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Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure 1

**CHAPTERS 1-17**

**Litigation Milestone Checklists**

**First Steps**

**Plaintiff's Pleading**

**Defendant's Response**

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*1 MB Practice Guide: CA Pretrial Civil Procedure Cite As*

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Cite this publication as:

Kiesel et al., Matthew Bender Practice Guide: Cal. Pretrial Civil Procedure, § \_\_\_\_ (year)

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ISBN **978-0-8205-5684-0**

Library of Congress Card Number: 2003110651

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The Honorable Peter D. Lichtman is a Judge of the Los Angeles Superior Court and former Supervising Judge of the Complex Litigation Program. Prior to that, Judge Lichtman served as a civil fast track judge. He was previously an attorney in private practice for 17 years, with concentration in the area of complex civil litigation. He has authored numerous articles and contributed to legal publications, as well as lecturing widely in the area of civil litigation.

### **Edith R. Matthai**

Edith R. Matthai is a partner with Robie & Matthai, a Professional Corporation, in Los Angeles, California, where her practice centers on professional malpractice defense, insurance related litigation and business litigation. Ms. Matthai served as a Trustee of the Los Angeles County Bar Association. She is Senior Vice President of the Los Angeles

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**Richard L. Seabolt**

Richard L. Seabolt is a partner in the San Francisco office of Duane Morris LLP. Mr. Seabolt has extensive experience in complex trials and appeals arising from commercial disputes in the technology, entertainment, construction, and insurance industries. He serves as Chair of the Litigation Section of the State Bar of California for 2005-2006. He also is a member of the Judicial Council's Civil Jury Instruction Committee ("CACI") Advisory Committee, the Board of Governors of the Association of Business Trial Lawyers (ABTL), and the American Arbitration Association's Large Complex Case Panel. Mr. Seabolt frequently speaks and writes on civil litigation topics and topics involving his particular practice areas.





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*1 MB Practice Guide: CA Pretrial Civil Procedure Abbreviations*

## **Abbreviations**

### **California Constitution and Statutory Sources**

**Cal Const**     California Constitution

**B&P Code**     Business and Professions Code

**CC**     Civil Code

**CCP**     Code of Civil Procedure

**Com Code**     Commercial Code

**Corp Code**     Corporations Code

**Ed Code**     Education Code

**Elec Code**     Elections Code

**Evid Code**     Evidence Code

**Fam Code**      Family Code

**Fin Code**      Financial Code

**F&G Code**      Fish and Game Code

**F&A Code**      Food and Agriculture Code

**Gov Code**      Government Code

**H&N Code**      Harbors and Navigation Code

**H&S Code**      Health and Safety Code

**Ins Code**      Insurance Code

**Lab Code**      Labor Code

**M&V Code**      Military and Veterans Code

**Pen Code**      Penal Code

**Prob Code**      Probate Code

**PC Code**      Public Contract Code

**PR Code**      Public Resources Code

**PU Code**      Public Utilities Code

**R&T Code**      Revenue and Taxation Code

**S&H Code** Streets and Highways Code

**UI Code** Unemployment Insurance Code

**Veh Code** Vehicle Code

**Water Code** Water Code

**W&I Code** Welfare and Institutions Code

**Cal Stat** California Statutes **United States Constitution and Statutory Sources**

**US Const** United States Constitution

**USCS** United States Code

**USC app** United States Code Appendices

**IRC** United States Code, Title 26 **California and Federal Regulations**

**CCR** California Regulations

**CFR** Code of Federal Regulations

**Fed Reg** Federal Register **California Attorney General Opinions**

**Ops Cal Atty Gen** Opinions of California Attorney General **Case Law**

**C** California Reports

**C2d** California Reports, Second Series

**C3d** California Reports, Third Series

**C4th** California Reports, Fourth Series

**CA** California Appellate Reports

**CA2d** California Appellate Reports, Second Series

**CA3d** California Appellate Reports, Third Series

**CA4th** California Appellate Reports, Fourth Series

**CA Supp** California Appellate Reports, Supplement

**CA2d Supp** California Appellate Reports, Second Series, Supplement

**CA3d Supp** California Appellate Reports, Third Series, Supplement

**CA4th Supp** California Appellate Reports, Fourth Series, Supplement

**CR** California Reporter

**CR2d** California Reporter, Second Series

**CR3d** California Reporter, Third Series

**P** Pacific Reporter

**P2d** Pacific Reporter, Second Series

**P3d** Pacific Reporter, Third Series

**US** United States Supreme Court Reports

**S Ct** Supreme Court Reporter

**L Ed** Lawyer's Edition

**L Ed2d** Lawyer's Edition, Second Series

**F** Federal Reporter

**F2d** Federal Reporter, Second Series

**F3d** Federal Reporter, Third Series

**F Supp** Federal Supplement

**F Supp2d** Federal Supplement, Second Series

**FRD** Federal Rules Decisions **California State Court Rules**

**Cal Rules Ct** California Rules of Court

**Cal Rules Prof Conduct** California Rules of Professional Conduct **Federal Rules**

**Fed R Civ P** Rules of Civil Procedure

**Fed R Civ P Appendix of Forms** Rules of Civil Procedure, Forms Appendix

**Fed R App P** Federal Rules of Appellate Procedure

**9th Cir R** Circuit Rules

**9th Cir R Appendix of Forms** Circuit Rules, Forms Appendix

**Sup Ct R** Supreme Court Rules

**Multidistrict R**     Multidistrict Rules

**Fed R Evid**     Rules of Evidence

**Fed R Bankr P**     Rules of Bankruptcy Procedure

**Fed R Crim P**     Rules of Criminal Procedure **Central District abbreviations**

**CD Cal Civ LR**     Local Rules

**CD Cal Local Civil Appendix**     Civil Appendices

**CD Cal Mag LR**     Magistrate Judge Rules

**CD Cal Gen Order**     General Orders **Eastern District abbreviations**

**ED Cal Gen LR**     General Rules

**ED Cal Civ LR**     Civil Rules

**ED Cal Mag LR**     Magistrate Judge Rules

**ED Cal Automated Case Assignment Plan**     Automated Case Assignment Plan

**ED Cal Gen Order**     General Orders **Northern District abbreviations**

**ND Cal Civ LR**     Local Rules

**ND Cal ADR LR**     Local Rules for Alternative Dispute Resolution

**ND Cal Appendix**     Appendixes of Sample Forms

**NC Cal Gen Order**     General Orders **Southern District abbreviations**



**SD Cal Civ LR**    Local Rules

**SD Cal Gen Order**    General Orders **Miscellaneous**

**US Code Cong & Admin News**    Congressional and Admin. News

**UST**    United States Treaties



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What's New

*1 MB Practice Guide: CA Pretrial Civil Procedure Scope*

## Scope

### HIGHLIGHTS

Release 15 August 2010

### Choice of Law

*McCann v. Foster Wheeler LLC* (2010) 48 C4th 68 holds California has replaced the doctrine of the law of the forum state with a governmental interest analysis for choice of law determinations.

### Settlement

*Goodman v. Lozano* (2010) 47 C4th 1327 holds if the amount of settlement with fewer than all defendants before judgment exceeds the award in the judgment against remaining defendants, those defendants are deemed the prevailing parties for purposes of attorney fees under CCP § 877.

### Up-To-Date Cases, Rules, and Judicial Council Forms

This release updates the publication throughout with the 2010 legislative changes, changes to the Rules of Court and Judicial Council Forms that are effective July 1, 2010, and the latest California Supreme Court and Courts of Appeal cases.

### Developments in Other Areas of Law Include:

Beginning and Terminating The Attorney-Client Relationship

Limitation of Actions

Parties

Determining Forum

Personal Jurisdiction

Subject Matter Jurisdiction

Anti-SLAPP Motions

Injunctions

Attachment

Disqualification of Judge

Law and Motion Procedure

Stipulations  
 Motion for Reconsideration  
 Intervention  
 Class Actions  
 Sanctions  
 Defaults  
 Settlement and Release  
 Summary Judgment  
 Dismissal for Delay

## BEGINNING AND TERMINATING THE ATTORNEY-CLIENT RELATIONSHIP

**Disqualification of Attorney.** This chapter is updated with *Kirk v. First Am. Title Ins. Co. (2010) 183 CA4th 776*, which holds some courts of appeal view the rule of vicarious disqualification to be a rebuttable presumption, and lists the elements for rebutting this presumption that an appropriate screen has been put in place. In evaluating whether the properties of an appropriate screen meet the test, the trial court must be satisfied that the tainted attorney has not had and will not have any improper communication with others at the firm concerning the litigation. See *Ch. 3, Beginning and Terminating the Attorney-Client Relationship*, 3.36[5].

## LIMITATION OF ACTIONS

**Choice of Law for Limitation of Actions.** This chapter is updated with *McCann v. Foster Wheeler LLC (2010) 48 C4th 68*, which holds California has replaced the doctrine of the law of the forum state with a governmental interest analysis for choice of law determinations. To limit forum shopping by plaintiffs, California has adopted a "borrowing statute." The borrowing statute provides that when a cause of action has arisen in another state or country, and by the laws of that other jurisdiction an action could not be maintained thereon by reason of lapse of time, the cause of action cannot be brought in California even if the California statute of limitations has not run. See *Ch. 4, Limitation of Actions*, 4.10[1], [2].

## PARTIES

**Standing and Shareholder Derivative Suits.** This chapter is updated with *Haro v. Ibarra (2009) 180 CA4th 823*, which holds a plaintiff in a shareholder's derivative suit generally must maintain continuous stock ownership throughout the pendency of the litigation; and the only exception to this rule applies when equitable considerations warrant an exception to the continuous ownership requirement because the stockholder was wrongfully deprived of standing. See *Ch. 5, Parties*, 5.05[5].

## DETERMINING FORUM

**Class Action Arbitration Clauses.** This chapter is updated with *Cellphone Termination Fee Cases (2009) 180 CA4th 1110*, which holds if a class action settlement contains a clause calling for arbitration of claims, the validity of the arbitration clause will rest not only on principles applicable to arbitration clauses generally, but on the standards of fairness applicable to court approval of the class action settlement itself. See *Ch. 6, Determining Forum*, 6.22[8].

**Unconscionable Arbitration Agreements.** This chapter is updated with *Suh v. Superior Court (2010) 181 CA4th 1504*, which holds an arbitration agreement is unconscionable where an employer required that the employees sign a waiver of notice and acceptance of terms of an agreement that they had not read and that contained the arbitration clause and limits on remedies; and with *Lhotka v. Geographic Expeditions, Inc. (2010) 181 CA4th 816*, which holds an arbitration agreement is unconscionable where the terms and conditions of a recreational release agreement were nonnegotiable, and defendant's statement that plaintiffs would encounter the same requirements with any other recreational company. See *Ch. 6, Determining Forum*, 6.24[2][b], 6.24[4].

## PERSONAL JURISDICTION

**General Appearance and Appeal.** This chapter is updated with *State Farm General Ins. Co. v. JT's Frames, Inc.* (2010) 181 CA4th 429 , which holds waiver of the lack of personal jurisdiction by a general appearance of the defendant waives the right to raise the jurisdictional question on appeal. See *Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction*, 9.07[3][b].

## SUBJECT MATTER JURISDICTION

**Doctrine of Primary Jurisdiction and Administrative Agencies.** This chapter is updated with *Blue Cross of California, Inc. v. Superior Court* (2009) 180 CA4th 1237 , which holds a trial court does not abuse its discretion by refusing to defer litigation that presents issues that are within the conventional competence of the courts if the judgment of a technically expert body would not aid judicial decisionmaking. See *Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction*, 10.04[11][b].

**Abstention Doctrine and Equitable Remedies.** This chapter is updated with *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 CA4th 471 , which holds a court may abstain from adjudicating a suit that seeks equitable remedies if 1) granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency, 2) the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency, or 3) granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress. See *Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction*, 10.04[12].

**Doctrine of Exclusive Concurrent Jurisdiction.** This chapter is updated with *California Attorneys, etc. v. Schwarzenegger* (2010) 182 CA4th 1424 , which holds the exclusive jurisdiction rule does not apply where the parties and legal issues are so different that both judgment in the first case is not binding on the parties as to the issues in the second case, and the second case does not threaten or produce a conclusion that is irreconcilable with the judgment in the first case. See *Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction*, 10.05[3][a].

## ANTI-SLAPP MOTIONS

**Non-Protected Activity Subject to the Anti-SLAPP Statute.** This chapter is updated with cases that highlight causes of action that are not protected activity under the anti-SLAPP statute [CCP § 425.16]: *All One God Faith, Inc. v. Organic and Sustainable Industry Standards, Inc.* (2010) 183 CA4th 1186 (certification of products as complying with a proposed industry "organic" standard and commercial advertising); *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 CA4th 1207 (termination of a public contract in accordance with its terms and sealing a contract with another vendor without competitive bid); *Oasis West Realty, LLC v. Goldman* (2010) 182 CA4th 688 (litigation concerning an attorney's breach of the duty of loyalty in violation of *Cal Rules Prof Conduct*, Rule 3-310); *Robles v. Chalilpoyil* (2010) 181 CA4th 566 (defective expert testimony on behalf of the plaintiff in an underlying action). See *Ch. 13, Anti-SLAPP Motions*, 13.06[1][a].

**Statements Made In Official Proceedings.** This chapter is updated with new cases that include statements made in connection with official proceedings for purposes of CCP § 425.16: *Seltzer v. Barnes* (2010) 182 CA4th 953 (lawful settlement negotiations between homeowner and homeowners association); *Park 100 Investment Group II, LLC. v. Ryan* (2009) 180 CA4th 795 (filing a lawful lis pendens). See *Ch. 13, Anti-SLAPP Motions*, 13.06[2][b].

**Protected Activity and True Threats.** This chapter is updated with *D.C. v. R.R.* (2010) 182 CA4th 1190 , which holds written or oral statements made in a public forum must be speech protected by the First Amendment; and actions based on unprotected "true threats," i.e., statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, are not subject to

anti-SLAPP motions. See Ch. 13, Anti-SLAPP Motions, 13.06[2][c].

**Business Exception to Anti-SLAPP Statute.** This chapter is updated with cases highlighting entities and actions that are not business related such that the business exception to the anti-SLAPP suit apply under *CCP § 425.17(c)*: *All One God Faith, Inc. v. Organic and Sustainable Industry Standards, Inc.* (2010) 183 CA4th 1186 (a nonprofit trade association is not "a person primarily engaged in the business of selling or leasing goods or services"); *Stewart v. Rolling Stone LLC* (2010) 181 CA4th 664 (a magazine's use of the name of a rock band on its cover does not constitute "representations of fact about the operations, goods, or services" of the publisher). See Ch. 13, Anti-SLAPP Motions, 13.06[3][b].

**Timing of Costs Memorandum.** This chapter is updated with *Daniels v. Robbins* (2010) 182 CA4th 204, which holds a memorandum for costs from an anti-SLAPP motion must be filed within the time specified by *Cal Rules Ct, Rule 3.1700*, and for purposes of Rule 3.1700, a minute order granting the motion does not trigger the 15-day deadline for filing for costs, only a judgment or dismissal after the order is granted does that under *CCP § 581*. See Ch. 13, Anti-SLAPP Motions, 13.136[7]

## INJUNCTIONS

**Injunction Undertakings.** This chapter is updated with *Smith v. Adventist Health System/West* (2010) 182 CA4th 729, which holds a waiver of the right to plaintiff's undertaking is a question of fact, and a finding of waiver requires the defendant's showing the intentional relinquishment or abandonment of the right to plaintiff's undertaking. The intent to waive may be expressed in words, either oral or written, or implied by a party's conduct, and the right to require plaintiff to post an undertaking on a preliminary injunction may be forfeited by the untimeliness of the request. See Ch. 18, TROs and Preliminary Injunctions, 18.11[6][f].

## ATTACHMENT

**Judicial Council Forms.** This chapter is updated with the July 1, 2010 updates to the Judicial Council Forms for obtaining a writ of attachment or temporary protective order: AT-105, AT-115, AT-120, AT-125, AT-140. See Ch. 19, Attachment, 19.41 -19.45.

## DISQUALIFICATION OF JUDGE

**Writ Review on Disqualification.** This chapter is updated with *People v. Freeman* (2010) 47 C4th 993, which holds a defendant's failure to seek writ review pursuant to *CCP § 170.3(d)*, of the denial of his or her statutory disqualification motions, forfeits the potential statutory claims that the trial judge should have been disqualified for cause and, having once recused himself, was statutorily precluded from subsequently accepting reassignment of the case. See Ch. 22, Disqualification of Judge, 22.35[2].

## LAW AND MOTION PROCEDURE

**Telephonic Appearance.** This chapter is updated with the new optional Judicial Council Forms for telephonic appearances: Judicial Council Form CIV-020 Notice of Intent to Appear by Telephone. See Ch. 26, Law and Motion Procedure, 26.69.

## STIPULATIONS

**Appeal of Stipulated Judgment.** This chapter is updated with *Villano v. Waterman Convalescent Hosp., Inc.* (2010) 181 CA4th 1189, which highlights a split of authority. In most instances a stipulated judgment is not appealable. An exception to this rule permits an appeal if consent was merely given to facilitate an appeal following adverse determination of a critical issue. The Courts of Appeal are divided on when there has been an adverse determination of a

critical issue. See *Ch. 28, Stipulations*, 28.09[1].

## MOTION FOR RECONSIDERATION

**Motion to Reconsider and Postjudgment Motions.** This chapter is updated with *D.R.S. Trading Co., Inc. v. Barnes* (2009) 180 CA4th 815 , which holds, contrary to the general rule that reconsideration is not allowed after entry of judgment, that a motion for reconsideration is permissible of a determination on a postjudgment motion filed and decided after entry of default judgment, and relied on *CCP § 1008(e)* to affirm reconsideration of motion to vacate based on attorney fault under *CCP § 473(b)*. See *Ch. 29, Motions to Reconsider and Renewed Motions*, 29.05[2].

## INTERVENTION

**Direct Interest.** This chapter is updated with *Gray v. Begley* (2010) 182 CA4th 1509 , which holds an insurer providing defense to an insured under policy has a direct interest to intervene in an attempt by the insured and tortfeasor to settle the case without the participation of the insurer. See *Ch. 31, Intervention*, 31.05[3][a].

## CLASS ACTIONS

**Class Certification.** This chapter is updated with cases where class certification is appropriate where the community of interest is less than total: *McAdams v. Monier, Inc.* (2010) 182 CA4th 174 (an inference of common reliance was adequate to show causation as to each class member sufficient to establish common issues predominate); *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 CA4th 471 (certification warranted despite individual issues because two central legal issues that are common to all putative class members); *Steroid Hormone Product Cases* (2010) 181 CA4th 145 (common issues of unlawful sales and the amount of restitution in a Consumers Legal Remedies Act, *Civ. Code, § 1750 et seq.*, were not dominated by individual issues of causation and injury). See *Ch. 33, Class Actions*, 33.04[2][a].

**Prima Facie Showing of Community of Interest Must Be Reasonable Possibility.** This chapter is updated with *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 CA4th 471 , which holds in seeking class certification, the class action plaintiff must only establish that there is a reasonable possibility that plaintiffs can establish a prima facie community of interest among the class members. Where there is a reasonable possibility that the plaintiff in a class action can establish a community of interest among class members, the preferred course is to defer decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation. See *Ch. 33, Class Actions*, 33.04[6].

**Pick Off Cases.** This chapter is updated with *Wallace v. Geico Gen. Ins. Co.* (2010) 183 CA4th 1390 , which holds where a defendant in a class action has forced an involuntary settlement on the representative plaintiff after the lawsuit is filed, a representative plaintiff may continue to be a member of the proposed class. These cases so-called "pick off" cases arise when, prior to class certification, a defendant in a proposed class action gives the named plaintiff the entirety of the relief claimed by that individual. The proper procedure in a pickoff case is for the trial court to consider whether the named plaintiff will continue fairly to represent the class in light of the individual relief offered by the defendant. As a practical matter, in most cases, that evaluation may be performed in the context of a ruling on a motion for class certification. See *Ch. 33, Class Actions*, 33.08[2].

**Private Attorney General Theory and Attorneys' Fees.** This chapter is updated with *McGuigan v. City of San Diego* (2010) 183 CA4th 610 , which holds only an opposing party can be liable for attorney fees under *CCP § 1021.5*. Defining "opposing party" requires consideration of both the origin and the entire procedural history of the subject action between the parties. First, determine who is the successful party in favor of whom fees may be awarded. The courts utilize a broad, pragmatic view of what constitutes a "successful party" in order to effectuate the policy underlying *CCP § 1021.5*. It is the "impact" of the case as a whole that is to be considered. This must include a recognition of the roles of all the different participants or parties, as of all the relevant time periods. Once the successful

party is ascertained, the "opposing party" is one party whose position in the litigation was adverse to that of the successful party. See *Ch. 33, Class Actions*, 33.43[2].

## SANCTIONS

**Vexatious Litigants.** This chapter is updated with *Shalant v. Girardi (2010) 183 CA4th 545*, which holds *CCP* § 391.7(c) does not prevent a vexatious litigant who is plaintiff in an action filed by his or her counsel from continuing to prosecute it in propria persona after substituting himself or herself in as attorney in the case. See *Ch. 35, Sanctions*, 35.15G[1A].

## DEFAULTS

**Motion to Reconsider.** This chapter is updated with *D.R.S. Trading Co., Inc. v. Barnes (2009) 180 CA4th 815*, which holds after the substituted attorney's motion to vacate default judgment based on the original attorney's fault under *CCP* § 473(b) was denied due to the failure to submit the necessary declaration of the original attorney, the trial court properly granted reconsideration within the statutory period for doing so based on the submission of the declaration as new evidence. See *Ch. 36, Defaults and Motions for Relief*, 36.67[6].

## SETTLEMENT AND RELEASE

**Settlement With Less Than All Parties.** This chapter is updated with *Goodman v. Lozano (2010) 47 C4th 1327*, which holds if the amount of settlement with fewer than all defendants before judgment exceeds the award in the judgment against remaining defendants, those defendants are deemed the prevailing parties for purposes of attorney fees under *CCP* § 877. See *Ch. 37, Settlement and Release*, 37.23[2].

## SUMMARY JUDGMENT

**Grounds Not Raised By Pleadings.** This chapter is updated with *Kendall v. Walker (2009) 181 CA4th 584*, which holds while a motion for summary judgment may be granted on an issue the moving party has not raised, summary judgment cannot be denied on a ground not raised by the pleadings. See *Ch. 38, Summary Judgment*, 38.39.

## DISMISSAL FOR DELAY

**Estoppel.** This chapter is updated with *Jordan v. Superstar Sandcars (2010) 182 CA4th 1416*, which holds the plaintiff's assumption that defense counsel's declaration of unavailability until after the expiration of the five-year period meant that defendant would agree to an extension does not support equitable estoppel. See *Ch. 40, Dismissal for Delay in Bringing to Trial*, 40.16[2][a].



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A searchable Directory of Online Sources can be viewed without an ID at <http://web.nexis.com/sources/>

Additionally, a task-based web page is available for this publication at <http://www.lexisnexis.com/mbpracticeguide/CA/>

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California > Search Analysis & CLE Materials > CA Treatises & Analytical Materials > **Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure.**

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**Bender[(R)] Practice Guide: California Pretrial Civil Procedure.**

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*1- MB Practice Guide: CA Pretrial Civil Procedure How To. 02*

**How To. 02 Authority and Sources Referenced in This Publication.**

**[1] Using *lexis.com* resources to update cases.**

The Matthew Bender[(R)] Practice Guide series is updated twice a year and cites the strongest, most recent cases available as of its last update. New cases are added to *lexis.com* daily, and can be combined with additional cases online to update, validate, and research fact patterns, issues, and points of law.

**[2] California Case Databases.**

Several sources may assist research needs. They include:

CA Federal & State Cases, Combined (CAL;CAMEGA)

CA Cases, Administrative Decisions & Attorney General Opinions, Combined (CAL;CACASE)

CA Published Cases, Combined (CAL;CACTSP)

CA State Cases, Combined (CAL;CACTS) (includes unpublished as well as published cases)

CA Supreme Court Cases from 1850 (CAL;CAL)

CA Courts of Appeal Cases from 1905 (CAL;APP)

Published CA Court of Appeal Cases from 1905 (CAL;APP-P)

Unpublished CA Court of Appeal Cases from 1966 (CAL;APP-U) n1

Although unpublished cases are not citable in California courts, users may wish to search the CA State Cases, Combined to get ideas about possible legal arguments. That source would also be preferable to CA Published Cases, Combined if a user is searching for any appellate cases in which a party, attorney, or judge has been involved.

Case law from all 50 states, the Virgin Islands, Guam, Northern Marianas Islands, Washington D.C. federal courts, state

and federal agencies are also available on *lexis.com* through the Legal tab > Cases -- U.S.

### **[3] Hypertext Links.**

Click the hypertext link to jump to the corresponding cases, codes, rules, and other publications online.

### **[4] Finding Related Sources and Suggested Searches.**

This publication highlights additional online sources to assist your research tasks, both legal and factual, related to pretrial civil procedure. Thousands of additional sources are also available on *lexis.com*. The following list highlights frequently used sources and sample search strategies relevant to topics contained in this publication:

#### **REFERENCED CASE LAW SOURCES ON *lexis.com*:**

##### **CA Federal & State Cases, Combined** (see *Sample Search in section 5.02*)

To learn about other litigation in which the person or entity was a party, try a NAME segment search of the case law: *name (name of company)* (see 5.02)

##### **CA State Cases, Combined** (see *Sample Searches in section 6.04, 6.32, 22.02*)

To investigate judges for appellate rulings regardless of topic, use the HISTORY segment with the judge's last name in this format: *history (first name /3 last name /3 j or judge or judicial or mag or hon!)* (see 6.04, 6.32, 22.02)

For appellate decisions on a judge's rulings in a particular procedural setting or on a particular substantive topic, use the HISTORY segment with the judge's last name in this format plus words for finding the specific topic, for example: *summary judgment and history (first name /3 last name /3 j or judge or judicial or mag or hon!)* (see 6.04, 6.32)

##### **9th Circuit-Federal and State Cases, Combined** (see *Sample Search in section 17.04*)

For appellate rulings regardless of topic, use the HISTORY segment with the judge's last name in this format: *history (first name /3 last name /3 j or judge or judicial or mag or hon!)* (see 17.04)

#### **REFERENCED TOPICAL, PUBLIC RECORDS, COURT FILINGS, AND NEWS SOURCES ON *lexis.com*:**

##### **All Company Information (excluding Investext & D&B)** (see *Sample Search in section 3.04*)

To identify potential conflicts when representing a company, find profiles of companies and company executives, annual reports and other SEC filings, bankruptcy reports, merger and acquisition transactions, and earnings reports for all US public companies, more than 200,000 private US companies, and thousands of international companies by using this search format: *company (name of company)* (see 3.04)

##### **All Motor Vehicle Registrations** (see *Sample Search in section 2.10*)

To uncover personal property held by a party, check for motor vehicle registration records by using this search format: *name (first name /3 last name)* (see 2.10)

##### **Biographies** (see *Sample Searches in sections 24.08, 25.05*)

To find biographical information about an arbitrator, try this NAME segment search: *first name /3 last name* (see 24.08)

To find biographical information about a referee, try this NAME segment search: *first name /3 last name* (see 25.05)

### **CA Bankruptcy Filings** (see *Sample Searches* in sections 5.02, 5.12, 5.14)

A single search of bankruptcy filings, real property records, person and business locator sources, liens, federal district court docket information, secretary of state, and license information may be done in this search format: *name (name of company)* or *first name /3 last name* (see 5.02)

To discover potentially valuable information about a decedent's (or any other person's) possible previous bankruptcy, try a search in this format: *first name /3 last name* (see 5.12)

To discover potentially valuable information about a corporation's bankruptcy-related background, try a search in this format: *name (name of company)* (see 5.14)

### **CA Business and Corporation Information** (see *Sample Search* in section 3.04)

To identify potential conflicts when representing a company or individual, find information from the California Business Locator, California State Board of Equalization Sales and Use Tax, California Contractors State License Board, California Secretary of State and all California counties in the Fictitious Business Names file and locate active and inactive corporations, limited partnerships, contractors, and other businesses, including fictitious business names, registered in California by using this search format: *company (name of company)* or *name (first name /3 last name)* (see 3.04)

### **CA Combined Civil Court Filings From Superior and Municipal Courts** (see *Sample Search* in section 5.02)

A NAME segment search in docket materials may provide information about other litigation in which the person or entity was a party: *name (name of company)* (see 5.02)

### **CA Combined Jury Verdicts and Settlements** (see *Sample Searches* in section 37.06)

To find examples of California verdicts or settlements in a products liability action involving quadriplegia injuries from a "rollover" accident, try this search: *product liability and quadr! and rollover or roll over* (see 37.06)

To find examples of California verdicts or settlements in a wrongful death action based on misdiagnosis, try this TOPIC segment search: *topic (wrongful death and misdiagnos! or diagnos! and cancer!)* (see 37.06)

### **CA Criminal Case Filings** (see *Sample Search* in section 5.02)

To discover possible criminal activity of a party, try a search in criminal case filings: *first name /3 last name* (see 5.02)

### **CA Deed Transfers, Tax Assessor Records and Mortgage Records--Selected Counties** (see *Sample Searches* in sections 5.02, 5.14)

To discover real estate owned by a person or entity, try a search of tax assessor, deed transfer, and mortgage records in this format: *first name /3 last name* (see 5.02, 5.14)

**CA Judgment and Lien Filings** (see *Sample Search* in section 5.02)

A NAME segment search in the Judgment and Lien Filings also provides information about past litigation: *name (name of company)* (see 5.02)

**CA Listings-Martindale Hubbell[(R)] Law Directory** (see *Sample Search* in section 37.38)

To find a person with prior special master qualifications in California, try a search in the Martindale Hubbell[(R)] Law Directory such as: *special master*. If a special master is sought for a particular area of the state, try a search in this type of format: *special master /100 los angeles* (see 37.38)

**CA Person Locator** (see *Sample Searches* in section 8.11)

To find a possible Los Angeles address of an individual for purposes of summons and other procedures, try a NAME and ADDRESS segment search in the People Locator databases such as: *name (first name /3 last name) and address (los angeles)* (see 8.11)

**CA Professional Licenses** (see *Sample Search* in section 5.09)

To learn information pertaining to professional licensing, try a search in this format: *first name /3 last name* (see 5.09)

**CA Secretary of State Corporation, LP and LLC Information** (see *Sample Searches* in sections 3.04, 5.13, 5.14)

To determine selected director and officer records of California corporations and limited partnerships (some director and officer information may not be listed) for conflicts of interest, check the corporation and limited partnership records using this search: *first name /3 last name* (see 3.04)

To discover potentially valuable information about a limited partnership's status and/or registered agent for service of process, try a NAME segment search in this format: *name (name of company)* (see 5.13)

To discover potentially valuable information about a corporation's financial status, try a NAME segment search in this format: *name (name of company)* (see 5.14)

**CA Uniform Commercial Code Lien Filings** (see *Sample Search* in section 5.29)

To learn about liens on a party's personal property interests (or liens a party holds on another's interests), try a search in this format: *name (name of company)* (see 5.29)

**California News Publications** (see *Sample Searches* in section 6.04, 6.32, 17.04, 22.02, 24.08, 25.05)

To find news articles about a particular judge for determining forum or disqualification, try a search in this format: *first name /3 last name* (see 6.04, 6.32, 17.04, 22.02)

To find news articles about a particular arbitrator for determining selection or disqualification, try a search in this format: *first name /3 last name* (see 24.08)

To find news articles about a particular referee for determining selection or disqualification, try a search in this format: *first name /3 last name* (see 25.05)

**Combined Deed Transfers, Tax Assessor Records and Mortgage Records** (see *Sample Search in section 2.10*)

To uncover real estate currently or previously held by a party, check for deed, tax, and mortgage records by using this search format: *name (first name /3 last name)* (see 2.10)

**Combined Judgments & Liens Filings** (see *Sample Search in section 3.04*)

To identify potential conflicts when representing a company or individual, find judgments and liens that may be filed against the company or individual by a previously represented client by using this search format: *company (name of company)* or *name (first name /3 last name)* (see 3.04)

**Combined State Boat Registrations and U.S. Coast Guard** (see *Sample Search in section 2.10*)

To uncover personal property held by a party, check for boat registration records by using this search format: *name (first name /3 last name)* (see 2.10)

**Combined State Civil and Criminal Filings** (see *Sample Search in section 3.04*)

To identify potential conflicts when representing a company or individual, find civil and criminal filings by that company or individual that may be against a previously represented client by using this search format: *company (name of company)* or *name (first name /3 last name)* (see 3.04)

**D & B Business Reports** (see *Sample Search in section 3.04*)

To identify potential conflicts when representing a company, find useful information on a company's history and operations as well as a business background of its management and a business summary by using this search format: *company (name of company)* (see 3.04)

**Executive Affiliations** (see *Sample Search in section 3.04*)

To identify potential conflicts of an individual party, check the executive affiliations using this search format: *first name /3 last name* (see 3.04)

**Federal Aviation Administration Aircraft Registrations** (see *Sample Search in section 2.10*)

To uncover personal property held by a party, check for aircraft registration records by using this search format: *name (first name /3 last name)* (see 2.10)

**International Company Reports** (see *Sample Search in section 3.04*)

To identify potential conflicts when representing an international company, find a list of subsidiaries of public and private non-U.S. companies by retrieving the company's profile by using this search format: *company (name of company)* (see 3.04)

**Judicial Staff Directory** (see *Sample Searches in sections 6.04, 6.32, 17.04, 22.02*)

To find biographical information about federal judges, search for a particular judge using this search format: *name (first name /3 last name)* (see 6.04, 6.32, 17.04, 22.02)

**Law Reviews, CLE, Legal Journals & Periodicals, Combined** (see *Sample Searches in sections 6.04, 6.05, 6.10, 6.32, 17.04, 22.02, 24.08, 37.38*)



To find articles about a judge or legal articles written by the judge both before and after the judge took the bench, search for a particular judge using this search format: *first name /3 last name* (see 6.04, 6.32, 17.04, 22.02)

To find articles about or written by a mediator, search for a particular mediator using this search format: *first name /3 last name* (see 6.05)

To find articles about or written by an arbitrator, search for a particular arbitrator using this search format: *first name /3 last name* (see 6.09, 24.08)

To find articles about or written by a special master, search for a particular special master using this search format: *first name /3 last name* (see 37.38)

**Locate a Person (Nationwide)** (see *Sample Search in 8.11*)

To find a possible California address of an individual, try a NAME and ADDRESS segment search in the People Locator databases such as: *name (first name /3 last name) and address (ca)* (see 8.11)

**Martindale-Hubbell Dispute Resolution Directory** (see *Sample Searches in sections 6.05, 6.10, 24.08*)

To find basic professional information about dispute resolution practitioners in California listed in the Martindale-Hubbell Dispute Resolution Directory, use this two-segment search: *name (first name /3 last name) and geo-scope (ca)* (see 6.05, 6.10, 24.08)

To locate arbitrators in a particular county, such as Los Angeles county, use this segment search: COUNTY (los angeles) (see 6.10)

**Martindale-Hubbell Listings, All** (see *Sample Search in section 6.10*)

To investigate a mediator that is being considered or has been selected, find biographical and practice information on a mediator using this search: *name (first name /3 last name)* (see 6.05)

**Mergers and Acquisitions Reports--Company Reports** (see *Sample Search in section 3.04*)

To identify potential conflicts when representing a company, find a list of mergers and acquisitions to determine if the scope of the company's business has changed since prior representation by using this search format: *company (name of company)* (see 3.04)

**News, All (English, Full Text)** (see *Sample Search in section 2.10*)

To uncover real and personal property and important financial developments, search for news reports that cite the opposing party and may include financial announcements, investments, assets, and other information pertaining to the party's ownership of property using this search format: *name (first name /3 last name)* (see 2.10)

**News Group, Most Recent Two Years** (see *Sample Search in section 3.04*)

To locate information about a person associated with a particular company, check the news sources using this search: *first name /3 last name /25 name of company* (see 3.04)

**Social Security Death Records** (see *Sample Search in section 8.11*)

To determine whether a potential party or witness is deceased, use a NAME segment search in the Social Security Death Records, such as: *name (first name /3 last name)* (see 8.11)

**The Executive Directories** (see *Sample Search in section 3.04*)

To identify potential conflicts, find useful biographical information on persons and their business affiliations by using this search format: *name (first name /3 last name)* (see 3.04)

**U.S. and International Company Intelligence Reports** (see *Sample Search in section 3.04*)

To identify potential conflicts when representing a U.S. company, find a list of subsidiaries of public and private U.S. companies by retrieving the company's profile by using this search format: *company (name of company)* (see 3.04)

**What's It Worth? A Guide to Personal Injury Awards and Settlements** (see *Sample Search in section 37.06*)

For a national perspective in helping to assess the damages demand for example, an ankle injury, try an INJURY segment search, such as: *injury (brok! or fractur! /2 ankle)* (see 37.06)

**[5] "Search by Topic or Headnote" Links to Related Cases and Analytical Materials.**

**Search by Topic or Headnote** is a finding tool for legal data based on areas of law and related legal topics. It can help target your legal issue, identify appropriate sources, and formulate your search request.

Some of the search paths in **Search by Topic or Headnote** that are especially relevant to this publication include:

Civil Procedure > Alternative Dispute Resolution

Civil Procedure > Class Actions

Civil Procedure > Dismissals

Civil Procedure > Joinder of Claims & Remedies

Civil Procedure > Judicial Officers

Civil Procedure > Jurisdiction

Civil Procedure > Parties

Civil Procedure > Pleading and Practice

Civil Procedure > Pretrial Judgments

Civil Procedure > Pretrial Matters

Civil Procedure > Settlements

Civil Procedure > Summary Judgment

Civil Procedure > Venue

**FOOTNOTES:**

(n1)Footnote 1. Unpublished CA Court of Appeal Cases from 1966 covers selected unpublished, depublished, and partially published opinions from August 1966 through current, and full coverage of Rule 977 unpublished opinions from October 2001. Although local rules generally preclude citation to unpublished opinions except in limited circumstances, this database may be useful to research similar fact patterns, case information, rulings, factual discovery, strategy, and disposition.



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**How To. 03 Formulating a Search Query on *lexis.com*.**

**[1] Frame Your Search.**

After you have selected your source, you can use available tables of contents or enter search terms to retrieve relevant documents. This sample search form provides tips about structuring your search, search connectors, segment searching and date restrictions:

[Click here to view image.](#)

**[2] Develop Your Search Strategy.**

Identify relevant terms, their variations, synonyms, necessity, proximity, and relationship to your research issue. Your first search should be structured broadly, then results can be narrowed without additional search transactions through Focus[™] by adding terms to reduce your search results set.

**[3] Narrow Your Search.**

Additional parameters, like Restrict by Segment (field) and Restrict by Date are available. Available Segments are displayed in a drop down box. For example, the NAME segment of a case contains the names of the parties to the action. To research your adversary's litigation history, you can do a NAME segment search in cases and jury verdicts. You can Add the segment restriction, or type this restriction in your search query as: name (Party Name). Targeted results can also be obtained by restricting the search results to documents that have multiple references to a term or phrase by using ATLEAST#. For example, including *atleast5 (fair use)* as a search term will restrict your search results to documents that reference the phrase "fair use" a minimum of five times.

**[4] Find More Authorities Like This.**

When you find cases or other documents that are helpful (or hurtful) and you want (or need) to find whether there are other similar materials, you can click the More Like This link at the top of the page. More Like This extracts the relevant search terms for the document you are viewing and gives you the option to use these terms to locate additional materials in the same or a different database. Cases have an additional benefit using More Like This to extract citations

from an on-point case and use similar citation patterns to locate other cases, treatises, or law reviews. Similarly, the More Like Selected Text link at the top of documents can be used to target specific paragraphs or language you highlight in an on-point document to locate similar materials. In Case law, More Like This Headnote creates a virtual case law digest online based on the language, law, and topic discussed in headnotes.

**[5] Keep Current With Alerts.**

To keep your search results current, update your search results by saving an **Alert**. From your online search results screen, select **Save as Alert** link at the top of the screen. You will be given options for how often the search should be run (including daily or weekly) and for how to have the results delivered or a notification sent to you by email.



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**How To. 04 Shepardize[(R)] to Validate Your Results and As a Research Tool.**

**Shepardize** [(R)] the cases that you intend to cite to be sure that they are still good law. Additionally, Shepard's can be used as a case-finding and research tool to lead you to other cases, statutes, treatises, and authority on a given issue. You can FOCUS within a Shepard's report on particular terms or phrases. Additionally, the Custom Restrictions link at the top of the Shepard's report allows you to narrow results by jurisdiction, date and/or headnote restriction. Use the Shepard's Signals to help you analyze validity and subsequent treatment of the case. CheckCite is a free software program to automate Shepardizing your brief or cases, and streamlines the cite checking process for briefs, motions, research, and prior to hearings.



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Chapter 1 Litigation Milestone Checklists

*1-1 MB Practice Guide: CA Pretrial Civil Procedure 1.syn*

**§ 1.syn Synopsis to Chapter 1: Litigation Milestone Checklists**

1.01 Scope.

1.02 CHECKLIST: Steps to Take Before Filing a Lawsuit.

1.03 CHECKLIST: Plaintiff's Next Steps When Lawsuit Is Filed.

1.04 CHECKLIST: Defendant's First Steps.

1.05 CHECKLIST: Plaintiff's Responses.

1.06 CHECKLIST: Case Management Process.

1.07 CHECKLIST: Pretrial Motions and Steps Initiated by Plaintiff.

1.08 CHECKLIST: Defendant's Responses to Pretrial Motions and Steps Initiated by Plaintiff.

1.09 CHECKLIST: Additional Pretrial Motions and Steps That May Be Initiated by Defendant.

1.10 CHECKLIST: Plaintiff's Responses to Pretrial Motions and Steps Initiated by Defendant.



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Chapter 1 Litigation Milestone Checklists  
I. SCOPE

*1-1 MB Practice Guide: CA Pretrial Civil Procedure 1.01*

**1.01 Scope.**

This chapter provides an outline of procedures that should be followed in the pretrial phases of a civil action. This chapter covers civil actions generally.

Special proceedings covered in other publications include:

- Eminent domain. For procedures in eminent domain proceedings, see California Forms of Pleading and Practice, Ch. 247, Eminent Domain (Matthew Bender).
- Family law. For procedures in family law proceedings, see California Forms of Pleading and Practice, Ch. 220, Dissolution of Marriage and Related Proceedings (Matthew Bender), and many other chapters on family law topics in that publication, or California Family Law Practice and Procedure (Matthew Bender).
- Juvenile courts. For procedures in juvenile court proceedings, see California Forms of Pleading and Practice, Ch. 327, Juvenile Courts: Jurisdiction and General Procedures; Ch. 328, Juvenile Courts: Dependency Proceedings; and Ch. 329, Juvenile Courts: Delinquency Proceedings; or California Juvenile Courts Practice and Procedure (Matthew Bender).
- Probate. For procedures in probate proceedings, see California Forms of Pleading and Practice, Ch. 440, Probate; and Ch. 560, Trusts; or California Probate Practice (Matthew Bender).
- Unlawful or forcible detainer. For procedures in unlawful detainer and forcible detainer proceedings, see Matthew Bender(R) Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer; California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Actions (Matthew Bender).



**Warning:**

Counsel should always check local rules to determine whether a different procedure applies in a particular situation.





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Chapter 1 Litigation Milestone Checklists  
II. FIRST STEPS IN FILING OR RESPONDING TO A LAWSUIT

*1-1 MB Practice Guide: CA Pretrial Civil Procedure 1.02*

**1.02 CHECKLIST: Steps to Take Before Filing a Lawsuit.**

- ☐ Gather initial facts from potential client [ *see* Ch. 2, Client Interview].
- ☐ Perform conflicts check [ *see* Ch. 3, *Beginning and Terminating the Attorney-Client Relationship*, 3.03 et seq.].
- ☐ Identify potential causes of action and applicable statutes of limitation [ *see* Ch. 4, Limitation of Actions], including:
  - ☐ Any claim period if public entity is potential defendant.
  - ☐ Any claim period if person who would be potential defendant is deceased.
  - ☐ Any claim period for making a claim or providing notice in a relevant insurance policy or other contract.
  - ☐ Any shortened period of limitation imposed by insurance policy or contract.
- ☐ Determine whether dispute is or may be within scope of an arbitration agreement [ *see* Ch. 6, *Determining Forum*, 6.03 et seq.].
- ☐ Verify plaintiff's capacity to bring action [ *see* Ch. 5, *Parties*, 5.08 et seq.]:
  - ☐ If entity, is entity suspended?

- ☐ If plaintiff is transacting business under a fictitious name, has plaintiff filed fictitious business name statement?
- ☐ Is guardian ad litem required?
- ☐ Can attorney's fees be recovered from the opposing party if your client is the prevailing party?
  - ☐ If contract is involved, check for attorney fee clause.
  - ☐ Determine if statutory attorney fee award available.
- ☐ Review costs and risks of representing client in litigation:
  - ☐ Can client afford to pay attorney fees and costs?
  - ☐ Is case strong enough to take on contingency fee basis?
  - ☐ Are you knowledgeable enough in area of law to competently handle case?
  - ☐ Will case occupy too much time for you to afford to take it on a contingency fee basis?
  - ☐ If contingency fee arrangement, is client able to pay out of pocket costs?
  - ☐ Is client credible?
  - ☐ Will client make a good witness?
  - ☐ Has client been interviewed by other attorneys who would not take case?
  - ☐ Has client been represented by another attorney? If so, approach case with great caution.
  - ☐ How settled is the area of law on which the plaintiff's claim is based?
  - ☐ What are nature and extent of client's injuries and anticipated range of recovery versus time and expense associated with achieving a successful outcome?
- ☐ Decide on fee arrangement with client [ *see Ch. 3, Beginning and Terminating the Attorney-Client Relationship, 3.11 et seq.*]:

- ☐ If hourly fee, try to obtain advance fee (or retainer) from client.
- ☐ If contingency fee, determine if client can pay costs as they are incurred.
- ☐ Prepare and have client execute retention letter.
- ☐ Investigate potential defendants [ *see Ch. 5, Parties, 5.02*]:
  - ☐ Identify.
  - ☐ Determine whether any are judgment proof.
  - ☐ If an entity, does entity have capacity to defend suit?
- ☐ Further investigate facts of the case, including:
  - ☐ Comprehensive interview with client [ *see Ch. 2, Client Interview*].
  - ☐ Thorough review and analysis of client documents, including:
    - ☐ Any correspondence between the parties.
    - ☐ Written statements made by the parties to others.
  - ☐ Witness interviews. Determine:
    - ☐ Do witnesses verify client's version of event?
    - ☐ Will key witnesses be available to testify at trial?
  - ☐ View publicly accessible sites.
  - ☐ Gather publicly available documents.
  - ☐ Ensure protection of tangible evidence in hands of third parties.

**Cross Reference:**

Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 14, Preservation of Evidence.

- ☐ If action cannot presently be brought, engage in discovery or take other steps to perpetuate testimony or preserve

evidence.

➤ **Cross Reference:**

Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 14, Preservation of Evidence.

☐ Review the scope and technology aspects of data storage systems that may be involved in the matter and determine the potential discovery of electronically stored information ("ESI") and the requirements for preserving ESI.

➤ **Cross References:**

Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

☐ Verify causes of action to be pursued.

☐ Review jury instructions for causes of action and perform legal research to determine what proof is needed.

➤ **Cross References:**

Judicial Council of California Civil Jury Instructions (Matthew Bender, Official Publisher).

Substance of jury instructions, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 16.06.

☐ Consider all potential affirmative defenses [ see *Ch. 14, Answers*, 14.19].

☐ Consider burdens of proof and persuasion for each cause to be pursued and each potential affirmative defense.

➤ **Cross Reference:**

Burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

☐ Satisfy any claim requirements [ see *Ch. 4, Limitation of Actions*, 4.07 -4.09]:

☐ Government claims.

☐ Claims against decedent's estates.

☐ Insurance claims.

☐ Exhaust any administrative remedies.

☐ Identify forum [ see *Ch. 6, Determining Forum*]:

☐ Contractual arbitration:

☐ To be pursued; or

☐ Resisted.

☐ Action in state or federal court.

☐ In which county or federal district.

☐ In which courthouse.

☐ If state, unlimited or limited jurisdiction.

☐ Identify any related cases [ *see Ch. 32, Notice of Related Cases, Consolidation, Coordination, and Severance of Actions, 32.03 et seq.*].

☐ Continuing duty while case is pending.

☐ Draft complaint [ *see Ch. 7, Complaints*].



**Warning:**

Filing the signed complaint without adequate investigation of underlying facts and law may result in sanctions [CCP § 128.7(a)].

☐ Exclude or redact social security and financial account numbers and consider filing optional confidential identifier reference list [see 7.06[10]].

☐ Fill out Civil Case Cover Sheet [ *see Ch. 7, Complaints*].

☐ Determine whether to identify case as complex on Civil Case Cover Sheet [ *see Ch. 7, Complaints, and Ch. 23, Case Management*].

☐ Fill out Civil Case Cover Sheet [ *see Ch. 7, Complaints, 7.20, 7.43*].

☐ If not identifying case as complex, consider which case management plan case is likely to be assigned or if it is likely to be exempt [ *see Ch. 23, Case Management*].

☐ Include certificate of merit if case is professional negligence action against an architect, engineer, or land surveyor [CCP § 411.35].

- ☐ Determine if TRO should be requested to protect status quo [ see Ch. 18, TROs and Preliminary Injunctions].

**Timing:**

File with complaint or anytime thereafter [CCP § 527(c); Cal Rules Ct, Rule 3.1150(b)].

- ☐ Determine whether writ of attachment should be requested to secure recovery [ see Ch. 19, Attachment].

**Timing:**

File with complaint or anytime thereafter [CCP §§ 483.010-483.020, 484.010, 484.020, 484.030, 485.210].

- ☐ If action concerns real property, consider filing notice of pendency of action in county recorder's office where property is situated [ see Ch. 21, Lis Pendens].

**Timing:**

File notice of lis pendens at time complaint filed or anytime thereafter [CCP § 405.20].

- ☐ Determine whether grounds exist for gag order at this stage of the action.

**Cross Reference:**

Gag orders, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 2.30 *et seq.*

- ☐ Consider motion to seal complaint in whole or in part, and if so, initially lodging complete complaint with court conditionally under seal, along with filing of redacted complaint.

**Cross Reference:**

Sealing court records, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 2.11 *et seq.*

- ☐ File complaint and have summons issued.



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Chapter 1 Litigation Milestone Checklists  
II. FIRST STEPS IN FILING OR RESPONDING TO A LAWSUIT

*1-1 MB Practice Guide: CA Pretrial Civil Procedure 1.03*

**1.03 CHECKLIST: Plaintiff's Next Steps When Lawsuit Is Filed.**

- ☐ Serve summons and complaint [ see Ch. 8, Service of Summons].



**Timing:**

Within 60 days of filing under trial court delay reduction rules.

- ☐ Consider whether voluntary mediation or arbitration might be beneficial.



**Cross Reference:**

California Forms of Pleading and Practice, Ch. 30, Using Alternative Dispute Resolution;  
Ch. 31, Mediation (Matthew Bender).

- ☐ Be prepared to discuss possibility of judicially mandated mediation or arbitration [ see Ch. 24, Pretrial ADR].



**Timing:**

Mediation may occur as soon as 60 days after the complaint is filed and must be completed within 60 days after referral [Cal Rules Ct, Rule 3.876(c)]. Arbitration cannot occur until a minimum of 210 days after the filing of the complaint [Gov Code § 68616(g)].

- ☐ Prepare discovery plan if not done.



**Cross References:**

Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 1, Strategy and

Planning: Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 4, Planning E-Discovery.

☐ Commence early discovery.



**Timing:**

Written discovery can be served by plaintiff 10 days after serving summons and complaint [*CCP* §§ 2030.020(b), 2031.020(b), 2033.020(b)], except in unlawful detainer actions or other proceedings under *CCP* § 1159-1179a, in which case the waiting period is 5 days [*CCP* §§ 2030.020(c), 2031.020(c), 2033.020(c)]. Deposition notice can be served by plaintiff 20 days after service of summons and complaint or appearance of defendant [*CCP* § 2025.210(b)].





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Chapter 1 Litigation Milestone Checklists  
II. FIRST STEPS IN FILING OR RESPONDING TO A LAWSUIT

*1-1 MB Practice Guide: CA Pretrial Civil Procedure 1.04*

**1.04 CHECKLIST: Defendant's First Steps.**



Calendar time for response; generally 30 days after service of summons [CCP § 412.20(a)(3)].

☐

Review complaint.

☐

Gather additional initial facts from potential client [ *see* Ch. 2, Client Interview].

☐

Perform conflicts check [ *see* Ch. 3, *Beginning and Terminating the Attorney-Client Relationship*, 3.03 et seq.].

☐

Review costs and risks of representing client in litigation:

☐

Can client afford to pay attorney fees and costs?

☐

Are you knowledgeable enough in area of law to competently handle case?

☐

Is client credible?

☐

Will client make a good witness?

☐

Has client been interviewed by other attorneys who would not take case?

☐

Has client been represented by another attorney? If so, approach case with great

caution.

- ☐ How settled is the area of law on which the plaintiff's claim is based?
- ☐ If contract is involved, check for attorney fee clause.
- ☐ Decide on fee arrangement with client [ *see Ch. 3, Beginning and Terminating the Attorney-Client Relationship, 3.11 et seq.*]:
  - ☐ If hourly fee, try to obtain advance fee (or retainer) from client.
  - ☐ Prepare and have client execute retention letter.
- ☐ Determine whether defendant has the capacity to defend the action [ *see Ch. 5, Parties, 5.08 et seq.*].
  - ☐ If entity, is entity suspended?
  - ☐ Is guardian ad litem required?
- ☐ Determine whether dispute is or may be within scope of an arbitration agreement [ *see Ch. 6, Determining Forum, 6.03 et seq.*].
- ☐ Further investigate facts of the case, including:
  - ☐ Obtain all relevant documents in the client's possession, including:
    - ☐ Any correspondence between the parties.
    - ☐ Written statements made by the parties to others.
    - ☐ Insurance policies.
  - ☐ Witness interviews. Determine:
    - ☐ Do witnesses verify client's version of event?
    - ☐ Will key witnesses be available to testify at trial?
  - ☐ View publicly accessible sites.

- ☐ Gather publicly available documents.
- ☐ Ensure protection of tangible evidence in hands of third parties.
- ☐ Give notice to insurance carrier if there is any potential for coverage under any of client's insurance policies [ see *Ch. 4, Limitation of Actions, 4.07*].
- ☐ Consider counterdesignation of any matter on Civil Case Cover Sheet, such as whether case is complex [ see *Ch. 23, Case Management*].
- ☐ Determine whether court has personal jurisdiction over defendant [ see *Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction, 9.03 et seq.*]:
  - ☐ Was defendant served with summons and complaint?
  - ☐ Was summons or service defective?
  - ☐ Does non-resident defendant have sufficient contacts with California so as to justify exercise of jurisdiction?
  - ☐ If not, prepare and file motion to quash service of summons.

**Timing:**

File on or before last day on which defendant is required to plead [*CCP § 418.10(a)(1)*], prior to or concurrent with the filing of answer, demurrer, or motion to strike the complaint.

**Warning:**

Filing of demurrer or motion to strike the complaint without moving to quash results in defendant waiving the issues of personal jurisdiction and adequacy of service of process [*CCP § 418.10(e)(3)*]. In addition, prudent counsel would not answer without moving to quash, even though section 418.10(e)(3) does not refer to answering without moving to quash.

- ☐ Determine whether suitable alternative forum for trial exists outside of California or contract in dispute between the parties contains forum selection clause directing use of different forum [ see *Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction, 9.23 et seq.*]. If so:
  - ☐ Prepare and file motion to dismiss or stay on the ground of inconvenient forum [*CCP § 430.30*].

**Timing:**

File on or before last day on which defendant is required to plead [*CCP § 418.10(a)(2)*], prior to or concurrent with the filing of answer, demurrer, or motion to strike the

complaint.



**Warning:**

Defendant's failure to file motion to dismiss on ground of inconvenient forum before or with demurrer or motion to strike results in defendant waiving the issue of inconvenient forum [CCP § 418.10(e)(3)]. In addition, prudent counsel would not answer without moving to quash, even though section 418.10(e)(3) does not refer to answering without moving to quash.

☐ Determine whether any grounds exist for a mandatory or discretionary dismissal for delay in serving summons and complaint under CCP §§ 583.210-583.250, 583.410-583.430.

☐ If so, prepare and file motion to dismiss for delay in serving summons and complaint [ see Ch. 9, *Motions to Quash and Other Objections to Personal Jurisdiction*, 9.40 et seq.].



**Timing:**

On or before last day on which defendant is required to plead [CCP § 418.10(a)(3)], prior to or concurrent with filing of answer, demurrer, or motion to strike the complaint.



**Warning:**

Defendant's failure to file motion to dismiss for before or with demurrer or motion to strike results in defendant waiving the issue of delay in serving summons and complaint [CCP § 418.10(e)(3)]. In addition, prudent counsel would not answer without moving to quash, even though section 418.10(e)(3) does not refer to answering without moving to quash.

☐ If motions to quash, dismiss on the ground of inconvenient forum, or delay in serving summons and complaint are denied, defendant may file petition for writ of mandate with appellate court, file demurrer or motion to strike complaint, or file answer [ see Ch. 9, *Motions to Quash and Other Objections to Personal Jurisdiction*, 9.48 et seq.].

☐ Examine complaint for facial defects and consider defenses that can be established by facts of which the court can take judicial notice, including:



☐ Lack of subject matter jurisdiction [ see Ch. 10, *Dismissal for Lack of Subject Matter Jurisdiction*].



☐ Failure to state cause of action [ see Ch. 11, *Demurrers and Motions for Judgment on the Pleadings*, 11.03 et seq.].



☐ Is action barred by statute of limitations or laches [ see Ch. 4, *Limitation of Actions*], res judicata, or some other affirmative defense?



**Cross References:**

*California Forms of Pleading and Practice*, Ch. 345, *Limitation of Actions*, Appendix,

*Table of Limitation Periods, § 345.150; Ch. 491, Res Judicata (Matthew Bender).*

- ☐ Does complaint fail to plead an essential element of a cause of action?
- ☐ Is action premature?
- ☐ Does plaintiff lack capacity or standing to sue [ see Ch. 5, Parties]?
- ☐ Did plaintiff state legally cognizable cause of action that is only maintainable against someone other than defendant?
- ☐ Is complaint uncertain, ambiguous, or unintelligible?
- ☐ Have the proper parties been joined?
- ☐ Is there another action pending between same parties on same cause(s) of action?
- ☐ If a contract action, is it ascertainable from complaint whether contract was written, oral, or implied by conduct?
- ☐ Have the requisite certificates been filed with complaint?
  - ☐ E.g., a certificate indicating merit to a professional negligence action under *CCP § 411.35*.
- ☐ If a facial deficiency is found, prepare and file a demurrer [ see *Ch. 11, Demurrers and Motions for Judgment on the Pleadings, 11.15 et seq.*].



**Timing:**

File within 30 days of service of complaint [*CCP § 430.40(a)*].

- ☐ If demurrer is overruled, generally file answer within 10 days [*CCP § 472a(b)*; *Cal Rules Ct, Rule 3.1320(g)*].
- ☐ Determine whether all or any part of complaint contains irrelevant, false or improper matter or is not in conformity with law [*CCP § 436*]. If so, file motion to strike [ see *Ch. 12, Motions to Strike*].



**Timing:**

File concurrently with demurrer or within time allowed to file answer [*CCP § 435(b)*].



**Warning:**

If motion to strike is filed without a demurrer, the time to answer is extended but not the time to file

demurrer [CCP § 435(c), (d)].

- ☐ Determine whether complaint constitutes strategic litigation against public participation (SLAPP) [CCP § 425.16].  
If so, file special motion to strike [ see Ch. 13, Anti-SLAPP Motions].



**Timing:**

File within 60 days of service of complaint or in court's discretion, at later time [CCP § 425.16(f)].



**Warning:**

Motion stays discovery [CCP § 425.16(g)].

- ☐ Determine whether the complaint constitutes a SLAPPback action [CCP § 425.18(b)(1)]. If so, file special motion to strike [ see Ch. 13, Anti-SLAPP Motions, 13.22A et seq.].



**Timing:**

File within 120 days of service of complaint or as court permits within statutory bounds of its discretion [CCP § 425.18(d)].

- ☐ If motion to strike entire complaint or portion thereof is denied, prepare and file answer. If motion to strike portion of complaint is granted, file answer to remaining portions of complaint [see Ch. 14, Answers].



**Timing:**

Time to file answer is within court's discretion [CCP § 472a(d)].

- ☐ Determine whether action was filed in the proper court [ see Ch. 6, Determining Forum, 6.45 et seq.].



If not, prepare and file a motion to transfer to a court of proper venue.



**Timing:**

File motion to transfer with answer, demurrer, or motion to strike, or without answering or demurring, within time allowed to respond to complaint [CCP § 396b(a)].

- ☐ If motion to transfer to a court of proper venue is denied, defendant may file petition for writ of mandate with appellate court or file answer [ see Ch. 6, Determining Forum, 6.56 et seq.].



**Timing:**

File answer within 30 days if not already filed [Cal Rules Ct, Rule 3.1326].

- ☐ If motion to transfer to a court of proper venue is granted, file answer within 30 days from the date the receiving court mails notice of receipt of the case and its new case number [Cal Rules Ct, Rule 3.1326].

- ☐ Determine whether complaint misstated jurisdictional classification of case or failed to state that action is limited

civil case [ see Ch. 15, Reclassification of Cases].

- ☐ If so, file motion for reclassification.



**Timing:**

File motion for reclassification within time allowed for filing the answer [CCP § 403.040(a)].



**Warning:**

Motion for reclassification does not extend the time to answer [CCP § 403.040(a)].

- ☐ Before preparing answer, consider whether grounds exist to compel contractual arbitration [see CCP § 1281.2; Ch. 6, *Determining Forum*, 6.03 et seq.].

- ☐ If so, file petition to compel arbitration.



**Timing:**

File petition within time allowed for filing answer.

- ☐ If petition is denied, defendant may file appeal or has 15 days from the date of denial to file answer [CCP § 1281.7].



**Strategic Point:**

Since order denying arbitration is directly appealable, all proceedings in trial court are stayed pending resolution of appeal [CCP § 916].

- ☐ Determine whether the plaintiff is or has been declared a vexatious litigant [CCP §§ 391, 391.7]. If so, file motion for order for plaintiff to provide security for defendant's costs and to require plaintiff to obtain leave of court to file new litigation in propria persona [ see Ch. 35, *Sanctions*, 35.15A et seq.].



**Timing:**

File at any time before entry of final judgment [CCP § 391.1].

- ☐ Prepare answer [ see Ch. 14, *Answers*].



Go through each allegation of complaint with defendant to determine which facts and claims are untrue.



Identify potential defenses and affirmative defenses.



Review jury instructions (search by cause of action) for affirmative defenses to determine what proof is needed.

➤ **Cross References:**

*California Forms of Pleading and Practice, Ch. 26, Answers, Appendix, Table of Affirmative Defense Forms, § 26.150 et seq. (Matthew Bender).*

Text of jury instructions, see Judicial Council of California Civil Jury Instructions (Matthew Bender, Official Publisher).

Substance of jury instructions, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 16.06.*

☐ Determine whether any information collected from client constitutes basis for cross-complaint against any plaintiff, co-defendant, or nonparty [ see Ch. 16, Cross-Complaints].

☐ If so, and cross-complaint is against plaintiff, file before or with answer [CCP § 428.50(a)].

☐ If so, and cross-complaint is against a co-defendant or nonparty, file at any time before court has set date for trial [CCP § 428.50(b)].

☐ Consider burdens of proof and persuasion for each of plaintiff's causes and each potential affirmative defense.

➤ **Cross Reference:**

Burdens of proof and persuasion, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.*

☐ Exclude or redact social security and financial account numbers and consider filing optional confidential identifier reference list [see 7.06[10]].

☐ If plaintiff filed motion for gag order and/or to seal part or all of complaint, consider opposing the filed motion(s) by filing memorandum of points and authorities and, if proof of facts is required, supporting affidavits or declarations.

➤ **Cross Reference:**

Opposing motion for gag order, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 2.30 et seq.*

Opposing motion to seal court records, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 2.11 et seq.*

☐ Determine whether grounds exist for filing motion for gag order at this stage of the action.

➤ **Cross Reference:**

Gag orders, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 2.30 et seq.*

☐ Consider motion to seal response(s) in whole or in part, and if so, initially lodging the respective complete



response with court conditionally under seal, along with filing of redacted response.

 **Cross Reference:**

Sealing court records, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 2.11 et seq.*

- ☐ File and serve answer [ see Ch. 14, Answers].

 **Timing:**

Generally, within 30 days after receiving summons and complaint [*CCP* § 412.20(a)(3)].

- ☐ Initiate discovery.

 **Timing:**

Defendant may commence discovery at any time after being served with complaint or appearing in action [*CCP* §§ 2025.210(a), 2031.020(a), 2033.020(a)].

 **Cross References:**

Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 1, Strategy and Planning, and chapters on specific discovery tools; Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 4, Planning E-Discovery.



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**1.05 CHECKLIST: Plaintiff's Responses.**

☐ If defendant does not answer within 30 days or otherwise appear in action within time limits in CCP § 585, plaintiff should file and serve on defendant request for entry of default [ *see Ch. 36, Defaults and Motions for Relief, 36.11 et seq.*].

☐ If amount of damages are not specified in complaint or punitive damages are sought, serve defendant with statement of damages in same manner as service of summons [CCP §§ 425.11 (c), (d), 425.115].

☐ After entry of default, seek entry of default judgment [see CCP § 585; *see also Ch. 36, Defaults and Motions for Relief, 36.44 et seq.*].



**Timing:**

Within 45 days of entry of default unless court granted extension of time [*Cal Rules Ct, Rule 3.110(h)*].

☐ File opposing memorandum, attaching affidavits or declarations if proof of facts is required, as needed to oppose any of the following actions taken by defendant:

☐ Petition to compel arbitration [ *see Ch. 6, Determining Forum, 6.20 et seq.*].

☐ Motion to quash [ *see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction, 9.14 et seq.*].

☐ Motion to stay or dismiss for inconvenient forum [ *see Ch. 9, Motions to Quash and Other*

*Objections to Personal Jurisdiction, 9.33 et seq.].*

- ☐ Demurrer [ *see Ch. 11, Demurrers and Motions for Judgment on the Pleadings, 11.20 et seq.*].
- ☐ Motion to dismiss for lack of subject matter jurisdiction [ *see Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction*].
- ☐ Motion to change venue under *CCP* § 396b [ *see Ch. 6, Determining Forum, 6.50 et seq.*].
- ☐ Motion to dismiss for delay in prosecution [ *see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction, 9.45 et seq.*].
- ☐ Motion to strike [ *see Ch. 12, Motions to Strike, 12.15 et seq.*].
- ☐ Special motion to strike strategic litigation against public participation [ *see Ch. 13, Anti-SLAPP Motions, 13.14 et seq.*].
- ☐ Special motion to strike SLAPPback action [ *see Ch. 13, Anti-SLAPP Motions, 13.22F*].
- ☐ Motion for declaration that plaintiff is vexatious litigant, or for order for plaintiff to provide security for defendant's costs or requiring plaintiff to obtain leave of court to file new litigation in propria persona [ *see Ch. 35, Sanctions, 35.15A et seq.*].



**Timing:**

File and serve opposition papers at least 9 court days prior to day scheduled for hearing [CCP §§ 465, 1005(b), 1011-1013, 1015].



**Cross References:**

See applicable chapters in Matthew Bender's California Points and Authorities for numerous memoranda.

- ☐ Motion for gag order.



**Cross Reference:**

Opposing motion for gag order, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 2.30 et seq.*

- ☐ Motion to seal response.



**Cross Reference:**

Opposing motion to seal court records, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 2.11 et seq.*

☐ Plaintiff may respond to defendant's answer by:

☐ Filing and serving a demurrer to the answer [*CCP* § 430.40(b); *see Ch. 11, Demurrers and Motions for Judgment on the Pleadings, 11.03 et seq.*].

☐ Filing and serving a motion to strike the answer [*CCP* §§ 435(b)(1), 430.40(b); *see Ch. 12, Motions to Strike. 12.03 et seq.*].



**Timing:**

Must be served and filed within 10 days of service of answer [*CCP* § 430.40(b)].

☐ Plaintiff must respond to cross-complaint by:

☐ Filing and serving a demurrer to the cross-complaint [ *see Ch. 11, Demurrers and Motions for Judgment on the Pleadings, 11.03 et seq.*].

☐ Filing and serving a motion to strike the cross-complaint [ *see Ch. 12, Motions to Strike. 12.03 et seq.*].

☐ Motion to quash [ *see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction, 9.03 et seq.*].

☐ Motion to stay or dismiss for inconvenient forum [ *see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction, 9.23 et seq.*].

☐ Motion to change venue under *CCP* § 396b [ *see Ch. 6, Determining Forum, 6.45 et seq.*].

☐ Motion to dismiss for delay in service of summons under *CCP* §§ 583.210-583.250 [ *see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction, 9.40 et seq.*].

☐ Filing and serving an answer to the cross-complaint [ *see Ch. 14, Answers*].



**Timing:**

Must be filed within 30 days after service of the cross-complaint to avoid default [*CCP* §§ 432.10, 585(e)].



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Chapter 1 Litigation Milestone Checklists  
III. PRETRIAL STEPS

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**1.06 CHECKLIST: Case Management Process.**

- ☐ Calendar date for case management conference [ *see Ch. 23, Case Management, 23.06 et seq.*].



**Timing:**

Court must give at least 45 days notice to all parties.

- ☐ Meet and confer with all other parties before conference [ *see Ch. 23, Case Management*].



Discuss discovery schedule and any anticipated motions, try to reach stipulations on uncontested issues, and discuss settlement possibilities.



**Timing:**

Meet and confer must be held at least 30 days prior to case management conference.

- ☐ Determine whether action is entitled to precedence or preference in the setting of trial date. If so, and you want an early trial date, indicate grounds on case management statement and file motion in time to be heard at case management conference [ *see Ch. 23, Case Management*].

- ☐ Determine whether to request jury trial.



**Cross Reference:**

Choosing non-jury or jury trial, *see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 5.03 et seq.*

Requesting non-jury trial, *see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil*

*Procedure, 5.12 et seq.*

- ☐ Determine whether to request bifurcated trial.



**Cross Reference:**

Requesting separate trials of issue or phased trials, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 1.15 et seq.*

- ☐ Identify any related cases.
- ☐ Determine whether action is subject to mandatory judicial arbitration; if not, consider agreeing to submit action to mediation or arbitration [ see Ch. 24, Pretrial ADR].
- ☐ Prepare, file, and serve case management statement [ see Ch. 23, Case Management].



**Timing:**

Must be served no later than 15 days before date set for case management conference.

- ☐ Attend case management conference in person and be prepared to discuss and commit to positions on the issues listed in *Cal Rules Ct, Rule 3.724, 3.727, 3.729* [ see Ch. 23, Case Management].
- ☐ Review case management order, which controls unless modified, and calendar deadlines set by the order.



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Chapter 1 Litigation Milestone Checklists  
III. PRETRIAL STEPS

*1-1 MB Practice Guide: CA Pretrial Civil Procedure 1.07*

**1.07 CHECKLIST: Pretrial Motions and Steps Initiated by Plaintiff.**

☐ Consider moving for summary judgment if undisputed facts show that there is no defense to plaintiff's action or that a cross-complaint filed by defendant lacks merit [ *see* Ch. 38, Summary Judgment].

☐ Consider moving for summary adjudication as to one or more causes of action to which there is no defense in the alternative in the summary judgment motion or as a separate motion.



**Timing:**

File motion for summary judgment any time after 60 days have elapsed since general appearance of defendant against whom motion is directed. Motion must be heard but no later than 30 days before the trial date and on 75 days' notice (with longer periods required based on manner of service) [CCP § 437c(a), (c)].

☐ If defendant pleads special defenses, such as statute of limitations or res judicata, consider moving for separate trial of those defenses [ *see* Ch. 23, *Case Management*, 23.20 et seq.].



Intent to bifurcate should have been indicated in case management statement.



**Timing:**

CCP § 597 does not provide a particular procedure for the making of a motion for a separate trial on defenses that do not relate to the merits of the action. Three different practices are commonly used:

- Counsel makes a motion on written notice before trial.
- Motion is brought in limine and is heard by the trial judge.
- Court, on its own motion, orders a separate trial in accordance with its discretionary authority to regulate the order of proof under *Evid Code* § 320.

**Cross Reference:**

Requesting separate trials of special defenses, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 1.15 et seq.

Making motions in limine, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 4.20 et seq.

- ☐ If separate trials of the issues will further convenience, avoid prejudice, or be expeditious, consider moving for separate trials [ see *Ch. 23, Case Management*, 23.20 et seq.].

**Timing:**

Motion for bifurcation must be heard not later than the pretrial conference if one is held, or, if none, no later than 30 days before trial. The court, acting on its own motion, may make the order at any time [CCP § 598].

**Warning:**

Since very few, if any, local rules currently refer to the final conference before trial as a "pretrial conference," counsel should file and serve bifurcation motion in time to be heard at the conference designated in the local rules as the final conference before trial.

**Cross Reference:**

Final pretrial conferences, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 4, Final Pretrial Conference.

**Cross Reference:**

Requesting separate trials of issue or phased trials, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 1.15 et seq.

- ☐ If multiple actions are pending that concern common questions of law or fact, consider moving for consolidation of cases for all purposes or only for trial of certain common issues [CCP § 1048; *Cal Rules Ct, Rule 3.350*; see *Ch. 32, Notice of Related Cases, Consolidation, Coordination, and Severance of Actions*, 32.07 et seq.].

**Timing:**

Motion can be filed at any time and should be made as soon as counsel determines the value of consolidation.

**Distinguish:**

Consolidation applies to cases filed in the same county; coordination is the assignment of cases filed in



different counties to a single judge in one of the counties [*CCP* §§ 403, 404 *et seq.*].

☐ If needed or desired, amend complaint or answer to cross-complaint [ *see Ch. 34, Amended and Supplemental Pleadings, 34.03 et seq.*].

☐ Amendment is allowed once as matter of right before responsive pleading is filed [*CCP* § 472].

☐ Later amendments may be allowed by noticed motion if they are in furtherance of justice [*CCP* §§ 473(a), 576].



**Timing:**

Motion may be filed at any time before or after trial commences [*CCP* § 576].

☐ If pleadings should be modified to reflect recent facts, move to supplement complaint or answer to cross-complaint [ *see Ch. 34, Amended and Supplemental Pleadings, 34.22 et seq.*].



**Timing:**

No time limits on motion.

**Distinguish:**

Amendments correct errors in pleadings; supplemental pleadings add material facts that occurred after the original pleading was filed [*CCP* § 464].

☐ Consider filing a motion for judgment on the pleadings if the complaint states a cause of action and the answer does not state facts sufficient to constitute a defense to the complaint [*CCP* § 438(c)(1)(A); *see Ch. 11, Demurrers and Motions for Judgment on the Pleadings, 11.38 et seq.*].



**Timing:**

Motion for judgment on the pleadings may be filed at anytime, except that it cannot be filed after entry of any pretrial conference order or within 30 days of date set for trial, whichever is later [*CCP* § 438(e)].



**Warning:**

Motion for judgment on the pleadings cannot be based on same grounds as prior demurrer that was overruled [*CCP* § 438(g)].

☐ Move for continuance of trial date, if necessary [ *see Ch. 30, Continuances*].



**Timing:**

Motion for continuance must be filed when necessity of continuance becomes reasonably apparent.

☐ Consider making an offer to compromise or a settlement offer [ *see Ch. 37, Settlement and Release, 37.03 et seq.*].



**Timing:**

*CCP § 998* offer to compromise can be made at any time but not less than 10 days before trial. Offer expires 30 days after it is made or at start of trial or arbitration [*CCP § 998(b)*].



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Chapter 1 Litigation Milestone Checklists  
III. PRETRIAL STEPS

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**1.08 CHECKLIST: Defendant's Responses to Pretrial Motions and Steps Initiated by Plaintiff.**

☐ If default judgment is entered against defendant, determine whether grounds exist to have it set aside under *CCP* § 473 or any other applicable statute [ *see Ch. 36, Defaults and Motions for Relief, 36.65*].



**Timing:**

Move for relief should be sought as soon as possible after learning of default. Follow time limits set forth in particular statute that authorized the default judgment.

**Grounds:**

Defendant must show mistake, inadvertence, surprise or excusable neglect [*CCP* § 473(b)].

☐ File and serve any responses to all motions made by plaintiff at least 9 court days prior to the hearing scheduled on any such motion unless otherwise indicated by applicable statute [*see CCP* § 1005(b); *Cal Rules Ct, Rules 3.1103(a)(2), 3.1300*].

☐ If plaintiff demurs to defendant's cross-complaint or moves to strike it, file and serve a memorandum in opposition to the demurrer or motion [ *see Ch. 11, Demurrers and Motions for Judgment on the Pleadings, 11.20; Ch. 12, Motions to Strike, 12.15 et seq.*].

☐ If plaintiff answers the cross-complaint, determine whether grounds exist for a demurrer or motion to strike the answer and file and serve accordingly [ *see Ch. 11, Demurrers and Motions for Judgment on the Pleadings, 11.03 et seq.; Ch. 12, Motions to Strike, 12.03 et seq.*].



**Timing:**

Demurrer or motion to strike the answer must be filed and served within 10 days after service of the answer [CCP § 430.4(b)].

☐ If plaintiff files a motion for summary judgment or summary adjudication, file opposition papers not less than 14 days prior to noticed or continued date of hearing [CCP § 437c(b)(2); see Ch. 38, *Summary Judgment*, 38.19 et seq.].

☐ Consider filing a cross-motion for summary judgment.



**Warning:**

Cross motion requires 75 days' notice and must be heard by the court no later than 30 days before trial, so if original moving party files summary judgment motion on last day to do so (105 days before trial), it will be too late for opposing party to make cross motion without a stipulation or court approval [see CCP § 437c(a)]. Counsel should try to coordinate so that motion and cross motion are heard at same time by court.

☐ If plaintiff has made a settlement offer or offer to compromise, consider and accept or reject offer as appropriate.



**Timing:**

CCP § 998 offer to compromise can be made at any time but not less than 10 days before trial. If offer to compromise is not accepted prior to trial or arbitration or within 30 days after it is made, whichever occurs first, the offer is deemed withdrawn [CCP § 998(b)(2)].



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Chapter 1 Litigation Milestone Checklists  
III. PRETRIAL STEPS

*1-1 MB Practice Guide: CA Pretrial Civil Procedure 1.09*

**1.09 CHECKLIST: Additional Pretrial Motions and Steps That May Be Initiated by Defendant.**

☐ Consider moving for summary judgment if undisputed facts show that (1) plaintiff's causes of action have no merit because they are lacking an essential element or (2) defendant can establish an affirmative defense to each cause of action [ *see* Ch. 38, Summary Judgment].

☐ Consider moving for summary adjudication as to one or more causes of action to which there is no defense in the alternative in the summary judgment motion or as a separate motion.



**Timing:**

File motion for summary judgment any time after 60 days have elapsed since general appearance of defendant against whom motion is directed. Motion must be heard but no later than 30 days before the trial date and on 75 days' notice (with longer periods required based on manner of service) [CCP § 437c(a), (c)].

☐ To avoid multiplicity of actions or inconsistent decisions, consider moving to join a third party who should be a part of the case because he or she has the same rights against the defendant that plaintiff has [CCP §§ 378, 379, 389; *see* Ch. 5, Parties, 5.30 et seq.]. Defendant may also bring a new party into the action by cross-complaint [ *see* Ch. 16, Cross-Complaints, 16.03 et seq.].



**Timing:**

Motion or cross-complaint should be filed as early as possible to avoid prejudice to new party.

☐ If defendant has pled special defenses, such as statute of limitations or res judicata, defendant may want to move for separate trial of those [ *see* Ch. 23, Case Management, 23.20 et seq.].

- ☐ Intent to bifurcate should have been indicated in case management statement.



**Timing:**

*CCP § 597* does not provide a particular procedure for the making of a motion for a separate trial on defenses that do not relate to the merits of the action. Three different practices are commonly used:

- Counsel makes a motion on written notice before trial.
- Motion is brought in limine and is heard by the trial judge.
- Court, on its own motion, orders a separate trial in accordance with its discretionary authority to regulate the order of proof under *Evid Code § 320*.



**Cross References:**

Requesting separate trials of special defenses, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 1.15 et seq.*

Making motions in limine, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 4.20 et seq.*

- ☐ If separate trials of the issues will further convenience, avoid prejudice, or be expeditious, consider moving for separate trials.



**Timing:**

Motion for bifurcation must be heard not later than the pretrial conference, if any, or, if none, no later than 30 days before trial. The court, acting on its own motion, may make the order at any time [*CCP § 598*].



**Warning:**

Since very few, if any, local rules currently refer to the final conference before trial as a "pretrial conference," counsel should file and serve bifurcation motion in time to be heard at the conference designated in the local rules as the final conference before trial.



**Cross Reference:**

Final pretrial conferences, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 4, Final Pretrial Conference.*



**Cross Reference:**

Requesting separate trials of issue or phased trials, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 1.15 et seq.*

- ☐ If multiple actions are pending that concern common questions of law or fact, consider moving for consolidation

of the cases for all purposes or only for trial of certain common issues [CCP § 1048; *Cal Rules Ct, Rule 3.350*; see *Ch. 32, Notice of Related Cases, Consolidation, Coordination, and Severance of Actions*, 32.07 et seq.].

**Distinguish:**

Consolidation applies to cases filed in the same county; coordination is the assignment of cases filed in different counties to a single judge in one of the counties [CCP §§ 403, 404 et seq.].



**Timing:**

Motion can be filed at any time and should be made as soon as counsel determines the value of consolidation.



Amend answer or cross-complaint if needed or desired [ see *Ch. 34, Amended and Supplemental Pleadings*, 34.03 et seq.].



Amendment allowed once as matter of right before responsive pleading is filed [CCP § 472].



Later amendments may be allowed by noticed motion if they are in the furtherance of justice [CCP §§ 473(a), 576].



**Timing:**

Motion may be filed at any time before or after trial commences [CCP § 576].



If pleadings should be modified to reflect recent facts, move to supplement answer or cross-complaint [ see *Ch. 34, Amended and Supplemental Pleadings*, 34.22 et seq.].



**Timing:**

No time limits on motion.

**Distinguish:**

Amendments correct errors in pleadings; supplemental pleadings add material facts that occurred after the complaint or cross-complaint were filed [CCP § 464].



Consider filing a motion for judgment on the pleadings if complaint fails to state a cause of action or the court does not have subject matter jurisdiction over the case [CCP § 438 (c)(1)(B); see *Ch. 11, Demurrers and Motions for Judgment on the Pleadings*, 11.38].



**Timing:**

Motion for judgment on the pleadings may be filed at anytime, except that it cannot be filed after entry of any pretrial conference order or within 30 days of date set for trial, whichever is later [CCP § 438(e)].



**Warning:**

Motion for judgment on the pleadings cannot be based on same grounds as a demurrer that has been overruled [CCP § 438(g)].



If grounds exist for discretionary [CCP §§ 583.410-583.430] or mandatory [CCP §§ 583.310-583.360] dismissal

for failure to bring action to trial, serve and file motion for dismissal [see Ch. 40, Dismissal for Delay in Bringing to Trial]. The court may also make the motion [CCP § 583.360; *Cal Rules Ct, Rule 3.1340*].

**Timing:**

The earliest possible time for a discretionary dismissal for delay in bringing to trial is two years after the action was commenced [*Cal Rules Ct, Rule 3.1340(a)*]. A motion for discretionary dismissal filed by a party is heard on 45 days' notice [*Cal Rules Ct, Rule 3.1342(a)*].

Mandatory dismissal applies if the case is not brought to trial within five years after the action was commenced [CCP §§ 583.310-583.360].



Consider making an offer to compromise or a settlement offer [ see Ch. 37, *Settlement and Release*, 37.03 et seq.].

**Timing:**

CCP § 998 offer to compromise can be made at any time but not less than 10 days before trial. Offer expires 30 days after it is made or at start of trial or arbitration [CCP § 998(b)].





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**1.10 CHECKLIST: Plaintiff's Responses to Pretrial Motions and Steps Initiated by Defendant.**

☐ File and serve any responses to all defense motions at least 9 court days prior to the hearing scheduled on any such motion unless otherwise indicated by applicable statute [*see CCP § 1005(b); Cal Rules Ct, Rules 3.1103(a)(2), 3.1300*].

☐ If defendant files a motion for summary judgment or summary adjudication, file opposition papers not less than 14 days prior to noticed or continued date of hearing [*CCP § 437c(b)(2); see Ch. 38, Summary Judgment, 38.19 et seq.*].

☐ If plaintiff has not done so already, he or she should consider filing a cross motion for summary judgment.



**Warning:**

Cross motion also requires 75 days' notice and must be heard by the court no later than 30 days before trial so if original moving party files summary judgment motion on last day to do so (105 days before trial), it will be too late for opposing party to make a cross motion without a stipulation or court approval. Counsel should try to coordinate so that motion and cross motion are heard at same time by court.

☐ If defendant has made a settlement offer or offer to compromise, consider and accept or reject offer as appropriate.



**Timing:**

*CCP § 998* offer to compromise can be made at any time but not less than 10 days before trial. If offer to compromise is not accepted prior to trial or arbitration or within 30 days after it is made, whichever occurs first, the offer is deemed withdrawn [*CCP § 998(b)(2)*].



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Chapter 2 Client Interview

*1-2 MB Practice Guide: CA Pretrial Civil Procedure 2.syn*

**§ 2.syn Synopsis to Chapter 2: Client Interview**

2.01 Scope.

2.02 Objective and Strategy.

2.03 CHECKLIST: Client Interview by Plaintiff's Attorney.

2.04 CHECKLIST: Client Interview by Defendant's Attorney.

2.05 Gathering All Relevant Facts.

2.05[1] Obtaining Basic Information.

2.05[1][a] Type of Claim.

2.05[1][b] When Claim First Became Known to Potential Client.

2.05[1][c] Names of Opposing Party or Parties.

2.05[1][d] Potential Client Should Bring All Relevant Documents to Initial Meeting.

2.05[2] Questionnaire to Potential Client.

2.05[3] Meeting With Potential Client to Obtain More Detailed Information.

2.05[3][a] Information About Potential Client.

2.05[3][b] Information About Claim.

2.05[3][c] Information About Opposing Party or Parties.

2.05[3][d] Information About Witnesses.

2.06 Explaining Costs of Litigation.

2.07 Explaining Litigation Process.

2.08 Outlining Steps to Be Taken After Interview.

2.09 Attorney Must Review All Documents Obtained From Potential Client.

2.10 Factors to Consider in Determining Whether to Represent Potential Client.

2.10[1] Financial Resources of Potential Client.

2.10[2] Existence of and Types of Conflicts With Current or Former Clients.

2.10[3] Competence to Handle Matter.

2.10[4] Availability to Represent Potential Client Effectively.

2.10[5] Viability of Claim or Defense.

2.10[6] Financial Resources of Opposing Party.

2.11 Procedure to Decline Representation.

2.12 Steps Prior to Representation.

2.12[1] Disclosing Potential or Actual Conflicts.

2.12[2] Obtaining Client Consent to Potential or Actual Conflicts.

2.12[3] Entering Into Fee Agreement.

2.12[3][a] Contingency Fee Cases.

2.12[3][b] Non-Contingency Fee Cases.

2.12[3][c] Fee Agreement Is Not Prerequisite to Attorney-Client Relationship.

2.13 Questionnaire for Potential Client.

2.14 Letter From Attorney Declining Representation.



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Chapter 2 Client Interview  
I. STRATEGY

*1-2 MB Practice Guide: CA Pretrial Civil Procedure 2.01*

**2.01 Scope.**

This chapter covers:

- Objective and strategy for the client interview [ *see* 2.02].
- Types of information to gather from potential client [ *see* 2.05; Form: *see* 2.13].
- Need to explain litigation costs and process, and post-interview steps to potential client [ *see* 2.06-2.08].
- Factors to consider in determining whether to represent potential client [ *see* 2.10].
- Procedure to decline representation [ *see* 2.11; Form: *see* 2.14].
- Steps to be taken prior to representation of client [ *see* 2.12].



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Chapter 2 Client Interview  
I. STRATEGY

*1-2 MB Practice Guide: CA Pretrial Civil Procedure 2.02*

**2.02 Objective and Strategy.**

The primary objective of the client interview is to gather information from a potential client to determine whether a viable cause of action exists and whether you can provide effective representation. Another purpose is to obtain information necessary to determine whether there are potential or actual conflicts with current or former clients that could prevent representation of the potential client or require disclosure and consent to the proposed representation.

The attorney should also be aware of the probability that the client might be attorney shopping. Instilling confidence in the prospective client by providing examples of similar cases handled and results achieved by the attorney are important in helping to assist a client in selecting you as their lawyer. With the very large number of lawyers in the State of California, it is essential to provide the perspective client with good reasons for retaining you as their counsel.

It is also important for you to consider the client's objectives and goals in the litigation. Do not undertake the representation of a client whose goals or expectation exceed that which you believe can realistically be achieved. The attorney who ignores this "warning signal" is likely to windup a defendant in a malpractice action.



**Trap:**

As a preliminary matter, obtain information to determine whether the statute of limitations for the prospective client's claim is about to expire [ see Ch. 4, Limitation of Actions].



**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.



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Chapter 2 Client Interview  
II. CLIENT INTERVIEW

*1-2 MB Practice Guide: CA Pretrial Civil Procedure 2.03*

**2.03 CHECKLIST: Client Interview by Plaintiff's Attorney.**

☐ Obtain basic information from potential client during an initial telephone conversation or at outset of initial meeting. Basic information should include:

☐ Type of claim.

**Discussion:**

See 2.05[1][a]

☐ When potential client first became aware of existence of claim.

**Discussion:**

See 2.05[1][b]

☐ Names of potential defendants.

**Discussion:**

See 2.05[1][c]

☐ Determine from initial conversation (or a subsequent meeting) whether it will be necessary to:

☐ Decline representation and/or refer matter to another attorney because of:

☐ Insufficient client financial resources to cover costs and attorney's fees (if representation will be on non-contingency basis).

**Discussion:**

See 2.10[1]

- ☐ Conflict of interest with potential defendant that cannot be waived by disclosure and consent.

**Authority:***Cal Rules Prof Conduct, Rule 3-310***Discussion:**

See 2.10[2]

- ☐ Lack of competence with subject matter of claim.

**Authority:***Cal Rules Prof Conduct, Rule 3-110(A)***Discussion:**

See 2.10[3]

- ☐ Lack of time to devote to matter and effectively represent potential client.

**Discussion:**

See 2.10[4]

- ☐ Determination that claim is not viable.

**Authority:***Cal Rules Prof Conduct, Rule 3-200(B)***Discussion:**

See 2.10[5]

- ☐ Determination that opposing party is insolvent or judgment-proof.

**Discussion:**

See 2.10[6]

- ☐ Associate with another attorney.

**Discussion:**

See 2.10[3]

- ☐ If initial contact is by telephone:

- ☐ Set a date and time for potential client to meet at attorney's office for an initial consultation.

**Prerequisite:**

If associating with another attorney, it will be necessary to coordinate the date and time of the meeting with the associated attorney so that the attorney can attend.

- ☐ Inform potential client of the fee, if any, that will be charged for the initial consultation.
- ☐ Request that potential client bring to the meeting all relevant documents.

**Discussion:**

See 2.05[1][d]

- ☐ Tell potential client that a questionnaire will be sent prior to meeting and that potential client is to complete the questionnaire and return it or bring it to the meeting.
- ☐ Prepare and send to potential client a questionnaire that is tailored as closely as possible for the type of claim asserted by potential client.
- ☐ Prepare and send to potential client a checklist of requested documents, tailored as closely as possible to the particular type of claim asserted by potential client.

**Discussion:**

See 2.05[2]

**Form:**

See 2.13

☐ At meeting with potential client:

- ☐ Briefly review questionnaire.
- ☐ Obtain greater detail about:

☐ Potential client.

**Discussion:**

See 2.05[3][a]

☐ Potential client's claim.

**Discussion:**

See 2.05[3][b]

☐ Potential defendants.

**Discussion:**

See 2.05[3][c]



- ☐ Potential witnesses.

**Discussion:**

See 2.03[3][d]

- ☐ Analyze likely cost of litigation, discuss cost with potential client, and determine client's ability to pay fees.

**Discussion:**

See 2.06

- ☐ Explain litigation process to potential client and provide letter outlining the process.

**Discussion:**

See 2.07

- ☐ Based on information gathered, inform potential client at the meeting that either:

- ☐ More investigation will be needed to determine whether you can or will represent potential client;

- ☐ You will represent client; or

- ☐ You must decline and:

- ☐ Provide potential client with name of another attorney; or

- ☐ Do not provide potential client with name of another attorney.

- ☐ If you decide further investigation is necessary, review documents received by potential client.

**Discussion:**

See 2.09

- ☐ If you decide to decline representation:

- ☐ Inform the potential client in writing of the decision.

- ☐ If decision was communicated orally, confirm in writing.

- ☐ Include warning as to statute of limitations.

**Discussion:**

See 2.11

**Form:**

See 2.14

☐ If you decide to represent potential client:

☐ If necessary, prepare for signature written disclosure of potential and/or actual conflicts and consent agreement.

**Discussion:**

See 2.12[1], [2]

☐ Draft fee agreement for signature.

**Discussion:**

See 2.12[3]



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Chapter 2 Client Interview  
II. CLIENT INTERVIEW

*1-2 MB Practice Guide: CA Pretrial Civil Procedure 2.04*

**2.04 CHECKLIST: Client Interview by Defendant's Attorney.**

☐ Obtain basic information from potential client during an initial telephone conversation or at outset of initial meeting. Basic information should include:

☐ Type of claim.

**Discussion:**

See 2.05[1][a]

☐ When potential client first became aware of existence of claim.

**Discussion:**

See 2.05[1][b]

☐ If received, caption(s) and file date(s) of complaint and other court papers.

☐ Name of plaintiff(s).

**Discussion:**

See 2.05[1][c]

☐ Determine from initial conversation (or a subsequent meeting) whether it will be necessary to:

☐ Decline representation and/or refer matter to another attorney because of:

☐ Insufficient client financial resources to cover costs and attorney's fees.

**Discussion:**

See 2.10[1]

- ☐ Conflict of interest with plaintiff that cannot be waived by disclosure and consent.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310*

**Discussion:**

See 2.10[2]

- ☐ Lack of competence with subject matter of claim.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-110(A)*

**Discussion:**

See 2.10[3]

- ☐ Lack of time to devote to matter and effectively represent potential client.

**Discussion:**

See 2.10[4]

- ☐ Determination that defense is not legally viable.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-200(B)*

**Discussion:**

See 2.10[5]

- ☐ Associate with another attorney.

**Discussion:**

See 2.10[3]

- ☐ If initial contact is by telephone:

- ☐ Set a date and time for potential client to meet at attorney's office for an initial consultation.

**Prerequisite:**

If associating with another attorney, it will be necessary to coordinate the date and time of the meeting with the associated attorney so that the attorney can attend.

- ☐ Inform potential client of the fee, if any, that will be charged for the initial consultation.

☐ Request that potential client bring to the meeting all relevant documents, including all court papers received.

**Discussion:**

See 2.05[1][d]

☐ Tell potential client that a questionnaire will be sent prior to meeting and that potential client is to complete the questionnaire and return it or bring it to the meeting.

☐ Prepare and send to potential client a questionnaire that is tailored as closely as possible for the type of claim asserted by the plaintiff.

☐ Prepare and send to potential client a checklist of requested documents, tailored as closely as possible to the particular type of claim asserted by the plaintiff.

**Discussion:**

See 2.05[2]

**Form:**

See 2.13

☐ At meeting with potential client:

☐ Briefly review questionnaire.

☐ Obtain greater detail about:

☐ Potential client.

**Discussion:**

See 2.05[3][a]

☐ The claim.

**Discussion:**

See 2.05[3][b]

☐ The plaintiff(s).

**Discussion:**

See 2.05[3][c]

☐ Potential witnesses.

**Discussion:**

See 2.05[3][d]

- ☐ Analyze likely cost of litigation, discuss cost with potential client and determine client's ability to pay fees.

**Discussion:**

See 2.06

- ☐ Explain litigation process to potential client and provide letter outlining the process.

**Discussion:**

See 2.07

- ☐ Based on information gathered, inform potential client at the meeting that either:

- ☐ More investigation will be needed to determine whether you can or will represent potential client;
- ☐ You will represent client; or
- ☐ You must decline and:

☐ Provide potential client with name of another attorney; or

☐ Do not provide potential client with name of another attorney.

- ☐ If you decide further investigation is necessary, review documents received by potential client.

**Discussion:**

See 2.09

- ☐ If you decide to decline representation:

- ☐ Inform the potential client in writing of the decision.
- ☐ If decision was communicated orally, confirm in writing.
- ☐ Include warning as to filing deadlines.

**Discussion:**

See 2.11

**Form:**

See 2.14

- ☐ If you decide to represent potential client:

- ☐ If necessary, prepare for signature written disclosure of potential and/or actual conflicts and consent agreement.

**Discussion:**

See 2.12[1], [2]

- ☐ Draft fee agreement for signature.

**Discussion:**

See 2.12[3]



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## **2.05 Gathering All Relevant Facts.**

### **2.05[1] Obtaining Basic Information.**

**2.05[1][a] Type of Claim.** In the initial contact with a potential client, which typically will be a telephone conversation, find out first what type of claim is involved. For example, if the claim involves a will contest and you have no probate experience the client will likely be better served by an attorney who has the requisite knowledge and experience. Then, you have the choice to decline representation, associate with another attorney who has probate experience, or refer the matter outright to another attorney.

#### **Cross References:**

Discussion of the consideration of an attorney's competence to handle a particular matter, see *2.10[3]*.

Discussion of the duty to practice with competence, see *Ch. 3, Beginning and Terminating the Attorney-Client Relationship, 3.06[4]*.

**2.05[1][b] When Claim First Became Known to Potential Client.** You must also determine when the claim arose. If the potential client has a claim, the statute of limitations will be an issue. Based on the type of claim and when the client first knew of the claim (or should have first become aware of the claim), you must evaluate the risk that the claim will become time barred if not filed soon. Similarly, when the potential client has a belief that a claim will soon be filed in court against him or her, if you determine that the claim may soon become time barred, you will not want the potential client to do or say anything to provoke an immediate filing.

#### **Cross References:**

Determining applicable statute of limitations, see *Ch. 4, Limitation of Actions, 4.03 -4.11*. Determining when limitation period begins to run, see *Ch. 4, Limitation of Actions, 4.12 -4.15*.

**2.05[1][c] Names of Opposing Party or Parties.** You will need to ascertain the names of the opposing party or parties. If you, or someone in your firm, represents or formerly represented one of the opposing parties, representation may not be possible. At the very least, representation may be possible only after the required disclosures are made, and



in certain circumstances, consents obtained.

#### **Cross Reference:**

Discussion of the consideration of actual or potential conflicts to representation of a potential client, see 2.10[1].



#### **Strategic Point:**

The basic information, such as the type of claim, when the claim arose, and the identities of the opposing parties, could be obtained in a face-to-face meeting. However, gathering this information can be done quickly over the phone and will speed up the process. If the basic information leads you to the conclusion that you cannot represent the potential client, neither you nor the potential client will have lost valuable time in a face-to-face meeting. In addition, if you decide that you need to associate with another attorney, arrangements can be made to have the other attorney present at the initial meeting.

**2.05[1][d] Potential Client Should Bring All Relevant Documents to Initial Meeting.** You should request that the potential client bring copies of all documents relevant to the claim. If the potential client is a defendant in an action, the potential client should also bring all court papers received, including, if available, the envelopes that the papers came in.

#### **Example:**

A former employee who believes he or she was wrongfully terminated should bring:

- Employment contract, if one exists.
- Performance evaluations.
- Employee handbook, manual, or policy memos.
- All documents pertaining to benefits and compensation.
- Termination letter.
- Any other documents that the potential client believes may be relevant.



#### **Strategic Point:**

Consider preparing or obtaining checklists of documents that can be used to request documents from a potential client. Each checklist could be based on a basic claim, such as an employment dispute, a personal injury action, marriage dissolution, a medical malpractice action, and a breach of contract claim. The appropriate checklist could be sent to the potential client prior to the initial meeting or its contents could be read over the phone.

**2.05[2] Questionnaire to Potential Client.** Prior to the initial meeting, it is good practice to send the potential client a questionnaire. In addition to asking basic information about the client, the questionnaire can seek information on the claim and the opposing parties. Each page of the questionnaire should be marked as attorney/client work product and privileged communication. The potential client may either return the completed questionnaire prior to the meeting or bring it to the meeting. The questionnaire facilitates the information gathering process and also forces the potential

client to organize his or her thoughts. The questionnaire will also be part of the client file--available for reference from time to time as the matter progresses.

**Form:**

See 2.13.

If time does not permit sending the questionnaire to the potential client before the meeting, the questionnaire may instead be provided at the initial meeting, in which case the client should be given time at the meeting to complete it.

**2.05[3] Meeting With Potential Client to Obtain More Detailed Information.**

**2.05[3][a] Information About Potential Client.** Although much information can be gathered over the phone or by mail or fax, there is no substitute for a face-to-face meeting with the potential client. It will give the client the opportunity to meet you and gain a degree of comfort with the person who may be handling the claim. It also gives you an opportunity to gauge what type of client you may be representing. Will the client make a good witness? Is the client credible?



**Strategic Point:**

To better assess the quality and credibility of the client as a witness, consider giving the client a "practice" witness preparation and questioning session up front to test the person's ability to convey the facts within his or her own knowledge.



**Cross Reference:**

Preparation of witnesses for examination, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 7.21 et seq.

In addition, if the potential client is an entity, such as a corporation or a partnership, gather as much information as possible about the entity's senior officers or partners.



**Strategic Point:**

Prior to the meeting, inform the potential client as to the fee, if any, that will be charged for the initial meeting.

**2.05[3][b] Information About Claim.** Details of the potential client's claim need to be obtained during the initial meeting. If the potential client brought the relevant documents, these documents can be briefly reviewed in the presence of the potential client. You should have the potential client recount his or her version of the events that gave rise to the claim in detail, even if this was already covered in the questionnaire. Your questions may elicit additional information. In addition, any discrepancies between the information in the questionnaire and the information given at the meeting could be a red flag, prompting you to delve deeper into the matter to determine the potential client's veracity.



**Strategic Point:**

If the claim involves a contract, pay particular attention to provisions in the contract that govern disputes, such as:

- Notice requirements.
- Shortened period of limitation.
- Forum selection provision.
- Arbitration provision.
- Releases of liability.
- Attorney's fees provision.
- Precondition to attorney's fees (e.g., participation in mediation).

**2.05[3][c] Information About Opposing Party or Parties.** The potential client should give you any information he or she has about the opposing party or parties. Often, the opposing party will be a former employer, a fellow businessman, or a medical professional who treated the potential client. In such case, the party or parties will have a history with the potential client that will be highly relevant to the litigation. If the claim involves a personal injury, such as an automobile accident, the client's recollection of the opposing party's demeanor and statements made at the accident could be critical to the outcome.

**2.05[3][d] Information About Witnesses.** You should ask the potential client the identity of all potential fact witnesses, both friendly and adverse. You will want to contact and interview key witnesses early on if you decide to take the case. If possible, the witnesses should be interviewed before filing the complaint or, if you represent the defendant, before filing an answer or cross-complaint.



**Strategic Point:**

To better assess the quality and credibility of the potential favorable witnesses, consider giving them a "practice" witness preparation and questioning session up front to test the person's ability to convey the facts within his or her own knowledge.



**Cross Reference:**

Preparation of witnesses for examination, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 7.21 et seq.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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## **2.06 Explaining Costs of Litigation.**

Once you learn the basic factual information and legal authority regarding the claim or case, try to estimate the likely cost of pursuing the litigation and discuss this with the potential client. Unless you are willing to take the case on a contingency, the client's ability to pay will be a major factor in deciding whether or not to represent the client.



### **Cross References:**

Recovery of costs and attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Chs. 24, Costs, and 25, Attorney's Fees.



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### **2.07 Explaining Litigation Process.**

Depending on the level of sophistication of the potential client, it may be necessary to provide some basic information on the litigation process. The potential client with a claim may have unrealistic expectations as to how quickly the court will dispense justice. The potential client has to understand that the process will take time and will involve the filing of a complaint, a response by the defendant, the taking of depositions, and, likely, a discussion of settlement. Likewise, the potential client who has had a claim filed against him or her may have a wrong impression of the process. Any misunderstandings at the early stage of litigation will often cause problems later. Regardless of whether you decide at the meeting to represent the potential client or inform the client that you still have to perform a conflict check or conduct further investigation, you should give the potential client a letter outlining the litigation process and the next steps in the process.



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## 2.08 Outlining Steps to Be Taken After Interview.

The potential client should be informed at the conclusion of the initial meeting what will happen next. If you decide on the basis of the meeting that you will represent the potential client, advise the potential client that the next step is the signing of a fee agreement. At this point, you should have in mind what type of fee will be charged. For example, if the potential client has a claim, will the fee be a contingency fee, an hourly fee, or a fixed fee subject to an additional fee if the matter later requires the rendering of unexpected services? If the potential client is a defendant, will the fee be charged on an hourly basis or will you charge a fixed fee in advance? The type of fee will largely rest on the type of claim and the resources of the potential client.

In addition, if possible, you should obtain an advance fee or retainer to cover your fees for the initial period of the litigation.

If you conclude after the initial meeting that you lack sufficient information to make a decision on representation because of the need for a conflict check, doubts over the viability of the claim, or some lingering questions, you should inform the client that additional information will need to be gathered and that a decision on representation will soon be forthcoming. You should determine whether the client can afford to pay the fees that will be required to properly handle the case and you may want to discuss a possible fee agreement at this point.



### Warning:

If there is an impending statute of limitations or filing deadline, you will have to make the decision very quickly or else risk malpractice liability for putting the potential client in a position of losing his or her rights [see *Flatt v. Superior Court* (1994) 9 C4th 275, 290, 36 CR2d 537, 885 P2d 950 ].



### Strategic Point:

At the initial consultation stage, make it clear to the potential client that, because you have not yet fully reviewed the relevant documents or carefully researched the applicable law, the comments made regarding the matter are preliminary and subject to modification based on further investigation.



### Cross References:

Discussion of the factors to consider in determining whether to represent a potential client, see 2.10.

Discussion of the types of fees and fee agreements, see *Ch. 3, Beginning and Terminating the Attorney-Client Relationship*, 3.14 -3.18.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**2.09 Attorney Must Review All Documents Obtained From Potential Client.**

Whether you decide to represent the potential client or determine that additional investigation is necessary, review the documents provided by the potential client. If you will be representing the client, the review is the first step in preparing a complaint or responding to a complaint. You may have a duty to investigate the facts and not rely solely on client statements if circumstances call for further inquiry [ *Butler v. State Bar* (1986) 42 C3d 323, 329, 228 CR 499, 721 P2d 585 ]. If you still have doubts as to representation for reasons other than the client's ability to pay his or her fees, a review will be necessary to aid in the decision.



**Warning:**

Even when declining representation, you may still have a fiduciary duty to the potential client. Information that you gather may constitute confidential information that must be protected [LACBA Formal Opinion No. 366 (1970) (protection afforded client confidences and secrets under *B&P Code* § 6068(e) applies when an attorney is consulted before actual employment even when no employment ensues); see *In re Marriage of Zimmerman* (1993) 16 CA4th 556, 564, 20 CR2d 132 (finding minimal contact did not create fiduciary duty but recognizing possibility of duty when no formal relationship created)]. Any confidential information obtained may not be used against the potential client in future representation of another client without the written consent of the potential client [*Cal Rules Prof Conduct*, Rule 3-310(E)].

**Example:**

An attorney was employed by a widower to settle the estate of his late wife. The attorney had previously drafted the will and was in possession of it. The widower told the attorney that all of the known assets were held jointly, which, if true, would have defeated the disposition of certain assets as contemplated by the will. Although the attorney checked the title to some of the assets, he made no effort to check the title to certain other assets, which turned out to be solely owned by the decedent. Based on the failure to investigate and a failure to communicate with the client, the court suspended the attorney from the practice of law for two years, staying all but 60 days and placing the attorney on probation for the remainder of the two-year period [ *Butler v. State Bar* (1986) 42 C3d 323, 228 CR 499, 721 P2d 585 ].



**Cross Reference:**

Discussion of the obligations of an attorney who has obtained confidential information, see *Ch. 3*,



*Beginning and Terminating the Attorney-Client Relationship, 3.08[5].*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**2.10 Factors to Consider in Determining Whether to Represent Potential Client.**

**2.10[1] Financial Resources of Potential Client.** Unless you are willing to represent the potential client on a contingency fee basis, you must make a practical decision whether or not to assume representation of a client who may have very limited resources. Very often, a contingency fee arrangement is not possible, such as when representing a defendant or when the claim is for reinstatement by a terminated employee or for injunctive relief instead of monetary damages.

When possible, you should obtain an advance fee to cover the initial period of the litigation. You should not agree to represent a client if there is a strong possibility you will later seek to withdraw as counsel for non-payment of fees.



**Warning:**

An attorney must not unlawfully discriminate or knowingly permit unlawful discrimination when accepting representation of a client on the basis of race, national origin, sex, sexual orientation, religion, age or disability [*Cal Rules Prof Conduct, Rule 2-400(B)*].

**2.10[2] Existence of and Types of Conflicts With Current or Former Clients.** The identification of potential and actual conflicts of interest is an essential prerequisite to entering into the representation of a client. Failure to take the necessary steps to comply with the requirements of the ethics rules and laws could lead to disqualification of representation and severe sanctions, including suspension and disbarment, as well as potential malpractice liability [*see B&P Code §§ 6077, 6078*]. Among the actual or potential conflicts that need to be identified include:

- Conflicts from representing multiple clients [*see Cal Rules Prof Conduct, Rule 3-310(C)*].
- Conflicts from representing a client when confidential information has been obtained from a former or current client and the representation is adverse to the former or current client [*see Cal Rules Prof Conduct, Rule 3-310(E)*].
- Conflicts when a third party is paying the client's legal bills [*see Cal Rules Prof Conduct, Rule 3-310(F)*].

- Conflicts when the attorney has a current relationship or had a past relationship with a party or witness in the same matter [*see Cal Rules Prof Conduct, Rule 3-310(B)*].
- Conflicts when the attorney has a relationship with another person or entity who would be substantially affected by a resolution of the matter [*see Cal Rules Prof Conduct, Rule 3-310(B)*].
- Conflicts when the attorney has certain relationships with the opposing party's attorney [*see Cal Rules Prof Conduct, Rule 3-320(B)*].

Each of these situations will likely require written disclosure of the potential or actual conflicts and, in some cases, written consent to representation. There may even be circumstances in which representation is not possible, such as:

- Representing opposing sides in a contested hearing [ *Flatt v. Superior Court* (1994) 9 C4th 275, 288, 36 CR2d 537, 885 P2d 950 ; *McPhearson v. The Michaels Co.* (2002) 96 CA4th 843, 850, 117 CR2d 489 ].
- When potential client lacks capacity to give consent to the representation [*see LACBA Formal Opinion No. 471* (1992)].
- When disclosure of the potential or actual conflicts is precluded by law [*Cal Rules Prof Conduct, Rule 3-310, Discussion*].
- When, because of the potential or actual conflicts, the attorney cannot represent the potential client effectively [*LACBA Formal Opinion No. 471* (1992)].



#### **Warning:**

A potential or actual conflict that arises because of a relationship between a person or entity and a member of the attorney's firm may be imputed to the attorney [*see Cal Rules Prof Conduct, Rule 3-310, Discussion; Rosenfeld Constr. Co., Inc. v. Superior Court* (1991) 235 CA3d 566, 573, 286 CR 609 ]. The attorney must conduct a firm-wide conflict check as part of the determination of whether to represent a potential client.



#### **Cross Reference:**

Discussion of the obligations of an attorney to manage conflict of interest situations, see *Ch. 3, Beginning and Terminating the Attorney-Client Relationship, 3.03 -3.10*.

**2.10[3] Competence to Handle Matter.** An attorney may not intentionally, recklessly, or repeatedly fail to perform legal service with competence [*Cal Rules Prof Conduct, Rule 3-110(A)*]. "Competence" means to apply the diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary for the performance of the legal services [*Cal Rules Prof Conduct, Rule 3-110(B)*].

If you do not have sufficient learning and skill to handle a particular case, you may nonetheless perform such services competently by associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or by acquiring sufficient learning and skill before performance is required [*Cal Rules Prof Conduct, Rule 3-110(C)*].

#### **Example:**

A lawyer may not wish to turn down a significant wrongful death personal injury action but not have the

experience in litigating such claims. Initiating representation and then associating in experienced counsel is an extremely effective way for an attorney to secure a financial interest while, at the same time, protecting the client's interests.

The duty to practice with competence includes the duty to supervise the work of subordinate attorneys and non-attorney employees or agents [*Cal Rules Prof Conduct, Rule 3-110(C)*, Discussion].

**2.10[4] Availability to Represent Potential Client Effectively.** You must be reasonably certain that you will have the time to represent the potential client effectively. A large volume of case work for other clients will not excuse an attorney who fails to represent a client competently [ *Blair v. State Bar* (1989) 49 C3d 762, 780, 263 CR 641, 781 P2d 933 ; *Garlow v. State Bar* (1988) 44 C3d 689, 711, 244 CR 452, 749 P2d 1307 ]. If you lack the time and resources to pursue a client's case with reasonable diligence, you must decline representation, regardless of whether you are being paid or are performing services pro bono [ *Segal v. State Bar* (1988) 44 C3d 1077, 1084, 245 CR 404, 751 P2d 463 ].

**2.10[5] Viability of Claim or Defense.** An attorney's duty is to maintain only such actions as appear to him or her to be legal or just [*B&P Code § 6068(c)*]. An attorney may not present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law [*Cal Rules Prof Conduct, Rule 3-200(B)*]. Furthermore, when an attorney forms the belief that the case has no merit and the client refuses to settle or dismiss the action, he or she should withdraw from the case [see *Kirsch v. Duryea* (1978) 21 C3d 303, 309-310, 146 CR 218, 578 P2d 935 ].



#### Strategic Point:

An efficient method of identifying whether a claim or defense is viable is to consult Judicial Council of California Civil Jury Instructions (CACI) (LexisNexis(R) Matthew Bender(R), Official Publisher). Knowing what eventually will have to be proved at trial is essential to planning a case and developing strategies. It is common for attorneys to include excerpts of jury instructions in their initial letters to clients about the merits and difficulties of the case. Advising the client about the elements needed to prove or defend an action at the outset goes a long way in developing reasonable expectations for both attorney and client. For example, including the jury instruction regarding loss of consortium [CACI No. 3920] in a client letter might help a spouse to decide whether to pursue a claim or decline its pursuit.



#### Cross References:

Judicial Council of California Civil Jury Instructions (CACI) (LexisNexis(R) Matthew Bender(R), Official Publisher) are available in print and also available in LexisNexis(R) Automated Judicial Council of California Civil Jury Instructions.

Selection of jury instructions, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 16.06.

**2.10[6] Financial Resources of Opposing Party.** The best claim is of no value to a claimant if there is no person or entity from which damages can be collected. You should determine, to the extent possible, the financial resources of all parties who could be liable if the claim is adjudicated in the potential client's favor. If the opposing party is insolvent or judgment-proof, there is no point in wasting the client's money in pursuing litigation against that party.

#### Exception:

The financial resources of the opposing parties may be irrelevant if the relief sought is not monetary, such as injunctive relief or specific performance.



#### Locating Opposing Party's Financial Resource Information With the Help of Online Resources:

Many online resources are available for obtaining detailed information about an opposing party's financial resources. These resources can aid you in determining if the opposing party has assets sufficient to satisfy the anticipated award, what property may be used to enforce the judgment, and to determine if any prejudgment remedies should be sought regarding the property, such as attachment, claim and delivery, or *lis pendens*. For example, helpful resources at [lexis.com](http://lexis.com) include:

■ Public Records > Find Assets > Combined Deed Transfers, Tax Assessor Records and Mortgage Records

☐ Sample Search: To uncover real estate currently or previously held by a party, check for deed, tax, and mortgage records by using this search format: *name (first name /3 last name)*.

■ Public Records > Find Assets > All Motor Vehicle Registrations

☐ Sample Search: To uncover personal property held by a party, check for motor vehicle registration records by using this search format: *name (first name /3 last name)*.

■ Public Records > Find Assets > Combined State Boat Registrations and U.S. Coast Guard

☐ Sample Search: To uncover personal property held by a party, check for boat registration records by using this search format: *name (first name /3 last name)*.

■ Public Records > Find Assets > Federal Aviation Administration Aircraft Registrations

☐ Sample Search: To uncover personal property held by a party, check for aircraft registration records by using this search format: *name (first name /3 last name)*.

■ News & Business tab > Combined Sources > News, All (English, Full Text)

☐ Sample Search: To uncover real and personal property and important financial developments, search for news reports that cite the opposing party and may include financial announcements, investments, assets, and other information pertaining to the party's ownership of property using this search format: *name (first name /3 last name)*.

➡ **Cross Reference:**

Searches of companies and corporations and their assets and affiliations using the same type of searches as used for conflicts of interest, see *Ch. 3, Beginning and Terminating the Attorney-Client Relationship, 3.04*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Legal Ethics Client Relations Accepting Representation



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## **2.11 Procedure to Decline Representation.**

If the decision is to decline representation of the potential client, you should inform the potential client of the decision in writing. If the decision was originally communicated orally, confirm it in writing. The letter should warn of the existence of the statute of limitations and warn that the statute may bar the claim if the potential client does not commence an action by a certain date. If the potential client is a defendant, warn the client of the need to file a responsive pleading, or seek an extension, by a certain date.

### **Example:**

An attorney, who had met for an hour with a potential client about a legal malpractice action, withdrew a week later after she discovered that her firm represented the potential defendant in an unrelated matter. The potential client failed to secure new counsel prior to the expiration of the statute of limitations and sued the attorney for malpractice on the grounds that she should have advised him on the limitation issues prior to withdrawing. The California Supreme Court found no liability, holding that the attorney's duty of loyalty to the firm's existing client was paramount. The Court however, in dicta, suggested that in a different factual situation, in which there was the lapse of considerable time and the expenditure of substantial resources before discovery of the conflicting dual representation, an attorney's mere withdrawal from the second representation might not be sufficient in itself to resolve all ethical responsibilities [ *Flatt v. Superior Court* (1994) 9 C4th 275, 290, 36 CR2d 537, 885 P2d 950 ].

Usually it would be prudent when declining representation, to recommend that the potential client promptly consult another attorney.

### **➡ Cross Reference:**

Form, see 2.14.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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## 2.12 Steps Prior to Representation.

**2.12[1] Disclosing Potential or Actual Conflicts.** When the proposed representation may create an actual or potential conflict of interest between the duties owed by the attorney to the potential client and the duties owed by the attorney (or a member of his or her firm) to a current or former client, disclosure of the conflict may be required prior to representation of the client. The written disclosure must be made prior to or at the same time as the fee agreement is signed [*see Cal Rules Prof Conduct, Rule 3-310(B)*].

### ➤ Cross Reference:

Discussion of the obligations of an attorney to disclose potential or actual conflicts of interests, see *Ch. 3, Beginning and Terminating the Attorney-Client Relationship, 3.09*.

**2.12[2] Obtaining Client Consent to Potential or Actual Conflicts.** In addition to the requirement of written disclosure of any potential or actual conflicts of interest, you may be required to obtain the consent of the potential client and/or the current or former client. Such situations include:

- Representing multiple clients, including representing the clients in a settlement of their respective claims [*Cal Rules Prof Conduct, Rule 3-310(C), (D)*].
- Representing a client when confidential information has been obtained from a former or current client and the representation is adverse to the former or current client [*Cal Rules Prof Conduct, Rule 3-310(E)*].
- Representing a client when a third party is paying the client's legal bills [*Cal Rules Prof Conduct, Rule 3-310(F)*].

### ➤ Cross Reference:

Discussion of the obligations of an attorney to obtain consent to potential or actual conflicts of interests, see *Ch. 3, Beginning and Terminating the Attorney-Client Relationship, 3.08*.

**2.12[3] Entering Into Fee Agreement.**

**2.12[3][a] Contingency Fee Cases.** A contingency fee agreement must be in writing and contain information specified in *B&P Code § 6147(a)*. Failure to comply renders the agreement voidable at the option of the client; however, the attorney is then entitled to collect a reasonable fee [*B&P Code § 6147(b)*].

**Cross Reference:**

Discussion of non-contingency fee agreements, see *Ch. 3, Beginning and Terminating the Attorney-Client Relationship*, 3.16[6].

**2.12[3][b] Non-Contingency Fee Cases.** In any non-contingency case in which it is reasonably foreseeable that total expenses to a client, including attorney fees, will exceed \$1,000, the contract for services must be in writing [*B&P Code § 6148(a)*]. The contract must explain the basis and terms of the attorney's compensation, the nature of the services to be provided and the respective responsibilities of the attorney and the client [*B&P Code § 6148(a)*].

Failure to comply with these requirements renders the agreement voidable at the option of the client. If the agreement is voided, or if there is no written fee agreement in the first place, counsel will only be entitled to compensation for the reasonable value of his or her services [*B&P Code § 6148(c)*; *Flannery v. Prentice* (2001) 26 C4th 572, 589, 110 CR2d 809, 28 P3d 860 ].

**Cross Reference:**

Discussion of non-contingency fee agreements, see *Ch. 3, Beginning and Terminating the Attorney-Client Relationship*, 3.16[6].

**2.12[3][c] Fee Agreement Is Not Prerequisite to Attorney-Client Relationship.** A written fee agreement is not necessary to establish an attorney/client relationship [ *Lister v. State Bar* (1990) 51 C3d 1117, 1126, 275 CR 802, 800 P2d 1232 ; *Farnham v. State Bar* (1976) 17 C3d 605, 612, 131 CR 661, 552 P2d 445 ]. Nonetheless, entering into such an agreement is strongly advised even if not required by *B&P Code § 6148(a)*. The agreement will set out what type of fee will be charged. Even if no fee is to be paid, a clear writing specifying the exact parameters of the representation is important to avoid disputes with the client and potential malpractice liability.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Legal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsAttorney FeesFee AgreementsLegal EthicsClient RelationsConflicts of Interest





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Chapter 2 Client Interview  
III. FORMS

*1-2 MB Practice Guide: CA Pretrial Civil Procedure 2.13*

**2.13 Questionnaire for Potential Client.**

Client Questionnaire

1. State your name, address, telephone numbers (including residence, fax, cell, and business), date of birth, social security number, and any other names by which you have ever been known, including maiden name.

Response: \_\_\_\_\_

2. Give any other addresses you have had for the past 10 years, including the dates for each such residence.

Response: \_\_\_\_\_

3. State your present spouse's name, birth date, place and date of marriage, and the name and address of all former spouses, if any. If a former marriage has been terminated by divorce, annulment, or death, give the former spouse's name and the date and the Court entering the decree, or the date of death.

Response: \_\_\_\_\_

4. Give the names, birth dates, and addresses of all children, whether natural or by adoption. If by adoption, so indicate.

Response: \_\_\_\_\_

5. With reference to your present occupation, state:

(a) The name and address of your employer and the date you were first so employed.

Response: \_\_\_\_\_

(b) A brief description of your work.

Response: \_\_\_\_\_

6. With reference to insurance please state:

(a) The name and local address of each insurance company with whom you carry any type of liability insurance protection (home, automobile, business, etc.), including the policy number and the effective dates, beginning and expiration, of each policy.

Response: \_\_\_\_\_

(b) The name and local address of each insurance company with whom you carry any type of umbrella or excess coverage, including the policy number and the effective dates, beginning and expiration, of each policy.

Response: \_\_\_\_\_

(c) List all insurance policies that provide for payments of your medical expenses (such as C.P.S., Blue Cross, Kaiser Hospital, Automobile Insurance Medical Pay Provisions, Union Insurance, etc.).

Response: \_\_\_\_\_

(d) If you are listed as a resident relative on the insurance policy of any relative of yours, provide, if available to you, the name of your relative's liability insurance carrier, and the number of the policy.

Response: \_\_\_\_\_

7. List the names and addresses of all witnesses to the events on which your claim is based. If you do not know their names, but have some idea as to how we might locate them, so indicate.

Response: \_\_\_\_\_

8. Have you ever talked with, personally or by telephone or correspondence, any insurance company or other claim representative relating to your claim?:

Response: \_\_\_\_\_ If so,

(a) Did you sign a statement?

Response: \_\_\_\_\_ If so, and a copy was left with you, please return it with the answers to this questionnaire.

(b) Was the statement written down by the representative, regardless of whether or not you signed it?

Response: \_\_\_\_\_

(c) Was more than one person present at the interview (perhaps a shorthand reporter)?

Response: \_\_\_\_\_

(d) If there was correspondence, did you keep a copy of the correspondence?

Response: \_\_\_\_\_

(e) Were you asked to record a statement, and if so on what date was it made and what were the contents of the statement?

Response: \_\_\_\_\_

9. If you have previously consulted an attorney with respect to your case, please provide details of that consultation.

(a) Provide the attorney's name, address, telephone number, and fax number, if any.

Response: \_\_\_\_\_

(b) Provide the date or dates that you consulted with the attorney.

Response: \_\_\_\_\_

(c) Explain why you did not retain that attorney, or if you did retain that attorney, explain why the attorney did not continue to represent you.

Response: \_\_\_\_\_

NOTES.

**Use of Client Questionnaire:**

*See 2.05[2]*



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Chapter 2 Client Interview  
III. FORMS

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**2.14 Letter From Attorney Declining Representation.**

Dear \_\_\_\_\_ [name]:

Thank you for considering \_\_\_\_\_ [identify law firm] to represent you in your possible lawsuit arising out of injuries sustained on \_\_\_\_\_ [date].

Our response in this letter should not be construed as a negative evaluation of the possible lawsuit against the party or parties or any other potential defendants in your potential case. However, we regret to advise you that our firm will not be able to represent you. Please be assured we gave this case every consideration.

[Provide explanation if desired, e.g., Based on our interview with you and the client questionnaire you filled out, our office has determined that \_\_\_\_\_ (summarize facts of case, e.g.,). Thus, it is our conclusion that, although you suffered significant injuries, a civil suit would be difficult to prove, at best.]

Because we are not accepting representation, neither our firm nor any of its individual attorneys will have responsibility for taking any steps to prosecute or defend your rights in any manner. This firm will not be filing a lawsuit before any applicable statute of limitations expires. In general, a statute of limitation proscribes the time period during which a lawsuit must be filed. Failing to file a lawsuit within the proscribed limitation period means that the Court will not allow you to maintain the action even if the action would have been meritorious, had it been filed before the limitation period expired. In other words, the passage of time alone can extinguish valuable legal rights.

It is important is that you seek legal counsel as quickly as possible to protect your rights. The determination of when the statute of limitations period expires can be a complicated legal analysis which is further reason that you should seek other legal counsel immediately.

Thank you very much for considering our office for your representation. We are sorry we are not able to represent you

in this matter.

\_\_\_\_\_ [*name*]

NOTES.

**Declining Representation:**

See 2.11



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Chapter 3 Beginning and Terminating the Attorney-Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.syn*

**§ 3.syn Synopsis to Chapter 3: Beginning and Terminating the Attorney-Client Relationship**

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Chapter 3 Beginning and Terminating the Attorney-Client Relationship  
I. STRATEGY

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.01*

**3.01 Scope.**

This chapter covers:

- Objective and strategy for beginning and terminating the attorney/client relationship [see 3.02].
- Identifying and disclosing conflicts of interest [see 3.03 -3.10; Forms: see 3.37, 3.38].
- Beginning the attorney/client relationship [see 3.11 -3.18; Forms: see 3.39 -3.42].
- Handling client funds and property [see 3.19 -3.26].
- Terminating the attorney/client relationship [see 3.27, 3.28], including withdrawal from representation [see 3.29 -3.32; Forms: see 3.43 -3.46], discharge [see 3.33], substitution [see 3.34; Forms: see 3.47 -3.50], and disqualification [see 3.35; Forms: see 3.51, 3.52].

**Core Statutes and Rules:**

State Bar Act, *B&P Code* §§ 6000-6238; California Rules of Professional Conduct



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Chapter 3 Beginning and Terminating the Attorney-Client Relationship  
I. STRATEGY

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.02*

### **3.02 Objective and Strategy.**

A complete understanding of the ethical issues addressed in this chapter is essential in order to promote competent representation and to prevent malpractice liability and disciplinary action by the State Bar.



#### **Strategic Point:**

It is important for the attorney to make clear at the outset of the attorney/client relationship what his or her objectives are and to be certain to spell out the limitations, if any, of the attorney's representation. Having clear goals at the start of the attorney/client relationship is important for long-term client happiness. It is also important that attorneys indicate what the level of communication between the attorney and client will be and, while encouraging the client to communicate frequently with the attorney, is important to note that this access should not either be underutilized or overutilized.

#### **Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics (Matthew Bender).



#### **Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.



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Chapter 3 Beginning and Terminating the Attorney-Client Relationship  
II. IDENTIFYING AND DISCLOSING CONFLICTS OF INTEREST

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.03*

### **3.03 CHECKLIST: Conflicts of Interest.**

#### **3.03[1] Representation of One Client.**

☐

Determine whether:

☐

Potential client's interest in a matter handled by you for an existing client is adverse to the existing client.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(C)(3)*

**Discussion:**

*See 3.08[3][e]*

☐

Representation of potential client is adverse to current or former client when, by reason of the representation of the client or former client, you have obtained confidential information material to the proposed representation.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(E)*

**Discussion:**

*See 3.08[5]*

☐

You have a current legal, business, financial, professional, or personal relationship with a party or witness in the matter.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(B)(1)*

**Discussion:**

See 3.09[2]

☐ You had a prior legal, business, financial, professional, or personal relationship with a party or witness in the matter.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(B)(2)*

**Discussion:**

See 3.09[3]

☐ You have or had a legal, business, financial, professional, or personal relationship with a person or entity that you know or should know would be substantially affected by the resolution of the matter.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(B)(3)*

**Discussion:**

See 3.09[4]

☐ You have or had a legal, business, financial, or professional interest in the subject matter of the proposed representation.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(B)(4)*

**Discussion:**

See 3.09[5]

☐ You have a relationship with the other party's attorney:

☐ You are a spouse, parent, child, or sibling of the attorney.

☐ You live with the attorney or have an intimate personal relationship with the attorney.

☐ You are a client of the attorney.

**Exception:**

This does not apply to a relationship with another attorney who is merely a partner or associate in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-320*

**Discussion:**

See 3.09[6]

☐ Determine whether any attorney in your firm has any of the above listed relationships or interests.

☐ If you or any attorney in your firm has any of the above listed relationships or interests, you cannot represent the client if:

☐ You already represent the opposing party;

☐ The client lacks capacity to understand and assess a disclosure of the applicable relationships or interests;

☐ By making an adequate disclosure to the potential client concerning the applicable relationships or interests, you would be violating the confidences or secrets of a current or former client or you would be in violation of a law or rule; or

☐ Even if the potential client waives any potential or actual conflict, it is unlikely that you could represent the client competently.

**Authority:**

*Flatt v. Superior Court* (1994) 9 C4th 275, 288, 36 CR2d 537, 885 P2d 950 ; see LACBA Formal Opinion No. 471 (1992); *Cal Rules Prof Conduct, Rule 3-310*

**Discussion:**

See 3.10

☐ If you or an attorney in your firm has any of the above listed relationships or interests and no absolute bar to representation as set forth directly above applies, you may represent the client provided that sufficient disclosure in writing is made.

☐ The disclosure should include:

☐ The nature of the relationship or interest.

☐ The length of the relationship.

☐ The frequency of contact with the other person or entity.

☐ If applicable, when the relationship terminated, the circumstances and reasons for the termination, and the potential for a reestablishment of the relationship.

☐ If applicable, explain how the other person or entity would be substantially affected by a resolution of the matter.

☐ Any significant events that have affected the relationship positively or negatively.

☐ Your personal feelings toward the person or entity.

☐ Explain why you believe that your representation will not be adversely affected by the relationship and/or interest.

☐ Explain that if circumstances change you might have to withdraw if the change would adversely affect your representation.

☐ Any other factors that would assist in providing the potential client with a clear picture of the relationship and/or interest.

☐ If the other relationship involves a current client, you should also disclose (without disclosing any confidences and secrets):

☐ The number of matters handled for the other client.

☐ The volume of billings to the other client.

☐ The potential for future business from the other client.

☐ The extent of any personal, social, or other relationship you have with the other client that goes beyond the attorney/client relationship.

☐ If the situation is one in which representation of the potential client is adverse to a current or former client when, by reason of the representation of the client or former client, you have obtained confidential information material to the proposed representation, you should also:

☐ Disclose to the current or former client the fact and circumstances of the lawyer's proposed representation, the confidential information you acquired that is material to the proposed representation, how the information could be used in the proposed representation, and the potential adverse consequences to the current or former client as a result of the information's use.

☐ Obtain the written consent of the current or former client.

☐ Disclose to the potential client that the former or current client's consent is required and that, even if the former or current client consents, he or she could attempt later to withdraw consent or circumstances could change so that additional consent would be required.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(E)*

**Discussion:**

See 3.08[5]

**Form:**

See 3.37

☐ If disclosure is required because the potential client's interest in a matter handled by you for an existing client is adverse to the existing client, you must also obtain the written consent to the proposed representation from both clients.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(C)(3)*

**Discussion:**

See 3.08[3][e]

☐ If a person or entity other than the potential client will be paying the legal fees for the client and that person or entity will not be jointly represented by you, ensure that:

- ☐ There is no interference with your independent professional judgment or with the attorney/client relationship.
- ☐ Information relating to representation of the client is protected as required by *B&P Code § 6068(e)*.
- ☐ You disclose to the client the manner of compensation.
- ☐ You obtain the client's informed written consent.
- ☐ You obtain the third party's agreement in writing that the party may not interfere with your representation of the client or your independent judgment and an acknowledgment that any communications between you and the client are confidential and will not be disclosed to the third party.

**Exception:**

No disclosure or consent is required if: (a) the nondisclosure is otherwise authorized by law; or (b) you are rendering legal services on behalf of any public agency that provides legal services to other public agencies or the public.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(F)*

**Discussion:**

See 3.08[6]

☐ If a person or entity other than the potential client will be paying the legal fees for the client and that person or

entity will be jointly represented by you, follow the steps under 3.03[2].

**3.03[2] Representation of Multiple Clients.**

- ☐ Determine whether interests of the clients potentially or actually conflict.
- ☐ If there are potential or actual conflicts, make written disclosure and obtain written consent to the representation from all clients.
  - ☐ Written disclosure should include:
    - ☐ Nature and extent of any past relationship with any of the clients.
    - ☐ Explanation of why you believe you can represent all clients effectively.
    - ☐ Suggestion that clients may want to consult with independent counsel before consenting to the multiple representation (particularly if clients lack experience or sophistication).
    - ☐ Depending on whether or not clients agree to allow sharing by you of a client's confidential information with the other clients, explanation of ramifications of their decision.
    - ☐ Statement stressing the importance that you receive a common set of instructions from clients that can be followed so that a conflict of interest does not arise that would require withdrawal.
    - ☐ Statement stressing the importance of pursuing common objectives.
    - ☐ Explanation that if future conflict arises and is not consented to by clients you may be required to withdraw from representation of one, some, or all of the clients.
  - ☐ Written consent should include:
    - ☐ Agreement among clients that either:
      - ☐ You can disclose confidential or secret information obtained about any one of the clients to the other clients, or
      - ☐ You may not disclose confidential or secret information obtained about any one of the clients to the other clients.
    - ☐ Agreement among clients that you retain the original file until you receive a common set of instructions to deliver the file to someone else, and that you will provide copies of the file to any client



who requests a copy, at the requesting client's expense.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(C)(1), (2)*

**Discussion:**

See 3.08

**Form:**

See 3.38

- ☐ If consent is obtained despite potential conflicts and actual conflicts later arise, make written disclosure to all clients of the actual conflicts and obtain new written consent to continued representation from all clients.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310*

- ☐ If you determine at any time that continued representation of the clients is not ethically possible, immediately take steps to withdraw representation of one, some, or all of the clients.

**Authority:**

*Flatt v. Superior Court (1994) 9 C4th 275, 290, 36 CR2d 537, 885 P2d 950*

**Discussion:**

See 3.08[3][g]

- ☐ If a person or entity other than the potential clients is paying the legal fees for the clients, ensure that:
- ☐ There is no interference with your independence of professional judgment or with the attorney/client relationship.
  - ☐ Information relating to representation of the clients is protected as required by *B&P Code § 6068(e)*.
  - ☐ You obtain the clients' informed written consent.
  - ☐ You obtain the third party's agreement in writing that the party may not interfere with your representation of the clients or your independent judgment and an acknowledgment that any communications between you and the clients are confidential and will not be disclosed to the third party.

**Exception:**

No disclosure or consent is required if the nondisclosure is otherwise authorized by law or you are rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(F)*

**Discussion:**

See 3.08[6]



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.04*

### 3.04 Options and Strategies.

Before entering into representation of a client, identifying potential and actual conflicts of interest is an essential step. Failure to take the necessary measures to comply with the ethics rules and laws can lead to disqualification and severe sanctions, including suspension and disbarment, as well as potential malpractice liability.

#### ► Locating Conflict of Interest Information With the Help of Online Resources:

Many resources are available online for investigating detailed information about past, present, and prospective clients. These resources can aid you in determining whether you are able to accept an engagement with a prospective client or whether you have a conflict requiring you to decline. For example, helpful resources at *lexis.com* include:

- News & Business tab > Company & Financial > Company Directors & Executives > D & B Executive Affiliations

- Sample Search: To identify potential conflicts of an individual party, check the executive affiliations using this search format: *first name /3 last name*

- Legal tab > States Legal--U.S. > California > Public Records > Find a Business > Corporation and Partnership Registration by State > Corporation Findings

- Sample Search: To determine selected director and officer records of California corporations and limited partnerships (some director and officer information may not be listed) for conflicts of interest, check the corporation and limited partnership records using this search: *first name /3 last name*

- News & Business > Combined Sources > News, Most Recent Two Years (English, Full Text)

- Sample Search: To locate information about a person associated with a particular

company, check the news sources using this search: *first name /3 last name /25 company name*

- News & Business tab > Company & Financial > Company Profiles & Directories > U.S. and International Company Intelligence Reports

☐ Sample Search: To identify potential conflicts when representing a U.S. company, find a list of subsidiaries of public and private U.S. companies by retrieving the company's profile by using this search format: *company (name of company)*.

- News & Business tab > Company & Financial > Company Profiles & Directories > International Company Reports

☐ Sample Search: To identify potential conflicts when representing an international company, find a list of subsidiaries of public and private non-U.S. companies by retrieving the company's profile by using this search format: *company (name of company)*.

- News & Business tab > Company & Financial > Mergers & Acquisitions > Mergers and Acquisitions Reports--Company Reports

☐ Sample Search: To identify potential conflicts when representing a company, find a list of mergers and acquisitions to determine if the scope of the company's business has changed since prior representation by using this search format: *company (name of company)*.

- News & Business tab > Company & Financial > All Company Information (excluding Investext & D&B)

☐ Sample Search: To identify potential conflicts when representing a company, find profiles of companies and company executives, annual reports and other SEC filings, bankruptcy reports, merger and acquisition transactions, and earnings reports for all US public companies, more than 200,000 private US companies, and thousands of international companies by using this search format: *company (name of company)*.

- News & Business tab > Company & Financial > Company Directors & Executives > The Executive Directories

☐ Sample Search: To identify potential conflicts, find useful biographical information on persons and their business affiliations by using this search format: *name (first name /3 last name)*.

- Public Records tab > Find a Business > D & B Business Reports

☐ Sample Search: To identify potential conflicts when representing a company, find useful information on a company's history and operations as well as a business background of its management and a business summary by using this search format: *company (name of company)*.

● Public Records tab > Courts & Filings > Civil and Criminal Court Filings and Regulatory Actions > Combined State Civil and Criminal Filings



Sample Search: To identify potential conflicts when representing a company or individual, find civil and criminal filings by that company or individual that may be against a previously represented client by using this search format: *company (name of company) or name (first name /3 last name)*.

● Public Records tab > Courts & Filings > Judgments & Liens > Combined Judgments & Liens > Combined Judgments & Liens Filings



Sample Search: To identify potential conflicts when representing a company or individual, find judgments and liens that may be filed against the company or individual by a previously represented client by using this search format: *company (name of company) or name (first name /3 last name)*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Legal Ethics Client Relations Conflicts of Interest



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### **3.05 Conflict of Interest Is Situation That Interferes With Attorney's Fulfillment of Basic Duties Owed to Client.**

A conflict of interest is a situation that interferes with a lawyer's ability to fulfill basic duties to a client [see State Bar Formal Opinion 1982-69 (1982); LACBA Formal Opinion No. 471 (1992)]. Four basic duties are involved in conflict situations:

- The duty of undivided loyalty.
- The duty to inform the client.
- The duty to maintain client confidences and secrets.
- The duty to represent a client competently.



#### **Cross Reference:**

Discussion of these duties, see 3.06.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Legal Ethics Client Relations Conflicts of Interest



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1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.06

### 3.06 Attorney's Duties Underlying Conflicts of Interest.

#### 3.06[1] Duty of Undivided Loyalty to Client.

**3.06[1][a] Any Act That Interferes With Client's Interests Is Forbidden.** The duty of loyalty precludes an attorney from assuming any relationship that would prevent him or her from devoting his or her entire energies to the client's interests [ *Santa Clara County Counsel Attorneys Ass'n v. Woodside* (1994) 7 C4th 525, 548, 28 CR2d 617, 869 P2d 1142 ; *Anderson v. Eaton* (1930) 211 C 113, 116, 293 P 788 ].

**3.06[1][b] Duty of Loyalty Continues After Termination of Attorney/Client Relationship.** The duty of loyalty continues after the attorney/client relationship terminates. The duty forbids [ *Frazier v. Superior Court* (2002) 97 CA4th 23, 35, 118 CR2d 129 ; see *Wutchumna Water Co. v. Bailey* (1932) 216 C 564, 571, 15 P2d 505 ]:

- Any act that would injure the former client in matters involving the former representation; or
- Use against the former client of any information acquired during the relationship.

#### Example:

By buying an interest in the judgment against his former client from his former client's opponent, and by seeking to oppose his client's efforts to reverse the judgment, the attorney violated a myriad of ethical duties [ *Styles v. Mumbert* (2008) 164 CA4th 1163, 1167-1169, 79 CR3d 880 ].

