacate judgment and enter different judgment/§25.96 1. Form: Notice of motion to vacate judgment and enter different judgment (CCP §663)

### C. Motion to vacate judgment and enter different judgment

### §25.96 1. Form: Notice of motion to vacate judgment and enter different judgment (CCP §663)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | |
|---|---|
| _ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)** | **No. _ _ _ _ _ _** **NOTICE OF MOTION AND MOTION TO VACATE JUDGMENT AND ENTER DIFFERENT JUDGMENT (CCP §663); SUPPORTING MEMORANDUM; DECLARATION OF** _ _[*name*]_ _ **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _ |

**To each party and attorney of record:**

**PLEASE TAKE NOTICE that on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _ _ _ _ _ **of the above-titled court, located at** _ _[*address*]_ _**,** _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _ **will move the court for an order setting aside and vacating its judgment entered in this case on** _ _[*date of entry of judgment*]_ _ **and entering another, different judgment.**

[*Either*]

**This motion is made on the ground that** _ _[*e.g., the legal basis for the decision is not consistent with or supported by the facts/the judgment is not consistent with the special verdict*]_ _**, because** _ _[*specify particulars*]_ _**.**

[*or*]

**This motion is based on this notice; all pleadings, papers, and records in this action; the evidence presented at trial; the attached supporting memorandum and the declaration of** _ _[*name*]_ _**;** _ _[*and on such evidence as may be presented at the hearing*]_ _**.**

[*Continue*]

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

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* The notice of motion should specify the particulars in which the decision or judgment is inconsistent with the facts or special verdict. A supporting memorandum should be attached. Cal Rules of Ct 3.1113(a). See §§25.72-25.77.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.97 2. Form: Order granting motion to vacate judgment and enter different judgment (jury's special verdict) (CCP §663)

## §25.97 2. Form: Order granting motion to vacate judgment and enter different judgment (jury's special verdict) (CCP §663)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ORDER GRANTING MOTION** |
| **vs** | ) | **TO VACATE JUDGMENT AND** |
| _ _[*Name(s)*]_ _ | ) | **ENTER DIFFERENT** |
| **Defendant(s)** | ) | **JUDGMENT (CCP §663)** |
| _____ | ) | **Hearing:** _ _[*date; time*]_ _ |
| | | **Dep't:** _ _[*number*]_ _ |
| | | **Hearing judge:** _ _[*if known*]_ _ |
| | | **Action filed:** _ _[*date*]_ _ |
| | | **Trial date:** _ _ _ |

**The motion of** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, to vacate judgment and enter different judgment came on regularly for hearing on** _ _[*date*]_ _**. Appearing as attorneys for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**. Good cause appearing,**

**IT IS ORDERED that judgment rendered on** _ _[*date*]_ _**, be vacated and that judgment consistent with and supported by the jury's special verdict be entered as follows:** _ _[*State language of new judgment*]_ _**.**

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

*Copies:* Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* This form is appropriate when the original judgment was inconsistent with or unsupported by the jury's special verdict. See §25.72.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.98 3. Form: Order granting motion to vacate judgment and enter different judgment (court's statement of decision) (CCP §663)

## §25.98 3. Form: Order granting motion to vacate judgment and enter different judgment (court's statement of decision) (CCP §663)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _ | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ORDER GRANTING MOTION** |
| **vs** | ) | **TO VACATE JUDGMENT AND** |
| _ _[*Name(s)*]_ _ | ) | **ENTER DIFFERENT** |
| **Defendant(s)** | ) | **JUDGMENT (CCP §663)** |
| _____ | ) | **Hearing:** _ _[*date; time*]_ _ |
| | | **Dep't:** _ _[*number*]_ _ |
| | | **Hearing judge:** _ _[*if known*]_ _ |
| | | **Action filed:** _ _[*date*]_ _ |
| | | **Trial date:** _ _ _ |

**The motion of** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, to vacate judgment and enter different judgment came on regularly for hearing on** _ _[*date*]_ _**. Appearing as attorneys for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**. Good cause appearing,**

**IT IS ORDERED that judgment rendered on** _ _[*date*]_ _**, be vacated, and that different judgment be entered as follows:** _ _[*State language of new judgment*]_ _**.**

**IT IS FURTHER ORDERED that the statement of decision be amended to conform to the facts as follows:** _ _[*State corrections in the statement of decision*]_ _**.**

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

*Copies:* Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* This form is appropriate when the original judgment is incorrect because the legal basis for the decision is not consistent with or supported by the facts in a court trial. See §25.72.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/ D. Motion to correct clerical error/§25.99 1. Form: Notice of motion to correct clerical error (CCP §473)

## D. Motion to correct clerical error

### §25.99 1. Form: Notice of motion to correct clerical error (CCP §473)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | |
|---|---|
| _ _[*Name(s)*]_ _ **Plaintiff(s)** | **No.** _ _ _ _ _ _ |
| **vs** | **NOTICE OF MOTION AND MOTION TO CORRECT CLERICAL ERROR (CCP §473); SUPPORTING MEMORANDUM; DECLARATION OF** _ _[*name*]_ _ |
| _ _[*Name(s)*]_ _ **Defendant(s)** | **Hearing:** _ _[*date; time*]_ _ |
| _____ | **Dep't:** _ _[*number*]_ _ |
| | **Hearing judge:** _ _[*if known*]_ _ |
| | **Action filed:** _ _[*date*]_ _ |
| | **Trial date:** _ _ |

**To each party and attorney of record:**

**PLEASE TAKE NOTICE that on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _ _ _ _ _ **of the above-titled court, located at** _ _[*address*]_ _, _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _ **will move the court for an order correcting** _ _[*nunc pro tunc*]_ _ **the** _ _[*judgment entered/order made*]_ _ **on** _ _[*date*]_ _**, in favor of** _ _[*name of plaintiff or defendant*]_ _**, and against** _ _[*name of moving party*]_ _**, by (1) deleting the following:** _ _[*State language to be eliminated*]_ _**; and (2) inserting in its place the following:** _ _[*State proposed correction(s)*]_ _**. This motion is made on the grounds that the** _ _[*judgment entered/order made*]_ _ **contains clerical error in that** _ _[*specify error(s)*]_ _**, and that the proposed correction(s)** _ _[*is/are*]_ _ **necessary to conform the** _ _[*judgment/order*]_ _ **to the actual** _ _[*judgment/order*]_ _ **intended and made by the court.**

**This motion is based on this notice; all pleadings, papers, and records in this action; the evidence presented at trial; the attached supporting memorandum and declaration of** _ _[*name*]_ _**;** _ _[*and on such evidence as may be presented at the hearing*]_ _**.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* Correction of clerical error in a judgment can also be made on an order to show cause. See, *e.g., Thomson v L.C. Roney & Co.* (1952) 112 CA2d 420, 246 P2d 1017. A supporting memorandum should be attached. Cal Rules of Ct 3.1113(a). A declaration from the court clerk or the court itself may be necessary if the clerical error does not appear on the face of the record. See §§23.31, 25.78.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/25 Motions After Trial/§25.100 2. Form: Order granting motion to correct clerical error (CCP §473)

**§25.100 2. Form: Order granting motion to correct clerical error (CCP §473)**

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**

| | |
|---|---|
| _ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)** _____ ) | **No.** _ _ _ _ _ _ **ORDER GRANTING MOTION TO CORRECT** _ _[*NUNC PRO TUNC*]_ _ _ _[*JUDGMENT/ORDER*]_ _ **(CCP §473)** **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _ |

**The motion of** _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _ **to correct clerical error came on regularly for hearing on** _ _[*date*]_ _**. Appearing as attorneys for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**.**

**Owing to clerical error, it appears that the** _ _[*insert title of document*]_ _ _ _[*entered/made*]_ _ **on** _ _[*date*]_ _**, does not correctly set forth the** _ _[*judgment rendered/order made*]_ _ **by this court. Good cause appearing,**

**IT IS ORDERED that the** _ _[*insert title of document to be corrected*]_ _ _ _[*entered/made*]_ _ **on** _ _[*date*]_ _**, be amended by (1) deleting the following:** _ _[*State language to be eliminated*]_ _ **and (2) inserting the following:** _ _[*State language to be inserted*]_ _**.**

[*Add if appropriate*]

**IT IS FURTHER ORDERED that this order be entered nunc pro tunc as of** _ _[*insert full date of original judgment/order*]_ _**.**

[*Continue*]

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

*Copies:* Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* To prevent further errors, reference may be made to the page and line numbers of the matter to be deleted. Counsel can also avoid confusion by setting out a complete clause or sentence even if only one word is to be changed or struck. On procedures for correcting clerical errors, see §§25.80-25.81.

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# 26

# Recovering Attorney Fees

**Steven Evans Kirby**
**Paul J. Neibergs**

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## §26.1 I. SCOPE OF CHAPTER

This chapter covers the various grounds for recovery of attorney fees following resolution of an action (see §§26.2-26.3). It includes recovery of fees provided by statute (see §§26.4-26.10, 26.54-26.76), by contract (see §§26.77-26.112), and under equitable theories (see §§26.121-26.128), as well as when attorney fees may be recovered as damages (see §§26.121-26.126) or in the nature of sanctions (see §§26.11-26.53) for wrongful conduct in litigation (other than discovery). This chapter also outlines fee awards based on express or implied indemnity claims (see §§26.127-26.130), how to determine the amount of fee awards (see §§26.131-26.142), and the procedures for recovering them (see §§26.143-26.153). Recovery of fees as costs under CCP §1033.5 is covered in chap 27. See §§27.51-27.66 on the effect of CCP §998 offers on costs (including attorney fees as costs).

**Further research:** For further discussion of the topics in this chapter, see California Attorney Fee Awards (3d ed Cal CEB 2010). See also the CEB Civil Litigation Reporter, published eight times a year, for a continuing update on attorney fee awards in California. For discussion of recovering attorney fees in administrative proceedings, see Attorney Fee Awards, chap 13. For discussion of recovery of attorney fees in dissolution proceedings, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity (Cal CEB Annual); 3 California Decedent Estate Practice, chap 30 (2d ed Cal CEB 2009) for fee awards in probate or conservatorship proceedings; and California Conservatorship Practice (Cal CEB 2005) and California Guardianship Practice (Cal CEB Annual) for fee awards in conservatorship and guardianship cases.

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## II. REVIEW GENERAL GROUNDS FOR RECOVERY

### §26.2 A. General provisions

Attorney fees incurred in litigation are not recoverable without express statutory authority, contractual provisions, or judicially created equitable exceptions. *Steele v Gold* (1984) 150 CA3d 928, 198 CR 257 (error for trial court to award attorney fees; neither statutory authority nor agreement between parties about attorney fees). See also *Grasso v Crow* (1997) 57 CA4th 847, 67 CR2d 367.

Local government legislation may also provide for attorney fees. See *Brennan v Board of Supervisors* (1984) 153 CA3d 193, 200 CR 192 (San Francisco City Charter allowed attorney fees in taxpayer actions against city). See also *McHugh v Santa Monica Rent Control Bd.* (1989) 49 C3d 348, 378, 261 CR 318 (dicta noting power of administrative agency to award attorney fees).

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## §26.3 B. In federal court or under federal law

Federal fee-shifting statutes provide a basis for fee awards in state court as well as in federal court. See, *e.g., Serrano v Unruh* (1982) 32 C3d 621, 638 n27, 186 CR 754 (Serrano IV). See California Attorney Fee Awards, chap 2 (3d ed Cal CEB 2010). See discussion of recovery of attorney fees under the Civil Rights Attorney's Fees Awards Act of 1976 in §§26.55-26.60. Federal courts also have the power to award attorney fees under state laws. See, *e.g., Bouman v Block* (9th Cir 1991) 940 F2d 1211, 1237 (fee awarded under California Fair Employment and Housing Act, Govt C §12965(b)). See Attorney Fee Awards, chap 2.

State courts also have the power to award attorney fees under federal law. See Attorney Fee Awards, chap 2. Note that Attorney Fee Awards, chap 1, provides a useful summary of whether federal or California law on attorney fees will be applied.

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## §26.4 III. WHEN RECOVERY PROVIDED BY STATUTE

Many statutes provide for awards of attorney fees in specific instances; most are intended to enforce statutory rights and remedies. A compilation of California statutes providing for attorney fees is set forth in California Attorney Fee Awards (3d ed Cal CEB 2010).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.5 A. Court usually awards fees to prevailing party

### §26.5 A. Court usually awards fees to prevailing party

Most fee-shifting statutes provide that the court may award reasonable attorney fees to the prevailing party. The prevailing party under CCP §1032(a)(4) is usually the party that is deemed to have prevailed under other fee-shifting statutes. See, *e.g., Hunt v Fahnestock* (1990) 220 CA3d 628, 632, 269 CR 614. In matters regarding hospital medical staff physician privileges, for example, the prevailing party must have obtained a damage award, a permanent injunction, or declaratory relief to be entitled to reasonable attorney fees based on the opponent's conduct in bringing or defending the litigation as frivolous, unreasonable, without foundation, or in bad faith. See, *e.g.*, Bus & P C §809.9; *Mir v Charter Suburban Hosp*. (1994) 27 CA4th 1471, 33 CR2d 243. See also 42 USC §11113; *Smith v Ricks* (9th Cir 1994) 31 F3d 1478, 1488.

The determination of the prevailing party under CCP §1032(a)(4) was addressed in *Childers v Edwards* (1996) 48 CA4th 1544, 56 CR2d 328. In a fraud action by real estate buyers against sellers, the trial court entered judgment for defendants based on its finding that, while defendants had made misrepresentations, the plaintiff buyers had failed to prove out-of-pocket damages. The trial court also denied defendants' motion for attorney fees as the prevailing parties. The court of appeal reversed the order denying attorney fees and held that defendants were the "prevailing parties" by definition under CCP §1032 because even though the buyers won on liability, they failed to prove any damages and thus failed to "recover any relief against" defendants as required by CCP §1032. The *Childers* court also noted that CC §1717 did not apply because that section covers only "contract actions, when the theory of the case is breach of contract, and when the contract sued on itself specifically provides for an award of attorney fees incurred to enforce *that* contract." 48 CA4th at 1548 (quoting *Xuereb v Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 1342, 5 CR2d 154, disapproved on other grounds in *Damien v Tamondong* (1998) 65 CA4th 1115, 1127 n13, 77 CR2d 262). In contrast, the action in *Childers* was limited to fraud and negligent misrepresentation, which did not come within the domain of CC §1717.

Other cases that have determined the "prevailing party" under various statutes awarding attorney fees include:

- *Martin v Szeto* (2004) 32 C4th 445, 9 CR3d 687 (prevailing party in an action for slander or libel may recover fees under CCP §1021.7 only when a peace officer or the officer's public employer is a party).
- *Krug v Maschmeier* (2009) 172 CA4th 796, 800, 91 CR3d 452 (no abuse of discretion to award attorney fees to defendant in CCP §527.6 action who successfully moved to dismiss petition for temporary restraining order, even though petition was not frivolous).
- *Mann v Quality Old Time Serv., Inc.* (2006) 139 CA4th 328, 339, 42 CR3d 607 (defendants were entitled to attorney fees as prevailing party under anti-SLAPP statute (CCP §425.16), even though they did not prevail on all counts, because they successfully narrowed scope of lawsuit by, among other things, eliminating trade libel claim; amount of fees recoverable based on results achieved).
- *Salawy v Ocean Towers Hous. Corp.* (2004) 121 CA4th 664, 17 CR3d 427 (reliance on terms of common interest development's governing documents as successful defense to claims brought to enforce those documents did not entitle defendant to fee award under CC §1354(f)).
- *Los Angeles Times v Alameda Corridor Transp. Auth.* (2001) 88 CA4th 1381, 107 CR2d 29 (in action under Public Records Act (Govt C §§6250-6276.48), plaintiff who obtained only one of several documents requested from public agency was still found to be "prevailing party" under provision of statute authorizing fee award).
- *Dowling v Zimmerman* (2001) 85 CA4th 1400, 103 CR2d 174 (defendant who appears in SLAPP action in propria persona, and later retains pro bono counsel, is entitled to attorney fees under CCP §425.16); but see *Witte v Kaufman* (2006) 141 CA4th 1201, 46 CR3d 845 (law firm defendant not entitled to its attorney fees in bringing anti-SLAPP motion to strike because work was done by firm members on their own behalf).
- *Foothill Props. v Lyon/Copely Corona Assocs.* (1996) 46 CA4th 1542, 54 CR2d 488 (court of appeal affirmed award of attorney fees for defendants and reversed order granting discovery sanctions for plaintiffs; court also stated that discovery sanctions awarded against defendants did not constitute "net monetary recovery" under CCP §1032 for purposes of determining the prevailing party).

When a statute does not specifically define "prevailing party," many courts take a practical rather than a rigid approach to determining the prevailing party. See *Castro v Superior Court* (2004) 116 CA4th 1010, 10 CR3d 865 (prevailing party under CCP §405.38 *may* include a party moving to expunge an improperly recorded lis pendens when the lis pendens is withdrawn before the court rules on the motion). See also *Kim v Euromotors W./The Auto Gallery* (2007) 149 CA4th 170, 56 CR3d 780 (settlement of action under Consumer Legal Remedies Act does not preclude award of attorney fees, CC §1780(d), if court determines plaintiff is "prevailing plaintiff" under law).

A defendant, to defeat a prevailing plaintiff's claim for attorney fees, must show special circumstances in order to render an award unjust. *Los Angeles Times Communications LLC v Los Angeles County Bd. of Supervisors* (2003) 112 CA4th 1313, 1324, 5 CR3d 776; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 245, 261 CR 520. Both the federal and state courts have adopted a narrow view of the special circumstances exception to the award of attorney fees. See, *e.g., Serrano v Unruh* (1982) 32 C3d 621, 632, 186 CR 754; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 245, 261 CR 520; *Ackerley Communications, Inc. v City of Salem* (9th Cir 1985) 752 F2d 1394, 1396. See California Attorney Fee Awards, chap 2 (3d ed Cal CEB 2010).

If a statute provides for an award of attorney fees to the prevailing defendant on a finding that the plaintiff's prosecution was not in good faith, the test for "good faith" is subjective and the burden of proof is on the defendant moving for attorney fees. *Corbett v Hayward Dodge, Inc.* (2004) 119 CA4th 915, 924, 14 CR3d 741 (discussing CC §1780(d) of the Consumers Legal Remedies Act (§§1750-1784)).

The impact of the action, not the manner in which the action is resolved, determines whether a party has prevailed for purposes of an award of fees. *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 685, 186 CR 589. A judgment based on a settlement agreement may preclude an award of attorney fees when no finding of liability is made under the compromise. See *Doran v North State Grocery, Inc.* (2006) 137 CA4th 484, 491, 39 CR3d 922 (compromise settlement was silent on any liability under CC §52(a) regarding discrimination, thus, there was no finding of liability against defendant as required by statute to permit award of fees to plaintiff).

**NOTE:** Under the Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996), prevailing defendants are entitled to attorney fees only if the plaintiff's action is "unreasonable, frivolous, or meritless." *Mangano v Verity, Inc.* (2008) 167 CA4th 944, 948, 84 CR3d 526. Attorney fees awarded to the prevailing party under FEHA belong to the attorney, not to the attorney's client, absent an enforceable agreement between the attorney and client to the contrary. See *Flannery v Prentice* (2001) 26 C4th 572, 110 CR2d 809.

**Further research:** See Attorney Fee Awards, chap 2, for a thorough discussion of the prevailing party concept.

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## §26.6 B. General retroactive effect

Absent any contrary legislative expression, the enactment, amendment, and repeal of statutes authorizing attorney fee awards are given retroactive effect, applying to all cases pending at the trial level or on appeal as of the effective date of the legislation. Thus, if the legislature enacts a statute authorizing such an award while that action is pending on appeal, attorney fees are recoverable. *Harbor View Hills Community Ass'n v Torley* (1992) 5 CA4th 343, 349, 7 CR2d 96. See California Attorney Fee Awards, chap 2 (3d ed Cal CEB 2010).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.7 C. Same rule governing cost awards generally applies

### §26.7 C. Same rule governing cost awards generally applies

Statutory fee awards are incidental to the action, not a part of the cause of action, and are therefore generally governed by the same rules governing cost awards. Under CCP §1033.5(a)(10), attorney fees authorized by contract, statute, or law are allowable as costs under CCP §1032.

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### §26.8 D. Recovery statute applies to trial court proceedings and appellate court proceedings

If a statute authorizes attorney fees, they are authorized for both trial court proceedings and appellate proceedings. *People ex rel Cooper v Mitchell Bros. Santa Ana Theater* (1985) 165 CA3d 378, 211 CR 501. See also *Wanland v Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 CA4th 15, 21, 45 CR3d 633 (under CCP §425.16(c) (anti-SLAPP statute), recoverable fees include those incurred in responding to appeal of order granting special motion to strike or order granting attorney fees, as well as fees incurred in challenging undertaking submitted by plaintiff to stay enforcement of award pending appeal); §26.152. Additionally, attorney fees are authorized for both trial court proceedings and appellate proceedings under CCP §1033.5(a)(10), (c)(5). Costs now specifically include both types of attorney fees, and, consequently, fees may be requested either from the appellate court or from the trial court on issuance of remittitur. *Harbour Landing-Dolfann, Ltd. v Anderson* (1996) 48 CA4th 260, 55 CR2d 640.

Depending on the statute involved, a prevailing party may be able to recover fees only in a trial and not in an administrative proceeding. See *Sampson v Parking Serv. 2000 Com., Inc.* (2004) 117 CA4th 212, 223, 11 CR3d 595 (an administrative proceeding is not a "civil action" under Lab C §1194 so claimant could recover only fees attributable to trial de novo). See also *Eicher v Advanced Bus. Integrators, Inc.* (2007) 151 CA4th 1363, 61 CR3d 114 (Lab C §1194 authorizes award of attorney fees for fees incurred in trial court if employee prevails in trial court in Lab C §98.2 "appeal" from administrative decision.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.9 E. Apportionment and liability among losing parties

## §26.9 E. Apportionment and liability among losing parties

Liability for sanctions is presumed to be joint and several if the court does not apportion the award among the liable parties, although any party paying a disproportionate share may be entitled to reimbursement. See *Young v Rosenthal* (1989) 212 CA3d 96, 128, 260 CR 369.

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## §26.10 F. When constitutional issue of equal protection of law raised

Statutes authorizing attorney fee awards in certain classes of cases but not others, or to one party who prevails but not to the other party if the latter prevails, raise the constitutional issue of equal protection of the law. For a chart showing the statutes that provide for an award to only one party, see California Attorney Fee Awards (3d ed Cal CEB 2010). An equal protection challenge may be sustained in a case involving a one-sided statute if the court finds the classifications to be arbitrary. See *Sacramento Mun. Util. Dist. v PG&E* (1942) 20 C2d 684, 128 P2d 529 (statute constitutional); *Builders' Supply Depot v O'Connor* (1907) 150 C 265, 88 P 982 (statute unconstitutional).

**NOTE:** Constitutional challenges have been largely unsuccessful.

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## IV. RECOVERY OF ATTORNEY FEES BASED ON BAD FAITH ACTIONS OR TACTICS UNDER CCP §128.5

### §26.11 A. Effective only for proceedings under CCP §425.16 (anti-SLAPP statute) or initiated before January 1, 1995

Code of Civil Procedure §128.5 applies only to complaints or proceedings filed or initiated before January 1, 1995. See *Olmstead v Arthur J. Gallagher & Co.* (2004) 32 C4th 804, 11 CR3d 298. For proceedings initiated on or after January 1, 1995, see §§26.32-26.53.

Because CCP §425.16 (anti-SLAPP statute) refers to awards of attorney fees "pursuant to Section 128.5," §128.5 and the cases decided under it remain relevant for proceedings under CCP §425.16. See *Decker v U.D. Registry, Inc.* (2003) 105 CA4th 1382, 1391, 129 CR2d 892.

For further discussion of sanctions under CCP §128.5, see California Attorney Fee Awards, chap 6 (3d ed Cal CEB 2010).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/ B. Application of CCP §128.5/§26.12 1. Actions or tactics [Deleted]

### B. Application of CCP §128.5

### §26.12 1. Actions or tactics [Deleted]

This section has been deleted as obsolete.

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## §26.13 2. Frivolous [Deleted]

This section has been deleted as obsolete.

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## C. When sanctions may be awarded

### §26.14 1. In judicial arbitration and other judicial proceedings [Deleted]

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.15 2. Against public entities [Deleted]

## §26.15 2. Against public entities [Deleted]

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.16 3. After plaintiff dismisses case [Deleted]

## §26.16 3. After plaintiff dismisses case [Deleted]

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.17 4. Assessed as punitive damages [Deleted]

## §26.17 4. Assessed as punitive damages [Deleted]

This section has been deleted as obsolete.

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## §26.18 D. Court will review subjective bad faith [Deleted]

This section has been deleted as obsolete.

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## §26.19 1. If entire action or defense in bad faith [Deleted]

This section has been deleted as obsolete.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.20 2. If action filed or maintained in bad faith [Deleted]

## §26.20 2. If action filed or maintained in bad faith [Deleted]

This section has been deleted as obsolete.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.21 E. Who can be sanctioned [Deleted]

## §26.21 E. Who can be sanctioned [Deleted]

This section has been deleted as obsolete.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.22 F. Notice and opportunity to be heard are required [Deleted]

## §26.22 F. Notice and opportunity to be heard are required [Deleted]

This section has been deleted as obsolete.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.23 G. Standing to bring motion [Deleted]

## §26.23 G. Standing to bring motion [Deleted]

This section has been deleted as obsolete.

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## H. Requirements for the order

### §26.24 1. Must be specific [Deleted]

This section has been deleted as obsolete.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.25 2. Written order required [Deleted]

## §26.25 2. Written order required [Deleted]

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.26 I. Amount of fees awardable [Deleted]

## §26.26 I. Amount of fees awardable [Deleted]

This section has been deleted as obsolete.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.27 J. Period for which fees awarded [Deleted]

## §26.27 J. Period for which fees awarded [Deleted]

This section has been deleted as obsolete.

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## §26.28 K. Appealability of award [Deleted]

This section has been deleted as obsolete.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.29 L. Examples of proper sanction awards under CCP §128.5 [Deleted]

## §26.29 L. Examples of proper sanction awards under CCP §128.5 [Deleted]

This section has been deleted as obsolete.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.30 M. Examples of improper sanction awards under CCP §128.5 [Deleted]

## §26.30 M. Examples of improper sanction awards under CCP §128.5 [Deleted]

This section has been deleted as obsolete.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.31 N. Guidelines for amount of award [Deleted]

## §26.31 N. Guidelines for amount of award [Deleted]

The discussion has been moved to §26.26.

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## V. RECOVERY OF ATTORNEY FEES BASED ON BAD FAITH ACTIONS OR TACTICS UNDER CCP §128.7

### §26.32 A. Purpose of statute

The focus of CCP §128.7, taken almost verbatim from revised Fed R Civ P 11, is to make every signature by an attorney or unrepresented party on a pleading, petition, written notice of motion, or "other similar paper" a certification "to the best of the person's knowledge, information, and belief," that the action has merit. CCP §128.7(a). See §26.39 for discussion of the scope of certification. Sanctions under §128.7 are available in juvenile court dependency proceedings. *In re Mark B.* (2007) 149 CA4th 61, 56 CR3d 697.

**Further research:** See California Attorney Fee Awards, chap 6 (3d ed Cal CEB 2010), for discussion of attorney fee awards as sanctions for frivolous appeals under CCP §907 and Cal Rules of Ct 8.276. See Attorney Fee Awards, chap 6, and Handling Motions to Compel and Other Discovery Motions (Cal CEB Action Guide December 2009) for discussion of award of attorney fees as discovery sanctions.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.33 B. Effective for complaints or proceedings filed on or after January 1, 1995

### §26.33 B. Effective for complaints or proceedings filed on or after January 1, 1995

Code of Civil Procedure §128.7 applies to complaints filed, or proceedings initiated, on or after January 1, 1995. *Olmstead v Arthur J. Gallagher & Co.* (2004) 32 C4th 804, 11 CR3d 298. See also *Murphy v Yale Materials Handling Corp.* (1997) 54 CA4th 619, 62 CR2d 865 (CCP §128.7 does not apply to fourth amended complaint filed in 1995 because original complaint filed in 1991). See §§26.11-26.31 for discussion of actions subject to §128.5 (complaints filed, or proceedings initiated, on or before December 31, 1994).

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### §26.34 C. Look to federal decisions for interpretation

In interpreting CCP §128.7, California courts may look to federal decisions interpreting Fed R Civ P 11. *Malovec v Hamrell* (1999) 70 CA4th 434, 440, 82 CR2d 712; *Goodstone v Southwest Airlines Co.* (1998) 63 CA4th 406, 419, 73 CR2d 655.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.35 D. Requirements for signing

### §26.35 D. Requirements for signing

At least one attorney of record must sign the pleading in the attorney's individual name and must state the signer's address and telephone number. An unrepresented party must sign the pleading and give his or her address and telephone number, if any. Unless otherwise provided by law, no verification or accompanying affidavit is required. An unsigned pleading "shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party." CCP §128.7(a).

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### §26.36 E. Certification requirements

By presenting the paper to the court (whether by "signing, filing, submitting or later advocating"), the presenter certifies that the conditions specified in the statute are, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances." CCP §128.7(b).

The presenter certifies that the paper is "not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." CCP §128.7(b)(1).

The presenter also certifies that the

> claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

CCP §128.7(b)(2).

The certification provides that 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." CCP §128.7(b)(3).

The certification requires that 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." CCP §128.7(b)(4).

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### §26.37 F. Reasonable inquiry required

Under CCP §128.7, the attorney or party presenting a paper to the court must make an inquiry into the law and facts that is reasonable under the circumstances. Like the federal rule, this rule is designed to make litigants "stop-and-think" before filing pleadings. See Senate Committee on Judiciary Report on AB 3594, p 4 (Aug. 16, 1994). It is an objective reasonableness test. See *Zaldivar v City of Los Angeles* (9th Cir 1986) 780 F2d 823, 829. All circumstances of a case are factors in determining the reasonableness of inquiry. *Townsend v Holman Consulting Corp.* (9th Cir 1990) 929 F2d 1358.

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## §26.38 G. Sanctions are discretionary

Like the revised version of Fed R Civ P 11(c), sanctions are discretionary under CCP §128.7(c): "If … the court determines that subdivision (b) has been violated, the court may … impose an appropriate sanction."

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.39 H. Frivolous motion for sanctions is also subject to sanction

### §26.39 H. Frivolous motion for sanctions is also subject to sanction

If a motion is brought "primarily for an improper purpose" (*e.g.,* to harass or to cause unnecessary delay or needlessly increase litigation costs), the motion itself will be subject to sanctions. CCP §128.7(h).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.40 I. Discovery not covered

## §26.40 I. Discovery not covered

Code of Civil Procedure §128.7 does not apply to disclosure or discovery requests, responses, objections, or motions. CCP §128.7(g).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/ J. Procedure for bringing motion for sanctions/§26.41 1. Separate motion required

## J. Procedure for bringing motion for sanctions

### §26.41 1. Separate motion required

A motion brought under CCP §128.7(c)(1) must be made "separately from other motions or requests." (The requirement is the same under Fed R Civ P 11.) Thus, do not include a sanctions motion as an addition to another motion.

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### §26.42 2. No time period specified

Like Fed R Civ P 11, the California statute provides no time period for bringing the motion after the occurrence of offending conduct. Unlike the federal rule, CCP §128.7(c) provides: "In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions has exercised due diligence."

Generally, the motion should be served promptly, but if discovery is critical to determining the motion, it should not be served until the other party has had a reasonable time for discovery. See Proposed Amendments to the Federal Rules of Civil Procedure and Forms, Judicial Conference Committee Notes to Rule 11, 146 FRD 515, 590.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.43 3. Motion must be specific

## §26.43 3. Motion must be specific

The motion must describe the specific conduct that is alleged to have violated CCP §128.7(b).

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### §26.44 4. General serving and filing requirements

The notice of motion must be served as provided for motions in general under CCP §1010. CCP §128.7(c)(1). Once the notice is served, it cannot be filed with or presented to the court *unless,* within 21 days after service or such other period as the court prescribes, the challenged paper, claim, defense, contention, allegation, or denial is *not* withdrawn or appropriately corrected. CCP §128.7(c)(1). See, *e.g., Malovec v Hamrell* (1999) 70 CA4th 434, 440, 82 CR2d 712; *Goodstone v Southwest Airlines Co.* (1998) 63 CA4th 406, 73 CR2d 655 (affirming denial of motion for §128.7 sanctions because party failed to comply with "safe harbor" provision).

Actual service of the motion and a formal notice of motion are required to comply with CCP §128.7 and begin the running of the "safe harbor" period; informal notice through telephone calls or letters is insufficient. *Barnes v Dep't of Corrections* (1999) 74 CA4th 126, 87 CR2d 594.

A motion served in compliance with the "safe harbor" provision in §128.7(c)(1) may be filed and ruled on after judgment is entered. *Day v Collingwood* (2006) 144 CA4th 1116, 50 CR3d 903.

**PRACTICE TIP:** Note that the court has the authority to prescribe a different period of time. If counsel has not completed its investigation or discovery, it may be reasonable to request the court to extend the safe harbor period while the investigation or discovery continues. Timely withdrawal of the alleged offending contention will protect a party from sanctions.

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### §26.45 K. Court may initiate order to show cause

On its own motion, the court may enter an order describing the specific conduct appearing to violate CCP §128.7(b) and direct the attorney, law firm, or party to show cause why it has not violated §128.7(b). *Barnes v Dep't of Corrections* (1999) 74 CA4th 126, 87 CR2d 594. The safe harbor provision applies to motions for sanctions initiated by the court as well as those initiated by a party and the court must provide an opportunity for the "challenged paper, claim, defense, contention, allegation, or denial" to be withdrawn or appropriately corrected within 30 days after service of the order to show cause. CCP §128.7(c)(2); *Malovec v Hamrell* (1999) 70 CA4th 434, 440, 82 CR2d 712.

Monetary sanctions may not be awarded on the court's own motion unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned. CCP §128.7(d)(2).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.46 L. Court must describe violation

## §26.46 L. Court must describe violation

The court must describe the conduct constituting a violation when imposing sanctions and must explain the basis for the sanctions imposed. CCP §128.7(e).

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## §26.47 M. Scope of sanctions allowed

Sanctions may include (CCP §128.7(d)):

- Directives of a nonmonetary nature;
- An order to pay a penalty to the court; or
- An order to pay the moving party some or all of the reasonable attorney fees and other expenses incurred as a direct result of the conduct described in the motion.