**3.06[2] Duty to Inform.** An attorney must keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed [ *Cal Rules Prof Conduct, Rule 3-500*]. In addition, an attorney must respond promptly to reasonable status inquiries of clients and keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services [ *B&P Code § 6068(m)*].

#### 3.06[3] Duty to Maintain Confidences and Secrets.

**3.06[3][a] Attorney Has Strict Duty to Maintain Confidence and Preserve Secrets of Client.** It is an 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 [B&P Code § 6068(e)(1)].

**Exception:**

Effective July 1, 2004, California codifies an exception to the duty of confidentiality when "disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death, or substantial bodily harm to, an individual" [see B&P Code § 6068(e)(2)]. For this and other recognized exceptions, see 3.06[3][e].

**3.06[3][b] "Confidence" and "Secret" Defined.** "Confidence" refers to information protected by the attorney/client privilege under applicable law. "Secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be a detriment to the client [State Bar Formal Opinion Nos. 1976-37, 1980-52, 1981-58, 1986-87 and 1993-133 (adopting definitions contained in Model Code of Prof'l Responsibility DR 4-101(A) (1980))].

**Examples:**

The scope of the duty is quite broad. It includes:

- Information obtained before employment even if no employment ensues [ *Pound v. Demera Demera Cameron* (2005) 135 CA4th 70, 80, 36 CR3d 922 ; LACBA Formal Opinion No. 366 (1970)].
- Information that could link a client to criminal activity [ *Ex parte McDonough* (1915) 170 C 230, 233, 149 P 566 ].
- Information that a client has filed a fraudulent bankruptcy petition or that the client is receiving money to which the client is not entitled [LACBA Formal Opinion No. 422 (1983)].

**3.06[3][c] Duty Continues After Termination of Attorney/Client Relationship.** The duty to maintain client confidences and secrets survives the termination of the attorney/client relationship [ *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* (1995) 36 CA4th 1832, 1841-1842, 43 CR2d 327 ; *Commercial Standard Title Co. v. Superior Court* (1979) 92 CA3d 934, 945, 155 CR 393 ].

**3.06[3][d] Inadvertent Disclosure Is Not Waiver of Attorney/Client Privilege.** The accidental, inadvertent disclosure of privileged matter by the client's attorney does not constitute a waiver of the attorney/client privilege under Evid Code § 912 [ *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 CA4th 644, 652-654, 82 CR2d 799 ]. When a lawyer seeks to hold another lawyer accountable for misuse of inadvertently received confidential materials, the burden rests on the complaining lawyer to show persuasively the inadvertence of the disclosure [ *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 CA4th 644, 657, 82 CR2d 799 ].



**Warning--Receipt of Inadvertently Disclosed Privileged Material:**

An attorney who receives materials that appear to have been provided or made available through inadvertence and appear to be subject to an attorney/client privilege, or otherwise appear to be confidential and privileged, should [ *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 CA4th 644, 656-657, 82 CR2d 799 ]:

- Refrain from examining the materials any more than is essential to determine if the materials are privileged; and



- Immediately notify the sender that he or she possesses material that appears to be privileged.

Disqualification might be justified if an attorney who inadvertently receives confidential materials fails to so act, assuming other factors compel disqualification [ *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 CA4th 644, 656-657, 82 CR2d 799 ].

#### **Cross Reference:**

Discussion of disqualification of opposing counsel, see 3.36.

**3.06[3][e] Exceptions May Permit Disclosure.** The following exceptions to the duty to maintain confidences and secrets have been recognized by case authority or have been codified:

- Effective July 1, 2004, an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual [B&P Code § 6068(e)(2)]. There is no attorney/client privilege if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonable believes is likely to result in death of, or substantial bodily harm to, an individual [Evid Code § 956.5]. *Cal Rules Prof Conduct, Rule 3-100*, adopted in response to the 2004 amendments to B&P Code § 6068(e)(2) elaborates on the parameters of this disclosure requirement, and is annotated with an extensive discussion on the duty of confidentiality, exposure to discipline, scope of disclosure, counseling clients or third persons not to commit a criminal act, and withdrawal after disclosure.

- A client may consent to disclosure of confidential and secret information [ *Commercial Standard Title Co. v. Superior Court* (1979) 92 CA3d 934, 945, 155 CR 393 ].

- An attorney may be legally compelled to disclose confidences and secrets [LACBA Formal Opinion No. 456 (1990)].

- When an attorney represents two or more clients in a matter, one client's communications with the attorney are not privileged as between the clients [Evid Code § 962].



#### **Warning:**

For the protection of *Evid Code* § 962 to apply, the clients must be parties in the same action, and the protection does not apply to clients in separate related actions [ *Roush v. Seagate Technology, LLC* (2007) 150 CA4th 210, 224-225, 58 CR3d 275 ].



#### **Strategic Point:**

When cooperating and sharing information with someone who appears to have a common interest, counsel should consider a confidentiality agreement to preclude the other party from settling and disclosing the shared information with the common adverse party. The result in *Roush* probably would have been different if there had been such a confidentiality agreement that referred to parties' common interest and required both parties to maintain the confidentiality of any shared confidential information.

- An attorney cannot suppress any evidence that the attorney or the client has a legal obligation to reveal or to produce [*Cal Rules Prof Conduct, Rule 5-220*].

- An attorney may reveal relevant confidences and secrets when the attorney is responding to a client's attacks on the attorney's integrity, good faith, authority, or performance of duty [LACBA Formal Opinion No. 396 (1982)].

- An attorney may disclose client confidences to his or her own attorney for the purpose of determining whether the information is admissible evidence under an exception to the attorney/client privilege [ *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 CA4th 294, 314, 106 CR2d 906 (in-house counsel who sued her former employer for wrongful termination was permitted to disclose to her attorney confidential and privileged information to the extent necessary for the prosecution of the action)].

**3.06[4] Duty to Practice With Competence.** An attorney may not intentionally, recklessly, or repeatedly fail to perform legal services with competence [*Cal Rules Prof Conduct, Rule 3-110(A)*]. "Competence" means to apply the diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary for the performance of the legal services [*Cal Rules Prof Conduct, Rule 3-110(B)*]. If the attorney does not have sufficient learning and skill, the attorney may nonetheless perform legal services competently by associating with or, when appropriate, professionally consulting another lawyer reasonably believed to be competent, or by acquiring sufficient learning and skill before performance is required [*Cal Rules Prof Conduct, Rule 3-110(C)*]. The duty to practice with competence includes the duty to supervise the work of subordinate attorneys and non-attorney employees or agents [*Cal Rules Prof Conduct, Rule 3-110(C)*, Discussion].

**Exception:**

In an emergency, an attorney may advise or assist in a matter in which the lawyer does not have the skill ordinarily required, when referral to or consultation with another lawyer would be impractical [*Cal Rules Prof Conduct, Rule 3-110(C)*, Discussion]. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances [*Cal Rules Prof Conduct, Rule 3-110(C)*, Discussion].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Legal EthicsClient RelationsConfidentiality of InformationLegal EthicsClient RelationsConflicts of InterestLegal EthicsClient RelationsEffective Representation



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.07*

### **3.07 Attorney Usually Owes Duty Exclusively to Client.**

**3.07[1] Attorney's Duties Are Owed to Client.** An attorney's duties are owed to a client [see *Major Clients Agency v. Diemer* (1998) 67 CA4th 1116, 1132, 79 CR2d 613 ]. "Client" is defined as a person or entity who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity [Evid Code § 951].

Whenever a party seeking legal advice consults a lawyer, the relation of attorney and client is established prima facie [ *Beery v. State Bar* (1987) 43 C3d 802, 811, 239 CR 121, 739 P2d 1289 ]. Payment of attorney fees alone does not determine an attorney/client relationship; it is merely a factor [ *Strasbourg Pearson Tulcin Wolff, Inc. v. Wiz Tech., Inc.* (1999) 69 CA4th 1399, 1404, 82 CR2d 326 ]. The primary factor is whether and to what extent the attorney acquired confidential information [ *People ex rel. Dep't of Corps. v. Speedee Oil Change Sys., Inc.* (1999) 20 C4th 1135, 1147, 86 CR2d 816, 980 P2d 371 ].

**3.07[2] Attorney May Owe Duties to Nonclient.** In some instances, an attorney may owe duties to a nonclient [ *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 CA4th 1017, 1032-1037, 117 CR2d 685 ; *William H. Raley Co. v. Superior Court* (1983) 149 CA3d 1042, 1047-1048, 197 CR 232 (decided under former *Cal Rules Prof Conduct, Rule 5-102(B)*)].

#### **Example:**

A law firm represented a client in an action against a corporation. A partner in the law firm was a director of a bank, which was trustee for a trust that was the sole shareholder of the defendant corporation. The bank's board and its trust investment committee, of which the lawyer was also a member, had the authority to settle lawsuits involving wholly owned corporations such as the defendant. Even though the lawyer did not represent the bank as trustee, the court disqualified the firm from representing the plaintiff against the corporation because the lawyer had fiduciary duties to the corporation trust beneficiaries [ *William H. Raley Co. v. Superior Court* (1983) 149 CA3d 1042, 1050, 197 CR 232 (decided under former *Cal Rules Prof Conduct, Rule 5-102(B)*)].

### **3.07[3] Organization As Client.**

**3.07[3][a] Attorney Who Represents an Organization Represents That Organization, Not Individuals.** When an attorney represents an organization, the client is the organization, not the organization's constituents [*Cal Rules Prof Conduct, Rule 3-600(A)*].

**Exception:**

An attorney representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to *Cal Rules Prof Conduct, Rule 3-310* [*Cal Rules Prof Conduct, Rule 3-600(E)*]. If the organization's consent to the dual representation is required by *Cal Rules Prof Conduct, Rule 3-310*, the consent must be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members [*Cal Rules Prof Conduct, Rule 3-600(E)*].

**3.07[3][b] Attorney Must Disclose Identity of Client for Whom Attorney Is Acting If Organization's Interests Are or May Become Adverse to the Organization's Constituents.** In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, an attorney must explain the identity of the client for whom the attorney acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituents with whom the attorney is dealing [*Cal Rules Prof Conduct, Rule 3-600(D)*]. The attorney must not mislead a constituent into believing that the constituent may communicate confidential information to the attorney in a way that will not be used in the organization's interest if that interest is or becomes adverse to the constituent [*Cal Rules Prof Conduct, Rule 3-600(D)*].

**3.07[3][c] Attorney Has Duty to Act If Agent for Organization Acts or Intends or Refuses to Act in Manner That Is Likely to Result in Injury to the Organization.** An attorney must take such actions as appear to the attorney to be in the best lawful interest of the organization if an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner that is likely to result in substantial injury to the organization [*Cal Rules Prof Conduct, Rule 3-600(B)*]. So long as the attorney does not violate the duty to maintain client confidences and secrets, such actions may include among others: (1) urging reconsideration of the matter while explaining its likely consequences to the organization; or (2) referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization [*Cal Rules Prof Conduct, Rule 3-600(B)*].

If, despite the attorney's actions, the highest authority that can act on behalf of the organization insists on action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the attorney's response is limited to the attorney's right, and, when appropriate, duty to resign in accordance with *Cal Rules Prof Conduct, Rule 3-700* [*Cal Rules Prof Conduct, Rule 3-600(C)*].

 **Cross Reference:**

Discussion of an attorney's withdrawal from representation, see 3.29.

**3.07[3][d] Corporation As Client.** For an attorney representing a corporation, the client is the corporation itself, not the shareholders, officers, or employees of the corporation [*see Cal Rules Prof Conduct, Rule 3-600(A)*]. The attorney's duty to the corporation takes precedence even though the legal advice rendered to the corporation may adversely affect the shareholders [ *Thomas v. Gordon* (2000) 85 CA4th 113, 122, 102 CR2d 28 ].

**3.07[3][e] Affiliates of Corporation.** When an attorney represents a corporation, the client is the corporate entity actually represented, not any affiliated corporations [ *Brooklyn Navy Yard Cogeneration Partners v. Superior Court* (1997) 60 CA4th 248, 254, 70 CR2d 419 ].

**Exception:**

A subsidiary of a corporate client may also be considered a client of a law firm for conflict of interest purposes if the corporation is an alter ego of the subsidiary, if the two entities have a sufficient unity of

interest, or if the attorney has obtained confidential information from the subsidiary and the matter relates to the subject matter of the confidential information [ *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 CA4th 223, 239-252, 81 CR2d 425 ].

**3.07[3][f] Close Corporation As Client.** In dealing with a close corporation or small association, attorneys commonly perform professional engagements for both the organization and its major constituents [ *Cal Rules Prof Conduct, Rule 3-600*, Discussion]. While under *Cal Rules Prof Conduct, Rule 3-600* an attorney for a close corporation does not necessarily have an attorney/client relationship with the corporation's shareholders, such a relationship may arise when the attorney has a close interaction with a shareholder [ *Skarbrevik v. Cohen, England & Whitfield* (1991) 231 CA3d 692, 705, 282 CR 627 (corporate attorney, because of a close interaction with a shareholder or shareholders, may stand in confidential relationships in respect to both the corporation and individual shareholders)].

**3.07[3][g] Partnership As Client.** A partnership is an organization within the meaning of *Cal Rules Prof Conduct, Rule 3-600* [ *Responsible Citizens v. Superior Court* (1993) 16 CA4th 1717, 1729-1731, 20 CR2d 756 ]. Whether an attorney/client relationship exists between the partnership's attorney and one of the partners depends on the particular facts and circumstances. Among the factors are [ *Responsible Citizens v. Superior Court* (1993) 16 CA4th 1717, 1733, 20 CR2d 756 ]:

- The type and size of the partnership.
- The nature and scope of the lawyer's engagement by the partnership.
- The kind and extent of contacts between the attorney and the individual partner.
- The attorney's access to information (*e.g.*, partnership financial information) relating to the individual partner's interests.

**3.07[3][h] Trade Association As Client.** Generally an attorney can be adverse to a member of an incorporated trade association when he or she represents the trade association itself [ *Glueck v. Jonathan Logan, Inc.* (2d Cir 1981) 653 F2d 746, 748-749 ].

**Exception:**

There is an exception to this general rule when an attorney receives confidential information from an association member under circumstances in which the association member has a reasonable expectation that the attorney will use the information for the member's benefit [ *Glueck v. Jonathan Logan, Inc.* (2d Cir 1981) 653 F2d 746, 748-749 ; *Westinghouse Elec. Corp. v. Kerr-McGee Corp.* (7th Cir 1978) 580 F2d 1311, 1318-1320 , *cert. denied*, 439 US 955 (1978) ].

 **Cross Reference:**

Discussion of disqualification of opposing counsel, see 3.35.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Legal EthicsClient RelationsAccepting Representation



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Matthew Bender (R) Practice Guide: California Pretrial Civil Procedure  
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Chapter 3 Beginning and Terminating the Attorney-Client Relationship  
II. IDENTIFYING AND DISCLOSING CONFLICTS OF INTEREST

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.08*

### **3.08 Client's Informed Written Consent to Conflict Is Required in Some Situations.**

#### **3.08[1] Consent Must Be Preceded by Written Disclosure That Sufficiently Informs Client of Conflicts.**

When the informed written consent of the client or former client is required, the consent must be preceded by written disclosure [*Cal Rules Prof Conduct, Rule 3-310(B)*]. "Disclosure" is defined as "informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client" [*Cal Rules Prof Conduct, Rule 3-310(A)(1)*]. The disclosure must include all facts and circumstances that, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable the client to make free and intelligent decisions regarding the subject matter of the representation [ *Ishmael v. Millington* (1966) 241 CA2d 520, 528, 50 CR 592 ]. The attorney should include the areas of potential conflict and the possibility and desirability of seeking independent legal advice [ *Civil Serv. Comm'n v. Superior Court* (1984) 163 CA3d 70, 82, 209 CR 159 ].

#### **Distinguish:**

Rule 3-310 controls conflicts of interest and disqualification motions only in the context of attorney-client relationships [ *Oaks Management Corporation v. Superior Court* (2006) 145 CA4th 453, 465, 51 CR3d 561 (mere exposure to the confidences of an adversary does not alone warrant disqualification)].

**3.08[2] "Informed Written Consent" Defined.** "Informed written consent" is the client's or former client's written agreement to the representation following written disclosure [*Cal Rules Prof Conduct, Rule 3-310(A)(2)*].

"Written" is defined as handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording on 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 [*Cal Rules Prof Conduct, Rule 3-310(A)(3)* (incorporating definition in *Evid Code* § 250)].

#### **3.08[3] Disclosing and Obtaining Consent to Representation of Multiple Clients.**

**3.08[3][a] Both Actual and Potential Conflicts Must Be Disclosed.** An attorney may not, without the informed written consent of each client, accept representation of more than one client in a matter in which the interests of the

clients potentially conflict or accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict [*Cal Rules Prof Conduct, Rule 3-310(C)(1), (2)*].

 **Cross Reference:**

Form, see 3.38.

**3.08[3][b] Separate Consents Are Required for Potential and Actual Conflicts.** The rules contemplate that after consent to a representation involving a potential conflict is obtained, an additional consent would be required if an actual conflict later arises [*Cal Rules Prof Conduct, Rule 3-310, Discussion*].

**3.08[3][c] Disclosure and Consent to Potential Conflicts.** Sometimes it may be advantageous, for the sake of convenience or economy, for an attorney to represent multiple clients when the representation presents potential conflicts.

Multiple representation is not automatically prohibited, but is allowed provided that disclosure is sufficient to enable the clients to make free and intelligent decisions regarding the subject matter of the representation [ *Day v. Rosenthal* (1985) 170 CA3d 1125, 1148-1149, 217 CR 89 ] and the attorney obtains the informed written consent of all of the clients.

**3.08[3][d] Disclosure and Consent to Actual Conflicts.** If an actual conflict exists or, if during representation, an actual conflict develops, the attorney must immediately disclose the problem in writing to all of the clients. To continue the multiple representation, the attorney must obtain the written consent of each client. However, when the representation involves a litigation matter, informed consent may not be sufficient [ *Klemm v. Superior Court* (1977) 75 CA3d 893, 898, 142 CR 509 ("purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed") ].

If the attorney chooses or is required to withdraw from the multiple representation, he or she may have to withdraw from representing all parties, unless the party the attorney will no longer represent gives informed written consent to the continued representation. Consent is required if the attorney obtained confidential information during the course of representing the soon-to-be client [*Cal Rules Prof Conduct, Rule 3-310(E)*].



**Warning:**

Although Rules 3-310(B) and 3-310(C) permit multiple representation when there are actual conflicts between clients, as long as informed written consent is obtained, an attorney generally should not continue to represent both clients in such a situation.

Although there are a few limited circumstances when the co-parties may wish to proceed with the same attorney, to avoid potential malpractice liability, the attorney must be very diligent to assure that the clients are aware that they may be giving up their right to pursue a damage claim against the other party, and obtain from the clients a knowing and intelligent waiver of this right.

 **Cross References:**

Discussion of an attorney's withdrawal from representation, see 3.29.

Discussion of disclosing and obtaining consent to adverse representation when confidential information has been obtained, see 3.08[5].

**3.08[3][e] Disclosing and Obtaining Consent to Representation Adverse to a Client.** An attorney may not, without the informed written consent of each client, represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter [

*Cal Rules Prof Conduct, Rule 3-310(C)(3)*].



**Warning:**

Although Rule 3-310(C)(3) does not refer to a situation in which another attorney in the law firm has a relationship adverse to an attorney's client, courts have held under prior rules that the Rule applied when the adverse representation was handled by a different attorney in the firm [ *Flatt v. Superior Court* (1994) 9 C4th 275, 285, 36 CR2d 537, 885 P2d 950 ; *Truck Ins. Exch. v. Fireman's Fund Ins. Co.* (1992) 6 CA4th 1050, 1055-1056, 8 CR2d 228 ]; see also *Cal W. Nurseries v. Superior Court* (2005) 129 CA4th 1170, 1172-1177 ].

**Distinguish:**

Rule 3-310(C)(3) prohibits the concurrent representation of clients without informed written consent only if the attorney represents one of the clients in a matter in which the clients' interests are adverse. This rule does not prohibit the concurrent representation of clients whose interests are adverse only in a matter in which the attorney does not represent either client [ *Fremont Ind. Co. v. Fremont Gen. Corp.* (2006) 143 CA4th 50, 65, 49 CR3d 82 (interests of parties adverse only in third matter)].



**Strategic Point:**

Although Rule 3-310(C)(3) would permit adverse representation with the informed, written consent of the clients, it is not advisable to proceed under such circumstances. The California Supreme Court has stated that the cases in which simultaneous representation is permissible are rare, typically involving corporate clients, and overcoming the presumption of "prima facie impropriety" is not easily accomplished [ *Flatt v. Superior Court* (1994) 9 C4th 275, 285, 36 CR2d 537, 885 P2d 950 ].

**3.08[3][f] Withdrawal From Representing Existing Client Not Permitted to Avoid Conflict.** An attorney cannot avoid obtaining the informed, written consent of a client in order to take on adverse representation of a second client by withdrawing from representing the first client [ *Flatt v. Superior Court* (1994) 9 C4th 275, 288, 36 CR2d 537, 885 P2d 950 ; *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 CA4th 1017, 1037, 117 CR2d 685 ].

**Example:**

A law firm representing a client against a party in one suit may not avoid the need for consent to represent the adverse party in that suit with respect to other claims against other parties in that suit by withdrawing only with respect to representation of the adverse party on claims that the client has against the adverse party [ *Cal W. Nurseries v. Superior Court* (2005) 129 CA4th 1170, 1177 ].

**3.08[3][g] When Attorney Is Required to Sever Relationship With New Client.** On determining that withdrawal is necessary to avoid ethical problems, the attorney should withdraw as soon as he or she learns that the new matter is adverse to an existing client. Any delay in withdrawing might be insufficient to avoid a problem [ *Flatt v. Superior Court* (1994) 9 C4th 275, 290, 36 CR2d 537, 885 P2d 950 ].

**Example:**

An attorney, who had met for an hour with a prospective client about a legal malpractice action, withdrew a week later after she discovered that her firm represented the potential defendant in an unrelated matter. The prospective client failed to secure new counsel prior to the expiration of the statute of limitations and sued the attorney for malpractice on the grounds that she should have advised him on the limitation issues prior to withdrawing. The California Supreme Court found no liability, holding that the attorney's duty of loyalty to the firm's existing client was paramount. The Court however, in dicta, suggested that in a different factual situation, in which there was the lapse of considerable time and the



expenditure of substantial resources before discovery of the conflicting dual representation, an attorney's mere withdrawal from the second representation might not be sufficient in itself to resolve all ethical responsibilities [ *Flatt v. Superior Court* (1994) 9 C4th 275, 290, 36 CR2d 537, 885 P2d 950 ].

### **3.08[4] Disclosing and Obtaining Consent to Aggregate Settlement of Claim Involving Two or More Clients.**

An attorney who represents two or more clients cannot enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client [ *Cal Rules Prof Conduct, Rule 3-310(D)* ]. An aggregate settlement is one in which more than one client's claim or defense is settled at once.

#### **Exception:**

*Cal Rules Prof Conduct, Rule 3-310(D)* does not apply to class action settlements subject to court approval [ *Cal Rules Prof Conduct, Rule 3-310, Discussion* ].

### **3.08[5] Disclosing and Obtaining Consent to Adverse Representation When Confidential Information Has Been Obtained.**

**3.08[5][a] Purpose of Rule Is to Protect Present or Former Client.** An attorney may not, without the informed written consent of the client or former client, accept employment adverse to the client or former client when, by reason of the representation of the client or former client, the attorney has obtained confidential information material to the employment [ *Cal Rules Prof Conduct, Rule 3-310(E)* ]. The purpose of Rule 3-310(E) is to prevent an attorney from doing anything that would injuriously affect his or her client in any matter in which he or she formerly represented the client--at no time may the attorney use against the client knowledge or information acquired by virtue of the previous relationship [ *Galbraith v. The State Bar* (1933) 218 C 329, 333, 23 P2d 291 ].

**3.08[5][b] Confidential Information Is Defined.** Although "confidential" information is not defined in Rule 3-310(E), it has been defined in the courts to include the confidences and secrets protected under *B&P Code § 6068(e)* [ *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 CA4th 1017, 1040-1041, 117 CR2d 685 ; *Goldstein v. Lees* (1975) 46 CA3d 614, 620-621, 120 CR 253 ].

#### **Cross Reference:**

Form, see 3.37.

**3.08[5][c] Informed Written Consent Must Be Obtained From the Former or Current Client From Whom Confidential Information Was Obtained.** Informed written consent must be obtained from the current or former client from whom the material, confidential information was obtained [ *Cal Rules Prof Conduct, Rule 3-310(E)* ].

#### **Warning:**

A person with whom the attorney consulted can be a former client even though no actual employment resulted from the consultation [see *In re Marriage of Zimmerman* (1993) 16 CA4th 556, 564, 20 CR2d 132 (finding minimal contact did not create fiduciary duty but recognizing possibility of duty when no formal relationship created)].

#### **Distinguish:**

When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying the rule that restricts representation when there are concurrent conflicts of interest; and the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter [ *Sharp v. Next Entertainment Inc.* (2008) 163 CA4th 410, 433-435, 78 CR3d 37 ].

#### **Cross Reference:**

Discussion of when attorney/client relationship can be created without formal agreement, see 3.13.

**3.08[5][d] Representation Must Be Adverse.** The representation must be adverse for the attorney to be required to obtain informed written consent from the current or former client [*Cal Rules Prof Conduct, Rule 3-310(E)*].

**3.08[5][e] Required Disclosure Includes Potential As Well As Actual Use of Confidential Information.** The later representation of a client against a former client is forbidden not merely when the attorney will be called on to use material, confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he or she may be called on to use such information [ *Galbraith v. State Bar* (1933) 218 C 329, 332-333, 23 P2d 291 ; *Woods v. Superior Court* (1983) 149 CA3d 931, 936, 197 CR 185 ].

**3.08[5][f] Attorney Is Presumed to Have Confidential Information If Two Matters Are Substantially Related.** When a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client confidential information material to the current dispute would normally have been imparted to the attorney or to subordinates for whose legal work the attorney was responsible, the attorney's knowledge of confidential information is presumed [ *Adams v. Aerojet-General Corp.* (2001) 86 CA4th 1324, 1331, 104 CR2d 116 ]. The presumption is not rebuttable [ *People ex rel. Deukmejian v. Brown* (1981) 29 C3d 150, 156, 172 CR 478, 624 P2d 1206 ].

**Exception:**

There is a limited exception to the conclusive presumption when the attorney can show that there was no opportunity for confidential information to be divulged [ *H.F. Ahmanson & Co. v. Salomon Bros., Inc.* (1991) 229 CA3d 1445, 1455, 280 CR 614 ]. Generally, the exception will apply when the attorney works in a firm. Factors to examine include [ *Adams v. Aerojet-General Corp.* (2001) 86 CA4th 1324, 1331, 104 CR2d 116 ]:

- The time spent by the attorney working on behalf of the former client.
- The attorney's possible exposure to formulation of policy or strategy in matters relating to the current dispute.
- Whether the attorney worked out of the same branch office that handled the former litigation.
- Whether the attorney's administrative or management duties may have placed him or her in a position where he or she would have been exposed to matters relevant to the current dispute.

**3.08[5][g] Knowledge of Confidential Information Is Imputed to Members of Attorney's Firm.** Knowledge obtained by one member of a firm of lawyers is imputed to all the other members [ *Rosenfeld Constr. Co. v. Superior Court* (1991) 235 CA3d 566, 573, 286 CR 609 ].



**Strategic Point:**

Law firms should adopt a firm-wide conflict check procedure. Computer tracking is the most effective way to avoid potential conflicts with future clients. A thorough computer check should be made of your firm's database before undertaking representation. Upon joining a firm, new associates and partners should be asked if they have previously represented any of the firm's existing clients. All attorneys should be asked if they have previously represented a prospective client or a potentially adverse party prior to the initiation of any new action.

**3.08[6] Disclosing and Obtaining Consent When Third Party Is Paying Client's Bill Is Required.**

**3.08[6][a] Prerequisites for Accepting Compensation.** An attorney may not accept compensation for representing a client from someone other than the client unless all of the following requirements are met [*Cal Rules Prof Conduct, Rule 3-310(F)*]:

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

**3.08[6][b] If Third Party Is a Client.** When the party paying the legal bills for a client is also a client, *Cal Rules Prof Conduct, Rule 3-310(F)* still applies [*see LACBA Formal Opinion No. 471 (1992)*].

**Example:**

An action is brought against a corporation and one of its employees. The corporation elects to retain one lawyer to represent it and the employee and pay for the representation. The attorney must obtain the employee's informed written consent [*see LACBA Formal Opinion No. 471 (1992)*].

**3.08[6][c] If Third Party Is Not a Client.** If the third party paying the legal bills is not a client, the attorney does not represent the third party and the attorney's duties are to the client. The attorney must not disclose to the third party the client's confidences and secrets [*Cal Rules Prof Conduct, Rule 3-310(F)(2)*].

**3.08[6][d] There Must Be No Interference With Attorney's Independence of Professional Judgment or With Attorney/Client Relationship.** There can be no interference with the attorney's independence of professional judgment or with the attorney/client relationship [*Cal Rules Prof Conduct, Rule 3-310(F)(1)*].

**Warning:**

You should be very careful to avoid even the appearance that the party paying the bills is interfering, particularly when the party paying the bill is an employer on behalf of an employee. Consent to the payment arrangement by the client is not sufficient by itself to avoid ethical problems. It must be clear that you are representing the client without interference that affects your judgment or your relationship with the client.

**3.08[6][e] Circumstances When Disclosure and Consent Not Required.** Disclosure of and written consent to a third party payment arrangement is not required when the attorney is rendering legal services on behalf of any public agency that provides legal services to other public agencies or the public or when nondisclosure is otherwise not required by law [*Cal Rules Prof Conduct, Rule 3-310(F)(3)*].

**Example:**

An insurer has a contractual right to select counsel for the insured unilaterally. *Cal Rules Prof Conduct, Rule 3-310(F)(3)* does not abrogate this contractual right when there is no conflict of interest, and does

not require the attorney retained by the insurer for the insured to obtain the insured's written consent to accept compensation from the insurer [*Cal Rules Prof Conduct, Rule 3-310, Discussion*]. However, disclosure and consent is required when there is a potential or actual conflict of interest between the insured and the insurer [ *San Diego Fed. Credit Union v. Cumis Ins. Soc'y, Inc. (1984) 162 CA3d 358, 364-365* (disclosure and consent required if, based on the outcome of the litigation, the insured's liability may be determined to be outside the scope of coverage)]. When there is a conflict, the insured has the right to independent counsel of its choosing, paid by the insurer [*CC § 2860*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Legal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConflicts of Interest



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Chapter 3 Beginning and Terminating the Attorney-Client Relationship  
II. IDENTIFYING AND DISCLOSING CONFLICTS OF INTEREST

1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.09

### **3.09 Written Disclosure of Conflict Without Client's Written Consent Is Adequate in Some Situations.**

**3.09[1] Disclosure Must Be in Writing and Sufficiently Inform Client of Conflict.** In conflict situations in which informed written consent is not required, written disclosure must still be made and the extent of the disclosure is the same as is required in situations in which informed written consent is required [*see Cal Rules Prof Conduct, Rule 3-310(A), (B)*].



#### **Cross Reference:**

Discussion of what constitutes sufficient disclosure, see *3.08[1]*.

### **3.09[2] Disclosing Current Relationship With a Party or Witness in Same Matter Is Required.**

**3.09[2][a] Five Types of Relationships Must Be Disclosed.** An attorney may not accept or continue representation of a client without providing written disclosure to the client when the attorney has a "legal, business, financial, professional, or personal" relationship with a party or witness in the same matter [*Cal Rules Prof Conduct, Rule 3-310(B)*]. The types of relationships are not defined in the Rule.

**3.09[2][b] Who Is a Party or Witness.** In a litigation context, "party" refers to those by or against whom a legal suit is brought [ *Poe v. Diamond (1987) 191 CA3d 1394, 1399, 237 CR 80* ]. "Witness" is defined as a person whose declaration under oath is received as evidence for any purpose, whether such declaration is made on oral examination, or by deposition or affidavit [*CCP § 1878*]. In a nonlitigation context, the precise definitions are unclear.



#### **Warning:**

Because the extent to which a person may be considered a party or witness could be quite broad, particularly in a nonlitigation context, you should err on the side of caution and disclose any relationship that could affect your loyalty or independent judgment.

**3.09[2][c] Disclosure May Include Relationship Between a Party or Witness and a Member of Attorney's Firm.** Although *Cal Rules Prof Conduct, Rule 3-310(B)* is intended to apply only to an attorney's own relationships or interests, if the attorney knows that a partner or associate in the same firm as the attorney has or had a relationship with

another party or witness or has or had an interest in the subject matter of the representation, disclosure of the relationship is required [*Cal Rules Prof Conduct, Rule 3-310, Discussion*].



**Strategic Point:**

Although this aspect of Rule 3-310(B) only requires disclosure if the attorney knows of a relationship with another partner or associate, not relationships that the attorney should know of, because of the difficulty in proving or disproving who knew what and when, you should include an inquiry in a firm-wide conflict check.

**3.09[2][d] To Whom Disclosure Is Made.** The required disclosure need be made only to the client being represented in the matter [*see LACBA Formal Opinion No. 463 (1990)*].

**3.09[3] Disclosing Past Relationship With Party or Witness in Same Matter.**

**3.09[3][a] Types of Relationships to Be Disclosed Are Same As for Disclosing Current Relationship.** An attorney may not accept or continue representation of a client without providing written disclosure to the client when the attorney knows or reasonably should know that the he or she previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter and the previous relationship would substantially affect the attorney's representation [*Cal Rules Prof Conduct, Rule 3-310(B)(2)*].

**3.09[3][b] Who Is a Party or Witness Is Same As for Disclosing Current Relationship.** *Cal Rules Prof Conduct, Rule 3-310(B)(2)* involves the same requirement as *Cal Rules Prof Conduct, Rule 3-310(B)(1)*, that the relationship involve a party or witness.



**Cross Reference:**

Discussion of who is a party or witness, see 3.09[2][b].

**3.09[3][c] Disclosure May Include Relationship Between a Party or Witness and a Member of Attorney's Firm.** As with disclosing current relationships, the attorney must disclose past relationships he or she knows other attorneys in the firm had with a party or witness [*Cal Rules Prof Conduct, Rule 3-310, Discussion*].



**Cross Reference:**

Discussion of disclosing relationships of other firm members, see 3.09[2][c].

**3.09[3][d] Standard Is Whether Attorney Knows or Reasonably Should Know About the Past Relationship and Its Effect on Current Representation.** Unlike the requirement for disclosing current relationships, written disclosure of past relationships is only required when the attorney knows or reasonably should know of both the prior relationship and its effect on the representation [*Cal Rules Prof Conduct, Rule 3-310(B)(2)(a)*].



**Warning:**

The "reasonably should know" standard suggests that the attorney has an obligation to investigate the existence of a prior relationship and its effect on the current or proposed representation.

**3.09[3][e] Disclosure Is Required Only If Past Relationship Would Substantially Affect Attorney's Representation.** Another difference from the requirement for disclosing current relationships is that disclosure of past relationships is only required if the past relationship would substantially affect the representation [*Cal Rules Prof Conduct, Rule 3-310(B)(2)(b)*].

**3.09[3][f] Effect Need Not Be Negative, Only Substantial.** The disclosure requirement is not dependent on a

finding that the effect of the representation on another person or entity would be negative, only that the effect would be "substantial" [*Cal Rules Prof Conduct, Rule 3-310(B)(2)(b)*].

**3.09[3][g] Disclosure Is Not Required to Former Client.** Disclosure of the new engagement to a former client or the consent of the former client to the new engagement is not required [*Cal Rules Prof Conduct, Rule 3-310, Discussion*].

**Exception:**

Disclosure and consent is required if *Cal Rules Prof Conduct, Rule 3-310(E)* applies (requiring disclosure of employment adverse to the former client when, by reason of the representation of the former client, the attorney has obtained confidential information material to the employment) [*Cal Rules Prof Conduct, Rule 3-310, Discussion*].

 **Cross Reference:**

Discussion of the requirement of disclosing and obtaining consent to adverse employment when the attorney has obtained material, confidential information, see *3.08[5]*.

**3.09[4] Disclosing Relationship With Another Person or Entity Who Would Be Substantially Affected by Resolution of Matter.**

**3.09[4][a] Types of Relationships to Be Disclosed Are Same As for Disclosing Current or Past Relationship.**

An attorney may not accept or continue representation of a client without providing written disclosure to the client when the attorney has or had a legal, business, financial, professional, or personal relationship with another person or entity the attorney knows or reasonably should know would be substantially affected by resolution of the matter [*Cal Rules Prof Conduct, Rule 3-310(B)(3)*].

**3.09[4][b] Disclosure Is Not Limited to Parties or Witnesses.** Disclosure is not limited to parties and witnesses. It applies to any person or entity [*Cal Rules Prof Conduct, Rule 3-310(B)(3)*].

**Exception:**

*Cal Rules Prof Conduct, Rule 3-310(B)(3)* does not apply to the relationship of an attorney to another party's attorney. Such relationships are governed by *Cal Rules Prof Conduct, Rule 3-320* (requiring disclosure of certain relationships with the other party's attorney) [*Cal Rules Prof Conduct, Rule 3-310, Discussion*].

 **Cross Reference:**

Discussion of the requirement to disclose certain relationships with the other party's attorney, see *3.09[6]*.

**3.09[4][c] Effect Need Not Be Negative, Only Substantial.** The disclosure requirement is not dependent on a finding that the effect of the representation on another person or entity would be negative, only that the effect would be "substantial" [*Cal Rules Prof Conduct, Rule 3-310(B)(3)*].

**3.09[5] Disclosing Attorney's Interest in Subject Matter.**

**3.09[5][a] Disclosure Applies to Current and Past Interests.** An attorney may not accept or continue representation of a client without providing written disclosure to the client when the attorney has or had a legal, business, financial, or professional interest in the subject matter of the representation [*Cal Rules Prof Conduct, Rule 3-310(B)(4)*].

**3.09[5][b] Disclosure of Attorney's Personal Interest Is Not Required.** Unlike other parts of *Cal Rules Prof*

*Conduct, Rule 3-310(B)*, Rule 3-310(B)(4) does not require disclosure of an attorney's personal interest in the subject matter.

**3.09[6] Disclosing Relationships With Other Party's Attorney.** An attorney may not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the attorney, lives with the attorney, is a client of the attorney, or has an intimate personal relationship with the attorney, unless the attorney informs the client in writing of the relationship [*Cal Rules Prof Conduct, Rule 3-320*].

**Exception:**

The rule does not apply to circumstances in which the attorney has a relationship with another lawyer who is merely a partner or associate in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter [*Cal Rules Prof Conduct, Rule 3-320, Discussion*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Legal Ethics Client Relations Accepting Representation Legal Ethics Client Relations Conflicts of Interest





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Chapter 3 Beginning and Terminating the Attorney-Client Relationship  
II. IDENTIFYING AND DISCLOSING CONFLICTS OF INTEREST

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.10*

### **3.10 Conflicts That Cannot Be Consented to by Client.**

**3.10[1] Representing Opposing Sides in Contested Hearing.** An attorney may not concurrently represent parties pursuing opposing claims in a trial or a hearing [ *Flatt v. Superior Court* (1994) 9 C4th 275, 288, 36 CR2d 537, 885 P2d 950 ; *McPhearson v. Michaels Co.* (2002) 96 CA4th 843, 850, 117 CR2d 489 ].

#### **Example:**

In a derivative suit, the organization named as a defendant is actually a plaintiff, and case law forbids dual representation in a derivative suit alleging fraud by the principals, because the principals and the organization have adverse, conflicting interests [ *Gong v. RFG Oil, Inc.* (2008) 166 CA4th 209, 215, 82 CR3d 416 ].

**3.10[2] When Client Lacks Capacity to Give Consent.** When the client lacks the capacity to understand and assess the attorney's disclosure and the consent sought, informed consent is not possible [see LACBA Formal Opinion No. 471 (1992)].

**3.10[3] When Disclosure Is Precluded by Law.** If other rules or laws prevent an attorney from making adequate disclosure, informed written consent is not possible [ *Cal Rules Prof Conduct, Rule 3-310*, Discussion].

#### **Example:**

In order to provide adequate disclosure to a client, the attorney must reveal confidences or secrets of another client. Because such disclosure would violate the law that an attorney maintain inviolate the confidence and preserve the secrets of his or her client [see *B&P Code § 6068(e)*], the attorney cannot make the required disclosure.

**3.10[4] When Competent Representation Is Unlikely.** A client cannot waive a conflict that makes it unlikely that the attorney can competently represent the client [LACBA Formal Opinion No. 471 (1992)].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Legal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConflicts of InterestLegal

EthicsClient RelationsEffective Representation



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III. BEGINNING THE ATTORNEY/CLIENT RELATIONSHIP

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.11*

### 3.11 CHECKLIST: Beginning the Attorney/Client Relationship.

☐ If deciding not to undertake the relationship:

- ☐ Inform the potential client in writing of the decision.
- ☐ If decision was communicated orally, confirm in writing.
- ☐ Include warning as to statute of limitations.
- ☐ If appropriate, advise potential client to seek another attorney promptly.

☐ Decide scope of tasks to be performed as part of representation.

☐ If representation is to be limited in scope and involves court appearance by the attorney, determine whether the representation constitutes "noticed representation."

☐ If representation constitutes "noticed representation":

☐ Establish agreement with client over specific tasks to be performed under terms of limited scope representation.

☐ Give court notice of the agreement for limited scope representation on Judicial Council Form MC-950 Notice of Limited Scope Representation.

**Authority:**

*Cal Rules Ct, Rules 3.35, 3.36(a)*

**Discussion:**

See 3.13[2]

**Form:**

See 3.38A

☐ Decide on what basis services for the client will be charged:

- ☐ Hourly fee.
- ☐ Contingency fee.
- ☐ Retainer fee.
- ☐ Exploratory or diagnostic fee.
- ☐ Per diem fee.
- ☐ Transaction or lump sum fee.
- ☐ A combination of the above.

**Discussion:**

See 3.14[1]

☐ In establishing the amount of the fee:

- ☐ Determine whether, based on the type of matter to be handled, there are any statutes or local court rules that restrict the fees that can be charged.

**Discussion:**

See 3.14[2][a]

- ☐ Consider the factors outlined in *Cal Rules Prof Conduct, Rule 4-200(B)*.

**Authority:**

*Cal Rules Prof Conduct, Rule 4-200(B)*

**Discussion:**

See 3.14[2][b]

☐ If you decide to associate with an attorney who is not a partner of, associate of, or shareholder with you or if you

decide to refer the matter to another attorney:

- ☐ Prepare fee-splitting agreement for signature by other attorney and client.

**Discussion:**

See 3.17

**Form:**

See 3.40

- ☐ If you decide to associate with another attorney:

☐ Prepare and file with court notice of association of counsel, signed by other attorney and client.

**Authority:**

*Cal Rules Prof Conduct, Rule 2-200(A)*

**Discussion:**

See 3.17[1]

**Form:**

See 3.41

- ☐ Serve notice of association on opposing party.

**Form:**

See 3.42

- ☐ If you decide to refer the matter to another attorney and you have made an appearance in court on behalf of the client:

☐ Prepare and file notice of substitution, signed by you, the client, and new attorney, with clerk of court.

**Form:**

See 3.47

- ☐ Serve adverse party by mail with notice of substitution.

- ☐ Based on the type of fee arrangement, prepare an appropriate fee agreement.

- ☐ If the agreement is a contingency fee agreement, ensure that:

☐ Statements required under *B&P Code § 6147(a)(1)-(5)* are included.

**Authority:**

*B&P Code § 6147(a)(1)-(5)*

**Discussion:**

See 3.16[7][b]

☐ The agreement contains a provision for a lien on the proceeds of a prospective judgment or settlement in favor of the client for legal services rendered.

**Discussion:**

See 3.16[7][e]

☐ If agreement is for the collection of a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based on the person's alleged professional negligence, the fee is within the limits proscribed in *B&P Code § 6146(a)*.

**Authority:**

*B&P Code § 6146(a)*

**Discussion:**

See 3.16[7][g]

☐ The agreement does not contain a provision that the client may not compromise the suit without the consent of the attorney.

**Authority:**

*Calvert v. Stoner (1948) 33 C2d 97, 103, 199 P2d 297*

**Discussion:**

See 3.16[7][h]

☐ When required, obtain court or administrative approval to fee agreement:

☐ If fee agreement is for services in litigation on behalf of a minor, obtain approval of court in which the litigation is pending.

**Authority:**

*Fam Code § 6602*

**Discussion:**

See 3.16[3][a]

☐ If fee agreement is a contingency agreement involving a ward or conservatee, obtain court order authorizing guardian or conservator to execute the fee agreement.

**Authority:**

*Prob Code § 2644(a)*

**Discussion:**

See 3.16[3][b]

- ☐ If action is an appeal before the California Unemployment Insurance Appeals Board, obtain approval of fee agreement from the Board.

**Authority:**

*UI Code § 1957*

**Discussion:**

See 3.16[3][c]

- ☐ Obtain signature of client on fee agreement and provide client with a copy of the signed agreement.

**Prerequisite:**

If necessary or required, provide conflicts of interest disclosure and obtain written consent to representation prior to (or at the same time of) execution of fee agreement.

- ☐ If fees are to be paid by a person or entity other than the client:

- ☐ Obtain signature of paying party on fee agreement.

- ☐ Make required disclosure to client and obtain client's written consent to payment arrangement.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(F)*

**Discussion:**

See 3.08[6]; 3.18



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### 3.12 Options and Strategies.

With the adoption of court rules permitting limited scope representation of a client by an attorney in all civil cases, the Judicial Council envisions that rule will help litigants who cannot afford full representation to [Judicial Council of California Report, *Limited Scope Representation in Civil Cases* ..., at 2-3 (October 6, 2006)]:

- Prepare court documents legibly, completely, and accurately;
- Prepare cases based on a better understanding of the law and procedures;
- Obtain representation for portions of cases; and
- Obtain assistance in understanding, preparing, and enforcing court orders.

Accordingly, the new rules [*Cal Rules Ct, Rule 3.35 et seq.*] provide for two types of limited scope representation:

- Noticed representation [*see 3.13[2][b]*].
- Undisclosed representation [*see 3.13[2][c]*].

#### **Distinguish:**

The distinction between the two types of limited scope representation is whether the attorney appears in court. If so, the attorney-client relationship constitutes "noticed representation," which must be established by serving and filing a notice [*see 3.13[2]*]. Likewise, completed limited scope representation requires a withdrawal using specifically applicable procedures [*see 3.29[7], 3.30[4]*].



#### **Strategic Point:**

Entering into a limited representation relationship may be used to avoid problems associated with the fact that there is no absolute right to withdraw as counsel [*see 3.29*].

Several types of fees can be charged for the rendering of legal services. The fee should be of an amount that fairly



compensates the attorney for his or her services but is not so large that it is considered unconscionable. Charging an unconscionable fee could subject the attorney to disciplinary action and render the fee agreement unenforceable. In addition, attention must be given to a proper fee-splitting arrangement if it is determined that an association with an outside attorney is necessary or that the handling of the matter needs to be referred to another attorney. Finally, if the fee is to be paid by a person or entity other than the client, certain requirements must be met.



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.13*

### **3.13 Formal Requirements for Establishing Representation.**

#### **3.13[1] Neither a Retainer Nor Formal Agreement Is Required to Establish Attorney/Client Relationship.**

Although typically an attorney will enter into a contract or retainer agreement with the client, neither a retainer nor other formal agreement is required to establish the attorney/client relationship [ *Lister v. State Bar* (1990) 51 C3d 1117, 1126, 275 CR 802, 800 P2d 1232 ; *Farnham v. State Bar* (1976) 17 C3d 605, 612, 131 CR 661, 552 P2d 445 ].

#### **Examples:**

An attorney/client relationship has been established without retainer or other formal agreement when:

- An attorney volunteers his or her services [see *Miller v. Metzinger* (1979) 91 CA3d 31, 39, 154 CR 22 ].
- An attorney is appointed by the court to represent a client [see *Houston Gen. Ins. Co. v. Superior Court* (1980) 108 CA3d 958, 964, 166 CR 904 ].
- An attorney makes a single, special appearance for a litigant [see *Streit v. Covington & Crowe* (2000) 82 CA4th 441, 447, 98 CR2d 193 ].
- An attorney agrees to provide legal advice to a prospective client without an agreement as to fees [ *Beery v. State Bar* (1987) 43 C3d 802, 811-812, 239 CR 121, 739 P2d 1289 ].



#### **Trap:**

Avoid the trap of representing a client without a written agreement of some kind. Even if no fee is to be paid, a clear writing specifying the exact parameters of the representation is profoundly important to avoid disputes with the client and potential malpractice liability. Counsel may intend to give some preliminary advice and have no intention of undertaking full representation in the matter, but the new unintended client may think that he or she has left the matter in counsel's hands. When the statute of limitations runs without further action the nonclient may well be looking to counsel for the recovery.

**Strategic Point:**

If the client waives nonbinding arbitration under the California Mandatory Fee Arbitration Act [B&P Code § 6200 *et seq.*], a pre-dispute arbitration agreement is enforceable [ *Ervin, Cohen & Jessup, LLP v. Kassel* (2007) 147 CA4th 821, 827 ].

**3.13[2] Establishing Limited Scope Representation.**

**3.13[2][a] Special Rules Apply to Limited Scope Representation.** *Cal Rules Ct, Rules 3.35-3.37* apply to cases involving limited scope representation of a client by an attorney [*Cal Rules Ct, Rule 3.35(b)*].

**Distinguish:**

"Limited scope representation" is an attorney-client relationship in which the attorney and client agree to a scope of legal services to be provided that is limited to specific tasks [*Cal Rules Ct, Rule 3.35(a)*].

**3.13[2][b] Agreement and Notice to Court Required for Limited Scope Representation.** "Noticed representation" of limited scope, which arises in civil cases other than family law cases [*Cal Rules Ct., Rule 3.35(b)*] from notice by the client and his or her attorney to the court and other parties of the limited scope representation, is subject to *Cal Rules Ct, Rule 3.36* [*Cal Rules Ct., Rule 3.35(c)(1)*]. To establish noticed representation, the party and his or her attorney "may" provide notice of their agreement to limited scope representation on Judicial Council Form MC-950 Notice of Limited Scope Representation, a mandatory form [*Cal Rules Ct, Rule 3.36(a)*].

**Cross Reference:**

Judicial Council Form MC-950, see 3.38A.

The Judicial Council intended that under this rule, "the attorney and client must give the court notice of the limited representation" [Judicial Council of California Report, *Limited Scope Representation in Civil Cases* ..., at 3 (October 6, 2006)].

**Cross References:**

Grounds for obtaining order to be relieved as attorney upon completion of noticed representation limited in scope, see 3.29[7].

Effect of limited scope representation on requirements for service of documents by other parties, see *Ch. 26, Law and Motion Procedure*, 26.10[3].

**3.13[2][c] Notice of Agreement Not Required for Representation Limited to Preparation of Legal Documents and Not Involving Court Appearance.** The notice requirement does not apply to "undisclosed representation," which is limited representation that is not disclosed [*Cal Rules Ct., Rule 3.35(c)(2)*]. Under this type of representation, the attorney may draft legal documents that the client submits, but does not make an appearance before the court. The attorney in this situation need not disclose in the text of the documents his or her role in drafting the documents [*Cal Rules Ct., Rule 3.37(a)*].

**Strategic Point:**

In undisclosed representation, the client must seek attorney's fees to which he or she may be entitled by submitting required information on his or her own [see *Cal Rules Ct., Rule 3.37(b)*]. Thus, an attorney undisclosedly representing a client should negotiate for a term of the representation that makes assistance with the preparation of the documents necessary for the client's obtaining an order for attorney fees a part

of the attorney's undisclosed representation of the client in the matter.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Legal EthicsClient RelationsAccepting Representation



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### 3.14 Fees.

#### 3.14[1] Types of Fees That Can Be Charged.

**3.14[1][a] Hourly Fee.** The fee can be based on payments at set hourly rates.



#### Strategic Point:

Most attorneys bill in quarter hour increments. The increments on which the billing will be based should be set forth in the fee agreement with the client. For example, the agreement should state that the attorney's fees are \$100 per hour with fees billed on 0.25 hour minimum increments.

**3.14[1][b] Contingency Fee.** In a contingency fee arrangement, the attorney can receive a fee only if a specific contingency occurs, such as a settlement of the client's claim or a money judgment in favor of the client.



#### Cross Reference:

Discussion of contingency fee agreements, see 3.16[7].

**3.14[1][c] Retainer Fee.** A retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time [ *Baranowski v. State Bar* (1979) 24 C3d 153, 164 n4, 154 CR 752, 593 P2d 613 ]. The fee is earned by the attorney when paid because the attorney is entitled to the money regardless of whether he or she actually performs any services for the client [ *Baranowski v. State Bar* (1979) 24 C3d 153, 164 n4, 154 CR 752, 593 P2d 613 ].



#### Cross Reference:

Discussion of retainer fee agreements, see 3.16[6][c].

**3.14[1][d] Exploratory or Diagnostic Fee.** An exploratory or diagnostic fee is a fixed fee arrangement only for the attorney's services in performing preliminary work on a matter. After the preliminary work is completed, the attorney and client can then make an arrangement for payment for additional work.

**3.14[1][e] Per Diem Fee.** A per diem fee arrangement, primarily used in litigation matters, provides for a set rate for a particular type of service performed, such as appearance at a court hearing, filing, serving, and appearing on a motion, or attendance on a trial day.

**3.14[1][f] Transaction or Lump Sum Fee.** In a transaction or lump sum fee arrangement, the attorney charges a fixed fee for a particular matter.

**3.14[2] Amount of Fees Must Not Be Illegal or Unconscionable.**

**3.14[2][a] Attorney Cannot Enter Into an Agreement for, Charge, or Collect an Illegal or Unconscionable Fee.** An attorney may not enter into an agreement for, charge, or collect an illegal or unconscionable fee [*Cal Rules Prof Conduct, Rule 4-200(A)*]. Not only may an attorney be disciplined for entering into an unconscionable fee agreement, but the fee agreement may be held unenforceable [ *Baron v. Mare (1975) 47 CA3d 304, 312, 120 CR 675* ].



**Warning:**

Several statutes and rules restrict the fees that can be charged in particular cases, such as medical malpractice, workers' compensation, and claims under the Federal Tort Claims Act [*see, e.g., B&P Code § 6146* (medical malpractice); *Lab Code § 4906* (workers' compensation); *28 USC § 2678* (federal tort claims)]. Local court rules can also have an impact on attorney's fees [*see, e.g., Los Angeles Super Ct Rules, Rules 3.2(a)* (calculation of attorney's fees for recovery on a note)].

**3.14[2][b] Unconscionability Determined on Basis of Facts and Circumstances.** Unconscionability of a fee is determined on the basis of all the facts and circumstances existing at the time the agreement is entered into [*Cal Rules Prof Conduct, Rule 4-200(B)*]. Among the factors to be considered, when appropriate, in determining the unconscionability of a fee are the following [*Cal Rules Prof Conduct, Rule 4-200(B)*]:

- The amount of the fee in proportion to the value of the services performed.
- The relative sophistication of the attorney and the client.
- The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney.
- The amount involved and the results obtained.
- The time limitations imposed by the client or by the circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the attorney or attorneys performing the services.
- Whether the fee is fixed or contingent.
- The time and labor required.
- The informed consent of the client to the fee.



**Cross Reference:**

Discussion of certain of these factors and additional factors that courts have considered, see California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics, § 72.190 et seq. (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Legal Ethics Client Relations Attorney Fees Excessive Fees



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.15*

### **3.15 Recovery of Costs and Expenses by Attorney.**

An attorney can advance the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter [*Cal Rules Prof Conduct, Rule 4-210(A)(3)*]. The costs are limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client [*Cal Rules Prof Conduct, Rule 4-210(A)(3)*]. A client is obligated to repay the advances made by the attorney [ *Cooley v. Miller & Lux (1909) 156 C 510, 525-526, 105 P 981* ; *Ripley v. Pappadopoulos (1994) 23 CA4th 1616, 1626, 28 CR2d 878* ]. An attorney's travel expenses can also be recovered if there is an agreement with the client permitting the recovery [see *Darnell v. Woodruff (1936) 14 CA2d 628, 634, 58 P2d 975* ].

#### **Strategic Point:**



You should always include in the fee agreement a provision for repayment of costs and expenses advanced.



#### **Cross References:**

Recovery of attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 25, Attorney's Fees.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Legal EthicsClient RelationsAttorney FeesGeneral Overview





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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.16*

### 3.16 Fee Agreements.

**3.16[1] Fee Agreement May Be Express or Implied.** A fee agreement may be in a detailed contract [see *Preston v. Herminghaus* (1930) 211 C 1, 5-7, 292 P 953 ], a letter [see *Goldberg v. City of Santa Clara* (1971) 21 CA3d 857, 861, 98 CR 862 ], or a memorandum [see Model Rules Prof Conduct, Rule 1.5, cmt. (1994)]. Without an express agreement, the agreement may also be implied [ *Flannery v. Prentice* (2001) 26 C4th 572, 589, 110 CR2d 809, 28 P3d 860 (citing "well-established rule" that in the absence of an agreement on the subject, the client must be deemed to have promised to pay the attorney the reasonable value of the services performed on the client's behalf and with the client's consent and knowledge)].



#### Warning:

Mediation confidentiality under *Evid Code* § 1119(a) does not apply to conversations between client and counsel about altering a fee arrangement, merely because they are participating in a mediation, where the adverse party was not present for the discussion [Porter v. Wyner (2010) 183 CA4th 949, 961, 107 CR3d 653].

**3.16[2] Fee Agreement Construed Against Attorney.** Fee agreements are strictly construed against the attorney [ *Reynolds v. Sorosis Fruit Co.* (1901) 133 C 625, 630, 66 P 21 ; *Severson & Werson v. Bolinger* (1991) 235 CA3d 1569, 1572, 1 CR2d 531 ]. A fee agreement is evaluated at the time of its making and must be fair, reasonable, and fully explained to the client [ *Severson & Werson v. Bolinger* (1991) 235 CA3d 1569, 1572, 1 CR2d 531 ].

### 3.16[3] Court Approval of Fee Agreement Required in Certain Cases.

**3.16[3][a] Services Provided to a Minor in Litigation.** A contract for attorney's fees for services in litigation, made by or on behalf of a minor, is void unless the contract is approved, on petition by an interested person, by the court in which the litigation is pending or by the court having jurisdiction of the guardianship estate of the minor [*Fam Code* § 6602]. If the contract is not approved and a judgment is recovered by or on behalf of the minor, the attorney's fees chargeable against the minor must be fixed by the court rendering the judgment [*Fam Code* § 6602].

**3.16[3][b] Contingency Fee Agreement With Guardian or Conservator.** A contingency fee agreement involving a ward or conservatee is valid only if the agreement is made pursuant to an order of the court authorizing the

guardian or conservator to execute the contract or the contract is approved by order of the court [*Prob Code* § 2644(a)].

**3.16[3][c] Unemployment Insurance Appeal.** When an attorney brings an appeal before the California Unemployment Insurance Appeals Board, the attorney's charge for services provided must be approved by the Board [*UI Code* § 1957]. Failure to secure Board approval may result in a fine of up to \$1,000, imprisonment up to six months, or both [*UI Code* § 1957].

**3.16[4] Fee Agreement for Illegal Fee Is Void.** An attorney is subject to discipline if he or she enters into a fee agreement for charging or collecting an illegal fee [*see Cal Rules Prof Conduct, Rule 4-200(A)*]. A fee is illegal if it is in violation of:

- A statute [ *Estate of Hastings (1952) 108 CA2d 713, 716, 239 P2d 684* (indefinite contingency fee rather than fixed fee in probate matter violated former *Prob Code* § 910)].
- Public policy [ *Calvert v. Stoner (1948) 33 C2d 97, 103, 199 P2d 297* ("contingent fee contract providing that the client may not compromise the suit without the consent of his attorney is against public policy and void")].
- California Rules of Professional Conduct [ *Goldstein v. Lees (1975) 46 CA3d 614, 618-619, 120 CR 253* ("attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility")].

**Example:**

A client with negligence claims arising out of two automobile accidents desired to change attorneys. Her first attorney refused to execute a substitution agreement or transmit the case files to the new attorney unless the client signed a fee agreement for 40 percent of any sums collected by settlement or judgment. The client signed the agreement but later challenged its validity. The court held that the agreement was void because it violated the attorney's ethical duties to the client [ *Kallen v. Delug (1984) 157 CA3d 940, 951, 203 CR 879* ].

**3.16[5] Fee Agreement With Out-of-State Attorney or Law Firm.** The practice of law in California by an out-of-state attorney not licensed to practice law in California constitutes the unauthorized practice of law [*B&P Code* § 6125] and precludes the collection of attorney fees under fee agreements for work performed in California [ *Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 C4th 119, 124, 70 CR2d 304, 949 P2d 1* ].



**Warning:**

A person may be found to have practiced law in California without actual physical presence in the state [ *Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 C4th 119, 124, 128-129, 70 CR2d 304, 949 P2d 1* ("one may practice law in the state in violation of *B&P Code* § 6125 although not physically present [in California] by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means")].

**3.16[6] Non-Contingency Fee Agreements.**

**3.16[6][a] Certain Non-Contingency Fee Arrangements Must Be in Writing.** In any non-contingency case in which it is reasonably foreseeable that total expenses to a client, including attorney fees, will exceed \$1,000, the contract for services must be in writing [*B&P Code* § 6148(a)]. At the time the fee agreement is entered into, the attorney must provide a duplicate copy of the agreement signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative [*B&P Code* § 6148(a)]. The contract must contain the following [*B&P Code* § 6148(a)]:

- Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.
- The general nature of the legal services to be provided to the client.
- The respective responsibilities of the attorney and the client as to the performance of the contract.

Failure to comply with these requirements renders the agreement voidable at the option of the client. If the agreement is voided, the attorney will still be entitled to collect a reasonable fee [*B&P Code § 6148(c)*].

**Exceptions:**

*B&P Code § 6148* does not apply [*B&P Code § 6148(d)*]:

- To services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or when a writing is otherwise impractical.
- To an arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.
- If the client knowingly states in writing, after full disclosure of *B&P Code § 6148*, that a writing concerning fees is not required.
- When the client is a corporation.

➤ **Cross Reference:**

Forms, see *California Forms of Pleading and Practice*, Ch. 72, *Attorney Practice and Ethics*, § 72.670-72.676 (Matthew Bender).

**3.16[6][b] Hourly Fee Agreements.** Under an hourly fee agreement, the attorney charges a fee based on time worked on the matter at set hourly rates.

➤ **Cross Reference:**

Forms, see *California Forms of Pleading and Practice*, Ch. 72, *Attorney Practice and Ethics*, §§ 72.670, 72.671, 72.673, (Matthew Bender).

**3.16[6][c] Retainer Fee Agreements.** A retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time [ *Baranowski v. State Bar (1979) 24 C3d 153, 164 n4, 154 CR 752, 593 P2d 613* ]. The fee is earned by the attorney when paid because the attorney is entitled to the money regardless of whether he or she actually performs any services for the client [ *Baranowski v. State Bar (1979) 24 C3d 153, 164 n4, 154 CR 752, 593 P2d 613* ].

**Distinguish:**

A retainer fee agreement is not to be confused with an advance fee agreement although in common practice, the terms are used interchangeably. In an advance fee agreement, the fee paid is not earned until the services are actually performed. If all or part of the contemplated services are not performed, the fee, or an appropriate portion, must be returned.

➤ **Cross References:**

Discussion of advance fee agreements, see 3.16[6][g].

Form of retainer agreement, see 3.39.

**3.16[6][d] Transaction or Lump Sum Fee Agreements.** In a transaction or lump sum fee agreement, the attorney charges a fixed fee for a particular transaction. Such an arrangement is common in bankruptcy matters. A risk in this type of agreement for the attorney is underestimating the work involved in the matter. This potential problem can be alleviated somewhat in the agreement by being careful to specify what services the agreement covers and the charges for any additional work.

➡ **Cross Reference:**

Form, see *California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics, § 72.672* (Matthew Bender).

**3.16[6][e] Exploratory or Diagnostic Fee Agreements.** This type of agreement can be useful to fix a fee for preliminary work on a matter when there is not enough known of the extent of the ultimate work needed in order to set a fixed fee for the entire transaction. The agreement gives the client the comfort of a limit on the preliminary cost of representation while giving the parties flexibility to agree on a different type of fee arrangement once the extent of the services needed comes into clearer focus.

➡ **Cross Reference:**

Form, see *California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics, § 72.678* (Matthew Bender).

**3.16[6][f] Per Diem Fee Agreements.** A per diem fee agreement is best utilized for setting a fixed fee for certain litigation services, such as attending a pretrial conference, or preparing, serving, and appearing on a motion.

➡ **Cross Reference:**

Form, see *California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics, § 72.679* (Matthew Bender).

**3.16[6][g] Advance Payment Fee Agreements.** An advance fee agreement can be entered into when the attorney wants to prevent not being paid for performing services. Advance fee agreements are frequently used in family law and criminal law matters. The funds received under an advance payment agreement remain the property of the client until earned by the attorney [ *T&R Foods, Inc. v. Rose* (1996) 47 CA4th Supp 1, 7, 56 CR2d 41 ]. The failure of the attorney to segregate the client's funds from the attorney's funds constitutes breach of fiduciary duty and professional negligence [ *T&R Foods, Inc. v. Rose* (1996) 47 CA4th Supp 1, 8, 56 CR2d 41 ].

**Distinguish:**

In connection with an hourly fee agreement, it is common practice for attorneys to refer to an advance fee received from a client to be applied against the time billed to the case as a "retainer" even though any unearned portion of the fee will be returned to the client.

➡ **Cross Reference:**

Forms of advance payment provision, see *California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics, § 72.682* (Matthew Bender).

**3.16[6][h] Fee Agreement Should Contain Lien Provision.** An attorney can expressly provide in the hourly fee agreement for a lien on the proceeds of a prospective judgment in favor of the client for legal services rendered. Commonly known as a "charging lien," this lien may be used to secure either an hourly fee or a contingency fee [ *Fletcher v. Davis* (2004) 33 C4th 61, 66 ].

**Warning:**

An attorney who secures payment of hourly fees by acquiring a charging lien against a client's future judgment or recovery has acquired an interest that is adverse to the client, and so must comply with *Cal Rules Prof Conduct, Rule 3-300* requiring the attorney who wishes to obtain such a lien to explain the transaction fully, to offer fair and reasonable terms, to provide a copy of the agreement, to give the client an opportunity to seek independent legal advice, and to secure the client's written consent [ *Fletcher v. Davis* (2004) 33 C4th 61, 71-72 ; *Hawk v. State Bar* (1988) 45 C3d 589, 601, 247 CR 599, 754 P2d 1096 ]. In light of *Fletcher*, prior case law finding an "implied" lien when the agreement is not in writing no longer appears to be valid, and any lien provisions should be clearly written and comply with all requirements of Rule 3-300 (compare *Fletcher v. Davis* (2004) 33 C4th 61 , with *Cetenko v. United Cal. Bank* (1982) 30 C3d 528, 531-532, 179 CR 902, 638 P2d 1299 ]. Note that, contrary to commonly held belief, the retention of independent counsel may not, in and of itself, protect against a violation of Rule 3-300; even if independent counsel is retained the agreement still must be fair and in writing to comply with Rule 3-300 [see *BGJ Assocs. v. Wilson* (2004) 113 CA4th 1217, 1227, 7 CR3d 140 ].

**Distinguish:**

A contingency fee agreement need not comply with *Cal Rules Prof Conduct, Rule 3-300*, to create an attorney's lien [ *Plummer v. Day/Eisenberg, LLP* (2010) 184 CA4th 38, 49, 108 CR3d 455].

**3.16[7] Contingency Fee Agreements.**

**3.16[7][a] Written Fee Agreement Mandatory for Contingency Fee Arrangements.** A contingency fee agreement must be in writing and contain certain statutorily required information [ *B&P Code § 6147(a)* ]. Failure to comply renders the agreement voidable at the option of the client, and the attorney is then only entitled to collect a reasonable fee [ *B&P Code § 6147(b)* ; *Alderman v. Hamilton* (1988) 205 CA3d 1033, 1037-1038, 252 CR 845 ].

**Exceptions:**

The requirement that the contingency fee agreement be in writing does not apply to contingency fee agreements for the recovery of worker's compensation benefits [ *B&P Code § 6147(c)* ] and contingency fee agreements involving certain claims between merchants [ *B&P Code § 6147.5* ].

A modification or amendment of an original contingency fee agreement is independently subject to the same requirements [ *Stroud v. Tunzi* (2008) 160 CA4th 377, 382-383, 72 CR3d 756 (documents modifying original contingent-fee agreement voided); *Fergus v. Songer* (2007) 150 CA4th 552, 570, 59 CR3d 273 (letter amending contingency rate voided)].

**Cross Reference:**

Forms, see *California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics, §§ 72.675, 72.676* (Matthew Bender).

**3.16[7][b] Contingency Fee Agreement Requirements.** A contingency fee agreement must include, but is not limited to, statements of the following [ *B&P Code § 6147(a)(1)-(5)* ]:

- A statement of the contingency fee rate that the client and attorney have agreed on.
- A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.
- A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee

contract, including any amounts collected for the client by the attorney.

- Unless the claim is subject to *B&P Code § 6146* (governing contingency fee agreements in negligence actions against health care providers), a statement that the fee is not set by law but is negotiable between attorney and client.
- If the claim is subject to *B&P Code § 6146*, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.



#### Strategic Point:

Since a contingency fee agreement should indicate that the fees are negotiable and not set by law it is advisable that the actual percentages not be preprinted but should be hand written by the attorney once the percentage fee has been agreed upon. This is a demonstration and manifestation of the negotiability of the fee itself.

**3.16[7][c] Contingency Fee Agreement Must Not Charge Unconscionable Fees.** Contingency fee agreements may not charge a fee that is unconscionable [*see Cal Rules Prof Conduct, Rule 4-200*].



#### Cross Reference:

Discussion of the factors involved in determining the unconscionability of fees generally, see 3.14[2][b].

**3.16[7][d] Contingency Fee Based on Client's Gross Recovery Is Permitted.** A contingency fee that is based on a percentage of the gross recovery rather than the net recovery after costs is not unfair so long as the fee is not so exorbitant and wholly disproportionate to the services performed as to shock the conscience [ *Ramirez v. Sturdevant* (1994) 21 CA4th 904, 913-914, 26 CR2d 554 ].

**3.16[7][e] Contingency Fee Agreement Should Contain Lien Provision.** An attorney can expressly provide in the contingency fee agreement for a lien on the proceeds of a prospective judgment in favor of the client for legal services rendered. Commonly known as a "charging lien," this lien may be used to secure either an hourly fee or a contingency fee [ *Fletcher v. Davis* (2004) 33 C4th 61, 66 ; *Flannery v. Prentice* (2001) 26 C4th 572, 597, 110 CR2d 809, 28 P3d 860 ].



#### Warning:

An attorney who secures payment of contingency fees by acquiring a charging lien against a client's future judgment or recovery has acquired an interest that is adverse to the client, and so must comply with *Cal Rules Prof Conduct, Rule 3-300* requiring the attorney who wishes to obtain such a lien to explain the transaction fully, to offer fair and reasonable terms, to provide a copy of the agreement, to give the client an opportunity to seek independent legal advice, and to secure the client's written consent [ *Fletcher v. Davis* (2004) 33 C4th 61, 71-72 ; *Hawk v. State Bar* (1988) 45 C3d 589, 601, 247 CR 599, 754 P2d 1096 ]. In light of *Fletcher*, prior case law finding an "implied" lien when the agreement is not in writing no longer appears to be valid, and any lien provisions should be clearly written and comply with all requirements of Rule 3-300 [*compare Fletcher v. Davis* (2004) 33 C4th 61, 71-72 , with *Cetenko v. United Cal. Bank* (1982) 30 C3d 528, 531-532, 179 CR 902, 638 P2d 1299 ]. Note that, contrary to commonly held belief, the retention of independent counsel may not, in and of itself, protect against a violation of Rule 3-300; even if independent counsel is retained the agreement still must be fair and in writing to comply with Rule 3-300 [*see BGJ Assocs. v. Wilson* (2004) 113 CA4th 1217, 1227, 7 CR3d 140 ].

**3.16[7][f] On Discharge, Attorney Limited to Reasonable Value of Services Rendered.** An attorney discharged with or without cause is entitled to recover the reasonable value of his or her services rendered to the time of discharge. However, the cause of action to recover compensation for services rendered under a contingent fee agreement does not accrue until the occurrence of the stated contingency [ *Fracasse v. Brent* (1972) 6 C3d 784, 792, 100 CR 385, 494 P2d 9 ].

**3.16[7][g] Contingency Fee Agreements Are Restricted in Medical Malpractice Actions.** In an action seeking damages for injury or damage against a health care provider based on the provider's alleged professional negligence, contingency fees are restricted by statute. In these medical malpractice cases, an attorney may not contract for or collect a contingency fee for representing any person in excess of the following limits [B&P Code § 6146(a)]:

- Forty percent of the first \$50,000 recovered.
- Thirty-Three and One-Third percent of the next \$50,000 recovered.
- Twenty-Five percent of the next \$500,000 recovered.
- Fifteen percent of any amount on which the recovery exceeds \$600,000.



**Warning:**

Additional statutory requirements govern contingency fee agreements in medical malpractice actions. Be sure to review carefully B&P Code § 6146.

**3.16[7][h] Contingency Fee Agreement Cannot Prohibit Settlement by Client Without Attorney's Consent.** A contingent fee contract providing that the client may not compromise the suit without the consent of his or her attorney is against public policy and void [ *Calvert v. Stoner* (1948) 33 C2d 97, 103, 199 P2d 297 ].

**3.16[8] Attorney May Contractually Secure Payment of Fees by Lien on Client's Recovery.** A charging or nonpossessory lien in favor of an attorney on the proceeds of a prospective judgment or recovery in favor of his or her client for legal services rendered may be created by contract [ *Cetenko v. United Cal. Bank* (1982) 30 C3d 528, 531 (judgment); *Levin v. Gulf Ins. Group* (1999) 69 CA4th 1282, 1286, 82 CR2d 228 (recovery)].

**3.16[9] Fee Agreement Is Confidential.** A written fee agreement is a confidential communication within the meaning of B&P Code § 6068(e) (attorney's duty to preserve client confidences and secrets) and Evid Code § 952 (attorney/client privilege) [B&P Code § 6149].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Legal EthicsClient RelationsAttorney FeesContingency FeesLegal EthicsClient RelationsAttorney FeesFee AgreementsLegal EthicsClient RelationsConfidentiality of Information





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1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.17

### 3.17 Fee-Splitting Arrangements.

**3.17[1] Fee-Splitting Arrangement Between Attorney and Outside Associated Counsel Is Permitted.** An attorney may hire outside counsel on behalf of a client. Outside counsel is an attorney who is not a partner of, associate of, or shareholder with the attorney [*Cal Rules Prof Conduct, Rule 2-200(A)*]. The client is not liable, however, for the expense of the associated counsel absent an express agreement [ *Streit v. Covington & Crowe (2000) 82 CA4th 441, 446, 98 CR2d 193* ].



#### Warning:

If you enter into a fee-splitting agreement with associated counsel, you must disclose in writing to the client the existence of the agreement and obtain the client's written consent [*Cal Rules Prof Conduct, Rule 2-200(A)*; *Chambers v. Kay (2002) 29 C4th 142, 156, 126 CR2d 536, 56 P3d 645* ]. The total fee charged may not be increased solely because of the fee-splitting arrangement and cannot be unconscionable, as that term is defined in *Cal Rules Prof Conduct, Rule 4-200* [*Cal Rules Prof Conduct, Rule 2-200(A)(2)*].

#### Exception:

An attorney may recover fees in quantum meruit for services rendered even though the fee splitting agreement was not in writing nor disclosed to the client; however, the amount recovered will most likely be lower than the fee set by oral agreement [ *Huskinson & Brown v. Wolf (2004) 32 C4th 453, 460* ].



#### Timing:

While *Cal Rules Prof Conduct, Rule 2-200* requires the client's written consent be obtained prior to any division of fees, the rule does not require the client's written consent prior to the lawyers' entering into a fee-splitting arrangement, or prior to the commencement of work, or at any time other than prior to any division of fees; however, written consents obtained early in the process are preferable to those obtained after-the-fact [ *Mink v. Maccabee (2004) 121 CA4th 835, 838* ].



### ► Cross References:

Discussion of unconscionability, see 3.14[2].  
 Form of fee-splitting agreement, see 3.40.  
 Form of association of counsel--with consent of client, see 3.41.  
 Form of notice of association of counsel, see 3.42.  
 Discussion of attorney requirement to obtain client's informed and written consent before asserting charging lien against future judgments, see 3.16[6][h], [7][e].

**3.17[2] Fee-Splitting Arrangement Between Referring Attorney and Referred Attorney Is Permitted.** If an attorney decides to refer a matter to another attorney, who is not a partner of, associate of, or shareholder with the attorney, the two attorneys may enter into a fee-splitting agreement even if the first attorney's involvement is limited to making the referral. The requirements for disclosure and consent are the same as when the attorney hires an associated counsel [see *Cal Rules Prof Conduct*, Rule 2-200(A)].

### Distinguish:

*Cal Rules Prof Conduct*, Rule 2-200 does not require the fee-splitting agreement between the attorneys to be in writing, although the preferable practice is to have a written agreement [ *Mink v. Maccabee* (2004) 121 CA4th 835, 838 ].

### ► Cross Reference:

Form, see 3.40.

**3.17[3] Fee-Splitting Arrangement Between Attorney and Non-Attorney Is Prohibited.** Neither an attorney nor a law firm may directly or indirectly share legal fees with a person who is not a lawyer, except with the following:

- A deceased attorney's estate [*Cal Rules Prof Conduct*, Rule 1-320(A)(1), (2)].
- Non-attorney employees in a compensation, profit-sharing, or retirement plan, provided that the plan does not circumvent the rules or *B&P Code* §§ 6000-6238 [*Cal Rules Prof Conduct*, Rule 1-320(A)(3)].
- A lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service [*Cal Rules Prof Conduct*, Rule 1-320(A)(4)].

### Legal Topics:

For related research and practice materials, see the following legal topics:  
 Legal Ethics Client Relations Attorney Fees Fee Splitting



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.18*

### **3.18 Requirements When Fees Are Paid by Third Person.**

An attorney may not accept compensation for representing a client from someone other than the client unless all of the following requirements are met [*Cal Rules Prof Conduct, Rule 3-310(F)*]:

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



#### **Cross Reference:**

Discussion of the disclosure and consent requirements when someone other than the client is paying the fees, see *3.08[6]*.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Legal Ethics Client Relations Attorney Fees Fee Agreements



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.19*

**3.19 CHECKLIST: Handling Client Funds and Property.**

- ☐ Deposit all funds received or held for the benefit of the client, including advances for costs and expenses, in one or more client-only interest bearing trust account established in California.

**Authority:**

*Cal Rules Prof Conduct, Rule 4-100(A)*

**Discussion:**

See 3.21[1]

**Exception:**

If funds received by you are paid as a true retainer fee to assure your availability for future legal services, the amount need not be placed in a trust account but rather can be placed in your general account.

**Discussion:**

See 3.25

**Exception:**

If you receive funds that are nominal in amount or are on deposit for a short period of time, funds must be placed in a separate interest bearing or dividend paying account with the interest or dividends paid to the State Bar.

**Authority:**

*B&P Code § 6211(a)*

**Discussion:**

See 3.23

- ☐ Do not commingle law firm funds with funds received from clients.

**Authority:**

*Cal Rules Prof Conduct, Rule 4-100(A)*

**Discussion:**

See 3.21[1]

- ☐ Promptly identify and label securities and property received or held for the benefit of the client and place it in a safe deposit box or other place of safekeeping as soon as practicable.

**Authority:**

*Cal Rules Prof Conduct, Rule 4-100(B)(2)*

**Discussion:**

See 3.21[3]

- ☐ Promptly notify client of the receipt of the client's funds, securities, or other property.

**Authority:**

*Cal Rules Prof Conduct, Rule 4-100(B)(1)*

**Discussion:**

See 3.21[2]

- ☐ Maintain record of all funds, securities, or other property received for a period of five years after the final distribution of the funds, securities, or other property. Record must include:

☐ A written ledger for each client on whose behalf funds are held that sets forth:

☐ The name of the client.

☐ The date, amount, and source of all funds received on behalf of the client.

☐ The date, amount, payee, and purpose of each disbursement made on behalf of the client.

☐ The current balance for the client.

☐ A written journal for each bank account that sets forth:

☐ The name of the account.

☐ The date, amount, and client affected by each debit and credit.

☐ The current balance in the account.

- ☐ All bank statements and cancelled checks for each bank account.
- ☐ Each monthly reconciliation (balancing) of the above items.
- ☐ Each item of security and property held.
- ☐ The person on whose behalf the security or property is held.
- ☐ The date of receipt of the security or property.
- ☐ The date of distribution of the security or property.
- ☐ Each person to whom the security or property was distributed.

**Authority:**

*Cal Rules Prof Conduct, Rule 4-100(B)(3); Cal Rules Prof Conduct, Rule 4-100, Standards*

**Discussion:**

See 3.21[4]

- ☐ If client requests funds, securities, other properties in trust account, promptly pay or deliver the requested items.

**Authority:**

*Cal Rules Prof Conduct, Rule 4-100(B)(4)*

**Exception:**

If there is a dispute as to whether the funds belong to the client or to you, the funds must remain in the client trust account until the dispute is resolved.

**Authority:**

*Cal Rules Prof Conduct, Rule 4-100(A)(2)*

**Discussion:**

See 3.21[5]

- ☐ If client requests trust account statement, furnish client with complete statement of the funds and property received and disbursed, and any charges on the account.

**Timing:**

Statement must be furnished within 10 calendar days after receipt of the request. The requests cannot be made more often than once each 30 days unless a client files a complaint with the California State Bar and the State Bar determines that more statements are warranted.

**Authority:**

*B&P Code § 6091*

**Discussion:**

See 3.24

☐ When your right to any of the funds in the client trust account become fixed, withdraw such portion of the funds at the earliest possible time.

**Authority:**

*Cal Rules Prof Conduct, Rule 4-100(A)(2)*

**Discussion:**

See 3.25



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### **3.20 Options and Strategies.**

Mismanagement of client funds by an attorney is treated as a very serious offense, often leading to the disbarment of the attorney. An attorney must diligently adhere to the rules governing handling of the client's funds and other property, including the keeping of detailed records.



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1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.21

### 3.21 Attorney Has a Duty to Properly Handle Client's Funds and Property.

**3.21[1] Client's Funds Must Be Segregated From Attorney's Funds.** All funds received or held for the benefit of a client by an attorney, including advances for costs and expenses, must be segregated from the attorney's funds and deposited in a trust account maintained in the state of California [*Cal Rules Prof Conduct, Rule 4-100(A)*].



#### Warning:

The prohibition on commingling client funds with attorney funds is strict. A violation occurs even if the failure to segregate client funds does not harm the client and is never discovered by the client [ *Murray v. State Bar* (1985) 40 C3d 575, 584, 220 CR 677, 709 P2d 480 ]. The "usual" discipline for an attorney who wilfully misappropriates a client's funds is disbarment [ *Edwards v. State Bar* (1990) 52 C3d 28, 37, 276 CR 153, 801 P2d 396 ]. Willful misappropriation may be found even in the absence of deliberate wrongdoing [ *Palomo v. State Bar* (1984) 36 C3d 785, 795, 205 CR 834, 685 P2d 1185 ("where fiduciary violations occur as the result of serious and inexcusable lapses in office procedure, they may be deemed 'willful' for disciplinary purposes, even if there was no deliberate wrongdoing")].



#### Strategic Point:

There is no need to segregate individual client's funds. All client funds can be commingled in one client trust account.



#### Cross Reference:

Discussion of the sanctions for trust account mismanagement, see 3.26.

**3.21[2] Attorney Must Promptly Notify Client of Receipt of Funds and Property of Client.** An attorney must promptly notify a client of the receipt of the client's funds, securities, or other properties [*Cal Rules Prof Conduct, Rule 4-100(B)(1)*].

**3.21[3] Attorney Must Identify Client's Property and Keep It Safe.** An attorney must promptly identify and



label securities and property of the client and place it in a safe deposit box or other place of safekeeping as soon as practicable [*Cal Rules Prof Conduct, Rule 4-100(B)(2)*]. The safekeeping duty is nondelegable. An attorney will be subject to discipline due to the negligence of an office employee [ *Palomo v. State Bar (1984) 36 C3d 785, 795-796, 205 CR 834, 685 P2d 1185* ].

### **3.21[4] Attorney Must Keep Appropriate Records.**

**3.21[4][a] Attorney Must Maintain Complete Records and Preserve Records for at Least Five Years After Distribution.** An attorney must [*Cal Rules Prof Conduct, Rule 4-100(B)(3)*]:

- Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the attorney or law firm.
- Render appropriate accounts to the client regarding the funds or properties.
- Preserve the records for a period of no less than five years after final appropriate distribution of the funds or properties.
- Comply with any order for an audit of the records issued pursuant to the Rules of Procedure of the State Bar.

**3.21[4][b] Specific Recordkeeping Standards Must Be Followed.** The Board of Governors of the State Bar has adopted standards as to what records must be maintained by attorneys and law firms in accordance with *Cal Rules Prof Conduct, Rule 4-100(B)(3)*. An attorney must, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintain [*Cal Rules Prof Conduct, Rule 4-100, Standards*]:

- A written ledger for each client on whose behalf funds are held that sets forth:
  - ☐ The name of the client.
  - ☐ The date, amount, and source of all funds received on behalf of the client.
  - ☐ The date, amount, payee, and purpose of each disbursement made on behalf of the client.
  - ☐ The current balance for the client.
- A written journal for each bank account that sets forth:
  - ☐ The name of the account.
  - ☐ The date, amount, and client affected by each debit and credit.
  - ☐ The current balance in such account.
- All bank statements and cancelled checks for each bank account.

- Each monthly reconciliation (balancing) of the above items.

In addition, an attorney must, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written journal that specifies [*Cal Rules Prof Conduct, Rule 4-100, Standards*]:

- Each item of security and property held.
- The person on whose behalf the security or property is held.
- The date of receipt of the security or property.
- The date of distribution of the security or property.
- Each person to whom the security or property was distributed.

**3.21[4][c] Recordkeeping Duty Is Nondelegable.** As with the safekeeping requirement, the duty to maintain appropriate records of the client's funds, securities, and other property is nondelegable [ *Palomo v. State Bar (1984)* 36 C3d 785, 795-796, 205 CR 834, 685 P2d 1185 ].

**3.21[5] Attorney Must Pay or Deliver Client's Funds and Property on Client's Request.** An attorney must promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the attorney that the client is entitled to receive [*Cal Rules Prof Conduct, Rule 4-100(B)(4)*]. If there is a dispute as to whether the funds belong to the client or to the attorney, the funds must remain in the client trust account until the dispute is finally resolved [*Cal Rules Prof Conduct, Rule 4-100(A)(2)*].



#### **Cross Reference:**

Discussion of an attorney's duties on withdrawal of representation, see 3.32.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Legal Ethics Client Relations Client Funds



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### **3.22 Attorney May Have Fiduciary Duty Concerning Funds and Property of Nonclient.**

An attorney may be disciplined for breach of a fiduciary duty owed to a nonclient [ *Hartford v. State Bar* (1990) 50 C3d 1139, 1153, 270 CR 12, 791 P2d 598 ].

#### **Example:**

An attorney representing the husband in a dissolution action received funds in which both the client husband and the nonclient wife had an interest. The attorney misappropriated, commingled, and failed to account for the funds. The attorney argued that, as the wife was represented by separate counsel and she was not his client, he had no obligation to pay funds or account to her. The court rejected the contention, holding that the circumstances under which the attorney received the funds (receipt in trust of the proceeds of sale of the community property residence) created a duty to the wife as well as to the client husband [ *Guzzetta v. State Bar* (1987) 43 C3d 962, 979 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Legal Ethics Professional Conduct Opposing Counsel & Parties



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### **3.23 Certain Amount of Client's Funds Must Be Placed in IOLTA Account.**

An attorney or law firm receiving or disbursing trust funds must establish and maintain an interest bearing or dividend paying IOLTA (Interest on Lawyers Trust Accounts) account in which to deposit or invest all client funds that are nominal in amount or on deposit for a short period of time. Interest and dividends earned on IOLTA accounts must be paid to the State Bar of California [*B&P Code § 6211(a)*]. Funds are nominal if it is impractical to segregate them to earn income for the benefit of the client, in light of the income the funds could earn or the costs involved in earning or accounting for the income [Rules Regulating Interest-Bearing Trust Fund Accounts, Rule 1.4].



#### **Strategic Point:**

Although not required, the client trust account for non-IOLTA funds should be an interest bearing account with the interest payable to the client.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Legal Ethics Client Relations Client Funds



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**3.24 Attorney Must Provide Trust Account Statement on Client's Request.**

At the client's written request, the attorney must furnish the client with a complete statement of the funds received and disbursed and any charges on the trust account, within 10 calendar days after receipt of the request [*B&P Code § 6091*]. The requests may not be made more often than once each 30 days unless a client files a complaint with the State Bar and the State Bar determines that more statements are warranted [*B&P Code § 6091*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Legal Ethics Client Relations Client Funds



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**3.25 Withdrawal From Trust Account for Attorney's Fees Must Be Made at Earliest Reasonable Time After Attorney's Fee Becomes Fixed.**

The funds in the trust account belonging to the attorney must be withdrawn at the earliest reasonable time after the attorney's interest becomes fixed [*Cal Rules Prof Conduct, Rule 4-100(A)(2)*]. When there is a dispute, however, between the attorney and the client over the right of the attorney to make a withdrawal, the disputed amount must not be withdrawn until the dispute is finally resolved [*Cal Rules Prof Conduct, Rule 4-100(A)(2)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Legal Ethics Client Relations Client Funds



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### 3.26 Sanctions for Trust Account Mismanagement.

**3.26[1] Disbarment Is Usual Discipline for Willful Misappropriation.** The usual discipline for an attorney who willfully misappropriates a client's funds is disbarment [ *Edwards v. State Bar* (1990) 52 C3d 28, 37, 276 CR 153, 801 P2d 396 ]. Willful misappropriation may be found even in the absence of deliberate wrongdoing [ *Palomo v. State Bar* (1984) 36 C3d 785, 795, 205 CR 834, 685 P2d 1185 ("where fiduciary violations occur as the result of serious and inexcusable lapses in office procedure, they may be deemed willful for disciplinary purposes, even if there was no deliberate wrongdoing")]. Pursuant to the State Bar's Standards For Attorney Sanctions For Professional Misconduct (contained in Title IV of the Rules of Procedure of the State Bar of California), willful misappropriation of entrusted funds or property must result in disbarment, unless the amount of funds or property misappropriated is insignificant or the most compelling mitigating circumstances clearly predominate [Standards For Attorney Sanctions For Professional Misconduct, Standard 2.2(a)]. In the latter cases, the discipline must not be less than one year suspension, regardless of mitigating circumstances.



#### Warning:

The California Supreme Court is not bound by the State Bar Standards but will accord them great weight [ *In re Lamb* (1989) 49 C3d 239, 245, 260 CR 856, 776 P2d 765 ]. The Supreme Court has not hesitated to impose a harsher sanction than recommended by the State Bar, and even has rejected a recommendation of suspension and disbarred an attorney [ *In re Morse* (1995) 11 C4th 184, 205, 44 CR2d 620, 900 P2d 1170 ].

**3.26[2] Suspension for Commingling or Other Failure to Safeguard Client's Property.** If there is no willful misappropriation, an attorney guilty of commingling, failure to properly safeguard the client's property, or failure to maintain adequate records and deliver client property to the client on request, must receive at least a three-month actual suspension from the practice of law. The punishment must be imposed regardless of mitigating circumstances [see Standards For Attorney Sanctions For Professional Misconduct, Standard 2.2(b) (referring to violations of Cal Rules Prof Conduct, former Rule 8-101)].

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Legal EthicsClient RelationsClient FundsLegal EthicsSanctionsDisbarmentsLegal EthicsSanctionsSuspensions





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### **3.27 CHECKLIST: Terminating the Attorney/Client Relationship.**

#### **3.27[1] Withdrawal by Attorney.**

- ☐ If grounds for a mandatory withdrawal are present, you must withdraw from representation.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-700(B)*

**Grounds:**

See 3.29[3]

- ☐ If withdrawal is being made on a permissive or nonmandatory basis, ensure that sufficient grounds for a permissible withdrawal are present.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-700(C)*

**Grounds:**

See 3.29[4]

- ☐ To withdraw from representation when no action or special proceeding is pending involving the client:

- ☐ Provide notice of withdrawal to client, allowing time for the client to retain new counsel.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-700(A)(2)*

**Discussion:**

See 3.30[1]

- ☐ Perform duties of attorney upon withdrawal.

**Standard Checklist:**

See 3.27[2]

- ☐ To withdraw from representation that is not limited in scope while a court proceeding is pending involving the client:

- ☐ If the client consents to the withdrawal:

☐ Prepare and have client, and, if applicable, new attorney, sign Judicial Council Form MC-050, Substitution of Attorney.

**Exception:**

If client is not an individual but an entity or representative (such as a corporation or trustee) that cannot represent itself in court, Judicial Council Form MC-050 can only be used if signed by a new attorney for the client.

**Authority:**

CCP § 284

**Discussion:**

See 3.30[2]

**Form:**

See 3.47 (with client's name or, if known, new attorney's name inserted as new counsel)

- ☐ File signed Substitution of Attorney with the clerk of court and serve on all parties who have appeared in the action.

**Authority:**

CCP § 284

**Discussion:**

See 3.30[2]

- ☐ If required by the court or other tribunal, also obtain the consent of the tribunal to the withdrawal.

**Authority:**

Cal Rules Prof Conduct, Rule 3-700(A)(1)

- ☐ If the client does not consent to the withdrawal:

- ☐ Prepare and file with the court:

☐ Application for leave to withdraw by notice of motion and motion on Judicial Council Form MC-051.

**Authority:**

*Cal Rules Ct, Rule 3.1362(a)*

**Discussion:**

See 3.30[3][a]

**Form:**

See 3.43

☐ Declaration in support of motion on Judicial Council Form MC-052.

**Authority:**

*Cal Rules Ct, Rule 3.1362(c)*

**Discussion:**

See 3.30[3][c]

**Form:**

See 3.44

☐ Proposed order granting leave to withdraw on Judicial Council Form MC-053.

**Authority:**

*Cal Rules Ct, Rule 3.1362(e)*

**Discussion:**

See 3.30[3][e]

**Form:**

See 3.45

☐ Serve, by personal service or mail, motion, proposed order, and declaration on client and all other parties who have appeared in the action.

**Authority:**

*Cal Rules Ct, Rule 3.1362(d)*

**Discussion:**

See 3.30[3][d]

☐ If client is served by mail, the papers must be accompanied by a declaration stating facts showing that either (1) the service address is the current residence or business address of the client or (2) the service address is the last known residence or business address of the client and the attorney has been unable to locate a more current address after making reasonable efforts to do so within 30 days prior to the filing of the motion to be relieved.

**Authority:**

*Cal Rules Ct, Rule 3.1362(d)*

**Discussion:**

See 3.30[3][d]

**Content Note:**

"Current" means that the address was confirmed within 30 days prior to the filing of the motion to withdraw. Merely demonstrating that the notice was sent to the client's last known address and was not returned will not, by itself, be sufficient to demonstrate that the address is current.

- ☐ After the order granting leave to withdraw is signed, serve a copy of the order on the client and all parties who have appeared in the action or proceeding.

**Authority:**

*Cal Rules Ct, Rule 3.1362(e)*

**Discussion:**

See 3.30[3][d]

**Form:**

See 3.45

- ☐ After consent to withdrawal or a court order granting leave to withdraw is obtained, perform duties of attorney upon withdrawal.

**Standard Checklist:**

See 3.27[2]

- ☐ To withdraw from noticed representation that is limited in scope and completed, while a court proceeding is pending:

- ☐ Apply for order to be relieved as attorney upon completion of limited scope representation.

- ☐ Prepare Judicial Council Form MC-955 Application to Be Relieved as Attorney on Completion of Limited Scope Representation.

- ☐ Obtain blank copy of Judicial Council Form MC-956 Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation.

- ☐ Serve application on client and all parties and file with court, and include blank objection form with service on client.

**Authority:**

*Cal Rules Ct, Rule 3.36(c)-(e)*

**Discussion:**

See 3.30[4][a]

**Forms:**

See 3.38B (application), 3.38C (objection)

☐ If client serves objection form:

☐ Calendar anticipated receipt of notice of hearing on the objection schedule within 25 days of the filing of the objection.

☐ Determine whether the form was properly completed and was served and filed within 15 days of the date the blank form is served on the client.

☐ Calendar hearing date after receiving notice of date from court clerk.

☐ Prepare documentation that all tasks agreed to on notice of limited scope representation have been completed.

☐ Attend hearing and present evidence contesting client's objection to the application for withdrawal.

**Authority:**

*Cal Rules Ct, Rule 3.36(f), (g)*

**Discussion:**

See 3.30[4][b]

☐ If client does not serve objection form:

☐ File:

☐ "Updated" application indicating the lack of objection by the client, on Judicial Council Form MC-955 Application to Be Relieved as Attorney on Completion of Limited Scope Representation.

☐ Proposed order for relief as limited representation attorney on Judicial Council Form MC-958 Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation.

☐ After clerk has judge sign order, serve copy of signed order on client and all parties or their attorneys who appeared in the action.

**Authority:**

*Cal Rules Ct, Rule 3.36(f), (h)*

**Discussion:**

See 3.30[4][c]

**Forms:**

See 3.38B (application), 3.38D (order)

- ☐ After court order granting leave to withdraw is obtained, perform duties of attorney upon withdrawal.

**Standard Checklist:**

See 3.27[2]

**3.27[2] Duties of Attorney on Withdrawal or Discharge.**

- ☐ If you are discharged and there is a pending action or proceeding, make sure that a notice of substitution of attorney is filed with the clerk of court.

**Discussion:**

See 3.33[2]

- ☐ Regardless of whether there is a pending action or proceeding:

- ☐ Return original file to client or, at the written direction of the client, to the new attorney, making copies as desired.

**Exception:**

The obligation to return the client's property is subject to any protective order or non-disclosure agreement.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-700(D)(1)*

**Discussion:**

See 3.32[1]

- ☐ Return to client all funds and property in client trust account.

**Exception:**

If there is a dispute as to whether the funds belong to the client or to you, the funds must remain in the client trust account until the dispute is resolved.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-700(D)(1)*

**Discussion:**

See 3.32[1]

- ☐ To the extent that the funds are not in the client trust account, return to client any part of fee paid in advance that has not been earned as of the date of withdrawal.

**Exception:**

If the fee paid was a true retainer fee, paid by a client to secure an attorney's availability over a given period of time, the fee does not have to be returned.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-700(D)(2)*

**Discussion:**

See 3.32[2]

**3.27[3] Substitution of Attorneys--New Attorney Checklist.**

☐ Substitution by consent of client and current attorney:

☐ Prepare and file Substitution of Attorney, Judicial Council Form MC-050, signed by client, current attorney, and new attorney, with clerk of court.

**Authority:**

*CCP § 284(1)*

**Discussion:**

See 3.34[1]

**Form:**

See 3.47

☐ Serve adverse party by mail with notice of substitution.

**Authority:**

*CCP § 285*

**Discussion:**

See 3.34[3]

☐ Substitution without consent of current attorney:

☐ Prepare and file with the court:

☐ Notice of motion to substitute attorneys.

**Authority:**

*CCP § 284(1)*

**Discussion:**

See 3.34[2]

**Form:**

See 3.48

☐ Declaration in support of motion.

**Authority:**

*CCP § 284(1)*

**Form:**

See 3.48

- ☐ Supporting memorandum.
- ☐ Proposed order granting motion to substitute attorneys.

**Authority:**

*CCP § 284(1)*

**Discussion:**

See 3.34[2]

**Form:**

See 3.49

- ☐ After the order granting motion to substitute attorneys is signed, serve all parties in the action and client's former attorney with notice of substitution.

**Authority:**

*CCP § 285*

**Discussion:**

See 3.34[3]

**Form:**

See 3.50

- ☐ Obtain client file from client or former attorney.

**3.27[4] Substitution of Attorneys--Current Attorney Checklist.**

- ☐ Execute Substitution of Attorney, Judicial Council Form MC-050.

**Form:**

See 3.47

- ☐ Make sure that Substitution has been filed with the clerk of court.
- ☐ After employment has been terminated or attorney stops providing services to client:

- ☐ Return original file to client or, at the written direction of the client, to the new attorney, making copies as desired.

**Exception:**

The obligation to return the client's property is subject to any protective order or



non-disclosure agreement.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-700(D)(1)*

**Discussion:**

See 3.32[1]

- ☐ Return to client all funds and property in client trust account.

**Exception:**

If there is a dispute as to whether the funds belong to the client or to you, the funds must remain in the client trust account until the dispute is resolved.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-700(D)(1)*

**Discussion:**

See 3.32[1]

- ☐ To the extent that the funds are not in the client trust account, return to client any part of fee paid in advance that has not been earned as of the date of withdrawal.

**Exception:**

If the fee paid was a true retainer fee, paid by a client to secure an attorney's availability over a given period of time, the fee does not have to be returned.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-700(D)(2)*

**Discussion:**

See 3.32[2]



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### **3.28 Options and Strategies.**

An attorney's withdrawal from representation may be necessary for any one of several reasons, such as conflict with the representation of another client or when the client insists on pursuing an illegal course of conduct. Because of the potential for prejudice to the client when an attorney withdraws, the withdrawing attorney must take the appropriate steps, including, when required, obtaining the approval of the court before which the matter is pending. Failure to account for and return a client's funds and property can result in severe disciplinary sanctions.



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### **3.29 Withdrawal of Attorney From Representation.**

**3.29[1] Attorney Does Not Have Absolute Right to Withdraw.** The right of an attorney to withdraw from employment is not absolute [ *Vann v. Shilleh* (1975) 54 CA3d 192, 197, 126 CR 401 ]. The right is limited by the following:

- Statutes [see, e.g., CCP § 284 (attorney may be changed with consent of client or on order of court); CCP § 285.2 (withdrawal when public funding reduced)].
- Rules of Professional Conduct [*Cal Rules Prof Conduct, Rule 3-700* (attorney may not withdraw until the attorney has taken steps to avoid prejudice to client)].
- California Rules of Court [*Cal Rules Ct, Rule 8.36* (withdrawal or substitution of attorney pending appeal)].
- Case law [ *De Recat Corp. v. Dunn* (1926) 197 C 787, 791, 242 P 936 (attorney subject to supervision and authority of court); *Manfredi & Levine v. Superior Court* (1998) 66 CA4th 1128, 1132-1136, 78 CR2d 494 (court can require attorney to disclose substance of alleged conflict of interest before granting motion to withdraw)].

**3.29[2] Attorney May Not Withdraw at Will or for Personal Considerations Unless Released by Client or Court.** An attorney may withdraw at will or for personal reasons only with the consent of his or her client, or without that consent if withdrawal is approved by the court [ *Ramirez v. Sturdevant* (1994) 21 CA4th 904, 915, 26 CR2d 554 ].

### **3.29[3] Circumstances When Withdrawal Is Mandatory.**

**3.29[3][a] Client's Conduct Is Without Probable Cause and for Purpose of Harassment or Malicious Injury.** An attorney representing a client before a tribunal must withdraw from employment with the permission of the tribunal, if required by its rules, and an attorney representing a client in other matters must withdraw from employment, if the attorney knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any

person [*Cal Rules Prof Conduct, Rule 3-700(B)(1)*].

**3.29[3][b] Attorney's Continued Employment Will Violate Ethics Rules or Statutes.** An attorney representing a client before a tribunal must withdraw from employment with the permission of the tribunal, if required by its rules, and an attorney representing a client in other matters must withdraw from employment if the attorney knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the State Bar Act, B&P Code §§ 6000-6238 [*Cal Rules Prof Conduct, Rule 3-700(B)(2)*].

**Example:**

Attorneys filed a motion to reconsider a court order. The court later determines that the statements in support of the motion were false and known to the attorneys to be false, and that the motion was made solely to cause unnecessary delay. The attorneys, in response to sanctions imposed on them, argued that they were forced to file the motion by the client and could not withdraw their representation because they could not have withdrawn from the case without adversely affecting the client's position, and that the attorney/client privilege prevented them from being able to exonerate themselves. The court held that an attorney does not have an ethical obligation to his client to perjure himself or to file a knowingly frivolous or bad faith motion. The court concluded that, if the client demanded the filing of the false motion, the attorneys had an ethical obligation to withdraw immediately from the case [ *Young v. Rosenthal* (1989) 212 CA3d 96, 126-128, 260 CR 369 ].

**3.29[3][c] Attorney's Mental or Physical Condition Renders It Unreasonably Difficult to Continue Employment.** An attorney representing a client before a tribunal must withdraw from employment with the permission of the tribunal, if required by its rules, and an attorney representing a client in other matters must withdraw from employment if the attorney's mental or physical condition renders it unreasonably difficult to carry out the employment effectively [*Cal Rules Prof Conduct, Rule 3-700(B)(3)*].

**3.29[3][d] Attorney Entitled to Recover Reasonable Value of Services Rendered Prior to Mandatory Withdrawal.** An attorney representing a client under a contingency fee agreement who withdraws from the representation for reasons that are mandatory under the Rules of Professional Conduct or statute is deemed to have withdrawn for good cause and is entitled to compensation for the reasonable value of his or her services if there is a future recovery in the action [ *Estate of Falco* (1987) 188 CA3d 1004, 1013-1017, 233 CR 807 ; *Hensel v. Cohen* (1984) 155 CA3d 563, 568, 202 CR 85 (both declining to follow *Pearlmutter v. Alexander* (1979) 97 CA3d Supp 16, 20, 158 CR 762 , which awarded fees to an attorney with a lien on any recovery who had voluntarily withdrawn when he was not legally or ethically compelled to do so)]. However, an attorney who voluntarily withdraws, without any justifiable cause or an ethical reason for doing so, will generally not be entitled to any attorney's fees from a future recovery [ *Estate of Falco* (1987) 188 CA3d 1004, 1013-1017, 233 CR 807 ].

**3.29[4] Circumstances When Withdrawal Is Permissible.**

**3.29[4][a] Client Knowingly and Freely Assents to Termination of Employment.** An attorney may withdraw with the permission of the tribunal, if the client knowingly and freely assents to termination of the employment [*Cal Rules Prof Conduct, Rule 3-700(C)(5)*].

**3.29[4][b] Client Insists on Presenting Unwarranted Claim or Defense.** An attorney may withdraw with the permission of the tribunal, 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 [*Cal Rules Prof Conduct, Rule 3-700(C)(1)(a)*; see, e.g., *Metzger v. Silverman* (1976) 62 CA3d Supp 30, 39, 133 CR 355 (attorney may withdraw if client insists on filing action in the wrong venue)].

**3.29[4][c] Client Seeks to Pursue or Insists That Attorney Pursue an Illegal Course of Conduct.** An attorney may withdraw with the permission of the tribunal, if the client seeks to pursue an illegal course of conduct, or insists

that the attorney pursue a course of conduct that is illegal or that is prohibited under the Rules of Professional Conduct or the State Bar Act, *B&P Code §§ 6000-6238* [*Cal Rules Prof Conduct, Rule 3-700(C)(1)(b), (c)*].

**3.29[4][d] Client Renders It Unreasonably Difficult for Attorney to Effectively Represent Client.** An attorney may withdraw with the permission of the tribunal, if the client by other conduct renders it unreasonably difficult for the attorney to carry out the employment effectively [*Cal Rules Prof Conduct, Rule 3-700(C)(1)(d)*].

**Example:**

A client authorized his attorney to negotiate a settlement of his claim but the client later refused to go forward with the settlement. The court authorized the attorney's withdrawal as counsel on the ground that the client's refusal to consummate the agreed-on settlement rendered it unreasonably difficult for the attorney to carry out his employment effectively [ *Pearlmutter v. Alexander (1979) 97 CA3d Supp 16, 20, 158 CR 762* ].

**3.29[4][e] Client Insists That Attorney Engage in Conduct That Does Not Violate Ethics Rules but Is Contrary to Judgment and Advice of Attorney.** An attorney may withdraw with the permission of the tribunal, if the client insists, in a matter not pending before a tribunal, that the attorney engage in conduct that is contrary to the judgment and advice of the attorney but not prohibited under the Rules of Professional Conduct or the State Bar Act [*Cal Rules Prof Conduct, Rule 3-700(C)(1)(e)*].

**3.29[4][f] Client Breaches an Agreement or Obligation to Attorney Regarding Expenses or Fees.** An attorney may withdraw with the permission of the tribunal, if the client breaches an agreement or obligation to the attorney as to expenses or fees [*Cal Rules Prof Conduct, Rule 3-700(C)(1)(f)*].

**3.29[4][g] Attorney's Continued Employment Is Likely to Result in a Violation of Ethics Rule or Statute.** An attorney may withdraw with the permission of the tribunal, if the continued employment is likely to result in a violation of the Rules of Professional Conduct or the State Bar Act [*Cal Rules Prof Conduct, Rule 3-700(C)(2)*].

**3.29[4][h] Attorney's Inability to Work With Co-Counsel Indicates That Best Interest of Client Would Be Served by Withdrawal.** An attorney may withdraw with the permission of the tribunal, if the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal [*Cal Rules Prof Conduct, Rule 3-700(C)(3)*].

**3.29[4][i] Attorney's Mental or Physical Condition Renders It Difficult to Carry Out Employment Effectively.** An attorney may withdraw with the permission of the tribunal, if the attorney's mental or physical condition renders it difficult for the attorney to carry out the employment effectively [*Cal Rules Prof Conduct, Rule 3-700(C)(4)*].

**3.29[4][j] Attorney Believes in Good Faith That Tribunal Will Find Existence of Other Good Cause for Withdrawal.** An attorney may withdraw with the permission of the tribunal, if the attorney believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal [*Cal Rules Prof Conduct, Rule 3-700(C)(6)*].

**3.29[4][k] Attorney May Be Entitled to Recover Reasonable Value of Services Rendered Prior to Permissive Withdrawal.** An attorney with a contingency fee agreement with a client who withdraws from the representation of that client for reasons that are under the permissive withdrawal provisions of the Rules of Professional Conduct or statute may, in the discretion of the court, be deemed to have withdrawn for good cause and be entitled to compensation for the reasonable value of his or her services if there is a future recovery in the action [ *Estate of Falco (1987) 188 CA3d 1004, 1013-1017, 233 CR 807* ; *Hensel v. Cohen (1984) 155 CA3d 563, 568, 202 CR 85* (both declining to follow *Pearlmutter v. Alexander (1979) 97 CA3d Supp 16, 20, 158 CR 762* , which awarded fees to an attorney with a lien on any recovery who had voluntarily withdrawn when he was not legally or ethically compelled to do so)]. In order to recover fees in this situation, the attorney has the burden of showing that the primary motivation for his or her withdrawal was the obligation to adhere to the ethical imperatives of the Rules of Professional Conduct or statute as

opposed to being for financial reasons [ *Estate of Falco (1987) 188 CA3d 1004, 1016, 233 CR 807* ]. However, an attorney who voluntarily withdraws, without any justifiable cause or an ethical reason for doing so, will generally not be entitled to any attorney's fees from a future recovery [ *Estate of Falco (1987) 188 CA3d 1004, 1013-1017, 233 CR 807* ].

**3.29[5] Withdrawal May Be Permitted for Attorney Representing Indigent Client.** If a reduction in public funding for legal service materially impairs a legal service agency attorney's ability to represent an indigent client, the court, on its own motion or on the motion of either the client or attorney, may permit the withdrawal of the attorney on a showing that all of the following apply [CCP § 285.2]:

- There are not adequate public funds to continue the effective representation of the indigent client.
- A good faith effort was made to find alternate representation for the indigent client.
- All reasonable steps to reduce the legal prejudice to the client have been taken.

A showing of indigency of the client, in and of itself, will not be deemed sufficient cause to deny the application for withdrawal [CCP § 285.2].

**3.29[6] Withdrawal Permitted Within Specific Time Periods in Domestic Relations Cases.** An attorney of record for any party in any civil action or proceeding for dissolution of marriage, legal separation, or for a declaration of void or voidable marriage, or for the support, maintenance or custody of minor children may withdraw by filing a notice of withdrawal. The withdrawal can be made at any time, within two time periods [CCP § 285.1]:

- Prior to service on the attorney of pleadings or motion papers in any proceeding then pending in the cause; and
- After any judgment in the action or proceeding, other than an interlocutory judgment, becomes final.

 **Cross Reference:**

Form, see California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics (Matthew Bender).

**3.29[7] Attorney Providing Noticed Representation Limited in Scope May Withdraw Upon Completion of Agreed Tasks.** An attorney who has completed the tasks specified in the notice of limited scope representation may request that he or she be relieved as attorney from a case in which he or she has provided noticed representation limited in scope [Cal Rules Ct, Rule 3.36(c)].

**Exception:**

Withdrawal as attorney need not be sought if the client has signed a substitution of attorney [Cal Rules Ct, Rule 3.36(c)].

 **Cross Reference:**

Substitution of attorneys, see 3.34.

 **Cross References:**

Establishing noticed representation limited in scope, see 3.13[2]. Procedure for obtaining order for relief upon completion of noticed representation limited in scope, see 3.30[4].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureCounselWithdrawalsLegal EthicsClient RelationsAccepting Representation



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.30*

### 3.30 Steps to Be Relieved As Counsel.

**3.30[1] Attorney Must Avoid Foreseeable Prejudice to Client's Rights.** An attorney may not withdraw from employment until the attorney has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including [*Cal Rules Prof Conduct, Rule 3-700(A)(2)*]:

- Giving due notice to the client, allowing time for employment of other counsel.
- Complying with *Cal Rules Prof Conduct, Rule 3-700(A)(2)* (return of papers, property, and unearned fees).
- Complying with applicable laws and rules.

**3.30[2] Withdrawal Can Be Accomplished With or Without Consent of Client.** An attorney in an action or special proceeding may be changed at any time before or after judgment or final determination [*CCP § 284*]:

- On the consent of both client and attorney, filed with the clerk, or entered on the minutes; or
- On the order of the court, on the application of either client or attorney, after notice from one to the other.



#### Strategic Point:

Because withdrawal without consent of the client may signal the attorney's lack of confidence in the merits of the case, or another serious problem, and thereby prejudice the client, an attorney should first attempt to obtain the client's consent before making a motion for leave to withdraw.



#### Cross Reference:

Form of consent to substitution, see 3.47.



### 3.30[3] Withdrawal Without Consent of Client.

**3.30[3][a] Notice of Motion and Motion Must Be Made on Specific Form.** If an attorney in an action or proceeding is unable to obtain the client's consent to withdraw or chooses not to obtain consent, the attorney must apply for leave to withdraw by notice of motion and motion on Judicial Council Form MC-051 Notice of Motion to Be Relieved as Counsel--Civil [*Cal Rules Ct, Rule 3.1362(a)*].

 **Cross Reference:**

Form, see 3.43.

**3.30[3][b] No Memorandum Is Required.** The attorney need not file a memorandum in support of the motion [*Cal Rules Ct, Rules 3.1114(a)(3), 3.1362(b)*]. The court may order, or a party may submit, a memorandum in support of the motion if it would further the interests of justice [*Cal Rules Ct, Rule 3.1114(b)*].

**3.30[3][c] Motion Must Be Supported by a Declaration.** The motion must be supported by a declaration on Judicial Council Form MC-052 Declaration in Support of Attorney's Motion to Be Relieved as Counsel--Civil. The declaration must state in general terms, and without compromising the confidentiality of the attorney/client relationship, why a motion is being made under *CCP* § 284(2) as opposed to filing a consent to substitution under *CCP* § 284(1) [*Cal Rules Ct, Rule 3.1362(c)*].

 **Cross Reference:**

Form, see 3.44.

**3.30[3][d] Motion Must Be Served on Client.** The notice of motion, the declaration, and the proposed order [*see 3.30[3][e]*] must be served on the client and on all other parties who have appeared in the case [*Cal Rules Ct, Rule 3.1362(d)*]. The notice may be by personal service or mail. If the notice is served on the client by mail under *CCP* § 1013, it must be accompanied by a declaration stating facts showing that either [*Cal Rules Ct, Rule 3.1362(d)*]:

- The service address is the current residence or business address of the client; or
- The service address is the last known residence or business address of the client and the attorney has been unable to locate a more current address after making reasonable efforts to do so within 30 days prior to the filing of the motion to be relieved.

"Current" means that the address was confirmed within 30 days prior to the filing of the motion to be relieved [*Cal Rules Ct, Rule 3.1362(d)*]. Merely demonstrating that the notice was sent to the client's last known address and was not returned will not, by itself, be sufficient to demonstrate that the address is current [*Cal Rules Ct, Rule 3.1362(d)*]. If the service is by mail, *CCP* § 1011(b) applies [*Cal Rules Ct, Rule 3.1362(d)*].

**3.30[3][e] Proposed Order Granting Leave to Withdraw Must Be Prepared on Specific Form.** The proposed order granting leave to withdraw must be prepared on Judicial form MC-053 Order Granting Attorney's Motion to Be Relieved as Counsel--Civil, and be lodged with the court and served on the client with the moving papers [*Cal Rules Ct, Rule 3.1362(d), (e)*]. The order must specify all hearing dates scheduled in the action or proceeding, including the date of trial, if known. If no hearing date is presently scheduled, the court may set one and specify the date in the order [*Cal Rules Ct, Rule 3.1362(e)*]. After the order is signed, a copy of the signed order must be served on the client and on all parties that have appeared in the case [*Cal Rules Ct, Rule 3.1362(e)*]. The court may delay the effective date of the order relieving counsel until proof of service of a copy of the signed order on the client has been filed with the court [*Cal Rules Ct, Rule 3.1362(e)*].

 **Cross Reference:**

Form, see 3.45.

**3.30[3][f] Court Has Discretion to Deny Motion.** The court has the discretion to deny the motion to withdraw if the withdrawal might work an injustice [ *People v. McCracken* (1952) 39 C2d 336, 350, 246 P2d 913 ] or cause undue delay in the proceedings [ *Manfredi & Levine v. Superior Court* (1998) 66 CA4th 1128, 1133-1136, 78 CR2d 494 ]. The court's discretion, however, must be exercised reasonably [ *Mandell v. Superior Court* (1977) 67 CA3d 1, 4, 136 CR 354 ].

### **3.30[4] Withdrawal Upon Completion of Noticed Representation Limited in Scope.**

**3.30[4][a] Attorney Must Serve and File Application, and Include Objection Form to Client.** An attorney who has completed the tasks required in his or her noticed representation limited in scope [see 3.29[7]] must direct an application for relief as attorney under CCP § 284(2) on Judicial Council Form MC-955 Application to Be Relieved as Attorney on Completion of Limited Scope Representation to the client, an optional form [Cal Rules Ct, Rule 3.36(c), (d)].

#### **Cross Reference:**

Judicial Council Form MC-955 Application to Be Relieved as Attorney on Completion of Limited Scope Representation, see 3.38B.

The attorney must file the application with the court and serve a copy on the client and all other parties or their attorneys in the case. Service on the client must include a blank copy of Judicial Council Form MC-956 Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation, an optional form [Cal Rules Ct, Rule 3.36(e)].

#### **Cross Reference:**

Judicial Council Form MC-956 Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation, see 3.38C.

### **3.30[4][b] If Objection Is Served and Filed Within 15 Days, Hearing Is Scheduled for Date Within 25 Days.**

To contest the application for relief as limited representation attorney, the client must serve and file a completed objection form [see 3.30[4][a]] within 15 days of the date it is served on the client [Cal Rules Ct, Rule 3.36(f), (g)].

After the filing of the objection form, the clerk of court must schedule a hearing on the objection for a date within 25 days of what the form is filed. The clerk is to send notice of the hearing date to the client and the attorney [Cal Rules Ct, Rule 3.36(g)].

**3.30[4][c] If No Objection Is Filed, Attorney Files Updated Application and Proposed Order, and Serves Order After It Is Signed.** If the client does not serve and file a timely objection to the attorney's application for an order for relief as limited representation attorney [see 3.30[4][b]], the attorney must file an "updated" application with the court, indicating the lack of objection, on Judicial Council Form MC-955, Application to Be Relieved as Attorney on Completion of Limited Scope Representation, an optional form [Cal Rules Ct, Rule 3.36(f)].

#### **Cross Reference:**

Judicial Council Form MC-955 Application to Be Relieved as Attorney on Completion of Limited Scope Representation, see 3.38B.

The attorney must file along with the updated application a proposed order for relief as limited representation attorney on Judicial Council Form MC-958 Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation, an optional form [Cal Rules Ct, Rule 3.36(f)].

 **Cross Reference:**

Judicial Council Form MC-958 Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation, see 3.38D.

The clerk forwards the application and proposed order for signature by the judge [*Cal Rules Ct, Rule 3.36(f)*]. Thereafter, the attorney must serve a copy of the signed order on the client and all parties or their attorneys who have appeared in the action. The court may delay the effective date of the order until proof of service of the order on the client is filed with the court [*Cal Rules Ct, Rule 3.36(h)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureCounselWithdrawalsLegal EthicsClient RelationsAccepting Representation



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.31*

**3.31 Attorney May Be Subject to Disciplinary Action and Civil Liability for Wrongful Withdrawal.**

An attorney who withdraws from representation of a client without the consent of either the client or the court may be subject to disciplinary action [ *Vann v. Shilleh* (1975) 54 CA3d 192, 197, 126 CR 401 ]. In addition, if the client can show that he or she was damaged by or suffered a loss as a result of the attorney's wrongful withdrawal, the attorney may be subject to civil liability [ *Lane v. Storke* (1909) 10 CA 347, 351-352, 101 P 937 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureCounselWithdrawalsLegal EthicsClient RelationsAccepting Representation



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.32*

### **3.32 Attorney's Duties on Withdrawal.**

**3.32[1] Attorney Must Return Client's Property.** An attorney whose employment has terminated must promptly release to the client, at the request of the client, all the client papers and property [*Cal Rules Prof Conduct, Rule 3-700(D)(1)*]. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not [*Cal Rules Prof Conduct, Rule 3-700(D)(1)*]. An attorney may not retain a client's papers or files to secure payment of fees or costs, even if the client has granted the lawyer a contractual lien on the papers [ *Academy of Cal. Optometrists, Inc. v. Superior Court* (1975) 51 CA3d 999, 1006, 124 CR 668 ]. An attorney is not prohibited from making, at the attorney's own expense, and retaining, copies of papers released to the client, nor is an attorney prohibited from making a claim for the recovery of the attorney's expense in any subsequent legal proceeding [*Cal Rules Prof Conduct, Rule 3-700, Discussion*].

The requirement to return all papers and property arises when the attorney stops providing services to the client, prior to even forming the intent to withdraw as counsel [ *Baker v. State Bar* (1989) 49 C3d 804, 817 n5, 263 CR 798, 781 P2d 1344 ].

#### **Exception--Protective Order or Non-Disclosure Agreement:**

The obligation to return the client's property is subject to any protective order or non-disclosure agreement [*Cal Rules Prof Conduct, Rule 3-700(D)(1)*].

#### **Consider:**

Only make copies of documents in the file you may need in the future. Documents to copy include any the attorney may need in a future fee dispute or malpractice action, documents that may be useful in future litigation with third parties, and documents containing attorney work product.

**3.32[2] Attorney Must Refund Unearned Fees Paid in Advance.** An attorney whose employment has terminated must promptly refund any part of a fee paid in advance that has not been earned [*Cal Rules Prof Conduct, Rule 3-700(D)(2)*].

#### **Exception--Retainer Fee:**

A true retainer fee, which was paid solely for the purpose of ensuring the availability of the attorney for the matter, does not have to be refunded [*Cal Rules Prof Conduct, Rule 3-700(D)(2)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Counsel Withdrawals Legal Ethics Client Relations Accepting Representation Legal Ethics Client Relations Client Funds



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### 3.33 Discharge of Attorney.

**3.33[1] Client's Right to Discharge or Change Attorney Is Absolute.** The client has the absolute power to discharge an attorney, with or without cause [ *Santa Clara Counsel Attorneys Ass'n v. Woodside* (1994) 7 C4th 525, 555, 28 CR2d 617, 869 P2d 1142 ]. The fact that the attorney has rendered valuable services, or that the client is indebted to the attorney for moneys advanced in the prosecution or defense of the action, does not deprive the client of this right [ *Fracasse v. Brent* (1972) 6 C3d 784, 790, 100 CR 385, 494 P2d 9 ].

**3.33[2] Formal Substitution Required for Change in Attorney.** Whenever an attorney has undertaken the representation of a client and filed a pleading, the execution and filing of a substitution of attorney is essential to an effective change in representation [ *Kallen v. Delug* (1984) 157 CA3d 940, 950, 203 CR 879 ]. Until the substitution is a matter of record, the successor attorney cannot act affirmatively to protect the client's interests and the original attorney retains the power to bind the client by his or her actions [ *Kallen v. Delug* (1984) 157 CA3d 940, 950, 203 CR 879 ].



#### Warning:

An attorney who refuses to execute a consent to a substitution of attorney breaches the ethical duty of fidelity to the client [ *Kallen v. Delug* (1984) 157 CA3d 940, 951, 203 CR 879 (attorney breached ethical duty when he used his refusal to execute a substitution of attorney as a device to protect his fees)].



#### Cross Reference:

Discussion of substitution of attorneys, see 3.34.

**3.33[3] Attorney's Duties on Discharge.** The duties of an attorney who is discharged are the same as if the attorney had voluntarily withdrawn [ *Kallen v. Delug* (1984) 157 CA3d 940, 950, 203 CR 879 ]. Thus, an attorney must promptly release to the client, at the request of the client, all the client papers and property and promptly refund any part of a fee paid in advance that has not been earned [ *Cal Rules Prof Conduct, Rule 3-700(D)* ].



#### Cross Reference:

Discussion of an attorney's duties on withdrawal, see 3.32.

**3.33[4] Discharged Attorney Entitled to Recover Reasonable Value of Services Rendered Prior to Discharge.**

An attorney discharged with or without cause is entitled to recover the reasonable value of his or her services rendered to the time of discharge [ *Fracasse v. Brent* (1972) 6 C3d 784, 790-792, 100 CR 385, 494 P2d 9 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureCounselSubstitutionsLegal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsAttorney FeesGeneral Overview





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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.34*

### 3.34 Substitution of Attorneys.

**3.34[1] Substitution May Be Made With Consent of Attorney and Client.** The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination on the consent of both client and attorney [*CCP* § 284(1)]. The consent must be filed with the clerk, or entered on the minutes [*CCP* § 284(1)].

#### **Cross Reference:**

Judicial Council Form MC-050 Substitution of Attorney, see 3.46.

**3.34[2] Substitution May Be Made Without Consent of Attorney or Client Pursuant to Noticed Motion.** If either the client or the attorney will not consent to a substitution or is unable to do so, the client or the attorney can obtain an order of substitution from the court after notice is given from one to the other [*CCP* § 284(2)].

#### **Warning:**

An attorney who refuses to execute a consent to a substitution of attorney breaches his or her ethical duty of fidelity to the client [ *Kallen v. Delug* (1984) 157 CA3d 940, 951, 203 CR 879 (attorney breaches ethical duty when using refusal to execute a substitution as a device to protect fees)].

#### **Cross References:**

Form of notice of motion to substitute attorneys, see 3.48.

Form of order granting motion to substitute, see 3.49.

**3.34[3] Notice of Substitution Must Be Given to Adverse Party.** When an attorney is changed pursuant to *CCP* § 284, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in pro per, must be given to the adverse party [*CCP* § 285]. Until then the adverse party must recognize the former attorney [*CCP* § 285]. If the substitution was made by consent, Judicial Form MC-050 operates as the notice.

#### **Warning:**

If the client is one that cannot represent itself in court, such as a corporation, trustee or the other entities

or party representatives listed on Judicial Council Form MC-050, the attorney cannot withdraw until the client has a new attorney to substitute in as counsel, except by noticed motion. This situation might arise if the client stops paying the attorney's fees.

 **Cross References:**

Judicial Council Form MC-050, see 3.47.

Form of notice if substitution is by court order, see 3.50.

**3.34[4] Substitution of Attorneys on Appeal.** The substitution of an attorney pending an appeal may be made by serving and filing in the reviewing court a substitution signed by the party represented and the new attorney [*Cal Rules Ct, Rule 8.36(b)* (appeal from superior court); *Cal Rules Ct, Rule 8.768(b)* (appeal in limited civil case to superior court appellate division)]. In all appeals and in original proceedings related to a superior court proceeding, the party must also serve the superior court [*Cal Rules Ct, Rule 8.36(b)*].

In the absence of a substitution, an attorney may request withdrawal by filing a motion to withdraw, and the motion need be served only on the party represented and the attorneys directly affected, unless the court orders otherwise [*Cal Rules Ct, Rule 8.36(c)(1)* (appeal from superior court); *Cal Rules Ct, Rule 8.768(b)* (appeal in limited civil case to superior court appellate division)]. If withdrawing in an appeal from superior court, proof of service of the motion need not include the address of the party represented; but if the motion is granted, the withdrawing attorney must promptly provide the court and the opposing party with the party's current or last known address and telephone number [*Cal Rules Ct, Rule 8.36(c)(2)*]. In all appeals and in original proceedings related to a superior court proceeding, the reviewing court clerk must notify the superior court of any ruling on the motion; and if the motion is filed in any proceeding pending in the Supreme Court after grant of review, the Supreme Court clerk must also notify the Court of Appeal of any ruling on the motion [*Cal Rules Ct, Rule 8.36(c)(3), (4)*]. If a notification of any withdrawal or substitution is made in an appeal to the superior court appellate division, substituted counsel also must give notice to all parties [*Cal Rules Ct, Rule 8.768(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureCounselSubstitutions



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VI. DISQUALIFICATION OF OPPOSING COUNSEL FOR REPRESENTATION ADVERSE TO FORMER  
CLIENT OR TO PARTY OWED DUTY OF FIDELITY OR CONFIDENTIALITY

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.35*

**3.35 CHECKLIST: Disqualification of Opposing Counsel For Representation Adverse to Former Client or to Party Owed Duty of Fidelity or Confidentiality.**

**3.35[1] Moving Party Checklist.**

- ☐ As soon as identity of opposing counsel is known, interview client and witnesses to determine if client or witness, including witnesses on opposing party's witness list, had any past relationship with any attorney in opposing party's law firm.
- ☐ If client or witness had any relationship with opposing counsel in past, determine whether opposing counsel has a conflict because he or she possesses or is presumed to possess confidential information adverse to counsel's client, or whether witness had a duty of fidelity to counsel's client.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(E); B&P Code § 6068(e)*

**Discussion:**

See 3.08[5], 3.36, 3.36A

- ☐ If conflict revealed, write to opposing counsel and ask firm to withdraw from representing opposing party.
- ☐ If opposing counsel refuses to withdraw, promptly prepare, file and serve motion to disqualify.
  - ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.

**Discussion:**

See 3.36

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**Forms:**

See 3.51, 3.52

- ☐ If motion for disqualification is denied, consider filing petition for writ of mandate.

**Discussion:**

See 3.36[6]

**3.35[2] Opposing Party Checklist.**

- ☐ Calendar response and hearing dates.
- ☐ Prepare, file and serve opposition to motion.
- ☐ Follow standard noticed motion procedure.

**Discussion:**

See 3.36[6]

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.46

- ☐ If motion for disqualification is granted, consider filing petition for writ of mandate.

**Discussion:**

See 3.36[6]



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CLIENT OR TO PARTY OWED DUTY OF FIDELITY OR CONFIDENTIALITY

1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.36

**3.36 Disqualification of Opposing Counsel for Representation Adverse to Former Client.**

**3.36[1] Representation Adverse to Former Client Is Ethically Prohibited.** An attorney may not do anything that would injuriously affect a former client in any matter in which the attorney formerly represented the client, nor may an attorney at any time use against a former client knowledge or information acquired by virtue of the previous relationship [ *Cal Rules Prof Conduct, Rule 3-310*; *People ex rel. Deukmejian v. Brown* (1981) 29 C3d 150, 155-156, 172 CR 478, 624 P2d 1206 ; *City Nat'l Bank v. Adams* (2002) 96 CA4th 315, 323-324, 117 CR2d 125 ].

**3.36[2] Former Client Can Move to Disqualify Attorney for Adverse Party.** A former client may seek to disqualify a former attorney from representing an adverse party by showing that the former attorney possesses confidential information adverse to the former client [ *H.F. Ahmanson & Co. v. Salomon Bros.* (1991) 229 CA3d 1445, 1452, 280 CR 614 ].



**Warning:**

A conflict of interest warranting disqualification can arise from a single preliminary consultation in which confidential information is disclosed even if actual employment of the attorney does not result [ *People ex rel. Dep't of Corps. v. Speedee Oil Change Sys.* (1999) 20 C4th 1135, 1147-1148, 86 CR2d 816, 980 P2d 371 ]. In such a case, the party seeking disqualification must show, directly or by reasonable inference, that the attorney acquired confidential information in the conversation [ *Med-Trans Corp., Inc. v. City of California City* (2007) 156 CA4th 655, 668, 68 CR3d 17 ].

**Example:**

City failed to establish that confidential information was imparted to the attorney in the prior meeting that was an initial consultation, and initial discussion never went beyond the preliminary stages, and no actual representation occurred for purposes of showing a conflict of interest, so that disqualification of attorney was error [ *Med-Trans Corp., Inc. v. City of California City* (2007) 156 CA4th 655, 668-669, 68 CR3d 17 ].

**3.36[3] Possession of Confidential Information May Be Presumed Depending on Attorney's Relationship**

**With Former Client.** To disqualify current counsel where the facts involve successive representation, there must be a "substantial relationship" between the subjects of the prior and current representations [ *Flatt v. Superior Court* (1994) 9 C4th 275, 283, 36 CR2d 537, 885 P2d 950 ; *Jessen v. Hartford Cas., Ins. Co.* (2003) 111 CA4th 698, 710 ]. The former client need not establish that the attorney actually possesses confidential information [ *People ex rel. Deukmejian v. Brown* (1981) 29 C3d 150, 156-157, 172 CR 478, 624 P2d 1206 ].

When ruling on a disqualification motion in a successive representation case, the court will first identify where the attorney's former representation placed the attorney with respect to the prior client [ *Jessen v. Hartford Cas., Ins. Co.* (2003) 111 CA4th 698, 710 ]:

- If the attorney's relationship was direct and personal--providing legal advice and services to the former client--then confidential information is conclusively presumed to have passed to the attorney, and disqualification will depend on the strength of the similarities between the legal problem involved in the former representation and the legal problem involved in the current representation [ *Meza v. H. Muehlstein & Co., Inc.* (2009) 176 CA4th 969, 977-978, 98 CR3d 422 ; *Jessen v. Hartford Cas., Ins. Co.* (2003) 111 CA4th 698, 710 ; *H.F. Ahmanson & Co. v. Salomon Bros.* (1991) 229 CA3d 1445, 1453-1455, 280 CR 614 ]. Information acquired during the first representation must be "material" to the second, in that it would materially advance the present client's position in the subsequent matter to use confidential information obtained in the prior representation [ *Farris v. Fireman's Fund Ins. Co.* (2004) 119 CA4th 671, 680 ].

#### **Example:**

In addition to the attorney-client privilege, the substantial relationship test can be used to protect the work-product privilege. Thus, defendants who shared work product under the common interest doctrine had standing and grounds for disqualification of attorney for codefendant and plaintiffs' counsel's firm where the attorney became associate of plaintiffs' counsel's firm during the pendency of the action between the parties [ *Meza v. H. Muehlstein & Co., Inc.* (2009) 176 CA4th 969, 977-983, 98 CR3d 422 ] .

- If the attorney's relationship was not direct and personal, then the court must assess whether the attorney was positioned during the first representation so as to make it likely the attorney acquired confidential information relevant to the current representation, given the similarities or lack of similarities between the two [ *Faughn v. Perez* (2006) 145 CA4th 592, 605, 51 CR3d 692 ; *Jessen v. Hartford Cas., Ins. Co.* (2003) 111 CA4th 698, 711 ]. The possibility that counsel had access to confidential information of the former client may not be merely speculative [ *Derivi Constr. & Architecture, Inc. v. Wong* (2004) 118 CA4th 1268, 1273 ].

Accordingly, disqualification under Rule 3-310(E) is not warranted where the circumstances and issues involved in successive actions are totally unrelated [ *Fremont Ind. Co. v. Fremont Gen. Corp.* (2006) 143 CA4th 50, 69, 49 CR3d 82 ].

If the facts do show a substantial relationship, a firm-switching attorney then has the burden of proving that he or she had no exposure to confidential information relevant to the current action while he or she was a member of the former firm. That burden requires an affirmative showing and is not satisfied by a cursory denial [ *Ochoa v. Fordel, Inc.* (2007) 146 CA4th 898, 908-909, 53 CR3d 277 ].

#### **Distinguish:**

Without a second relationship, there is no violation of Rule 3-310(E) [ *Oasis West Realty, LLC v. Goldman* (2010) 182 CA4th 688, 698, 106 CR3d 539 ] .

### ► Cross References:

Discussion of the substantial relationship test, see 3.08[5][f].

Form of notice of motion to disqualify attorney, see 3.51.

Form of order granting motion to disqualify, see 3.52.

**3.36[4] Moving Party Must Exercise Diligence.** A party must exercise reasonable diligence when making a motion to disqualify [ *Earl Scheib, Inc. v. Superior Court* (1967) 253 CA2d 703, 709, 61 CR 386 ]. Disqualification is not automatic if the current client opposing disqualification of its counsel offers prima facie evidence of an unreasonable delay by the former client in making the motion and resulting prejudice to the current client [ *River W., Inc. v. Nickel* (1987) 188 CA3d 1297, 1309, 234 CR 33 ]. The burden then shifts back to the party seeking disqualification to justify the delay, who must address [ *River W., Inc. v. Nickel* (1987) 188 CA3d 1297, 1309, 234 CR 33 ]:

- How long it has known of the potential conflict.
- Whether it has been represented by counsel since it has known of the potential conflict.
- Whether anyone prevented the moving party from making the motion earlier, and if so, under what circumstances.
- Whether an earlier motion to disqualify would have been inappropriate or futile and why.

### Prerequisite:

Delay and prejudice will not necessarily result in the denial of a disqualification motion; the delay and the ensuing prejudice must be extreme [ *Gong v. RFG Oil, Inc.* (2008) 166 CA4th 209, 217, 82 CR3d 416 ].

**3.36[5] Disqualification Extends to Entire Firm, But Exceptions Exist for Public Law Offices.** If the substantial relationship test is satisfied, disqualification will be ordered [ *Rosenfeld Constr. Co. v. Superior Court* (1991) 235 CA3d 566, 574, 286 CR 609 ]. Moreover, the disqualification will be extended vicariously to the attorney's entire firm [ *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 C4th 839, 854, 43 CR3d 771, 135 P3d 20 (city attorney's office); *Meza v. H. Muehlstein & Co., Inc.* (2009) 176 CA4th 969, 978, 98 CR3d 422 ; *People ex rel. Dep't of Corps. v. Speedee Oil Change Sys.* (1999) 20 C4th 1135, 1146, 86 CR2d 816, 980 P2d 371 ].

### Exception:

While the Supreme Court has not clearly ruled that this is so, and the courts of appeal have not necessarily accepted it consistently, some courts of appeals view the rule of vicarious disqualification to be a rebuttable presumption [ *Kirk v. First Am. Title Ins. Co.* (2010) 183 CA4th 776, 792-800 (overruling trial court's determination of automatic disqualification)]. Specifically, the presumption of disqualification may be rebutted by showing that:

- The screen was timely imposed.
- The screen consists of preventive measures that guarantee that information will not be conveyed.

To establish the second element of a screen rebutting the presumption of vicarious disqualification, the screen must include [ *Kirk v. First Am. Title Ins. Co.* (2010) 183 CA4th 776, 810-811 (discussing first four elements)]:

- Physical, geographic, and departmental separation of attorneys.
- Prohibitions against and sanctions for discussing confidential matters.
- Rules and procedures preventing access to confidential information and files.
- Procedures preventing a disqualified attorney from sharing in the profits from the representation.
- Continuing education in professional responsibility.

In evaluating whether these properties of the screen meet the second element, the trial court must be satisfied that the tainted attorney has not had and will not have any improper communication with others at the firm concerning the litigation [ *Kirk v. First Am. Title Ins. Co. (2010) 183 CA4th 776, 811* (ordering trial court to determine whether screen rebutted presumption)].

**Exception:**

California courts have generally declined to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices. Instead, in this context, courts have looked to whether a public law office has adequately protected, and will continue to adequately protect, a former client's confidences through timely, appropriate, and effective screening measures and/or structural safeguards [ *In re Charlissee C. (2008) 45 C4th 145, 162, 84 CR3d 597, 194 P3d 330* ].

**Example:**

Ethical screening might suffice to shield a senior supervisory attorney with a personal conflict and thus avoid vicarious disqualification of the entire government legal unit under that attorney's supervision. In ruling on a disqualification motion involving this situation, a trial court should make a factual inquiry into [ *In re Charlissee C. (2008) 45 C4th 145, 165, 84 CR3d 597, 194 P3d 330* ]:

- The supervisor's actual duties with respect to those attorneys who will be ethically screened.
- The supervisor's responsibility for setting policies that might bear on the subordinate attorney's handling of the litigation.
- Whether public awareness of the case, the conflicted attorney's role in the litigation, or any other circumstance is likely to cast doubt on the integrity of the governmental law office's continued participation in the matter.

**3.36[6] Order Granting or Denying Motion to Disqualify Is Reviewable.** An order granting or denying a motion to disqualify is reviewable by a petition for writ of mandate [ *Rosenfeld Constr. Co. v. Superior Court (1991) 235 CA3d 566, 572, 286 CR 609* ] or by direct appeal [ *Truck Ins. Exch. v. Fireman's Fund Ins. Co. (1992) 6 CA4th 1050, 1052 n1, 8 CR2d 228* (order is appealable as a final order on a collateral matter unrelated to the merits of the underlying litigation)]. If the issue of attorney disqualification is not raised until an appeal from a final judgment on the underlying action, the party raising the issue must show that the erroneous granting or denial of the motion to disqualify affected the outcome of the proceeding to the prejudice of the complaining party [ *In re Sophia B. (1988) 203 CA3d 1436, 1439, 250 CR 802* ].



**Strategic Point:**

Because petitions for extraordinary writs are generally determined quicker than direct appeals, a petition for a writ of mandate, coupled with a request for an immediate stay of the underlying action, is preferable [ *Reed v. Superior Court* (2001) 92 CA4th 448, 455, 111 CR2d 842 ("specter of disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal")].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureCounselDisqualifications



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Chapter 3 Beginning and Terminating the Attorney-Client Relationship  
VI. DISQUALIFICATION OF OPPOSING COUNSEL FOR REPRESENTATION ADVERSE TO FORMER  
CLIENT OR TO PARTY OWED DUTY OF FIDELITY OR CONFIDENTIALITY

1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.36A

**3.36A Disqualification Outside of Attorney-Client Relationship Under Court's Power to Control Court Officers.**

**3.36A[1] Court Has Inherent Power to Disqualify Attorney.** A trial court may disqualify an adverse party's attorney under its the inherent power in the furtherance of justice to control the conduct of ministerial officers and other persons in pending judicial proceedings, as codified in *CCP § 128(a)(5)* [ *Dino v. Pelayo* (2006) 145 CA4th 347, 351, 51 CR3d 620 ; *Oaks Management Corporation v. Superior Court* (2006) 145 CA4th 453, 462, 51 CR3d 561 ]. A trial court's power within the context of an attorney-client relationship is codified as *Cal Rules Prof Conduct, Rule 3-310* [see *Oaks Management Corporation v. Superior Court* (2006) 145 CA4th 453, 463-465, 51 CR3d 561 ].



**Warning:**

Amendments to the California Rules of Professional Conduct in 1988 may limit the effect of cases on the court's inherent power to disqualify an attorney outside an attorney-client relationship that were decided prior to those amendments [see *Oaks Management Corporation v. Superior Court* (2006) 145 CA4th 453, 465, 51 CR3d 561 ].

**Distinguish:**

Opposing counsel may not be disqualified for communicating with a pro se litigant who is working with an attorney who is not of record in the case, even if the nonrecord attorney has told opposing counsel of his limited participation in the case [ *McMillan v. Shadow Ridge at Oak Park Homeowner's Assn.* (2008) 165 CA4th 960, 965, 81 CR3d 550 ].



**Cross Reference:**

Disqualification of adverse counsel under *Cal Rules Prof Conduct, Rule 3-310*, see 3.36.

**3.36A[2] Grounds for Disqualification Outside of Context of Attorney-Client Relationship.**

**3.36A[2][a] When Attorney Owes Duty of Fidelity.** The power of the court to disqualify an adverse party extends to conflicts of interest arising from an attorney's relationship with a *nonclient* when the relationship creates an expectation that the attorney owes a duty of fidelity [ *Oaks Management Corporation v. Superior Court* (2006) 145

CA4th 453, 464, 51 CR3d 561 (no duty of fidelity); *William H. Raley Co. v. Superior Court* (1983) 149 CA3d 1042, 1047, 197 CR 232 (attorney had duty of fidelity)].

The court must weigh the combined effect of a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of interest [ *McMillan v. Shadow Ridge at Oak Park Homeowner's Assn.* (2008) 165 CA4th 960, 965, 81 CR3d 550 ; *Oaks Management Corporation v. Superior Court* (2006) 145 CA4th 453, 464, 51 CR3d 561 ].

**3.36A[2][b] When Attorney Owes Duty of Confidentiality.** Grounds for disqualifying the attorney of an adverse party may also arise where the attorney has acquired confidential information in the course of a relationship with a *nonclient* that will be, or may appear to the person or entity to be, useful in the attorney's representation in an action on behalf of a client [ *Oaks Management Corporation v. Superior Court* (2006) 145 CA4th 453, 464, 467, 51 CR3d 561 (no violation of confidentiality); *Gregori v. Bank of America* (1989) 207 CA3d 291, 300, 308-309, 254 CR 853 ].

Under California law, a confidential relationship "is not created simply by the receipt of confidential information. Instead, its creation generally hinges on " 'an unequal relationship between parties in which one surrenders to the other some degree of control because of the trust and confidence which he reposes in the other' " [ *Dino v. Pelayo* (2006) 145 CA4th 347, 356, 51 CR3d 620 ].

**Example:**

A lawyer may be disqualified under CCP § 128(a)(5) after improper contacts with an opposing party's expert witness [ *County of Los Angeles v. Superior Court* (1990) 222 CA3d 647, 658, 271 CR 698 ]. However, the rebuttable presumption that the moving party's attorney disclosed confidential work-product materials to an expert later hired by the adversary's attorney does not apply when the expert remains a consultant to the moving party's counsel [ *Shandralina G. v. Homonchuk* (2007) 147 CA4th 395, 410, 54 CR3d 207 ].

**Distinguish:**

The decision of two adverse parties, as evidenced by their written waiver, to maintain common representation by an attorney with whom the party seeking disqualification of the adverse parties' attorney had never had a confidential relationship was not grounds for disqualifying the attorney under CCP § 128(a)(5) [ *Dino v. Pelayo* (2006) 145 CA4th 347, 357, 51 CR3d 620 ].

The disqualification of an adverse party's attorney whose spouse was a member of the board of directors of the foundation that ran a hospital corporation seeking the attorney's disqualification was improper under CCP § 128(a)(5), because there was no confidential relationship between the attorney and the corporation, so that the corporation had no standing [ *DCH Health Services Corp. v. Waite* (2002) 95 CA4th 829, 115 CR2d 847 ].

 **Cross Reference:**

Disqualification as a result of use of inadvertently disclosed evidence or work product, see Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 2, Scope of Discovery.

**3.36A[3] Disqualification Extends to Entire Firm.** If the court finds grounds to disqualify the attorney of an adverse party outside an attorney-client relationship, the disqualification generally extends to the attorney's entire firm [ *William H. Raley Co. v. Superior Court* (1983) 149 CA3d 1042, 1048-1049, 197 CR 232 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureCounselDisqualifications



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Chapter 3 Beginning and Terminating the Attorney-Client Relationship

VII. FORMS

A. Identifying and Disclosing Conflicts of Interest

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.37*

### **3.37 Written Informed Consent by Former Client to Adverse Representation by Former Attorney.**

\_\_\_\_\_ [Name of former client], former client of \_\_\_\_\_ [name of attorney], Attorney, gives his/her informed consent to Attorney for Attorney to \_\_\_\_\_ [specify action to be taken by attorney that is potentially adverse to former client, e.g., represent \_\_\_\_\_'s [name of former client] wife in a dissolution action against \_\_\_\_\_ [name of former client]. Attorney has fully informed \_\_\_\_\_ [name of former client] of the potentially adverse nature of such representation because of the potential for the disclosure of confidential information concerning \_\_\_\_\_ [name of former client], which was obtained by Attorney while Attorney represented \_\_\_\_\_ [name of former client] and \_\_\_\_\_ [name of any other parties represented with former client], in that Attorney had access to information of a confidential nature by virtue of such representation.

\_\_\_\_\_ [Name of former client] acknowledges that he/she has read the foregoing consent carefully, that he/she fully understands that the contemplated representation of \_\_\_\_\_ [specify party to be represented by attorney] by Attorney is potentially adverse to \_\_\_\_\_ [name of former client] for the foregoing reasons, and \_\_\_\_\_ [name of former client] nevertheless knowingly and voluntarily consents to such representation by Attorney.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature of former client]

\_\_\_\_\_ [typed name]

NOTES.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(E)*

**Requirement of Informed Consent:**

See 3.08



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Chapter 3 Beginning and Terminating the Attorney-Client Relationship  
VII. FORMS

A. Identifying and Disclosing Conflicts of Interest

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.38*

**3.38 Disclosure and Consent to Joint Representation of Defendants.**

Re: \_\_\_\_\_[*identify lawsuit*]

Dear \_\_\_\_\_[*names of all clients*]: You have asked our firm to represent each of you in the lawsuit referenced above. Because we will be representing all of you in this matter, the California Rules of Professional Conduct require that we make certain disclosures to you and obtain your informed written consent to our representation of all of you together.

*Absence of Conflicts of Interest.* At this stage, it does not appear that there is a conflict of interest that would prevent us from representing you. Each of you shares the same defenses to the claims which have been alleged by the plaintiffs. Nevertheless, it is possible that a conflict of interest could arise in the future which would require us to withdraw.

*Request for Common Instructions.* One way in which a conflict of interest could occur is if we receive conflicting instructions from you. For example, if one of you instructs us to take certain actions on your behalf which another of you instructs us not to take, we would be placed in a position where we could not follow one of the instructions without violating the other. That situation, if unresolved, could create a conflict of interest that would require each of you to seek new attorneys. It is therefore important that we receive a common set of instructions from you that we can follow so that a conflict of interest does not arise that would require our withdrawal.

*Pursuit of Common Objectives.* Another way in which a conflict could arise is if in the course of litigation, you develop inconsistent defenses or objectives. For example, if one of you wants us to pursue a defense that could adversely affect the defenses of the rest, a conflict of interest would exist that could require us to withdraw as your counsel. It will therefore be important during the course of our engagement to make sure that we are pursuing common objectives and defenses for all of you so that we will not be required to withdraw later. At the same time, if any of you determine that pursuing a common objective is not in your best interests, we may be required to withdraw from representing you.

*Indemnification Rights.* You should be aware that each of you may have indemnification rights against the others. Because we are representing your common interest in this lawsuit, we cannot represent or advise you with respect to those claims. We strongly urge you to consult separate counsel with respect to any such claims. To the extent that you choose to assert claims against each other in this lawsuit, we again, may be required to withdraw.

*Preventing Potential Conflicts From Becoming Real.* At present it does not appear that any of these conflict of interest situations exist. Nevertheless, we cannot rule out the possibility that these conflicts could arise during the course of the representation. Since changing counsel in the midst of litigation can be expensive and detrimental to your interests, it is important that you are comfortable with us representing all of you together in light of these potential conflicts of interest. In addition, we will need you to work with us through the course of the litigation to keep these potential conflicts from becoming real.

*Disclosure of Information to All Clients.* In addition, because we represent all of you together, each of you has a right to learn the substance of the communications that we have with the rest of you. In other words, if one of you tells us something, that information may be disclosed to the rest of you. Although the attorney-client privilege will bar disclosure of our conversations with any of you to the outside world, the privilege does not bar disclosure to the rest of you of what any one of you tells us. Indeed, if the information is significant, we may have a duty to disclose information from or about one of you to the rest of you.

*Comfort Zone.* Here again, it is extremely important that you are comfortable with this arrangement. If each of you were separately represented, your lawyers would not be required to disclose your communications with them to the rest of you. Each of you needs to consider whether you will be as candid with us as you would be with a lawyer representing your interests alone. If you believe that you would not be comfortable with this arrangement or that there would be information that you would be unwilling to disclose to us, because you would not want to disclose to the others, you should obtain your own separate counsel.

*Access to Case File.* As you know, during the course of this lawsuit, we will be maintaining a file which will contain original correspondence, evidence, pleadings and other documentation. In the event we are required to withdraw from representing all of you, we will retain the original file until we receive a common set of instructions to transmit the file somewhere else. At your request, we will provide you or your new counsel with a copy of the file.

*Costs and Attorneys Fees.* As you know, \_\_\_\_\_[*name of paying client*] has agreed to pay our attorneys' fees and costs incurred in defending the rest of you in this action. The California Rules of Professional Conduct require us to obtain consent from the rest of you to this arrangement. The Rules are intended to allow the rest of you to consider whether the fact that \_\_\_\_\_[*name of paying client*] is paying our fees will interfere with our ability to represent the rest of you with the same degree of loyalty and independent judgment that you would expect from a lawyer you were paying. In other words, the rest of you should consider whether we would tend to favor the interests of \_\_\_\_\_[*name of paying client*] because \_\_\_\_\_[*name of paying client*] is paying our fees in this matter. While this risk exists, it is our intention to represent all of you without regard to which of you is paying our fees. Nevertheless, each of you must be comfortable with this arrangement.

*Questions.* Please forgive the relative length and formality of this letter. However, we want to be certain that you are fully informed about these important issues and that you are comfortable proceeding with our representation of all of you. Please do not hesitate to call if you have any questions about this letter. In addition, if you are having any trouble understanding the nature of the disclosures in this letter, you may want to consult with a separate lawyer.

*Informed Consent.* Once you had an opportunity to review this letter, kindly sign and date the enclosed copy of this letter where indicated below, and return the signed copy to me in the enclosed self-addressed and stamped envelope. By signing this letter, you are agreeing to our representing all of you jointly in light of the disclosures above.



*Thanks for your cooperation in connection with this matter.*

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

I have read the contents of this letter and consent to the firm representing me on the terms set forth in this letter.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature of client]

\_\_\_\_\_ [typed name]

NOTES.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(C)*

**Disclosing and Obtaining Consent to Joint Representation:**

*See 3.08[3]*

**Disclosing and Obtaining Consent When Third Party Paying Bill:**

*See 3.08[6]*



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Chapter 3 Beginning and Terminating the Attorney-Client Relationship  
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B. Beginning the Attorney/Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.38A*

**3.38A Judicial Council Form MC-950 Notice of Limited Scope Representation.**

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NOTES:

**Authority:**

*Cal Rules Ct, Rules 3.35, 3.36(a)*; California Judicial Council Form MC-950, pictured above, has been adopted for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Discussion:**

*See 3.13[2]*

**Related Form of Application to Be Relieved as Attorney on Completion of Limited Scope Representation:**

*See 3.38B*

**Related Form of Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation:**

*See 3.38C*

**Related Form of Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation:**

*See 3.38D*



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Chapter 3 Beginning and Terminating the Attorney-Client Relationship  
VII. FORMS

B. Beginning the Attorney/Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.38B*

**3.38B Judicial Council Form MC-955 Application to Be Relieved as Attorney on Completion of Limited Scope Representation.**

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NOTES:

**Authority:**

*Cal Rules Ct, Rules 3.35(c)-(f)*; California Judicial Council Form MC-955, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

**Discussion:**

See 3.30[4][a], [c]

**Related Form of Notice of Limited Scope Representation:**

See 3.38A

**Related Form of Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation:**

See 3.38C

**Related Form of Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation:**

See 3.38D



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B. Beginning the Attorney/Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.38C*

**3.38C Judicial Council Form MC-956 Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation.**

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NOTES:

**Authority:**

*Cal Rules Ct, Rules 3.35(c)-(g)*; California Judicial Council Form MC-956, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

**Discussion:**

See 3.30[4][a], [b]

**Related Form of Notice of Limited Scope Representation:**

See 3.38A

**Related Form of Application to Be Relieved as Attorney on Completion of Limited Scope Representation:**

See 3.38B

**Related Form of Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation:**

See 3.38D



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B. Beginning the Attorney/Client Relationship

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**3.38D Judicial Council Form MC-958 Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation.**

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NOTES:

**Authority:**

*Cal Rules Ct, Rules 3.35(f)*; California Judicial Council Form MC-958, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

**Discussion:**

See 3.30[4][c]

**Related Form of Notice of Limited Scope Representation:**

See 3.38A

**Related Form of Application to Be Relieved as Attorney on Completion of Limited Scope Representation:**

See 3.38B

**Related Form of Judicial Council Form MC-956, Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation:**

See 3.38C



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Chapter 3 Beginning and Terminating the Attorney-Client Relationship

VII. FORMS

B. Beginning the Attorney/Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.39*

### 3.39 Retainer Agreement.

\_\_\_\_\_ [name of law firm or attorney]  
 \_\_\_\_\_ [address]  
 \_\_\_\_\_ [telephone number]  
 \_\_\_\_\_ [Date]

#### RETAINER AGREEMENT

1. \_\_\_\_\_ [On execution of this agreement or Within \_\_\_\_\_ days of execution of this agreement], Client shall pay Attorney \$\_\_\_\_\_ as a retainer to assure Attorney's availability for [a maximum of \_\_\_\_\_ hours during] the period from \_\_\_\_\_ [date] to \_\_\_\_\_ [date] to provide the following legal services: \_\_\_\_\_ [describe services, e.g., to provide counsel and advice to Client by telephone or in person regarding the conduct of Client's business, including the answering of legal questions and tax questions, and the writing of any incidental correspondence on matters in connection with the conduct of Client's business]. This retainer shall not be refundable; it shall be earned by Attorney whether or not any legal services are actually performed.

2. If any of the services specified in Paragraph 1 are actually required to be performed during the retainer period, Attorney will \_\_\_\_\_ [agree with Client at that time on the fees to be paid for those services or be compensated as follows: \_\_\_\_\_ (specify rate of compensation, e.g., on an hourly basis at a fee of \$\_\_\_\_\_ per hour billed on 0.1 hour minimum increments)].

Dated: \_\_\_\_\_

\_\_\_\_\_ [name of law firm or attorney]

By: \_\_\_\_\_ *[signature]*

\_\_\_\_\_ *[typed name]*

\_\_\_\_\_ *[signature]*

\_\_\_\_\_  
*[client's typed name, address, and telephone number]*

NOTES.

**Authority:**

*B&P Code § 6148*

**Retainer Fee Agreements:**

*See 3.16[6]*



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B. Beginning the Attorney/Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.40*

### **3.40 Disclosure and Consent to Fee Splitting.**

#### DISCLOSURE AND AGREEMENT TO FEE-SPLITTING ARRANGEMENT DISCLOSURE

1. On \_\_\_\_\_[*date*], Client and Attorney entered into a legal representation agreement, (hereafter "the agreement"), a copy of which is attached as Exhibit A.
2. Under the terms of the agreement, Attorney is to perform legal services on behalf of Client including:  
\_\_\_\_\_[*description*].
3. Under the terms of the agreement, Attorney is entitled to compensation as follows: \_\_\_\_\_[*specify hourly, per diem, contingency, or other basis for fee*].
4. Attorney desires to \_\_\_\_\_[*associate or refer*] this case to \_\_\_\_\_[*name*] to \_\_\_\_\_[*specify role of associating attorney, e.g., control litigation of the case because of his/her special knowledge of* \_\_\_\_\_(*specify, e.g., malpractice litigation*)].
5. Attorney at his/her own expense will pay \_\_\_\_\_[*name of associated attorney*]  
\_\_\_\_\_[*specify fee to be paid associated attorney, e.g., a fee of \$*\_\_\_\_\_ *or*  
\_\_\_\_\_ percent of the contingency fee fixed by the agreement] for these services.
6. This \_\_\_\_\_[*association or referral*] will not cause any increase in fees owed by Client, and the total fees charged by Attorneys will not be "unconscionable," as that term is defined in *Rule 4-200 of the California Rules of Professional Conduct*.



Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name of attorney]

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name of associated attorney]

#### CLIENT'S CONSENT TO FEE-SPLITTING ARRANGEMENT

I understand that \_\_\_\_\_ [name of associated attorney] is being associated on my case in order to \_\_\_\_\_ [specify role of associating attorney in case, e.g., control litigation of the case because of his/her special knowledge of \_\_\_\_\_ (specify, e.g., malpractice litigation)] and that Attorney will pay \_\_\_\_\_ [name of associated attorney] on the basis of \_\_\_\_\_ [specify fee for associated attorney, e.g., a fee of \$\_\_\_\_\_ or \_\_\_\_\_ percent of the contingency fee fixed by the agreement].

I have been advised that this association will not cause any increase in the fees to be paid by me and that the total fees charged by the Attorneys will not be "unconscionable" under *Cal Rules Prof Conduct, Rule 4-200*. I consent to this association of attorneys and splitting of the fee between \_\_\_\_\_ [name of original attorney] and \_\_\_\_\_ [name of associated attorney].

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

NOTES.

#### **Authority:**

*Cal Rules Prof Conduct, Rule 2-200(A)*

#### **Fee-Splitting Arrangements:**

See 3.17



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## B. Beginning the Attorney/Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.41*

### 3.41 Association of Counsel--With Consent of Party.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                        |
|---------------|---|------------------------|
| _____ [name], | ) |                        |
| Plaintiff,    | ) |                        |
| vs.           | ) | NO. _____              |
| _____ [name], | ) | ASSOCIATION OF COUNSEL |
| Defendant.    | ) |                        |
|               | ) |                        |
|               | ) |                        |

\_\_\_\_\_

\_\_\_\_\_ [Name], being the attorney of record for \_\_\_\_\_ [e.g., plaintiff], hereby  
associates \_\_\_\_\_ [name], attorney at law, as co-counsel for \_\_\_\_\_ [e.g., plaintiff] in  
the above entitled matter. The office address and telephone number of \_\_\_\_\_ [name of associated  
counsel] are: \_\_\_\_\_ [specify].

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [party's status and name]

\_\_\_\_\_ [Name of associated counsel] accepts the above association.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

\_\_\_\_\_ [Name], \_\_\_\_\_ [e.g., plaintiff] consents to the association.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

\_\_\_\_\_ [party's status e.g., Plaintiff]

NOTES.

**Authority:**

*Cal Rules Prof Conduct, Rule 2-200(A)*

**Fee-Splitting Arrangement With Associated Counsel:**

See 3.17[1]



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Chapter 3 Beginning and Terminating the Attorney-Client Relationship

# VII. FORMS

## B. Beginning the Attorney/Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.42*

### 3.42 Notice of Association of Counsel.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                        |
|---------------|---|------------------------|
| _____ [name], | ) |                        |
| Plaintiff,    | ) |                        |
| vs.           | ) | NO. _____              |
| _____ [name], | ) | ASSOCIATION OF COUNSEL |
| Defendant.    | ) |                        |
|               | ) |                        |
|               | ) |                        |

\_\_\_\_\_

To \_\_\_\_\_ [specify party, e.g., defendant] and his attorney of record:

NOTICE IS HEREBY GIVEN that \_\_\_\_\_ [name of associated attorney] has  
become associated with \_\_\_\_\_ [name of attorney of record] as attorney for  
\_\_\_\_\_ [specify party, e.g., plaintiff] in this matter. The office address and telephone number of  
\_\_\_\_\_ [name of associated attorney] are: \_\_\_\_\_  
\_\_\_\_\_ [specify].

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [party's status and name]

NOTES.

**Authority:**

*Cal Rules Prof Conduct, Rule 2-200(A)*

**Fee-Splitting Arrangement With Associated Counsel:**

See 3.17[1]



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.43*

**3.43 Judicial Council Form MC-051 Notice of Motion and Motion to Be Relieved As Counsel--Civil.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1362(a)*; California Judicial Council Form MC-051, pictured above, has been adopted for mandatory use [*Cal Rules Ct, Rule 3.1362(a)*]

**Withdrawal Without Consent of Client:**

*See 3.30[3]*

**Related Form of Declaration:**

*See 3.44*

**Related Form of Order:**

*See 3.45*



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.44*

**3.44 Judicial Council Form MC-052 Declaration in Support of Attorney's Motion to Be Relieved As Counsel--Civil.**

Click here to view image.

Go to Interactive Fillable Form.

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1362(c)*; California Judicial Council Form MC-052, pictured above, has been adopted for mandatory use [*Cal Rules Ct, Rule 3.1362(c)*]

**Related Form of Notice of Motion and Notice of Motion:**

See 3.43

**Related Form of Order:**

See 3.45



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.45*

**3.45 Judicial Council Form MC-053 Order Granting Attorney's Motion to Be Relieved As Counsel--Civil.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

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NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1362(e)*; California Judicial Council Form MC-053, pictured above, has been adopted for mandatory use [*Cal Rules Ct, Rule 3.1362(e)*]

**Withdrawal Without Consent of Client:**

See 3.30[3]

**Related Form of Notice of Motion and Notice of Motion:**

See 3.43

**Related Form of Declaration:**

See 3.44





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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.46*

**3.46 Notice of Withdrawal of Attorney of Record.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

To \_\_\_\_\_ [*identify adverse party, e.g., defendant*] and his/her attorney of record:

NOTICE IS HEREBY GIVEN that \_\_\_\_\_ [*name of attorney*] has withdrawn as attorney of record for  
\_\_\_\_\_ [*name of client*], \_\_\_\_\_ [*designation of client in action or proceeding, e.g.,*  
*plaintiff*] in the above-entitled \_\_\_\_\_ [*action or proceeding*], effective \_\_\_\_\_ [*date*].

Until changed by appropriate notice, the address of record of \_\_\_\_\_ [*name of client*] is as follows:  
\_\_\_\_\_ [*specify mailing address and telephone number of client*].

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

NOTES.

**Authority:**  
CCP § 285

**Withdrawal From Representation:**

See 3.29, 3.30

**Attorney Duties on Withdrawal:**

See 3.32



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*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.47*

**3.47 Judicial Council Form MC-050 Substitution of Attorney--Civil (Without Court Order).**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*CCP §§ 284(1), 285, Cal Rules Ct, Rule 3.1362*; California Judicial Council Form MC-050 is a mandatory form [*Cal Rules Ct, Rule 1.31*]

**Substitution of Attorneys:**

See 3.34



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# VII. FORMS

## C. Terminating the Attorney/Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.48*

### **3.48 Notice of Motion to Substitute Attorneys, Including Declaration and Supporting Memorandum.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR SUB-  
)STITUTION OF ATTORNEY, SUPPORTING DE-  
)CLARATION OF \_\_\_\_\_ [name],  
) AND SUPPORTING MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
Date Action Filed: \_\_\_\_\_  
Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [name of attorney of record]:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in \_\_\_\_\_ [(Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [address], \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order substituting \_\_\_\_\_ [name of new attorney, e.g., Ann Carter] as his/her attorney of record in this \_\_\_\_\_ [action or proceeding] in the place of \_\_\_\_\_ [name of original attorney of record, e.g., Tom Doe], and for an order directing

\_\_\_\_\_ [name of original attorney, e.g., Tom Doe] to turn over to \_\_\_\_\_ [name of new attorney, e.g., Ann Carter] all the papers and records in connection with this case that he/she has in his/her possession. The motion is made on the ground that \_\_\_\_\_ [specify grounds, e.g., Plaintiff John Smith has discharged Tom Doe as his attorney, but Tom Doe has refused to withdraw from the case or to turn over the papers and records relating to this case in his/her possession to plaintiff or to Ann Carter, whom Plaintiff John Smith has retained to represent him/her]. The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)] and the supporting memorandum served and filed with it, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

SUPPORTING DECLARATION OF \_\_\_\_\_ [name]

I, \_\_\_\_\_ [name], declare:

1. I am [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above].

2. On or about \_\_\_\_\_ [date], I was retained by \_\_\_\_\_ [specify party, e.g., Plaintiff John Smith] to represent him/her in this \_\_\_\_\_ [action or proceeding] and I agreed to do so.

[Set forth evidentiary facts within declarant's personal knowledge that establish the grounds set forth in the notice of motion, such as the following:]

3. By letter dated \_\_\_\_\_, a copy of which is attached as Exhibit A and made a part hereof, I notified \_\_\_\_\_ [name of original attorney of record, e.g., Tom Doe] of my employment by \_\_\_\_\_ [specify party, e.g., Plaintiff John Smith] and of \_\_\_\_\_ [specify party, e.g., Plaintiff John Smith's] wish to replace him/her with me as \_\_\_\_\_ [specify party, e.g., Plaintiff John Smith's] attorney of record. I enclosed a Substitution of Attorneys form that had been signed by the \_\_\_\_\_ [specify party, e.g., plaintiff] with the request that \_\_\_\_\_ [name of original attorney of record, e.g., Tom Doe] sign and return it in the stamped, self-addressed return envelope that I also enclosed. I requested in the letter that \_\_\_\_\_ [name of original attorney of record, e.g., Tom Doe] forward to me any papers or records in his/her possession belonging to \_\_\_\_\_ [specify party, e.g., plaintiff] or related to this case. \_\_\_\_\_ [Name of original attorney of record, e.g., Tom Doe] failed to return the form, to forward the papers and records in his/her possession, or to otherwise reply to my letter.

4. Over the next several weeks, I phoned \_\_\_\_\_ [identify original attorney of record, e.g., Tom Doe's] office numerous times, but was unable to reach him/her. On each occasion, I left my name and phone number with \_\_\_\_\_ [identify original attorney of record, e.g., Tom Doe's] \_\_\_\_\_ [assistant or answering service or other] with a request that \_\_\_\_\_ [name of original attorney of record, e.g., Tom

Doe] return my call. He/She failed to do so.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

SUPPORTING DECLARATION OF \_\_\_\_\_ [name of party]

I, \_\_\_\_\_ [name], declare:

1. I am the \_\_\_\_\_ [specify party, e.g., plaintiff] in this \_\_\_\_\_ [action or proceeding] and the moving party herein.

[Set forth evidentiary facts within declarant's personal knowledge that establish the grounds set forth in the notice of motion, e.g.:]

2. I originally employed \_\_\_\_\_ [name of original attorney of record, e.g., Tom Doe] as my attorney to represent me in this matter.

3. On or about \_\_\_\_\_ [date], I retained \_\_\_\_\_ [name of new attorney, e.g., Ann Carter] to represent me in the place of \_\_\_\_\_ [name of original attorney of record, e.g., Tom Doe].

4. By letter dated \_\_\_\_\_ [date], a copy of which is attached as Exhibit B and made a part hereof, I discharged \_\_\_\_\_ [name of original attorney of record, e.g., Tom Doe], as my attorney in this case and requested that he/she send all papers and records in his/her possession relating to this case to \_\_\_\_\_ [name of new attorney, e.g., Ann Carter].

5. I wish to remove \_\_\_\_\_ [name of original attorney of record, e.g., Tom Doe] and to substitute \_\_\_\_\_ [name of new attorney, e.g., Ann Carter] as my attorney of record in this \_\_\_\_\_ [action or proceeding].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated \_\_\_\_\_

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

SUPPORTING MEMORANDUM

[Add memorandum supporting motion]

NOTES.

**Authority:**

*CCP § 284(2)*

**Discharge of Attorney:**

See 3.33

**Motion to Substitute Attorney:**

See 3.34[2]

**Related Form of Order:**

See 3.49

**Related Form of Notice of Substitution to Adverse Parties:**

See 3.50



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C. Terminating the Attorney/Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.49*

### 3.49 Order Granting Motion to Substitute Attorneys.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)  
)  
)  
)  
)  
)  
)

NO. \_\_\_\_\_

ORDER

The motion of \_\_\_\_\_ [identify party, e.g., Plaintiff John Smith] for an order substituting \_\_\_\_\_ [name of new attorney, e.g., Ann Carter] for \_\_\_\_\_ [name of original attorney, e.g., Tom Doe] as his/her attorney of record in this \_\_\_\_\_ [action or proceeding] was heard by the court on \_\_\_\_\_ [date]. \_\_\_\_\_ [Set forth appearances, e.g., Ann Carter appeared for Plaintiff John Smith, who consented to such representation, and Tom Doe appeared in person].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that \_\_\_\_\_ [name of substituted attorney, e.g., Ann Carter] is hereby substituted in the place and stead of \_\_\_\_\_ [name of original attorney, e.g., Tom Doe] as \_\_\_\_\_ [specify party, e.g., plaintiff's] attorney of record in this \_\_\_\_\_ [action or proceeding].



IT IS FURTHER ORDERED that \_\_\_\_\_ [*name of original attorney, e.g., Tom Doe*] forthwith and without delay turn over to \_\_\_\_\_ [*name of substituted attorney, e.g., Ann Carter*], at \_\_\_\_\_ [*street address and city*], California, all the papers and records concerning this \_\_\_\_\_ [*action or proceeding*] that he/she has in his/her possession.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*CCP § 284(2)*

**Discharge of Attorney:**

See 3.33

**Motion to Substitute Attorney:**

See 3.34[2]

**Related Form of Notice of Motion:**

See 3.47

**Related Form of Notice of Substitution to Adverse Parties:**

See 3.49



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C. Terminating the Attorney/Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.50*

### 3.50 Notice of Substitution of Attorneys to Adverse Parties.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name],

Defendant.

)  
)  
)  
)  
)  
)  
)

NO. \_\_\_\_\_

NOTICE OF SUBSTITUTION OF ATTORNEYS

To \_\_\_\_\_ [identify adverse party, e.g., Defendant Mary Jones] \_\_\_\_\_ [name] and to  
his/her attorney of record:

NOTICE IS HEREBY GIVEN that by the order of this court dated \_\_\_\_\_ [date],  
\_\_\_\_\_ [name of substituted attorney, e.g., Ann Carter], whose address is \_\_\_\_\_ [street  
address and city], California, was substituted as the attorney of record for \_\_\_\_\_ [specify party, e.g.,  
Plaintiff John Smith] in this \_\_\_\_\_ [action or proceeding] in the place of \_\_\_\_\_  
[name of original attorney, e.g., Tom Doe].

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_ [*party's status and name*]

NOTES.

**Authority:**

*CCP § 285*

**Notice of Substitution of Attorneys:**

*See 3.34[3]*

**Related Form of Notice of Motion:**

*See 3.48*

**Related Form of Order:**

*See 3.49*



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C. Terminating the Attorney/Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.51*

**3.51 Notice of Motion for Order Disqualifying Opposing Counsel, Including Declaration and Supporting Memorandum.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR OR-  
) DER DISQUALIFYING OPPOSING COUNSEL,  
) SUPPORTING DECLARATION OF  
) \_\_\_\_\_ [name], AND SUPPORTING  
) MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
Date Action Filed: \_\_\_\_\_  
Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in \_\_\_\_\_ [(Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address] \_\_\_\_\_ [party, e.g., Defendant Mary Jones] will, and hereby does, move for an order disqualifying and barring \_\_\_\_\_ [name(s) of

attorney(s) or firm, e.g., Tom Doe] from representing or assisting \_\_\_\_\_ [specify opposing party, e.g., Plaintiff John Smith] in this action. The motion is made on the grounds that \_\_\_\_\_ [specify grounds for disqualifying opposing counsel, e.g., Tom Doe formerly represented Defendant Mary Jones in a matter that is substantially related to the subject of this action. In the course of this employment Tom Doe obtained confidential information that he may be called on to use against Defendant Mary Jones in representing Plaintiff John Smith in this action].

The motion is based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)] and the supporting memorandum served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

SUPPORTING DECLARATION OF \_\_\_\_\_ [name]

I, \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for \_\_\_\_\_ (moving party or other statement as appropriate)].

[Set forth facts showing that opposing counsel represented moving party in the same matter that is the subject of the present action, or in a matter that is substantially related to the subject of this action, or that opposing counsel obtained confidential information in the course of his/her former employment by moving party that he/she may be called on to use against the moving party in the present action, e.g.:]

2. \_\_\_\_\_ [Name of opposing counsel, e.g., Tom Doe] was formerly associated with the firm of \_\_\_\_\_ [name], which is representing \_\_\_\_\_ [name of moving party, e.g., Mary Jones] in the defense of this action.

3. While thus associated, \_\_\_\_\_ [name of opposing counsel, e.g., Tom Doe] represented \_\_\_\_\_ [specify moving party, e.g., Defendant Mary Jones] in the following matters: \_\_\_\_\_ [specify].

4. In the course of representing \_\_\_\_\_ [specify moving party, e.g., Defendant Mary Jones] in these matters, \_\_\_\_\_ [name of opposing counsel, e.g., Tom Doe] obtained confidential information concerning \_\_\_\_\_ [specify, e.g., defendant's business operations] that is substantially related to the subject matter of this action. \_\_\_\_\_ [Name of opposing counsel, e.g., Tom Doe] may use this

confidential information against \_\_\_\_\_ [*specify moving party, e.g., Defendant Mary Jones*] in the present action.

5. \_\_\_\_\_ [*Specify moving party, e.g., Defendant Mary Jones*] does not and has never consented, either expressly or implicitly, to \_\_\_\_\_ [*identify counsel, e.g., Tom Doe's*] representation of \_\_\_\_\_ [*specify opposing party, e.g., Plaintiff John Smith*] in this action.

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*]

#### SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

NOTES.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(E)*

**Disqualification of Opposing Counsel:**

See 3.36

**Related Form of Order:**

See 3.52



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Chapter 3 Beginning and Terminating the Attorney-Client Relationship  
VII. FORMS

C. Terminating the Attorney/Client Relationship

*1-3 MB Practice Guide: CA Pretrial Civil Procedure 3.52*

### 3.52 Order Granting Motion to Disqualify Opposing Counsel.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)  
)  
)  
)  
)  
)  
)

NO. \_\_\_\_\_

ORDER

The motion of \_\_\_\_\_ [identify party, e.g., Defendant Mary Jones] for an order disqualifying and barring \_\_\_\_\_ [name(s) of opposing counsel, e.g., Tom Doe] from representing or otherwise assisting \_\_\_\_\_ [specify opposing party, e.g., Plaintiff John Smith] in this action was heard by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that \_\_\_\_\_ [name(s) of opposing counsel] is/are hereby disqualified from representing \_\_\_\_\_ [name of opposing party] in this action.

IT IS FURTHER ORDERED that \_\_\_\_\_ [name(s) of opposing counsel, e.g., Tom Doe] refrain from advising or assisting \_\_\_\_\_ [name of opposing party, e.g., John Smith] in any manner in connection

with this action.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*Cal Rules Prof Conduct, Rule 3-310(E)*

**Disqualification of Opposing Counsel:**

See 3.36

**Related Form of Notice of Motion:**

See 3.51





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Chapter 4 Limitation of Actions

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.syn*

**§ 4.syn Synopsis to Chapter 4: Limitation of Actions**

4.01 Scope.

4.02 Objective and Strategy.

4.03 CHECKLIST: Determining Applicable Statute of Limitations.

4.04 Gravamen of Action Determines Applicable Limitation Period.

4.05 Types of Actions.

4.05[1] Contract.

4.05[2] Personal Injury or Wrongful Death.

4.05[3] Negligence Other Than Personal Injury.

4.05[4] Real Property.

4.05[5] Actions Based on Liability Created by Statute.

4.05[6] Insurance Claims.

4.05[7] Other Types of Actions.

4.06 Four-Year Statute of Limitations Applies As Default If No Other Period Applies.

4.07 Prerequisite Procedures Affecting Insurance-Claim Limitation Periods.

4.07[1] Notice to Insurer Is Required.

4.07[1][a] Form and Manner of Notice Varies Among Policies.

4.07[1][b] Notice Prejudice Rule May Save Defective Compliance.

4.07[2] Contractual Limitation Period May Control.

4.08 Prerequisite Procedures Affecting Limitations on Claims Against Decedents.

4.08[1] Time for Filing Claims Against Probate Estates Runs From Personal Representative's Notice.

4.08[2] Claims Must Be Filed Within Claim-Filing Time Period.

4.08[3] Manner of Filing Claims.

4.08[4] Proper Claim Filing Tolls Limitation Period.

4.09 Prerequisite Procedures Affecting Limitations on Claims Against Public Entities.

4.09[1] Most Cases Against Public Entities Require a Prerequisite Presentation of the Claim.

4.09[2] Time Limitations for Claim Filing Depends on Type of Claim.

4.09[2][a] Six Months for Tort Claims.

4.09[2][b] One Year for Contract and Real Property Claims.

4.09[2][c] Nature of Right Sued on Determines Type of Claim.

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4.10 Choice-of-Law Factors Determine Applicable Limitation Period.

4.10[1] Court Conducts Governmental Interest Analysis.

4.10[2] Borrowing Statute May Bar Action Arising in Another State or Country.

4.10[3] Contractual Choice-of-Law Clause Incorporates Statute of Limitations From Chosen State.

4.11 Choice Between Two Applicable Statutes Is Needed.

4.11[1] More Specific Statute of Limitations Applies.

4.11[2] Shorter Statute of Limitations Applies When Neither Is More Specific.

4.12 CHECKLIST: Determining When Limitation Period Begins to Run.

4.12[1] Plaintiff's Checklist.

4.12[2] Defendant's Checklist.

4.13 Accrual May Depend on Purpose for Determination.

#### 4.14 Limitation Period Begins to Run When Cause of Action Accrues.

4.14[1] Claim Must Be Legally Actionable.

4.14[2] Appreciable Harm Is Required.

#### 4.15 Accrual of Cause of Action May Be Delayed.

4.15[1] Discovery Rule May Delay Accrual.

4.15[1][a] Factors for Delayed Discovery Must Be Pleaded.

4.15[1][b] Complication After Original Injury Is Separate Cause of Action.

4.15[1][c] Special Rules Apply to Asbestos Cases.

4.15[1][d] Special Rules Apply to Toxic Injury Cases.

4.15[1][e] Exemptions From Discovery Rule.

4.15[2] Fiduciary Relationship.

4.15[2][a] Fiduciaries Have Duty to Disclose Facts.

4.15[2][b] Limitation Period Does Not Run Until Repudiation.

4.15[2][c] Anticipatory Repudiation Does Not Start Running of Limitation Period.

4.15[3] Other Delays.

4.15[3][a] Statutes Expressly Delay Accrual.

4.15[3][b] Delay Prevents Manifest Unjustness.

4.15[3][c] Court Looks to Parties' Relationship.

4.15[3][d] Judicial Opinion Does Not Delay Accrual.

#### 4.16 CHECKLIST: Determining If Statute of Limitations Has Been Tolloed.

#### 4.17 Commencing Action Tolls Limitation Period.

4.17[1] Complaint Must Be Filed.

4.17[2] Limitation Period Suspended While Action Is Pending.

4.17[3] Court May Lack Jurisdiction.

4.17[3][a] Action Must Be Seasonably Commenced.

4.17[3][b] Action May Be Transferred After Limitation Period Expired.

4.17[4] Defect in Designating Party.

4.17[4][a] Defective Description of Defendant Does Not Affect Limitation Period.

4.17[4][b] Wrong Defendant Does Not Toll Limitation Period.

4.17[4][c] Technical Defect Related to Plaintiff Is Curable by Amendment.

4.17[5] Plaintiff May Sue Defendant by Fictitious Name.

4.17[5][a] Plaintiff's Ignorance of Name Must Be Genuine.

4.17[5][b] Complaint May Be Amended to Add Real Name.

4.17[6] Form of Complaint May Be Defective but Must Be Curable by Amendment.

4.17[7] Cross-Complaints Are Affected by Statute of Limitations.

4.17[7][a] Cross-Complaint May Be Barred on Otherwise Barred Action.

4.17[7][b] Action That Should Have Been Cross-Complaint Does Not Relate Back.

4.17[8] Dismissal Restores Limitation Period.

4.18 Defendant's Absence or Departure From State Tolls Limitation Period.

4.18[1] Time of Absence Is Not Counted.

4.18[2] Defendant Need Not Have Resided in State.

4.18[3] Defendant's Secret Return to State Is Not Counted, but Open Return Is Counted.

4.18[4] Period of Absence Coinciding With Plaintiff's Disability to Bring Action.

4.18[5] Plaintiff Need Not Be a Resident of State.

4.18[6] Absence of One Joint Defendant Does Not Affect Limitation Period for Other Defendant.

4.18[7] Tolling Provisions Do Not Apply to Motorists.

4.18[8] Tolling Provisions Do Not Apply to Create Violation of Commerce Clause.

4.19 Special Rules Apply If Defendant Dies.

4.19[1] One-Year Period Replaces Otherwise Applicable Limitation Period.

4.19[2] One-Year Period Generally May Not Be Topped.

4.19[3] Replacement of Limitation Period May Not Apply.

4.19[3][a] Claims Against Decedent's Estate.

4.19[3][b] Claims Against Decedent's Revocable Trust.

4.19[3][c] Actions to Recover Decedent's Insurance Proceeds.

4.19[3][d] Actions to Enforce Lien on Property in Decedent's Estate.

4.19[3][e] Will Contests.

4.20 Special Rules Apply If Plaintiff Dies.

4.20[1] Action Must Be Commenced Before Expiration of the Later of Six Months After Death or Otherwise Applicable Limitation Period.

4.20[2] Discovery Rule May Apply.

4.20[3] Heirs Do Not Derive Barred Cause of Action.

4.21 Disability of Plaintiff Tolls Limitation Period.

4.21[1] Court Inquires As to When Disability Arose.

4.21[2] Disability Must Be Continuing.

4.21[3] Minority May Toll Limitation Period.

4.21[3][a] Limitation Period Topped While Minor Is Under 18.

4.21[3][b] Special Rules Apply to Actions for Prenatal Injuries, Medical Malpractice, and Sexual Abuse.

4.21[3][c] Existence of Custodians and Guardians Is Immaterial.

4.21[3][d] Tolling Does Not Apply to Emancipated Minor.

4.21[4] Insanity May Toll Limitation Period.

4.21[4][a] Plaintiff Must Be Incapable of Caring for Property or Understanding Acts.

4.21[4][b] Unconsciousness Qualifies As Insanity.

4.21[4][c] Having Conservator Is Immaterial.

4.21[5] Imprisonment May Toll Limitation Period.

4.21[5][a] Prisoner Must Be Imprisoned or in Execution Under Sentence for Term Less Than Life.

4.21[5][b] Tolling May Not Exceed Two Years.

4.22 Equitable Tolling Suspends Limitation Period.

4.22[1] Equitable Tolling Applies When Plaintiff Has Several Remedies.

4.22[2] Three-Pronged Test Must Be Satisfied.

4.22[3] Equitable Tolling Must Be Consistent With Relevant Statute of Limitations.

4.22[4] Tolling Cannot Revive Already Expired Statute of Limitations.

4.22[5] Special Rules Apply to Equitable Tolling for Exhaustion of Administrative Remedies.

4.23 Doctrine of Continuing Wrongs Suspends Limitation Period.

4.24 Arbitration Tolls Limitation Period.

4.25 Filing Class Action Tolls Limitation Period Pending Certification.

4.25[1] Tolling Occurs Pending Certification.

4.25[2] Two-Pronged Test Must Be Satisfied.

4.26 Condition on Obligation Tolls Limitation Period.

4.26[1] Complaint Should Not Be Filed Before Performance of Condition.

4.26[2] Limitation Period Begins When Condition Occurs.

4.26[3] Plaintiff May Not Indefinitely Delay Performance of Condition.

4.27 Legal Inhibition to Sue Tolls Limitation Period.

4.27[1] Injunction or Statute Stays Action.

4.27[2] Special Rules Apply to Medical Malpractice Action.

4.28 Statute of Limitations Restarts After Appeal.

4.29 Exhausting Administrative Remedies Suspends Statute of Limitations.

4.30 War Tolls Limitation Period.

4.31 CHECKLIST: Determining If Limitation Period Has Been Changed.

4.31[1] Plaintiff's Checklist.

4.31[2] Defendant's Checklist.

4.32 Limitation Period May Be Extended.

4.32[1] Amended Statute May Extend Limitation Period.

4.32[2] Parties May Extend Limitation Period by Agreement.

4.32[3] Paying on Promissory Note Extends Limitation Period.

4.33 Limitation Period May Be Shortened.

4.33[1] Amended Statute May Shorten Limitation Period.

4.33[1][a] Shortened Limitation Period Generally May Not Be Applied Retroactively.

4.33[1][b] Affected Party Receives Grace Period.

4.33[1][c] Court Conducts Due Process Analysis.

4.33[2] Clarified Statute May Be Applied Retroactively.

4.33[3] Parties May Shorten Limitation Period by Agreement.

4.33[3][a] Shortened Limitation Period Must Be Reasonable.

4.33[3][b] Strict Construction Applies When Limitation Period Is Shortened.

4.34 CHECKLIST: Calculating Limitation Period.

4.35 Courts Strictly Construe Statute of Limitations.

4.36 Exceptions to Strict Construction Rule.

4.36[1] Statutes Suspending or Tolling Limitation Period.

4.36[2] Cases Suspending Limitation Period.

4.37 Number of Days Must Be Calculated.

4.37[1] First Day Is Excluded, Last Day Is Included.

4.37[2] Saturdays, Sundays, and Holidays May Not Be Last Day.

4.37[3] Government Office Closure Considered Holiday.

4.38 CHECKLIST: Raising Statute of Limitations As Bar to Action.

4.39 Burden-Shifting Analysis Applies.

4.39[1] Defendant Must Establish That Statute of Limitations Applies.

4.39[2] Plaintiff Must Establish Facts to Avoid Statute of Limitations.

4.40 CHECKLIST: Obtaining Relief From Bar of Statute of Limitations.

4.41 Statute of Limitations May Be Challenged As Unconstitutional.

#### 4.42 Equitable Estoppel May Prevent Defendant From Raising Bar of Statute of Limitations.

4.42[1] Equitable Estoppel Applies After Limitation Period Expires.

4.42[2] Plead Equitable Estoppel As Affirmative Bar to Defense of Statute of Limitations.

4.42[3] Plaintiff Must Establish Requirements for Equitable Estoppel.

4.42[3][a] Defendant Was Aware of Limitation Period.

4.42[3][b] Defendant Intended That Plaintiff Should Rely on His or Her Conduct or Statements.

4.42[3][c] Plaintiff Was Ignorant of True Facts.

4.42[3][d] Plaintiff Relied on Defendant's Conduct or Statements to His or Her Detriment.

4.42[4] Court Applies Reasonable Diligence Test to Plaintiff's Actions.

4.42[5] Court Inquires Into Timing of Defendant's Fraudulent Act.

4.42[6] Examples of Establishing Equitable Estoppel.

4.42[6][a] Defendant Was Silent.

4.42[6][b] Defendant Fraudulently Concealed Cause of Action.

4.42[6][c] Defendant Fraudulently Concealed His or Her Identity.

4.42[6][d] Defendant's Fraud Induced Plaintiff to Refrain From Suing.

4.42[6][e] Defendant's Intimidation or Violence Induced Plaintiff to Refrain From Suing.

#### 4.43 Defendant May Waive Bar of Statute of Limitations.

4.43[1] By Agreement.

4.43[1][a] Limitation Period May Be Extended.

4.43[1][b] Writing Is Required When Defense Is Barred.

4.43[1][c] Waiver Binds Persons in Privity.

4.43[2] By Conduct.

4.43[2][a] Defendant May Waive Bar by Being Silent.

4.43[2][b] Defendant May Waive Bar by Acting Inconsistently With Claim of Bar.

4.43[3] By Failure to Plead.



4.43[3][a] Statute of Limitations Defense Must Be Raised in Trial Court.

4.43[3][b] Plaintiff's Delay Is Immaterial.

4.44 Plaintiff's Amended Complaint May Relate Back.

4.44[1] Relation Back Occurs If Test Is Met.

4.44[2] Changing or Adding Information Is Permitted.

4.44[2][a] Legal Theory May Be Changed If Parties Stay the Same.

4.44[2][b] Facts May Be Added.

4.44[2][c] Damages May Be Added.

4.44[2][d] Caption or Prayer May Be Changed.

4.44[2][e] New Plaintiff May Be Substituted Based on Technical Defect.

4.44[2][f] Defendant's True Name May Be Added.

4.44[3] Variance of Proof May Be Cured.

4.45 Plaintiff's Supplemental Complaint May Relate Back.

4.45[1] Supplemental Claims Must Relate to Those in Original Complaint.

4.45[2] Original Pleading Must Have Given Notice That Wrongful Conduct Was Continuing.

4.46 Certain Procedures Should Be Considered.

4.46[1] Reversed Judgment.

4.46[2] Dismissal.

4.46[3] Summary Judgment.

4.47 Mistake by Court Clerk May Provide Relief From Bar.

4.48 Barred Debt May Be Revived.

4.49 CHECKLIST: Raising and Opposing Laches.

4.49[1] Defendant's Checklist.

4.49[2] Plaintiff's Checklist.

4.50 Laches Provides an Equitable Defense.

4.51 Plaintiff Must Assert Equitable Rights.

4.52 Laches Should Be Pleaded.

4.53 Court Considers Two Factors When Laches Is Asserted.

4.53[1] Unreasonable Delay Plus Plaintiff's Acquiescence or Material Change to Defendant's Prejudice.

4.53[2] Statute of Limitations.

4.54 Burden of Proof May Shift.

4.54[1] Proponent of Laches Has Burden When Demonstrating Unreasonable Delay and Prejudice by Evidence.

4.54[2] Opponent of Laches Has Burden If Delay Exceeds Analogous Limitation Period.

4.55 Defendant May Be Estopped From Pleading Laches.

4.55[1] Defendant's Conduct Cannot Contribute to Delay.

4.55[2] Defendant Cannot Have Unclean Hands.

4.56 Allegation--Suspension of Period of Limitation--Absence of Defendant From State.

4.57 Allegation--Suspension of Period of Limitation--Departure of Defendant From State.

4.58 Allegation--Suspension of Period of Limitation--Disability Because of Minority.

4.59 Allegation--Suspension of Period of Limitation--Death of Person Entitled to Sue.

4.60 Allegation--Suspension of Period of Limitation--Reversal of Judgment for Plaintiff on Appeal.

4.61 Allegation--Defendant Estopped to Raise Defense of Bar.

4.62 Allegation--Statute of Limitations Equitably Tolloed.

4.63 Allegation--Extension of Period of Limitation by Agreement.

4.64 Demurrer to Complaint--Bar of Statute of Limitations.

4.65 Affirmative Defense--Action Barred by Statute of Limitations--General Form.

4.66 Affirmative Defense--Defendant Foreign Corporation Having Designated Agent Within State for Service of Process.

4.67 Affirmative Defense--Shortening of Period of Limitation by Private Agreement.

4.68 Ground of Demurrer--Bar of Laches Against Complaint for Equitable Relief.



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Chapter 4 Limitation of Actions  
I. STRATEGY

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.01*

**4.01 Scope.**

This chapter covers:

- Determining the statute of limitations that applies to a case [*see 4.03 -4.11*].
- Determining when the statute of limitations begins to run [*see 4.12 -4.15*].
- Determining whether the statute of limitations has been tolled [*see 4.16 -4.30*; Forms: *see 4.56 -4.60, 4.62*], extended [*see 4.31, 4.32*; Form: *see 4.63*], or shortened [*see 4.31, 4.33*; Form: *see 4.67*].
- Calculating the statute of limitations [*see 4.34 -4.37*].
- Pleading the statute of limitations as a defense [*see 4.38, 4.39*; Forms: *see 4.64 -4.66*].
- Avoiding the statute of limitations bar [*see 4.40 -4.48*; Form: *see 4.61*].
- Raising and opposing laches [*see 4.49 -4.55*; Form: *see 4.68*].

**Core Statute:**

*CCP § 312 et seq.*

**Detailed Discussion/Forms References:**

California Forms of Pleading and Practice, Ch. 345, Limitation of Actions; California Forms of Pleading and Practice, Ch. 345, Appendix: Table of Limitation Periods (Matthew Bender).



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Chapter 4 Limitation of Actions  
I. STRATEGY

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.02*

#### 4.02 Objective and Strategy.

A defendant may raise the statute of limitations as a defense to bar a plaintiff's action as untimely. Statutes of limitations prevent the need to defend stale claims and require plaintiffs to pursue their claims in a timely manner. Statutes of limitations are intended to promote justice by preventing [ *Gutierrez v. Mofid* (1985) 39 C3d 892, 898, 218 CR 313, 705 P2d 886 ]:

- Revival of claims that were not diligently brought by plaintiffs, and
- Revival of claims for which evidence has been lost, memories have faded, and witnesses have disappeared.

#### **Distinguish:**

A statute of repose limits the time within which an action may be brought and is not related to accrual. A statute of repose is a bar on all suits brought after a specified period [ *Giest v. Sequoia Ventures, Inc.* (2000) 83 CA4th 300, 305-306, 99 CR2d 476 ].

#### **Exception:**

The statutes of limitations set forth in the Code of Civil Procedure do not apply to administrative proceedings [ *Coachella Valley Mosquito & Vector Control Dist. v. California Pub. Employment Relations Bd.* (2005) 35 C4th 1072, 1088, 112 P3d 623 ].

#### **► Cross References:**

Forms of supporting and opposing memoranda relating to limitation of actions, see California Points and Authorities, Ch. 143, Limitation of Actions (Matthew Bender).

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.



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Chapter 4 Limitation of Actions  
II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.03*

**4.03 CHECKLIST: Determining Applicable Statute of Limitations.**

- ☐ Determine nature of cause of action.
  - ☐ Consider main issue underlying action.
  - ☐ Ignore caption and form of relief requested.

**Discussion:**

See 4.04

- ☐ Consult statutes to determine which limitation period applies to action.

**Discussion:**

See 4.05

- ☐ If no statute of limitations is provided, apply four-year period.

**Authority:**

CCP § 343

**Discussion:**

See 4.06

- ☐ Consider contract to stipulate choice of law if applicable statute of limitations is not beneficial.

**Discussion:**

See 4.10[3]

- ☐ Determine if California's borrowing statute bars action arising in another state or foreign country.

**Discussion:**

See 4.11A



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Chapter 4 Limitation of Actions  
II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.04

**4.04 Gravamen of Action Determines Applicable Limitation Period.**

The gravamen of the cause of action or the nature of the right sued upon determines the statute of limitation period [ *Day v. Greene* (1963) 59 C2d 404, 411, 29 CR 785, 380 P2d 385 ; *Marin Healthcare Dist. v. Sutter Health* (2002) 103 CA4th 861, 874, 127 CR2d 113 ]. For limitations purposes, courts will look to the primary interest invaded by defendant's wrongful conduct [ *Marin Healthcare Dist. v. Sutter Health* (2002) 103 CA4th 861, 875, 127 CR2d 113 ].



**Warning--Plaintiff:**

The form of relief that plaintiff demands does not determine the applicable statute of limitations [ *Day v. Greene* (1963) 59 C2d 404, 411, 29 CR 785, 380 P2d 385 ; *Marin Healthcare Dist. v. Sutter Health* (2002) 103 CA4th 861, 875, 127 CR2d 113 ]. In addition, neither the caption nor the form of the complaint is conclusive in determining the nature of the cause of action [ *Parker v. Walker* (1992) 5 CA4th 1173, 1189, 6 CR2d 908 ; *Agair, Inc. v. Shaeffer* (1965) 232 CA2d 513, 516, 42 CR 883 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTime Limitations



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Chapter 4 Limitation of Actions  
II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.05

#### 4.05 Types of Actions.

**4.05[1] Contract.** A four-year statute of limitations applies to an action, on or for rescission of, a written contract [CCP § 337(1), (3)].



**Trap:**

The failure to observe a contractual limitation on the time in which to make a demand for arbitration under a mandatory arbitration clause may waive the right to arbitration and the claim as a whole [see *Pearson Dental Supplies, Inc. v. Superior Court* (2008) 166 CA4th 71, 86-87, 82 CR3d 154 (not citable--superseded by grant of review 2008 Cal. LEXIS 13526 ) (demand for arbitration made after expiration of one-year contractual limitation was untimely)]. Check the contract for a mandatory arbitration clause and, if it contains one, a limitation on the time in which to make a demand for arbitration. Take necessary steps to demand arbitration within the limitation period.



**Cross Reference:**

Contractual time limits on demanding arbitration under mandatory arbitration clause, see Ch. 6, *Determining Forum*, 6.11[2].

A two-year statute of limitations applies to an action, on or for rescission of, an oral contract [CCP § 339(1), (3)].

**Distinguish:**

A contract may be "in writing" for purposes of the statute of limitations even though it was accepted orally or by an act other than signing [ *Pietrobon v. Libarle* (2006) 137 CA4th 992, 997, 40 CR3d 718 ].

An action for breach of the covenant of good faith and fair dealing sounds in both tort and contract and is subject to the contract limitation period if plaintiff is pursuing the contract theory [see *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 CA3d 205, 220-221, 285 CR 717 (CCP § 337(1) applies to written contract rather than tort or oral contract periods)].

An action for negligent performance of an implied obligation based on contract is also subject to the contract limitation



period [see *Bruckman v. Parliament Escrow Corp.* (1987) 190 CA3d 1051, 1057-1058, 235 CR 813 (CCP § 337(1) applies to written contract rather than period applicable to fraud, mistake, oral contract, or negligence)].

A two-year statute of limitations applies to an action in quantum meruit [CCP § 339; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 996, 90 CR2d 665 ].

#### **Cross Reference:**

See California Forms of Pleading and Practice, Ch. 345, Appendix: Table of Limitation Periods (Matthew Bender).

**4.05[2] Personal Injury or Wrongful Death.** A two-year statute of limitations applies to an action for personal injury caused by wrongful act or neglect [CCP § 335.1].

A two-year statute of limitations applies to an action for death of person caused by wrongful act or neglect of another [CCP § 335.1].

The phrase "injury to, or for the death of, an individual caused by the wrongful act or neglect of another" is to be interpreted as embracing all infringements of personal rights, including malicious prosecution [ *Stavropoulos v. Superior Court* (2006) 141 CA4th 190, 197, 45 CR3d 705 ].

#### **Exceptions:**

Exceptions to the general two-year rule include:

- Intentional infliction of emotional distress--one year [CCP § 340; *Magpali v. Farmers Group, Inc.* (1996) 48 CA4th 471, 485, 55 CR2d 225 ].
- Domestic violence--three years from last act or discovery [CCP § 340.15].
- Childhood sexual abuse--the later of eight years from the date plaintiff attained the age of majority or three years from the date plaintiff discovered or reasonably should have discovered that the injury was caused by sexual abuse [CCP § 340.1].
- Asbestos injury or wrongful death--one year, but have special provisions for delayed discovery [CCP § 340.2]. Toxic injury or wrongful death cases are two years, but have special provisions for delayed discovery [CCP § 340.8].
- Minor's injuries sustained before or during birth--six years from the date of birth [CCP § 340.4].
- Professional negligence of a healthcare provider--the earlier of three years after the date of injury or one year after plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury [CCP § 340.5].

#### **Cross Reference:**

See California Forms of Pleading and Practice, Ch. 345, Appendix: Table of Limitation Periods (Matthew Bender).

**4.05[3] Negligence Other Than Personal Injury.** A three-year statute of limitations applies to an action for negligent property damage [CCP § 338(c)].

For an action against an accountant for malpractice, an action must be brought within two years after plaintiff discovers, or should have discovered, loss or damage, plus actual injury [*CCP* § 339(1); *International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 *C4th* 606, 608-609, 613, 38 *CR2d* 150, 888 *P2d* 1279 ; *Apple Valley Unified Sch. Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 *CA4th* 934, 942, 120 *CR2d* 629 ].

For an action against an attorney based on professional errors and omissions, an action must be brought within one year after plaintiff discovers, or should have discovered, facts constituting wrongful act or omission, or four years after the error or omission, subject to suspension of the period for certain causes [*CCP* § 340.6(a)].

 **Cross Reference:**

See California Forms of Pleading and Practice, Ch. 345, Appendix: Table of Limitation Periods (Matthew Bender).

**4.05[4] Real Property.** For an action to quiet title based on entry on real property, an action must be brought within one year after entry and five years after accrual of the right to enter [*CCP* § 320].

For an action to recover real property or possession of real property, an action must be brought within five years of the other party's adverse possession of property [*CCP* § 321].

A five-year statute of limitations applies to an action in ejectment against a tenant [*CCP* § 326].

 **Cross Reference:**

See California Forms of Pleading and Practice, Ch. 345, Appendix: Table of Limitation Periods (Matthew Bender).

**4.05[5] Actions Based on Liability Created by Statute.** A three-year statute of limitations applies to an action based on a liability created by statute, other than a penalty or forfeiture [*CCP* § 338(a)].

A one-year statute of limitations applies to an action on a statute for a penalty or forfeiture, unless the statute imposing it prescribes a different limitation [*CCP* § 340(a)].

A three-year statute of limitations applies to an action for actual damages [*CCP* § 338(a)], and a one-year statute of limitations for an action for treble damages [*CCP* § 340(a)].

 **Cross Reference:**

See California Forms of Pleading and Practice, Ch. 345, Appendix: Table of Limitation Periods (Matthew Bender).

**4.05[6] Insurance Claims.** A one-year limitation period applies to insurance claims [*Ins Code* § 2071; *Vu v. Prudential Prop. & Cas. Ins. Co.* (2001) 26 *C4th* 1142, 1148, 113 *CR2d* 70, 33 *P3d* 487 ].

**4.05[7] Other Types of Actions.** Many types of actions have specific statutory limitation periods, such as actions for foreclosure of street improvements, actions for mesne profits on real property, actions to recover damages from latent deficiencies in planning or construction or improvement to real property; therefore, a careful check of all limitations statutes is warranted [see *CCP* §§ 315-366.3].

 **Cross Reference:**

See California Forms of Pleading and Practice, Ch. 345, Appendix: Table of Limitation Periods (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Contracts LawDefensesStatutes of LimitationsReal Property LawTitle QualityAdverse Claim ActionsEjectmentReal  
Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTortsIntentional TortsIntentional Infliction of  
Emotional DistressDefensesTortsWrongful Death & Survival ActionsDefensesStatutes of Limitations



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Chapter 4 Limitation of Actions

## II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.06*

### **4.06 Four-Year Statute of Limitations Applies As Default If No Other Period Applies.**

If no specific statute of limitations applies, a four-year statute of limitations controls [*CCP* § 343].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTime Limitations



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1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.07

**4.07 Prerequisite Procedures Affecting Insurance-Claim Limitation Periods.**

**4.07[1] Notice to Insurer Is Required.**

**4.07[1][a] Form and Manner of Notice Varies Among Policies.** Almost all insurance policies require that the insured give prompt notice of the claim. Depending on the terms of the policy, acceptable notice may be either written or oral; it may be given either to the agent or to the insurance company or its claims department; and it may be received either from the insured or directly from the claimant [10 CCR § 2695.2(o) ("notice of claim" defined); *but see California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 CA3d 1, 58, 221 CR 171* (constructive notice insufficient)]. Large commercial policies may have very specialized reporting requirements.

**4.07[1][b] Notice Prejudice Rule May Save Defective Compliance.** Under California's "notice prejudice" rule, an insured's defective compliance with notice requirements will not bar recovery unless the insurer has been substantially prejudiced [ *Campbell v. Allstate Ins. Co. (1963) 60 C2d 303, 306, 32 CR 827, 384 P2d 155* (no prejudice because police report clearly revealed insured's liability for auto accident)].

**4.07[2] Contractual Limitation Period May Control.** Many policies state a time limit, distinct from the notice requirement, for filing an action against the insurer. The law requires that insurers advise insureds of applicable claim time limits [10 CCR § 2695.1]. Policy-based contractual limitations operate as statutes of limitations [see, e.g., *Ins Code § 2071* (fire insurance policies must require loss actions against insured commence within 12 months of inception of loss)].



**Cross References:**

Discussion, see *California Forms of Pleading and Practice*, § 308.10 *et seq.* (Matthew Bender); or *California Insurance Law & Practice*, Ch. 12, Claims Processing and Investigation (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Insurance Law Claims & Contracts Notice to Insurers Prejudice to Insurer



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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.08*

**4.08 Prerequisite Procedures Affecting Limitations on Claims Against Decedents.**

**4.08[1] Time for Filing Claims Against Probate Estates Runs From Personal Representative's Notice.**

Decedent's representative must give notice of estate administration under *Prob Code* §§ 9050-9054 by both publication of notice to all creditors and personal notice to known and reasonably ascertainable creditors. Notice to creditors must be given within the later of [*Prob Code* § 9051]:

- Four months after letters are first issued to a general personal representative; or
- 30 days after the personal representative first has knowledge of the creditor.

Nevertheless, a creditor may file a claim without receiving notice, and the personal representative is excused from giving notice to a creditor whose demand for payment is treated as a claim under *Prob Code* § 9054.

**4.08[2] Claims Must Be Filed Within Claim-Filing Time Period.** Following proper notice, claims must be filed within the later of [*Prob Code* § 9100(a)]:

- Four months after letters are first issued to a general personal representative; or
- 60 days after the date notice of administration is mailed or personally delivered to the creditor.

Creditors may petition to file late claims and may file amended or revised claims [*Prob Code* §§ 9103, 9104]. However, a personal representative may not allow, and the court may not approve, a claim barred by a statute of limitations [*Prob Code* §§ 9103(f), 9104(c)(2), 9253].

**4.08[3] Manner of Filing Claims.** Claims must be filed with the court, and a copy must be served on the personal representative or other duly appointed person [*Prob Code* § 9150(b), (c)]. Failure to properly file and serve a claim will cause it to be invalid [*Prob Code* § 9150(d)].

**4.08[4] Proper Claim Filing Tolls Limitation Period.** The filing of a claim or a petition under *Prob Code* § 9103 tolls the statute of limitations otherwise applicable to the claim until allowance, approval, or rejection [*Prob Code* §

9352(a)].

The uniform one-year statute of limitations in *CCP* § 366.2 applies to actions on all claims against a decedent that survive the decedent's death. However, this limitation period is tolled by [ *Levine v. Levine* (2002) 102 CA4th 1256, 1261, 126 CR2d 255 ]:

- The timely filing of a creditor's claim,
- The filing of a petition for payment of debts, claims, or expenses, or
- A proceeding to construe a no contest provision judicially.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Estate Administration  
Claims Against Estates  
Notice to Creditors  
Estate, Gift & Trust Law  
Estate Administration  
Claims Against Estates  
Time Limitations



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1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.09

**4.09 Prerequisite Procedures Affecting Limitations on Claims Against Public Entities.**

**4.09[1] Most Cases Against Public Entities Require a Prerequisite Presentation of the Claim.** In the vast majority of actions--both tort and contract--against the State of California or other public entities in the state, it is necessary to file statutorily governed claims prior to filing suit. The California Tort Claims Act is set forth in *Gov Code § 810 et seq.*; general provisions governing claims are set forth in *Gov Code § 900 et seq.*; the presentation and consideration of claims against public entities and public employees are governed by *Gov Code § 910 et seq.*

Subject to several exceptions (such as claims for childhood sexual abuse under *CCP § 340.1* arising out of conduct occurring on or after January 1, 2009, mechanics' and materialmen's liens, workers' compensation, public-employee wage claims, and public assistance claims), all claims for money or damages against local public entities must be presented in accordance with the requirements of *Gov Code §§ 900-915.4* [*Gov Code § 905*].



**Trap:**

*Gov Code §§ 930.2, 930.4, 930.6* allow local entities to develop their own claims procedures for contractual disputes as an alternative to the *Gov Code § 910*, statutory claim requirements. Local alternative procedures in a contract are exclusively controlling, in that a statutory claim presentation is not necessary, except these alternative claims procedures must conform to statutory claims procedures in three--and only three--particulars [ *Arntz Builders v. City of Berkeley* (2008) 166 CA4th 276, 288, 82 CR3d 605 ]:

- Time for filing suit on a claim,
- Limitations on the scope of a claim that can be sued upon, and
- Access to late claim procedures in certain circumstances.

After determining that a claim against a local entity is subject to *Gov. Code § 910*, check the contract language for local contractual alternative claim procedures.



**Trap:**

Due diligence does not end with a determination that a claim against a local governmental entity is not subject to *Gov Code § 910*. Local ordinances may also establish a presentment requirement that applies to specific types of claims not subject to § 910 [see, e.g., Los Angeles County Code § 4.04.010]. Counsel must therefore always check local ordinances for presentment requirements applicable to any claim against local public entities not subject to *Gov Code § 910*.

**Distinguish:**

In a class action, the requirement in *Gov Code § 910* that a "claimant" must present claims to local governmental entities refers to the class itself rather than to each individual class member [ *County of Los Angeles v. Superior Court (2008) 159 CA4th 353, 362, 71 CR3d 485*, overruled in part, *Ardon v. City of Los Angeles (2009) 2009 Cal. App. LEXIS 860* ].

**Exception:**

The presentment requirement does not apply to claims against a public entity under federal law [ *State of California v. Superior Court (2004) 32 C4th 1234, 1240, 90 P3d 116* ].

**Warning:**

Failure to allege facts in the complaint that demonstrate or excuse compliance with the claim presentation requirement subjects a claim against a public entity to a demurrer for failure to state a cause of action under *CCP § 340.10[e]* [ *State of California v. Superior Court (2004) 32 C4th 1234, 1242-1243* ].

**4.09[2] Time Limitations for Claim Filing Depends on Type of Claim.**

**4.09[2][a] Six Months for Tort Claims.** Claims for death or injury to person, or to personal property or growing crops, must be presented within six months after accrual, including the following claims [*Gov Code § 911.2(a)*]:

- Negligence, negligence per se, intentional infliction of emotional distress, and violation of *Gov Code § 845.6*;
- False arrest and false imprisonment [ *Ridley v. City etc. of San Francisco (1969) 272 CA2d 290, 292, 77 CR 199* ];
- Malicious prosecution and tortious interference with contract [ *Meester v. Davies (1970) 11 CA3d 342, 345-348, 89 CR 711* ];
- Defamation [ *Miller v. Hoagland (1966) 247 CA2d 57, 61, 55 CR 311* ]; and
- Breach of warranty or strict liability theory for personal injury or property damages [ *Voth v. Wasco Public Util. Dist. (1976) 56 CA3d 353, 359, 128 CR 608 (dictum)*].

**4.09[2][b] One Year for Contract and Real Property Claims.** Claims arising out of contract and claims for injuries to real property, such as a claim for damages to growing crops based on breach of promise of fitness of water implied from written lease, must be filed within one year of accrual [*Gov Code § 911.2(a)*; see *Voth v. Wasco Public Util. Dist. (1976) 56 CA3d 353, 356, 128 CR 608* ].

**4.09[2][c] Nature of Right Sued on Determines Type of Claim.** An action for breach of promise is contractual; an action for breach of duty is a tort action. If both types of harm are implicated, the type of claim depends on the

"quintessence of the action" [ *Voth v. Wasco Public Util. Dist.* (1976) 56 CA3d 353, 356, 128 CR 608 ].



#### **Cross References:**

Discussion, see California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers: California Tort Claims Act (Matthew Bender); or  
 Levy et al., California Torts, Ch. 62, Claims and Actions Against Public Entities and Employees (Matthew Bender).

**4.09[2][d] Payment or Obtaining Waiver of Filing Fee Necessary to Meeting Statute of Limitations.** A claimant against the state must pay the requisite filing fee or obtain a waiver of payment of the fee [see CCP § 905.2(c)] within the statutory time frame in order for his or her presentment of the claim to be considered to have been timely filed [CCP § 911.2(b)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

TortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements



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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.10*

**4.10 Choice-of-Law Factors Determine Applicable Limitation Period.**

**4.10[1] Court Conducts Governmental Interest Analysis.** California has replaced the doctrine of the law of the forum state with a governmental interest analysis for choice of law determinations [ *Reich v. Purcell* (1967) 67 C2d 551, 554, 63 CR 31, 432 P2d 727] . Under the governmental interest analysis, the court [ *McCann v. Foster Wheeler LLC* (2010) 48 C4th 68, 87-88, 105 CA3d 378, 225 P3d 516 ; *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 C4th 95, 107-108, 45 CR 3d 730, 137 P3d 914] .

- Determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different.
- If there is a difference, examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists.

**Distinguish:**

On the one hand, a true conflict exists if both California and a foreign state have a strong interest in applying their respective laws. On the other hand, a false conflict exists if only one of two involved states has an interest in having its law applied. The court will apply the law of the interested state [ *Hambrech & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1543, 46 CR2d 33] .

- If there is a true conflict, carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be more impaired if its law were not applied.

**4.10[2] Borrowing Statute May Bar Action Arising in Another State or Country.** To limit forum shopping by plaintiffs, California has adopted a "borrowing statute." The borrowing statute provides that when a cause of action has arisen in another state or country, and by the laws of that other jurisdiction an action could not be maintained thereon by reason of lapse of time, the cause of action cannot be brought in California even if the California statute of limitations has not run [CCP § 361; *McCann v. Foster Wheeler LLC* (2010) 48 C4th 68, 83-84, 105 CA3d 378, 225 P3d 516 ;

*Delfosse v. C.A.C.I., Inc.-Federal (1990) 218 CA3d 683, 691]* .



**Warning:**

Cases involving delayed onset of disease or other harm in personal injury cases present more difficult questions of the applicability of *CCP* § 361 with respect to which state the cause of action "has arisen in" [see *McCann v. Foster Wheeler LLC (2010) 48 C4th 68, 85-87, 105 CA3d 378, 225 P3d 516* (court suggested, but did not rule that mesothelioma appeared while plaintiff resided in California 50 years after exposure to asbestos in another state)].

**Prerequisites:**

*CCP* § 361 applies only to causes of action barred by the law of the state of creation, but not by California law [ *Biewend v. Biewend (1941) 17 C2d 108, 115, 109 P2d 701* ] . The "borrowing statute" does not apply to a plaintiff who became a citizen of California after the cause of action accrued but before the lawsuit in question was filed [ *McCann v. Foster Wheeler LLC (2010) 48 C4th 68, 85, 105 CA3d 378, 225 P3d 516* ] .

**Distinguish:**

In cases in which *CCP* § 361 does not require the application of the other state's limitation, it does not compel application of the California statute of limitations without consideration of California's generally applicable choice-of-law principles [ *McCann v. Foster Wheeler LLC (2010) 48 C4th 68, 87, 105 CA3d 378, 225 P3d 516* ] .



**Cross Reference:**

Discussion of California's choice-of-law principles, see 4.10[1].

**4.10[3] Contractual Choice-of-Law Clause Incorporates Statute of Limitations From Chosen State.** A choice-of-law provision providing that a contract will be governed by the law of a particular jurisdiction incorporates that state's statute of limitations [ *Taylor v. Lockheed Martin Corp. (2000) 78 CA4th 472, 487, 92 CR2d 873* (citing *Hambrech & Quist Venture Partners v. American Med. Int'l, Inc. (1995) 38 CA4th 1532, 1536, 1538-1544, 46 CR2d 33* )].

**Example--Borrowing Statute:**

A contractual choice-of-law clause that does not refer to nor attempt to distinguish or exclude the chosen state's substantive laws from its procedural provisions renders that state's borrowing statute applicable so the complaint filing must satisfy both the statute of limitations of the state whose law was chosen by contract, as well as the statute of limitations that is "borrowed" under that state's borrowing statute [ *Hughes Elec. Corp. v. Citibank Del. (2004) 120 CA4th 251, 259* ].

For a contractual choice-of-law provision to be enforceable [ *Nedlloyd Lines B.V. v. Superior Court (1992) 3 C4th 459, 466, 11 CR2d 330, 834 P2d 1148* ; *Hughes Elecs. Corp. v. Citibank Del. (2004) 120 CA4th 251, 258* ]:

- The chosen state must have a substantial relationship to the parties; or
- There must be any other reasonable basis for the parties' choice; and
- The chosen state's law may not fundamentally conflict with a policy of California.



If there is a fundamental conflict, the choice-of-law provision will not be enforced if California has a materially greater interest than the chosen state in the determination of

the issue.



**Cross Reference:**

Discussion of contractual choice of law provisions, see California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureFederal & State InterrelationshipsChoice of LawGovernmental InterestsGovernmentsLegislationStatutes of LimitationsPleading & Proof



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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.11*

**4.11 Choice Between Two Applicable Statutes Is Needed.**

**4.11[1] More Specific Statute of Limitations Applies.** When two statutes of limitations may apply to a cause of action and one is general and the other is specific, the specific limitation period applies [ *Collection Bureau of San Jose v. Rumsey* (2000) 24 C4th 301, 310-311, 99 CR2d 792, 6 P3d 713 ; see *Levine v. Levine* (2002) 102 CA4th 1256, 1264, 126 CR2d 255 ].

**Example:**

In a quasi-contract action based on mistake, the three-year limitation period under *CCP* § 338(d) applied because it pertains to quasi-contract actions that seek recovery of money obtained by fraud or mistake. The two-year statute of limitations under *CCP* § 339 did not apply because it pertains generally to quasi-contract actions based on contract, obligation, or liability not founded on a written instrument [see *Creditors Collection Serv. v. Castaldi* (1995) 38 CA4th 1039, 1043-1044, 45 CR2d 511 ].

**4.11[2] Shorter Statute of Limitations Applies When Neither Is More Specific.** If two statutes of limitations are applicable to a cause of action and neither is more specific, the statute with the shorter limitation period controls [see *Anson v. County of Merced* (1988) 202 CA3d 1195, 1199, 1202, 249 CR 457 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsGeneral Overview



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Chapter 4 Limitation of Actions  
III. DETERMINING WHEN LIMITATION PERIOD BEGINS TO RUN

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#### **4.12 CHECKLIST: Determining When Limitation Period Begins to Run.**

##### **4.12[1] Plaintiff's Checklist.**

☐ Determine date when plaintiff suffered injury or damages.

**Discussion:**

See 4.14[2]

☐ Determine date when plaintiff became able to pursue a remedy.

**Discussion:**

See 4.14[1]

☐ Plead discovery rule to delay accrual of cause of action, showing time and manner of discovery of facts.

☐ Grounds are:

☐ Plaintiff had excuse for late discovery.

☐ Plaintiff was not at fault in late discovery.

☐ Plaintiff lacked knowledge of facts.

☐ Plaintiff exercised reasonable diligence.

**Discussion:**

See 4.15[1]

- ☐ If discovery rule does not apply, assert manifest unjustness.

**Discussion:**

See 4.15[3][b]

**4.12[2] Defendant's Checklist.**

- ☐ Assert discovery rule does not apply on one or more of the following grounds;
- ☐ Plaintiff had no excuse for late discovery.
  - ☐ Plaintiff was at fault in discovering facts late.
  - ☐ Plaintiff was put on inquiry notice of cause of action.
  - ☐ Plaintiff did not use reasonable diligence in discovering cause of action.

**Discussion:**

See 4.15[1][a]

- ☐ Action is exempt from discovery rule.

**Discussion:**

See 4.15[1][d]





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Chapter 4 Limitation of Actions

III. DETERMINING WHEN LIMITATION PERIOD BEGINS TO RUN

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#### **4.13 Accrual May Depend on Purpose for Determination.**

A cause of action may accrue on different dates, depending on the purpose for determining the date of accrual [ *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 C4th 520, 530, 66 CR2d 438, 941 P2d 71 ].

##### **Examples:**

- The discovery of one asbestos-related disease did not start the running of the limitation period on all separate and distinct asbestos-related diseases caused by the same asbestos exposure [ *Wagner v. Apex Marine Ship Mgmt. Corp.* (2000) 83 CA4th 1444, 1446, 1453, 100 CR2d 533 ].

- Monthly installment contract payments are divisible performance obligations as determined by the provisions of the contract and the conduct of the parties; the statute of limitations begins to run from the time of each breach [ *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 CA4th 1375, 1388 ].

- When there are ongoing contractual obligations the plaintiff may elect to rely on the contract despite a breach, and the statute of limitations does not begin to run until the plaintiff has elected to treat the breach as terminating the contract. In the context of successive breaches of a continuing contractual obligation, "where the parties did not mutually abandon or rescind it upon a breach or successive breaches, the injured party could wait until the time arrived for a complete performance by the other party and then bring an action for damages for such breaches. [The injured party] was not bound to treat the contract as abandoned on the first breach of it, or on any particular breach, but had his election to still rely on it, and the statute of limitations could not begin to run until it had made its election" [ *Romano v. Rockwell Int'l. Inc.* (1996) 14 C4th 479, 489-490, 59 CR2d 20, 926 P2d 1114 ].

##### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Governments Legislation Statutes of Limitations Time Limitations Torts Procedure Statutes of Limitations Accrual of

ActionsGeneral Overview



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Chapter 4 Limitation of Actions  
III. DETERMINING WHEN LIMITATION PERIOD BEGINS TO RUN

1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.14

**4.14 Limitation Period Begins to Run When Cause of Action Accrues.**

**4.14[1] Claim Must Be Legally Actionable.** A cause of action accrues when a claim becomes legally actionable [ *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 CA4th 1018, 1029, 98 CR2d 661 ].

**Examples:**

- In tort and contract actions, the statute of limitations begins to run on the occurrence of the last element essential to the cause of action [ *Norgart v. Upjohn Co.* (1999) 21 C4th 383, 389, 397, 87 CR2d 453, 981 P2d 79 ; *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C3d 176, 187, 98 CR 837, 491 P2d 421 ].

- In actions for an insurance company's refusal to defend, the cause of action accrues not with the filing of the action to be defended, but by the insurer's refusal to defend [ *Eaton Hydraulics Inc. v. Continental Cas. Co.* (2005) 132 CA4th 966, 973-974 ].

**4.14[2] Appreciable Harm Is Required.** Plaintiff must suffer appreciable harm so that he or she is entitled to a real legal remedy rather than merely a symbolic judgment, such as nominal damages. Indeed, the appreciable harm may be the last element essential to the action [ *Jordache Enters., Inc. v. Brobeck, Phleger & Harrison* (1998) 18 C4th 739, 76 CR2d 749, 958 P2d 1062 (appreciable harm accrued on legal malpractice claim when defense costs paid by law firm's client instead of by insurer, which had duty to defend)]. The actual harm suffered need not be certain in amount [ *Davies v. Krasna* (1975) 14 C3d 502, 121 CR 705, 535 P2d 1161 ; *Barton v. New United Motor Mfg.* (1996) 43 CA4th 1200, 1209, 51 CR2d 328 ].

In addition to suffering appreciable harm, plaintiff must also be aware of necessary facts that connect defendant to such harm [ *Curtis v. Kellogg & Andelson* (1999) 73 CA4th 492, 501, 86 CR2d 536 ].

Speculative harm or threats of future harm do not constitute appreciable harm suffered [ *San Francisco Unified Sch. Dist. v. W.R. Grace & Co.* (1995) 37 CA4th 1318, 1326, 44 CR2d 305 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Governments  
Legislation  
Statutes of Limitations  
Time Limitations  
Torts  
Procedure  
Statutes of Limitations  
Accrual of  
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III. DETERMINING WHEN LIMITATION PERIOD BEGINS TO RUN

1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.15

#### 4.15 Accrual of Cause of Action May Be Delayed.

##### 4.15[1] Discovery Rule May Delay Accrual.

**4.15[1][a] Factors for Delayed Discovery Must Be Plead.** Under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action; in that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis [ *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 C4th 797, 803 ]. Ignorance of the identity of the defendant does not delay accrual of a cause of action, but ignorance of a generic element of the cause of action does [ *Norgart v. Upjohn Co.* (1999) 21 C4th 383, 399, 87 CR2d 453, 981 P2d 79 ; see also *Burdette v. Carrier Corp.* (2008) 158 CA4th 1668, 1693, 71 CR3d 185 ].



##### Strategic Point--Plaintiff:

The initial limitation period applicable to an action in which the exact causality and, therefore, the identity of liable parties are not immediately known may be extended by the proper filing and amendment of a Doe complaint [see *Knowles v. Superior Court* (2004) 118 CA4th 1290, 1300 ].



##### Trap--Public Entity Defendants:

While the delayed discovery rule applies to actions against public entities, plaintiffs still must file the prerequisite claim with the public entity within six months of its discovery in accordance with CCP § 945.6 [ *K.J. v. Arcadia Unified School Dist.* (2009) 172 CA4th 1229, 1237-1238, 92 CR3d 1 ; for discussion of CCP § 945.6, see 4.09].



##### Cross Reference:

Filing and amendment of a Doe complaint, see 5.39 et seq.

To be entitled to the benefit of the discovery rule, plaintiff must plead the time and manner of discovery and show the

following [ *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 CA4th 1308, 1319, 1324-1325, 64 CR3d 9 ; *McKelvey v. Boeing N. Am., Inc.* (1999) 74 CA4th 151, 160, 86 CR2d 645 , *superseded by statute as stated in Bonds v. Nicoletti Oil, Inc.* (2008) 2008 U.S. Dist. LEXIS 47054 ]:

- Plaintiff had an excuse for late discovery.
- Plaintiff was not at fault in discovering facts late.
- Plaintiff did not have actual or presumptive knowledge to be put on inquiry.
- Plaintiff was unable to make earlier discovery despite reasonable diligence.

**Example:**

A doctor left a foreign object inside a patient's body during surgery, and the patient could not have discovered the presence of the object immediately [see, e.g., *Artal v. Allen* (2003) 111 CA4th 273, 280-281 (exploratory surgery needed to discover negligence)].

**Distinguish--Separate Wrongs for Same Physical Injury:**

In products liability cases, a plaintiff's ignorance of wrongdoing involving a product's defect will usually delay accrual because such wrongdoing is essential to that cause of action. The delayed discovery rule applies even when a related medical malpractice claim has already accrued, unless the plaintiff has reason to suspect that his or her injury resulted from a defective product. More broadly stated, if a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim. The investigation may only disclose an action for one type of tort (e.g., medical malpractice), and facts supporting an entirely different type of tort action (e.g., products liability) may, through no fault of the plaintiff, only come to light at a later date. Although both claims seek to redress the same physical injury to the plaintiff, they are based on two distinct types of wrongdoing and should be treated separately in that regard [ *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 C4th 797, 813-815 ].



**Warning--Plaintiff:**

The discovery rule may not apply if the basis for a claim has been published in the public record or has been the subject of publicity. Under the single publication rule, the cause of action accrues and the period of limitations commences upon the first general distribution of the publication to the public, and the discovery rule does not apply [ *Shively v. Bozanich* (2003) 31 C4th 1230, 1245 ; see *Traditional Cat Ass'n, Inc. v. Gilbreath* (2004) 118 CA4th 392, 404, 13 CR3d 353 (internet publishing subject to single publication rule)].



**Cross Reference:**

Single publication rule, see *California Forms of Pleading and Practice*, § 345.19 (Matthew Bender).

Plaintiff is charged with presumptive knowledge so as to commence the running of the statute of limitations once he or she has notice or information of circumstances to put a reasonable person on inquiry or has the opportunity to obtain knowledge [ *Sanchez v. South Hoover Hosp.* (1976) 18 C3d 93, 101, 132 CR 657, 553 P2d 1129 ; *Wilshire Westwood Assocs. v. Atlantic Richfield Co.* (1993) 20 CA4th 732, 740, 24 CR2d 562 ]. Suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period [ *Cypress Semiconductor Corp. v. Superior Court* (2008) 163 CA4th 575, 586, 77 CR3d 685 (where

a defendant's state of mind is an element, such as in bad faith, plaintiff is not expected or allowed to wait until he or she has direct proof of the defendant's mental state before filing the lawsuit)]. The running of the period is not affected by the plaintiff's diligence thereafter in finding facts to support the lawsuit [ *Knowles v. Superior Court* (2004) 118 CA4th 1290, 1300 ].



**Warning--Plaintiff:**

Conclusory allegations are not allowable.



**Cross Reference:**

Discussion of pleadings, see Ch. 7, Complaints.

**Example:**

If a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim [ *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 CA4th 1308, 1323, 64 CR3d 9 ]. Accordingly, claims based on two independent legal theories against separate defendants or the same defendant can accrue at different times [ *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 CA4th 1308, 1323, 64 CR3d 9 ].

**Distinguish:**

Within the requirement of diligence in the discovery rule, plaintiff's duty to investigate does not begin until the plaintiff actually has a reason to investigate, and the theory of "constructive suspicion" is not California law [ *Unruh-Haxton v. Regents of the University of California* (2008) 162 CA4th 343, 360, 76 CR3d 146] . Circumstances that are dubious or equivocal are not sufficient to take the place of actual notice; the circumstances must be such that further inquiry is not merely suggested, but becomes an imperative duty, so that failure to make it constitutes a negligent omission [ *Cleveland v. Internet Specialties West, Inc.* (2009) 171 CA4th 24, 33, 88 CR3d 892] .

**Distinguish:**

The discovery rule is different than tolling [see *Cuadra v. Millan* (1998) 17 C4th 855, 865, 72 CR2d 687, 952 P2d 704 ] .



**Cross Reference:**

Discussion of tolling, see 4.16 et seq.

**4.15[1][b] Complication After Original Injury Is Separate Cause of Action.** The discovery rule may apply if a complication arises after defendant's tort has caused an earlier injury to plaintiff and if the complication was of a different type than the earlier injury. In such a case, plaintiff is considered to have separate causes of action for the independent injuries [see *Zambrano v. Dorough* (1986) 179 CA3d 169, 173-174, 224 CR 323 ] .

**4.15[1][c] Special Rules Apply to Asbestos Cases.** CCP § 340.2 applies to cases of injury or illness from asbestos exposure.

CCP § 340.2 excepts the limitation period commencing with the date of the injury or illness or its discovery.

Rather under CCP § 340.2(a), an action for injury or illness based on exposure to asbestos must be commenced within the later of:

- One year after the date plaintiff first suffered the disability; or

- One year after the date plaintiff either knew or should have known through the exercise of reasonable diligence that such disability was caused by asbestos exposure.

"Disability" under *CCP* § 340.2(a) means the loss of time from work as a result of asbestos exposure that precludes plaintiff's regular occupation [*CCP* § 340.2(b)].

**4.15[1][d] Special Rules Apply to Toxic Injury Cases.** *CCP* § 340.8 applies to cases of injury or illness, from exposure to a hazardous material or toxic substance, other than asbestos claims or actions against a health care provider, and an action must be commenced within no later than:

- Two years after the plaintiff's date of injury; or
- Two years after the plaintiff becomes aware of, or reasonably should have become aware of: (1) an injury, (2) the physical cause of the injury or death, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another.

Media reports regarding the hazardous material or toxic substance contamination do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another [*CCP* § 340.8(c)(2)].

**4.15[1][e] Exemptions From Discovery Rule.** An action for unfair competition under *B&P Code* § 17200 is exempt from the discovery rule [see *Snapp & Assocs. Ins. Serv. v. Robertson* (2002) 96 CA4th 884, 891, 117 CR2d 331, among conflicting authorities as noted in, *Broberg v. The Guardian Life Ins. Co. of America* (2009) 171 Cal. App. 4th 912, 90 Cal. Rptr. 3d 225, 2009 Cal. App. LEXIS 271 ].



**Cross Reference:**

Detailed analysis of unfair competition law, see Matthew Bender(R) Practice Guide: California Unfair Competition and Business Torts, Ch. 2, Unfair Competition (Matthew Bender).

**4.15[2] Fiduciary Relationship.**

**4.15[2][a] Fiduciaries Have Duty to Disclose Facts.** The statute of limitations for actions involving a fiduciary obligation normally is not triggered until plaintiff discovers or should have discovered the negligence [ *Field v. Century 21 Klowden-Forness Realty* (1998) 63 CA4th 18, 20-21 ].

However, plaintiff's burden of discovery is reduced while a fiduciary relationship continues, and he or she may rely on the fiduciary's statements and advice [ *Eisenbaum v. Western Energy Res., Inc.* (1990) 218 CA3d 314, 324, 267 CR 5 ]. Plaintiff's burden does not entail establishing that he or she used due diligence to discover the facts within the limitation period unless a duty existed to inquire and the circumstances were such that failure to inquire would be negligent [see, e.g., *Amtower v. Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1597, 71 CR3d 361 ].

**4.15[2][b] Limitation Period Does Not Run Until Repudiation.** The limitation period on an action by a beneficiary against a fiduciary generally does not run as long as the fiduciary relationship has not been repudiated [ *Estate of Clary* (1928) 203 C 335, 341, 264 P 242 ; *Bennett v. Hibernia Bank* (1956) 47 C2d 540, 561, 305 P2d 20 ]. Repudiation by the fiduciary must be brought to the beneficiary's attention for the limitation period to start running [ *MacMullan v. Kelly* (1912) 19 CA 700, 706, 127 P 819 ].

**4.15[2][c] Anticipatory Repudiation Does Not Start Running of Limitation Period.** An anticipatory breach of the fiduciary relationship does not start the running of the limitation period [ *Romano v. Rockwell Int'l, Inc.* (1996) 14 CA4th 479, 489, 59 CR2d 20, 926 P2d 1114 ; *Brewer v. Simpson* (1960) 53 C2d 567, 593, 2 CR 609, 349 P2d 289 ].



**4.15[3] Other Delays.**

**4.15[3][a] Statutes Expressly Delay Accrual.** Some statutes expressly delay the time when the cause of action accrues.

**Example:**

An action for fraud or mistake does not accrue until plaintiff actually discovers the facts constituting the fraud or mistake [*CCP* § 338(d)].

**4.15[3][b] Delay Prevents Manifest Unjustness.** A court may allow delayed discovery in a cause of action when it would be manifestly unjust to deprive plaintiff of a cause of action prior to plaintiff's awareness of the injury [see *Leaf v. City of San Mateo* (1980) 104 CA3d 398, 406-408, 163 CR 711 ; *Mangini v. Aerojet-General Corp.* (1991) 227 CA3d 1248, 1269, 278 CR 395 ].

**4.15[3][c] Court Looks to Parties' Relationship.** The discovery rule generally applies in actions between parties in a fiduciary or confidential relationship [ *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 C3d 586, 595-597, 83 CR 418, 463 P2d 770 ; *Mark K. v. Roman Catholic Archbishop of Los Angeles* (1998) 67 CA4th 603, 611, 79 CR2d 73 ].

**4.15[3][d] Judicial Opinion Does Not Delay Accrual.** When a new judicial opinion clarifies that a right of action exists, it does not extend the running of the statute of limitations [ *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 C4th 809, 815-816, 107 CR2d 369, 23 P3d 601 ].

**Cross Reference:**

Discussion of effect of judicial opinion on tolling limitation period, see 4.27[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Environmental Law Hazardous Wastes & Toxic Substances Asbestos Statutes of Limitations Environmental  
Law Litigation & Administrative Proceedings Toxic Torts Torts Intentional Torts Breach of Fiduciary  
Duty Defenses Torts Procedure Statutes of Limitations Accrual of Actions Discovery Rule



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**4.16 CHECKLIST: Determining If Statute of Limitations Has Been Tolled.**

☐ Calculate limitation period.

**Discussion:**

See 4.34 -4.37

☐ Determine whether plaintiff timely filed complaint within limitation period.

**Discussion:**

See 4.17[1]

☐ Examine complaint for defects.

**Discussion:**

See 4.17[3], [4], [6]

☐ Plaintiff--file amendment to cure defective complaint.

**Discussion:**

See 4.17[6]

☐ Defendant--allege that defects cannot be cured.

☐ If applicable, plaintiff should plead tolling of limitation period.

☐ Grounds:

☐ Defendant was absent from state:

- ☐ Ensure allegation of absence is contained in complaint.
- ☐ Allege date cause of action accrued.
- ☐ Allege dates that defendant was outside state.
- ☐ State whether defendant returned to state or remained outside state.

**Authority:**

*CCP § 351*

**Discussion:**

*See 4.18*

**Forms:**

*See 4.56, 4.57*

☐ Party to the action has died:

- ☐ Allege name of party who died.
- ☐ Allege party died on date after cause of action accrued and before limitation period expired.

**Discussion:**

*See 4.19, 4.20*

**Form:**

*See 4.59*

☐ Plaintiff was a minor:

- ☐ Allege date cause of action accrued.
- ☐ Allege plaintiff's age at accrual.
- ☐ Allege date plaintiff became 18 years old.

**Authority:**

*CCP § 352(a)*

**Discussion:**

*See 4.21[3]*

**Form:**

See 4.58

☐ Plaintiff was insane:

- ☐ Allege date cause of action accrued.
- ☐ Allege facts showing plaintiff's insanity.
- ☐ State that plaintiff recovered on a certain date or remains insane.

**Authority:**

CCP § 352(a)

**Discussion:**

See 4.21[4]

**Form:**See *California Forms of Pleading and Practice*, § 345.74 (Matthew Bender).☐ Plaintiff was in prison:

- ☐ Allege date cause of action accrued.
- ☐ Allege that plaintiff was imprisoned and his or her term.
- ☐ State whether plaintiff was released or remains in prison.

**Authority:**

CCP § 352.1(a)

**Discussion:**

See 4.21[5]

**Form:**See *California Forms of Pleading and Practice*, § 345.75 (Matthew Bender).☐ Doctrine of continuing wrongs applies.**Discussion:**

See 4.23

☐ Action was submitted to arbitration.**Discussion:**

See 4.24

- ☐ Class action was filed.

**Discussion:**

See 4.25

- ☐ Condition on obligation has not occurred.

**Discussion:**

See 4.26

- ☐ Plaintiff was legally inhibited from suing.

**Authority:**

CCP § 356

**Discussion:**

See 4.27

**Form:**

See *California Forms of Pleading and Practice*, § 345.80 (Matthew Bender).

- ☐ Plaintiff was exhausting administrative remedies.

**Discussion:**

See 4.29

- ☐ Plaintiff was prevented from filing suit because of war.

**Authority:**

CCP § 354

**Discussion:**

See 4.30

**Form:**

See *California Forms of Pleading and Practice*, § 345.78 (Matthew Bender).

- ☐ If plaintiff has several remedies:

- ☐ Pursue remedy to lessen extent of damages.
- ☐ Provide timely notice of first claim to defendant.
- ☐ Pursue subsequent claims immediately after first claim is dismissed.

☐ File motion alleging equitable tolling as to other remedies.

☐ Set out plaintiff's action that gave defendant notice of claim.

☐ Attach copy of complaint.

☐ Show lack of prejudice to defendant.

☐ Show good faith by plaintiff.

**Discussion:**

See 4.22

**Form:**

See 4.62



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**4.17 Commencing Action Tolls Limitation Period.**

**4.17[1] Complaint Must Be Filed.** An action commences under *CCP* § 312 *et seq.* when the complaint is filed [*CCP* § 350]. A complaint is considered filed when it is presented to the court clerk in the requisite form for filing during business hours [ *Carlson v. Department of Fish & Game* (1998) 68 CA4th 1268, 1270, 1272-1276, 80 CR2d 601 ; *but see Duran v. St. Luke's Hosp.* (2003) 114 CA4th 457, 459 (actions filed before January 1, 2005, are not considered filed if full fee not tendered at time of filing)].



**Cross Reference:**

Discussion of filing fees with complaint, 20-day period to cure dishonored check, and voided complaint for nonpayment, see 7.26.

**4.17[2] Limitation Period Suspended While Action Is Pending.** The commencement of an action suspends the running of the limitation period as to matters arising out of the transaction in the complaint. The suspension continues while the action is pending [see *Record Machine & Tool Co. v. Pageman Holding Corp.* (1959) 172 CA2d 164, 175-176, 342 P2d 402 ].

**4.17[3] Court May Lack Jurisdiction.**

**4.17[3][a] Action Must Be Seasonably Commenced.** Plaintiff must seasonably file the action to be entitled to a trial on the merits, despite a choice of the wrong court. Plaintiff cannot sleep on his or her rights [ *Friends of Mammoth v. Board of Supervisors* (1972) 8 C3d 247, 269, 104 CR 761, 502 P2d 1049 ; *Morgan v. Somervell* (1940) 40 CA2d 398, 400, 104 P2d 866 ].

**4.17[3][b] Action May Be Transferred After Limitation Period Expired.** Defendant's constitutional rights are not impaired if plaintiff's seasonably commenced action is transferred from a court without jurisdiction to a court with jurisdiction [see *Morgan v. Somervell* (1940) 40 CA2d 398, 400, 104 P2d 866 ; *Friends of Mammoth v. Board of Supervisors* (1972) 8 C3d 247, 269, 104 CR 761, 502 P2d 1049 ].

**4.17[4] Defect in Designating Party.**

**4.17[4][a] Defective Description of Defendant Does Not Affect Limitation Period.** Plaintiff's error in describing defendant that is an excusable mistake can be corrected by amendment [see *CCP* § 473(a)(1)] after the limitation period has otherwise expired that changes a misnomer by which an "old" defendant was sued that is strikingly similar to a fictitious business name used by the originally intended defendant, even though no deceit was intended [ *Hawkins v. Pacific Coast Bldg. Prods., Inc.* (2005) 124 CA4th 1497, 1503-1504 ].

**Examples:**

- Naming defendant as a partnership instead of a corporation [see *Mayberry v. Coca Cola Bottling Co.* (1966) 244 CA2d 350, 352-353, 53 CR 317 ].
- Misnaming a defendant corporation where similar entities share similar names and involve the same officers and/or owners, or where the corporation has changed names and the plaintiff is unaware of the prior name [see *Cuadros v. Superior Court* (1992) 6 CA4th 671, 676, 8 CR2d 18 ; *Hawkins v. Pacific Coast Bldg. Prods., Inc.* (2005) 124 CA4th 1497, 1503-1504 ].

 **Cross Reference:**

Amendment of complaint to correct misnomer of defendant, see 34.09.

**4.17[4][b] Wrong Defendant Does Not Toll Limitation Period.** The naming of a wrong defendant is not curable by amendment after the limitation period has expired as to the defendant that should have been named [see *Chitwood v. County of Los Angeles* (1971) 14 CA3d 522, 525, 92 CR 441 ].

**4.17[4][c] Technical Defect Related to Plaintiff Is Curable by Amendment.** A technical defect in the designation of plaintiff in a complaint that is otherwise adequate is curable by amendment that will relate back to the filing of the original complaint, even if the limitation period has otherwise expired before the filing of the amendment [ *Cloud v. Northrop Grumman Corp.* (1998) 67 CA4th 995, 1011, 79 CR2d 544 ].

**Example:**

Designating plaintiff in a representative, rather than an individual, capacity.

**4.17[5] Plaintiff May Sue Defendant by Fictitious Name.**

**4.17[5][a] Plaintiff's Ignorance of Name Must Be Genuine.** If plaintiff is genuinely ignorant as to defendant's true name, plaintiff may sue defendant by a fictitious name under *CCP* § 474 as a means of bringing suit before it is barred by the statute of limitations.

**4.17[5][b] Complaint May Be Amended to Add Real Name.** If plaintiff sues defendant by fictitious name, plaintiff may amend the complaint after the limitation period has run. In such a case, defendant is considered a party to the action from its commencement so that the limitation period stops running as of the date of the original pleading [ *Bernson v. Browning-Ferris Indus.* (1994) 7 C4th 926, 930, 30 CR2d 440, 873 P2d 613 ; *Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 C2d 596, 599, 600, 602, 15 CR 817, 364 P2d 681 ].

 **Cross Reference:**

Discussion of proper fictitious name allegation, see California Forms of Pleading and Practice, Ch. 20, Allegations Commonly Used (Matthew Bender).

**4.17[6] Form of Complaint May Be Defective but Must Be Curable by Amendment.** If a complaint filed within the limitation period is defective but curable by amendment, the running of the limitation period is suspended by



the filing of the complaint [ *Cloud v. Northrop Grumman Corp.* (1998) 67 CA4th 995, 1011, 79 CR2d 544 ].

**Example:**

Failing to verify a pleading [see *United Farm Workers of Am. v. Agricultural Labor Relations Bd.* (1985) 37 C3d 912, 210 CR 453, 694 P2d 138 ].

 **Cross References:**

Discussion of amended pleadings, see Ch. 34, Amended and Supplemental Pleadings; and California Forms of Pleading and Practice, Ch. 21, Amended and Supplemental Pleadings (Matthew Bender).

**4.17[7] Cross-Complaints Are Affected by Statute of Limitations.**

**4.17[7][a] Cross-Complaint May Be Barred on Otherwise Barred Action.** The filing of a complaint suspends the running of the statute of limitations as to an action that may be raised as a cross-complaint, if the action that may be raised on the cross-complaint is not already time barred [see *Union Sugar Co. v. Hollister Estate Co.* (1935) 3 C2d 740, 746, 47 P2d 273 ; *Sidney v. Superior Court* (1988) 198 CA3d 710, 715-716, 717, 244 CR 31 ].

However, an action that is already barred when the complaint is filed may not be raised by cross-complaint [see *Strong v. Strong* (1943) 22 C2d 540, 544-545, 140 P2d 386 ].

**Exception:**

A cross-complaint on an action otherwise barred is not barred if plaintiff took unfair advantage of an extended limitation period to delay filing the complaint until the cross-complaint was barred [see *Liberty Mut. Ins. Co. v. Fales* (1973) 8 C3d 712, 717, 106 CR 21, 505 P2d 213 ].



**Strategic Point--Cross-Complainant:**

Although cross-complaint may be barred and affirmative relief precluded, the claim may be used to offset the plaintiff's claim [ *Safine v. Sinnott* (1993) 15 CA4th 614, 619, 19 CR2d 52 (in attorney's collection action against client, although client's legal malpractice cross-action was time-barred, court permitted client to assert malpractice harm as means of offsetting attorney's collection claim)].

**4.17[7][b] Action That Should Have Been Cross-Complaint Does Not Relate Back.** An action that could have been asserted as a cross-complaint in an original action, but that was filed as a separate action, does not relate back to the filing of the original action. Therefore, the limitation period is not tolled during the pendency of the original action [ *Luna Records Corp., Inc. v. Alvarado* (1991) 232 CA3d 1023, 1026-1028, 1030, 283 CR 865 ].

 **Cross References:**

Discussion of cross-complaints, see Ch. 16, Cross-Complaints; and California Forms of Pleading and Practice, Ch. 123, Complaints and Cross Complaints (Matthew Bender).

**4.17[8] Dismissal Restores Limitation Period.** When an action is dismissed without prejudice by voluntary dismissal without prejudice or by involuntary dismissal, the limitation period is restored as if no action had been brought [ *Wood v. Elling Corp.* (1977) 20 C3d 353, 359, 142 CR 696, 572 P2d 755 ; *Thomas v. Gilliland* (2002) 95 CA4th 427, 430-433, 115 CR2d 520 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

GovernmentsLegislationStatutes of LimitationsTollingTortsProcedureStatutes of LimitationsTollingGeneral Overview



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**4.18 Defendant's Absence or Departure From State Tolls Limitation Period.**

**4.18[1] Time of Absence Is Not Counted.** If defendant is out of the state when a cause of action accrues against him or her, the action may be commenced within the statutory period after he or she returns to the state. If defendant leaves the state after a cause of action accrues against him or her, the time of his or her absence is not part of the time limited for the commencement of the action [CCP § 351].



**Strategic Point:**

Plaintiff may conduct discovery to determine whether defendant has been out of the state during the applicable limitation period [see *Kaplan v. Mamelak* (2008) 162 CA4th 637, 644-645, 75 CR3d 861 ].



**Cross Reference:**

Discovery, see Matthew Bender(R) Practice Guide: California Civil Discovery.



**Cross References:**

Forms alleging defendant's absence and departure from the state, see 4.56, 4.57.

Form supporting motion, see *California Points and Authorities*, § 143.34 (Matthew Bender).

**4.18[2] Defendant Need Not Have Resided in State.** The provision in CCP § 351 that an action may be commenced against defendant after his or her return to the state applies if defendant was once a resident of the state, left the state, and returned. It also applies if defendant has never been present in or resided in the state [see *Cvecich v. Giardino* (1940) 37 CA2d 394, 399-400, 99 P2d 573 ; *Green v. Zissis* (1992) 5 CA4th 1219, 1222-1223, 7 CR2d 406 ].

**4.18[3] Defendant's Secret Return to State Is Not Counted, but Open Return Is Counted.** If defendant returns to the state in a secret manner, such time in the state will not be counted in his or her favor for the purpose of ascertaining the time of absence from the state. If defendant returns openly, the fact that the plaintiff did not learn of his or her presence in the state prior to departure is immaterial [ *Stewart v. Stewart* (1907) 152 C 162, 166, 92 P 87 ].

**4.18[4] Period of Absence Coinciding With Plaintiff's Disability to Bring Action.** A period during which defendant was absent from the state while plaintiff was under a disability may not be added to the period within which plaintiff must bring an action after the disability is removed [see *Rafael v. Superior Court* (1969) 1 CA3d 457, 458-460, 81 CR 748 ].

**4.18[5] Plaintiff Need Not Be a Resident of State.** The provision of CCP § 351 that the limitation period on a cause of action does not begin to run while defendant is absent from the state is given effect even if plaintiff is a nonresident of the state [ *Cvecich v. Giardino* (1940) 37 CA2d 394, 400-402, 99 P2d 573 ].

**4.18[6] Absence of One Joint Defendant Does Not Affect Limitation Period for Other Defendant.** When two or more defendants are jointly liable on an obligation, the fact that the limitation period has expired as to one of them who resides in the state does not affect the running of the period as to another of them who is absent from the state. The running of the limitation period remains suspended as to the absent defendant under CCP § 351 during his or her absence [see *Arocena v. Sawyer* (1923) 60 CA 581, 591-592, 213 P 523 ].

**4.18[7] Tolling Provisions Do Not Apply to Motorists.** Veh Code § 17463 provides that the tolling provisions of CCP § 351 do not apply to a resident motorist who could be served in the state. This exemption has been extended to a nonresident motorist [ *Bigelow v. Smik* (1970) 6 CA3d 10, 12-13, 85 CR 613 ; see *Dew v. Appleberry* (1979) 23 C3d 630, 635, 153 CR 219, 591 P2d 509 ].

**4.18[8] Tolling Provisions Do Not Apply to Create Violation of Commerce Clause.** CCP § 351 may not be applied to a nonresident defendant sued on a contractual obligation incurred in interstate commerce because such application would violate the Commerce Clause of the United States Constitution [ *Abramson v. Brownstein* (9th Cir 1990) 897 F2d 389, 391-393 ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
 GovernmentsLegislationStatutes of LimitationsTolling



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#### **4.19 Special Rules Apply If Defendant Dies.**

**4.19[1] One-Year Period Replaces Otherwise Applicable Limitation Period.** *CCP* § 366.2(a) provides that if defendant dies before the expiration of the otherwise applicable limitation period and if the cause of action survives, an action may be commenced within one year after the date of death. In essence, the one-year period in *CCP* § 366.2(a) replaces the otherwise applicable statute of limitations. As other limitations, the end date of the one-year period is calculated under the rules in *CCP* §§ 12, 12a, 12b [*CCP* § 366.2(b)(1)].

#### **Examples:**

- Claim that was filed more than one year after decedent's death against decedent's irrevocable trust for decedent's acts while decedent was trustee of the trust was barred [ *Stoltenberg v. Newman* (2009) 179 CA4th 287, 296-297, 101 CR3d 606 ].
- Without regard to the location of the decedent's personal representative or estate, the one-year limitation period barred an action arising from a surrogacy contract between the decedent and his former wife and a surrogate mother [ *Farb v. Superior Ct.* (2009) 174 CA4th 678, 684-686, 94 CR3d 586 ].

#### **➡ Cross Reference:**

Calculation of end date of limitation period under *CCP* §§ 12, 12a, 12b, see 4.37.

If plaintiff is unaware of defendant's death, the action is timely if the complaint that names defendant is filed within one year of defendant's death. Plaintiff may later amend the complaint to name the personal representative of defendant's estate. If the amended complaint seeks recovery on the same general facts and for the same injuries as the original complaint, the amended complaint will relate back and be considered filed as of the date of the original complaint [ *Burgos v. Tamulonis* (1994) 28 CA4th 757, 762-763, 33 CR2d 728 ].

#### **➡ Cross Reference:**

Discussion of relation back of amended pleadings, see 4.44.

**4.19[2] One-Year Period Generally May Not Be Tolled.** Although the one-year limitation period of *CCP* § 366.2(a) that applies when defendant dies is not tolled, it is subject to equitable estoppel [*CCP* § 366.2(b); *Farb v. Superior Ct.* (2009) 174 CA4th 678, 683, 94 CR3d 586 (not tolled for minority); *Battuello v. Battuello* (1998) 64 CA4th 842, 848, 75 CR2d 548 ].

 **Cross Reference:**

Discussion of equitable estoppel, see 4.42.

**4.19[3] Replacement of Limitation Period May Not Apply.**

**4.19[3][a] Claims Against Decedent's Estate.** The replacement of the otherwise applicable limitation period by the one-year limitation period of *CCP* § 366.2(a) when defendant dies does not apply to claims against the decedent's estate [*CCP* § 366.2(b)(2)].

 **Cross Reference:**

Discussion of claims procedures in decedents' estates, see California Forms of Pleading and Practice, Ch. 454, Probate: Claims Against the Estate (Matthew Bender).

**4.19[3][b] Claims Against Decedent's Revocable Trust.** The replacement of the otherwise applicable limitation period by the one-year limitation period of *CCP* § 366.2(a) when defendant dies does not apply with respect to claims against a decedent's revocable trust [*CCP* § 366.2(b)(3)].

 **Cross Reference:**

Discussion of claims procedures in revocable trusts, see California Forms of Pleading and Practice, Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts (Matthew Bender).

**4.19[3][c] Actions to Recover Decedent's Insurance Proceeds.** Actions under *Prob Code* § 550 *et seq.* to establish a decedent's liability covered by liability insurance may be brought within one year of the end of the otherwise applicable limitation period, if it has not expired at the time of the decedent's death. This is an express exception to *CCP* § 366.2 [*Prob Code* § 551].

**4.19[3][d] Actions to Enforce Lien on Property in Decedent's Estate.** *Prob Code* § 9391 authorizes an action to enforce a lien on property in a decedent's estate when plaintiff has waived all recourse against other property in the estate. The limitations provisions of *CCP* § 366.2 do not apply in such an action.

**4.19[3][e] Will Contests.** *CCP* § 366.2 does not apply to motions, petitions, or other acts by a beneficiary as to which the statute of limitations is tolled pending a determination of whether the motion, petition, or act constitutes a contest within the meaning of a no-contest clause as determined under the relevant portion of the Probate Code as it read prior to its repeal in 2008 [*CCP* § 366.2(b)(4)].

 **Cross Reference:**

Discussion of will contests, see California Forms of Pleading and Practice, Ch. 444, Probate: Will Contests (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estate Administration Claims Against Estates Time Limitations Governments Legislation Statutes of Limitations Extension & Revival



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#### 4.20 Special Rules Apply If Plaintiff Dies.

**4.20[1] Action Must Be Commenced Before Expiration of the Later of Six Months After Death or Otherwise Applicable Limitation Period.** If plaintiff dies before the expiration of the applicable limitation period and if the cause of action survives, an action may be commenced before the expiration of the later of [CCP § 366.1]:

- Six months after plaintiff's death; or
- The limitation period that would have applied if plaintiff had not died.

#### ► Cross References:

Form alleging death of person entitled to sue, see 4.59.

Form supporting motion, see *California Points and Authorities*, § 143.40 (Matthew Bender).

**4.20[2] Discovery Rule May Apply.** The time limitations in CCP § 366.1 for bringing an action when plaintiff dies may be subject to the discovery rule [see *Parsons v. Tickner* (1995) 31 CA4th 1513, 1525-1529, 37 CR2d 810 ].

#### ► Cross Reference:

Discussion of discovery rule, see 4.15[1].

**4.20[3] Heirs Do Not Derive Barred Cause of Action.** If plaintiff's action was barred when he or she died, plaintiff's heirs do not derive any cause of action from plaintiff [ *Manti v. Gunari* (1970) 5 CA3d 442, 446, 85 CR 366 ; *Rogers v. Bank of Am.* (1956) 140 CA2d 228, 231, 294 P2d 959 ].

#### Exception:

If the heirs correctly allege circumstances causing suspension of the running of the limitation period, the action will not be barred.

#### ► Cross Reference:

Discussion of suspension of limitation period, see 4.16 -4.30.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

TortsWrongful Death & Survival ActionsSurvival Actions





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**4.21 Disability of Plaintiff Tolls Limitation Period.**

**4.21[1] Court Inquires As to When Disability Arose.** A disability does not extend a limitation period unless it existed when the cause of action accrued [*CCP* § 357; *Weinstock v. Eissler* (1964) 224 CA2d 212, 231, 36 CR 537 ].

**4.21[2] Disability Must Be Continuing.** The tacking of disabilities, some of which did not exist when cause of action accrued, is not allowed [ *Rose v. Petaluma & Santa Rosa Ry. Co.* (1923) 64 CA 213, 217, 221 P 406 ].

**4.21[3] Minority May Toll Limitation Period.**

**4.21[3][a] Limitation Period Tolloed While Minor Is Under 18.** If plaintiff is under 18 years of age when his or her cause of action accrues, the limitation period under *CCP* § 335 *et seq.* is tolled during plaintiff's minority [*CCP* § 352(a)].

➡ **Cross References:**

Form alleging disability of minority, see 4.58.

Discussion of minors, see California Forms of Pleading and Practice, Ch. 364, Minors: Claims and Property of Minors; Ch. 365, Minors: Contract Actions; Ch. 367A, Minors: Tort Actions (Matthew Bender).

Form supporting motion, see *California Points and Authorities*, § 143.35 (Matthew Bender).

**4.21[3][b] Special Rules Apply to Actions for Prenatal Injuries, Medical Malpractice, and Sexual Abuse.** Actions based on prenatal injuries are subject to a specific limitation period that is not tolled by minority [see *CCP* § 340.4].

A specific limitation period applies to a minor's action against a health care provider for professional negligence [see *CCP* § 340.5]. The time for commencement of the action may not exceed three years unless tolled for any of the following reasons:

- Proof of fraud;
- Intentional concealment; or
- The presence of a foreign body in the injured person.

**Trap:**

In a suit for medical malpractice involving a government health care facility, the plaintiff must comply with the prerequisite procedures for actions against public entities set forth in *Gov Code § 900 et seq.* [see 4.09], during which the limitation period of *CCP § 340.5* is not tolled [ *Roberts v. Cty. of L.A.* (2009) 175 CA4th 474, 486-487, 96 CR3d 60] .

For an action by a minor under the age of six, the limitation period may be tolled for any period during which a parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring a professional negligence action on behalf of the injured minor for professional negligence.

Actions based on the sexual abuse of a minor are subject to an extended period of limitation [see *CCP § 340.1*]. There is a split of authority on the application of *CCP § 340.1* [see *Quarry v. Doe 1 (First Dist., Div. Four 2009) 170 CA4th 1574, 1584, 1589, 89 CR3d 640* (claims not barred by one-year rule in *CCP § 340.1(c)*; cf. *K.J. v. Roman Catholic Bishop of Stockton* (2009) 172 CA4th 1388, 1399-1403, 92 CR3d 673 (*CCP § 340.1(b)(2)* does not have retroactive effect)].

**Example:**

*CCP § 340.1(a)* applies in an action against the defendant who perpetrated the abuse, or a third party whose liability stems from a negligent or intentional act that was the legal cause of the abuse that resulted in the injury [ *Joseph v. Johnson* (2009) 178 CA4th 1404, 1413-1415, 101 CR3d 248] .

**Cross Reference:**

Discussion of abuse, see California Forms of Pleading and Practice, Ch. 5, Abuse of Minors and Elderly (Matthew Bender).

**4.21[3][c] Existence of Custodians and Guardians Is Immaterial.** The existence of a custodian under the Uniform Transfers to Minor Act does not affect the tolling of the statute of limitations as to a cause of action accruing to a minor [see *Epstein v. Frank* (1981) 125 CA3d 111, 122, 177 CR 831 ].

The appointment of a general guardian does not affect the tolling of the statute of limitations as to a cause of action accruing to a minor [ *Epstein v. Frank* (1981) 125 CA3d 111, 122, 177 CR 831 ; *Aronson v. Bank of Am.* (1941) 42 CA2d 710, 720, 109 P2d 1001 ].

**4.21[3][d] Tolling Does Not Apply to Emancipated Minor.** A minor who is emancipated by court order under *Fam Code § 7000 et seq.* has the right to sue and is subject to suit in his or her own name. The statute of limitations begins to run on the date of emancipation [ *West Shield Investigations & Sec. Consultants v. Superior Court* (2000) 82 CA4th 935, 940, 949-951, 98 CR2d 612 ].

**4.21[4] Insanity May Toll Limitation Period.**

**4.21[4][a] Plaintiff Must Be Incapable of Caring for Property or Understanding Acts.** If plaintiff is insane when a cause of action accrues, the limitation period under *CCP § 335 et seq.* is tolled for the time of the insanity [*CCP § 352(a)*]. Plaintiff is considered "insane" if he or she is incapable of caring for his or her property, transacting business, or understanding the nature or effects of his or her acts [ *Alcott Rehabilitation Hosp. v. Superior Court* (2001) 93

CA4th 94, 101, 112 CR2d 807 ].

**4.21[4][b] Unconsciousness Qualifies As Insanity.** Unconsciousness constitutes insanity sufficient to toll the limitation period [ *Feeley v. Southern Pac. Transp. Co.* (1991) 234 CA3d 949, 951-953, 285 CR 666 ].

**4.21[4][c] Having Conservator Is Immaterial.** The limitation period remains tolled even when a conservator is appointed for an incompetent person [ *Tzolov v. International Jet Leasing, Inc.* (1991) 232 CA3d 117, 118, 120, 283 CR 314 ; see *Alcott Rehabilitation Hosp. v. Superior Court* (2001) 93 CA4th 94, 106, 112 CR2d 807 ]. Thus, a cause of action that belongs to an incompetent person is not affected by a conservator's failure to sue during the limitation period [ *Tzolov v. International Jet Leasing, Inc.* (1991) 232 CA3d 117, 120 ; *Gottesman v. Simon* (1959) 169 CA2d 494, 502-503, 337 P2d 906 ].



**Cross Reference:**

Form alleging disability of insanity, see *California Forms of Pleading and Practice*, § 345.74 (Matthew Bender).

**4.21[5] Imprisonment May Toll Limitation Period.**

**4.21[5][a] Prisoner Must Be Imprisoned or in Execution Under Sentence for Term Less Than Life.** If plaintiff is imprisoned on a criminal charge or is in execution under the sentence of a criminal court for a term of less than life when his or her cause of action accrues, the limitation period under CCP § 335 *et seq.* is tolled for the time of the imprisonment [CCP § 352.1(a)].

**4.21[5][b] Tolling May Not Exceed Two Years.** The tolling of the limitation period arising from imprisonment may not exceed two years [CCP § 352.1(a)].

CCP § 352.1(a) applies to causes of action that accrued before January 1, 1995. Thus, claims that accrued before that effective date are tolled for two years from accrual or until January 1, 1995, whichever occurs later, as long as such an application does not result in manifest injustice [ *Carlson v. Blatt* (2001) 87 CA4th 646, 650, 105 CR2d 42 ].

**Exceptions:**

The tolling provision of CCP § 352.1 does not apply to:

- An action against a public entity or public employee on a cause of action subject to a claim requirement under *Gov Code* §§ 900 *et seq.*, 910 *et seq.*, or 950 *et seq.*
- An action relating to the conditions of confinement, including an action brought under 42 USC § 1983 [CCP § 352.1(b), (c)].



**Cross Reference:**

Form alleging disability of imprisonment, see *California Forms of Pleadings and Practice*, § 345.75 (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Governments Legislation Statutes of Limitations Tolling Torts Procedure Statutes of Limitations Tolling Disabilities



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#### 4.22 Equitable Tolling Suspends Limitation Period.

**4.22[1] Equitable Tolling Applies When Plaintiff Has Several Remedies.** Equitable tolling applies when plaintiff possesses several legal remedies and pursues one designed to lessen the extent of his or her injuries or damage. The running of the limitation period may be tolled with respect to plaintiff's other available remedies [ *Ashou v. Liberty Mut. Fire Ins. Co.* (2006) 138 CA4th 748, 758, 763-764, 41 CR3d 819 ; *Hu v. Silgan Containers Corp.* (1999) 70 CA4th 1261, 1270, 83 CR2d 333 ]. The remedy pursued need not be a legal remedy.

##### Exceptions:

- Equitable tolling does not apply when a plaintiff who has suffered several different wrongs pursues only one remedy as to one of those wrongs [ *Aerojet-General Corp. v. Superior Court* (1986) 177 CA3d 950, 956, 223 CR 249 ].

- Merely engaging in negotiations is not adequate to support equitable tolling [see *65 Butterfield v. Chicago Title Ins. Co.* (1999) 70 CA4th 1047, 1063, 83 CR2d 40 ].

##### ➤ Cross Reference:

Form alleging equitable tolling, see 4.62.

**4.22[2] Three-Pronged Test Must Be Satisfied.** A limitation period may be tolled when plaintiff has sought an alternative form of relief and a three-prong test is satisfied [ *Addison v. State of California* (1978) 21 C3d 313, 319, 146 CR 224, 578 P2d 941 ; *Waterman Convalescent Hosp., Inc. v. Department of Health Servs.* (2002) 101 CA4th 1433, 1441, 125 CR2d 168 ]:

- Plaintiff provided timely notice of the first claim to defendant.

The first claim must be filed within the statutory period [ *Tarkington v. California Unemployment Ins.*

*Appeals Bd. (2009) 172 CA4th 1494, 1503, 92 CR3d 131 ; 65 Butterfield v. Chicago Title Ins. Co. (1999) 70 CA4th 1047, 1063, 83 CR2d 40 ]*.

The filing of the first claim must alert defendant in subsequent claims of the need to begin investigating the facts that form the basis for the subsequent claims. Generally, this means that the defendant in the first claim is the same one in the subsequent claims [ *Tarkington v. California Unemployment Ins. Appeals Bd. (2009) 172 CA4th 1494, 1503, 92 CR3d 131 ; Downs v. Department of Water & Power (1997) 58 CA4th 1093, 1100, 68 CR2d 590 ]*.

- Defendant was not prejudiced in gathering evidence for the subsequent claims.

The facts of the claims must be identical or similar enough that defendant's investigation of the first claim will put him or her in a position to defend the other claims [ *Tarkington v. California Unemployment Ins. Appeals Bd. (2009) 172 CA4th 1494, 1504, 92 CR3d 131 ; Downs v. Department of Water & Power (1997) 58 CA4th 1093, 1100, 68 CR2d 590 ]*.

- Plaintiff acted reasonably and in good faith in filing the subsequent claims.

The element of good faith is not clearly defined. However, plaintiff should proceed in a diligent manner. Plaintiff must not intentionally lead defendant into believing that subsequent claims will not be filed [ *Structural Steel Fabricators, Inc. v. City of Orange (1995) 40 CA4th 459, 464-465, 46 CR2d 867 ]*.

Whether a plaintiff has exercised due diligence may depend on whether plaintiff delayed filing the second claim until the statute on that claim had nearly run [ *Tarkington v. California Unemployment Ins. Appeals Bd. (2009) 172 CA4th 1494, 1505, 92 CR3d 131 ]*.



#### **Strategic Point--Plaintiff:**

File the subsequent claims a short time after tolling ends.

**4.22[3] Equitable Tolling Must Be Consistent With Relevant Statute of Limitations.** Equitable tolling is not permissible when it is inconsistent with the text of the relevant statute of limitations [ *Young v. United States (2002) 535 US 43, 49, 122 S Ct 1036, 152 L Ed2d 79 ; United States v. Beggerly (1998) 524 US 38, 48, 118 S Ct 1862, 141 L Ed2d 32 ; Lantzy v. Centex Homes (2003) 31 C4th 363, 371 ]*.

**4.22[4] Tolling Cannot Revive Already Expired Statute of Limitations.** Tolling can only suspend the running of a statute that still has time to run. It cannot revive a statute that has already expired [ *65 Butterfield v. Chicago Title Ins. Co. (1999) 70 CA4th 1047, 1062, 83 CR2d 40 ]*.



#### **Cross References:**

Form alleging equitable tolling, see 4.62.

Form supporting motion, see *California Points and Authorities*, § 143.46 (Matthew Bender).

**4.22[5] Special Rules Apply to Equitable Tolling for Exhaustion of Administrative Remedies.** Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic [ *McDonald v. Antelope Valley Community College Dist. (2008) 45 C4th 88, 101, 84 CR3d 734 ]*. Tolling may extend even to the voluntary pursuit of alternate administrative remedies, so long as the general requirements for equitable tolling [see 4.22[2]] are satisfied [ *McDonald v. Antelope Valley Community College Dist. (2008) 45 C4th 88, 101-102, 84 CR3d 734 ]*.

**Example:**

Exhaustion of internal administrative remedies prior to filing a Fair Employment and Housing Act (FEHA) [see *Gov Code § 12900 et seq.*] claim is not mandatory, but may support equitable tolling of the statute of limitation on the filing of the FEHA claim [ *McDonald v. Antelope Valley Community College Dist.* (2008) 45 C4th 88, 104, 84 CR3d 734 ].

**Distinguish:**

Issues of judicial or administrative exhaustion and equitable tolling are distinct. A complaint may be timely on grounds of equitable tolling but fail for reasons of judicial exhaustion, or a complainant may exhaust available judicial review procedures only to find a subsequent complaint time-barred. One inquiry has little bearing on the other [ *McDonald v. Antelope Valley Community College Dist.* (2008) 45 C4th 88, 113, 84 CR3d 734 ].

 **Cross Reference:**

Exhaustion of administrative remedies as a jurisdictional requirement, see 10.04[11].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTolling



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##### **4.23 Doctrine of Continuing Wrongs Suspends Limitation Period.**

With respect to actions based on progressively developing or continuing wrongs when the nature, extent, or permanence of the harm is difficult to discover, the running of the limitation period is suspended until the time of discovery of, or the opportunity to discover, the facts [see *Bradler v. Craig* (1969) 274 CA2d 466, 471, 79 CR 401 ].

The key is whether the conduct complained of constitutes a continuing pattern and course of conduct as opposed to unrelated discrete acts. If there is a pattern, then the suit is timely so long as the action is filed within one year of the most recent violation, and the entire course of conduct is at issue [ *Komarova v. National Credit Acceptance, Inc.* (2009) 175 CA4th 324, 344, 95 CR3d 880] .

##### **Example:**

Unreasonably frequent calling in violation of CC § 1788.11(e) is clearly a continuing course of conduct because the violation occurs only through repetition. Calling without disclosure of identity in violation of CC § 1788.11(b) and improper communication with an employer in violation of CC § 1788.12(a) could be single, discrete acts; however, the continuing violation doctrine can be applied to those acts if they are part of a pattern of unreasonably frequent calling that extends into the limitations period. In that event, they are not "unrelated" discrete acts. Use of judicial proceedings to collect a debt without service of process in violation of CC § 1788.15(a) will also be a continuing course of conduct insofar as the conduct involves multiple acts, such as obtaining and collecting on a judgment, that extend over a period of time before the proceedings are concluded [ *Komarova v. National Credit Acceptance, Inc.* (2009) 175 CA4th 324, 344, 95 CR3d 880] .

##### **Example:**

The statute of limitations for an action against an attorney for wrongful act or omission other than fraud tolls so long as *that* attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred [ *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 C4th 503, 508, 66 CR3d 52, 167 P3d 666 ] .

##### **Distinguish:**

If the wrong is permanent, the plaintiff ordinarily must bring one action for all past, present and future damage within the limitation period after the creation of the wrong [ *McCoy v. Gustafson* (2009) 180 CA4th 56, 106, 103 CR3d 37] . The crucial test of the permanency of a trespass or nuisance is whether

the trespass or nuisance can be discontinued or abated. "Abatable" means that the nuisance can be remedied at a reasonable cost by reasonable means [ *McCoy v. Gustafson* (2009) 180 CA4th 56, 84, 103 CR3d 37] .

**Warning:**

The lack of evidence of nature and extent of the continuing wrong precludes a finding of a continuing wrong [see, e.g., *McCoy v. Gustafson* (2009) 180 CA4th 56, 84, 103 CR3d 37] . To defeat a demurrer [see Chapter 11], plaintiff's counsel must therefore be prepared before trial to be able show the nature and extent of the continuing wrong, as well as the means by which it can be abated.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsExtension & Revival





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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.24*

#### **4.24 Arbitration Tolls Limitation Period.**

When contractual disputes are submitted to arbitration, the running of the limitation period usually is suspended [ *A. Teichert & Son, Inc. v. State of California* (1965) 238 CA2d 736, 746-747, 48 CR 225 (overruled on other grounds in *E.H. Morrill Co. v. State of California* (1967) 65 C2d 787, 792, 56 CR 479, 423 P2d 551 )].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTolling



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1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.25

#### **4.25 Filing Class Action Tolls Limitation Period Pending Certification.**

**4.25[1] Tolling Occurs Pending Certification.** The filing of a class action may toll the running of the statute of limitations for the members of the putative class until class certification is denied [*see Jolly v. Eli Lilly & Co. (1988) 44 C3d 1103, 1121-1125, 245 CR 658, 751 P2d 923*; *Becker v. McMillin Constr. Co. (1991) 226 CA3d 1493, 1498-1502, 277 CR 491* ].

**4.25[2] Two-Pronged Test Must Be Satisfied.** Tolling occurs if the following two-pronged test is satisfied [ *American Pipe & Constr. Co. v. Utah (1974) 414 US 538, 553, 94 S Ct 756, 38 L Ed2d 713* ]:

- Class action must protect efficiency and economy of litigation.
- Class action must notify defendant of claims and plaintiffs.



#### **Cross References:**

Discussion of class actions, see Ch. 33, Class Actions; and  
California Forms of Pleading and Practice, Ch. 120, Class Actions (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTolling



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**4.26 Condition on Obligation Tolls Limitation Period.**

**4.26[1] Complaint Should Not Be Filed Before Performance of Condition.** If plaintiff files a complaint before performance of a condition precedent upon which the right to maintain an action against defendant depends, the complaint does not state a cause of action [ *Wilson v. People ex rel. Dept. of Public Works* (1969) 271 CA2d 665, 667-669, 76 CR 906 ]. Plaintiff must amend the complaint within the limitation period after the condition precedent has occurred.



**Cross References:**

Discussion of amended pleadings, see Ch. 34, Amended and Supplemental Pleadings; and California Forms of Pleading and Practice, Ch. 21, Amended and Supplemental Pleadings (Matthew Bender).

**4.26[2] Limitation Period Begins When Condition Occurs.** The limitation period for an action based on a liability that does not arise until the occurrence of a condition precedent commences to run only when that condition occurs [see *Rose v. Foord* (1892) 96 C 152, 154, 30 P 1114 ].

**4.26[3] Plaintiff May Not Indefinitely Delay Performance of Condition.** The running of the limitation period is not suspended when plaintiff indefinitely delays performance of a condition. A reasonable amount of time for performance is allowed, which is generally the statutory period [ *Bass v. Hueter* (1928) 205 C 284, 287, 270 P 958 ; *Stafford v. Oil Tool Corp.* (1955) 133 CA2d 763, 766, 284 P2d 937 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTolling



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**4.27 Legal Inhibition to Sue Tolls Limitation Period.**

**4.27[1] Injunction or Statute Stays Action.** When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action [CCP § 356]. The running of the limitation period is suspended during any period in which plaintiff is legally restrained from taking action [see *Eistrat v. Cekada* (1958) 50 C2d 289, 291-292, 324 P2d 881 ; *Record Machine & Tool Co. v. Pageman Holding Corp.* (1959) 172 CA2d 164, 175, 342 P2d 402 ].

**Exception:**

The existence of a rule of law propounded in a judicial opinion that would defeat plaintiff's cause of action cannot be used as a legal inhibition to sue [ *Estate of Horman* (1971) 5 C3d 62, 71, cert. denied, 404 US 1015 (1972) ].



**Cross References:**

See 4.15[3][d].

Form alleging legal inhibition to sue, see *California Forms of Pleading and Practice*, § 345.80 (Matthew Bender).

**4.27[2] Special Rules Apply to Medical Malpractice Action.** Because a plaintiff is not legally prevented from commencing a medical malpractice suit during the mandatory 90-day waiting period of CCP §§ 364, 365, there is no statutory prohibition requiring tolling under CCP § 356 during the 90-day waiting period [ *Woods v. Young* (1991) 53 C3d 315, 324, 279 CR 613, 807 P2d 455 ].

**Exception:**

Under certain circumstances, CCP § 364(d) tolls for 90 days the applicable statute of limitations for a health care provider's professional negligence. With regard to the one-year limitation period after discovery in CCP § 340.5, if the notice of intent to sue is served during the last 90 days of that one-year limitation period, the one-year period is tolled under CCP § 364(d) for 90 days. If the notice of intent to sue is served before the last 90 days of the one-year limitation period, CCP § 364(d) does not toll the one-year limitation period [ *Woods v. Young* (1991) 53 C3d 315, 325-326, 328, 279 CR 613, 807 P2d

455 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Governments Legislation Statutes of Limitations Tolling



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##### **4.28 Statute of Limitations Restarts After Appeal.**

An action on a judgment may not be commenced until the judgment has become final, either on expiration of the period within which an appeal may be taken or, if an appeal is taken, on the issuance of the remittitur when the judgment has been affirmed [ *Hoover v. Galbraith* (1972) 7 C3d 519, 525-526, 102 CR 733, 498 P2d 981 ; *Green v. Zissis* (1992) 5 CA4th 1219, 1223, 7 CR2d 406 ].

If an appeal is taken, the statute of limitations restarts on the date the appellate court issues a remittitur. If it is not possible to bring an action to trial pending determination of an appeal in a related case, the time taken on that appeal is excluded from the limitation period [ *Hoover v. Galbraith* (1972) 7 C3d 519, 526, 102 CR 733, 498 P2d 981 ; *Green v. Zissis* (1992) 5 CA4th 1219, 1223, 7 CR2d 406 ].

##### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsExtension & Revival



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**4.29 Exhausting Administrative Remedies Suspends Statute of Limitations.**

An attempt to exhaust administrative remedies before suing suspends the limitation period, even if exhaustion is not required. The attempt must be reasonable and made in good faith [ *Campbell v. Graham-Armstrong* (1973) 9 C3d 482, 490, 107 CR 777, 509 P2d 689 ; *Permanente Med. Group v. Workers' Comp. Appeals Bd.* (1985) 171 CA3d 1171, 1183, 217 CR 873 ]. When exhaustion is required prior to filing suit, this exhaustion suspends the running of the limitation period from the time the claim is made until the decision [ *Dillon v. Board of Pension Comm'rs* (1941) 18 C2d 427, 431, 116 P2d 37 ; *Community Cause v. Boatwright* (1981) 124 CA3d 888, 903, 177 CR 657 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTolling



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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.30*

#### **4.30 War Tolls Limitation Period.**

When plaintiff is unable to commence an action because of the existence of a state of war, the limitation period may be tolled for the time of the war. Whether the cause of action accrued before or during the time of the war is irrelevant [CCP § 354].



#### **Cross Reference:**

Form alleging state of war, see *California Forms of Pleading and Practice*, § 345.78 (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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Chapter 4 Limitation of Actions  
V. DETERMINING IF LIMITATION PERIOD HAS BEEN CHANGED

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**4.31 CHECKLIST: Determining If Limitation Period Has Been Changed.**

**4.31[1] Plaintiff's Checklist.**

- ☐ Determine if statute of limitations has been amended to extend limitation period.

**Discussion:**

*See 4.32[1]*

- ☐ Consider extending limitation period by agreement.

- ☐ Plead agreement as allegation in complaint.

- ☐ Set out clause from agreement extending period, or

- ☐ Attach copy of agreement to complaint.

**Authority:**

*CCP § 360.5*

**Discussion:**

*See 4.32[2], 4.43[1]*

**Form:**

*See 4.63*

**4.31[2] Defendant's Checklist.**

- ☐ Determine if statute of limitations has been amended to shorten limitation period.

**Discussion:**

See 4.33[1]

- ☐ Consider shortening limitation period by agreement.
- ☐ Plead agreement as affirmative defense in answer.
  - ☐ Set out clause from agreement shortening period.
  - ☐ State that action is barred by agreement.

**Discussion:**

See 4.33[3]

**Form:**

See 4.67



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**4.32 Limitation Period May Be Extended.**

**4.32[1] Amended Statute May Extend Limitation Period.** The legislature may extend a limitation period by amending a statute of limitations. Extension is generally valid as to any cause of action then pending and not already barred [ *Mudd v. McColgan* (1947) 30 C2d 463, 468, 183 P2d 10 ; *Battle v. Kessler* (1983) 149 CA3d 853, 860, 197 CR 170 ].

A civil statute of limitations may also be extended retroactively to revive an action that was barred under the former statute of limitations [ *Mid-Century Ins. Co. v. Superior Court* (2006) 138 CA4th 769, 776-777, 41 CR3d 833 ; *Hellinger v. Farmers Group, Inc.* (2001) 91 CA4th 1049, 1061, 111 CR2d 268 ].