A monetary sanction imposed after a court motion is limited to a penalty payable to the court and may not include monetary sanctions payable to a party. *Malovec v Hamrell* (1999) 70 CA4th 434, 443, 82 CR2d 712. Under CCP §128.7, self-represented attorneys are not entitled to sanctions in the form of attorney fees. *Musaelian v Adams* (2009) 45 C4th 512, 87 CR3d 475.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.48 N. Expenses and fees for motion may be awarded

### §26.48 N. Expenses and fees for motion may be awarded

The court has discretion to award the prevailing party reasonable expenses and attorney fees incurred in presenting or opposing the motion. CCP §128.7(c)(1).

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## §26.49 O. Limitations on sanctions

The sanction for a violation of CCP §128.7(b) must be "limited to what is sufficient to deter repetition" of the conduct involved in the motion, or "comparable conduct by others similarly situated."

Monetary sanctions may not be awarded against a represented party for a claimed violation of CCP §128.7(b)(2) (certification that claims, defenses, or other legal contentions warranted by existing law or by nonfrivolous argument for extension, modification, or reversal of existing law or establishment of new law).

Sanctions under CCP §128.7 may not be awarded on the court's own motion after the court has made a dispositive ruling on the challenged pleading, *e.g.,* sustaining a demurer without leave to amend or granting summary judgment. *Malovec v Hamrell* (1999) 70 CA4th 434, 444, 82 CR2d 712.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.50 P. Who may be sanctioned

### §26.50 P. Who may be sanctioned

The court may impose a sanction on the attorney, law firms, or parties that have violated CCP §128.7(b) or are responsible for the violation. CCP §128.7(c). Absent exceptional circumstances, a law firm will be held jointly responsible for violations committed by partners, associates, and employees. CCP §128.7(c)(1).

Business and Professions Code §6068(o)(3) requires attorneys to report to the State Bar any nondiscovery-related monetary sanction award made against them that exceeds $1000. Counsel doing so will probably want to report contemporaneously that the award has been paid.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.51 Q. Court may assess punitive damages

### §26.51 Q. Court may assess punitive damages

The court may also assess punitive damages against a plaintiff on a determination that the plaintiff's action was maintained by a person convicted of a felony against the person's victim, or against the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony and the plaintiff is guilty of fraud, oppression, or malice in maintaining the action. CCP §128.7(f).

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## §26.52 R. Appeal of sanction

A sanction award over $5000 is appealable. CCP §904.1(a)(11)-(12). See §26.28. The standard for review of sanctions under CCP §128.7 appears to be an abuse of discretion standard. See *McFarland v City of Sausalito* (1990) 218 CA3d 909, 911, 267 CR 412; *Winick Corp. v County Sanitation Dist. No. 2* (1986) 185 CA3d 1170, 1175, 230 CR 289 (considering sanctions under CCP §128.5 under abuse of discretion standard).

A sanction order under §128.7 against a party's attorney who has been substituted out should be directly appealable, regardless of the amount of the sanction; the order would be final as to that attorney because he or she is no longer involved in the underlying action. See *Barton v Ahmanson Devs.* (1993) 17 CA4th 1358, 1361, 22 CR2d 56 (discovery sanctions).

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### §26.53 S. Order denying sanctions

Parties have no statutory right to appeal an order denying sanctions. Do not expect a court of appeal to exercise its discretion to allow mandamus review of the denial of a sanctions motion brought under CCP §128.7. But see *Muller v Fresno Community Hosp. & Med. Ctr.* (2009) 172 CA4th 887, 898, 91 CR3d 617 (order denying sanctions under CCP §128.7 and former CCP §2023 appealable as collateral order). The court of appeal will deem review by appeal from the final judgment to be an adequate remedy. See *Wells Prop. v Popkin* (1992) 9 CA4th 1053, 1055, 11 CR2d 845 (denial of motion for sanctions under CCP §128.5 presents no unusual or compelling circumstances to justify treating improper appeal as petition for writ of mandate).

**NOTE:** The provision in CCP §128.7(c) allowing the court to sanction the attorneys, law firms, or parties that have violated or are responsible for violating §128.7(b) may send tremors through many law firms. Law firms must be diligent in making certain that individual counsel and clients are aware of the possible consequences of proceeding with a "baseless claim." Otherwise, enforcement of these provisions could drive an irreparable split between attorney and client and between the individual attorney and his or her law firm.

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## §26.54 VI. RECOVERY OF ATTORNEY FEES UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (42 USC §1988)

An important component of federal civil rights laws is the availability of attorney fee awards. S 94-1011, 94th Cong, 2d Sess (1976), reprinted in 1976 US Code Cong & Ad News 5908. Most federal civil rights acts provide for attorney fees.

A complete discussion of the award of attorney fees under federal fee-shifting statutes is beyond the scope of this chapter. Recovery of attorney fees under the Civil Rights Attorney's Fees Awards Act of 1976, authorizing fee awards in any action or proceeding brought to enforce 42 USC §§1981, 1981a, 1982, 1983, 1985, 1986, 2000bb, 2000d, 20 USC §1681, and Title IX or Title VI of the Civil Rights Act of 1964, is briefly discussed (see §§26.55-26.60) in order to present some of the primary issues in claiming attorney fees under federal fee-shifting statutes. See California Attorney Fee Awards, chap 3 (3d ed Cal CEB 2010), for a partial listing of federal fee-shifting statutes.

**Further research:** See Attorney Fee Awards, chap 2, for discussion of federal fee-shifting statutes in state court.

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### §26.55 A. Award need not be proportionate to amount of damages

In *City of Riverside v Rivera* (1986) 477 US 561, 91 L Ed 2d 466, 106 S Ct 2686, the Supreme Court, in a plurality decision, rejected the view that reasonable attorney fees, awarded under the Civil Rights Attorney's Fees Awards Act of 1976 (42 USC §1988), should be proportionate to the amount of damages recovered in the underlying civil rights action. In *Rivera,* the Supreme Court affirmed an award of $245,456.25 in attorney fees, even though plaintiffs recovered only $33,350 in damages. But see *Choate v County of Orange* (2000) 86 CA4th 312, 103 CR2d 339 (trial court did not abuse its discretion in denying attorney fees to plaintiffs because damages awarded were de minimis); *Benton v Oregon Student Assistance Comm'n* (9th Cir 2005) 421 F3d 901, 908 (same; lawsuit must achieve "other tangible results" besides nominal damages to justify award of fees).

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## §26.56 B. Adjustment for delay in payment

The Supreme Court in *Missouri v Jenkins* (1989) 491 US 274, 283, 105 L Ed 2d 229, 109 S Ct 2463, held that an appropriate adjustment for delay in payment of attorney fees is within the contemplation of 42 USC §1988.

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### §26.57 C. If contingent fee agreement

A contingent fee contract does not place a ceiling on the recovery of attorney fees. *Blanchard v Bergeron* (1989) 489 US 87, 103 L Ed 2d 67, 109 S Ct 939. In *Blanchard,* the Supreme Court observed that fee awards in 42 USC §1983 cases should not be modeled on the contingent fee arrangements used in personal injury actions, because it would encourage the quest for damages at the expense of equitable remedies. Instead, the contingent nature of a fee agreement between lawyer and client is only one of many factors to consider in assessing a reasonable fee.

The use of a contingency fee arrangement to enhance the award was disapproved in *Watkins v Fordice* (5th Cir 1993) 7 F3d 453. However, the Supreme Court held in *Venegas v Mitchell* (1990) 495 US 82, 109 L Ed 2d 74, 110 S Ct 1679, that contingent fee contracts may be honored and that their use is not only consistent with the goals of 42 USC §1988 but furthers its goals by enabling plaintiffs to secure competent counsel. The Court observed that it has never held that §1988 constrains a civil rights plaintiff's freedom to become contractually and personally bound to pay an attorney a percentage of the recovery, if any, even if such a fee is larger than the statutory fee the defendant must pay to the plaintiff.

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### §26.58 D. Using time records

The California Attorney General issued a policy memorandum dated August 23, 1985, urging that contemporaneous time records be a prerequisite to a fee award under 42 USC §1988. The approach in the memorandum is based on the criteria set forth in *National Ass'n of Concerned Veterans v Secretary of Defense* (DC Cir 1982) 675 F2d 1319. Courts have recognized the propriety of such a prerequisite but have seldom invoked it. In *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1470, 240 CR 1, the court held that contemporaneous time records are desirable but not obligatory, because the adequacy of the showing supporting an attorney fee claim is within the trial court's discretion. See *Webb v Board of Educ*. (1985) 471 US 234, 238 n6, 85 L Ed 2d 233, 105 S Ct 1923 (contemporaneously recorded time sheets are preferred).

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### §26.59 E. When settlement agreement

The court has discretion to uphold a settlement agreement that contains an attorney fee waiver provision. *Muckleshoot Tribe v Puget Sound Power & Light Co.* (9th Cir 1989) 875 F2d 695; *Wakefield v Mathews* (9th Cir 1988) 852 F2d 482 (waiver of 42 USC §1988 fees will be found if settlement purports to encompass entire controversy, including costs, as opposed to mere silence on attorney fee issue). For the court to enforce it, however, a waiver of attorney fees must be clearly expressed in a settlement agreement. *Muckleshoot Tribe v Puget Sound Power & Light Co.* (9th Cir 1989) 875 F2d 695, 698.

The court in *EWAP, Inc. v City of Ontario* (1986) 177 CA3d 1108, 223 CR 422, held that 42 USC §1988 allows the prevailing party in a civil rights action brought under 42 USC §1983 to recover reasonable attorney fees as part of the costs of suit unless "special circumstances" render such an award unjust. The court held that, even though defendant conceded the constitutional issue raised in plaintiff's civil rights complaint, the plaintiff was the "prevailing party" within the meaning of §1988 and there was no "special circumstance" that would preclude an award of attorney fees.

Complex issues arise when a defense attorney, in the context of resolving a civil rights lawsuit, seeks settlement of the lawsuit conditioned on plaintiff's counsel waiving the statutory fees. A settlement proposal seeking a waiver of such statutory fees creates a dilemma. On one hand, such a fee waiver appears beneficial to the plaintiff/client in that it expedites a resolution of the plaintiff's underlying claim. On the other hand, if such a settlement practice becomes prevalent, the viability of public interest litigation is jeopardized. In *Muckleshoot Tribe v Puget Sound Power & Light Co., supra,* the Ninth Circuit Court of Appeals allowed such a settlement proposal. A host of various state bar associations condemned the practice, relying on various provisions of the ABA Code of Professional Responsibility. See generally State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 89-114 (discussion of former proposed Cal Rules of Prof Cond 2-400 that would prohibit settlement offers conditioned on a plaintiff's attorney's agreement to waive statutory fees); but see State Bar of Cal, Standing Comm on Prof Resp & Cond, Formal Opinion No. 94-136 (opining that lawyers may contract with their clients for an assignment of the client's statutory right to attorney fees). These provisions, however, are only secondary authority for California lawyers.

California specifically chose not to make the Code of Professional Responsibility binding on California lawyers by drafting and adopting the California Rules of Professional Conduct. In Los Angeles County Bar Association Formal Opinion No. 445, it was opined that settlement offers in a civil rights or civil liberty lawsuit, that are conditioned on plaintiff counsel's waiver of his or her statutory attorney fees, are improper. The committee, in reaching this conclusion, relied on former Cal Rules of Prof Cond 2-109 (now Cal Rules of Prof Cond 1-500) which in pertinent part provided that

> (A) A member of the State Bar shall not be a party to or participate in an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member of the State Bar to practice law.

This same ethics opinion (Los Angeles County Bar Association Formal Opinion No. 445) also relied on Bus & P C §6068(h) in disfavoring such a settlement scheme. Section 6068(h) mandates that it is the duty of an attorney not to reject, for any consideration personal to himself or herself, the cause of the defenseless or oppressed.

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### §26.60 F. Applies in state court

The statute authorizing attorney fees applies in state court proceedings. See *Filipino Accountants' Ass'n v State Bd. of Accountancy* (1984) 155 CA3d 1023, 204 CR 913. The appellate court in *Filipino Accountants' Ass'n* held that the federal Civil Rights Attorney's Fees Awards Act of 1976 (42 USC §1988) applies in state as well as federal court and upheld the trial court's discretion in awarding attorney fees under the statute when petitioners claimed a violation of their civil rights under 42 USC §1981 but prevailed on their state statutory claim that arose from the same common nucleus of operative facts as in their §1981 claim. Compare *Filipino Accountants' Ass'n* with *Kreutzer v County of San Diego* (1984) 153 CA3d 62, 200 CR 322 (attorney fees denied because plaintiff acted primarily for his own benefit while public benefit was small; factors for court to consider in granting or denying attorney fees under 42 USC §1988 discussed). See also *Board of Admin. v Wilson* (1997) 57 CA4th 967, 67 CR2d 477 (affirming denial of attorney fees motion because party did not mention §1983 until its postjudgment motion for attorney fees).

When both state and federal claims are based on the same legal theory or core of common facts, attorney fees may be granted under 42 USC §1988 in the pendent state law claim when the federal claim either is successful or is not adjudicated at all, but not when the federal claim is unsuccessful. See *McFadden v Villa* (2001) 93 CA4th 235, 113 CR2d 80 (reversing trial court's award of attorney fees under 42 USC §1988 to a party who prevailed on state law cause of action for battery but not on federal civil rights cause of action for excessive use of force).

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## VII. AWARD OF ATTORNEY FEES UNDER PRIVATE ATTORNEY GENERAL RULE (CCP §1021.5)

### §26.61 A. What it is

The purpose of the private attorney general doctrine is to provide an incentive to private parties when they have successfully vindicated important rights that have benefited the public. The rule, first recognized in case law and applied to cases involving constitutional rights, is now codified in CCP §1021.5, which is not limited to cases involving constitutional rights. See *Serrano v Priest* (1977) 20 C3d 25, 46, 141 CR 315; *Concerned Citizens of La Habra v City of La Habra* (2005) 131 CA4th 329, 31 CR3d 599.

Although CCP §1021.5 allows a public entity to recover attorney fees from another public entity if the plaintiffs are the people of the state, acting through the Attorney General to enforce the laws of the state, the people cannot recover attorney fees under §1021.5. *People ex rel Brown v Tehama County Bd. of Supervisors* (2007) 149 CA4th 422, 56 CR3d 558.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.62 B. When it applies

### §26.62 B. When it applies

On motion, a court may award attorney fees to a successful party against one or more opposing parties in any action that has resulted in the enforcement of an important right affecting the public interest if:

- A significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons;
- The necessity and financial burden of private enforcement are such as to make the award appropriate; and
- In the interest of justice, attorney fees should not be paid out of any recovery.

See CCP §1021.5.

In actions involving public entities, this section applies to allowances against, but not in favor of, public entities, in which no claim is required to be filed. CCP §1021.5.

Under CCP §1021.5, parties may recover attorney fees only from "opposing parties." See *Connerly v State Personnel Bd*. (2006) 37 C4th 1169, 1176, 39 CR3d 788 (real party in interest advocacy group that neither proposed nor enforced invalid statutory affirmative action programs acted like amicus curiae, not opposing party); *Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1093, 69 CR3d 184 (agency responsible for initiating and maintaining challenged policy decision was opposing party). But see *Ramon v County of Santa Clara* (2009) 173 CA4th 915, 921, 93 CR3d 278 (*Connerly* does not preclude attorney fee award to plaintiff's counsel for opposing defendant county's amicus brief in related matter, when county was advocating same interpretation of statute in both suits).

Section 1021.5 does not apply to parties without an institutional interest in the litigation that seek only a determination of private rights, even if the case leads to an important appellate decision. *Annette F. v Sharon S* (2008) 42 C4th 945, 954, 70 CR3d 372. In *Sharon S v Superior Court* (2003) 31 C4th 417, 2 CR3d 699, the supreme court had earlier upheld "second parent" adoption; *Annette F* addressed the issue of attorney fees arising from the case.

**Further research:** A full discussion of the private attorney general rule and the three criteria set out in CCP §1021.5(a)-(c) that are to be considered by the court in making attorney fee awards under the statute, together with many case examples, is provided in California Attorney Fee Awards, chap 3 (3d ed Cal CEB 2010). See also *California Common Cause v Duffy* (1987) 200 CA3d 730, 246 CR 285, for a summary of the rules.

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### §26.63 C. Pre-litigation attempt to enforce "important right"

Under CCP §1021.5, the court may award attorney fees to a private party if the court finds that the necessity of private enforcement makes the award appropriate. In deciding whether the private enforcement was necessary, the court should consider whether the private party attempted to resolve the matter without litigation. *Vasquez v State* (2008) 45 C4th 243, 85 CR3d 466. In "catalyst theory" cases, the court may allow attorney fees only if the private party made a reasonable effort to settle the dispute without litigation. *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 560, 21 CR3d 331. See §26.64.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.64 D. Prevailing party

### §26.64 D. Prevailing party

Cases deciding whether a party has prevailed for purposes of the private attorney general doctrine include:

- *Maria P. v Riles* (1987) 43 C3d 1281, 1290, 240 CR 872 (when plaintiffs obtained preliminary injunction, attorney fees were properly awarded even though action was dismissed for failure to prosecute; because case had some impact on vindicating important right, trial court had power to award attorney fees).
- *Harbor v Deukmejian* (1987) 43 C3d 1078, 1103, 240 CR 569 (fees were proper in action that resulted in clarification of both governor's veto power and single subject rule of legislation, even though plaintiffs neither obtained any relief sought nor benefited personally).
- *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 52 CR3d 1 (county brought suit against state agencies challenging validity of conservation easement; because state agencies subsequently modified easement, county was prevailing party).
- *City of Santa Monica v Stewart* (2005) 126 CA4th 43, 24 CR3d 72 (intervening party who contributes to success of public interest litigation entitled to award of attorney fees on same terms as other prevailing party).
- *Urbaniak v Newton* (1993) 19 CA4th 1837, 1841, 24 CR2d 333 (AIDS patient brought invasion of privacy action for disclosure of his condition; party bringing damages action who prevails on declaratory relief cause of action only, and did not bring about any change of behavior of defendants, is not prevailing party).
- *City of Sacramento v Drew* (1989) 207 CA3d 1287, 1303, 255 CR 704 (allegation that defendant prevailed on ground he did not raise until invited to do so is not dispositive; defendant in fact raised issue and prevailed).
- *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 244, 261 CR 520 (when plaintiffs sued county and private volunteer search and rescue organization to compel termination of latter's male-only restriction or its association with county sheriff, plaintiffs were prevailing party because one of two options was chosen by organization as part of permanent injunction).
- *Leiserson v City of San Diego* (1988) 202 CA3d 725, 736, 249 CR 28 (fees not awarded when plaintiff failed to show nexus between his lawsuit and city's later voluntary change of policy on media access to disaster scenes).
- *County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 223 CR 846 (fees were proper in defendants' favor because their success in resisting action to recover costs of their civil disobedience and for injunction confirmed important principles of limiting risks of political protest).
- *Carroll v State Bar* (1985) 166 CA3d 1193, 1208, 213 CR 305 (reversal of trial court ruling transformed successful plaintiff into unsuccessful party, precluding award of attorney fees).

**NOTE:** A plaintiff may be considered a prevailing party under the "catalyst theory" if the litigation does not end in judicial resolution, but it leads to a change in the defendant's behavior. *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 565, 21 CR3d 331. See *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 608, 21 CR3d 371 (catalyst theory for prevailing party under Govt C §12965(b)); *Westside Community for Indep. Living, Inc. v Obledo* (1983) 33 C3d 348, 353, 188 CR 873; *Woodland Hills Residents Ass'n v City Council* (1979) 23 C3d 917, 937, 154 CR 503 (*Woodland Hills II*). The terms "prevailing party" and "successful party," as used in CCP §1021.5, are synonymous. *Graham*, 34 C4th at 570.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.65 E. Causation

### §26.65 E. Causation

A finding must be made that the lawsuit motivated the opponent to modify its behavior. Even if plaintiff is successful in the lawsuit, attorney fees may be inappropriate if the causation factor is not satisfied. Examples of cases discussing the causation factor include:

- *Westside Community for Indep. Living, Inc. v Obledo* (1983) 33 C3d 348, 353, 188 CR 873 (fee award is justified when causal connection exists between lawsuit and relief obtained; no award here, because when suit was filed defendant had already approved regulations that plaintiff sought).
- *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 968, 259 CR 599 (inference permitted that causal connection exists between action taken by defendant after plaintiff's lawsuit is filed, but error to rely solely on chronology of events).
- *Crawford v Board of Educ.* (1988) 200 CA3d 1397, 246 CR 806 (attorney fees properly denied when causal connection between plaintiffs' litigation efforts and eventual adoption of desegregation plan was not established; moreover, efforts to have statewide initiative put on ballot and adopted were not litigation-related and thus did not entitle plaintiffs to attorney fees).
- *Macias v Municipal Court* (1986) 178 CA3d 568, 223 CR 756 (although changes were made after lawsuit was filed, both trial and appellate courts ruled against plaintiffs; changes made were different from those plaintiffs sought).

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### §26.66 F. Vindication of important right

Although this factor is frequently discussed together with the significant public benefit factor, the two are distinct considerations. The following cases discuss this issue:

- *Harbor v Deukmejian* (1987) 43 C3d 1078, 240 CR 569 (clarification of both governor's veto power and single-subject rule of legislation).
- *Notrica v State Compensation Ins. Fund* (1999) 70 CA4th 911, 83 CR2d 89 (award of injunction affecting state fund's relationships with 25,000 separate employers belied claim of state defendant that unfair competition action against fund served only private interests of plaintiffs).
- *Hull v Rossi* (1993) 13 CA4th 1763, 1768, 17 CR2d 457 (action resulting in minor changes in voter pamphlet ballot arguments was sufficient in view of state's strong interest in providing electorate with accurate information).
- *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1417, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81 (class action by credit card holders to recover excessive bank fees acted as consumer protection action and thus vital to public interest).
- *California Common Cause v Duffy* (1987) 200 CA3d 730, 246 CR 285 (in taxpayers' suit for declaratory and injunctive relief against sheriff, seeking to establish illegality of his using departmental funds and personnel to distribute postcards opposing Chief Justice of California Supreme Court, taxpayers, as prevailing parties, were entitled to attorney fees under CCP §1021.5, because causal connection existed between lawsuit and relief obtained and lawsuit secured important right affecting public interest).
- *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 241 CR 239 (litigation establishing right of adult to refuse life-saving medical treatment vindicated important right, but second action that did not challenge defendant's policy did not do so).
- *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 232 CR 697 (invalidation of $5 parking charge vindicated important right because it required city to comply with decision of its Employee Relations Board).
- *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 186 CR 589 (action furthered fundamental legislative goals by diverting funds from highways to public transit systems).

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## G. Significant public benefit

### §26.67 1. Several factors considered

Determination of whether a public benefit has been conferred involves consideration of a number of factors, including:

- Magnitude of the right or principle being vindicated (see *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 318, 193 CR 900);
- The size of the class directly benefited (34 C3d at 319); and
- Whether the public as a whole has been benefited (see *Harbor v Deukmejian* (1987) 43 C3d 1078, 240 CR 569; see also *King v Lewis* (1990) 219 CA3d 552, 268 CR 277 (fees properly denied when lawsuit brought by proponents of ballot referendum resulted in minor changes to ballot pamphlet, because neither important right was enforced nor significant benefit obtained)).

**NOTE:** Even if the benefits are vindications of concepts and rights rather than of a concrete pecuniary nature, the benefits may still be significant.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.68 2. Examples

### §26.68 2. Examples

Examples of cases dealing with the scope of the public benefit involved in the action include:

- *Maria P. v Riles* (1987) 43 C3d 1281, 1293, 240 CR 872 (enforcing student's right to confidentiality of school records benefited all similarly situated students and parents).
- *Roybal v Governing Bd. of Salinas City Elementary Sch. Dist.* (2008) 159 CA4th 1143, 1149, 72 CR3d 146 (no public benefit from ruling that school district deviated from Ed C §44949 in laying off three school psychologists).
- *Baxter v Salutary Sportsclubs, Inc.* (2004) 122 CA4th 941, 946, 19 CR3d 317 (no significant benefit to public because relief only affected those people who were or might become members of defendant health club and there was no evidence that anyone had suffered any harm).
- *Gregory v State Bd. of Control* (1999) 73 CA4th 584, 86 CR2d 575 (action that exposed long-standing errors in practices of state board pertaining to restitution of crime victims conferred significant public benefit).
- *Draeger v Reed* (1999) 69 CA4th 1511, 82 CR2d 378 (challenge to Department of Motor Vehicles policies concerning out-of-state DUI convictions clarified governing law but affected only narrow class of persons having such convictions).
- *Family Planning Specialists Med. Group, Inc. v Powers* (1995) 39 CA4th 1561, 46 CR2d 667 (no public benefit found when defendant's success in the litigation was very narrow and benefited only himself).
- *Lowe v California Resources Agency* (1991) 1 CA4th 1140, 1153, 2 CR2d 558 (action successfully changed civil service classification but inured to plaintiff's pecuniary advantage, not to large class or to public).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.69 H. Private benefit and burden

### §26.69 H. Private benefit and burden

Most cases focus on whether the plaintiff's financial burden was outweighed by his or her private benefit. When plaintiffs have no financial interest in the outcome, the requirement is usually satisfied. See *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 321, 193 CR 900. However, when a party receives a substantial private benefit, attorney fees are available only if the burden of conducting the litigation was out of proportion to the benefit gained. Examples of cases discussing the private benefit and burden issue include the following:

- *Meija v City of Los Angeles* (2007) 156 CA4th 151, 158, 67 CR3d 228 (although homeowner's personal interest in opposing proposed development based on inadequate environmental review was substantial, financial burden supported attorney fees award).
- *Riverside Sheriffs' Ass'n v County of Riverside* (2007) 152 CA4th 414, 61 CR3d 295 (sheriffs' association action enforced important procedural rights for its members, and protections afforded by Public Safety Officers' Bill of Rights Act benefit not only public safety officers but public in general).
- *Conservatorship of Levitt* (2001) 93 CA4th 544, 113 CR2d 294 (reduction in requested attorney fees proper in financial elder abuse cases because fees award is based on all factors relevant to value of services rendered, including value of estates of elderly victims).
- *Jobe v City of Orange* (2001) 88 CA4th 412, 105 CR2d 782 (trial court did not abuse its discretion in denying attorney fees under CCP §1021.5 to high school association because as the real party in interest it failed to show that cost of its legal victory outweighed its personal benefit).
- *Williams v San Francisco Bd. of Permit Appeals* (1999) 74 CA4th 961, 88 CR2d 565 (despite possible benefit to neighborhood, plaintiff's nonmonetary stake in blocking huge new construction next to his property constituted individual stake sufficient to deny attorney fees). But see *Bowman v City of Berkeley* (2005) 131 CA4th 173, 182, 31 CR3d 447 (awarding attorney fees and costs, and distinguishing *Williams* in that only two of seven plaintiffs in *Bowman* lived adjacent to proposed housing project, and plaintiffs' personal stakes were "far more attenuated" than in *Williams;* plaintiff's due process claim conferred significant public benefit).
- *Notrica v State Compensation Ins. Fund* (1999) 70 CA4th 911, 83 CR2d 89 (disparity between damages award obtained by plaintiffs and amount of attorney fees expended supported finding that private enforcement of right was expensive for purposes of CCP §1021.5 award).
- *Flannery v California Highway Patrol* (1998) 61 CA4th 629, 71 CR2d 632 (gender discrimination action under FEHA).
- *Satrap v PG&E* (1996) 42 CA4th 72, 49 CR2d 348 (denial of attorney fees proper when settlement demand of $3 million was not disproportionate to total attorney fees of $1.2 million even though jury verdict was substantially less).
- *Wang v Division of Labor Standards Enforcement* (1990) 219 CA3d 1152, 1162, 268 CR 669 (no attorney fees recoverable when administrative order was issued without substantial justification against small business, because public benefit was incidental and private financial interest was significant).
- *Austin v Board of Retirement* (1989) 209 CA3d 1528, 1535, 258 CR 106 (employee's action to obtain retirement benefits motivated by self-interest).
- *Save Oxnard Shores v California Coastal Comm'n* (1986) 179 CA3d 140, 154, 224 CR 425 (public benefit incidental to private advantage of intervenor's members);
- *Henneberque v City of Culver City* (1985) 172 CA3d 837, 218 CR 704 (trial court abused discretion in denying attorney fees to police officer who prevailed (on appeal) in action against city for failing to provide administrative appeal mandated by Govt C §3304(b), even though plaintiff's own financial gain was modest).
- *Compton Community College Fed'n of Teachers v Compton Community College Dist.* (1985) 165 CA3d 82, 211 CR 231 (subject of litigation was enforcement of salary clause in union contract; no showing made of necessity and financial burden of private enforcement, that legal costs were disproportionately large, that plaintiff union was so small it lacked resources to protect its members' interests, or that benefits to public were so out of proportion

to benefits received by membership as to justify fee award).

- *California Teachers Ass'n v Cory* (1984) 155 CA3d 494, 202 CR 611 (association members received substantial benefit to their retirement fund; magnitude of litigation burden not out of proportion to their personal stake in action).

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### §26.70 I. Whether private action necessary

An additional consideration is whether the private action was necessary to vindicate the right involved. In *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1468, 240 CR 1, the court affirmed an award of attorney fees even though the California Department of Fair Employment and Housing could have prosecuted the case on plaintiff's behalf and obtained the same result. The court noted not only an absence of evidence that the DFEH would or could have handled the case but also that public agencies do not have the time or resources to take on every meritorious case.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.71 J. Applicability beyond injunction or damage actions

## §26.71 J. Applicability beyond injunction or damage actions

Attorney fees may be recoverable in other than traditional injunction or damage actions, although the extent of the recoverability is not yet clear.

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### §26.72 1. Criminal proceedings

The supreme court in *In re Head* (1986) 42 C3d 223, 228 CR 184, affirmed a fee award when prisoners brought a habeas corpus petition that successfully challenged work furlough procedures. The court noted, however, that fees cannot be recovered by criminal defendants, because their primary motivation is vindication of their personal rights.

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### §26.73 2. Administrative proceedings

Several decisions suggest that attorney fees under CCP §1021.5 will be permitted when a party has prevailed in administrative proceedings. In *National Parks & Conserv. Ass'n v County of Riverside* (2000) 81 CA4th 234, 96 CR2d 576, the appellate court found that the trial court erred in awarding fees incurred by a plaintiff in litigating a challenge to an environmental impact report (EIR) because the litigation itself had not resulted in any significant benefit. The court noted, however, that previous administrative proceedings challenging the EIR might have resulted in such changes and that the plaintiffs might be entitled to fees expended in those proceedings. The court remanded the issue to the trial court for further consideration of the extent to which fees in an earlier administrative proceeding met the three-pronged test for recovery under CCP §1021.5. See also *Hospital Sys., Inc. v Office of Statewide Health* (1994) 25 CA4th 1686, 30 CR2d 922 (when administrative proceedings are "sufficiently entwined" with later litigation, fees incurred for administrative proceedings may be recovered under CCP §1021.5); *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1459, 240 CR 1. But see *Beach Colony II, Ltd. v California Coastal Comm'n* (1985) 166 CA3d 106, 116, 212 CR 485 (statute's reference to fees incurred in any "action" suggests that fees are not authorized in quasi-judicial proceedings prior to litigation).

Fees awards in administrative proceedings that follow litigation were also found proper in *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 848, 216 CR 649. In *Wallace*, the court found that the later administrative action was inextricably intertwined with the legal action and that the prior action's settlement envisioned just such administrative proceedings. 170 CA3d at 548.

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### §26.74 K. Appellate court can determine or remand on applicability of CCP §1021.5

It is for the appellate court to decide which court, trial or appellate, is better equipped to make the initial determination of whether attorney fees are warranted under CCP §1021.5. Although the more common and perhaps better practice is to remand to the trial court for this determination, CCP §1021.5 does not require it. *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 425, 253 CR 426 (appellate court properly granted motion for attorney fees and remanded to trial court to determine amount).

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### §26.75 L. Appealability

A trial court's decision not to award attorney fees under CCP §1021.5 will not be reversed on appeal unless a prejudicial abuse of discretion is shown. *Slayton v Pomona Unified Sch. Dist.* (1984) 161 CA3d 538, 207 CR 705.

When the trial court awards attorney fees, the court determines the amount under CCP §1021.5 in accordance with the guidelines in *Serrano v Priest* (1977) 20 C3d 25, 141 CR 315. *Slayton v Pomona Unified Sch. Dist., supra*. In *Slayton,* plaintiffs, who were 12 parents and their children, obtained a peremptory writ in the trial court, prohibiting the school district and four administrators from violating the plaintiffs' rights under Ed C §§48900-48927, Cal Const art I, §2, and US Const amend I. The trial court did not award attorney fees. The appellate court reversed the trial court's denial of an award and remanded the case to the trial court to determine the amount of fees to be awarded because: (1) plaintiffs met each of the factors to be considered under CCP §1021.5, and (2) no reasonable basis for denying an award of fees appeared in the record. See also *Washburn v City of Berkeley* (1987) 195 CA3d 578, 586, 240 CR 784 (award upheld against challenge based on CC §47 privilege and claim that free expression was chilled by threat of fee award).

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### §26.76 M. Procedure

Code of Civil Procedure §1021.5 provides that the court may award attorney fees on motion. See *Marini v Municipal Court* (1979) 99 CA3d 829, 160 CR 465. Under CCP §1021.5, a prevailing party is not entitled to expert witness fees in addition to attorney fees. *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 74 CR3d 81.

A motion for fees under the private attorney general rule may be made after the judgment becomes final. *United Firefighters v City of Los Angeles* (1991) 231 CA3d 1576, 1584, 283 CR 8. An attorney fee motion is premature if an action is not yet resolved. *Bullock v City & County of San Francisco* (1990) 221 CA3d 1072, 1094, 271 CR 44.

A CCP §1021.5 motion must be made within the time limitations of Cal Rules of Ct 3.1702(b). *Save Our Forest & Ranchlands v County of San Diego* (1996) 50 CA4th 1757, 58 CR2d 708 (explaining 1994 change in prior law). But see *Lee v Wells Fargo Bank, N.A.* (2001) 88 CA4th 1187, 106 CR2d 726 (trial court did not abuse its discretion in granting motion under CCP §473 for relief from failure to submit untimely cost bill, including claims for attorney fees).