**4.32[2] Parties May Extend Limitation Period by Agreement.** Parties to a contract are permitted to extend the limitation period for a cause of action [ *Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1547-1548, 1549, 46 CR2d 33 ; *FNB Mortgage Corp. v. Pacific Gen. Group* (1999) 76 CA4th 1116, 1135, 90 CR2d 841 ].

► **Cross References:**

Form alleging extension of limitation period by agreement, see 4.63.

Discussion of waiving bar of statute of limitations by agreement, see 4.43[1].

Discussion of extending time, see Ch. 27, Service of Papers.

**4.32[3] Paying on Promissory Note Extends Limitation Period.** A partial payment of principal or interest due on a promissory note made by an obligor constitutes an acknowledgment or promise of a continuing contract to stop the running of the limitation period and to start the running of a new period of time from the date of the payment [CCP § 360].

► **Cross Reference:**

Form of allegation of partial payments extending limitation period, see *California Forms of Pleading*

*and Practice*, § 345.85 (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Governments  
Legislation  
Statutes of Limitations  
Extension & Revival



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#### 4.33 Limitation Period May Be Shortened.

##### 4.33[1] Amended Statute May Shorten Limitation Period.

**4.33[1][a] Shortened Limitation Period Generally May Not Be Applied Retroactively.** The legislature may shorten a limitation period, but the shortened period may not be applied retroactively to defeat an accrued cause of action that is not barred by the statute of limitations applicable before the new statute became effective [ *Krusesky v. Baugh* (1982) 138 CA3d 562, 566, 188 CR 57 ; *Niagara Fire Ins. Co. v. Cole* (1965) 235 CA2d 40, 42-43, 44 CR 889 ].

##### Exception:

Retroactive application of a shortened limitation period is permissible if the party has a reasonable amount of time to avail himself or herself of the remedy before the statute cuts off his or her rights [see *Edward Fineman Co. v. Superior Court* (1998) 66 CA4th 1110, 1125, 78 CR2d 478 ].

**4.33[1][b] Affected Party Receives Grace Period.** When a shortened limitation period is applied prospectively, a reasonable amount of time must be permitted for plaintiff to avail himself or herself of a remedy before the new statute takes effect [ *Scheas v. Robertson* (1951) 38 C2d 119, 125, 238 P2d 982 ; *Espinosa v. Superior Court* (1988) 202 CA3d 409, 413, 248 CR 375 ].



##### Warning--Plaintiff:

The court will not consider individual hardship if there was a reasonable time for the exercise of a remedy before the shortened limitation period became fixed by the new statute of limitations [ *Rosefield Packing Co. v. Superior Court* (1935) 4 C2d 120, 122, 124, 47 P2d 716 ; *Mohlmann v. City of Burbank* (1986) 179 CA3d 1037, 1044, 225 CR 109 ].

**4.33[1][c] Court Conducts Due Process Analysis.** When a statute of limitations is applied retroactively to accrued causes of action, a court must inquire whether retroactive application violates due process. If the time that is left to file suit is reasonable, no constitutional violation occurs and the statute will be applied. If no time is left or only an unreasonably short time remains, the statute will not be applied [ *Fink v. Shedler* (9th Cir 1999) 192 F3d 911, 915 ; *Aronson v. Superior Court* (1987) 191 CA3d 294, 297-298, 236 CR 347 ].

**4.33[2] Clarified Statute May Be Applied Retroactively.** Retroactive application of an amendment that merely clarifies a statute of limitations is permissible [ *Noggle v. Bank of Am.* (1999) 70 CA4th 853, 859, 82 CR2d 829 ].

**4.33[3] Parties May Shorten Limitation Period by Agreement.**

**4.33[3][a] Shortened Limitation Period Must Be Reasonable.** Parties may agree to shorten the limitation period by agreement. However, the limitation period cannot be so short as to show undue advantage in favor of one party [ *Beeson v. Schloss* (1920) 183 C 618, 622, 192 P 292 ; see *West v. Henderson* (1991) 227 CA3d 1578, 1585, 278 CR 570 ].



**Strategic Point--Plaintiff:**

If plaintiff opposes enforcement of the agreement that shortens the limitation period, he or she can show that the agreed upon period is unreasonable because its commencement fluctuating, vague, and indefinite.



**Cross References:**

Form alleging affirmative defense of shortened limitation period by agreement, see 4.67.

Discussion of shortening time, see Ch. 27, Service of Papers.

**4.33[3][b] Strict Construction Applies When Limitation Period Is Shortened.** Contractual provisions that limit the right to sue to a period shorter than that granted by a statute of limitations are disfavored and are generally strictly construed, although the entire contract need not be destroyed. Also, the rule should not be used to destroy the effect of a more specific rule of law that applies to the case [ *Sanders v. American Cas. Co.* (1969) 269 CA2d 306, 309, 74 CR 634 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTime Limitations



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VI. CALCULATING LIMITATION PERIOD

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**4.34 CHECKLIST: Calculating Limitation Period.**

☐ Calculate last day for filing suit based on:

☐ Statute of limitations for gravamen of action.

**Discussion:**

See 4.04 -4.11

☐ Accrual of cause of action.

**Discussion:**

See 4.14

☐ Determine whether statute of limitations has been tolled, extended, or shortened.

**Discussion:**

See 4.16 -4.33

☐ Consider agreement to change limitation period.

☐ Plaintiff may request to extend period if in danger of filing untimely action.

**Discussion:**

See 4.32[2], 4.43[1]

**Form:**

See 4.63

- ☐ Defendant may request to shorten period.

**Discussion:**

See 4.33[3]

**Form:**

See 4.67

- ☐ Plaintiff should file action within limitation period.





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#### 4.35 Courts Strictly Construe Statute of Limitations.

Statutes of limitations are generally strictly construed and applied according to their plain meaning [ *Skidmore v. County of Alameda* (1939) 13 C2d 534, 540, 90 P2d 577 ]. However, if there is doubt as to whether an action was timely brought, a court should not strain its construction of the statute to support defendant's plea of bar because of the statute [see *County of Los Angeles v. Security First Nat'l Bank* (1948) 84 CA2d 575, 580, 191 P2d 78 ; *Herman v. Los Angeles County Metropolitan Transp. Auth.* (1999) 71 CA4th 819, 826-827, 84 CR2d 144 ].



#### Warning--Plaintiff:

Courts that strictly construe statutes of limitations will bar an untimely action regardless of plaintiff's hardship or the underlying merits of the claim [see *Skidmore v. County of Alameda* (1939) 13 C2d 534, 540, 90 P2d 577 ; *State Farm Fire & Cas. Co. v. Superior Court* (1989) 210 CA3d 604, 612, 258 CR 413 ].



#### Cross Reference:

Discussion of principles of statutory construction, see California Forms of Pleading and Practice, Ch. 531, Statutes and Ordinances (Matthew Bender).

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTime Limitations



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#### 4.36 Exceptions to Strict Construction Rule.

**4.36[1] Statutes Suspending or Tolling Limitation Period.** Examples of statutes that suspend or toll the limitation period:

- CCP § 351 tolls the period when defendant is absent from the state.
- CCP § 352 tolls the period when plaintiff is under a disability.

► **Cross Reference:**

Discussion of statutes that suspend or toll limitation period, see 4.16 -4.30.

**4.36[2] Cases Suspending Limitation Period.** Examples of case law that suspends or tolls the limitation period:

- Fraudulent concealment of a cause of action [see *Bollinger v. National Fire Ins. Co.* (1944) 25 C2d 399, 411, 154 P2d 399 ; *Community Cause v. Boatwright* (1981) 124 CA3d 888, 899, 177 CR 657 ].
- Fraudulent concealment of identity [see *Kleinecke v. Montecito Water Dist.* (1983) 147 CA3d 240, 245-247, 195 CR 58 ].

► **Cross Reference:**

Discussion of case law that suspends limitation period, see 4.17 -4.30.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTolling



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**4.37 Number of Days Must Be Calculated.**

**4.37[1] First Day Is Excluded, Last Day Is Included.** The limitation period is calculated by excluding the first day and including the last day [*CCP* § 12].

**4.37[2] Saturdays, Sundays, and Holidays May Not Be Last Day.** If the last day of the limitation period is a Saturday, Sunday, or holiday, it is excluded [*CCP* §§ 10, 12, 12a; *Gov Code* § 6700(a)]. The next day that is not a Saturday, Sunday, or holiday becomes the last day of the limitation period [*CCP* § 12a]. Holidays are listed in *Gov Code* § 6700.

**4.37[3] Government Office Closure Considered Holiday.** If any city, county, or state office, other than a branch office, is closed for the whole day, that day is considered a holiday for the purposes of computing the limitation period [*CCP* § 12b].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTime Limitations



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Chapter 4 Limitation of Actions  
VII. RAISING STATUTE OF LIMITATIONS AS BAR TO ACTION

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**4.38 CHECKLIST: Raising Statute of Limitations As Bar to Action.**

- ☐ Determine whether plaintiff's action was untimely.

**Discussion:**

*See 4.39[1]*

- ☐ Consider whether asserting bar of statute of limitations will be successful.

- ☐ Assert bar by demurrer to complaint if defect appears on face of complaint.

**Authority:**

*CCP § 430.10*

**Form:**

*See 4.64*

**Grounds:**

State that action is barred by statute of limitations.

- ☐ File and serve notice of hearing with demurrer.

**Authority:**

*Cal Rules Ct, Rule 3.1320(c)*

- ☐ Accompany demurrer with memorandum in support of each ground of demurrer.

**Authority:**

*Cal Rules Ct, Rule 3.1113(a)*

☐ Assert bar by answer as affirmative defense if pleading does not show on its face that limitation period has expired.

**Authority:**

*CCP § 431.30(b)(2)*

☐ Allege facts showing action is barred and indicate that lateness of commencement of action is urged as defense, or

☐ State generally that action is barred by provisions of specified section of California Code of Civil Procedure.

**Authority:**

*CCP § 458*

**Form:**

See 4.65

☐ Set up bar by amendment if answer did not raise defense.

☐ Assert bar in motion for summary judgment.

☐ File motion to strike the complaint with demurrer pleading same objection.

☐ Plaintiff may attack sufficiency of defendant's plea:

☐ By demurrer.

**Timing:**

Before trial and judgment.

**Grounds:**

Allege uncertainty if defendant's form of allegation under *CCP § 458* is defective.

☐ By objection.

**Timing:**

At trial.



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#### 4.39 Burden-Shifting Analysis Applies.

**4.39[1] Defendant Must Establish That Statute of Limitations Applies.** Defendant must establish a prima facie case that the statute of limitations applies [ *Burgon v. Kaiser Found. Hosps.* (1979) 93 CA3d 813, 824, 155 CR 763 (overruled in part on other grounds in *Samuels v. Mix* (1999) 22 C4th 1, 91 CR2d 273, 989 P2d 701 )]. However, defendant need not show prejudice in order to have the statute of limitations enforced [ *65 Butterfield v. Chicago Title Ins. Co.* (1999) 70 CA4th 1047, 1063, 83 CR2d 40 ; *State Farm Fire & Cas. Co. v. Superior Court* (1989) 210 CA3d 604, 612, 258 CR 413 ].

**4.39[2] Plaintiff Must Establish Facts to Avoid Statute of Limitations.** Once defendant establishes a prima facie case that the statute of limitations applies, the burden shifts to plaintiff to prove facts to avoid the statute of limitations [ *Burgon v. Kaiser Found. Hosps.* (1979) 93 CA3d 813, 824, 155 CR 763 (overruled in part on other grounds in *Samuels v. Mix* (1999) 22 C4th 1, 91 CR2d 273, 989 P2d 701 )]. When there is a reasonable possibility the complaint can be amended to allege facts sufficient to invoke a delayed discovery rule of accrual, the trial court abuses its discretion in sustaining a demurrer without leave to amend [ *Curtis T. v. County of Los Angeles* (2004) 123 CA4th 1405, 1422 ].

#### ➡ Cross References:

Discussion of avoiding statute of limitations, see 4.40 -4.48.

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsPleading & Proof



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Chapter 4 Limitation of Actions  
VIII. OBTAINING RELIEF FROM BAR OF STATUTE OF LIMITATIONS

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.40*

**4.40 CHECKLIST: Obtaining Relief From Bar of Statute of Limitations.**

- ☐ Examine statute of limitations for constitutional violations of due process.

**Discussion:**

See 4.41

- ☐ Plead equitable estoppel to bar defense of statute of limitations.

☐ Grounds are:

- ☐ Defendant was aware of limitation period.
- ☐ Defendant intended plaintiff to rely on conduct or statements.
- ☐ Plaintiff was ignorant of true facts.
- ☐ Plaintiff detrimentally relied on defendant's conduct or statements.

**Discussion:**

See 4.42

**Form:**

See 4.61

- ☐ Plead that defendant waived bar of statute of limitations.

☐ Grounds are:

- ☐ Defendant waived bar by agreement:
  - ☐ Set out clause from agreement waiving limitation period, or
  - ☐ Attach copy of agreement to complaint.

☐ Defendant waived bar by conduct.

☐ Defendant waived bar by failure to plead.

**Discussion:**

See 4.43

**Form:**

See 4.63

☐ If plaintiff must amend or supplement complaint, assert that it relates back to original complaint.

**Discussion:**

See 4.44, 4.45

☐ Defendant should plead that plaintiff is barred from raising equitable estoppel.

**Grounds:**

Plaintiff failed to use reasonable diligence to discover cause of action.

**Discussion:**

See 4.42[4]

☐ Defendant should assert that amended or supplemental complaint asserts new cause of action.

**Discussion:**

See 4.44, 4.45





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#### **4.41 Statute of Limitations May Be Challenged As Unconstitutional.**

The legislature may not provide for a statute of limitations that is so manifestly inequitable as to amount to a denial of justice [ *Valley Circle Estates v. VTN Consol., Inc.* (1983) 33 C3d 604, 615, 189 CR 871, 659 P2d 1160 ; *Ocean S. R. Co. v. Santa Cruz* (1961) 198 CA2d 267, 273, 17 CR 892 ].

When a statute of limitations is not self-executing and limits a cause of action that amounts to a property interest, it violates due process if it does not provide actual notice of the limitation period [ *Tulsa Collection Servs. v. Pope* (1988) 485 US 478, 486-488, 491, 108 S Ct 1340, 99 L Ed2d 565 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTime Limitations



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1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.42

### 4.42 Equitable Estoppel May Prevent Defendant From Raising Bar of Statute of Limitations.

**4.42[1] Equitable Estoppel Applies After Limitation Period Expires.** Equitable estoppel applies after the limitation period has expired. The doctrine prevents defendant from benefitting from the defense of the statute of limitations because he or she acted in such a manner as to induce plaintiff into not bringing suit. Application of equitable estoppel is independent of the limitation period itself [ *Lantzy v. Centex Homes* (2003) 31 C4th 363, 383-384 ; *Northwest Airlines, Inc. v. Ontario Aircraft Servs., Inc.* (2002) 104 CA4th 1053, 1060-1061, 129 CR2d 146 ; *Battuello v. Battuello* (1998) 64 CA4th 842, 847-848, 75 CR2d 548 ].

#### Distinguish:

Equitable estoppel differs from tolling, which is concerned with the point at which the limitation period commences to run or the circumstances that may suspend the running of the limitation period [ *Lantzy v. Centex Homes* (2003) 31 C4th 363, 383-384 ; *Leasequip, Inc. v. Dapeer* (2002) 103 CA4th 394, 407, 126 CR2d 782 ; *Battuello v. Battuello* (1998) 64 CA4th 842, 847, 75 CR2d 548 ].

#### ➡ Cross Reference:

Discussion of tolling, see 4.16 -4.30.

**4.42[2] Plead Equitable Estoppel As Affirmative Bar to Defense of Statute of Limitations.** Equitable estoppel must be pleaded and proved as an affirmative bar to the defense of the statute of limitations [ *Hanson v. Garden Grove Unified Sch. Dist.* (1982) 129 CA3d 942, 948, 181 CR 378 ]. The complaint must contain a statement of facts, not conclusions, constituting the grounds for estoppel [see *Negaard v. Department of Aeronautics* (1973) 32 CA3d 92 , cert. denied, 414 US 1069 (1973) ].

#### ➡ Cross References:

Form of allegation raising equitable estoppel, see 4.61.

Form supporting motion, see *California Points and Authorities*, § 143.50 (Matthew Bender).

### 4.42[3] Plaintiff Must Establish Requirements for Equitable Estoppel.

**4.42[3][a] Defendant Was Aware of Limitation Period.** Plaintiff must show that defendant knew of the statute of limitations [ *Kleinecke v. Montecito Water Dist.* (1983) 147 CA3d 240, 245-247, 195 CR 58 ].

**4.42[3][b] Defendant Intended That Plaintiff Should Rely on His or Her Conduct or Statements.** Plaintiff must establish that defendant intentionally acted or made statements in order to induce plaintiff to rely on such conduct or statements [ *Kleinecke v. Montecito Water Dist.* (1983) 147 CA3d 240, 245-247, 195 CR 58 ].

**4.42[3][c] Plaintiff Was Ignorant of True Facts.** Plaintiff must prove that he or she was genuinely ignorant of the true state of facts [ *Kleinecke v. Montecito Water Dist.* (1983) 147 CA3d 240, 245-247, 195 CR 58 ].

**4.42[3][d] Plaintiff Relied on Defendant's Conduct or Statements to His or Her Detriment.** Plaintiff must show that he or she in fact relied on defendant's conduct or statements to his or her detriment [ *Kleinecke v. Montecito Water Dist.* (1983) 147 CA3d 240, 245-247, 195 CR 58 ].

The conduct that forms the estoppel need not be performed in bad faith or with an intent to mislead plaintiff [ *Barr v. ACandS, Inc.* (1997) 57 CA4th 1038, 1057, 67 CR2d 494 (overruled in part on other grounds in *Hamilton v. Asbestos Corp.* (2000) 22 C4th 1127, 95 CR2d 701, 998 P2d 403 )].



#### **Warning:**

Should defendant's conduct include offers to fix problem in lieu of suit, failure to adequately plead facts that defendant's conduct actually and reasonably induced plaintiff to forebear suing within limitations period will preclude equitable estoppel. Complaint must include facts indicating defendant's conduct directly prevented plaintiff from filing suit on time [ *Lantzy v. Centex Homes* (2003) 31 C4th 363, 383-385 ].

**4.42[4] Court Applies Reasonable Diligence Test to Plaintiff's Actions.** The court must determine whether plaintiff's failure to discover the cause of action earlier was due to plaintiff's failure to act with reasonable diligence. The test of reasonable diligence is whether plaintiff had sufficient information to put a reasonable person on inquiry or opportunity to obtain knowledge from sources open to investigation. [ *Snow v. A.H. Robins Co.* (1985) 165 CA3d 120, 128, 129, 211 CR 271 ]. After estoppel has expired, plaintiff has a reasonable time within which to bring an action.

#### **Reasonable Diligence:**

Filing a timely Doe complaint to facilitate discovery of defendant's identity within the requisite time period for service of process [ *Bernson v. Browning-Ferris Indus.* (1994) 7 C4th 926, 936-937, 30 CR2d 440, 873 P2d 613 ].

If possible, before litigation has commenced, use an investigator and Internet searches to ascertain the identity of a prospective defendant or the relationship between the parties--including research to identify other, similar litigation. After litigation has commenced, make discovery inquiries of the other parties, some of which may have a relationship with the party that had not yet been sued.

#### **Unreasonable Diligence:**

The statute of limitations in plaintiff's products liability action against a manufacturer of intrauterine contraceptive devices was not tolled, even though the manufacturer allegedly fraudulently concealed the actual pregnancy rate associated with the use of the device. Plaintiff failed to use reasonable diligence because she became aware of facts giving rise to the cause of action within the limitation period by virtue of her miscarriage [ *Braxton-Secret v. A.H. Robins Co.* (9th Cir 1985) 769 F2d 528, 531-532 ].

**4.42[5] Court Inquires Into Timing of Defendant's Fraudulent Act.** A fraudulent act committed after the limitation period has expired is not considered fraudulent concealment of a cause of action by defendant [ *Scafidi v. Western Loan & Bldg. Co.* (1946) 72 CA2d 550, 566, 165 P2d 260 ].

**4.42[6] Examples of Establishing Equitable Estoppel.**

**4.42[6][a] Defendant Was Silent.** Equitable estoppel may arise when defendant remained silent while he or she had a duty to speak [see *Spray, Gould & Bowers v. Associated Int'l Ins. Co.* (1999) 71 CA4th 1260, 1265, 1267-1269, 84 CR2d 552 (insurer that failed to satisfy duty to notify insured of time limits pertaining to claim was equitably estopped from asserting statute of limitations as defense); *Northwest Airlines, Inc. v. Ontario Aircraft Servs., Inc.* (2002) 104 CA4th 1053, 1060, 129 CR2d 146 ].

**4.42[6][b] Defendant Fraudulently Concealed Cause of Action.** When defendant is guilty of fraudulently concealing the facts on which plaintiff's cause of action depends, the statute of limitations is tolled until plaintiff discovers or should have discovered the facts [ *Hernandez v. Garcetti* (1998) 68 CA4th 675, 680-681, 80 CR2d 443 ].

**Warning--Plaintiff:**

Defendant's negligent failure to disclose a cause of action is not sufficient to toll the statute of limitations [ *Community Cause v. Boatwright* (1981) 124 CA3d 888, 901, 177 CR 657 ]. In addition, nondisclosure of a material fact is not fraudulent concealment of a cause of action [ *Hesse v. Vinatieri* (1956) 145 CA2d 448, 451, 302 P2d 699 ].

**Exception:**

When defendant has a duty of disclosure.

**Cross Reference:**

Discussion of defendant's duty of disclosure, see 4.42[6][a].

**Warning--Plaintiff:**

If plaintiff is aware of the cause of action, defendant's fraudulent concealment will not toll the limitation period [ *Snyder v. Boy Scouts of Am., Inc.* (1988) 205 CA3d 1318, 1323, 253 CR 156 ].

**4.42[6][c] Defendant Fraudulently Concealed His or Her Identity.** Defendant may be equitably estopped from asserting the statute of limitations as a defense if his or her intentional concealment caused plaintiff to be unable to discover defendant's actual identity [ *Bernson v. Browning-Ferris Indus.* (1994) 7 C4th 926, 936, 30 CR2d 440, 873 P2d 613 ].

**Warning--Plaintiff:**

Plaintiff's lack of knowledge alone is not sufficient to stay the statute of limitations [ *Bernson v. Browning-Ferris Indus.* (1994) 7 C4th 926, 936, 30 CR2d 440, 873 P2d 613 ].

**Strategic Point--Plaintiff:**

Plaintiff should use reasonable diligence to discover defendant's identity and investigate reasonably available avenues of inquiry.

**Cross References:**

Discussion of plaintiff's reasonable diligence, see 4.42[4].

**4.42[6][d] Defendant's Fraud Induced Plaintiff to Refrain From Suing.** Equitable estoppel may apply if defendant induced plaintiff to refrain from bringing a timely action by fraud, misrepresentation, or other deception, with regard to factors other than the existence of the actual cause of action [ *Kleinecke v. Montecito Water Dist.* (1983) 147

CA3d 240, 245-247, 195 CR 58 ].

**4.42[6][e] Defendant's Intimidation or Violence Induced Plaintiff to Refrain From Suing.** Estoppel may be established by acts of intimidation or violence that are intended to prevent the filing of claim [ *V.C. v. Los Angeles Unified School Dist. (2006) 139 CA4th 499, 516, 43 CR3d 103* ]. In assessing the propriety of applying equitable estoppel in view of evidence of intimidation or violence, the court must assess not only whether the threats occurred, but also when the effect of the threat ceased and whether plaintiff acted within a reasonable time after the coercive effect of the threat ended [ *V.C. v. Los Angeles Unified School Dist. (2006) 139 CA4th 499, 517, 43 CR3d 103* (plaintiff failed to bring claim diligently after effect of coercion ended)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsEquitable Estoppel



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1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.43

**4.43 Defendant May Waive Bar of Statute of Limitations.**

**4.43[1] By Agreement.**

**4.43[1][a] Limitation Period May Be Extended.** Parties to a cause of action may agree to forego the statute of limitations for a certain period. The agreement is considered an estoppel against the pleading of the bar of the statute of limitations [ *Kemper v. Industrial Accident Comm'n* (1918) 177 C 618, 620, 171 P 426 ; *FNB Mortgage Corp. v. Pacific Gen. Group* (1999) 76 CA4th 1116, 90 CR2d 841 ]. The agreement may give plaintiff the right to sue at his or her convenience and whenever desired [ *Atlas Fin. Corp. v. Kenny* (1945) 68 CA2d 504, 514-517, 157 P2d 401 ]. The agreement may waive forever defendant's right to plead the bar of the statute in certain cases [ *Brownrigg v. DeFrees* (1925) 196 C 534, 546, 238 P 714 ].

**Exception:**

CCP § 360.5 provides that no waiver executed prior to the expiration of the statute limitations may be effective for a period exceeding four years from the date of expiration of the limitation period, and no waiver executed after the expiration of the period may be effective for a period exceeding four years from the date thereof. However, any such waiver may be renewed for a period not exceeding four years from the expiration of the preceding waiver. Such waivers may be made successively [CCP § 360.5; *Carlton Browne & Co. v. Superior Court* (1989) 210 CA3d 35, 40-46, 258 CR 118 ].



**Strategic Point--Plaintiff or Cross-Plaintiff:**

Often, a tolling agreement is a useful means of preserving a claim that would be undesirable to assert because it would be inconsistent with a claim that is the subject of pending litigation. Although permitted, alternative and inconsistent pleading is often undesirable from a tactical standpoint. For example, a policyholder may sue an insurer claiming that the policy provides coverage and enter a tolling agreement against its insurance broker for a potential claim if the court determines that the insurance policy did not provide coverage.

Frequently, tolling and standstill agreements are also helpful means of allowing the parties to attempt to

negotiate a settlement while preserving the status quo. They allow the parties to preserve prospective claims or defenses without waiver caused by the mere passage of time.

#### **Cross References:**

Discussion of extension of limitation period by agreement, see 4.32[2].

Form alleging extension of limitation period by agreement, see 4.63.

**4.43[1][b] Writing Is Required When Defense Is Barred.** A written instrument is required when a party's waiver is designed to bar the defense of the statute of limitations. The writing must be signed by the person obligated [CCP § 360.5] or by the authorized agent of the person obligated [ *Carlton Browne & Co. v. Superior Court* (1989) 210 CA3d 35, 46, 258 CR 118 ].

**4.43[1][c] Waiver Binds Persons in Privity.** An agreement to extend the limitation period binds the parties to the agreement but has no effect on other potential parties with whom no privity exists [ *FNB Mortgage Corp. v. Pacific Gen. Group* (1999) 76 CA4th 1116, 1121, 1129-1131, 1135-1136, 90 CR2d 841 ].

#### **Exception:**

A non-party to the agreement, such as a third-party beneficiary, must take the contract as he or she finds it in order to benefit under it [see *Sanders v. American Cas. Co.* (1969) 269 CA2d 306, 308-310, 74 CR 634 ; *Marina Tenants Assn. v. Deauville Marina Dev. Co.* (1986) 181 CA3d 122, 132, 226 CR 321 ].

#### **4.43[2] By Conduct.**

**4.43[2][a] Defendant May Waive Bar by Being Silent.** Under some circumstances, defendant's silence may create an equitable estoppel that would deprive him or her of the right to plead the bar of the statute of limitations [ *Atlas Fin. Corp. v. Kenny* (1945) 68 CA2d 504, 517, 157 P2d 401 ].

**4.43[2][b] Defendant May Waive Bar by Acting Inconsistently With Claim of Bar.** A defendant who acted inconsistently with a claim of bar of a statute of limitations before plaintiff filed suit may be considered to have waived his or her right to plead the statute as a defense [ *Lerner v. Los Angeles Bd. of Educ.* (1963) 59 C2d 382, 396, 29 CR 657, 380 P2d 97 ; *Isaacson v. Oakland* (1968) 263 CA2d 414, 419, 69 CR 379 ].

#### **4.43[3] By Failure to Plead.**

**4.43[3][a] Statute of Limitations Defense Must Be Raised in Trial Court.** The defense of the statute of limitations is typically waived by failure to plead, or to adequately plead, the defense [see *Hall v. Chamberlain* (1948) 31 C2d 673, 679-680, 192 P2d 759 ; *O'Neil v. Spillane* (1975) 45 CA3d 147, 156, 119 CR 245 ] in the trial court [ *Trabuco Highlands Cmty. Ass'n v. Head* (2002) 96 CA4th 1183, 1192, 117 CR2d 842 ; *Stalberg v. Western Title Ins. Co.* (1991) 230 CA3d 1223, 1232, 282 CR 43 ].

**4.43[3][b] Plaintiff's Delay Is Immaterial.** Once plaintiff files suit, defendant waives the defense of the statute of limitations if he or she does not timely raise the bar, no matter how long plaintiff delayed [ *Hambrech & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1548, 46 CR2d 33 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsWaivers



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### 4.44 Plaintiff's Amended Complaint May Relate Back.

**4.44[1] Relation Back Occurs If Test Is Met.** Plaintiff's amended complaint may relate back to the filing of the original complaint and avoid the bar of the statute of limitations if the following conditions are met [ *Norgart v. Upjohn Co.* (1999) 21 C4th 383, 409, 87 CR2d 453, 981 P2d 79 ; *Edwards v. Superior Court* (2001) 93 CA4th 172, 180, 112 CR2d 838 ]:

- Both pleadings must rest on the same general set of facts.
- Both pleadings must involve the same injury.
- Both pleadings must refer to the same instrumentality.

#### ► Cross References:

Discussion of amended complaints in general, see Ch. 34, Amended and Supplemental Pleadings; and California Forms of Pleading and Practice, Ch. 21, Amended and Supplemental Pleadings (Matthew Bender).

### 4.44[2] Changing or Adding Information Is Permitted.

**4.44[2][a] Legal Theory May Be Changed If Parties Stay the Same.** An amended complaint that merely changes the legal theory of the original complaint is allowable, even if additional incidental facts are alleged, provided the parties remain the same [ *Grudt v. City of Los Angeles* (1970) 2 C3d 575, 584, 86 CR 465, 468 P2d 825 ].

An amended complaint does not relate back if a new plaintiff joins a suit brought before the statute of limitations has run against the original plaintiff and seeks to enforce an independent right [ *Quiroz v. Seventh Ave. Center* (2006) 140 CA4th 1256, 1278-1279, 45 CR3d 222 ; *Parker v. Superior Court* (1985) 175 CA3d 1082, 1088-1091, 223 CR 292 ].

**4.44[2][b] Facts May Be Added.** An amended complaint that merely adds matters as a means of completing the original cause of action relates back to the time of the commencement of the actions even if the amendment is made after the limitation period has expired, as long as the amendment does not state a new cause of action [ *Stockwell v.*



*McAlvay* (1937) 10 C2d 368, 375, 74 P2d 504 ]. An allegation in the amended complaint may merely add an incidental fact reasonably inferential from the facts alleged in the original complaint [see *Grudt v. City of Los Angeles* (1970) 2 C3d 575, 584, 86 CR 465, 468 P2d 825 ; *Barnes v. Wilson* (1974) 40 CA3d 199, 205, 114 CR 839 ].

**4.44[2][c] Damages May Be Added.** An amended complaint alleging special damages not mentioned in the original complaint may relate back to the original complaint, as long as the special damages are the result of the injury alleged in the original complaint [ *Walton v. Guinn* (1986) 187 CA3d 1354, 1362, 232 CR 451 ].

**4.44[2][d] Caption or Prayer May Be Changed.** An amended complaint that merely changes the caption or relief prayed for has no effect on whether the complaint was originally filed within the limitation period, as long as it does not state a new cause of action or bring in new parties [ *Kent v. San Francisco Sav. Union* (1900) 130 C 401, 406, 62 P 620 ].

**4.44[2][e] New Plaintiff May Be Substituted Based on Technical Defect.** Courts generally allow leave to substitute a new plaintiff based on a technical defect in plaintiff's status, such as an honest mistake in the naming of the party [ *Cloud v. Northrop Grumman Corp.* (1998) 67 CA4th 995, 1000, 1004-1008, 1011, 79 CR2d 544 ]. However, courts will not allow an amendment that interjects a new party into the litigation for the first time under the guise of a misnomer [ *Meller & Snyder v. R & T Props., Inc.* (1998) 62 CA4th 1303, 1313, 73 CR2d 740 ; *Kerr-McGee Chem. Corp. v. Superior Court* (1984) 160 CA3d 594, 598-605, 206 CR 654 ].

To determine whether an amendment to change plaintiff's name relates back to avoid the bar of the statute of limitations, a court will look at whether the nature of the action is substantially changed [ *Cloud v. Northrop Grumman Corp.* (1998) 67 CA4th 995, 1000, 1006-1008, 1011, 79 CR2d 544 ].

**4.44[2][f] Defendant's True Name May Be Added.** A party sued by fictitious name under CCP § 474 and later brought into the proceeding by an amendment substituting his or her true name for the fictitious name is considered a party to the proceeding from its commencement for the purpose of the statute of limitations [ *Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 C2d 596, 600, 15 CR 817, 364 P2d 681 ; *Woo v. Superior Court* (1999) 75 CA4th 169, 176, 89 CR2d 20 ]. CCP § 474 should be liberally construed [ *Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 C2d 596, 602-603 ; *Barnes v. Wilson* (1974) 40 CA3d 199, 203, 114 CR 839 ].

An amended pleading may rest on a different legal theory and state a different cause of action, even against a defendant not named in the original complaint, and still relate back to the time the original complaint was filed if plaintiff seeks recovery for the same accident and the same injuries [see *Olson v. Volkswagen of Am.* (1988) 201 CA3d 1437, 1442-1443, 247 CR 719 ]. The new defendant needs no previously established relationship with the original defendant in order that the amended complaint relate back to the original complaint [see *Barnes v. Wilson* (1974) 40 CA3d 199, 202-205, 114 CR 839 ].



#### **Warning--Plaintiff:**

Plaintiff's ignorance of the identity of the fictitiously named defendant at the time the complaint is filed must be real and not feigned [CCP § 474].

**4.44[3] Variance of Proof May Be Cured.** As long as plaintiff does not change the cause of action, an amendment to cure a variance between allegations and proof has no effect on whether the action was originally filed within the limitation period. Such an amendment relates back to the time when the complaint was originally filed [see *Smullen v. Phillips* (1891) 92 C 408, 411, 28 P 442 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Civil ProcedurePleading & PracticePleadingsAmended PleadingsRelation Back



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### **4.45 Plaintiff's Supplemental Complaint May Relate Back.**

**4.45[1] Supplemental Claims Must Relate to Those in Original Complaint.** Whether a supplemental complaint may encompass the entire period following commencement of suit depends on the nature of the claims raised in the supplemental pleading. The statute of limitations will not be applied if the claims are related to those alleged in the initial complaint or rely on conduct or events that are the same as those involved in the original action. [ *Bendix Corp. v. City of Los Angeles* (1984) 150 CA3d 921, 926, 198 CR 370 ].

#### **Cross References:**

Discussion of supplemental complaints in general, see Ch. 34, Amended and Supplemental Pleadings; and  
California Forms of Pleading and Practice, Ch. 21, Amended and Supplemental Pleadings (Matthew Bender).

**4.45[2] Original Pleading Must Have Given Notice That Wrongful Conduct Was Continuing.** If the original pleading gave notice that the alleged wrongful conduct was of a continuing nature, supplemental pleadings addressed to the same conduct will relate back to the date of the original pleading [ *Bendix Corp. v. City of Los Angeles* (1984) 150 CA3d 921, 926, 198 CR 370 ; see *Ocean Servs. Corp. v. Ventura Port Dist.* (1993) 15 CA4th 1762, 1778, 19 CR2d 750 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Pleading & Practice Pleadings Supplemental Pleadings



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1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.46

### 4.46 Certain Procedures Should Be Considered.

**4.46[1] Reversed Judgment.** If an action is commenced within the applicable limitation period and a judgment for plaintiff is reversed on appeal on grounds other than the merits, plaintiff may commence a new action within one year after the reversal [CCP § 355]. CCP § 355 does not apply if judgment for plaintiff is reversed on appeal and the cause is remanded for a new trial [see *Watterson v. Owens River Canal Co.* (1922) 190 C 88, 95, 210 P 625 ].



#### Cross Reference:

Form supporting motion, see *California Points and Authorities*, § 143.43 (Matthew Bender).

**4.46[2] Dismissal.** The protection of CCP § 355 should extend to a plaintiff who was not allowed to proceed to trial on the merits because of a trial court's error [ *Bollinger v. National Fire Ins. Co.* (1944) 25 C2d 399, 409-410, 411, 154 P2d 399 ]. However, if the court properly declares an involuntary dismissal because of plaintiff's lack of prosecution, the failure to secure a trial on the merits could be seen as plaintiff's own failure. In such a case, a new action is barred if the limitation period has expired before the action is again commenced [see *Tannhauser v. Adams* (1947) 31 C2d 169, 177-178, 187 P2d 716 ; *Stuckman v. Woodhull* (1959) 170 CA2d 424, 426-427, 338 P2d 934 ].

**4.46[3] Summary Judgment.** Although resolution of the statute-of-limitations issue is normally a question of fact, summary judgment is proper if there are uncontradicted facts that are susceptible of only one legitimate inference [ *San Diego Unified School Dist. v. County of San Diego* (2009) 170 CA4th 288, 300, 87 CR3d 796 ; *Romano v. Rockwell Int'l, Inc.* (1996) 14 C4th 479, 487, 59 CR2d 20, 926 P2d 1114 ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsExtension & Revival



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**4.47 Mistake by Court Clerk May Provide Relief From Bar.**

Representations made by a court clerk may be construed as an extrinsic mistake giving rise to equitable relief and may therefore preclude application of a statute of limitations [see *Mirvis v. Crowder* (1995) 32 CA4th 1684, 1686-1688, 38 CR2d 644 ].

**Exception:**

A motion under CCP § 473(b) for relief based on mistake, inadvertence, surprise, or excusable neglect is not available to provide relief from an error that results in the running of the statute of limitations [see *Life Sav. Bank v. Wilhelm* (2000) 84 CA4th 174, 177, 100 CR2d 657 ; *Carlson v. Department of Fish & Game* (1998) 68 CA4th 1268, 1279, 80 CR2d 601 ].

**➡ Cross Reference:**

Discussion of relief from judgments and orders under CCP § 473(b) and related equitable relief, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 29.10 *et seq.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTime Limitations



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Chapter 4 Limitation of Actions

VIII. OBTAINING RELIEF FROM BAR OF STATUTE OF LIMITATIONS

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.48*

#### **4.48 Barred Debt May Be Revived.**

A written acknowledgment of or a promise to pay a debt after an action on the debt has become barred by a statute of limitations can revive the debt [ *Western Coal & Mining Co. v. Jones* (1946) 27 C2d 819, 822, 167 P2d 719 ; see *Buescher v. Lastar* (1976) 61 CA3d 73, 132 CR 124 ].



#### **Cross Reference:**

Forms alleging revival of barred debt, see *California Forms of Pleading and Practice*, § 345.85 (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsExtension & Revival



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Chapter 4 Limitation of Actions  
IX. RAISING AND OPPOSING LACHES

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.49*

**4.49 CHECKLIST: Raising and Opposing Laches.**

**4.49[1] Defendant's Checklist.**

- ☐ Determine whether to raise the issue of laches.
  - ☐ Grounds are:
    - ☐ Plaintiff inexcusably and unreasonably delayed commencement of action, and
    - ☐ Defendant was prejudiced by plaintiff's delay.
  - ☐ Consider probability of success:
    - ☐ If plaintiff's delay was minimal, likelihood of success is lower.
    - ☐ If plaintiff's delay was lengthy, likelihood of success is higher.
    - ☐ Delay caused by defendant may estop defendant from relying on laches.
    - ☐ Compare any applicable statute of limitations.

**Discussion:**

See 4.53 -4.55

- ☐ Determine how to raise the issue of laches:

- ☐ If facts constituting laches appear on face of complaint, raise by demurrer.
- ☐ Otherwise, raise by affirmative defense in answer.

☐ If plaintiff contests issue and summary adjudication does not settle issue, consider seeking trial of defense before other issues.

**Authority:**

*CCP §§ 430.10, 597*

**Discussion:**

See 4.52

**Form:**

See 4.68

**4.49[2] Plaintiff's Checklist.**

- ☐ Evaluate the defense.
  - ☐ Grounds are:
    - ☐ Plaintiff inexcusably and unreasonably delayed commencement of action, and
    - ☐ Defendant was prejudiced by plaintiff's delay.
- ☐ Facts to gather and consider are:
  - ☐ Whether plaintiff had good reason for delay.
  - ☐ Whether defendant caused or contributed to delay.
  - ☐ What prejudice defendant experienced as a result of any delay caused by plaintiff.

**Discussion:**

See 4.54, 4.55

- ☐ Respond by:
  - ☐ Opposing demurrer.
  - ☐ Resisting affirmative defense as appropriate by:

☐ Demurrer to answer.

☐ Summary judgment or summary adjudication of the defense.

☐ If summary adjudication does not settle issue, consider seeking trial of defense before trial of other issues.

**Authority:**  
*CCP § 597*





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IX. RAISING AND OPPOSING LACHES

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.50*

**4.50 Laches Provides an Equitable Defense.**

Laches is a defense to a suit in equity whereby plaintiff may be refused equitable relief because of his or her delay in bringing suit, even though the suit is commenced within the statutory limitation period [ *Trail v. Firth* (1921) 186 C 68, 69, 198 P 1033 ; see *In re Marriage of Dancy* (2000) 82 CA4th 1142, 1150, 98 CR2d 775 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General  
Overview Governments Legislation Statutes of Limitations Pleading & Proof



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IX. RAISING AND OPPOSING LACHES

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**4.51 Plaintiff Must Assert Equitable Rights.**

The defense of laches is a creature of equity and not a defense at law [ *Barkley v. City of Blue Lake* (1996) 47 CA4th 309, 315, 54 CR2d 679 ]. In an action at law or an action in which plaintiff asserts no equitable rights, the statute of limitations rather than the doctrine of laches governs [see *Brownrigg v. DeFrees* (1925) 196 C 534, 539, 238 P 714 ; see *United States Capital Corp. v. Nickelberry* (1981) 120 CA3d 864, 867-868, 174 CR 814 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
GovernmentsLegislationStatutes of LimitationsTime Limitations



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#### 4.52 Laches Should Be Pleaded.

The general rule is that defendant cannot raise laches when neither defendant nor the complaint pleaded facts showing laches [see *Hamud v. Hawthorne* (1959) 52 C2d 78, 84, 338 P2d 387 ; *Reed v. Norman* (1953) 41 C2d 17, 21-22, 256 P2d 930 ].

#### Exception:

In extraordinary cases, a court may deny equitable relief on its own initiative if the evidence shows that plaintiff is guilty of laches [ *Akley v. Bassett* (1922) 189 C 625, 648, 209 P 576 ].

Laches may be raised by demurrer if the facts constituting laches are apparent on the face of the complaint [see *Neet v. Holmes* (1944) 25 C2d 447, 460 ]. Where the facts constituting laches are not so apparent, laches should be raised in an answer [ *Sangiolo v. Sangiolo* (1978) 87 CA3d 511, 514, 151 CR 27 ].

When the answer or demurrer pleads that the action is barred by the statute of limitations or sets up any other defense not involving the merits of plaintiff's cause of action, but constituting a bar or ground of abatement, the court may, either upon its own motion or upon the motion of any party, proceed to the trial of the special defense or defenses before the trial of any other issue in the case [CCP § 597].



#### Cross References:

Form alleging bar of laches, see 4.68.

Discussion of case management, see Ch. 23, Case Management.



#### Strategic Point--Defendant:

Plead laches so that the court need not determine whether the case is extraordinary.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral  
OverviewGovernmentsLegislationStatutes of LimitationsPleading & Proof



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IX. RAISING AND OPPOSING LACHES

1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.53

**4.53 Court Considers Two Factors When Laches Is Asserted.**

**4.53[1] Unreasonable Delay Plus Plaintiff's Acquiescence or Material Change to Defendant's Prejudice.** The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to defendant resulting from the delay [ *Johnson v. City of Loma Linda* (2000) 24 C4th 61, 68, 99 CR2d 316 ; *Bono v. Clark* (2002) 103 CA4th 1409, 1418, 128 CR2d 31 ].

There is no rule specifying the lapse of time that will justify the application of the doctrine of laches. The court will look to the extent of prejudice to defendant and to the reasonableness of plaintiff's actions. The greater the prejudice, the more timely the relief should have been sought [see *In re Marriage of Modnick* (1983) 33 C3d 897, 909, 191 CR 629, 663 P2d 187 ].

**4.53[2] Statute of Limitations.** In determining whether plaintiff's delay in bringing suit has been reasonable, the court may use a statute of limitations as a guide [see *Vai v. Bank of Am.* (1961) 56 C2d 329, 343, 15 CR 71, 364 P2d 247 ; *Robert F. Kennedy Med. Ctr. v. Department of Health Servs.* (1998) 61 CA4th 1357, 1362, 72 CR2d 180 ]. The court will look to the strength of analogy between the statute of limitations and the circumstances under which laches is sought [ *Fountain Valley Reg'l Hosp. & Med. Ctr. v. Bonta* (1999) 75 CA4th 316, 323-325, 89 CR2d 139 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General  
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#### 4.54 Burden of Proof May Shift.

**4.54[1] Proponent of Laches Has Burden When Demonstrating Unreasonable Delay and Prejudice by Evidence.** The proponent of laches has the burden of proof on the issue, which may be shown by the evidence in the case [ *Fountain Valley Reg'l Hosp. & Med. Ctr. v. Bonta* (1999) 75 CA4th 316, 323-325, 89 CR2d 139 ].

**Exception:**

If the delay exceeds an analogous statute of limitations, a presumption may shift the burden of proof [ *Fountain Valley Reg'l Hosp. & Med. Ctr. v. Bonta* (1999) 75 CA4th 316, 323-325, 89 CR2d 139 ].

**4.54[2] Opponent of Laches Has Burden If Delay Exceeds Analogous Limitation Period.** The element of prejudice may be presumed if a statute of limitations exists that is sufficiently analogous to the facts of the case and the limitation period has been exceeded by plaintiff. In such case, the limitation period is borrowed from the analogous statute [see *City of Oakland v. Public Employees' Ret. Sys.* (2002) 95 CA4th 29, 51, 115 CR2d 151 ], and the burden of proof shifts from the party asserting laches to the party opposing laches. The party opposing the application of laches must [ *Fountain Valley Reg'l Hosp. & Med. Ctr. v. Bonta* (1999) 75 CA4th 316, 323-325, 89 CR2d 139 ]:

- Show that the delay was excusable.
- Rebut the presumption of prejudice.

When no statute of limitations sufficiently analogous to the facts of the case exists, prejudice is not presumed and defendant must affirmatively demonstrate prejudice to sustain his or her burden of proof [see *Miller v. Eisenhower Med. Ctr.* (1980) 27 C3d 614, 624, 166 CR 826, 614 P2d 258 ; *Board of Admin. v. Wilson* (1997) 52 CA4th 1109, 1126-1127, 61 CR2d 207 ].

 **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral Overview



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**4.55 Defendant May Be Estopped From Pleading Laches.**

**4.55[1] Defendant's Conduct Cannot Contribute to Delay.** A defendant whose conduct contributed to plaintiff's delay in bringing suit may be estopped from asserting the defense of laches [see *Austin v. Hallmark Oil Co. (1943) 21 C2d 718, 735, 134 P2d 777* ].

**4.55[2] Defendant Cannot Have Unclean Hands.** Because laches is an equitable remedy, defendant must come into court with clean hands [ *In re Marriage of Dancy (2000) 82 CA4th 1142, 1157, 98 CR2d 775* ; see *Piscioneri v. City of Ontario (2002) 95 CA4th 1037, 1053, 116 CR2d 38* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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X. FORMS

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.56*

**4.56 Allegation--Suspension of Period of Limitation--Absence of Defendant From State.**

1. On \_\_\_\_\_ [date cause of action accrued], Defendant \_\_\_\_\_ [name, unless there is only one defendant] was outside the State of California and had no designated agent within the state for service of process.

[EITHER]

2. On \_\_\_\_\_ [date], Defendant \_\_\_\_\_ [returned to the state or had a designated agent within the state for service of process, namely \_\_\_\_\_ (name)]. For the entire period between \_\_\_\_\_ [date], and \_\_\_\_\_ [date], Defendant was outside the state and had no designated agent within the state for service of process.

[OR]

2. As of \_\_\_\_\_ [date complaint filed], Defendant remains outside the state and has no designated agent within the state for service of process. For the entire period between \_\_\_\_\_ [date], and \_\_\_\_\_ [date], Defendant has been outside the state and has had no designated agent within the state for service of process.

NOTES.

**Authority:**

*CCP § 351*

**Grounds for Suspending Limitation Period Based on Defendant's Absence from State:**

*See 4.18*

**Drafting Allegation for Complaint:**

See 4.16

**Related Form of Memorandum:**

See *California Points and Authorities*, § 143.34 (Matthew Bender)



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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.57*

**4.57 Allegation--Suspension of Period of Limitation--Departure of Defendant From State.**

1. On \_\_\_\_\_ [*date after cause of action accrued but before period of limitation expired*], Defendant \_\_\_\_\_ [*name*] departed from the state of California.

[*EITHER*]

2. On \_\_\_\_\_ [*date*], Defendant \_\_\_\_\_ [*returned to the state or had a designated agent within the state for service of process, namely \_\_\_\_\_ (name)*]. For the entire period between those dates Defendant was outside the state and had no designated agent for service of process within the state.

[*OR*]

2. As of \_\_\_\_\_ [*date complaint filed*], Defendant has not returned to the state. For the entire period between those dates Defendant has been outside the state and has had no designated agent for service of process within the state.

NOTES.

**Authority:**  
*CCP § 351*

**Grounds for Suspending Limitation Period Based on Defendant's Departure from State:**  
*See 4.18*

**Drafting Allegation for Complaint:**  
*See 4.16*



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X. FORMS

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.58*

**4.58 Allegation--Suspension of Period of Limitation--Disability Because of Minority.**

1. On \_\_\_\_\_ [*date cause of action accrued*], Plaintiff was \_\_\_\_\_ years old. Plaintiff became 18 years old on \_\_\_\_\_ [*date*].

NOTES.

**Authority:**

*CCP § 352(a)*

**Grounds for Suspending Limitation Period Based on Plaintiff's Minority:**

*See 4.21[3]*

**Drafting Allegation for Complaint:**

*See 4.16*

**Related Form of Memorandum:**

*See California Points and Authorities, § 143.34 (Matthew Bender)*



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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.59*

**4.59 Allegation--Suspension of Period of Limitation--Death of Person Entitled to Sue.**

1. On \_\_\_\_\_ [date after cause of action accrued and before period of limitation expired],  
\_\_\_\_\_ [name of decedent] died.

NOTES.

**Authority:**

*CCP § 366.1*

**Grounds for Suspending Limitation Period Based on Plaintiff's Death:**

*See 4.20*

**Drafting Allegation for Complaint:**

*See 4.16*

**Related Form of Memorandum:**

*See California Points and Authorities, § 143.40 (Matthew Bender)*



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**4.60 Allegation--Suspension of Period of Limitation--Reversal of Judgment for Plaintiff on Appeal.**

1. On \_\_\_\_\_ [date], Plaintiff filed a complaint against Defendant \_\_\_\_\_ [name, unless there is only one defendant] in \_\_\_\_\_ [this court or name and location of court] for the same relief sought in the present action. Judgment in that former action was entered for Plaintiff, but that judgment was reversed on appeal other than on the merits by \_\_\_\_\_ [name of appellate court and, if not California court, jurisdiction]. \_\_\_\_\_ [Date of "reversal" as referred to in CCP § 355; if California appellate court, e.g., On January 1, 2000, the remittitur was entered by the clerk of the Court of Appeal of California, Sixth Appellate District in the register].

NOTES.

**Authority:**

*CCP § 355*

**Grounds for Suspending Limitation Period Based on Reversed Judgment:**

*See 4.46[1]*

**Related Form of Memorandum:**

*See California Points and Authorities, § 143.43 (Matthew Bender)*



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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.61*

#### **4.61 Allegation--Defendant Estopped to Raise Defense of Bar.**

1. On \_\_\_\_\_ [date], Defendant \_\_\_\_\_ [name, unless there is only one defendant] \_\_\_\_\_ [specify acts establishing estoppel, e.g., informed Plaintiff that Defendant would settle Plaintiff's claim and pay Plaintiff the sum of \$ 100, which was acceptable to Plaintiff. Defendant promised to pay that sum forthwith. However, no payment was made as of \_\_\_\_\_ (date of last day of period of limitation). Between those dates, Plaintiff refrained from filing a complaint because of Defendant's continued assurances that payment was forthcoming. Plaintiff relied on Defendant's promises to pay because of Defendant's relationship to plaintiff as plaintiff's \_\_\_\_\_ (specify, e.g., employer). On \_\_\_\_\_ (date), Plaintiff discovered that Defendant never had any intention of paying any settlement sum but, instead, intended to induce Plaintiff not to commence an action and, thus, to prevent Plaintiff not to commence an action within the period of limitation].

NOTES.

#### **Grounds for Alleging Equitable Estoppel:**

See 4.42

#### **Drafting Allegation for Complaint:**

See 4.40

#### **Related Form of Memorandum:**

See *California Points and Authorities*, § 143.50 (Matthew Bender)



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Chapter 4 Limitation of Actions  
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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.62*

**4.62 Allegation--Statute of Limitations Equitably Tolled.**

1. On \_\_\_\_\_ [date], Plaintiff \_\_\_\_\_ [set out plaintiff's action(s) that gave defendant notice of plaintiff's claim within the applicable statute of limitations, e.g., filed an action in federal court naming as Defendant John Doe, the defendant in this action. A copy of that complaint is attached as Exhibit A and made a part hereof].
2. \_\_\_\_\_ [Both claims arose from the Defendant's conduct as alleged herein or allege other circumstances demonstrating lack of prejudice to defendant in gathering evidence necessary for defense].
3. \_\_\_\_\_ [Set out facts showing good faith and reasonableness of plaintiff's acts in filing second claim, e.g., Plaintiff filed this action immediately after his/her federal court action was dismissed without prejudice to any state cause of action due to lack of federal court jurisdiction, as he/she had maintained to Defendant would be done were the federal action dismissed].

NOTES.

**Grounds for Alleging Equitable Tolling:**

See 4.22

**Drafting Allegation for Complaint:**

See 4.16

**Related Form of Memorandum:**

See *California Points and Authorities*, § 143.46 (Matthew Bender)





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X. FORMS

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.63*

**4.63 Allegation--Extension of Period of Limitation by Agreement.**

1. The agreement referred to above contains a clause \_\_\_\_\_ [as follows: \_\_\_\_\_] (*set out verbatim clause extending period of limitation*) or as set out in the copy of the agreement which is attached as Exhibit A and made a part hereof].

NOTES.

**Authority:**

*CCP § 360.5*

**Grounds for Alleging Extension of Limitation Period by Agreement:**

*See 4.32[2], 4.43[1][a]*

**Drafting Allegation for Complaint:**

*See 4.31, 4.40*



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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.64*

**4.64 Demurrer to Complaint--Bar of Statute of Limitations.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                          |
|---------------|---|--------------------------|
| _____ [name], | ) |                          |
| Plaintiff     | ) | NO. _____                |
| vs.           | ) | DEMURRER TO COMPLAINT    |
| _____ [name], | ) | [LIMITED CIVIL CASE]     |
| Defendant.    | ) | Date: _____              |
|               | ) | Time: _____              |
|               | ) | Location: _____          |
|               | ) | Judge: _____             |
|               | ) | Date Action Filed: _____ |
|               | ) | Trial Date: _____        |
|               | ) |                          |

Defendant demurs to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that the action is barred by the statute of limitations

\_\_\_\_\_, [add, if desired, either namely, Section \_\_\_\_\_, subdivision \_\_\_\_\_, of the Code of Civil Procedure or in that \_\_\_\_\_ (state facts showing bar)].

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant \_\_\_\_\_ [name]

NOTES.

**Authority:**

*CCP § 430.10*

**Grounds for Demurrer Based on Statute of Limitations:**

*See 4.38*

**Drafting Demurrer:**

*See 4.38*

**Related Forms of Memoranda:**

*See California Points and Authorities, §§ 143.20-143.28 (Matthew Bender)*



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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.65*

**4.65 Affirmative Defense--Action Barred by Statute of Limitations--General Form.**

[\_\_\_\_\_ (if more than one, specify number, e.g., FIRST)] SEPARATE AND AFFIRMATIVE  
DEFENSE [if more than one cause of action alleged, state TO THE \_\_\_\_\_ (specify, e.g., SECOND)  
CAUSE OF ACTION]

1. The action is barred \_\_\_\_\_ [by the provisions of \_\_\_\_\_ (insert, if appropriate:  
subdivision \_\_\_\_\_ of) Section \_\_\_\_\_ of the Code of Civil Procedure or in that  
\_\_\_\_\_ (state facts establishing bar)].

NOTES.

**Authority:**

*CCP § 431.30(b)(2)*

**Grounds for Affirmative Defense Based on Statute of Limitations:**

*See 4.38*

**Drafting Affirmative Defense for Answer:**

*See 4.38*



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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.66*

**4.66 Affirmative Defense--Defendant Foreign Corporation Having Designated Agent Within State for Service of Process.**

[\_\_\_\_\_ (if more than one, specify number, e.g., FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [if more than one cause of action alleged, state TO THE \_\_\_\_\_ (specify, e.g., SECOND) CAUSE OF ACTION]

1. On \_\_\_\_\_ [date], pursuant to Corp Code § 6403, Defendant filed with the Secretary of State of California an instrument in writing, under the seal of and duly executed by Defendant, designating \_\_\_\_\_ [name] as a person on whom personal service of summons on any action brought against Defendant might be made, and containing the other information required by that section. Also filed on that date along with that instrument was the written consent of \_\_\_\_\_ [name] to serve as designated agent for the service of process. From that date until the filing of the complaint those written instruments remained on file, unchanged and in full force and effect. Therefore, the action is barred by the provisions of Section \_\_\_\_\_, subdivision \_\_\_\_\_, of the Code of Civil Procedure.

NOTES.

**Authority:**

*CCP § 431.30(b)(2); Corp Code §§ 2105, 2110, 2111*



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*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.67*

**4.67 Affirmative Defense--Shortening of Period of Limitation by Private Agreement.**

[\_\_\_\_\_ (if more than one, specify number, e.g., FIRST)] SEPARATE AND AFFIRMATIVE  
DEFENSE [if more than one cause of action alleged, state TO THE \_\_\_\_\_ (specify, e.g., SECOND)  
CAUSE OF ACTION]

1. The agreement described in the complaint contains the following provision: \_\_\_\_\_ [set out clause  
shortening period of limitation]. Therefore, the action is barred by the terms of the agreement.

NOTES.

**Authority:**

*CCP § 431.30(b)(2)*

**Grounds for Affirmative Defense Based on Shortened Limitation Period:**

*See 4.33[3]*

**Drafting Affirmative Defense for Answer:**

*See 4.31*



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Chapter 4 Limitation of Actions  
X. FORMS

*1-4 MB Practice Guide: CA Pretrial Civil Procedure 4.68*

**4.68 Ground of Demurrer--Bar of Laches Against Complaint for Equitable Relief.**

Defendant demurs to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that Plaintiff has inexcusably and unreasonably delayed the commencement of the action, to the prejudice of Defendant in that \_\_\_\_\_[specify how delay caused prejudice].

NOTES.

**Authority:**

*CCP § 430.10*

**Grounds for Demurrer Based on Laches:**

*See 4.49, 4.50, 4.53*

**Drafting Demurrer:**

*See 4.49*



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## Chapter 5 Parties

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.syn*

### **§ 5.syn Synopsis to Chapter 5: Parties**

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5.02 Objective and Strategy.

5.02[1] Capacity and Standing.

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Chapter 5 Parties  
I. STRATEGY

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.01*

**5.01 Scope.**

This chapter covers:

- Standing, including issues of real parties in interest [see 5.03 -5.07].
- Capacity, including issues regarding corporations, limited liability companies, unincorporated associations, partnerships, decedents and their representatives, businesses with fictitious names, minors, and incompetents [see 5.08 -5.17].
- Guardians ad litem [see 5.18 -5.29; Forms: see 5.56, 5.57].
- Joinder of parties, both compulsory and permissive [see 5.30-5.33; Forms: see 5.53 -5.55].
- Objecting to nonjoinder and misjoinder [see 5.34 -5.38].
- Fictitiously named defendants [see 5.39 -5.43].
- Interpleading parties [see 5.44 -5.52; Forms: see 5.58 -5.63].

Discussion/checklists/forms relating to personal jurisdiction, see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction.

Discussion/checklists/forms relating to service of summons, see Ch. 8, Service of Summons.



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Chapter 5 Parties  
I. STRATEGY

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.02*

## 5.02 Objective and Strategy.

**5.02[1] Capacity and Standing.** The objective of the standing requirement is to avoid wasting judicial resources in litigation by parties who lack a real interest in the subject matter. Standing refers to a right to relief on the cause of action alleged. By comparison, capacity to sue is the right to come into court [ *Parker v. Bowron* (1953) 40 C2d 344, 351, 254 P2d 6 ]. A defendant uses challenges to both standing and capacity to collaterally attack plaintiff's action. Plaintiffs can challenge capacity if a defendant is an entity that lacks the capacity to defend an action [see, e.g., *R&T Code* § 23301 (failure of corporation to pay taxes)].

Lack of capacity is a plea in abatement, which is waived if not raised by demurrer or answer [see *Color-Vue, Inc. v. Abrams* (1996) 44 CA4th 1599, 1604, 52 CR2d 443 (plea waived)].

Because it goes to the right to relief, lack of standing may be raised at any point in the proceeding [ *Common Cause of Cal. v. Board of Supervisors* (1989) 49 C3d 432, 438, 261 CR 574, 777 P2d 610 (plaintiffs had standing); *Parker v. Bowron* (1953) 40 C2d 344, 351, 254 P2d 6 (distinguishing capacity and standing; plaintiffs lacked standing)].

### Investigating Potential Parties Using Online Resources:

The attorney's investigation of existing and potential adversaries (and perhaps allied parties) who may have been parties in other litigation can be greatly facilitated by information and leads from online resources. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Find Cases > CA Federal & State Cases, Combined.



Sample Search: To learn about other litigation in which the person or entity was a party, try a NAME segment search of the case law: *name(name of company)*.

- Legal tab > States Legal--U.S. > California > Public Records > Find Filings > Civil & Criminal Court Filings and Regulatory Actions > Combined State Civil and Criminal Filings.

☐ Sample Search: A NAME segment search in docket materials may provide information about other litigation in which the person or entity was a party: *name(name of company)*.

■ Legal tab > States Legal--U.S. > California > Public Records > Find Filings > Civil & Criminal Court Filings and Regulatory Actions > Combined State Civil and Criminal Filings.

☐ Sample Search: To discover possible criminal activity of a party, try a search in criminal case filings: *first name /3 last name*.

■ Legal tab > States Legal--U.S. > California > Public Records > Find Filings > Civil & Criminal Court Filings and Regulatory Actions > Judgments and Liens.

☐ Sample Search: A NAME segment search in the Judgment and Lien Filings also provides information about past litigation: *name(name of company)*.

■ Legal tab > States Legal--U.S. > California > Public Records > Find Filings > Civil & Criminal Court Filings and Regulatory Actions > Bankruptcy Filings.

☐ Sample Search: A single search of bankruptcy filings, real property records, person and business locator sources, liens, federal district court docket information, secretary of state, and license information may be done in this search format: *name(name of company)* or *first name /3 last name*.

#### Cross Reference:

For tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**5.02[2] Guardian Ad Litem.** Minors and incompetents, who lack capacity on their own, usually must be represented by a guardian ad litem, unless there is a guardian or conservator of the estate [CCP § 372(a)].

Attorneys, whether representing or opposing a minor or incompetent, want to ensure that the minor or incompetent is properly before the court. The former seeks to provide proper representation; the latter seeks a judgment that will not be disaffirmed or vacated [ *Keane v. Penha* (1946) 76 CA2d 693, 696, 173 P2d 835 (minor); *Briggs v. Briggs* (1958) 160 CA2d 312, 318-319, 325 P2d 219 (incompetent)].

**5.02[3] Joinder.** Compulsory joinder ensures that complete relief can be accorded among the parties and creates finality in the issues [see CCP § 389(a)].

Permissive joinder fosters judicial efficiency by creating a single forum for litigating related issues or diverse issues among the same parties [see CCP § 428.20].

**5.02[4] Fictitiously Named Parties.** California law entitles plaintiffs to bring suit against unknown parties for two purposes:

- To bring suit on the action before limitations bars suit, even though plaintiff may not know the defendant(s)' name(s) [ *Smeltzley v. Nicholson Mfg. Co.* (1977) 18 C3d 932, 939 n1, 136 CR 269, 559 P2d 624 ; *Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 C2d 596, 602, 15 CR 817, 364 P2d

681 ]; or

- To bring a newly discovered cause of action against a known defendant [ *General Motors Corp. v. Superior Court* (1996) 48 CA4th 580, 593-594, 55 CR2d 871 ].

**5.02[5] Interpleader.** Interpleader is a procedure to allow a stakeholder who has no claim to disputed property or who is potentially exposed to multiple claims, to escape litigation and to leave the competing claimants to sort out their rights and obligations.

A stakeholder who has been made a defendant in an action may seek an order substituting a nonparty in the stakeholder's stead, or may bring the party in by cross-complaint [*CCP* § 386(a), (b)].

A stakeholder who may be subject to multiple liabilities for a single obligation may also bring an action against all the claimants to compel them to litigate their claims [*CCP* § 386(a), (b)].

Also, if the stakeholder is one of the defendants, but is subject only to the claim of withholding of a stated amount of money, the stakeholder may seek an order discharging the liability on depositing the amount with the court [*CCP* § 386.5].

**Detailed Discussion/Forms:**

See California Points and Authorities, Ch. 123, Interpleader; Ch. 168, Parties (Matthew Bender).



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Chapter 5 Parties  
II. ESTABLISHING AND ATTACKING STANDING

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.03*

**5.03 CHECKLIST: Establishing and Attacking Standing.**

**5.03[1] Plaintiff's Checklist for Verifying Standing and Curing Standing Problems.**

- ☐ Establish that plaintiff has standing to bring suit, either as a real party in interest or by law.
- ☐ Establish that party is real party in interest by ascertaining that:
  - ☐ Party has actual and substantial interest in subject matter of action, and
  - ☐ Would benefit or be injured by a judgment in the action.

**Authority:**  
*CCP § 367*

**Discussion:**  
*See 5.04, 5.05*

- ☐ If party is acting in representative capacity, determine whether party is expressly authorized to sue, as, *e.g.*:
  - ☐ Assignee of properly assigned claim (can sue in own name).

**Authority:**  
*CC § 953-954*

**Discussion:**  
*See 5.05[1]*

- ☐ Subrogee (can sue in own name).

**Authority:**

*CCP § 368.5*

**Discussion:**

*See 5.05[2]*

- ☐ Class action representative.

**Authority:**

*Anthony v. General Motors Corp. (1973) 33 CA3d 699, 704, 109 CR 254*

**Discussion:**

*See 5.05[3]*

- ☐ Unincorporated association on members' behalf.

**Authority:**

*New York State Club Ass'n v. City of New York (1988) 487 US 1, 9, 108 S Ct 2225, 101 L Ed2d 1*

**Discussion:**

*See 5.05[4]*

- ☐ Limited partner (derivative suit).

- ☐ Shareholder (derivative suit).

**Authority:**

*Corp Code § 800(b); Wallner v. Parry Prof'l Bldg. (1994) 22 CA4th 1446, 1449-1450, 27 CR2d 834*

**Discussion:**

*See 5.05[5]*

- ☐ Personal representative of decedent's estate.

- ☐ Trustee of express trust.

- ☐ Party to third-party beneficiary contract.

**Authority:**

*CCP § 369(a)*

**Discussion:**

*See 5.05[6] -[8]*

- ☐ Community association managing common-interest development.

**Authority:**

*CC § 1368.3*

**Discussion:**

See 5.05[9]

- ☐ Receiver (note: can sue in own name as receiver).

**Authority:**

*CCP § 568*

**Discussion:**

See 5.05[10]

- ☐ If standing is lacking, amend complaint to substitute real party in interest.

**Exception:**

Substitution not allowed if it introduces new cause of action.

**Authority:**

*Klopstock v. Superior Court (1941) 17 C2d 13, 19-22, 108 P2d 906*

**Discussion:**

See 5.07

**5.03[2] Defendant's Checklist for Attacking Standing.**

- ☐ Object on becoming aware of plaintiff's lack of standing by:

☐ General demurrer to complaint.

☐ Objecting to evidence at trial.

- ☐ Raise issue of lack of standing at any time, even on appeal.

**Authority:**

*Sacramento County Fire Prot. Dist. v. Sacramento County Assessment Appeals Bd. II (1999) 75 CA4th 327, 331, 89 CR2d 215 ; Klopstock v. Superior Court (1941) 17 C2d 13, 18, 108 P2d 906*

**Exception:**

Reversal of a judgment for lack of standing is justified and required only if the error was of prejudicial nature resulting in miscarriage of justice.

**Authority:**

*In re Eugene W. (1972) 29 CA3d 623, 631, 105 CR 736*

**Discussion:**



See 5.06



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Chapter 5 Parties

## II. ESTABLISHING AND ATTACKING STANDING

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.04*

### 5.04 Establish Standing by Identifying Real Party in Interest.

Apart from certain statutory exceptions (discussed in 5.05), every action must be prosecuted in the name of the real party in interest [CCP § 367]. The real party in interest is the person possessing the right sued upon by reason of the substantive law [ *Ventura County Ry. Co. v. Hadley Auto Transport* (1995) 38 CA4th 878, 880, 45 CR2d 362 ].

If the cause of action alleged shows an invasion of plaintiff's legally protected interests under the substantive law, nothing further is required. But if the cause of action exists in favor of some person other than the plaintiff, the plaintiff is not the real party in interest; although having the legal capacity to sue, he or she lacks standing to sue on the cause of action pleaded [ *Pillsbury v. Karmgard* (1994) 22 CA4th 743, 756, 27 CR2d 491 (trust beneficiary lacked standing to bring action for malicious prosecution of litigation third party had brought against trust); *Torres v. City of Yorba Linda* (1993) 13 CA4th 1035, 1041, 1043, 17 CR2d 400 (nonresidents lacked standing to challenge city's redevelopment plan)].

A person lacks standing if he or she, or those whom he or she properly represents, lacks a real interest in the ultimate adjudication because neither past nor future injury is of sufficient magnitude reasonably to assure that all relevant facts and issues will be adequately presented [ *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 CA4th 42, 55, 58 CR3d 225 ; *Schmier v. Supreme Court* (2000) 78 CA4th 703, 707-708, 93 CR2d 580 ]. The injury required for standing need not be actualized; a party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct [ *Davis v. FEC* (2008) -- US --, 128 S Ct 2759, 2769, 171 L Ed2d 737, 748 ]. Standing goes to the issue of the right of a person to sue for relief on the cause of action alleged [ *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd. II* (1999) 75 CA4th 327, 331, 89 CR2d 215 ; *American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 CA4th 551, 559, 49 CR2d 686 ].

In general, a plaintiff may assert a claim on behalf of a third party only when [ *Singleton v. Wulff* (1976) 428 U.S. 106, 113-116, 96 S. Ct. 2868, 49 L. Ed. 2d 826 ; *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal. App. 4th 1284, 1297, 50 Cal. Rptr. 3d 27 ]:

- Plaintiff has suffered an injury in fact;
- Plaintiff has a relationship with the third party so that it can, and will, effectively present the third party's rights; **and**

- Obstacles exist preventing the third party from asserting his or her own rights.



#### Strategic Point:

Some statutes, such as the Unfair Competition Law [see *B & P Code* § 17204] and the Labor Code Private Attorneys General Act of 2004 [see *Lab Code* § 2699], allow representational actions only in the form of class actions [ *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Ct.* (2009) 46 C4th 993, 1002, 1005, 95 CR3d 605, 209 P3d 937 ; *Arias v. Superior Ct.* (2009) 46 C4th 969, 980, 95 C R3d 588, 209 P3d 923 (representative actions not permitted under the Law)]. But under the Labor Code Private Attorneys General Act of 2004, that restriction does not apply to a suit for civil penalties [ *Arias v. Superior Ct.* (2009) 46 C4th 969, 982-987, 95 C R3d 588, 209 P3d 923] .

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJusticiabilityStandingInjury in FactCivil ProcedureJusticiabilityStandingThird Party StandingCivil ProcedurePartiesReal Parties in InterestGeneral Overview



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Chapter 5 Parties

## II. ESTABLISHING AND ATTACKING STANDING

1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.05

### 5.05 Particular Parties Who Have Standing.

**5.05[1] Assignee May Bring Claim in Own Name.** Generally, the assignee of a properly assigned claim may maintain an action on the claim in his or her own name [see CC §§ 953-954]. Even if the assignment is for collection only, the assignee takes legal title to the claim and may sue despite a lack of beneficial interest [ *Harrison v. Adams* (1942) 20 C2d 646, 650, 128 P2d 9 ; *National Reserve Co. v. Metropolitan Trust Co.* (1941) 17 C2d 827, 831, 112 P2d 598 ].

#### Exceptions:

Under the Unfair Competition Law [see B & P Code § 17204] an injured employee's assignment of rights cannot confer standing on an uninjured assignee [ *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Ct.* (2009) 46 C4th 993, 1002, 1005, 95 CR3d 605, 209 P3d 937 (all representational actions under the Law must be brought as class actions)]. Under the Labor Code Private Attorneys General Act of 2004 [see Lab Code § 2699], an aggrieved employee cannot assign a claim for statutory penalties because the employee does not own an assignable interest [ *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Ct.* (2009) 46 C4th 993, 1003, 1005, 95 CR3d 605, 209 P3d 937 (all representational actions under the Act must be brought as class actions)].

A collateral assignee can sue on the claim and recover the entire amount, but must hold any excess for the claim's assignor [ *Ginocchio v. Amador Canal & Mining Co.* (1885) 67 C 493, 496, 8 P 29 ; *Wetmore v. City of San Francisco* (1872) 44 C 294, 302 ].

A partial assignee may not sue individually, but can and should join both the assignor and any other partial assignees [see *Stein v. Cobb* (1940) 38 CA2d 8, 10, 100 P2d 358 ].

#### ➡ Cross Reference:

Discussion and form of complaint on assigned claim, see California Forms of Pleading and Practice, Ch. 60, Assignments (Matthew Bender).

**5.05[2] Subrogee May Bring Claim in Own Name.** A subrogee may sue in his or her own name on a subrogated

claim [see generally CCP § 368.5 (after transfer of interest in action, action may continue in transferor's name or transferee may be substituted)]. An equitable subrogee, similarly, has standing to assert the claim to which it has become subrogated [see *Chang v. Redding Bank of Commerce* (1994) 29 CA4th 673, 678, 35 CR2d 64 ].

#### **Cross Reference:**

Discussion and forms for suing on subrogated claims, see California Forms of Pleading and Practice, Ch. 536, Subrogation (Matthew Bender).

**5.05[3] Class Action Representative Must Be Member of Class and Justify Class Representation.** In a class action, the named class representatives must be members of the class alleged, at least at the time the action is commenced [ *La Sala v. American Sav. & Loan Ass'n* (1971) 5 C3d 864, 872, 97 CR 849, 489 P2d 1113 ].



#### **Warning:**

Including representatives whose claims do not include those reasonably expected to be raised by class members may prevent class certification [ *City of San Jose v. Superior Court* (1974) 12 C3d 447, 457-464 ].

#### **Example:**

The standing requirements of the Unfair Competition Law [see *B & P Code § 17204*] are applicable only to the class representatives and not to all absent class members, but under them, the class representative must show an injury in fact [In *Re Tobacco II Cases* (2009) 46 C4th 298, 323-324, 93 CR3d 559, 207 P3d 20 (requirement of actual injury did not apply to absent class members)].

#### **Cross Reference:**

Discussion and forms, see Ch. 33, Class Actions.

**5.05[4] Association May Sue on Members' Behalf.** An association may sue on behalf of its members if [ *Driving Sch. Ass'n of California v. San Mateo Union High Sch. Dist.* (1992) 11 CA4th 1513, 1517, 14 CR2d 908 (plaintiff had standing as to some, but not all issues)]:

- Its members would otherwise have standing to sue individually;
- The interests it seeks to protect are germane to the organization's purpose; and
- Neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

If an unincorporated association has been injured as an entity, it can sue in a representative capacity seeking prospective relief, such as an injunction or a declaration of rights on behalf of its members [ *Tenants Assn. of Park Santa Anita v. Southers* (1990) 222 CA3d 1293, 1302, 272 CR 361 ]. An association may also sue for some damages incurred by its members, although not for personal injuries that vary from member to member [ *Tenants Assn. of Park Santa Anita v. Southers* (1990) 222 CA3d 1293, 1304, 272 CR 361 ].

#### **Exception:**

Associational standing may be barred by the language of statutes creating statutory causes of action, such as the Unfair Competition Law and the Labor Code Private Attorneys General Act of 2004 [ *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Ct.* (2009) 46 C4th 993, 1005, 95 CR3d 605, 209 P3d 937 ].

The issue of whether the association can fairly and adequately represent its members is for the trial court [ *Tenants*

*Assn. of Park Santa Anita v. Southers* (1990) 222 CA3d 1293, 1300, 1303-1304, 272 CR 361 ].

**Example:**

An organization composed of tenants and past tenants of a mobilehome park, formed to pursue the legal rights of its members in a dispute with the park owners, had standing to sue for damages incurred by its members in seeking to enforce their rights before the city council and for statutory fines for willful violations of the Mobilehome Residency Law. The organization also had standing to seek injunctive relief against further violations and for abatement of nuisance. In these matters, the members of the organization had a community of interest in law and fact. However, because claims for emotional distress were too personal to reasonably constitute a community of interest, the association lacked standing to sue on those causes of action [ *Tenants Assn. of Park Santa Anita v. Southers* (1990) 222 CA3d 1293, 1300, 1303-1304, 272 CR 361 ].

 **Cross Reference:**

Discussion of capacity of unincorporated associations, see 5.13.

**5.05[5] Shareholder or Limited Partner May Bring Derivative Suit.** A shareholder has standing to assert a cause of action of the corporation in a derivative suit [see *Corp Code* § 800(b); see also *Klopstock v. Superior Court* (1941) 17 C2d 13, 16, 108 P2d 906 ; *Patrick v. Alacer Corp.* (2008) 167 CA4th 995, 1003, 84 CR3d 642 ].



**Trap:**

Consider choice of law issues in determining whether standing is automatic or is subject to a prerequisite under applicable foreign law [see, e.g., *Vaughn v. LJ Internat., Inc.* (2009) 174 CA4th 213, 222-229, 94 CR3d 166] .

A limited partner's derivative suit is filed in the name of a limited partner, and the partnership is named as a defendant. Although a limited partner is named as the plaintiff, it is the limited partnership that derives the benefits of the action [ *Wallner v. Parry Prof'l Bldg.* (1994) 22 CA4th 1446, 1449-1450, 27 CR2d 834 ].

Standing is conferred not only on a record owner, but also on an equitable or beneficial shareholder or unregistered owner of shares [ *Patrick v. Alacer Corp.* (2008) 167 CA4th 995, 1011, 84 CR3d 642 (demurrer denied due to potential claim of community property in stock)].



**Trap:**

A plaintiff in a shareholder's derivative suit generally must maintain continuous stock ownership throughout the pendency of the litigation [ *Grosset v. Wenaas* (2008) 42 C4th 1100, 1119, 72 CR3d 129, 175 P3d 1184] . The only exception to this rule applies when equitable considerations warrant an exception to the continuous ownership requirement because the stockholder was wrongfully deprived of standing [ *Haro v. Ibarra* (2009) 180 CA4th 823, 836-837, 103 CR3d 340] .

 **Cross References:**

Discussion, see California Forms of Pleading and Practice, Ch. 168, Corporations: Derivative Actions; Ch. 404, Partnerships: Actions between Limited Partners and Partnerships, § 404.40 (Matthew Bender).

**5.05[6] Personal Representative of Decedent's Estate.** A personal representative of a decedent's estate, as defined in *Prob Code* § 58, has standing to sue without joining the heirs, devisees, or other parties who are represented [CCP § 369(a)(1)]. "Personal representative" means executor, administrator, administrator with the will annexed, special administrator, successor personal representative, or a person who performs substantially the same function under the law of another jurisdiction governing the person's status [*Prob Code* § 58].

 **Cross Reference:**

Discussion of capacity regarding decedents and estates, see 5.08.

**5.05[7] Trustee or Beneficiary of Express Trust.** A trustee of an express trust has standing to sue without joining any other parties to the trust, such as settlors or beneficiaries [*CCP* § 369(a)(2); see *Wolf v. Mitchell, Silberberg & Knupp* (1999) 76 CA4th 1030, 1036, 90 CR2d 792 ]. Conversely, a trust beneficiary cannot sue in the name of the trust; however, a trust beneficiary can bring a proceeding against a trustee for breach of trust. Moreover, a trust beneficiary can pursue a cause of action against a third party who actively participates in or knowingly benefits from a trustee's breach of trust [ *Estate of Bowles* (2008) 169 CA4th 684, 691-692, 87 CR3d 122 ].

**5.05[8] Party to Third-Party Beneficiary Contract.** A person with whom, or in whose name, a contract is made for the benefit of another has standing to sue without the need to join any other party, except for a person on whom a power of sale has been conferred under a deed of trust or mortgage [*CCP* § 369(a)(3)]. However, a trustee holding a power of sale under a deed of trust or mortgage may, sue to exercise a trustee's powers and duties under *CC* §§ 2920-2967 [*CCP* § 369(b)].

**5.05[9] Community Association Managing Common-Interest Development.** An association established to manage a common-interest development has standing to sue in its own name as the realparty in interest in matters pertaining to the enforcement of the governing documents and some types of property damage [*CC* § 1368.3; see *Windham at Carmel Mountain Ranch Ass'n v. Superior Court* (2003) 109 CA4th 1162, 1168-1177, 135 CR2d 834 (applying former statute, *CCP* § 383)].

**5.05[10] Receiver Has Standing and May Sue in Own Name As Receiver.** A receiver may bring and defend actions in his or her own name as receiver [*CCP* § 568].

**5.05[11] Employer Has Standing to Sue on Behalf of Employees.** An employer may have grounds for bringing suit on behalf of its employees under the test set out by the U.S. Supreme Court for third-party suits generally [ *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal. App. 4th 1284, 1298, 50 Cal. Rptr. 3d 27 (citing *Singleton v. Wulff* (1976) 428 U.S. 106, 113-116, 96 S. Ct. 2868, 49 L. Ed. 2d 826 ); see 5.04].

**Example:**

An employer had standing to sue for its employees for injunctive relief against organization and its members who perpetrated acts of harassment, infliction of emotional distress, intrusion, and trespass against its employees, where [ *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal. App. 4th 1284, 1298, 50 Cal. Rptr. 3d 27 ]:

- The employer also suffered harm at the hands of the perpetrators.
- The strong relationship of employer-employee was the reason the employees were targeted, so that their interests coincided.
- The fear of being named plaintiff on a lawsuit against the perpetrators was sufficient obstacle to suits by individual employees.

**5.05[12] Corporation May Qualify for Standing as Citizen.** A corporation attempting to vindicate or enforce an important public right may enjoy citizen standing if it meets certain criteria. These criteria include [ *Regency Outdoor Advertising, Inc. v. City of West Hollywood* (2007) 153 CA4th 825, 833, 63 CR3d 287 (financial self-interest of for-profit corporation masquerading as environmentalism does not qualify)]:

- A continuing interest or commitment to the subject matter.
- By a corporation consisting of or representing individuals beneficially interested in the action.
- Who would find it difficult or impossible to act on their own.
- Citizen standing for the corporation does not conflict with other public policies.

**5.05[13] Former Owner May Sue on Accrued Property Damage Action.** One whose property has been wrongfully damaged by another does not lose the right to recover for that damage merely because he or she has sold the property at the time of suit [ *Jasmine Networks, Inc. v. Superior Court* (2009) 180 CA4th 980, 993, 103 CR3d 426] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesTrusteesCivil ProcedurePartiesReal Parties in InterestAssigneesCivil ProcedurePartiesReal Parties in InterestSubrogeesCivil ProcedureClass ActionsDerivative ActionsGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of RepresentationCivil ProcedureClass ActionsUnincorporated AssociationsGeneral OverviewCivil ProcedureClass ActionsUnincorporated AssociationsAdequate Representation Requirement





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Chapter 5 Parties

## II. ESTABLISHING AND ATTACKING STANDING

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### 5.06 Objecting to Lack of Standing.

**5.06[1] Lack of Standing May Be Raised at Any Time.** Lack of standing can be raised at any time in the proceeding, even for first time on appeal [ *Associated Builders & Contractors Inc. v. San Francisco Airports Comm'n* (1999) 21 C4th 352, 361-363, 87 CR2d 654, 981 P2d 499 (plaintiff had standing on some issues, but not others)]. However, reversal of a judgment on this ground is justified and required only if the error complained of was prejudicial and resulted in a miscarriage of justice [ *County of Riverside v. Loma Linda Univ.* (1981) 118 CA3d 300, 319-320, 173 CR 371 (affirming judgment)].

**5.06[2] Raise Objection by General Demurrer.** Plaintiff's lack of standing is normally raised by a general demurrer alleging that the complaint fails to state facts sufficient to constitute a cause of action. Standing to sue goes to the existence of the cause of action [ *Sacramento County Fire Prot. Dist. v. Sacramento County Assessment Appeals Bd II* (1999) 75 CA4th 327, 331, 89 CR2d 215 ; see CCP § 430.10(e)]. If the complaint shows that plaintiff is not a real party in interest and therefore lacks standing to sue, the general demurrer will be sustained [ *Friendly Village Cmty. Ass'n v. Silva & Hill Constr. Co.* (1973) 31 CA3d 220, 224, 107 CR 123 ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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Chapter 5 Parties

## II. ESTABLISHING AND ATTACKING STANDING

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.07*

### **5.07 Real Party in Interest May Be Substituted Freely.**

If the plaintiff can amend the complaint to substitute the real party in interest, the substitution should be allowed so long as the amended complaint does not introduce a wholly different cause of action [see *Klopstock v. Superior Court* (1941) 17 C2d 13, 19-20, 108 P2d 906 ; *Haley v. Dow Lewis Motors, Inc.* (1999) 72 CA4th 497, 507, 85 CR2d 352 ]. Amendments to substitute a plaintiff with standing for one who is not a real party in interest are freely allowed [ *Foundation for Taxpayer & Consumer Rights v. Nextel Communications, Inc.* (2006) 143 Cal. App. 4th 131, 136, 48 Cal. Rptr. 3d 836 ; *Charpentier v. Los Angeles Rams Football Co.* (1999) 75 CA4th 301, 308, 89 CR2d 115 ]. But if the complaint cannot be amended to state a cause of action in the plaintiff, a demurrer will be properly sustained without leave to amend [see *Friendly Village Cmty. Ass'n, Inc. v. Silva & Hill Constr. Co.* (1973) 31 CA3d 220, 225-226, 107 CR 123 .

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesSubstitutionsGeneral Overview



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Chapter 5 Parties  
III. ESTABLISHING AND ATTACKING CAPACITY

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.08*

**5.08 CHECKLIST: Establishing and Attacking Capacity.**

**5.08[1] Plaintiff's Checklist for Capacity of Minor or Incompetent Client or Decedent's Cause of Action.**

☐ In case of minor, determine whether minor has capacity to sue because:

☐ Minor is emancipated.

☐ Minor is suing for injunctive relief/protective orders relating to harassment or workplace or family violence.

**Authority:**

*CCP § 372(b)(1); Fam Code § 7002*

**Discussion:**

*See 5.10*

☐ If minor lacks capacity, determine whether minor has guardian of estate or if guardian ad litem has been appointed.

☐ If not, seek appointment of a guardian ad litem.

**Authority:**

*CCP §§ 372(a), 373(a); Fam Code § 6601*

**Discussion:**

*See 5.10[2]*

- ☐ In case of incompetent person, determine whether conservator of estate or guardian ad litem has been appointed.
- ☐ If not, seek appointment of guardian ad litem.

**Authority:***CCP § 372(a)***Discussion:***See 5.11[2]* **Cross Reference:**

Discussion of guardians ad litem, see 5.18 -5.29.

- ☐ In case of decedent's cause of action that survives death, bring in name of:
  - ☐ Decedent's personal representative, or
  - ☐ If no representative has been appointed, successor in interest.

**Authority:***CCP § 377.30***Discussion:***See 5.12***5.08[2] Plaintiff's Checklist for Capacity of Business-Entity Client.**

- ☐ In case of partnership, confirm assumed, generally known, or partnership name.
- ☐ If suing in assumed name, confirm compliance with fictitious business name statute.

**Authority:***B&P Code § 17918; CCP § 369.5(a); Corp Code § 16307(a)***Discussion:***See 5.13* **Cross Reference:**

Discussion of fictitious business names, see 5.17.

- ☐ In case of corporation, confirm corporate status from Secretary of State.
  - ☐ If corporation has been suspended or forfeited;
    - ☐ Have client cure problem, *e.g.*, by paying overdue franchise taxes, filing reports.

☐ If suit already filed and opposing party has objected to corporation's status, seek continuance to cure problem.

☐ Obtain certificate of revivor showing revival of corporate status to present to court.

**Authority:**

See *R&T Code* § 23305; *Timberline Inc. v. Jaisinghani* (1997) 54 CA4th 1361, 1366, 64 CR2d 4

**Discussion:**

See 5.14[5] (domestic corporations), 5.14[6][b] (foreign corporations), 5.14[7] (cure)

☐ If corporation has been dissolved, confirm, action is within scope of winding up affairs.

**Authority:**

*Corp Code* § 2010

**Discussion:**

See 5.14[3]

☐ If corporation has been merged, confirm that action is brought in name of surviving corporation.

**Authority:**

*J.C. Peacock, Inc. v. Hasko* (1960) 184 CA2d 142, 150, 7 CR 490

**Discussion:**

See 5.14[4]

☐ In case of limited liability company, determine status from Secretary of State.

☐ Cure any defaults.

**Authority:**

*Corp Code* § 17456(a), (b)

**Discussion:**

See 5.15

☐ Confirm compliance with filing and publishing requirements for fictitious business name if:

☐ Client company operates under fictitious business name, or

☐ Client is assignee of business with fictitious business name.

**Authority:**

*B&P Code* §§ 17910, 17915, 17917, 17918

**Discussion:**

See 5.17

**5.08[3] Plaintiff's Checklist for Capacity of Unincorporated Association Client.**

- ☐ Bring action in name association has assumed or by which it is known.

**Authority:***CCP § 369.5(a)***Discussion:**

See 5.16

**5.08[4] Plaintiff's Checklist for Opposing Party's Capacity.**

- ☐ If unemancipated minor defendant does not have guardian of estate, and if minor, relative, or friend fails to apply for appointment of guardian ad litem, apply to have guardian ad litem appointed.

**Authority:***CCP §§ 372(a), 373(b); Fam Code § 7002***Discussion:**

See 5.10[2], [3]

- ☐ If incompetent defendant does not have conservator of estate and no relative or friend applies for appointment of guardian ad litem, apply to have guardian ad litem appointed.

**Authority:***CCP § 372(a), 373(c)***Discussion:**

See 5.11[2]

- ☐ If cause of action is against deceased person, name:

- ☐ Personal representative, or
- ☐ If none, decedent's successor in interest.

**Authority:***CCP § 377.40***Discussion:**

See 5.12

- ☐ Sue partnership in name it has assumed, name by which it is known, or partnership name.

- ☐ Sue partnership, not just partners, to obtain jurisdiction over the partnership.

☐ Join partners in suit against partnership to obtain true joint and several liability against them for partnership obligations.

**Authority:**

*CCP § 369.5(a); Corp Code §§ 16306, 16307(a)-(c)*

**Discussion:**

See 5.13

☐ Sue corporation in its own name.

☐ If corporation attempts to appear in court in propria persona, other than in small claims court, move to strike its pleadings.

**Authority:**

*CCP § 116.540(a); Himmel v. City Council (1959) 169 CA2d 97, 100, 336 P2d 996*

**Discussion:**

See 5.14[8]

☐ Sue association in:

- ☐ Its own name;
- ☐ Name that it has assumed; or
- ☐ Name by which it is known.

☐ To obtain judgment for personal liability of association member, demonstrate more involvement with action than mere membership.

**Authority:**

*CCP § 369.5(a); Orser v. George (1967) 252 CA2d 660, 670-671, 60 CR 708*

**Discussion:**

See 5.16

**5.08[5] Defendant's Checklist for Client's Capacity.****5.08[5][a] Minor.**

☐ Determine whether minor is emancipated.

**Authority:**

*Fam Code § 7002*

**Discussion:**

See 5.10[3]

☐ If minor not emancipated, determine whether minor is represented by a guardian or guardian ad litem:

- ☐ If so, defend suit in name of guardian or guardian ad litem.
- ☐ If none appointed, seek appointment of guardian ad litem.

**Authority:**

CCP § 372(a); Fam Code § 6601

**Discussion:**

See 5.10[2]

**5.08[5][b] Incompetent.**

☐ If incompetent is not represented by conservator or guardian ad litem, have guardian ad litem appointed.

**Authority:**

CCP § 372(a)

**Discussion:**

See 5.11[2]

**5.08[5][c] Decedent.**

☐ If suit is based on cause of action against a decedent that survived his or her death, verify action is asserted against decedent's personal representative or successor in interest, not against decedent's estate.

**Authority:**

CCP § 377.40

**Discussion:**

See 5.12[2], [3]

**5.08[6] Defendant's Checklist for Opposing Party's Capacity.****5.08[6][a] Challenging Plaintiff's Lack of Capacity Generally.**

☐ If lack of capacity is apparent on face of complaint, file special demurrer.

**Exception:**

Special demurrers are not allowed in limited civil actions.

☐ If extrinsic evidence is needed (*e.g.*, a corporation whose rights are suspended or forfeited for



nonpayment of taxes), file affirmative defense.

**Authority:**

*CCP §§ 92(c), 430.10(b); Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 C3d 988, 994, 803 P2d 370*

**Discussion:**

See 5.09

**5.08[6][b] Minor.**

☐ Unless minor plaintiff is emancipated or is filing suit under one of the grounds set out in 5.10[4], assert affirmative defense against a complaint presented by a minor who is without representation by a guardian or guardian ad litem.

**Authority:**

See *CCP §§ 372(a), 430.10(b); Fam Code § 6500*

**Discussion:**

See 5.10[2]

**5.08[6][c] Corporation or Limited Liability Company.**

☐ Confirm plaintiff's corporate or limited liability company status with Secretary of State.

☐ If plaintiff's rights have been suspended or forfeited, answer with affirmative defense.

**Authority:**

See *Maryland Cas. Co. v. Superior Court (1928) 91 CA 356, 361, 267 P 169* (loss of corporate status treated as plea in abatement properly addressed by affirmative defense)

**Discussion:**

See 5.14[6][e], 5.15[1]

**5.08[6][d] Business With Fictitious Business Name.**

☐ If no fictitious business name statement has been filed, file special demurrer alleging lack of capacity to sue.

**Authority:**

*B&P Code §§ 17915, 17917, 17918*

**Discussion:**

See 5.17



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Chapter 5 Parties

### III. ESTABLISHING AND ATTACKING CAPACITY

1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.09

#### 5.09 Capacity Generally.

**5.09[1] All Parties Must Have Capacity to Appear in Court.** The capacity to sue is the right to come into court [ *Parker v. Bowron* (1953) 40 C2d 344, 351, 254 P2d 6 (incapacity deprives party of right to come into court); *see also Klopstock v. Superior Court* (1941) 17 C2d 13, 18-19, 108 P2d 906 ]. All persons have the capacity to sue unless that capacity is limited by statute. This includes:

- Corporations [see *Corp Code* § 207 (granting corporations powers of a natural person in carrying out business activities)];
- Unincorporated associations [see *CCP* § 369.5(a)];
- Partnerships [see *CCP* § 369.5(a)]; and
- Public entities [see *Gov Code* § 945].

A civil action must target some existing entity against whom the court's judgment will operate [ *Johnston v. Long* (1947), 30 C2d 54, 61, 181 P2d 645 ; *Tanner v. Estate of Best* (1940) 40 CA2d 442, 445, 104 P2d 1084 (estate is not an entity that can be sued)].

#### ► Investigating Potential Parties Using Online Resources:

The attorney's investigation of existing and potential professional adversaries (and perhaps allied parties) who may present professional licensing issues can be greatly facilitated by information and leads from online resources. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Find Licenses > Professional Licenses.



Sample Search: To learn information pertaining to professional licensing, try a

search in this format: *first name /3 last name*.

#### **Cross References:**

Discussion of corporations as parties, see 5.14; limited liability companies, see 5.15; partnerships, see 5.13; unincorporated associations, see 5.16; decedents' representatives, see 5.12; minors, see 5.10; incompetent persons, see 5.11; businesses with fictitious names, see 5.17.

#### **5.09[2] Objecting to Lack of Capacity.**

**5.09[2][a] Lack of Capacity Appearing on Face of Complaint May Be Raised by Demurrer.** When plaintiff's lack of capacity to sue appears on the face of the complaint or from a matter of which the court must or may take judicial notice, the objection is properly made by a special demurrer [CCP §§ 430.10(b), 430.30(a); *but see Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 C3d 988, 994, 803 P2d 370 (non-obvious lack of capacity requires affirmative defense, not demurrer)]. Special demurrers, however, are not allowed in limited civil cases [CCP § 92(c)].

#### **Cross Reference:**

See Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

**5.09[2][b] Lack of Capacity Shown by Extrinsic Evidence Must Be Raised by Affirmative Defense.** When the lack of capacity is not obvious and must be shown by extrinsic evidence, the proper response is by affirmative defense [ *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 C3d 988, 994, 803 P2d 370 ].

**5.09[2][c] Lack of Capacity Must Be Pleaded Specifically.** Lack of capacity is a technical objection and must be pleaded specifically. Thus, an affirmative defense or demurrer that contains a general assertion that plaintiff has not stated a cause of action is insufficient [ *Color-Vue, Inc. v. Abrams* (1996) 44 CA4th 1599, 1604, 52 CR2d 443 ].

An allegation that plaintiff has no legal capacity to sue is only a legal conclusion. Without specifying the cause of the incapacity, it tenders no issue of fact and the objection is waived [ *Ontario State Bank v. Tibbits* (1889) 80 C 68, 69-70, 22 P 66 ; *Kadota Fig Ass'n v. Case-Swayne Co.* (1946) 73 CA2d 796, 805, 167 P2d 518 ]. Because the objection is a ground for abatement and dilatory, it is strictly construed and may not be pleaded on information and belief [ *Home Owners' Loan Corp. v. Gordon* (1939) 36 CA2d 189, 192, 97 P2d 845 ].

**5.09[2][d] Failure to Object Constitutes Waiver.** Failure to object by demurrer or answer constitutes a waiver of the objection [CCP § 430.80(a)]. The objection cannot, therefore, be urged for the first time on appeal [ *Parker v. Bowron* (1953) 40 C2d 344, 351, 254 P2d 6 ; *American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 CA4th 551, 559, 49 CR2d 686 ]. Once a plea in abatement is waived, a court will rarely be justified in permitting the defense later. However, in the unusual circumstance of a plaintiff corporation announcing it does not intend to pay its delinquent taxes, trial court may properly relieve a defendant of a waiver and permit assertion of the object that the corporation lacks the capacity to sue [ *Color-Vue, Inc. v. Abrams* (1996) 44 CA4th 1599, 1604 n.5, 1605, 52 CR2d 443 ].

**5.09[2][e] Objection for Lack of Capacity Does Not Test Existence of Cause of Action.** An objection on the ground of lack of capacity questions only whether plaintiff is free from legal disabilities, such as infancy or insanity, and is improper to test whether the plaintiff has stated a cause of action [ *Klopstock v. Superior Court* (1941) 17 C2d 13, 17-18, 108 P2d 906 ]. If plaintiff states a cause of action but the cause of action is in someone else, the proper objection is failure to state a cause of action and not lack of capacity to sue [see CCP § 430.10(e); *Klopstock v. Superior Court* (1941) 17 C2d 13, 19-20, 108 P2d 906 ]. This distinction is significant because an objection on the ground of lack of capacity is waived if not seasonably raised. But an objection on the ground of failure to state a cause of action is not waived [see CCP § 430.80(a)] and may even be raised for the first time on appeal [see *Parker v. Bowron* (1953) 40 C2d 344, 351, 254 P2d 6 ; *Klopstock v. Superior Court* (1941) 17 C2d 13, 19-20, 108 P2d 906 ].

**5.09[3] Cure Lack of Capacity by Substitution.** If the court sustains an objection for lack of capacity to sue, it may grant leave to substitute a party or entity having the requisite capacity [ *Lazar v. Estate of Lazar* (1962) 208 CA2d 554, 559, 25 CR 354 ; see *American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 CA4th 551, 559, 49 CR2d 686 (dicta)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral Overview



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.10*

## 5.10 Minors.

**5.10[1] Minor Defined.** A minor is a person under 18 years of age [*Fam Code* § 6500].

**5.10[2] Minors Generally Must Have Guardian or Guardian Ad Litem to Conduct Court Action.** A minor may enforce his or her legal rights by civil action or other legal proceedings in the same manner as an adult, except that a guardian must conduct the action or proceeding [*Fam Code* § 6601]. A party who is a minor must appear either by a guardian of his or her estate under *Prob Code* §§ 1440-1444 or by a guardian ad litem appointed by the court in which the action is pending or by a judge of that court [*CCP* § 372(a)].

### ➤ Cross References:

Discussion of guardians ad litem, see 5.18 -5.29.

Discussion and forms regarding minors, see California Forms of Pleading and Practice, Ch. 364, Minors: Claims and Property of Minors; Ch. 365, Minors: Contract Actions (Matthew Bender).

### Exception--Emancipated Minor Has Capacity:

A minor will be considered to be over the age of majority for all purposes, including the capacity to sue and be sued in his or her own name if he or she [*Fam Code* § 7002]:

- Has entered into a valid marriage;
- Is on active duty with the armed forces; or
- Has received a declaration of emancipation.

### Exception--Certain Family Law Matters:

A minor who is the parent in proceedings for child custody, visitation, or support in which the child is a parent and whom the court has not found to not understand the proceedings does not need a guardian ad litem for those proceedings [*see CCP* § 372(c)].

**5.10[3] Minor May Appear Unaccompanied to Obtain Certain Injunctions or Protective Orders.** A minor 12 years of age or older may appear without a guardian, counsel, or guardian ad litem to request or oppose a request for the following [CCP § 372(b)(1)]:

- An injunction or temporary restraining order, or both, to prohibit harassment [see CCP §§ 527.6, 527.10];
- An injunction or temporary restraining order or both against violence or a credible threat of violence in the workplace [see CCP §§ 527.8, 527.10];
- A protective order pursuant to the Domestic Violence Prevention Act [see Fam Code § 6200 et seq.]; or
- A protective order pursuant to in connection with proceedings under the Uniform Parentage Act [see Fam Code §§ 7710 and 7720].

The court may appoint a guardian ad litem to assist the minor in these matters.

#### **Cross Reference:**

Discussion and forms, see California Forms of Pleading and Practice, Ch. 293, Harassment and Domestic Violence (Matthew Bender).

**5.10[4] Judgment Against Unrepresented Minor Can Be Vacated or Disaffirmed.** A judgment taken against a minor who is not represented by a guardian or guardian ad litem can be disaffirmed and vacated if no innocent purchaser has acquired rights under it [ *Garbutt v. Campbell* (1955) 130 CA2d 167, 168-169, 278 P2d 508 ; *Keane v. Penha* (1946) 76 CA2d 693, 696, 173 P2d 835 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGuardians for Minors



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### III. ESTABLISHING AND ATTACKING CAPACITY

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#### 5.11 Incompetent Persons.

##### 5.11[1] Determining Individual's Incompetence.

**5.11[1][a] Capacity to Make Decision.** A person lacks the capacity to make a decision unless the person has the ability to communicate the decision verbally, or by any other means, and to understand and appreciate, to the extent relevant, all of the following [*Prob Code § 812*]:

- The rights, duties, and responsibilities created by, or affected by the decision;
- The probable consequences for both the decision maker and, if appropriate, the persons affected by the decision; and
- The significant risks, benefits, and reasonable alternatives involved in the decision.

**5.11[1][b] Unsound Mind or Incapacity.** *Prob Code § 811* enumerates pertinent mental functions and requires that a person adjudged incompetent must have a deficit in at least one of these functions [*Prob Code § 811(a)*]:

- Alertness and attention, including, but not limited to, the following:
  - ☐ Level of arousal or consciousness,
  - ☐ Orientation to time, place, person, and situation,
  - ☐ Ability to attend and concentrate.
- Information processing, including, but not limited to, the following:
  - ☐ Short- and long-term memory, including immediate recall,

- ☐ Ability to understand or communicate with others, either verbally or otherwise,
- ☐ Recognition of familiar objects and familiar persons,
- ☐ Ability to understand and appreciate quantities,
- ☐ Ability to reason using abstract concepts,
- ☐ Ability to plan, organize, and carry out actions in one's own rational self-interest,
- ☐ Ability to reason logically.
- Thought processes whose deficits may be demonstrated by the presence of the following:
  - ☐ Severely disorganized thinking,
  - ☐ Hallucinations,
  - ☐ Delusions,
  - ☐ Uncontrollable, repetitive, or intrusive thoughts.
- Ability to modulate mood and affect, with deficits demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

These deficits may be considered--individually or in combination--only if they impair the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question [*Prob Code* § 811(b)].

**5.11[2] Incompetent Must Be Represented by Conservator or Guardian Ad Litem.** An incompetent appearing as a party must be represented by a conservator or guardian ad litem. A guardian ad litem must be appointed for the incompetent if there is no conservator [*CCP* § 372(a)].



**Cross References:**

Discussion of guardians ad litem, see 5.18 -5.29.

Discussion and forms relating to conservatorships, see California Forms of Pleading and Practice, Ch. 281, Guardianship and Conservatorship: Appointment of Conservators (Matthew Bender).

**5.11[3] Judgment Against Incompetent Can Be Vacated or Disaffirmed.** A judgment taken against an insane or incompetent person who is not represented by a guardian or guardian ad litem can be disaffirmed and vacated if no innocent purchaser has acquired rights under it [ *Briggs v. Briggs* (1958) 160 CA2d 312, 318-319, 325 P2d 219 ].



**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesGuardians



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.12*

#### 5.12 Decedents and Decedents' Representatives.

**5.12[1] Personal Representative or Successor in Interest May Bring Decedent's Cause of Action.** A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, subject to *Prob Code* §§ 7000-7001, and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest [*CCP* § 377.30].

#### ► Cross Reference:

Discussion of personal representative's standing, see 5.05[6].

**5.12[2] Cause of Action Against Decedent May Be Asserted Against Personal Representative or Successor in Interest.** Subject to *Prob Code* §§ 9000-9399 governing creditor claims, a surviving cause of action against a decedent may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest [*CCP* § 377.40].

**5.12[3] Decedent's Estate Cannot Be a Party.** An estate is not an entity and cannot be a party to an action. It is neither a natural nor an artificial person. It is merely a name to indicate the sum total of the assets and liabilities of a decedent, or of an incompetent, or of a bankrupt [ *Tanner v. Estate of Best* (1940) 40 CA2d 442, 445, 104 P2d 1084 ].

#### ► Investigating Potential Parties Using Online Resources:

The attorney's investigation of existing and potential adversaries (and perhaps allied parties) who may have been involved in bankruptcy proceedings can be greatly facilitated by information and leads from online resources. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Find Filings > Civil & Criminal Court Filings and Regulatory Actions > Bankruptcy Filings.

○ Sample Search: To discover potentially valuable information about a decedent's (or any other person's) possible previous bankruptcy, try a search in this format: *first name* /3

*last name.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesExecutors



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### III. ESTABLISHING AND ATTACKING CAPACITY

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.13*

#### 5.13 Partnerships.

##### 5.13[1] Partnership's Capacity.

**5.13[1][a] Partnership May Sue or Be Sued in Its Assumed, Generally Known, or Partnership Name.** Any partnership or other unincorporated association, whether or not organized for profit, may sue or be sued in the name which it has assumed or by which it is known [*CCP* § 369.5(a)]. A partnership may sue or be sued in the partnership name [*Corp Code* § 16307(a)].

##### ► Cross Reference:

Forms of allegations, see *California Forms of Pleading and Practice*, Ch. 20, *Allegations Commonly Used*, §§ 20.35 (plaintiff), 20.37 (defendant) (Matthew Bender).

**5.13[1][b] Partnership May Not Sue in Fictitious Name Unless Fictitious Name Statement Is Filed.** A partnership that is transacting business under a fictitious business name may not maintain any action on or on account of any contract made, or transaction had, in the fictitious business name in any state court until a fictitious business name statement has been executed, filed, and published [*B&P Code* § 17918].

##### ► Investigating Potential Parties Using Online Resources:

The attorney's investigation of existing and potential partnership adversaries (and perhaps allied parties) can be greatly facilitated by information and leads from online resources. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Find a Business > Corporation & Partnership Registration by State > Corporation Filings.



Sample Search: To discover potentially valuable information about a limited partnership's status and/or registered agent for service of process, try a NAME segment search in this format: *name(name of business)*.

 **Cross Reference:**

Discussion of parties with fictitious names, see 5.17.

**5.13[2] Liability Issues of Partnership and Partners.**

**5.13[2][a] Must Sue Partnership, Not Just Partners, for Jurisdiction Over Partnership.** To acquire jurisdiction over a partnership, the partnership entity must be designated as a defendant; naming only the individual partners in the complaint is not sufficient [ *Epstein v. Frank* (1981) 125 CA3d 111, 119-120, 177 CR 831 ; *Hildebrand v. Stonecrest Corp.* (1959) 174 CA2d 158, 169, 344 P2d 378 ].

**5.13[2][b] Partner May Be Joined in Suit Against Partnership.** Any member of a partnership (other than a registered limited liability partnership) may be joined as a party in an action against the partnership, and a personal judgment against that partner may be obtained [ *Corp Code* § 16307(b); see *CCP* § 369.5(b) ].

**5.13[2][c] Partner's Liability for Partnership Obligations.** All partners are (as a general rule) jointly and severally liable for partnership obligations [ *Corp Code* § 16306 ]. A judgment against the partnership alone, however, is not a judgment against a partner. [ *Corp Code* § 16307(c) ]. Execution on a judgment solely against the partnership can only be levied against a partner if a writ of execution against the partnership is returned unsatisfied in whole or part, the partnership is a bankrupt debtor, the partner has agreed that the creditor need not exhaust partnership assets first, a court grants permission for such levy after finding that the partnership assets would be clearly insufficient, or if the partner is otherwise liable under contract or law [ *Corp Code* § 16307(d) ].



**Warning:**

Because claims against partnerships may exceed available assets and expose individual partners' assets [see e.g., *Black v. Shearson, Hammill & Co.* (1968) 266 CA 2d 362, 369, 72 CR 157 (punitive damages against partner and partnership proper given partner's malice)], a punitive damages claim against the partnership may create conflicts among the partners. To protect against the risk of individual exposure to the punitive damages claim, partners may require separate representation of each partner's interest.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
General Partnerships  
Management Duties & Liabilities  
Causes of Action  
Partnership Liabilities  
Civil Procedure  
Parties  
Capacity of Parties  
General Overview  
Civil Procedure  
Parties  
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### III. ESTABLISHING AND ATTACKING CAPACITY

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.14*

#### 5.14 Corporations.

**5.14[1] Corporations Generally Have Same Capacity As Natural Persons.** Because a corporation is considered a person and (in most cases) has the powers of a natural person under California law, it has the same capacity to sue and be sued in any court as does a natural person [see *CCP* § 17; *Corp Code* § 207]. A corporation may be sued as otherwise provided for in the Code of Civil Procedure [*Corp Code* § 105].

#### ► Investigating Potential Parties Using Online Resources:

The attorney's investigation of existing and potential corporate adversaries (and perhaps allied parties) can be greatly facilitated by information and leads from online resources. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Find a Business > Corporation & Partnership Registration by State > Corporation Filings.

☐ Sample Search: To discover potentially valuable information about a corporation's financial status, try a NAME segment search in this format: *name(name of corporation)*.

- Legal tab > States Legal--U.S. > California > Public Records > Find Filings > Civil & Criminal Court Filings and Regulatory Actions > Bankruptcy Filings.

☐ Sample Search: To discover potentially valuable information about a corporation's bankruptcy-related background, try a search in this format: *name(name of corporation)*.

#### ► Cross References:

Forms alleging corporate status of parties, see *California Forms of Pleading and Practice*, Ch. 20, *Allegations Commonly Used*, §§ 20.38 (domestic corporation), 20.39 (foreign corporation), 20.40 (foreign corporation transacting intrastate business) (Matthew Bender).

**5.14[2] Status of Corporation Can Be Checked Through Secretary of State.** The California Secretary of State provides a convenient clearinghouse for corporation status. Enter the corporation's name at the Secretary's web site, <http://kepler.ss.ca.gov/list.html>, to obtain status information.

**5.14[3] Dissolved Corporations Have Capacity for Limited Purposes.** A dissolved corporation has a capacity to sue and defend, and otherwise continues to exist, but only for the limited purpose of winding up its affairs [*Corp Code § 2010(a)*]. An action or proceeding to which a corporation is a party does not abate on account of the dissolution of the corporation or the proceedings for winding up and dissolution [*Corp Code § 2010(b)*].

**Exception:**

*Corp Code § 2010* does not apply to foreign corporations [*Greb v. Diamond Int'l Corp.* (2010) 184 CA4th 15, 27, \_\_\_ CR3d \_\_\_].



**Warning:**

Some jurisdictions, including California [*Corp Code § 2011(a)*], allow post-dissolution actions against the former corporation's shareholders only if the cause of action arose prior to dissolution; other jurisdictions permit actions arising after dissolution [*see e.g., Levin Metals Corp. v. Parr-Richmond Terminal Co.* (9th Cir 1987) 817 F2d 1448, 1451 (because statute creating cause of action not enacted until after dissolution, action was barred notwithstanding statute's application to harm caused during period corporation existed)]. Because a corporation's successor capacity is a question of state law, it is important to review the corporation law of a corporate defendant's domicile state, which will control even if the harm occurred in California.

**Example:**

Trial court dismissal of action against dissolved Delaware corporation was affirmed because the action did not comply with Delaware law prohibiting the commencement of actions by or against dissolved corporations more than three years after their dissolution, so that the corporation lacked the capacity to be sued [*Greb v. Diamond Int'l Corp.* (2010) 184 CA4th 15, 27, \_\_\_ CR3d \_\_\_].

**5.14[4] Merged Corporation Loses Right to Bring Suit.** A merged corporation loses its corporate existence and cannot bring suit [ *J.C. Peacock, Inc. v. Hasko* (1960) 184 CA2d 142, 150, 7 CR 490 ]. However, when a statutory merger becomes effective, the surviving corporation automatically succeeds, without further transfer, to all the rights and property of each of the disappearing corporations [*Corp Code § 1107(a)*].

**5.14[5] Domestic Corporation's Rights May Be Suspended.**

**5.14[5][a] Nonpayment of Taxes.** A domestic corporation's rights, powers, and privileges, including its ability to sue or be sued are suspended for failure to pay corporate taxes [*R&T Code § 23301*]. During the period of the suspension or forfeiture of its corporate powers, a corporation may neither prosecute [ *Ransome--Crummey Co. v. Superior Court* (1922) 188 C 393, 394-397, 466 ] nor defend an action [ *Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.* (1957) 155 CA2d 46, 49, 317 P2d 649 ]. Neither may the corporation seek a writ of mandate [ *Brown v. Superior Court* (1966) 242 CA2d 519, 522, 51 CR 633 ]. Further, the corporation may not appeal from an adverse judgment during the period of suspension or forfeiture [ *Boyle v. Lakeview Creamery Co.* (1937) 9 C2d 16, 20, 68 P2d 968 ].

The suspension prescribed by *R&T Code § 23301* is not automatic; it takes effect only when the Franchise Tax Board transmits the name of the tax-delinquent corporation to the Secretary of State [*R&T Code § 23302*]. If this has not been done, the corporation will continue to have the capacity to sue and defend, even though the corporation may, in fact, have failed to pay its taxes [*R&T Code § 23302*; *see Mediterranean Exports, Inc. v. Superior Court* (1981) 119 CA3d 605, 615, 617-618, 174 CR 169 ].

**Distinguish:**

However, a foreign corporation can be subject to jurisdiction based on "minimum contacts," as opposed to actually doing business within the state. In such situations, the foreign corporation need not be qualified to defend itself in California courts. Only a foreign corporation transacting intrastate business without having qualified pursuant to *Corp Code* § 2105 is penalized by the provisions of *Corp Code* § 2203(c). It is a well-established principle flowing from the commerce clause of the federal Constitution [US Const, art I, § 8, cl 3] that a state may not compel a purely interstate seller of goods to qualify to do business in the state [ *Allenberg Cotton Co. v. Pittman* (1974) 419 US 20, 33-34, 95 S Ct 260, 42 L Ed2d 195 ].

**5.14[5][b] Failure to File Return.** Except for the purpose of filing an application for exempt status, or amending the articles of incorporation as necessary either to perfect the application or to set forth a new name, and subject to *R&T Code* § 23301.6, the corporate powers, rights, and privileges of a domestic corporation may be suspended if the taxpayer fails to file a tax return required by Corporation Tax Code [R&T Code § 23301.5].

**5.14[5][c] Failure to File Information Statement.** A domestic corporation is required to file initial and annual statements setting out information about, among other things, its officers, directors, and business and auditing practices [*Corp Code* § 1502]. Failure to file this statement will result first in an assessment of penalty [*Corp Code* § 2204], then suspension of corporate rights, powers, and privileges [*Corp Code* § 2205]. A corporation suspended for failure to file this statement is disabled from participating in any litigation activities to the same extent as a corporation suspended for failure to pay taxes under *R&T Code* § 23301 [ *Palm Valley Homeowners Ass'n, Inc. v. Design MTC* (2000) 85 CA4th 553, 560, 102 CR2d 350 ].

**5.14[5][d] Raise Corporation's Lack of Capacity by Affirmative Defense.** If a domestic corporation's rights are suspended, the opposing party should raise the issue by affirmative defense [see *Maryland Cas. Co. v. Superior Court* (1928) 91 CA 356, 361, 267 P 169 (loss of corporate status treated as plea in abatement properly addressed by affirmative defense)]. The matter has also been raised by motion to strike the corporation's pleadings [see *Mediterranean Exports, Inc. v. Superior Court* (1981) 119 CA3d 605, 609, 174 CR 169 ].

**5.14[6] Foreign Corporation May Lose Rights.**

**5.14[6][a] Nonpayment of Taxes.** A foreign corporation's ability to sue or be sued is forfeited for nonpayment of corporate taxes [R&T Code § 23301]. This forfeiture is essentially the same action, and has the same effect, as the suspension of a domestic corporation's right to sue and be sued, and the same rules and effects apply.

 **Cross Reference:**

Discussion of suspension of domestic corporation, see 5.14[5][a].

**5.14[6][b] Failure to File Return.** Foreign corporations, like domestic corporations, may have their corporate powers, rights, and privileges suspended for failure to file the tax return required by the Corporation Tax Code [R&T Code § 23301.5].

 **Cross Reference:**

Discussion of suspension of a domestic corporation, see 5.14[5][b].

**5.14[6][c] Failure to File Certificate of Qualification.** A foreign corporation subject to *Corp Code* § 2100 et seq. (qualification for transaction of intrastate business) that transacts intrastate business in California must file a certificate of qualification [*Corp Code* § 2105]. A corporation that fails to do so is not authorized to maintain any action or proceeding on any intrastate business in any California court until it has filed the certificate and has paid the applicable fees and penalties [*Corp Code* § 2203(c)]. The corporation must also file, with the clerk of the court in which its action is pending, receipts showing the payment of the fees and penalty and all franchise taxes and any other taxes on business



or property in California that should have been paid for the period during which it transacted intrastate business [*Corp Code* § 2203(c)].

**Example:**

A foreign corporation that converted during the pendency of litigation from a Nevada to a Delaware corporation and immediately filed a new certificate of qualification was not barred from continuing the legislation, because the law of the other states permitted the continuation. The conversion requirements set forth in *Corp Code* § 1157 do not apply to a foreign corporation's conversion to another foreign corporation, and the procedures under *Corp Code* § 2107 for notice of certain corporate changes are inapplicable to a change in the state of incorporation of a foreign corporation, even though the corporation did not immediately file a certificate of surrender under *Corp Code* § 2112 [ *The Capital Gold Group, Inc. v. Nortier* (2009) 176 CA4th 1119, 1127-1134, 98 CR3d 439] .

**5.14[6][d] Failure to File Information Statement.** Foreign corporations, like domestic corporations, may have their corporate powers, rights, and privileges suspended for failure to file the information statement required by *Corp Code* § 1502 [*Corp Code* § 2205].



**Cross Reference:**

Discussion of suspension of domestic corporation, see 5.14[5][c].

**5.14[6][e] Object to Corporation's Lack of Capacity by Affirmative Defense.** If a foreign corporation's rights are forfeited or suspended, the opposing party should raise the issue by affirmative defense [see *Maryland Cas. Co. v. Superior Court* (1928) 91 CA 356, 361, 267 P 169 (loss of corporate status treated as plea in abatement properly addressed by affirmative defense)]. The matter also may be raised by motion to strike the corporation's pleadings [see *Mediterranean Exports, Inc. v. Superior Court* (1981) 119 CA3d 605, 609, 174 CR 169] .

**5.14[7] Curing the Corporation's Default.**

**5.14[7][a] Seek Continuance to Cure Default and Reinstate Corporate Privileges.** When a corporation's status only comes to light during litigation, the normal practice is for the trial court to grant a short continuance to enable a suspended corporation to effect reinstatement (by paying back taxes, interest and penalties) to defend itself in court [ *Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal. App. 4th 504, 512-513, 50 Cal. Rptr. 3d 480 ; see *Timberline Inc. v. Jaisinghani* (1997) 54 CA4th 1361, 1366, 64 CR2d 4 ] .

**5.14[7][b] Cure Corporation's Default and Obtain Certificate of Revivor.** A corporation that has suffered a suspension or forfeiture of its corporate powers may be reinstated by applying to the Franchise Tax Board for a certificate of revivor, filing all required tax returns, and paying the taxes, interest, and penalties due. Application for revivor may be made by any shareholder or creditor, by a majority of the surviving trustees or directors, by an officer, or by any other person who has interest in the relief [*R&T Code* § 23305].

Reinstatement without full payment of taxes, penalties, and interest due may be allowed by the Franchise Tax Board if it determines that the revivor will improve the prospects for collection of the full amount due. There is currently a benign attitude that revival can validate otherwise invalid prior action [see *Peacock Hill Ass'n v. Peacock Lagoon Constr. Co.*(1972) 8 C3d 369, 371 n1, 373, 105 CR 29, 503 P2d 285 ; *Reed v. Norman* (1957) 48 C2d 338, 343, 309 P2d 809] .

The revivor may be limited as to time and/or functions that the revived corporation can perform, and the corporate powers may be again suspended or forfeited if the Franchise Tax Board determines that the prospects for full collection have not been improved by the revivor [*R&T Code* § 23305b]. In addition, a suspended corporation or one whose powers have been forfeited may obtain relief by providing the Franchise Tax Board with an acceptable assumption of liability, or a bond, deposit, or other security for its liability [*R&T Code* § 23305.2].

**5.14[8] Attorney Representation of Corporation in Court.**

**5.14[8][a] Corporation Must Be Represented by Attorney in Courts Other Than Small Claims Court.** Except for small claims court, a corporation can act only through licensed attorneys and may not appear in propria persona or by a non-attorney officer [ *Merco Constr. Eng'rs, Inc. v. Municipal Court* (1978) 21 C3d 724, 729, 147 CR 631, 581 P2d 636 (municipal court); *Himmel v. City Council* (1959) 169 CA2d 97, 100, 336 P2d 996 (superior court); *Paradise v. Nowlin* (1948) 86 CA2d 897, 898, 195 P2d 867 (appeal)].

**Strategic Point--Opposing Party:**

When a corporation attempts to appear without an attorney, the opposing party should file a motion to strike the corporation's complaint, answer, or other pleading [see *Himmel v. City Council* (1959) 169 CA2d 97, 100, 336 P2d 996 ; see also CCP §§ 435(b), 436].

**Consider:**

While a prior ruling of the Court of Appeal held that a corporate complaint not submitted by an attorney of the corporation is incurable and void [ *Paradise v. Nowlin* (1948) 86 CA2d 897, 899, 195 P2d 867 ], a subsequent opinion rejected that rule, found the defect curable, and required the trial court to grant leave to the corporation plaintiff to amend [ *CLD Constr., Inc. v. City of San Ramon* (2004) 120 CA4th 1141, 1146 ].

**5.14[8][b] Corporation Attorney May Not Appear in Small Claims Court.** In small claims court, a corporation may appear only through a regular employee or a duly appointed or elected officer or director who is employed, appointed, or elected for purposes other than solely representing the corporation in small claims court [CCP § 116.540(b)]. Except as otherwise provided, no attorney may take part in the conduct or defense of a small claims action [CCP § 116.530(a) (attorneys generally may not appear)].

**Exceptions:**

Attorneys may participate in a corporation's small claims court action [CCP § 116.530(b)]:

- If the attorney is a party; or
- If the attorney is appearing to maintain or defend an action by or against a professional corporation of which he or she is an officer or director and of which all other officers and directors are attorneys.

**Cross Reference:**

Discussion of small claims procedures, see California Forms of Pleading and Practice, Ch. 526, Small Claims (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsDissolution & ReceivershipTermination & Winding UpLimited SurvivalBusiness & Corporate LawCorporationsFinanceFranchise TaxPenalties for NoncomplianceBusiness & Corporate LawCorporationsFormationCorporate Existence, Powers & PurposePowersLitigationBusiness & Corporate LawForeign BusinessesNoncomplianceCivil ProcedurePartiesRequired Representation



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### III. ESTABLISHING AND ATTACKING CAPACITY

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#### 5.15 Limited Liability Company.

**5.15[1] Limited Liability Company Loses Right to Sue or Defend for Failure to Pay Taxes.** Both foreign and domestic limited liability companies are subject to the provisions of *R&T Code § 23301 et seq.* [*R&T Code § 23305.5(a)*]. In applying those provisions to limited liability companies, the term "tax" includes the tax and fee imposed by *R&T Code §§ 17941 and 17942* (or former *R&T Code §§ 23091 and 23092*), respectively [*R&T Code § 23305.5(b)*].

**5.15[2] Failure of Foreign Limited Liability Company to Register Forfeits Rights.** A foreign limited liability company transacting intrastate business in California is not authorized to maintain any action, suit, or proceeding in any California state court until it has registered in California [*Corp Code § 17456(a)*; *see also Corp Code § 17456(b)*].

#### ◆ Cross Reference:

Forms alleging plaintiff's status as limited liability company, *see California Forms of Pleading and Practice, Ch. 20, Allegations Commonly Used, §§ 20.36* (plaintiff), *20.41* (plaintiff or defendant) (Matthew Bender).

**5.15[3] Raise Company's Lack of Capacity by Affirmative Defense.** If a limited liability company's rights are suspended, the opposing party should raise the issue by affirmative defense [*see Maryland Cas. Co. v. Superior Court (1928) 91 CA 356, 361, 267 P 169* (loss of corporation's status treated as plea in abatement properly addressed by affirmative defense)]. The matter could also be raised by motion to strike the corporation's pleadings [*see Mediterranean Exports, Inc. v. Superior Court (1981) 119 CA3d 605, 609, 174 CR 169* (involving corporation)].

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Foreign Businesses Noncompliance Business & Corporate Law Limited Liability Companies General Overview Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview



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### III. ESTABLISHING AND ATTACKING CAPACITY

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.16*

#### 5.16 Unincorporated Associations.

##### 5.16[1] Association's Capacity.

**5.16[1][a] Association May Sue and Be Sued in Assumed or Known Name.** An unincorporated association, whether or not organized for profit, may sue and be sued in the name it has assumed or by which it is known [CCP § 369.5(a)].



##### Cross References:

Discussion of association's standing, see 5.05[4].

For forms alleging association's capacity, see *California Forms of Pleading and Practice*, Ch. 20, *Allegations Commonly Used*, §§ 20.35 (plaintiff), 20.37 (defendant) (Matthew Bender).

**5.16[1][b] Defunct Association Cannot Be Defendant.** An unincorporated association that has ceased to exist cannot be a defendant [ *Oliver v. Swiss Club Tell* (1963) 222 CA2d 528, 537, 35 CR 324 ].

**5.16[2] Association Membership Alone Not Enough to Establish Member's Liability for Association's Acts.** Mere membership in an unincorporated association does not make a member liable for unlawful acts of other members, there must also be participation, knowledge, or approval. Liability may exist, however, based on a member's personal participation in an unlawful activity or the fact that he or she set the unlawful activity in motion. The liability of members cannot extend beyond the principles of agency on which the liability of each copartner for the acts of his or her fellow partners is grounded [ *Orser v. George* (1967) 252 CA2d 660, 670-671, 60 CR 708 ].

A member, director, or agent of a nonprofit association is not liable for a debt, obligation, or liability of the association solely by reason of being a member, director, officer, or agent [ *Corp Code* § 18605]. Members, directors, officers, and agents are only liable for contractual obligations of the nonprofit association under statutorily specified circumstances, unless they control the nonprofit association as its alter ego under common law or the Uniform Fraudulent Transfer Act [CC § 3439 *et seq.*] imposes liability for the transfer giving rise to the obligation [ *Corp Code* § 18640].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Business & Corporate LawUnincorporated Associations



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### III. ESTABLISHING AND ATTACKING CAPACITY

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#### **5.17 Businesses With Fictitious Names.**

**5.17[1] Business With Fictitious Business Name Must File Statement and Publish Notice.** Every person ("person" being defined as including individuals, limited liability companies, partnerships and other associations, and corporations) who regularly transacts business for profit in California under a fictitious business name must file a fictitious business name statement and refile as set out by law [*B&P Code § 17915*].

A "fictitious business name" is [*B&P Code § 17900(b)*]:

- For an individual, a name that does not include the surname of the individual or a name that suggests the existence of additional owners.
- For a partnership or other association of persons other than a limited partnership or limited liability partnership, a name that does not include the surname of each general partner or a name that suggests the existence of additional owners.
- For a corporation, any name other than the corporate name stated in the articles of incorporation.
- For a limited partnership, any name other than the name of the limited partnership as on file with the Secretary of State.
- For a limited liability company, any name other than the name stated in its articles of organization; for a foreign limited liability company, any name other than the name on file with the Secretary of State.

A name that "suggests the existence of additional owners" is one which includes words such as "Company," "& Company," "& Son," "& Sons," "& Associates," "Brothers," and the like, but not words that merely describe the business being conducted [*B&P Code § 17900(c)*].

The statement must be filed with the clerk of the county where the registrant has his or her principal place of business or, if there is no place of business in California, with the county clerk of Sacramento County [*B&P Code § 17915*].

There is also a newspaper publication requirement [*B&P Code § 17917*].

 **Cross Reference:**

Discussion of capacity of partnership with fictitious business name, see 5.13[1][b].

**5.17[2] Failure to File Fictitious Business Name Statement Suspends Right to Maintain Action Until Statement Filed.** Failure to file and publish a fictitious name statement as required by *B&P Code §§ 17910* and *17917* suspends the business's right to bring any action upon or on account of any contract made, or transaction had, in the fictitious business name in any court of this state until the fictitious business name statement has been executed, filed, and published [*B&P Code § 17918*].

The commencement of an action is not prohibited by *B&P Code § 17918*. It merely forbids the maintenance of the action until the certificate has been filed and the publication has been made. Before an action is finally dismissed on that ground, the plaintiff should be given an opportunity prior to the trial to comply with the statute [ *Kadota Fig Ass'n v. Case-Swayne Co. (1946) 73 CA2d 796, 804-805, 167 P2d 518* ].

**5.17[3] Fictitiously Named Business's Complaint Failing to Affirmatively Allege Compliance With Statute Subject to Demurrer.** If the complaint shows that plaintiff does business under a fictitious business name [*see B&P Code §§ 17910-17918*], but does not affirmatively allege compliance with the requirements of those sections, the opposing party may demur on the ground of lack of capacity to sue [ *Pleaters & Stitchers Ass'n v. Davis (1934) 140 CA 403, 406, 35 P2d 401* ].

 **Cross Reference:**

See Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

**5.17[4] Assignees of Persons Transacting Under Fictitious Business Name Cannot Maintain Action Until Certificate Filed.** No assignee of a person transacting business under a fictitious business name may maintain any action on, or on account of, any contract made, or transaction had, in the fictitious business name in any California court until a fictitious business name statement has been executed, filed, and published as required by law [*B&P Code § 17918*]. A fictitious business name statement may be executed, filed, and published by an assignee of the business at any time after the assignment, if a failure to comply with the statute would otherwise preclude the maintenance of an action to recover any sums due to the assignee by reason of the assignment [*B&P Code § 17919(c)*].

 **Cross Reference:**

Discussion of standing of assignee of claim, see 5.05[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporate NamesFictitious NamesConsequences of NoncomplianceBusiness & Corporate LawCorporate NamesFictitious NamesRegistration RequirementsCivil ProcedurePartiesFictitious Names



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.18*

**5.18 CHECKLIST: Guardians Ad Litem.**

**5.18[1] Checklist for Appointment of Guardian Ad Litem.**

☐ Determine whether guardian ad litem is required:

☐ Minor party in litigation has no guardian of the estate.

**Exceptions:**

Minor is emancipated, seeking injunctions or protective orders relating to harassment or violence or is parent in child custody, visitation, or support proceedings.

☐ Incompetent party in litigation has no conservator of the estate.

☐ Guardian ad litem can be appointed without any prior finding of incompetency in an independent proceeding.

**Authority:**

*CCP § 372; Fam Code § 7002 (emancipation)*

**Discussion:**

*See 5.10[3], 5.19[1], 5.21*

☐ Determine who will apply for appointment if minor is plaintiff:

☐ Under age 14, relative or friend applies.



- ☐ Age 14 or over, minor applies.

**Timing:**

Guardian ad litem must be appointed before summons issued; should be appointed before complaint is drafted so it can reflect appointment.

**Authority:**

*CCP § 373(a)*

**Discussion:**

See 5.22[1], 5.23[1]

- ☐ Determine who will apply for appointment if minor is defendant:

- ☐ Under age 14, friend, relative, or any other party applies.
- ☐ Age 14 or over, minor applies within 10 days of service of summons.
- ☐ After 10 days, friend, relative, or any other party may apply.
- ☐ Court may apply on its own motion.

**Authority:**

*CCP § 373(b)*

**Discussion:**

See 5.22[2]

- ☐ Determine who will apply for party who is incompetent person:

- ☐ Relative.
- ☐ Friend.
- ☐ Any party to the action.
- ☐ Court on its own motion.

**Authority:**

*CCP § 373(c)*

**Discussion:**

See 5.22[3]

- ☐ Make ex parte application.

- ☐ Notice to incompetent not required.

**Authority:**

*Sarracino v. Superior Court* (1974) 13 C3d 1, 12-13, 118 CR 21, 529 P2d 53 (incompetent); *Scott v. Family Ministries* (1976) 65 CA3d 492, 509, 135 CR 430 (minor); *Briggs v. Briggs* (1958) 160 CA2d 312, 318, 325 P2d 219

**Discussion:**

See 5.24

**Standard Procedure Checklist:**

See Ch. 26, Law and Motion Procedure

- ☐ Use mandatory Judicial Council form:

☐ Judicial Council Form CIV-010 (Application and Order for Appointment of Guardian Ad Litem--Civil) for all applications other than for Probate Code actions.

☐ Judicial Council Form DE-350/GC-100 (Petition for Appointment of Guardian Ad Litem-Probate) for appointments under the Probate Code.

**Discussion:**

See 5.24[2]

**Form:**

See 5.56

**5.18[2] Checklist of Powers of Guardian Ad Litem.**

☐ Petition for court approval of contract for attorney's fees for litigation services made by or on behalf of minor.

☐ If guardian ad litem is attorney, show need to hire another attorney.

**Authority:**

*Fam Code* § 6602; *Prob Code* § 3601

**Discussion:**

See 5.26

- ☐ Control litigation representing interest of minor, including:

☐ Compromising action.

☐ Agreeing to any order or judgment.

- ☐ Satisfying any judgment in minor's favor
- ☐ Releasing or discharging claims.

**Authority:***CCP §§ 372(a), 373.5***Discussion:**

See 5.25

- ☐ Recover expenses, costs, and attorney's fees out of any recovery in action.
- ☐ Pay balance of recovery for minor's behalf as provided by *Prob Code §§ 3600-3612*.

**Authority:***Prob Code § 3601; CCP §§ 372, 373.5***Discussion:**

See 5.29

**5.18[3] Opposing Guardian Ad Litem for Minor.**

- ☐ If unemancipated minor brings action alone, raise affirmative defense.
- ☐ Consider demurrer to complaint if it fails to affirmatively allege guardian ad litem's appointment.
- ☐ Seek removal of guardian ad litem for conflict of interest or improper motive.

**Authority:***See CCP §§ 372(a), 430.10(b); Fam Code § 6500***Discussion:**

See 5.27

**5.18[4] Checklist for Guardian Ad Litem for Disposition of Recovery on Minor's Behalf.**

- ☐ If representing a minor or an incompetent, seek award of reasonable expenses, costs, and attorney's fees to be paid from:
  - ☐ Recovery by judgment, or
  - ☐ Recovery by compromise.
- ☐ If representing a minor, seek award of reasonable expenses, costs, and attorney's fees for compromise or execution of:

- ☐ A covenant not to sue, or
- ☐ A covenant not to enforce a judgment on the minor's claim.

**Authority:**

See *CCP* § 373.5; *Prob Code* § 3601

**Discussion:**

See 5.29



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### 5.19 When Appointment of Guardian Ad Litem Required.

**5.19[1] Guardian Ad Litem Required for Minors and Incompetent Persons.** When a minor or an incompetent person is a party to a civil action and does not have a guardian or conservator of the estate, a guardian ad litem must be appointed by the court in which the action is pending [CCP § 372]. A guardian ad litem can be appointed for an incompetent person without any prior finding of incompetency in an independent proceeding [ *Sarracino v. Superior Court* (1974) 13 C3d 1, 12, 118 CR 21, 529 P2d 53 ]. An "incompetent person," for purposes of CCP § 372, includes a person for whom a conservator has been appointed.

#### ➤ Cross References:

Discussion of minority and emancipation, see 5.10; discussion of incompetence, see 5.11.

Form alleging appearance by guardian ad litem, see *California Forms of Pleading and Practice*, Ch. 20, *Allegations Commonly Used*, § 20.46 (Matthew Bender).

**5.19[2] Judgment Against Unrepresented Minor or Incompetent Can Be Vacated or Disaffirmed.** A judgment against a minor or an insane or incompetent person who was not represented by a guardian or guardian ad litem can be disaffirmed and vacated if no innocent purchaser has acquired rights under it [ *Briggs v. Briggs* (1958) 160 CA2d 312, 318-319, 325 P2d 219 (incompetent); *Keane v. Penha* (1946) 76 CA2d 693, 696, 173 P2d 835 (minor)]. However, failure to appoint a guardian ad litem is not jurisdictional and the court may decline to set aside a judgment if the minor's interests were not substantially prejudiced and there is no claim that there was a defense to the action [ *Pacific Coast Joint Stock Land Bank v. Clausen* (1937) 8 C2d 364, 366, 65 P2d 352 ]. The same harmless-error analysis applies to appointment of guardian ad litem for a person who is incompetent or subject to a conservator [ *In re A.C.* (2008) 166 CA4th 146, 157, 82 CR3d 542 ; *In re Esmeralda S.* (2008) 165 CA4th 84, 95-96, 80 CR3d 585 ].

The court does not have a duty to appoint a guardian ad litem for a person who is not a party to the action [ *In re Emily R.* (2000) 80 CA4th 1344, 1356, 96 CR2d 285 (alleged father who had not appeared in dependency proceedings not a party entitled to appointment of ad litem)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesGuardiansFamily LawGuardiansAppointment



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**5.20 When Guardian Ad Litem May Be Appointed.**

**5.20[1] If Guardian or Conservator Is Already Appointed.** If the court deems it expedient in the case before it, a guardian ad litem may be appointed in any case, even if the minor, incompetent person, or conservatee may have a guardian or conservator of the estate and may have appeared by him or her [CCP § 372].

**5.20[2] If Representation of Certain Classes Would Otherwise Be Inadequate (Probate Code Proceedings).** In a proceeding under the Probate Code, the court may, on its own motion or on request of a personal representative, guardian, conservator, trustee, or other interested person, appoint a guardian ad litem at any stage of a proceeding to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate [*Prob Code § 1003(a)*]:

- A minor;
- An incapacitated person;
- An unborn person;
- An unascertained person;
- A person whose identity or address is unknown; or
- A designated class of persons who are not ascertained or are not in being.

**5.20[3] To Represent Unascertained or Unknown Persons or Persons Not in Being (Actions Concerning Property).** In an action relative to or affecting real or personal property, the court has the power to appoint a guardian ad litem to represent a person or persons of a designated class who are not ascertained or who are not in being, or a person or persons who are unknown, who may be or may become interested in the property. This may be done on the representation of any party to the action or any interested person. The ad litem has the power, with the court's permission, to compromise the action, agree to any order or judgment entered for against the represented parties, to satisfy any judgment or order in their favor, and to release or discharge any of their claims. Any judgment, order, or

decree rendered after such appointment shall be conclusive on the persons the ad litem was appointed to represent [*CCP* § 373.5].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGuardians for  
MinorsFamily LawGuardiansAppointment





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**5.21 When Guardian Ad Litem Is Not Needed.**

**5.21[1] For Settlement If No Action Pending.** If a minor who has a disputed claim for damages, money, or other property does not have a guardian of the estate, either parent, if the parents are not living separate and apart, or the parent having the care, custody, or control of the minor, has the right to compromise the claim, or to execute a covenant not to sue or not to enforce judgment on the claim, unless the claim is against that parent. Such a compromise or covenant requires court approval, but appointment of a guardian ad litem is not necessary if no action is pending on the claim [*Prob. Code* § 3500].

The guardian of the estate of a minor or the conservator of the estate of an adult has powers to compromise the claims of a minor or conservatee under the general provisions pertaining to guardianship and conservatorship [*Prob Code* §§ 2500-2507].

➤ **Cross References:**

Discussion and forms relating to the compromise of a minor's claims by his or her parents, see Ch. 37, Settlement and Release; and California Forms of Pleading and Practice, Ch. 364, Minors: Claims and Property of Minors (Matthew Bender).

**5.21[2] To Obtain Certain Injunctions or Protective Orders.** A minor 12 years of age or older may appear without a guardian, counsel, or guardian ad litem to request or oppose a request for [*CCP* § 372(b)(1)]:

- An injunction or temporary restraining order, or both, pursuant to *CCP* §§ 527.6, 527.10, to prohibit harassment;
- An injunction or temporary restraining order, or both, against violence or a credible threat of violence in the workplace pursuant to *CCP* §§ 527.8, 527.10;
- A protective order pursuant to *Fam Code* §§ 6200-6409, the Domestic Violence Prevention Act; or
- A protective order pursuant to *Fam Code* §§ 7710 and 7720, in connection with proceedings under

the Uniform Parentage Act.

The court may appoint a guardian ad litem to assist the minor in this matter.



**Cross Reference:**

Discussion and forms, see California Forms of Pleading and Practice, Ch. 293, Harassment and Domestic Violence (Matthew Bender).

**5.21[3] In Child Custody, Visitation, or Support Proceedings in Which Minor is Parent and Understands Proceedings.** A minor who is the parent in proceedings for child custody, visitation, or support in which the child is a parent and whom the court has not found to not understand the proceedings does not need a guardian ad litem for those proceedings [*see CCP § 372(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Family LawGuardiansAppointment



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.22*

## **5.22 Who May Apply for Appointment of Guardian Ad Litem.**

**5.22[1] Minor Plaintiff--Minor, Friend, or Relative.** If the minor is 14 or older, the appointment is made on his or her application. Otherwise, it is made on the application of a relative or friend of the minor [*CCP* § 373(a); see *Safai v. Safai* (2008) 164 CA4th 233, 245-246, 78 CR3d 759 ].

**5.22[2] Minor Defendant--Minor, Friend or Relative, Any Party, or Court Sua Sponte.** The application may be made by the minor if he or she is 14 or older and applies within 10 days after service of summons. If the minor is under 14, or neglects to apply within 10 days of service, it may be made by a relative or friend, any other party to the action, or by the court on its own motion [*CCP* § 373(b)].

**5.22[3] Insane or Incompetent Plaintiff or Defendant--Friend, Relative, Any Party, or Court Sua Sponte.** The application may be made by a relative or friend, any other party to the action, or the court on its own motion [*CCP* § 373(c)].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesGuardiansFamily LawGuardiansAppointment



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Chapter 5 Parties  
IV. GUARDIANS AD LITEM

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.23*

**5.23 Time of Application.**

**5.23[1] Minor Plaintiff--Apply Before Summons Issued, Preferably Before Complaint Filed.** For a minor plaintiff, the guardian ad litem must be appointed before the summons is issued [*CCP* § 373(a)]. The appointment of a guardian ad litem should be obtained before the complaint is filed so that the complaint can allege the appointment of the guardian ad litem and avoid a potential demurrer [see *City of Los Angeles v. Superior Court* (1968) 264 CA2d 766, 772, 70 CR 826 ; *Crawford v. Neal* (1880) 56 C 321, 322 (failure to affirmatively set out appointment renders complaint subject to demurrer)].

**5.23[2] Minor Defendant--Apply Within 10 Days of Service If Minor Over 14.** For a minor defendant, the minor can apply if he or she is over age 14 and applies within 10 days after service of summons [*CCP* § 373(b)]. If the minor is under age 14 or neglects to apply within the 10-day limit, a relative or friend of the minor or any party to the action may apply, or the court may act on its own motion [*CCP* § 373(b)].

**5.23[3] Insane or Incompetent Person--Apply When Need Apparent.** The court should appoint a guardian ad litem whenever the need for one is brought to the court's attention. *CCP* § 373(c), governing ad litem appointments for incompetent persons, gives no time deadline.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Parties Capacity of Parties Guardians Family Law Guardians Appointment



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**5.24 Procedure for Appointment.**

**5.24[1] Application Can Be Made Ex Parte.** A guardian ad litem can be appointed on an ex parte application [ *Sarracino v. Superior Court* (1974) 13 C3d 1, 12-13, 118 CR 21, 529 P2d 53 (incompetent); *Scott v. Family Ministries* (1976) 65 CA3d 492, 509, 135 CR 430 (minor)].

**5.24[2] Judicial Council Forms Must Be Used.** Applications for appointment of guardians ad litem must be made on Judicial Council Form CIV-010 (Application and Order for Appointment of Guardian Ad Litem--Civil). A memorandum is not required with the application, but an applicant may submit one or the court may order one if it would further the interests of justice [*Cal Rules Ct, Rule 3.1114*].

**Exception:**

For applications for appointment of guardians ad litem under the Probate Code, Judicial Council Form DE-350/GC-100 (Petition for Appointment of Guardian Ad Litem-Probate) must be used.



**Cross Reference:**

Reproduction of general form, see 5.56.

**5.24[3] Notice to Incompetent of Application Not Necessary.** Notice to the incompetent person on whose behalf the application for appointment of guardian ad litem is being made is not necessary [ *Briggs v. Briggs* (1958) 160 CA2d 312, 318, 325 P2d 219 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Family LawGuardiansAppointment



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**5.25 Powers of Guardian Ad Litem.**

The guardian ad litem has the power, with the court's permission, to [CCP §§ 372(a), 373.5]:

- Compromise the action;
- Agree to any order or judgment entered for against the represented parties;
- Satisfy any judgment or order in their favor; and
- Release or discharge any of their claims.

The guardian ad litem has the right to control the litigation on behalf of the minor or incompetent [ *Regency Health Serv., Inc. v. Superior Court* (1998) 64 CA4th 1496, 1504, 76 CR2d 95 ; *In re Christina B.* (1993) 19 CA4th 1441, 1453, 23 CR2d 918 ]. The guardian ad litem may even voluntarily dismiss the action without prejudice, and without first obtaining a court order, but the court retains the power to rescind or modify any action that is inimical to the interests of the ward [ *Zapanta v. Universal Care, Inc.* (2003) 107 CA4th 1167, 1174-1175, 132 CR2d 842 ; see *Safai v. Safai* (2008) 164 CA4th 233, 245-246, 78 CR3d 759 ].

With regard to fundamental decisions affecting the litigation, the guardian ad litem may act only with the interest of his or her charge in mind. Specifically, the guardian may not compromise fundamental rights, including the right to trial, without some countervailing and significant benefit [ *In re Christina B.* (1993) 19 CA4th 1441, 1454, 23 CR2d 918 ].

A guardian ad litem's role is more than an attorney's but less than a party's. The guardian ad litem oversees any attorney representing a minor's litigation-related interests and may make tactical and even fundamental decisions affecting the litigation, but always with the interest of the child in mind [ *County of Los Angeles v. Superior Court* (2001) 91 CA4th 1303, 1312, 111 CR2d 471 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Parties Capacity of Parties Guardians Family Law Guardians Duties & Rights



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## 5.26 Guardians Ad Litem and Attorneys.

**5.26[1] Guardian Ad Litem Who Is Not Attorney Cannot Act in Propria Persona.** A guardian ad litem who is not an attorney may not act in propria persona to represent the minor or incompetent in legal proceedings. To do so would constitute the unauthorized practice of law [see *J.W. v. Superior Court* (1993) 17 CA4th 958, 969, 22 CR2d 527 ].

**5.26[2] If Guardian Ad Litem Is Attorney, Must Prove Need to Hire Another Attorney.** If the guardian ad litem is an attorney, the estate of the minor or incompetent cannot be charged with the expense of employing another attorney without proof of a need for assistance [ *In re Price*(1923) 61 CA 592, 600, 215 P 710 ].

**5.26[3] Hiring Attorney for Minor Requires Court Approval.** A contract for attorney's fees for services in litigation, made by or on behalf of a minor, is void unless the contract is approved by the court in which the litigation is pending or the court having jurisdiction of the guardianship estate of the minor. Any interested person may petition for approval. If no contract has been approved and a judgment is recovered by or on behalf of a minor, the court rendering the judgment must fix the attorney's fees chargeable against the minor [*Fam Code* § 6602; *Prob Code* § 3601].

While there is no similar statutory requirement of court approval when an attorney is hired by or on behalf of an incompetent person, the prudent attorney should submit such a contract for court approval as well [see *Stafford v. Superior Court* (1934) 1 C2d 321, 324, 325, 34 P2d 998 (applying prior law)].

### ➡ Cross Reference:

Form, see 5.57.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Parties Capacity of Parties Guardians Family Law Guardians Duties & Rights



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## 5.27 Opposing Party Represented by Guardian Ad Litem.

**5.27[1] Raise Affirmative Defense to Complaint Brought by Minor Alone.** When a minor brings a complaint without representation by a guardian or guardian ad litem (and the minor is neither emancipated nor bringing the complaint for one of the reasons set out in 5.21[2]), respond to the incapacity by affirmative defense [*see CCP §§ 372(a), 430.10(b); Fam Code § 6500*].

**5.27[2] Demurrer to Guardian Ad Litem's Complaint May Be Available If Complaint Fails to Affirmatively Allege Appointment.** The appointment of a guardian ad litem for a minor plaintiff is a traversable fact. Therefore, a failure to affirmatively set out the appointment in the complaint makes it subject to demurrer [ *Crawford v. Neal (1880) 56 C 321, 322* ]. However, since appointment of the guardian ad litem need not be done before the summons is issued [*CCP § 373*], it is possible to appoint the guardian ad litem after filing suit but before issuing summons.



### Warning:

To avoid pursuing a baseless demurrer, counsel should determine whether the guardian ad litem was appointed after the complaint was filed but before issuance of summons. Generally, a defendant should raise the failure to appoint a guardian ad litem with plaintiff's counsel before incurring the expense of raising the issue by demurrer.

**5.27[3] Guardian Ad Litem May Be Removed for Conflict of Interest or Improper Motives.** In the event of a conflict of interest or disclosure of improper motives, a guardian ad litem should be removed [ *Estate of Lacy (1975) 54 CA3d 172, 185, 126 CR 432* ; *Estate of Emery (1962) 199 CA2d 22, 29, 18 CR 86* ].

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesCapacity of PartiesGeneral Overview





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**5.28 Judgment Must Be for or Against Party, Not Guardian Ad Litem.**

A guardian ad litem is not a party to an action, but merely a party's representative [ *Sarracino v. Superior Court* (1974) 13 C3d 1, 13, 118 CR 21, 529 P2d 53 ; *Regency Health Servs., Inc. v. Superior Court* (1998) 64 CA4th 1496, 1499, 76 CR2d 95 ]. For that reason, a judgment may not be rendered for or against a guardian ad litem, but only for or against the party he or she represents [ *Estate of Cochems* (1952) 110 CA2d 27, 242 P2d 56 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesGuardiansFamily LawGuardiansDuties & Rights



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.29*

**5.29 Disposition of Money or Property Recovered on Minor's Behalf.**

**5.29[1] Expenses, Costs, and Attorney's Fees Awarded to Guardian Ad Litem From Recovery.** Reasonable expenses, costs, and attorney's fees may be awarded to a guardian ad litem out of minor's or incompetent person's recovery, pursuant to a judgment or to a compromise of a pending action or proceeding to which a minor or incompetent person is a party, or in the case of a minor only, to the compromise or execution of a covenant not to sue or not to enforce judgment on the minor's claim [*Prob Code § 3601; CCP § 373.5*].

➡ **Cross References:**

Discussion of recovery of costs and attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Chs. 24, Costs, and 25, Attorney's Fees.

**5.29[2] Balance of Money or Property to Be Paid to Minor or Incompetent.** Any money or other property to be paid or delivered for the benefit of a minor, incompetent person, or conservatee pursuant to the order or judgment must be paid and delivered in the manner and on the terms and conditions specified in *Prob Code § 3600 et seq.* [*CCP § 372*].

➡ **Investigating Potential Parties Using Online Resources:**

The attorney's investigation of whether a party's personal property is subject to existing security interests, can be greatly facilitated by information and leads from online resources. For example, helpful resources at *lexis.com* include:

● Legal tab > States Legal--U.S. > California > Public Records > Find Filings > Civil & Criminal Court Filings and Regulatory Actions > Judgments and Liens.

○ Sample Search: To learn about liens on a party's personal property interests (or liens a party holds on another's interests), try a search in this format: *name(name of business)* or *name (first name/3 last name)*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Family LawGuardiansDuties & Rights



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**5.30 CHECKLIST: Joining Parties.**

**5.30[1] Checklist for Compulsory Joinder.**

- ☐ Determine whether compulsory joinder applies to party. Applies if:
- ☐ Complete relief cannot be accorded among existing parties in party's absence; or
  - ☐ Person claims interest in subject matter of action and disposition of action in his or her absence:
    - ☐ May, as a practical matter, impair or impede his or her ability to protect that interest; or
    - ☐ Leave any existing parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations.

- ☐ Party seeking to be joined must be subject to service of process and must not deprive court of jurisdiction.

**Authority:**

*CCP § 389(a)*

**Discussion:**

*See 5.31[1]*

- ☐ If party who should be joined is not in complaint or cross-complaint, state names if known and reasons not joined.

- ☐ Court determines whether in equity and good conscience action should proceed.

☐ Any party, including omitted party, can file notice of motion for order to bring in omitted party.

☐ Defendant may file cross-complaint to join party.

**Authority:**

*CCP § 389; see De La Beckwith v. Superior Court (1905) 146 C 496, 498, 80 P 717 ; CCP § 428.20*

**Discussion:**

See 5.31

**5.30[2] Checklist for Permissive Joinder of Plaintiff.**

☐ Determine whom to join as plaintiff. May join parties who:

☐ Have a right to relief arising from the same transaction, occurrence, or series thereof; or

☐ Have a claim, right, or interest adverse to defendant in the property or controversy.

☐ Join plaintiff by:

☐ Amending complaint as a matter of course before answer or demurrer is filed, or after the demurrer and before trial;

☐ Seeking leave to amend complaint to add willing plaintiff.

☐ If party is not willing to be joined as plaintiff, join by naming and aligning as a defendant.

**Authority:**

*CCP §§ 379.5, 382, 428.20*

**Discussion:**

See 5.32

**5.30[3] Checklist for Permissive Joinder of Defendant.**

☐ Determine whether to join omitted party as defendant. May join if:

☐ Omitted party would be subject to claim of any right to relief jointly, severally, or in the alternative, arising from the same transaction or occurrence.

☐ Omitted party would be subject to claim, right, or interest adverse to him or her in the subject matter of the action.

☐ Plaintiff has doubt regarding party from which he or she can seek redress.

☐ Join defendant by:

☐ Amending complaint as a matter of course before answer or demurrer is filed or after demurrer but before trial;

☐ Seeking leave to add new defendant.

**Authority:**

*CCP §§ 379(a), (c), 472, 473(a)*

**Discussion:**

See 5.32

**5.30[4] Checklist for Petition for Joinder by Omitted Party Claiming Interest in Property.**

☐ Determine whether joinder is available. Party may join if:

☐ Action is for recovery of real or personal property;

☐ Action is to determine conflicting claims to real property; or

☐ Omitted party has interest in subject matter of action.

☐ Omitted party makes application to be made a party.

**Authority:**

*CCP § 389.5*

**Discussion:**

See 5.33



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### 5.31 Compulsory Joinder.

**5.31[1] When Joinder of Party Is Compulsory.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action must be joined as a party in the action if [CCP § 389(a)]:

- In the party's absence, complete relief cannot be accorded among those already parties; or
- A person claims an interest relating to the subject of the action and is so situated that the disposition of the action in his or her absence may:
  - ☐ As a practical matter, impair or impede his or her ability to protect that interest; or
  - ☐ Leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his or her claimed interest.

The "complete relief" clause of CCP § 389(a) focuses not on whether complete relief can be afforded all possible parties to the action, but on whether complete relief can be afforded the parties named in the action [ *Deltakeeper v. Oakdale Irrigation Dist.*(2001) 94 CA4th 1092, 1101, 115 CR2d 244 ].

**5.31[2] "Necessary" Parties.** A person joined as a party pursuant to CCP § 389(a) is also deemed a "necessary" party [see *Countrywide Home Loans, Inc. v. Superior Court* (1999) 69 CA4th 785, 791, 82 CR2d 63 ]. The term "necessary party" is also used to refer to a party that should have been joined as required by CCP § 389(a) and was not, even though the court was able to proceed to make a valid judgment between the parties present without seriously affecting the interests of the nonjoined parties [see *Camp v. Board of Supervisors* (1981) 123 CA3d 334, 354, 176 CR 620 ; *Noguera v. North Monterey County Unified Sch. Dist.* (1980) 106 CA3d 64, 73, 164 CR 808 ].

Joint tortfeasors with joint and several liability are not necessary parties under CCP § 389(a), but rather are permissive parties whose joinder is governed by CCP §§ 378 and 379 [ *Countrywide Home Loans, Inc. v. Superior Court* (1999)

69 CA4th 785, 794, 82 CR2d 63 ].

#### **Cross Reference:**

Discussion of permissive joinder, see 5.32.

**5.31[3] "Indispensable" Parties.** A party is "indispensable" when it cannot be joined and the court finds it would be preferable to dismiss the action without prejudice; but a person is an indispensable party only when the judgment to be rendered necessarily must affect his or her rights [see CCP § 389(b); *Olszewski v. Scripps Health* (2003) 30 C4th 798, 808-809, 135 CR2d 1, 69 P3d 927 ; see also *Siena Court Homeowners Assn. v. Green Valley Corp.* (2008) 164 CA4th 1416, 1427, 79 CR3d 915 ; *County of San Joaquin v. State Water Res. Control Bd.* (1997) 54 CA4th 1144, 1149, 63 CR2d 277 ].

**5.31[4] Plead Omitted Parties in Complaint or Cross-Complaint and State Reasons for Omission.** When there are omitted parties who under CCP § 389(a) would be required to be joined in a complaint or cross-complaint, and are not joined, the complaint or cross-complaint must state their names, if known to the pleader, and the reasons why they are not joined [CCP § 389(c)].

**5.31[5] If Joinder Is Impossible, Court May Dismiss or Proceed Without Missing Party.** If a person as described in CCP § 389(a)(1) or (2) cannot be made a party, the court determines whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include [CCP § 389(b); *Tracy Press, Inc. v. Superior Court* (2008) 164 CA4th 1290, 1298, 80 CR3d 464 ]:

- To what extent a judgment rendered in the person's absence might be prejudicial to him or her, or to those already parties;
- The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
- Whether a judgment rendered in the person's absence will be adequate; and
- Whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder.

Whether a party is necessary and/or indispensable is a matter of trial court discretion in which the court weighs "factors of practical realities and other considerations." Accordingly, the determination is reviewed for abuse of discretion [ *Hayes v. State Dept. of Developmental Services* (2006) 138 CA4th 1523, 1529, 42 CR3d 363 ].

**5.31[6] Compel Joinder by Motion to Bring in New Party.** Either the plaintiff or the defendant may move the court to compel joinder of an omitted party by filing a notice of motion for an order to bring in the omitted party as a new party plaintiff or defendant under CCP § 389 [see *De La Beckwith v. Superior Court* (1905) 146 C 496, 498, 80 P 717 ]. The court, on learning that a party required to be joined has not been joined, must order that party joined, if feasible [CCP § 389(a); see *Conrad v. Unemployment Ins. Appeals Bd.* (1975) 47 CA3d 237, 241, 120 CR 803 ].

#### **Cross References:**

Forms, see 5.53 (notice of motion), 5.54 (supporting declaration), 5.55 (order granting motion).

**5.31[7] Defendant May File Cross-Complaint to Join Party.** A person filing a cross-complaint as authorized by CCP § 428.10 may join any person as a cross-complainant or cross-defendant, whether or not that person is already a party to the action, if, had the cross-complaint been filed as an independent action, the joinder of that party would have



been permitted by the statutes governing joinder of parties [*CCP* § 428.20].



**Cross Reference:**

Discussion of who may be joined, see 5.31[1], 5.32[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil  
ProcedurePartiesJoinderNecessary Parties



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**5.32 Permissive Joinder.**

**5.32[1] When Permissive Joinder of Plaintiffs Allowed.** All persons may join in one action as plaintiffs if [CCP § 378(a)]:

- They assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
- If any question of law or fact common to all these persons will arise in the action; or
- They have a claim, right, or interest adverse to the defendant in the property or controversy that is the subject of the action.

It is not necessary that each plaintiff be interested as to every cause of action or as to all relief sought. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief [CCP § 378(b)].

**5.32[2] When Permissive Joinder of Defendants Allowed.** All persons may be joined in one action as defendants if either [CCP § 379(a)]:

- Any right to relief is alleged against such persons jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
- If any question of law or fact common to all these persons will arise in the action; or
- A claim, right, or interest is alleged adverse to them in the property or controversy that is the subject of the action.

It is not necessary that each defendant be interested as to every cause of action or as to all relief sought. Judgment may be given against one or more defendants according to their respective liabilities [CCP § 379(b)].

**5.32[3] "Proper" Parties.** Proper parties are those parties who have some interest in the action, whose rights it

will be convenient to settle in the same action, and who may be joined under the rules of permissive joinder [ *General Ins. Co. v. Whitmore* (1965) 235 CA2d 670, 674, 45 CR 556 ].

**5.32[4] Defendants May Be Joined If Plaintiff Is Unsure Which One Is Liable.** If the plaintiff is in doubt as to the person from whom he or she is entitled to redress, he or she may join two or more defendants, with the intent that questions regarding their respective liabilities may be determined between the parties [CCP § 379(c); see *Colusa Air Pollution Control Dist. v. Superior Court* (1991) 226 CA3d 880, 885-886, 277 CR 110 ].

**5.32[5] Unwilling Plaintiff May Be Joined As Defendant.** If the consent of anyone who should have been joined as a plaintiff under the provisions of CCP § 389 cannot be obtained, he or she may be made a party defendant in the action. In joining the unwilling party as a defendant, the plaintiff must state the reasons for doing so in the complaint [CCP § 382; see also *Estate of Kuebler v. Superior Court* (1978) 81 CA3d 500, 503-504, 146 CR 481 ].

**5.32[6] Court May Make Orders to Protect Parties.** When parties have been joined under CCP § 378 or 379, the court may make such orders as may appear just to prevent any party from being embarrassed, delayed, or put to undue expense, and may order separate trials or make such other order as the interests of justice may require [CCP § 379.5].

**5.32[7] Parties Joined by Amending Pleading or by Seeking Leave to Amend.** A party seeking to add a nonjoined party after the complaint or cross-complaint has been filed may amend the pleading by joining the desired party. This may be done once as a matter of course any time before the answer or demurrer is filed or after demurrer and before the trial of the relevant issue [CCP § 472; *Gross v. Department of Transp.* (1986) 180 CA3d 1102, 1104, 226 CR 49 ]. Alternatively, a party may seek leave of the court to amend the pleadings to add a nonjoined party [see CCP § 473(a)].



#### **Cross Reference:**

Discussion, checklists, and forms relating to amended pleadings, see Ch. 34, Amended and Supplemental Pleadings.

**5.32[8] Defendant May File Cross-Complaint to Join Party.** A person filing a cross-complaint as authorized by CCP § 428.10, may join any person as a cross-complainant or cross-defendant, whether or not that person is already a party to the action, if, had the cross-complaint been filed as an independent action, the joinder of that party would have been permitted by the statutes governing joinder of parties [CCP § 428.20].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesJoinderPermissive Joinder



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**5.33 Omitted Party May Apply to Be Party in Action for Recovery of Real or Personal Property.**

In an action for the recovery of real or personal property or to determine conflicting claims to real or personal property, a person who is not a party to the action, but has an interest in the property may apply to the court to be made a party. The court may order the omitted party to be brought into an action by the proper amendment [CCP § 389.5].

► **Cross Reference:**

Discussion of when omitted party may also seek to be included as a party pursuant to CCP § 389, see 5.31[6].



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VI. OBJECTING TO NONJOINDER OR MISJOINDER

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**5.34 CHECKLIST: Objecting to Nonjoinder or Misjoinder.**

- ☐ Demur when nonjoinder or misjoinder appears from:
  - ☐ Face of complaint; or
  - ☐ Matter of which court must take judicial notice.
- ☐ Raise objection by answer if defect is not apparent.

**Authority:**

*CCP §§ 430.10(d), 430.30(a), (b); see CCP § 430.70*

**Discussion:**

See 5.35

- ☐ Raise lack of indispensable parties at any time.

**Authority:**

*County of Alameda v. State Bd. of Control (1993) 14 CA4th 1096, 1105 n5, 18 CR2d 487*

**Discussion:**

See 5.36

- ☐ Seek review of joinder order by writ of mandate.

**Authority:**

See *Peerless Ins. Co. v. Superior Court (1970) 6 CA3d 358, 363, 85 CR 679*; see also *Bank of Orient*

*v. Superior Court (1977) 67 CA3d 588, 599, 136 CR 741*

**Discussion:**

See 5.38



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.35*

**5.35 Objection to Nonjoinder or Misjoinder Raised by Demurrer or Answer.**

The defendant may raise the matter of defect of parties (nonjoinder) or misjoinder of a party by demurrer if the defect or misjoinder appears from the face of the complaint or from a matter of which the court must take judicial notice [*CCP* §§ 430.10(d), 430.30(a); see *CCP* § 430.70]. The defendant may raise the objection by answer if the defect or misjoinder is not apparent on the face of the complaint [*CCP* § 430.30(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesJoinderMisjoinder



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VI. OBJECTING TO NONJOINDER OR MISJOINDER

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.36*

**5.36 May Object to Failure to Join Indispensable Parties at Any Time.**

The contention that indispensable parties were not joined may be raised at any time, although if raised for the first time on appeal, relief will be available only if the trial court was unable to render an effective judgment between the parties before it [ *County of Alameda v. State Bd. of Control* (1993) 14 CA4th 1096, 1105 n.5, 18 CR2d 487 ; see *Bank of California v. Superior Court* (1940) 16 C2d 516, 522, 106 P2d 879 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesJoinderIndispensable Parties





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**5.37 Failure to Object May Waive Objection.**

The defendant should object to the failure to join a party or the matter may be waived if the court finds that the absentee's interests have not been inequitably affected [see *Kraus v. Willow Park Pub. Golf Course* (1977) 73 CA3d 354, 369-370, 140 CR 744 ; see also *Jordan v. Department of Motor Vehicles* (1999) 75 CA4th 449, 469, 89 CR2d 333 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Parties Joinder Indispensable Parties



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**5.38 Immediate Review of Joinder Order Obtained by Writ of Mandate.**

Appeals from orders granting or denying joinder of a new party are not specifically authorized by *CCP* § 904.1 or 904.2. Parties seeking immediate review of an order compelling joinder can seek a writ of mandate [see *Peerless Ins. Co. v. Superior Court* (1970) 6 CA3d 358, 363, 85 CR 679 ; *People v. Superior Court* (1969) 1 CA3d 167, 172, 81 CR 555 ]. A trial court's order denying joinder can also be reviewed by petition for writ of mandate [see *Bank of Orient v. Superior Court* (1977) 67 CA3d 588, 599, 136 CR 741 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesJoinderGeneral Overview



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Chapter 5 Parties  
VII. INCLUDING FICTITIOUSLY NAMED DEFENDANTS (DOE ALLEGATIONS)

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**5.39 CHECKLIST: Including Fictitiously Named Defendants (Doe Allegations).**

☐ Decide whether to name fictitious defendant to allow amendment of complaint after period of limitation has run if:

☐ Additional defendant's true name is learned.

**Authority:**

*Bernson v. Browning-Ferris Indus. (1994) 7 C4th 926, 930, 30 CR 2d 440, 873 P2d 613 ; Austin v. Massachusetts Bonding & Ins. Co. (1961) 56 C2d 596, 602, 15 CR 817, 364 P2d 681*

**Discussion:**

See 5.41

☐ Known person's connection of with cause of action is discovered.

**Authority:**

*General Motors Corp. v. Superior Court (1996) 48 CA4th 580, 593-594, 55 CR2d 871*

**Discussion:**

See 5.42

☐ In complaint:

☐ Designate defendant by any name ("Doe" is most commonly used).

☐ Allege ignorance of defendant's true name.

- ☐ State cause of action against fictitious defendant.

**Authority:**

*CCP § 474; Williams v. Goodman (1963) 214 CA2d 856, 861, 29 CR 877*

**Discussion:**

See 5.40, 5.43[1], [2]

- ☐ After learning defendant's name, amend pleading.

**Authority:**

*CCP § 474*

**Discussion:**

See 5.43[3]



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.40*

#### **5.40 Suing Defendants by Fictitious Names Authorized.**

When the plaintiff is ignorant of the name of a defendant, the plaintiff must state that fact either in the complaint [CCP § 474] or in the affidavit, if the action is commenced by affidavit [see CCP § 116.320 (claim under oath in small claims court); see also CCP § 2015.5 (use of declarations in lieu of affidavits)].

The defendant may be designated in any pleading or proceeding by any name [CCP § 474]. The most commonly used name is Doe, the allegation often referred to as a "Doe allegation," and the party is commonly referred to as a "Doe defendant."

#### **➡ Cross Reference:**

Forms of allegations against fictitiously named defendants, see *Ch. 7, Complaints*, 7.36 -7.39.

Form of Doe allegation, see *Ch. 7, Complaints*, 7.36.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Parties Fictitious Names



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.41*

#### **5.41 Fictitious Defendant Allegation Allows Action to Be Filed Within Period of Limitations.**

Fictitious defendant actions enable a plaintiff who is ignorant of the true name of a defendant to bring an action against that defendant before it is barred by the statute of limitations [ *Bernson v. Browning-Ferris Indus. (1994) 7 C4th 926, 930, 30 CR 2d 440, 873 P2d 613* ; *Austin v. Massachusetts Bonding & Ins. Co. (1961) 56 C2d 596, 602, 15 CR 817, 364 P2d 681* ].

If the defendant's name is not discovered until after the statute of limitations has expired, the plaintiff's amended complaint naming the defendant may "relate back" to the time the original complaint was filed. This will avoid the bar of the statute of limitations if the requirements of the doctrine of relation back are satisfied [see *Austin v. Massachusetts Bonding & Ins. Co. (1961) 56 C2d 596, 599, 15 CR 817, 364 P2d 681* ].

#### **➤ Cross Reference:**

Discussion of relation back, see Ch. 4, Limitation of Actions.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePartiesFictitious Names



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.42*

**5.42 Fictitiously Named Defendant May Be Used to Allege Recently Discovered Cause of Action Against Known Defendant.**

Even though the plaintiff knows of the existence of the defendant sued by a fictitious name, and even though the plaintiff knows the defendant's actual identity (that is, his or her name), the plaintiff is "ignorant" within the meaning of the statute if unaware of that person's connection with the case or with the injuries [ *General Motors Corp. v. Superior Court* (1996) 48 CA4th 580, 593-594, 55 CR2d 871 ; *Wallis v. Southern Pac. Transp. Co.* (1976) 61 CA3d 782, 786, 132 CR 631 ]. Therefore, an original complaint against a Doe defendant allows a plaintiff to allege a new cause of action against a new, previously known defendant, if the plaintiff was actually ignorant of the cause of action when the original complaint was filed.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesFictitious Names



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VII. INCLUDING FICTITIOUSLY NAMED DEFENDANTS (DOE ALLEGATIONS)

1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.43

### 5.43 Procedure for Including Fictitiously Named Defendants.

**5.43[1] Allege Ignorance of Defendant's True Name.** The allegation must state plaintiff's ignorance of the defendant's true name [*CCP* § 474; see *Dieckmann v. Superior Court* (1985) 175 CA3d 345, 351-364, 220 CR 602 ]. This requirement may be satisfied by stating that the fictitiously named defendant is sued pursuant to provisions of *CCP* § 474 [ *Motor City Sales v. Superior Court* (1973) 31 CA3d 342, 347-348, 107 CR 280 ].

#### ► Cross Reference:

Forms of allegations against fictitiously named defendants, see *Ch. 7, Complaints*, 7.36 -7.39.  
Form of Doe allegation, *Ch. 7, Complaints*, 7.36.

**5.43[2] Must State Cause of Action Against Fictitious Defendant.** Although named in the complaint, if no cause of action is stated against a fictitious defendant, the statute of limitations is not tolled as to that defendant [ *Williams v. Goodman* (1963) 214 CA2d 856, 861, 29 CR 877 ]. If the complaint merely alleges plaintiff's ignorance of the true names of fictitiously named defendants without including them in any way in the charging allegations, any attempt to amend a cause of action against such a defendant will fail if the amended complaint is filed after the statute of limitations has expired [ *Williams v. Goodman* (1963) 214 CA2d 856, 861-862, 29 CR 877 ; *Kolodziejski v. Hover* (1954) 124 CA2d 731, 732-733, 269 P2d 163 ]. If the complaint states a cause of action against all defendants, such accusation includes the fictitiously named ones [see *Breceda v. Gamsby* (1968) 267 CA2d 167, 171-172, 72 CR 832 ; *Garrett v. Crown Coach Corp.* (1968) 259 CA2d 647, 649, 66 CR 590 ].

#### Distinguish:

However, a charging allegation in a complaint that refers to "defendants" in the plural necessarily includes fictitiously named defendants, and amendment is permitted to state a new theory of liability based on those facts alleged in the original complaint [see *Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 C2d 596, 598-603, 15 CR 817, 364 P2d 681 ; *Breceda v. Gamsby* (1968) 267 CA2d 167, 173-179, 72 CR 832 ].

**5.43[3] When True Name Learned, Amend Pleading.** When the defendant's true name is discovered, the plaintiff must amend the pleading or proceeding accordingly and serve the newly named party [*CCP* § 474].



 **Cross References:**

Checklist for substituting fictitiously named party (Does), see *Ch. 34, Amended and Supplemental Pleadings*, 34.31[1].

Discussion of substituting fictitiously named party (Does), see *Ch. 34, Amended and Supplemental Pleadings*, 34.33.

Service of summons on substituted party, see Ch. 8, Service of Summons.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesFictitious Names



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VIII. INTERPLEADING PARTIES

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.44*

**5.44 CHECKLIST: Interpleading Parties.**

**5.44[1] Stakeholder's Checklist for Availability of Interpleader.**

- ☐ Determine availability of interpleader relief under one of three categories:
  - ☐ Conflicting claims to specific personal property or contractual obligation;
  - ☐ Claims involving multiple liability for single obligation;
    - ☐ Stakeholder need not admit liability to any claimant.
  - ☐ Claims may be unliquidated when interpleader sought.
- ☐ Conflicting claims by other parties in existing litigation.
  - ☐ Party is already a defendant.
  - ☐ Only relief sought against party is payment of a stated amount of money alleged to be wrongfully withheld.
  - ☐ Two or more parties are making conflicting claims to the money.
  - ☐ Party alleges he or she is mere stakeholder and has no interest in the money.

**Authority:**

CCP §§ 386(a), (b), 386.5

**Discussion:**

See 5.45

**5.44[2] Stakeholder's Checklist for Interpleader Based on Conflicting Claims Under CCP § 386(a).**

☐ If suit has not been filed, file complaint in interpleader, alleging:

- ☐ Parties sought to be interpleaded claim same thing;
- ☐ Claims are adverse to each other; and
- ☐ Plaintiff cannot determine which claim is lawful.

☐ If suit has been filed against stakeholder, either:

☐ Apply for order of substitution by application and affidavit.

☐ Affidavit must state that person not party to litigation has made claim on contract or against property and that claim is without collusion with defendant.

☐ Application made on notice to adverse party and nonparty.



**Timing:**

Must be filed before defendant files answer.

**Exception:**

If answer has already been filed, court may allow stakeholder to withdraw answer to allow application to be filed before answer.

☐ Stakeholder may deposit money with court clerk without court order.

☐ Stakeholder must deliver property to person designated by court.

☐ File verified cross-complaint in interpleader, which must:

☐ Admit that stakeholder has no interest in money or property claimed or a portion thereof.

☐ Allege that all or a portion of the money or property is demanded by parties to the action or cross action.

☐ Request court order that stakeholder deliver money or property per court direction.

**Authority:***CCP § 386(a)***Discussion:**

See 5.46

**Forms:**

See 5.58 (complaint)

- ☐ Stakeholder can seek order restraining extraneous proceedings.

**Authority:***CCP § 386(f)***Discussion:**

See 5.47

- ☐ Request costs and attorney's fees in all cases.

**Authority:***CCP § 386(a)***Discussion:**

See 5.51[1]

**5.44[3] Stakeholder's Checklist for Interpleader Based on Multiple Liability for Single Obligation Under CCP § 386(b).**

- ☐ If suit has not been filed, file complaint in interpleader.
- ☐ If suit has been filed either:
- ☐ File verified cross-complaint in interpleader, which must:
    - ☐ Admit that defendant has no interest in money or property claimed or a portion thereof;
    - ☐ Allege that all or a portion of money or property is demanded by parties to the action or cross action; and
    - ☐ Request court order that defendant deliver money or property per court direction.
  - ☐ File separate interpleader action, which must allege:
    - ☐ Parties sought to be interpleaded claim the same thing;

☐ Claims are adverse to each other; and

☐ Plaintiff cannot determine which claim is lawful.

**Authority:**

*CCP § 386(b); Fidelity Sav. & Loan Ass'n v. Rodgers (1919) 180 C 683, 684-685, 182 P 426*

**Discussion:**

See 5.46

☐ Seek order restraining other proceedings that may affect rights and obligations of parties, if desired.

**Authority:**

*CCP § 386(f)*

**Discussion:**

See 5.47

☐ Request costs and attorney's fees.

**Authority:**

*CCP § 386.6*

**Discussion:**

See 5.51[1]

**5.44[4] Stakeholder's Checklist for Interpleader Based on Conflicting Claims by Other Parties to Existing Litigation Under CCP § 386.5.**

☐ Apply for order of discharge.

☐ Include request for costs and attorney's fees.

**Authority:**

*CCP §§ 386.5, 386.6*

**Discussion:**

See 5.46[2][d], 5.51[1]

**Forms:**

See 5.61 (notice of motion), 5.62 (declaration), 5.63 (order)

**5.44[5] Opposing Party's Checklist.**

☐ Object to interpleader by demurrer or cross-complaint in interpleader.

**Authority:**

See *Hancock Oil Co. v. Hopkins* (1944) 24 C2d 497, 501-502, 510, 150 P2d 463

**Discussion:**

See 5.48[1][a]

☐ Grounds include:

☐ Independent liability of stakeholder to claimant.

**Authority:**

*Hancock Oil Co. v. Hopkins* (1944) 24 C2d 497, 505, 150 P2d 463

**Discussion:**

See 5.49[1]

☐ Stakeholder not entitled to costs and fees due to failure to follow procedure precludes.

**Authority:**

See *Phillips v. Barton* (1962) 207 CA2d 488, 495, 24 CR 527

**Discussion:**

See 5.51[1]

☐ Stakeholder liable for damages and interest for wrongful withholding.

☐ Liability ends on deposit.

**Authority:**

CCP § 386(c); see *Conner v. Bank of Bakersfield* (1917) 174 C 400, 402-403, 163 P 353

**Discussion:**

See 5.49[2]

☐ Contestants may file answer to complaint in interpleader in lieu of or in addition to any other pleading.

☐ Must include allegations of fact regarding claimant's ownership or other interest in property, any affirmative defenses, relief requested.

☐ Must be served on all other parties.

**Authority:**

CCP § 386(d)

**Discussion:**

See 5.48[3]

**Form:**

See 5.59

- ☐ Raise any complaint about insufficiency of amount or value of property.

**Authority:**

*CCP §§ 386(e), 607-630*

**Discussion:**

See 5.48[4]



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.45*

**5.45 When Interpleader Is Available.**

**5.45[1] Person Is Subject to Conflicting Claims to Property or Contract Obligation.** A party who is subject to conflicting claims to specific personal property or a contractual obligation, or any portion thereof, may obtain interpleader relief [*CCP* § 386(a)].

The third party or parties need not be parties to the litigation when the party institutes the interpleader action [*see CCP* § 386(a)].

A party who has already been sued on the obligation may:

- Seek to obtain an order substituting a nonparty for the party;
- File a verified cross-complaint in interpleader; or
- Institute a separate complaint in interpleader.

A party who has not been sued may bring a complaint in interpleader [*CCP* § 386(a)].

► **Cross References:**

Discussion of procedure for party who has been sued to seek interpleader relief, *see* 5.44[2].

Discussion of procedure for party who has not been sued, *see* 5.44[1].

**5.45[2] Person Is Subject to Multiple Claims of Liability for Single Obligation.** Any person or entity against whom double or multiple claims have been made, or may be made, and which may give rise to double or multiple liability, may compel the claimants to interplead their claims in a single proceeding. The person or entity need not admit liability to any of the claimants; what liability that may exist need not have arisen yet, and the claims may still be unliquidated when interpleader is sought [*CCP* § 386(b); *Dial 800 v. Fesbinder* (2004) 118 CA4th 32, 42 ].





### Strategic Point--Escrow:

When counsel has doubt about the proper disposition of an escrow, counsel can avoid the danger inherent in closing the escrow by pursuing the interpleader remedy [ *Virtanen v. O'Connell* (2006) 140 CA4th 688, 692, 44 CR3d 702 ].

A party who has already been sued may file a verified cross-complaint in interpleader, while a party who has not been sued may bring an interpleader action [CCP § 386(b)].



### Cross References:

Discussion of procedure for party who has been sued to seek interpleader relief, see 5.45[2].

Discussion of procedure for party who has not been sued, see 5.45[1].

**5.45[3] Defendant Is Subject to Multiple Demands by Parties to Litigation.** A defendant may apply to the court for an order discharging him or her from liability and dismissing him or her from an action on executing an application and affidavit and depositing the claimed amount with the clerk of the court when [CCP § 386.5]:

- The only relief sought against one of two or more defendants is the payment of a stated amount of money alleged to be wrongfully withheld;
- Two or more parties to the litigation are making conflicting claims to the money; and
- That defendant alleges that he or she is a mere stakeholder and has no interest in the money,



### Cross Reference:

Discussion of procedure for obtaining relief under CCP § 386.5, see 5.46[2][d].

**5.45[4] Competing Claims May Be Independent of One Another.** Interpleader relief under either CCP § 386(a) or (b) may be available even though the claims or titles of the adverse claimants do not have a common origin or are not identical but are adverse to and independent of another. However, the claimants must seek the same thing, debt, or duty. If the claims do not relate to the same thing, debt, or duty, interpleader is improper [ *City of Morgan Hill v. Brown* (1999) 71 CA4th 1114, 1123, 84 CR2d 361 (interpleader not proper)].

**5.45[5] Party Seeking Interpleader Need Not Be Disinterested Stakeholder As to Part or All of Property or Obligation.** Both CCP § 386(a) and 386(b) allow the party seeking interpleader to interplead only a portion of the property or obligation in question and claim an interest in the rest. Similarly, CCP § 386(b) allows the party to deny liability in whole or in part. These provisions abrogate the common-law requirement that a party seeking interpleader be a disinterested stakeholder. However, a plaintiff (i.e., a party initiating an interpleader action without first being sued) cannot claim a partial interest in property if suing under CCP § 386(a). Interpleader relief under CCP § 386(a) may only be brought as a cross-complaint.



### Cross Reference:

Discussion of disputes over the amount or quantity interpleaded, see 5.48[4].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule Interpleaders



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.46*

#### 5.46 Initiating Interpleader.

**5.46[1] As Plaintiff by Filing Complaint in Interpleader Under CCP § 386(a) or 386(b).** A party who has not been sued can seek interpleader relief by filing a complaint in interpleader. The complaint must allege [ *Fidelity Sav. & Loan Ass'n v. Rodgers* (1919) 180 C 683, 684-685, 182 P 426 ]:

- The parties sought to be interpleaded are claiming the same thing;
- The claims are adverse to each other; and
- Plaintiff cannot determine which claim is lawful.

It is not necessary to allege the legal probability of recovery of each claimant [ *Fidelity Sav. & Loan Ass'n v. Rodgers* (1919) 180 C 683, 684, 182 P 426 ].



#### Cross Reference:

Form of complaint, see 5.58.

#### 5.46[2] As Defendant.

**5.46[2][a] By Applying for Order of Substitution Under CCP § 386(a).** A defendant against whom an action is pending on a contract, or for specific personal property, may apply for an order to substitute a nonparty in his or her place by filing an application and affidavit [CCP § 386(a)]. The affidavit must state that a person not a party to the action has made a claim on the contract or against the property and that the claim was made without collusion with the defendant [CCP § 386(a)]. The application must be made on notice to both the adverse party and the nonparty, and it must be filed before the defendant files an answer [CCP § 386(a)]. However, if the defendant fails to apply before filing an answer, the court has discretion to permit the answer to be withdrawn, to grant additional time for it to be refiled, and to permit the defendant to apply for the order of substitution before the answer is refiled [ *Israel v. Bryan* (1921) 52 CA 66, 71-72, 197 P 121 ].

If the claim is for money, the defendant may deposit the money with the court clerk without requiring a court order. If personal property is in question, the defendant must deliver the property to the person designated by the court [CCP § 386(a)].



#### Cross Reference:

Forms, see 5.61 (notice of motion), 5.62 (declaration), 5.63 (order).

**5.46[2][b] By Filing Verified Cross-Complaint in Interpleader Under CCP § 386(a) or 386(b).** A defendant subject to either conflicting claims to property or a contract obligation or multiple claims of liability for a single obligation may file a verified cross-complaint in interpleader [CCP § 386(a), (b)]. The cross-complaint must [CCP § 386(a), (b)]:

- Admit that the defendant has no interest in the money or property claimed or in a portion thereof;
- Allege that all or a portion of the money or property is demanded by parties to the action or cross-action (although a new cross-defendant may, and often is, introduced by this cross-complaint); and
- Request an order that the defendant deliver the money or property claimed to such persons as the court may direct.

**5.46[2][c] By Filing Separate Interpleader Action Under CCP § 386(b).** Any person or entity against whom double or multiple claims have been made, or may be made, which may give rise to double or multiple liability, may file a separate interpleader action [CCP § 386(b)]. This action is described at 5.45[1].

A separate interpleader action appears to be the only procedural vehicle for a defendant who wishes to contest his or her liability on the claim, since a cross-complaint must include an admission that the defendant has no interest in all or part of the claim [see CCP § 386(a), (b)].

**5.46[2][d] By Applying for Order of Discharge Under CCP § 386.5.** When the only relief sought against one of two or more defendants is the payment of a stated amount of money alleged to be wrongfully withheld, that defendant may apply to the court for an order discharging him or her from liability and dismissing him or her from the action, on deposit of the claimed amount with the clerk of the court [CCP § 386.5; see also *Pasadena Inv. Co. v. Peerless Cas. Co.* (1955) 134 CA2d Supp 902, 904 ].

The application is to be made on affidavit (or declaration under CCP § 2015.5) that he or she is a mere stakeholder with no interest in the amount whatever, who has received conflicting demands for the amount by parties to the action. The application must be made on notice to the parties who made the conflicting demands [CCP § 386.5].



#### Cross References:

Forms, see 5.61 (notice of motion), 5.62 (declaration), and 5.63 (order).

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesSubstitutionsGeneral Overview



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.47*

**5.47 Injunctive Relief Preventing Extraneous Proceedings Available.**

After a complaint or cross-complaint in interpleader has been filed, the court may enter an order restraining all parties to the action from instituting or further prosecuting any other proceeding in any court in this state affecting the rights and obligations between the parties to the interpleader until further order of the court [*CCP § 386(f)*].

The restraining order is available to preclude a party that has obtained judgment in another court from enforcing that judgment. The order is directed at the party, not at the other court [ *Surety Co. of the Pac. v. Piver* (1983) 149 CA3d Supp 29, 30-32, 197 CR 531 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesInterpleadersGeneral Overview



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Chapter 5 Parties  
VIII. INTERPLEADING PARTIES

1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.48

**5.48 Procedure After Interpleader Action or Cross-Action Commenced.**

**5.48[1] Objections and Answers to Complaint in Interpleader.**

**5.48[1][a] Objections Raised by Demurrer or Cross-Complaint in Interpleader.** The interpleaded or adverse claimants may contest the issue of the interpleading party's entitlement to the remedy of interpleader at the time the trial court is determining that issue. They may raise this objection by demurrer to the interpleader complaint or cross-complaint [see *Hancock Oil Co. v. Hopkins* (1944) 24 C2d 497, 501-502, 510, 150 P2d 463 ; *City of Los Angeles v. Amidor* (1903) 140 C 400, 401, 73 P 1049 ] or in the answer [see *San Francisco Sav. Union v. Long* (1898) 123 C 107, 109, 55 P 708 ; *Williams v. Gilmore* (1942) 51 CA2d 684, 689, 125 P2d 539 ].

**5.48[1][b] Failure to Object Deemed Consent to Interpleader.** If the interpleaded or adverse claimants fail to object to the interpleading party's right to maintain an interpleader action at the first stage of the proceeding, but proceed without objection to litigate their claims fully in the action, they are deemed to have consented to the interpleader remedy. Later, they may not object that the complaint did not state a cause of action for interpleader, or that the facts were such that the interpleading party was not entitled to compel the claimants to interplead [ *Conner v. Bank of Bakersfield* (1920) 183 C 199, 202-203, 190 P 801 ; *O'Connell v. Zimmerman* (1958) 157 CA2d 330, 337, 321 P2d 161 ].

**5.48[1][c] Adjudication Regarding Interpleader May Be by Trial or on Review of Pleadings.** The first stage of an interpleader action may require a full trial on the issue of whether interpleader lies in the particular action. The court may, however, issue an interlocutory decree on the pleadings alone, if the allegations of the complaint, coupled with admissions in the answer or answers, show that the interpleading party is entitled to the relief sought [see *Williams v. Gilmore* (1942) 51 CA2d 684, 689-690, 125 P2d 539 ].

**5.48[2] Interlocutory Decree Requiring Interpleader and Discharging Party Seeking Interpleader.** Following the entry of an interlocutory decree requiring the adverse claimants to litigate their claims between themselves, the interpleading party ceases to be a party to the action and is usually discharged [ *San Francisco Sav. Union v. Long* (1898) 123 C 107, 109, 55 P 708 ; *Great-West Life Assurance Co. v. Superior Court* (1969) 271 CA2d 124, 127, 76 CR 284 ].

**Exceptions:**

An interlocutory order will not, however, completely discharge the interpleading party, even though by its terms it purports to do so, in either of the following situations [ *Great-West Life Assurance Co. v. Superior Court* (1969) 271 CA2d 124, 127-128, 76 CR 284 ]:

- When the interlocutory order fails to discharge the interpleading party from the claims of all the adverse or conflicting claimants, and if it specifically directs the interpleading party to deposit additional sums with the clerk as they become due although such sums may not be necessary to satisfy the conflicting claimants; or
- If the order states that costs and attorney's fees will be paid to interpleading party, but defers the determination of this award until the trial between the claimants.

In each of these cases, the first stage of the interpleader action remains partially undetermined, and the interpleading party necessarily remains an active participant in the case [ *Great-West Life Assurance Co. v. Superior Court* (1969) 271 CA2d 124, 127-128, 76 CR 284 ].

 **Cross Reference:**

Form of interlocutory order, see 5.60.

**5.48[3] Answers of Contesting Parties.** A party who has been interpleaded may, in lieu of or in addition to any other pleading, file an answer to the complaint or cross-complaint in interpleader. The answer must include [CCP § 386(d)]:

- Allegations of fact regarding the pleader's ownership or other interest in the amount or property;
- Any affirmative defenses; and
- The relief requested.

This answer must be served on all other parties to the action [CCP § 386(d)]. The allegations of each answer are deemed denied by all other parties unless otherwise admitted in the pleadings [CCP § 386(d)].

 **Cross Reference:**

Form of answer, see 5.59.

**5.48[4] Objecting Party's Objection to Inadequacy of Fund or Property Raised in Next Stage.** If the amount deposited is less than the amount claimed to be due by one or more of the claimants, or if the property or its value is less than one or more claimants alleges it should be, that issue is adjudicated in the second stage, after issuance of the order of interpleader. This issue, unlike any others arising from interpleader, may be tried to a jury [CCP §§ 386(e), 607-630].

**5.48[5] Deposit of Money or Delivery of Property May Sometimes Require Court Order.** At the time of the filing a complaint or cross-complaint in interpleader, the plaintiff or cross-complainant may deposit any amount he or she admits is payable with the clerk of the court, without first obtaining an order of the court for the deposit [CCP § 386(c)]. CCP § 386(c) permits a partial deposit--that is, a sum which the party admits it owes but which is less than the amount claimed by the opponent--to be made without court order. However, the court may not accept a deposit that is less than the total amount at issue if the making of the deposit is conditioned on the court granting the party making the deposit a complete discharge. Such a deposit would not qualify as a partial deposit and the court has no power to accept it on those terms [ *Crocker-Anglo Nat'l Bank v. American Trust Co.* (1959) 170 CA2d 289, 300, 338 P2d 617 ].

In the case of substitution of defendants under *CCP* § 386(a) or discharge of a defendant under *CCP* § 386.5, a court order is required before the money in dispute may be deposited with the court.

When the subject matter of the dispute is personal property, the property may be delivered only pursuant to court order. The property must be delivered to the person designated in the order [*CCP* § 386(a), (b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirements



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Chapter 5 Parties  
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1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.49

**5.49 Stakeholder's Liability.**

**5.49[1] Independent Liability of Stakeholder to Claimant Ordinarily Precludes Interpleader.** Generally, interpleader relief is not available to a stakeholder who has incurred some personal obligation to any of the claimants that is independent of the title or right of possession of the fund or property in question [ *Hancock Oil Co. v. Hopkins*(1944) 24 C2d 497, 505, 150 P2d 463 ]. To justify dismissal of an interpleader action, this independent obligation must be such that it will not be resolved by the litigation between the interpleaded defendants [ *Hancock Oil Co. v. Hopkins* (1944) 24 C2d 497, 505, 150 P2d 463 ].

Not every independent obligation will negate interpleader relief. If the court's determines the responsibility of the interpleading party to be that of a mere stakeholder for the purposes of CCP §§ 386-386.6, interpleader is available [see *Hancock Oil Co. v. Hopkins* (1944) 24 C2d 497, 505-506, 150 P2d 463 (interpleader of adverse claimants to rent held by tenant not barred by independent obligation of tenant to landlord under terms of lease); *Security Trust & Sav. Bank v. Carlsen* (1928) 205 C 309, 316-317, 271 P 100 ].

**5.49[2] Liability for Interest or Wrongful Withholding Ceases on Deposit.** Any interest on amounts deposited with the court clerk and any right to damages for detention of property delivered to the court pursuant to court order ceases to accrue after the date of deposit or delivery [CCP § 386(c)]. Prior to such deposit or delivery, the stakeholder may be liable to the successful interpleaded claimant for interest on the money or damages for wrongful withholding of the property claimed [see *Conner v. Bank of Bakersfield* (1917) 174 C 400, 402-403, 163 P 353 (interest)].

**5.49[3] Stakeholder Immune From Tort Liability.** As a matter of law and public policy, an interpleader plaintiff is not liable in tort for naming someone as a potential claimant in an interpleader action. Thus, a claimant to the fund at issue may not successfully sue the interpleader plaintiff for malicious prosecution, abuse of process, or intentional infliction of emotional distress [ *Cantu v. Resolution Trust Corp.* (1992) 4 CA4th 857, 873, 6 CR2d 151 ].

**5.49[4] Interpleaded Funds Not Subject to Further Claims.** When in the legal custody of the court, the funds deposited no longer are subject to further claims, such as claims made by writs of attachment or execution that purport to levy on all or part of the funds in question [see *Van Orden v. Anderson* (1932) 122 CA 132, 141, 9 P2d 572 (attachment); *Durkin v. Durkin* (1955) 133 CA 2d 283, 293, 284 P2d 185 (execution)].



**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesInterpleadersRequirements



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Chapter 5 Parties  
VIII. INTERPLEADING PARTIES

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.50*

**5.50 Interest on Interpleaded Funds May Be Ordered, Then Paid to Parties in Proportion to Award of Original Funds.**

When a deposit has been made pursuant to *CCP* § 386, the court, on application of any party to the action, must order the deposit to be invested in an insured interest-bearing account. The interest earned should be allocated to the parties in the same proportion as are the original funds [*CCP* § 386.1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesInterpleadersGeneral Overview



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Chapter 5 Parties  
VIII. INTERPLEADING PARTIES

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.51*

### 5.51 Costs and Attorney's Fees.

**5.51[1] Stakeholder Must Follow Procedure to Obtain Costs and Attorney's Fees.** A party to an action who follows the procedure set forth in *CCP* § 386 (complaints and cross-complaints in interpleader and application for substitution) or *CCP* § 386.5 (application for dismissal), may insert in his or her motion, petition, complaint, or cross-complaint a request for allowance of costs and reasonable attorney fees incurred in the action [*CCP* § 386.6].

The party must follow the procedures set out in *CCP* § 386 or 386.5 to qualify for costs and fees.

**Distinguish:**

A stakeholder who merely files an answer stating that he or she is a stakeholder with no interest in the amount in question, but does not follow through with the statutory interpleader procedures, does not qualify for attorney's fees [ *Phillips v. Barton* (1962) 207 CA2d 488, 495, 24 CR 527 ].

A defendant's opposition to deposit of the disputed funds does not excuse the stakeholder's failure to deposit the funds with the court in furtherance of gaining entitlement to an award of attorney's fees from those funds [ *Wells Fargo Bank v. Zinnel* (2004) 125 CA4th 393, 401 ].

**5.51[2] Court Has Discretion in Award of Costs and Fees.** In ordering the discharge of an interpleader party, the court has discretion to award that party costs and reasonable attorney fees from the disputed amount deposited with the court [*CCP* § 386.6(a)]. An award of attorney's fees to a discharged stakeholder may only be made from funds deposited with the court [ *Wells Fargo Bank v. Zinnel* (2004) 125 CA4th 393, 403 ].

At the time of the final judgment in the action, the court may make such further provisions for assumption of costs and attorney fees by one or more of the adverse claimants as may appear proper [*CCP* § 386.6(a)].

 **Cross References:**

Discussion of recovery of costs and attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Chs. 24, Costs, and 25, Attorney's Fees.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
[Civil Procedure](#)[Parties](#)[Interpleaders](#)[General Overview](#)



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Chapter 5 Parties  
VIII. INTERPLEADING PARTIES

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.52*

**5.52 Order of Discharge Is Not Appealable but Final Judgment Is Appealable.**

Generally, an order of discharge is not appealable because it does not make a final disposition of money or property [see CCP § 904.1(a); *Camp v. Oakland Mortgage & Fin. Co. (1928) 205 C 380, 381-383, 270 P 685* ; *Neilsen v. Saylor (1956) 146 CA2d 139, 140, 303 P2d 781* ]. Only the final judgment in interpleader is appealable [ *Lincoln Nat'l Life Ins. Co. v. Mitchell (1974) 41 CA3d 16, 19, 115 CR 723* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesInterpleadersGeneral Overview



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Chapter 5 Parties  
IX. FORMS  
A. Joinder of Omitted Party

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.53*

**5.53 Notice of Motion for Order Compelling Joinder of Omitted Party.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],  
Plaintiff,  
vs.  
\_\_\_\_\_[name],  
Defendant.

)  
) No. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR OR-  
) DER TO COMPEL JOINDER OF OMITTED  
) PARTY  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_[name], Plaintiff, and to \_\_\_\_\_[name], his/her attorney of record:

[EITHER, if motion is under Code Civ. Proc. § 389(a)(1) ]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_[date], at \_\_\_\_\_[time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_] of this court, located at \_\_\_\_\_[street address], \_\_\_\_\_[city], \_\_\_\_\_ [Defendant or name of omitted party] will, and hereby does, move for an order under *Code of Civil Procedure* Section

389(a)(1) compelling Plaintiff to bring \_\_\_\_\_ [name of omitted party] into this action as a new party \_\_\_\_\_ [Plaintiff or Defendant]. The motion will be made on the grounds that in the absence of \_\_\_\_\_ [name of omitted party], complete relief cannot be accorded among those already parties in that \_\_\_\_\_ [specify reasons]. [\_\_\_\_\_ (Name of omitted party) is a person who is subject to service of process and whose joinder will not deprive this court of jurisdiction over the subject matter of this action.]

[OR, if motion is under Code Civ. Proc. § 389(a)(2) ]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ ] of this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [Defendant or name of omitted party] will, and hereby does, move for an order under Code of Civil Procedure Section 389(a)(2) compelling Plaintiff to bring \_\_\_\_\_ [name of omitted party] into this action as a new party \_\_\_\_\_ [Plaintiff or Defendant]. The motion will be made on the grounds that \_\_\_\_\_ [name of omitted party] claims an interest relating to the subject of the action and is so situated that the disposition of the action in his/her absence may \_\_\_\_\_ [as a practical matter impair or impede his/her ability to protect that interest or leave \_\_\_\_\_ (current party to the action) subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his/her claimed interest] in that \_\_\_\_\_ [specify reason]. [\_\_\_\_\_ (Name of omitted party) is a person who is subject to service of process and whose joinder will not deprive this court of jurisdiction over the subject matter of this action.]

[CONTINUE]

The motion will be based on this notice of motion, on the declaration of \_\_\_\_\_ [name] and the supporting memorandum served and filed herewith, on the papers and records and file herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [moving party]

NOTES.

**Authority:**

CCP § 389

**Grounds:**

See 5.31

**Related Form of Declaration:**

See 5.54

**Related Form of Order:**

See 5.55

**Related Forms of Memoranda:**

See California Points and Authorities, Ch. 168, Parties (Matthew Bender)





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A. Joinder of Omitted Party

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.54*

**5.54 Declaration Supporting Motion for Order Compelling Joinder of Omitted Party.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],  
Plaintiff,  
vs.  
\_\_\_\_\_[names],  
Defendant.

)  
) No. \_\_\_\_\_  
) DECLARATION OF \_\_\_\_\_ [name]  
) SUPPORTING MOTION FOR ORDER TO COM-  
) PEL JOINDER OF OMITTED PARTY  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

I, \_\_\_\_\_[name], declare:

1. I am \_\_\_\_\_[identify declarant, e.g., the Defendant in the above-described action].
2. This declaration is in support of \_\_\_\_\_'s [Defendant or the omitted party] motion for an order compelling joinder of \_\_\_\_\_[name] as a new party \_\_\_\_\_ [Plaintiff or Defendant] to this action.
3. \_\_\_\_\_[Set forth nature of plaintiff's action and existing parties.].

[EITHER, if relief is sought under Code Civ. Proc. § 389(a)(1) ]

4. \_\_\_\_\_ [Name of omitted party] has a right against \_\_\_\_\_ [Plaintiff or Defendant]  
\_\_\_\_\_ [name] because \_\_\_\_\_ [state facts showing that in the absence of omitted party,  
complete relief cannot be accorded among those already parties].

[OR, if relief is sought under Code Civ. Proc. § 389(a)(2)(i) ]

4. \_\_\_\_\_ [Name of omitted party] has a right against \_\_\_\_\_ [Plaintiff or Defendant]  
because \_\_\_\_\_ [state facts showing that omitted party claims an interest relating to the subject of the  
action and is so situated that the disposition of the action in his/her absence may, as a practical matter, impair or  
impede his/her ability to protect that interest].

[OR, if relief is sought under Code Civ. Proc. § 389(a)(2)(ii) ]

4. \_\_\_\_\_ [Name of omitted party] has a right against \_\_\_\_\_ [Plaintiff or Defendant]  
because \_\_\_\_\_ [state facts showing that omitted party claims an interest relating to the subject of the  
action and is so situated that the disposition of the action may, as a practical matter, leave an existing party subject to  
substantial risk of incurring double, multiple, or inconsistent obligations].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

NOTES.

**Authority:**

CCP § 389

**Related Form of Motion:**

See 5.53



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Chapter 5 Parties  
IX. FORMS  
A. Joinder of Omitted Party

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.55*

**5.55 Order Granting Motion Compelling Joinder of Omitted Party.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                    |
|---------------|---|------------------------------------|
| _____ [name], | ) |                                    |
| Plaintiff,    | ) |                                    |
| vs.           | ) | No. _____                          |
| _____ [name], | ) | ORDER TO COMPEL JOINDER OF OMITTED |
| Defendant.    | ) | PARTY                              |
|               | ) |                                    |
|               | ) |                                    |

\_\_\_\_\_

The motion of \_\_\_\_\_ [name of defendant or omitted party] for an order directing Plaintiff to amend his/her complaint to bring in \_\_\_\_\_ [name of omitted party] as a new party \_\_\_\_\_ [Plaintiff or Defendant] came on regularly for hearing by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; \_\_\_\_\_ [specify additional appearances, e.g., Defendant appeared by counsel \_\_\_\_\_ (name); moving party appeared by counsel \_\_\_\_\_ (name)].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted as follows:

[EITHER, if new party plaintiff]

The motion is granted and Plaintiff is directed to amend his/her complaint herein to join into this action \_\_\_\_\_ *[name of new party]* as a new party Plaintiff.

*[OR, if new party defendant]*

The motion is granted and Plaintiff is directed to amend his/her complaint herein to join into this action \_\_\_\_\_ *[name of new party]* as a new party Defendant. Summons is to be issued thereon, and Plaintiff is to serve \_\_\_\_\_ *[name of new party]* with a copy of the summons and a copy of the amended complaint within \_\_\_\_\_ days from the date of this order.

Dated: \_\_\_\_\_

\_\_\_\_\_ *[signature]*

Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 389*

**Related Form of Motion:**

See 5.53



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Chapter 5 Parties  
IX. FORMS  
B. Guardian Ad Litem

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.56*

**5.56 Judicial Council Form CIV-010 Application and Order for Appointment of Guardian Ad Litem--Civil.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

CCP § 373; California Judicial Council Form CIV-010 has been adopted by the California Judicial Council for mandatory use

**Requirement and Exceptions:**

See 5.19, 5.21

**Who May Apply:**

See 5.22



**Timing:**

See 5.23

**Procedure:**

See 5.24

**Related Form:**

Use Judicial Council Form DE-350/GC-100 (Petition for Appointment of Guardian Ad Litem-Probate) for appointments under the Probate Code



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Chapter 5 Parties  
IX. FORMS  
B. Guardian Ad Litem

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.57*

### 5.57 Petition for Approval of Contract With Attorney.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name], a Minor, )  
by \_\_\_\_\_ [name], his/her )  
Guardian [ad Litem], )  
Plaintiff, )  
vs. )  
\_\_\_\_\_[name(s)], )  
Defendant(s). )

No. \_\_\_\_\_  
EX PARTE PETITION FOR APPROVAL OF CON-  
TRACT \_\_\_\_\_ [BY or ON BE-  
HALF OF] MINOR FOR ATTORNEY'S FEES AND  
SUPPORTING DECLARATION OF  
\_\_\_\_\_[name]

Petitioner \_\_\_\_\_[name] respectfully represents:

1. Petitioner is \_\_\_\_\_ [specify relationship to minor, e.g., the mother] of  
\_\_\_\_\_[name], a minor.

2. \_\_\_\_\_ [Name of minor] was born on \_\_\_\_\_ [date], and is \_\_\_\_\_  
years of age.

[EITHER, if minor is plaintiff]

3. \_\_\_\_\_ [Name of minor] has a cause of action against the above-named Defendant(s) on which a suit should be brought. The cause of action arises out of \_\_\_\_\_ [specify facts giving rise to cause of action, e.g., an automobile collision occurring on or about October 14, 2003, at or near the intersection of Main and Oak Streets in Farallon City, California, in which an automobile driven by Defendant John Jones and owned by Defendant Mary Jones negligently collided with the rear of an automobile in which \_\_\_\_\_ [name of minor] was riding, causing the minor injuries and damages].

[OR if minor is defendant]

3. \_\_\_\_\_ [Name of minor] has been served with summons as a Defendant in the above-entitled action alleging that \_\_\_\_\_ [specify facts alleged against minor, e.g., the minor caused an automobile collision occurring on or about October 14, 2003, causing the Plaintiff injuries and damages].

[CONTINUE]

4. Petitioner has contracted, subject to the approval of this court, with \_\_\_\_\_ [name(s)], attorney(s) at law with an office at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], California, to \_\_\_\_\_ [defend or prosecute the cause of action for] the minor under an agreement whereby \_\_\_\_\_ [name (s) of attorney (s)] is/are to be paid \_\_\_\_\_ [specify terms of fee agreement]. A copy of the agreement is attached as Exhibit A and made a part hereof.

WHEREFORE, petitioner prays that the above-described agreement for attorney's fees be approved], and for such other and further relief as the court may deem proper.

\_\_\_\_\_ [signature]

Petitioner

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Petitioner

#### VERIFICATION

I, \_\_\_\_\_ [name], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein represented on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

NOTES.

**Authority:**

*Fam Code § 6602*

**Requirement of Court Approval:**

*See 5.26[3]*





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Chapter 5 Parties  
IX. FORMS  
C. Interpleader

*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.58*

**5.58 Complaint Alleging Adverse Claims Made on Plaintiff With Respect to One Liability.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                             |   |                           |
|-----------------------------|---|---------------------------|
| _____ [name],               | ) |                           |
| Plaintiff,                  | ) |                           |
| vs.                         | ) | No. _____                 |
| _____ [names],              | ) | COMPLAINT IN INTERPLEADER |
| [and DOES I through _____,] | ) |                           |
| Defendants.                 | ) |                           |
|                             | ) |                           |
|                             | ) |                           |

Plaintiff alleges:

1. Defendants \_\_\_\_\_ [names] are, and at all times mentioned herein were, residents of \_\_\_\_\_ County, California \_\_\_\_\_ [or allege other capacity and residence of defendants].

[2. Defendants Doe I through Doe \_\_\_\_\_, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to Plaintiff. When their true names and capacities are ascertained, Plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.)] (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named Defendants is making or has a claim to the

\_\_\_\_\_ [property or funds or obligation] described in this complaint which is conflicting with the claims of Defendants herein and which may subject Plaintiff to vexatious litigation with respect to \_\_\_\_\_ [that property or those funds or that obligation].)

3. \_\_\_\_\_ [Describe personal property, funds, or obligation, or portion thereof, to which conflicting claims have been made, e.g., On or about \_\_\_\_\_ (date), Plaintiff entered into a written contract with Defendant \_\_\_\_\_ (name) for the construction of a sidewalk over Plaintiff's property. Under this contract Defendant \_\_\_\_\_ (name) promised to perform all necessary labor and supply all necessary materials for the construction of the sidewalk and Plaintiff promised to pay Defendant \_\_\_\_\_ (name) the sum of \$\_\_\_\_\_ on completion of the sidewalk. Defendant \_\_\_\_\_ (name) has fully performed all conditions, covenants, and promises under the contract and Plaintiff now holds the sum of \$\_\_\_\_\_, (the sum due under the contract or after deduction of all sums of money consisting of prior payments or specify other portion of sum that is not in dispute)].

4. \_\_\_\_\_ [State conflicting claims that have been made on Plaintiff relating to personal property or performance of obligation, or portion thereof, so that Plaintiff shows reasonable probability of vexatious litigation, e.g., Defendant \_\_\_\_\_ (name of claimant under contract) has demanded that Plaintiff pay the sum due under the contract (, specifically making a written demand for this sum on \_\_\_\_\_ [date], a copy of which is attached as Exhibit A and made a part hereof). However, Plaintiff has refused to pay that sum because Defendant \_\_\_\_\_ (name of assignee) has claimed that this sum is now due and owing to him/her under an assignment of all right, title, and interest in and to the contract mentioned above, allegedly made by Defendant \_\_\_\_\_ (name of claimant under contract) to Defendant \_\_\_\_\_ (name of assignee) on or about \_\_\_\_\_ [date], and of which Plaintiff was given notice by \_\_\_\_\_ (specify manner in which notice was given) (, a copy of which is attached as Exhibit B and made a part hereof)].

5. Plaintiff is indifferent with respect to which Defendant Plaintiff should \_\_\_\_\_ [deliver the property described above or pay the \$\_\_\_\_\_ or perform the obligation described above] and \_\_\_\_\_ [claims no interest in the property or claims no interest in the \$\_\_\_\_\_ or does not dispute that he/she is required to perform such obligation].

6. The respective claims made by Defendants \_\_\_\_\_ [names] are adverse and conflicting and are made without Plaintiff's collusion. Plaintiff is unable to safely determine which of the claims is valid.

[7. Plaintiff has deposited the sum of \$\_\_\_\_\_, being the entire amount in dispute which is due and unpaid at this time with the clerk of this court on the filing of this complaint.]

[8. Defendants \_\_\_\_\_ (names) have commenced separate actions against Plaintiff on their respective claims. These actions have been commenced in \_\_\_\_\_ (list title of court and number of each action). Defendants \_\_\_\_\_ (names) have threatened to file actions against Plaintiff on their respective claims and Plaintiff fears that unless restrained by an order of the court, these Defendants will file such actions on their claims. Therefore, it is necessary to restrain the prosecution of those actions which have been commenced against Plaintiff and to restrain the filing of those actions which have been threatened to be filed, in order to prevent a multiplicity of judicial proceedings and to prevent Plaintiff from facing vexatious litigation with respect to the \_\_\_\_\_ (property or \$\_\_\_\_\_ or obligation) described above.]

9. Plaintiff has incurred attorney fees and costs as a result of these proceedings.

WHEREFORE, Plaintiff prays judgment against Defendants, and each of them, as follows:

1. That Defendants be ordered to interplead and litigate their respective rights to the \_\_\_\_\_ [property

or \$ \_\_\_\_\_ or obligation] described above;

2. That Plaintiff be discharged from any and all liability on account of the claims of each of the Defendants;

[3. That Defendants \_\_\_\_\_ (*names*) be restrained from prosecution of their actions against Plaintiff on their respective claims and that Defendants \_\_\_\_\_ (*names*) be restrained from instituting any actions against Plaintiff on their respective claims;]

4. That Plaintiff be awarded costs and reasonable attorney fees to be determined by the court [and to be paid out of the money deposited with the court]; and

5. For such other and further relief as the court may deem proper.

#### VERIFICATION

I, \_\_\_\_\_ [*name*], am the Plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [*date*]

\_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

#### NOTES.

##### **Authority:**

*CCP § 386(a), (b), (c), (f)*

##### **Grounds:**

*See 5.45*

##### **Contents of Complaint:**

*See 5.46[1]*

##### **Availability of Injunctive Relief:**

*See 5.47*

##### **Costs and Attorney's Fees:**

*See 5.51*



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.59*

**5.59 Answer to Complaint or Cross-Complaint in Interpleader.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

*[EITHER, if answer to complaint in interpleader]*

\_\_\_\_\_, [name], )  
Plaintiff, )  
vs. )  
\_\_\_\_\_, [names], )  
[and DOES I through \_\_\_\_\_,] )  
Defendants. )  
)  
)  
)

No. \_\_\_\_\_  
ANSWER TO COMPLAINT IN INTERPLEADER

*[OR, if answer to cross-complaint in interpleader]*

\_\_\_\_\_, [name], )  
Plaintiff, )  
vs. )  
\_\_\_\_\_, [names], )  
Defendants. )  
\_\_\_\_\_, [name], )  
Cross-Complainant, )  
vs. )  
\_\_\_\_\_, [names], )  
Cross-Defendant. )

No. \_\_\_\_\_  
ANSWER TO CROSS-COMPLAINT IN INTER-  
PLEADER

)  
)

[CONTINUE]

\_\_\_\_\_ [Defendant or Cross-Defendant] \_\_\_\_\_ [name] answers the  
\_\_\_\_\_ [complaint or cross-complaint] herein as follows:

1. \_\_\_\_\_ [Defendant or Cross-Defendant] admits each and every allegation set forth in Paragraph(s) \_\_\_\_\_ of the \_\_\_\_\_ [complaint or cross-complaint] herein, and, in particular, the allegation that \_\_\_\_\_ [Plaintiff or Cross-Complainant] has no interest in the \_\_\_\_\_ [sum of \$ \_\_\_\_\_ or describe personal property][, or in any portion thereof,] as alleged in Paragraph(s) \_\_\_\_\_ of the \_\_\_\_\_ [complaint or cross-complaint].
2. \_\_\_\_\_ [Defendant or Cross-Defendant] denies each and every allegation set forth in Paragraph(s) \_\_\_\_\_ of the \_\_\_\_\_ [and, in particular, the allegation that there is a conflict between this answering (Cross-) Defendant and (Cross-) Defendant \_\_\_\_\_ (name of other interpleaded claimant) over the \_\_\_\_\_ (\$ \_\_\_\_\_ or property) as alleged in Paragraph(s) \_\_\_\_\_ of the \_\_\_\_\_ [complaint or cross-complaint] (and affirmatively alleges that there is no such conflict)].
3. This answering [Cross-] Defendant further denies that [Cross-] Defendant \_\_\_\_\_ [name of adverse claimant] has any right to or interest in the \_\_\_\_\_ [sum of \$ \_\_\_\_\_ or property described] as alleged in Paragraph(s) \_\_\_\_\_ of the \_\_\_\_\_ [complaint or cross-complaint] herein[, other than \_\_\_\_\_ (the sum of \$ \_\_\_\_\_ or describe property),] for the reason that \_\_\_\_\_ [specify].
4. \_\_\_\_\_ [Allege facts in this paragraph, and in succeeding paragraphs if required, showing (cross-) defendant's right to the money or property in dispute, e.g., On or about October 15, 2003, the contract referred to in Paragraph 3 of the complaint herein was duly assigned in writing by Defendant John Lee to this answering Defendant Mary Jones, and, thereafter, on or about October 27, 2003, notice of the assignment was given to Plaintiff John Smith. Copies of the assignment and of the notice are attached as Exhibits A and B, respectively, and made a part hereof. By the terms of the assignment, this answering Defendant Mary Jones has been and now is entitled to the full sum of \$87,500].

[If alleging affirmative defense or defenses, ADD]

AS A (FIRST) SEPARATE AND AFFIRMATIVE DEFENSE, (Cross-) Defendant alleges:

1. \_\_\_\_\_ [Set forth any facts constituting affirmative defense].

[CONTINUE with any additional affirmative defenses.]

WHEREFORE, this answering [Cross-] Defendant prays judgment as follows:

- [1. For a determination that this is not a proper case for interpleader and that \_\_\_\_\_ (Plaintiff or

Cross-Complainant) is therefore not entitled to compel (Cross-) Defendants to interplead and litigate their claims to the \_\_\_\_\_ (money *or* property) in question;]

2. That the \_\_\_\_\_ [money *or* property] in question be awarded to this answering [Cross-] Defendant; and

3. For such other and further relief as the court may deem proper.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for [Cross-] Defendant \_\_\_\_\_

[name]

#### VERIFICATION

I, \_\_\_\_\_ [name], am the Defendant in the above-entitled action. I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

#### NOTES.

##### **Authority:**

*CCP § 386(d)*

##### **Responses to Complaint in Interpleader:**

See 5.48



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.60*

**5.60 Interlocutory Order of Discharge.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                             |   |           |
|-----------------------------|---|-----------|
| _____ [name],               | ) |           |
| Plaintiff,                  | ) |           |
| vs.                         | ) | No. _____ |
| _____ [names],              | ) | ORDER     |
| [and DOES I through _____,] | ) |           |
| Defendants.                 | ) |           |
|                             | ) |           |
|                             | ) |           |

This cause came regularly for trial on \_\_\_\_\_ [date], in Department No. \_\_\_\_\_ of the above-entitled court, the Honorable \_\_\_\_\_, Judge, presiding, sitting without a jury. Plaintiff appeared by \_\_\_\_\_ [name of attorney], Defendant \_\_\_\_\_ [name] appeared by his/her attorney \_\_\_\_\_ [name], and Defendant \_\_\_\_\_ [name] appeared by his/her attorney \_\_\_\_\_ [name], and oral and documentary evidence having been presented and the cause having been argued and submitted for decision[, and the court having heretofore filed its written findings of fact and conclusions of law herein,] and the court having found that this cause in interpleader has been properly brought,

[NOW, THEREFORE, IT IS ORDERED that Plaintiff be, and he/she is hereby, relieved and discharged from this case and from further liability or responsibility arising out of the rights and obligations of the parties to this action with respect to \_\_\_\_\_ (sum of money which plaintiff has deposited with the clerk of the court or following described property: \_\_\_\_\_ [describe subject matter in dispute more particularly]).]

\_\_\_\_\_ [IT IS FURTHER ORDERED or NOW, THEREFORE, IT IS ORDERED] that Defendant \_\_\_\_\_ [name] and Defendant \_\_\_\_\_ [name] be, and they hereby are, directed to interplead and litigate their claims to the above-described \_\_\_\_\_ [sum of money or property or specify other] amongst themselves.

[EITHER]

IT IS FURTHER ORDERED that Plaintiff have and recover the sum of \$\_\_\_\_\_ as costs for suit herein and the sum of \$\_\_\_\_\_ as reasonable attorney fees incurred in this action, to be paid from the \_\_\_\_\_ [fund deposited with the clerk of this court by Plaintiff or fund or property or specify subject matter in dispute more particularly].

[OR]

[IT IS FURTHER ORDERED that the court hereby retain jurisdiction over all matters affecting the rights and obligations of each of the above-named Defendants with respect to the \_\_\_\_\_ (\$\_\_\_\_\_ [deposited with clerk of the court by Plaintiff] or above-described property or specify subject matter in dispute more particularly)(and that Plaintiff deposit \_\_\_\_\_ [this sum or this property or specify subject matter in dispute more particularly] to await) a determination of the total \_\_\_\_\_ (amount or value or specify more particularly) for which Plaintiff may be liable to any of the above-named Defendants and a determination of the sum of money to which Plaintiff may be entitled for the costs of suit and attorney fees incurred herein and the manner in which payment of such sum should be made.]

[CONTINUE]

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

CCP § 386(d)

**Discharge of Stakeholder by Interlocutory Judgment:**

See 5.48[2]





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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.61*

**5.61 Notice of Motion for Order to Dismiss Defendant As Mere Stakeholder and for Costs and Attorney Fees.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],  
Plaintiff,  
vs.  
\_\_\_\_\_[names],  
Defendant.

)  
) No. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR OR-  
) DER TO DISMISS STAKEHOLDER AND FOR  
) COSTS AND ATTORNEY FEES  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To Plaintiff \_\_\_\_\_[name] and to \_\_\_\_\_[name], his/her attorney of record:

To Defendant \_\_\_\_\_[name] and to \_\_\_\_\_[name], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_[date], at \_\_\_\_\_[time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_[address], \_\_\_\_\_[city], Defendant \_\_\_\_\_[name] will, and hereby does, move for an order under *Code of Civil Procedure Section 386.5* to discharge him/her from liability and to dismiss him/her from this action on his/her depositing with the clerk of this court

\$\_\_\_\_\_, the amount in dispute herein and for costs and attorney's fees pursuant to *Code of Civil Procedure Section 386.6*. The motion will be made on the grounds that the only relief sought in this action against Defendant \_\_\_\_\_ [name of moving party] is the payment of the sum of \$\_\_\_\_\_, which Plaintiff \_\_\_\_\_ [name] seeks in his/her complaint and which Defendant \_\_\_\_\_ [name of adverse claimant] claims has been wrongfully withheld from him/her, and that Defendant \_\_\_\_\_ [name of moving party] is a mere stakeholder with no interest in this sum or in any portion thereof.

The motion will be based on this notice of motion, on the declaration of Defendant \_\_\_\_\_ [name] and the supporting memorandum served and filed herewith, on the papers and records filed herein, and on such oral and documentary evidence as may be presented at the hearing of this motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Plaintiff \_\_\_\_\_ [name]

NOTES.

**Authority:**

*CCP §§ 386.5, 386.6*

**Related Form of Declaration:**

See 5.62

**Related Form of Order:**

See 5.63

**Related Forms of Memoranda:**

See California Points and Authorities, Ch. 123, Interpleader, §§ 123.24, 123.25 (Matthew Bender)



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.62*

**5.62 Declaration in Support of Motion for Order to Dismiss Defendant As Mere Stakeholder and for Costs and Attorney Fees.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [names],  
Defendant.

)  
) No. \_\_\_\_\_  
) DECLARATION OF  
) \_\_\_\_\_ [name] IN SUPPORT OF  
) MOTION FOR ORDER TO DISMISS DEFEND-  
) ANT AS STAKEHOLDER  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

I, \_\_\_\_\_ [name of defendant stakeholder], declare:

1. I am one of the Defendants in this action. The only relief sought against me in this action is the payment of \$\_\_\_\_\_. In his/her complaint on file herein, Plaintiff \_\_\_\_\_ [name] has alleged that I have wrongfully withheld this sum from him/her. Defendant \_\_\_\_\_ [name] has also claimed that I have wrongfully withheld this sum from him/her in that \_\_\_\_\_ [state basis for claim, incorporating any supporting documents].

2. I am a mere stakeholder with no interest in this sum of money, or in any portion of it. I am willing and ready to deposit the sum with the clerk of the court to await disposition of these claims to the sum by order of this court.

3. As a result of this action I have incurred costs and attorney fees.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

NOTES.

**Authority:**

*CCP §§ 386.5, 386.6, 2015.5*

**Related Form of Motion:**

*See 5.61*



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*1-5 MB Practice Guide: CA Pretrial Civil Procedure 5.63*

### 5.63 Order to Dismiss Defendant As Mere Stakeholder and for Costs and Attorney Fees.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                |   |                                      |
|----------------|---|--------------------------------------|
| _____ [name],  | ) |                                      |
| Plaintiff,     | ) | No. _____                            |
| vs.            | ) | ORDER DISMISSING STAKEHOLDER AND FOR |
| _____ [names], | ) | COSTS AND ATTORNEY FEES              |
| Defendant.     | ) | Date: _____                          |
|                | ) | Time: _____                          |
|                | ) | Location: _____                      |
|                | ) | Judge: _____                         |
|                | ) | Date Action Filed: _____             |
|                | ) | Trial Date: _____                    |

The motion of Defendant \_\_\_\_\_ [name] for the order hereinafter made came on regularly for hearing by the court this date. Plaintiff \_\_\_\_\_ [name] appeared by counsel \_\_\_\_\_ [name]; Defendant \_\_\_\_\_ [name] appeared by counsel \_\_\_\_\_ [name]; and Defendant \_\_\_\_\_ [name] appeared by counsel \_\_\_\_\_ [name].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be and it hereby is granted and that Defendant \_\_\_\_\_ [name] be and he/she hereby is discharged from all liability in this action to either Plaintiff \_\_\_\_\_ [name] or Defendant \_\_\_\_\_ [name] and is dismissed from this action on his/her deposit with the clerk of this

court the sum of \$\_\_\_\_\_, which sum is the amount in dispute in this action.

IT IS ORDERED that Defendant \_\_\_\_\_[*name*] shall recover his/her costs and reasonable attorney's fees from the fund deposited in court.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature*]

Judge of the Superior Court

NOTES.

**Authority:**

*CCP §§ 386.5, 386.6*

**Related Form of Motion:**

*See 5.61*



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## Chapter 6 Determining Forum

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.syn*

### **§ 6.syn Synopsis to Chapter 6: Determining Forum**

6.01 Scope.

6.02 Objective and Strategy.

6.03 CHECKLIST: Analyzing Arbitration Requirements and Alternative Dispute Resolution (ADR) Options.

6.04 Options and Strategies.

6.05 Mediating Disputes.

6.05[1] Voluntary Mediation.

6.05[2] Courts Will Order Mediation in Certain Cases.

6.06 Contractual Arbitration.

6.06[1] Arbitration Provides Decision by Neutral Third Party That May Be Binding or Nonbinding.

6.06[2] Arbitration Is Substitute for Court Proceedings, but Rules of Evidence and Procedure May Not Apply.

6.06[3] Arbitration Decisions Are Usually Final, Subject to Limited Judicial Review.

6.06[4] Public Policy Strongly Favors Arbitration.

6.07 Alternative Dispute Resolution Options for Cases in Litigation.

6.07[1] Judicial Arbitration Preserves Right to Trial De Novo.

6.07[2] Reference of Cases.

6.07[2][a] Case May Be Referred by Agreement, or Upon Motion of a Party or the Court.

6.07[2][b] Rules of Evidence Apply.

6.07[2][c] Trial Court Independently Reviews Referee's Decision.

6.07[3] Temporary Judge May Try Case to Final Determination and Render Judgment.

6.08 Using Arbitration Service Providers.

6.08[1] Arbitration Service Provider Rules May Be Incorporated Into Contract.

6.08[2] American Arbitration Association Has Specialized Rules.

6.09 CHECKLIST: Submitting to or Compelling Arbitration.

6.10 Options and Strategies for Plaintiffs and Defendants.

6.10[1] Using Pre- or Post-Dispute Arbitration Agreements.

6.10[1][a] Agreement to Arbitrate Is a Contract.

6.10[1][b] Arbitration Agreement Covers Broad Range of Issues.

6.10[1][c] Consider Expenses When Drafting Agreement.

6.10[2] Judicial Involvement Is Limited When Contractual Arbitration Agreement Exists.

6.10[3] Grounds for Vacating, Correcting, or Dismissing Arbitration Decision Are Limited.

6.10[4] File Contemporaneous Complaint to Avoid Statute of Limitation and Facilitate Arbitration.

6.11 Enforcing Arbitration Agreements.

6.11[1] Timely Demand for Arbitration Must Be Made.

6.11[2] Delay in Making Demand May Result in Waiver of Right to Arbitrate.

6.11[2][a] Arbitration Must Be Demanded Within Time Specified in Agreement, Unless Topped by Commencement of Civil Action.

6.11[2][b] Demand Must Be Within Reasonable Time If Agreement Does Not Specify Time.

6.12 Parties May Seek Provisional Remedies.

6.12[1] Provisional Remedies Protect Potential Arbitration Award.

6.12[2] Provisional Remedy Is Sought Where Arbitration Is Pending or in Any Proper Court.

6.12[3] Objection As to Arbitrability of Dispute Not Relevant.

6.12[4] Arbitration Right Not Waived If Applicant Requests Stay of Proceedings.



### 6.13 State Laws Affecting Arbitration Agreements May Be Preempted.

6.13[1] State Laws That Invalidate Arbitration Agreements May Be Preempted in Cases Involving Interstate Commerce.

6.13[2] Federal Arbitration Act's Substantive, Not Procedural, Provisions Apply in State Court.

6.13[3] Preemption Is Determined Case by Case.

#### 6.13A Class Arbitration.

6.13A[1] Class Arbitration May Be Allowed.

6.13A[1][a] Class Arbitration May Be Authorized By Agreement.

6.13A[1][b] Class Arbitration May Be Ordered to Preserve Individual Right to Arbitrate.

6.13A[2] Class Arbitration Waiver Must Not Be Unconscionable.

6.13A[3] Class Certification Issues May Be Determined Before Class Arbitration Is Ordered.

### 6.14 Self-Executing Arbitration Agreements Require No Court Action.

6.14[1] Arbitration Agreements Ordinarily Are Not Self-Executing.

6.14[2] Parties May Expressly Agree to Make Agreement Self-Executing.

6.14[3] Objecting to Arbitration Under Self-Executing Agreement.

### 6.15 Petitioning Courts to Compel Arbitration.

6.15[1] Who May Compel Arbitration or Be Compelled to Arbitrate.

6.15[1][a] Party to Arbitration Agreement May Petition Court to Compel Arbitration by Another Party to Agreement.

6.15[1][b] Limited Exceptions Permit Nonsignatory to Compel Arbitration or Be Compelled to Arbitrate.

6.15[1][c] Nonsignatories to Arbitration Agreement May Compel Arbitration or Be Compelled to Arbitrate By Equitable Estoppel.

6.15[1][d] Nonsignatories to Arbitration Agreement May Compel Arbitration or Be Compelled to Arbitrate By Agency Principles.

6.15[1][e] Nonsignatory Third-Party Beneficiaries of Arbitration Agreement May Compel Arbitration or Be Compelled to Arbitrate.

6.15[1][f] Nonsignatories to Arbitration Agreement May Compel Arbitration or Be Compelled to Arbitrate By Doctrine of Alter Ego.

6.15[2] Preparing, Filing, and Serving a Petition to Compel Arbitration.

6.15[2][a] Petition Must Allege Written Agreement to Arbitrate Controversy and Refusal by Other Party to Arbitrate.

6.15[2][b] Venue Is County Where Agreement to Be Performed or Was Made, or Where Any Party Resides or Has Place of Business.

6.15[2][c] Caption of Petition Must Indicate If Limited Civil Case.

6.15[2][d] Serving the Petition.

6.15[3] California Superior Courts Have Jurisdiction Over Arbitration-Related Matters.

6.15[4] Responding to a Petition to Compel Arbitration.

6.15[5] Judicial Involvement Is Limited and Doubts Are Resolved in Favor of Arbitration.

6.15[6] Limitation Period for Enforcing Arbitration Agreements Is Four Years.

6.15[7] Arbitrator Determines Compliance With Contract's Time Limits.

6.15[8] Petitions Are Heard Summarily and Given Precedence.

6.15[9] Submitting Evidence in Support of and Opposition to Petition.

6.15[10] Court Will Compel Arbitration Unless It Finds Grounds for Avoiding Arbitration.

6.15[11] Right to Compel Arbitration Depends on Parties' Contract.

6.15[12] Agreements Are Construed in Favor of Arbitration.

6.16 Rulings on Petitions to Compel Arbitration.

6.16[1] Entire Controversy Subject to Arbitration Unless Severable Issues Exist.

6.16[2] Intervention, Joinder, or Stay May Be Ordered Where There Is Pending Court Action With Third Party Arising Out of Same Transaction.

6.16[3] Court Must Make Statement of Decision Only If Petition Is Denied.

6.16[4] Court May Award Attorney Fees Under Contractual Provision for Fees to Party Against Whom Action Was Brought Before Arbitration.

6.16[5] Trial Court May Reconsider Decision on Arbitrability on Its Own Motion.

6.17 Defense Options When Suit Is Brought on Arbitrable Issue.

6.17[1] Defendant May File Petition to Compel Arbitration in Lieu of Answer.

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6.50[2] Plaintiff May File Counteraffidavit in Opposition to Motion.

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6.53[3] Transfer Costs and Fees Paid by Moving Party or, If Action in Wrong Court, by Plaintiff.

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6.55 Motion for Change of Venue May Be Renewed If Circumstances Change.

6.56 Seeking Review of Orders Issued on Motions to Change Venue.

6.56[1] Aggrieved Party May Petition Court of Appeal for Writ of Mandate.

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6.58 Petition to Compel Arbitration.

6.59 Notice of Hearing on Petition to Compel Arbitration.

6.60 Responding to Petition to Compel Arbitration--Admissions, Denials, and Defenses.

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6.62 Order Denying Arbitration and Dismissing Proceedings.

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6.64A Judicial Council Form CM-180 Notice of Stay of Proceedings.

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6.65 Notice of Motion for Change of Venue.

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Chapter 6 Determining Forum  
I. STRATEGY

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.01*

**6.01 Scope.**

This chapter covers:

- Objectives and strategy for determining the forum in which a dispute should be resolved [see 6.02]
- Analyzing alternative dispute resolution (ADR) requirements and options [see 6.03 -6.08]
- Demanding arbitration [see 6.09 -6.13; Form: see 6.57]
- Petitioning to compel arbitration as plaintiff [ see 6.13 -6.16; Forms: see 6.58, 6.59, 6.61, 6.63, 6.64]
- Compelling arbitration as defendant [see 6.17]
- Opposing arbitration see 6.20 -6.30; Forms: 6.60, 6.62]
- Determining venue for trial [see 6.31 -6.44]
- Moving for change of venue [see 6.45 -6.56; Forms: see 6.65 -6.68]

**Core Statutes:**

*CCP §§ 1280 et seq., 392 et seq.*



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## Chapter 6 Determining Forum

### I. STRATEGY

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.02*

#### 6.02 Objective and Strategy.

The objective in determining the forum in which to proceed is to have a case heard before a forum with jurisdiction to hear the case, and when there are options, to select that jurisdiction which is most convenient and which you perceive to be most likely to take a favorable view of your position.

Many factors must be considered in forum selection. The initial factor is whether one must or desires to pursue alternative dispute resolution [*see, e.g., CC § 1369.510 et seq.* (requires attempt at alternative dispute resolution prior to filing enforcement action concerning common interest development)]. Most importantly is the determination whether the dispute is governed by a contractual arbitration requirement [*see CCP § 1280 et seq.; 9 USC § 1 et seq.*]. If a contractual arbitration agreement is involved, each party needs to consider whether arbitration is desirable under the circumstances and whether grounds to resist arbitration may exist.



#### **Strategic Point:**

Although arbitration offers flexibility and finality, the lack of substantial judicial involvement and precedential value may make it less appropriate for some cases [*see CCP §§ 1286-1286.8* (grounds for vacating or correcting arbitration decisions)]. Enforceability particularly should be scrutinized if the parties are not of equal bargaining power, as in consumer and employment situations.

Whether or not arbitration is mandatory, a party should always consider whether mediation is an appropriate way to dispose of a dispute promptly and efficiently. If a party to an arbitration agreement pursues a case through the superior court, the opposing party has an alternative whether or not to compel arbitration pursuant to the terms of the contract, or simply to respond by filing an answer or otherwise pleading in the superior court.

If a party prefers or is left with no option but to litigate the dispute in court, the first consideration is identifying the courts with jurisdiction. In addition to simply determining whether California state courts have jurisdiction, this might mean choosing between California and another state's courts, state versus federal court, or even a foreign tribunal.

If an action is to be brought in California courts, it will almost certainly be brought in the superior court, although a small category of cases are brought in the court of appeal or the Supreme Court in the first instance. In selecting the appropriate superior court, the final consideration is venue, which will depend on the nature of the claim and the parties

[see *CCP* § 392 *et seq.*].

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration; Ch. 571, Venue (Matthew Bender).

California Points and Authorities, Ch. 20, Arbitration; Ch. 238, Venue (Matthew Bender).

 **Cross References:**

Discussion of jurisdiction, see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction; and

Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.



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Chapter 6 Determining Forum

## II. ANALYZING ARBITRATION REQUIREMENTS AND ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.03*

### 6.03 CHECKLIST: Analyzing Arbitration Requirements and Alternative Dispute Resolution (ADR) Options.

- ☐ Determine if dispute is governed by contractual or statutory arbitration requirements.
  - ☐ If dispute involves a contract, review contract for arbitration agreement/clause.
    - ☐ If contract contains an arbitration agreement:
      - ☐ Determine scope of topics to be addressed in arbitration, and whether dispute at issue is within that scope.
  - ☐ Review for preconditions or time limits placed on arbitration.
  - ☐ Assess whether any party has waived right to arbitrate by:
    - ☐ Waiving arbitration in a written release.
    - ☐ Taking steps inconsistent with the intent to invoke arbitration.

#### **Discussion:**

See 6.10, 6.11, 6.15, 6.29, 6.30

#### **Authority:**

*CCP § 1280 et seq.; 9 USC § 1 et seq.*

- ☐ If agreement to arbitrate includes arbitration of rights conferred by statute, analyze whether Congress or legislature indicated judicial remedies for such rights could not be waived.



☐ If so, jury trial may be available as to statutory claims.

☐ Claims under the following acts may be subject to arbitration:

☐ Age Discrimination in Employment Act, *29 USC § 621 et seq.*

☐ California Franchise Investment Law, *Corp Code § 31000 et seq.*

☐ Cartwright Act, *B&P Code § 16700 et seq.*

☐ Consumer Legal Remedies Act, *CC § 1750 et seq.*

☐ Fair Employment and Housing Act, *Gov Code § 12900 et seq.*

☐ Federal Labor Standards Act, *29 USC § 201 et seq.*

☐ Securities Act of 1933, *15 USC § 77a et seq.*

☐ Securities Exchange Act of 1934, *15 USC § 78a et seq.*

☐ Sherman Act, *15 USC § 1 et seq.*

☐ Unfair Trade Practices Act, see *B&P Code § 17000 et seq.*

☐ Unfair Competition Act, see *B&P Code §§ 17200, 17203.*

☐ Unruh Civil Rights Act, *CC § 51 et seq.*

☐ Uninsured Motorist Statute, see *Ins Code § 11580.2(a), (f).*

**Authority:**

*9 USC § 1 et seq.; Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 US 20, 26, 111 S Ct 1647, 114 L Ed2d 26*

**Discussion:**

See 6.28

☐ If a contract appears to require arbitration, consider whether to seek to compel or avoid arbitration.

☐ Follow procedures required to compel or avoid arbitration.

**Authority:**

*CCP § 1280 et seq.*

**Discussion:**

See 6.11, 6.15

☐ If arbitration is not required by contract or statute, consider whether alternative dispute resolution is desirable:

- ☐ Consider ADR opportunities and requirements for cases in litigation.
- ☐ Distinguish judicial arbitration, reference, and trial by judge pro tem from other forms of ADR.

**Discussion:**

See 6.05 -6.07

- ☐ Consider whether mediation would be adequate.

**Discussion:**

See 6.05

- ☐ Consider whether arbitration would be desirable.

☐ Consider arbitration service provider rules, procedures and costs.

**Discussion:**

See 6.06, 6.08

☐ Review pros and cons of available alternatives with client, advising client of any relevant statute of limitations issues.

- ☐ Select forum, and take any necessary steps to preserve client's right to relief in other forums if possible.

**Discussion:**

See 6.05 -6.10



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#### Chapter 6 Determining Forum

### II. ANALYZING ARBITRATION REQUIREMENTS AND ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.04*

#### 6.04 Options and Strategies.

Alternative Dispute Resolution (ADR) is generally defined to be a process, other than formal litigation, in which a neutral person or persons resolve a dispute or assist parties in resolving their dispute [*see Cal Rules Ct, Rule 3.800(1)*; *see also CCP § 1731(a)*]. In some cases, ADR is neither required, nor appropriate. For example, traditional litigation is preferred where:

- There is a significant public interest in a question of statutory or constitutional interpretation.
- Deterrence of recurring issues or injuries is important.
- There is a public interest in sanctioning unacceptable conduct.
- The parties are incompetent negotiators.
- Serious issues of compliance requiring discovery or injunctive relief are involved.

In the vast majority of cases, though, ADR processes are likely to offer significant advantages over traditional, full-scale litigation.

Alternative dispute resolution may be required as a prerequisite to filing a court action and may be subject to statutory rules [*see, e.g., CC § 1369.510 et seq.* (requires attempt at alternative dispute resolution subject to certain statutory rules prior to filing enforcement action concerning common interest development)].



#### Strategic Point:

If your case is assigned to a judge who is likely to be unfavorably disposed to make rulings in your favor, alternative dispute resolution may be an attractive alternative.



#### Investigating Judges Using Online Resources:

Many resources are available online for investigating judges. These resources can help you find information and cases pertaining to your assigned judge. For example, helpful resources at *lexis.com* include:

- For opinions or decisions affirming or reversing a judge's ruling, search in Legal tab > States Legal--U.S. > California > Find Cases > CA State Cases, Combined.

☐ Sample search: For appellate rulings regardless of topic, use the HISTORY segment with the judge's last name in this format: *history (first name /3 last name /3 j or judge or judicial or mag or hon!)*.

☐ Sample search: For appellate decisions on a judge's rulings in a particular procedural setting or on a particular substantive topic, use the HISTORY segment with the judge's last name in this format plus words for finding the specific topic, for example: summary judgment and *history (first name /3 last name /3 j or judge or judicial or mag or hon!)*.

- To find biographical information about a federal judge, search the biographies in Legal tab > Reference > Law > Legal Reference Materials > Judicial Staff Directory.

☐ Sample search: For a particular judge, try: *name (first name /3 last name)*.

- To find news articles about a judge, search in the California news files Legal tab > States Legal--U.S. > California > Search News > General News > California News Publications.

☐ Sample search: For articles on particular judge, try a simple search: *first name /3 last name*.

- To find articles about a judge or legal articles written by the judge both before and after the judge took the bench, search the law reviews and other periodicals in Legal tab > Secondary Legal > Law Reviews, CLE, Legal Journals & Periodicals, Combined.

☐ Sample search: For legal articles written by a particular judge, try a simple search: *first name /3 last name*.



#### **Timing:**

Since one of the primary advantages of ADR is to save disputants time and money, ADR should be a threshold consideration for a party determining in what forum to resolve a claim. In the many cases that would be subject to mandatory judicial mediation or arbitration if filed in court [see CCP §§ 1141.11, 1775 *et seq.*], the inevitability of mandatory ADR, and the attendant restrictions placed on parties, might persuade disputants first to attempt a voluntary form of ADR, over which they could maintain greater control.



#### **Cross References:**

Discussion of court-ordered mediation, see 6.05[2].

Discussion of judicial arbitration, see 6.07.

Discussion of ADR within the judicial system and alternative forms of ADR, see California Forms of Pleading and Practice, Ch. 30, Using Alternative Dispute Resolution (Matthew Bender).



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## II. ANALYZING ARBITRATION REQUIREMENTS AND ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.05*

### 6.05 Mediating Disputes.

**6.05[1] Voluntary Mediation.** Mediation is a process in which a neutral person or persons facilitate communication between disputants to assist them in reaching a mutually acceptable resolution to a dispute [see *CCP* § 1775.1(a)]. Mediation is likely to be faster and less expensive than more formal ADR processes, and should be considered early on in a dispute. Unlike binding arbitration, submitting to mediation does not restrict a party's recourse to the courts. Typically, mediation involves factual presentations by lawyers, followed by negotiations between the parties involved in the dispute with the assistance of a mediator, with or without an evaluative component.

#### ► Finding and Investigating Mediators Using Online Resources:

Many resources are available online for finding and investigating mediators. These resources can help you select a mediator and also help you assess the strengths and weaknesses of both your and your opponent's cases. For example, helpful resources at *lexis.com* include:

- To locate dispute resolution practitioners in a particular County listed in the Martindale-Hubbell(R) Dispute Resolution Directory. Search Legal tab > Area of Law--By Topic > Alternative Dispute Resolution > Access Directories > Martindale-Hubbell(R) Dispute Resolution Directory.

☐ Sample search: To locate mediators in Los Angeles county, use this segment search:  
COUNTY (los angeles).

- To investigate a mediator that is being considered or has been selected, search the Martindale-Hubbell(R) listings. Legal tab > Reference > Martindale-Hubbell(R) > Combined Law Directory Listings > Martindale-Hubbell(R) Listings, All.

☐ Sample search: To find biographical and practice information on a mediator, use this search: *name (first name /3 last name)*.

● To find articles about a judge or legal articles written by the judge both before and after the judge took the bench, search the law reviews and other periodicals in Legal tab > Secondary Legal > Law Reviews, CLE, Legal Journals & Periodicals, Combined.

○ Sample search: For legal articles written by a particular mediator, try a simple search: *first name /3 last name*.

Furthermore, courts are authorized to provide lists of mediators if they choose to do so. Under Cal Rules Ct, effective January 1, 2011, courts that supply lists of mediators to parties or that recommend, select, appoint, or compensate mediators to mediate general civil cases pending in the court must establish minimum qualifications for those mediators [Cal Rules Ct, Rule 10.781, as amended effective January 1, 2011].

**6.05[2] Courts Will Order Mediation in Certain Cases.** Courts in Los Angeles County may order all at-issue civil actions in which arbitration is otherwise required by CCP § 1141.11 (nonexempt unlimited civil cases, where amount in controversy does not exceed \$50,000 per plaintiff) to mediation as an alternative to judicial arbitration [see CCP § 1775 *et seq.*]. Courts in other counties may opt to do so as well [see CCP § 1775.3]. Thus, when mediation is inevitable in a given case, it would behoove the disputants to opt for voluntary mediation prior to incurring the expense of filing suit.



#### Strategic Point:

Parties to a dispute first might attempt a lawyers-and-parties-only mediation. If the mediation does not result in a settlement, the mediation still may help the parties identify those issues on which there appears to be the most serious disagreement, and then have a mini-trial or summary jury trial, preceded by limited discovery focused on those narrowed issues.



#### Cross References:

Court-ordered mediation, see 24.43.

Discussion of alternative forms of mediation, including mini-trials, see California Forms of Pleading and Practice, Ch. 30, Using Alternative Dispute Resolution (Matthew Bender).

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMediations



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### II. ANALYZING ARBITRATION REQUIREMENTS AND ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.06*

#### 6.06 Contractual Arbitration.

##### **6.06[1] Arbitration Provides Decision by Neutral Third Party That May Be Binding or Nonbinding.**

Arbitration is the submission of factual and/or legal issues to a neutral third party, or panel of neutral third parties, who renders a decision similar to that which a judge or jury would render in a court proceeding [*see Cheng-Canindin v. Renaissance Hotel Assocs. (1996) 50 CA4th 676, 687-688, 57 CR2d 867*]. The decision rendered in arbitration may be binding or nonbinding. If nonbinding, it is essentially mediation by another name, or judicially mandated arbitration. Contractual arbitration proceedings are typically binding, and are governed by *CCP § 1280 et seq.*

**6.06[2] Arbitration Is Substitute for Court Proceedings, but Rules of Evidence and Procedure May Not Apply.** Contractual arbitration is a substitute for proceedings in court, but, unless the parties agree otherwise, the rules of evidence and judicial procedure do not apply in arbitration proceedings [*CCP § 1282.2(d)*]. Despite the relaxed procedures and evidentiary rules, binding arbitration is the most formal ADR process, and the one most similar to a court trial. Consequently, arbitration may well be as expensive as a court trial, and may involve similar time delays.

**6.06[3] Arbitration Decisions Are Usually Final, Subject to Limited Judicial Review.** Binding arbitration is substantially insulated from judicial review [*see CCP §§ 1286-1287.2; see also Moncharsh v. Heily & Blase (1992) 3 C4th 1, 26-28, 33, 10 CR2d 183, 832 P2d 899*]. Arbitrators are not bound to decide cases in accordance with the law, and may base a decision on principles of justice and equity; thus, it is considered inappropriate for a court to review an arbitration decision [*Sy First Family Ltd. P'ship v. Cheung (1999) 70 CA4th 1334, 1341-1344, 83 CR2d 340; Gueyffier v. Ann Summers, Ltd. (2008) 43 C4th 1179, 1184, 77 CR3d 613, 184 P3d 739* (arbitrator had authority to apply equitable defenses to excuse party from performing material condition of agreement that provided arbitrator could not modify or change any material provisions in agreement)]. If judicial review of an arbitration decision is sought, the available grounds for challenge are extremely limited [*CCP §§ 1286.2-1286.8*].

#### **Decision Point:**

Parties to a dispute may agree to arbitration after the dispute arises, rather than beforehand in their contract. The benefits of post-dispute arbitration agreements include the ability of the parties to structure more precisely the scope of the arbitration, for example, in a way such that the arbitrator's role is to choose among possible outcomes negotiated by the parties.



**Drawback:**

Because the grounds for judicial review of arbitration decisions are very limited, an arbitrator's decision will be relatively final. The inability to obtain substantive review of an arbitration decision could be a factor weighing against binding arbitration, particularly if a case contains important or novel questions of law.

**Exception:**

The parties to an arbitration agreement may take themselves out of the general rule that the merits of the award are not subject to judicial review by clearly agreeing that legal errors are an excess of arbitral authority reviewable by the courts under CCP §§ 1286.2, 1286.6 [*Cable Connection, Inc. v. Directv, Inc.* (2008) 44 C4th 1334, 1354-1364, 82 CR3d 229, 190 P3d 586 ; *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2010) 182 CA4th 503, 516, 106 CR3d 70 (requiring application of California law is insufficient to impose judicial review); *Oaktree Capital Mgmt., L.P. v. Bernard* (2010) 182 CA4th 60, 71, 106 CR3d 16] .

**Cross Reference:**

Discussion of language of clauses that impose judicial review for legal error, see *California Forms of Pleading and Practice*, Ch. 34, *Contractual Arbitration: Judicial Review*, § 34.10 (Matthew Bender).

**6.06[4] Public Policy Strongly Favors Arbitration.** Public policy strongly favors arbitration as a speedy and relatively inexpensive means of dispute resolution [ *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.* (1983) 35 C3d 312, 322, 197 CR 581, 673 P2d 251 ]. The right to arbitration, however, depends on the existence of a contract, and there is no public policy favoring arbitration of disputes that the parties have not agreed to arbitrate [ *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Hock Inv. Co.* (1998) 68 CA4th 83, 88, 80 CR2d 147 ].

**Cross References:**

Discussion of nonbinding, judicial arbitration, see 6.07[1].

Comparison of contractual arbitration with judicial arbitration and other forms of ADR, see *California Forms of Pleading and Practice*, Ch. 30, *Using Alternative Dispute Resolution* (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Alternative Dispute Resolution Arbitrations General Overview



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*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.07*

### 6.07 Alternative Dispute Resolution Options for Cases in Litigation.

**6.07[1] Judicial Arbitration Preserves Right to Trial De Novo.** Judicial arbitration is nonbinding arbitration that is a mandatory part of pretrial procedure in many litigated civil cases, and is governed by *CCP* §§ 1141.10-1141.31, *Cal Rules Ct, Rules 3.720 et seq., 3.810 et seq.*, and local court rules. When not mandatory, judicial arbitration may be opted for by parties in litigation [see *CCP* § 1141.12].

Judicial arbitration is required when any party to a civil action is a public agency or public entity [*CCP* § 1141.27], and may also be ordered in the following situations:

- When the court determines the amount in controversy will not exceed \$50,000 for each plaintiff [*CCP* § 1141.11(a), (b)];
- When the plaintiff elects to place the matter into arbitration and agrees no arbitration award will exceed \$50,000 [*CCP* § 1141.12(b)];
- When the parties agree by stipulation to submit the matter to arbitration prior to any trial, regardless of the amount in controversy [*CCP* § 1141.12(a)].

The purpose of judicial arbitration is to provide parties already involved in legal proceedings a simplified alternative to a trial for resolving their dispute, yet retain their right to a civil trial if they are not satisfied with the results of the arbitration proceeding [see *CCP* § 1141.20 (providing for trial de novo following arbitration decision)].

#### **Drawback:**

If a party requests a trial de novo after judicial arbitration and fails to obtain a judgment more favorable than the arbitration award, he or she will be liable for significant costs and fees [see *CCP* § 1141.21]; thus, there is a disincentive to requesting a trial de novo following judicial arbitration.

#### **Exception:**

On motion of a party, if the court makes a written finding that the imposition of costs and fees would

create such a substantial economic hardship as not to be in the interest of justice, it may decline to impose costs and fees against the party who requested trial de novo [CCP § 1141.21].

#### ◆ **Cross Reference:**

Detailed discussion of judicial arbitration, see Ch. 24, Pretrial ADR.

### **6.07[2] Reference of Cases.**

**6.07[2][a] Case May Be Referred by Agreement, or Upon Motion of a Party or the Court.** An action or proceeding, or a particular issue in an action or proceeding, may be referred to a referee by agreement of the parties or on the motion of a party or the court in certain cases [CCP §§ 638, 639]. A "general reference" is a trial before a referee on all issues of fact and law, and may occur only with the parties' consent [CCP § 638(a)]. The decision of a referee in a general reference stands as the decision of the court upon the filing of the decision of statement with the clerk of the court or judge, and judgment may be entered on the decision [CCP § 644(a)].

#### **Prerequisite:**

For a case to be referred based on the motion of a party, the court must find that a written reference agreement exists between the parties [CCP § 638].

A "special reference" is where a referee is appointed for one of several limited purposes listed in CCP § 639, including the resolution of discovery disputes, to aid the court in reaching its decision [ *Ellsworth v. Ellsworth* (1954) 42 C2d 719, 722-723, 269 P2d 3 ]. A special reference may be made with or without the consent of the parties [see CCP §§ 638, 639(a); *Cal Rules Ct, Rules 3.900 et seq., 3.920 et seq.*].

#### **Drawback:**

Unless the referee is an employee or officer of the court at the time of the reference, the court may order the parties to pay the referee's fees [see CCP §§ 645.1, 1023].

**6.07[2][b] Rules of Evidence Apply.** A hearing before a referee is conducted in the same way it would be before a court, under the rules of evidence applicable to judicial proceedings [ *Sy First Family Ltd. P'ship v. Cheung* (1999) 70 CA4th 1334, 1341, 83 CR2d 340 ; see *Evid Code* § 300].

**6.07[2][c] Trial Court Independently Reviews Referee's Decision.** In most cases, the decision of a referee is only advisory, but the court may adopt the decision in whole or in part after independently considering the referee's findings and any objections and responses filed with the court [CCP § 644(b); see also *Nat'l. Union Fire Ins. Co. v. Nationwide Ins.* (1999) 69 CA4th 709, 716, 82 CR2d 16 ].

#### **Exception:**

In consensual general references, the decision of a referee stands as the decision of the court, upon the filing of the decision of statement with the clerk of the court or judge [CCP § 644(a)].

#### ◆ **Cross Reference:**

Detailed discussion, see Ch. 25, Reference.

**6.07[3] Temporary Judge May Try Case to Final Determination and Render Judgment.** Parties in litigation may stipulate to appoint a member of the State Bar as a "judge pro tem," who can try the case and render judgment as would a regular judge of the court [Cal Const, art VI, § 21; *Cal Rules Ct, Rules 2.830, 2.831*]. The stipulation must be in writing and be submitted for approval to the presiding judge or, in a branch court, the supervising judge [Cal Rules Ct, Rule 2.831(a)]. Despite this writing requirement, under the tantamount stipulation doctrine, a stipulation may also be implied by a party's or counsel's conduct in participating in a case before a judge pro tem with knowledge of the judge's status [ *In re Horton* (1991) 54 C3d 82, 91-92, 284 CR 305, 813 P2d 1335 ; *Estate of Fain* (1999) 75 CA4th 973,

988, 89 CR2d 618 ].

**Drawbacks:**

If a judge pro tem hears a case, the ruling issued is not confirmed by the trial court, but is reviewable only by writ to the appellate court [see *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 45 CA4th 631, 635, 53 CR2d 50 (a temporary judge has the power to render a judgment appealable in the same manner as one rendered by a constitutional judge); *Kajima Eng'g & Constr., Inc. v. Pacific Bell* (2002) 103 CA4th 1397, 1401, 127 CR2d 464 ].

 **Cross References:**

Comparison of the powers of a judge pro tem and a referee, see California Forms of Pleading and Practice, Ch. 317, Judges (Matthew Bender).

Further discussion of ADR proceedings, see California Forms of Pleading and Practice, Ch. 30, Using Alternative Dispute Resolution (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersRefereesJudicial ReviewCivil ProcedureJudicial OfficersReferencesCivil ProcedureAlternative Dispute ResolutionMandatory ADR



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*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.08*

### 6.08 Using Arbitration Service Providers.

**6.08[1] Arbitration Service Provider Rules May Be Incorporated Into Contract.** Some of the commonly used arbitration service providers in California are the American Arbitration Association, CPR Institute for Dispute Resolution, JAMS/Endispute, and Los Angeles County Bar Association Dispute Resolution Services, Inc., as well as many other county bars. An arbitration service provider's rules may be incorporated by reference into a contract. In such a case, the provider is the administrator of any arbitration initiated pursuant to the agreement. The entire scheme for arbitration established by a provider may be comprehensive enough to be self-executing, so that a court order to compel arbitration is not required [see *Kustom Kraft Homes v. Leivenstein* (1971) 14 CA3d 805, 810-811, 92 CR 650 ].

**6.08[2] American Arbitration Association Has Specialized Rules.** The American Arbitration Association (AAA), a private nonprofit organization founded in 1926 to advance arbitration, has formulated a comprehensive set of specialized rules for the arbitration of various types of controversies. The AAA does not act as arbitrator; its function is to administer arbitrations in accordance with the agreement of the parties and to maintain panels from which the parties may choose arbitrators. Once chosen, the arbitrator decides the issues, and his or her award is final and binding.

Specialized sets of rules established by the AAA include the following:

- Accident Claims Rules for arbitration of disputes involving motor vehicle liability insurance policies;
- Construction Industry Arbitration Rules for arbitration of disputes under construction contracts;
- Voluntary Labor Arbitration Rules and Expedited Labor Arbitration Rules for arbitration of labor disputes; and
- Commercial Arbitration Rules for arbitration of disputes under commercial contracts.

The Commercial Arbitration Rules include Procedures for Large, Complex Commercial Disputes, typically those in which the claim or counterclaim of any party is at least \$500,000. An important feature

of these procedures is the arbiter's broad authority and discretion to order and control discovery.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview



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Chapter 6 Determining Forum  
III. SUBMITTING TO OR COMPELLING ARBITRATION

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.09*

**6.09 CHECKLIST: Submitting to or Compelling Arbitration.**

☐ Review arbitration agreement, if any, checking for the following potential terms:

- ☐ Preconditions to arbitration.
- ☐ Time limits.
- ☐ Fee posting requirements.
- ☐ Designation of a specific arbitration service provider and incorporation of that provider's rules.

☐ Prepare written demand for arbitration that complies with arbitration agreement and, if appropriate, arbitration service provider's rules.

- ☐ Use form required by arbitration service selected; or
- ☐ Prepare a letter demanding arbitration.
- ☐ Identify the underlying agreement, pursuant to which demand is being made.
- ☐ Describe the dispute to be arbitrated.

☐ Serve demand within time specified in arbitration agreement or, if not stated, within a reasonable time.

- ☐ Serve on parties to agreement via certified mail.
- ☐ Send demand to arbitration service selected, if applicable.

**Form:**

See 6.57 (demand for arbitration)

**Authority:**

See *Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1043, 9 CR2d 381, 831 P2d 821 ; see also *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 313-314, 24 CR2d 597, 862 P2d 158

**Discussion:**

See 6.11

- ☐ If parties can agree on what issues are and are not arbitrable:

- ☐ Prepare submission agreement or, if case is in litigation, stipulation to arbitrate.
- ☐ Have parties execute submission agreement or stipulation.
- ☐ Submit agreement or stipulation to proper authorities.

**Discussion:**

See 6.10

- ☐ If any party refuses to arbitrate and the arbitration agreement is not self executing, petition court to compel arbitration.

- ☐ Prepare petition to compel arbitration.

☐ Allege the existence of a written agreement to arbitrate a controversy.

☐ Allege a refusal to arbitrate by a party to the agreement.

☐ Set forth provisions of agreement verbatim or attach a copy of the agreement and incorporate it by reference.

**Authority:**

CCP § 1281.2

**Forms:**

See 6.58 (petition to compel), 6.61 (order compelling arbitration)

**Discussion:**



See 6.15

- ☐ Prepare notice of hearing and other papers, if any, on which petition is based.

**Authority:**

*CCP §§ 1281.2, 1290-1290.4*

**Form:**

See 6.59 (notice of hearing on petition to compel arbitration)

**Discussion:**

See 6.15

- ☐ Serve and file petition in appropriate court no less than 10 days before hearing date and, if served on party outside California, no less than 30 days before hearing date, together with notice of hearing and any other papers.

☐ If party has not appeared before, serve as if a summons.

☐ If party has appeared or been served in accordance with *CCP § 1290.4(b)*, serve as provided for other papers in *CCP §§ 1010-1020*.

**Authority:**

See *CCP §§ 85, 86(a)(10)(A), 1290.4, 1292.4, 1292.8*

**Discussion:**

See 6.15

- ☐ If a party has initiated litigation of an arbitrable controversy:

- ☐ File petition to compel arbitration in lieu of answer.



**Timing:**

If the petition is denied, the petitioning defendant will have 15 days after the denial to plead to the complaint [*CCP § 1281.7*].

- ☐ Prepare notice of motion to stay proceedings in that court.

**Authority:**

*CCP § 1281.7*

**Forms:**

See 6.58 (petition to compel), 6.63 (motion to stay), 6.64 (order to stay)

**Discussion:**

See 6.17

- ☐ Prepare supporting declarations and memorandum.

**Authority:**

*CCP § 1281.4*

- ☐ Serve and file notice of motion and accompanying papers.

- ☐ If a case is stayed, immediately file a notice of the stay and attach a copy of the order or other document staying the proceedings.

**Authority:**

*Cal Rules Ct, Rule 3.650(a)*

**Form:**

See 6.64A (notice of stay)

**Discussion:**

See 6.17

- ☐ Prepare order granting or denying petition to compel arbitration.

**Authority:**

*CCP § 1281.2*

**Forms:**

See 6.61 (order compelling arbitration), 6.62 (order denying arbitration)

- ☐ Appeal an adverse decision if client is aggrieved by order dismissing or denying petition to compel.

- ☐ Appeal is taken in the same manner as from an order or judgment in civil action.

**Authority:**

*CCP §§ 1294, 1294.2*

**Discussion:**

See 6.19

 **Cross Reference:**

Discussion of procedure and forms, see California Forms of Pleading and Practice, Ch. 42, Appeal: Notice of Appeal (Matthew Bender).

- ☐ If stay is terminated or modified, immediately file notice of the termination or modification of the stay and attach a copy of the order or other document terminating or modifying the stay.

**Authority:**

*Cal Rules Ct, Rule 3.650(d)*

**Form:**

See 6.64B (notice of termination or modification of stay)

**Discussion:**

See 6.17[2][b]



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*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.10*

## 6.10 Options and Strategies for Plaintiffs and Defendants.

### 6.10[1] Using Pre- or Post-Dispute Arbitration Agreements.

**6.10[1][a] Agreement to Arbitrate Is a Contract.** Parties may agree to submit an existing controversy or future disputes to arbitration. Private arbitration is a matter of agreement between the parties, and is governed by contract law [ *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 313-314, 24 CR2d 597, 862 P2d 158 ]. A written agreement to submit an existing or future controversy to arbitration is valid, enforceable, and irrevocable except on such grounds as exist for revocation of any contract [CCP § 1281].

#### Cross Reference:

Discussion of contract defenses to arbitration agreements, see 6.24, 6.25.



#### Strategic Point:

A pre-dispute arbitration agreement is usually contained in or incorporated into an underlying contract between the parties, and might not be extremely detailed with respect to arbitration, whereas a post-dispute arbitration agreement might be a free-standing agreement addressing only the dispute to be arbitrated. Thus, a post-dispute arbitration agreement may allow for greater specificity with respect to how, and on what issues, the arbitration will proceed.

#### Cross Reference:

Discussion, see California Forms of Pleading and Practice, Ch. 32, Contractual Arbitration Agreements & Compelling Arbitration (Matthew Bender).



#### Strategic Point--Attorney Fee Arbitration:

An award of attorney fees rendered pursuant to an arbitration under the Mandatory Fee Arbitration Act is nonbinding, and either party may seek a trial de novo under *Bus & Prof Code* § 6204(a), unless the

parties have agreed that the MFAA arbitrator's award is binding [ *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 C4th 557, 565, 87 CR3d 700, 198 P3d 1109] . Contractual arbitration under the California Arbitration Act, CCP § 1280 *et seq.*, may be the proceeding constituting "trial de novo" with respect to the proceeding that follows rejection of the mandatory award by either party [ *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 C4th 557, 566, 87 CR3d 700, 198 P3d 1109] .

### **Distinguish:**

If a matter is in litigation when the parties decide to submit it to arbitration, their agreement must be in the form of a stipulation [ *Cal Rules Ct, Rule 3.726*]. Specifically, the clerk provides the plaintiff with a form stipulation to ADR process as part of an ADR information package when the complaint is filed, which the plaintiff must serve with the complaint [see *Cal Rules Ct, Rule 3.221*]. Cross-complainants must also serve copies of the ADR information package on any new parties to the action along with the cross-complaint [see *Cal Rules Ct, Rule 3.221*]. If the parties agree to use an ADR process, they are to complete the form stipulation jointly and file it with the court [see *Cal Rules Ct, Rule 3.726*].

### **Finding and Investigating Arbitrators Using Online Resources:**

Many resources are available online for finding and investigating arbitrators. These resources can help you select and/or investigate an arbitrator. For example, helpful resources at *lexis.com* include:

- To locate potential arbitrators, search the directory in Legal tab > Area of Law--By Topic > Alternative Dispute Resolution > Access Directories > Martindale-Hubbell(R) Dispute Resolution Directory.

☐ Sample search: To locate arbitrators in Los Angeles county, use this segment search: COUNTY (los angeles).

- To find biographical and practice information on an arbitrator, search the Martindale-Hubbell(R) listing in Legal tab > Reference > Martindale-Hubbell(R) > Combined Law Directory Listings > Martindale-Hubbell(R) Listings, All.

☐ Sample search: To find information on a arbitrator that is being considered or has been selected, use this search: *name (first name /3 last name)*.

- To find articles about or written by an arbitrator, search the law reviews and other periodical articles in Legal tab> Secondary Legal > Law Reviews, CLE, Legal Journals & Periodicals, Combined.

☐ Sample search: For legal articles written by a particular arbitrator, try a simple search: *first name /3 last name*.

**6.10[1][b] Arbitration Agreement Covers Broad Range of Issues.** If disputants can agree to submit their dispute to arbitration, they can negotiate a submission agreement to identify issues and establish ground rules for the arbitration.

### **Example:**

A stipulation or submission agreement can be used to do any or all of the following:

- Expressly identify issues that are, and are not, to be arbitrated.

- Expressly waive any right to a jury trial.
- Identify an arbitrator or state the method in which arbitrators will be selected.
- Provide a time within which the arbitration must commence and terminate.
- Require all hearings to be held in a specific geographical area.
- Require that the procedures contained in the Federal Arbitration Act apply in proceedings in state court to compel arbitration.
- Establish notice requirements.
- Provide for each party to comply with discovery called for by the arbitrator.
- Specify any limitations on the arbitrator's power.
- Provide for payment of the arbitrator's compensation and the arbitration expenses.
- In an ongoing contractual relationship, provide that the parties' further dealings under the contract will be conducted in accordance with the arbitrator's interpretation of the agreement.

The contractual nature of private arbitration dictates that the scope and effect of an arbitral award must derive from the parties' consent [ *Vandenberg v. Superior Court* (1999) 21 C4th 815, 830, 88 CR2d 366, 982 P2d 229 ]; accordingly, an arbitration may proceed against some parties without violating the rule against splitting causes of action or the one judgment rule [ *Cuevas v. Truline Corp.* (2004) 118 CA4th 56, 61 ].



#### Cross References:

Improperly splitting causes of action, see § 7.12[5].

Form of submission to arbitration, see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.80.

Discussion of different arbitration structures parties may select in post-dispute agreements, see *California Forms of Pleading and Practice*, § 30.11[5][c] (Matthew Bender).

**6.10[1][c] Consider Expenses When Drafting Agreement.** Retaining multiple arbitrators is expensive; therefore, a panel of arbitrators is particularly inappropriate in small disputes and in disputes in which one party has much less economic power than the other. In those situations, the economically weaker party should, if possible, resist attempts by the stronger party to require a panel. On the other hand, a panel may be appropriate in a high stakes, complex dispute between parties with ample resources, who value the interaction of the panel in solving the dispute because of its complexity.



#### Strategic Point:

Unless the parties agree otherwise, expenses and fees are not recoverable in contractual arbitrations [CCP § 1284.2; *Dickinson v. Kaiser Found. Hosps.* (1980) 112 CA3d 952, 954, 169 CR 493 ]. If the parties intend for the prevailing party to recover costs, they must so specify in their submission agreement or stipulation. An arbitration agreement should be explicit about what arbitration expenses

will be paid equally by the parties. Common expenses would be subpoenas, witness fees, transcripts, and cost of a hearing room.

**6.10[2] Judicial Involvement Is Limited When Contractual Arbitration Agreement Exists.** When disputants have a contractual agreement to arbitrate a controversy, judicial proceedings surrounding the arbitration itself will be limited to [CCP §§ 1286.2-1286.8]:

- Determining whether a party resisting arbitration in fact agreed to arbitrate the controversy at issue [see CCP § 1281.2; *State Farm Mut. Auto Ins. Co. v. Superior Court* (1994) 23 CA4th 1297, 1301, 28 CR2d 711 ].

- Enforcing the arbitration award [see CCP §§ 1287.4, 1293; *Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange* (2008) 162 CA4th 1498, 1506, 77 CR3d 88 ].

Thus, an arbitrator's decision is even more final than that of a judge or jury because the grounds for reversal are very limited.

**Exception:**

The parties to an arbitration agreement may take themselves out of the general rule that the merits of the award are not subject to judicial review by clearly agreeing that legal errors are an excess of arbitral authority reviewable by the courts under CCP §§ 1286.2, 1286.6 [ *Cable Connection, Inc. v. Directv, Inc.* (2008) 44 C4th 1334, 1354-1364, 82 CR3d 229, 190 P3d 586 ; see *Christensen v. Smith* (2009) 171 CA4th 931, 937, 90 CR3d 57] .



**Strategic Point:**

In reviewing an arbitration award, an administrative board is required to apply the same standards as the courts [ *California School Employees Assn. v. Bonita Unified School Dist.* (2008) 163 CA4th 387, 406, 77 CR3d 486 (applying Ed Code § 45113(e))].



**Cross Reference:**

Discussion of judicial review of arbitration proceedings, see California Forms of Pleading and Practice, Ch. 34, Contractual Arbitration: Judicial Review (Matthew Bender).

**6.10[3] Grounds for Vacating, Correcting, or Dismissing Arbitration Decision Are Limited.** If judicial review of an arbitration decision is sought, the available grounds for vacating, correcting, or dismissing the award are very limited [see CCP § 1286 *et seq.* (corruption, fraud, misconduct or prejudice required to vacate arbitration awards, mistake required to correct)].

**Exception:**

Under California law as well as the Federal Arbitration Act, the question whether an arbitration agreement is unenforceable, in whole or in part, based on general contract law principles, is a question for the court to decide, rather than an arbitrator. This includes the determination whether an arbitration agreement is unconscionable or contrary to public policy [ *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 165, 90 CR3d 818] .

**6.10[4] File Contemporaneous Complaint to Avoid Statute of Limitation and Facilitate Arbitration.** A party seeking resolution of a dispute through contractual arbitration should also file a complaint asserting his or her substantive claims in court because, if it is later determined that the arbitration agreement does not apply to the subject matter of the dispute or is unenforceable, the party's cause of action may already be time-barred by the applicable

limitation period. Courts frequently hold status conferences even when a complaint is stayed and a matter is in arbitration, which can help prevent delays in the arbitration. Moreover, if there are parties to a dispute who are not parties to the agreement to arbitrate, the court may order the joinder of all of the parties in the court action or consolidate multiple arbitration proceedings to prevent conflicting rulings on common issues of law or fact [CCP §§ 1281.2(c), 1281.3].



**Strategic Point:**

Commencing a civil action tolls any time limitations in arbitration agreement requiring commencing party to demand or initiate arbitration within a specified period of time [CCP § 1281.12; see 6.11[2][a]].



**Cross Reference:**

Tolling of statute of limitation by submission to arbitration, see *Ch. 4, Limitation of Actions, 4.24*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods





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### III. SUBMITTING TO OR COMPELLING ARBITRATION

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#### 6.11 Enforcing Arbitration Agreements.

**6.11[1] Timely Demand for Arbitration Must Be Made.** The first step in enforcing an agreement to arbitrate is to demand arbitration under the agreement [see *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 C3d 888, 894, 95 CR 53, 484 P2d 1397 (arbitration, or unsuccessful attempt to secure arbitration, is condition precedent to right to maintain enforcement action)].

##### **Cross Reference:**

Form of demand for arbitration, see 6.57.

##### **Example:**

A demand for arbitration is usually submitted in the form of a letter. The purpose of a demand for arbitration is to inform the other party that the party making the demand intends to ask for a determination of the dispute between them. The demand should identify the underlying contract and describe the dispute, and should be sent by certified mail.

##### **Exception:**

A defendant named in a complaint may seek to enforce an arbitration agreement by filing a petition to compel arbitration in lieu of filing an answer to the complaint [see CCP §§ 1281.2, 1281.7].

##### **Cross Reference:**

Discussion of compelling arbitration as a defendant, see 6.17.

##### **Warning--Demanding Party:**

Prior to demanding arbitration, counsel should study the contract requiring arbitration. Many arbitration clauses have preconditions, time limits, fee posting requirements, and forms under the rules of certain arbitration service providers, such as the American Arbitration Association or JAMS/Endispute. A demand for arbitration should comply with the contract and any arbitration rules that may have been adopted by the parties. Copies of the demand should be mailed to any arbitration association or arbitrators selected under the contract [see, e.g., *Mansouri v. Superior Court* (2010) 181 CA4th 633,

641-642, 104 CR3d 824 (demand for one-arbitrator arbitration under agreement calling for three arbitrators not valid); *Maggio v. Windward Capital Mgmt., Co.* (2000) 80 CA4th 1210, 1215, 96 CR2d 168 ].

**Example:**

If, under the disputants' agreement, arbitration is to be conducted pursuant to the rules of the American Arbitration Association (AAA), the AAA has its own forms of demand that are available at any of its regional offices or from its website. Rule 5 of AAA's Commercial Arbitration Rules (2003) requires the demand to contain a statement of the matter in dispute, the names and addresses of all parties, the amount of money involved, if any, the remedy sought, and the hearing locale requested. Two copies of the demand must be submitted to the regional office.

**6.11[2] Delay in Making Demand May Result in Waiver of Right to Arbitrate.**

**6.11[2][a] Arbitration Must Be Demanded Within Time Specified in Agreement, Unless Tolloed by Commencement of Civil Action.** Where a contract requires a party's demand for arbitration to be made within a certain time, a timely demand is a condition precedent to the other party's obligation to submit to arbitration, and an unreasonable delay in demanding arbitration may constitute a waiver of the right to arbitrate [see *Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1043, 9 CR2d 381, 831 P2d 821 ; see also *Sawday v. Vista Irrigation Dist.* (1966) 64 C2d 833, 836-837, 52 CR 1, 415 P2d 816 ; see also CC § 1657].

**Exception:**

When an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, tolls the applicable time limitations contained in the arbitration agreement with respect to that controversy. The tolling period lasts from the date the civil action is commenced until the earlier of [CCP § 1281.12]:

- 30 days after a final determination by the court that the party is required to arbitrate the controversy.
- 30 days after the final termination of the civil action that was commenced and initiated the tolling.

**Distinguish:**

A party's failure to make a timely demand constitutes a waiver of the right to arbitrate in the sense of losing a right based on the failure to perform an obligation, rather than making a knowing, voluntary waiver, and is not dependent on the party's intent to waive [see *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 313-314, 24 CR2d 597, 862 P2d 158 ; *Pearson Dental Supplies, Inc. v. Superior Court* (2008) 166 CA4th 71, 86-87, 82 CR3d 154 (not citable--superseded by grant of review 2008 Cal. LEXIS 13526 )].

**6.11[2][b] Demand Must Be Within Reasonable Time If Agreement Does Not Specify Time.** If an arbitration agreement does not specify a time within which arbitration must be demanded, a reasonable time is allowed [ *Sawday v. Vista Irrigation Dist.* (1966) 64 C2d 833, 836, 52 CR 1, 415 P2d 816 ]. What constitutes a reasonable time is a question of fact depending on the situation of the parties, the nature of the transaction, and the facts of the particular case [see, e.g., *Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1043-1044, 9 CR2d 381, 831 P2d 821 ].

**Example:**

A delay of several years has been found to be reasonable when the delay was occasioned by the party opposing the demand for arbitration [ *Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035,

*1043-1044, 9 CR2d 381, 831 P2d 821 ].*



**Cross Reference:**

Discussion of acts constituting waiver of right to arbitration, see 6.29, 6.30.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsWaiversCivil ProcedureAlternative Dispute  
ResolutionValidity of ADR Methods



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*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.12*

## 6.12 Parties May Seek Provisional Remedies.

**6.12[1] Provisional Remedies Protect Potential Arbitration Award.** A party to an arbitration agreement may apply for a provisional remedy in connection with an arbitrable controversy [*see CCP § 1281.8(b)*]. The sole ground for the application is that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief [*CCP § 1281.8(b)*]. Conversely, it is improper for a court to grant provisional relief that could render the arbitration ineffective [*see, e.g., Davenport v. Blue Cross of Cal. (1997) 52 CA4th 435, 453-454, 60 CR2d 641* ].

### Examples:

"Provisional remedies" include the following: attachments and temporary protective orders issued pursuant to *CCP § 481.010 et seq.*; writs of possession issued pursuant to *CCP § 512.010 et seq.*; preliminary injunctions and temporary restraining orders issued pursuant to *CCP § 527*; and receivers appointed pursuant to *CCP § 564* [*CCP § 1281.8(a)*].

### Prerequisite:

In addition to the requirements of *CCP § 1281.8(b)* itself, a petition for a provisional remedy must also meet the requirements of the statutes governing the specific remedy sought [*see, e.g., CCP §§ 526, 527* (establishing requirements for obtaining preliminary injunctions)].

### ➡ Cross References:

See Ch. 18, TROs and Preliminary Injunctions; Ch. 19, Attachment; and Ch. 20, Claim and Delivery.

**6.12[2] Provisional Remedy Is Sought Where Arbitration Is Pending or in Any Proper Court.** An application for a provisional remedy may be filed in the court in the county in which an arbitration is pending or, if an arbitration proceeding has not been commenced, in any proper court [*CCP § 1281.8(b)*]. The application must be accompanied by a complaint or by copies of the demand for arbitration and any responses to it and, if accompanied by a complaint, the application also must be accompanied by a statement stating whether or not the applicant is reserving his or her right to arbitration [*CCP § 1281.8(b)*].

**6.12[3] Objection As to Arbitrability of Dispute Not Relevant.** A claim by the party opposing issuance of a provisional remedy, that the controversy is not subject to arbitration, is not grounds for denial of any provisional remedy

[*CCP* § 1281.8(c)].

**6.12[4] Arbitration Right Not Waived If Applicant Requests Stay of Proceedings.** An application for a provisional remedy under *CCP* § 1281.8(b) will not operate to waive any right of arbitration the applicant may have pursuant to a written arbitration agreement if, at the same time as the application for provisional relief is presented to the court, the applicant also presents an application asking that other proceedings in the action be stayed pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and that is relevant to the action pursuant to which the provisional remedy is sought [*CCP* § 1281.8(d)].



**Cross Reference:**

Form of notice of motion for stay, see 6.63.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsWaiversCivil ProcedureRemediesProvisional RemediesGeneral Overview



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#### **6.13 State Laws Affecting Arbitration Agreements May Be Preempted.**

**6.13[1] State Laws That Invalidate Arbitration Agreements May Be Preempted in Cases Involving Interstate Commerce.** Congress has not completely displaced state regulation of arbitration, but in cases involving interstate commerce, the Federal Arbitration Act (FAA) [9 USC § 1 *et seq.*] preempts state laws that seek to invalidate arbitration agreements [ *Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995) 513 US 265, 270, 281, 115 S Ct 834, 130 L Ed2d 753 ; *Volt Info. Scis. v. Board of Trs.* (1989) 489 US 468, 477, 109 S Ct 1248, 103 L Ed2d 488 ; *Southland Corp. v. Keating* (1984) 465 US 1, 15-16, 104 S Ct 852, 79 L Ed2d 1 ].