California Rules of Ct 3.1702 does not govern the time limit for seeking attorney fees for successfully litigating post-judgment motions in the trial court. *Crespin v Shewry* (2004) 125 CA4th 259, 22 CR3d 696 (award of attorney fees to plaintiff that successfully defended injunction against post-judgment challenges was proper). See also *Carpenter v Jack in the Box Corp.* (2007) 151 CA4th 454, 468, 59 CR3d 839 (time limits imposed by Cal Rules of Ct 3.1702 and 8.104 for filing motion for fees under CCP §425.16(c) do not begin to run until entry of judgment at conclusion of litigation).

It is for the appellate court to decide which court, trial or appellate, is better equipped to make the initial determination of whether attorney fees are warranted under CCP §1021.5. See §26.74.

Courts have generally been hesitant to find implied waiver of attorney fees under CCP §1021.5 in agreements that are silent on fees. In *Zambrano v Oakland Unified Sch. Dist.* (1991) 229 CA3d 802, 280 CR 454, the court held that plaintiff was entitled to recover fees for efforts expended in nonjudicial enforcement of a consent decree that provided for judicial enforcement but was silent on availability of fees for nonjudicial enforcement. See *Rider v County of San Diego* (1992) 11 CA4th 1410, 1422, 14 CR2d 885, holding that an action invalidating a sales tax gave rise to an entitlement to attorney fees under a common-fund theory, not under the private attorney general rule.

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## VIII. WHEN RECOVERY PROVIDED BY CONTRACT

### §26.77 A. General interpretation of provisions

Contractual provisions for recovery of attorney fees by a prevailing party in the event of litigation are generally enforceable. CC §1717; CCP §1021; *Wilson v Wilson* (1960) 54 C2d 264, 5 CR 317. Code of Civil Procedure §1021 specifically authorizes contractual agreements for attorney fees. See generally California Attorney Fee Awards, chap 4 (3d ed Cal CEB 2010). Such clauses are upheld to prevent lessening the value of the successful party's judgment by the expense of obtaining it. See *Hunt v Smyth* (1972) 25 CA3d 807, 832, 101 CR 4. Courts have long given effect to reciprocal contractual provisions for attorney fees to the prevailing party in the event of litigation between the parties to the contract. See, *e.g., Iverson v Spang Indus.* (1975) 45 CA3d 303, 119 CR 399; *Heidt v Miller Heating & Air Conditioning Co.* (1969) 271 CA2d 135, 74 CR 695.

Contract clauses are not to be interpreted inflexibly, but must be reasonably interpreted and may be limited by sound public policy and equitable considerations. See *Ecco-Phoenix Elec. Corp. v Howard J. White, Inc.* (1969) 1 C3d 266, 272, 81 CR 849 (fee clause cannot be read literally to place liability for fees on one party regardless of who is responsible for litigation); *Geffen v Moss* (1975) 53 CA3d 215, 227, 125 CR 687 (neither party may recover fees if entire contract void as contrary to public policy). For a short discussion of recovery of fees when the contract is invalid, see Attorney Fee Awards, chap 4.

Civil Code §1717 provides a reciprocal right to attorney fees when the contract provides the right to any party. Even when CC §1717 does not apply, the court may enforce an agreement under CCP §1021 because the parties can usually agree to attorney fee awards. *Palmer v Shawback* (1993) 17 CA4th 296, 299, 21 CR2d 575.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.78 B. No waiver of attorney fees

### §26.78 B. No waiver of attorney fees

Attorney fees under CC §1717 (reciprocal right to attorney fees when contract provides fees to any party) in connection with contracts entered into after January 1, 1995, the effective date of the code section, may not be waived. CC §1717(a).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.79 C. Fee award provision applies to entire contract

### §26.79 C. Fee award provision applies to entire contract

Civil Code §1717 provides that a fee award provision in a contract is construed as applying to the entire contract unless each party was represented by counsel in the negotiation and execution of the contract, and unless the fact of that representation is specified in the contract. CC §1717(a).

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### §26.80 D. Retroactivity of amendments

An amendment to CC §1717 after the date of the contract was held to apply to current litigation because statutes increasing or decreasing litigation costs are applied to pending matters regardless of the absence of retroactivity language. *Harbor View Hills Community Ass'n v Torley* (1992) 5 CA4th 343, 347, 7 CR2d 96.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.81 E. Both sides benefit from provisions

### §26.81 E. Both sides benefit from provisions

When a contractual provision provides for fees to only one party to the contract, CC §1717 extends the provision to benefit the other side. *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 1109, 86 CR2d 614. Civil Code §1717(a) provides, in part:

- In any action on a contract, when the contract specifically provides that attorney fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney fees in addition to other costs.
- When a contract provides for attorney fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.
- Reasonable attorney fees shall be fixed by the court, and shall be an element of the costs of suit.
- The reciprocity of CC §1717 applies only to contractual provisions that allow recovery of attorney fees in actions to enforce the contract. Thus, in *Southern Pac. Thrift & Loan Ass'n v Savings Ass'n Mortgage Co.* (1999) 70 CA4th 634, 82 CR2d 874, the court held that a party's right to recover attorney fees as an element of indemnified costs under an indemnity contract was not "a provision for attorneys' fees in an action to enforce the contract," and was therefore not made reciprocal by §1717. See also *Campbell v Scripps Bank* (2000) 78 CA4th 1328, 93 CR2d 635.

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### §26.82 F. Purpose of CC §1717

Civil Code §1717 is part of an overall legislative policy designed to prevent oppressive use of attorney fees clauses and to enable consumers and others who may be in an unequal contractual bargaining position to protect their rights through the judicial process by permitting recovery of attorney fees incurred in litigation in the event they prevail. See *M. Perez Co. v Base Camp Condominiums Ass'n* (2003) 111 CA4th 456, 3 CR3d 563; *California Wholesale Material Supply, Inc. v Norm Wilson & Sons, Inc.* (2002) 96 CA4th 598, 117 CR2d 390; *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 158 CR 1.

Civil Code §1717 applies to business entities as well as to individuals. *ABF Capital Corp. v Grove Prop. Co.* (2005) 126 CA4th 204, 23 CR3d 803. The statute applies to contracts executed before January 1, 1969, the effective date of the statute. *System Inv. Corp. v Union Bank* (1971) 21 CA3d 137, 163, 98 CR 735; *Coast Bank v Holmes* (1971) 19 CA3d 581, 593, 97 CR 30. For a thorough decision of the history, background, and purpose of §1717, see *Sears v Baccaglio* (1998) 60 CA4th 1136, 1143, 70 CR2d 769.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.83 G. Applies to reciprocal fee clauses

### §26.83 G. Applies to reciprocal fee clauses

The statute also applies to reciprocal fee clauses, *i.e.,* clauses benefiting the prevailing party. CC §1717(a). The applicability of CC §1717 and its decisional law to reciprocal fee contracts is important, for example, in determining persons entitled to and liable for fee awards, and the procedures available for making a fee claim.

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### §26.84 H. Applicability of CC §1717 to contracts with comprehensive or limited fee clauses

Under CC §1717, contractual provisions that limit attorney fees to specific amounts will be upheld but made reciprocal. *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 128, 158 CR 1 (reciprocal remedy of attorney fees to prevailing nonsignatory defendant sued on contract by signatory plaintiff who would have been entitled to attorney fees had plaintiff prevailed). See also *California Wholesale Material Supply, Inc. v Norm Wilson & Sons, Inc.* (2002) 96 CA4th 598, 117 CR2d 390 (awarding attorney fees to prevailing signatory defendant in suit on subcontract by nonsignatory plaintiff who would have been entitled to attorney fees had plaintiff prevailed). Civil Code §1717 does not, however, permit contracting parties to limit an attorney fee clause to specific types of actions or to certain contractual provisions. Instead, CC §1717(a) states that a contractual provision for attorney fees will apply to the entire contract. *Harbor View Hills Community Ass'n v Torley* (1992) 5 CA4th 343, 346, 7 CR2d 96.

In *Bruckman v Parliament Escrow Corp.* (1987) 190 CA3d 1051, 235 CR 813, the court held that a real estate vendor was entitled to attorney fees under CC §1717 as the prevailing party in an action for negligence and breach of contract. The court held that a provision in the escrow agreement by which the parties to the escrow would indemnify the escrow holder was reciprocal to those parties if they prevailed in the action. See also *California Teachers Ass'n v Governing Bd.* (1984) 161 CA3d 393, 207 CR 659.

An unsettled issue is the extent to which the right to recover fees extends to actions for damages in tort. The California Supreme Court has held that a tort action for fraud, while arising from the contract, is not an action "on the contract" within the meaning of CC §1717. *Stout v Turney* (1978) 22 C3d 718, 730, 150 CR 637. However, fees have been awarded under §1717 in cases in which a party defends causes of action sounding in tort while seeking to enforce the contract when the court finds that such defenses were necessarily incurred in attempting to enforce the contract. See *Wagner v Benson* (1980) 101 CA3d 27, 37, 161 CR 516. Moreover, joinder of tort and contract causes of action do not dilute the right to attorney fees.

The trial court need not apportion fees incurred in connection with an issue common to both causes of action. *Bruckman v Parliament Escrow Corp., supra*. For further discussion, see California Attorney Fee Awards, chap 4 (3d ed Cal CEB 2010).

It appears to be possible for a party to recover fees in a tort action based solely on contractual authority under CCP §1021 and not under CC §1717. See *Xuereb v Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 5 CR2d 154 (prevailing party in tort action on real estate sale recovered attorney fees provided for in purchase agreement, not under CC §1717 but under CCP §1021, which provides that parties may agree to attorney fees in any litigation between themselves), disapproved on other grounds in *Damian v Tamondong* (1998) 65 CA4th 1115, 1127 n13, 77 CR2d 262. See also *Skyway Aviation, Inc. v Troyer* (1983) 147 CA3d 604, 611, 195 CR 281 (attorney fees awarded in negligence action in connection with enforcement of express contractual promise to pay for all damages caused by defendant's negligence). See Attorney Fee Awards, chap 4.

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## I. Examples of typical actions under CC §1717

### §26.85 1. Express or implied warranties

In typical fee clauses, an action for breach of either express or implied warranties is an action on a contract within the meaning of CC §1717. *A & M Produce Co. v FMC Corp.* (1982) 135 CA3d 473, 495, 186 CR 114; *Schoolcraft v Ross* (1978) 81 CA3d 75, 80, 146 CR 57.

Assuming that the duty involved is embraced by the fee clause, an award may be made on any action, legal or equitable in nature, regardless of whether the remedy sought would affirm or disaffirm the contract, unless perhaps the parties clearly agreed otherwise. See, *e.g., Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 129, 158 CR 1 (damages); *Star Pac. Inv. v Oro Hills Ranch, Inc.* (1981) 121 CA3d 447, 460, 176 CR 546 (rescission); *System Inv. Corp. v Union Bank* (1971) 21 CA3d 137, 163, 98 CR 735 (equitable relief).

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### §26.86 2. When case includes cause of action for which award of fees not proper

If a party prevails on a cause of action for which a fee award is proper, but there is another cause of action for which it is not, because the cause of action was not "on the contract," the fees should be apportioned and awarded only on the former cause of action, unless the fees were incurred in connection with an issue common to both causes. *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 129, 158 CR 1. See *Korech v Hornwood* (1997) 58 CA4th 1412, 1422, 68 CR2d 637; *Perry v Robertson* (1988) 201 CA3d 333, 341, 247 CR 74 (tort and contract causes of action joined and neither remedy elected during trial); *Bruckman v Parliament Escrow Corp.* (1987) 190 CA3d 1051, 235 CR 813. If the issues are not common to both causes of action and no apportionment is possible, recovery will be denied. *McKenzie v Kaiser-Aetna* (1976) 55 CA3d 84, 88, 127 CR 275.

Usually, a party is entitled to CC §1717 fees only if the action is one on contract rather than on noncontract theory, such as fraud. *Star Pac. Inv. v Oro Hills Ranch, Inc.* (1981) 121 CA3d 447, 460, 176 CR 546 (action for fraud arising from contract is not action on contract within meaning of §1717).

When a plaintiff brings a case on both fraud and contract theories and elects to recover on the fraud cause of action, there will be no recovery of attorney fees. *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1259, 1 CR2d 301 (but attorney fees permitted to defend declaratory relief cross-action arising from same contract). See also *Korech v Hornwood, supra* (plaintiff prevailed on mechanic's lien claim but defendant prevailed on contract claim; defendant held to be prevailing party); *Xuereb v Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 5 CR2d 154 (prevailing party in tort action on real estate sale recovered attorney fees provided for in purchase agreement, not under CC §1717 but under CCP §1021, which provides that parties may agree to attorney fees in any litigation between themselves), disapproved on other grounds in *Damien v Tamondong* (1998) 65 CA4th 1115, 1127 n13, 77 CR2d 262. On election of remedies, see *Perry v Robertson, supra,* in which the court held that, when the plaintiff brought an action in both tort and contract and did not elect either remedy at any point during the trial, she preserved her right to seek attorney fees on the contract by bringing a postverdict motion.

When the action is one for fraud arising from a contract to buy land and when the contract provides for attorney fees for any action arising from the agreement, attorney fees are properly awarded. *Lerner v Ward* (1993) 13 CA4th 155, 160, 16 CR2d 486. When the action is for fraud and for rescission, and plaintiff recovers on the rescission claim, attorney fees are recoverable because they are based on the contract. *Super 7 Motel Assocs. v Wang* (1993) 16 CA4th 541, 549, 20 CR2d 193.

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### §26.87 3. If contract illegal

Attorney fees are not recoverable in a contract action when the successful defense is based on unenforceability owing to illegality. *Bovard v American Horse Enters.* (1988) 201 CA3d 832, 843, 247 CR 340. Attorney fees may be properly awarded, however, when the contract action is successfully defended because of lack of an enforceable contract on grounds other than illegality. See *Torrey Pines Bank v Hoffman* (1991) 231 CA3d 308, 321, 282 CR 354 (defendants entitled to both trial and appellate attorney fees on contract found to be unenforceable); *Rosen v Robert P. Warmington Co.* (1988) 201 CA3d 939, 247 CR 635.

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### §26.88 4. Eviction or unlawful detainer

In *Drybread v Chipain Chiropractic Corp.* (2007) 151 CA4th 1063, 60 CR3d 580, the sublessee was entitled to attorney fees under a clause in the sublease despite sublessors' voluntary dismissal of the unlawful detainer action. The court found that the unlawful detainer action sounded in tort; therefore, CC §1717(b)(2), which bars fees if a contract claim is voluntarily dismissed, did not apply. But see *Mitchell Land & Improvement Co. v Ristorante Ferrantelli, Inc.* (2007) 158 CA4th 479, 488, 70 CR3d 9 (unlawful detainer action sounded in contract; CC §1717(b)(2) barred fees).

The court in *Beeman v Burling* (1990) 216 CA3d 1586, 1608, 265 CR 719, held that the attorney fees provision in a tenant's lease gave rise to CC §1717 fees in his successful wrongful eviction case springing from a rent control ordinance violation. The court found that the action was fundamentally based on the lease and on the landlord's interference with the tenants' right to occupy the premises.

In *Mitchell v Exhibition Foods, Inc.* (1986) 184 CA3d 1033, 229 CR 535, defendants in an unlawful detainer action cross-complained for specific performance of a new lease based on a right of first refusal provision in their original lease. The court of appeal affirmed the trial court's award of fees to defendants under the attorney fees provision in the new lease. The court held that the judgment established that the new lease was effective between the parties, so that the fees provision in that lease applied to the action.

In *North Assocs. v Bell* (1986) 184 CA3d 860, 229 CR 305, plaintiff lessor was entitled to attorney fees although the trial court found that the original lease, on which plaintiff based his action and which contained an attorney fees provision, had expired and a new lease without such a provision had become effective. Under CC §1717, if one party would be entitled to fees under a contract if he or she prevailed, the other party would be entitled to attorney fees even if the contract is found to be invalid, terminated, or nonexistent. The court held that defendant would have been entitled to attorney fees had he prevailed because he claimed extensions under the original lease; plaintiff was thus also entitled to attorney fees because he ultimately prevailed in the action.

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### §26.89 5. Promissory note

In *Ganey v Doran* (1987) 191 CA3d 901, 236 CR 787, the prevailing party in a suit on a promissory note was entitled to attorney fees based on the fees provision in the underlying sales contract. The court noted the general rule that several papers relating to the same subject matter (such as note, mortgage, and agreement of sale) constitute one contract when they are part of the same transaction. See also *Niederer v Ferreira* (1987) 189 CA3d 1485, 234 CR 779 (guarantor on promissory note that contained attorney fees provision effectively agreed to pay attorney fees if there was a suit against him on note even though guaranty did not provide for payment of fees).

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### §26.90 6. When contract found unenforceable as to a party

The prevailing party is entitled to fees when the contract is found unenforceable as to that party if the opposing party has alleged entitlement to fees under the agreement. The contract in question, however, must actually contain a fee clause; "[t]he mere allegation is not enough." *M. Perez Co. v Base Camp Condominiums Ass'n* (2003) 111 CA4th 456, 468, 3 CR3d 563. A party is similarly entitled to fees against one who is not a signatory to the agreement if the nonsignatory originally alleged an entitlement to fees under the agreement, but only if the contract actually would have entitled the nonsignatory to recover fees. *Leach v Home Sav. & Loan Ass'n* (1986) 185 CA3d 1295, 1305, 230 CR 553.

**NOTE:** In *M. Perez Co. v Base Camp*, *supra,* the Third District Court of Appeal rejected its own reasoning in *International Billing Servs. v Emigh* (2000) 84 CA4th 1175, 101 CR 2d 532. In *International Billing Servs.,* the court held that a party need only allege entitlement to attorney fees to be able to recover them. In *M. Perez* the court decided instead that the mere allegation of entitlement to attorney fees is not enough to support a fee award. The contract must actually provide for recovery of attorney fees by the prevailing party. 11 CA4th at 467. In *Blickman Turkus LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 899, 76 CR3d 325, the Sixth District Court of Appeal held that the party claiming attorney fees must establish that the opposing party would have been entitled to fees if that party had been the prevailing party. See *Leach*, 185 CA3d at 307.

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### §26.91 7. In case of arbitration

When a contract contains both arbitration and attorney fees clauses, the arbitrator may award fees to the prevailing party. *Tate v Saratoga Sav. & Loan Ass'n* (1989) 216 CA3d 843, 856, 265 CR 440; *Taranow v Brokstein* (1982) 135 CA3d 662, 185 CR 532.

When a party's entitlement to attorney fees is within the scope of issues submitted for binding arbitration, the arbitrator's decision to award or not to award fees is not subject to review, even when it is premised on an erroneous reading of the law. *Moore v First Bank of San Luis Obispo* (2000) 22 C4th 782, 94 CR2d 603 (fees denied); *Taylor v Van-Catlin Constr*. (2005) 130 CA4th 1061, 1068, 30 CR3d 690 (fees awarded); *Pierotti v Torian* (2000) 81 CA4th 17, 96 CR2d 553 (fees denied).

The prevailing parties in postarbitration judicial proceedings are entitled to recover their attorney fees for those proceedings under CCP §1293.2. *Marcus & Millichap Real Estate Inv. Brokerage Co. v Woodman Inv. Group* (2005) 129 CA4th 508, 28 CR3d 584 (award of costs per §1293.2, including attorney fees when authorized by contract, is mandatory).

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### §26.92 8. If lawyer chooses to litigate in propria persona

In an action to enforce a contract containing an attorney fee provision, a lawyer who chooses to litigate in propria persona, rather than retain another attorney to represent him or her, may not recover attorney fees under CC §1717. *Trope v Katz* (1995) 11 C4th 274, 277, 45 CR2d 241. Self-represented attorneys are also not entitled to sanctions in the form of attorney fees. *Musaelian v Adams* (2009) 45 C4th 512, 87 CR3d 475.

When a corporation chooses to be represented in litigation by its in-house attorneys, however, it may recover attorney fees based on the number of hours reasonably expended by its in-house counsel. *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 95 CR2d 198. Similarly, two law firms that hire each other to sue their former client for attorney fees may recover such fees under CC §1717. *Farmers Ins. Exch. v Law Offices of Conrado Joe Sayas, Jr., Esq.* (9th Cir 2001) 250 F3d 1234.

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### §26.93 9. If prevailing party's fees paid by insurance carrier

That a prevailing party's fees were paid by an insurance carrier does not preclude an award of fees under CC §1717. *Staples v Hoefke* (1987) 189 CA3d 1397, 1409, 235 CR 165. Compare *Staples* with *Bramalea Cal. Inc. v Reliable Interiors, Inc.* (2004) 119 CA4th 468, 14 CR3d 302 (attorney fees paid by insurance not recoverable through indemnity claim).

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## J. Fees awarded to party prevailing on contract

### §26.94 1. Court determines

The court will determine the party prevailing on the contract regardless of whether the suit proceeds to final judgment. CC §1717(b)(1). As a general rule, the party who obtains judgment is deemed the prevailing party, but the form of the judgment is not controlling. *Lewis v Alpha Beta Co.* (1983) 141 CA3d 29, 189 CR 840.

In deciding whether a party prevailed on the contract, the trial court is to compare the relief awarded on the contract claim with the party's demand on that claim and the party's litigation objectives; the determination is to be made only on a final resolution of the contract claims and only by comparing the extent to which each party has succeeded and failed in its contentions. *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 1109, 86 CR2d 614 (prevailing plaintiff sought more than $2 million but was awarded only $442,054 in damages); *Hsu v Abbara* (1995) 9 C4th 863, 876, 39 CR2d 824; *Mustachio v Great W. Bank* (1996) 48 CA4th 1145, 1150, 56 CR2d 33. See also *Estate of Drummond* (2007) 149 CA4th 46, 51, 56 CR3d 691 (dismissal of petition filed in wrong forum only "interim victory" and neither party prevailed on contract). But see *Turner v Schultz* (2009) 175 CA4th 974, 979, 96 CR3d 659 (party entitled to attorney fees after successfully defending suit to stay arbitration under contract, even though merits of underlying matter not yet determined).

The trial court may award attorney fees incurred on appeal, even if the appellate court orders both parties to bear their own appellate costs. *Butler-Rupp v Lourdeaux* (2007) 154 CA4th 918, 924, 65 CR3d 242.

**Equitable considerations.** Equitable principles govern the award of contractual attorney fees. See *Sears v Baccaglio* (1998) 60 CA4th 1136, 1150, 70 CR2d 769 (whether party has prevailed under CC §1717 involves "equitable consideration of who should fairly be regarded as the winner"); *Pirkig v Dennis* (1989) 215 CA3d 1560, 1566, 264 CR 494 (plaintiff prevailed even though offsets from prior settlements resulted in no net recovery); *Hsu v Abbara* (1995) 9 C4th 863, 877, 39 CR2d 824 (prevailing party determination is based on comparison of what was sought with what was gained).

**Discretion of court.** It is within the trial court's discretion to determine which party has prevailed; its finding will not be reversed on appeal unless a clear abuse of discretion is shown. *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614; *Smith v Krueger* (1983) 150 CA3d 752, 198 CR 174 (trial court abused discretion in denying fees to party that prevailed in action to declare invalid acceleration provision in deed of trust). A de novo standard of review does not apply to the issue of entitlement to attorney fees unless pure questions of law are presented. *Agnew v State Bd. of Equalization* (2005) 134 CA4th 899, 910, 36 CR3d 464 (whether court abused its discretion in finding Tax Board's position was "not substantially justified" under Rev & T C §7156 did not involve questions of law, and thus de novo review not warranted).

**Mixed result cases.** The trial court's discretion to make a determination of the prevailing party is broad in cases that render mixed results. See, *e.g.*, *Jackson v Homeowners Ass'n Monte Vista Estates-East* (2001) 93 CA4th 773, 788, 113 CR2d 363 (no clear win by either side, but court was within its equitable discretion in awarding plaintiff unit owners fees even when they were not entitled to any relief or damages).

**Definition of prevailing party under CC §1717(b)(1).** The party prevailing on the contract is the party who recovered greater relief in the action on the contract except when (1) the action has been voluntarily dismissed or dismissed under a settlement (in which event there is no prevailing party) (CC §1717(b)(2)), or (2) defendant tenders the full amount owed to plaintiff and meets certain other requirements (CC §1717(b)(2)). See CC §1717(b)(1) (the "party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract"). For example, in a fraud action under a real estate contract, plaintiff received a judgment in its favor for $834,900. Defendant was successful in a partial appeal that sought a reduction in the amount of emotional distress damages and punitive damages. The court of appeal rejected defendant's argument that it was the prevailing party simply because it had prevailed on appeal and affirmed the trial court's determination that the plaintiff was the prevailing party on the contract under CC §1717 because plaintiff received a judgment in its favor. *Snyder v Marcus & Millichap* (1996) 46 CA4th 1099,

54 CR2d 268.

The court also has the power to determine that neither party has prevailed on the contract for purposes of CC §1717. CC §1717(b)(1). See *Hsu v Abbara* (1995) 9 C4th 863, 875, 39 CR2d 824 (and cases cited); *Nasser v Superior Court* (1984) 156 CA3d 52, 202 CR 552 (in declaratory relief action, court of appeal affirmed trial court ruling that neither party prevailed because lessee was forced to pay rental amount higher than requested and higher than previously offered, although the 3-year option to renew was validated). A prevailing party is not entitled to fees simply because the opposing party requested them. *Hasler v Howard* (2005) 130 CA4th 1168, 1171, 30 CR3d 714 (fee award reversed; unlike *Hsu,* alleged contract in *Hasler* did not entitle either party to fees, regardless of who prevailed).

The statutory definition of "prevailing party" under CC §1717 is mandatory and cannot be changed by contract. See *Exxess Electronixx v Heger Realty Corp.* (1998) 64 CA4th 698, 707, 75 CR2d 376. The determination of the prevailing party is normally dispositive, regardless of that party's misbehavior. *Deane Gardenhome Ass'n v Denktas* (1993) 13 CA4th 1394, 1398, 16 CR2d 816. A writ proceeding, however, is not a final judgment for determination of who is the prevailing party. *580 Folsom Assocs. v Prometheus Dev. Co.* (1990) 223 CA3d 1, 29, 272 CR 227.

In *People ex rel Cooper v Mitchell Bros. Santa Ana Theater* (1985) 165 CA3d 378, 211 CR 501, the court held that it was proper to deny attorney fees to plaintiff when he prevailed on only one of 20 issues raised on appeal and defendant prevailed on four issues. But see *Buck v Barb* (1983) 147 CA3d 920, 926, 195 CR 461, in which the court noted that the fact that a party recovers less than the amount prayed for in an action under a contract does not make the adversary the prevailing party within the meaning of CC §1717.

**Effect of CCP §998.** Acceptance of an offer of compromise under CCP §998 that is silent on costs or attorney fees does not preclude recovery of fees as cost items under CC §1717 after judgment was entered on the compromise agreement. *Lanyi v Goldblum* (1986) 177 CA3d 181, 223 CR 32. Costs and attorney fees are incidental to the judgment unless expressly part of the judgment. *Engle v Copenbarger & Copenbarger, LLP* (2007) 157 CA4th 165, 169, 68 CR3d 461. Although CCP §998 provides that a written offer to compromise must include "a statement of the offer, containing the terms and conditions of the judgment or award," an offer to compromise will exclude fees only if it expressly excludes them. 157 CA4th at 169.

**Tort actions based on contract.** The court will decide whether, in any particular case, a written contract provides for attorney fees to the prevailing party in a tort action. *Gil v Mansano* (2004) 121 CA4th 739, 17 CR3d 420. In *Gil*, the plaintiff sued defendant for fraud and defendant successfully asserted a written release in defense. Because the release was narrowly drawn to provide for fees only when an action was brought to enforce the terms of the release, defendant's defensive assertion of the release did not entitle him to fees. 121 CA4th at 745. If the attorney fees language is sufficiently broad, however, the court may allow recovery of fees when the contract is used successfully to defend a tort action. See *Thompson v Miller* (2003) 112 CA4th 327, 336, 4 CR3d 905 (fees awarded to defendant who successfully asserted defense based on representations contained in stock purchase agreement that provided for award of attorney fees to prevailing party in "any dispute under" the agreement).

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### §26.95 2. If damages awarded on causes of action not on contract

In an action that seeks relief in addition to that based on contract, if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, CC §1717(c) provides that the amounts awarded to the prevailing party under CC §1717 must be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under §1717 exceeds the amount of damages awarded to the party not prevailing on the contract, the net amount must be awarded to the party prevailing on the contract.

However, when various common issues are tried concurrently and the tort issues litigated are determinative of the contract claims, it is within the court's discretion to award attorney fees incurred in litigating those common issues. *Erickson v R.E.M. Concepts, Inc.* (2005) 126 CA4th 1073, 25 CR3d 39.

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### §26.96 3. When cross-complaint

Attorney fees for "costs of collection" properly encompass attorney fees incurred in defending against a cross-complaint in the same action. See *Finalco, Inc. v Roosevelt* (1991) 235 CA3d 1301, 1306, 3 CR2d 865; *Boyd v Oscar Fisher Co.* (1989) 210 CA3d 368, 378, 258 CR 473 (cross-complainant was impliedly held to be prevailing party on contract theory when only contractual theory was submitted to jury on cross-complaint and when no specific findings were made concerning tort or contract character of award).

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### §26.97 4. When no prevailing party

Under CC §1717(b)(2), when an action is voluntarily dismissed or dismissed under a "settlement of the case," there is no prevailing party for purposes of CC §1717. In *Share v Casiano Bel-Air Homeowners' Ass'n* (1989) 215 CA3d 515, 524, 263 CR 753, plaintiffs brought a contempt proceeding to enforce a consent judgment concerning covenants, codes, and restrictions (CC&Rs). During the contempt proceeding, the parties entered into a stipulated order. The court held that the exception of §1717(b)(2) did not apply to a stipulated order reserving contempt issues, because there was no dismissal of the case, and that attorney fees under §1717 were thus available for efforts in enforcing the stipulated order. The court also held that §1717 applied in the contempt proceeding to enforce the consent judgment, because the broad attorney fees clause in the CC&Rs provided for such an award of fees to the prevailing party in any proceeding to enforce the CC&Rs.

Dismissal of an action with prejudice at the plaintiff's request under former CCP §581(5) (now CCP §581(e)) after the commencement of trial is a voluntary dismissal, precluding an award of attorney fees under CC §1717. *D & J, Inc. v Ferro Corp.* (1986) 176 CA3d 1191, 222 CR 656.

Plaintiff's request to voluntarily dismiss an action and thereby avoid liability for fees under CC §1717(b)(2) has been broadly interpreted. In *Rosen v Robert P. Warmington Co.* (1988) 201 CA3d 939, 247 CR 635, plaintiff secured an involuntary dismissal through a judgment on the pleadings with respect to plaintiff's contract cause of action. The contract contained a fee clause. Plaintiff then voluntarily dismissed the remaining nonfee claims and, hence, the action as a whole. The court rejected defendant's claim that it was entitled to fees because of having prevailed on the contract cause of action. The court held that §1717(b)(2) precludes an award of fees when the action was "voluntarily dismissed." A dismissal for failure to prosecute, however, may render the defendant the prevailing party. *Elms v Builders Disbursements, Inc.* (1991) 232 CA3d 671, 283 CR 515.

In *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830, the supreme court addressed the issue of voluntary dismissal and held that a defendant in a contract action is the prevailing party, in the contract sense, when a plaintiff voluntarily dismisses the action against the defendant without a settlement. The *Santisas* court, however, held that §1717 precluded the defendant from recovering attorney fees on the contract claim but ruled that the prevailing defendant could recover attorney fees on tort claims under the contract's attorney fees provision because they were not precluded by §1717. See *Damian v Tamondong* (1998) 65 CA4th 1115, 1127, 77 CR2d 262 (limiting the holding in *Santisas* to situations in which parties assert a contractually based right to recover attorney fees, so as to bring the case within the scope of §1717). See also *Drybread v Chipain Chiropractic Corp.* (2007) 151 CA4th 1063, 60 CR3d 580 (unlawful detainer action sounded in tort, therefore §1717 did not apply and defendant was entitled to fees under provisions of sublease). But see *Mitchell Land & Improvement Co. v Ristorante Ferrantelli, Inc.* (2007) 158 CA4th 479, 488, 70 CR3d 9 (unlawful detainer action sounded in contract; §1717 applied).

A settlement agreement that calls for a voluntary dismissal of the action will also not preclude recovery of fees if disputes over fee issues have been expressly reserved by the parties for resolution by the court. *Jackson v Homeowners Ass'n Monte Vista Estates-East* (2001) 93 CA4th 773, 113 CR2d 363.

Although a voluntary dismissal of an action may terminate the dismissed party's right to contractual attorney fees under CC §1717, it does not necessarily preclude a party's rights to fees under statutes authorizing them. See, *e.g.*, *Del Cerro Mobile Estates v Proffer* (2001) 87 CA4th 943, 105 CR2d 5 (dismissal of action by plaintiff prevented recovery of fees by defendant under CC §1717, but did not preclude defendant's right to recover fees under the Mobilehome Residency Law, CC §798). Further case examples include: *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 50 CR3d 273 (plaintiff, who settled with auto seller, was entitled to attorney fees under Automobile Sales Finance Act (CC §2981) and Consumers Legal Remedies Act (CC §1750) as prevailing party); *Donner Mgmt. Co. v Schaffer* (2006) 142 CA4th 1296, 48 CR3d 534 (Corp C §800 provides statutory basis for attorney fees in shareholder derivative suits; director was prevailing party when shareholders dismissed suit without prejudice).

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### §26.98 5. Award on appeal

A trial court has jurisdiction to award statutorily authorized attorney fees to a prevailing party on appeal, even if the court of appeal did not explicitly award such fees in either its opinion or its remittitur. *MST Farms v C.G. 1464* (1988) 204 CA3d 304, 251 CR 72 (fees awarded under CC §1717). However, in this context, "the distinction between a contractual and a statutory right to attorney fees … is now meaningless," since CCP §1033.5 was amended in 1990 to provide that "costs" include attorney fees when authorized by contract, statute, or law. CCP §1033.5(a)(10). *Harbour Landing-Dolfann, Ltd. v Anderson* (1996) 48 CA4th 260, 264, 55 CR2d 640.