The state law designated by parties in a contract will not be preempted, and will govern arbitration under the contract, unless enforcement of the particular state provision would undermine the goals and policies of the FAA, which are to favor arbitration and the enforcement of agreements to arbitrate [ *Volt Info. Scis. v. Board of Trs. of Leland Stanford Univ.* (1989) 489 US 468, 477-478, 109 S Ct 1248, 103 L Ed2d 488 ; *Garden Grove Cmty. Church v. Pittsburgh-Des Moines Steel Co.* (1983) 140 CA3d 251, 262, 191 CR 15 ].

States may regulate contracts, including arbitration clauses, under general contract law principles, and they may invalidate an arbitration clause on such grounds as exist at law or in equity for the revocation of any contract [see 9 USC § 2; see also CCP § 1281]. Under the FAA, arbitration clauses simply must be treated the same as any other contract clause under state law [see *Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995) 513 US 265, 281, 115 S Ct 834, 130 L Ed2d 753 ].

#### **Exception:**

The FAA [9 USC § 1 *et seq.*] does not apply to contracts of transportation workers [ *Harden v. Roadway Packaging Sys.* (9th Cir 2001) 249 F3d 1137, 1140-1142 (arbitration of former delivery service driver's wrongful termination claims could not be compelled under FAA)]. All other employment contracts "evidencing transactions involving commerce" are governed by the FAA [ *Circuit City Stores, Inc. v. Adams* (2001) 532 US 105, 118, 121 S Ct 1302, 149 L Ed2d 234 (overruling Ninth Circuit minority position articulated in *Craft v. Campbell Soup Co.* (9th Cir 1998) 177 F3d 1083 )].

**6.13[2] Federal Arbitration Act's Substantive, Not Procedural, Provisions Apply in State Court.** The substantive provisions of 9 USC §§ 1, 2 apply in state court proceedings, but the procedural terms of 9 USC §§ 3, 4 only

apply to proceedings in federal court [ *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 405, 407, 58 CR2d 875, 926 P2d 1061 ]. State procedures may be followed as long as they do not defeat the rights granted by Congress [ *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 406-407, 58 CR2d 875, 926 P2d 1061 ].

**Exception:**

The parties may expressly set forth in their arbitration agreement that the procedures contained in the FAA apply in proceedings in state court to compel arbitration [ *Aviation Data, Inc. v. American Express Travel Related Services Co., Inc.* (2007) 152 CA4th 1522, 1535-1536, 62 CR3d 396 (waiver); *Rodriguez v. American Technologies, Inc.* (2006) 136 CA4th 1110, 1121, 39 CR3d 437 ].

**Distinguish:**

California procedure relating to the enforcement of arbitration agreements is substantially similar to federal law [ *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 406-407, 58 CR2d 875, 926 P2d 1061 (comparing CCP §§ 1281, 1281.2, 1281.3 with 9 USC §§ 2-4)]. However, a major difference is that federal law provides for a jury trial on the issue of whether an arbitration agreement exists, whereas California law does not [see 9 USC § 4; CCP § 1290.2 (providing for summary determination of issue)]. Yet, because this state procedure furthers the federal policy encouraging enforcement of arbitration clauses, it is not preempted [see 9 USC § 1 et seq.].



**Strategic Point:**

Additional distinction between Federal Arbitration Act and California law is that while 9 USCS § 3 requires the court to stay all judicial proceedings until contemporaneous arbitration is completed, CCP § 1281.2(c) gives the trial court discretion to stay the judicial proceedings or stay the arbitration proceedings, in order to prevent separate conflicting decisions on the claims [ *Rodriguez v. American Technologies, Inc.* (2006) 136 CA4th 1110, 1117, 39 CR3d 437 ].



**Strategic Point:**

Unlike the California Arbitration Act, the Federal Arbitration Act does not permit an arbitration agreement to expressly authorize judicial review of legal error [ *Christensen v. Smith* (2009) 171 CA4th 931, 937, 90 CR3d 57] .

**6.13[3] Preemption Is Determined Case by Case.** The determination of whether a specific California statute or policy is preempted by the FAA is made on a case-by-case basis [see, e.g., *Volt Info. Scis. v. Board of Trs. of Leland Stanford Univ.* (1989) 489 US 468, 477-478, 109 S Ct 1248, 103 L Ed2d 488 ].

**Examples:**

Cases interpreting federal preemption include:

- The FAA does not provide for a stay of arbitration when third parties who have not agreed to arbitrate are necessary to the resolution of the dispute, but CCP § 1281.2(c) does. Under a contract provision that provides for arbitration in accordance with California law, CCP § 1281.2 is not in conflict with the policies of the FAA, and is therefore not preempted by it [ *Volt Info. Scis. v. Board of Trs. of Leland Stanford Univ.* (1998) 489 US 468, 477-478, 109 S Ct 1248, 103 L Ed2d 488 ].
- A reading of the California Arbitration Act that permits the enforcement of agreements for merits review is fully consistent with and not preempted by the Federal Arbitration Act [ *Cable Connection,*

*Inc. v. Directv, Inc. (2008) 44 C4th 1334, 1354, 82 CR3d 229, 190 P3d 586 ].*

■ Where arbitration agreements contained a choice-of-law clause for California and further provided that "designation of a situs or specifically a governing law for this agreement or the arbitration shall not be deemed an election to preclude application of the [FAA], if it would be applicable," the FAA was found not to preempt the application of *CCP § 1281.2(c)* because the FAA does not have any procedural provisions applicable in state court, and because *CCP § 1281.2(c)* it is an evenhanded law that allows the trial court to stay arbitration proceedings while the concurrent lawsuit proceeds or stay the lawsuit while arbitration proceeds to avoid conflicting rulings on common issues of fact and law amongst interrelated parties [ *Cronus Investments, Inc. v. Concierge Services (2005) 35 C4th 376, 393, 25 CR3d 540, 107 P3d 217 (disapproving Warren-Guthrie v. Health Net (2000) 84 CA4th 804, 814-816, 101 CR2d 260 and The Energy Group, Inc. v. Liddington (1987) 192 CA3d 1520, 1522-1528, 238 CR 202 to the extent their holdings are predicated on the conclusion that CCP § 1281.2(c) limits the authority of arbitrators and conflicts with the FAA); Best Interiors, Inc. v. Millie & Severson, Inc. (2008) 161 CA4th 1320, 1329, 75 CR3d 1 ].*

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & Exceptions





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### III. SUBMITTING TO OR COMPELLING ARBITRATION

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#### 6.13A Class Arbitration.

##### 6.13A[1] Class Arbitration May Be Allowed.

**6.13A[1][a] Class Arbitration May Be Authorized By Agreement.** California law recognizes classwide arbitration as a means of bringing collective legal action by parties bound to an arbitration agreement [ *Cruz v. PacifiCare Health Systems, Inc.* (2004) 30 C4th 303, 319, 133 CR2d 58, 66 P3d 1157 ]. An agreement may authorize class arbitration if it contains a general arbitration agreement calling for arbitration under the rules of an arbitration service that allow for class arbitration [see *Cable Connection, Inc. v. DirecTV, Inc.* (2008) 44 C4th 1334, 1365-1366, 82 CR3d 229, 190 P3d 586 (remanding for determination by arbitrator of whether American Arbitration Association rules permit class arbitration)].

##### Prerequisite:

Where there is an issue of whether class arbitration is forbidden under an arbitration agreement, it is recommended that the arbitrator rule on this issue [see *Green Tree Fin. Corp. v. Bazzle* (2003) 539 US 444, 453, 123 S Ct 2402, 156 L Ed2d 414 (Breyer, J. plurality op.) (whether classwide arbitration should proceed determined by arbitrator and not by trial court)].

##### Exception:

Statutory claims may not be subject to class arbitration if a statute prohibits arbitration and, where applicable, if statutory rights have not been properly waived [see *Cruz v. PacifiCare Health Systems, Inc.* (2004) 30 C4th 303, 319, 133 CR2d 58, 66 P3d 1157 (class arbitration of private attorney general suits for claims for public injunctive relief under Unfair Competition Law (B&P Code § 17203), for public injunctive relief on false advertising claims under B&P Code § 17535, or for public injunctive relief under the Consumer Legal Remedies Act (CCP Code § 1780(a)(2)), cannot be compelled under the Federal Arbitration Act, but class arbitration of restitution and disgorgement claims under the Unfair Competition Law (B&P Code § 17203), and common-law restitution claims in a private attorney general action, may be compelled)].

##### ➤ Cross Reference:

Arbitrability of statutory claims, see 6.28.

**Distinguish:**

A plaintiff who did not sign an arbitration agreement cannot be compelled to arbitrate claims on a class basis because the plaintiff's complaint was filed as a putative class or representative action [ *Lee v. S. Cal. Univ. for Prof. Studies* (2007) 148 CA4th 782, 788, 56 CR3d 134 ].

**6.13A[1][b] Class Arbitration May Be Ordered to Preserve Individual Right to Arbitrate.** When a properly-maintained class action arises from a contract that contains an arbitration provision, even an adhesion contract, the court may permit arbitration on a class-wide basis rather than allow a defendant automatically to eliminate the right to a class proceeding by compelling individual arbitration [ *Keating v. Superior Court* (1982) 31 C3d 584, 609, 612-614, 183 CR 360, 645 P2d 1192 (overruled on other grounds in *Southland Corp. v. Keating* (1984) 465 US 1, 104 S Ct 852, 79 L Ed2d 1 ); *Blue Cross of Cal. v. Superior Court* (1998) 67 CA4th 42, 46, 65-66, 78 CR2d 779 ].

**Distinguish:**

The *Keating* rule does not apply where the party seeking class arbitration did not claim and the arbitrators did not find that the contract was adhesive, or that a denial of classwide arbitration would lead to gross unfairness. Furthermore, *Keating* did not address whether arbitrators can order class arbitration under the rule, as opposed to courts [ *Cable Connection, Inc. v. DirecTV, Inc.* (2008) 44 C4th 1334, 1365, 82 CR3d 229, 190 P3d 586 ].

**6.13A[2] Class Arbitration Waiver Must Not Be Unconscionable.** Arbitration agreements that prohibit arbitration of class or representative claims have been found to be unconscionable and unenforceable [ *Discover Bank v. Superior Court* (2005) 36 C4th 148, 161, 166-167, 30 CR3d 76, 113 P3d 1100 (credit card agreement's prohibition of class action claim stricken; *see also* 33.04[5])].

**Warning:**

As with class action waivers [see Ch. 33, *Class Actions*, 33.04[5]], choice of law clauses can play a role in the unconscionability determination [ *Hoffman v. Citibank (South Dakota), N.A.* (9th Cir. 2008) 546 F3d 1078 (California law against unconscionable class arbitration waivers gives California additional interest in applying its law where the other state is likely to enforce the waiver)].

**Strategic Point:**

The analysis of class arbitration waivers for unconscionability mirrors that used for determining the unconscionability of arbitration agreements and class action waivers generally [see, e.g., *Gentry v. Superior Court* (2007) 42 C4th 443, 468-473, 64 CR3d 773, 165 P3d 556 ].

**Example:**

Employer's explanation of class arbitration waiver to employee was procedurally unconscionable, even though an option to opt out of the waiver was given [ *Gentry v. Superior Court* (2007) 42 C4th 443, 469-473, 64 CR3d 773, 165 P3d 556 ].

If an arbitration provision is unconscionable and unenforceable, the trial court in a class action, even one in which no class has yet been certified, has authority to order that the arbitration provision not be enforced against potential class members [ *Patterson v. ITT Consumer Fin. Corp.* (1993) 14 CA4th 1659, 1667-1668, 18 CR2d 563 ; *see also* CCP §§ 187, 527].

**Cross References:**

Discussion of unconscionability of arbitration agreements and provisions, see 6.24. Discussion of unconscionability of class action waivers, see Ch. 33, *Class Actions*, 33.04[5].

**6.13A[3] Class Certification Issues May Be Determined Before Class Arbitration Is Ordered.** The kind of inquiry a trial court must make in certifying the arbitration class is similar to the one it makes to determine whether class actions are appropriate [ *Gentry v. Superior Court* (2007) 42 C4th 443, 463, 64 CR3d 773, 165 P3d 556 ].



**Timing:**

Class certification issues may be determined before arbitration is ordered, and arbitration may be stayed and a petition for individual arbitration denied "without prejudice," so class certification issues can be determined first [ *Sanders v. Kinko's, Inc.* (2002) 99 CA4th 1106, 1112-1113, 121 CR2d 766 ].



**Cross Reference:**

Certification of class, see *Ch. 33, Class Actions, 33.04*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsCivil ProcedureClass ActionsPrerequisites



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#### 6.14 Self-Executing Arbitration Agreements Require No Court Action.

**6.14[1] Arbitration Agreements Ordinarily Are Not Self-Executing.** Agreements to arbitrate are ordinarily not self-executing, which means that where the parties do not agree to arbitrate a dispute, court intervention will be required to compel arbitration [see *Sauter v. Superior Court* (1969) 2 CA3d 25, 29, 82 CR 395 ; see *American Home Assurance Co. v. Benowitz* (1991) 234 CA3d 192, 198-199, 285 CR 626 ].

**6.14[2] Parties May Expressly Agree to Make Agreement Self-Executing.** The parties may, by specific terms, make an arbitration agreement self-executing [see, e.g., *Brink v. Allegro Builders, Inc.* (1962) 58 C2d 577, 579-580, 25 CR 556, 375 P2d 436 ; see also *Kustom Kraft Homes v. Leivenstein* (1971) 14 CA3d 805, 810-811, 92 CR 650 ; *Smith v. Campbell & Facciolla, Inc.* (1962) 202 CA2d 134, 137, 20 CR 606 ]. When parties expressly agree that in the event there is a dispute and either party refuses to arbitrate, after demand is made, the other party may unilaterally select one arbitrator and proceed with the arbitration, such an agreement is self-executing, and it is not necessary for the party seeking arbitration to obtain a court order to arbitrate [ *Brink v. Allegro Builders, Inc.* (1962) 58 C2d 577, 579-580, 25 CR 556, 375 P2d 436 ].

A party to a self-executing agreement who fails to select an arbitrator is still entitled to notice of the arbitration hearing and an opportunity to be heard [see CCP § 1282.2(a), (d), (e); see also *Smith v. Campbell & Facciolla, Inc.* (1962) 202 CA2d 134, 135, 137, 20 CR 606 (notice of arbitration is required by the due process clause of the US Const, amend XIV)].

**6.14[3] Objecting to Arbitration Under Self-Executing Agreement.** When arbitration proceeds under a self-executing agreement without a court order to arbitrate, the party who opposes arbitration is required to participate in the arbitration and then raise its objections in a petition to vacate the award under CCP § 1286.2, or oppose the petition to confirm the award [see CCP § 1281.2; *National Marble Co. v. Bricklayers & Allied Craftsmen* (1986) 184 CA3d 1057, 1064, 229 CR 653 ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Contracts LawContract Conditions & ProvisionsArbitration Clauses



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Chapter 6 Determining Forum

### III. SUBMITTING TO OR COMPELLING ARBITRATION

1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.15

#### 6.15 Petitioning Courts to Compel Arbitration.

##### 6.15[1] Who May Compel Arbitration or Be Compelled to Arbitrate.

**6.15[1][a] Party to Arbitration Agreement May Petition Court to Compel Arbitration by Another Party to Agreement.** A party to a written arbitration agreement may petition the court for an order compelling arbitration if another party to the agreement refuses to arbitrate a controversy covered by the agreement [see CCP §§ 1281, 1281.2, 1290].



##### Cross Reference:

Form of petition to compel arbitration, see 6.58.

##### 6.15[1][b] Limited Exceptions Permit Nonsignatory to Compel Arbitration or Be Compelled to Arbitrate.

Subject to limited exceptions, only parties to an arbitration contract may enforce it or be required to arbitrate [ *Nguyen v. Tran* (2007) 157 CA4th 1032, 1036-1037, 68 CR3d 906] . Accordingly, a petition to compel nonsignatories will be denied if the suit is based on equitable contribution instead of contractual obligations [ *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 CA4th 1061, 1072, 70 CR3d 605] .

**6.15[1][c] Nonsignatories to Arbitration Agreement May Compel Arbitration or Be Compelled to Arbitrate By Equitable Estoppel.** Under equitable estoppel principles and in appropriate factual circumstances, a signatory to a agreement containing an arbitration clause may be compelled to arbitrate its claims against a nonsignatory when the relevant causes of action rely on and presume the existence of the contract [ *Boucher v. Alliance Title Co., Inc.* (2005) 127 CA4th 262, 269, 25 CR3d 440] . The cause of action against the nonsignatory must be "intimately founded in and intertwined" with the underlying contract obligations [ *Goldman v. KPMG LLP* (2009) 173 CA4th 209, 92 CR3d 534, 2009 Cal. App. LEXIS 592 at 20 (denying arbitration by equitable estoppel); *Boucher v. Alliance Title Co., Inc.* (2005) 127 CA4th 262, 271, 25 CR3d 440] .

##### Distinguish:

Doctors suing a medical group and a hospital for discrimination could not be compelled to arbitrate under an agreement providing for arbitration of claims between the medical group and the hospital [ *Suh v. Superior Court* (2010) 181 CA4th 1504, 1514, 105 CR3d 585] .

**Distinguish:**

Defendant-insurer could not use equitable estoppel to compel plaintiff in survivor's action to arbitrate survivorship claim arising from insurer's policy on decedent's life on the basis of an arbitration clause in a loan agreement between the decedent and a creditor to whom the life insurance benefits were to be paid [ *Mundi v. Union Security Life Ins. Co.* (9th Cir. 2009) 555 F.3d 1042, 1045-1047 ].

 **Cross Reference:**

Form of petition to compel arbitration, see 6.58.

**6.15[1][d] Nonsignatories to Arbitration Agreement May Compel Arbitration or Be Compelled to Arbitrate By Agency Principles.** Exceptions in which an arbitration agreement may be enforced by or against nonsignatories include when a nonsignatory and one of the parties to the agreement have a preexisting agency relationship that makes it equitable to impose the duty to arbitrate on either of them [ *Nguyen v. Tran* (2007) 157 CA4th 1032, 1036-1037, 68 CR3d 906 (compelling buyers as principles of cooperating brokers to arbitrate claims against nonsignatory cooperating brokers)].

**Distinguish:**

Doctors who had contract with hospital were not agents of the hospital for purposes of compelling them to arbitrate, because they were not agents of the corporate defendant or alleged to be parties to the agreement, and had not sought the benefit of the arbitration clause in the contract [ *Suh v. Superior Court* (2010) 181 CA4th 1504, 1514, 105 CR3d 585 ].

 **Cross Reference:**

Form of petition to compel arbitration, see 6.58.

**6.15[1][e] Nonsignatory Third-Party Beneficiaries of Arbitration Agreement May Compel Arbitration or Be Compelled to Arbitrate.** Exceptions in which an arbitration agreement may be enforced by or against nonsignatories include when a nonsignatory is a third party beneficiary of the agreement [ *Nguyen v. Tran* (2007) 157 CA4th 1032, 1036-1037, 68 CR3d 906 (denying arbitration against nonsignatory listing brokers by nonsignatory cooperating brokers)].

 **Cross Reference:**

Form of petition to compel arbitration, see 6.58.

**6.15[1][f] Nonsignatories to Arbitration Agreement May Compel Arbitration or Be Compelled to Arbitrate By Doctrine of Alter Ego.** Individual defendants, who are not signatories to a contract containing an arbitration provision but are sued as alter egos of a corporate defendant who was a signatory, may compel another signatory party to arbitrate the controversies raised in the complaint [ *Rowe v. Exline* (2007) 153 CA4th 1276, 1285, 63 CR3d 787 ; but see *Hayden v. Robertson Stephens, Inc.* (2007) 150 CA4th 360, 368, 58 CR3d 333 (corporate parent is not a party to arbitration absent involvement in underlying transaction)].

 **Cross Reference:**

Form of petition to compel arbitration, see 6.58.

**6.15[2] Preparing, Filing, and Serving a Petition to Compel Arbitration.**

**6.15[2][a] Petition Must Allege Written Agreement to Arbitrate Controversy and Refusal by Other Party to Arbitrate.** A petition to compel arbitration must allege there is a written agreement to arbitrate a controversy, and a refusal to arbitrate by a party to the agreement [see CCP § 1281.2]. Additionally, the petition must set forth the provisions of the written agreement and the paragraph that provides for arbitration verbatim, or by a copy attached to

the petition and incorporated by reference [*Cal Rules Ct, Rule 3.1330*].

**6.15[2][b] Venue Is County Where Agreement to Be Performed or Was Made, or Where Any Party Resides or Has Place of Business.** Except as otherwise provided in *CCP* §§ 1292-1293.2, any petition made prior to the commencement of arbitration must be filed in a court having jurisdiction in the county where the agreement was to be performed or was made [*CCP* § 1292(a)]. If the agreement does not specify a county where the agreement was to be performed, and the agreement was not made in any county in California, the petition must be filed in the county where any party to the court proceeding resides or has a place of business or, in any other case, in any California county [*CCP* § 1292(b), (c)].

Any petition made after the commencement or completion of an arbitration must be filed in a court having jurisdiction in the county where the arbitration is being, or was, held [*CCP* § 1292.2].

**Exceptions:**

When the petition relates to a controversy that is involved in a pending superior court action or proceeding, the petition must be filed in that action or proceeding [*CCP* § 1292.4]. When arbitration is not held exclusively in any one county of California or outside this state, and a petition is made after commencement or arbitration, venue is determined the same as for petitions filed prior to arbitration [*CCP* § 1292.2; see *CCP* § 1292].

**6.15[2][c] Caption of Petition Must Indicate If Limited Civil Case.** If a matter is a limited civil case, and the petition to compel arbitration is the first paper filed, the caption must state that the matter is a limited civil case, and also indicate whether the demand exceeds or does not exceed \$10,000 [*CCP* § 422.30(b); *Gov Code* § 70613(b); *Cal Rules Ct, Rule 2.111(9), (10)*]. Otherwise, a petition to compel arbitration is classified as a case of unlimited jurisdiction [see *Cal Const, art VI, § 10*].

**6.15[2][d] Serving the Petition.** A copy of the petition and a written notice of the time and place of the hearing, and any other papers on which the petition is based, must be served in the manner provided in the arbitration agreement if it so provides [*CCP* § 1290.4(a)].

When the arbitration agreement does not set out service requirements, if the person on whom service is to be made has not previously appeared in the proceeding or been served in accordance with *CCP* § 1290.4(b), service within California is to be performed in the manner provided by law for the service of summons in an action [*CCP* § 1290.4(b)(1); see *CCP* §§ 413.10-417.40 (service of summons)]. If service is to be made outside California, it is to be made by mailing a copy of the petition, notice, and other papers on which the petition is based by registered or certified mail, or by personal service. Proof of service by mail must be made by affidavit and return receipt from the United States Post Office [*CCP* § 1290.4(b)(2)].

If the person to be served has previously appeared in the proceeding or been served in accordance with *CCP* § 1290.4(b), service is to be made in the manner provided in *CCP* §§ 1010-1020 (service of papers other than summonses) [*CCP* § 1290.4(c)].



**Timing:**

A petition to compel arbitration is heard on the notice provided for the making and hearing of motions, except that not less than 10 days' notice of the hearing date may be given [*CCP* § 1290.2; see *CCP* § 1010 (notice requirements)]. If a petition is served out of state under the provisions of *CCP* § 1290.4(b), it may not be heard until at least 30 days after the date of service [*CCP* § 1290.4(b)(2)].



**Cross References:**

Discussion of limitations period for compelling arbitration, see 6.15[6].

Form, notice of hearing on petition to compel arbitration, see 6.59.

Discussion of service of summons, see Ch. 8, Service of Summons.

Discussion of service of papers, see Ch. 27, Service of Papers.

**6.15[3] California Superior Courts Have Jurisdiction Over Arbitration-Related Matters.** When parties enter into an agreement to arbitrate a matter in California, the agreement is deemed a consent to the jurisdiction of the California courts to enforce the agreement by issuing orders provided in *CCP § 1280 et seq.* and by entering of judgment on an award under the agreement [*CCP § 1293*].

The superior court has jurisdiction over arbitration-related matters, including limited civil cases [see *Cal Const, art VI, § 10*; *CCP §§ 85, 86*]. "Limited civil cases" include all arbitration-related petitions filed under *CCP §§ 1292-1293.2* if the petition is filed before the arbitration award becomes final and the matter to be resolved by arbitration is a limited civil case under *CCP § 86(a)(1)-(9)*; or, after the arbitration award becomes final and the amount of the award and all other rulings, pronouncements, and decisions made in the award are within *CCP § 86(a)(1)-(9)* [*CCP §§ 85, 86(a)(10)(A)*].

**Exception:**

Uninsured motorist proceedings under *Ins Code § 11580.2* are not limited civil cases [*CCP § 86(a)(10)(A)*].

After a petition to compel arbitration has been filed, the court in which the petition was filed retains jurisdiction to determine any subsequent petition involving the same agreement to arbitrate and the same controversy, and any subsequent petition must be filed in the same proceeding [*CCP § 1292.6*].

 **Cross Reference:**

Discussion of jurisdiction in limited civil cases, see Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction.

**6.15[4] Responding to a Petition to Compel Arbitration.** Once a petitioner has alleged that a written agreement to arbitrate exists, the burden shifts to the party resisting arbitration to prove the alleged agreement does not govern the parties' dispute [see *Condee v. Longwood Mgmt. Corp. (2001) 88 CA4th 215, 218-219, 105 CR2d 597*]. Any person named as a respondent in a petition to compel arbitration may file a response to the petition, and a respondent who fails to duly serve and file his or her response will be deemed to have admitted the allegations of the petition [see *CCP § 1290*]. A response must be served as provided in *CCP §§ 1010-1020* [*CCP § 1290.8*]. The allegations of a response are deemed controverted or avoided [*CCP § 1290*].



**Timing:**

A response must be filed and served within 10 days after service of the petition, unless the petition is served out of state, in which case the response must be served and filed within 30 days after service of the petition [*CCP § 1290.6*; see *CCP § 1290.4(b)(2)* (out-of-state service)].

**Exception:**

The time for filing and serving a response may be extended by a written agreement of the parties or, for good cause, by order of the court [*CCP § 1290.6*].

 **Cross Reference:**

Discussion of grounds for avoiding arbitration, see 6.21 -6.30.

**6.15[5] Judicial Involvement Is Limited and Doubts Are Resolved in Favor of Arbitration.** Judicial



involvement in arbitration proceedings is strictly limited to a determination of whether the party resisting arbitration in fact agreed to arbitrate the dispute at issue [ *State Farm Mut. Auto Ins. Co. v. Superior Court* (1994) 23 CA4th 1297, 28 CR2d 711 ]. The court's function is to ascertain whether the party seeking arbitration is making a claim that on its face is governed by the contract [ *Charles J. Rounds Co. v. Joint Council of Teamsters* (1971) 4 C3d 888, 892 ]. Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration [ *Service Employees Int'l Union, Local 347 v. City of Los Angeles* (1994) 24 CA4th 136, 143, 29 CR2d 357 ].



#### **Cross Reference:**

Additional discussion of construction of arbitration agreements, see 6.15[12].

**6.15[6] Limitation Period for Enforcing Arbitration Agreements Is Four Years.** An action to compel arbitration is in essence a suit in equity to compel specific performance of a contract; the contract is considered breached, and the cause of action accrues, when the other party refuses a demand to arbitrate [ *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 C4th 19, 29, 58 CR3d 434, 157 P3d 1029 ; *City of Hope v. Bryan Cave, L.L.P.*, (2002) 102 CA4th 1356, 1369, 126 CR2d 283 (citing *Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1040-1043, 9 CR2d 381, 831 P2d 821 )]. Thus, the four-year limitation period applicable to breach of contract actions [see CCP § 337] applies, requiring a petition to compel arbitration to be filed within four years of the refusal to arbitrate [ *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 C4th 19, 29, 58 CR3d 434, 157 P3d 1029 ; *Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1040, 9 CR2d 381, 831 P2d 821 ].



#### **Warning--Modified Limitation Period:**

The statutory four year limitation period may be shortened by a provision in the parties' arbitration agreement [see generally *Hamaker v. Williams* (1937) 22 CA2d 256, 259, 70 P2d 973 ]. If the agreement does not provide a time for the parties to seek arbitration, a court may consider whether the petitioning party has sought arbitration within a reasonable time under the circumstances, which may or may not be as long as the four-year limitation period [see *Meyer v. Carnow* (1986) 185 CA3d 169, 175, 229 CR 617 ].

#### **Distinguish--Medical Malpractice:**

When the underlying dispute involves medical malpractice, the four-year period of CCP § 337 governs, but in determining whether the party seeking arbitration has petitioned to compel within a reasonable time, the court may look to CCP § 340.5 to the extent that section demonstrates the legislature's determination of what is a reasonable time in which to file a lawsuit alleging medical malpractice [ *Meyer v. Carnow* (1986) 185 CA3d 169, 175, 229 CR 617 ].

#### **Exception--Uninsured Motorist:**

In the case of uninsured motorist arbitration, the insured is required to conclude arbitration within five years after it is instituted [ *Ins Code § 11580.2(i)(2)(A)* ]. Arbitration may be considered instituted on the date the insured sends his or her demand for arbitration [ *Santangelo v. Allstate Ins. Co.* (1998) 65 CA4th 804, 812, 76 CR2d 735 ]. Thus, if an insured does not conclude the arbitration within five years after demanding it, and he or she cannot establish any basis for waiver or estoppel of the five-year period for completion of arbitration, any petition for an order to compel that arbitration must be denied [ *Santangelo v. Allstate Ins. Co.* (1998) 65 CA4th 804, 812, 816-818, 76 CR2d 735 ].

**6.15[7] Arbitrator Determines Compliance With Contract's Time Limits.** Where the parties' arbitration agreement contains time limits for actions taken in connection with arbitration, a party's compliance with contractual time limits is generally determined in the arbitration proceeding, not by the court deciding whether to compel arbitration [see *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 CA4th 1266, 1276, 8 CR2d 587 (analyzing compliance with two-year contractual limitation period)]. Neither CCP § 1281.2 nor any other statute

permits a court to deny a petition to compel arbitration based on a party's assertion that the statute of limitations has run on the claims the parties agreed to arbitrate [ *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 C4th 19, 28, 58 CR3d 434, 157 P3d 1029 ].

**Distinguish:**

Issues regarding compliance with statutes of limitation, however, are for the court to determine on the petition to compel arbitration, if failure to comply may constitute waiver of the right to arbitrate [ *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 C3d 473, 485-486, 121 CR 477, 535 P2d 341 (limitation period for uninsured motorist actions under *Ins. Code* § 11580.2); see *CCP* § 1281.2(a); but see *Kennedy, Cabot & Co. v. National Assn. of Securities Dealers, Inc.* (1996) 41 CA4th 1167, 1176-1179, 49 CR2d 66 (statutory limitation period issue raised by broad arbitration clause was subject to arbitration)].



**Cross Reference:**

Discussion, see Ch. 4, Limitation of Actions.

**6.15[8] Petitions Are Heard Summarily and Given Precedence.** A petition for an order to compel arbitration is heard in a summary way, in the manner and on the notice provided for the making and hearing of motions [see *CCP* § 1003 *et seq.*], except that not less than 10 days' notice of the hearing date may be given [*CCP* § 1290.2]. Proceedings to compel arbitration are to be given preference over all other civil actions or proceedings, except older matters of the same character and matters to which special precedence may be given by law, so that they can be quickly determined [see *CCP* § 1291.2].

A hearing is required on a petition to compel, because the existence of the agreement to arbitrate is a question of fact [ *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 CA4th 754, 762-763, 765, 50 CR3d 700 ].



**Cross References:**

Discussion of petition content and notice requirements, see 6.15[2].

Form, notice of hearing on petition to compel arbitration, see 6.59.

Discussion of general motion procedures, see Ch. 26, Law and Motion Procedure.

**6.15[9] Submitting Evidence in Support of and Opposition to Petition.** In ruling on a petition to compel arbitration, the trial court may consider evidence on factual issues relating to the threshold issue of arbitrability, i.e., whether the contract includes or excludes the dispute from its arbitration clause, and parties may submit declarations on those factual issues [ *Eng's & Architects Ass'n v. Cmty. Dev. Dept.* (1994) 30 CA4th 644, 653, 35 CR2d 800 ].



**Warning--Respondents:**

A party resisting arbitration must provide evidence by declaration or otherwise to support the facts underlying the argument in opposition to a petition to compel; otherwise, the agreement must be enforced as a matter of law [see *Owens v. Intertec Design, Inc.* (1995) 38 CA4th 72, 74-75, 44 CR2d 840 ].



**Cross Reference:**

Discussion of grounds for avoiding arbitration, see 6.22 -6.30.

**6.15[10] Court Will Compel Arbitration Unless It Finds Grounds for Avoiding Arbitration.** If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate may not be refused on the

ground that the petitioner's contentions lack substantive merit [CCP § 1281.2(c)], and the court will order the parties to arbitrate the controversy, unless it determines that any of the following apply [CCP § 1281.2]:

- The right to compel arbitration has been waived by the petitioner [CCP § 1281.2(a)].
- Grounds exist for revocation of the agreement [CCP § 1281.2(b); *Rodriguez v. Superior Ct.* (2009) 176 CA4th 1461, 1469-1470, 98 CR3d 728 (expiration of 30-day revocation period necessary for valid arbitration agreement subject to CCP § 1295)].
- A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact [CCP § 1281.2(c)].

#### **Distinguish:**

The exception in CCP § 1281.2(c) applies only to the peculiar situation that arises when a controversy also affects claims by or against *other parties* not bound by the arbitration agreement [ *Cronus Investments, Inc. v. Concierge Services* (2005) 35 C4th 376, 393, 25 CR3d 540, 107 P3d 217 ; *Birl v. Heritage Care, LLC* (2009) 172 CA4th 1313, 1317-1321, 91 CR3d 777 , (plaintiffs and codefendants were "other parties"); *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 CA4th 1511, 1520, 81 CR3d 892 ]. Persons who can enforce the arbitration agreement are not "third parties" within the meaning of CCP § 1281.2(c), and it therefore may not be used to deny enforcement of arbitration against them [ *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 CA4th 1511, 1520-1521, 81 CR3d 892 ; *Rowe v. Exline* (2007) 153 CA4th 1276, 1290, 63 CR3d 787 (denial of enforcement overturned)].

#### **Distinguish:**

"Court actions or proceedings" under CCP § 1281.2(c) include proceedings initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed but on or before the date of the hearing on the petition [CCP § 1281.2(c)].

#### **Exception:**

CCP § 1281.2(c) does not apply to agreements to arbitrate disputes as to the professional negligence of a health care provider made pursuant to CCP § 1295 [CCP § 1281.2(c); see *Reigelsperger v. Siller* (2007) 40 Cal. 4th 574, 578-580, 53 CR3d 887 ].

#### **Cross References:**

Discussion of waiver of the right to compel arbitration, see 6.29, 6.30. Forms of orders relating to proceedings to compel arbitration, see 6.61, 6.62, 6.64.

**6.15[11] Right to Compel Arbitration Depends on Parties' Contract.** The right to compel arbitration depends on the parties' contract, and the general policy favoring arbitration cannot take the place of an agreement to arbitrate [ *Mayhew v. Benninghoff* (1997) 53 CA4th 1365, 1371, 62 CR2d 27 ]. In determining whether a particular dispute falls within the purview of an arbitration agreement, effect must be given to the parties' intentions in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made [ *EFund Capital Partners v. Pless* (2007) 150 CA4th 1311, 1321, 59 CR3d 340 ; see *Victoria v. Superior Court* (1985) 40 C3d 734, 744, 222 CR 1, 710 P2d 833 ].

**6.15[12] Agreements Are Construed in Favor of Arbitration.** Because arbitration is a favored method of dispute resolution, arbitration agreements will be liberally construed [ *Baker v. Sadick* (1984) 162 CA3d 618, 623, 208 CR 676 ]. Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration [ *Eng'rs & Architects Ass'n v. Cmty. Dev. Dept.* (1994) 30 CA4th 644, 652, 35 CR2d 800 ]. Only a clear-cut expression to exclude a claim from arbitration can prevail and, absent an expressly stated exclusionary

purpose, an ambiguity must be resolved in favor of the arbitration process [ *Taylor v. Crane* (1979) 24 C3d 442, 450-451, 155 CR 695, 595 P2d 129 ]. The strong policy in favor of arbitration may not be used to permit a party to enforce provisions of an arbitration agreement that either do not exist or were so poorly drafted that another party cannot be presumed to have agreed to them [ *Thompson v. Toll Dublin, LLC* (2008) 165 CA4th 1360, 1370, 81 CR3d 736 ].

**Exception:**

In certain situations, other rules of construction may prevail over the rule of liberal construction of arbitration agreements. For example, ambiguities in an arbitration clause in a standardized contract may be construed against its drafter [see *Victoria v. Superior Court* (1985) 40 C3d 734, 740-747, 222 CR 1, 710 P2d 833 (sexual assault by hospital employee on patient outside scope of arbitration provision requiring arbitration of all claims "arising from rendition or failure to render services")].

**Exception:**

In certain situations, the court may give greater weight to the significant right to jury trial and the rule that in cases of doubt, the issue should be resolved in favor of preserving a litigant's right to jury trial [ *Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.* (1985) 164 CA3d 1122, 1127-1129, 211 CR 62 ].



**Cross Reference:**

Discussion of jury trial waiver, see 6.22[5].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods



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Chapter 6 Determining Forum

### III. SUBMITTING TO OR COMPELLING ARBITRATION

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.16*

#### **6.16 Rulings on Petitions to Compel Arbitration.**

**6.16[1] Entire Controversy Subject to Arbitration Unless Severable Issues Exist.** When a valid agreement to arbitrate exists and neither has been waived nor is subject to revocation, the entirety of the controversy must be determined by the arbitrator [CCP § 1281.2; *Orpustan v. State Farm Mut. Auto. Ins. Co.* (1972) 7 C3d 988, 991-992, 103 CR 919, 500 P2d 1119 ]. The court has no discretion but to order arbitration, and its refusal to do so is reversible error [ *Valsan Partners Ltd. P'ship v. Calcor Space Facility* (1994), 25 CA4th 809, 817, 30 CR2d 785 ].

#### **Exception:**

If the court determines there are other issues between the petitioner and respondent, which are not subject to arbitration and are the subject of a pending action or special proceeding between the parties, and a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until a determination of such other issues or until such earlier time as the court specifies [CCP § 1281.2].



#### **Strategic Point:**

Prior to implementing CCP § 1281.2(c), the court first determines the arbitrable and nonarbitrable claims alleged in the complaint, orders all of the arbitrable claims to arbitration and stays all nonarbitrable claims pending arbitration. The court then has discretion to delay its order to arbitrate the arbitrable claims under 1281.2(c), but only if it determines that the adjudication of the nonarbitrable claims in court might make the arbitration unnecessary. Absent that determination, the arbitrable claims would proceed to arbitration and the nonarbitrable claims would continue to be litigated in court unless a party moved successfully pursuant to CCP § 1281.4 9 [see 6.17[2]], to stay further litigation of the nonarbitrable claims [ *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 CA4th 1511, 1521-1522, 81 CR3d 892 ]. Alternatively, if arbitration could make trial of the severable issues unnecessary, the court may order arbitration and stay action on the severable issues or remedies, such as injunctions, pending resolution of the arbitration [see, e.g., *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 CA4th 677, 691-692, 99 CR2d 809 ].

**6.16[2] Intervention, Joinder, or Stay May Be Ordered Where There Is Pending Court Action With Third Party Arising Out of Same Transaction.** If the court determines that a party to an arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact, the court has the following options [*CCP* § 1281.2(c)]:

- Refuse to enforce the arbitration agreement and order intervention or joinder of all parties in a single action or special proceeding.
- Order intervention or joinder as to all or only certain issues.
- Order arbitration among the parties who have agreed to arbitration and stay the court action or special proceeding pending the outcome of the arbitration proceeding.
- Stay arbitration pending the outcome of the court action or special proceeding.



**Strategic Point:**

In addition to avoiding inconsistent rulings, by avoiding two forums hearing the same facts and issues, joinder will save time and money.

**Examples:**

- Inspectors could not be compelled to arbitrate under agreement between disputing general contractor and subcontractor [ *Best Interiors, Inc. v. Millie & Severson, Inc.* (2008) 161 CA4th 1320, 1328, 75 CR3d 1 ].
- The power of the court under *CCP* § 1281.2(c) to order joinder of parties and issues to avoid inconsistent rulings extends to cases involving uninsured motorist arbitration to avoid inconsistent rulings involving a combination of insured and uninsured parties [see *Mercury Ins. Group v. Superior Court* (1998) 19 C4th 332, 345, 79 CR2d 308, 965 P2d 1178 ; *Prudential Property & Cas. Ins. Co. v. Superior Court* (1995) 36 CA4th 275, 278-279, 42 CR2d 227 ; see *Ins Code* § 11580.2].

**Exception:**

These options do not apply when the arbitration agreement was made under *CCP* § 1295, relating to arbitration of medical malpractice disputes [*CCP* § 1281.2(c)]. However, many contracts for medical services are not subject to *CCP* § 1295, and the options available under *CCP* § 1281.2(c) are therefore available in many situations involving medical malpractice [see *CCP* § 1295(f) (exception for health care service plan contracts offered by organizations registered under *H&S Code* § 1340 *et seq.* or former *Gov Code* § 12530 *et seq.* that comply with Health & Safety Code requirements for arbitration clauses)].



**Cross Reference:**

Discussion of options when third parties involved in controversy, see 6.26.

**6.16[3] Court Must Make Statement of Decision Only If Petition Is Denied.** A court is not required to make a requested statement of decision when it issues an order compelling arbitration [*CCP* §§ 1291, 1294]. When a court has issued an order dismissing or denying a petition to compel arbitration, however, the court must make a statement of decision if one is requested pursuant to *CCP* § 632 [*CCP* §§ 1291, 1294(a)].

**Strategic Point:**

Whether to request a statement of decision and whether to object may have an effect on the degree of deferential treatment by the appellate court on appeal [see *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 CA4th 547, 558, 66 CR3d 1 ].

**Cross Reference:**

Discussion of procedure, form statements of decision, see California Forms of Pleading and Practice, Ch. 529, Statement of Decision (Matthew Bender).

**6.16[4] Court May Award Attorney Fees Under Contractual Provision for Fees to Party Against Whom Action Was Brought Before Arbitration.** If a contractual arbitration clause provides that a party against whom legal action was brought by any method other than arbitration, and the court in compelling arbitration, in the absence of contractual language to the contrary [ *Acosta v. Kerrigan* (2007) 150 CA4th 1124, 1130, 1132, 58 CR3d 865 ]:

- Has jurisdiction to determine the award of attorney fees arising from the proceeding to compel arbitration to the sued party.
- May do so before the arbitration is complete.
- May do so before any party has prevailed in the arbitration.

**Cross References:**

Discussion of recovery of attorney fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 25, Attorney Fees.

**6.16[5] Trial Court May Reconsider Decision on Arbitrability on Its Own Motion.** In the absence of a provision of the arbitration agreement barring it from doing so, a trial court may on its own motion reconsider its ruling on the question of whether particular issues are subject to arbitration under an arbitration agreement [ *Clark v. First Union Securities, Inc.* (2007) 153 CA4th 1595, 1608-1609, 64 CR3d 313 (trial court properly reconsidered its own order compelling arbitration)].

**Example:**

Trial court properly reconsidered its decision finding that two issues were arbitrable where the arbitration agreement allowed either the court or the arbitrator to determine the question and, subsequent to the court's initial ruling, the arbitrator ruled that the issues were not arbitrable, but failed to remand the issues back to the trial court [ *Clark v. First Union Securities, Inc.* (2007) 153 CA4th 1595, 1609, 64 CR3d 313 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods



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*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.17*

**6.17 Defense Options When Suit Is Brought on Arbitrable Issue.**

**6.17[1] Defendant May File Petition to Compel Arbitration in Lieu of Answer.** If a controversy that is referable to arbitration under an alleged agreement is the subject of an action or proceeding in a superior court, a defendant may file a petition to compel arbitration in the action or proceeding, in lieu of filing an answer to the complaint [CCP § 1281.7; *see also* CCP § 1292.4]. If the petition is denied, the defendant has 15 days from denial to plead to the complaint [CCP § 1281.7].

➡ **Cross References:**

Discussion of petitions to compel arbitration, *see* 6.15.

Forms, *see* 6.58 -6.61.

**6.17[2] Defendant May Obtain Stay of Court Action to Permit Arbitration.**

**6.17[2][a] Stay Required When Arbitration or Application for Arbitration Order Is Pending.** On a party's motion [*see Heritage Provider Network, Inc. v. Superior Court* (2008) 158 CA4th 1146, 1152, 70 CR3d 645 (in limited circumstances movant need not be a party to arbitration agreement); *see also* 6.15[1]], a California court is required to stay an action or proceeding pending before the court if either of the following circumstances apply [CCP § 1281.4]:

- A court of competent jurisdiction has ordered arbitration of a controversy that is an issue involved in the case; or
- An application has been made to a court of competent jurisdiction, whether in California or not, for an order to arbitrate a controversy that is an issue in the case, and the application is undetermined.

The trial court generally does not have discretion to deny a stay if there is a single overlapping issue [ *Heritage Provider Network, Inc. v. Superior Court* (2008) 158 CA4th 1146, 1153, 70 CR3d 645 ].

This rule applies whether the court that ordered arbitration, or before which an application for such an order is pending,



is in California or not [CCP § 1281.4].

Under either of the above circumstances, the court must stay the action or proceeding until there is arbitration in accordance with the order to arbitrate, or until such earlier time as the court specifies [CCP § 1281.4]. Relief based on a claim of delay, as well as any substantive arguments relating to whether arbitration is appropriate under the facts presented, should be presented to the court in which the application to arbitrate was filed [CCP § 1281.4].

The motion for a stay of proceedings must be made in the court where the action is pending [CCP §§ 1281.4, 1292.8; see also CCP §§ 85, 86(a)(10)(A) (limited civil cases)].



#### **Cross Reference:**

Form, motion to stay proceedings, see 6.63.

**6.17[2][b] Notice of Stay Must Be Immediately Filed.** If a case is stayed due to contractual arbitration under CCP § 1281.4, the party who requested or caused the stay must immediately file a notice of the stay and attach a copy of the order or other document showing that the proceedings are stayed [Cal Rules Ct, Rule 3.650(a), (b)(2)]. If the person who requested or caused the stay has not appeared, or is not subject to the jurisdiction of the court, the plaintiff must immediately file the notice and attach a copy of the order showing the proceedings are stayed [Cal Rules Ct, Rule 3.650(a)]. When the stay is vacated, no longer in effect, or modified, the party who filed the notice of stay must immediately file and serve a notice of termination or modification of the stay, and upon that party's failure to give notice, any party with knowledge of the termination or modification must file and serve the notice [Cal Rules Ct, Rule 3.650(d)].



#### **Cross References:**

Form, notice of stay of proceedings, see 6.64A.

Form, notice of termination or modification of stay, see 6.64B.



#### **Warning--Sanctions:**

Failure to comply with these notice requirements may be deemed an unlawful interference with the proceedings of the court, and sanctions may be imposed [Cal Rules Ct, Rule 2.30]. Thus, a party would be prudent to prepare the notice in advance and have it ready for immediate filing once the court issues the order staying the action.

**6.17[2][c] Issue Subject to Arbitration May Be Severed for Purposes of Stay.** If an issue subject to arbitration is severable, the stay may be with respect to that issue only [CCP § 1281.4]. Conversely, if arbitration could make trial of the severable issues unnecessary, the court may order arbitration and stay the action on the severable issues or remedies, such as injunctions, pending resolution of the arbitration [see, e.g., *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal 677, 693, 99 CR2d 809 ].

**6.17[3] Defendant May Raise Arbitration Issue by Demurrer or Summary Judgment.** If the only issue to be litigated is covered by the arbitration agreement, and a plaintiff has not first pursued or attempted to pursue his or her arbitration remedy, a defendant may elect to demur or move for summary judgment on the ground that the plaintiff has failed to exhaust arbitration remedies [ *Charles J. Rounds Co. v. Joint Council of Teamsters* (1971) 4 C3d 888, 899 ].

#### **Exceptions:**

If the complaint also raises issues not susceptible to arbitration, the defendant may not raise a request to arbitrate by way of demurrer; in that situation, the defendant must demand arbitration and seek a stay of the litigation [ *Badgley v. Van Upp* (1993) 20 CA4th 218, 221, 24 CR2d 406 ]. Similarly, if the arbitration agreement is binding only with respect to some defendants, summary judgment is proper only as to those defendants [see *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 CA4th 1199, 1204, 1212,

1215, 78 CR2d 533 ]. An exception for cases in which the plaintiff would suffer irreparable injury is rarely granted [ *Service Employees Int'l Union, Local 1000 v. Dep't of Personnel Admin.* (2006) 142 CA4th 866, 872-873, 48 CR3d 457 ].



#### **Strategic Point--Defendant:**

A defendant may prefer to move for summary judgment rather than moving to compel arbitration because, in arguing against summary judgment, the plaintiff may waive his or her right to arbitration, and judgment may be entered in accordance with the summary judgment motion, leaving the plaintiff without a remedy [see, e.g., *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 CA4th 1236, 1250-1251, 100 CR2d 403 ; but see *Johnson v. Siegel* (2000) 84 CA4th 1087, 1095-1100, 101 CR2d 412 (no waiver found and grant of summary judgment not res judicata as to plaintiff's right to arbitrate)].

**6.17[4] Defendant May Raise Final Arbitration Award As Affirmative Defense.** A party may raise the existence of a final and binding arbitration award that fully adjudicated the dispute as an affirmative defense [see *Archuleta v. Grand Lodge of the Int'l Ass'n of Machinists and Aerospace Workers* (1968) 262 CA2d 202, 208, 68 CR 694 ].



#### **Cross Reference:**

Form, see *California Forms of Pleading and Practice*, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*, § 32.100 (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionValidity of ADR Methods



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### III. SUBMITTING TO OR COMPELLING ARBITRATION

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.18*

#### **6.18 Five-Year or Three-Year Dismissal Statutes May Apply to Lawsuits Subject to Arbitration.**

Several courts have held that the statutes allowing dismissal of an action that is not brought to trial within five years [see *CCP* §§ 583.310-583.360 (mandatory dismissal)] or three years [see *CCP* §§ 583.410, 583.420 (discretionary dismissal)] apply to lawsuits that are subject to contractual arbitration, even if a case is in arbitration [ *Kuzmanoff v. Kron* (1988) 207 CA3d Supp 1, 3, 255 CR 168 (citing cases)]. The courts of appeal, however, are not in complete agreement as to the manner in which the dismissal statutes apply [see *Brock v. Kaiser Found. Hosps.* (1992) 10 CA4th 1790, 1801, 1805, 1808, 13 CR2d 678 (holding court has no jurisdiction to dismiss arbitration, and may not dismiss action while stayed for arbitration); *Preston v. Kaiser Found. Hosps.* (1981) 126 CA3d 402, 406-407, 178 CR 882 (holding court retains jurisdiction to entertain certain motions even after ordering arbitration)].



#### **Warning:**

While the courts agree the dismissal statutes do not apply directly to arbitrations, the concepts and limits of those statutes may be used as guidelines for determining whether a matter submitted to contractual arbitration should be dismissed for unreasonable delay in bringing the matter to conclusion [see, e.g., *Burgess v. Kaiser Found. Hosps.* (1993) 16 CA4th 1077, 1081, 20 CR2d 488 ; *Byerly v. Sale* (1988) 204 CA3d 1312, 1315, 251 CR 749 ]. An arbitrator's order dismissing a matter for failure to conclude arbitration within five years may be confirmed or vacated by the trial court [see *Burgess v. Kaiser Found. Hosps.* (1993) 16 CA4th 1077, 1081-1082, 20 CR2d 488 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations



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#### 6.19 Appealing Adverse Decisions on Petitions to Compel Arbitration.

##### 6.19[1] Order Denying Petition or Staying Arbitration.

**6.19[1][a] Order Denying Petition Immediately Appealable.** An aggrieved party may immediately appeal from an order dismissing or denying a petition to compel arbitration [*CCP* § 1294(a); *Mayhew v. Benninghoff* (1997) 53 CA4th 1365, 1369, 62 CR2d 27 ].



##### Trap:

An immediate appeal must be taken under *CCP* § 1294(a), because subsequent review of such an order, on appeal from the final judgment, is precluded by *CCP* § 906 [see *Hobbs v. Eichler* (1985) 164 CA3d 174, 190-191, 210 CR 387 ].

##### Distinguish:

An appeal may not be taken if the court denies a motion to compel that only seeks resolution of the question of arbitrability; the court order must finally determine all issues before the court to be appealable [ *Vivid Video, Inc. v. Playboy Entertainment Group, Inc.* (2007) 147 CA4th 434, 442-444, 54 CR3d 232 ].

**6.19[1][b] Order Staying Petition Immediately Appealable Because Equivalent to Denial.** An order staying arbitration is appealable because it is the functional equivalent of an order refusing to compel arbitration [ *Sanders v. Kinko's, Inc.* (2002) 99 CA4th 1106, 1109-1110, 121 CR2d 766 (order stayed arbitration until class certification issues were resolved)]. Denying immediate review would subject the party who claimed to have a right to arbitrate to significant delay, and defeat the purpose of arbitration [ *Henry v. Alcove Inv., Inc.* (1991) 233 CA3d 94, 99-100, 284 CR 255 (arbitration stayed under *CCP* § 1281.2(c))].

**6.19[1][c] Appeal Brought in Same Manner As Civil Action Appeal.** An appeal from an order dismissing or denying a petition to compel arbitration is taken in the same manner as an appeal from an order or judgment in a civil action [*CCP* § 1294.2]. On appeal, the court may review the decision on the petition and any intermediate ruling, proceeding, order, or decision that involves the merits or necessarily affects the order or judgment appealed from, or that substantially affects the rights of a party [*CCP* § 1294.2].

**Strategic Point--Respondent:**

The party in whose favor the judgment or order was given may, without appealing from that decision, ask the court to review any of the rulings described above to determine whether the party appealing the decision was prejudiced by the error on which he or she relies for reversal or modification of the decision [CCP § 1294.2].

**Exception:**

The provisions of CCP § 1294.2 do not authorize the court to review any decision or order from which an appeal might have been taken [CCP § 1294.2].

**6.19[2] Order Granting Petition and Compelling Arbitration.**

**6.19[2][a] Order Compelling Arbitration Not Immediately Appealable.** An order compelling arbitration is not immediately appealable under CCP § 1294 [ *Muao v. Grosvenor Properties, Ltd.* (2002) 99 CA4th 1085, 1090, 122 CR2d 131 ; see also *Melchor Inv. Co. v. Rolm Sys.* (1992) 3 CA4th 587, 591, 4 CR2d 343 (order denying preliminary injunction barring arbitration as nonappealable)]. However, the order compelling arbitration is reviewable on appeal from a judgment confirming an arbitration award, which itself is appealable under CCP § 1294(d) [ *State Farm Fire & Cas. Co. v. Hardin* (1989) 211 CA3d 501, 506, 259 CR 433 ; *Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co.* (1969) 271 CA2d 675, 692, 77 CR 100 ]. Additionally, if the court that orders arbitration also dismisses, rather than stays, the related civil action, the dismissal may be appealed, and the propriety of the arbitration order necessarily will be reviewed [ *Muao v. Grosvenor Properties, Ltd.* (2002) 99 CA4th 1085, 1094, 122 CR2d 131 ].

**6.19[2][b] Relief by Writ of Mandate or Prohibition Available Under Limited Circumstances.** If matters ordered arbitrated fall clearly outside the scope of the arbitration agreement and the arbitration process would appear to be unduly time-consuming or expensive, relief may be sought by writ of prohibition, prohibiting the court from enforcing the order compelling arbitration, or by writ of mandate, compelling the trial court to set aside its order to arbitrate and exercise its jurisdiction to hear and decide any pending civil action involving the nonarbitrable dispute [ *Int'l Film Investors v. Arbitration Tribunal of Directors Guild* (1984) 152 CA3d 699, 704, 199 CR 690 ; *Dinong v. Superior Court* (1980) 102 CA3d 845, 848, 162 CR 606 (writ of mandate denied)].

**Cross Reference:**

Procedure and forms, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender).

**6.19[3] Standard of Review of Ruling on Scope of Arbitration Clause Depends on Need for Extrinsic Evidence.** The standard of review of a ruling on the scope of an arbitration provision is de novo when the interpretation of the provision does not depend on conflicting extrinsic evidence [ *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 CA4th 1511, 1522, 81 CR3d 892 ; *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 CA4th 677, 684, 99 CR2d 809 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition



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**6.20 CHECKLIST: Opposing Arbitration.**

☐ Review petition to compel arbitration and arbitration agreement, and analyze contractual defenses that may apply.

☐ Analyze whether contract is arguably an adhesion contract.

☐ Unequal bargaining power of parties.

☐ Contract offered on a take-it-or-leave-it basis.

☐ No alternatives available.

☐ Determine whether arbitration provisions are unconscionable, either on their face or in practice.

☐ Analyze whether arbitration provision was reasonably to be expected.

☐ Analyze whether arbitration provision is unduly oppressive to one party.

☐ Determine whether provisions for arbitration procedures lack minimum levels of integrity.

☐ Determine whether arbitration provisions result in surprise, oppression, or an unreasonable allocation of risk to one party.

☐ If any of the above apply, resulting in both procedural and substantive

unconscionability, prepare opposition to arbitration based on unconscionability.

☐ Consider whether unconscionable provisions are severable from contract.

☐ If arbitration provisions were added unilaterally, review underlying contract to determine if addition of those terms was within scope of agreement; if not, arbitration may be avoidable.

☐ If arbitration agreement is not in underlying contract, determine whether it was properly incorporated by reference into contract; if not, arbitration may be avoidable.

**Authority:**

*CCP § 1281; CC § 1670.5(a)*

**Discussion:**

See 6.22, 6.24

☐ Analyze whether dispute at issue falls within scope of arbitrable issues defined in contract; if not, arbitration may be avoidable.

**Authority:**

*CCP § 1281*

**Discussion:**

See 6.23

☐ Investigate facts surrounding the parties' contract.

☐ Determine whether any misrepresentations were made inducing client to enter into contract.

☐ Determine whether any misrepresentations were made as to existence or nature of arbitration provisions.

☐ Determine whether any misrepresentation caused client to execute contract.

☐ Analyze client's reliance on misrepresentation and materiality of misrepresentation.

**Authority:**

See *CCP § 1281*

**Discussion:**

See 6.25

☐ If client is a third party to the arbitration agreement, assert that client cannot be compelled to arbitrate.

**Authority:**

See *American Builder's Ass'n v. Au-Yang* (1990) 226 CA3d 170, 177-180, 276 CR 262

**Discussion:**

See 6.26

- ☐ If arbitration will affect rights conferred by statute, research statute for indication that right to jury may not be waived, or requires knowing waiver.

**Authority:**

*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 US 20, 26, 111 S Ct 1647, 114 L Ed2d 26 ; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 US 614, 628, 105 S Ct 3346, 87 L Ed2d 444 ; *Kummetz v. Tech Mold, Inc.* (9th Cir 1998) 152 F3d 1153, 1155-1156

**Discussion:**

See 6.28

- ☐ Consider whether any party has expressly or impliedly waived right to arbitrate.

**Authority:**

*Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 982-983, 64 CR2d 843, 938 P2d 903 ; *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 315, 24 CR2d 597, 862 P2d 158 ; *Sobremonte v. Superior Court* (1998) 61 CA4th 980, 992, 72 CR2d 43

**Discussion:**

See 6.29, 6.30

- ☐ Prepare response to petition to compel, asserting all contractual or other defenses of client.
- ☐ Prepare declarations or affidavits establishing defenses to petition.

**Authority:**

CCP §§ 1281, 1290, 1290.6, 1290.8

**Discussion:**

See 6.15[4]

- ☐ Serve and file response on all parties, as provided for service of other papers.

**Timing:**

Response must be served within 10 days after service of petition, or within 30 days after service if petition served out of state.

**Authority:**

CCP §§ 1010-1020, 1290.6, 1290.8

- ☐ If court dismisses or denies the petition to compel arbitration, request statement of decision.

**Authority:**

See CCP §§ 1291, 1294(a)





**Cross Reference:**

Procedure and forms, see California Forms of Pleading and Practice, Ch. 529, Statement of Decision (Matthew Bender).



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### 6.21 Options and Strategies.

There are four general categories for opposing enforcement of an arbitration agreement:

- The arbitration agreement itself is unenforceable due to unconscionable terms, fraud, improper unilateral amendment, or claims that are not subject to arbitration.
- Even if the arbitration agreement is a valid contract, the issues of the dispute are not the subject of the agreement.
- Third parties affect enforcement of the agreement.
- The party seeking the agreement's enforcement has waived the right to arbitrate.



#### **Strategic Point:**

Commencing a civil action tolls any time limitations in arbitration agreement requiring commencing party to demand or initiate arbitration within a specified period of time [*CCP § 1281.12*; *see* 6.22[6]]. Thus, a plaintiff with grounds to challenge a contractual arbitration requirement [*see, e.g.,* 6.24, 6.25, 6.27] or its applicability to the plaintiff's cause [*see, e.g.,* 6.23, 6.29] can, instead of demanding or initiating arbitration of the cause, bring suit on the claim in anticipation that the defendant will seek arbitration of the matter, and litigate the challenge or the issue of applicability before pursuing arbitration under such an agreement.



#### **Strategic Point--Plaintiff:**

If a suit ordered to arbitration consists of multiple counts, some of which are subject to arbitration and some of which are not, the plaintiff may dismiss the action without prejudice and file a second action on only the nonarbitrable causes. The trial court loses jurisdiction to enforce its order compelling arbitration in the first action, so long as the dismissal is taken before arbitration commences [ *Cardiff Equities, Inc. v. Superior Court* (2008) 166 CA4th 1541, 1543-1544, 83 CR3d 699] .

A party opposing arbitration should develop a coordinated attack using any or all of these grounds. The central issue of arbitration is that the parties have made an agreement, a contract, to use an alternative system for disputes. Therefore, to oppose arbitration, use contract defenses to defeat enforcement of the contract. Start by determining if the contract is valid from the outset, and then turn to whether the contract was procured by improper means. If a valid contract was fairly bargained, seek to limit its terms, and to show how third parties may affect its enforcement. Lastly, show how the terms of the contract have been expressly or implied waived.

Case law has indicated that unconscionable arbitration terms have been forced on persons and entities that do not have sufficient bargaining strength, and that statutory claims serving important governmental interests are being adversely affected. A central theme in these cases is that the courts favor an alternative system that may be less expensive and time consuming, but not when the person opposing arbitration has effectively had no choice but to accept arbitration or the alternative system falls below a basic level of fairness. Demonstrating this lack of fairness can be a strong central theme in developing a coordinated opposition to arbitration.



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## 6.22 Rules Impacting Enforcement of Arbitration Agreements.

**6.22[1] Enforceability of Agreement Is Governed by Contract Law.** Whether an agreement to arbitrate is enforceable will be determined under principles of contract law [ *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 313, 24 CR2d 597, 862 P2d 158 ]. Accordingly, the grounds available for avoiding most contracts are available for avoiding arbitration agreements, including lack of capacity, duress, unconscionability, and fraud [see, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 114, 99 CR2d 745, 6 P3d 669 (analyzing unconscionability); *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 64 CR2d 843, 938 P2d 903 (fraudulent misrepresentation)].



### Cross References:

Discussion of contract defenses, see 6.22 -6.25; and  
California Forms of Pleading and Practice, Ch. 140, Contracts; Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake (Matthew Bender).

**6.22[2] Existence of Contract Is Factual Determination.** The threshold determination a court will make in determining the arbitrability of a dispute--whether a contract to arbitrate exists--is a question of fact [see *Cochran v. Rubens* (1996) 42 CA4th 481, 485, 49 CR2d 672 ]. In establishing the existence of an agreement to arbitrate, the party seeking to compel arbitration need only allege the existence of an agreement, and support the allegation as provided in *Cal Rules Ct, Rule 3.1330* [ *Condee v. Longwood Mgmt. Corp.* (2001) 88 CA4th 215, 218, 105 CR2d 597 ]. The party seeking to compel arbitration does not have to introduce the agreement into evidence or provide the court with anything more than a copy or recitation of its terms [see *Cal Rules Ct, Rule 3.1330*].

The petitioner seeking to compel arbitration bears the burden of proving the agreement's existence by a preponderance of the evidence [ *Mitri v. Arnel Management Co.* (2007) 157 CA4th 1164, 1169, 69 CR3d 223 (employee handbook insufficient proof)].

An arbitration clause in a contract that has been terminated can require arbitration of a dispute that arose under the contract while the agreement was still in force [see, e.g., *Ajida Techs., Inc. v. Roos Instruments, Inc.* (2001) 87 CA4th 534, 545, 104 CR2d 686 ; *Coast Plaza Doctors Hosp. v. Blue Cross of California* (2000) 83 CA4th 677, 685-687, 99

CR2d 809 ].

**6.22[3] Party Resisting Arbitration Must Prove Alleged Arbitration Agreement Does Not Apply to Dispute.**

Once the petitioner has alleged that an arbitration agreement exists, the burden shifts to the party resisting arbitration to prove that the alleged arbitration agreement does not cover the dispute at issue [see *O'Malley v. Wilshire Oil Co.* (1963) 59 C2d 482, 491-492, 30 CR 452, 381 P2d 188 ; *Condee v. Longwood Mgmt. Corp.* (2001) 88 CA4th 215, 218-219, 105 CR2d 597, 381 P2d 188 ; *Weeks v. Crow* (1980) 113 CA3d 350, 352-353, 169 CR 830 ].

Factual issues are resolved by the trial court based on conflicting affidavits or declarations and, at the court's discretion, even oral testimony [ *Brookwood v. Bank of Am.* (1996) 45 CA4th 1667, 1670, 53 CR2d 515 ]. In determining whether an arbitration agreement applies to a specific dispute, the court may examine only the agreement itself and the pleading filed by the party refusing arbitration [ *Leon Handbag Co. v. Leather, Luggage & Handbag Workers* (1969) 276 CA2d 240, 243, 81 CR 63 ]. The court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made.

**Examples:**

- Agreement to arbitrate contained in a dispute form on which the employee was directed to submit his grievance, and the form did not look like a contract and did not alert the employee he was agreeing to binding arbitration was unenforceable [ *Metters v. Ralphs Grocery Co.* (2008) 161 CA4th 696, 703, 74 CR3d 210 ].
- Insurers not signatories to arbitration agreements between insured and third-party insurers could not be compelled to arbitrate their equitable contribution claim against third-party insurers [ *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 CA4th 1061, 1071-1072, 70 CR3d 605 ].
- In the absence of conduct of the principal creating an ostensible agency, an arbitration agreement signed by one spouse is not enforceable against the other spouse [ *Warfield v. Summerville Senior Living, Inc.* (2007) 158 CA4th 443, 451, 69 CR3d 783 ].
- Trial court improperly denied motion to compel under agreements that provided "any action" to enforce or interpret those agreements "shall be settled by arbitration" [ *Segal v. Silberstein* (2007) 156 CA4th 627, 634-635, 67 CR3d 426 ].

**Distinguish:**

A meritorious defense to the enforcement of the arbitration provision is not properly raised as a defense to a petition to compel arbitration. Rather, it is subject to arbitration [ *United Teachers L.A. v. L.A. Unified Sch. Dist.* (2009) 177 CA4th 863, 871, 99 CR3d 524 (ordering arbitration of defense of preemption by state law)].

**6.22[4] Arbitration Clause May Be Incorporated by Reference.** An arbitration clause need not be contained in the contract under which a dispute arises, but may be contained in a collateral agreement [ *Marsch v. Williams* (1994) 23 CA4th 250, 255, 28 CR2d 398 ]. Thus, a dispute under a contract that does not include an arbitration clause may be subject to arbitration if that contract incorporates another contract that includes an arbitration clause [ *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 CA4th 1266, 1271-1274, 8 CR2d 587 ].

**Prerequisite:**

To be effective, the arbitration provision must be properly incorporated by a clear reference to and identification of the incorporated document in which the arbitration clause appears [ *Adajar v. RWR Homes, Inc.* (2008) 160 CA4th 563, 569-571, 73 CR3d 17 (insufficient evidence); *Metters v. Ralphs*

*Grocery Co. (2008) 161 CA4th 696, 703, 74 CR3d 210* (insufficient reference); *Chan v. Drexel Burnham Lambert, Inc. (1986) 178 CA3d 632, 643-645, 223 CR 838* (reference and availability were insufficient for incorporation); *cf. Baker v. Aubry (1989) 216 CA3d 1259, 1264-1265, 265 CR 381* (agreement contained promise to arbitrate, but rules incorporated by reference defined scope of arbitration clause)].

**6.22[5] Agreement to Arbitrate Operates As Waiver of Jury Trial.** An agreement to arbitrate operates as a waiver of the right to a jury trial. The right to a jury trial in California courts under *Cal Const, art I, § 16* may be waived in a civil matter by the consent of the parties expressed as prescribed by statute [CCP § 631]. Although CCP § 631 applies only to waiver by a party to a pending action, it does not prevent parties from avoiding a jury trial by agreeing to a method of resolving a controversy, such as arbitration, that does not invoke a judicial forum [ *Madden v. Kaiser Found. Hosps. (1976) 17 C3d 699, 713, 131 CR 882, 552 P2d 1178* ].

**Distinguish:**

Pre-dispute contractual jury trial waivers generally are invalid unless the procedure is authorized by statute, for example, arbitration or judicial reference [ *Grafton Partners v. Superior Court (2005) 36 C4th 944, 956, 964-965, 116 P3d 479* ]. Even when authorized by statute, pre-dispute agreements requiring arbitration or judicial reference can be subject to attack as procedurally or substantively unconscionable [see *Trend Homes, Inc. v. Superior Court (2005) 131 CA4th 950* ].

An arbitration agreement need not expressly waive the parties' constitutional right to jury trial in order to result in waiver. When parties agree to submit their disputes to arbitration, they select an alternative that is independent of the judicial forum; the parties know arbitrated disputes are not resolved by juries [ *Madden v. Kaiser Found. Hosps. (1976) 17 C3d 699, 713-714, 131 CR 882, 552 P2d 1178* ; *Powers v. Dickson, Carlson & Campillo (1997) 54 CA4th 1102, 1109, 63 CR2d 261* ].

Neither California law nor public policy is offended by requiring an employee to waive his or her right to a jury trial as a condition of employment [ *Lagatree v. Luce, Forward, Hamilton & Scripps (1999) 74 CA4th 1105, 1127-1128, 88 CR2d 664* ], and predispute arbitration agreements, even if compulsory, are enforceable [ *City of Vista v. Sutro & Co. (1997) 52 CA4th 401, 411, 60 CR2d 488* ].

When the requirement to arbitrate is based on a statute, such as CC § 2860(c) (arbitration of disputes involving attorney's fees of independent counsel retained by an insured but to be paid by an insurer), the statute may be construed to avoid requiring arbitration of claims to which the right to a jury trial applies [see *Fireman's Fund Ins. Cos. v. Younesi (1996) 48 CA4th 451, 458-459, 55 CR2d 671* (fraud claim not subject to arbitration under CC § 2860(c))].

**6.22[6] Commencing Court Action Tolls Agreement's Time Limitation on Demanding or Initiating Arbitration.** When an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, tolls the applicable time limitations contained in the arbitration agreement with respect to that controversy. The tolling period lasts from the date the civil action is commenced until the earlier of [CCP § 1281.12]:

- 30 days after a final determination by the court that the party is required to arbitrate the controversy.
- 30 days after the final termination of the civil action that was commenced and initiated the tolling.

**6.22[7] Court May Award Attorney Fees Under Contractual Provision for Fees to Party Obtaining Denial of Petition to Compel Arbitration.** In an action that is brought solely to compel arbitration of contractual disputes between the parties, a party who succeeds in obtaining an order denying the petition to compel arbitration is a prevailing party in the action on the contract even though the merits of the parties' underlying contractual disputes have not yet

been resolved [ *Otay River Constructors v. San Diego Expressway (2008) 158 CA4th 796, 799, 808, 70 CR3d 434* (denial of fees under *CC § 1717* is appealable as special order)].

#### **6.22[8] Validity of Arbitration Clause of Class Action Settlement Is Subject to Class Action Settlement**

**Rules.** If a class action settlement contains a clause calling for arbitration of claims, the validity of the arbitration clause will rest not only on principles applicable to arbitration clauses generally, but on the standards of fairness applicable to court approval of the class action settlement itself [ *Cellphone Termination Fee Cases (2009) 180 CA4th 1110, 1123-1125, 104 CR3d 275* ] .



#### **Cross Reference:**

Standards of fairness applicable to court approval of class action settlement agreements, see *Ch. 33, Class Actions*, 33.33.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions & ProvisionsArbitration Clauses



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Chapter 6 Determining Forum  
IV. OPPOSING ARBITRATION

1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.23

**6.23 Issue May Not Be Subject to Arbitration.**

**6.23[1] Parties May Limit Arbitrable Issues.** A person may not be required to submit to arbitration any dispute that he or she has not agreed to arbitrate [ *Unimart v. Superior Court* (1969) 1 CA3d 1039, 1045, 82 CR 249 ]. In a written arbitration agreement, the parties may delineate the areas to which an arbitration provision applies, and, because an agreement to arbitrate is a contract, an arbitrator may consider only those disputes that are covered by the arbitration agreement [ *Morris v. Zukerman* (1967) 257 CA2d 91, 96, 64 CR 714 ]. An arbitration award may be vacated if the arbitrator has exceeded his or her power in this regard [CCP § 1286.2(a)(4)].

Whether a contractual arbitration clause covers a particular dispute rests substantially on whether the clause in question is "broad" or "narrow" [ *Bono v. David* (2007) 147 CA4th 1055, 1067, 54 CR3d 837 ]. In determining the scope of an arbitration clause, a court gives effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made [ *Victoria v. Superior Court* (1985) 40 C3d 734, 744, 222 CR 1, 710 P.2d 833 ; *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 CA4th 1511, 1523, 81 CR3d 892 ]. Even a broad form arbitration clause will not cover every type of dispute that might arise between those bound by it. "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract" [ *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 CA4th 1511, 1523, 81 CR3d 892 (quoting *Civ Code* § 1648)].

**Examples:**

- The phrase "all disputes arising in connection with this agreement" includes "every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract," including antitrust, trade secrets, defamation, and misrepresentation claims [ *Simula, Inc. v. Autoliv, Inc.* (9th Cir. 1999) 175 F.3d 716, 720-725 ].
- While claims framed in tort are subject to contractual arbitration provisions when they arise out of the contractual relationship between the parties, a party cannot seriously argue that the parties intended it to cover tort claims arising from an alleged violent physical assault by an employee of one company against an employee of the other in the context of an intimate domestic relationship between them [ *RN*



*Solution, Inc. v. Catholic Healthcare West* (2008) 165 CA4th 1511, 1523, 81 CR3d 892 (battery-related claim not arbitrable)].



**Warning:**

The right to enforce a limitation in an arbitration agreement on arbitration of a specific issue is waived if the party seeking to exercise the right has not raised the limitation before the arbitrator [ *J.C. Gury Co. v. Nippon Carbide Indus. (USA) Inc.* (2007) 152 CA4th 1300, 1304-1306, 62 CR3d 118 ].

**6.23[2] Court Decides Arbitrability Unless Agreement Provides Otherwise.** Unless parties to a dispute agreed to submit the question of arbitrability to an arbitrator, the court will decide that issue independently [ *First Options of Chicago, Inc. v. Kaplan* (1995) 514 US 938, 943, 115 S Ct 1920, 131 L Ed2d 985 (under the FAA, court has primary power to decide arbitrability of a dispute unless clear and unmistakable evidence shows parties agreed arbitrator would decide)]. To divest a court of jurisdiction over the issue, the agreement must "clearly and unmistakably" reserve the issue of enforceability to the arbitrator [ *Baker v. Osborne Development Corp.* (2008) 159 CA4th 884, 893, 71 CR3d 854 ; see *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 165, 90 CR3d 818]. If, however, the issue of arbitrability is submitted to an arbitrator, a court reviewing the arbitrator's determination must defer to the arbitrator's decision on that issue [ *First Options of Chicago, Inc. v. Kaplan* (1995) 514 US 938, 943, 115 S Ct 1920, 131 L Ed2d 985 ].

**6.23[3] Clear and Unmistakable Evidence Is Required to Order Arbitration.** There must be "clear and unmistakable evidence" that the parties agreed to arbitrate the issue of arbitrability, for a court to order arbitration of that issue [ *First Options of Chicago, Inc. v. Kaplan* (1995) 514 US 938, 944, 115 S Ct 1920, 131 L Ed2d 985 ].

The rule of liberal construction of agreements to arbitrate may be offset by other presumptions [ *Mayhew v. Benninghoff* (1997) 53 CA4th 1365, 1367, 62 CR2d 27 ].

**Example:**

Presumptions relating to business transactions between an attorney and his or her clients may preclude the extension of an ambiguous arbitration clause in an engagement letter to cover a dispute between the attorney and client [ *Mayhew v. Benninghoff* (1997) 53 CA4th 1365, 1369-1370, 62 CR2d 27 (attorney could not enforce arbitration clause in engagement letter relating to representation of client in divorce proceedings with respect to dispute involving unrelated financial investments); cf. *Powers v. Dickson, Carlson & Campillo* (1997) 54 CA4th 1102, 1113, 63 CR2d 261 (unambiguous arbitration clause in retainer agreement and amendment to retainer agreement was broad enough to cover malpractice as well as fee disputes)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrability



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Chapter 6 Determining Forum  
IV. OPPOSING ARBITRATION

1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.24

## 6.24 Arbitration Agreement May Be Avoided on Unconscionability Grounds.

### 6.24[1] Unconscionability Under Adhesion Contract Analysis.

**6.24[1][a] Arbitration Provisions in Adhesion Contracts Are Scrutinized Closely.** In analyzing whether an arbitration provision is unconscionable, a court will first determine whether the contract in which the provision appears is a contract of adhesion [ *Armendariz v. Found. Health Psychcare Servs., Inc. (2000) 24 C4th 83, 113, 99 CR2d 745, 6 P3d 669* ]. An adhesion contract is a standardized contract, imposed and drafted by the party of superior bargaining strength, which relegates to the subscribing party only the opportunity to adhere to the contract or reject it [ *Armendariz v. Found. Health Psychcare Servs., Inc. (2000) 24 C4th 83, 113, 99 CR2d 745, 6 P3d 669* ].

The determination of whether a contract is one of adhesion will depend on factors such as the bargaining power of the parties, whether alternative contracts were available, and whether the challenged clause limited one party's liability or could be beneficial to all parties [see, e.g., *Engalla v. Permanente Med. Group, Inc. (1997) 15 C4th 951, 985, 64 CR2d 843, 938 P2d 903* ].

#### Example:

An agreement between a group health care plan and a state employee was held not to be an adhesion contract, even though presented to the employee on a take it or leave it basis, where the parties who negotiated the contract were of equal power (insurer and the State of California), the employee had a number of different plans from which to choose, and the challenged clause did not limit the liability or obligations of a stronger party, but could prove helpful to all parties [see *Madden v. Kaiser Found. Hosps. (1976) 17 C3d 699, 710-711, 131 CR 882, 552 P2d 1178* ].

#### Compare:

A group health care plan containing an arbitration clause was found to have more indicia of an adhesion contract when the employees were offered few plans, the employer had only a small number of employees enrolled in the plan containing the challenged arbitration clause, the employer lacked the strength to bargain with the health care provider, and the claim was not that the clause was unconscionable, but that the arbitration program established under the clause was biased [see *Engalla v. Permanente Med. Group, Inc. (1997) 15 C4th 951, 985, 64 CR2d 843, 938 P2d 903 (distinguishing*

*Madden v. Kaiser Found. Hosps.* (1976) 17 C3d 699, 710-711, 131 CR 882, 552 P2d 1178, but finding contract did not lack minimum level of integrity)].

**6.24[1][b] Arbitration Provisions in Adhesion Contracts Will Not Be Enforced If Not Reasonably Expected, or If Unduly Oppressive or Unconscionable.** Courts impose the following limitations on enforcement of adhesion contracts [ *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 113, 99 CR2d 745, 6 P3d 669 ]:

- A contract or provision that does not fall within the reasonable expectations of the weaker party (in terms of negotiating the contract) will not be enforced against him or her.
- A contract provision, even if within the reasonable expectations of the parties, will not be enforced if it is unduly oppressive or unconscionable.

If the facts show that the parties could reasonably anticipate an arbitration clause, and that the agreement is not unduly oppressive, the arbitration provision will be enforced even though it is contained in an adhesion contract [see *Keating v. Superior Court* (1982) 31 C3d 584, 594-595, 183 CR 360, 645 P2d 1192 (reversed in part on other grounds by *Southland Corp. v. Keating* (1984) 465 US 1, 16-17, 104 S Ct 852, 79 L Ed2d 1 )].

**6.24[1][c] Where Arbitration Procedures Lack Minimum Levels of Integrity, Agreement Will Not Be Enforced.** An agreement to arbitrate will be denied enforcement on grounds of unconscionability if the procedures outlined for the arbitration in the contract lack minimum levels of integrity [ *Graham v. Scissor-Tail, Inc.* (1981) 28 C3d 807, 825, 171 CR 604, 623 P2d 165 ; see *Patterson v. ITT Consumer Fin. Corp.* (1993) 14 CA4th 1659, 1664-1667, 18 CR2d 563 ; see also *Spinello v. Amblin Entm't* (1994) 29 CA4th 1390, 1397-1398, 34 CR2d 695 (upholding clause)]. Whether the contractual arrangements for arbitration proceedings possess minimum levels of integrity is determined from the face of the contract [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 985-986, 64 CR2d 843, 938 P2d 903 ].

**Example:**

An arbitration clause providing for neutral arbitrators to be selected by party arbitrators is not per se unconscionable; if, however, a gap exists between the contractual provisions and the actual workings of the arbitration program, other theories, such as fraud or waiver, may be used to address a discrepancy between contractual representations regarding the arbitration procedures, and reality [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 986, 64 CR2d 843, 938 P2d 903 ].

 **Cross References:**

- Discussion of fraud, see 6.25.
- Discussion of waiver, see 6.29.

**6.24[2] Unconscionability Under Procedural and Substantive Analysis.**

**6.24[2][a] Procedural and Substantive Elements of Arbitration Provisions Will Affect Enforcement.** To determine whether an arbitration agreement is unenforceable due to unconscionability, courts often follow the traditional analysis set forth in *A&M Produce Co. v. FMC Corp.* (1982) 135 CA3d 473, 485-487, 489-490, 186 CR 114, which is based on CCP § 1670.5, and assesses both the procedural and substantive elements of an agreement [ *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 CA4th 846, 852-853, 113 CR2d 376 ; see also *Stirlen v. Supercuts, Inc.* (1997) 51 CA4th 1519, 1533-1534, 60 CR2d 138 ].

**Distinguish:**

A court may not consider a claim that an arbitration provision is unenforceable if it is a subterfuge for a challenge that the entire agreement (in which the arbitration clause is only a part) is unconscionable. That contention must be presented to the arbitrator [ *Higgins v. Superior Court* (2006) 140 CA4th 1238,

1249, 45 CR3d 293 ; see also *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 US 440, 445 ].

An analysis under either this framework or the adhesion-contract framework should reach the same result [ *Patterson v. ITT Consumer Fin. Corp.* (1993) 14 CA4th 1659, 1663-1664, 18 CR2d 563 ].



#### **Cross Reference:**

Discussion of adhesion contract analysis, see 6.24[1].

**6.24[2][b] Analysis Focuses on Surprise, Oppression, and Allocation of Risk.** Procedural unconscionability focuses on oppression or surprise due to unequal bargaining power, such as exists when there is an adhesion contract. Surprise involves the extent to which the allegedly agreed-upon term is hidden in a preprinted form drafted by the party seeking to enforce the disputed term [ *Kinney v. United Healthcare Services, Inc.* (1999) 70 CA4th 1322, 1329, 83 CR2d 348 ], or a term providing for a particular protection of a party's rights is illusory [see *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 174, 90 CR3d 818] . Oppression exists where there is no real negotiation of contract terms because of unequal bargaining power and the absence of meaningful choice [ *Baker v. Osborne Development Corp.* (2008) 159 Cal. App. 4th 884, 894, 71 Cal. Rptr. 3d 854 ; *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 CA4th 846, 853, 113 CR2d 376 ; *Kinney v. United Healthcare Servs., Inc.* (1999) 70 CA4th 1322, 1330, 83 CR2d 348 ].

#### **Examples:**

The following are examples of factual bases for finding procedural unconscionability:

- An employer's requirement that the employees sign a waiver of notice and acceptance of terms of an agreement that they had not read and that contained the arbitration clause and limits on remedies [ *Suh v. Superior Court* (2010) 181 CA4th 1504, 1516, 105 CR3d 585] .
- Terms and conditions of a recreational release agreement that are nonnegotiable, and defendant's statement that plaintiffs would encounter the same requirements with any other recreational company [ *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 CA4th 816, 822, 104 CR3d 844] .

Substantive unconscionability focuses on overly harsh or one-sided terms or results [ *Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1071, 130 CR2d 892, 63 P3d 979 ; *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 114, 99 CR2d 745, 6 P3d 669 ]. Specifically, a court will look to whether the contract allocates the risks of the parties' bargain in an objectively unreasonable or unexpected manner [ *Patterson v. ITT Consumer Fin. Corp.* (1993) 14 CA4th 1659, 1664, 18 CR2d 563 ].

#### **Example:**

A clause in an employment contract that allowed the employer to bring claims against the employee in court, limited the employee's rights in the litigation, and stripped the employee of his or her job and salary pending the litigation even if the employer's claim proved unmeritorious, was unconscionable [ *Stirlen v. Supercuts, Inc.* (1997) 51 CA4th 1519, 1541-1542, 60 CR2d 138 ].

#### **Example:**

Although parties are free to contract for asymmetrical remedies, if the arbitration agreement requires arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party, the agreement lacks the modicum of bilaterality needed to make it enforceable [ *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 117-118, 99 CR2d 745 ; *Jaramillo v. JH Real Estate Partners, Inc.* (2003) 111 CA4th 394, 405 ].

#### **Example:**

American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration that limit the award of consequential, exemplary, incidental, punitive or special damages to narrow circumstances, were substantively unconscionable, because they force a party to separately sue to obtain those remedies [ *Suh v. Superior Court* (2010) 181 CA4th 1504, 1515-1516, 105 CR3d 585] .

**Example:**

Limitation of the amount of recovery to the cost of a recreational trip is without more substantively unconscionable [ *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 CA4th 816, 825-826, 104 CR3d 844] .

**Example:**

Contractual arbitration provision in employment agreement was unenforceable as illegal and unconscionable because of requirement that effectively required employees to share arbitration costs in pursuing public rights claims [ *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 CA4th 494, 510-511, 79 CR3d 471 ; *Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 666 ] .

**Example:**

An arbitration agreement that only permits an amount of discovery that is so low while the burden for showing a need for more discovery is so high that plaintiff's ability to prove his or her claims would be unlawfully thwarted is substantively unconscionable [ *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 CA4th 494, 513, 79 CR3d 471 ; cf., *Dotson v. Amgen, Inc.* (2010) 181 CA4th 975, 983-985, 104 CR3d 341 (discovery restriction interpreted as not narrow enough to be unconscionable)].



**Strategic Point:**

A party, such as a company, that repeatedly appears before the same group of arbitrators, has a distinct advantage over the individual employee or consumer. This "repeat player effect" occurs when an arbitration agreement requires the arbitrator to be from a specific dispute resolution organization before which the stronger (usually drafting) party appears frequently. A party that employs this tactic should consider its benefits and drawbacks. Although the "repeat player effect" has never been held sufficient by itself to render an arbitration agreement unconscionable, it is a factor to be considered in determining substantive unconscionability because it deprives the weaker party of the chance to participate in the selection of the arbitrator [ *Mercuro v. Superior Court* (2002) 96 CA4th 167, 178-179, 116 CR2d 671 ] . Nonetheless, it may be enough to render a arbitrator selection clause unconscionable, when it is in combination with only the unequal bargaining position of the parties [see *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 174, 90 CR3d 818] .

**6.24[2][c] Agreement Must Be Both Procedurally and Substantively Unconscionable to Be Unenforceable.**

To be denied enforcement, an arbitration agreement must be both procedurally and substantively unconscionable, though not necessarily in equal degrees [ *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 114, 99 CR2d 745, 6 P3d 669 ] .

The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa [ *Gentry v. Superior Court* (2007) 42 C4th 443, 469, 64 CR3d 773, 165 P3d 556 ; *Gatton v. T-Mobile USA Inc.* (2007) 152 CA4th 571, 584, 61 CR3d 344 ] .



**Cross Reference:**

Further discussion of unconscionability, see California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

**6.24[3] Unconscionability Analyzed As of Time Contract Made, Under California Law.** The factors that help determine whether an agreement is unconscionable will be examined as they existed when the contract was made [see *Tate v. Saratoga Sav. & Loan Ass'n* (1989) 216 CA3d 843, 852-853, 265 CR 440 ].

If a contract is within the scope of the Commerce Clause, the FAA will govern enforceability of the arbitration clause, but a federal court deciding such a case should apply California law on the issue of unconscionability [see *Circuit City Stores, Inc. v. Adams* (9th Cir 2002) 279 F3d 889, 892-893 ].



**Cross Reference:**

Discussion of federal preemption, see 6.13.

**6.24[4] Unconscionable Provisions May Be Severable.** When a contract is found to contain an unconscionable provision, a court may enforce the remainder of the contract without the unconscionable clause, or may limit the application of any unconscionable clause so as to avoid any unconscionable result [CC § 1670.5(a)].

**Example:**

One type of unconscionable arbitration provision that is severable is a provision that negates the neutrality of the arbitrator. When such a provision exists, a party may have such a provision severed, after which the rest of the arbitration clause can be enforced, and the arbitrator chosen in accordance with CCP § 1281.6 [ *Graham v. Scissor-Tail, Inc.* (1981) 28 C3d 807, 831, 171 CR 604, 623 P2d 165 ; *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1986) 183 CA3d 1097, 1106-1107, 228 CR 345 ].

**Example:**

Although the employment contract containing an arbitration clause was procedurally unconscionable due to its being a contract of adhesion, where the only substantively unconscionable provision was an unlawful fee shifting clause, it would be severed and arbitration compelled under the remainder of the agreement [ *Roman v. Superior Court* (2009) 172 CA4th 1462, 1477, 92 CR3d 153] .

**Exception:**

When an entire arbitration provision is unilateral, and multiple defects indicate a systematic effort to impose arbitration on the weaker party as an inferior forum that works to the stronger party's advantage, severing the unconscionable portions within the clause and compelling arbitration is not appropriate [ *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 121-122, 124, 99 CR2d 745, 6 P3d 669 ; *Mercurio v. Superior Court (Countrywide Sec. Corp.)* (2002) 96 CA4th 167, 184-186, 116 CR2d 671 ; *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 CA4th 846, 857, 113 CR2d 376 ].

**Examples:**

The following are examples of factual bases for finding lack of severability of an unconscionable clause of an arbitration agreement:

- Provision limiting the award of consequential, exemplary, incidental, punitive or special damages to narrow circumstances in the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration could not be severed, because the Rules are applicable as a whole [ *Suh v. Superior Court* (2010) 181 CA4th 1504, 1516-1517, 105 CR3d 585] .
- Provisions greatly limiting plaintiffs' recovery, requiring plaintiffs to indemnify the other party for its legal costs and fees if plaintiffs pursued any claims covered by the release agreement, and to pay half of any mediation fees and mediate and arbitrate in defendant's choice of venue, far from plaintiffs [ *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 CA4th 816, 826, 104 CR3d 844] .

**6.24[5] Federal Arbitration Act Does Not Preempt California Law on Unconscionability.** State-court refusal to enforce arbitration clauses that are clearly unconscionable, under a general contract law principle that is not at all hostile to arbitration, presents no obstacle to the objective of the FAA, and state law is not preempted. In fact, the analysis of unconscionability under the FAA is the same as under California law [ *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 98-99, 119, 99 CR2d 745, 6 P3d 669 ; *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 CA4th 846, 856, 113 CR2d 376 ; *Stirlen v. Supercuts, Inc.* (1997) 51 CA4th 1519, 1551-1552, 60 CR2d 138 (distinguishing cases where California law preempted by other federal statutes or because of specific anti-arbitration policy)].



**Cross Reference:**

Discussion of federal preemption, see 6.13.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts

LawDefensesUnconscionabilityAdhesion ContractsContracts LawDefensesUnconscionabilityArbitration Agreements



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*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.25*

**6.25 Arbitration Agreements May Be Unenforceable Due to Fraud.**

**6.25[1] Fraud May Relate to Entire Contract or Only Arbitration Provisions.** Three types of fraud might affect the enforceability of arbitration agreements:

- Fraud in the making of the arbitration agreement itself.
- Fraud in the inception (or execution) of the contract (party never intended to enter into any contract).
- Fraud in the inducement of the contract as a whole (party intended to contract, but would not have done so but for other party's misrepresentations).

For fraud to invalidate an arbitration clause, the fraud must specifically and unquestionably infect the agreement to arbitrate such that it nullifies the apparent consent to that agreement [ *Hayes Children Leasing Co. v. NCR Corp.* (1995) 37 CA4th 775, 785, 43 CR2d 650 ].

**6.25[2] Alleging Fraud in Response to Petition to Compel Arbitration.** A petition to compel arbitration may not be denied based on an allegation of fraud asserted in an unverified pleading, but only on evidence, supplied by affidavit or declaration under penalty of perjury [ *Strauch v. Eyring* (1994) 30 CA4th 181, 185-186, 35 CR2d 747 ; see also *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 415, 58 CR2d 875, 926 P2d 1061 ].

Allegations in a verified complaint may be sufficient to defeat a motion to compel arbitration [see *Rice v. Dean Witter Reynolds, Inc.* (1991) 235 CA3d 1016, 1027-1028, 1 CR2d 265 (under CCP §§ 2009, 2011, a verified complaint constitutes prima facie evidence of facts stated therein)], but even if a complaint is verified, it may not necessarily be used to defeat a petition to compel arbitration, because pleadings usually contain allegations of ultimate facts rather than evidentiary facts.

On a petition to compel arbitration, the trial court is the trier of fact and must decide the fraud issue in order to rule on the petition [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 974, 64 CR2d 843, 938 P2d 903 ]. There is no right to a jury trial on the existence or validity of an arbitration agreement [ *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 409-410, 411-413, 58 CR2d 875, 926 P2d 1061 (disapproving cases to the contrary)].



**6.25[3] If Fraud Induced Agreement to Arbitrate, Arbitration May Be Avoided.**

**6.25[3][a] Elements of Fraud.** A claim of fraud specifically as to an arbitration provision amounts to a claim of promissory estoppel--alleging a promise was made regarding the arbitration of disputes, with no intent to perform it. The following are the elements of such a claim [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 973-974, 64 CR2d 843, 938 P2d 903 ]:

- Misrepresentation (false representation, concealment, or nondisclosure);
- Knowledge of falsity;
- Intent to defraud (intent to induce reliance);
- Justifiable reliance; and
- Damage.

**Example:**

A statement in an arbitration provision that indicated the selection of arbitrators would be expeditious, when drafter of agreement knew that previous selections under that provision had taken considerably longer than the provision would suggest (an average of two years rather than the 60 days indicated in the provision), was found to be fraudulent, and the arbitration agreement was not enforced [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 974, 64 CR2d 843, 938 P2d 903 ].

**6.25[3][b] Reliance May Be Inferred When Misrepresentation Is Material.** Actual reliance occurs when a misrepresentation is an immediate cause of a party's conduct, which alters his or her legal relations if, absent the representation, the party, in all reasonable probability, would not have entered into the contract or other transaction. Reliance may be inferred from a showing that the misrepresentation was material, that is, that a reasonable person would attach importance to its existence or nonexistence in determining his or her choice of action in the transaction in question [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 977, 64 CR2d 843, 938 P2d 903 ].

**6.25[3][c] Pecuniary Damage Need Not Be Shown.** A defrauded party need not show pecuniary damage to defeat a petition to compel arbitration. It is not, however, adequate merely to show that the other party has engaged generally in fraudulent misrepresentation. The defrauded party must show that in their particular case, some aspect of arbitration was contrary to their reasonable, fraudulently induced, contractual expectations [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 979, 64 CR2d 843, 938 P2d 903 ].

**6.25[3][d] Court Determines Issue of Fraud.** Claims that a party has employed fraud in inducing consent specifically to an agreement to arbitrate--for example, by actively concealing the agreement's existence or misrepresenting its meaning or value--are to be decided by a court because they go to the validity of the making of the arbitration agreement itself [ *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 419, 58 CR2d 875, 926 P2d 1061 ].

**6.25[4] Fraud in Inception or Execution of Contract Also May Be Ground for Avoiding Arbitration.** Fraud in the inception or execution of a contract occurs when the promisor is deceived as to the nature of his or her act, and actually does not know what he or she is signing, or does not intend to enter into a contract at all. In such a situation, mutual assent is lacking, and the contract is void [ *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 415, 58 CR2d 875, 926 P2d 1061 ; *Jones v. Adams Fin. Servs.* (1999) 71 CA4th 831, 835, 84 CR2d 151 ]. If the entire contract is void from its inception because of fraud, the parties have not agreed to arbitrate any controversy, and arbitration will not be compelled [ *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 415-416, 58 CR2d 875, 926 P2d 1061 ].

**Warning:**

To the extent that cases issue analyzing this issue in terms of fraud "permeating" the contract have used that terminology as another name for fraud in the inception or execution of the contract, those cases may illustrate situations in which the arbitration agreement was void and unenforceable. However, to the extent that they fail to recognize that the arbitration clause is severable from the rest of the contract when the issue is fraud in the inducement, cases dealing with the "permeation doctrine" should not be relied on [see *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 418, 58 CR2d 875, 926 P2d 1061 (criticizing *Ford v. Shearson Lehman Am. Express, Inc.* (1986) 180 CA3d 1011, 225 CR 895 )].

**6.25[5] Allegation That Fraud Induced Agreement to the Contract As a Whole Is Subject to Arbitration.**

Absent an indication of contrary intent by the parties, claims of fraud in the inducement of a contract (as distinguished from claims of fraud directed to the arbitration clause itself) are deemed subject to arbitration [ *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.* (1983) 35 C3d 312, 323, 197 CR 581, 673 P2d 251 (noting that the fraud did not permeate the entire contract, including the arbitration clause, because the plaintiff did not deny ever agreeing to anything and was concededly aware of the arbitration clause); *King v. Prudential-Bache Sec., Inc.* (1990) 226 CA3d 749, 753, 277 CR 214 ].

This follows the federal rule that, under a broadly-worded arbitration provision, fraud in the making or performance of the principal contract is to be decided by the arbitrator, and the issue of fraud is to be decided by the court only when it is alleged that the arbitration provision itself was obtained by fraud or as part of a fraudulent scheme [ *Prima Paint Corp. v. Flood & Conklin* (1967) 388 US 395, 403-404, 87 S Ct 1801, 18 L Ed2d 1270 ]. Thus, to state a claim for judicial relief rather than arbitration, plaintiff must not attack the entire contract, but the arbitration agreement only [ *Mago v. Shearson Lehman Hutton, Inc.* (9th Cir 1992) 956 F2d 932, 934 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawDefensesFraud & MisrepresentationIntentional FraudTortsBusiness TortsFraud & MisrepresentationActual FraudElements



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*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.25A*

**6.25A Arbitration Agreements May Be Unenforceable Due to Illegality.**

Arbitration agreements contrary to express statutes or to the policy of express statutes are illegal; and such illegality voids the entire agreement, including the arbitration clause, if the taint of illegality cannot be removed from the agreement by severing or restricting the objectionable terms [ *Duffens v. Valenti (2008) 161 CA4th 434, 455, 74 CR3d 311* ]. Illegality of the entire agreement may be raised either before or after arbitration has taken place [ *Duffens v. Valenti (2008) 161 CA4th 434, 443, 74 CR3d 311* ].

If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced [see *Franco v. Athens Disposal Co., Inc. (2009) 171 CA4th 1277, 1299, 90 CR3d 539* ; *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 CA4th 154, 181, 90 CR3d 818* ] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawDefensesFraud & MisrepresentationIntentional FraudTortsBusiness TortsFraud & MisrepresentationActual FraudElementsContracts LawDefensesIllegal Bargains



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**6.26 Arbitrator Does Not Have Jurisdiction to Determine Enforceability by or Against Third Parties.**

**6.26[1] Court Must Decide Third Party's Status.** An arbitrator generally does not have jurisdiction to determine any question regarding a third party's status, such as whether a third party can enforce an arbitration agreement, either for its own benefit or "on behalf" of a party to the arbitration agreement, and cannot order joinder of a third party of undetermined status [ *American Builder's Ass'n v. Au-Yang* (1990) 226 CA3d 170, 177-180, 276 CR 262 ]. This precludes an arbitrator from determining whether a third party is an undisclosed principal of a signatory to the arbitration agreement [ *Valley Casework, Inc. v. Comfort Constr., Inc.* (1999) 76 CA4th 1013, 1024, 90 CR2d 779 ].

**Exception:**

When an arbitration agreement provides for any third party who is not a party to the agreement but is necessary for complete resolution of any matter required to be arbitrated under the agreement to be joined in the arbitration, and also provides, or incorporates arbitration rules or procedures providing, that the arbitrator determine whether anyone must be joined in the arbitration to provide a complete resolution [see, e.g., *Zakarian v. Bekov* (2002) 98 CA4th 316, 325-327, 119 CR2d 623 ].

**Example:**

The California Hospital Association-California Medical Association Rules for the Arbitration of Hospital and Medical Fee Disputes (CHA-CMA Rules) contain such a provision. Thus, an agreement to be arbitrated under those or similar rules will be enforced to refer the issue of the third party's joinder to the arbitrator [ *Zakarian v. Bekov* (2002) 98 CA4th 316, 325-327, 119 CR2d 623 (third party wanted to be joined in arbitration)]. A well-drafted arbitration provision of this nature will include the signatories' consent to joinder of any person necessary to full resolution of an arbitrable dispute.

**6.26[2] Standing to Arbitrate Is Question of Law.** The determination of standing to arbitrate as a party to the contractual arbitration agreement is a question of law for the trial court in the first instance [ *City of Hope v. Bryan Cave, L.L.P.* (2002), 102 CA4th 1356, 1369, 126 CR2d 283 ; accord, *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.* (9th Cir 1991) 925 F2d 1136, 1140-1142, 1144 (under federal rule and FAA)].

**6.26[3] Arbitration Should Be Stayed Until Status of Indispensable Party to Arbitration Determined by Court.** If arbitration has already commenced between the signatories, and a nonparty of undetermined status appears to

be an indispensable party to the arbitration, the arbitration proceeding should be stayed until the nonsignatory's status is determined in a declaratory relief action [see *American Builder's Ass'n v. Au-Yang* (1990) 226 CA3d 170, 179-180, 276 CR 262 ].

**Cross Reference:**

Discussion of joinder of parties, actions, or proceedings, see 6.16, 6.17.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionJudicial Review



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**6.27 Unilaterally Added Arbitration Provisions May Not Be Enforceable.**

General contract principles will determine whether an arbitration provision added unilaterally, after the primary contract is made, is enforceable as part of the primary contract. A threshold requirement for enforcement of the arbitration provision is that there must be a clause in the primary contract that allows one party unilaterally to change the terms of the agreement. That clause will be examined to determine whether addition of an arbitration provision is within the scope of the terms a party was allowed to change unilaterally [ *Badie v. Bank of Am. (1998) 67 CA4th 779, 790, 791, 796-807, 79 CR2d 273* ].

**Example:**

An arbitration requirement added in a "bill stuffer" was not binding on credit cardholders because it was beyond the scope of what customers would reasonably believe the bank intended by reserving to itself the power to change terms. The bank's power was reasonably interpreted to reserve to the bank the power to change financial terms, such as interest rate and service charges, but not to deprive cardholders of the right to a jury trial to resolve disputes with the bank [see *Badie v. Bank of Am. (1998) 67 CA4th 779, 802-803, 79 CR2d 273* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure  
Alternative Dispute Resolution  
Validity of ADR Methods  
Contracts Law  
Contract Conditions & Provisions  
Arbitration Clauses



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## 6.28 Statutory Claim May Not Be Subject to Arbitration.

**6.28[1] Arbitration Agreements Affecting Statutory Rights Are Enforced Unless Legislative Intent Indicates Otherwise.** Parties may agree to arbitrate rights conferred by statute, and their agreements will be enforceable under the FAA. Although all statutory claims may not be appropriate for arbitration, a party will be held to a contractual arbitration clause unless Congress or the legislature indicated that judicial remedies for the statutory rights at issue could not be waived [ *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 US 20, 26, 111 S Ct 1647, 114 L Ed2d 26, 37 ; *Gentry v. Superior Court* (2007) 42 C4th 443, 456-457, 463, 64 CR3d 773, 165 P3d 556 ].



### Strategic Point:

In order for statutory claims, i.e., violation of statutory rights, to be subject to arbitration, the agreement must state that violations of statutory rights are arbitrable. Merely restating the right in the text of the agreement does not itself make violations of it arbitrable [ *Zavala v. Scott Brothers Dairy, Inc.* (2006) 143 CA4th 585, 594-595, 49 CR3d 503 ].

### Example:

Prelitigation class arbitration waiver that attempts to waive specified nonwaivable statutory rights to overtime pay under *Lab Code § 1194* may be voided if the trial court considers and concludes both that [ *Gentry v. Superior Court* (2007) 42 C4th 443, 456-457, 463, 64 CR3d 773, 165 P3d 556 ]:

- A class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and
- The disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations.

In determining its conclusions on these two points, the court is to consider the following factors [ *Gentry v. Superior Court* (2007) 42 C4th 443, 463, 64 CR3d 773, 165 P3d 556 ; *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172

CA4th 154, 168, 90 CR3d 818] :

- The modest size of the potential individual recovery.
- The potential for retaliation against members of the class.
- The fact that absent members of the class may be ill informed about their rights.
- Other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration.

Statutory claims that may be subject to arbitration include claims under the following laws:

- Age Discrimination in Employment Act (29 USC § 621 *et seq.*) [ *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 US 20, 26, 111 S Ct 1647, 114 L Ed2d 26 ].
- California Franchise Investment Law (Corp Code § 31000 *et seq.*) [ *Southland Corp. v. Keating* (1984) 465 US 1, 10-16, 104 S Ct 852, 79 L Ed2d 1 (preempting Corp Code § 31512)].
- Cartwright Act (B&P Code § 16700 *et seq.*) [ *Wolitarsky v. Blue Cross of Cal.* (1997) 53 CA4th 338, 345, 61 CR2d 629 ; *Crown Homes, Inc. v. Landes* (1994) 22 CA4th 1273, 1276, 27 CR2d 827 ].
- Consumer Legal Remedies Act (CC § 1750 *et seq.*) claims for damages, at least to the extent those claims are governed by the Federal Arbitration Act, but not claims for injunctive relief in which the plaintiff is acting as private attorney general, for example, a claim seeking to enjoin deceptive business practices [ *Cruz v. PacifiCare Health Systems, Inc.* (2004) 30 C4th 303, 307, 133 CR2d 58, 66 P3d 1157 (affirming *Broughton* in light of recent federal rulings)]. *Broughton v. Cigna Healthplans of Cal.* (1999) 21 C4th 1066, 1072, 1079-1080, 1088, 90 CR2d 334, 988 P2d 67 (remanding for determination regarding existence of arbitration agreement and applicability of FAA)].
- Fair Employment and Housing Act (Gov Code § 12900 *et seq.*), as long as the arbitration procedures allow the plaintiff to vindicate his or her statutory rights [ *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 93-96, 102-113, 99 CR2d 745, 6 P3d 669 (finding as unpersuasive and refusing to follow *Duffield v. Robertson Stephens & Co.* (9th Cir 1998) 144 F3d 1182 ); *Blake v. Ecker* (2001) 93 CA4th 728, 733, 741, 113 CR2d 422 (holding *Armendariz* must be applied retroactively); but see *Circuit City Stores, Inc. v. Najd* (9th Cir 2002) 294 F3d 1104, 1108 ; *Circuit City Stores, Inc. v. Ahmed* (9th Cir 2002) 283 F3d 1198, 1200 (ordering arbitration of FEHA claims)].
- False advertising claims in a private attorney general action for public injunctive relief under B&P Code § 17535 are not arbitrable [ *Cruz v. PacifiCare Health Systems, Inc.* (2004) 30 C4th 303, 316, 133 CR2d 58, 66 P3d 1157 ].
- Federal Labor Standards Act (29 USC § 201 *et seq.*) [ *Kuehner v. Dickinson & Co.* (9th Cir 1996) 84 F3d 316, 319-320 ].
- Wage disputes under contracts involving interstate commerce [ *Perry v. Thomas* (1987) 482 US 483, 491-492, 107 S Ct 2520, 96 L Ed2d 426 (preempting Lab Code § 229); *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 CA4th 1276, 1287 ].
- Securities Act of 1933 (15 USC § 77a *et seq.*) and Securities Exchange Act of 1934 (15 USC § 78a



*et seq.*) [ *Elliot v. Albright* (1989) 209 CA3d 1028, 1036-1037 ].

- Sherman Act (15 USC § 1 *et seq.*) [ *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.* (1985) 473 US 614, 624-626, 105 S Ct 3346, 87 L Ed2d 444 ].

- Unfair Trade Practices Act (B&P Code § 17000 *et seq.*) and Unfair Competition Law (B&P Code §§ 17200, 17203) damage claims are arbitrable, but related remedy of injunction, sought by plaintiff acting as private attorney general, is not arbitrable; and action, including related discovery, on injunction must be stayed until resolution of arbitration on damages claims [ *Cruz v. PacifiCare Health Systems, Inc.* (2004) 30 C4th 303, 316, 133 CR2d 58, 66 P3d 1157 (claims for public injunctive relief under UCL); *Coast Plaza Doctors' Hosp. v. Blue Cross of Cal.* (2000) 83 CA4th 677, 691-693, 99 CR2d 809 ].

#### ► Cross Reference:

Limitation of ability to compel arbitration in unfair competition action, see *Matthew Bender(R) Practice Guide: California Unfair Competition and Business Torts*, 2.46.

- Unruh Civil Rights Act (CC § 51 *et seq.*) [ *Wolitorsky v. Blue Cross of Cal.* (1997) 53 CA4th 338, 345-348, 61 CR2d 629 ].

#### ► Cross Reference:

List of statutes governing specific types of controversies in California, see *California Forms of Pleading and Practice*, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*, § 32.10 (*Matthew Bender*).

**6.28[2] Minimum Requirements Must Be Met for Fair Employment and Housing Act Claims.** In the context of statutory claims under the Fair Employment and Housing Act (*Gov Code* § 12900 *et seq.*), the minimum requirements of an arbitration procedure necessary for the plaintiff to vindicate his or her statutory rights are the following: neutrality of the arbitrator; adequate discovery; arbitrator authority to award all types of relief authorized by the statute--injunctive relief, punitive damages, attorney's fees; a written decision to permit a limited form of judicial review; and limitations on the costs of arbitration [ *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 103-113, 99 CR2d 745, 6 P3d 669 ].

Under the FAA, the fact that an agreement is silent as to who bears the costs of arbitration is not in itself enough to establish that the party seeking to invalidate the arbitration agreement will be burdened with prohibitive costs that prevent him or her from vindicating his or her statutory rights. The party resisting arbitration has the burden of showing the likelihood of incurring prohibitive costs [see *Green Tree Fin. Corp. v. Randolph* (2000) 531 US 79, 89-92, 121 S Ct 513, 148 L Ed2d 373 ].

#### Distinguish:

An arbitration agreement explicitly eliminating an administrative proceeding or a lawsuit as a dispute resolution vehicle and setting a reasonable period in which to seek arbitration does not unreasonably burden plaintiff's ability to vindicate his or her statutory rights under the Fair Employment and Housing Act [ *Pearson Dental Supplies, Inc. v. Superior Court* (2008) 166 CA4th 71, 85, 82 CR3d 154 (not citable--superseded by grant of review 2008 Cal. LEXIS 13526 )].

#### **6.28[3] Disputes Over Damages Involving Uninsured Motorists Must Be Resolved by Arbitration.**

Automobile insurance policies containing uninsured motorist coverage must provide that the determination of whether the insured is legally entitled to recover damages, and if so, the amount of the damages, is to be made by agreement between the insured and the insurer, or, in the event of disagreement, by arbitration conducted by a single neutral arbitrator [*Ins Code* § 11580.2(a), (f); *Bouton v. USAA Cas. Ins. Co.* (2008) 43 C4th 1190 1201, 78 CR3d 519, 186

*P3d 1 (Ins Code § 11580.2(f) requires arbitration of only: (1) whether the insured is entitled to recover against the uninsured motorist and (2) if so, the amount of the damages); see also Bouton v. USAA Cas. Ins. Co. (2008) 167 CA4th 412, 427-429, 84 CR3d 152 (ordering trial court to decide whether plaintiff is an "insured" after discovery and summary proceeding)].*

The power of the court to order joinder of an arbitration proceeding and a civil action to avoid inconsistent rulings extends to cases involving uninsured motorist arbitration [*CCP § 1281.2(c); Mercury Ins. Group v. Superior Court (1998) 19 C4th 332, 345, 79 CR2d 308, 965 P2d 1178; Prudential Prop. & Cas. Ins. Co. v. Superior Court (1995) 36 CA4th 275, 278-279, 42 CR2d 227; see Ins Code § 11580.2*].

#### **Exception:**

Uninsured motorist coverage does not apply in any instance in which it would inure directly or indirectly to the benefit of any workers' compensation carrier or to any person qualified as a self-insurer under any workers' compensation law, or directly to the benefit of the United States, or any state or any political subdivision of the United States [*Ins Code § 11580.2(c)(4)*].

#### **Cross Reference:**

Discussion of uninsured motorist arbitration, see *California Forms of Pleading and Practice*, § 32.92[3][e] (Matthew Bender).

#### **6.28[4] Party With Dominant Economic Power Cannot Force Waiver of Statutory Rights in Arbitration**

**Clause.** An arbitration clause may not be used by a party with dominant economic power to force another party to surrender rights and benefits conferred by statute [ *Graham Oil v. Arco Prods. Co. (9th Cir 1994) 43 F3d 1244, 1247* ]. If the arbitration procedure set out in an arbitration agreement does not allow the plaintiff to pursue his or her statutory rights, the arbitration clause cannot be enforced [ *Armendariz v. Found. Health Psychcare Servs., Inc. (2000) 24 C4th 83, 101, 99 CR2d 745, 6 P3d 669* ].

#### **Example:**

An arbitration clause under which a franchisee waived its rights to exemplary damages, recovery of attorney's fees, and a one-year statute of limitations under the Petroleum Marketing Practices Act (PMPA), was held to contravene that Act and was severed from the contract [ *Graham Oil v. Arco Prods. Co. (9th Cir 1994) 43 F3d 1244, 1247-1248* ].

If an arbitration clause contains invalid provisions of this nature, the court must determine whether the clause is severable from the contract and, applying the same principles, whether the invalid parts of the clause are severable from the remainder of the arbitration clause [see *Graham Oil v. Arco Prods. Co. (9th Cir 1994) 43 F3d 1244, 1248-1249* (striking entire arbitration clause)].

**6.28[5] Arbitration of Some Statutory Claims Requires Knowing Waiver of Right to Jury Trial.** Some statutes demonstrate a Congressional or legislative intent to require a knowing jury trial waiver in favor of arbitration. Two such statutes are:

- Title VII of the Civil Rights Act of 1964 (42 USC § 2000e et seq.) [ *Renteria v. Prudential Ins. Co. of Am. (9th Cir 1997) 113 F3d 1104, 1108; Prudential Ins. Co. of Am. v. Lai (9th Cir 1994) 42 F3d 1299, 1304-1305, cert. denied, 516 US 812 (1995)* (sexual harassment and sexual discrimination claims); but see *Armendariz v. Found. Health Psychcare Servs., Inc. (2000) 24 C4th 83, 99 n7, 99 CR2d 745, 6 P3d 669* (establishing minimum procedural safeguards for arbitration of claims under California's Fair Employment and Housing Act (Gov Code § 12900 et seq.) and possibly declining to follow *Prudential Ins. Co. of Am. v. Lai (9th Cir 1994) 42 F3d 1299* )].

● The Americans with Disabilities Act of 1990 (ADA) (42 USC §§ 12101-12213) [ *Kummetz v. Tech Mold, Inc.* (9th Cir 1998) 152 F3d 1153, 1155-1156 ; *Nelson v. Cyprus Bagdad Copper Corp.* (9th Cir 1997) 119 F3d 756, 761, 763 ].

Where a governing statute requires a knowing jury trial waiver, the arbitration agreement at issue must specifically refer to the type of statutory claim to be arbitrated, in clear and unmistakable language [ *Kummetz v. Tech Mold, Inc.* (9th Cir 1998) 152 F3d 1153, 1155-1156 ; *Nelson v. Cyprus Bagdad Copper Corp.* (9th Cir 1997) 119 F3d 756, 762 ; *Prudential Ins. Co. of Am. v. Lai* (9th Cir 1994) 42 F3d 1299, 1304-1305 ; see *Vasquez v. Superior Court* (2000) 80 CA4th 430, 435-436, 95 CR2d 294 (waiver not established where agreement did not specifically refer to anti-discrimination statutes under which plaintiff was suing)].

#### Example:

In interpreting an arbitration provision in a collective bargaining agreement, the Supreme Court found the language not "clear and unmistakable" enough to waive an employee's right to a judicial forum for determination of an ADA claim [ *Wright v. Univ. Maritime Serv. Corp.* (1998) 525 US 70, 82, 119 S Ct 391, 142 L Ed2d 361 ].



#### Warning:

The issue of whether *predispute* jury waivers in civil cases is enforceable in California is currently before the state Supreme Court. The court has taken review of *Grafton Partners v. Superior Court* (2004) 115 CA4th 700 (*superseded by grant of review*, 12 CR3d 287 (2004)) where the appellate court reasoned that the California Constitution allowed a jury trial waiver only if specifically authorized by the Legislature and that CCP § 631 allows a jury trial waiver only during the course of litigation.

Similarly, California courts of appeal have held that a union may not prospectively waive an employee's right to a judicial forum for his or her statutory discrimination or state claims by agreeing to arbitration in a collective bargaining agreement [ *Deschene v. Pinole Point Steel Co.* (1999) 76 CA4th 33, 48-49, 90 CR2d 15 ; *Torrez v. Consol. Freightways Corp.* (1997) 58 CA4th 1247, 1259, 68 CR2d 792 (FEHA case)].

#### Distinguish--EEOC Not Bound By Agreement:

The Equal Employment Opportunity Commission is not bound by an arbitration agreement entered into by an employee when enforcing the ADA provisions on discrimination, which adopt the discrimination provisions of Title VII [ *EEOC v. Waffle House, Inc.* (2002) 534 US 279, 291-292, 306, 122 S Ct 754, 151 L Ed2d 755 ]. If the employee files a complaint with the EEOC, rather than pursuing arbitration, and the EEOC brings an enforcement action, arbitration cannot be compelled against the EEOC, because it was not a party to the agreement. The Federal Arbitration Act does not prohibit the EEOC from recovering victim-specific relief such as back pay, reinstatement, compensatory damages, and punitive damages in that action [ *EEOC v. Waffle House, Inc.* (2002) 534 US 279, 306, 122 S Ct 754, 151 L Ed2d 755 ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsInsurance LawMotor Vehicle InsuranceArbitration



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Chapter 6 Determining Forum  
IV. OPPOSING ARBITRATION

1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.29

## 6.29 Right to Compel Arbitration May Be Waived.

**6.29[1] Waiver Can Be Intentional or Based on Failure to Act.** The term "waiver" generally means the voluntary relinquishment of a known right. However, it can also mean the loss of an opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to abandon or relinquish the right [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 982-983, 64 CR2d 843, 938 P2d 903 ; *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 315, 24 CR2d 597, 862 P2d 158 ]. It is also used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost [ *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 315-316, 24 CR2d 597, 862 P2d 158 ].



### Warning:

If an arbitration agreement calls for application of the Federal Arbitration Act, federal law concerning waiver of the right to arbitration preempts state law on the subject [ *Aviation Data, Inc. v. American Express Travel Related Services Co., Inc.* (2007) 152 CA4th 1522, 1535-1536, 62 CR3d 396 ].

### Example:

When a contract provides that arbitration may be demanded within a stated time, failure to make a demand within that time constitutes a waiver of the right to arbitrate, in the sense of a forfeiture of a right resulting from the failure to perform a required act [ *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 315-316, 24 CR2d 597, 862 P2d 158 ].

Three separate issues that courts loosely refer to as "waiver" may be identified as follows:

- Waiver--an intentional relinquishment of a known right, demonstrated explicitly or implicitly.
- Estoppel--conduct by an insurer that reasonably causes an insured to rely to his or her detriment.
- Forfeiture--the assessment of a penalty against an insurer for either misconduct or failure to perform an obligation under a contract [ *Chase v. Blue Cross of Cal.* (1996) 42 CA4th 1142, 1149, 1151, 50 CR2d 178 ].

**6.29[2] Issue of Waiver Is Preliminary Question for Court.** Waiver of the right to compel arbitration is a preliminary question that the trial court must decide in considering the petition to compel arbitration [CCP § 1281.2(a); *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 CA4th 1266, 1274, 8 CR2d 587 ]. On appeal, the question is whether there is substantial evidence to support the trial court's finding of waiver [ *Groom v. Health Net* (2000) 82 CA4th 1189, 1198, 98 CR2d 836 ].

The court will closely scrutinize any claims of waiver and indulge every intendment to give effect to arbitration proceedings [ *Christensen v. Dewor Devs.* (1983) 33 C3d 778, 782, 191 CR 8, 661 P2d 1088 ; *Chase v. Blue Cross of Cal.* (1996) 42 CA4th 1142, 1151, 50 CR2d 178 ].

**6.29[3] Burden of Proving Waiver Is on Party Resisting Arbitration.** Whether there has been a waiver is ordinarily a question of fact [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 983, 64 CR2d 843, 938 P2d 903 ; *Guess?, Inc. v. Superior Court* (2000) 79 CA4th 553, 557 ]. The burden of proving waiver is on the party resisting arbitration.

The defense of waiver, like any other defense in a civil case, must be proved by a preponderance of the evidence [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 984, 64 CR2d 843, 938 P2d 903 ; *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 413, 58 CR2d 875, 926 P2d 1061 ]. Similarly, if the issue is framed as forfeiture rather than waiver, the burden of proof is on the party asserting forfeiture and must be demonstrated by clear and convincing evidence [ *Chase v. Blue Cross of Cal.* (1996) 42 CA4th 1142, 1157, 50 CR2d 178 ].

**Exception:**

If the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law [ *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 319, 24 CR2d 597, 862 P2d 158 ].

➡ **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**6.29[4] Express Waiver in Written Release Settling Arbitrable Dispute Is a Waiver.** A valid release in settlement of an arbitrable claim constitutes a waiver of the right to compel arbitration [ *Gustafson v. State Farm Mut. Auto. Ins. Co.* (1973) 31 CA3d 361, 365, 107 CR 243 ].

➡ **Cross Reference:**

Discussion and form releases generally, see *California Forms of Pleading and Practice*, Ch. 520, *Settlement and Release*, § 520.50 et seq. (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionArbitrationsWaivers



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Chapter 6 Determining Forum  
IV. OPPOSING ARBITRATION

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.30*

**6.30 Right to Arbitrate May Be Impliedly Waived.**

**6.30[1] Implied Waiver May Be Shown by a Number of Factors.** No single test delineates the nature of the conduct that will constitute waiver of arbitration [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 983, 64 CR2d 843, 938 P2d 903 ; *Sobremonte v. Superior Court* (1998) 61 CA4th 980, 992, 72 CR2d 43 ].

However, factors that will be considered in determining whether there has been an implied waiver include whether the party seeking arbitration has done any of the following [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 983, 64 CR2d 843, 938 P2d 903 ; *Christensen v. Dewor Devs.* (1983) 33 C3d 778, 782, 191 CR 8, 661 P2d 1088 ; *Sobremonte v. Superior Court* (1998) 61 CA4th 980, 992, 72 CR2d 43 ; see *Berman v. Health Net* (2000) 80 CA4th 1359, 1363, 96 CR2d 295 ; *Davis v. Cont'l Airlines, Inc.* (1997) 59 CA4th 205, 211-212, 69 CR2d 79 ]:

- Previously took steps inconsistent with an intent to invoke arbitration.
- Unreasonably delayed seeking arbitration.
- Acted in bad faith or with willful misconduct.
- Invoked the litigation machinery so substantially that the parties were well into preparation of a lawsuit before the party notified the opposing party of intent to arbitrate.
- Either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay.
- Filed a counterclaim without asking for a stay of the proceedings.
- Took important intervening steps, such as one party's taking advantage of judicial discovery procedures not available in arbitration.
- Delayed the demand for arbitration in a way that affected, misled, or prejudiced the opposing party.

**6.30[2] Prejudice and Knowledge Are Factors.** The presence or absence of prejudice is also an important consideration in determining the issue of waiver, as is whether or not the party who brought the action was a party to the arbitration agreement, acting in knowing disregard of the arbitration agreement's provisions [ *Christensen v. Dewor Devs.* (1983) 33 C3d 778, 782-783, 191 CR 8, 661 P2d 1088 ; see *Berman v. Health Net* (2000) 80 CA4th 1359, 1363-1364, 96 CR2d 295 ; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 CA4th 1266, 1275-1276, 8 CR2d 587 (unexcused delay of three years not waiver when no prejudice was caused to defendant by delay)].

**6.30[3] Waiver by Acts Inconsistent With Agreement to Arbitrate.**

**6.30[3][a] Acting Inconsistent With Intention to Arbitrate May Imply Waiver.** Waiver may be implied where a party acts inconsistent with the agreement to submit a dispute to arbitration [ *Palm Springs Homes, Inc. v. W. Desert, Inc.* (1963) 215 CA2d 270, 276-277, 30 CR 34 ].

**Example:**

One party to an arbitration agreement may, by delay tactics or express refusal to proceed with arbitration, place himself or herself in such a position that the other party may acquiesce in the implied abandonment of arbitration, and resort to court action [ *Grunwald-Marx, Inc. v. Los Angeles Joint Bd., Amalgamated Clothing Workers* (1961) 192 CA2d 268, 277, 280, 13 CR 446 ].

A party who moves to stay an action while arbitration involving a party to the action is pending, while contending in the motion that he or she is not a party to the arbitration agreement, will likely be deemed to have acted wholly inconsistent with a desire to arbitrate [ *Guess?, Inc. v. Superior Court* (2000) 79 CA4th 553, 558 ].

**6.30[3][b] Failure to Plead Arbitration As Affirmative Defense.** At a minimum, the failure to plead the arbitration requirement as an affirmative defense is an act inconsistent with a later assertion of the right to arbitrate [ *Guess?, Inc. v. Superior Court* (2000) 79 CA4th 553, 558 ].

**6.30[3][c] Ignoring Demands for Arbitration May Result in Waiver.** An arbitration clause may not be used to support an objection to a party's right to sue on an arbitrable dispute when the defendant ignored the party's prior demands for arbitration [ *Grunwald-Marx, Inc. v. Los Angeles Joint Bd., Amalgamated Clothing Workers* (1961) 192 CA2d 268, 280, 13 CR 446 ].

**6.30[3][d] Waiver by Conducting Discovery.** Prejudice can result from the disclosure of defenses and strategies during discovery. If one party uses the discovery process to obtain information about the other party's case that could not be obtained in arbitration, and then, having gained that information, seeks to compel arbitration, the court may reasonably find that the party who conducted discovery has waived its right to compel arbitration. This is especially true if the party resisting arbitration will not have equivalent discovery rights [ *Sobremonte v. Superior Court* (1998) 61 CA4th 980, 996-997, 72 CR2d 43 ; *Guess?, Inc. v. Superior Court* (2000) 79 CA4th 553, 558, 94 CR2d 201 ; *Davis v. Cont'l Airlines, Inc.* (1997) 59 CA4th 205, 215, 69 CR2d 79 ; see also *Berman v. Health Net* (2000) 80 CA4th 1359, 1370-1371, 96 CR2d 295 (prejudice can be found when both parties engaged in discovery)].

**Example:**

In an action for sexual harassment in employment, defendant employer claimed the dispute had to be resolved by arbitration as specified in the employee handbook. Seven months after filing an answer in which the right to arbitrate was raised as an affirmative defense, defendants moved to compel arbitration. During those seven months, defendant obtained 1,600 pages of documents from plaintiff in 86 categories and took plaintiff's two-day, 410-page videotaped deposition. Although defendant claimed much of the discovery was designed to prove the agreement to arbitrate, the deposition covered typical broad-ranging issues, such as plaintiff's attitude towards vulgar remarks and how she handled them. The trial court denied the motion to compel arbitration. The record amply supported the inference that defendant

unreasonably delayed the motion to compel arbitration to use discovery to learn plaintiff's strategies, evidence, and witnesses and to pin plaintiff down to a particular version of the facts. Plaintiff was prejudiced by incurring court costs and legal expenses and by disclosure of defenses and strategies [ *Davis v. Cont'l Airlines, Inc.* (1997) 59 CA4th 205, 213-217, 69 CR2d 79 ].

**6.30[4] Unreasonable Delay in Seeking Arbitration May Result in Waiver.** For delay in seeking arbitration to constitute waiver, the delay must be substantial, unreasonable, and in spite of the reasonable diligence of the party claiming waiver [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 984, 64 CR2d 843, 938 P2d 903 ]. The party asserting the defense of waiver must show delay amounting to laches, which requires a showing of prejudice, namely, that he or she did or omitted to do something that impaired his or her ability to participate in the arbitration in a meaningful way [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 983-984, 64 CR2d 843, 938 P2d 903 ; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 CA4th 1266, 1275, 8 CR2d 587 ; see *Sawday v. Vista Irrigation Dist.* (1966) 64 C2d 833, 836-837, 52 CR 1, 415 P2d 816 ].

**Distinguish:**

When the delay is in the selection of an arbitrator, and is the result of reasonable and good faith disagreements between the parties, the remedy for the delay is to petition the court to choose an arbitrator under CCP § 1281.6, rather than evasion of the agreement to arbitrate. To avoid arbitration entirely, the burden would be on the party opposing arbitration to prove that the other party's dilatory conduct rises to such a level of misfeasance as to constitute waiver of the right to arbitrate [ *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 984, 64 CR2d 843, 938 P2d 903 ].

**6.30[5] Litigation on the Merits or That Prejudices a Party May Waive Arbitration.** Arbitration may be waived by litigating an arbitrable dispute without seeking arbitration [ *Case v. Kadota Fig Ass'n of Producers* (1950) 35 C2d 596, 604-605, 606, 220 P2d 912 ; *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 CA4th 1236, 1250, 100 CR2d 403 ]. For an arbitration waiver to be found, however, the action ordinarily must be litigated on the merits or result in prejudice to the other party [see *Doers v. Golden Gate Bridge, Highway and Transp. Dist.* (1979) 23 C3d 180, 188, 151 CR 837, 588 P2d 1261 ; *McMillin Dev., Inc. v. Home Buyers Warranty* (1998) 68 CA4th 896, 909, 80 CR2d 611 ]. Thus, a dismissal that is not based on the merits of the action, such as a dismissal due to lack of subject-matter jurisdiction, does not constitute a waiver of the right to arbitration, absent prejudice to the other party [ *Doers v. Golden Gate Bridge, Highway and Transp. Dist.* (1979) 23 C3d 180, 188, 151 CR 837, 588 P2d 1261 ].

Conversely, if prejudice is established, waiver may be found even though the case was not litigated on the merits. It is sufficient that the litigation was undertaken in bad faith, for example, for the purpose of determining the other party's defenses in the arbitration proceeding [ *Christensen v. Dewor Devs.* (1983) 33 C3d 778, 783-784, 191 CR 8, 661 P2d 1088 ].

**Examples:**

Prejudice may consist of attorney's fees incurred and delays causing lost records and faded memories [ *Christensen v. Dewor Devs.* (1983) 33 C3d 778, 783-784, 191 CR 8, 661 P2d 1088 ]. However, time and expense alone do not constitute the prejudice that bars a related petition to compel arbitration [ *Groom v. Health Net* (2000) 82 CA4th 1189, 1197, 98 CR2d 836 ]. Prejudice can be established when discovery and motions have given the party seeking to arbitrate an opportunity to test both the legal validity and the factual persuasiveness of its opponent's position, usually at considerable expense to that opponent and while depriving that opponent of the efficiencies that would have been available to it by way of arbitration [ *McMillin Dev., Inc. v. Home Buyers Warranty* (1998) 68 CA4th 896, 910, 80 CR2d 611 ]. However, being forced to articulate a legal theory clear enough to withstand a demurrer is not prejudice [ *Groom v. Health Net* (2000) 82 CA4th 1189, 1195, 98 CR2d 836 ].

**Distinguish:**

If the litigation seeks relief that is not inconsistent with, or available in, arbitration proceedings, the right



to arbitrate will not be deemed waived [ *Schwartz v. Leibel* (1967) 249 CA2d 761, 763-764, 57 CR 831 (arbitration not waived by suit for injunction to restrain breach of agreement containing arbitration clause), *disapproved on other grounds in Doers v. Golden Gate Bridge, Highway and Transp. Dist.* (1979) 23 C3d 180, 188, 151 CR 837, 588 P2d 1261 ].

**6.30[6] American Arbitration Association Non-Waiver Rule Must Comport With Caselaw.** Rule 26(a) of the American Arbitration Association's Home Warranty Arbitration Rules states that no judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate. It has been held, however, that the AAA cannot by rule deprive courts of their power over parties who have appeared before for them, especially in light of *CCP § 1281.2(a)*, which gives the court the power to deny arbitration if a party has waived its right to arbitration [ *McMillin Dev., Inc. v. Home Buyers Warranty* (1998) 68 CA4th 896, 909, 80 CR2d 611 ]. Thus, the AAA rule has been interpreted to mean that arbitration will not be waived by mere participation in litigation, and that substantial prejudice to a party or litigation on the merits must be established to result in waiver [ *McMillin Dev., Inc. v. Home Buyers Warranty* (1998) 68 CA4th 896, 909, 80 CR2d 611 ].

**6.30[7] Failure to Make Timely Demand for Arbitration May Constitute Waiver.** When the parties have agreed that a demand for arbitration must be made within a certain time, that demand is a condition precedent that must be performed before the contractual duty to submit the dispute to arbitration arises. A party's failure to make a timely demand constitutes a waiver of the right to arbitrate in the sense of a loss of a right based on a failure to perform an obligation. It is not relevant that the party did not intend to waive the right to arbitrate the dispute [ *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 313-314, 24 CR2d 597, 862 P2d 158 ].

**Exception:**

Commencing a civil action tolls any time limitations in arbitration agreement requiring commencing party to demand or initiate arbitration within a specified period of time [*CCP § 1281.12*; see 6.11[2][a]].

When the arbitration agreement does not specify a time within which arbitration must be demanded, an unreasonable delay in demanding arbitration may constitute a waiver of the right to arbitrate [ *Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1043, 9 CR2d 381, 831 P2d 821 ; *Sawday v. Vista Irrigation Dist.* (1966) 64 C2d 833, 836-837, 52 CR 1, 415 P2d 816 ; see also *CC § 1657*].



**Strategic Point--Plaintiff in Medical Malpractice Case:**

In a medical malpractice case, a plaintiff may wish to include a notice to arbitrate in the Notice of Intent to Commence Action that is required by *CCP § 364*. If the recipient ignores the Notice of Intent and does not promptly seek arbitration, inclusion of the arbitration notice could strengthen an argument by the plaintiff that the healthcare provider has waived arbitration by failing to demand it in a timely fashion.



**Cross Reference:**

Discussion of timely demand for arbitration, see 6.11[1].

**6.30[8] Insurer That Misleads Insured May Forfeit Right to Arbitration.** Waiver, or more properly, forfeiture, of the right to invoke arbitration may be based on an insurer's failure to inform an insured about an arbitration provision and conduct designed to mislead the policyholder. The court's focus for a determination of bad faith will be on the insurer's subjective intent, under the totality of the circumstances [ *Chase v. Blue Cross of Cal.* (1996) 42 CA4th 1142, 1148, 50 CR2d 178 ; see *Davis v. Blue Cross of N. Cal.* (1979) 25 C3d 418, 158 CR 828, 600 P2d 1060 ; see also *Sarchett v. Blue Shield of Cal.* (1987) 43 C3d 1, 233 CR 76, 729 P2d 267 (mere failure to inform adequately was not enough to find that the insurer has relinquished its right to arbitration)].

**Distinguish:**

The intent to mislead required for a forfeiture of arbitration distinguishes the situation from one where estoppel would apply. An insurer may be estopped from compelling arbitration even if it did not intend to mislead the insured, as long as the insured reasonably relied to its detriment on the insurer's actions. Forfeiture is satisfied whether or not the insured is, in fact, misled. Thus, even if the insured is aware of the arbitration right, bad faith tactics designed to mislead the insured merit the sanction of forfeiture. [ *Chase v. Blue Cross of Cal.* (1996) 42 CA4th 1142, 1157, 50 CR2d 178 ].

The principle that an insurer forfeits the right to arbitrate if the covenant of good faith and fair dealing is breached is an application of general contract principles, and therefore is not preempted by the Federal Arbitration Act (9 USC § 1) [ *Chase v. Blue Cross of Cal.* (1996) 42 CA4th 1142, 1158-1160, 50 CR2d 178 ].

#### **Cross Reference:**

Discussion of federal preemption, see 6.13.

**6.30[9] In Suit to Enforce Mechanics' Lien, Right to Arbitrate Is Not Waived If Stay Requested Within 30 Days.** A person who begins an action to enforce a mechanics' lien under *CC § 3082 et seq.* does not necessarily waive his or her right to arbitrate under a written agreement if, in beginning the action, the plaintiff does either of the following [*CCP § 1281.5(a)*]:

- Includes an allegation in the complaint that the claimant does not intend to waive any right of arbitration, and intends to move the court, within 30 days after service of the summons and complaint, for an order to stay further proceedings in the action; or
- At the same time the complaint is filed the claimant files an application that the action be stayed pending the arbitration of any issue, question, or dispute that is claimed arbitrable under the agreement and that is relevant to the action.

#### **Warning--Plaintiff:**

The plaintiff must file and serve a notice of motion and motion under *CCP § 1281.4* to stay the action pending arbitration within 30 days after service of summons and complaint or the plaintiff will waive the right to compel arbitration [*CCP § 1281.5(b)*; compare *Sobremonte v. Superior Court* (1998) 61 CA4th 980, 992, 72 CR2d 43 (waiver of right to arbitrate ordinarily occurs only when parties' actions are inconsistent with arbitration)].

#### **Distinguish:**

Filing the application to stay the action will prevent a finding of waiver that is based only on the filing of the complaint to enforce a mechanics' lien, but waiver may still be found based on other factors [ *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 CA3d 1220, 1227, 249 CR 544 ].

#### **Warning--Defendant:**

The failure of a defendant to file a petition for an order to arbitrate pursuant to *CCP § 1281.2* at or before the time he or she answers a complaint to enforce a mechanics' lien constitutes a waiver of the defendant's right to compel arbitration [*CCP § 1281.5(c)*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionArbitrationsWaivers



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Chapter 6 Determining Forum  
V. SELECTING THE VENUE FOR TRIAL

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.31*

**6.31 CHECKLIST: Selecting the Place for Trial.**

☐ If case is brought under a specific act or statute, check act or statute for specific venue provisions.

☐ Actions based on consumer obligations brought under *CCP § 395(b)* are subject to venue provisions of that statute:

☐ Venue is proper where:

☐ Buyer or lessee signed contract.

☐ Buyer resided at time of contracting.

☐ Buyer resides at commencement of action.

☐ Proper court location for trial is location where such actions are tried and that is nearest or most accessible to buyer or lessee, or as court specifies otherwise by local rule.

**Authority:**

*CCP § 395(b)*

**Discussion:**

See 6.35[4]

☐ Actions based on a retail installment sale, under the Unruh Act (*CC § 1801 et seq.*), are subject to venue provisions in that Act:

☐ Venue is proper where:

- ☐ Contract signed by buyer.
- ☐ Buyer resided at time of contracting.
- ☐ Buyer resides at commencement of action.
- ☐ If goods have been affixed to real property so as to become part of that property, where goods are located.

☐ Proper court location for trial is location where such actions are tried, and that is nearest or most accessible to buyer, or as court specifies otherwise by local rule.

**Authority:**

*CC § 1812.10*

**Discussion:**

See 6.35[5]

☐ Actions based on motor vehicle sales contracts, under the Rees-Levering Motor Vehicle Sales and Finance Act (*CC § 2981 et seq.*), are subject to venue provisions in that Act:

☐ Venue is proper where:

- ☐ Contract or purchase order was signed by buyer.
- ☐ Buyer resided when contract entered into.
- ☐ Buyer resides at commencement of action.
- ☐ Motor vehicle is permanently garaged.

☐ Proper court location for trial is location where such actions are tried and that is nearest or most accessible to buyer, or as court specifies otherwise by local rule.

☐ This Act's venue provisions apply in actions involving multiple claims or causes of action, as long as at least one claim arises from a contract subject to the Act.

**Authority:**

*CC § 2984.4*

**Discussion:**

See 6.35[6]

☐ In proceedings to determine parental relationship under the Uniform Parentage Act (*Fam Code § 7600 et seq.*), or to enforce support obligations (*Fam Code § 3900 et seq.*), venue is proper in county where child resides.

**Authority:**

*CCP § 395(a)*

**Discussion:**

See 6.35[7]

☐ Determine whether the type of party suing or being sued controls or affects venue. The following are subject to specific venue rules:

☐ Actions against the State.

☐ General venue rules apply unless otherwise indicated, such as in the following types of cases:

☐ Actions for personal injury or wrongful death that occurred within the state should be brought in county where injury occurred.

☐ Actions for money or damages, for which filing of a claim is a statutory prerequisite or specifically exempted, must be brought in any city or city and county where the Attorney General has an office (Sacramento, Los Angeles or San Francisco).

☐ Actions by a city, county, city and county, or local agency may be tried in any county where the local government entity is situated.

☐ Before answering, the Attorney General may move to change the place of trial to any city or city and county where the Attorney General has an office (Sacramento, Los Angeles, San Francisco).

**Authority:**

*Regents of Univ. of Cal. v. Superior Court (1970) 3 C3d 529, 534-535, 91 CR 57, 476 P2d 457 ; Gov Code §§ 955, 955.2, 955.3; CCP §§ 401(1), 397*

**Discussion:**

See 6.43[1]

☐ Actions by the State.

☐ May be removed on motion of defendant to the city or city and county in which the Attorney General has an office that is nearest to the county where defendants, or some of them, reside.

**Authority:**

*CCP § 401(2)*

**Discussion:**

See 6.43[2]

☐ Actions against public officers.

☐ Bring in county where the act giving rise to cause of action occurred.

**Authority:**

*CCP § 393(b)*

**Discussion:**

See 6.42[1]

☐ Actions against executors, administrators, guardians, conservators, or trustees in representative capacities.

☐ Bring in county having jurisdiction over the estate.

**Authority:**

*CCP § 395.1*

**Discussion:**

See 6.38

☐ Actions by or against a city, county, city/county, or local agency ("local government entity").

☐ Action against a local government entity may be brought and tried in county where defendant entity is situated, unless plaintiff is another local government entity, in which case, action will be transferred to neutral county.

☐ Exception--action against a local government entity for personal injury occurring within county in which defendant entity is situated, due to alleged negligence of defendant entity, will be transferred to county where local government entity is situated.

☐ Plaintiff may still seek discretionary change of venue under *CCP § 397(b)*.

☐ Actions brought in otherwise proper venues are subject to transfer to neutral county or, in nonjury cases, assignment of disinterested judge.

☐ Action by local government entity against a resident of, or corporation doing business in, another county may be transferred on motion of either party.

☐ Corporate defendant might not obtain transfer if "doing business" in forum county, and not seen as an outsider.

☐ Exception--parties may stipulate to place of trial.

- ☐ Right to transfer can be waived based on unreasonable delay.
- ☐ Motions for transfer under *CCP* § 394 are not subject to procedural requirements of *CCP* § 396b(a).

**Authority:**

*CCP* § 394; *San Francisco Found. v. Superior Court* (1984) 37 C3d 285, 297-298, 208 CR 31, 690 P2d 1; *Newman v. County of Sonoma* (1961) 56 C2d 625, 627, 15 CR 914, 364 P2d 850; *Ventura Unified Sch. Dist. v. Superior Court* (2001) 92 CA4th 811, 814-815, 112 CR2d 260; *Fitzpatrick v. Sonoma County* (1929) 97 CA 588, 591, 276 P 113

**Discussion:**

See 6.43[3], [4]

- ☐ Transitory actions against corporations and unincorporated associations.

☐ Bring in county where:

- ☐ Contract made or to be performed,
- ☐ Obligation or liability arose,
- ☐ Breach occurred, or
- ☐ Corporation's or unincorporated association's principal place of business is situated.

☐ For venue to be proper in unincorporated association's principal place of business, association must have filed statement under *Corp Code* § 18200.

**Authority:**

*CCP* § 395.5

**Discussion:**

See 6.35, 6.39, 6.41

- ☐ Research and comply with specific venue rules when case involves one of the entities as a party.

**Authority:**

*CCP* §§ 392, 393(b), 394, 395.1, 395.5, 401; *Gov Code* §§ 955, 955.2, 955.3

**Discussion:**

See 6.31 et seq.

- ☐ If no specific venue provisions apply to cause of action, determine whether action is transitory or local.

- ☐ Transitory actions involve primarily financial obligations or personal relationships.
- ☐ Local actions involve title or injury to real property.
- ☐ If complaint alleges one cause of action but seeks both local and transitory relief, apply "main relief" rule.
- ☐ If complaint joins multiple causes of action, some transitory, some local, action generally classified as transitory.

**Authority:**

*CCP §§ 392-403; Brown v. Superior Court (1984) 37 C3d 477, 482 n5, 208 CR 724, 691 P2d 272; Carlton v. Superior Court (1966) 240 CA2d 586, 589, 49 CR 759*

**Discussion:**

See 6.34 -6.36

- ☐ General rule in transitory actions: venue is proper where defendant, or any of them, reside.

**Authority:**

*CCP § 395(a)*

**Discussion:**

See 6.35[1]

- ☐ If action is against multiple defendants, commence action where any defendant resides.
  - ☐ Rule applies where individual and corporate defendants are joined.
  - ☐ Where a corporate defendant and the State are joined in a personal injury action, plaintiff waives venue rules for corporations under *CCP § 395.5*.
  - ☐ Do not join any defendant, who is not a real party in interest, solely for venue purposes.

**Authority:**

*CCP § 395(a)*

**Discussion:**

See 6.42

- ☐ General rule in local actions: venue is proper in county where some or all of the real property that is subject of action is situated.

**Authority:**

*CCP § 392(a)*



**Discussion:**

See 6.36[2]

☐ Check additional venue options for specific causes of action.

☐ In physical personal-injury and wrongful death cases, venue proper in defendant's residence or place of injury.

☐ In contract actions, venue proper where defendant resides, contract made, contract breached, and, in some cases, where contract to be performed.

☐ Unless contract specifies otherwise, contract to be performed where made.

☐ If contract specifies the place for defendant's performance, venue is also proper where obligation to be performed.

**Authority:***CCP § 395(a)***Discussion:**

See 6.35[3][b], [c]

☐ In actions for penalty or forfeiture imposed by statute, venue is proper where some part of the cause of action arose.

☐ If penalty or forfeiture imposed for offense committed on a lake, river, or other stream of water situated in two or more counties, venue proper in any bordering county.

**Authority:***CCP § 393(a)***Discussion:**

See 6.37[1]

☐ Prepare complaint containing allegations sufficient to establish venue.

☐ If action is based on any of the following, prepare affidavit or verified complaint stating facts showing that action is commenced in proper court and court location, and is subject to *CCP § 395(b)*, *CC § 1801 et seq.*, or *CC § 2981 et seq.*, as appropriate:

☐ A consumer obligation under *CCP § 395(b)*, arising from:

☐ The offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family or household use; or

- ☐ A transaction consummated as the result of either: unsolicited phone calls by sellers engaged in consummating transactions of that kind; or, a telephone or electronic transmission made by a buyer or lessee in response to a solicitation by a seller.
- ☐ A retail installment sale under the Unruh Act (*CC § 1801 et seq.*); or
- ☐ A motor vehicle sales contract under the Rees-Levering Motor Vehicle Sales and Finance Act (*CC § 2981 et seq.*).

**Authority:**

*CCP §§ 395(b), 396a; CC § 1801 et seq.; CC § 2981 et seq.*

**Discussion:**

*See 6.35[4] -[6]*

- ☐ If filing unlawful detainer action, prepare affidavit or verified complaint stating facts showing action commenced in proper court and court location.

**Authority:**

*CCP §§ 392(a)(1), 396a*

**Discussion:**

*See 6.36[5]*

- ☐ Check local rules of court to determine if there is a central location for filing civil actions.

**Authority:**

*CCP § 402*

**Discussion:**

*See 6.33[2]*

- ☐ File complaint in proper court and, when required, also file affidavit or verification as to venue.



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### 6.32 Options and Strategies.

The statutes governing venue often list multiple places where the action may be brought. The ability to choose from two or more appropriate venues provides the opportunity to select a venue that favors the party's strategy.



#### **Strategic Point:**

Consider witness availability, jury pool, costs, time, availability of records, and potential judges, all of which play a role in making an effective venue choice.

The plaintiff makes the initial choice of venue by filing the complaint. It is up to the defendant to move for change of venue, unless the plaintiff later decides that another venue is appropriate. Plaintiffs should use the advantage of selecting the initial venue to best support their case. Issues such as impartiality and witness convenience will need to be raised by the opposition, which may yield early clues about the opposition's strategy. However, be mindful that the courts are averse to gamesmanship, and a judge that detects "forum shopping" will more likely grant a motion for change of venue. Moreover, losing a motion for change of venue would be time consuming and potentially costly if the court orders payment fees and costs and the imposition of sanctions.

#### **Investigating Judges Using Online Resources:**

Many resources are available online for investigating judges. These resources can help you find information and cases pertaining to your assigned judge. For example, helpful resources at *lexis.com* include:

- For opinions or decisions affirming or reversing a judge's ruling, search in Legal tab > States Legal--U.S. > California > Find Cases > CA State Cases, Combined.

○ Sample search: For appellate rulings regardless of topic, use the HISTORY segment with the judge's last name in this format: *history (first name /3 last name /3 j or judge or judicial or mag or hon!)*.

 Sample search: For appellate decisions on a judge's rulings in a particular procedural setting or on a particular substantive topic, use the HISTORY segment with the judge's last name in this format plus words for finding the specific topic, for example: summary judgment and *history (first name /3 last name /3 j or judge or judicial or mag or hon!)*.

■ To find biographical information about a federal judge, search the biographies in Legal tab > Reference > Law > Judicial Staff Directory.

 Sample search: For a particular judge, try: *name (first name /3 last name)*.

■ To find news articles about a judge, search in the California news files Legal tab > States Legal--U.S. > California > Search News > General News > California News Publications.

 Sample search: For articles on a particular judge, try a simple search: *first name /3 last name*.

■ To find articles about a judge or legal articles written by the judge both before and after the judge took the bench, search the law reviews and other periodicals in Legal tab > Secondary Legal > Law Reviews, CLE, Legal Journals & Periodicals, Combined.

 Sample search: For legal articles written by a particular judge, try a simple search: *first name /3 last name*.



#### **Warning:**

Several statutes govern venue in specific actions or proceedings that are not addressed in the general venue rules set forth in *CCP* §§ 392-403 [see, e.g., *Fam Code* § 8714(a) (agency adoptions), *Fam Code* § 8802(a) (independent adoptions); *Prob Code* §§ 2201, 2202 (venue in conservatorship or guardianship proceedings); *Corp Code* §§ 177, 1800 (dissolution and winding up of corporations)].



#### **Cross Reference:**

Discussion of venue in various special proceedings, see California Forms of Pleading and Practice, Ch. 571, Venue (Matthew Bender).



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**6.33 Venue and the Superior Courts.**

**6.33[1] Venue Is Geographical Location and Political Subdivision Where Court Will Hear Cause.** Venue relates to and defines the particular county or city in which a court having jurisdiction may properly hear and determine a case [ *Arganbright v. Good (1941) 46 CA2d Supp 877, 878, 116 P2d 186* ].

**6.33[2] Superior Court Can Specify Locations for Filing and Hearing Certain Cases, and May Transfer Cases Accordingly.** Except as otherwise provided by law, a superior court may specify by local rule the locations where certain types of actions or proceedings are to be filed, and where cases are to be heard or tried [CCP § 402]. A superior court may not dismiss a case, and the clerk may not reject a case for filing, because it is filed, or a person seeks to file it, in a court location other than the location specified by local rule. However, the court may transfer the case to the proper court location on its own motion [CCP § 402(a)(3)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureVenueGeneral Overview



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**6.34 Cases Are Classified As Transitory or Local to Determine Venue.**

**6.34[1] Transitory Action Involves Financial Obligations and Personal Relationships While Local Action Involves Real Property.** The rules of venue generally require actions to be classified as mainly transitory or local [ *Brown v. Superior Court* (1984) 37 C3d 477, 482 n5, 208 CR 724, 691 P2d 272 ; see CCP §§ 392, 395]. The cause of action asserted affects or determines the place of trial, and whether an action is transitory or local will be ascertained from the complaint alone [ *Peiser v. Mettler* (1958) 50 C2d 594, 603, 328 P2d 953 ].

- An action is transitory if it deals primarily with financial obligations or personal relationships;
- An action is local if title or injury to real property is the focus of trial [ *Carlton v. Superior Court* (1966) 240 CA2d 586, 589, 49 CR 759 ].

**6.34[2] Main Relief Sought by Complaint Determines Whether Action Is Transitory or Local.** The court will inspect the complaint to determine the character of the action and judgment that may be rendered on default [ *Peiser v. Mettler* (1958) 50 C2d 594, 603, 328 P2d 953 ; *Eckstrand v. Wilshusen* (1933) 217 C 380, 381-382, 18 P2d 931 ].

Venue problems arise when a complaint, although stating a single cause of action, demands both local and transitory relief. The nature of the "main relief" sought or "principal object" of the action is what determines whether the action is classified as transitory or local [ *Massae v. Superior Court* (1981) 118 CA3d 527, 535, 173 CR 527 ]. If there is other relief sought that would be characterized differently, the nature of the main relief will control [ *Massae v. Superior Court* (1981) 118 CA3d 527, 535-536, 173 CR 527 ].

**Example:**

An action to recover damages for injury to real property is local even if the complaint is framed in various counts according to theories of negligence, negligent breach of contract, and breach of warranty [see CCP § 392(a)]. The addition of a breach of warranty theory, which is transitory, does not transform the action into a transitory one because the "main relief" sought is for damages based on injury to real property [ *Stauffer Chem. Co. v. Superior Court* (1968) 265 CA2d 1, 4, 71 CR 202 ; see CCP§ 392(a) (location of subject matter controls in actions for injuries to real property)].



**Cross Reference:**

Discussion of joinder of several causes of action or defendants affected by different venue statutes, see 6.42.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureVenueGeneral Overview



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### 6.35 Venue Rules for Transitory Actions.

**6.35[1] Residence of Defendant or Some Defendants Generally Determines Venue.** Except as otherwise provided by law and subject to the power of the court to transfer actions or proceedings [*see CCP §§ 392-404.9*], the superior court in the county where the defendants or some of them reside at the commencement of a transitory action is the proper court for the trial of the action [*CCP § 395(a)*; *see, e.g., Turlock Theatre Co. v. Laws* (1939) 12 C2d 573, 576, 86 P2d 345 ; *Smith v. Smith* (1891) 88 C 572, 575, 26 P 356 ].

**Exception:**

If another venue provision applies to the same cause of action, *CCP § 395(a)* might not control [*see Brown v. Superior Court* (1984) 37 C3d 477, 482, 208 CR 724, 691 P2d 272 (venue provisions in the California Fair Employment and Housing Act, *Gov Code § 12965*, prevailed over *CCP § 395*)].

**Compare:**

Where a complaint alleges multiple causes of action that are subject to different venue statutes, the case is a "mixed action," and *CCP § 395* might prevail over more specific provisions [ *Gallin v. Superior Court* (1991) 230 CA3d 541, 545, 281 CR 304 ].

**Distinguish--Multiple Defendants:**

When a case involves multiple defendants who reside in different counties, a defendant is not entitled to have a transitory action tried in the county of his or her residence. In such a case, the action may be brought in the county of any defendant who is a proper party, and a nonresident defendant cannot obtain a change of venue even if a resident defendant joins in the motion [ *Colusa Air Pollution Control Dist. v. Superior Court* (1991) 226 CA3d 880, 890, 277 CR 110 ].

► **Cross Reference:**

Discussion of mixed actions, *see 6.42[2]*.

### 6.35[2] Alleging Residence.

**6.35[2][a] A Person Has Only One Residence for Venue Purposes.** For venue purposes, a person can have only



one residence [see *CCP* § 395(a)]. The material question is the intent to establish a permanent residence. Residence has ordinarily been accepted to mean the fixed home of a person as understood by that person and his or her neighbors and friends [ *Burt v. Scarborough* (1961) 56 C2d 817, 820-821, 17 CR 146, 366 P2d 498 ; see *Gov Code* § 244(a) (residence as place where one remains when not called elsewhere for labor or other special or temporary purpose)].

**6.35[2][b] Plaintiff May Designate County in Case With Nonresident Defendant or Defendant Whose County of Residence Unknown.** If none of the defendants reside in the state, or if they reside in the state but the county in which they reside is unknown to the plaintiff, the action may be tried in any county which the plaintiff may designate in his or her complaint [*CCP* § 395(a)].

**6.35[2][c] Venue Proper Where Parties Reside or Service Made If Defendant Is About to Leave State.** If the defendant is about to depart from the state, the action may be tried in any county where either of the parties resides or service is made [*CCP* § 395(a)].

**6.35[2][d] Residence of Improper Defendant Not Considered.** If a person is improperly joined as a defendant, or has been made a defendant solely for the purpose of establishing venue where that defendant resides, his or her residence will not be considered in determining proper venue [*CCP* § 395(a)].

### **6.35[3] Additional Venue Provisions in Tort and Contract Cases.**

**6.35[3][a] Defendant's Residence Establishes Venue in Nonphysical Tort Cases.** Generally, the residence of the defendant is the proper place for the trial of a personal tort case not involving physical injury, such as conversion [*CCP* § 395(a); see *Haurat v. Superior Court* (1966) 241 CA2d 330, 333, 50 CR 520 ; *Mason v. Buck* (1929) 99 CA 219, 221, 278 P 461 ]. Similarly, actions for libel, malicious prosecution, abuse of process, and false imprisonment are triable solely where the defendant resides [ *Johnson v. Superior Court* (1965) 232 CA2d 212, 218, 42 CR 645 ; see *Cacciaguidi v. Superior Court* (1990) 226 CA3d 181, 184-186, 276 CR 465 (abuse of process action)].



#### **Cross Reference:**

Discussion of venue in physical injury tort cases, see 6.35[3][b].

**6.35[3][b] In Personal Injury and Wrongful Death Actions, Place of Injury Is Also Proper for Trial.** If an action is for injury to a person or personal property from a wrongful act or negligence, either the county where the injury occurs, or in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action [*CCP* § 395(a)]. Thus, a defendant is entitled to have a negligence action tried either in the county of his or her residence or the county in which the tort occurred [ *Maxwell v. Murray* (1961) 190 CA2d 440, 443, 11 CR 916 ].

#### **Distinguish:**

The phrase "injury to person" in this context is limited to physical injury, incapacity, or death caused by the wrongful or negligent act of another. It does not apply to:

- Nonphysical injuries resulting from false imprisonment or malicious prosecution [ *Monk v. Ehret* (1923) 192 C 186, 191-193, 219 P 452 ; *Cacciaguidi v. Superior Court* (1990) 226 CA3d 181, 187, 276 CR 465 ];
- Injuries to character or reputation [ *Carruth v. Superior Court* (1978) 80 CA3d 215, 219, 145 CR 344 ]; or
- Actions sounding in tort, such as severe humiliation, anguish, emotional distress, and trauma [ *Cubic Corp. v. Superior Court* (1986) 186 CA3d 622, 625, 231 CR 18 ].

In such cases, venue is only proper in the defendant's place of residence [CCP § 395(a)].

**6.35[3][c] Venue In Contract Actions Is Proper Where Defendant Resides, Where Contract Was Made, and, in Some Cases, Where Contract to Be Performed.** Absent a special written contract to the contrary, it is presumed that an obligation under a contract will be performed where the contract was made [see CCP § 395(a); *Braunstein v. Superior Court* (1964) 225 CA2d 691, 694-695, 37 CR 666 ]. In a breach of contract action, unless the defendant has contracted specially in writing designating the county in which his or her obligation is to be performed, the proper county for the trial of an action founded on the contract is either:

- The county in which the contract was made; or
- The county in which the defendant or any defendant resides at the commencement of the action [CCP § 395(a); *Armstrong v. Smith* (1942) 49 CA2d 528, 531-532, 122 P2d 115 ].

Thus, a defendant is entitled to have a contract action transferred to the county of his or her residence unless:

- The contract was made in another county; or
- The defendant specifically contracted to perform his or her obligation in another county [see CCP § 395(a); *Braunstein v. Superior Court* (1964) 225 CA2d 691, 694, 37 CR 666 ; *Richardson v. Rose* (1961) 197 CA2d 318, 322, 17 CR 84 ].

If the defendant has contracted specially and in writing as to the county in which his or her obligation is to be performed, then such county is also a proper county for the trial of the action [CCP § 395(a); *Armstrong v. Smith* (1942) 49 CA2d 528, 531-532, 122 P2d 115 ; see also *Mitchell v. Superior Court* (1986) 186 CA3d 1040, 1046, 231 CR 176 ].

#### **Compare:**

The language of CCP § 395(a) suggests that these venue rules apply only "if a defendant has contracted to perform an obligation in a particular county," which would seem to obviate the need for the exception that is created for cases in which a contract designates the place of performance. However, courts have dismissed this prefatory language as being of "no great consequence," since any existing obligation must be performable at some place, and interpret the statute as allowing trial in the place of performance only if a special written contract designates such place [see CCP § 395(a); *Armstrong v. Smith* (1942) 49 CA2d 528, 531-532, 122 P2d 115 ].

**6.35[3][d] In Contract Actions, Place of Performance Must Be Certain, and Extrinsic Evidence Will Not Be Allowed to Establish Venue There.** A special contract is one in which particular stipulations with respect to the obligations of the parties are expressed, which, if omitted, the law will not supply [ *Armstrong v. Smith* (1942) 49 CA2d 528, 535, 122 P2d 115 ; see also *Wathen v. Superior Court* (1963) 212 CA2d 125, 129, 27 CR 840 ]. Thus, the contract required under CCP § 395(a), to establish venue in the place of performance, must specify a geographic location for performance and, if it does not, extrinsic evidence may not be introduced to show the alleged proper county for trial [ *Morthrift Plan v. Fischer* (1961) 196 CA2d Supp 865, 868-869, 17 CR 607 ; see also *Fidelity Thrift & Loan Ass'n v. Hall* (1960) 186 CA2d Supp 895, 899 ].

#### **Examples:**

An agreement to pay money in a particular county, or to deliver goods at a particular place, or to perform an obligation in a particular city could be sufficient to establish venue based on place of performance [see *Wathen v. Superior Court* (1963) 212 CA2d 125, 129, 27 CR 840 ]. A designation of the city or county of performance, without a specific address, is enough to establish the place of performance. Thus,

when a contract stated the place of payment as the office of a trustee in a particular county, it was sufficient to give the plaintiff the right to specify that county as the proper place of trial in an action on the contract [ *Stute v. Burinda* (1981) 123 CA3d Supp. 11, 16, 177 CR 102 ].

**6.35[3][e] Contract Is Made Where the Last Act Necessary for Its Validity Is Done.** The place where a contract was made is the place where the last act necessary for its validity was done. This is usually the act constituting acceptance [see *Braunstein v. Superior Court* (1964) 225 CA2d 691, 696-697, 37 CR 666 ].

**Examples:**

When a contract is prepared in one county, and is forwarded to a party in another county for acceptance and signature, the latter county is the proper place for trial because that is where the contract was made [ *Braunstein v. Superior Court* (1964) 225 CA2d 691, 696-697, 37 CR 666 ]. Similarly, when a contract is made by telephone, the contract is entered into at the place where offer is accepted [ *Friedman Bag Co., Inc. v. Shrier* (1961) 194 CA2d 561, 564, 15 CR 38 ; *Wilson v. Scannavino* (1958) 159 CA2d 369, 371, 324 P2d 350 ].

**6.35[4] Actions Based on Consumer Obligations Under CCP § 395(b).**

**6.35[4][a] Buyer's Location During Specific Events Determines Venue.** Actions arising from the offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family or household use, as well as actions arising from transactions consummated as the result of either: (1) unsolicited phone calls by sellers engaged in the business of consummating transactions of that kind; or (2) a telephone call or electronic transmission made by a buyer or lessee in response to a solicitation by a seller, are governed by CCP § 395(b).

**Example:**

Collection efforts "aris[e] from" a consumer loan and determine the basis for venue in an action alleging illegal collection efforts, and CCP § 395(b) applies as long as the action arises from a consumer transaction specified in the statute [ *Fontaine v. Superior Ct.* (2009) 175 CA4th 830, 841, 96 CR3d 607] .

In such actions, venue is proper in the superior court in the county where the buyer or lessee [CCP § 395(b)]:

- Signed the contract;
- Resided at the time the contract was entered into; or,
- Resides at the commencement of the action.

In the superior court designated as the proper court under CCP § 395(b), the proper location for trial is the location of the court where such actions are tried and that is nearest or most accessible to the buyer or lessee under the above criteria, which the superior court may specify by local rule [CCP § 395(b)]. Otherwise, any location of the superior court designated as the proper court under CCP § 395(b) is a proper court location for the trial [CCP § 395(b)].

Any term of a consumer obligation described in CCP § 395(b) waiving these venue provisions is void and unenforceable [CCP § 395(c)].

**Exceptions:**

CCP § 395(b) does not apply to an action under CC § 1812.10 (Retail Installment Sales Contract Actions (Unruh Act)) or CC § 2984.4 (Motor Vehicle Sales Contract Actions (Rees-Levering Motor Vehicle Sales and Finance Act)) [CCP § 395(b)].

**6.35[4][b] Plaintiff Must File Affidavit Showing Action Commenced in Proper Place.** In any action under *CCP* § 395(b), the plaintiff must state facts in a verified complaint, or an affidavit filed concurrently with the complaint, showing that the action has been commenced in the proper superior court and court location, and is subject to *CCP* § 395(b) [*CCP* § 396a]. When filed with the complaint, a copy of the affidavit must be served with the summons [*CCP* § 396a].



**Warning:**

If a plaintiff fails to file the required affidavit or a verified complaint, no further proceedings may occur except the dismissal of the action without prejudice [*CCP* § 396a].

**Exception:**

The court may, on terms that are just, permit the affidavit to be filed after the complaint is filed, and a copy of the affidavit must be served on the defendant. The time to answer or otherwise plead will date from that service [*CCP* § 396a].

**6.35[5] Venue in Retail Installment Sales Contract Actions (Unruh Act).**

**6.35[5][a] Location of Buyer, or Goods If Affixed to Real Property, Determines Venue.** An action on a contract or installment account under the Unruh Act, *CC* § 1801 *et seq.*, must be tried in the superior court in the county where [*CC* § 1812.10(a)]:

- The contract was in fact signed by the buyer;
- The buyer resided at the time the contract was entered into;
- The buyer resides at the commencement of the action; or
- The goods purchased pursuant to the contract have been so affixed to real property as to become a part of that real property.

In the superior court designated as the proper court under *CC* § 1812.10(a), the proper location for trial is the location of the court where such actions are tried and that is nearest or most accessible to the buyer under the above criteria, which the superior court may specify by local rule [*CC* § 1812.10(b)]. Otherwise, any location of the superior court designated as the proper court under *CC* § 1812.10(a) is a proper court location for the trial [*CC* § 1812.10(b)].

**6.35[5][b] Plaintiff Must File Affidavit Showing Action Commenced in Proper Place.** In any action subject to *CC* § 1812.10, the plaintiff must state facts in a verified complaint, or an affidavit filed concurrently with the complaint, showing that the action has been commenced in the proper superior court and court location, and is subject to *CCP* § 1812.10 [*CC* § 1812.10(c); *CCP* § 396a]. When filed with the complaint, a copy of the affidavit must be served with the summons [*CC* § 1812.10(c)].



**Warning:**

If a plaintiff fails to file the required affidavit or a verified complaint, no further proceedings may occur except the dismissal of the action without prejudice [*CC* § 1812.10(c); *CCP* § 396a].

**Exception:**

The court may, on terms that are just, permit the affidavit to be after the complaint is filed, and a copy of the affidavit must be served on the defendant. The time to answer or otherwise plead will date from that service [*CC* § 1812.10(c); *CCP* § 396a].

 **Cross References:**

Discussion and form of venue affidavit (or declaration under *CCP* § 2015.5) required under the Unruh Act, see *California Forms of Pleading and Practice*, § 501.102, and § 502.160[7] (*Matthew Bender*).

**6.35[6] Venue in Motor Vehicle Sales Contract Actions (Rees-Levering Motor Vehicle Sales and Finance Act).**

**6.35[6][a] Location of Buyer or Permanently Garaged Vehicle Determines Venue.** The Rees-Levering Motor Vehicle Sales and Finance Act, *CC* § 2981 *et seq.*, applies to all conditional sale contracts, for the sale or lease of motor vehicles for primarily personal purposes, between a buyer and any person engaged in the business of selling or leasing motor vehicles under conditional sale contracts. An action on a contract or purchase order governed by that act must be tried in the county in which [*CC* § 2984.4(a)]:

- The contract or purchase order was signed by the buyer;
- The buyer resided at the time the contract or purchase order was entered into;
- The buyer resides at the commencement of the action; or
- The motor vehicle purchased pursuant to the contract or purchase order is permanently garaged.

These venue provisions will apply in actions that involve multiple claims, or causes of action, so long as there is at least one claim or cause of action arising from a contract subject to the act [*CC* § 2984.4(a)].

In the superior court designated as the proper court under *CC* § 2984.4(a), the proper location for trial is the location of the court where such actions are tried and that is nearest or most accessible to the buyer under the above criteria, which the superior court may specify by local rule [*CC* § 2984.4(b)]. Otherwise, any location of the superior court designated as the proper court under *CC* § 2984.4(a) is a proper court location for the trial [*CC* § 2984.4(b)].

**6.35[6][b] Plaintiff Must File Affidavit Showing Action Commenced in Proper Place.** In any action subject to *CC* § 2984.4, the plaintiff must state facts in a verified complaint, or an affidavit filed concurrently with the complaint, showing that the action has been commenced in the proper superior court and court location, and is subject to *CC* § 2984.4 [*CC* § 2984.4(c); *CCP* § 396a]. When filed with the complaint, a copy of the affidavit must be served with the summons [*CC* § 2984.4(c); *CCP* § 396a].



**Warning:**

If a plaintiff fails to file the required affidavit or a verified complaint, no further proceedings may occur except the dismissal of the action without prejudice [*CC* § 2984.4(c); *CCP* § 396a].

**Exception:**

The court may, on terms that are just, permit the affidavit to be filed after the complaint is filed, and a copy of the affidavit must be served on the defendant. The time to answer or otherwise plead will date from that service [*CC* § 2984.4(c); *CCP* § 396a].



**Cross Reference:**

Discussion and form of venue affidavit (or declaration under *CCP* § 2015.5) required under the Rees-Levering Act, see *California Forms of Pleading and Practice*, Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act*, §§ 89.27, 89.61 (*Matthew Bender*).

**6.35[7] Venue in Proceedings to Determine Parental Relationship or Enforce Support Obligations.** In a

proceeding to determine parental relation under *Fam Code § 7600 et seq.* (Uniform Parentage Act), the county in which the child resides is the proper county for the trial of the action [*CCP § 395(a)*]. In a proceeding to enforce an obligation of support under *Fam Code § 3900* (civil suit on behalf of child to enforce parents' obligations), or to establish and enforce a foreign judgment or court order for the support of a minor child, the county in which the child resides is the proper county for the trial of the action [*CCP § 395(a)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureVenueIndividual DefendantsCivil ProcedureVenueSpecial Venue



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### 6.36 Venue in Local Actions.

**6.36[1] In Local Actions, Location of Property Controls.** In the following types of actions, the county in which some or all of the real property that is the subject of the action is situated is the proper county for trial [CCP § 392(a)]:

- An action for the recovery of real property, or an estate or interest therein;
- An action for a determination in any form of a right or interest in real property;
- An action for injuries to real property;
- An action for the foreclosure of all liens and mortgages on real property.

**6.36[2] Local Classification Turns on Title to or Possession of Real Property.** An action must be wholly local in nature to be governed by CCP § 392(1)(a) [ *Peiser v. Mettler* (1958) 50 C2d 594, 605, 328 P2d 953 ]. An action is local when it turns on title to property as distinct from a personal obligation, and a judgment granting the relief requested will affect title [ *Peiser v. Mettler* (1958) 50 C2d 594, 604, 328 P2d 953 ; *Thielen v. Superior Court* (1963) 219 CA2d 217, 221-222, 33 CR 1 ].

**Example:**

An action that has for its sole and exclusive object the cancellation of a deed or a deed of trust is wholly local in nature [ *Beutke v. Am Sec. Co.* (1955) 132 CA2d 354, 359, 282 P2d 201 ].

**6.36[3] Action Not Local If Title or Possession Is Incidental.** When title to or possession of real property is only incidentally involved in an action, the action is not local [ *Marcacci v. Cont'l Baking Co.* (1962) 202 CA2d 224, 226, 20 CR 567 ]. This distinction is most clearly established when the main relief sought consists of a money judgment.

**Examples:**

An action for specific performance of a contract for the sale of realty is not local if it is brought by the seller, since the seller merely seeks the purchase price. Conversely, if the buyer brings the action, it is local because the buyer seeks possession of the property [ *Hammon v. Am. Exploration and Mining Co.*

(1962) 203 CA2d 306, 309, 21 CR 409 ].

Similarly, an action for damages for deceit in inducing a buyer to purchase real property, rather than for rescission and restitution resulting in reconveyance, is not a local action [ *Kaluzok v. Brisson* (1946) 27 C2d 760, 763-764, 167 P2d 481 ; but see *Etter v. Vollmer* (1956) 139 CA2d 718, 720, 294 P2d 55 (action for fraud with respect to conveyance of real property local if buyer seeks to reobtain title)].

**Compare:**

The fact that a complaint seeks a money judgment does not necessarily mean the action is not local, if the judgment is predicated on damages to real property [ *Strosnider v. Pomin* (1939) 32 CA2d 103, 109, 89 P2d 179 ; see CCP § 392(a)(1)].

**Example:**

A complaint in an action to foreclose a mechanic's lien on real property may also seek a personal judgment for the amount of the debt secured by the lien without removing the action from CCP § 392(a)(2). As long as the complaint also alleges that the defendants against whom the personal judgment is sought have an interest in the property, and that the interest is subject to the lien, the action is still one to foreclose a lien; therefore, it must be tried in the county in which the real property is situated [ *Case v. Kirkwood* (1931) 119 CA 207, 211, 6 P2d 110 ].

 **Cross Reference:**

Discussion of characterization of relief sought and "main relief" rule, see 6.34[2].

**6.36[4] Injury to Real Property Is Broadly Construed.** For venue purposes, the phrase "injury to real property" is not limited to physical injury to or interference with land [see CCP § 392(a)(1)]. It embraces every wrong that in legal contemplation is an injury to real property, including actions for damage to buildings affixed to real property based on construction defects [see *Found. Eng'rs, Inc. v. Superior Court* (1993) 19 CA4th 104, 111-113, 23 CR2d 469 ]. It includes not only direct and forcible injury, but also consequential and threatened injuries to land. It even includes nonfeasance, such as permissive waste [ *Coley v. Hecker* (1928) 206 C 22, 28, 272 P 1045 ; *Strosnider v. Pomin* (1939) 32 CA2d 103, 108, 89 P2d 179 ].

**Example:**

Where a plaintiff sought damages because he was fraudulently compelled to dismiss a separate action to quiet title to a right of way, and the defendant thereafter erected an obstruction on the right of way, the injury to the real property represented by the obstruction was a consequential injury resulting from the defendant's fraud, and plaintiff's action for damages was local under CCP § 392(a)(1) [ *Strosnider v. Pomin* (1939) 32 CA2d 103, 108-109, 89 P2d 179 ].

**Compare:**

Slander of title is also considered an indirect and consequential injury to real property [ *Wick v. Mattison* (1962) 207 CA2d 608, 610, 24 CR 677 ; see also *Coley v. Hecker* (1928) 206 C 22, 26, 28, 272 P 1045 (action is one in which determination of rights or interest in title is properly adjudicated)]. Similarly, a malicious prosecution action for damages has been found to be an action for injury to real property when it flows from an unfounded action to set aside a trustee's sale on the false ground that there was no default under a trust deed [ *Wick v. Mattison* (1962) 207 CA2d 608, 609-610, 24 CR 677 ].

**6.36[5] Unlawful Detainer Actions Require Verified Complaint or Affidavit Showing Action Filed in Proper Place.** Actions for unlawful detainer are local actions, governed by CCP § 392 [ *Childs v. Eltinge* (1973) 29 CA3d 843, 851, 105 CR 864 ]. In an unlawful detainer action, the plaintiff must state facts in a verified complaint or concurrently filed affidavit, stating facts showing that the action has been commenced in the proper superior court and court location [CCP § 396a]. When filed with the complaint, a copy of the affidavit must be served with the summons [CCP § 396a];



*see also CCP § 1161* (defining unlawful detainer)].

The proper court location for trial of an unlawful detainer proceeding is the location where the court tries that type of proceeding that is nearest or most accessible to where some or all of the real property is situated, or otherwise as designated by the court [*CCP § 392(b)*].



**Warning:**

If a plaintiff fails to file the required affidavit or a verified complaint, no further proceedings may occur except the dismissal of the action without prejudice [*CCP § 396a(a)*].

**Exception:**

The court may, on terms that are just, permit the affidavit to be filed subsequent to the filing of the complaint, and a copy of the affidavit must be served on the defendant. The time to answer or otherwise plead will date from that service [*CCP § 396a(a)*].



**Cross References:**

Discussion of pleading requirements in unlawful detainer actions, see Ch. 7, Complaints; and Ch.14, Answers.

Forms and discussion of venue in unlawful detainer actions, see Matthew Bender(R) Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer; California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Actions (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial Venue



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**6.37 In Actions for Recovery of Penalty or Forfeiture, or Against Public Officers, Venue Proper Where Cause Arose.**

**6.37[1] Actions for Recovery of Penalty or Forfeiture Imposed by Statute.** The county in which some or all of the causes of action arose is the proper venue for an action to recover a penalty or forfeiture imposed by statute [*CCP* § 393(a)].

If the penalty or forfeiture is imposed for an offense committed on a lake, river, or other stream of water situated in two or more counties, the action may be tried in any county bordering on the lake, river, or stream, and opposite to the place where the offense was committed. Within such counties, the proper place for trial is the court nearest to the place where the offense was committed [*CCP* § 393(a)].

**6.37[2] Actions Against Public Officers.** In any action against a public officer or person especially appointed to execute the duties of a public officer, for an act done by him or her by virtue of his or her office, or against a person who, by his or her command or in his or her aid, does anything touching the duties of an officer, venue is proper where the cause of action arose [*CCP* § 393(b); *Colusa Air Pollution Control Dist. v. Superior Court* (1991) 226 CA3d 880, 887-888, 277 CR 110 ].

A "public officer" in this context is not restricted to an individual. Absent a statutory designation of an administrative or enforcement officer, the term "public officer" also includes state agencies, departments, institutions, boards, or other public entities. This is the case even if an entity's individual members are not "public officers," as long as the members collectively constitute the entity [see *Regents of Univ. of Cal. v. Superior Court* (1970) 3 C3d 529, 537-538, 91 CR 57, 476 P2d 457 ; see also *Sutter Union High Sch. Dist. v. Superior Court* (1983) 140 CA3d 795, 797, 190 CR 182 (governing board of school district is a "public officer")].

*CCP* § 393(b) only applies to actions taken, that is, acts done as distinguished from acts threatened [ *California State Parks Foundation v. Superior Court* (2007) 150 CA4th 826, 834, 58 CR3d 715 ]. The language in the statute does not expressly or impliedly limit its purview to actions seeking to vindicate private, as opposed to public, rights [ *California State Parks Foundation v. Superior Court* (2007) 150 CA4th 826, 834-835, 58 CR3d 715 (rule applied to action on public right)].

**Example:**

*CCP § 393(b)* would apply in an action against a state agency that deprives the plaintiff of his or her right to do business, and the county where the plaintiff carries on the business and in which he or she will be hurt by the agency's action is the proper county for trial [ *Regents of Univ. of Cal. v. Superior Court* (1970) 3 C3d 529, 538, 91 CR 57, 476 P2d 457 ; see *Colusa Air Pollution Control Dist. v. Superior Court* (1991) 226 CA3d 880, 888, 277 CR 110 ].

**Compare:**

Where a petitioner sought a writ of prohibition to restrain a state board from taking further action, *CCP § 393(b)* did not apply [ *Harris v. Alcoholic Beverage Control Appeals Bd.* (1961) 197 CA2d 759, 768, 18 CR 151 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureVenuePublic OfficialsCivil ProcedureVenueSpecial Venue



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**6.38 Proper Venue in Actions Against Individuals in Representative Capacities Is County Having Jurisdiction Over Estate.**

Except as otherwise provided in *Prob Code* § 17005 (venue for proceedings brought under the Trust Law), when a defendant is sued in an official or representative capacity as executor, administrator, guardian, conservator, or trustee on a claim for the payment of money or for the recovery of personal property, the county having jurisdiction over the estate is the proper county for trial [*CCP* § 395.1; see *Prob Code* § 15000 et seq. (Trust Law)].

In this context, the word "claim" does not have any technical meaning. It is commonly defined to mean simply a demand for something rightfully or allegedly due. Therefore, application of *CCP* § 395.1 is not limited only to suits on rejected creditors' claims [see, e.g., *Metzger v. Silverman* (1976) 62 CA3d Supp 30, 36-37, 133 CR 355 ].

**Example:**

An action against an administratrix and her attorney for the value of tax services performed for an estate is properly brought in the county that has jurisdiction over the estate [ *Metzger v. Silverman* (1976) 62 CA3d Supp 30, 36-37, 133 CR 355 ].

**➡ Cross Reference:**

Discussion of proceedings under the Trust Law, see California Forms of Pleading and Practice, Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureVenueAgentsCivil ProcedureVenuePublic Officials



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### 6.39 Venue in Actions Against Domestic Corporations.

**6.39[1] Transitory Action May Be Brought Where Cause of Action Arose or at Corporation's Principal Place of Business.** Subject to the court's power to change the place of trial [see *CCP* §§ 392-402], a corporation may be sued in a transitory action in the county where [*CCP* § 395.5]:

- The contract was made;
- The contract was to be performed;
- The obligation or liability arose;
- The breach occurred; or
- The corporation's principal place of business is situated.

These five bases for establishing venue have been construed more generally as permitting trial in:

- The place where the cause of action arose; or
- The corporation's principal place of business.

This rule allows wider venue than is afforded in actions against individuals, by allowing a corporate defendant to be sued other than in its principal place of business (considered to be its "residence") [see *CCP* §§ 395(a), 395.5; *Mission Imports, Inc. v. Superior Court* (1982) 31 C3d 921, 928, 184 CR 296, 647 P2d 1075 ; *Jhirmack Enters., Inc. v. Superior Court* (1979) 96 CA3d 715, 723-724, 158 CR 192 ; *Hale v. Bohannon* (1952) 38 C2d 458, 476, 241 P2d 4 ].



#### Cross References:

Discussion of transitory actions, see 6.35.

Discussion of how *CCP* § 395(a) may determine venue in actions in which corporate and individual

defendants are joined, see 6.42[5].

#### **6.39[2] Terms of CCP § 395.5 Relate to Contract, Tort, and Statutory Actions.**

**6.39[2][a] Contract Cause of Action Arises Where Contract Made or to Be Performed.** A contract is "made," and contractual obligations generally arise, where the last act necessary to the contract's validity, usually the act constituting acceptance, occurs [ *Braunstein v. Superior Court* (1964) 225 CA2d 691, 696-697, 37 CR 666 ]. The place of performance of a contract is generally also where the breach occurs [ *Hale v. Bohannon* (1952) 38 C2d 458, 479, 241 P2d 4 ].

Thus, a contract cause of action generally will be found to have arisen either where the contract was made or to be performed, which place, in some cases, might also be the corporation's principal place of business [see *Mission Imports, Inc. v. Superior Court* (1982) 31 C3d 921, 928, 184 CR 296, 647 P2d 1075 ; *Hale v. Bohannon* (1952) 38 C2d 458, 479, 241 P2d 4 ; *Jhirmack Enters., Inc. v. Superior Court* (1979) 96 CA3d 715, 724, 158 CR 192 ].

#### **Distinguish:**

Unlike the general statute addressing venue in contract actions [see CCP § 395(a)], CCP § 395.5 does not require a special contract in writing to establish venue where the contract was to be performed; where no place of performance is expressly stated, a corporation's contract will be held performable in the place where the circumstances, viewed in light of pertinent code provisions, indicate the parties expected or intended it to be performed [ *Burr v. W. States Life Ins. Co.* (1931) 211 C 568, 574, 296 P 273 ].

#### **Example:**

*Com Code* § 2319(1)(a) indicates that in certain f.o.b. shipments, a seller completes delivery and no longer bears the risk when it places goods in the possession of a carrier at the place of shipment. Thus, the place of performance is established, by application of a statute rather than contract provision, as being the county from which shipment is being made, and not the county in which the shipment is to be delivered to the buyer [see *Jhirmack Enters., Inc. v. Superior Court* (1979) 96 CA3d 715, 723-724, 158 CR 192 ].

**6.39[2][b] Tort Actions May Be Brought Where Liability Arises.** Although CCP § 395.5 appears to be addressing contract actions, it also governs actions sounding in tort [ *Mission Imports, Inc. v. Superior Court* (1982) 31 C3d 921, 928, 184 CR 296, 647 P2d 1075 ]. Tort claims against a corporation may be tried in any county in which the liability arises [CCP § 395.5].

#### **Example:**

In an action for wrongful interference with contractual relations when the cause of action is based on an intimidating letter sent to persons in several counties, venue is properly laid in any of the counties in which the plaintiff suffered injury resulting from the letters [ *Mission Imports, Inc. v. Superior Court* (1982) 31 C3d 921, 928-929, 184 CR 296, 647 P2d 1075 ].

**6.39[2][c] Statutory Action May Be Brought Where Liability or Obligation Arises.** Statutory actions may be brought where the liability or obligation arises, and the defendant need not perform any act inside the county to permit venue there as long as the obligation arises there [ *Black Diamond Asphalt, Inc. v. Superior Court* (2003) 109 CA4th 166, 171-174, 134 CR2d 510 ].

#### **Example:**

A statutory action by a third party against an insurer may be commenced in the county where the third party files suit because that is where the insurer's liability arises [ *Black Diamond Asphalt, Inc. v. Superior Court* (2003) 109 CA4th 166, 171-174, 134 CR2d 510 ].

**6.39[3] Alter Ego Allegation Allows Venue to Be Based on Corporate or Individual Defendant.** In an action

for breach of contract, an alter ego allegation places the individual in the same position as the corporation, as a party to the contract, and venue is proper where the action could be brought against either the individual or corporate defendant [ *Lebastchi v. Superior Court* (1995) 33 CA4th 1465, 1467, 39 CR2d 787 ]. If there is only one cause of action alleged against the individual and corporation, the suit does not constitute a "mixed action," which could be transferred to the individual defendant's county of residence [ *Lebastchi v. Superior Court* (1995) 33 CA4th 1465, 1470, 39 CR2d 787 (denying change of venue from San Diego County, where corporation entered, performed, and breached contract, to Placer County, where individual defendant lived)].

**Cross Reference:**

Discussion of the effect of having a "mixed action," see 6.42.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Venue Corporations



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**6.40 In Some Cases, Foreign Corporations May Invoke Venue Rules Applicable to Domestic Corporations; Otherwise, Venue Proper in Any County.**

A foreign corporation that establishes it has qualified to do business in California under *Corp Code* § 2105 may invoke the venue rules of *CCP* § 395.5 in the same manner as a domestic corporation [see *Easton v. Superior Court* (1970) 12 CA3d 243, 246, 90 CR 642 (decided under former *Cal Const*, art XII, § 16, now *CCP* § 395.5, and former *Corp Code* § 6403, now *Corp Code* § 2105)].

The foreign corporation's principal place of business in California will be designated in the corporation's statement filed with the Secretary of State, under *Corp Code* § 2105 [ *Bohn v. Better Biscuits, Inc.* (1938) 26 CA2d 61, 64, 78 P2d 1177 (decided under former *CC* § 405, now *Corp Code* § 2105)].

**Compare:**

A foreign corporation that does not establish it has qualified to do business in California under *Corp Code* § 2105 may be sued in any county in the state [ *Easton v. Superior Court* (1970) 12 CA3d 243, 246-247, 90 CR 642 ].

**► Cross References:**

Discussion of venue rules under *CCP* § 395.5, see 6.39.

Forms and discussion of qualification under *Corp Code* § 2105, see California Forms of Pleading and Practice, Ch. 160, Corporations: Capacity (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Venue Corporations





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**6.40A Venue in Actions Against Limited Liability Companies.**

The statute governing venue for corporations and associations, *CCP* § 395.5, does not expressly state that this section is applicable to limited liability companies [*see Corp Code* § 17000 *et seq.*]. However, the term "association" may be broadly interpreted to include limited liability companies within the scope of *CCP* § 395.5 [*see, e.g., Buran Equipment Co. v. Superior Court* (1987) 190 CA3d 1662, 1665-1666, 236 CR 171 (law partnership treated as "association" under related statute)]; and the provision of *CCP* § 395.5 and cases interpreting it would likely apply to limited liability companies.

Note that *CCP* § 395.5 provides for additional venue "[i]n the county where the principal place of business of such corporation is situated ... ." One court has interpreted this alternative to lay venue did not apply to unincorporated associations because the clause only states "corporation" by its own terms [*see Mosby v. Superior Court* (1974) 43 CA3d 219, 225, 117 CR 588 ]. However, venue for an unincorporated association is the same as a corporation if the unincorporated association has filed a statement with the Secretary of State designating its principal office in California [*CCP* § 395.2]. Given that a limited liability company must file articles of organization with the Secretary of State [*see Corp Code* § 17050], it is probable that a limited liability company will be treated like a corporation for venue purposes, but clarification of this issue awaits a judicial decision or amendments to the Code of Civil Procedure and/or Corporations Code.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureVenueCorporations



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**6.41 Venue in Actions Against Unincorporated Associations.**

An unincorporated association is an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not [*Corp Code* § 18035(a)]. However, joint tenancy, tenancy in common, community property, or other forms of property tenure does not by itself establish an unincorporated association, even if coowners share ownership of the property for a common purpose [*Corp Code* § 18035(b)]. Similarly, marriage or the creation of a registered domestic partnership does not by itself establish an unincorporated association [*Corp Code* § 18035(c)]. An action may be brought against an unincorporated association in any county where [*CCP* § 395.5]:

- The contract was made;
- The contract was to be performed;
- The obligation or liability arose; or
- The breach occurred.

**Compare:**

The provision in *CCP* § 395.5, permitting venue in a *corporation's* principal place of business, does not apply to unincorporated associations.

**Exception:**

If an unincorporated association has filed a statement with the Secretary of State pursuant to *Corp Code* § 18200, venue is the same as it would be if the unincorporated association were a corporation, and the county of its principal place of business would be a proper county for venue [*CCP* § 395.2; *see CCP* § 395.5]. While partnerships may no longer file new statements as unincorporated associations with the Secretary of State under *Corp Code* § 18200 [*Corp Code* § 18055(c)], statements properly filed under former *Corp Code* § 24003 remain subject to *Corp Code* § 18200 until they expire or are revoked [*Corp Code* § 18200(g)]. In determining that county, the association's principal place of business will be deemed to be its principal office in California, listed in the statement filed with the Secretary of State [*CCP* § 395.2; *see also CCP* § 395.5]. If an unincorporated association has no principal place of business, venue is proper in the county where any member of the association resides [ *Mosby v.*

*Superior Court (1974) 43 CA3d 219, 229 n7, 117 CR 588 ].*



**Cross Reference:**

Forms and discussion of the effect of former *Corp Code* § 24003 statements on venue in actions against partnerships, see California Forms of Pleading and Practice, Ch. 402, Partnerships: Actions Between General Partners or Partnership and Third Parties (Matthew Bender).



**Strategic Point--Individual Defendants:**

When a plaintiff brings an action against several defendants, including both individuals and unincorporated associations, in a county that is neither the residence nor principal place of business of any defendant, the individual defendant has the right, on a proper showing, to a change of venue to the county of his or her residence, even if venue as initially laid may otherwise be justifiable on one of the four alternative grounds in *CCP* § 395.5 [ *Mosby v. Superior Court (1974) 43 CA3d 219, 226, 117 CR 588 ; CCP § 395(a)*].

**Compare:**

When an action is brought in the county in which an individual partner resides, rather than in the county specified as the partnership's principal place of business, the individual partners have no right to a change of venue to the location of the partnership's office [ *Buran Equip. Co. v. Superior Court (1987) 190 CA3d 1662, 1666-1667, 236 CR 171 ].*

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureVenueCorporations



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Chapter 6 Determining Forum  
V. SELECTING THE VENUE FOR TRIAL

1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.42

**6.42 Venue in Actions Involving Multiple Defendants or Causes of Action.**

**6.42[1] Multiple Causes of Action or Defendants May Create a Mixed Venue Action.** Mixed venue actions exist when a plaintiff alleges two or more causes of action, each of which is governed by a different venue statute, or names two or more defendants, who are subject to different venue standards [ *Brown v. Superior Court* (1984) 37 C3d 477, 488, 208 CR 724, 691 P2d 272 ; *see also* *Gallin v. Superior Court* (1991) 230 CA3d 541, 544, 281 CR 304 ].

**Distinguish:**

Cases in which there is only one cause of action, but which seek different forms of relief, are not mixed venue actions but, rather, call for application of the main relief rule [ *see* *Smith v. Smith* (1891) 88 C 572, 576, 26 P 356 ].

➡ **Cross Reference:**

Discussion of main relief rule, *see* 6.34[2].

**Distinguish:**

In a case where the complaint set forth only one cause of action, but based it on several different legal theories, labeled as separate causes of action, the court held there were not separate causes of action, but alternative methods of pleading the plaintiffs' right to recover. Because the plaintiffs had alleged only one wrong, the main relief rule was applied [ *Peiser v. Mettler* (1958) 50 C2d 594, 605, 328 P2d 953 ].

**6.42[2] In Mixed Venue Actions, Motion for Change of Venue Must Be Granted If Defendant Entitled to Transfer on Any Cause of Action.** When two or more inconsistent venue provisions apply in the same case, a defendant's motion for change of venue must be granted if that defendant is entitled to a change of venue on any one cause of action [ *see* *Capp Care, Inc. v. Superior Court* (1987) 195 CA3d 504, 508, 241 CR 741 ].

**Example:**

Involuntary dissolution of a corporation is a local action, for which the proper venue is the county in which the corporation maintains its principal office. Thus, in an action for involuntary dissolution of a corporation, the corporation was entitled to have venue changed to the county in which it maintained its principal office, even though venue was proper as to nine other causes of action [ *Capp Care, Inc. v.*

*Superior Court* (1987) 195 CA3d 504, 508, 241 CR 741 ].

When a complaint states multiple causes of action, a corporate defendant that is entitled to a change of venue as to one cause of action is entitled to a transfer of the entire action [ *Jhirmack Enters. v. Superior Court* (1979) 96 CA3d 715, 720, 158 CR 192 ; *Sanborn v. Pomona Pump Co.* (1933) 131 CA 241, 244, 21 P2d 124 ].

**6.42[3] When Transitory and Local Actions Are Joined, Action Will Be Treated As Transitory.** When transitory and local causes of action are joined in a single complaint, the general rule is that the action will be regarded as transitory for determining the place of trial, and the defendant will be entitled to have the case transferred to the county of his or her residence [ *Peiser v. Mettler* (1958) 50 C2d 594, 605, 328 P2d 953 ; *see also Smith v. Smith* (1891) 88 C 572, 576-577, 26 P 356 ; *Channell v. Superior Court* (1964) 226 CA2d 246, 251, 38 CR 13 ].



#### Cross References:

Discussion of local and transitory actions, see 6.34.

Discussion of permissive joinder of actions generally, see California Forms of Pleading and Practice, Ch. 123, Complaints and Cross Complaints (Matthew Bender).

**6.42[4] Plaintiff May Commence Action in County Where Any Defendant Resides.** When there are several defendants who reside in different counties, the plaintiff may commence the action in a county where any one of the defendants resides [ *Taff v. Goodman* (1940) 41 CA2d 771, 776, 107 P2d 431 ; *CCP § 395(a)*]. Thus, a defendant is not entitled to have an action removed to the county of his or her residence unless it appears that none of the other defendants are residents of the county where the action was brought. Even when all of the defendants join in a demand for a change of venue, the case will not be transferred if the complaint attempts, in apparent good faith, to state a cause of action against a defendant who resides in the county where the action was commenced [ *Monogram Co. v. Kingsley* (1951) 38 C2d 28, 30, 237 P2d 265 ].

#### Example:

A cross-defendant may not obtain a change of venue to the county in which he or she resides if proper venue of that case is established under the complaint in a county in which any defendant resides [ *K.R.L. P'ship v. Superior Court* (2004) 120 CA4th 490, 498 ].

#### Distinguish:

A plaintiff cannot join as a defendant one who is not a real party in interest, merely to obtain trial in the county of that defendant's residence [ *see CCP § 395(a)*; *Neet v. Holmes* (1942) 19 C2d 605, 612, 122 P2d 557 ]. The test to determine whether the resident defendant has been joined solely for the purpose of having the action tried in the county of his or her residence is whether, based on an examination of pleadings, it appears the plaintiff pleaded a cause of action against him or her in good faith [ *Russello v. Mori* (1957) 153 CA2d 828, 830, 315 P2d 343 ; *Taff v. Goodman* (1940) 41 CA2d 771, 776, 107 P2d 431 ]. A purported cause of action stated in the pleadings against the defendant, apparently in good faith, is sufficient proof if it is not so defective as to be beyond correction by amendment [ *Russello v. Mori* (1957) 153 CA2d 828, 830, 315 P2d 343 ; *see also Taff v. Goodman* (1940) 41 CA2d 771, 776, 107 P2d 431 ].



#### Cross Reference:

Discussion of joinder of parties generally, see Ch. 5, Parties.

**6.42[5] General Rules Apply Whether Individual or Corporate Defendants Are Joined.** The general rules governing the effect of joinder of defendants on venue apply whether the defendants are individuals or corporations. A plaintiff may fix venue at the residence of either the individual or the corporation in an action against both, as long as

the joinder is proper under the joinder statutes [ *Dillman v. Superior Court* (1962) 205 CA2d 769, 772, 23 CR 498 ; CCP § 395(a)].

**Example:**

When a corporation and an individual are properly joined as defendants, and the action is commenced in a county where the corporation has its principal place of business, but which is not the county in which the individual defendant resides, the individual defendant may not have the action moved to the county of his or her residence because the preference for residence venue under CCP § 395(a) is satisfied when venue is laid in a corporation's "residence," which is its principal place of business [see CCP § 395(a); see also *Hale v. Bohannon* (1952) 38 C2d 458, 472-473, 241 P2d 4 ; *McClung v. Watt* (1922) 190 C 155, 158-159, 211 P 17 ].

**Distinguish:**

If an action is commenced in a county that, although proper as to the corporate defendant, under one of the transaction-based venue provisions of CCP § 395.5 (county where contract made or to be performed, where obligation or liability arose, or where breach occurred), is not a proper venue for the individual defendant, the individual defendant is entitled to have the venue changed to the county where he or she resides [CCP § 395(a); *State of Cal. v. Superior Court* (1967) 252 CA2d 637, 642-643, 60 CR 653 ; see also *Walker v. Wells Fargo Bank & Union Trust Co.* (1937) 24 CA2d 220, 222-223, 74 P2d 849 (decided under former Cal Const, art XXI, § 16)].

 **Cross Reference:**

Discussion of venue relating to corporate defendants generally, see 6.39.

**6.42[6] When State and Corporate Defendants Are Joined in Personal Injury Actions, Venue Provisions of Gov Code § 955.2 Controls.** When a plaintiff joins the state and a corporation as defendants in an action for personal injuries, the venue provisions in *Gov Code* § 955.2 takes precedence, and the plaintiff waives the procedural rights granted by CCP § 395.5 [ *State v. Superior Court of Los Angeles County* (1967) 252 CA2d 637, 643, 60 CR 653 ].

 **Cross Reference:**

Discussion of venue in actions involving the state or state agencies generally, see 6.43[1], [2].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureVenueIndividual DefendantsCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenueSpecial Venue



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1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.43

### 6.43 Venue in Actions by or Against Government Entities.

#### 6.43[1] Venue in Actions Against the State.

**6.43[1][a] General Venue Rules Apply Unless Another Statute Addresses Venue.** Unless otherwise designated by statute, the provisions for venue that pertain to other civil actions apply to actions against the state and its agencies [ *Regents of Univ. of Cal. v. Superior Court* (1970) 3 C3d 529, 534-535, 91 CR 57, 476 P2d 457 ; see, e.g., CCP §§ 392, 393, 395 (general venue provisions)]. There are, however, several statutes governing actions against state agencies, officers, or public entities, which operate to override the general venue rules.

#### Examples:

Declaratory actions to establish nonresident tax status can be commenced only in Sacramento, San Francisco, or Los Angeles [CCP § 1060.5]. Inverse condemnation actions against the state must be brought in the county in which the property is situated [Gov Code § 955]. Actions against public officers should be brought where the cause of action, or some part thereof, arose [CCP § 393(b); see also *Tharp v. Superior Court* (1982) 32 C3d 496, 500-503, 186 CR 335, 651 P2d 1141 ].

**6.43[1][b] Actions for Money or Damages May Be Transferred on Demand of Attorney General.** In most actions against the state for money or damages, for which filing of a claim is a statutory prerequisite or specifically exempted (see Gov Code §§ 905, 905.1, 905.2, 905.7), the place of trial will be changed to Sacramento County on written demand by the Attorney General on or before answering [Gov Code § 955; but see Gov Code §§ 955.2, 955.3 (exceptions in actions for death or personal injury, or where local government entity is plaintiff)].

#### Distinguish:

Whenever any law of California provides that an action or proceeding against the state or any state department, institution, board, commission, bureau, officer, or other agency shall or may be commenced in, tried in, or removed to the County of Sacramento, the case may be commenced and tried in any city or city and county of California in which the Attorney General has an office, that is, San Francisco, Los Angeles County, or Sacramento County [CCP § 401(1); *Harris v. Alcoholic Beverage Control Appeals Bd.* (1961) 197 CA2d 759, 762, 18 CR 151 ].

 **Cross References:**

Discussion of general venue rules in transitory and local actions, see 6.35, 6.36.

Forms and discussion of claim filing requirements in actions against the state and local public entities, see California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers: California Tort Claims Act (Matthew Bender).

**6.43[1][c] Proper Venue in Actions for Death or Injury to Person or Personal Property Is County Where Injury Occurred.** When the state is named as a defendant in any action or proceeding for death or injury to person or personal property that occurred within the state, venue is proper in the county where the injury occurred [*Gov Code* § 955.2].

**Exception:**

The court may, on motion, change the place of the trial in the same manner and under the same circumstances as the place of trial may be changed where an action is between private parties [*Gov Code* § 955.2; see, e.g., *CCP* § 397 (change of venue motions)].

**6.43[1][d] Actions by City, County, or Local Agency Against State.** When a city, county, city and county, or local agency ("local government entity") is a plaintiff in an action or proceeding against the state, the action may be tried in any city or county where the local government entity is situated [*Gov Code* § 955.3].

**Exception:**

On behalf of the State of California and before answering, the Attorney General may move, under *CCP* § 397, to change the place of trial to Sacramento County, San Francisco County, or Los Angeles County [*Gov Code* § 955.3; *CCP* § 401 (allowing actions to be moved to any city or city and county in which the Attorney General has an office)].

In this context, "local agency" means any governmental district, board or agency, or any other local governmental body or corporation or elected local public official, but shall not include the state or any of its agencies, departments, commissions, or boards, or elected public officials in the state's executive branch [*Gov Code* § 955.3].

 **Cross Reference:**

Discussion of actions by or against local government entities, see 6.43[3].

**6.43[2] Actions by the State May Be Transferred on Defendant's Motion.** Whenever any law of California provides that the state or any state department, institution, board, commission, bureau, officer, or other agency shall or may commence an action or proceeding in Sacramento County, on motion of the defendants or some of them, the case must be removed for trial to the county or city and county in which the Attorney General has an office nearest to the county in which the defendants or some of them reside or have their principal office in California [*CCP* § 401(2)].

**6.43[3] Actions Involving Local Government Entities.**

**6.43[3][a] Action Against City, County, or Local Agency May Be Tried in Defendant County Unless Plaintiff Is Another Local Government Entity.** An action or proceeding against a city, county, city and county ("city/county"), or local agency may be tried in the county or city/county in which that local government entity is situated [*CCP* § 394(a)]. In this context, a "local agency" is any governmental district, board or agency, or any other local governmental body or corporation not including the State of California or any of its agencies, departments, commissions or boards [*CCP* § 394(b)].

**Exception:**

If the action or proceeding is brought by another local government entity, it must be tried in a neutral



county, which would be any county that is not a party to the action or in which either party is situated [CCP § 394(a); see *Westinghouse Elec. Corp. v. Superior Court* (1976) 17 C3d 259, 267-268, 131 CR 231, 551 P2d 847; see also *San Francisco Found. v. Superior Court* (1984) 37 C3d 285, 296, 208 CR 31, 690 P2d 1; *City of Stockton v. Wilson* (1926) 79 CA 422, 424, 249 P 835 ].

Thus, a plaintiff, other than a local government entity, is permitted to file and proceed to trial in an action or proceeding against a local government entity in the defendant county [ *Fitzpatrick v. Sonoma County* (1929) 97 CA 588, 591, 276 P 113; CCP § 394(a)].

**6.43[3][b] Cases Are Subject to Transfer to Neutral County.** Actions involving local government entities are subject to CCP § 394, which operates as a removal statute, providing for the transfer of an action by or against a local public entity to a neutral county, to avoid local bias [ *County of Riverside v. Superior Court* (1968) 69 C2d 828, 830-831, 73 CR 386, 447 P2d 626; *Fin. & Constr. Co. v. Sacramento* (1928) 204 C 491, 493, 269 P 167; see also *San Francisco Found. v. Superior Court* (1984) 37 C3d 285, 296, 208 CR 31, 690 P2d 1 ].

The statute operates when an action, to which a local government entity is a party, is pending in a county that is otherwise proper under venue rules [ *County of San Bernardino v. Superior Court* (1994) 30 CA4th 378, 381, 388-389, 35 CR2d 760; *Dorame v. Superior Court* (1978) 81 CA3d 70, 72, 146 CR 162 ]. Thus, venue statutes that specify the proper counties for the initial filing of actions (e.g., CCP §§ 392, 393, and 395), are subject to the court's power to transfer under CCP § 394 [ *County of Riverside v. Superior Court* (1968) 69 C2d 828, 831, 73 CR 386, 447 P2d 626 ].

**Example:**

This transfer statute modifies the venue rules in local actions, such that an eminent domain proceeding properly brought in the county where the property sought to be taken is located may be transferred to a neutral county on a motion by the plaintiff county [ *City of Stockton v. Ellingwood* (1926) 78 CA 117, 121, 248 P 272; see *City of Stockton v. Wilson* (1926) 79 CA 422, 424-425, 249 P 835; see CCP § 1250.020].

When transfer is indicated, the trial court will select the neutral county to which a case will be transferred [ *Cent. Contra Costa Sanitary Dist. v. Superior Court* (1978) 84 CA3d 702, 706, 148 CR 801 ].

 **Cross Reference:**

Discussion of venue in transitory actions, see 6.35, and local actions, see 6.36.

**Compare:**

The California appellate court districts disagree over whether CCP § 394, which refers specifically only to plaintiffs and defendants, applies to cross-complainants and cross-defendants [see, e.g., *Ohio Cas. Ins. Group v. Superior Court* (1994) 30 CA4th 444, 450-451, 35 CR2d 771 (Third Dist.; criticizing and declining to follow *City of Chico v. Superior Court* (1979) 89 CA3d 187, 152 CR 380 (First Dist., Div. Four)); *Kennedy/Jenks Consultants, Inc. v. Superior Court* (2000) 80 CA4th 948, 955-956, 95 CR2d 817 (First Dist., Div. Five; following Third Dist.); *Metropolitan Transit System v. Superior Court* (2007) 153 CA4th 293, 302, 62 CR3d 517 (Fourth Dist., Div. One; following Third Dist.)].

**6.43[3][c] Government Entity's Role in Action Determines Whether CCP § 394 Applies.** Whether an action is brought by a local government entity within the meaning of CCP § 394 depends on the role of the government entity in the lawsuit [see *Transamerica Homefirst, Inc. v. Superior Court* (1999) 69 CA4th 577, 579-580, 81 CR2d 705 ].

**Examples:**

When a district attorney represents the People of the State of California in a red light abatement action pursuant to *Pen Code* § 11226, the district attorney acts on behalf of the state rather than the county, and the mandatory transfer provisions of CCP § 394(a) do not apply [ *Nguyen v. Superior Court* (1996) 49

*CA4th 1781, 1784, 1786-1791, 57 CR2d 611* ]. Similarly, when a county's public guardian brings an action on behalf of a conservatee, against a nonresident defendant, the action is not brought by a county agency within the meaning of *CCP* § 394, and the action need not be transferred [ *Transamerica Homefirst, Inc. v. Superior Court* (1999) 69 *CA4th* 577, 579-581, 81 *CR2d* 705 ].

**Exception:**

Venue in actions initiated by local child support agencies under *Fam. Code* §§ 17400, 17402, 17404, and 17416 is governed by the venue provision in *Fam Code* § 17400(n) [see *CCP* § 394(a)].

 **Cross Reference:**

Discussion of paternity and child support actions, see *California Forms of Pleading and Practice*, Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*, § 259.153[4][d] (Matthew Bender).

**6.43[3][d] Parties May Stipulate to Place of Trial.** In actions that are subject to *CCP* § 394, the parties may, by stipulation in writing, or made in open court and entered in the minutes, agree on any county for the place of trial [*CCP* § 394(a); *Newman v. County of Sonoma* (1961) 56 *C2d* 625, 627, 15 *CR* 914, 364 *P2d* 850 ].

**6.43[3][e] In Nonjury Cases, Disinterested Judge May Be Assigned in Lieu of Transfer.** When the action or proceeding is one in which a jury is not of right, or if a jury is waived, in lieu of transferring the case, the court in the original county may request the chairman of the Judicial Council to assign a disinterested judge from a neutral county to hear the case and all proceedings in connection with it [*CCP* § 394(a)].

This rule applies despite the presence of another party plaintiff, who has the right to a jury trial, and it is error for the court to deny the governmental entity's motion based on the presence of the nongovernmental party, who is subject to the general venue rules [see *Brennan v. Superior Court* (1994) 30 *CA4th* 454, 460-462, 35 *CR2d* 693 ].

**6.43[4] Specific Transfer Rules for Certain Actions by Local Government Entities.**

**6.43[4][a] Action Against a Resident of, or Corporation Doing Business in, Another City or County Must Be Transferred on Motion of Either Party.** Whenever an action or proceeding is brought by a local government entity within a certain county against a resident of, or a corporation doing business in, another city or county, on motion of either party, the case must be transferred for trial to a neutral county [*CCP* § 394(a); see *Kennedy/Jenks Consultants, Inc. v. Superior Court* (2000) 80 *CA4th* 948, 953-964, 95 *CR2d* 817 ].

**Exception:**

A corporation "doing business" within the forum county might not obtain a transfer when there is a small likelihood of local bias against the corporation [see *San Francisco Found. v. Superior Court* (1984) 37 *C3d* 285, 297-298, 208 *CR* 31, 690 *P2d* 1 ]. When the nature of the case poses a reasonable risk that the defendant would be viewed as an outsider, however, a change of venue under *CCP* § 394(a) is proper [see *San Francisco Found. v. Superior Court* (1984) 37 *C3d* 285, 299, 208 *CR* 31, 690 *P2d* 1 ; *Kennedy/Jenks Consultants, Inc. v. Superior Court* (2000) 80 *CA4th* 948, 963-964, 95 *CR2d* 817 ].

For venue transfer purposes, whether a corporation is "doing business" in the forum county turns on the extent to which the corporation is viewed as an outsider by the community [ *San Francisco Found. v. Superior Court* (1984) 37 *C3d* 285, 298, 208 *CR* 31, 690 *P2d* 1 ; see *Kennedy/Jenks Consultants, Inc. v. Superior Court* (2000) 80 *CA4th* 948, 957-958, 95 *CR2d* 817 ; see also *Westinghouse Elec. Corp. v. Superior Court* (1976) 17 *C3d* 259, 270, 131 *CR* 231, 551 *P2d* 847 ].

 **Cross Reference:**

Definition of "neutral county," see exception in 6.43[3][b].

**6.43[4][b] Personal Injury Actions Against Local Government Entities Must Be Transferred to Defendant County.** Any action or proceeding against a local government entity for injury occurring to person or property within the defendant county, city/county, or county in which the local agency is situated, caused by the alleged negligence of such local government entity, or its agents or employees, must be tried in the defendant county, city/county, or county in which the local agency is situated [*CCP* § 394(a); see also *Ventura Unified Sch. Dist. v. Superior Court* (2001) 92 CA4th 811, 814, 112 CR2d 260 ].

**Example:**

If a plaintiff sues both a county and individual defendants, who reside outside the county, for injuries occurring within the county, *CCP* § 394 requires the suit to be tried in defendant county, even though the general venue statute (see *CCP* § 395) would have permitted trial in the county where the individual defendants reside [ *County of Orange v. Superior Court* (1999) 73 CA4th 1189, 1192-1193, 86 CR2d 923 ].

**Exceptions:**

Despite the mandatory language of *CCP* § 394, a plaintiff may seek and obtain a discretionary change of venue to another county under *CCP* § 397(b) [see *Paesano v. Superior Court* (1988) 204 CA3d 17, 19-20, 250 CR 842 ].

The right to transfer under *CCP* § 394 may be waived if there is unreasonable delay in seeking a change of venue [ *Ventura Unified Sch. Dist. v. Superior Court* (2001) 92 CA4th 811, 815, 112 CR2d 260 (citing *Newman v. County of Sonoma* (1961) 56 C2d 625, 627-628, 15 CR 914, 364 P2d 850 )].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Venue Public Officials Governments Local Governments Claims By & Against Governments State & Territorial Governments Claims By & Against



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**6.44 Moving for Change of Venue in Actions by or Against Local Government Entities.**

**6.44[1] Motions Not Subject to Procedural Requirements of CCP § 396b(a).** The procedural requirements of *CCP § 396b(a)*, governing motions for change of venue generally, do not govern venue transfer motions under *CCP § 394* [ *Channell v. Superior Court* (1964) 226 CA2d 246, 252, 38 CR 13 ].



**Timing:**

*CCP § 394* does not prescribe a time within which a motion for transfer to a neutral county must be made, but courts have held the motion may be made within a reasonable time after the time to answer or bring a counterclaim, and even after a demurrer has been heard and submitted for decision [see, e.g., *Adams v. Superior Court* (1964) 226 CA2d 365, 367-369, 38 CR 164 ]. Nonetheless, the right to a change of venue may be deemed waived for lack of diligence in prosecuting the motion, and if the motion is made after the demurrer has been submitted to the court for decision, the issues of law raised by the demurrer may be decided by the original court [see *Adams v. Superior Court* (1964) 226 CA2d 365, 367-369, 38 CR 164 ].

Generally, however, the motion will not be denied on the ground that it is untimely unless it is pursued for dilatory purposes and unless the government entity can show substantial prejudice [ *Marin Cmty. College Dist. v. Superior Court* (1977) 72 CA3d 719, 723, 140 CR 310 ].

**6.44[2] Moving Party Has Burden of Proof.** The burden of proof justifying a change of venue rests on the moving party [ *City of Los Angeles v. Pac. Tel. & Tel. Co.* (1958) 164 CA2d 253, 260, 330 P2d 888 ]. However, the moving party is not required to show possible prejudice [ *City of Alameda v. Superior Court* (1974) 42 CA3d 312, 317, 116 CR 806 ]. The moving party is only required to show the following:

- That the proceeding was brought in the county in which plaintiff government entity was situated; and
- That the defendant lived in another county.

Once the moving party has met its burden, change of venue to a neutral county is mandatory [*CCP § 394*; see *San*

*Francisco Found. v. Superior Court* (1984) 37 C3d 285, 296-297 208 CR 31, 690 P2d 1 ; *City of Oakland v. Darbee* (1951) 102 CA2d 493, 500, 227 P2d 909 ; *see also* *Ohio Cas. Ins. Group v. Superior Court* (1994) 30 CA4th 444, 452, 35 CR2d 771 (stating in dicta that prejudice is presumed and transfer mandatory unless nonmoving party would suffer actual prejudice from transfer)].



#### **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenuePublic OfficialsGovernmentsLocal GovernmentsClaims By & Against



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**6.45 CHECKLIST: Moving for Change of Venue.**

- ☐ Determine whether a change of venue is necessary or would benefit client.
- ☐ Determine whether venue was proper when/where case filed by analyzing applicable venue statutes.
- ☐ Determine whether any of the following grounds for change of venue apply:
  - ☐ Action not filed in proper court.
  - ☐ Impartial trial cannot be had.
  - ☐ Convenience of witnesses and interests of justice.
  - ☐ No qualified judge available.

**Authority:**  
*CCP § 397*

**Discussion:**  
See 6.47

- ☐ Draft motion for change of venue, supporting declarations and memorandum, and proposed order.



**Timing:**

Simultaneous with answering, demurring, or moving to strike, or without answering, demurring, or moving to strike, within the time allowed to respond to the complaint [*CCP* § 396b(a)].

☐ Serve and file motion:

☐ Follow standard procedures for noticed motions.

**Authority:**

*CCP* §§ 396a, 396b, 397, 398

**Discussion:**

See 6.47, 6.48

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**Forms:**

See 6.65 -6.68



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**6.46 Options and Strategy.**

If the defendant does not agree with the plaintiff's choice venue for a case, the defendant may move for change of venue.



**Strategic Point:**

Consider witness availability, jury pool, costs, time, availability of records, and potential judges. If the defendant's case is adversely affected by plaintiff's choice of venue and a good argument can be made for moving to another California superior court, move for change of venue immediately.

The first step is to seek a stipulation between the parties to change venue. The plaintiff's initial choice may well have been made without knowledge of certain facts. Educate the plaintiff about how a change of venue will benefit all parties involved and make for a more just and speedy resolution. If a stipulation is not forthcoming, move the court to make the change in forum.

The plaintiff's venue choice will be presumed valid, and the defendant will have the burden of showing the original court to be improper under any applicable theory and that the other venue sought is a proper court. Emphasize the fairness of moving the action for all involved, as well as the best use of court resources. If the plaintiff's choice of venue is not supported by the facts, consider requesting attorney fees and expenses. Even if the motion is unsuccessful, the motion may yield insights into the plaintiff's case.





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## 6.47 Grounds for Motion for Change of Venue.

### 6.47[1] Action Commenced in Wrong Court.

#### 6.47[1][a] Defendant May File Motion for Order Transferring Action to Proper Court in Lieu of Answer.

Except as otherwise provided in *CCP* § 396a, if an action or proceeding is commenced in a court other than the court designated as the proper place for trial by *CCP* §§ 392-395.5, the defendant may file a notice of motion for an order transferring the case to the proper court with the clerk of the court, together with proof of service of such papers on adverse parties [*CCP* § 396b(a); see also *CCP* §§ 397(a), 1010; *Otsuka v. Balangue* (1949) 92 CA2d 788, 790, 208 P2d 65; *Bohn v. Bohn* (1913) 164 C 532, 536, 129 P 981 (requirements of *CCP* § 1010 apply)].



#### Strategic Point:

Before proceeding on a motion for transfer order, the parties should first consider entering a stipulation to change venue.



#### Timing:

A defendant seeking a change of venue based on this ground must move for an order transferring the action at the time he or she answers, demurs, or moves to strike, or, at his or her option, without answering, demurring, or moving to strike and within the time otherwise allowed to respond to the complaint [*CCP* § 396b(a)].

On the hearing of a motion for an order transferring an action to the proper court, if it appears the action was not commenced in the proper court, the original court must order the case transferred to the proper court [*CCP* § 396b(a)].

#### Exception:

Actions involving installment or automotive sales, certain consumer obligations, or unlawful detainer are excepted from *CCP* § 396b(a) [see *CCP* §§ 396a, 396b(a)].



#### Cross References:

Form of stipulation and order for change of venue, see *California Forms of Pleading and Practice*, Ch. 571, *Venue*, § 571.105 (Matthew Bender).

Discussion of possible sanctions following motion, see 6.47[1][b].

Form notice of motion, see 6.65.

Form declarations in support of motion, see 6.66, 6.67.

Discussion of selection of transferee court, see 6.53.

**6.47[1][b] Court May Order Payment of Prevailing Party's Expenses and Attorney Fees in Making or Resisting Motion.** In its discretion, the court may order the payment to the prevailing party of reasonable expenses and attorney's fees incurred in making or resisting the motion to transfer [CCP § 396b(b)]. In determining whether an order for expenses and fees will be made, the court must take into consideration:

- Whether an offer to stipulate to change of venue was reasonably made and rejected; and
- Whether the motion or selection of venue was made in good faith, given the facts and law the party making the motion or selecting the venue knew or should have known.

Such sanctions may not be imposed unless there is notice, contained in a party's papers or on the court's own noticed motion, and an opportunity to be heard [CCP § 396b(b)].



**Warning:**

The expenses and fees to be paid to the prevailing party will be the personal liability of the attorney, and are not chargeable to the party [CCP § 396b(b)]. The court may award attorney's fees if, after reviewing the factual and legal presentation made by the losing party, it finds that no reasonable attorney would have honestly chosen the forum, and that it appears to have been selected to impair the defendant's right to defend.

**Reasonable Investigation and Selection of Forum:**

An attorney must carefully investigate the facts of a case to determine which court is proper for bringing an action. If, following a thorough investigation, an attorney has an honest and reasonable belief that his or her client has a tenable contention, and that he or she can provide facts supporting the choice of venue to the court's satisfaction, the investigation and forum selection will likely be considered reasonable [see *Metzger v. Silverman* (1976) 62 CA3d Supp 30, 38-39, 133 CR 355 ; see also *Cacciaguidi v. Superior Court* (1990) 226 CA3d 181, 187, 276 CR 465 ].



**Strategic Point--Prevailing Party:**

If the motion for transfer or the opposition to it is frivolous or otherwise improper, sanctions may also be available under the general provisions of CCP § 128.7.



**Cross References:**

Discussion of sanctions under CCP § 128.7, see Ch. 35, Sanctions.

Discussion of recovery of costs and attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Chs. 24, Costs, and 25, Attorney's Fees.

**6.47[1][c] If Motion for Transfer Order Is Denied, Defendant Is Allowed Time to Plead.** If a motion for change of venue is denied, the court will allow the defendant time to move to strike, demur, or otherwise plead if he or

she has not previously filed a response to the complaint [CCP § 396b(e)].

#### **6.47[2] Impartial Trial Cannot Be Had.**

**6.47[2][a] Party May Move for Change of Venue Based on Inability to Obtain Impartial Trial.** On motion of a party, a court may change the place of trial when there is reason to believe that an impartial trial cannot be had in the forum [CCP § 397(b)].

**6.47[2][b] Motion Filed After Answer or After Jury Impaneled.** While the transfer statute itself is silent on the issue of timing, caselaw indicates that a motion based on CCP § 397(b) must be made after the answer has been filed [see, e.g., *Cook v. Pendergast* (1882) 61 C 72, 79]. However, courts may differ regarding whether there must be a failed attempt to impanel an impartial jury before such a motion can be filed [see, e.g., *J.I. Case Threshing Co. v. Copren Bros.* (1917) 35 CA 70, 79, 169 P 443]. One court has held there is no need to delay the transfer decision until an attempt to secure a fair and impartial jury has been made if, at the motion hearing, there is sufficient reason to believe an impartial trial cannot be had [see *People v. Ocean S. R., Inc.* (1938) 24 CA2d 420, 426-427, 75 P2d 560].

#### **Cross References:**

Form of notice of motion, see 6.65.

Form of declaration in support of motions under CCP § 397, see 6.66.

#### **6.47[3] Convenience of Witnesses and Ends of Justice Would Be Promoted by Transfer.**

**6.47[3][a] Procedure for Noticed Motions Applies.** A party may base a motion for change of venue on the ground that the convenience of witnesses and the ends of justice would be promoted [CCP § 397(c)]. There is no stated procedure for bringing a motion on this basis; however, caselaw indicates that CCP § 1010 (requisites of written notice) governs notice of motions brought under CCP § 397(c) [see *Willingham v. Pecora* (1941) 44 CA2d 289, 295, 112 P2d 328].

#### **Cross References:**

Form notice of motion and motion, see 6.65.

Form declaration in support of motion, see 6.66.

**6.47[3][b] Motion Must Be Filed Within Reasonable Time After Answer.** There is no express time limit within which a motion for change of venue must be made under CCP § 397(c); however, a court will not entertain a motion based on witness convenience when the defendant has not yet filed an answer because, until the issues are joined, the court cannot determine what testimony will be material [ *Johnson v. Superior Court* (1965) 232 CA2d 212, 214, 42 CR 645]. For similar reasons, the court cannot entertain a CCP § 397(c) motion when the defendant has appeared only by demurrer [ *Russello v. Mori* (1957) 153 CA2d 828, 834, 315 P2d 343]. Thus, the rule courts employ is that a motion based on this ground must be made within a reasonable time after the answer is filed [ *Cooney v. Cooney* (1944) 25 C2d 202, 208, 153 P2d 334; *Thompson v. Superior Court* (1972) 26 CA3d 300, 306, 103 CR 94].

**6.47[3][c] Court Considers Convenience of Nonparty Witnesses Only.** The court should not grant a CCP § 397(c) motion unless both the convenience of the witnesses will be served and the ends of justice will be promoted. In this regard, the court will normally consider the convenience only of witnesses who are neither parties to the action nor employees of a party [see *Lieberman v. Superior Court* (1987) 194 CA3d 396, 401, 239 CR 450; *Dillman v. Superior Court* (1962) 205 CA2d 769, 773, 23 CR 498; *Harden v. Skinner & Hammond* (1955) 130 CA2d 750, 754, 279 P2d 978; see also *Peiser v. Mettler* (1958) 50 C2d 594, 611, 328 P2d 953 (convenience of expert witnesses not considered unless they have personal knowledge of facts, i.e., they are percipient witnesses)].

#### **Exceptions:**

A court may consider a party's convenience when the serious illness of the party will prevent his or her

traveling to attend the trial in the other county and his or her testimony is material [ *Lieberman v. Superior Court* (1987) 194 CA3d 396, 401, 239 CR 450 ]. Likewise, the court may consider the convenience of witnesses who are employees of a party when the employees are called as witnesses by the adverse party rather than on behalf of their employer [ *Lieberman v. Superior Court* (1987) 194 CA3d 396, 401-402, 239 CR 450 ].

**6.47[3][d] Moving Party Must Show Testimony Is Admissible, Relevant and Material, and That Witness Will Be Inconvenienced.** The moving party will meet part of his or her burden by showing that the proposed testimony of the witnesses is admissible, relevant, and material to some issue in the case, and that it will be inconvenient for the witnesses to attend trial [ *Peiser v. Mettler* (1958) 50 C2d 594, 607, 328 P2d 953 ; *Willingham v. Pecora* (1941) 44 CA2d 289, 293, 112 P2d 328 ]. The inconvenience to witnesses in attending trial, not simply where they reside, is the issue the court considers [ *Willingham v. Pecora* (1941) 44 CA2d 289, 293, 112 P2d 328 ]. Although the witnesses' residences are not determinative, the fact that all the witnesses reside in the county to which the transfer is requested will be relevant to the issue of convenience. Further, inconvenience may be presumed from the witnesses' distance from the county where the case is pending [ *Pearson v. Superior Court* (1962) 199 CA2d 69, 77, 18 CR 578 ].

The moving party may show that the ends of justice will be promoted by demonstrating that delay and expense in court proceedings will be avoided, and transfer will save the witnesses' time and expenses [ *Pearson v. Superior Court* (1962) 199 CA2d 69, 77, 18 CR 578 ; *Harden v. Skinner & Hammond* (1955) 130 CA2d 750, 754, 279 P2d 978 ].

**6.47[4] All Judges in County Disqualified.** The place of trial may be changed when the judges of the court in which the action is brought are disqualified to try the case [CCP § 397(d); *Hancock v. Burton* (1882) 61 C 70, 71 ]. However, even if all judges in the original county are disqualified from trying a case, a qualified judge from another county may be assigned, and the case need not be transferred [ *People v. Spring Valley Co.* (1952) 109 CA2d 656, 672, 241 P2d 1069 ]. Thus, motions brought on this basis are rare.



#### Cross Reference:

Discussion of disqualification of judges, see Ch. 22, Disqualification of Judge.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Venue Motions to Transfer General Overview Civil Procedure Venue Motions to Transfer Convenience of Witnesses Civil Procedure Venue Motions to Transfer Interests of Justice



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#### **6.48 Who May Bring Motion to Transfer Venue.**

**6.48[1] Defendant May Demand Transfer--If No Other Defendant Resides in Forum.** When an action is not brought in the proper county, any defendant may move for a transfer to the proper county, without joining any codefendants [ *People v. Ocean S. R., Inc. (1938) 24 CA2d 420, 424, 75 P2d 560* ; see *CCP* §§ 396b, 397(a)]. The moving defendant or defendants must show that none of the other defendants reside in the forum [ *Goossen v. Clifton (1946) 75 CA2d 44, 51, 170 P2d 104* ]. These rules apply to motions based on any of the grounds stated in *CCP* § 397 [ *People v. Ocean S. R., Inc. (1938) 24 CA2d 420, 424, 75 P2d 560* ].

**6.48[2] Plaintiffs May Seek Transfer on Grounds Other Than Case Brought in Wrong County.** A plaintiff may move to change the place of trial on all of the grounds enumerated in *CCP* § 397, except the ground that he or she has brought the action in the wrong county [see *Cook v. Pendergast (1882) 61 C 72, 79* ; *CCP* § 397].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**6.49 Until Motion for Change of Venue Decided, Court May Not Proceed With Any Other Issue in Case.**

The filing of motion for change of venue suspends the power of the trial court to act on any other question until the motion has been determined, and any order made before the motion is determined is a nullity [ *Moore v. Powell* (1977) 70 CA3d 583, 587, 138 CR 914 ; *Adams v. Superior Court* (1964) 226 CA2d 365, 368, 38 CR 164 ; *Beard v. Superior Court* (1940) 39 CA2d 284, 286, 102 P2d 1087 ].

**Examples:**

The court has no authority to issue a temporary restraining order relating to the main action after a notice of motion for transfer has been filed [ *County of Riverside v. Superior Court* (1968) 69 C2d 828, 831, 73 CR 386, 447 P2d 626 ].

Similarly, the court may not issue an order passing on a demurrer to the complaint [see *City of Oakland v. Darbee* (1951) 102 CA2d 493, 503, 227 P2d 909 (also holding rule applicable to CCP § 394 transfer motions)].

**Exceptions:**

Exceptions to this rule apply to certain rulings in dissolution of marriage or separation proceedings and to proceedings under the Uniform Parentage Act [see CCP §§ 396b(c), 397(e)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### 6.50 Opposing Motions for Change of Venue.

**6.50[1] Original Court Considers Opposition.** If an answer has been filed, the original court may consider opposition to the motion to transfer, and retain the action in the forum county if it appears that will promote the convenience of the witnesses or the ends of justice [CCP § 396b(d)].

**6.50[2] Plaintiff May File Counteraffidavit in Opposition to Motion.** If a defendant's motion is made on any of the following grounds, the plaintiff may file counteraffidavits in response to the motion:

- An impartial trial cannot be had [CCP § 397(b)];
- The change will promote the convenience of the witnesses and the ends of justice [CCP § 397(c)]; or
- No judge of the court is qualified to act [CCP § 397(d)].

**6.50[3] If Defendant's Motion Is Based on Residence in Another County, Plaintiff May File Countermotion Based on Witness Convenience or Interests of Justice.** A plaintiff has the right to oppose a defense motion that asserts the action was not brought in the county of defendant's residence, by showing, on countermotion, that the convenience of the witnesses or the ends of justice would be promoted by refusing to change counties [CCP § 396b(d); see *Cook v. Pendergast* (1882) 61 C 72, 76 ; *Braunstein v. Superior Court* (1964) 225 CA2d 691, 697, 37 CR 666 ].



#### Timing:

Like a motion under CCP § 397(c), a countermotion to retain a cause on the ground of witness convenience is not proper unless the defendant has filed his or her answer, because, until the issues of fact are joined by the answer, the court cannot determine what testimony will be material [CCP § 396b(d); *Gilman v. Nordin* (1952) 112 CA2d 788, 793, 247 P2d 394 ]. Similarly, an attempt to retain the original venue for the convenience of the witnesses cannot be made when only a demurrer has been filed [ *Johnson v. Superior Court* (1965) 232 CA2d 212, 214, 42 CR 645 ].



#### Cross Reference:

Form of notice of countermotion, see *California Forms of Pleading and Practice*, Ch. 571, Venue, § 571.104 (Matthew Bender).

**Distinguish:**

The courts of appeal are in conflict over whether *CCP* § 396b(d) requires a plaintiff to show both that the convenience of the witnesses and the ends of justice will be served by retaining the action in the original county (as required in motions brought under *CCP* § 397(c)), or if the plaintiff may prevail by showing that either interest would be promoted [see *Braunstein v. Superior Court* (1964) 225 CA2d 691, 698 n2, 37 CR 666 (1st Dist., either factor is sufficient); *Maxwell v. Murray* (1961) 190 CA2d 440, 443, 11 CR 916 (2nd Dist., requiring both factors)].

**6.50[4] Plaintiff's Choice of Venue Is Presumptively Correct.** The plaintiff's choice of venue is presumptively correct [ *Buran Equip. Co., Inc. v. Superior Court* (1987) 190 CA3d 1662, 1666, 236 CR 171 ; *Easton v. Superior Court* (1970) 12 CA3d 243, 247, 90 CR 642 ]. Thus, the county in which the action is brought is, prima facie, the proper county for the filing and trial of the action absent an affirmative showing to the contrary [ *Mission Imports, Inc. v. Superior Court* (1982) 31 C3d 921, 928, 184 CR 296, 647 P2d 1075 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenueMotions to TransferChoice of ForumCivil ProcedureVenueMotions to TransferConvenience of WitnessesCivil ProcedureVenueMotions to TransferInterests of Justice





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## **6.51 Burdens of Proof on Motions for Transfer.**

**6.51[1] Moving Party Must Show Original Court Is Improper Under Any Applicable Theory and County to Which Transfer Is Sought Is Proper.** The general rule is that the party moving for a change of venue must show the following [ *Mosby v. Superior Court* (1974) 43 CA3d 219, 228, 117 CR 588 ]:

- That the county in which the action was filed is improper under any applicable theory; and
- That the action is proper in the county to which he or she seeks a transfer.

### **Example:**

A corporate defendant seeking a change of venue in a contract action brought in a county other than where it has its principal place of business must show that [ *Shores v. Chip Steak Co.* (1955) 130 CA2d 620, 623, 279 P2d 591 ; see CCP § 395.5 (venue in actions against corporations and associations)]:

- The contract was not made or to be performed in that county;
- The obligation or liability of the defendant did not arise there; and
- Any breach of obligation did not occur there.

### **➡ Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**6.51[2] Defendant Has Initial Burden on Motion Alleging Action Commenced in Wrong Court.** When a motion to change venue is based on the ground that the original court is "not the proper court" for the action, the defendant bears the burden of showing facts justifying a change of venue [ *Massae v. Superior Court* (1981) 118 CA3d

527, 530, 173 CR 527 ; see CCP § 397(a)].

**Example:**

If the motion is based on the defendant's residence under CCP § 395(a), the defendant is required to show that at the commencement of the action, he or she was not a resident of the county where the action was brought, and is currently a resident of the county to which he or she wishes the case transferred [ *Sequoia Pine Mills, Inc. v. Superior Court* (1968) 258 CA2d 65, 67-68, 65 CR 353 ]. If the defendant makes this showing, the burden of proof shifts back to the plaintiff, who must then show that the case comes clearly within one of the statutory exceptions to the general rule that actions are triable at the place of defendant's residence [ *Stute v. Burinda* (1981) 123 CA3d Supp 11, 15, 177 CR 102 ; *Archer v. Superior Court* (1961) 202 CA2d 417, 420, 21 CR 48 ].

 **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**6.51[3] Moving Party Has Burden of Proof When Motion Based on Other Grounds.** If the motion is based on CCP § 397(b)-(d), the burden is on the moving party, whether he or she is plaintiff or defendant [see *City of Stockton v. Ellingwood* (1926) 78 CA 117, 121-122, 248 P 272 (countermotion by defendant based on witness convenience); see also *J.I. Case Threshing Co. v. Copren Bros.* (1917) 35 CA 70, 75-76, 169 P 443 (motion by plaintiff based on inability to have impartial trial)].

 **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**6.52 Actions Involving Installment or Automotive Sales, Consumer Obligations, or Unlawful Detainer.**

**6.52[1] Case Not Commenced in Proper Court Will Be Transferred.** If it appears from the complaint, affidavit or declaration, or otherwise, that the court in which the case was commenced is not the proper court for its trial, the original court must, whenever that fact appears, transfer the case to the proper court on its own motion, or on motion of the defendant [*CCP* § 396a(b)].

**Exception:**

If the defendant consents in writing, or in open court with consent being entered in the minutes of the court, to keeping the case in the court where it was filed, the case may continue in that court [*see CCP* § 396a(b) (requiring defendant to be represented by counsel at time of giving consent)].

If a case is ordered transferred under *CCP* § 396a(b), and summons is served on a defendant before the case is filed in the transferee court, as to any defendant so served who has not appeared in the case, the time to answer or otherwise plead dates from service on that defendant of written notice of the filing [*CCP* § 396a(c)].

**6.52[2] Case Commenced in Proper Court May Be Transferred.** Even if it appears from the plaintiff's complaint or affidavit that the court in which an action or proceeding was commenced is a proper court for its trial, a motion for transfer may be made as in other cases, within the time, on the grounds, and in the manner provided in other cases. If, on such a motion, it appears the case is not pending in the proper court, or should for other reason be transferred, it must be ordered transferred as provided in *CCP* § 392 *et seq.* [*CCP* § 396a(e)].

**6.52[3] Transfer Procedures and Fees Are As in Other Cases.** When any action or proceeding is ordered transferred as provided in *CCP* § 396a, the procedures, and the costs and fees to be paid, will be as provided in *CCP* §§ 398 and 399 [*CCP* § 396a].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**6.53 Transfer of Case After Motion for Change of Venue Granted.**

**6.53[1] If Action Commenced in Wrong Court, Transfer Will Be to Proper Court As Agreed by Parties, or As Designated by Defendant or Transferor Court.** If the court orders the action or proceeding transferred on the ground that it was commenced in the wrong court, it must be transferred to any proper court that the parties may agree on by stipulation in writing, or made in open court and entered in the minutes or docket. If the parties do not so agree, the case must be transferred to any proper court in the county in which the action or proceeding was commenced that the defendant may designate, or, if there is no proper court in that county, to any proper court, in a proper county, designated by the defendant. If the parties do not agree, and the defendant does not designate a court, or if the court orders the transfer on its own motion as provided in *CCP* §§ 392-404.8, then the case will be transferred to a proper court as determined by the transferor court [*CCP* § 398; *Cubic Corp. v. Superior Court* (1986) 186 CA3d 622, 625, 231 CR 18 ].

**6.53[2] Transfer of a Case Brought in Proper Court Will Be to Court As Agreed by Parties, or to Nearest or Most Accessible Proper Court.** If the court orders the transfer of a case for any reason specified in *CCP* § 397(b)-(d), transfer must be to a court having subject matter jurisdiction that the parties agree on by stipulation in writing, or made in open court and entered in the minutes or docket, or, if they do not so agree, then to the nearest or most accessible court where the objection or cause for making the order does not exist [*CCP* § 398].

**6.53[3] Transfer Costs and Fees Paid by Moving Party or, If Action in Wrong Court, by Plaintiff.** When a transfer is sought on any ground stated in *CCP* § 397(b)-(e), the costs and fees of the transfer, and of filing the papers in the transferee court, must be paid at the time the moving party files the motion for transfer [*CCP* § 399(a)].

When a transfer occurs solely because the action was commenced in the wrong court, the costs and fees, including any expenses and attorney fees awarded the defendant under *CCP* § 396b, must be paid by the plaintiff before the case is transferred, and any costs or fees paid by the defendant on filing the transfer motion must be repaid by the plaintiff when transfer is ordered [*CCP* § 399(a)].

**Exception:**

If the plaintiff does not pay the costs and fees within five days after service of notice of the transfer order, any other interested party, whether named in the complaint or not, may pay the costs and fees, and

the clerk must transmit the papers and pleadings as if the plaintiff had paid them. In that case, the costs and fees will be a proper cost item recoverable by the party who paid them if he or she prevails in the action. Otherwise, the costs and fees will be offset against and deducted from the amount, if any, awarded the plaintiff if he or she prevails in the action [*CCP* § 399(a)].

**Warning:**

An action will not be prosecuted further in any court until the transfer costs and fees are paid. If they are not paid within 30 days after notice of the transfer order (or notice of its finality following a petition for writ of mandate or appeal) is served, the court may dismiss the action without prejudice, on any party's duly noticed motion. Following such a dismissal, no other action on the cause may be commenced until the court's order for fees and costs is satisfied [*CCP* § 399(a)].

**Exception:**

If the writ of mandate proceeding or appeal does not stay proceedings, costs must be paid 60 days after notice of the transfer order is served [*CCP* § 399(a)].

**Cross Reference:**

Discussion of transfer costs and fees, see California Forms of Pleading and Practice, Ch. 571, Venue (Matthew Bender).

**6.53[4] Clerks of Courts Must Provide Notice of Transfer and New Case Number.** When an order is made transferring an action or proceeding under any of the provisions of *CCP* §§ 392-404.9, and transfer costs and fees have been paid, the clerk must transmit the pleadings and papers in the case to the clerk of the court to which the action or proceeding is being transferred, once the time for filing a petition for writ of mandate under *CCP* § 400 has expired, or, if a petition is filed, after judgment denying the writ becomes final [*CCP* § 399(a)].

When the clerk transmits the papers and pleadings, he or she must mail notice to all parties who have appeared in the case, stating the date on which the transmittal occurred. Promptly on receipt of the papers and pleadings, the clerk of the transferee court must mail notice to all parties who have appeared in the case, stating the date of the filing of the case and the number assigned to it [*CCP* § 399(b)].

**Cross Reference:**

Procedure on petitions for writ of mandate under *CCP* § 400, see 6.56.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureVenueMotions to TransferGeneral Overview



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VI. MOVING FOR CHANGE OF VENUE

1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.54

### 6.54 Jurisdiction Following Change of Venue.

**6.54[1] Transferee Court Has Same Jurisdiction As If Action Commenced There.** The court to which an action or proceeding is transferred under *CCP* §§ 392-404.8 will have the same jurisdiction over the case as if it had been originally commenced there, and the court may require the filing and service of amended, additional, or supplemental pleadings as may be necessary for the proper presentation and determination of the case [*CCP* § 399(c)].

**6.54[2] Transferor Court Lacks Jurisdiction to Take Any Further Steps.** The court granting a motion for a change of venue is without jurisdiction to make any further order or take any further steps in the action [ *Moore v. Powell* (1977) 70 CA3d 583, 587, 138 CR 914 ].

**Exception:**

The transferor court may consider a motion to vacate the transfer order brought under *CCP* § 473, based on mistake, inadvertence, surprise, or excusable neglect [ *Badella v. Miller* (1955) 44 C2d 81, 86, 279 P2d 729 ].

➡ **Cross Reference:**

Discussion of relief from orders under *CCP* § 473(b) and related equitable relief, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 29.10 et seq.



**Warning:**

The court may also dismiss the action if the transfer fees are not paid within 30 days after notice of the transfer order is served [ *Moore v. Powell* (1977) 70 CA3d 583, 587-588, 138 CR 914 ; *CCP* § 399(a)].

➡ **Cross Reference:**

Discussion of timing for paying transfer costs and fees, see 6.53[3].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureVenueMotions to TransferGeneral Overview



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VI. MOVING FOR CHANGE OF VENUE

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.55*

**6.55 Motion for Change of Venue May Be Renewed If Circumstances Change.**

A court has jurisdiction to consider a renewal of a motion for change of venue, but as a matter of policy and practice, renewal of the same motion is discouraged, and the renewed motion will almost invariably be denied when the grounds are the same. However, when circumstances have changed, renewal of the motion may be proper. In such a case, the renewed motion must be made within a reasonable time after the changed circumstances are, or should be, known [ *Thompson v. Superior Court* (1972) 26 CA3d 300, 306, 103 CR 94 ]. A renewed motion may also be proper if it is made on a different ground than the previous motion [ *Seybert v. County of Imperial* (1956) 139 CA2d 221, 226-230, 293 P2d 135 ].

In addition, a court may entertain a renewed motion if the first motion was expressly denied without prejudice [ *Lundy v. Lettunich* (1920) 50 CA 451, 454-455, 195 P 451 ]. Successive motions may be considered if they are made by different parties [ *Marshall v. Dunlap* (1955) 138 CA2d 59, 60-61, 291 P2d 538 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Venue Motions to Transfer General Overview





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VI. MOVING FOR CHANGE OF VENUE

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.56*

**6.56 Seeking Review of Orders Issued on Motions to Change Venue.**

**6.56[1] Aggrieved Party May Petition Court of Appeal for Writ of Mandate.** When the superior court grants or denies a motion to change the place of trial, the party aggrieved by the court's order may petition the court of appeal, for the district in which the court that issued the order is situated, for a writ of mandate requiring trial of the case in the proper court. [CCP § 400].



**Timing:**

The petition must be filed within 20 days after written notice of the order is served. However, prior to the expiration of this initial 20-day period, the superior court may extend the time to file a petition, for good cause, for one additional period not to exceed 10 days [CCP § 400].

The petitioner must file a copy of the petition in the trial court immediately after the petition is filed in the court of appeal. The court of appeal may stay all proceedings in the case, pending judgment on the petition becoming final. The clerk of the court of appeal must file with the clerk of the trial court a copy of any final order or judgment immediately after the order or judgment becomes final [CCP § 400].



**Cross Reference:**

Forms and discussion of mandate proceedings in general, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender).

**6.56[2] Standard of Review on Appeal.**

**6.56[2][a] When Transfer Is Matter of Right, Only Arbitrary Rulings Are Disturbed.** When a change of venue is a matter of right, an appellate court will not disturb an order made on conflicting evidence unless it is clear that the order was the result of arbitrary action [see *Swartz v. Cal. Olive Growers' Packing Corp.* (1942) 56 CA2d 168, 170-171, 133 P2d 20 ; see CCP § 396b(a) (mandatory language of statute requires action not commenced in proper court to be transferred to proper court)].

**6.56[2][b] Discretionary Rulings Are Disturbed Only for Abuse of Discretion.** Granting or denying a CCP §

397(c) motion is discretionary with the trial court, and an appellate court will reverse such an order only on a clear showing of abuse of discretion. Thus, the appellate court is required to determine whether sufficient facts have been shown on which the trial court could base its exercise of discretion [ *Fontaine v. Superior Ct.* (2009) 175 CA4th 830, 836, 96 CR3d 607 (discretion not abused); *Dillman v. Superior Court* (1962) 205 CA2d 769, 774, 23 CR 498 ].

**Example:**

The denial of a motion to change venue would be an abuse of discretion if there was a showing that the convenience of witnesses and ends of justice would be promoted by the change, and there was no showing to the contrary. Under these circumstances, there would be no evidence to support the decision of the trial court [see *Union Trust Life Ins. Co. v. Superior Court* (1968) 259 CA2d 23, 28, 66 CR 270 ].

A judgment on a motion for change of venue will not be disturbed when the evidence is conflicting, as all conflicts are required to be resolved in favor of the prevailing party, and all reasonable inferences must be drawn in support of the trial court's order [ *Wheeler v. Moschetti* (1961) 188 CA2d 827, 829, 10 CR 722 ; *City of Long Beach v. Lakewood Park* (1953) 118 CA2d 596, 598, 258 P2d 538 ].

**6.56[3] Defendant Allowed Reasonable Time to Respond to Complaint After Review of Order.** If an order granting or denying a motion to transfer under CCP § 396a or 396b is the subject of an appeal in which a stay is granted, or of a mandate proceeding, the court having jurisdiction over the trial, on application or on its own motion after the appeal or mandate proceeding becomes final or on earlier termination of a stay, must allow the defendant a reasonable time to respond to the complaint [CCP § 586(a)(6)(C); see CCP § 904.2 (appeals in limited civil cases); CCP § 400 (mandate proceedings)]. Notice of the order allowing the defendant further time to respond to the complaint must be promptly served by the party who obtained the order, or by the clerk if the order was made on the court's own motion [CCP § 586(a)(6)(C)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Civil ProcedureVenueMotions to TransferGeneral Overview



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Chapter 6 Determining Forum  
VII. FORMS  
A. Demanding Arbitration

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.57*

**6.57 Demand for Arbitration.**

\_\_\_\_\_ [name of addressee]  
\_\_\_\_\_ [street address]  
\_\_\_\_\_ [city, state, zip code]

Re: Agreement dated \_\_\_\_\_

**DEMAND FOR ARBITRATION**

There is a dispute between you and the undersigned relating to the agreement dated \_\_\_\_\_, for  
\_\_\_\_\_ [state nature of agreement or otherwise identify it] ("Agreement").

Under Paragraph \_\_\_\_\_ of the Agreement, disputes arising under the Agreement are to be settled by  
arbitration. That provision states the following: \_\_\_\_\_ [set out paragraph in agreement providing for  
arbitration].

THEREFORE, THE UNDERSIGNED HEREBY DEMANDS that the following dispute(s) be submitted to arbitration:  
\_\_\_\_\_ [set forth nature of dispute, e.g., the undersigned's entitlement to damages in the amount of  
\$65,000, resulting from defects in the packaging equipment delivered to the undersigned on March 12, 1996].

[EITHER, if single neutral arbitrator is to be used and contract specifies method of selection, demand compliance with  
the contractual procedure in as many paragraphs as necessary, for example]

TAKE NOTICE that the undersigned proposes any the following three persons as the neutral arbitrator:

\_\_\_\_\_ [list names, addresses, and telephone numbers of proposed arbitrators].

TAKE FURTHER NOTICE that under Paragraph \_\_\_\_\_ of the Agreement, you have 30 days to agree to one of these persons as neutral arbitrator or to propose a counter list, and if you fail to do so, the undersigned has the right to petition the court for appointment of a neutral arbitrator pursuant to *Code of Civil Procedure Section 1281.6*.

[OR, if single neutral arbitrator is to be used and contract does not specify method of selection, request agreement on a procedure in as many paragraphs as necessary, for example]

TAKE NOTICE that the undersigned intends to exercise his/her/its right to petition the court for appointment of a neutral arbitrator under *Code of Civil Procedure Section 1281.6* if we have not selected a neutral arbitrator by \_\_\_\_\_ [date]. The undersigned suggests \_\_\_\_\_ [name persons who would be acceptable as neutral arbitrator or outline a procedure for selecting an arbitrator].

[OR, if panel of arbitrators is to be used, initiate contractual procedure for selecting panel, for example]

TAKE NOTICE that the undersigned, under that Paragraph, has selected \_\_\_\_\_ [name] as a party arbitrator to act on their behalf in the dispute, and hereby demand that you select a party arbitrator to act on your behalf in the dispute. Your selection must be made within \_\_\_\_\_ days after this demand is served on you.

TAKE FURTHER NOTICE that the party arbitrator acting on behalf of the undersigned will be ready to cooperate with the party arbitrator acting on your behalf in: the selection of a third, neutral arbitrator; the settlement of the claims, controversies, and disputes existing between you and the undersigned; and, the determination of all demands and differences arising out of the Agreement.

TAKE FURTHER NOTICE that should you refuse to select a party arbitrator to act on your behalf, as stated above, or should you otherwise refuse to arbitrate the disputes mentioned above, the undersigned will take further steps to proceed with arbitration according to law.

[CONTINUE]

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

NOTES.

**Authority:**

CCP § 1281



**Timing:**

See 6.11[1]

**Related Petition to Compel:**

See 6.58



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VII. FORMS

B. Compelling Arbitration

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.58*

### 6.58 Petition to Compel Arbitration.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Petitioner,  
vs.  
\_\_\_\_\_, [name]  
Respondent.

)  
) NO. \_\_\_\_\_  
) PETITION BY \_\_\_\_\_ [identify  
) party, e.g., MARY JONES] TO COMPEL ARBIT-  
) RATION  
) [LIMITED CIVIL CASE]  
) [Amount demanded \_\_\_\_\_ (exceeds  
) or does not exceed \$10,000)]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
Date Action Filed: \_\_\_\_\_  
Trial Date: \_\_\_\_\_

Petitioner alleges:

[EITHER]

1. The agreement alleged below \_\_\_\_\_ [is to be performed or was made] in \_\_\_\_\_

County, California.

[OR]

1. The agreement alleged below does not specify a county where it is to be performed and was not made in California. \_\_\_\_\_ [Petitioner or Respondent] \_\_\_\_\_ [resides or has a place of business] in \_\_\_\_\_ County, California [at \_\_\_\_\_ (address)].

[CONTINUE]

2. On or about \_\_\_\_\_ [date], petitioner and respondent entered into a written agreement [in which, at Paragraph \_\_\_\_\_, the parties agreed] to arbitrate \_\_\_\_\_ [specify controversy subject to arbitration, e.g., all disputes arising out of the agreement]. A copy of the agreement is attached as Exhibit "A" and made a part hereof.

3. On or about \_\_\_\_\_, a controversy arose between petitioner and respondent in that \_\_\_\_\_ [describe controversy]. The arbitration agreement herein alleged requires that petitioner and respondent arbitrate their controversy \_\_\_\_\_ [as to the following issues: \_\_\_\_\_ (specify) or in its entirety].

4. On or about \_\_\_\_\_, petitioner demanded that respondent submit the \_\_\_\_\_ [issues or controversy] to arbitration as agreed. Respondent has at all times refused, and still refuses, to arbitrate.

*[If agreement provides for joinder in arbitration of any third party who is not a party to the agreement but who is necessary for complete resolution of any matter required to be arbitrated and requires the arbitrator to determine whether anyone must be so joined, ADD]*

5. The arbitration agreement which is Exhibit "A" to this petition includes at Paragraph \_\_\_\_\_ respondent's consent to the intervention or joinder in the arbitration proceeding of all parties relevant to a full and complete settlement of any dispute arbitrated under the agreement \_\_\_\_\_ [as set forth in the \_\_\_\_\_ (specify any rules incorporated in agreement), which provide or and further provides] that the arbitrator determine, prior to the date set for the arbitration hearing, any person whose participation is material or relevant to a complete resolution of this dispute. Thus, the fact that \_\_\_\_\_ [name] has been named in the complaint but is not a party to the arbitration agreement does not prevent arbitration of this matter because petitioner contends, and will seek to have the neutral arbitrator determine before the arbitration hearing, that \_\_\_\_\_ [name] is required to be joined in the arbitration.

WHEREFORE, petitioner prays:

1. That the court order respondent to arbitrate the controversy as herein alleged.
2. That petitioner be awarded costs of suit herein incurred.
3. For such other and further relief as the court may deem proper.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Petitioner

NOTES.

**Authority:**

CCP §§ 1281.2, 1290



**Timing:**

See 6.15[6]

**Service:**

See 6.15[2][d]

**Related Notice of Hearing on Petition to Compel Arbitration:**

See 6.59

**Related Orders Granting or Denying Petition to Compel Arbitration:**

See 6.61, 6.62

**Related Forms of Memoranda:**

See *California Points and Authorities*, Ch. 20, Arbitration, §§ 20.11, 20.12 (Matthew Bender)



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## VII. FORMS

## B. Compelling Arbitration

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.59*

**6.59 Notice of Hearing on Petition to Compel Arbitration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                       |
|---------------|---|---------------------------------------|
| _____ [name], | ) |                                       |
| Petitioner,   | ) | NO. _____                             |
| vs.           | ) | NOTICE OF HEARING ON PETITION TO COM- |
| _____ [name]  | ) | PEL ARBITRATION                       |
| Respondent.   | ) | [LIMITED CIVIL CASE]                  |
|               | ) | [Date: _____]                         |
|               | ) | [Time: _____]                         |
|               | ) | [Location: _____]                     |
|               | ) | [Judge: _____]                        |
|               | ) | [Date Action Filed: _____]            |
|               | ) | [Trial Date: _____]                   |

To respondent \_\_\_\_\_ [name] and to \_\_\_\_\_ [name], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter can be heard, in [Department \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], California, the petition of \_\_\_\_\_ [name] for an order to arbitrate certain controversies specified in the petition, a copy of which is served herewith, will be heard by the court.

This petition is based on the following described papers that are served with this petition: \_\_\_\_\_ [



*describe*].

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for Petitioner

NOTES.

**Authority:**

*CCP § 1290.4*



**Timing:**

*See 6.15[2][d]*

**Service:**

*See 6.15[2][d]*

**Related Petition to Compel Arbitration:**

*See 6.58*



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## Chapter 6 Determining Forum

## VII. FORMS

## B. Compelling Arbitration

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.60*

**6.60 Responding to Petition to Compel Arbitration--Admissions, Denials, and Defenses.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Petitioner,  
vs.  
\_\_\_\_\_, [name]  
Respondent.

)  
) NO. \_\_\_\_\_  
) RESPONSE TO PETITION TO COMPEL ARBIT-  
) RATION  
) [LIMITED CIVIL CASE]  
) [Date: \_\_\_\_\_]  
) [Time: \_\_\_\_\_]  
) [Location: \_\_\_\_\_]  
) [Judge: \_\_\_\_\_]  
) [Date Action Filed: \_\_\_\_\_]  
) [Trial Date: \_\_\_\_\_]

Respondent \_\_\_\_\_ [name] answers and responds to the petition herein as follows:

1. Answering [Paragraph(s) \_\_\_\_\_ of] the petition, respondent denies each and every, all and singular, generally and specifically, the allegations therein[, except that respondent admits \_\_\_\_\_ (specify)].

2. \_\_\_\_\_ [Continue with denials].

FIRST AFFIRMATIVE DEFENSE  
(Waiver of Arbitration)

1. The alleged controversy that petitioner seeks to arbitrate allegedly arose on or about \_\_\_\_\_ [date], and any right to arbitrate existed, if at all, at that time.

*[EITHER, if written agreement specifies a time within which to demand arbitration]*

2. Under the terms of the arbitration agreement of \_\_\_\_\_ [date], between petitioner and respondent, a demand for arbitration must be filed not later than \_\_\_\_\_ [specify time limitation on demand, e.g., 60 days after the occurrence of the disputed event].

3. \_\_\_\_\_ [Set forth facts showing waiver, e.g., Petitioner did not make any demand on respondent to arbitrate the controversy and did not take any steps to enforce his/her right to arbitrate until \_\_\_\_\_ (date), when for the first time petitioner demanded that the controversy be submitted to arbitration].

4. This failure to make a timely demand constitutes a waiver and forfeiture of any right petitioner may have to arbitrate this controversy.

*[OR, if written agreement does not specify a certain time within which to demand arbitration]*

2. \_\_\_\_\_ [Set forth facts showing waiver, e.g., Petitioner did not make any demand on respondent to arbitrate the controversy and did not take any steps to enforce his/her right to arbitration until \_\_\_\_\_ [date], when for the first time petitioner demanded that the controversy be submitted to arbitration. The delay was unreasonable in that \_\_\_\_\_ (set forth circumstances showing delay was unreasonable)].

3. In so doing petitioner, with full knowledge of the existence of the controversy and his/her alleged right to arbitrate, intentionally waived and relinquished any such right to settle the controversy by arbitration.

*[CONTINUE]*

## SECOND AFFIRMATIVE DEFENSE

(Grounds for Revoking Agreement to Arbitrate)

1. Respondent admits that on or about \_\_\_\_\_ [date] petitioner and respondent entered into a written agreement requiring that the controversy alleged in the petition be submitted to arbitration.

2. Grounds exist for revocation of the agreement to arbitrate the alleged controversy in that \_\_\_\_\_ [specify].

## THIRD AFFIRMATIVE DEFENSE

(Insufficient Facts Alleged)

The facts alleged in the petition are insufficient for the court to order arbitration in that \_\_\_\_\_ [specify, e.g., the petition does not allege that there is a written agreement to arbitrate].

## FOURTH AFFIRMATIVE DEFENSE

## (Possibility of Conflicting Rulings)

1. \_\_\_\_\_ [Party designation] is also a party to the proceeding now pending in the \_\_\_\_\_ [specify court, e.g., United States District Court for the Northern District of California], entitled \_\_\_\_\_ [title of case], No. \_\_\_\_\_, which arises out of the same \_\_\_\_\_ [transaction or series of related transactions] from which the present matter arose.
2. If that proceeding and the present proceeding are both allowed to proceed simultaneously, there is a possibility of conflicting rulings on a common issue of \_\_\_\_\_ [law or fact], namely \_\_\_\_\_ [specify common issue].

## FIFTH AFFIRMATIVE DEFENSE

## (The Parties Have No Agreement to Arbitrate)

1. Respondent admits that on or about \_\_\_\_\_ [date], petitioner and respondent began negotiations for a contract [and exchanged drafts of proposed agreements], but the parties intended[, and the draft agreements specifically provided,] that no agreement between the parties would constitute a legal and binding obligation of the parties until and unless it was signed. [A copy of the draft agreement dated \_\_\_\_\_ and incorporating that provision at paragraph \_\_\_\_\_ is attached hereto and made a part hereof by this reference.]
2. Respondent never signed the agreement and notified petitioner on or about \_\_\_\_\_ [date], that it was terminating their negotiations because agreement could not be reached on material terms.
3. No contract to arbitrate was ever formed between petitioner and respondent.

WHEREFORE, respondent prays:

1. That the petition be denied;
2. That respondent be awarded costs of suit herein incurred; and
3. For such other and further relief as the court may deem proper.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Respondent

## NOTES.

**Authority:**

CCP § 1290

**Discussion:**

See 6.15[4]

**Related Petition to Compel Arbitration:**

See 6.58

**Related Forms of Memoranda:**

See California Points and Authorities, Ch. 20, Arbitration, § 20.100 et seq. (Matthew Bender)



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## Chapter 6 Determining Forum

## VII. FORMS

## B. Compelling Arbitration

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.61*

**6.61 Order Compelling Arbitration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                              |
|---------------|---|------------------------------|
| _____ [name], | ) |                              |
| Petitioner,   | ) | NO. _____                    |
| vs.           | ) | ORDER COMPELLING ARBITRATION |
| _____ [name]  | ) | [LIMITED CIVIL CASE]         |
| Respondent.   | ) |                              |
|               | ) |                              |
|               | ) |                              |

\_\_\_\_\_

The petition of \_\_\_\_\_ [name] for an order compelling arbitration came on regularly for hearing on \_\_\_\_\_ [date]. Petitioner appeared through his/her counsel \_\_\_\_\_ [name] and respondent appeared through his/her counsel \_\_\_\_\_ [name].

Due and proper notice of the hearing of the petition having been given and proof having been made to the satisfaction of the court that the petition should be granted,

IT IS ORDERED that petitioner \_\_\_\_\_ [name] and respondent \_\_\_\_\_ [name] arbitrate the controversies existing between them in accordance with the provisions of their agreement dated \_\_\_\_\_ [date], and that petitioner recover his/her costs of this proceeding.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*CCP § 1281.2*

**Discussion:**

*See 6.15*

**Related Petition to Compel Arbitration:**

*See 6.58*



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VII. FORMS

B. Compelling Arbitration

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.62*

### 6.62 Order Denying Arbitration and Dismissing Proceedings.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                    |
|---------------|---|------------------------------------|
| _____ [name], | ) |                                    |
| Petitioner,   | ) | NO. _____                          |
| vs.           | ) | ORDER DENYING ARBITRATION AND DIS- |
| _____ [name]  | ) | MISSING PROCEEDINGS                |
| Respondent.   | ) | [LIMITED CIVIL CASE]               |
|               | ) |                                    |
|               | ) |                                    |

\_\_\_\_\_

The petition of \_\_\_\_\_ [name] for an order compelling arbitration came on regularly for hearing on this date. Petitioner appeared through his/her counsel, \_\_\_\_\_ [name] and respondent appeared through his/her counsel, \_\_\_\_\_ [name].

The court, having considered the \_\_\_\_\_ [affidavit(s) or declaration(s)] and other documents and evidence in support of and in opposition to the petition, having heard the arguments of counsel, [and] being fully advised in the premises,

IT IS ORDERED that the petition to order arbitration is denied and the proceeding is dismissed, respondent to recover his/her costs herein incurred.

Dated: \_\_\_\_\_



\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*CCP § 1281.2*

**Discussion:**

*See 6.17*

**Related Petition to Compel Arbitration:**

*See 6.58*



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Chapter 6 Determining Forum  
VII. FORMS  
B. Compelling Arbitration

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.63*

**6.63 Notice of Motion to Stay Proceedings in Pending Action Until Arbitration Is Completed.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Petitioner,  
vs.  
\_\_\_\_\_, [name]  
Respondent.

)  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR OR-  
) DER TO STAY PROCEEDINGS IN PENDING AC-  
) TION UNTIL ARBITRATION COMPLETED; SUP-  
) PORTING DECLARATION OF  
) \_\_\_\_\_ [name]; AND SUPPORTING  
) MEMORANDUM  
) [LIMITED CIVIL CASE]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith], and to his/her attorney of record:

[EITHER]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for an order staying the proceedings herein until \_\_\_\_\_ [party, e.g., defendant's] application to arbitrate, now pending before \_\_\_\_\_ (specify court), is determined and there is an arbitration, if it is ordered. The motion will be made on the ground that the controversy to be arbitrated pursuant to the \_\_\_\_\_ [application or order] is an issue involved in the above entitled cause now pending before this court.

[OR]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [specify moving party, e.g., defendant] will, and hereby does, move for an order staying the proceedings herein until there is an arbitration in accordance with the order by \_\_\_\_\_ (specify court), a copy of which is attached to, and served with, this notice of motion] or until such earlier time as the court may order. The motion will be made on the ground that the controversy to be arbitrated pursuant to the \_\_\_\_\_ [application or order] is an issue involved in the above entitled cause now pending before this court.

[CONTINUE]

The motion will be based on this notice of motion, the declaration of \_\_\_\_\_ [name], and the supporting memorandum served and filed with this notice, on the records and file of this case, and on any evidence that may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [party's status,

e.g., Defendant Mary Jones]

SUPPORTING DECLARATION OF \_\_\_\_\_ [name]

I, \_\_\_\_\_ [name], say:

1. I am \_\_\_\_\_ [specify, e.g., the defendant in this action].

2. On \_\_\_\_\_ [date], I \_\_\_\_\_ [filed a petition to compel arbitration which is now pending in or obtained an order compelling arbitration from] the Superior Court of California, County of \_\_\_\_\_

\_\_\_\_\_.

3. The controversy subject to arbitration as \_\_\_\_\_ [stated in the petition mentioned above *or* ordered] is \_\_\_\_\_ [describe]. This controversy is an issue involved in the above entitled cause now pending before this court in that \_\_\_\_\_ [specify].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

#### SUPPORTING MEMORANDUM

[Add memorandum supporting motion.]

NOTES.

**Authority:**

CCP § 1281.4

**Discussion:**

See 6.17[2]

**Related Order Staying Proceedings:**

See 6.64

**Related Notice of Stay of Proceedings:**

See 6.64A

**Related Notice of Termination or Modification of Stay:**

See 6.64B



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## Chapter 6 Determining Forum

## VII. FORMS

## B. Compelling Arbitration

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.64*

**6.64 Order Staying Proceedings in Pending Action.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                      |
|---------------|---|--------------------------------------|
| _____ [name], | ) |                                      |
| Petitioner,   | ) | NO. _____                            |
| vs.           | ) | ORDER STAYING PROCEEDINGS IN PENDING |
| _____ [name]  | ) | ACTION UNTIL ARBITRATION COMPLETED   |
| Respondent.   | ) | [LIMITED CIVIL CASE]                 |
|               | ) |                                      |
|               | ) |                                      |

\_\_\_\_\_

The motion of \_\_\_\_\_ [name] for an order to stay proceedings in the above-entitled cause came on regularly for hearing this date. \_\_\_\_\_ [identify party, e.g., Plaintiff] appeared by his/her counsel \_\_\_\_\_ [name] and \_\_\_\_\_ [identify party, e.g., defendant] appeared by his/her counsel \_\_\_\_\_ [name].

Proof having been made to the satisfaction of the court that the motion should be granted and good cause appearing therefor,

IT IS ORDERED that the above entitled \_\_\_\_\_ [action or proceeding] be stayed \_\_\_\_\_ [with respect to the following issues only: \_\_\_\_\_ (specify) or as to all proceedings therein] until \_\_\_\_\_ [arbitration has been concluded and award made in accordance with the Order Compelling Arbitration made by the Superior Court of California, County of \_\_\_\_\_, dated \_\_\_\_\_, or the Petition to Compel Arbitration now pending before the Superior Court of California,

County of \_\_\_\_\_, is determined and arbitration is concluded if ordered therein or  
\_\_\_\_\_ (specify other time ordered by the court)].

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

CCP § 1281.4

**Discussion:**

See 6.17[2]

**Related Notice of Motion:**

See 6.63

**Related Notice of Stay of Proceedings:**

See 6.64A

**Related Notice of Termination or Modification of Stay:**

See 6.64B



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*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.64A*

**6.64A Judicial Council Form CM-180 Notice of Stay of Proceedings.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.650*; California Judicial Council Form CM-180 has been adopted by the California Judicial Council for mandatory use

**Discussion:**

See 6.17[2], 32.06A

**Related Notice of Motion:**

See 6.63

**Related Order Staying Proceedings:**

See 6.64

**Related Notice of Termination or Modification of Stay:**

See 6.64B



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B. Compelling Arbitration

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.64B*

**6.64B Judicial Council Form CM-181 Notice of Termination or Modification of Stay.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

**NOTES:**

**Authority:**

*Cal Rules Ct, Rule 3.650*; California Judicial Council Form CM-181 has been adopted by the California Judicial Council for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Discussion:**

See 6.17[2], 32.06A

**Related Notice of Motion:**

See 6.63

**Related Order Staying Proceedings:**

See 6.64

**Related Notice of Stay of Proceedings:**

See 6.64A





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## Chapter 6 Determining Forum

## VII. FORMS

## C. Change of Venue

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.65*

**6.65 Notice of Motion for Change of Venue.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],  
Plaintiff,  
vs.  
\_\_\_\_\_[name]  
Defendant.

)  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR  
) CHANGE OF VENUE, SUPPORTING  
) DECLARATION OF \_\_\_\_\_  
) [name], AND SUPPORTING MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in \_\_\_\_\_ [identify Department or Division \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [identify party, e.g., defendant] will, and hereby does, move for an order pursuant to *Code of Civil Procedure Section 397* to transfer the venue of this action to the Superior Court of the State of California in and for the County of \_\_\_\_\_. The motion will be made on the ground that \_\_\_\_\_ [specify

*one of the grounds enumerated in Code Civ. Proc. § 397, e.g., the court designated in the complaint is not the proper court or there is reason to believe that an impartial trial cannot be had in the court designated in the complaint or the convenience of the witnesses and the ends of justice will be promoted by the change or there is no judge of the court qualified to act].*

*[IF motion is based on case being commenced in wrong court]*

[In addition, pursuant to *Code of Civil Procedure section 396b(b)* , \_\_\_\_\_ (*identify party, e.g., defendant*) will, and hereby does, move for an award of reasonable expenses and attorney's fees incurred in making this motion to transfer, in the amount of \$ \_\_\_\_\_ [*specify sum*].

[CONTINUE]

The motion will be based on this notice of motion, the declaration(s) of \_\_\_\_\_ [*declarants' names*], the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

SUPPORTING DECLARATION OF \_\_\_\_\_ [*name*]

*[Add declaration supporting motion]*

SUPPORTING MEMORANDUM

*[Add memorandum supporting motion]*

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_ [*identify moving party*]

NOTES.

**Authority:**

*CCP §§ 396b, 397*

**Grounds:**

*See 6.50*

**Related Declarations:**

*See 6.66, 6.67*

**Related Order:**

*See 6.68*

**Related Form of Memorandum:**

See California Points and Authorities, Ch. 238, Venue (Matthew Bender)



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VII. FORMS

C. Change of Venue

1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.66

### 6.66 Declaration in Support of Motion for Change of Venue--General Form.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name]  
Defendant.

)  
) NO. \_\_\_\_\_  
) DECLARATION OF \_\_\_\_\_ [name]  
) IN SUPPORT OF MOTION FOR CHANGE OF  
) VENUE  
) [LIMITED CIVIL CASE]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

I, \_\_\_\_\_ [declarant's name], declare:

1. I am \_\_\_\_\_ [describe declarant's relationship to case, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for defendant or other statement as appropriate].

\_\_\_\_\_, [SET FORTH, in successively numbered paragraphs, facts supporting the ground on which the motion is being made, for example:]

2. \_\_\_\_\_ [Set forth the names and addresses of the witnesses and the nature of their testimony, e.g., Plaintiff expects to call as witnesses at the trial of the above-captioned action the following persons, who will testify in substance as follows: \_\_\_\_\_].

3. \_\_\_\_\_ [Set forth facts showing reasons why attendance at the present place of trial would be inconvenient, e.g., These witnesses are beyond subpoena range of this court, and are prevented from voluntarily attending this court because \_\_\_\_\_].

4. \_\_\_\_\_ [Set forth facts tending to show that change of venue will promote the ends of justice, e.g., the change of venue sought will promote the ends of justice in that it will reduce delays and expenses that are anticipated to occur based on the distance the witnesses will have to travel to attend trial].

[5. If reasonable expenses and fees are sought pursuant to Code Civ. Proc. § 396b(b), set forth basis for award, e.g., I have contacted plaintiff's attorney by telephone on three separate occasions to discuss the possibility of a stipulation that the above-captioned action be transferred. I explained during each of the conversations that several of plaintiff's witnesses are beyond the subpoena range of this court and that they are prevented from voluntarily attending this court. Nevertheless, each time I have offered to stipulate to a change of venue, plaintiff's attorney has refused. As a result of these refusals, defendant has incurred expenses and attorney's fees in making this motion for change of venue, in the amount of \$\_\_\_\_\_.]

[CONTINUE]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

NOTES.

**Authority:**

CCP § 397

**Discussion:**

See 6.47

**Related Notice of Motion and Motion for Change of Venue:**

See 6.65



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VII. FORMS

C. Change of Venue

*1-6 MB Practice Guide: CA Pretrial Civil Procedure 6.67*

**6.67 Declaration in Support of Motion for Change of Venue--Action Commenced in Improper Court.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name]  
Defendant.

)  
) NO. \_\_\_\_\_  
) DECLARATION OF \_\_\_\_\_ [name]  
) IN SUPPORT OF MOTION FOR CHANGE OF  
) VENUE  
) [LIMITED CIVIL CASE]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

I, \_\_\_\_\_ [name of defendant], declare:

1. I am the defendant in the above-captioned action.

[EITHER, if motion based on situs of subject matter of action]

2. The real property that is the subject of the above-captioned action is located \_\_\_\_\_ [partly] in

\_\_\_\_\_[city], \_\_\_\_\_[specify county where property located] County, California.

3. No part of the subject real property is located in \_\_\_\_\_[specify county in which action has been commenced] County, California.

[OR, if motion based on where the cause of action arose]

2. The \_\_\_\_\_[alleged offense which is the basis of the \_\_\_\_\_(penalty or forfeiture) or act done by the public officer] on which the above-captioned action is based occurred in \_\_\_\_\_[city], \_\_\_\_\_ County, California.

[OR, if motion based on residence of defendant or defendants]

2. At the time this action was commenced, I resided in \_\_\_\_\_ County, California.

[OR, if motion based on place where contract entered into or was to be performed]

2. \_\_\_\_\_[Specify basis for venue, e.g., The contract on which this action is based was entered into or Pursuant to Provision Five in the contract on which this action is founded, the obligation that is the subject of this action was to be performed] in \_\_\_\_\_[city], \_\_\_\_\_ County, California.

3. \_\_\_\_\_[Set forth facts showing either that contract was in fact entered into in another county, or that, pursuant to a special contract in writing, the obligation was to be performed in another county, e.g., I signed the contract on which this action is founded in \_\_\_\_\_[city], \_\_\_\_\_ County, California, and there is no written provision in the contract specifying the place where the obligation was to be performed].

[OR, if motion based on place where injury to person or personal property occurred]

2. \_\_\_\_\_[Set forth facts showing that injury occurred in county other than where action commenced, e.g., The injury to my automobile on which this action is based occurred] in \_\_\_\_\_[city], \_\_\_\_\_ County, California.

[CONTINUE]

[If reasonable expenses and fees are sought pursuant to Code Civ. Proc. § 396b(b), set forth basis for award, e.g.,

3. I have contacted plaintiff's attorney by telephone on three separate occasions to discuss the possibility of a stipulation that the above-captioned action be transferred. I explained during each of these conversations that no part of the subject real property is located in the county in which plaintiff's action was commenced, and that the proper venue would be in the county in which the property is located. Nevertheless, each time I have offered to stipulate to a change of venue, plaintiff's attorney has refused. As a result these refusals, defendant has incurred expenses and attorney's fees in making this motion for change of venue, in the amount of \$\_\_\_\_\_.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

NOTES.

**Authority:**

*CCP §§ 392, 393, 395(a), 396b(a), 397*

**Discussion:**

*See 6.47[1]*

**Related Notice of Motion and Motion for Change of Venue:**

*See 6.65*



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Chapter 6 Determining Forum  
VII. FORMS  
C. Change of Venue

### 6.68 Order Granting Motion for Change of Venue.

\_\_\_\_\_ *[name]*,  
 Plaintiff,  
 vs.  
 \_\_\_\_\_ *[name]*  
 Defendant.

)  
 ) NO. \_\_\_\_\_  
 ) ORDER GRANTING MOTION FOR CHANGE OF  
 ) VENUE  
 ) [LIMITED CIVIL CASE]  
 )  
 )

IT IS ORDERED that the motion be, and it hereby is, granted and that the action of the above-captioned case is hereby transferred to the Superior Court of California for the County of \_\_\_\_\_ on payment of all the necessary fees required by law. The clerk of this court is authorized to transfer all the pleadings and papers herein to the clerk of that court.

[IT IS FURTHER ORDERED that \_\_\_\_\_ (*specify attorney for opposing party, e.g., plaintiff's attorney, Tom Doe,*) pay \_\_\_\_\_ (*moving party, e.g., Defendant Mary Jones*) the sum of \$\_\_\_\_\_ as the amount of reasonable expenses and attorney's fees incurred in making the motion to transfer.]

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*CCP §§ 396b, 397, 398*

**Discussion:**

*See 6.47 -6.52*

**Related Notice of Motion and Motion for Change of Venue:**

*See 6.65*



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## Chapter 7 Complaints

*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.syn*

### **§ 7.syn Synopsis to Chapter 7: Complaints**

7.01 Scope.

7.02 Objective and Strategy.

7.03 CHECKLIST: Drafting a Complaint.

7.04 Use of Judicial Council Complaint Forms.

7.04[1] Judicial Council Complaint Forms Are Not Mandatory.

7.04[2] Judicial Council Forms May Be Duplicated and Typewritten.

7.04[3] Attachment Forms Are Required for Tort or Contract Actions Using General Complaint Forms.

7.04[3][a] Attachment Forms Must Be Used to Allege Specific Causes of Action.

7.04[3][b] Cause of Action Attachments Must Be Numbered Consecutively Beginning With One.

7.04[3][c] Causes of Action for Which No Form Has Been Approved May Be Prepared in Alternate Format.

7.04[4] Attachment Forms May Be Used to Supplement Information on Forms.

7.05 Local Courts May Not Condition Filing of Complaint on Local Rule Requirements.

7.06 Format Is Governed by California Rules of Court Requirements.

7.06[1] Paper Must Be Opaque, Recycled, and 8 1/2 by 11 Inches in Size.

7.06[2] Print May Not Be Smaller Than 12 Points.

7.06[3] Spacing Must Be Double or One and One-Half.

7.06[4] Left Margin Must Be One Inch, Right Margin Must Be One-Half Inch.

7.06[5] Line Numbers Must Be Properly Spaced and Consecutively Numbered.

7.06[6] Pages Must Be Consecutively Numbered at Bottom.

7.06[7] Pre-Punched Holes Are Required.

7.06[8] Footers Are Required on All Pages Except Exhibits.

7.06[9] Legal Citations Must Follow Consistent Format.

7.06[10] Certain Identifiers Must Be Excluded or Redacted from Complaint.

7.06[10][a] Certain Identifiers Generally Must Be Excluded.

7.06[10][b] Where Identifiers Are Necessary, They Must Be Redacted.

7.06[10][c] Exclusion and Redaction Requirements Do Not Apply to Documents Subject to Order of Confidentiality or to Seal.

7.06[10][d] Court Clerk Not Responsible for Ensuring Exclusion or Redaction.

7.07 First Page Must Conform to Particular Format.

7.07[1] Attorney Information Is Required.

7.07[2] Space Must Be Left for Use by Clerk.

7.08 Captions Are Mandatory.

7.08[1] Every Complaint Must Contain Caption.

7.08[2] Every Caption Used in Complaint Must Contain Certain Information.

7.08[2][a] Title of Court.

7.08[2][b] Title of Case.

7.08[2][c] Description of Parties.

7.08[2][d] Number of Case.

7.08[2][e] Description of Complaint.

7.08[2][f] Statements Required to Identify Limited Civil Case.

7.08[2][g] Assigned Judge and Department, If Any.

7.09 Introduction to Allegations Is Customary but Not Required.

7.10 Plaintiff Must Be Identified Unless Suing in Individual Capacity.

7.10[1] Real Party in Interest Must Prosecute Action.

7.10[2] Individual Plaintiff Need Not Be Further Identified.

7.10[3] Guardian ad Litem for Minor Must Be Identified.

7.10[4] Guardian ad Litem for Incompetent Person Should Be Identified.

7.10[5] Identification of Non-Individual Plaintiffs Is Customary.

7.10[6] Allegation of Plaintiff's Status or Capacity Must Be Included If It Affects Action.

7.10[7] Plaintiff Transacting Business Under Fictitious Business Name May Not Maintain Action Unless Fictitious Business Name Statement Has Been Executed.

7.10[8] Partnerships and Associations May Sue Under Names by Which They Are Known.

7.11 Allegation of Status and Capacity of Defendant Is Customary but Is Not Required.

7.11[1] Allegation of Status and Capacity of Defendant Is Not Mandatory in Most Cases.

7.11[2] Allegation of Status and Capacity of Defendant Is Required in Certain Consumer and Unlawful Detainer Litigation.

7.11[3] Designation of Defendant by Fictitious Name; When Allowed.

7.11[3][a] Genuine Ignorance Required.

7.11[3][b] No Duty to Exercise Reasonable Diligence to Discover Name.

7.11[3][c] Ignorance Measured at Time Complaint Is Filed.

7.11[3][d] Default Judgment May Not Be Entered Against Fictitious Defendant Unless He or She Has Been Served.

7.11[3][e] Plaintiff Must Amend Complaint When Defendant's True Name Is Discovered.

7.11[4] Complaint Must State Names of Persons Not Joined As Defendants Who Must Be Joined Under Compulsory Joinder Rules.

7.12 Complaint Must State One or More Causes of Action.

7.12[1] Each Cause of Action Must Be Separately Numbered.

7.12[2] Incorporation by Reference Is Generally Allowed.

7.12[3] Statement of Facts Constitutes Cause of Action.

7.12[4] Plaintiff May Plead Inconsistent Theories of Recovery.

7.12[5] Plaintiff May Join Some Defendants Under Permissive Joinder Rules.

7.12[6] Special Requirements for Pleading in Particular Situations.

7.12[6][a] Action for Recovery of Real Property Must Describe Land.

7.12[6][b] Action on Contract Must Plead Its Terms or Incorporate Contract.

7.12[6][c] Action on Contract Must Plead Occurrence of Conditions Precedent.

7.12[6][d] Judgments and Other Determinations May Be Stated to Have Been Duly Made.

7.12[6][e] Actions Based on Statutes or Ordinances.