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### §26.99 6. When multiple agreements

Under CC §1642, when there are several contracts between the parties relating to the same subject and transaction, the contracts must be considered together. In this situation, the court normally awards attorney fees as long as the action sued on is one arising largely from the contract containing the attorney fee clause. Whether the contracts are intended to be elements of a single transaction is a question of fact. If they are not so intended, the fact that one contract has an attorney fee clause will not give rise to attorney fees on actions concerning other contracts. *Pilcher v Wheeler* (1992) 2 CA4th 352, 3 CR2d 533. But see *Republic Bank v Marine Nat'l Bank* (1996) 45 CA4th 919, 921, 53 CR2d 90 (sublease incorporated by reference terms and conditions of master lease, including attorney fees clause).

The court in *Hunt v Fahnestock* (1990) 220 CA3d 628, 269 CR 614, held that, when an action is brought on several contracts, attorney fees may be awarded to the prevailing party on each contract, whether or not that party prevailed overall.

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## K. Only a party under CC §1717 awarded fees

### §26.100 1. Guidelines ambiguous

Civil Code §1717 allows an award of fees to a "party" in an action on a contract, "whether he or she is the party specified in the contract or not." CC §1717(a). Whether a litigant is a party for purposes of §1717 is not always easy to determine, and case law provides ambiguous guidelines. Simply being a party to litigation that in some way involves a contract containing a fee clause is not necessarily synonymous with being a party under §1717. For example, in *Citizens Sav. & Loan Ass'n v Khoury* (1978) 84 CA3d 244, 148 CR 529, a buyer of real property in a successful action for specific performance was not entitled to fees under §1717, because the only contractual provisions for attorney fees allowed for payment of such fees to the broker or escrow holder, neither of whom was a party to the action.

In *Chapple v Big Bear Super Mkt. No. 3* (1980) 108 CA3d 867, 167 CR 103, plaintiff property owner obtained judgment, which included a fee award against defendants, a contractor and real estate broker, but the court of appeal held that the award of fees against the broker was improper because the broker's liability was not based on the contract but on breach of a fiduciary duty to plaintiff that was outside the scope of the contract.

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### §26.101 2. If noncontracting party involved

Whether a noncontracting party is entitled to fees was discussed in *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 158 CR 1. In *Reynolds,* a creditor unsuccessfully sued the shareholders of a bankrupt corporation on a promissory note even though they were not parties to the contract. The court held that under the mutuality provision of CC §1717, they were entitled to fees just as the plaintiff would have been if successful in enforcing a contract. See also *Exarhos v Exarhos* (2008) 159 CA4th 898, 72 CR3d 409 (decedent's successor in interest was entitled to fees); *California Wholesale Material Supply, Inc. v Norm Wilson & Sons, Inc.* (2002) 96 CA4th 598, 117 CR2d 390 (awarding attorney fees to prevailing signatory defendant in suit on subcontract by nonsignatory plaintiff who would have been entitled to attorney fees had plaintiff prevailed).

*Reynolds* was distinguished in *Artesia Med. Dev. Co. v Regency Assocs.* (1989) 214 CA3d 957, 963, 266 CR 657, in which a lessor, instead of bringing an action on a contract, brought an unlawful detainer action to recover possession from an illegal assignee of the lease. Because it found the assignment to be null and void, the court held that the assignee was neither a party to the contract with the lessor nor in privity with any party to a contract, and that the assignee thus could not recover attorney fees, even when it ultimately had been declared the prevailing party by the trial court. See also *Loduca v Polyzos* (2007) 153 CA4th 334, 62 CR3d 780 (plaintiff property owner, third party beneficiary under construction contract, entitled to recover fees as prevailing party in suit against subcontractor); *Sessions Payroll Mgmt., Inc. v Noble Constr. Co.* (2000) 84 CA4th 671, 101 CR2d 127 (defendant that had not prevailed on claim that it was third party beneficiary under contract containing attorney fees provision could not recover fees from plaintiff).

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## §26.102 a. Real estate broker

In some instances, a real estate broker may be entitled to attorney fees even though he or she is not a signatory to the agreement for attorney fees. See *Steve Schmidt & Co. v Berry* (1986) 183 CA3d 1299, 228 CR 689 (real estate broker entitled to attorney fees under CC §1717 in action against seller for share of commission even though broker did not sign original listing agreement, which provided for attorney fees to prevailing party).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.103 b. Competing lienholders to property

### §26.103 b. Competing lienholders to property

Civil Code §1717 was held not to apply in a case between competing lienholders to a parcel of property, because attorney fee provisions were in separate deeds of trust and there was no privity between the parties under which a court could imply a reciprocal right to attorney fees. *Clar v Cacciola* (1987) 193 CA3d 1032, 238 CR 726.

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### §26.104 c. Action to remove cloud on title to trust property

In *Leach v Home Sav. & Loan Ass'n* (1986) 185 CA3d 1295, 230 CR 553, a beneficiary of a testamentary trust brought an action to remove a cloud on the title to trust property. Defendant lenders, whose lien on the property secured loans made to the trustee, were the prevailing parties. The court held that the lenders were not entitled to fees against the trustee based on the attorney fee provisions in the loan agreements, because plaintiff did not sign the loan agreements and would have had no contractual or statutory right to receive fees if she had prevailed.

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### §26.105 d. Property conveyed to third person

A third person to whom property was conveyed after the seller entered into a contract containing a fees clause with the plaintiff was not a party to the contract and was not liable for plaintiff's attorney fees in an action for specific performance against the seller and third person. *Glynn v Marquette* (1984) 152 CA3d 277, 199 CR 306.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.106 e. Recovery of fees when lender does not sign subcontract

### §26.106 e. Recovery of fees when lender does not sign subcontract

Attorney fees cannot be recovered by a subcontractor from a construction lender when the lender did not sign the subcontracts containing the fees clause. That the lender foreclosed and became the legal owner of the property did not imply that it assumed any contractual obligations. *Wilson's Heating & Air Conditioning v Wells Fargo Bank* (1988) 202 CA3d 1326, 1333, 249 CR 553.

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### 3. Expanded concept of prevailing parties

### §26.107 a. Nonsignatory defendant may be entitled to attorney fees

To ensure the reciprocal nature of contract provisions, the courts have expanded the concepts of "parties" to the contract and "prevailing parties." For example, a nonsignatory defendant sued on a contract as if he or she were a party to it is entitled to fees if he or she prevails, just as the plaintiff would be entitled to fees if successful in enforcing the contractual obligation against defendant. *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 128, 158 CR 1. Similarly, a signatory defendant sued on a contract by a nonsignatory plaintiff is entitled to attorney fees if the plaintiff would have been entitled to such fees had plaintiff prevailed. *California Wholesale Material Supply, Inc. v Norm Wilson & Sons, Inc*. (2002) 96 CA4th 598, 117 CR2d 390.

**PRACTICE TIP:** Be cautious in alleging a claim for attorney fees under agreements to which the party is not a signatory, because the other party may be entitled to fees if he or she prevails. Similarly, broad-based allegations against nonsignatories to an agreement, alleging that the nonsignatories are liable under the agreement, may result in fee awards to those parties if they prevail.

A litigant who would effectively and practically but not directly be liable for a fee award if he or she were to lose, is entitled to a fee award if he or she wins. *Wilhite v Callihan* (1982) 135 CA3d 295, 301, 185 CR 215; *Saucedo v Mercury Sav. & Loan Ass'n* (1980) 111 CA3d 309, 315, 168 CR 552. In these cases, there would have been no direct or personal liability under the contract, but if the successful parties had lost, they would have been indirectly subject to liability for the other party's attorney fees.

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### §26.108 b. Fees may be awarded to litigant benefiting from result of judgment between other contracting litigants

Less well established is the principle that fees may be awarded to a litigant who benefits from the result of a judgment between other contracting litigants. In *Lewis v Alpha Beta Co.* (1983) 141 CA3d 29, 189 CR 840, liquor store operators sued the Alpha Beta supermarket and their mutual landlord to enjoin the supermarket from selling liquor, contrary to the terms of plaintiffs' lease, which gave plaintiffs the exclusive right to sell liquor in the shopping center. The court granted an injunction against Alpha Beta in favor of cross-complainant landlord and, because the decision resolved all issues in the liquor store operators' favor, denied their request for a separate injunction. The court found that the liquor store operators were prevailing parties and entitled to a fee award under CC §1717.

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### §26.109 4. Actions on book accounts

A "book account" is defined in CCP §337a. It is essentially a record of the transactions between the creditor and the debtor, which serves as the creditor's principal record of the transactions between them. Attorney fees and costs may be awarded to the prevailing party in contract actions based on book accounts entered into after 1986. CC §1717.5. These fees and costs are available unless otherwise prohibited by law or waived by the parties. If there is a written agreement between the parties, it must contain a statement that the prevailing party to any action may recover attorney fees and costs as provided by CC §1717.5.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.110 a. Exempt parties

### §26.110 a. Exempt parties

Banks, insurance companies, savings and loan associations, federal associations, state and federal credit unions, and their subsidiaries, affiliates, or holding companies, authorized industrial loan companies, licensed consumer finance lenders, or licensed commercial finance lenders are specifically exempt from the statute.

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### §26.111 b. Fee limits

Reasonable attorney fees are fixed by the court and cannot exceed the lesser of $800 for book accounts for consumer purposes, $1000 for all other book accounts, or 25 percent of the principal amount owing under the contract. The fees cannot exceed $800 for book accounts for consumer purposes or $1000 for all other book accounts when the court finds that there is no liability under a book account. CC §1717.5. No attorney fees awarded under CC §1717.5 shall exceed the lesser of either the maximum allowed ($800 for book accounts for consumer purposes or $1000 for all other book accounts), the amount provided by any court adopted default attorney fees schedule, or an amount the court otherwise provides. CC §1717.5.

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### §26.112 L. Fees incurred to enforce judgment

A judgment rendered in a contract case extinguishes all further contractual rights, including attorney fees clauses, and postjudgment attorney fees cannot be recovered unless a statute expressly authorizes them. *Berti v Santa Barbara Beach Props.* (2006) 145 CA4th 70, 77, 51 CR3d 364. Under CCP §685.040, attorney fees incurred in enforcing a judgment are included as collectible costs if the underlying judgment includes an award of attorney fees to the judgment creditor under CCP §1033.5(a)(10)(A). See *Jaffe v Pacelli* (2008) 165 CA4th 927, 935, 82 CR3d 423 (award of postjudgment attorney fees is not based on contract but on award of attorney fees and costs in judgment).

Enforcement of an out-of-state judgment arising from a contract is also not an action on the contract but an action to enforce the judgment. *Hambrose Reserve, Ltd. v Faitz* (1992) 9 CA4th 129, 132, 11 CR2d 638, disapproved on other grounds in *Trope v Katz* (1995) 11 C4th 274, 292, 45 CR2d 241.

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## IX. RECOVERY OF ATTORNEY FEES UNDER EQUITABLE THEORIES

### A. Common fund doctrine

### §26.113 1. What it is

The common fund doctrine is an equitable exception to the general rule that attorney fees are not recoverable in the absence of a statutory or contractual provision. *D'Amico v Board of Med. Examiners* (1974) 11 C3d 1, 25, 112 CR 786. See also the discussion in California Attorney Fee Awards, chap 5 (3d ed Cal CEB 2010). Under the doctrine, anyone who successfully maintains an action to create, preserve, or compel distribution of a common fund from which others derive benefit is entitled to a total or partial recoupment of attorney fees and other litigation expenses from the fund so that an equitable portion of the burden is borne by all those benefited. See *Serrano v Priest* (1977) 20 C3d 25, 35, 141 CR 315; *D'Amico v Board of Med. Examiners, supra*. For discussion of the underlying rationale of the rule, see *Estate of Stauffer* (1959) 53 C2d 124, 132, 346 P2d 748. The theory of the common fund doctrine has been extended to third party suits as "equitable apportionment." See *Quinn v State* (1975) 15 C3d 162, 166, 124 CR 1 (workers' compensation).

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### §26.114 2. When it applies

The common fund doctrine rewards an active litigant only when other, passive members of the group benefit from the outcome. It does not apply when members of the benefited group retain their own separate counsel to participate in the litigation. *Walsh v Woods* (1986) 187 CA3d 1273, 232 CR 629 (plaintiff's counsel not entitled to additional fees on basis that his efforts also benefited intervenor when intervenor's counsel also actively participated in litigation). See *Bank of America v Cory* (1985) 164 CA3d 66, 210 CR 351 (taxpayers' action resulted in creation of common fund; unusual in that taxpayers' suits usually result in vindication of important public right, not creation of common fund; to extent judgment relied on CCP §1021.5 for recovery of attorney fees, judgment modified to confine award to common fund theory). See also *Steinberg v Allstate Ins. Co.* (1990) 226 CA3d 216, 222, 277 CR 32 (attorney fees awarded to plaintiffs' attorneys; minimal participation by attorneys representing subrogated insurer that did not bring about settlement fund were properly found not to have actively participated in creation of fund and thus not entitled to attorney fees from it).

Compare *Steinberg* with *Kavanaugh v City of Sunnyvale* (1991) 233 CA3d 903, 915, 284 CR 698 (distinguishing *Steinberg,* court held that attorney fees under Lab C §3856 were improper when allegedly passive beneficiary of litigation was represented by counsel and actively participated in case).

The common fund doctrine allows recovery of fees only from the fund recovered or preserved, and responsibility for payment of the fees cannot be shifted directly to the losing party. *Jutkowitz v Bourns, Inc.* (1981) 118 CA3d 102, 112, 173 CR 248. Furthermore, "where plaintiffs' efforts have not effected the creation or preservation of an identifiable 'fund' of money out of which they seek to recover their attorneys fees, the 'common fund' exception is inapplicable." *Serrano v Priest* (1977) 20 C3d 25, 37, 141 CR 315.

When there is a common-fund recovery, counsel may choose to seek fees under the private attorney general rule instead. The criterion for awarding the latter instead of the former is whether the "estimated value" of the case "exceeds by a substantial margin the actual litigation costs." If so, common-fund fees are appropriate. "Estimated value" means the monetary gains actually attained, discounted by the probability of success at the time vital litigation decisions were made. *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1414, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.115 3. Examples of actions in which common fund doctrine applies

### §26.115 3. Examples of actions in which common fund doctrine applies

Some actions in which the common fund doctrine have been applied are:

- Creditor's action against a trustee under an assignment for the benefit of creditors (*Farmers & Merchants Nat'l Bank v Peterson* (1936) 5 C2d 601, 607, 55 P2d 867).
- Subrogation recoveries (*Lee v State Farm Mut. Auto. Ins. Co.* (1976) 57 CA3d 458, 466, 129 CR 271). See also *Walsh v Woods* (1982) 133 CA3d 764, 184 CR 267 (application of Lab C §3856).
- Class action (*Melendres v City of Los Angeles* (1975) 45 CA3d 267, 119 CR 713 (on behalf of city employees seeking retroactive pay increase); *Knoff v City & County of San Francisco* (1969) 1 CA3d 184, 81 CR 683 (successful taxpayer class-action suit)).
- Shareholder derivative suits (*Fox v Hale & Norcross Silver Mining Co.* (1895) 108 C 475, 41 P 328). Compare *Fox* with *Baker v Pratt* (1986) 176 CA3d 370, 222 CR 253, in which the common fund doctrine was held inapplicable to actions by one shareholder against another involving closely held corporations because there were no other beneficiaries of the litigation.

**NOTE:** *Baker* was criticized by the court in *Cziraki v Thunder Cats, Inc.* (2003) 111 CA4th 552, 563, 3 CR3d 419. In a close corporation with few other shareholders, a broad reading of *Baker* would create a negative incentive for a shareholder to seek a legal remedy or to join a suit on behalf of a company in which he or she has any interest. It would have the same effect on any attorney who might otherwise represent such a shareholder in the hope of recovering fees from a better-funded company on whose behalf he or she has litigated. Accordingly, the *Cziraki* court refused "to extend *Baker* as a blanket rule disallowing attorney fee awards in any derivative suit merely because the litigation involves the entire class of shareholders in a close corporation." 111 CA4th at 565.

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### §26.116 4. Grounds for denying application of doctrine

Common grounds for denying application of the doctrine are that

- A county's lien for medical expenses in a personal injury action asserted against plaintiff's recovery under Govt C §23004.1 is not subject to the common fund doctrine (*City & County of San Francisco v Sweet* (1995) 12 C4th 105, 48 CR2d 42; see also *Parnell v Adventist Health Sys./W.* (2005) 35 C4th 595, 605, 26 CR3d 569 (following *Sweet;* doctrine does not apply to lien asserted under California's Hospital Lien Act (CC §§3045.1-3045.6)); *Lovett v Carrasco* (1998) 63 CA4th 48, 73 CR2d 496 (extending *Sweet* rule to private medical providers));
- The benefit to others was incidental, unintended, or both (see *Gabrielson v City of Long Beach* (1961) 56 C2d 224, 14 CR 651; *Estate of Stauffer* (1959) 53 C2d 124, 133, 346 P2d 748); and
- The claimant was independently indebted to a person who happened, therefore, to benefit by the recovery of a fund from a third party by the claimant (see *Lindsey v County of Los Angeles* (1980) 109 CA3d 933, 938, 167 CR 527).

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## B. Substantial benefit theory

### 1. What it is

### §26.117 a. Characterized as outgrowth of common fund doctrine

A second equitable exception to the general rule against the recovery of attorney fees in the absence of a statutory or contractual provision is the substantial benefit theory. The theory allows an award of attorney fees and other litigation expenses to a litigant proceeding in a representative capacity, whether or not in a formal class action, whose suit results directly in the conferral of a "substantial benefit" on an ascertainable group. *Woodland Hills Residents Ass'n v City Council* (1979) 23 C3d 917, 943, 154 CR 503 (Woodland Hills II); *Serrano v Priest* (1977) 20 C3d 25, 38, 141 CR 315.

The substantial benefit theory is characterized as an outgrowth of the common fund doctrine. *Woodland Hills Residents Ass'n v City Council, supra*. However, unlike the common fund doctrine, the substantial benefit theory does not require that the benefit conferred create a fund of money. See *Woodland Hills Residents Ass'n v City Council* (1979) 23 C3d 917, 945, 154 CR 503 (Woodland Hills II); *Serrano v Priest* (1977) 20 C3d 25, 42, 141 CR 315.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.118 b. Purpose is to prevent unjust enrichment

### §26.118 b. Purpose is to prevent unjust enrichment

The substantial benefit theory, like the common fund doctrine, is aimed at preventing unjust enrichment. Although an award of attorney fees may render the benefited parties "involuntary clients" of the attorneys, equitable considerations justify charging those who have received economic benefits with the costs of obtaining them. The court in *Woodland Hills Residents Ass'n v City Council* (1979) 23 C3d 917, 945, 154 CR 503 (Woodland Hills II), stated: "So long as the costs bear a reasonable relation to the benefits, the involuntary client who retains a substantial gain from the litigation will generally have no just cause to complain."

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### §26.119 2. When it applies

If the benefits conferred merely result from the stare decisis effect of applying the principle of the case to future litigation, the substantial benefit theory is inappropriate. *Woodland Hills Residents Ass'n v City Council* (1979) 23 C3d 917, 943, 154 CR 503 (*Woodland Hills II*). Nor is the theory applicable if the "benefit" derives primarily from "the effectuation of statutory policy." 23 C3d at 947; *Concerned Citizens of La Habra v City of La Habra* (2005) 131 CA4th 329, 31 CR3d 599.

**Further research:** For further discussion of the substantial benefit theory and how it differs from the common fund doctrine, see California Attorney Fee Awards, chap 5 (3d ed Cal CEB 2010). For a discussion of the development of the substantial benefit theory, see *Braude v Automobile Club of S. Cal.* (1986) 178 CA3d 994, 223 CR 914.

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## §26.120 3. Examples of actions applying substantial benefit theory

The substantial benefit theory has been applied in:

- Shareholders' derivative actions (*Fletcher v A. J. Indus.* (1968) 266 CA2d 313, 72 CR 146).
- Taxpayers' suits (*Card v Community Redev. Agency* (1976) 61 CA3d 570, 582, 131 CR 153).
- State employees' successful suits against an employer (*Mandel v Hodges* (1976) 54 CA3d 596, 127 CR 244). In *Aguilar v Johnson* (1988) 202 CA3d 241, 252, 247 CR 909, the court held that a police officer who brought a mandamus action challenging the police department's procedures in handling a citizen's complaint was entitled to attorney fees. The court found that a substantial benefit was afforded to a large class of persons, police officers, which in turn conferred resultant benefits on the general public in the form of stable police employer-employee relations.
- Environmental protection groups' successful suits to enjoin development plans (*Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 165 CR 514; *Coalition for Los Angeles County Planning in Pub. Interest v Board of Supervisors* (1977) 76 CA3d 241, 142 CR 766).

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## X. RECOVERY OF ATTORNEY FEES AS DAMAGES

### §26.121 A. When recoverable as damages

Attorney fees awarded as an element of damages must be pleaded and proved at trial as part of the case in chief. See *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 678 n16, 186 CR 589. Examples of types of cases in which attorney fees have been awarded as an element of damages include:

- When someone commits a wrongful act that reasonably could be foreseen to cause a third party to defend or prosecute a lawsuit (known as the "tort of another doctrine"). See *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 198 CR 551.
- Actions for damages in cases of express or implied indemnity (see §§26.127-26.130 below). See *Hillman v Leland E. Burns, Inc.* (1989) 209 CA3d 860, 257 CR 535.
- Actions for false imprisonment or malicious prosecution. See *Mabee v Nurseryland Garden Ctrs.* (1979) 88 CA3d 420, 425, 152 CR 31.

**Further research:** For further discussion of actions in which attorney fees have been awarded as an element of damages, see California Attorney Fee Awards, chap 7 (3d ed Cal CEB 2010).

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### §26.122 B. When not recoverable as damages

An insured is not entitled to an award of attorney fees incurred in the prosecution of a separate action against an insurer to enforce a right to be defended or indemnified or to be reimbursed for attorney fees previously incurred in an action that should have been defended by the insurer. *Twentieth Century-Fox Film Corp. v Harbor Ins. Co.* (1978) 85 CA3d 105, 114, 149 CR 313 (insured not entitled to award of attorney fees for prosecution of action against insurer for recovery of an excess judgment entered against insured in prior action by third party when insured's claim against insurer was based on its failure to accept settlement offer from third party which was within limits of policy coverage).

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### §26.123 C. Recovery for breach of insurer's duty of good faith and fair dealing

If an insurer tortiously withholds benefits due under a policy, an insured who is successful against the insurer on a cause of action in tort for breach of the implied covenant of good faith and fair dealing may recover attorney fees reasonably incurred to compel payment of the benefits as an element of damages. These fees are recoverable as damages resulting from a tort in the same manner as medical fees are part of the damages in a personal injury case. Because attorney fees are recoverable as damages, the trier of fact must determine the recoverable fees, unless the parties stipulate otherwise. *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211.

The supreme court in *Brandt* noted that stipulation for a postjudgment allocation by the trial court is usually preferable because (1) determination will then be made after completion of the legal services, and (2) presentation of proof that otherwise would have to be presented to the jury can be simplified because of the court's expertise in evaluating legal services. The court also noted that, if the jury is to decide this issue, the court should instruct the jury along the following lines (37 C3d at 820):

> If you find (1) that the plaintiff is entitled to recover on his cause of action for breach of the implied covenant of good faith and fair dealing, and (2) that because of such breach it was reasonably necessary for the plaintiff to employ the services of an attorney to collect the benefits due under the policy, then and only then is the plaintiff entitled to an award for attorney fees incurred to obtain the policy benefits, which award must not include attorney fees incurred to recover any other portion of the verdict.

Because *Brandt* entitles a successful plaintiff to recover as damages only that portion of the overall legal fees attributable to collecting the benefits due under the insurance contract, when the legal work on the contract and tort claims overlaps, the court "should exercise its discretion to apportion the fees." *Cassim v Allstate Ins. Co.* (2004) 33 C4th 780, 807, 16 CR3d 374. When plaintiff's attorney worked under a contingency fee agreement, the court determines the appropriate *Brandt* fee by:

- Determining the total number of hours the attorney spent on the case;
- Determining how many hours were spent working exclusively on the contract recovery;
- Determining how many hours were spent working on issues related to both the contract and tort recoveries and assigning some hours to the contract and some to the tort;
- Adding the hours spent on the contract alone to the hours spent jointly on contract and tort, but assigned to the contract;
- Dividing the total hours spent on the contract claim by the total number of hours worked and obtaining a percentage; and
- Applying the percentage to the amount of the contingency fee to determine the amount recoverable as *Brandt* damages.

33 C4th at 812. Plaintiff bears the burden of demonstrating how the fees should be apportioned. 33 C4th at 813.

**NOTE:** Detailed recordkeeping is essential to recovering *Brandt* fees. Counsel representing plaintiffs in insurance bad faith cases under contingency fee agreements should keep records of their time.

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## D. Recovery for tort of another or third party tort

### §26.124 1. What it is and when it applies

Attorney fees are recoverable for a plaintiff who must hire an attorney to prosecute or defend an action against a third party because of the defendant's tort. *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 198 CR 551; *Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 620, 30 CR 821.

The court in *Sooy v Peter* (1990) 220 CA3d 1305, 1310, 270 CR 151, explained that the third party tort doctrine is not a theory supporting attorney fees awards but is a rule recognizing that, when one is required to defend against a claim, attorney fees are an element of tort damages. However, the court also held that, when one is required to defend a lawsuit because of the negligence of a third party who owed that defendant no duty, the doctrine does not apply.

To recover third-party tort attorney fees, the fee issue must be given to the jury and not to the court after trial, because it is an element of damages rather than an ancillary matter for the court. Moreover, for a third-party tort claim to exist, there must be a distinct third party. The existence of more than one defendant acting jointly in committing tortious acts does not transform one defendant into a third party. *Vacco Indus. v Van Den Berg* (1992) 5 CA4th 34, 56, 6 CR2d 602. See also *Brandt v Superior Court* (1985) 37 C3d 813, 819, 210 CR 211.

In *Saunders v Cariss* (1990) 224 CA3d 905, 910, 274 CR 186, plaintiff employed an attorney on a one-third contingency fee to secure full payment from plaintiff's insurer for an injury that came under the uninsured motorist clause of plaintiff's policy. The insurer claimed that plaintiff had signed a policy amendment agreeing to a reduction in coverage. The insurer paid, then plaintiff sued his insurance agent to recover the contingency fee, claiming that the agent had forged plaintiff's signature to the amendment. The court held that a third party tort was adequately stated against the agent.

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### §26.125 2. When damages may not be appropriate or the doctrine does not apply

Attorney fees may not be recoverable to the extent that a plaintiff's interest benefited from the third party's negligence so that they were not actually damaged. In *Heckert v MacDonald* (1989) 208 CA3d 832, 839, 256 CR 369, plaintiffs sued defendants/sellers for damages from a sale in which structural defects were not disclosed. Defendants cross-complained against their broker and sought attorney fees on a third-party tort theory. The court held that attorney fees in defending the case were properly recoverable as an element of damages, but because cross-defendant broker's efforts resulted in a higher sales price, defendants received a special benefit that outweighed the fees.

It is improper to award attorney fees as damages for the prosecution of a separate tort against other defendants unrelated to the conduct of the party against whom the fees are awarded. *Flyer's Body Shop Profit Sharing Plan v Ticor Title Ins. Co.* (1986) 185 CA3d 1149, 230 CR 276 (plaintiff's suit to impose constructive trust on property sold at foreclosure sale was independent and not causally related to defendant title company's negligence in failing to verify unsigned escrow instructions on completion of loan transaction that placed third deed of trust on overencumbered property).

It is also improper to award attorney fees when an action is a successive case between the same parties and not a defense of a third party's action. See *Schneider v Friedman, Collard, Poswall & Virga* (1991) 232 CA3d 1276, 1281, 283 CR 882 (suit by former clients against law firm to recover fees in defending firm's suit against client to collect fees); *Golden W. Baseball Co. v Talley* (1991) 232 CA3d 1294, 1302, 284 CR 53 (action against employee of litigant of prior action in which employee's acts were imputed to employer).

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## §26.126 E. Recovery in other actions

For examples of recovery of attorney fees as damages in other tort actions, see *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 118 CR 184 (malicious prosecution); *Nelson v Kellogg* (1912) 162 C 621, 123 P 1115 (false imprisonment). See California Attorney Fee Awards, chap 7 (3d ed Cal CEB 2010).

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## XI. FEE AWARDS BASED ON EXPRESS OR IMPLIED INDEMNITY CLAIMS

### §26.127 A. Fee award when contractual indemnity

In cases in which one person (the indemnitor) contractually agreed to indemnify another (the indemnitee) against liability, the indemnitor must defend the indemnitee or pay the cost of the indemnitee's defense. CC §2778. For example, if a liability insurer fails to defend the insured in violation of its obligation under an insurance policy, the indemnitee may be awarded fees incurred in defending the action. *Gray v Zurich Ins. Co.* (1966) 65 C2d 263, 280, 54 CR 104; *Mullen v Glens Falls Ins. Co.* (1977) 73 CA3d 163, 173, 140 CR 605. See also *City of Watsonville v Corrigan* (2007) 149 CA4th 1542, 1549, 58 CR3d 458 (CC §2778 does not obligate indemnitee to tender defense to indemnitor to obtain reimbursement of defense costs). Similarly, a statute creating a right of indemnity may be the basis for a fee award against an indemnitor who fails to provide a defense or pay the fees of the indemnitee in an action involving a third party. See, *e.g.,* Lab C §2802; *Jacobus v Krambo Corp.* (2000) 78 CA4th 1096, 93 CR2d 425.

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### §26.128 B. Fee award when implied indemnity

In cases of implied indemnity, on motion, a person who prevails on a claim for implied indemnity may be awarded attorney fees if the court finds that (CCP §1021.6):

- The indemnitee, to protect his or her interest, had to bring an action against or defend an action by a third person because of the tort of the indemnitor;
- The indemnitor was properly notified of the demand to bring the action or provide the defense and did not do so; and
- The trier of fact determined that the indemnitee (1) was without fault in the principal case that is the basis for the action in indemnity or (2) had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict.

See *Wilson, McCall & Daoro v American Qualified Plans, Inc.* (1999) 70 CA4th 1030, 83 CR2d 192; *John Hancock Mut. Life Ins. Co. v Setser* (1996) 42 CA4th 1524, 50 CR2d 413. But see *Watson v Department of Transp.* (1998) 68 CA4th 885, 80 CR2d 594 (CCP §1021.6 presupposes claim for implied indemnity on which party seeking attorney fees has prevailed and does not allow exonerated alleged tortfeasor, in commonplace case of multiparty tort action, to avoid American rule that each party to lawsuit must ordinarily pay own attorney fees).

Case law provides additional support for the right to implied indemnification for fees incurred. See *Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 30 CR 821; *Manning v Sifford* (1980) 111 CA3d 7, 168 CR 387. See also *San Diego Navy Fed. Credit Union v Cumis Ins. Soc'y* (1984) 162 CA3d 358, 208 CR 494, in which the insurer provided its own counsel to defend under an insurance policy but reserved its right to disclaim coverage at a later date and denied any coverage for punitive damages. The appellate court held that a conflict of interest existed between the insured and the insurer, entitling the insured to hire independent counsel (to act as co-counsel) paid for by the insurer. See also CC §2860; *Gulf Ins. Co. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 CA4th 114, 93 CR2d 534 (reservation of rights alone does not create conflict requiring provision of independent counsel).

In *Uniroyal Chem. Co. v American Vanguard Corp.* (1988) 203 CA3d 285, 249 CR 787, the court held that a retailer and a wholesaler were prevailing parties on an implied indemnity cross-complaint against the manufacturer. The retailer prevailed on the main action and thus had no opportunity to prevail on the cross-complaint. For attorney fee purposes, the retailer was deemed the prevailing party on the indemnity claim. The wholesaler, which was found liable in the main action, still had the right to pursue its indemnity claim. Because the jury found the manufacturer to be 100 percent at fault and owed the wholesaler indemnity, the court held that the wholesaler was entitled to attorney fees.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.129 C. Fee award when good faith settlement agreement involved

### §26.129 C. Fee award when good faith settlement agreement involved

A good faith settlement agreement with plaintiff by a joint tortfeasor will bar claims for indemnity by other joint tortfeasors against the settling tortfeasor. *IRM Corp. v Carlson* (1986) 179 CA3d 94, 224 CR 438 (court dismissed defendant's cross-claim for indemnity under CCP §1021.6 on ground that cross-defendants had entered into sliding-scale settlement agreement with plaintiffs under CCP §877.6). See also *Far W. Fin. Corp. v D & S Co.* (1988) 46 C3d 796, 817, 251 CR 202 (good faith settlements bar not only partial but also total equitable implied indemnity actions); *Reliance Elec. Co. v Superior Court* (1986) 190 CA3d 369, 237 CR 1 (trial court's approval of good faith settlement by one defendant precluded other defendant from moving for indemnification of attorney fees under CCP §1021.6). But see *John Hancock Mut. Life Ins. Co. v Setser* (1996) 42 CA4th 1524, 50 CR2d 413 (defendant obtained summary judgment on plaintiff's complaint and then made successful CCP §877.6 motion; held on appeal that the trial court should have granted motion for attorney fees under CCP §1021.6).

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### §26.130 D. Recoverability of fees for obtaining indemnification

A distinction is ordinarily drawn between the indemnified expenses, which are recoverable, and the litigation expenses necessarily incurred to obtain indemnification, including attorney fees, which are not generally recoverable without statutory or contractual authority. See, *e.g., Douglas v Los Angeles Herald-Examiner* (1975) 50 CA3d 449, 467, 123 CR 683.

In *Bear Creek Planning Comm'n v Title Ins. & Trust Co.* (1985) 164 CA3d 1227, 211 CR 172, disapproved on other grounds in *Bay Dev., Ltd. v Superior Court* (1990) 50 C3d 1012, 1031 n12, 269 CR 720, plaintiff homeowner's association was required to defend a slander of title action brought by a homeowner due to defendant title insurance company's breach of contract. Plaintiff then sued defendant for indemnification. The appellate court affirmed the trial court's award of plaintiff's attorney fees under CCP §1021.6 for defense of the slander of title action, but reversed the award of fees incurred during the indemnification action. The court held that §1021.6 imposes liability on the indemnitor for fees it caused the indemnitee to incur in the underlying action, but with regard to the indemnification action, plaintiff does not come within §1021.6 but, rather, is subject to the general rule of CCP §1021, *i.e.,* unless a statute or an express or implied agreement authorizes the award of fees, the parties bear their own fees. 164 CA3d at 1246.

Whether the indemnitee is liable to a third party for damages is determined in the principal action. Whether the indemnitee's conduct is sufficient to preclude recovery of implied indemnity is determined in the indemnity action. It is no basis for denying attorney fees in the indemnity action that the indemnitee was found liable for damages in the principal action. 164 CA3d at 1245.

However, if an insurer tortiously withholds benefits due under a policy, an insured who is successful against the insurer on a cause of action in tort for breach of the implied covenant of good faith and fair dealing may recover attorney fees reasonably incurred to compel payment of policy benefits as an element of damages. *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211. See *Cassim v Allstate Ins. Co.* (2004) 33 C4th 780, 807, 16 CR3d 374, discussed in §26.123. There is disagreement about whether *Brandt* allows for recovery of attorney fees incurred when an insurer appeals from a judgment finding breach of the implied covenant of good faith and fair dealing. See *McGregor v Paul Revere Life Ins. Co.* (9th Cir 2004) 369 F3d 1099, 1101 (appeal-related attorney fees recoverable); *Burnaby v Standard Fire* (1995) 40 CA4th 787, 789, 47 CR2d 326 (attorney fees for appeal not recoverable).

**Further research:** See California Liability Insurance Practice: Claims & Litigation (Cal CEB 1991).

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## XII. DETERMINING AMOUNT OF AWARD

### §26.131 A. Fees must be reasonable

Typically, a statute or a contract provides for an award of "reasonable" attorney fees, the exact amount being within the court's sound discretion. See, *e.g., Iverson v Spang Indus.* (1975) 45 CA3d 303, 119 CR 399 (contract); *Trout v Carleson* (1974) 37 CA3d 337, 112 CR 282 (statute). When a contract provides that the prevailing party may recover attorney fees "incurred," the prevailing party may not recover more than that amount. *San Dieguito Partnership v San Dieguito River Valley Reg'l, etc. Auth.* (1998) 61 CA4th 910, 916, 72 CR2d 91, disapproved on other grounds in *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1097 n5, 95 CR2d 198.

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### §26.132 1. Factors court considers in determining reasonableness

In determining a "reasonable" amount of the fee award, the courts consider several factors, including counsel's skill and experience; the nature, difficulty, and importance of the case; the amount involved; the time consumed; and other circumstances of the case. See *Clejan v Reisman* (1970) 5 CA3d 224, 241, 84 CR 897. See also *Fed-Mart Corp. v Pell Enters.* (1980) 111 CA3d 215, 222, 168 CR 525.

In arriving at a reasonable amount, an award of fees as costs must bear a "reasonable relationship" to the substantive recovery. *Bakkebo v Municipal Court* (1981) 124 CA3d 229, 177 CR 239. See also *Garcia v Santana* (2009) 174 CA4th 464, 473, 94 CR3d 299 (determination of fee's reasonableness should also include losing party's ability to pay).

In determining the amount of fees, the court may use a "lodestar" (reasonable rate times reasonable number of hours) multiplier to compensate counsel for the risk of loss and to encourage counsel to undertake actions that benefit the public interest. *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1418, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81. See also *Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 78 CR2d 913 (trial court has discretion to determine whether number of attorney hours are reasonable); *Levy v Toyota Motor Sales, Inc.* (1992) 4 CA4th 807, 814, 5 CR2d 770 (appellate court affirmed trial court's reduction of attorney fees when there were several instances of fees and costs that were unnecessary and unreasonable, rejecting claim that trial court was required to apply lodestar multiplier). See also *Enpalm, LCC v Teitler* (2008) 162 CA4th 770, 774, 75 CR3d 902 (court may equitably reduce lodestar amount by amount of unnecessary fees).

In *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 95 CR2d 198, the supreme court explained that the "lodestar" methodology is preferred and results, presumptively, in the calculation of reasonable fees. The court noted that, in "exceptional cases," other methodologies might be appropriate. The *PLCM* court also rejected a "cost plus" methodology that would have included both the prevailing party's "lodestar" fees and additional allocations for administrative and other forms of cost overhead.

The hourly rate for attorney fees is within the sound discretion of the trial judge. In *Bihun v AT&T Info. Sys., Inc.* (1993) 13 CA4th 976, 997, 16 CR2d 787, disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109, the court held an award of $450 per hour to be appropriate under the facts; even though "at the high end," it was not "off the scale."

In *Sundance v Municipal Court* (1987) 192 CA3d 268, 273, 237 CR 269, the court held that plaintiffs were entitled to attorney fees for all attorney time reasonably expended, not only the time spent on issues on which they prevailed. The court stated that the value of volunteered paralegal time also would be recoverable if the trial court found that the time spent was reasonably necessary to the litigation. But see *Atherton v Board of Supervisors* (1986) 176 CA3d 433, 222 CR 56 (court rejected self-represented plaintiff's request for fees; CCP §1021.5 authorizes attorney fee awards only to individuals licensed to practice law).

**Further research:** For a detailed discussion of the lodestar and other methods of determining fees, see California Attorney Fee Awards, chaps 8-10 (3d ed Cal CEB 2010).

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## §26.133 2. Preserving issue of reasonableness

In the calculation of reasonable attorney fees, to preserve an issue on appeal, a party must request specific findings on which hours are deemed reasonable or unreasonable. *California Common Cause v Duffy* (1987) 200 CA3d 730, 753, 246 CR 285.

In *Common Cause,* the court held that a finding that time was expended on responding to the press or other attorneys, on duplicated efforts, and on adversarial activities between attorneys was sufficient to deny that portion of the claim. The court concluded that the hourly rate must be based on a market value, rather than the salary actually received by that lawyer or one similarly situated.

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### §26.134 3. If contingency fee agreement

The trial court is not limited by the terms of a contingency fee contract between the prevailing party and his or her attorney in determining "reasonable" fees; the contingency contract is merely "some evidence" of the value of the attorney's services. *Vella v Hudgins* (1984) 151 CA3d 515, 198 CR 725. It is, however, proper for the court to base the award on the contingency fee contract between the prevailing party and his or her attorney as long as all other appropriate factors have been considered. *Glendora Community Redev. Agency v Demeter* (1984) 155 CA3d 465, 202 CR 389. No published California case has specifically addressed whether the amount awarded may exceed the amount of the contingency fee.

See *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 218 CR 839, for a discussion of the various approaches that courts have taken in considering a contingency fee agreement for the award of "reasonable" attorney fees. The court reversed an award based on the contingency fee agreement in an inverse condemnation action, criticizing *Glendora Community Redev. Agency v Demeter, supra,* and remanded to the trial court for a redetermination of fees based on the standard factors enumerated by the courts in determining the propriety of fees, starting with the time actually spent by the attorneys ("risk factor" is an element to be considered).

Compare *Glendora* with *Imperial Cattle Co. v Imperial Irrig. Dist.* (1985) 167 CA3d 263, 213 CR 622, affirming an award of fees in an inverse action based on a 40-percent contingency agreement. See also *Aetna Life & Cas. Co. v City of Los Angeles* (1985) 170 CA3d 865, 216 CR 831, reversing the trial court's award of attorney fees based on a contingency fee of the gross award and holding that the trial court was required to consider all factors enumerated by the courts; the trial court's failure to consider all those factors in relationship to "the actual amount in dollars of this huge fee (approximately $2.2 million)" was error. The appellate court held the fee award to be unreasonable "in absolute terms and in relation to the hours worked" and criticized the compounding effect of applying the contingency percentage to a judgment that already included fees. See also *People ex rel Dep't of Transp. v Yuki* (1995) 31 CA4th 1754, 1770, 37 CR2d 616 (reversing trial court's award of attorney fees based on contingency fee contract).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.135 B. Determining fees under federal law

### §26.135 B. Determining fees under federal law

The Supreme Court in *Missouri v Jenkins* (1989) 491 US 274, 287, 105 L Ed 2d 229, 242, 109 S Ct 2463, held that a fee award under 42 USC §1988 encompasses paralegals and that the market rate is appropriate for such separately billed services, not their actual cost to the attorney.

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### §26.136 C. When no actual expenses incurred

A court may award attorney fees even if the client incurred no actual expense. In *Beverly Hills Prop. v Marcolino* (1990) 221 CA3d Supp 7, 270 CR 605, a tenant prevailed in an unlawful detainer action while represented by a legal services corporation. The court awarded fees because the attorneys had incurred expenses even though the client had not. See also *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1097 n5, 95 CR2d 198 (attorney fees properly awarded to in-house counsel based on number of hours spent multiplied by prevailing market rate for comparable legal services); *Young v Exxon Mobil Corp.* (2008) 168 CA4th 1467, 1477, 86 CR3d 507 (supervisor subjected to frivolous FEHA suit by former employee entitled to only nominal attorney fees of $1 because employer and codefendant provided representation, and only employer, which was not entitled to fees, would benefit from fee award); *Moran v Oso Valley Greenbelt Ass'n* (2004) 117 CA4th 1029, 12 CR3d 435 (attorney fees properly awarded to law firm employee represented pro bono by employer).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.137 D. If attorney fees exceed amount in controversy

### §26.137 D. If attorney fees exceed amount in controversy

The amount of attorney fees may exceed the amount in controversy if the factors of reasonableness are satisfied. *Boyd v Oscar Fisher Co.* (1989) 210 CA3d 368, 381, 258 CR 473 ($38,730 in fees on $21,699 judgment); *Clayton Dev. Co. v Falvey* (1988) 206 CA3d 438, 447, 253 CR 609 ($16,122 in fees in action to foreclose on $15,750 note); *Bruckman v Parliament Escrow Corp.* (1987) 190 CA3d 1051, 1062, 235 CR 813 ($16,022 in fees on $8297 plus $3216 interest judgment). See *Stokus v Marsh* (1990) 217 CA3d 647, 653, 266 CR 90 (fees of $75,000 following $6000 unlawful detainer award upheld as reasonable and within court's limited jurisdiction; fees also allowed for work done on prior action because it was reasonable and necessary to ultimate resolution of case). See also *City of Riverside v Rivera* (1986) 477 US 561, 580, 91 L Ed 2d 466, 483, 106 S Ct 2686, a plurality opinion indicating that there is no requirement for proportionality under 42 USC §1988.

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### §26.138 E. Fees need not be apportioned

Attorney fees need not be apportioned between distinct causes of action if fees are authorized for some causes of action but not for others when the claims involve a common core of facts or are based on related legal theories and plaintiff prevails on causes of actions for which fees may be authorized. *San Dieguito Partnership v San Dieguito River Valley Reg'l, etc. Auth.* (1998) 61 CA4th 910, 919, 72 CR2d 91, disapproved on other grounds in *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1097 n5, 95 CR2d 198; *Drouin v Fleetwood Enters.* (1985) 163 CA3d 486, 209 CR 623. See *Korech v Hornwood* (1997) 58 CA4th 1412, 1422, 68 CR2d 637 (no need to apportion prevailing party's fees). See also *Guardians of Turlock's Integrity v Turlock City Council* (1983) 149 CA3d 584, 197 CR 303 (if plaintiff has won substantial relief, fees should not be reduced, because court did not accept all party's contentions). But see *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 247, 261 CR 520 (party achieving limited rather than complete success, on one of several proffered theories, not necessarily entitled to full fee recovery under 42 USC §1988).

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### §26.139 F. Jurisdictional limitation in limited civil cases

In *Bakkebo v Municipal Court* (1981) 124 CA3d 229, 177 CR 239, the court held that a municipal court may not make an attorney fee award that itself exceeds the jurisdictional limit. However, it may award fees as costs that result in an aggregate amount that, when added to other costs and the substantive recovery, exceeds the jurisdictional limit. Fees that are recoverable as special damages are added to other elements of the substantive recovery. The total must not exceed the jurisdictional limit. Because the municipal and superior courts have been unified, these rules should also apply to limited civil cases in superior court. See CCP §32.5. See also CCP §§85-86.

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### §26.140 G. Special rules for determining awards based on particular theories

If a contract provides for a fee award in a specified amount, or as a percentage of some specified amount, the provision will apply, unless unconscionable, and will be made reciprocal. CC §1717. See *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 158 CR 1; *Johnson v Kaeser* (1925) 196 C 686, 695, 239 P 324; *California Wholesale Material Supply, Inc. v Norm Wilson & Sons, Inc.* (2002) 96 CA4th 598, 117 CR2d 390.

When an award to the successful litigant is made under the common fund doctrine (see §§26.113-26.116), the substantial benefit theory (see §§26.117-26.120), or the private attorney general rule (see §§26.61-26.76), the formulation ordinarily used in computing the fees is to:

- Multiply the number of hours spent by the attorney(s) by a reasonable hourly rate of compensation; and
- Augment or diminish this "touchstone" figure based on factors such as the novelty or complexity of the litigation.

Any valid contract between the successful party and its attorneys in public interest litigation cases must be respected as between them, but it is not binding as a measure of the appropriate compensation for the attorneys with respect to other benefited persons. That determination is left to the court's sound discretion under the "touchstone" rule. See *Long Beach City Employees Ass'n v City of Long Beach* (1981) 120 CA3d 950, 172 CR 277 (award under common fund theory); *Melendres v City of Los Angeles* (1975) 45 CA3d 267, 282, 119 CR 713 (same).

**Further research:** See *Serrano v Priest* (1977) 20 C3d 25, 48, 141 CR 315 (private attorney general rule); *Mandel v Lackner* (1979) 92 CA3d 747, 757, 155 CR 269, disapproved on other grounds in *Serrano v Unruh* (1982) 32 C3d 621, 630 n12, 186 CR 754 (substantial benefit theory; amount of attorney fees awarded by trial court in exercise of its discretion was for time spent and value per unit of time determined for each attorney).

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### §26.141 H. If award based on cost bill or motion

When an award of attorney fees is pursued by filing a cost bill or motion, the court determines the amount. See *Schoolcraft v Ross* (1978) 81 CA3d 75, 146 CR 57. When attorney fees must be pleaded and proved as special damages, the jury (in a jury trial) determines the amount, unless, for example, a contract expressly provides that the court shall set the amount. See generally *Mabee v Nurseryland Garden Ctrs.* (1979) 88 CA3d 420, 424, 152 CR 31; *Beneficial Standard Prop. v Scharps* (1977) 67 CA3d 227, 136 CR 549. Although local court rules may specify the amount to be awarded in certain situations, the court is not necessarily bound by such rules. *Ansco Constr. Co. v Ocean View Estates, Inc.* (1959) 169 CA2d 235, 337 P2d 146. See *State v Meyer* (1985) 174 CA3d 1061, 220 CR 884, on criteria to be applied in determining the amount of the fee award.

In general, the trial court, rather than a court of appeal, will determine the amount of the award. The supreme court in *Arenson v National Auto. & Cas. Ins. Co.* (1957) 48 C2d 528, 310 P2d 961, held that, although it had the power and ability to determine the value of services rendered by the insured's counsel in defending an action which the insurer wrongfully refused to defend, the better practice was to remand the matter to the trial court for the purpose of making a new determination.

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### §26.142 I. Appealability of award

A judicial determination of the attorney fee claim and any order made with respect to it is appealable as a final determination on a collateral matter severable from the general subject of the litigation. *Associated Convalescent Enters. v Carl Marks & Co.* (1973) 33 CA3d 116, 108 CR 782. See also *Serrano v Priest* (1977) 20 C3d 25, 32, 141 CR 315.

The trial court properly considers attorney fees after an order of dismissal, even if an appeal is pending, because the trial court retains jurisdiction over such ancillary matters. *Dameshghi v Texaco Ref. & Mktg.* (1992) 3 CA4th 1262, 1289, 6 CR2d 515, disapproved on other grounds in *Trope v Katz* (1995) 11 C4th 274, 292, 45 CR2d 241.

Although attorney fee orders are normally appealable, when the order is contingent on a matter still being litigated, it lacks the requirement of finality and is thus not appealable. *Nimmagadda v Krishnamurthy* (1992) 3 CA4th 1505, 5 CR2d 351. In the case of an interim appeal (*e.g.*, appeal from summary judgment), the party which ultimately prevails is entitled to the attorney fees on appeal. See *Presley of S. Cal. v Whelan* (1983) 146 CA3d 959, 962, 196 CR 1 (fees under CC §1717). But see *Bank of Idaho v Pine Ave. Assocs.* (1982) 137 CA3d 5, 17, 186 CR 695 (attorney fees of successful party on appeal offset attorney fees of ultimately prevailing party). See also §26.152.

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## XIII. REVIEW PROCEDURES FOR RECOVERING ATTORNEY FEES

### §26.143 A. Pleading considerations

Generally, there is no requirement that the grounds for a claim for attorney fees be specified in the pleading. See *Green v Obledo* (1984) 161 CA3d 678, 207 CR 830. A party may seek fees on different grounds from those originally pleaded. *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265.

**Statutory claims.** A claim for fees based on statute need not be included in the complaint. See *Washburn v City of Berkeley* (1987) 195 CA3d 578, 583, 240 CR 784; *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 678 n16, 186 CR 589.

**Claims based on contract.** In contract actions there is no requirement that fee claims be separately pleaded, at least when the contract containing the fee clause is pleaded and proved. *Allstate Ins. Co. v Loo* (1996) 46 CA4th 1794, 1797, 54 CR2d 541 (explaining significance of 1990 amendment to CCP §1033.5, a statute that states what items are allowable and not allowable as costs); *Wong v Davidian* (1988) 206 CA3d 264, 271, 253 CR 675; *Perry v Robertson* (1988) 201 CA3d 333, 247 CR 74; *Ganey v Doran* (1987) 191 CA3d 901, 236 CR 787. Civil Code §1717(a) provides that fees awarded under contract are "an element of costs of suit." But see §26.95 for discussion of award of fees and costs for purpose of determining when a judgment is more favorable when plaintiff has made a CCP §998 offer. See also §§27.52-27.53.

**PRACTICE TIP:** It is good practice to include any potential fee claim in the prayer of the complaint. Although failure to include the fee claim is rarely fatal to the claim, failure to plead the claim may prejudice a later claim. See *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 680, 186 CR 589; *Kreutzer v County of San Diego* (1984) 153 CA3d 62, 77, 200 CR 322.

**CAUTION:** Be aware that including a claim for fees in the complaint or answer may give the opposing party a reciprocal right to fees it would not otherwise have. See *Manier v Anaheim Bus. Ctr. Co.* (1984) 161 CA3d 503, 207 CR 508. But see *Blickman Turkus LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 897, 76 CR3d 325 (claim for fees alone does not give rise to reciprocal right).

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## §26.144 B. Settling fee claims

Difficult ethical and tactical concerns arise from the potential conflict of interest between attorneys and their clients when settling fee claims. These concerns are discussed fully in California Attorney Fee Awards, chap 11 (3d ed Cal CEB 2010). See also §§27.51-27.66 (for discussion of the relationship between claiming costs and fees and pretrial settlement procedures under CCP §§998), 26.94.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.145 C. Relationship to judgment

### §26.145 C. Relationship to judgment

An action need not proceed to final judgment for a party to be entitled to fees. See CC §1717(b)(1). For instance, dismissal of the action for failure to prosecute entitles the dismissed party to fees. In this situation, the prevailing party is entitled to costs. See CC §1717(b)(1). If the action is voluntarily dismissed, or dismissed under settlement, there is no prevailing party. CC §1717(b)(2).

A trial court retains jurisdiction on ancillary matters, including attorney fee awards, even after entry of judgment. *Maria P. v Riles* (1987) 43 C3d 1281, 1289, 240 CR 872; *Grant v List & Lathrop* (1992) 2 CA4th 993, 3 CR2d 654.

**NOTE:** The time limit for appealing a judgment on the merits is not tolled by a pending fee motion. See *Budinich v Becton Dickinson & Co.* (1988) 486 US 196, 100 L Ed 2d 178, 108 S Ct 1717; *UAP-Columbus JV 326132 v Nesbitt* (1991) 234 CA3d 1028, 285 CR 856. When a judgment is modified merely to add costs, attorney fees, and interest, the original judgment is not substantially changed and the time to appeal it is therefore not affected. *Torres v City of San Diego* (2007) 154 CA4th 214, 64 CR3d 495.

**PRACTICE TIP:** File a timely notice of appeal on the merits regardless of whether a fee motion or a claim for costs is pending.

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## D. General procedures for claiming attorney fees

### §26.146 1. Under California Rules of Court

**Uncontested cases.** Attorney fees based on statute or contract that are fixed without necessity of court determination are claimed in the memorandum of costs. Cal Rules of Ct 3.1702(d). Attorney fees authorized by contract or statute are allowable as costs under CCP §1032. CCP §1033.5(a)(10)(A)-(B). See §§27.88-27.102 for discussion of the procedure for claiming costs; §27.128 for a sample Memorandum of Costs (Worksheet); and §27.129 for a sample Memorandum of Costs (Summary).

**Contested cases at trial court level.** In contested cases, a notice of motion to claim attorney fees for services rendered, up to and including judgment in the trial court, must be served and filed within the time for filing a notice of appeal (see Cal Rules of Ct 8.104, 8.108, *e.g.,* 60 days after court clerk serves notice of entry of judgment). Cal Rules of Ct 3.1702(b).

**Attorney fees on appeal.** The notice of motion to claim attorney fees on appeal under a statute or a contract that requires the court to determine entitlement to the fees, the amount of the fees, or both must be filed within the time for serving and filing the memorandum of costs under Cal Rules of Ct 8.278(c)(1), *i.e.,* 40 days after the clerk of the reviewing court mails notice of the issuance of the remittitur. Cal Rules of Ct 3.1702(c).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.147 2. Awards based on statute

### §26.147 2. Awards based on statute

Attorney fees recoverable under a statute are generally claimed as costs by filing a memorandum of costs or cost bill unless the fee statute provides otherwise. See *Marini v Municipal Court* (1979) 99 CA3d 829, 833, 160 CR 465; *T.E.D. Bearing Co. v Walter E. Heller & Co.* (1974) 38 CA3d 59, 112 CR 910. An important example of a statute that precludes the cost bill procedure by specifying the use of a noticed motion is CCP §1021.5 (private attorney general rule; see §§26.61-26.76). See §§27.88-27.102 for discussion of procedures for claiming costs.

Attorney fees allowable as costs under statute may be fixed (CCP §1033.5(c)(5)):

- By noticed motion;
- At the time a statement of decision is rendered;
- On application supported by affidavit made concurrently with a claim for other costs; or
- On entry of default judgment.

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### §26.148 3. Awards based on contract

Attorney fees authorized by contract are allowable as costs under CCP §1032. CCP §1033.5(a)(10)(A). Attorney fees allowable as costs under §1033.5(a)(10)(A) must be fixed either on a noticed motion or on entry of a default judgment unless the parties stipulate otherwise. CCP §1033.5(c)(5).

Notice of motion to claim attorney fees as an element of costs under CC §1717 must be served and filed within the time for filing a notice of appeal. Cal Rules of Ct 3.1702. See *Exxess Electronixx v Heger Realty Corp.* (1998) 64 CA4th 698, 75 CR2d 376 (denying attorney fees under CC §1717(b)(2), which precludes recovery of attorney fees when action is dismissed under settlement of case). But see *Jackson v Homeowners Ass'n Monte Vista Estates-East* (2001) 93 CA4th 773, 113 CR2d 363 (settlement agreement that calls for voluntary dismissal of case does not preclude recovery of fees under CC §1717(b)(2) when parties expressly reserve issue of attorney fees to trial court for determination).

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### §26.149 4. Awards based on equitable theories

In general, when a fee award is made under equitable theories, the usual practice is for the party entitled to the award to proceed by posttrial motion. See, *e.g., Northington v Davis* (1979) 23 C3d 955, 154 CR 524; *Serrano v Priest* (1977) 20 C3d 25, 31, 141 CR 315. Code of Civil Procedure §1021.5 (private attorney general rule) specifically provides for the motion procedure. See *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 684, 186 CR 589.

The motion should be filed within a reasonable time after entry of judgment or other event beginning the period for filing an appeal, but there are no clear rules on what is unreasonably long. See, *e.g., Serrano v Priest, supra* (successful motion filed within 1 month after entry of judgment). A motion for fees under CCP §1021.5 need not be made until after final adjudication of the claims. *No Oil, Inc. v City of Los Angeles* (1984) 153 CA3d 998, 200 CR 768. A statement of decision from the trial judge on factual matters affecting the entitlement issue may be requested to avoid unnecessary proof at the hearing on the motion. See CCP §632. In any event, the court's factual bases for an award of fees should appear in an order or otherwise be available in the record for possible appeal. See *Mandel v Lackner* (1979) 92 CA3d 747, 758 n6, 155 CR 269, disapproved on other grounds in *Serrano v Unruh* (1982) 32 C3d 621, 630 n12, 186 CR 754.

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### §26.150 5. Awards based on indemnification

Indemnification generally entails an award of fees as damages incurred for prior litigation. Therefore, fees must ordinarily be pleaded and proved as damages. See generally *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 678 n16, 186 CR 589; *Mabee v Nurseryland Garden Ctrs.* (1979) 88 CA3d 420, 425, 152 CR 31. However, in implied indemnity cases under CCP §1021.6, the statute expressly requires that the issue of fees be determined on motion.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.151 E. Fee motion procedure

### §26.151 E. Fee motion procedure

Motions for attorney fees follow the same procedure as other motions. See Cal Rules of Ct 3.1100-3.1306, 3.1200-3.1207, 3.1130-3.1312. The prevailing party generally files the fee motion, and the opponent files an opposition with an opportunity for the moving party to file a reply. See Cal Rules of Ct 3.1300(a). For a detailed discussion of the fee motion procedure, see California Attorney Fee Awards, chap 11 (3d ed Cal CEB 2010).

The attorney claiming fees has the burden of producing evidence to support the claim. *Melnyk v Robledo* (1976) 64 CA3d 618, 134 CR 602. Entitlement is usually determined by the court from the file and from its general knowledge. See *Woodland Hills Residents Ass'n v City Council* (1979) 23 C3d 917, 940, 154 CR 503 *(Woodland Hills II)*.

The motion should be presented to the judge who heard the merits of the case. Counsel should fully explain the issues and the nature of the work performed. See *Long Beach City Employees Ass'n v City of Long Beach* (1981) 120 CA3d 950, 961, 172 CR 277.

The fee motion should include:

- Notice of motion, including the date, time, place of motion, summary of the grounds for entitlement to fees, and the documents on which the claim is based (see Attorney Fee Awards, App C for sample form);
- Supporting memorandum, discussing the background of the litigation, the grounds for entitlement, and the justification for the amount requested (see Attorney Fee Awards, App D for sample form);
- Declarations from attorneys claiming the fees, including, if appropriate, declarations from other attorneys or experts supporting the fee application (see Attorney Fee Awards, App E for sample form);
- A declaration explaining how the fees claimed are reasonable (see Attorney Fee Awards, App F for sample form); and
- A proposed order awarding reasonable attorney fees, including specific findings on the fee calculation (see Attorney Fee Awards, App I for sample form).

**NOTE:** It is permissible to conduct discovery on the basis for the fee award. See *State v Meyer* (1985) 174 CA3d 1061, 1075, 220 CR 884.

The hearing usually involves oral argument based on the papers filed with the court. It is up to the trial court's discretion whether to allow an evidentiary hearing with live testimony. See *Sablan v Department of Fin.* (9th Cir 1988) 856 F2d 1317, 1322.

Although a formal statement of decision is not required, in order to permit appellate review, consider requesting the trial court to state its finding on the elements of the fee award. See *Maria P. v Riles* (1987) 43 C3d 1281, 1289, 240 CR 872.

**PRACTICE TIP:** If you decide to bring a motion for summary judgment just before trial (or judgment on the pleadings, a demurrer, or any motion that will conclude the action if granted) that you believe is a "sure winner," consider doing the following:

- Before bringing the motion, send opposing counsel a letter stating why the action has no merit. Conclude by requesting that by a certain date you either (1) be advised in writing why the lawsuit has merit or (2) be in receipt of a conformed copy of a Request for Dismissal.
- Do not seek monetary sanctions at the time of the hearing on the motion for summary judgment.
- Ensure that you get a transcript of the hearing if the motion is granted because the transcript may reflect the court's disfavor that the lawsuit was filed.
- Sixty days after the court has executed the order granting the summary judgment, file your CCP §128.7 sanctions motions, in which you seek all costs and all attorney fees expended. Attach the hearing transcript and request the court to take judicial notice of the transcript under Evid C §452(d)(1).

For discussion of CCP §128.7, see §§26.32-26.53.

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### §26.152 F. Fees for appellate services

Ordinarily, fee awards under statutory or contractual authority include fees for services on appeal as well as at trial. See, *e.g., Wilson v Wilson* (1960) 54 C2d 264, 5 CR 317 (contract); *Fed-Mart Corp. v Pell Enters.* (1980) 111 CA3d 215, 168 CR 525 (statute). This rule has been applied in cases arising under CCP §1021.5 (private attorney general rule), and fees have been properly awarded even though the only issue on appeal was fee entitlement. *Serrano v Unruh* (1982) 32 C3d 621, 638, 186 CR 754 (*Serrano IV*).

Entitlement to and the amount of fees for appellate services are determined first in the trial court. See *Citizens Ass'n for Sensible Dev. v County of Inyo* (1985) 172 CA3d 151, 176, 217 CR 893. However, the appellate court has discretion whether to remand the issue of appellate fees. *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 426, 253 CR 426.

Appellate fees may be claimable in the trial court even if the appellate decision is silent on costs or fees if entitlement is based on a statute. *Harbour Landing-Dolfann, Ltd. v Anderson* (1996) 48 CA4th 260, 55 CR2d 640 (a good survey of the law on this issue); *MST Farms v C.G. 1464* (1988) 204 CA3d 304, 251 CR 72; *M.C. & D. Capital Corp. v Gilmaker* (1988) 204 CA3d 671, 677, 251 CR 178. See *Ford Motor Credit Co. v Price* (1985) 163 CA3d 745, 210 CR 17 (respondents prevailing on appeal were entitled to reasonable attorney fees under CC §1717); *Mackinder v OSCA Dev. Co.* (1984) 151 CA3d 728, 198 CR 864 (fee provision in agreement encompasses attorney fees on appeal). See discussion in §26.98.

In contractual awards, CC §1717 does not authorize the award of fees to the successful party on appeal without regard to the ultimate disposition of the entire case. *Bank of Idaho v Pine Ave. Assocs.* (1982) 137 CA3d 5, 186 CR 695. In *Bank of Idaho,* the court stated in dicta that if the ultimately prevailing party had been the unsuccessful party on the previous appeal, the fee award should not include the appellate fees of the ultimately prevailing party. However, fees properly awarded to the ultimately prevailing party should be offset by the fees incurred by the other party on the appeal, as long as the other party would have been entitled to an award of appellate fees had it ultimately prevailed. 137 CA3d at 17.

In *Presley of S. Cal. v Whelan* (1983) 146 CA3d 959, 196 CR 1, the court in dicta disagreed with *Bank of Idaho* and stated that the party who wins an outright victory at trial should recover all fees without offset for the fees incurred by the other party in a successful appeal and reversal of a summary judgment. Similarly, in *Serrano v Unruh* (1982) 32 C3d 621, 639 n28, 186 CR 754 (*Serrano IV*), the California Supreme Court noted: "It would seem obvious that fees would not be recoverable for an appeal that reversed the award entirely or reversed as excessive an award appellant claimed was inadequate."

**Further research:** The procedure for claiming costs awarded by a reviewing court is specified in Cal Rules of Ct 8.278, 8.891. See also 9 Witkin, California Procedure, *Appeal* §§803-805 (4th ed 1997). For a full discussion of obtaining fees for appellate services, see California Attorney Fee Awards, chap 12 (3d ed Cal CEB 2010).

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### §26.153 G. Fees for pressing fee claims

Attorney fees incurred in preparing the fee petition, and in resisting a motion to tax costs, are recoverable if fee awards are authorized by statute. *State v Meyer* (1985) 174 CA3d 1061, 220 CR 884 (abandonment of eminent domain action). But see *Estate of Cirone* (1987) 189 CA3d 1280, 1293, 234 CR 749 (court denied private attorney general fees for plaintiffs' efforts to collect final fee award).

The rule allowing attorney fees for pressing fee claims also applies to probate actions. *Estate of Trynin* (1989) 49 C3d 868, 873, 264 CR 93. The court distinguished this case from both (1) common-fund and common-benefit cases in which fees on fee claims are disallowed and (2) statutory fee cases in which fees are permissible, finding that economic factors and policy militate in favor of allowing such fees. See *Levy v Toyota Motor Sales, Inc.* (1992) 4 CA4th 807, 817, 5 CR2d 770 (party was held not entitled to improperly inflated fees to oppose motion to tax costs).

In cases successfully brought in state court under the common fund doctrine or substantial benefit theory, fees incurred in pressing fee claims at trial or on appeal are not recoverable, in part because of the potential conflicts of interest for the attorneys. See *Gabrielson v City of Long Beach* (1961) 56 C2d 224, 229, 14 CR 651; *Mandel v Lackner* (1979) 92 CA3d 747, 760, 155 CR 269, disapproved on other grounds in *Serrano v Unruh* (1982) 32 C3d 621, 630 n12, 186 CR 754.

**Further research:** See California Attorney Fee Awards, chap 15 (3d ed Cal CEB 2010) for discussion of collecting fee awards.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/26 Recovering Attorney Fees/§26.154 XIV. CHECKLIST: MOTION PROCEDURE

## §26.154 XIV. CHECKLIST: MOTION PROCEDURE

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___ 1. Prepare a Notice of Motion and Memorandum in Support of Motion for Award of Reasonable Attorney Fees.

___ 2. Prepare declarations and/or affidavits of counsel.

___ 3. Prepare declaration of experts and/or other relevant declarants.

___ 4. Prepare any exhibits not yet on file with the court that are relevant to the motion.

___ 5. If appropriate, prepare a Request for Statement of Decision.

___ 6. If appropriate, prepare a proposed order.

___ 7. Attach proof of service.

___ 8. Serve and file moving papers.

For a detailed discussion of motions and orders, including forms, see California Civil Procedure Before Trial, chaps 12-13 (4th ed Cal CEB 2004).

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## §26.155 XV. FORMS AND DOCUMENTS USED IN FEE MOTIONS

The following forms and documents are commonly used in conjunction with motions for attorney fees:

- Notice of Motion for Award of Reasonable Attorney Fees. See California Attorney Fee Awards, App C (3d ed Cal CEB 2010).
- Memorandum in Support of Motion for Award of Reasonable Attorney Fees. See Attorney Fee Awards, App D.
- Declarations in Support of Motion for Award of reasonable Attorney Fees. See Attorney Fee Awards §14.35, Apps E-F.
- Declarations from other experts or witnesses on such issues as causative effect or significance of the case.
- Memorandum in Opposition to Motion for Attorney Fees and Declarations.
- Stipulation and Order re Costs and Attorney Fees.
- Reply and Supplemental Declarations in Support of Motion for Award of Reasonable Attorney Fees. See Attorney Fee Awards, Apps G-H.

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# 27

# Recovering Costs and Obtaining Interest

**Steven Evans Kirby**
**Paul J. Neibergs**

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## I. SCOPE OF CHAPTER

### §27.1 A. Recovering costs

This chapter discusses the substantive and procedural law on a litigant's right to recover costs in California state trial courts. It covers the statutory basis for recovery of costs (see §§27.3-27.7, 27.19-27.31B), when recovery of costs is a matter of right (see §§27.8-27.18), when recovery of costs is discretionary (see §§27.32-27.46), when costs are disallowed by statute (see §§27.47-27.49), when an award must be reduced or augmented based on a CCP §998 offer to compromise (see §§27.51-27.66), what items of costs are allowed (see §§27.67-27.81) or disallowed (see §§27.82-27.87), and the procedures for claiming costs (see §§27.88-27.102) or moving or taxing costs (see §§27.103-27.111).

This chapter discusses only incidentally recovery of costs in the following matters: proceedings in probate court (see California Decedent Estate Practice (2d ed Cal CEB 2009)); actions for dissolution of marriage and similar proceedings (see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity (Cal CEB Annual)); proceedings before administrative agencies (see California Administrative Hearing Practice (2d ed Cal CEB 1997)); appellate proceedings (see California Civil Appellate Practice §§1.58-1.61 (3d ed Cal CEB 1996)); proceedings related to the contractual relationship between lawyer and client for the payment of attorney fees and costs (see California Civil Procedure Before Trial, chap 5 (4th ed Cal CEB 2004); California Attorney Fee Awards (3d ed Cal CEB 2010)).

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## §27.2 B. Obtaining interest

This chapter also examines the substantive and procedural law regarding a litigant's right to obtain interest on a judgment entered in California state trial courts. See §§27.112-27.121. The discussion covers obtaining interest on awarded damages (see §27.122), interest as damages (see §27.123), interest on obligation after a breach of contract (see §27.124), the rate of interest under retail installment contracts (see §27.125), the circumstances of a waiver of interest (see §27.126), and obtaining an award of prejudgment interest (see §27.127).

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## §27.3 II. RIGHT TO RECOVER COSTS IS STATUTORY

The right to recover costs is purely statutory; there is no common law right to recover costs. See *Murillo v Fleetwood Enters., Inc.* (1998) 17 C4th 985, 989, 73 CR2d 682; *La Mesa-Spring Valley Sch. Dist. v Otsuka* (1962) 57 C2d 309, 312, 19 CR 479; *Perko's Enters. v RRNS Enters.* (1992) 4 CA4th 238, 5 CR2d 470.

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### §27.4 A. Primary governing statutes

Although statutory references to costs are found throughout the codes, the central provisions governing cost recovery are in CCP §§1021-1038. The general right to cost recovery is established by CCP §1021, which provides that parties to actions or proceedings are entitled to reimbursement of costs as provided in the Code of Civil Procedure. Code of Civil Procedure §1032 provides for the award of costs to "prevailing parties," and other provisions provide for the award of costs in particular circumstances. See §§27.8-27.18. The specific cost items that may be recovered (see §§27.67-27.81), and those that are not allowed (§§27.82-27.87), are listed in CCP §1033.5.

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### §27.5 B. Recovery governed by statute in effect at time right accrues

The recovery of costs is governed by the statute in effect at the time the right accrues. See *Stockton Theatres, Inc. v Palermo* (1956) 47 C2d 469, 304 P2d 7. Statutes increasing or decreasing a party's right to recover costs apply to cases pending when those statutes become effective. Even if a statute is silent on the issue of retroactivity, the rule applies if the statute is revised while the case is pending on appeal. *Heritage Eng'g Constr., Inc. v City of Industry* (1998) 65 CA4th 1435, 1439, 77 CR2d 459. But see *Bodell Constr. Co. v Trustees of Cal. State Univ.* (1998) 62 CA4th 1508, 1511 n1, 73 CR2d 450.

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### §27.6 C. Judgment must be final to recover

Because costs are an incident to the judgment, they are seldom recoverable unless there is a final judgment on the merits. CCP §§1021-1038. See *Wells Fargo Co. v City & County of San Francisco* (1944) 25 C2d 37, 44, 152 P2d 625. When a court lacks jurisdiction to render a judgment on the issues, it also lacks power to award costs. See *Begbie v Begbie* (1900) 128 C 154, 60 P 667.

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### §27.7 D. Court may award costs when settlement agreement silent

If a settlement agreement is silent on costs and attorney fees, and the agreement concludes all matters put in issue by the pleadings, the court retains jurisdiction to entertain a cost bill. See *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 186 CR 589; *Berti v Santa Barbara Beach Properties* (2006) 145 CA4th 70, 75, 51 CR3d 364. However, when settling parties agree among themselves to waive costs, a nonsettling party is not entitled to the benefit of such an agreement and may still be liable for the prevailing party's costs. *Nelson v Anderson* (1999) 72 CA4th 111, 129, 84 CR2d 753.

**PRACTICE TIP:** Provide for payment of costs and attorney fees in the settlement agreement so that the parties can decide the matter rather than the court.

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## III. PREVAILING PARTY ENTITLED TO COSTS

### §27.8 A. Cost recovery matter of right for prevailing party

Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover allowable costs in any action or proceeding. CCP §1032(b). *Nelson v Anderson* (1999) 72 CA4th 111, 84 CR2d 753.

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## §27.9 1. Costs recoverable for action or proceeding

Every remedy that is not an action as defined in CCP §22 is a special proceeding, including all remedies covered in Part III of the Code of Civil Procedure. CCP §23. See *Avelar v Superior Court* (1992) 7 CA4th 1270, 9 CR2d 536; *San Diego Tavern & Restaurant Ass'n v Local Joint Executive Bd.* (1959) 174 CA2d 246, 249, 344 P2d 350. The difference between an action and a proceeding is in the remedy sought. *Avelar v Superior Court, supra*.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.10 2. Parties and pleadings defined

## §27.10 2. Parties and pleadings defined

For purposes of recovery of costs, unless the context clearly requires otherwise (CCP §1032(a)(1)-(3)):

- "Complaint" includes a cross-complaint;
- "Defendant" includes a cross-defendant or anyone against whom a complaint is filed; and
- "Plaintiff" includes a cross-complainant or a party who files a complaint in intervention.

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## §27.11 3. Prevailing party defined

Under CCP §1032(a)(4), a "prevailing party" for purposes of determining whether a cost award is mandatory includes:

- The party with a net monetary recovery (see §§27.13-27.14);
- A defendant in whose favor a dismissal is entered (see §§27.15-27.16);
- A defendant when neither plaintiff nor defendant obtains any relief (see §27.17); and
- A defendant as against plaintiffs who do not recover any relief against that defendant (see §27.18).

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### §27.12 4. When court will determine prevailing party

When any party recovers other than monetary relief, and in situations other than as specified in the statute, the prevailing party will be determined by the court. CCP §1032(a)(4); *Gilbert v National Enquirer, Inc.* (1997) 55 CA4th 1273, 64 CR2d 659. The court has the discretion to allow costs and to apportion costs between the parties. CCP §1032(a)(4). See *Lincoln v Schurgin* (1995) 39 CA4th 100, 45 CR2d 874 (order for each side to bear its own costs is not abuse of court's discretion).

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### B. Examples of prevailing parties

#### 1. Party with net monetary recovery

#### §27.13 a. Based on final judgment

In general, the party with the net recovery based on the final judgment is the prevailing party for purposes of recovery of costs. In *Haire v Stevenson* (1987) 196 CA3d 1249, 242 CR 433, the court of appeal reversed the trial court's granting of the landlords' request for costs and attorney fees in landlord-tenant action, holding that because there can be only one final judgment in an action with a cross-complaint, the tenants, with a net judgment in their favor of $81,000, were the successful parties within the meaning of CCP §1032 and the lease provision granting reasonable attorney fees to the prevailing party. See also, *e.g., Michell v Olick* (1996) 49 CA4th 1194, 57 CR2d 227 (plaintiff that won $63,000 on one cause of action and lost on 11 other causes of action was prevailing party); *Lincoln v Schurgin* (1995) 39 CA4th 100, 45 CR2d 874 (plaintiff won approximately $700,000 on one cause of action but lost other causes of action and did not recover on $4 million claim; trial court finding that neither party received net monetary recovery not an abuse of discretion).

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### §27.14 b. When damages offset

Offset of damages may change who the prevailing party is for recovery of costs. See *Reed v Wilson* (1999) 73 CA4th 439, 444, 86 CR2d 510 (plaintiff's settlement with defendant serves to reduce claims against remaining codefendants); *Public Employees' Retirement Sys. v Winston* (1989) 209 CA3d 205, 258 CR 612 (damages awarded to lessor were more than offset by award to lessee of security deposit, which made lessee prevailing party with net monetary recovery).

If the settlement amount is greater than the damages award, the award is entirely offset, resulting in a zero judgment. *Syverson v Heitman* (1985) 171 CA3d 106, 110, 214 CR 581. A plaintiff who does not obtain a net monetary recovery is not the prevailing party under CCP §1032(a)(4). *Goodman v Lozano* (Feb. 4, 2010, S162655) 2010 Cal Lexis 868.

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### 2. Party in whose favor dismissal is entered

### §27.15 a. When voluntary dismissal

The voluntary dismissal of a complaint is a dismissal within the meaning of CCP §1032 that entitles the prevailing party to cost recovery as a matter of right. See *West Coast Dev. v Reed* (1992) 2 CA4th 693, 3 CR2d 790 (award of attorney fees under CCP §128.5); *County of Santa Barbara v David R.* (1988) 200 CA3d 98, 245 CR 836. See also *Boonyarit v Payless Shoesource, Inc.* (2006) 145 CA4th 1188, 52 CR3d 241 (voluntarily dismissed defendant must secure entry of order or judgment of dismissal to be prevailing party for purposes of costs award under CCP §1032).

Proceeds from a settlement in exchange for a voluntary dismissal are not a net monetary recovery giving rise to costs as a matter of right under CCP §1032(b). *Chinn v KMR Prop. Mgmt.* (2008) 166 CA4th 175, 188, 82 CR3d 586.

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### §27.15A b. When dismissal result of good faith settlement

A prevailing party is defined to include a party in whose favor a dismissal is entered. CCP §1032(a)(4). The dismissal of a cross-complaint as a result of a good faith settlement is considered such a dismissal and entitles cross-defendant to recover its costs when the cross-complaint against that cross-defendant is dismissed. *Crib Retaining Walls, Inc. v NBS/Lowry, Inc.* (1996) 47 CA4th 886, 54 CR2d 850. See also *Great W. Bank v Converse Consultants, Inc*. (1997) 58 CA4th 609, 68 CR2d 224 (cross-defendant who settles with plaintiff and obtains good faith settlement determination order is prevailing party on cross-complaint and is entitled to recover costs from cross-complainant, because cross-complaint was dismissed under CCP §877.6).

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### §27.16 c. When intervention involved

Dismissal of a complaint in intervention entitles the dismissed party to costs against the intervenor for the period in which the intervenor was a party to the principal action. *Building Maintenance Serv. Co. v AIL Sys., Inc.* (1997) 55 CA4th 1014, 1027, 64 CR2d 353; *Catello v I.T.T. Gen. Controls* (1984) 152 CA3d 1009, 200 CR 4. Dismissal of the complaint in intervention entitles a defendant who is not a prevailing party to expenses incurred only while the intervenor was a party, *i.e.,* expenses that would not have been incurred but for the intervention. See *Andersen v Pacific Bell* (1988) 204 CA3d 277, 251 CR 66; *Burrow v Pike* (1987) 190 CA3d 384, 235 CR 408.

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### §27.17 3. In cross-complaint when neither plaintiff nor defendant prevails

Because CCP §1032(a) defines "defendant" to include "cross-defendant," actions involving cross-complaints raise particular issues in cost awards when neither plaintiff nor defendant obtains any relief. When neither plaintiff/cross-defendant nor defendant/cross-complainant prevails on his or her claims, the defendant/cross-complainant is the prevailing party and entitled to costs. See *McLarand, Vasquez & Partners, Inc. v Downey Sav. & Loan Ass'n* (1991) 231 CA3d 1450, 1455, 282 CR 828.

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### §27.18 4. Defendant may be prevailing party if plaintiffs do not recover

When plaintiff does not recover because of offset, or for some other reason does not obtain a net monetary recovery, defendant may be considered the prevailing party. See *Public Employees' Retirement Sys. v Winston* (1989) 209 CA3d 205, 258 CR 612 (when damages awarded to lessor were more than offset by award to lessee of security deposit, lessee was held to be prevailing party with net monetary recovery). See §27.14.

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## §27.19 IV. EXAMPLES OF RECOVERABLE COSTS SPECIFIED BY STATUTE

Determine whether specific statutory provisions apply in your case. Some examples of actions governed by specific statutes include those discussed in §§27.20-27.31B.

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## §27.20 A. Trespass actions

In any action to recover damages to personal or real property resulting from trespass on lands either under cultivation or intended or used for the raising of livestock, the prevailing plaintiff is entitled to reasonable attorney fees in addition to other costs and any liability for damages imposed by law. CCP §1021.9. See *Quarterman v Kefauver* (1997) 55 CA4th 1366, 64 CR2d 741; *Elton v Anheuser-Busch Beverage Group, Inc.* (1996) 50 CA4th 1301, 58 CR2d 303.

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### §27.21 B. Eminent domain proceedings

The right to recover costs in eminent domain proceedings is governed by CCP §§1268.610-1268.720. Defendants in eminent domain proceedings, whether or not prevailing parties, are allowed to recover their costs, including the costs of determining the apportionment of the award, except that the cost of determining any issues of title between two or more defendants must be apportioned by the court. CCP §1268.710. In addition, if an eminent domain proceeding is wholly or partially dismissed for any reason, or if final judgment does not allow plaintiff to acquire the property, the court must award defendant litigation expenses. CCP §1268.610(a).

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### §27.22 C. Inverse condemnation proceedings

The right to recover costs in inverse condemnation actions is governed by CCP §1036. Either the court rendering judgment, or an attorney representing a public entity if the claim is settled before judgment, must determine and award costs sufficient to reimburse plaintiff for reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred. CCP §1036. See *Smith v County of Los Angeles* (1989) 214 CA3d 266, 262 CR 754 (homeowners and waterworks district entitled to recover costs from county when landslide destroyed homes after construction of roadway and removal of debris).

The court has wide discretion in the scope of the costs awarded. See *Estate of Baum* (1989) 209 CA3d 744, 257 CR 566; *San Gabriel Valley Water Co. v Montebello* (1978) 84 CA3d 757, 148 CR 830.

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### §27.23 D. Actions to recover wages for labor performed

In actions for the recovery of wages for labor performed, when the amount of the demand, exclusive of interest, does not exceed $300, the court is required to add, as a part of the cost in any judgment recovered by plaintiff or cross-complainant, attorney fees not to exceed 20 percent of the amount recovered. CCP §1031.

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### §27.24 E. Eviction costs in unlawful detainer proceedings

In unlawful detainer proceedings, a plaintiff who obtains a judgment for possession of the premises can file a request to recover expenses incurred in the eviction, including costs of the sheriff or marshal to evict the occupants, after the sheriff or marshal informs plaintiff of the exact amounts necessarily incurred. CCP §1034.5.

The plaintiff must file a supplemental cost memorandum, claiming the additional costs and specifying the items and the amounts paid within 10 days after being informed by the sheriff or marshal of the exact costs. Cal Rules of Ct 3.200.

Defendant may move to tax the costs within 10 days after service of the supplemental cost memorandum. If defendant fails to file a timely notice of motion to tax costs, the court clerk will enter judgment for the costs. Cal Rules of Ct 3.200. The judgment is enforced in the same manner as a money judgment.

**Further research:** For further information about unlawful detainer, see California Eviction Defense Manual (2d ed Cal CEB 1993); California Landlord-Tenant Practice (2d ed Cal CEB 1997).

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### §27.25 F. Defense costs in actions against public entities

In cases brought against public entities under California's Tort Claims Act, including cases for express or implied indemnity or for contribution, the court must decide at the time a motion for summary judgment or nonsuit is granted whether the action was brought with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts or law that justified commencement of the action. CCP §1038(a). If the court finds that the action was *not* brought both in good faith and with reasonable cause, it must determine the defense costs reasonably and necessarily incurred, and award such costs as part of the judgment *in addition* to costs normally awarded to the prevailing party. CCP §1038(a). See *Kobzoff v Los Angeles County Harbor/UCLA Med. Ctr.* (1998) 19 C4th 851, 80 CR2d 803.

The legislative purpose in enacting CCP §1038 was to allow public entities to recover the cost of defending frivolous lawsuits in the same manner in which damages may be sought in a malicious prosecution action. *Knight v City of Capitola* (1992) 4 CA4th 918, 6 CR2d 874; *Curtis v County of Los Angeles* (1985) 172 CA3d 1243, 218 CR 772. Under CCP §1038, the meaning of "good faith" for determining whether costs must be awarded encompasses the equitable principle of fairness, and "reasonable cause" is defined as whether a reasonable attorney would consider the claim tenable. See *Carroll v State* (1990) 217 CA3d 134, 265 CR 753. Keeping a public entity in a case through summary judgment to avoid an "empty chair" argument by its codefendants does not constitute reasonable cause. *Hall v Regents of Univ. of Cal.* (1996) 43 CA4th 1580, 51 CR2d 387.

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### §27.26 G. Under judicial (court-ordered) arbitration

In judicial arbitration cases (see CCP §§1141.10-1141.31), the arbitrator has the power to award costs, not to exceed the statutory costs of suit. CCP §1141.19; Cal Rules of Ct 3.824(a). If the arbitrator does not make a cost award, the court retains jurisdiction to entertain a cost bill filed after the award. See *Guevara v Brand* (1992) 8 CA4th 995, 998, 10 CR2d 780.

A prevailing party retains the same right to costs under a cost bill procedure (Cal Rules of Ct 3.1700) as with a judgment following trial. *Guevara v Brand, supra*. The preferable procedure, however, is for the arbitrator to award costs as part of the award. See *Dickens v Lee* (1991) 230 CA3d 985, 281 CR 783.

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### §27.27 H. When judgment in trial de novo not more favorable to requesting party

If the judgment following a trial de novo is not more favorable than the arbitration award in either the amount of damages awarded or the type of relief granted for the party requesting the trial de novo, the court must order that party to pay the costs and fees specified in CCP §1141.21(a); see *Bhullar v Tayyab* (1996) 46 CA4th 582, 54 CR2d 17 (court of appeal reversed trial court's denial of attorney fees to defendant under CCP §1141.21). An exception to the imposition of costs and fees occurs if the court finds in writing, on a motion, that such imposition would create a substantial economic hardship. CCP §1141.21(a).

The provisions of CCP §1141.21 do not apply if the judgment after the trial de novo exceeds the amount in controversy specified in CCP §1141.11 ($50,000). CCP §1141.26.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.28 I. Partition actions

## §27.28 I. Partition actions

Costs are recoverable for actions for partition (division of interest in real property), including interest on disbursements, apportionment in proportion to interests, and future interest. CCP §§874.010-874.050.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.29 J. Unsuccessful actions to enjoin public improvement of utility

### §27.29 J. Unsuccessful actions to enjoin public improvement of utility

A person or entity that wrongfully enjoins a public improvement or utility will be liable for all costs, damages, and necessary expenses resulting to defendant because of the filing of the suit (if all statutory requirements are met). CCP §526b.

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### §27.30 K. Actions to review removal proceedings against permanent school employees

Fees and costs should be awarded under the general provisions of CCP §1032(b) to a prevailing employee for any review proceedings under Ed C §44944(e) (authorizing the payment of attorney fees to an employee whom the Commission on Professional Competence has determined should not be dismissed or suspended), even though §44944(e) does not expressly provide for the award of fees if judicial review of a commission decision is sought. *Fontana Unified Sch. Dist. v Burman* (1988) 45 C3d 208, 246 CR 733.

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### §27.31 L. Actions brought by personal representatives, trustees, or agents

In an action prosecuted or defended by a personal representative, the trustee of an express trust, a guardian or conservator, or anyone expressly authorized by statute, costs may be recovered as in an action by or against a person prosecuting or defending in the person's own right. CCP §1026(a).

Costs allowed will be made chargeable only to the estate, fund, or party represented, unless the court directs the costs to be paid by the fiduciary personally for mismanagement or bad faith in the action or defense. CCP §1026(b).

**Further research:** See 3 California Decedent Estate Practice, chap 29 (2d ed Cal CEB 2009) (actions by and against representative).

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### §27.31A M. Drug house abatement actions

The prevailing party in an action brought under the drug house abatement law (Health & S C §§11570-11587) is entitled to recover costs, including the costs of investigation, discovery, and attorney fees. CC §3496(c). This may include salaries and overhead expenses of government attorneys and law enforcement personnel attributable to the action. *City of Oakland v McCullough* (1996) 46 CA4th 1, 53 CR2d 531.

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### §27.31B N. Public Records Act proceedings

The prevailing party is entitled to costs and attorney fees in any Public Records Act proceeding brought to compel production of records. Govt C §6259(d); see *Motorola Communication & Electronics, Inc. v Department of Gen. Servs.* (1997) 55 CA4th 1340, 1344, 64 CR2d 477 (court properly denied request for costs and attorney fees because plaintiff was not the prevailing party).

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## V. WHEN COST RECOVERY IS DISCRETIONARY

### §27.32 A. Court determines prevailing party

Even when a party does not fall within the definition of a prevailing party as defined by statute (see §§27.8-27.18), the court may award costs to a party found to be "prevailing" by the court. CCP §1032(a)(4). This includes parties who recover other than monetary relief. CCP §1032(a)(4).

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### §27.33 B. Court may apportion costs

When costs are awarded to a party found to be prevailing in the discretion of the court, the court may apportion costs between the parties on the same or adverse sides under rules adopted by the Judicial Council. CCP §1032(a)(4).

In identifying the prevailing party, the courts have stated that the types of parties specifically listed in CCP §1032 are not all-inclusive, and that a party that does not fall within that list may nonetheless be declared prevailing and awarded costs in the court's discretion. See *Pirkig v Dennis* (1989) 215 CA3d 1560, 264 CR 494. See also §27.101.

When a prevailing party on summary judgment incurs costs jointly with other parties that remain in the litigation, then the prevailing party, during the pendency of the litigation, is entitled to recover only the costs it has incurred or were incurred on its behalf. *Fennessy v DeLeuw-Cather Corp*. (1990) 218 CA3d 1192, 267 CR 772 (in action for wrongful discharge, one of six defendants was granted summary judgment); *Jonkey v Carignan Constr. Co.* (2006) 139 CA4th 20, 26, 42 CR3d 399 (prevailing defendants in negligence action, represented by same counsel during proceedings, were jointly entitled to costs).

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### §27.34 C. Parties may stipulate to payment of costs

Parties may stipulate to alternative procedures for awarding costs incurred in litigation. CCP §1032(c). See, *e.g., Reveles v Toyota By The Bay* (1997) 57 CA4th 1139, 67 CR2d 543, disapproved on other grounds in *Gavaldon v DaimlerChrysler Corp.* (2004) 32 C4th 1246, 1261, 13 CR3d 793, and in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 775 n6, 98 CR2d 1. Make the language in any agreement stipulating to the payment of costs very clear as to the scope of the costs and the manner of allocation.

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### §27.35 D. Plaintiff may not recover costs if no net monetary recovery

A plaintiff whose judgment is reduced to zero is not the party with the net monetary recovery under CCP §1032(a)(4) and is not the prevailing party. *Goodman v Lozano* (Feb. 4, 2010, S162655) 2010 Cal Lexis 868. See §§27.13-27.14. The court still has discretion to deny costs when the only relief is injunctive and there is no net monetary recovery to either party. *United States Golf Ass'n v Arroyo Software Corp.* (1999) 69 CA4th 607, 81 CR2d 708.

The reduction of a damages award under principles of comparative fault does *not* result in the reduction of the costs awarded to a prevailing party. See *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 347, 145 CR 47. However, costs may be reduced if judgment is reduced below the court's jurisdictional limit. See §27.36.

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## E. When judgment could have been rendered in limited civil case or within jurisdictional limits of small claims court

### §27.36 1. Judgment in unlimited civil cases

When an action is brought in superior court in a case other than a limited civil case and the party recovers a judgment that is less than could have been rendered in a limited civil case, the court may award costs or any portion of claimed costs at its discretion. CCP §1033(a); *Chavez v City of Los Angeles* (2010) 47 C4th 970, ___ CR3d ___ (CCP §1033(a) also applies to actions brought under FEHA); *Dorman v DWLC Corp.* (1995) 35 CA4th 1808, 1815, 42 CR2d 459 (trial court is not required to add potential attorney fees award to damage award before determining whether prevailing party has recovered judgment exceeding jurisdictional limit). Under CCP §88, any civil action or proceeding other than a limited civil case may be referred to as an "unlimited civil case."

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### §27.37 2. Judgment in limited civil cases

In a limited civil case, when a prevailing plaintiff recovers less than the jurisdictional limit of the small claims court ($5000; CCP §116.220), the following rules apply:

- **When the party could have brought its action in small claims court,** the court may, in its discretion, allow or deny costs to the prevailing party, or may allow costs in part in any amount that is proper. CCP §1033(b)(1).
- **When the party could not have brought its action in small claims court,** costs and necessary disbursements must be limited to the (CCP §1033(b)(2)):
- Actual costs of the filing fee;
- Actual costs of service of process; and
- Reasonable attorney fees when specifically allowed by law.

Costs must be awarded to plaintiff only if the court is satisfied that, before the beginning of the action, plaintiff informed defendant in writing (CCP §1033(b)(2)):

- Of the intended legal action against defendant; and
- That legal action could result in a judgment against defendant that would include the costs and necessary disbursements allowed by CCP §1033.

As to situations in which a limited civil case is brought in the small claims division, and the case is within the jurisdiction of the small claims division, see CCP §87.

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### §27.38 F. Applicant may be required to pay costs of trial postponement

When an application is made to postpone a trial, the court may require the applicant, as a condition of granting the application, to pay expenses caused by the postponement. CCP §1024. The expenses may include jury fees. See *Inman v Fremont Med. Ctr.* (1975) 49 CA3d 169, 122 CR 372 (motion for continuance on day of trial conditioned on payment of jury fees for summoned jury panel).

**NOTE:** The expenses that may be awarded under CCP §1024 do not include attorney fees or reimbursement of lost income. See *DeCesare v Lembert* (1983) 144 CA3d 20, 192 CR 354. Nor does §1024 apply to juvenile proceedings. See *In re Sean* (1989) 214 CA3d 662, 262 CR 884.

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### §27.39 G. Costs may be awarded in bad faith actions

Trial courts have the discretionary authority to award reasonable expenses, including attorney fees incurred as a result of frivolous actions, actions not based on good faith, or actions that cause unnecessary delay. See CCP §128.7. For a discussion of recovery of attorney fees as sanctions, see chap 26.

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### §27.40 H. Cost awards in equitable indemnity actions

An award of costs in an equitable action is governed by the discretionary provisions of CCP §1032(a)(4), even though the relief sought or obtained takes the form of a payment of money. See *Miller v American Honda Motor Co.* (1986) 184 CA3d 1014, 229 CR 523 (cross-complaint rendered moot when distributor and retailer both defeated purchaser's claims against them; because neither distributor nor retailer prevailed within meaning of former CCP §1032(c), both had to bear their own costs on cross-complaint).

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### §27.41 I. Costs may be awarded in interpleader actions

In an interpleader action, a party who follows the procedures in CCP §386 or §386.5 may, by motion, petition, complaint, or cross-complaint, request an award of costs incurred in that action. CCP §386.6(a).

In ordering the discharge of a party in an interpleader action, the court may, in its discretion, award the party costs from the amount in dispute that was deposited with the court. CCP §386.6(a). At final judgment, the court may further provide for the assumption of such costs and attorney fees by one or more of the adverse claimants as may appear proper. See *Business Title Corp. v U.S.* (1978) 21 C3d 710, 717, 147 CR 622.

**Further research:** See California Civil Procedure Before Trial §28.22 (4th ed Cal CEB 2004) for further discussion of recovering costs and fees in interpleader actions.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.42 J. Costs may be awarded for judgment notwithstanding the verdict

### §27.42 J. Costs may be awarded for judgment notwithstanding the verdict

A party who prevails on a motion for judgment notwithstanding the verdict is a prevailing party, even if the other party receives some relief. See *Stevenson v Oceanic Bank* (1990) 223 CA3d 306, 321, 272 CR 757.

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### §27.43 K. Costs may be awarded for injunctive relief

A party who receives alternative injunctive relief, rather than the primary injunctive relief requested, may still be held by the court to be a prevailing party and awarded costs. See *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 261 CR 520. But see *United States Golf Ass'n v Arroyo Software Corp.* (1999) 69 CA4th 607, 81 CR2d 708 (court declined to find prevailing party and award costs when only relief obtained was injunctive and there was no net monetary recovery to either party).

**Further research:** For further discussion of injunctive relief, see California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004).

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### §27.44 L. State or county may recover costs

When the state is a party, costs must be awarded against it on the same basis as against any other party. CCP §1028. When any county, city, district, or other public agency or entity is a party, costs must also be awarded against it on the same basis as against any other party. CCP §1029. In *Heist v County of Colusa* (1984) 163 CA3d 841, 213 CR 278, the court of appeal held that a cost award to the county (including staff time needed to produce documents) was within the trial court's discretion (after denying plaintiff's petition for extraordinary writ challenging county's decision to abandon a road).

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### §27.45 M. Costs may be awarded to small business or licensee

If a small business or licensee prevails in a civil action with a state regulatory agency (that involves the regulatory functions of the state agency regarding the small business or licensee) and the court finds that the agency's action was undertaken without substantial justification, the small business or licensee may be awarded reasonable litigation expenses in addition to other costs. CCP §1028.5. The meanings of "reasonable litigation expenses," "licensee," and "small business" for the purposes of these provisions are defined by statute. See CCP §1028.5(b)-(d).

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### §27.46 N. Defendant recovers costs when tender and deposit made in action to recover money

A defendant who alleges tendering to plaintiff the full amount due before plaintiff filed an action to recover that money (and whose allegation is found to be true), and who has deposited the same amount with the court after the action was filed, is entitled to recover costs from plaintiff, even if plaintiff prevails. CCP §1025.

A tender made after the action is commenced is insufficient to avoid imposition of costs under CCP §1025. See *Cirimele v Shinazy* (1954) 124 CA2d 46, 268 P2d 210, aff'd (1955) 134 CA2d 50, 285 P2d 311 (on issue of additional allowance for attorney fees incurred on two appeals). The court of appeal held in *Cirimele* (a lessor's action for rent under a lease entitling him to reasonable attorney fees in the event of suit) that the trial court erred in finding such fees to be unnecessary as a result of the lessee's tender when not only was the tender for less than the amount due, but, being first made by attaching a check to the answer, it was not made before commencement of the action as required by §1025.

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## VI. STATUTES REQUIRING SHARING OR PROHIBITING COST RECOVERY

### §27.47 A. Costs not allowed in disclaimer of title actions

A plaintiff cannot recover costs in any action on title to real or personal property in which a defendant disclaims in the answer any claim, or allows judgment to be taken without filing an answer. CCP §761.030(b). However, disclaimer of title will *not* defeat plaintiff's right to costs if the issue of possession is contested and determined in plaintiff's favor. See *McMorris v Pagano* (1944) 63 CA2d 446, 146 P2d 944. See also *Lawton v Gordon* (1869) 37 C 202.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.48 B. Costs not allowed in submission of controversy without action: Agreed case

### §27.48 B. Costs not allowed in submission of controversy without action: Agreed case

When judgment is rendered on an "agreed case" submitted under CCP §1138, no costs may be awarded for any proceeding before trial. CCP §1139.

**Further research:** See 6 Witkin, California Procedure, *Proceedings Without Trial* §79 (5th ed 2008).

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### §27.49 C. Costs shared in contractual arbitration

Parties to arbitration proceedings are required to pay their prorata share of the arbitrator's fee and other expenses unless the arbitration agreement or the parties agree otherwise. CCP §1284.2. When the parties agree to bear their own costs in arbitration, costs on appeal will be treated the same in the absence of an agreement to treat them differently. See *Humphries Inv. v Walsh* (1988) 202 CA3d 766, 248 CR 800.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.50 D. Costs shared by primary and excess insurers when personal automobile liability policies involved

## §27.50 D. Costs shared by primary and excess insurers when personal automobile liability policies involved

When two or more personal policies afford automobile liability insurance that apply to the same motor vehicle in an occurrence from which a loss arises, and one policy is primary and one or more policies are excess, then each insurer must pay for the cost of defense in proportion to the percentage of total damages paid by that insurer. Ins C §11580.9(g)(1). Each insurer's share is the percentage of the total defense costs equal to the amount of damage paid by that insurer as a percentage of total damages paid by all insurers whose policies apply to the motor vehicle involved. Ins C §11580.9(g)(1).

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## VII. WHEN COST AWARD MUST BE REDUCED OR AUGMENTED BASED ON CCP §998 OFFER TO COMPROMISE

### §27.51 A. General effect and requirements

A cost award under CCP §1031 or §1032 must be reduced or augmented as specified in CCP §998 (written offers to compromise on pending action). For procedures for making and accepting offers to compromise under §998, see California Civil Procedure Before Trial, chap 47 (4th ed Cal CEB 2004).

To qualify as a CCP §998 offer, the statute must be fully satisfied in its particulars. See, *e.g., Lecuyer v Sunset Trails Apartments* (2004) 120 CA4th 920, 16 CR3d 169 (settlement offer under CCP §998 was invalid because not served by mail at least 15 days before trial); *Stell v Jay Hales Dev. Co.* (1992) 11 CA4th 1214, 1230, 15 CR2d 220, disapproved on other grounds in *Citizens for Covenant Compliance v Anderson* (1995) 12 C4th 345, 366, 47 CR2d 898 (offer made 79 days before trial, not referring to §998, and requiring immediate response, did not satisfy §998). But see *Berg v Darden* (2004) 120 CA4th 721, 728, 15 CR3d 829 (otherwise clear CCP §998 offer to compromise is not rendered invalid simply because it does not track statutory language); *Elite Show Servs., Inc. v Staffpro, Inc.* (2004) 119 CA4th 263, 14 CR3d 184 (settlement offer including offer to pay reasonable attorney fees was not too uncertain to be enforced under CCP §998).

**PRACTICE TIP:** Prepare and serve separate §998 offers for each plaintiff or defendant, allowing each the opportunity to accept the offer individually. *Menees v Andrews* (2004) 122 CA4th 1540, 1546, 19 CR3d 664 (offer that did not meet this requirement found invalid).

Code of Civil Procedure §998 provides that the written offer to compromise must include "a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." CCP §998(b). Any acceptance of the offer must be in writing, and be signed by either counsel for the accepting party or by that party if unrepresented. CCP §998(b).

Section 998 applies to an offer made before commencement of trial *or arbitration* (as provided in §1281 or §1295) of a dispute to be resolved by arbitration. This section does not apply to specific types of labor arbitrations. See CCP §998(i). Additionally, scheduling an arbitration does not necessarily terminate an existing offer.

A second CCP §998 offer supersedes and extinguishes prior §998 offers. *Wilson v Wal-Mart Stores, Inc.* (1999) 72 CA4th 382, 85 CR2d 4; but see *Ray v Goodman* (2006) 142 CA4th 83, 47 CR3d 659 (even if first §998 offer was considered revoked or superseded for purposes of contract law, under language of CC §3291, prejudgment interest accrues from date of first offer).

If a CCP §998 offer is not accepted before trial or arbitration, or within 30 days after it is made, whichever occurs first, the offer is deemed withdrawn, and is inadmissible in the trial or arbitration. CCP §998(b)(2).

A CCP §998 offer that is unilaterally revoked by the offeror before the expiration of the statutory period is a nullity for purposes of the cost-shifting provisions of §998. *Marcey v Romero* (2007) 148 CA4th 1211, 56 CR3d 402.

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### §27.52 B. When defendant's offer not accepted and plaintiff fails to obtain more favorable judgment or award

If defendant's offer is not accepted and plaintiff does not obtain a more favorable judgment or arbitration award, plaintiff cannot recover postoffer costs and must pay defendant's costs from the time of the offer. CCP §998(c). See, *e.g., Steele v Jensen Instrument Co*. (1997) 59 CA4th 326, 69 CR2d 135. In determining whether the plaintiff obtained a more favorable judgment, the court or arbitrator shall exclude postoffer costs. CCP §998(c)(2)(A).

In *Mesa Forest Prods., Inc. v St. Paul Mercury Ins. Co.* (1999) 73 CA4th 324, 86 CR2d 398, the plaintiff sued for approximately $122,000 and multiple defendants made a CCP §998 offer of $62,690, which plaintiff did not accept. One defendant then voluntarily paid plaintiff $62,690 before trial. After the jury, taking the voluntary payment into account, returned a verdict for plaintiff for $13,205.85, a defendant claimed it was entitled to recover §998 costs. The court of appeal affirmed the trial court's ruling that the voluntary payment would be included in the plaintiff's recovery, resulting in the recovery exceeding the offer and, therefore, denial of §998 costs to the defendant.

The making of a §998 offer does not, however, terminate the plaintiff's rights to recover pre-offer costs. *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614. See also *Duale v Mercedes-Benz USA, LLC* (2007) 148 CA4th 718, 56 CR3d 19.

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### §27.53 1. No distinction between tort and other causes of action

Former CCP §998(c) distinguished between tort causes of action and causes of action not in tort. See, *e.g., Wilson v Safeway Stores, Inc.* (1997) 52 CA4th 267, 271, 60 CR2d 532. In 1997, CCP §998(c) was amended to remove this distinction and provides, without reference to the type of cause of action involved, that if the plaintiff does not accept defendant's §998 offer and fails to obtain a more favorable judgment or award, plaintiff cannot recover postoffer costs and must pay defendant's postoffer costs. CCP §998(c).

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### §27.54 2. Scope of costs recoverable

If defendant's offer is not accepted and plaintiff does not obtain a more favorable judgment or arbitration award, plaintiff cannot recover postoffer costs and must pay defendant's costs from the time of the offer. CCP §998(c). In any action or proceeding other than an eminent domain action, the court or arbitrator has the discretion to require plaintiff to pay a reasonable sum to cover the costs of expert witnesses who are not regular employees of any party; the costs would be actually incurred and reasonably necessary in preparing for or during trial or arbitration of the case by defendant. CCP §998(c)(1).

**NOTE:** In determining expert witness fees, the court must view the necessity of expert deposition expenses. The court has discretion to apportion these costs among the parties. *Brake v Beech Aircraft Corp.* (1986) 184 CA3d 930, 229 CR 336. If a party obtains a more favorable judgment or arbitration award after its CCP §998 offer is refused, that party may recover expert witness fees under that statute that were actually incurred, even if they were not personally incurred by that party. *Skistimas v Old World Owners Ass'n* (2005) 127 CA4th 948, 952, 26 CR3d 319 (defendants awarded expert witness fees even though their insurer paid those fees on defendants' behalf).

If a defendant's offer is not accepted and plaintiff fails to obtain a more favorable judgment or award, the costs required to be paid by plaintiff under CCP §998, from the time of the offer, must be deducted from any damages awarded in plaintiff's favor. CCP §998(e). If the costs awarded under §998 exceed the damages awarded to plaintiff, the net amount must be awarded to defendant and judgment or award entered accordingly. CCP §998(e).

Preoffer costs should be considered a part of plaintiff's judgment in determining whether plaintiff failed to obtain a judgment more favorable than the compromise offer. See *Shain v City of Albany* (1980) 106 CA3d 294, 165 CR 69. In determining whether a party prevailing at trial has obtained a judgment more favorable than a pretrial settlement offer it refused, the court first adds to the judgment of damages the recoverable costs and attorney fees authorized by statute and incurred before the settlement offer. See *Kelly v Yee* (1989) 213 CA3d 336, 261 CR 568 (in action against landlords for wrongful eviction, court of appeal held that trial court erred in allowing landlords costs and attorney fees under §998 when total of plaintiffs' preoffer costs and attorney fees, punitive damages, and trebled general damages exceeded landlords' settlement offer). In such a case, plaintiff may not include postoffer costs in calculating the amount of the judgment.

In determining whether a judgment is more favorable, the court must exclude from the total recovery the costs incurred *after* the time of the offer and must also exclude damages incurred after the time of an offer. See *Harvard Inv. Co. v Gap Stores, Inc.* (1984) 156 CA3d 704, 711, 202 CR 891.

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### §27.55 3. Costs recoverable when multiple plaintiffs

With multiple plaintiffs, a defendant's CCP §998 offer to compromise should designate how costs are to be divided among the plaintiffs. Only an offer made to a single plaintiff, without need for allocation or acceptance by other plaintiffs, qualifies as a valid offer under §998. See *Randles v Lowry* (1970) 4 CA3d 68, 84 CR 321; *Meissner v Paulson* (1989) 212 CA3d 785, 260 CR 826. The concerns raised by, and the rule of, *Meissner* do not apply when the plaintiffs are married and their causes of action are, and any recovery therefrom would be, community property, because either plaintiff could accept a settlement offer on behalf of the community. *Vick v DaCorsi* (2003) 110 CA4th 206, 212, 1 CR3d 626. In addition, a plaintiff suing in multiple capacities is a single party for purposes of a defendant's §998 offer. *Peterson v John Crane, Inc.* (2007) 154 CA4th 498, 506, 65 CR3d 185.

When there are multiple plaintiffs whose interests are not identical and who have no single, indivisible injury, their joint settlement offer to defendant may not be deemed a valid offer under CCP §998. See *Hurlbut v Sonora Community Hosp.* (1989) 207 CA3d 388, 410, 254 CR 840. See also *Gilman v Beverly Cal. Corp.* (1991) 231 CA3d 121, 125, 283 CR 17 (following *Hurlbut* in medical malpractice wrongful death action); *Meissner v Paulson, supra*.

However, in *Fortman v Hemco, Inc.* (1989) 211 CA3d 241, 259 CR 311, although the offer of compromise was originally offered jointly by plaintiffs, a minor and her mother, and the mother subsequently dismissed her causes of action before trial, the court held that the remaining minor plaintiff received a greater amount in damages after trial than she would have received had defendant accepted the joint offer, even if the entire amount of the offer had been attributed to the minor. The offer of $1 million by the original two plaintiffs, in light of the $23 million verdict, left no doubt that the award exceeded the offer even if the entire offer were attributed to the prevailing plaintiff. Similarly, in *Stallman v Bell* (1991) 235 CA3d 740, 747, 286 CR 755, plaintiffs made, and defendants rejected, a §998 offer to settle for $225,000. The court of appeal affirmed the order awarding expert witness fees and reversed the order denying plaintiff's request for costs, including prejudgment interest, holding that plaintiff's statutory settlement offer was not void, although it was made jointly by both the individual plaintiff and decedent's estate, because there was only a single verdict to be compared with a single offer, and it could be determined clearly whether the judgment was more favorable than the offer.

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### §27.56 4. Costs recoverable when multiple defendants

In a multiple defendant case, a joint offer by defendants was permissible without apportionment when they were united in interest and were sued on a theory of joint and several liability. *Brown v Nolan* (1979) 98 CA3d 445, 451, 159 CR 469. See also *Stiles v Estate of Ryan* (1985) 173 CA3d 1057, 1066, 219 CR 647. When the offering defendants do not meet these criteria, CCP §998 may still apply if, despite the lack of apportionment, it is possible to determine whether a more favorable judgment was received as to each defendant. See *Winston Square Homeowner's Ass'n v Centex W., Inc.* (1989) 213 CA3d 282, 294, 261 CR 605.

This is an evolving area of the law, complicated by the passage of Proposition 51, which abolished joint liability for noneconomic damages in negligence suits. The validity of the CCP §998 offer appears to depend on whether it is sufficiently specific to permit one of multiple defendants to determine the exact amount plaintiff is seeking from that defendant. See *Steinfeld v Foote-Goldman Proctologic Med. Group, Inc.* (1996) 50 CA4th 1542, 1546, 58 CR2d 371; *Bihun v AT&T Info. Sys., Inc.* (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; *Taing v Johnson Scaffolding Co.* (1992) 9 CA4th 579, 11 CR2d 820.

In *Persson v Smart Inventions, Inc.* (2005) 125 CA4th 1141, 1171, 23 CR3d 335, the court upheld the validity of "a joint offer by two defendants, in which the defendants' offer to have judgment taken against each of them jointly and severally in a stated amount," even though "the two defendants are not jointly and severally liable on all claims."

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### §27.57 C. When plaintiff's offer not accepted and defendant fails to obtain more favorable judgment or award

If plaintiff's offer is not accepted and defendant fails to obtain a more favorable judgment or arbitration award in any action or proceeding other than an eminent domain action, the court or arbitrator in his or her discretion may require the defendant to pay, in addition to plaintiff's costs, a reasonable sum to cover postoffer costs that were actually incurred and reasonably necessary for the services of expert witnesses who are not regular employees of any party in preparing for or during trial or arbitration of the case by plaintiff. CCP §998(d).

In determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator shall exclude the postoffer costs. CCP §998(c)(2)(A). It was the intent of the legislature in enacting CCP §998(c)(2)(A) "to supersede the holding in Encinitas Plaza Real v Knight, 209 CA3d 996, that attorney's fees awarded to the prevailing party were not costs for purposes of this section but were part of the judgment." CCP §998(c)(2)(B).

In cases involving joint offers made by multiple plaintiffs, CCP §998 applies when, even though the offer was not apportioned among the plaintiffs, it is possible to determine whether a favorable judgment was received as to each plaintiff. See *Stallman v Bell, supra*; *Fortman v Hemco, Inc.* (1989) 211 CA3d 241, 259 CR 311. In *Fortman,* when two plaintiffs made a $1 million joint offer, it was still possible to ascertain whether defendant received a more favorable judgment as to each plaintiff, given that the verdict in plaintiffs' favor was more than $23 million and was thus more favorable even if the entire offer were apportioned to both plaintiffs. Compare *Fortman* with *Hurlbut v Sonora Community Hosp.* (1989) 207 CA3d 388, 254 CR 840 (cost recovery denied to plaintiffs who made joint offer when it could not be determined whether more favorable judgment was received as to each plaintiff).

Presumably, CCP §998 would apply when a plaintiff makes an offer to multiple defendants. In determining whether the judgment is more favorable than the offer when plaintiff makes separate offers to each of multiple defendants and obtains a judgment of joint and several liability, the offer is not combined and the judgment is not apportioned. See *Hilliger v Golden* (1980) 107 CA3d 394, 166 CR 33. See also *Wickware v Tanner* (1997) 53 CA4th 570, 61 CR2d 790.

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### §27.58 D. When both parties obtain more favorable judgments

If both parties obtain judgments more favorable than their opponents' CCP §998 offers, neither augmentation nor reduction of the costs is normally allowed by CCP §§1031-1032. See *Rose v Hertz Corp.* (1985) 168 CA3d Supp 6, 214 CR 795 (prevailing party simply party in whose favor judgment is entered, and concept of prevailing party bears no relationship to "more favorable judgment" language of §998). A CCP §998 offer applies to offers before trial and before *arbitration*. CCP §998.

Terms of a CCP §998 offer that have merely personal or subjective value to the litigants may also make it difficult for a court to determine whether the offering party has achieved a more favorable outcome than that offered. Thus, in *Barella v Exchange Bank* (2000) 84 CA4th 793, 101 CR2d 167, the defendant made a CCP §998 offer of $25,000, subject to a confidentiality provision. The defendant rejected the offer and subsequently obtained a verdict of only $10,000. The court denied the defendant's motion to strike the plaintiff's costs bill for CCP §998 costs, finding that the difference between the public vindication achieved through a verdict and a confidential settlement for a greater monetary amount was too subjective to support a finding that the plaintiff had recovered "less" than set forth in the CCP §998 offer.

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## E. Costs recoverable for expert witnesses

### §27.59 1. Costs must be in accord with Govt C §68092.5

The costs for services of expert witnesses awarded to either plaintiff or defendant under CCP §998 may not exceed the costs specified in Govt C §68092.5, which provides that a party requiring expert witness testimony must pay the reasonable and customary hourly or daily fee for the actual time spent in examining that expert by any party attending the action or proceeding. CCP §998(h).

**NOTE:** Police officers are deemed expert witnesses for purposes of §998. CCP §998(f).

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### §27.60 2. Fees collectible even if appeal pending

A party who is awarded expert witness fees under CCP §998 may collect them even pending an appeal despite the general rule that judgment for ordinary costs is subject to a stay on appeal unless an undertaking is filed. See *Bank of San Pedro v Superior Court* (1992) 3 C4th 797, 12 CR2d 696. See also *Gallardo v Specialty Restaurants Corp.* (2000) 84 CA4th 463, 100 CR2d 884 (when judgment included both ordinary costs under CCP §1032(a) and costs allowable under CCP §998, only collection of ordinary costs was stayed on appeal).

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### §27.61 3. Award is discretionary

A party is not entitled to the costs of services of expert witnesses as a matter of right under CCP §998. Rather, awarding such costs is within the discretion of the trial court, which may exercise its discretion only if the party against whom costs are awarded fails to obtain a more favorable judgment than the settlement offer. See *Syverson v Heitmann* (1985) 171 CA3d 106, 114, 214 CR 581.

In *Syverson,* the court held that plaintiff was not entitled to costs for the services of expert witnesses, based on an award of damages that equaled plaintiff's §998 offer but was reduced to zero by amounts paid by settling joint tortfeasors under CCP §877. The court found that defendant obtained a more favorable judgment because, had he accepted the offer, he would have been jointly liable for the amount of the offer. 171 CA3d at 114. The 1999 amendments to CCP §998 permit the court to award expert witness fees reasonably necessary in "either or both" preparation for trial or arbitration, or during trial or arbitration. CCP §998(c)(1).

If a party obtains a more favorable judgment or arbitration award after its CCP §998 offer is refused, that party may recover expert witness fees under that statute that were actually incurred, even if they were not personally incurred by that party. *Skistimas v Old World Owners Ass'n* (2005) 127 CA4th 948, 952, 26 CR3d 319 (defendants awarded expert witness fees even though their insurer paid those fees on defendants' behalf).

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### §27.62 F. Costs recoverable only for offers made in good faith

Only reasonable offers made in good faith give rise to cost shifting under CCP §998. Deciding whether an offer is reasonable is within the trial court's discretion and is viewed in the circumstances in which the offer was made. *Jones v Dumrichob* (1998) 63 CA4th 1258, 1262, 74 CR2d 607 (under circumstances of case, §998 offer for waiver of costs was reasonable, good faith offer). See *Mesa Forest Prods., Inc. v St. Paul Mercury Ins. Co.* (1999) 73 CA4th 324, 86 CR2d 398; *Elrod v Oregon Cummins Diesel, Inc.* (1987) 195 CA3d 692, 699, 241 CR 108; *Wear v Calderon* (1981) 121 CA3d 818, 175 CR 566.

If the §998 offer is made in good faith, it is an abuse of discretion for the court to refuse to award expert witness fees. *Thompson v Miller* (2003) 112 CA4th 327, 338, 4 CR3d 905. Moreover, when the offering party obtains a judgment more favorable than its pre-trial offer, the offer is presumed to have been made in good faith and the opposing party bears the burden of proving otherwise. 112 CA4th at 338.

In *Elrod v Oregon Cummins Diesel, Inc.* (1987) 195 CA3d 692, 699, 241 CR 108, the court articulated a two-part test to determine whether an offer is reasonable: the offer represents a reasonable prediction of the amount of money that the defendant would have to pay the plaintiff following a trial, based on the information that was known or reasonably should have been known to the defendant; and the plaintiff knows or should have known the defendant's information.

In *Elrod*, although the original award was over $l million, plaintiff received a net award of zero after reductions for comparative negligence and credits from prior settlements. 195 CA3d at 696. The court of appeal held that it was within the trial court's discretion to find a CCP §998 offer of $15,001 not to have been made in good faith, even though the eventual net award was less than the offer. 195 CA3d at 701.

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### §27.63 G. Attorney fees may be recoverable

A party who prevails in a breach of contract action by accepting an offer to compromise under CCP §998 may recover attorney fees under CC §1717 when there may also be recovery of attorney fees for action on a contract. See *Lanyi v Goldblum* (1986) 177 CA3d 181, 193, 223 CR 32. See chap 26 for discussion of recovery of attorney fees.

In *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614, the supreme court clarified this issue. Plaintiff sued for over $2 million on a construction subcontract that included an attorney fee clause. Defendant made a CCP §998 offer of $900,000, plaintiff made a CCP §998 offer of $1.5 million, and neither offer was accepted. After trial, plaintiff obtained a judgment for $442,054. The supreme court explained the language and purposes underlying CCP §998 and held that (1) because plaintiff was the prevailing party, it was entitled to its preoffer costs, but (2) because plaintiff recovered less than the amount of defendant's CCP §998 offer, defendant was entitled to its postoffer expert witness costs and attorney fees.

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### §27.64 H. Exception for contractual arbitrations

Code of Civil Procedure §998 does not to apply to settlement offers or awards in contractual arbitration proceedings under CCP §§1280-1294.2. See *Woodard v Southern Cal. Permanente Med. Group* (1985) 171 CA3d 656, 663, 217 CR 514. In *Joyce v Black* (1990) 217 CA3d 318, 266 CR 8, the court distinguished *Woodard* as a contractual arbitration case and held that CCP §998 and CC §3291 do apply to judicial arbitration cases. See §27.127 for discussion of CC §3291.

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### §27.65 I. Applicability in structured settlement

When a structured settlement offer is made but not reduced to a present value, the failure to reduce may preclude a decision on whether the judgment is more favorable than the offer. See *Hurlbut v Sonora Community Hosp.* (1989) 207 CA3d 388, 409, 254 CR 840. In *Hurlbut,* the court held that, because plaintiffs failed to establish the present value of a structured settlement offer, it was impossible to determine what constituted a judgment more favorable than the offer. 207 CA3d at 408. Plaintiffs thus could not take advantage of the benefits of CCP §998.

Costs cannot be shifted when a settlement offer includes a demand for relinquishment of claims not part of the complaint in the action, given the uncertainty in determining how much of the total offer relates to the causes of action in the complaint, as opposed to other potential causes of action. See *Valentino v Elliot Sav-On Gas, Inc.* (1988) 201 CA3d 692, 247 CR 483. See also *Linthicum v Butterfield* (2009) 175 CA4th 259, 270, 95 CR3d 538 (costs award upheld despite claims release in §998 offer, because release did not apply to claims outside scope of action).

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### §27.66 J. Special provision for Riverside and San Bernardino counties [deleted]

Former CCP §1021.1, the special provision for Riverside and San Bernardino counties, was operative until January 1, 2001, and has been repealed.

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## VIII. COST ITEMS ALLOWED

### §27.67 A. General rules

Any award of costs is subject to the following rules:

- Costs are allowable if incurred, whether paid or not (CCP §1033.5(c)(1));
- Allowable costs must be reasonably necessary to conduct litigation, rather than merely convenient or beneficial to its preparation (CCP §1033.5(c)(2));
- Allowable costs must be reasonable in amount (CCP §1033.5(c)(3)); and
- The court has discretion to allow or deny items specified as allowable in CCP §1033.5(a)-(b).

The requirement of reasonableness applies to costs awarded as a matter of right to a prevailing party, as well as to costs awarded in the court's discretion. See *Perko's Enters. v RRNS Enters.* (1992) 4 CA4th 238, 5 CR2d 470.

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## §27.68 B. Costs allowed

The items in §§27.69-27.80 are specifically listed in CCP §1033.5(a) as allowable costs under CCP §1032.

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### §27.69 1. Costs for filing, motion, and jury fees

A prevailing party is entitled as a matter of right to recover filing fees except as otherwise expressly provided by statute. CCP §§1032(b), 1033.5(a)(1). See *Heppler v JM Peters Co.* (1999) 73 CA4th 1265, 1294, 87 CR2d 497; *Perko's Enters. v RRNS Enters.* (1992) 4 CA4th 238, 244, 5 CR2d 470 (fees must have been necessarily incurred to be recoverable). See also §27.84. Costs of messengers used to file court documents are not expressly permitted by CCP §1033.5, but may be awarded in the court's discretion. *Ladas v California State Auto. Ass'n* (1993) 19 CA4th 761, 23 CR2d 810. But see *Nelson v Anderson* (1999) 72 CA4th 111, 84 CR2d 753 (messenger fees not permitted when they were of doubtful necessity due to alternatives such as mail, federal express, or personal filing by parties).

The daily fee for jurors is $15 a day for each day of the juror's attendance after the first day. CCP §215(a). Under some circumstances, government and public employees may not be paid a jury fee. CCP §215(b). Unless a higher mileage rate is provided by statute or by city or county ordinance, jurors must be reimbursed at the rate of 34 cents per mile for each mile actually traveled in attending court. CCP §215(c). Costs for jury fees are authorized under CCP §1033.5(a)(1). On pretrial jury fees, first day fees, and procedures for depositing fees, see §§2.31-2.35.

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### §27.70 2. Costs for jurors' food and lodging

Costs are allowed for juror food and lodging while the jurors are kept together during trial and after the jury retires for deliberation. CCP §1033.5(a)(2).

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### §27.71 3. Costs for videotaping and transcribing depositions

Costs are allowed for taking, video recording, and transcribing necessary depositions, including an original and one copy of those taken by the claimant and one copy of those taken by the party against whom costs are allowed, and travel expenses to attend depositions. CCP §1033.5(a)(3); see also *Thon v Thompson* (1994) 29 CA4th 1546, 35 CR2d 346 (reasonably necessary travel expenses by out-of-county counsel to attend depositions). The "necessity" of a deposition for purposes of recovering costs is determined from the "pretrial vantage point of a litigant," and is not based on how useful or relevant the witness ultimately proves at trial. *Nelson v Anderson* (1999) 72 CA4th 111, 84 CR2d 753.

Despite the requirement of CCP §1986.5 that a deposition witness is entitled to receive the same fees and mileage as if testifying before the court, the only fees owed to a witness required to produce business records under Evid C §1560, but not required to attend a deposition away from the place of business, are those set out in Evid C §1563. CCP §1986.5.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.72 4. Costs for service of process by public officer or registered process server

### §27.72 4. Costs for service of process by public officer or registered process server

Costs are allowed for service of process by a public officer, by a registered process server, or by other means, as follows:

- **Service by a public officer.** The recoverable cost is the fee authorized by law at the time of service. CCP §1033.5(a)(4)(A).
- **Service by a registered process server.** If service is by a process server registered under Chapter 16 (beginning with §22350 of Division 8 of the Business and Professions Code), the recoverable cost is the amount actually incurred in effecting service, including, but not limited to, a stakeout or other means used to locate the person to be served, unless those charges are successfully challenged by a party to the action. CCP §1033.5(a)(4)(B).
- **Service by publication.** The recoverable cost is the sum actually incurred in effecting service. CCP §1033.5(a)(4)(C).
- **Service by other means.** When service is by means other than by a public officer, process server, or publication, the recoverable cost is the lesser of the sum actually incurred or the amount allowed to a public officer in California for that service, except that, on application to the court, the court may allow the sum actually incurred in effecting service. CCP §1033.5(a)(4)(D).

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### §27.73 5. Costs for attachment, including keeper's fees

Costs may be allowed for obtaining attachment. CCP §1033.5(a)(5).

**Further Research:** For discussion of attachment, see Debt Collection Practice in California, chap 6 (2d ed Cal CEB 1999).

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## §27.74 6. Costs for premiums on surety bonds

Costs may be allowed for any premiums paid on surety bonds. CCP §1033.5(a)(6).

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### §27.75 7. Costs for ordinary witness fees

Costs for ordinary witness fees paid under Govt C §68903 are recoverable. CCP §1033.5(a)(7).

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### §27.76 8. Costs for fees of expert witness ordered by court

Fees of expert witnesses *ordered by the court* are allowable costs. CCP §1033.5(a)(8). Fees of expert witnesses not ordered by the court are not allowable costs unless expressly authorized by law. CCP §1033.5(b)(1). See §27.82.

**Further research:** For further discussion of issues concerning expert witnesses, see Handling Expert Witnesses in California Courts (Cal CEB Action Guide May 2008) and California Expert Witness Guide (2d ed Cal CEB 1991).

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## §27.77 9. Costs for transcripts of court-ordered proceedings

The costs incurred in obtaining transcripts for court-ordered proceedings are recoverable. CCP §1033.5(a)(9).

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### §27.78 10. Costs for attorney fees

Attorney fees are allowed as costs when authorized by contract or statute. CCP §1033.5(a)(10). Attorney fees awarded under CC §1717 are allowable as costs authorized by contract. CCP §1033.5(c)(5). See chap 26 for discussion of recovering attorney fees.

When a contract provides for the payment of attorney fees and costs, some courts allow the prevailing party to recover disbursements of counsel as costs even though the types of disbursements may not be mentioned specifically in CCP §1033.5. See *Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co.* (1996) 47 CA4th 464, 491, 54 CR2d 888; *Bussey v Affleck* (1990) 225 CA3d 1162, 275 CR 646. Other courts disagree. See *Hsu v Semiconductor Sys., Inc.* (2005) 126 CA4th 1330, 1342, 25 CR3d 82 (criticizing *Bussey*; disputed costs may not be awarded as element of attorney fees under "rationale that the expenses were disbursed by the attorneys in the course of litigation"); *Jones v Union Bank of Cal.* (2005) 127 CA4th 542, 551, 25 CR3d 783; *Robert L. Cloud & Assocs. v Mikesell* (1999) 69 CA4th 1141, 1154, 82 CR2d 143; *Ripley v Pappadopoulos* (1994) 23 CA4th 1616, 28 CR2d 878. See also *Fairchild v Park* (2001) 90 CA4th 919, 930, 109 CR2d 442, in which the court criticized the *Arntz* holding. The *Fairchild* court found that litigants cannot expand the definition of "costs" in CC §1717. For a consideration of the legislative history of CC §1717, see *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830 (litigants precluded from adopting definition of "prevailing party" that differs from CC §1717).

Attorney fees are not recoverable, however, if they were incurred for enforcement of judgment, even if the contract provides for the recovery of attorney fees incurred in enforcement. CCP §685.040; *Chelios v Kaye* (1990) 219 CA3d 75, 268 CR 38.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.79 11. Costs for court reporter fees

### §27.79 11. Costs for court reporter fees

Costs for court reporter fees are allowable under CCP §1033.5(a)(11). Government Code §69953 allows costs of court-ordered verbatim records to be made at public expense under Govt C §69952.

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### §27.80 12. Costs for models, blowups, and photocopies of exhibits

Models, blowups, and photocopies of exhibits may be allowed if they are reasonably helpful to aid the trier of fact. CCP §1033.5(a)(12). In *Ladas v California State Auto. Ass'n* (1993) 19 CA4th 761, 774, 23 CR2d 810, the court held that exhibit costs are recoverable only if they are reasonably helpful to the trier of fact, which is clearly not so if exhibits are not admitted into evidence or used demonstratively. But see *Benach v County of Los Angeles* (2007) 149 CA4th 836, 856, 57 CR3d 363 (court held it was not abuse of discretion to award defendant costs for photocopies and exhibits not used at trial because nothing indicated that defendant could have anticipated exhibits would not be used).

In *Nelson v Anderson* (1999) 72 CA4th 111, 133, 84 CR2d 753, the court disallowed costs for videotapes and laser discs under CCP §1033.5(a), agreeing with the trial court that, although parties were entitled to use "cutting edge" technology in the presentation of their cases, they were not entitled to "automatically pass the high cost of that technology to the other side."

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### §27.81 13. Costs for other items required to be awarded to prevailing party

In addition to the specifically enumerated cost items that may be recovered, CCP §1033.5(a)(13) provides for recovery of any other item that is required to be awarded to the prevailing party as an incident to its prevailing in the action at trial or on appeal. *Gibson v Bobroff* (1996) 49 CA4th 1202, 1207, 57 CR2d 235 (mediation fees); *Applegate v St. Francis Lutheran Church* (1994) 23 CA4th 361, 28 CR2d 436 (blueprints and photographs reasonably necessary even though not used because case dismissed); *Ripley v Pappadopoulos* (1994) 23 CA4th 1616, 28 CR2d 878 (overhead projector). But see *Carr Bus. Enters. v City of Chowchilla* (2008) 166 CA4th 25, 82 CR3d 135 (parties' stipulation under CCP §638 to submit to referee and split referee fees precludes prevailing party from recovering referee fees as costs).

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## IX. COST ITEMS NOT ALLOWED

### A. Items not allowed by CCP §1033.5(b)

### §27.82 1. Fees for expert witnesses not ordered by court

Fees of expert witnesses not ordered by the court are not allowable costs unless expressly authorized by law. CCP §1033.5(b)(1). See *Davis v KGO-T.V., Inc.* (1998) 17 C4th 436, 71 CR2d 452; *Baker-Hoey v Lockheed Martin Corp.* (2003) 111 CA4th 592, 3 CR3d 593 (physician's reasonable and customary fees, which must be paid to take physician's deposition, are expert witness fees and are not recoverable under CCP §1033.5); *Sanchez v Bay Shores Med. Group* (1999) 75 CA4th 946, 89 CR2d 634 (medical expert witness fees not recoverable in medical malpractice action unless expert appointed by court); *Desplancke v Wilson* (1993) 14 CA4th 631, 635, 17 CR2d 586 (when expert who testifies is not under court order and no CCP §998 demand is made, it is error to award expert witness fees). See also *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1149 n4, 74 CR3d 81 (Govt C §12965(b) amended after *Davis* to expressly authorize expert witness fees).

Expert witness fees may be recoverable when the parties have expressly agreed to their recovery in a contract. Such fees must be pleaded and proved at trial as elements of damages and cannot be claimed as costs for the first time through the filing of a memorandum of costs. *First Nationwide Bank v Mountain Cascade, Inc.* (2000) 77 CA4th 871, 92 CR2d 145. See §27.76 on when expert witness fees are allowed and for sources for further research on expert witnesses.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.83 2. Investigation expenses

### §27.83 2. Investigation expenses

Investigation expenses incurred in the litigation are generally not allowed. CCP §1033.5(b)(2).

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### §27.84 3. Postage, telephone, and photocopying charges, except for exhibits

Postage, telephone, and photocopying charges are generally not allowed unless they were incurred for exhibits. CCP §1033.5(b)(3). In *Austin v Allstate Ins. Co.* (1993) 16 CA4th 1812, 1815 n2, 21 CR2d 56, the court allowed photocopying charges as costs, but only for exhibits admitted into evidence. See *Fairchild v Park* (2001) 90 CA4th 919, 109 CR2d 442 (postage, telephone costs, and other administrative expenses not recoverable under CCP §1033.5). See also *Ladas v California State Auto. Ass'n* (1993) 19 CA4th 761, 23 CR2d 810.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.85 4. Costs for investigating jurors or preparing for voir dire

### §27.85 4. Costs for investigating jurors or preparing for voir dire

Costs incurred for investigating jurors or for preparing for voir dire are not allowed. CCP §1033.5(b)(4).

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### §27.86 5. Costs for transcripts of court proceedings not ordered by court

Costs for transcripts of court proceedings not ordered by the court are not allowed. CCP §1033.5(b)(5).

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### §27.87 B. Other cost items not allowed

Fees paid for letters of credit for a security bond are not recoverable under CCP §995.250. *Golf W., Inc. v Life Investors, Inc.* (1986) 178 CA3d 313, 223 CR 539.

Defendants have no right to costs for unnecessary filings. See *Perko's Enters. v RRNS Enters.* (1992) 4 CA4th 238, 244, 5 CR2d 470 (court held that trial court may disallow recovery of costs, including filing fees, when it finds that costs were incurred unnecessarily; defendant successfully defended application for temporary restraining order, then for no apparent reason filed its opposition, for which it paid filing fee).

The court in *Ladas v California State Auto. Ass'n* (1993) 19 CA4th 761, 774, 23 CR2d 810, was asked to award costs for exhibits not used at trial, for attorneys' meals while attending local depositions and other meals not related to depositions, for facsimile charges, for travel other than for depositions, for computerized legal research, and for obtaining documents for an expert's review. The court disallowed each claim as not being specified in the costs statute. See also *Seever v Copley Press, Inc.* (2006) 141 CA4th 1550, 47 CR3d 206 (employer not entitled to costs of unused trial exhibits; travel costs for counsel to attend out of county depositions were permissible, as were costs of videotaping certain depositions). The discretion extended to the trial court under CCP §1033.5(c)(4) is not limited solely by costs expressly prohibited under the statute; a discretionary award of costs for items "not mentioned in this section" is inapplicable unless the costs come within the specific categories stated under CCP §1033.5. *Seever v Copley Press*, 141 CA4th at 1559.

Costs permitted by CCP §1033.5 do not include costs of administrative law judges in administrative proceedings preliminary to trial. *California Teachers Ass'n v State* (1999) 20 C4th 327, 84 CR2d 425 (recoverable costs under CCP §§1032 and 1033.5 do not include costs of judges or adjudicators).

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## X. PROCEDURE FOR CLAIMING COSTS

### §27.88 A. When to file and serve

A prevailing party who claims costs must serve and file a memorandum of costs within (Cal Rules of Ct 3.1700(a)(1)):

- 15 days after the date of mailing notice of entry of judgment or dismissal by the clerk under CCP §664.5;
- 15 days after the date of serving the written notice of entry of judgment or dismissal; or
- 180 days after entry of judgment, whichever occurs first.

**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 and not a court day.

Failure to file a cost bill and a claim for attorney fees may waive the right to costs and fees. See *Hydratec, Inc. v Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 CA3d 924, 272 CR 899.

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### §27.89 B. Verification required

The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the cost items are correct and were necessarily incurred. Cal Rules of Ct 3.1700(a)(1). A party who fails to file a verified memorandum of costs may be construed to have waived the right to recover costs. See *Hydratec, Inc. v Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 CA3d 924, 272 CR 899.

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### §27.90 C. Verified memorandum is prima facie evidence of necessary expenses

If cost items are expressly authorized by CCP §1033.5 and appear proper on their face, a verified memorandum of costs is prima facie evidence that they were necessarily incurred. *Nelson v Anderson* (1999) 72 CA4th 111, 84 CR2d 753.

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### D. Time to file may be extended

### §27.91 1. By agreement of parties

The time for filing a cost memorandum may be extended by the parties' agreement, which must be in writing, must specify the extended date for service, and must be filed with the clerk. Cal Rules of Ct 3.1700(b)(3).

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### §27.92 2. By court

In the absence of an agreement, the court may extend the time for serving the cost memorandum for no more than 30 days. Cal Rules of Ct 3.1700(b)(3).

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### §27.93 E. Motion under CCP §473 for relief from failure to request costs

A court may grant relief from failure to request costs by a proper showing under CCP §473 of mistake, inadvertence, surprise, or excusable neglect. In the absence of prejudice, the court may allow the party to file a late memorandum of costs. See *Lee v Wells Fargo Bank,* N.A. (2001) 88 CA4th 1187, 106 CR2d 726 (granting plaintiff's motion for relief under CCP §473 from failure to timely file cost bill). See also *Pollard v Saxe & Yolles Dev. Co.* (1974) 12 C3d 374, 115 CR 648. However, whenever relief is granted based on an attorney's affidavit attesting to his or her mistake, inadvertence, surprise, or excusable neglect, the court must direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. CCP §473.

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### §27.94 F. Cost bill may be amended

A trial court may allow a party to file amendments to a cost bill that appear necessary when an opposing party has moved for taxation of costs. See *Puppo v Larosa* (1924) 194 C 721, 724, 230 P 440.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.95 G. When party seeking default requests costs

### §27.95 G. When party seeking default requests costs

A party seeking a default judgment who claims costs must request them on the Request to Enter Default form at the time the party applies for the default judgment. Cal Rules of Ct 3.1700(a)(2).

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## H. When attorney fees recoverable as costs

### §27.96 1. Costs allowable under statute or contract must be fixed

When any statute refers to "costs and attorney's fees," attorney fees are an item and component of the costs to be awarded. CCP §1033.5(c)(5).

Attorney fees allowable as costs under a statute may be fixed as follows (CCP §1033.5(c)(5)):

- On noticed motion;
- At the time a statement of decision is rendered;
- On application supported by affidavit made concurrently with a claim for other costs; or
- On entry of a default judgment.

Attorney fees allowable as costs under a contract or by action of law may be fixed as follows unless otherwise stipulated to by the parties (CCP §1033.5(c)(5)):

- On noticed motion; or
- On entry of a default judgment.

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### §27.97 2. Burden of proof requirements

Any claim not based on the court's established schedule for attorney fees for actions on a contract is required to bear the burden of proof. CCP §1033.5(c)(5).

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### §27.98 3. Claiming trial court attorney fees

A notice of motion for attorney fees based on a statute or a contract, for fees up to and including when the judgment is rendered in the trial court, must be served and filed within the time for filing a notice of appeal under Cal Rules of Ct 8.104, 8.108. Cal Rules of Ct 3.1702(b). In a case involving voluntary dismissal, the time for filing a motion for attorney fees commences when notice of entry of dismissal is served, even if the case continues on other causes of action. See *Sanabria v Embrey* (2001) 92 CA4th 422, 427, 111 CR2d 837.

By stipulation filed before the expiration of the time in which to file, the parties may extend the time for filing a motion for attorney fees until 60 days after the expiration of the time for filing a notice of appeal, or, if a notice of appeal is filed, until the time within which a memorandum of costs must be served and filed under Cal Rules of Ct 8.278. For good cause shown, the trial judge may extend the time for filing without a stipulation or for a period of time longer than allowed by a stipulation. Cal Rules of Ct 3.1702(d).

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### §27.99 4. Claiming attorney fees on appeal

A notice of motion to claim attorney fees on appeal under a statute or a contract that requires the court to determine either entitlement to the fees, the amount of fees, or both, must be served and filed within the time for serving and filing the memorandum of costs under Cal Rules of Ct 8.278(c)(1) (within 40 days after the clerk of the reviewing court mails notice of the issuance of the remittitur). Cal Rules of Ct 3.1702(c), 8.278(c).

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.100 5. When attorney fees fixed by formula

## §27.100 5. When attorney fees fixed by formula

If a party is entitled to statutory or contractual attorney fees that are fixed without requiring a court determination, the fees must be claimed in the memorandum of costs. Cal Rules of Ct 3.1702(d).

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### §27.101 I. Court's discretion to include costs later if judgment fails to award costs

If a party is entitled to costs as a matter of right but the judgment fails to provide for an award, the cost bill should still be filed. The judge may then change the judgment to include costs on the basis that the judge is merely correcting a clerical error. See, *e.g., Williams v Santa Maria Joint Union High Sch. Dist.* (1967) 252 CA2d 1010, 60 CR 911; *Miles Cal. Co. v Hawkins* (1959) 175 CA2d 162, 345 P2d 492. Similarly, a minute order dismissing defendant, but failing to award judgment for costs when defendant is entitled to them as a matter of right, may be amended nunc pro tunc. *McMahan's v McMahan Serv. Corp.* (1956) 145 CA2d 607, 302 P2d 847.

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### §27.102 J. Appealability of award

An order awarding costs is not appealable until the final judgment. See *Muller v Reagh* (1960) 179 CA2d 814, 815, 4 CR 147. The time to file an appeal of an order of costs runs from the notice of entry of judgment, even if the court specifically left open the cost issue in the judgment. See *UAP-Columbus JV 326132 v Nesbitt* (1991) 234 CA3d 1028, 1039, 285 CR 856.

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## XI. MOVING TO STRIKE TAX BILL OR TO TAX COSTS

### §27.103 A. When to file and serve

A notice of motion to strike or tax costs must be served and filed within 15 days after service of the cost memorandum. Cal Rules of Ct 3.1700(b)(1). If the memorandum was served by mail, this period is extended as provided in CCP §1013.

**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 and not a court day.

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### B. Time to file may be extended

### §27.104 1. By agreement of parties

The time for filing a motion to tax costs may be extended by the parties' agreement, which must be in writing, must specify the extended date for service, and must be filed with the clerk. Cal Rules of Ct 3.1700(b)(3).

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### §27.105 2. By court

In the absence of an agreement, the court may extend the time for filing a motion to tax costs for a period not to exceed 30 days. Cal Rules of Ct 3.1700(b)(3).

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### §27.106 C. Objections must be specified

Unless objection is made to the entire cost memorandum, a motion to strike or tax costs must specify each item objected to in the same order and with the same number used in the memorandum of costs and must specify why each contested item is objectionable. Cal Rules of Ct 3.1700(b)(2).

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### §27.107 D. Burden of proof requirements

If cost items are expressly permitted by CCP §1033.5(a), appear proper, and are set forth in a verified memorandum, the burden is on the party objecting to such costs to show that they are not properly chargeable or are unreasonable. *Nelson v Anderson* (1999) 72 CA4th 111, 84 CR2d 753. If costs do not appear proper, if their necessity seems doubtful on their face, and if the items are properly challenged, the burden is on the claimant to establish the need for them. *Nelson v Anderson, supra*; *Oak Grove Sch. Dist. v City Title Ins. Co.* (1963) 217 CA2d 678, 698, 32 CR 288. The claimant will usually file appropriate declarations and copies of documents such as receipts.

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### §27.108 E. Court may disallow costs

The burden of proof shifts to the party seeking costs when cost items are properly objected to. When that party offers no substantiation of costs beyond the cost bill and argument, the trial court has discretion to disallow the costs. See *Levy v Toyota Motor Sales, Inc.* (1992) 4 CA4th 807, 816, 5 CR2d 770.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.109 F. Judgment must include costs

### §27.109 F. Judgment must include costs

After the time has elapsed for a motion to strike or to tax costs or for determination of that motion, the clerk must enter the costs on the judgment. Cal Rules of Ct 3.1700(b)(4).

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### §27.110 G. Postjudgment hearing after timely motion to strike or to tax costs

If a motion to tax costs is timely filed, a postjudgment hearing is held and the clerk enters the final costs on the judgment, nunc pro tunc, in accordance with the court's posthearing order. See *Nazemi v Tseng* (1992) 5 CA4th 1633, 7 CR2d 762; *Grant v List & Lathrop* (1992) 2 CA4th 993, 996, 3 CR2d 654.

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### §27.111 H. Appealability of order denying motion

An order denying a motion to tax costs that is made before entry of final judgment is not appealable, but it may be reviewed on appeal from the judgment. See *Lacey v Bertone* (1949) 33 C2d 649, 654, 203 P2d 755. An order made after entry of judgment taxing or denying a motion to tax costs is separately appealable as a special order after judgment and is not reviewable on an appeal from the judgment. *Oakes v McCarthy Co.* (1968) 267 CA2d 231, 256, 73 CR 127; *Hardin v Elvitsky* (1965) 232 CA2d 357, 363, 42 CR 748.

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## XII. OBTAINING INTEREST

### A. Interest on Judgment

### §27.112 1. Authority for Award of Interest

The authority for awarding interest on a judgment appears in Cal Const art XV, §1. The implementing legislation appears in CCP §§685.010-685.030.

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### §27.113 2. Interest attaches to money judgment

Interest attaches generally to judgments for an amount of money, regardless of the nature of the suit or the status of the judgment debtor. See *Harland v State* (1979) 99 CA3d 839, 160 CR 613 (state liable for interest on tort judgment). The entire judgment amount, including any prejudgment interest recovered as damages, bears interest at the legal rate for the interim period, if any, following the verdict or decision until entry of judgment, as well as thereafter. *Boscus v Bohlig* (1916) 173 C 687, 162 P 100; *Big Bear Prop. v Gherman* (1979) 95 CA3d 908, 157 CR 443.

**Clerk should include interest in the judgment.** Interest is automatically included in the judgment even in the absence of a demand in the pleadings. See *Budget Fin. Plan v Sav-On Food Club, Inc.* (1955) 44 C2d 565, 572 n6, 283 P2d 694. The clerk must include in the judgment any court-awarded interest and the interest accrued since entry of the verdict. Cal Rules of Ct 3.1802. Similarly, CCP §585(a) provides that a default judgment entered by the clerk or judge shall include interest allowed by law. The omission of the provision for postjudgment interest in the judgment does not defeat the party's right to it. *Big Bear Prop. v Gherman* (1979) 95 CA3d 908, 913, 157 CR 443; *Pinecrest Prods. v RKO Teleradio Pictures, Inc.* (1970) 14 CA3d 6, 11, 92 CR 44.

**Interest may accrue even on conditional judgment.** Interest accrues on the judgment even if the judgment is conditional, as long as the condition is eventually fulfilled, and despite an attack on the judgment in the trial court or the granting of a temporary stay of execution. See generally *Bellflower City Sch. Dist. v Skaggs* (1959) 52 C2d 278, 339 P2d 848; *City of Ontario v Kelber* (1973) 35 CA3d 751, 111 CR 222. Similarly, interest is not suspended by appeal or certiorari if the judgment is affirmed. *Columbia Sav. Bank v County of Los Angeles* (1902) 137 C 467, 70 P 308.

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### §27.114 3. Interest rate

**General interest rate.** The legal rate of interest is 10 percent per year on the principal amount of a judgment remaining unsatisfied. CCP §685.010(a).

**Interest rate for public entities.** The interest rate on judgments against public entities is the constitutional rate of 7 percent because Govt C §970.1(b) specifically exempts public entities from the enforcement provisions of CCP §§680.010-724.260. *San Francisco Unified Sch. Dist. v San Francisco Classroom Teachers Ass'n* (1990) 222 CA3d 146, 272 CR 38.

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### §27.115 4. When interest begins to accrue

Except for money judgments payable in installments, interest begins to accrue on a money judgment on the date of entry of judgment. CCP §685.020(a). Interest begins to accrue on installments as each becomes due. CCP §685.020(b).

The order entered on a motion to tax costs or on the lapse of the time within which that motion may be filed, or on modification on appeal, is equivalent to the entry of judgment, and interest on costs starts running from that time. *Dalzell v Kelly* (1952) 115 CA2d 60, 251 P2d 343. See also *Stockton Theatres, Inc. v Palermo* (1961) 55 C2d 439, 11 CR 580. Presumably, the same rule would apply to a postjudgment order awarding attorney fees.

The clerk is required to include in the judgment "any interest awarded by the court and the interest accrued since the entry of the verdict." Cal Rules of Ct 3.1802.

When a judgment is modified on appeal, whether upward or downward, interest accrues from the date of entry of the *original order,* not from that of the new judgment. See *Munoz v City of Union City* (2009) 173 CA4th 199, 203, 92 CR3d 527. When a judgment is set aside by the trial court or reversed on appeal, the new award subsequently entered by the trial court will bear interest only from the date of the new judgment, verdict, or decision. *Snapp v State Farm Fire & Cas. Co*. (1964) 60 C2d 816, 36 CR 612.

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### §27.116 3. When interest stops accruing

A valid tender of the judgment amount, plus any interest accrued until the tender, made by the judgment debtor pending postjudgment proceedings, such as new trial motions and appeals, will stop the accrual of interest on the judgment if it is accepted or if the decision on the proceeding affirms or lowers the judgment amount. See *Montano v City of South Gate* (1970) 13 CA3d 446, 91 CR 523. This is so even if accepting the tender does or would effect a settlement or a satisfaction of judgment that terminates the litigation. *Montano v City of South Gate, supra*. If acceptance of a tender does not effect a complete settlement, the amount of the tender, if accepted, is applied first to interest and then to principal, and the remaining principal continues to draw interest. See *McConnell v Pacific Mut. Life Ins. Co.* (1962) 205 CA2d 469, 24 CR 5.

A tender made before a verdict, decision, or judgment, although effective in stopping accrual of prejudgment interest, does not stop accrual of interest on the judgment entered thereafter. A new tender must be made to stop the running of such interest. *Beeler v American Trust Co.* (1946) 28 C2d 435, 170 P2d 439; *Wadleigh v Phelps* (1906) 149 C 627, 643, 87 P 93.

When an appropriate tender stops the running of interest, the judgment debtor should move to amend the judgment to reflect that fact. See *Montano v City of South Gate* (1970) 13 CA3d 446, 448, 91 CR 523. It may also be possible to defeat an excessive interest charge by opposing execution.

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### §27.117 6. Interest not applied retroactively

Code of Civil Procedure §685.010, which sets the legal rate of interest on unpaid judgments, may not be applied retroactively. See *Hill v Pacific Tel. & Tel. Co.* (1985) 174 CA3d 1076, 220 CR 144; *Hersch v Citizens Sav. & Loan* (1985) 173 CA3d 373, 218 CR 646.

**NOTE:** As a practical matter, it is unlikely that there are still active cases to which this principle applies; however, it does provide precedence for any future changes in the interest rate.

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### §27.118 7. Interest not cumulatively awarded

The legislature did not intend, and Cal Const art XV, §1, does not allow, interest to be cumulatively awarded under CC §3291 (permitting interest at 10 percent on a judgment more favorable than a rejected offer of compromise) or CCP §685.010 (specifying 10 percent interest on an unsatisfied judgment) between entry of judgment and its satisfaction. However, neither CC §3291 nor CCP §685.010 violates Cal Const art XV, §1, because neither permits recovery of more than 10 percent interest if applied separately or conjunctively. *Mendez v Kurten* (1985) 170 CA3d 481, 215 CR 924.

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### §27.119 8. Compounding of interest

Postjudgment interest is not compounded. See *Gillanders v Da Silva* (1931) 212 C 626, 299 P 722 (second judgment did not carry interest on interest allowed on previous judgment); *Glenn v Rice* (1917) 174 C 269, 276, 162 P 1020. There is, however, the compounding effect of including prejudgment interest in the judgment itself as well as the possibility of compounding the interest that accrues between the date of the verdict or decision and the date of the judgment by its inclusion in the judgment. *Big Bear Prop. v Gherman* (1979) 95 CA3d 908, 913, 157 CR 443. However, CC §3291 prohibits inclusion in the judgment of prejudgment interest accrued under that section for the purpose of compounding the interest. See *Hess v Ford Motor Co.* (2002) 27 C4th 516, 532, 117 CR2d 220.

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### §27.120 9. Right to postjudgment interest

Postjudgment interest may not exceed the constitutional rate of 10 percent simple interest; awarding compound interest is not authorized. Compound postjudgment interest is permissible only if interest is part of the judgment itself (*e.g.,* postjudgment interest running on prejudgment interest award). See *Westbrook v Fairchild* (1992) 7 CA4th 889, 894, 9 CR2d 277. But see *OCM Principal Opportunities Fund, L.P. v CIBC World Markets Corp.* (2008) 168 CA4th 185, 201, 85 CR3d 350 (no constitutional limitation on compounding interest authorized by renewal statutes).

In *Schiernbeck v Haight* (1992) 7 CA4th 869, 9 CR2d 716, the court held that, when the trial court orders periodic payments under CCP §667.7 (actions against health care provider) that reflect future economic losses, no postjudgment interest is permitted. The court noted that even if there were a constitutional entitlement there is no right to interest on a judgment payment not yet due.

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### §27.121 10. Special rules for interest on condemnation awards

Special rules apply in computing interest on condemnation awards. See CCP §§1268.310-1268.360. If a public agency condemns property and exercises its statutory right (CCP §§1255.010-1255.480) to take possession before the condemnation price is set or fully paid, constitutional requirements of "just compensation" (US Const amend V, §4; Cal Const art I, §19) require inclusion of interest at prevailing market rates rather than at the rate specified in CCP §1268.310. A statutory interest ceiling cannot prevail if it falls short of constitutional just compensation. *Redevelopment Agency v Gilmore* (1985) 38 C3d 790, 214 CR 904.

The right to prejudgment interest in inverse condemnation derives from the Fifth Amendment of the United States Constitution, which prohibits the taking of private property without just compensation and is binding on the state through the Supremacy Clause (US Const art IV, §2). In *Aetna Life & Cas. Co. v City of Los Angeles* (1985) 170 CA3d 865, 216 CR 831, the court held that the trial court did not err in awarding plaintiffs prejudgment interest at the market rate set by Cal Const art XV, §1 and CCP §685.010, stating that the state cannot limit the amount it is required to pay as just compensation.

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### §27.122 B. Interest on awarded damages

Interest is awarded under CC §3287(a) when damages are certain or are capable of being made certain by calculation, and when the right to recover vests on a particular day. Interest is calculated from that day except for any time the debtor is prevented from paying the debt by law or by action of the creditor. See *Stein v Southern Cal. Edison Co.* (1992) 7 CA4th 565, 573, 8 CR2d 907 (court awarded plaintiffs prejudgment interest from date notice sent to defendant of claimed damages).

Damages are deemed certain or capable of being made certain under CC §3287(a) when the dispute centers on liability giving rise to the damage and when there is essentially no dispute between the parties on the issue of imposition of recoverable damages. *Fireman's Fund Ins. Co. v Allstate Ins. Co.* (1991) 234 CA3d 1154, 1172, 286 CR 146 (interest properly awarded when liability for insurance coverage was disputed, but coverage amount was ascertainable). See *Santa Clara County Envt'l Health Ass'n v County of Santa Clara* (1985) 173 CA3d 74, 218 CR 678. Denial of liability on the main theory of the case does not necessarily make the damages uncertain within the meaning of CC §3287. Thus, in *Cheng v California Pac. Bank* (1999) 76 CA4th 274, 90 CR2d 401, a bank presented with an allegedly forged endorsement claimed that the plaintiff's right to disputed funds did not vest for purposes of calculating interest until the plaintiff's title to the funds became clear. The court held that, regardless of whether the plaintiff was the actual owner of the funds, it was undisputed that the bank was not their owner and that interest under §3287 therefore accrued from the date on which the bank received and denied a demand for payment. See *Credit Managers' Ass'n v Brubaker* (1991) 233 CA3d 1587, 1595, 285 CR 417.

Interest is recoverable from any debtor that meets the criteria of the statute, including the state or a county, city, municipal corporation, public district, public agency, or political subdivision of the state. CC §3287(a).

Prejudgment interest for an action with calculable damages is available when the dispute centers on liability rather than the amount of damages, and when the damages as documented were awarded by the trier of fact. CC §3287(a); *Credit Manager's Ass'n v Brubaker, supra*.

The trial court can award prejudgment interest if the case comes within the requirement of CC §3287(b) even if the jury has rejected prejudgment interest; cases falling under §3287(b) are within the trial judge's discretion. See *Gebert v Yank* (1985) 172 CA3d 544, 218 CR 585.

Interest may also be awarded to anyone entitled under a judgment to receive damages based on a cause of action in contract when the claim was unliquidated from a date before entry of judgment, but no earlier than the date the action was filed, as set at the court's discretion. CC §3287(b); *George v Double-D Foods, Inc.* (1984) 155 CA3d 36, 201 CR 870 (decision to set date from which interest should be awarded is vested in court, not jury). The court in *George* also held that an action in quantum meruit is an action in contract within the meaning of §3287(b).

Other cases discussing the recovery of prejudgment interest under CC §3287 are:

- *Roodenburg v Pavestone Co., L.P.* (2009) 171 CA4th 185, 190, 89 CR3d 558 (uncertain damages amount no bar to recovery of prejudgment interest under CC §3287 when prejudgment interest part of amount owed under contract).
- *Doppes v Bentley Motors, Inc.* (2009) 174 CA4th 1004, 1009, 94 CR3d 797 (prejudgment interest under CC §3287 not barred by Song-Beverly Consumer Warranty Act (CC §§1790-1795.8).
- *North Oakland Med. Clinic v Rogers* (1998) 65 CA4th 824, 76 CR2d 743 (addresses timing considerations and holds that request for prejudgment interest must be made before entry of judgment).
- *Olson v Cory* (1983) 35 C3d 390, 197 CR 843 (certainty required by §3287(a) is generally absent if calculation depends on disputed facts, but not if dispute is confined to issue of liability).
- *Polster, Inc. v Swing* (1985) 164 CA3d 427, 210 CR 567 (certainty requirement of §3287(a) determined by whether defendant either knows amount owed or would readily be able to compute damages; if defendant does not know or cannot readily compute damages, plaintiff must supply statement and supporting data so that defendant can compute damages).
- *Chesapeake Indus. v Togova Enters.* (1983) 149 CA3d 901, 197 CR 348 (right to interest under §3287 cannot be defeated by filing unliquidated counterclaim as offset).

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### §27.123 C. Interest as damages

The jury has discretion to provide interest in an action for breach of an obligation not arising from contract and in "every case" of oppression, fraud, or malice. CC §3288.

Although a plaintiff is entitled under CC §3288 to receive prejudgment interest on the full judgment amount, interest must be awarded against the nonsettling defendants on that amount only up to the date the settling tortfeasor makes payment to plaintiff. See *Newby v Vroman* (1992) 11 CA4th 283, 288, 14 CR2d 44. In *Newby,* the court held that plaintiff was entitled to further prejudgment interest from nonsettling defendants only on the remaining balance of the judgment after its reduction by the amount of settlement. The court of appeal held that the trial court properly awarded prejudgment interest on the various components that made up the judgment from the date of each individual loss to the date the settling tortfeasor paid its share, and thereafter properly awarded plaintiffs prejudgment interest on the balance of their damages up to the time of judgment.

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### §27.124 D. Interest on obligation after breach

Under CC §3289(a), any legal interest rate stipulated by a contract remains chargeable after a breach until the contract is superseded by a verdict or other new obligations.

Civil Code §3289(b) sets the interest rate at 10 percent for contracts not specifying an interest rate. A "contract" under §3289(b) does not include a note secured by a deed of trust on real property.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.125 E. Interest rate under retail installment contracts

### §27.125 E. Interest rate under retail installment contracts

The rate of the contracted finance charge will be the legal interest rate stipulated by a retail installment contract. CC §3289.5.

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.126 F. Waiver of interest

### §27.126 F. Waiver of interest

Accepting payment of the whole principal waives all claim to interest. CC §3290.

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### §27.127 G. Award of prejudgment interest

Plaintiff may claim interest on the damages alleged in any action brought to recover damages for personal injury based on tort of a person, corporation, association, or partnership, whether based on negligence or willful intent and whether or not the injury was fatal. CC §3291.

If plaintiff made a CCP §998 offer (see §27.54) that defendant did not accept before trial or arbitration, or within 30 days (whichever occurred first), and plaintiff obtains a more favorable judgment, the judgment bears interest at 10 percent per year from the date of plaintiff's first §998 offer that exceeded the judgment obtained, and interest continues to accrue until the judgment is satisfied. CC §3291.

Section 3291 does not apply to a public entity or to a public employee for any act or omission that was within the scope of employment. The public entity or public employee cannot be liable either directly or indirectly for interest under §3291.

The applicability of CC §3291 depends on the primary purpose of the action (personal injury being recoverable and economic injury not being recoverable). Even if the events that formed the basis of a lawsuit involve other damages (such as property damage), that fact alone will not defeat a claim for damages under a personal injury theory, and prejudgment interest under §3291 will be available. See *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 656, 25 CR2d 109. Interest may be awarded under §3291 in strict liability actions as well as in negligence and intentional tort actions. See *Fortman v Hemco, Inc.* (1989) 211 CA3d 241, 262, 259 CR 311.

**EXAMPLE:** In an insurance bad faith action, the plaintiff seeks to recover for violation of a property right. Such a bad faith action is not a personal injury claim. *Gourley v State Farm Mut. Auto. Ins. Co.* (1991) 53 C3d 121, 3 CR2d 666.

Prejudgment interest under §3291 may not be awarded on punitive damages. See *Lakin v Watkins Assoc. Indus., supra*. Prejudgment interest under §3291 is not an element of damages for calculation of whether a party obtained a more favorable judgment under CCP §998. *Steinfeld v Foote-Goldman Proctologic Med. Group, Inc*. (1997) 60 CA4th 13, 70 CR2d 41.

**Further research:** For further information on prejudgment interest, see CC §§3287-3291; 1 Witkin, Summary of California Law, *Contracts* §§888-896 (10th ed 2005); 6 Witkin, Summary, *Torts* §§1643-1645.

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## XIII. FORMS

### §27.128 A. Form: Memorandum of Costs (Worksheet) (Judicial Council Form MC-011)

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

## MEMORANDUM OF COSTS (WORKSHEET)

1. **Filing and motion fees**

| | Paper filed | Filing fee |
|---|---|---|
| a. | _____ | $ _____ |
| b. | _____ | $ _____ |
| c. | _____ | $ _____ |
| d. | _____ | $ _____ |
| e. | _____ | $ _____ |
| f. | _____ | $ _____ |

g. ☐ Information about additional filing and motion fees is contained in Attachment 1g.

TOTAL 1. $ _____

2. **Jury fees**

| | Date | Fee & mileage |
|---|---|---|
| a. | _____ | $ _____ |
| b. | _____ | $ _____ |
| c. | _____ | $ _____ |
| d. | _____ | $ _____ |

e. ☐ Information about additional jury fees is contained in Attachment 2e.

TOTAL 2. $ _____

3. **Juror food:** $ _____ **and lodging:** $ _____ TOTAL 3. $ _____

4. **Deposition costs**

| | Name of deponent | Taking | Transcribing | Travel | Video-taping | Subtotals |
|---|---|---|---|---|---|---|
| a. | _____ | $ _____ | $ _____ | $ _____ | $ _____ | $ _____ |
| b. | _____ | $ _____ | $ _____ | $ _____ | $ _____ | $ _____ |
| c. | _____ | $ _____ | $ _____ | $ _____ | $ _____ | $ _____ |
| d. | _____ | $ _____ | $ _____ | $ _____ | $ _____ | $ _____ |

e. ☐ Information about additional deposition costs is contained in Attachment 4e.

TOTAL 4. $ _____

(Continued on reverse)



Form Approved for Optional Use
Judicial Council of California
MC-011 [Rev. July 1, 1999]



Code of Civil Procedure,
§§ 1032, 1033.5

Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

5. **Service of process**

| | Name of person served | Public officer | Registered process | Publication | Other *(specify)* |
|---|---|---|---|---|---|
| a. | | $ | $ | $ | $ |
| b. | | $ | $ | $ | $ |
| c. | | $ | $ | $ | $ |

d. ☐ Information about additional costs for service of process is contained in Attachment 5d.

TOTAL 5. $

6. **Attachment expenses** *(specify)*: ..... 6. $

7. **Surety bond premiums** *(itemize bonds and amounts)*: ..... 7. $

8. a. **Ordinary witness fees**

| | Name of witness | Daily fee | Mileage | Total |
|---|---|---|---|---|
| (1) | | ____ days at ____ $/day | ____ miles at ____ ¢/mile .... | $ |
| (2) | | ____ days at ____ $/day | ____ miles at ____ ¢/mile .... | $ |
| (3) | | ____ days at ____ $/day | ____ miles at ____ ¢/mile .... | $ |
| (4) | | ____ days at ____ $/day | ____ miles at ____ ¢/mile .... | $ |
| (5) | | ____ days at ____ $/day | ____ miles at ____ ¢/mile .... | $ |

(6) ☐ Information about additional ordinary witness fees is contained in Attachment 8a(6).

SUBTOTAL 8a. $

(Continued on next page)





Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

**MEMORANDUM OF COSTS (WORKSHEET)** *(Continued)*

8. b. **Expert fees** *(per Code of Civil Procedure section 998)*

| | Name of witness | | Fee | |
|---|---|---|---|---|
| (1) | _____ | _____ hours at $ _____ /hr | ... | $ _____ |
| (2) | _____ | _____ hours at $ _____ /hr | ... | $ _____ |
| (3) | _____ | _____ hours at $ _____ /hr | ... | $ _____ |
| (4) | _____ | _____ hours at $ _____ /hr | ... | $ _____ |

(5) ☐ Information about additional expert witness fees is contained in Attachment 8b(5).

SUBTOTAL 8b. $

c. **Court-ordered expert fees**

| | Name of witness | | Fee | |
|---|---|---|---|---|
| (1) | _____ | _____ hours at $ _____ /hr | ... | $ _____ |
| (2) | _____ | _____ hours at $ _____ /hr | ... | $ _____ |

(3) ☐ Information about additional court-ordered expert witness fees is contained in Attachment 8c(3).

SUBTOTAL 8c. $

TOTAL (8a, 8b, & 8c) 8. $

9. **Court-ordered transcripts** *(specify)*: ..... 9. $

10. **Attorney fees** *(enter here if contractual or statutory fees are fixed without necessity of a court determination; otherwise a noticed motion is required)*: ..... 10. $

11. **Models, blowups, and photocopies of exhibits** *(specify)*: ..... 11. $

12. **Court reporter fees** *(as established by statute)*

a. *(Name of reporter)*: _____ Fees: $ _____

b. *(Name of reporter)*: _____ Fees: $ _____

c. ☐ Information about additional court reporter fees is contained in Attachment 12c.

TOTAL 12. $

13. **Other** *(specify)*: ..... 13. $

**TOTAL COSTS** ..... **$** _____

(Additional information may be supplied on the reverse) Page _____ of _____



Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
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**MEMORANDUM OF COSTS (WORKSHEET)** *(Continued)*

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**Source:** Civil Litigation/California Trial Practice: Civil Procedure During Trial/27 Recovering Costs and Obtaining Interest/§27.129 B. Form: Memorandum of Costs (Summary) (Judicial Council Form MC-010)

## §27.129 B. Form: Memorandum of Costs (Summary) (Judicial Council Form MC-010)

Print

**MC-010**

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| INSERT NAME OF COURT, JUDICIAL DISTRICT, AND BRANCH COURT, IF ANY: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **MEMORANDUM OF COSTS (SUMMARY)** | CASE NUMBER: |

**The following costs are requested:** **TOTALS**

| | | |
|---|---|---|
| 1. Filing and motion fees | 1. $ | |
| 2. Jury fees | 2. $ | |
| 3. Jury food and lodging | 3. $ | |
| 4. Deposition costs | 4. $ | |
| 5. Service of process | 5. $ | |
| 6. Attachment expenses | 6. $ | |
| 7. Surety bond premiums | 7. $ | |
| 8. Witness fees | 8. $ | |
| 9. Court-ordered transcripts | 9. $ | |
| 10. Attorney fees *(enter here if contractual or statutory fees are fixed without necessity of a court determination; otherwise a noticed motion is required)* | 10. $ | |
| 11. Models, blowups, and photocopies of exhibits | 11. $ | |
| 12. Court reporter fees as established by statute | 12. $ | |
| 13. Other | 13. $ | |
| **TOTAL COSTS** | **$** | |

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.

Date:

(TYPE OR PRINT NAME) (SIGNATURE)

(Proof of service on reverse)

Form Approved for Optional Use
Judicial Council of California
MC-010 [Rev. July 1, 1999]

**MEMORANDUM OF COSTS (SUMMARY)**

Code of Civil Procedure,
§§ 1032, 1033.5

Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

**PROOF OF ☐ MAILING ☐ PERSONAL DELIVERY**

1. At the time of mailing or personal delivery, 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 *Memorandum of Costs (Summary)* 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' 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)



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