7.12[6][f] Pleading on Information and Belief.

7.12[6][g] Seeking Declaratory Relief.

7.12[7] Over-Pleading May Expose Plaintiff to Liability for Malicious Prosecution.

7.13 Demand for Judgment Is Required.

7.13[1] Complaint Must Include Demand for Judgment.

7.13[1][a] Complaint Must Demand Judgment for Relief Claimed, Including Any Amount Demanded.

7.13[1][b] Exception: Punitive Damages Amounts Must Not Be Stated.

7.13[1][c] Exception: Actual and Punitive Damages Amounts in Personal Injury or Wrongful Death Cases Must Not Be Stated.

7.13[2] Demand Defines Scope of Default Judgment.

7.13[3] Awards in Contested Cases May Exceed Prayer.

7.13[4] Prayer Should Be Included, but Absence Is Not Fatal.

7.13[5] All Claims Arising From the Same Cause of Action Must Eventually Be Raised in the Same Action.

7.14 Attorney or Unrepresented Party Must Sign Complaint.

7.14[1] Signature of Attorney of Record or Unrepresented Party Is Required.

7.14[2] Presentation of Signed Complaint Equals Certification.

7.14[2][a] Complaint Is Presented by Signing, Filing, Submitting, or Later Advocating.

- 7.14[2][b] Complaint Not Presented Primarily for Improper Purpose.
- 7.14[2][c] Legal Contentions Are Not Unwarranted.
- 7.14[2][d] Evidentiary Support Exists or Is Likely to Exist.
- 7.14[3] Sanctions May Be Imposed for Violation of Certification.
- 7.15 Verification Is Generally Not Required.
- 7.16 CHECKLIST: Filing a Complaint.
- 7.17 Clerk Is Not Permitted to Accept for Filing Any Papers That Do Not Comply With Requirements.
- 7.18 Complaint Is Deemed Filed When Presented at Proper Office and Deposited With Applicable Filing Fees.
- 7.19 Summons Form Should Be Included.
- 7.20 Case Cover Sheets Are Required in Every Civil Case.
- 7.20[1] Case Cover Sheet Must Be Included With Complaint.
- 7.20[2] Must Use Form Prescribed by Judicial Council.
- 7.20[3] Civil Case Cover Sheet Is Required in Addition to Any Cover Sheet Required by Local Rules.
- 7.20[4] Failure to File Case Cover Sheet May Result in Sanctions.
- 7.21 Additions, Deletions, and Interlineations Must Be Initialed by Clerk or Judge.
- 7.22 All Copies Must Conform to Original Complaint Filed.
- 7.23 Affidavits May Be Required in Actions Involving Installment or Automotive Sales, Consumer Obligations, or Unlawful Detainer.
- 7.24 Plaintiff May Be Required to File Additional Documents in Some Counties If Case Is Governed by Trial Court Delay Reduction Program.
- 7.25 Attorney Must File Notice of Related Case.
- 7.26 Filing Fees Must Be Included With Complaint.
- 7.26[1] Uniform Filing Fee Set By Statute.
- 7.26[2] Party Tendering Partial Payment or Check Returned for Nonpayment Has 20 Days to Complete Payment of Fee and Administrative Charge.
- 7.26[3] Failure to Complete Payment of Fee and Administrative Charge Results in Voided Complaint and Forfeiture of Partial Payment.
- 7.26[4] Seeking Initial Waiver of Filing and Other Fees and Costs.

7.26[4][a] Party Seeking Initial Waiver Must Meet One of Four Grounds for Indigency.

7.26[4][b] Confidential Application Granted Automatically Unless Court or Authorized Clerk Acts.

7.26[4][c] Specific Fees and Costs Waived Depend on Application.

7.27 Clerk Issues Summons on Filing of Complaint and Acceptance of Fees.

7.28 CHECKLIST: Serving Complaint on Defendant.

7.29 Service Must Be Completed Within 60 Days of Filing Complaint in All Civil Cases Except Unlawful Detainer Actions, Proceedings Under the Family Code, and Any Other Proceedings for Which Different Service Requirements Are Prescribed by Law.

7.30 Local Trial Court Delay Reduction Act Rules May Not Require Shorter Period for Service.

7.31 Other Local Rules May Not Require Shorter or Allow Longer Periods for Service.

7.32 Summons and Alternative Dispute Resolution Information Package Must Be Included.

7.33 Dismissals Without Prejudice.

7.34 Dismissals With Prejudice.

7.35 Skeletal Complaint.

7.36 Sample Allegation of Fictitiously Named Defendants (Doe Allegation).

7.37 Sample Allegation of Individual Plaintiff With Fictitious Business Name.

7.38 Sample Allegation of Fictitious Business Name When Plaintiff Is Partnership or Unincorporated Association.

7.39 Sample Allegation of Fictitious Business Name When Plaintiff Is Limited Liability Company.

7.40 Sample Allegation of Corporate Capacity of Plaintiff.

7.41 Allegation of Proper Court in Actions Involving Unruh Act or Rees-Levering Motor Vehicle Sales and Finance Act.

7.42 Allegation of Proper Court In Limited Civil Case Arising From Offer or Provision of Goods, Services, Loans, or Extensions of Credit for Personal, Family, or Household Use.

7.43 Judicial Council Form CM-010--Civil Case Cover Sheet.

7.44 Judicial Council Form FW-001--Request to Waive Court Fees

7.45 Judicial Council Form MC-120--Confidential Reference List of Identifiers





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Chapter 7 Complaints  
I. STRATEGY

*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.01*

**7.01 Scope.**

This chapter covers:

- Objective and strategy for complaints [see 7.02].
- Rules and considerations for drafting a complaint, including sample allegations [see 7.03 -7.15; Forms: see 7.35 -7.42].
- Filing of a complaint, including fees and the case cover sheet [see 7.16 -7.27; Form: see 7.43].
- Procedure for serving a complaint on a defendant [see 7.28 -7.32; Forms: see Ch. 8, Service of Summons].
- The effect that a dismissal has on a complaint [see 7.33, 7.34; for related information and forms, see Ch. 37, Settlement and Release, and Ch. 40, Dismissal for Delay in Bringing to Trial].

**Core Statutes:**

*CCP §§ 422.30, 422.40, 425.10-425.12; Cal Rules Ct, Rules 1.20(b), 1.200, 2.100 et seq.*



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Chapter 7 Complaints  
I. STRATEGY

*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.02*

## 7.02 Objective and Strategy.

Complaints are the pleadings by which a party who initiates a civil action seeks affirmative relief. The complaint presents and defines the issues, forms a foundation for proof, limits the proof to be submitted, and advises the court and the adverse party as to what is being relied on as a cause of action [see *Hughes v. Western MacArthur Co.* (1987) 192 CA3d 951, 956, 237 CR 738 ; *Roth v. Cottrell* (1952) 112 CA2d 621, 624, 246 P2d 958 ].

### **Strategic Point--Reasons Not to Rush to File:**



The complaint can be useful before it is filed. Mailing a factually rich complaint to the prospective defendant may precipitate settlement. Also, a defendant who does not want publicity may be more likely to settle before the complaint is filed, so that plaintiff could benefit from delaying filing until it is clear that there will be no possibility of settlement before the period of limitation runs.

By the same token, one's own client may be the one hoping to avoid the publicity that can come with filing an action. In response to a client's concerns of that nature, counsel should consider the acceptability on the part of the client and chances of success in court of filing with the complaint a motion to seal sensitive portions of a complaint (and subsequently filed papers), as well as a motion for a gag order, although in the latter case the courts rarely oblige.



### **Cross References:**

Discussion of sealing court records, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 2.11 et seq.

Discussion of gag orders, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 2.30 et seq.

If you do not need to file to comply with the statute of limitations or to obtain a provisional remedy, such as preliminary injunctive relief or attachment, consider delaying as long as possible so you can develop the case as fully as possible without discovery and allow time for settlement negotiations.

A plaintiff might decide to wait to file a complaint until just before the expiration of the statute of limitations to allow further time to investigate the facts giving rise to a claim and to interview current and former employees of prospective corporate defendant [see *Triple A Machine Shop Inc. v. State of California* (1989) 213 CA3d 131, 139-140, 261 CR 493 (lawyers are not prohibited from interviewing ex parte former employees of opponent corporation or its present employees, other than officers, directors, managing agents or those whose communications may bind the corporation)]. Once the action is filed, defense counsel is likely to contact former and current employees of a corporate defendant [see, e.g., *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.* (9th Cir 1981) 658 F2d 1355, 1359-1362 (defense counsel can represent corporate defendant and corporate defendants former employees)]. If defense counsel undertakes the representation of the former and current employees, ethical rules will preclude the plaintiff's counsel from having any ex parte contacts with these potential witnesses [*Cal Rules of Prof Conduct, Rule 2-100*].

A plaintiff might also decide to wait to file a complaint for personal injuries until sufficient time has elapsed to permit medical experts to make a reasoned prognosis of the extent to which the injuries might or might not be permanent. Conversely, a plaintiff might decide to file a complaint as early as possible to minimize the risk that the plaintiff might die before trial [see *Williamson v. Plant Insulation Co.* (1994) 23 CA4th 1406, 1417, 28 CR2d 751 (plaintiff's death prior to entry of a verdict precluded awards to the plaintiff's personal representative of noneconomic damages or anticipated economic damages)].

#### **Judge's Perspective:**

Counsel should remember that the filing of the complaint triggers all of the fast track deadlines. Accordingly, counsel should be prepared to comply with those deadlines once the complaint is filed. If counsel needs more time for case preparation and no statute of limitations is looming then thought should be given to a delay in the filing until such time as case preparation is further along.

#### **Strategic Point--Reasons Not to Wait to File:**



If insurance is involved, it may be necessary to file a lawsuit to discover the policy limits. Until suit is filed, insurers cannot reveal the policy limits without the insured's permission [ *Griffith v. State Farm Mut. Auto. Ins. Co.* (1991) 230 CA3d 59, 66-67, 281 CR 165 (construing *Ins Code* §§ 791.02(s), (v), 791.13); see *Boicourt v. Amex Assurance Co.* (2000) 78 CA4th 1390, 1392, 93 CR2d 763 (insurer's blanket rule against disclosing policy limits may lead to bad faith liability for failure to settle within policy limits; disclosure usually helps the policyholders by removing extra months of having a claim with a potential excess verdict hanging over their heads)].

It may be necessary to file to pursue other discovery as well because a person seeking CCP § 2035.010(a) perpetuation of testimony or preservation of evidence before an action is commenced must show a present inability to bring the action or cause it to be brought [see CCP § 2035.030(b)(2); see also CCP § 2035.010(b) (procedure not to be used to ascertain existence of cause of action or defense or to identify potential parties to action not yet filed)].

#### **Strategic Point--Seeking Declaratory Relief:**



An action for declaratory relief can resolve a difference of opinion about rights under an instrument or interpretation of law before a full cause of action accrues. It does not require a breach of an obligation [CCP § 1060], and is to be used to eliminate uncertainties and controversies that may result in future litigation [ *Interstate Marina Development Co. v. County of Los Angeles* (1984) 155 CA3d 435, 443 ]. Given the high priority afforded trials in purely declaratory actions [see 7.12[6][g]], and the preservation of other avenues for relief [see 7.13[1][a]], counsel should consider filing such an action to forestall a future breach or violation and the more expensive litigation resulting from it.

**Strategic Point--Scope of Complaint and Res Judicata Effects:**

When drafting a complaint for declaratory relief consider the scope of the declaration that is sought. Unlike a complaint for coercive relief (typically damages or equitable relief), which will finally determine all issues that were raised or could have been raised under principles of merger and bar, a declaratory relief action can seek a declaration as to a single element of a cause of action or a single affirmative defense. While it may be advantageous for a plaintiff to define the scope of the declaratory relief action in broad, generic terms based on the assumption that the plaintiff will prevail, the plaintiff that loses a declaratory relief action runs the risk of losing on the same broad basis sought in the complaint. A declaratory relief action will be given preclusive effect as to all matters declared in the judgment. If the scope of the declaratory relief complaint is broad and the case is lost, the scope of the matters declared by the judgment is likely to be equally broad [see *Aerojet-General Corp. v. American Excess Ins. Co.* (2002) 97 CA4th 387, 398, 414, 117 CR2d 427 (plaintiff "sought the broad judgment it got, albeit not its substance, and it is thus bound thereby")]. Additionally, in a claim for coercive relief (damages or injunction), be sure to include all claims that could be brought that arise from the same primary right or any attempt to bring later claims can be barred by res judicata and the rule against splitting a cause of action [ *Lincoln Property Co., N.C., Inc. v. Travelers Indemnity Co.* (2006) 137 CA4th 905 ].

**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.



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Chapter 7 Complaints  
II. DRAFTING A COMPLAINT

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**7.03 CHECKLIST: Drafting a Complaint.**



Determine timing:

- ☐ File before statute of limitations runs.
- ☐ For exact timing consider:
  - ☐ Need for time to investigate.
  - ☐ Plaintiff's health.
  - ☐ Key witness's health.
  - ☐ Status of negotiations with opposing party.
  - ☐ Preparedness to move forward promptly after filing.

**Discussion:**

See 7.02

- ☐ Determine court in which complaint will be filed.

**Discussion:**

See *Ch. 6, Determining Forum*, 6.31 et seq.

- ☐ Obtain appointment of guardian ad litem for plaintiff, if needed.

**Discussion:**

See *Ch. 5, Parties*, 5.18 et seq.

- ☐ Prepare complaint on proper paper and meeting basic format, citation, and confidentiality requirements.

**Authority:**

*Cal Rules Ct, Rules 1.20(b)* 1.200, 2.100 et seq.

**Discussion:**

See 7.06

**Form:**

7.45

- ☐ Prepare first page in proper format.

- ☐ Attorney information.
- ☐ Space left for use by clerk.
- ☐ Caption.

**Authority:**

*Cal Rules Ct, Rule 2.111*

**Discussion:**

See 7.07, 7.08

**Form:**

See 7.35

- ☐ Include introduction to allegations, if desired.

**Discussion:**

See 7.09

- ☐ Identify any plaintiff suing in other than individual capacity, if:

- ☐ Plaintiff's identity affects the action; or
- ☐ Plaintiff is doing business under a fictitious name and the action concerns the business.
- ☐ Allege compliance with fictitious business name statement requirement.

**Authority:***B&P Code § 17918***Discussion:**

See 7.10

**Forms:**

See 7.37 -7.40

- ☐ Allege status and capacity of defendant, if required or desired.
- ☐ Required in certain consumer and unlawful detainer litigation.
  - ☐ Desirable for obtaining admissions by way of answer.
  - ☐ Designate any unknown defendants with a fictitious name.
  - ☐ State names of any nonparties who must be joined as defendants under compulsory joinder rules and reasons for nonjoinder.

**Authority:***CCP §§ 389, 474***Discussion:**

See 7.11

**Forms:**

See 7.35, 7.36, 7.41, 7.42

- ☐ State causes of action.
- ☐ Number each separately.
    - ☐ Causes of action must state:
      - ☐ Number.
      - ☐ Nature.
      - ☐ Plaintiff asserting it, if more than one plaintiff.
      - ☐ Defendant against whom it is directed, if more than one defendant.
  - ☐ Incorporate relevant allegations from prior causes of actions in subsequent causes of action by

reference.

**Authority:**

*Cal Rules Ct, Rule 2.112*

**Discussion:**

See 7.12

**Form:**

See 7.35

☐ Observe any special pleading requirements, e.g., in actions involving:

- ☐ Recovery of real property.
- ☐ Contracts.
- ☐ Judgments and other determinations.
- ☐ Statutes or ordinances.
- ☐ Allegations on information and belief.
- ☐ Seeking declaratory relief.

**Authority:**

*CCP §§ 455-457, 459*

**Discussion:**

See 7.12[6]

☐ Include demand for judgment.

- ☐ State amount of money or damages demanded

**Exceptions:**

Do not state amount of punitive damages sought in any action.

Do not state amount of actual or punitive damages sought in personal injury or wrongful death actions.

**Authority:**

*CCP § 425.10(a)(2), (b); CC § 3295(e)*

**Discussion:**

See 7.13[1], [2]



☐ Sign the complaint:

☐ Attorney, or

☐ Unrepresented party.

**Authority:**

*CCP § 128.7(a)*

**Discussion:**

See 7.14

☐ Include verification, if required or desired.

**Authority:**

*CCP §§ 128.7(a), 446*

**Discussion:**

See 7.15

**Form:**

See 7.35



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#### 7.04 Use of Judicial Council Complaint Forms.

**7.04[1] Judicial Council Complaint Forms Are Not Mandatory.** The Judicial Council is required to provide official forms for use in California trial courts for any complaint that is based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud [CCP § 425.12]. However, use of these forms is optional [Cal Rules Ct, Rules 1.35, 1.45].



#### Strategic Point:

The Judicial Council pleading forms can be very useful for uncomplicated limited civil cases. However, in other cases using the form pleading may send the wrong message. If there is any complexity at all in the case, using the form could imply that plaintiff's counsel does not place a high value on the case, possibly because it is not strong enough to be worth the effort of drafting a complaint.

**7.04[2] Judicial Council Forms May Be Duplicated and Typewritten.** A plaintiff may file a duplicate of a Judicial Council form that has been reproduced by a laser printer or other similar device. The device may also fill in information that would normally have been done by a typewriter or word processor providing that the typestyle is contrasting to that in the form and equivalent to that produced by a typewriter or word processor [Cal Rules Ct, Rule 1.44]. By filing the form, the plaintiff certifies that it is a true and correct copy of a Judicial Council form [Cal Rules Ct, Rule 2.132].

#### 7.04[3] Attachment Forms Are Required for Tort or Contract Actions Using General Complaint Forms.

**7.04[3][a] Attachment Forms Must Be Used to Allege Specific Causes of Action.** If a plaintiff uses one of the general complaint forms for a tort or contract action, one or more attachments must be used to allege specific causes of action [see Judicial Council Forms PLD-PI-001, PLD-PI-003, PLD-C-001, PLD-C-001(3)].



#### Warning:

When specific allegations need to be set forth, the plaintiff must add the details because the form complaint, standing alone, is no more immune to demurrer than any other complaint that fails to properly

assert a cause of action [see *People ex rel. Dep't of Transp. v. Superior Court* (1992) 5 CA4th 1480, 1486, 7 CR2d 498 ].

**7.04[3][b] Cause of Action Attachments Must Be Numbered Consecutively Beginning With One.** Each paragraph within a cause of action attachment must be numbered consecutively, beginning with one, and each paragraph must be preceded with one or more identifying letters derived from the title of the cause of action [*Cal Rules Ct, Rule 1.45(c)*].

**7.04[3][c] Causes of Action for Which No Form Has Been Approved May Be Prepared in Alternate Format.** If no specific form has been approved for a certain cause of action, the plaintiff may prepare the allegation in the format prescribed by *Cal Rules Ct, Rules 2.100 et seq.* [*Cal Rules Ct, Rule 1.45(c)*].

**7.04[4] Attachment Forms May Be Used to Supplement Information on Forms.** Attachment forms may also be used to provide information for which there was insufficient space on the form. When using attachments, the format prescribed by *Cal Rules Ct, Rules 2.100 et seq.* should be followed, and each attachment and paragraph therein should be sufficiently labeled as to its identity and relationship to the form. Any attachment used should also contain the short title of the case at the top and a space designated for the case number [see *Cal Rules Ct, Rule 1.45(c)*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements



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**7.05 Local Courts May Not Condition Filing of Complaint on Local Rule Requirements.**

As long as a complaint is in a form that complies with *Cal Rules Ct, Rule 2.100 et seq.*, the clerk has a ministerial duty to file it. A superior court may not condition the filing of a complaint on local rule requirements [ *Carlson v. Department of Fish & Game* (1998) 68 CA4th 1268, 1276, 1280, 1282-1283, 80 CR2d 601 (action not barred by statute of limitations when clerk improperly returned complaint based on local rule)].



**Warning:**

Be aware of local requirements. It is not desirable to fail to comply with local rules and to have a clerk refuse to file a complaint when timely filing is important for statute of limitations or "race to the courthouse" reasons and then have to argue that the clerk should have filed the complaint.

Although a clerk may not refuse to file a complaint because it does not comply with local rule requirements, once the complaint is filed, the court may use its power to impose sanctions to redress any violation of local rule requirements [CCP § 575.2; *Cal Rules Ct, Rule 2.30*; *Maginn v. City of Glendale* (1999) 72 CA4th 1102, 1107, 85 CR2d 639 ].

**Legal Topics:**

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**7.06 Format Is Governed by California Rules of Court Requirements.**

**7.06[1] Paper Must Be Opaque, Recycled, and 8 1/2 by 11 Inches in Size.** Complaints must be drafted on recycled paper that is opaque, unglazed, white or unbleached, of a quality of at least 20-pound weight, and 8 1/2 by 11 inches in size [*Cal Rules Ct, Rules 1.22(a), 2.101(a), 2.103*]. The attorney, party, or other person filing the complaint certifies, by the act of filing, that the document was produced on paper purchased as recycled [*Cal Rules Ct, Rules 1.22(b), 2.101(b)*] as defined by PR Code § 42202 [*Cal Rules Ct, Rule 1.6(22)*]. Only one side of the paper may be used [*Cal Rules Ct, Rule 2.102*].

**7.06[2] Print May Not Be Smaller Than 12 Points.** Complaints must be typewritten or printed or prepared by a photocopying or other duplication process that produces clear and permanent copies that are at least as legible as printing. The type must be at least 12 points in size, and the typeface must be the equivalent of Courier, Times Roman, or Helvetica. The color of the print must be either black or blue-black [*Cal Rules Ct, Rules 2.104-2.106*].

**7.06[3] Spacing Must Be Double or One and One-Half.** The lines on each page of the complaint must be one and one-half spaced or double spaced and numbered consecutively [*Cal Rules Ct, Rule 2.108(1)*].

**Exception:**

Descriptions of real property may be single-spaced. Quotations may be single spaced and have unnumbered lines if they generally comply with the space requirements of *Cal Rules Ct, Rule 2.111* [*Cal Rules Ct, Rule 2.108(2), (3)*].

**7.06[4] Left Margin Must Be One Inch, Right Margin Must Be One-Half Inch.** The left margin on each page of a complaint must be no less than one inch from the left edge of the paper. The right margin on each page of a complaint must be no less than one-half inch from the right edge of the paper [*Cal Rules Ct, Rule 2.107*].

**7.06[5] Line Numbers Must Be Properly Spaced and Consecutively Numbered.** Line numbers must be placed at the left margin of each page of a complaint and separated from the text by a vertical column of space at least one-fifth of an inch wide or a single or double vertical line. Each line number must be aligned with a line of type or be evenly spaced vertically on the page. Line numbers must be consecutive and begin anew on each page of the complaint with the number "1." There must be at least three lines numbers for every vertical inch on the page [*Cal Rules Ct, Rule*

2.108(4)].

**7.06[6] Pages Must Be Consecutively Numbered at Bottom.** Each page of a complaint must be consecutively numbered at the bottom and consist of original pages without riders. The pages must be firmly bound together at the top. Exhibits may be fastened to the pages and, if prepared by a machine copying process, must be equal to typewritten material in terms of legibility and permanency of image [*Cal Rules Ct, Rules 2.109, 2.113, 2.114*].

**7.06[7] Pre-Punched Holes Are Required.** Each page of a complaint presented for filing must contain two pre-punched normal sized holes, centered 2 1/2 inches apart and 5/8 of an inch from the top of the paper [*Cal Rules Ct, Rule 2.115*].

**7.06[8] Footers Are Required on All Pages Except Exhibits.** Except for any exhibits, each page of a complaint must have a footer in the bottom margin of each page, placed below the page number and divided from the rest of the page by a printed line. The footer must be set in type that is no smaller than 10 points and must contain the title of the paper or some clear and concise abbreviation [*Cal Rules Ct, Rule 2.110*].

**Example:**

"Complaint" [*see Cal Rules Ct, Rule 2.110(b)*].

**7.06[9] Legal Citations Must Follow Consistent Format.** In accordance with the general requirement for each document filed with the court [*Cal Rules Ct, Rule 1.200*], the style of citations to legal sources in the entire complaint must comport consistently with the style guidelines contained in one of either the *California Style Manual* or *The Bluebook: Uniform System of Citation*.

**7.06[10] Certain Identifiers Must Be Excluded or Redacted from Complaint.**

**7.06[10][a] Certain Identifiers Generally Must Be Excluded.** In accordance with the general requirement for each document filed with the court, the plaintiff and plaintiff's counsel must not include the following identifiers in the complaint filed in the court's public file, whether filed in paper or electronic form [*Cal Rules Ct, Rule 1.20(b)(2)*]:

- Social security numbers.
- Financial account numbers.

**Exceptions:**

The requirement to exclude the specified identifiers does not apply where otherwise provided by law or ordered by the court [*Cal Rules Ct, Rule 1.20(b)(2)*].

**7.06[10][b] Where Identifiers Are Necessary, They Must Be Redacted.** If a social security number or financial account number is required in a pleading or other paper filed in the public file, only the last four digits of that number may be used [*Cal Rules Ct, Rule 1.20(b)(2)(A), (B)*].

**Exceptions:**

If the court orders on a showing of good cause, a party filing a document containing identifiers may file, along with the redacted document that will be placed in the public file, a reference list. The reference list is confidential. The confidential list must [*Cal Rules Ct, Rule 1.20(b)(4)*]:

- Identify each item of redacted information and
- Specify an appropriate reference that uniquely corresponds to each item of redacted information listed.

All references in the case to the redacted identifiers included in the confidential reference list will be understood to refer to the corresponding complete identifier. A party may amend its reference list as of right. A party filing a confidential reference list must use Judicial Council Form MC-120, Confidential Reference List of Identifiers, for that purpose. [*Cal Rules Ct, Rule 1.20(b)(4)*].

➤ **Cross Reference:**

Judicial Council Form MC-120, Confidential Reference List of Identifiers, see 7.45.

**7.06[10][c] Exclusion and Redaction Requirements Do Not Apply to Documents Subject to Order of Confidentiality or to Seal.** The requirements to exclude the specified identifiers, or to redact them where it is necessary that they be included, does not apply to documents or records that by court order or operation of law are filed in their entirety either confidentially or under seal [*Cal Rules Ct, Rule 1.20(b)(1)*].

➤ **Cross Reference:**

Obtaining or opposing orders to seal or unseal court records, see Matthew Bender(R) Practice Guide: *California Trial and Post-Trial Civil Procedure*, 2.11 et seq.

**7.06[10][d] Court Clerk Not Responsible for Ensuring Exclusion or Redaction.** The court clerk is not required to review pleadings or other papers for compliance with the exclusion or redaction of the specified identifiers. The responsibility for excluding or redacting identifiers from all documents filed with the court rests solely with the parties and their attorneys [*Cal Rules Ct, Rule 1.20(b)(3)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**7.07 First Page Must Conform to Particular Format.**

**7.07[1] Attorney Information Is Required.** Attorney information is required in the space commencing one inch from the top of the page with line 1, to the left of the center of the page. List the name, office address or, if none, residence address, telephone number, and State Bar membership number of the attorney presenting the complaint, in whose behalf the complaint is presented, or of the party if he or she is appearing in without counsel [*Cal Rules Ct, Rule 2.111(1)*].

The inclusion of a fax number or e-mail address on the first page of a complaint is optional [*Cal Rules Ct, Rule 2.118(b)*], and its inclusion does not constitute consent to service by those methods unless otherwise provided by law [*Cal Rules Ct, Rule 2.111(1)*].

If a complaint is filed with co-counsel who is not admitted in California, co-counsel's name may be followed by the notation "Pro Hac Vice Application Pending," instead of a State Bar Number [*see Cal Rules Ct, Rule 9.40* (pro hac vice applications)]. Although not expressly authorized, this notation explains on the face of the complaint why no State Bar member number is included.



**Warning:**

A party or attorney whose address changes while an action is pending must file and serve written notice of the address change on all parties [*Cal Rules Ct, Rule 2.200*].

**7.07[2] Space Must Be Left for Use by Clerk.** In the first two inches of space between lines 1 and 7 to the right of the center of the page, a blank space must be left for the use of the clerk [*Cal Rules Ct, Rule 2.111(2)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements





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**7.08 Captions Are Mandatory.**

**7.08[1] Every Complaint Must Contain Caption.** Every complaint must contain a caption [*CCP § 422.30; Cal Rules Ct, Rule 2.111*]. The contents of a caption are listed in *CCP §§ 422.30, 422.40*, and the formats of captions are governed by *Cal Rules Ct, Rule 2.111*.

**7.08[2] Every Caption Used in Complaint Must Contain Certain Information.**

**7.08[2][a] Title of Court.** Following the required attorney information [*see 7.07[1]*], the caption begins with the name of the court and the county in which the complaint is filed [*CCP § 422.30(a)*]. The name or title of the court is placed on line 8, at or below 31/3 inches from the top of the page, on the first page of the complaint [*Cal Rules Ct, Rule 2.111(3)*].

**7.08[2][b] Title of Case.** The title of the case is set forth below the title of the court and to the left of the center of the page [*Cal Rules Ct, Rule 2.111(4)*]. The title of the case in a complaint must set forth the names of all parties to the action [*CCP § 422.40*], with each name commencing on a separate line starting at the left margin of the page [*Cal Rules Ct, Rule 2.111(4)*].

On any subsequent pleadings or papers, the title of the case may simply state the name of the first party on each side, with an appropriate indication of other parties, and to state that a cross-action or cross-actions are involved, if applicable [*Cal Rules Ct, Rule 2.111(4)*].

**7.08[2][c] Description of Parties.** A party may be sued in any name in which he or she is known and recognized, even an assumed name [ *Cabrera v. McMullen (1988) 204 CA3d 1, 3-4, 251 CR 34 ; Emery v. Kipp (1908) 154 C 83, 84, 97 P 17* ].

When a party is acting on his or her own behalf, rather than in a representative capacity, it is sufficient to include the party's name. The party's name should include a first and last name, as well as a middle name or middle initial if the name is a common one or is likely to be confused with another party. If a party is an individual acting in a representative capacity, such as a guardian ad litem for a minor, a short description to that effect should follow the party's name. If a party is an entity other than an individual, such as a corporation or association, the party's name

should be followed by a description of its status.

If the body of the complaint correctly identifies a defendant who has been omitted from the caption, and that defendant has been properly served with process, the court will usually allow an amendment to correct technical defects in the caption [ *United Food & Commercial Workers Union v. Superior Court* (2000) 83 CA4th 566, 571, 99 CR2d 849 ; *Bell v. Tri-City Hosp. Dist.* (1987) 196 CA3d 438, 445-446, 449, 241 CR 796 ].

**7.08[2][d] Number of Case.** The case number must be placed to the right of and opposite the title [*Cal Rules Ct, Rule 2.111(5)*]. Because a case number is not assigned until the complaint has been filed, the phrase "NO. \_\_\_\_\_" should be provided. The clerk will stamp on the number after the complaint is filed.

The case number that is assigned by the clerk should be included on all subsequent pleadings and papers.

**7.08[2][e] Description of Complaint.** A description of the complaint must appear below the case number [*Cal Rules Ct, Rule 2.111(6)*]. The description of the nature of the complaint should be stated in capital letters.

A brief description of the character of the action must appear below the description of the nature of the complaint [*Cal Rules Ct, Rule 2.111(6)*].

**Example:**

"COMPLAINT FOR DAMAGES".

"Personal Injury and Property Damages".

**7.08[2][f] Statements Required to Identify Limited Civil Case.** The caption of every pleading in a limited civil case must contain the words "Limited Civil Case" [*CCP § 422.30(b)*; *Cal Rules Ct, Rule 2.111(10)*].

The first page of the complaint must state either "Amount demanded exceeds \$10,000" or "Amount demanded does not exceed \$10,000" [*Gov Code § 70613(b)*; *Cal Rules Ct, Rule 2.111(9)*].

If a cross-complaint or any amended pleading results in reclassification of the case, the caption must indicate that the pleading reclassifies the case [*Cal Rules Ct, Rule 2.111(11)*; see also *CCP §§ 403.020, 403.030, or 403.050*].



**Warning:**

There are economies in filing as a limited civil case. If the value of the case is close to the \$25,000 jurisdictional limit between limited and unlimited civil cases, counsel may want to weigh whether the potential for recovery in excess of \$25,000 is likely to cover the increased expense of filing as an unlimited civil case given the inability to use the economic litigation procedures of *CCP §§ 90-100*. However, if there is any potential for recovery of more than \$25,000, before filing an action as a limited civil case, counsel should disclose the limitation to the client to get the client's written agreement to file as a limited civil case.



**Strategic Point:**

If you file as a limited civil case but the injury develops or is revealed to be greater than initially thought, you can reclassify the case to unlimited by filing an amended or supplemental complaint and paying the appropriate fee [see *CCP § 403.020*].



**Cross Reference:**

Discussion of what constitutes limited civil case and changing classification, see *Ch. 15, Reclassification*

*of Cases, 15.03 et seq. and 15.07 et seq.*

**7.08[2][g] Assigned Judge and Department, If Any.** The name of the assigned judge and department, if any, must appear below the nature of the paper or the character of the action [*Cal Rules Ct, Rule 2.111(7)*]. This, of course, would not apply to filing the initial complaint in a case.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements



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**7.09 Introduction to Allegations Is Customary but Not Required.**

Although not required by statute, an introductory phrase usually follows the caption and leads into the body of the complaint. The introduction typically identifies the plaintiff and may also state the nature of the pleading. Simple introductions, such as "Plaintiff alleges" are most commonly used.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements



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**7.10 Plaintiff Must Be Identified Unless Suing in Individual Capacity.**

**7.10[1] Real Party in Interest Must Prosecute Action.** An action must be prosecuted in the name of the real party in interest [*CCP* § 367].

➤ **Cross Reference:**

Discussion regarding plaintiffs suing a representative capacity, see 7.08[2][c].

**7.10[2] Individual Plaintiff Need Not Be Further Identified.** Beyond providing his or her name, an individual plaintiff does not need to identify himself or herself further in the complaint.

➤ **Cross Reference:**

Discussion regarding plaintiff's use of an assumed name, see 7.08[2][c].

**7.10[3] Guardian ad Litem for Minor Must Be Identified.** An unemancipated minor must sue by the guardian of his or her estate or by a guardian ad litem [*CCP* § 372(a); *Fam Code* § 6601].

Counsel should obtain appointment of the guardian appearing on a minor's behalf before filing the complaint, and the complaint should allege the appointment to avoid a potential demurrer [see *City of Los Angeles v. Superior Court* (1968) 264 CA2d 766, 772, 70 CR 826 ; *Crawford v. Neal* (1880) 56 C 321, 321-322 ; but see *CCP* § 373(a) (appointment of guardian ad litem for a minor must be made before summons is issued)].

**Exceptions:**

A minor 12 or older may appear without a guardian or counsel to request or oppose injunctions and temporary restraining orders relating to domestic and other violence [*CCP* § 372(b)]. A minor who is the parent in proceedings for child custody, visitation, or support in which the child is a parent and whom the court has not found to not understand the proceedings does not need a guardian ad litem for those proceedings [see *CCP* § 372(c)].

➤ **Cross References:**

Discussion and forms for appointment of guardian ad litem, see *Ch. 5, Parties, 5.18* et seq.

Discussion of emancipated minors, see California Forms of Pleading and Practice, Ch. 245, Emancipation of Minors (Matthew Bender).

**7.10[4] Guardian ad Litem for Incompetent Person Should Be Identified.** An incompetent person or person for whom a conservator has been appointed must sue by the conservator of his or her estate or by a guardian ad litem [CCP § 372(a)].

The complaint may be filed and summons served without appointment of a guardian or conservator [see CCP § 373]. However, if the plaintiff's incompetence appears on the face of the complaint, for example, when the complaint alleges that the plaintiff was rendered unconscious or brain damaged by the occurrence that is the subject of the action and remains so, appointment of a guardian ad litem or conservator of the estate should be obtained before the complaint is filed and the appointment should be alleged to avoid demurrer [see *City of Los Angeles v. Superior Court* (1968) 264 CA2d 766, 772, 70 CR 826 ; *Crawford v. Neal* (1880) 56 C 321, 321-322 (both involving minors)].

 **Cross Reference:**

Discussion and forms for appointment of guardian ad litem, see *Ch. 5, Parties, 5.18* et seq.

**7.10[5] Identification of Non-Individual Plaintiffs Is Customary.** If a plaintiff is other than an individual, such as an association or a corporation, it is customary to identify the plaintiff as such in the complaint.

**7.10[6] Allegation of Plaintiff's Status or Capacity Must Be Included If It Affects Action.** If the status or capacity of the plaintiff affects the action, an allegation of the plaintiff's status or capacity must be included in the complaint.

**Examples:**

- A foreign corporate plaintiff that does only intrastate business does not have the capacity to maintain an action unless it has qualified to do business in California and has paid its corporate franchise taxes [Corp Code § 2203].

- In general, a contractor may not bring an action based on a contract without alleging that he or she was a duly licensed contractor at all times during the performance of that contract [B&P Code § 7031(a)].

 **Cross References:**

Discussion of capacity, see *Ch. 5, Parties, 5.08* et seq.

Form of sample allegation of corporate capacity of plaintiff, see 7.40.

**7.10[7] Plaintiff Transacting Business Under Fictitious Business Name May Not Maintain Action Unless Fictitious Business Name Statement Has Been Executed.** If a plaintiff is doing business under a fictitious name and brings an action in that name, an allegation to that effect must be made. The plaintiff must also show that it has complied with the fictitious name statement requirements of B&P Code § 17913 [B&P Code § 17918].

 **Cross Reference:**

Discussion of what constitutes a fictitious business name, see *Ch. 5, Parties, 5.17*.

**7.10[8] Partnerships and Associations May Sue Under Names by Which They Are Known.** Any partnership or other unincorporated association, whether established for profit or not, may file a complaint in the name that it has assumed or by which it is known [*CCP* § 369.5(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePartiesFictitious NamesCivil ProcedurePartiesReal Parties in InterestGeneral Overview



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**7.11 Allegation of Status and Capacity of Defendant Is Customary but Is Not Required.**

**7.11[1] Allegation of Status and Capacity of Defendant Is Not Mandatory in Most Cases.** A plaintiff is not usually required to allege the status and capacity of any defendant in the complaint.



**Strategic Point:**

A plaintiff may want to consider including in the complaint an allegation of the status, capacity, and residence (i.e., county and state) of each defendant in order to obtain an admission by way of answer as to these matters and to allege venue, which is in the county of the defendant's residence [CCP § 395(a)].

**7.11[2] Allegation of Status and Capacity of Defendant Is Required in Certain Consumer and Unlawful Detainer Litigation.** In the following cases, a plaintiff must state facts in the complaint, verified by plaintiff's oath or plaintiff's attorney's oath, which show that the complaint has been filed in the proper court and that the action is subject to the provisions of one of the following statutes [CCP § 396a]:

- Any case subject to the Unruh Retail Installment Sales Act [CC § 1801 *et seq.*].
- Any case subject to the Rees-Levering Motor Vehicle Sales and Financing Act [CC § 2981 *et seq.*].
- Any limited civil case subject to CCP § 395(b) that concerns:
  - ☐ Actions arising from an offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use; or
  - ☐ Actions arising from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller.



- Any limited civil case that is an action for unlawful detainer as defined by *CCP* § 1161.

**Decision Point:**

Instead of stating the facts in the complaint, the plaintiff may file an affidavit or a declaration made under penalty of perjury [*CCP* § 2015.5] stating facts showing that the action has been commenced in the proper court and is subject to the provisions of *CC* § 1812.10 or 2984.4 or *CCP* § 395(b) or is an action for unlawful detainer [see 7.23].

**Warning:**

In cases subject to *CC* § 1812.10 or 2984.4, if the facts are stated in a verified complaint, they may not be stated on information and belief [*CC* §§ 1812.10, 2984.4].

**Cross Reference:**

Discussion of declaration or affidavit, see 7.23.

**7.11[3] Designation of Defendant by Fictitious Name; When Allowed.**

**7.11[3][a] Genuine Ignorance Required.** If a plaintiff is genuinely ignorant of a defendant's name [ *Kerr-McGee Chemical Corp. v. Superior Court* (1984) 160 CA3d 594-597, 206 CR 654 ; *Nissan v. Barton* (1970) 4 CA3d 76, 79-81, 84 CR 36 ] or lacks knowledge of acts giving him or her a cause of action against that person [see *Westfour Corp. v. California First Bank* (1992) 3 CA4th 1554, 1560, 5 CR2d 394 ], the plaintiff must state that fact in the complaint [*CCP* § 474]. Such a defendant may be designated in the complaint by any name.

Fictitiously named defendants are commonly designated as DOES 1 through 50 (or whatever number are to be designated) and are commonly referred to as Doe allegations.

**Warning:**

An allegation as to a fictitiously named defendant should be used whenever there is the possibility that another defendant may be liable because the allegation will toll the statute of limitations against such defendant [see *Barrington v. A.H. Robins Co.* (1985) 39 C3d 146, 150, 151, 216 CR 405, 702 P2d 563 ; *Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 C2d 596, 602, 15 CR 817, 364 P2d 681 ].

**Trap:**

If no attempt is made to state any cause of action against a fictitiously named defendant, then the statute of limitations is not tolled as to that person [ *Williams v. Goodman* (1963) 214 CA2d 856, 861, 29 CR 877 ].

**Strategic Points:**

- Adding a charging allegation as to each fictitiously named defendant may facilitate later amendments to the complaint [see *Smeltzley v. Nicholson Mfg. Co.* (1977) 18 C3d 932, 940, 136 CR 269, 559 P2d 624 ; *Sobeck & Assocs. v. B & R Invs. No. 24* (1989) 215 CA3d 861, 867, 264 CR 156 ].

- Naming Does is free; do not be stingy. If there is any potential for a large number of Doe defendants, name a lot of them. Name Does 1 to 100. When you are amending the complaint to identify defendants, this may save you from later having to identify Doe 5.1, 5.2, etc.

#### **Cross References:**

Forms of sample allegations involving fictitious names, see 7.36-7.39.

Form of sample Doe allegation, see 7.36.

**7.11[3][b] No Duty to Exercise Reasonable Diligence to Discover Name.** *CCP* § 474 does not require a plaintiff to use due diligence to ascertain the true identity of a fictitiously named defendant or the facts giving rise to a cause of action against such a defendant [ *Westfour Corp. v. California First Bank* (1992) 3 CA4th 1554, 1560, 5 CR2d 394 ; *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 CA3d 369, 376, 228 CR 878 ]. Whether the plaintiff's ignorance of the defendant's true identity is the result of misinformation or negligence is irrelevant [ *Fuller v. Tucker* (2000) 84 CA4th 1163, 1170, 101 CR2d 776 ; *General Motors Corp. v. Superior Court* (1996) 48 CA4th 580, 592-594, 55 CR2d 871 ]. To defeat a claim of ignorance, it must generally be shown that the plaintiff had actual knowledge of the basic facts [ *General Motors Corp. v. Superior Court* (1996) 48 CA4th 580, 594, 55 CR2d 871 ].



#### **Warning:**

Courts vary as to how to evaluate whether a plaintiff is genuinely ignorant of the identity of a fictitiously named defendant because the plaintiff has forgotten the defendant's name. In *Woo v. Superior Court* (1999) 75 CA4th 169, 179-180, 89 CR2d 20 , (Fourth Dist., Div. One), the court held that a plaintiff who forgot a defendant's identity was required to resort to readily available information to ascertain the defendant's identity and criticized the approach of *Balon v. Drost* (1993) 20 CA4th 483, 488-490, 25 CR2d 12 (First Dist., Div. Two), which did not require any diligence to relearn the defendant's name.



#### **Trap:**

At the first status conference, the court will commonly ask whether there are to be any additional defendants and will seek to dismiss all unnamed fictitious defendants. Plaintiff should not stipulate to dismiss fictitiously-named defendants at this point. Under the Trial Court Delay Reduction Act, the court cannot compel the dismissal or severance of the fictitiously-named defendants until the conclusion of the introduction of evidence at trial except on stipulation or motion of the parties [*Gov Code* § 68616(h)].



#### **Cross Reference:**

Discussion of fictitiously named defendants, including the "ignorance" requirement, see *Ch. 34, Amended and Supplemental Pleadings*, 34.33.

**7.11[3][c] Ignorance Measured at Time Complaint Is Filed.** A plaintiff's ignorance of the identity of a fictitiously named defendant is measured at the time the plaintiff files the complaint [ *Woo v. Superior Court* (1999) 75 CA4th 169, 177, 89 CR2d 20 ].

**7.11[3][d] Default Judgment May Not Be Entered Against Fictitious Defendant Unless He or She Has Been Served.** No default or default judgment may be entered against a fictitiously named defendant unless a copy of the summons, a copy of process, or some other form of notice is served on that defendant [*CCP* § 474]. The notice must state in substance, on its face: "To the person served: You are hereby served in the within action (or proceeding) as (or on behalf of) the person sued under the fictitious name of (designating it)" [*CCP* § 474].

**7.11[3][e] Plaintiff Must Amend Complaint When Defendant's True Name Is Discovered.** A plaintiff must amend the complaint to include the actual name of a fictitiously named defendant when the name is discovered [*CCP* §

474].

Unreasonable delay in amending the complaint after discovery of the defendant's identity may bar a plaintiff from using the fictitious name device. However, there is no specific time limit for when the amendment must be made after discovery of the defendant's identity. To preclude relation back the plaintiff must be dilatory and the defendant must be prejudiced by the delay [ *Winding Creek v. McGlashan* (1996) 44 CA4th 933, 942-943, 52 CR2d 236 (no prejudice shown; 2-year delay); *Sobeck & Assocs., Inc. v. B & R Invs. No. 24* (1989) 215 CA3d 861, 867-869, 264 CR 156 (no prejudice shown; running of period of limitation measured from time of discovery of identity does not bar relation back)].

**7.11[4] Complaint Must State Names of Persons Not Joined As Defendants Who Must Be Joined Under Compulsory Joinder Rules.** If a plaintiff has not joined any person or persons who must be joined under compulsory joinder rules [see CCP § 389(a), (b)], the plaintiff must state so in the complaint, as well as provide the reason or reasons why they are not so joined [CCP § 389(c)].



**Cross Reference:**

Discussion, see *Ch. 5, Parties*, 5.31.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePartiesFictitious Names



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## 7.12 Complaint Must State One or More Causes of Action.

**7.12[1] Each Cause of Action Must Be Separately Numbered.** Each separately stated cause of action or count in a complaint must be separately numbered. Each separate cause of action in a complaint must be identified with all of the following information [*Cal Rules Ct, Rule 2.112*]:

- Its number (e.g., "Second Cause of Action").
- Its nature (e.g., "for breach of warranty").
- The plaintiff asserting it, if more than one plaintiff is represented in the complaint (e.g., "by Plaintiff Wilson").
- The defendant or defendants to whom it is directed (e.g., "against Defendant Miller").

### ➡ Cross Reference:

Discussion of distinction between cause of action and count, see *California Forms of Pleading and Practice*, § 123.13 (Matthew Bender).

**7.12[2] Incorporation by Reference Is Generally Allowed.** If a complaint sets forth more than one cause of action or count, the plaintiff need not repeat in each cause of action facts stated in preceding causes of action [ *Lambert v. Southern Counties Gas Co. (1959) 52 C2d 347, 352, 340 P2d 608* ]. Allegations of a preceding cause of action may be incorporated by reference into later ones [ *Clark v. Berlin Realty Co. (1917) 33 CA 50, 53, 164 P 333* ].



### Warning:

The references will not be subject to serious objection if they are definite and certain [ *Treweek v. Howard (1895) 105 C 434, 442, 39 P 20* ]. However, each count must be complete in itself and contain all of the facts necessary to constitute a cause of action. The defects in one count may not be supplied from other statements unless those statements are expressly referred to in the incomplete count and adopted as a part of it [ *Priola v. Paulino (1977) 72 CA3d 380, 383, 140 CR 186* ].

**Warning:**

When incorporating allegations from other counts, a plaintiff should be careful not to incorporate conflicting facts, thereby rendering the complaint uncertain and subject to demurrer [see CCP § 430.10(f)].

A complaint may also incorporate by reference a document that is attached as an exhibit, so as to allow the plaintiff to provide material facts that comprise the cause of action in which the reference is made [ *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 CA4th 592, 609, 98 CR2d 277 ; *In Re Parker* (1998) 60 CA4th 1453, 1469, 71 CR2d 167 ].

**Strategic Point--Plaintiff:**

Avoid incorporating all or most prior paragraphs with each purported cause of action. This type of pleading is disfavored because it causes ambiguity and creates redundancy [ *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 CA4th 598, 605, 135 CR2d 131 ].

**7.12[3] Statement of Facts Constitutes Cause of Action.** A statement of facts, in ordinary and concise language, constitutes a cause of action in a complaint [CCP § 425.10(a)(1)].

The nature of a cause of action is determined by the facts pleaded and not by the title the pleader gives it [see *Bloniarz v. Roloson* (1969) 70 C2d 143, 149, 74 CR 285, 449 P2d 221 ; *Nymark v. Heart Fed. Sav. & Loan Ass'n* (1991) 231 CA3d 1089, 1093, 283 CR 53 ].

Ultimate facts, rather than evidentiary facts or conclusions of law, must be alleged [ *Logan v. Southern Cal. Rapid Transit Dist.* (1982) 136 CA3d 116, 126, 185 CR 878 ; *Krug v. Meeham* (1952) 109 CA2d 274, 277, 240 P2d 732 ]. An allegation of ultimate fact usually involves one or more conclusions of fact [ *In re Estate of Bixler* (1924) 194 C 585, 589, 229 P 704 ]. Distinguishing ultimate facts from evidentiary facts and conclusions of law is sometimes difficult and involves a matter of degree [ *Burks v. Poppy Constr. Co.* (1962) 57 C2d 463, 473, 20 CR 609, 370 P2d 313 ; *Bach v. County of Butte* (1983) 147 CA3d 554, 563, 195 CR 268 ]. A plaintiff is required only to set forth the essential facts of the case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source, and extent of the cause of action [ *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 608, 98 Cal. Rptr. 2d 277 ; *Schulz v. Neovi Data Corp.* (2007) 152 CA4th 86, 95, 60 CR3d 810 ].

**Trap:**

General pleadings are controlled by specific allegations. For that reason, where plaintiff alleges a permissible conclusion of law but also avers specific additional facts that either do not support that conclusion or are inconsistent with it, the specific allegations will control, and a complaint that might have been sufficient with general allegations alone may be rendered defective [ *Melican v. Regents of University of California* (2007) 151 CA4th 168, 174-175, 59 CR3d 672 ].

**Warning:**

In stating a cause of action, a plaintiff should consider trying to strike a balance between being so specific that the proof of particular facts may be difficult and being so general that the complaint may be subject to demurrer for failing to state a cause of action or for being uncertain. Although a complaint is not subject to a demurrer without leave to amend when it can be amended to state a cause of action, a demurrer sustained with leave to amend results in delay and additional work and may result in some embarrassment to the plaintiff or his or her attorney, giving a psychological advantage to the defendant.

**Example:**

Pleadings that are so vague may render the complaint the "functional equivalent of no complaint at all," preventing amendment that relates back to the original complaint after the expiration of the applicable limitations period [ *Davaloo v. State Farm Ins. Co.* (2005) 135 CA4th 409, 417, 37 CR3d 528 ; see Ch. 34, *Amended and Supplemental Pleadings*, 34.09].

 **Cross Reference:**

Discussion of the distinction between ultimate facts and evidentiary facts or conclusions of law, see *California Forms of Pleading and Practice*, § 123.18[2], [3] (Matthew Bender).

**7.12[4] Plaintiff May Plead Inconsistent Theories of Recovery.** A plaintiff may plead inconsistent theories of recovery in separate counts and is entitled to recover on whichever count is supported by the evidence [ *Grudt v. City of Los Angeles* (1970) 2 C3d 575, 586, 86 CR 465, 468 P2d 825 ].

**Strategic Point:**

It is good practice to state a separate count for each separate theory of liability, instead of combining theories in a single cause of action or count. This will help to avoid inconsistent pleading and confusion in the framing of the issues [see *Zumbrun v. University of S. Cal.* (1972) 25 CA3d 1, 9, 101 CR 499 ].

**7.12[5] Plaintiff May Join Some Defendants Under Permissive Joinder Rules.** A plaintiff who alleges a cause of action against one or more defendants may combine with that cause any other causes he or she has, either alone or with co-plaintiffs, against any of the defendants [CCP § 427.10; see CCP §§ 378, 379 (permissive joinder of parties generally)].

**Strategic Point:**

When deciding whether to allege a particular cause of action, consider that the claim may be subject to a plea of abatement if another action is pending or that objections may be raised on grounds of claim-splitting because of a prior action [see *California Forms of Pleading and Practice*, Ch. 3, *Abatement of Actions*, and Ch. 491, *Res Judicata* (Matthew Bender)]. Consider also the need to avoid splitting a claim and the obligation to assert the cause of action in light of professional standards of conduct [Cal Rules Prof Conduct, Rules 3-110, 3-200]. For a detailed discussion, see *California Forms of Pleading and Practice*, Ch. 72, *Attorney Practice and Ethics*, § 72.270 et seq. (Matthew Bender).

**7.12[6] Special Requirements for Pleading in Particular Situations.**

**7.12[6][a] Action for Recovery of Real Property Must Describe Land.** In an action for the recovery of real property, the land at issue must be described in the complaint with enough certainty to allow its identification on execution [CCP § 455].

**7.12[6][b] Action on Contract Must Plead Its Terms or Incorporate Contract.** A complaint based on a contract is subject to demurrer if one cannot ascertain whether the contract is written, oral, or implied in law [CCP § 430.10(g)]. If a party relies on a written contract, and it affirmatively appears that all the terms of the contract are not set forth verbatim, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient [ *Gilmore v. Lycoming Fire Ins. Co.* (1880) 55 C 123, 124-125 (demurrer should have been sustained when complaint showed that insurance policy incorporated insured's application, but content of application was not alleged); *Otworth v. Southern Pacific Trans. Co.* (1985) 166 CA3d 452, 459, 212 CR 743 (complaint alleges none of the contract terms, nor asserts contract performed or performance excused)].

**7.12[6][c] Action on Contract Must Plead Occurrence of Conditions Precedent.** The pleading of the occurrence of conditions precedent is necessary for recovery on a contract with such conditions [ *Careau & Co. v. Security Pac. Bus. Credit, Inc.* (1990) 222 CA3d 1371, 1389, 272 CR 387 ; *Clack v. State of California ex rel. Dep't Pub. Works* (1969) 275 CA2d 743, 748, 80 CR 274 ]. In pleading the performance of conditions precedent, it may be stated generally that the plaintiff duly performed all of the conditions required on his or her part [CCP § 457]. It is not necessary to state the facts that show performance.

**7.12[6][d] Judgments and Other Determinations May Be Stated to Have Been Duly Made.** When pleading a judgment or other determination of a court, officer, or board, the judgment or determination may be stated to have been duly made and to have become final [CCP § 456]. It is not necessary to state the facts conferring jurisdiction.

**7.12[6][e] Actions Based on Statutes or Ordinances.** It is sufficient to refer to a private statute or ordinance by its title and the day of its passage when pleading a private statute or a county or municipal ordinance or a right derived therefrom.

When an action is based on a statute, it is usually sufficient to frame the complaint in the statute's language [ *Goss v. Fano* (1952) 114 CA2d 819, 823, 251 P2d 337 ].

It is not necessary to state the facts showing performance of conditions precedent when pleading a statute or ordinance or a right derived from a statute or ordinance. The plaintiff can instead state generally that he or she duly performed all of the conditions precedent required of him or her [CCP § 459].



**Cross Reference:**

Discussion and forms relating to pleading of statutes and ordinances, see California Forms of Pleading and Practice, Ch. 531, Statutes and Ordinances (Matthew Bender).

**7.12[6][f] Pleading on Information and Belief.** Allegations that concern matters that are within only a defendant's knowledge may be based on information and belief. However, a plaintiff may not allege in this manner facts presumably within his or her knowledge [ *Seamen's Bank v. Superior Court* (1987) 190 CA3d 1485, 1495, 236 CR 31 ], for example, facts that are a matter of public record [ *Ramsey v. City of Lake Elsinore* (1990) 220 CA3d 1530, 1541, 270 CR 198 ].



**Warning:**

Take care in pleading on information and belief because by filing the complaint, counsel is certifying to the court that there is evidentiary support for the allegations or, if specifically so identified, that the allegations are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery [CCP § 128.7(b)(3), (4)].

**7.12[6][g] Seeking Declaratory Relief.** A complaint for declaratory relief must set forth facts showing the existence of an actual justiciable controversy that is definite, concrete, and touching [ *LePage v. Oakland* (1970) 13 CA3d 689, 692, 91 CR 806 ] or relating to the rights and duties of the respective parties under a written instrument or contract [ *Maquire v. Hibernia S. & L. Soc.* (1944) 23 C2d 719, 728, 146 P2d 673 ; see CCP § 1060] other than a will or trust [CCP § 1060], which may include the interpretation of a law [e.g., *Wollam v. Palm Springs* (1963) 59 C2d 276, 279, 29 CR 1, 379 P2d 481 (statute or ordinance)].

A complaint seeking declaratory relief must demonstrate that this relief is, under all the circumstances, a necessary and proper means to stabilize a justiciable controversy that otherwise may lead to disastrous results or, if it involves a contract, defer the realization of the purposes of the contract [CCP § 1061; *C.J.L. Constr., Inc. v. Universal Plumbing* (1993) 18 CA4th 376, 390, 22 CR2d 360 (availability of another form of relief that is adequate usually justifies refusal to grant declaratory relief); *Southern Counties Gas Co. v. Ventura Pipeline Constr. Co.* (1971) 19 CA3d 372, 377, 96



CR 825 ].

**Example:**

To present a justiciable dispute, a statutory validation action must involve a claim by parties directly affected by a public entity's proposed action or involve a public official whose refusal to perform a public duty impedes the entity from fulfilling its functions [ *City of Santa Monica v. Stewart* (2005) 126 CA4th 43, 67 ].

**Exception:**

A trial court may properly grant declaratory relief on a question that is not in dispute when it is necessary for the court to determine that question before it can decide the issue in dispute for which declaratory relief is proper [ *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 CA4th 881, 893-894, 72 CR2d 73 ].

**Distinguish:**

CCP § 1060 contains no suggestion that the plaintiff must allege facts entitling him or her to a favorable decision [ *Maquire v. Hibernia S. & L. Soc.* (1944) 23 C2d 719, 728, 146 P2d 673 ].



**Warning:**

While the court must rule on the parties' contested rights even if the plaintiff's factual allegations compel an adverse ruling [ *Bennett v. Hibernia Bank* (1956) 47 C2d 540, 550, 305 P2d 20 ; *Southern Counties Gas Co. v. Ventura Pipeline Constr. Co.* (1971) 19 CA3d 372, 377, 96 CR 825 ], the statutes on sanctions for frivolous actions and vexatious litigants do not contain exceptions for actions for declaratory relief [see Ch. 35, Sanctions].



**Timing:**

The concept of justiciability involves the intertwined criteria of ripeness and standing [ *City of Santa Monica v. Stewart* (2005) 126 CA4th 43, 59 ]. A plaintiff has standing to raise a controversy for declaratory relief if the plaintiff has a real interest in the ultimate adjudication because he or she has suffered or is about to suffer an injury of sufficient magnitude to reasonably assure that all of the relevant facts and issues will be adequately presented [ *California Water & Tel. Co. v. Los Angeles* (1967) 253 CA2d 16, 22-23, 61 CR 618 ]. A party lacks standing if it does not have an actual and substantial interest in, or would not be benefited or harmed by, the ultimate outcome of an action. Standing is a function not just of a party's stake in a case, but the degree of vigor or intensity with which the presents its arguments. "Ripeness" refers to the requirements of a current controversy. An action not founded upon an actual controversy between the parties to it, and brought for the purpose of securing a determination of a point of law will not be entertained. A controversy becomes "ripe" once it reaches, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made [ *City of Santa Monica v. Stewart* (2005) 126 CA4th 43, 59 ]. If the parameters of the controversy are as yet unknown, the controversy is not yet ripe for declaratory relief, and a decision would be merely an advisory opinion [ *Sanctity of Human Life Network v. California Highway Patrol* (2003) 105 CA4th 858, 872, 129 CR2d 708 ]. Conversely, an action that has already accrued and in which the only question for determination is the ultimate liability of one party on account of consequential relief to which another is shown to be entitled, the nature of the action is no longer a cause for declaratory relief [ *Standard Brands of California v. Bryce* (1934) 1 C2d 718, 721, 37 P2d 446 ; *C.J.L. Constr., Inc. v. Universal Plumbing* (1993) 18 CA4th 376, 390, 22 CR2d 360 ].

**Test:**

A two-pronged test is used to determine the ripeness of a controversy:



- Whether the dispute is sufficiently concrete so that declaratory relief is appropriate; and
- Whether the parties will suffer hardship if judicial consideration is withheld.

Under the first prong, the courts will decline to adjudicate a dispute if the abstract posture of the proceeding makes it difficult to evaluate the issues, if the court is asked to speculate on the resolution of hypothetical situations, or if the case presents a contrived inquiry. Under the second prong, the courts will not intervene merely to settle a difference of opinion. There must be an imminent and significant hardship inherent in further delay [ *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 CA4th 531, 540, 84 CR3d 223 ; *City of Santa Monica v. Stewart* (2005) 126 CA4th 43, 59 ].

#### Example:

Action for declaratory relief concerning a municipal resolution failed under the first prong because it would require the court to speculate about hypothetical future actions by the City, the city council, and planning commission [ *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 CA4th 531, 540-541, 84 CR3d 223 ].



#### Strategic Point--Complaint on Contract:

To convince the court that it should consider an action for declaratory relief, plaintiffs must allege with particularity that the resolution of the declaratory relief action concerning contractual remedies would have practical consequences. Pleadings must allege that a dispute has arisen that would cause these remedial provisions to come into play or that the continuation of the contractual relationship depends on the resolution of these questions [ *Meyer v. Sprint Spectrum L.P.* (2009) 45 C4th 634, 648, 88 CR3d 859, 200 P3d 295 ].



#### Strategic Point--Preference:

While a purely declaratory action is automatically entitled to priority in setting trial dates [CCP § 1062.3(a)], an action for declaratory as well as other relief has preference only upon motion and showing that the action requires a speedy trial [CCP § 1062.3(b)].



#### Warning:

If the scope of the declaratory relief complaint is broad and the case is lost, the scope of the matters declared by the judgment is likely to be equally broad [see *Aerojet-General Corp. v. American Excess Ins. Co.* (2002) 97 CA4th 387, 398, 414, 117 CR2d 427 ]. For discussion of strategy when determining the scope of the declaratory relief sought, see 7.02.



#### Cross References:

Noticed motion for preference, see Ch. 23, *Case Management*, 23.34.

For detailed discussion of declaratory relief, see California Forms of Pleading and Practice, Ch. 182, Declaratory Relief (Matthew Bender).

**7.12[7] Over-Pleading May Expose Plaintiff to Liability for Malicious Prosecution.** To establish a cause of action for the tort of malicious prosecution, a plaintiff must plead and prove that the prior action was [ *Sheldon Appel Co. v. Albert & Olier* (1989) 47 C3d 863, 871, 254 CR 336, 765 P2d 498 ]:

- Commenced by or at the direction of the malicious prosecution defendant and was pursued to a legal termination in plaintiff's favor;
- Brought without probable cause; and
- Initiated with malice.

When the prior action involved multiple claims, liability for malicious prosecution can attach based on the absence of probable cause for any one claim, even though probable cause existed for other claims. The malicious prosecution plaintiff, however, must have had a favorable termination as to the entire prior action [see *Crowley v. Katleman* (1994) 8 C4th 666, 686, 34 CR2d 386, 881 P2d 1083 ].



#### **Warning:**

Beware of over-pleading your case. The Supreme Court in *Crowley* made clear that kitchen-sink pleading can result in liability for malicious prosecution.

Be sure to investigate the facts and compile the necessary supporting data before filing the complaint [see *Centers v. Dollar Markets* (1950) 99 CA2d 534, 543, 222 P2d 136 ; cf. *Fuss v. Superior Court* (1969) 273 CA2d 807, 817 n2, 78 CR 583 (when plaintiff objected to interrogatories on basis that request was burdensome, court noted in dicta that the burden asserted consisted of compiling the data on which plaintiff's claim was based, which plaintiff must have been done before filing the complaint if the litigation was commenced in good faith)].



#### **Cross Reference:**

Discussion of and for forms for malicious prosecution actions, see California Forms of Pleading and Practice, Ch. 357, Malicious Prosecution and Abuse of Process, § 357.30 et seq. (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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Chapter 7 Complaints  
II. DRAFTING A COMPLAINT

1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.13

### 7.13 Demand for Judgment Is Required.

#### 7.13[1] Complaint Must Include Demand for Judgment.

**7.13[1][a] Complaint Must Demand Judgment for Relief Claimed, Including Any Amount Demanded.** A complaint must contain a demand for judgment for the relief that the plaintiff claims he or she is entitled to receive. If the recovery of money or damages is demanded, the plaintiff must state the amount demanded [CCP § 425.10(a)(2)]. However, the actual amount is often unknown at the time the complaint is being filed. In that instance the complaint will commonly pray for "an amount to be determined at trial" or "an amount in excess of [a specific amount] to be proven at trial." The absence of a specific amount from the complaint is not necessarily fatal as long as the pleaded facts entitle the plaintiff to relief [ *Furia v. Helm* (2003) 111 CA4th 945, 957 ].

#### Exceptions:

- A specific amount will be necessary before a default judgment may be entered [see 7.13[2]].
- A party petitioning to confirm an arbitration award does not have to affirmatively plead entitlement to costs or prejudgment interest to be able to recover them [ *Pilimai v. Farmers Ins. Exch. Co.* (2006) 39 C4th 133, 148-151, 137 P3d 939 ].



#### Strategic Point:

Exercise judgment in setting the amount of any monetary demand in the prayer. A prayer that is too low can have the effect of limiting recovery, but a prayer that is too high can create credibility problems.

Also, if the complaint is filed as a limited civil case, it must state whether it involves damages more or less than \$10,000, which affects the filing fee [Gov Code § 70613(b); Cal Rules Ct, Rule 2.111(9)].

**Distinguish:**

While an action for declaratory relief must demand that the respective rights of the parties be determined and declared, it does not have to allege damages [ *Caira v. Offner* (2005) 126 CA4th 12, 24-25 ; *Twain Harte Homeowners Assn. v. Patterson* (1987) 193 CA3d 184, 188, 239 CR 316 ], and the seeking of declaratory relief does not foreclose seeking other remedies in the same or another action [CCP § 1062].

**7.13[1][b] Exception: Punitive Damages Amounts Must Not Be Stated.** No claim for punitive damages may state the amount of the punitive damages being requested [CC § 3295(e)].

If the plaintiff is going to take the defendant's default and is requesting punitive damages as part of the default judgment, the plaintiff must serve on the defendant a statement reserving the right to a specific amount of punitive damages sought before taking the default [CCP § 425.11(c)].

 **Cross Reference:**

Discussion and form of statement for reserving damages, see *Ch. 36, Defaults and Motions for Relief*, 36.83.

**7.13[1][c] Exception: Actual and Punitive Damages Amounts in Personal Injury or Wrongful Death Cases Must Not Be Stated.** The amount of damages sought, actual and punitive, may not be stated in an action for personal injury or wrongful death [CCP § 425.10(b)].

When the plaintiff is seeking actual or punitive damages for personal injury or wrongful death, the defendant may, at any time, request a CCP § 425.11 statement of damages. If the defendant does not make such a request, the plaintiff must give the defendant notice of the special and general damages sought before a default may be taken [CCP § 425.11(c)].

 **Cross Reference:**

Discussion and form of statement of damages, see *Ch. 36, Defaults and Motions for Relief*, 36.84.

**7.13[2] Demand Defines Scope of Default Judgment.** On a default judgment, the plaintiff may not recover more than the demand in the complaint, in a CCP § 425.11 statement of damages, or in a CCP § 425.115 statement reserving the right to punitive damages [CCP § 580(a); *Becker v. S.P.V. Constr. Co.* (1980) 27 C3d 489, 493, 165 CR 825, 612 P2d 915 ; *Janssen v. Luu* (1997) 57 CA4th 272, 275, 66 CR2d 838 ].

No damages can be awarded on a default judgment unless a specific amount of damages is alleged in the body of a complaint [ *Schwab v. Rondel Homes, Inc.* (1991) 53 C3d 428, 434, 280 CR 83, 808 P2d 226 ; *Becker v. S.P.V. Constr. Co.* (1980) 27 C3d 489, 494, 165 CR 825, 612 P2d 915 ]. A default judgment that gives relief when no demand is made for relief is void as in excess of the court's jurisdiction and is not res judicata [ *Becker v. S.P.V. Constr. Co.* (1980) 27 C3d 489, 493, 165 CR 825, 612 P2d 915 ]. A demand that only partially exceeds the relief demanded may be modified to save the portion that is not void [ *Becker v. S.P.V. Constr. Co.* (1980) 27 C3d 489, 495, 165 CR 825, 612 P2d 915 ].

**7.13[3] Awards in Contested Cases May Exceed Prayer.** In a contested case, the court may grant any relief justified by the allegations, even if that relief is greater than or different from that which is requested in the prayer, subject to the restriction that certain relief may not be granted in limited civil cases [CCP § 580(b); *Nevada County & Sacramento Canal Co. v. Kidd* (1869) 37 C 282, 305 ; *Romanchek v. Romanchek* (1967) 248 CA2d 337, 343, 56 CR 360 ]. However, if a particular sum of damages is specified in the complaint, the court may not award an amount in excess of that sum without an amendment of the prayer [ *Crofoot v. Blair Holdings Corp.* (1953) 119 CA2d 156, 195, 260 P2d 156 ].

Interest may be awarded in a contested case even when the complaint does not contain a prayer requesting interest [ *Sanders v. City of Los Angeles* (1970) 3 C3d 252, 263, 90 CR 169, 475 P2d 201 ; *Newby v. Vroman* (1992) 11 CA4th 283, 286, 14 CR 2d 44 ].



#### Strategic Point:

It is an error for the court, in the jury's presence, to sustain a motion to increase the amount of the prayer [ *Sanguinetti v. Moore Dry Dock Co.* (1951) 36 C2d 812, 819, 228 P2d 557 ; *Neumann v. Bishop* (1976) 59 CA3d 451, 485, 130 CR 786 ].

**7.13[4] Prayer Should Be Included, but Absence Is Not Fatal.** The absence of a prayer does not expose a complaint to general demurrer [ *Greenup v. Rodman* (1986) 42 C3d 822, 826, 231 CR 220, 726 P2d 1295 ]. Because the prayer is not part of the cause of action, and the issues involved are determinable from the facts alleged rather than from the prayer [ *Berg v. Investors Real Estate Loan Co.* (1962) 207 CA2d 808, 815, 24 CR 701 ], a defective prayer will not destroy an otherwise sufficient complaint [ *Carney v. Simmonds* (1957) 49 C2d 84, 96, 315 P2d 305 ].

While it may not be a fatal omission, a prayer to a complaint is essential in clearly communicating to the court and opposing counsel the relief that is being requested.

In a contested case recovery may be allowed despite the absence of a prayer [ *Estate of Kalal* (1981) 121 CA3d 841, 845, 175 CR 582 ]. The nature of the action and the amount in controversy, for purposes of subject matter jurisdiction, may be determined from examining the complaint as a whole [ *Sellery v. Ward* (1942) 21 C2d 300, 305, 131 P2d 550 ; *Davis v. Superior Court* (1972) 25 CA3d 596, 599, 102 CR 238 ].

#### Distinguish:

Inclusion of a prayer, or a CCP § 425.11 or 425.115 statement of damages, is a prerequisite to a default judgment [ *Greenup v. Rodman* (1986) 42 C3d 822, 826, 231 CR 220, 726 P2d 1295 ; see 7.13[2] ].

#### 7.13[5] All Claims Arising From the Same Cause of Action Must Eventually Be Raised in the Same Action.

Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit. Under this doctrine, all claims based on the same cause of action existing as of the filing of the action must be decided in a single suit. If some claims are not brought in the initial action, they may not be raised at a later date in a new action [ *Allied Fire Protection v. Diede Constr. Inc.* (2005) 127 CA4th 150, 154-155 ]. Thus, while not all demands must be made in the initial complaint, every type of relief desired from a given cause of action must eventually be demanded in the same suit.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements



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Chapter 7 Complaints  
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**7.14 Attorney or Unrepresented Party Must Sign Complaint.**

**7.14[1] Signature of Attorney of Record or Unrepresented Party Is Required.** A complaint must be signed by at least one attorney of record in the attorney's individual name. If the plaintiff is not represented by counsel, the plaintiff must sign the complaint. Each signature must be accompanied by the signer's address and telephone number, if any [CCP § 128.7(a)].



**Warning:**

An unsigned complaint will be stricken unless the omission is corrected promptly after being called to the attention of the attorney or the party [CCP § 128.7(a)].

The failure to include a signature in the complaint does not deprive the court of jurisdiction [ *Canadian Bank of Commerce v. Leale* (1910) 14 CA 307, 309, 111 P 759 ; see *United Farm Workers of Am. v. Agricultural Labor Relations Bd.* (1985) 37 C3d 912, 915, 210 CR 453, 694 P2d 138 (lack of verification; citing *Canadian Bank*)].

Further, an unsigned complaint is sufficient to institute the action for purposes of the applicable statute of limitation [ *Canadian Bank of Commerce v. Leale* (1910) 14 CA 307, 308-309, 111 P 759 ].

**7.14[2] Presentation of Signed Complaint Equals Certification.**

**7.14[2][a] Complaint Is Presented by Signing, Filing, Submitting, or Later Advocating.** A complaint is presented to the court by signing, filing, submitting, or later advocating [CCP § 128.7(b)]. By presenting a complaint to the court, an attorney or unrepresented party certifies under CCP § 128.7(b), that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the complaint meets the three conditions outlined in 7.14[2][b]-[d].

The term "inquiry reasonable under the circumstances" is not defined by CCP § 128.7. The standard under *Fed R Civ P 11*, on which CCP § 128.7 is patterned, is based on what was reasonable to believe at the time the complaint was submitted. Thus, what amounts to a reasonable inquiry may depend on factors such as how much investigation time was available to the signer, whether the attorney had to rely on the client for facts set forth in the complaint, whether the

complaint was based on a plausible view of the law, and whether the attorney relied on forwarding counsel or another member of the bar. This comports with California cases requiring the court to consider timing considerations when imposing sanctions under *CCP* § 128.5 [see *Atchison, Topeka, & Santa Fe Ry. Co. v. Stockton Port Dist.* (1983) 140 CA3d 111, 115, 117, 189 CR 208 ].

**7.14[2][b] Complaint Not Presented Primarily for Improper Purpose.** The signature on the complaint amounts to a certification that the complaint is not being filed for an improper purpose such as to harass, cause unnecessary delay, or increase litigation costs [*CCP* § 128.7(b)(1)].

**7.14[2][c] Legal Contentions Are Not Unwarranted.** The signature on the complaint amounts to a certification that the claims and other legal contentions set forth therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law [*CCP* § 128.7(b)(2)].

**7.14[2][d] Evidentiary Support Exists or Is Likely to Exist.** The signature on the complaint amounts to a certification that there is evidentiary support for the allegations and other factual contentions therein, or if specifically so identified, that the allegations and other factual contentions are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery [*CCP* § 128.7(b)(3)].

**7.14[3] Sanctions May Be Imposed for Violation of Certification.** In actions filed on or after January 1, 1995, the court may impose sanctions under *CCP* § 128.7 if the certification of the four conditions discussed in 7.14[2] is false and the attorney or plaintiff fails to withdraw or correct the complaint [*CCP* § 128.7(c), (i)].



**Cross Reference:**

Discussion and forms, see Ch. 35, Sanctions.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**7.15 Verification Is Generally Not Required.**

As a general rule, a complaint need not be verified or accompanied by an affidavit [*CCP § 128.7(a); CCP § 446* (verification of pleadings generally)].

**Exceptions:**

Narrow exceptions scattered through the codes require verified complaints in some specific situations. For example:

- Complaints to enforce self-storage facility owner's lien if declaration in opposition to sale is given to owner before sale [*B&P Code § 21710*].
- Complaints to re-establish destroyed land records [*CCP § 751.04*].
- Complaints to quiet title [*CCP § 761.020*].
- Complaints for unlawful detainer or forcible entry or detainer [*CCP § 1166*].
- Complaints in actions brought against vessels [*H&N Code § 495*].

Verification of a complaint consists of an affidavit or declaration under penalty of perjury that the complaint is true, except as to matters stated on information and belief, and as to those matters, that the persons signing the verification believe it to be true [*CCP §§ 446, 2015.5*]. If a complaint is verified, the plaintiff ordinarily signs the verification, but in certain circumstances the plaintiff's attorney or another person having knowledge of the facts may verify a complaint [*CCP § 446* (if verification is not by plaintiff, reason must be explained in affidavit)].

If an attorney verifies the complaint because the parties are absent from the county in which the attorney's office is located or for some other reason the parties cannot verify the complaint, the attorney's affidavit or declaration must state that the attorney has read the complaint and is informed and believes the matters therein to be true and on that ground alleges that the matters stated therein are true. The same provision applies to verifications by an officer of a corporation or public agency [*CCP §§ 446* (requirement), *2015.5* (use of declaration)]. In these instances, the complaint cannot be



used to establish the facts alleged in it [CCP § 446].

Verifying the complaint in an unlimited civil case usually precludes a general denial and forces the defendant to verify the answer [see CCP § 431.30(d)]. In limited civil cases the answer need not be verified even when the complaint has been verified, except in actions on claims assigned for collection [CCP §§ 91, 92(b), 431.30(d)].

### Strategic Points:



Although verifying the complaint in an unlimited civil case usually precludes a general denial and forces the defendant to verify the answer [see CCP § 431.30(d)], any benefit that might be derived from that is likely overshadowed by the drawbacks of verifying the complaint. A verified complaint may later be used to impeach the plaintiff. Also, while verification does not preclude the assertion of inconsistent theories of recovery, verification of inconsistent facts exposes the plaintiff to charges of perjury [see *Pen Code* § 118(a); *People v. Agnew* (1947) 77 CA2d 748, 753-755, 176 P2d 724 (upholding conviction based on statements made on information and belief in verified complaint; swearing to belief in fact known to be untrue is just as much perjury as swearing directly to the fact); *Manti v. Gunari* (1970) 5 CA3d 442, 449, 85 CR 366 (dicta while criticizing inconsistent facts in unverified complaint)].

In some situations a plaintiff may use a verified complaint that alleges evidentiary facts within the verifier's personal knowledge as an evidentiary statement. A verified complaint may support a temporary restraining order [CCP § 527(a)] or be used to oppose a motion to change venue or to quash a service of summons [see *Kroopf v. Guffey* (1986) 183 CA3d 1351, 1356, 228 CR 807; *Atkins, Kroll & Co. v. Broadway Labor Co.* (1963) 222 CA2d 646, 654, 35 CR 385; see also CC §§ 1812.10, 2984.4; CCP § 396a]. However, in these instances a plaintiff may also rely on a separate affidavit or declaration, and this may be preferable because the affidavit or declaration can target exactly the facts needed without having to verify other allegations contained in the complaint.



### Trap:

If you decide to verify a complaint give careful consideration to the consequences. For example, verification of a complaint that contains relatively common allegations that each defendant was the agent acting on behalf of the other defendants may create an agent's privilege defense to a claim of conspiracy [see *Black v. Bank of Am. N.T. & S.A.* (1994) 30 CA4th 1, 6 n3, 35 CR2d 725 (party not permitted to contradict verified pleading that defendant was agent acting within scope of agency to avoid application of rule that an agent cannot conspire with its corporate principal)].



### Warning:

The attorney must sign the complaint even if the plaintiff verifies it [see CCP § 128.7(a)].

### Judge's Perspective:

Counsel should be careful when considering the filing of a verified complaint. If a successful challenge is made to the pleading such that an amendment will become necessary, the subsequent amended allegations will be the subject of much scrutiny if factual inconsistencies exist between the amended pleading and the original complaint. These inconsistencies can lead to further challenges to the pleadings.

### Legal Topics:

For related research and practice materials, see the following legal topics:  
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**7.16 CHECKLIST: Filing a Complaint.**

- ☐ Be sure that complaint complies with *Cal Rules Ct, Rule 2.100 et seq.*
- ☐ Include a summons form.
- ☐ Include Judicial Council Form CM-010 Civil Case Cover Sheet.

**Authority:**

*Cal Rules Ct, Rule 3.220(a)*

**Discussion:**

*See 7.17 -7.20*

**Form:**

*See 7.43*

- ☐ Have any additions, deletions, or interlineations initialed by clerk or judge.
- ☐ Be sure that all copies of the complaint conform to the original.

**Authority:**

*Cal Rules Ct, Rule 2.117*

**Discussion:**

*See 7.21 -7.22*

- ☐ Attach any affidavits (declarations) required or optionally included.

☐ Include affidavits in certain consumer and unlawful detainer actions if certain facts are not presented in a verified complaint.

**Authority:**

*CCP §§ 396a, 2015.5; CC §§ 1812.10(c), 2984.4(c)*

**Discussion:**

See 7.23

☐ Determine whether county in which action is being filed requires that additional documents be filed under trial court delay reduction programs or other rules.

**Authority:**

*Gov Code §§ 68605.5, 68620*

**Discussion:**

See 7.24

☐ If applicable, include notice of a related case.

**Authority:**

*Cal Rules Ct, Rule 3.300(c)*

**Discussion:**

See 7.25

☐ Pay applicable filing fee when filing complaint.

**Authority:**

*Gov Code § 70600 et seq.; CCP § 411.20*

**Discussion:**

See 7.26

☐ If indigent, apply for waiver of fees at time of filing using Judicial Council Form FW-001.

**Authority:**

*Gov Code § 68630 et seq.; Cal Rules Ct, Rule 3.50 et seq.*

**Discussion:**

See 7.26[4]

**Form:**

See 7.44



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**7.17 Clerk Is Not Permitted to Accept for Filing Any Papers That Do Not Comply With Requirements.**

The clerk of the court must not accept for filing any complaint that does not comply with *Cal Rules Ct, Rule 2.100 et seq.* [*Cal Rules Ct, Rule 2.118(a)*].

**Exceptions:**

The clerk must not reject a complaint solely on the ground that it is handwritten or that the print is in a color other than black or blue-black [*Cal Rules Ct, Rule 2.118(a)*].

The clerk must not reject a complaint solely on the ground that it does not contain an attorney's or a party's fax number or e-mail address on the first page [*Cal Rules Ct, Rule 2.118(b)*].

For good cause shown, the court may accept for filing a complaint that does not comply with Rule 201 [*Cal Rules Ct, Rule 2.118(c)*].

**► Cross Reference:**

Tendering of filing fees and effect of improper fees, see 7.26.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements



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**7.18 Complaint Is Deemed Filed When Presented at Proper Office and Deposited With Applicable Filing Fees.**

A complaint is considered filed when it is presented at the proper office with the requisite documents attached and deposited with the applicable filing fees [ *Rojas v. Cutsforth* (1998) 67 CA4th 774, 778, 79 CR2d 292 ].

Courts must provide a drop box for filing when the clerk's office filing counter is closed during regular hours, and a complaint deposited in a court's drop box up to and including 4:00 p.m. on a court day is deemed to have been deposited for filing on that day [*Cal Rules Ct, Rule 2.210(a), (b)*].



**Cross Reference:**

Discussion of filing in drop boxes at court offices, see 26.44[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsFiling Fees



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**7.19 Summons Form Should Be Included.**

Although not required to accompany the complaint at the time of filing, a Judicial Council form of summons is typically included with the complaint.



**Cross Reference:**

Discussion and forms of summons, see Ch. 8, Service of Summons.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral Overview



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**7.20 Case Cover Sheets Are Required in Every Civil Case.**

**7.20[1] Case Cover Sheet Must Be Included With Complaint.** A case cover sheet must be filed with the complaint in every civil case [*Cal Rules Ct, Rule 3.220(a)*].

If the plaintiff indicates that his or her case is "complex" under *Cal Rules Ct, Rule 3.400* or a collections case under *Cal Rules Ct, Rule 3.740*, he or she must serve a copy of the cover sheet with the complaint [*Cal Rules Ct, Rule 3.220(a)*]. In all other cases, the plaintiff is not required to serve the cover sheet with the complaint [*Cal Rules Ct, Rule 3.220(a)*]. Factors considered by the court in deciding whether a case is complex and the types of cases provisionally designated as complex are listed in *Cal Rules Ct, Rule 3.400*.

➡ **Cross Reference:**

Form, see 7.43.

**7.20[2] Must Use Form Prescribed by Judicial Council.** The use of Judicial Council Form CM-010 is required in each civil action, except those filed in small claims court or filed under the Probate Code, Family Law Code, or Welfare and Institutions Code [*Cal Rules Ct, Rule 3.220(b)(1)*].

**7.20[3] Civil Case Cover Sheet Is Required in Addition to Any Cover Sheet Required by Local Rules.** Judicial Council Form CM-010 must be filed in addition to any cover sheet required by local court rules [*Cal Rules Ct, Rule 3.220(a)*].

**7.20[4] Failure to File Case Cover Sheet May Result in Sanctions.** If a plaintiff fails to file a case cover sheet under *Cal Rules Ct, Rule 3.220(a)* or any local court rule or files a defective or incomplete cover sheet when filing the complaint, the clerk is required to file the paper [*Cal Rules Ct, Rule 3.220(c)*]. However, the plaintiff, his or her attorney, or both may be subject to sanctions under *Cal Rules Ct, Rule 2.30* if the case cover sheet is not filed as required by *Cal Rules Ct, Rule 3.220(a)* [*Cal Rules Ct, Rule 3.220(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsComplaintsRequirements





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**7.21 Additions, Deletions, and Interlineations Must Be Initialed by Clerk or Judge.**

At the time of filing, the clerk or judge must initial any additions, deletions, or interlineations [*Cal Rules Ct, Rule 2.116*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral Overview



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**7.22 All Copies Must Conform to Original Complaint Filed.**

All copies of the complaint must conform to the original filed, including the numbering of lines, pagination, additions, deletions, and interlineations [*Cal Rules Ct, Rule 2.117*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements



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**7.23 Affidavits May Be Required in Actions Involving Installment or Automotive Sales, Consumer Obligations, or Unlawful Detainer.**

For the types of actions listed in 7.11[2], if the plaintiff does not state in a verified the complaint facts showing that the complaint has been filed in the proper court and that the action is subject to the provisions of one of the acts named in 7.11[2], then the plaintiff must file an affidavit or declaration made under penalty of perjury [CCP § 2015.5] that states facts showing that the action has been commenced in the proper court and is subject to the provisions of CC § 1812.10 or 2984.4 or CCP § 395(b) or is an action for unlawful detainer [see 7.11[2]]. The affidavit must be served with the summons and complaint [CC §§ 1812.10, 2984.4; CCP § 396a(a)].



**Warning:**

Failure to include the affidavit, declaration, or the facts in a verified complaint may result in dismissal of the action without prejudice [CC §§ 1812.10(c), 2984.4(c); CCP § 396a(a)].



**Cross References:**

Discussion and forms, see *California Forms of Pleading and Practice*, §§ 20.60; 89.61[5]; 501.102 (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements



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**7.24 Plaintiff May Be Required to File Additional Documents in Some Counties If Case Is Governed by Trial Court Delay Reduction Program.**

Superior courts in every California county are required to institute trial court delay reduction programs for limited civil cases [*Gov Code* §§ 68605.5, 68620]. Several counties require additional documents to be filed with the complaint. However, as long as the complaint is in a form that complies with *Cal Rules Ct, Rule 2.100 et seq.*, the clerk has a ministerial duty to file it [*see* 7.05].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements



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**7.25 Attorney Must File Notice of Related Case.**

When a party filing a complaint knows of a related action pending before, or dismissed with or without prejudice or disposed of by judgment by, any state or federal court in California, he or she has a duty to file and serve a Notice of Related Case. This duty is a continuing one that applies anytime thereafter that the party learns of a related action [*Cal Rules Ct, Rule 3.300(b), (f); see, e.g., Los Angeles Super Ct Rules, Rule 7.3(f)*].



**Cross Reference:**

Discussion, see *Ch. 32, Notice of Related Cases, Consolidation, Coordination, and Severance of Actions, 32.04*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements



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**7.26 Filing Fees Must Be Included With Complaint.**

**7.26[1] Uniform Filing Fee Set By Statute.** As of January 1, 2006, the uniform filing fee statutory structure for first papers filed in a general civil action (not including adoption, probate, or family law actions) applies to the filing of a complaint [*Gov Code § 70611* (unlimited civil actions); *Gov Code § 70613* (limited civil actions)].

**Exceptions:**

Surcharges may be tacked onto the uniform fee for complaints in complex cases [*see Gov Code § 70603(a)(1)*], unlawful detainer actions [*see Gov Code § 70603(a)(2)*], and, where imposed, for court construction funds in the county or county and city of Riverside, San Bernardino, and San Francisco [*see Gov Code §§ 70603(a)(3)-(5), 70622, 70624, 70625*].

**7.26[2] Party Tendering Partial Payment or Check Returned for Nonpayment Has 20 Days to Complete Payment of Fee and Administrative Charge.** If a party filing a complaint tenders partial payment of the filing fee or a check for the fee that is returned for nonpayment, the clerk must give specified notice to the party who tendered the payment, or the person who tendered payment on behalf of the party and the party that they must complete payment of the fee together with an administrative charge [*see CCP §§ 411.20(g), 411.21(g)*] for the notice [*CCP §§ 411.20(a), 411.21(a)*].

**Exceptions:**

The provision concerning the tendering of partial payment does not apply to unlawful detainer actions [*CCP § 411.21(a)*].

In the alternative, a party who has tendered partial payment or a person who has tendered partial payment on behalf of a party may request a refund in the amount of the partial payment less the administrative charge allowed in *CCP § 411.21(g)* [*CCP § 411.21(c)*].



**Timing:**

The party or person filing on behalf of the party must pay the outstanding amount due on the fee and the administrative charge, or, in the case of a party or person tendering partial payment, request a refund of

the partial payment, within 20 days from the date of the mailing of the clerk's notice [CCP §§ 411.20(a), 411.21(a), (c)].

**Exception:**

If trial or hearing is scheduled within the 20-day period for completing payment, the fee must be paid before the trial or hearing [CCP §§ 411.20(e), 411.21(f)].



**Warning:**

The clerk's certificate of notice of the mailing creates a rebuttable presumption that the fees were not paid. This presumption affects the burden of producing evidence [CCP §§ 411.20(a), 411.21(a); see *Hu v. Silgan Containers Corp.* (1999) 70 CA4th 1261, 1268, 83 CR2d 333 (returned check)].

**7.26[3] Failure to Complete Payment of Fee and Administrative Charge Results in Voided Complaint and Forfeiture of Partial Payment.** If the plaintiff does not pay the full filing fee and administrative charge by an authorized means within the 20-day period described under 7.26[2], the clerk must void the filing [CCP §§ 411.20(b), 411.21(b)] as well as any responsive pleading filed by the defendant [CCP §§ 411.20(c), 411.21(d)].



**Warning:**

Payment of the amount due within the 20-day period is mandatory and jurisdictional. If the amount due is not paid, the court loses jurisdiction over the complaint and can act only to void it. The trial court does not possess authority to thereafter reinstate the complaint [ *Hu v. Silgan Containers Corp.* (1999) 70 CA4th 1261, 1266, 1268-1269, 83 CR2d 333 (decided prior to amendment adding administrative charge)]. Further, CCP § 473 will not provide relief from the dismissal unless the amount due was actually paid during the 20-day period or the plaintiff was prevented from paying the amount due because of fraud or some other conduct on the part of the defendant [ *Hu v. Silgan Containers Corp.* (1999) 70 CA4th 1261, 1267, 1269-1270, 83 CR2d 333 (decided prior to amendment adding administrative charge)].

Similarly, if the fee is not paid before any trial or hearing scheduled within 20 days of the date of mailing of the clerk's notice of nonpayment or partial payment, the court will void the complaint and proceed as if it had never been filed [CCP §§ 411.20(e), 411.21(f)].

In addition, a party who has tendered partial payment or person who has tendered partial payment on behalf of a party, and in either case, who has not made a timely request for a refund [see 7.26[2]] forfeits the partial payment [CCP § 411.21(c)].

The court mails notice of the avoidance of the complaint and any responding papers to the parties or their counsel. If a defendant has filed a response to the complaint that does not include a cross complaint or other pleading for affirmative relief, together with a filing fee, and the complaint is voided for nonpayment of filing fee and administrative charge, defendant can obtain a refund of his or her filing fee by making a request within 20 days of the date on which notice of the avoidance was mailed [CCP §§ 411.20(c), 411.21(d)].

**7.26[4] Seeking Initial Waiver of Filing and Other Fees and Costs.**

**7.26[4][a] Party Seeking Initial Waiver Must Meet One of Four Grounds for Indigency.** An initial fee waiver excusing the applicant from paying some or all fees and costs for the first pleading or other paper [Gov Code § 68631] may be granted on four possible grounds:

- Receipt of financial assistance under one of the designated programs [Gov Code § 68632(a)];

- Receipt of monthly income no greater than 125 percent of the poverty line established by the U.S. Secretary of Health and Human Services [*Gov Code § 68632(b)*];
- Inability to proceed without using money committed to pay for necessities of life [*Gov Code § 68632(c)*]; or
- The inherent power of trial courts [ *Martin v. Superior Court (1917) 176 C 289, 293-294, 296, 168 P 135*] and appellate courts [ *Ferguson v. Keays (1971) 4 C3d 649, 654-656, 656 n6, 94 CR 398, 484 P2d 70*] to waive fees for indigent parties.

#### **Cross Reference:**

Detailed discussion of costs and fees, see California Forms of Pleading and Practice, Ch. 174, Costs and Attorney's Fees (Matthew Bender).

**7.26[4][b] Confidential Application Granted Automatically Unless Court or Authorized Clerk Acts.** Judicial Council Form FW-001 is a mandatory form [*see Cal Rules Ct, Rule 3.51*] that must be filed with the court to obtain a waiver of fees, along with specific information depending on the ground for seeking the waiver [*see Gov Code § 68633(a)-(c)*]. Upon receipt of this confidential [*see Gov Code § 68633(f)*; *Cal Rules Ct, Rule 3.54*] application, the clerk must file it and any accompanying pleading or other papers, but may request that the applicant supply documentation requested on the form and not supplied by the applicant [*Gov Code § 68634(b)*].



#### **Warning:**

Counsel representing an applicant who is filing in a general jurisdiction civil case pursuant to an agreement that counsel will advance litigation costs must indicate that agreement on the application form. The court must set a hearing to determine whether or not the applicant is able to pay court fees without using moneys that normally would pay for the common necessities of life [*Gov Code § 68633(g)*].

#### **Exception:**

This provision does not apply if the applicant is represented by counsel for, or affiliated with, a qualified legal services project, as defined in *Bus & Prof Code 6213* [*Gov Code § 68633(g)*].

The application is granted automatically unless the court or, if authorized by the court [*see Gov Code § 68634(d)*], the clerk acts upon the application within five days of its filing [*Gov Code § 68634(f)*; *Cal Rules Ct, Rule 3.53*]. In doing so, if the application is incomplete, the court may deny it, specifying the information lacking, with leave to submit a new one [*Gov Code § 68634(e)(2)*]. The court may grant or deny waiver without hearing on the face of an application conclusively showing justification for either [*Gov Code § 68634(e)(1), (3)*]. On a question of credibility or sufficiency of evidence concerning the applicant's eligibility, the court must hold a private hearing with at least ten days notice. In those circumstances, the court may request additional documentation to be submitted [*Gov Code § 68634(e)(4), (5)*]. The court must use the appropriate Judicial Council forms for its orders [*see Cal Rules Ct, Rule 3.52*] and may order partial payment of fees and costs [*see Gov Code §§ 68631, 68632, 68640*]. Additional mandatory Judicial Council Forms have been issued for the fee waiver process:

- FW-002, Request to Waive Additional Court Fees (Superior Court)
- FW-003, Order on Court Fee Waiver (Superior Court)
- FW-005, Notice: Waiver of Court Fees (Superior Court)



- FW-006, Request for Hearing About Court Fee Waiver Order (Superior Court)
- FW-007, Notice on Hearing About Court Fees
- FW-008, Order on Fee Waiver After Hearing (Superior Court)
- FW-010, Notice to Court of Improved Financial Situation or Settlement
- FW-011, Notice to Appear for Reconsideration of Fee Waiver
- FW-012, Order on Court Fee Waiver After Reconsideration Hearing (Superior Court)

**Warning:**

The applicant must inform the court if his or her financial situation changes in a manner affecting his or her ability to pay waived fees and costs [*Gov Code § 68636(a)*]. The court has authority to order a party who has received a waiver to pay waived fees and costs upon determining after a hearing that the party was in fact not eligible for the waiver or to order a party whose financial condition has changed to pay costs and fees going forward [*Gov Code § 68636(b)*].

**Cross Reference:**

Form of waiver application, see 7.44.

**7.26[4][c] Specific Fees and Costs Waived Depend on Application.** The fees and costs waived by the granting of an initial application for fee and cost waiver include [*Cal Rules Ct, Rule 3.55*]:

- Clerk's fees for filing papers;
- Clerk's fees for reasonably necessary certification and copying;
- Clerk's fees for issuance of process and certificate;
- Clerk's fees for transmittal of papers;
- Court appointed interpreter's fees for parties in small claims actions;
- Sheriff's fees and marshal's fees required by specified statutes;
- Reporter's fees for attendance at hearings and trials within 60 days of the date of the order granting the application;
- The fee for a telephone appearance pursuant to statute; and
- Clerk's fees for preparing, certifying, and transmitting the transcript on appeal.

The applicant may request on the same application or later file another application on a separate Judicial Council form [see *Cal Rules Ct, Rule 3.51*] for waiver of additional fees and costs [*Cal Rules Ct, Rule 3.56*].

**Distinguish:**

A waiver granted to a plaintiff who has been adjudged a vexatious litigant, and the facts warranting the

waiver, do not bear on the setting of security required of the vexatious litigant [ *McColm v. Westwood Park Assn.* (1998) 62 CA4th 1211, 1219, 73 CR2d 288 (decided under prior waiver statute); see 35.15E[5]].

 **Cross Reference:**

Discussion of vexatious litigants, see 35.15A et seq.

Detailed discussion of fees and costs, see California Forms of Pleading and Practice, Ch. 174, Costs and Attorney's Fees (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsComplaintsFiling Fees



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**7.27 Clerk Issues Summons on Filing of Complaint and Acceptance of Fees.**

After accepting a complaint and the requisite filing fee, the clerk issues the summons [CCP § 412.10], a ministerial duty that he or she is required to perform [ *Maginn v. City of Glendale* (1999) 72 CA4th 1102, 1107, 85 CR2d 639 ]. The clerk provides a copy of the summons to the party who requested its issuance and keeps the original for the records of the court [CCP § 412.10].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeService of ProcessSummonsIssuance



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IV. SERVING COMPLAINT ON DEFENDANT

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**7.28 CHECKLIST: Serving Complaint on Defendant.**



Timing:

☐ Service on all named defendants must be made and proof of service filed within 60 days of filing complaint.

☐ Motion may be made during 60-day period to extend time during which service can be made.

**Authority:**

*Cal Rules Ct, Rule 3.110(b), (e)*

**Discussion:**

See 7.29

☐ Include ADR package.

**Authority:**

*Cal Rules Ct, Rule 3.221(c)*

**Discussion:**

See 7.32

☐ Also include:

☐ Summons.

- ☐ Proof of service form.
- ☐ Any other documents filed with the complaint, such as exhibits, attachments, and affidavits.

**Discussion:**

See Ch. 8, Service of Summons



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**7.29 Service Must Be Completed Within 60 Days of Filing Complaint in All Civil Cases Except Unlawful Detainer Actions, Proceedings Under the Family Code, and Any Other Proceedings for Which Different Service Requirements Are Prescribed by Law.**

*Cal Rules Ct, Rule 3.110(b)* requires that the complaint, summons, and ADR information package [see 7.32] be served on all named defendants in an action and that proofs of service be filed with the court within 60 days after the complaint's filing.

**Exceptions:**

The 60-day rule in Rule 3.110(b) does not apply to the service of complaints or petitions in unlawful detainer actions, proceedings under the Family Code, and other proceedings for which different service requirements are prescribed by law [*Cal Rules Ct, Rule 3.110(a)*].

Similarly, the 60-day rule does not apply to collections cases as defined in *Cal Rules Ct, Rule 3.740(a)* [*Cal Rules Ct, Rules, 3.110(a), 3.740(c)(1)*]. Instead, the complaint must be served and proof of service filed, or an order for summons obtained, within 180 days of the filing of the complaint in those cases [*Cal Rules Ct, Rule 3.740(d)*].

If the plaintiff indicates on the cover sheet that the case is complex under *Cal Rules Ct, Rule 3.400 et seq.* or a collections case under *Cal Rules Ct, Rule 3.740*, the plaintiff must also serve a copy of the cover sheet with the complaint [*Cal Rules Ct, Rules 3.220(a), 3.740(b)*].

 **Cross Reference:**

Discussion of "collections case" as defined in *Cal Rules Ct, Rule 3.740(a)*, see *Ch. 23, Case Management, 23.04[1][i]*.

The court, on its own motion or on the plaintiff's application, may extend the time provided for service of a complaint under *Cal Rules Ct, Rule 3.110(b)* [*Cal Rules Ct, Rule 3.110(e)*].



**Warning:**

An application for an order to extend the time to serve the complaint must be made within the original 60-day period and must be accompanied by a declaration showing why service has not yet been effected,

documenting the efforts that have been made to effect service, and specifying the date by which service is proposed to be effected [*Cal Rules Ct, Rule 3.110(e)*].

**Strategic Point:**

An ex parte application for extension of time to serve pleadings may be considered without a personal appearance of the applicant [*Cal Rules Ct, Rule 3.1207(2)*].

**Trap:**

When amending the complaint to add a defendant, the added defendant must be served and proof of service must be filed within 30 days after the filing of the amended complaint [*Cal Rules Ct, Rule 3.110(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Service of Process Time Limitations General Overview



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**7.30 Local Trial Court Delay Reduction Act Rules May Not Require Shorter Period for Service.**

Local trial court delay reduction rules may not require a shorter period for service than the 60 days allowed under *Cal Rules Ct, Rule 3.110(b)* [Gov Code § 68616(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral Overview





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**7.31 Other Local Rules May Not Require Shorter or Allow Longer Periods for Service.**

The 60-day rule in *Cal Rules Ct, Rule 3.110(b)* has replaced the various local rules on the subject of service of a complaint [former Cal Rules Ct, Rule 201.7, 2.300 Drafter's Notes].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**7.32 Summons and Alternative Dispute Resolution Information Package Must Be Included.**

When a complaint is filed in a general civil case, the court must provide the plaintiff with an ADR information package that includes certain information [*Cal Rules Ct, Rule 3.221(a)*; see *Cal Rules Ct, Rule 1.6(4)* (definition of "general civil case")]. The plaintiff must serve a copy of the package on each defendant, with the complaint [*Cal Rules Ct, Rule 3.221(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionGeneral Overview



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V. EFFECT OF DISMISSAL OF A COMPLAINT

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### 7.33 Dismissals Without Prejudice.

Dismissal without prejudice occurs when the dismissal is not rendered on the merits of the action [ *Wilson v. Bittick* (1965) 63 C2d 30, 35, 45 CR 31, 403 P2d 159 ]. A dismissal without prejudice does not bar the filing of a subsequent action based on the same set of facts [ *Stephan v. American Home Builders* (1971) 21 CA3d 402, 406, 98 CR 354 ].

Involuntary dismissal under CCP §§ 583.110-583.430 for delay in prosecution is always without prejudice because it is not considered to have been made on the merits [CCP § 581(b)(4), (g); *Ashworth v. Memorial Hosp.* (1988) 206 CA3d 1046, 1063, 254 CR 104 ].

#### Strategic Point:



Try to avoid even a dismissal without prejudice because as a practical matter, the filing of a subsequent action based on the same set of facts often may be barred by the statute of limitations [ *Stephan v. American Home Builders* (1971) 21 CA3d 402, 407, 98 CR 354 ]. When an action is dismissed, the limitation period is restored as if no complaint had ever been filed [ *Wood v. Elling Corp.* (1977) 20 C3d 353, 359, 142 CR 696, 572 P2d 755 ; *Thomas v. Gilliland* (2002) 95 CA4th 427, 433, 115 CR2d 520 ].

#### Distinguish:

If the prior action dismissed without prejudice was in federal court, the doctrine of equitable tolling may allow the case to be filed in state court, if the filing is done promptly [see *Addison v. State of California* (1978) 21 C3d 313, 317-319, 146 CR 224, 578 P2d 941 ; *Kolani v. Gluska* (1998) 64 CA4th 402, 409-411, 75 CR2d 257 (statute not tolled because of delay after dismissal); see also 28 USC § 1367(d)].

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Dismissals Involuntary Dismissals Failures to Prosecute Civil Procedure Dismissals Voluntary Dismissals Court Orders Dismissals Without Prejudice



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Chapter 7 Complaints  
V. EFFECT OF DISMISSAL OF A COMPLAINT

*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.34*

### 7.34 Dismissals With Prejudice.

Dismissal with prejudice occurs when there is a final judgment on the merits of the action. Such a dismissal may be the result of an actual determination on the merits of the case, a settlement, or because there exists a statutory requirement for a dismissal with prejudice [see *CCP* § 581(d), (e); *Stephan v. American Home Builders* (1971) 21 CA3d 402, 407, 98 CR 354 ]. A dismissal with prejudice bars a plaintiff from filing a subsequent action based on the same set of facts [ *Gagnon Co., Inc. v. Nevada Desert Inn* (1955) 45 C2d 448, 455, 289 P2d 466 ; *Roybal v. University Ford* (1989) 207 CA3d 1080, 1086, 255 CR 469 ].

A dismissal that does not specify whether it was ordered with or without prejudice is considered to have been made with prejudice [ *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 CA4th 1422, 1430, 77 CR2d 574 ]. Voluntary dismissals under *CCP* § 581 are made with prejudice when entered in open court pursuant to a stipulation or motion [ *Gagnon Co., Inc. v. Nevada Desert Inn* (1955) 45 C2d 448, 455, 289 P2d 466 ] but are presumed to have been made without prejudice when the dismissal is accomplished by the clerk's entry.

#### Cross Reference:

Discussion on the effects of a dismissal, see Ch. 37, Settlement and Release;

Ch. 39, Voluntary Dismissal; and

Ch. 40, Dismissal for Delay in Bringing to Trial.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals  
With Prejudice



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1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.35

**7.35 Skeletal Complaint.**

\_\_\_\_\_[Name of attorney]  
 \_\_\_\_\_[Street address]  
 \_\_\_\_\_[City, state, and ZIP]  
 \_\_\_\_\_[Area code and phone number]  
 \_\_\_\_\_[State Bar No. of attorney]  
 Attorney for \_\_\_\_\_[e.g., Plaintiff John Smith]  
 SUPERIOR COURT OF CALIFORNIA,  
 COUNTY OF \_\_\_\_\_  
 \_\_\_\_\_[name(s)], )  
 Plaintiff(s) ) NO. \_\_\_\_\_  
 vs. ) COMPLAINT FOR PERSONAL INJURY-  
 \_\_\_\_\_[name(s)] ) NEGLIGENCE  
 [and DOES 1 THROUGH ) [LIMITED CIVIL CASE]  
 \_\_\_\_\_] ) [Amount Demanded \_\_\_\_\_  
 \_\_\_\_\_) (Exceeds or Does Not Exceed) \$10,000  
 \_\_\_\_\_

\_\_\_\_\_ [Party, e.g., Plaintiff Mary Smith] alleges:

FIRST CAUSE OF ACTION

(\_\_\_\_\_ [Specify theory, e.g., Negligence])

*[Identify parties in heading of cause of action if complaint names multiple parties.]*

1. \_\_\_\_\_ *(Allege plaintiff's status or capacity if she is other than a competent adult or is suing in a representative capacity.)*

2. The allegations of this complaint stated on information and belief are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.]

3. \_\_\_\_\_ *[Allege identity of each defendant, capacity if necessary, and residence, e.g., Defendant Tim Jones is, and at all times herein mentioned was, a resident of Paradise County, California.]*

4. \_\_\_\_\_ *[Allege unknown defendants by fictitious names in appropriate fictitious name allegation, e.g., The true names or capacities, whether individual, corporate, associate, or otherwise, of defendants DOE 1 to DOE \_\_\_\_\_ [e.g., 50] are unknown to plaintiff, who therefore sues such defendants by such fictitious names, and will amend this complaint to show their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the defendants designated as a DOE is negligently responsible in some manner for the events and happenings herein referred to, and thereby proximately caused injuries and damages to the plaintiff as herein alleged].*

5. \_\_\_\_\_ *(Set forth agency allegation relating to fictitious defendants, if appropriate, e.g., Plaintiff is informed and believes and thereon alleges that, at all times herein mentioned, Defendants DOE 1 through DOE 25 were agents of each other and of the named defendants and, in doing the things alleged in this complaint, were acting in the scope of such agency and with the permission and consent of Defendant Pete Adams.)*

6. \_\_\_\_\_ *(Set forth agency allegation, if appropriate, e.g., Plaintiff is informed and believes and thereon alleges that, at all times herein mentioned, Defendant Tim Jones was the agent of Defendant Pete Adams and, in doing the things hereinafter alleged, was acting in the scope of such agency and with the permission and consent of Defendant Pete Adams.)*

7. \_\_\_\_\_ *[Here and in subsequent numbered paragraphs, state facts constituting the cause of action under the theory alleged, in ordinary and concise language.]*

WHEREFORE, \_\_\_\_\_ *[plaintiff]* prays for judgment against \_\_\_\_\_ *[defendant]* as set forth below.

## SECOND CAUSE OF ACTION

(\_\_\_\_\_ *[Specify theory, e.g., Breach of Warranty]*)

*[Identify parties in heading of cause of action if complaint names multiple parties.]*

*[Paragraphs in succeeding causes of actions or counts should be numbered consecutively from the last paragraph of the immediately preceding cause of action or count.]*

10. \_\_\_\_\_ *(If desired, specify any paragraphs from preceding causes of action or counts to be*

*incorporated by reference, e.g., Plaintiff Mary Smith refers to and incorporates herein Paragraphs 1 through 5 of the First Cause of Action).*]

11. \_\_\_\_\_ *[Here and in subsequent numbered paragraphs, state facts constituting the cause of action under the theory alleged, in ordinary and concise language.]*

WHEREFORE, \_\_\_\_\_ *[plaintiff]* prays for judgment against \_\_\_\_\_ *[defendant]* as set forth below.

### THIRD CAUSE OF ACTION

(\_\_\_\_\_ *[Specify theory, e.g., Common Count]*)

*[Identify parties in heading of cause of action if complaint names multiple parties.]*

*[Paragraphs in succeeding causes of actions or counts should be numbered consecutively from the last paragraph of the immediately preceding cause of action or count.]*

20. \_\_\_\_\_ *[If desired, specify any paragraphs from preceding cause of action to be incorporated by reference, e.g., Plaintiff Mary Smith refers to and herein incorporates Paragraphs 1 through 5 of the First Cause of Action, and paragraphs 11 through 13 of the Second Cause of Action, First Count, as though fully set forth herein.]*

21. \_\_\_\_\_ *[Here and in subsequent numbered paragraphs, state facts constituting the cause of action under the theory alleged, in ordinary and concise language.]*

WHEREFORE, \_\_\_\_\_ *[plaintiff]* prays for judgment against \_\_\_\_\_ *[defendant]* as set forth below.

*[Set forth prayer for relief for each cause of action and count, for example:]*

#### On the FIRST CAUSE OF ACTION:

1. For general damages \_\_\_\_\_ *[in the sum of \$\_\_\_\_\_ or according to proof];*

2. For \_\_\_\_\_ *[specify special damages, if any, e.g., damages for lost wages]* \_\_\_\_\_ *[according to proof or in the sum of \$\_\_\_\_\_].*

#### On the SECOND CAUSE OF ACTION:

3. For compensatory damages in the sum of \$\_\_\_\_\_;

4. For interest on the sum of \$\_\_\_\_\_ from and after \_\_\_\_\_ *[date];*

*[5. For reasonable attorney's fees \_\_\_\_\_ in the sum of \$\_\_\_\_\_ or according to proof.]*

On the THIRD CAUSE OF ACTION:

6. For the sum of \$\_\_\_\_\_;
7. For interest on the sum of \$\_\_\_\_\_ from and after \_\_\_\_\_ [date].

On ALL CAUSES OF ACTION:

8. For costs of suit herein incurred; and
9. For such other and further relief as the court may deem proper.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature of  
attorney of record]

\_\_\_\_\_ [typed name]

Attorney for Plaintiff

[Verification, if desired. Discussion, see 7.15 ].

#### VERIFICATION

I, \_\_\_\_\_ [name], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

NOTES.

#### Authority:

Overall format is based on *Cal Rules Ct, Rules 2.111, 2.112*. Caption is required by *CCP § 422.30*. Doe allegations are authorized by *CCP § 474*



#### Timing:

See 7.02



**Drafting:**

See 7.03 -7.15

**Alternative Form for Fictitiously Named Defendants:**

See 7.36

**More Detailed Skeletal Form of Complaint:**

See *California Forms of Pleading and Practice*, § 123.61 (Matthew Bender)

**Alternative Forms for Captions:**

See *California Forms of Pleading and Practice*, Ch. 108, Captions and Introductions (Matthew Bender)

**Alternative Forms for Prayers:**

See *California Forms of Pleading and Practice*, §§ 420.50 -420.63 (Matthew Bender)

**Forms of Complaint for Many Different Substantive Areas:**

See the specific topic in *California Forms of Pleading and Practice*



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*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.36*

**7.36 Sample Allegation of Fictitiously Named Defendants (Doe Allegation).**

[EITHER]

Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-\_\_\_\_\_ [roman numeral, e.g., 50], inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by such defendants.]

[OR]

DOE 1 through DOE 100, inclusive, are fictitious names of defendants sued herein under the provisions of *Code Civ. Proc. § 474*. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by such defendants.]

NOTES.

**Authority:**

*CCP § 474*

**Drafting:**

See 7.06, 7.11[3]

**When Designation of Defendant By Fictitious Name Allowed.**

See 7.11[3]

**Including Fictitiously Named Defendants (Doe Allegations) for Party.**

See 5.39

**Substituting Fictitiously Named party Once Known.**

See 34.33

**Form for Fictitiously Named Defendants When Only Last Name Is Known:**

See *California Forms of Pleading and Practice*, § 20.33[1] (Matthew Bender)



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*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.37*

**7.37 Sample Allegation of Individual Plaintiff With Fictitious Business Name.**

[EITHER]

At all times herein mentioned plaintiff \_\_\_\_\_[*name*] is and was an individual doing business under the fictitious business name of \_\_\_\_\_[*name*], and plaintiff has filed the statement and published the notice as required by *Bus. & Prof. Code* §§ 17910-17917.

[OR]

Plaintiff is an individual residing in \_\_\_\_\_[*city, if any, and county*], California, [in the \_\_\_\_\_(*name of judicial district, if any*),] and therein doing business under the fictitious business name of \_\_\_\_\_. Plaintiff has duly complied in all respects with the requirements of *Bus. & Prof. Code* §§ 17910-17917 with respect to this fictitious business name.

NOTES.

**Authority:**

*B&P Code* §§ 17913, 17918

**Necessity of Allegation:**

See 7.10[7]



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**7.38 Sample Allegation of Fictitious Business Name When Plaintiff Is Partnership or Unincorporated Association.**

Plaintiff is, and at all times herein mentioned was, \_\_\_\_\_ [a partnership *or* an unincorporated association] with its principal place of business in \_\_\_\_\_ [city, if any, and county], California, [in the \_\_\_\_\_ (name, of judicial district, if any),] and it has filed and published the fictitious business name statement as required by *Bus. & Prof. Code* §§ 17910-17917.

NOTES.

**Authority:**

*B&P Code* §§ 17913, 17918; *CCP* § 369.5(a)

**Necessity for Allegation:**

See 7.10[7]



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*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.39*

**7.39 Sample Allegation of Fictitious Business Name When Plaintiff Is Limited Liability Company.**

Plaintiff is, and at all times herein mentioned was a limited liability company organized and existing under the laws of \_\_\_\_\_ [California or other state or country] [add for foreign limited liability company maintaining action or intrastate business, e.g., and registered to transact intrastate business in California]. Plaintiff has filed and published the fictitious name statement as required by *Bus. & Prof. Code* §§ 17910-17917.

NOTES.

**Authority:**

*B&P Code* §§ 17913, 17918

**Necessity for Allegation:**

See 7.10[7]



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*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.40*

**7.40 Sample Allegation of Corporate Capacity of Plaintiff.**

Plaintiff \_\_\_\_\_ [name] is, and at all times herein mentioned was, a corporation, organized and existing under the laws of California [with its principal place of business in \_\_\_\_\_ (city if any, and county), California(, in the \_\_\_\_\_ [name of judicial district, if any])].

NOTES.

**Authority:**

*Corp Code § 167*

**Necessity of Allegation:**

*See 7.10[5], [6]*

**Form for Corporate Capacity When Plaintiff Is Foreign Corporation:**

*See California Forms of Pleading and Practice, § 20.40[1] (Matthew Bender)*



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*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.41*

**7.41 Allegation of Proper Court in Actions Involving Unruh Act or Rees-Levering Motor Vehicle Sales and Finance Act.**

*[EITHER, if action brought where contract was signed]*

The sales contract on which this action is based was signed in \_\_\_\_\_[city, if any, and county], California[, in the \_\_\_\_\_ (name of judicial district, if any)].

*[OR, if action brought where consumer resided or resides]*

Plaintiff \_\_\_\_\_[name] is the buyer under the sales contract on which this action is based and at the time \_\_\_\_\_ [the contract was entered into or this action was commenced] resided in \_\_\_\_\_[city, if any, and county], California[, in the \_\_\_\_\_ (name of judicial district, if any)].

*[OR, if action brought where goods have become part of realty]*

The goods purchased pursuant to the contract on which this action is based are affixed to and have become a part of the real property] at \_\_\_\_\_[street address and city, if any, and county], California[, in the \_\_\_\_\_ (name of judicial district, if any)].

*[OR, if action brought where vehicle is garaged]*

The motor vehicle purchased pursuant to the contract on which the action is based is permanently garaged at



\_\_\_\_\_[*street address and city, if any, and county*], California[, in the \_\_\_\_\_ (*name of judicial district, if any*)].

NOTES.

**Authority:**

*CCP § 396a; CC §§ 1812.10, 2984.4*

**Drafting:**

*See 7.11[2], 7.23*



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*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.42*

**7.42 Allegation of Proper Court In Limited Civil Case Arising From Offer or Provision of Goods, Services, Loans, or Extensions of Credit for Personal, Family, or Household Use.**

1. The contract on which this \_\_\_\_\_ [action or proceeding] is based arose from an \_\_\_\_\_ [offer or provision] of \_\_\_\_\_ [goods and/or services and/or loans and/or extensions of credit] intended primarily for \_\_\_\_\_ [personal and/or family and/or household] use.

*[EITHER, if action brought where buyer or lessee signed contract]*

2. \_\_\_\_\_ [Name of buyer or lessee], the \_\_\_\_\_ [buyer or lessee], in fact signed the contract in \_\_\_\_\_ County, California[, in the \_\_\_\_\_ (name of judicial district, if any)].

*[OR, if action brought where buyer or lessee resided at time of entering contract]*

3. At the time the contract was entered into, \_\_\_\_\_ [name of buyer or lessee], the \_\_\_\_\_ [buyer or lessee] under the contract, resided in \_\_\_\_\_ County, California[, in the \_\_\_\_\_ (name of judicial district, if any)].

*[OR, if action brought where buyer or lessee resided at time of commencing action]*

4. At the time this \_\_\_\_\_ [action or proceeding] was commenced, \_\_\_\_\_ [name of buyer or lessee], the \_\_\_\_\_ [buyer or lessee] under the contract, resided in \_\_\_\_\_ County, California[, in the \_\_\_\_\_ (name of judicial district, if any)].

NOTES.

**Authority:**

*CCP §§ 395(b), (c), 396a*

**Requirement of Allegation:**

*See 7.11[2], 7.23*

**Form of Allegation for Consumer Actions Involving the Unruh Act or the Rees-Levering Motor Vehicle Sales and Finance Act:**

*Proper form for allegations in actions concerning the Unruh and Rees-Levering Acts, see 7.41*



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*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.43*

**7.43 Judicial Council Form CM-010--Civil Case Cover Sheet.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

Judicial Council Form CM-010, pictured above, is a mandatory form [*see Cal Rules Ct, Rule 3.220(b)(1)*]



**Timing:**

See 7.20[1]

**Drafting:**

See 7.06, 7.20



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*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.44*

#### **7.44 Judicial Council Form FW-001--Request to Waive Court Fees**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*Gov Code § 68630 et seq.; Cal Rules Ct, Rule 3.50 et seq..* Judicial Council Form FW-001, pictured above, is a mandatory form [*see Cal Rules Ct, Rule 3.220(b)(1)*]. For an information sheet, see Judicial Council Form FW-001-INFO

**Discussion:**

See 7.26[4]



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*1-7 MB Practice Guide: CA Pretrial Civil Procedure 7.45*

**7.45 Judicial Council Form MC-120--Confidential Reference List of Identifiers**

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NOTES:

**Authority:**

*Cal Rules Ct, Rule 1.20(b)(4)*; California Judicial Council Form MC-120, pictured above, has been adopted for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Discussion:**

See 7.06[10]



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Chapter 12 Motions to Strike

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.syn*

**§ 12.syn Synopsis to Chapter 12: Motions to Strike**

12.01 Scope.

12.02 Objective and Strategy.

12.03 CHECKLIST: Making Motion to Strike.

12.04 Options and Strategies for Moving Party.

12.04[1] Consider Whether Demurrer Is More Appropriate or Should Be Concurrently Filed.

12.04[2] Consider Stipulation.

12.05 Features of Motion to Strike.

12.05[1] Can Be Asserted Against Complaint, Answer, Demurrer, or Cross-Complaint.

12.05[2] Can Be Asserted Against All or Part of Pleading.

12.05[3] Grounds Must Appear on Face of Pleading or From Judicially Noticed Matter.

12.05[4] Motion Constitutes Making of General Appearance.

12.05[5] Motion Does Not Waive Right to Move for Change of Venue.

12.06 Timing of Motion to Strike.

12.06[1] Motion Generally Must Be Filed Within Time Limit for Response to Pleading.

12.06[2] Moving and Supporting Papers Generally Must Be Served and Filed at Least 16 Court Days Before Hearing.

12.06[2][a] Basic 16-Day Period Applies for Personal Delivery.

12.06[2][b] Time Period Increased When Notice Served by Mail.

12.06[2][c] Time Period Increased When Notice Served by Fax, Express Mail, or Overnight Delivery Method.

12.06[2][d] Time Period Increased When Notice Served by Electronic Service.

12.06[2][e] Court May Shorten Duration Between Service and Motion Hearing.

12.06[3] Time to Demur Not Extended.

12.06[4] Motion to Strike Complaint or Cross-Complaint Extends Time to Answer.

12.06[5] Local Rules Under Trial Court Delay Reduction Act May Affect Timing Requirements.

12.07 Motion to Strike May Be Made in Conjunction With Answer or Demurrer.

12.08 Grounds for Motion to Strike.

12.08[1] Irrelevant, False or Improper Matter May Be Stricken.

12.08[2] Pleading Not Drawn or Filed in Accordance With Law.

12.08[3] Unsupported Damages or Relief Is Sole Ground in Limited Civil Cases.

12.08[4] Special Statutory Grounds for Motion.

12.08[4][a] Failure to File Certificate in Action Against Architect, Engineer, or Land Surveyor.

12.08[4][b] Failure to Obtain Leave to Bring Suit in Civil Conspiracy Action Against Attorney Under CC § 1714.10.

12.09 Contents of Motion to Strike.

12.09[1] Papers Included.

12.09[2] Format Requirements for Notice of Motion.

12.10 Serving and Filing Motion Papers.

12.11 Responding to Opposing Party's Papers.

12.12 Order and Notice of Ruling.

12.12[1] Prevailing Party Prepares Order.

12.12[2] Prevailing Party Must Follow Notice Requirements.

12.13 Considerations When Motion to Strike Granted.

12.13[1] Direct Appeal Is Generally Not Available.



12.13[2] If Stricken Pleading Is Complaint, Court May Grant Leave to Amend.

12.13[2][a] Court May Allow Amendment on Terms It Deems Proper.

12.13[2][b] Defendant May Recover Expenses and Fees of Bringing Motion.

12.13[2][c] If Court Denies Leave to Amend, Party May Move for Dismissal.

12.13[3] If Stricken Pleading Is Demurrer, Court Will Allow Time for Answer.

12.14 Considerations When Motion to Strike Denied.

12.14[1] Direct Appeal Is Not Available.

12.14[2] Moving Party Must Have Opportunity to File Answer.

12.15 CHECKLIST: Opposing Motion to Strike.

12.16 Options and Strategies for Opposing Party.

12.17 Time Limitations for Opposing Party.

12.18 Contents of Opposing Papers.

12.19 Serving and Filing Motion Papers.

12.20 Order and Notice of Ruling.

12.21 Appellate Review of Granting of Motion to Strike.

12.21[1] Review by Appeal.

12.21[1][a] Review Is From Final Judgment.

12.21[1][b] Standard of Review.

12.21[2] Review by Extraordinary Writ.

12.22 Appellate Review of Denial of Motion to Strike.

12.22[1] Review by Appeal.

12.22[2] Review by Extraordinary Writ.

12.23 Notice of Motion for Order to Strike Entire Pleading.

12.24 Notice of Motion for Order Striking Portion of Pleading.

12.25 Order Granting or Denying Motion to Strike.



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Chapter 12 Motions to Strike  
I. STRATEGY

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.01*

**12.01 Scope.**

This chapter covers:

- Options and strategies for moving to strike a pleading [*see 12.04*].
- Key features of the motion to strike [*see 12.05*].
- Timing of the motion [*see 12.06, 12.07*].
- Grounds for the motion [*see 12.08*].
- Procedures for making the motion [*see 12.09 -12.12*; Forms: *see 12.23 -12.25*].
- Considerations after the motion has been granted or denied [*see 12.13, 12.14*].
- Options and strategies for opposing the motion [*see 12.16*].
- Procedures for opposing the motion [*see 12.17 -12.20*].
- Review of grant or denial of the motion [*see 12.21, 12.22*].

**Core Statutes:**

*CCP §§ 435-437*



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Chapter 12 Motions to Strike  
I. STRATEGY

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.02*

**12.02 Objective and Strategy.**

A motion to strike is the only pleading that allows an attack on a portion of a cause of action. A demurrer or motion for summary judgment requires that an entire cause of action be subject to defeat; thus, a motion to strike can be used to strike a particular claim for relief (*e.g.*, an emotional distress claim in a legal malpractice action, or a claim for punitive damages) and to strike unnecessary, scurrilous or offensive matter from the complaint. For example, a motion to strike would be filed in conjunction with a demurrer to a claim for punitive damages in order to remove from the complaint, if the demurrer were successful, those allegations which purportedly supported the claim for punitives.

Before filing a motion to strike, counsel should seek a stipulation from the opposing party that any offensive matter be voluntarily removed from the pleading.

If a pleading contains irrelevant, false, or improper matter, or if all or part of a pleading does not conform with California law, a governing court rule, or court order, a party may file a motion to strike all or part of the pleading [*see CCP § 436; see 12.08[1], [2]*]. Grounds for the motion to strike must appear on the face of the challenged pleading or from any matter of which the court may take judicial notice [*CCP § 437(a); see 12.05[3]*].

**Distinguish:**

In cases designated as "limited civil cases" (cases generally involving less than \$25,000 in controversy), motions to strike may only be used when the damages or relief sought are "not supported by the allegations of the complaint" [*CCP §§ 86(a), 91, 92(d); see 12.08[3]*].

Motions to strike in civil cases are governed generally by *CCP §§ 435-437*. In specific causes of action, other statutes and rules may provide their own motion to strike rules [*see 12.08[4]*]. As noted above, limitations on the availability of motions in limited civil cases are addressed in *CCP §§ 91, 92* [*see 12.08[3]*]. A special type of motion to strike, governed by *CCP § 425.16* and discussed in Chapter 13, addresses a cause of action arising from an act in furtherance of the defendant's Constitutional rights of petition or free speech regarding a public issue [*see CCP § 425.16(b)(1)*].

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 375, Motions to Strike: Pleadings (Matthew Bender).

California Points and Authorities, Ch. 160, Motions to Strike (Matthew Bender).



**Cross References:**

See Ch. 11, Demurrers and Motions for Judgment on the Pleadings; Ch. 13, Anti-SLAPP Motions.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 12 Motions to Strike  
II. MAKING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.03*

**12.03 CHECKLIST: Making Motion to Strike.**

☐ Examine the pleading at issue for the following:

☐ Susceptibility to a motion to strike:

☐ Irrelevant, false or improper matter.

☐ Pleading not drawn in conformity with state law, court rules or court order.

☐ Lack of certificate required by *CCP* § 411.35 in action against architect, engineer or land surveyor.

☐ Lack of required court order in civil conspiracy action against attorney.

**Authority:**

*CCP* §§ 435, 436

**Discussion:**

See 12.08



**Timing:** Examine the relevant timing issues:

☐ If no demurrer filed.

☐ If demurrer filed.

**Authority:**CCP § 435(c), (d); *Cal Rules Ct, Rule 3.1322(b)***Discussion:**

See 12.06

☐ Determine classification of the action:☐ Limited civil:☐ Grounds limited.☐ Unlimited civil.**Authority:**

CCP §§ 85, 86, 88

**Discussion:**

See 12.08[3]

☐ Prepare the following papers:☐ Notice of motion to strike.☐ Supporting memorandum.☐ Supporting declaration.☐ Proof of service.☐ Proposed order.☐ Responsive paper, if applicable.**Authority:**CCP § 435; *Cal Rules Ct, Rule 3.1322(a)***Content Note:**

Portions of a pleading targeted by the motion must be quoted in full unless an entire paragraph, cause of action, count, or defense.

**Discussion:**

See 12.09, 12.11

**Forms:**

See 12.23, 12.24

**Grounds:**

See 12.08

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

- ☐ Serve the notice and memorandum.
- ☐ File the originals with the clerk of court and pay filing fee.
- ☐ Note timing concern on filing proof of service.
- ☐ Examine opposing party's responsive memorandum to determine whether a reply is appropriate or necessary, keeping in mind the following:
  - ☐ Time limits.
  - ☐ Local rules.

**Authority:**

CCP §§ 1005(b), (c), 1010-1013; *Cal Rules Ct*, Rule 3.1300(a)

**Discussion:**

See 12.09 -12.11

- ☐ If motion denied:
  - ☐ File answer.
  - ☐ Challenge on review of final judgment.
- ☐ If motion granted:
  - ☐ If order strikes whole of complaint, move for dismissal.
  - ☐ Attorney's fees.

**Authority:**

CCP § 436

**Discussion:**

See 12.13, 12.14, 12.21, 12.22



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Chapter 12 Motions to Strike  
II. MAKING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.04*

**12.04 Options and Strategies for Moving Party.**

**12.04[1] Consider Whether Demurrer Is More Appropriate or Should Be Concurrently Filed.** The function of both a demurrer and a motion to strike is to raise objections to pleadings on grounds that appear on the face of the pleading or from matters of which the court may take judicial notice [see *CCP* §§ 430.30(a), 430.70, 437]. However, the two procedural devices have some differences:

- A demurrer is itself a pleading [see *CCP* § 435(a)(2)]. It raises specific statutory objections to a complaint, cross-complaint, or answer (*e.g.*, that a complaint does not state facts sufficient to constitute a cause of action) [see *CCP* §§ 430.10, 430.20].
- A motion to strike is not a pleading. It can be used against a demurrer, as well as a complaint, cross-complaint, or answer. The grounds for the motion to strike, set forth in *CCP* § 436, somewhat overlap with the grounds for demurrer, but are more broadly defined (*e.g.*, material not in conformity with state law is subject to being stricken) [see *CCP* §§ 435(a)(2), 436; *Warren v. Atchison, T. & S.F. Ry. Co.* (1971) 19 CA3d 24, 41, 96 CR 317 ].

A typical use of a demurrer and motion to strike would be to demur on the grounds that there are insufficient facts pled to support a claim for punitive damages, coupled with a motion to strike those allegations which purportedly support the punitive damage claim. A motion to strike alone may be appropriate in those circumstances in which the sole object is to remove unnecessary and inflammatory material from a complaint which otherwise appropriately states a cause of action.

► **Cross References:**

Grounds for motion to strike, see 12.08.

Grounds for demurrer, see *Ch. 11, Demurrers and Motions for Judgment on the Pleadings*, 11.05.

**12.04[2] Consider Stipulation.** If the parties can reach agreement, a written stipulation to remove objectionable material from a pleading may be used as an alternative to the motion to strike. The better practice is to submit such a



stipulation to the court to sign as an Order.



**Cross Reference:**

Discussion of stipulations, see Ch. 28, Stipulations.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral Overview



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Chapter 12 Motions to Strike  
II. MAKING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.05*

**12.05 Features of Motion to Strike.**

**12.05[1] Can Be Asserted Against Complaint, Answer, Demurrer, or Cross-Complaint.** The general motion to strike under *CCP* §§ 435-437 can be asserted against any defective pleading. Complaints, answers, demurrers, and cross-complaints may be subject to the motion [see *CCP* § 435(a), (b)].

**Distinguish:**

The special anti-SLAPP motion to strike under *CCP* § 425.16 is only available with respect to complaints and cross-complaints [see *CCP* § 425.16(f), (h)].

**12.05[2] Can Be Asserted Against All or Part of Pleading.** The motion to strike under *CCP* §§ 435-437 is most often used against specific parts of a defective pleading. However, it can be used to strike out all of a pleading not drawn or filed in conformity with California law, a court rule, or a court order [*CCP* § 436(b)].

**12.05[3] Grounds Must Appear on Face of Pleading or From Judicially Noticed Matter.** The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court may take judicial notice [*CCP* § 437(a); *City and County of San Francisco v. Strahlendorf* (1992) 7 CA4th 1911, 1913, 9 CR2d 817].

**Distinguish:**

Special anti-SLAPP motions to strike do not have this restriction; the parties may submit supporting affidavits [*CCP* § 425.16(b)(2); see *Ch. 13, Anti-SLAPP Motions, 13.02*].

If the motion is based on judicially noticeable matter [*Evid Code* §§ 452, 453], then the notice of motion, supporting memorandum, or other means specified by the court must set forth the judicially noticed matter [*CCP* § 437(b)]. Judicial notice may be taken of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments [ *Day v. Sharp* (1975) 50 CA3d 904, 914, 123 CR 918 ]. However, the pleading party's deposition or sworn testimony is not subject to judicial notice [ *Garcia v. Sterling* (1985) 176 CA3d 17, 22, 221 CR 349 ].

► **Cross Reference:**

Discussion of judicial notice, California Forms of Pleading and Practice, Ch. 321, Judicial Notice

(Matthew Bender).

Against a motion to strike, the complaint as a whole is read, all parts in context with all allegations assumed to be true [ *Courtesy Ambulance Serv. v. Superior Court* (1992) 8 CA4th 1504, 1519, 11 CR2d 161 ].

**Distinguish:**

In a summary judgment motion proceeding, where the court determines whether there are any disputed material facts, the parties submit supporting materials *outside* of the pleadings (*e.g.*, affidavits, declarations, admissions, answers to interrogatories, and depositions) [CCP § 437c(a); *see Ch. 38, Summary Judgment*, 38.05].

**12.05[4] Motion Constitutes Making of General Appearance.** The filing of a notice of a motion to strike constitutes the making of a general appearance in the case [CCP § 1014], and thereby confers jurisdiction over the moving party [see *Creed v. Schultz* (1983) 148 CA3d 733, 740, 196 CR 252 ]. A motion to strike in response to being brought into a suit as a party via a cross-complaint submits the party to the jurisdiction of the court [ *Halterman v. Pacific Gas & Elec. Co.* (1937) 22 CA2d 592, 594, 71 P2d 855 ].

Similarly, appearing at a hearing on a motion to strike is regarded as a general appearance in the case [ *Zobel v. Zobel* (1907) 151 C 98, 101, 90 P 191 ].



**Warning:**

If the court lacks personal jurisdiction over a defendant, defense counsel must address that issue before bringing a motion to strike the complaint (*e.g.*, by making a formal motion to quash service of summons under CCP § 418.10) [see *Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction*, 9.03].

**12.05[5] Motion Does Not Waive Right to Move for Change of Venue.** Filing a motion to strike does not waive the moving party's right to move for a change of venue [ *Wood, Curtis & Co. v. Herman Mining Co.* (1903) 139 C 713, 717, 73 P 588 ; *Marshall v. Benedict* (1958) 161 CA2d 284, 326 P2d 516 ].



**Cross Reference:**

Discussion of change of venue, see Ch. 6, Determining Forum.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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**12.06 Timing of Motion to Strike.**

**12.06[1] Motion Generally Must Be Filed Within Time Limit for Response to Pleading.** A motion to strike a pleading generally must be filed within the time allowed to respond to the specific pleading [*CCP* § 435(b)(1); *Cal Rules Ct*, Rule 3.1322(b); *City and County of San Francisco v. Strahlendorf* (1992) 7 CA4th 1911, 1913, 9 CR2d 817 ].

➤ **Cross Reference:**

Discussion of the time limits for response to specific pleadings, see *Ch. 14, Answers*, 14.03.

**12.06[2] Moving and Supporting Papers Generally Must Be Served and Filed at Least 16 Court Days Before Hearing.**

**12.06[2][a] Basic 16-Day Period Applies for Personal Delivery.** All moving and supporting papers must be served and filed at least 16 court days before the hearing on the motion to strike [*CCP* § 1005(b); see *CCP* § 435(b)(2); *Cal Rules Ct*, Rule 3.1300(a)].

**Exceptions:**

The 16-day time period applies when service is by personal delivery. The period will be increased when service is by mail or electronic transmission [see 12.06[2][b] -[d]]. Also, the court may shorten the statutory time period either on its own motion or on a motion by a party [see 12.06[2][e]].

➤ **Cross Reference:**

See *Ch. 27, Service of Papers*, 27.29.

**12.06[2][b] Time Period Increased When Notice Served by Mail.** If notice is served by mail, the required 16-day period is increased by five calendar days if both the place of mailing and the place of address are within California; by 10 calendar days if either the place of mailing or the place of address is outside the California but within the United States; and by 20 calendar days if either the place of mailing or the place of address is outside the United States [*CCP* § 1005(b); see *CCP* § 435(b)(2); *Cal Rules Ct*, Rule 3.1300(a)].

**12.06[2][c] Time Period Increased When Notice Served by Fax, Express Mail, or Overnight Delivery**

**Method.** If the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the 16-day period is increased by two calendar days [*CCP* § 1005(b); *see CCP* § 435(b)(2); *Cal Rules Ct, Rule 3.1300(a)*].

**12.06[2][d] Time Period Increased When Notice Served by Electronic Service.** Electronic service, which may be used by agreement of the parties or court order, may increase the 16-day period by two court days [*CCP* § 1010.6(a)(6); *Cal Rules Ct, Rule 2.260(e)(2)*].

**12.06[2][e] Court May Shorten Duration Between Service and Motion Hearing.** On its own motion or on a motion for an order shortening time supported by a declaration showing good cause, the court may prescribe shorter times than those ordinarily required by statute [*CCP* § 1005(b); *Cal Rules Ct, Rule 3.1300(b)*].

**12.06[3] Time to Demur Not Extended.** The filing of a notice of motion to strike all or part of an answer or complaint does not extend the time within which to demur [*CCP* § 435(d)].



**Warning:**

Because *CCP* § 435(d) does not extend the time for demurrer, the movant must address any defects in the pleading that are subject to demurrer concurrently with the defects that are subject to the motion to strike [*see 12.06[5], 12.07*].

**12.06[4] Motion to Strike Complaint or Cross-Complaint Extends Time to Answer.** The filing of a motion to strike a complaint or cross-complaint, without demurring, extends the time to answer, and no default may be entered against a defendant timely moving to strike [*CCP* § 435(a)(1), (c)].



**Warning:**

A default may be entered against the defendant if the motion to strike the complaint or cross-complaint is untimely and no other response to the pleading has been made [*CCP* § 585(c), (e)].

**12.06[5] Local Rules Under Trial Court Delay Reduction Act May Affect Timing Requirements.** The Judicial Council preempts local court rules pertaining to pleadings, motions and form and format of papers. All local rules concerning these fields are void [*Cal Rules Ct, Rule 3.20(a)*]. However, that mandated preemption does not apply to local court rules adopted pursuant to the Trial Court Delay Reduction Act [*Gov Code* § 68600 *et. seq.*; *Cal Rules Ct, Rule 3.20(b)(4)*].

The Trial Court Delay Reduction Act states that no delay reduction rules may require a time period shorter than 30 days after service of the complaint for service of responsive pleadings. However, the parties may stipulate to an additional 15 days. However, local rules may establish longer periods of time [*Gov Code* § 68616(b)].

The Trial Court Delay Reduction Act also states that no delay reduction rules may require a time for service of notice or other paper under *CCP* §§ 1005 and 1013, except as may be noted in those sections, or a time to plead after service of summons under *CCP* § 412.20, except as may be noted in that section [*Gov Code* § 68616(c)].



**Cross Reference:**

See *Ch. 23, Case Management, 23.04*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice  
 Defenses, Demurrers & Objections  
 Motions to Strike  
 General Overview  
 Civil Procedure Pleading & Practice  
 Motion Practice  
 Time Limitations



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**12.07 Motion to Strike May Be Made in Conjunction With Answer or Demurrer.**

A motion to strike can be made simultaneously with a responsive pleading such as an answer or demurrer.



**Decision Point:**

Determine whether an answer or demurrer should be served and filed concurrently with the motion to strike:

- If the motion to strike only targets *part* of a complaint, counsel should either file an answer to the remaining portion concurrently with the motion to strike, or calendar the need to answer once the motion to strike has been heard [see Ch. 14, Answers].
- If certain elements of the pleading are subject to statutory grounds for demurrer [see CCP §§ 430.10, 430.30] and party wishes to demur, prepare the demurrer at the same time as the motion to strike [see *Cal Rules Ct*, Rule 3.1322(b); see Ch. 11, *Demurrers and Motions for Judgment on the Pleadings*, 11.03].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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**12.08 Grounds for Motion to Strike.**

**12.08[1] Irrelevant, False or Improper Matter May Be Stricken.** Any party, or the court itself, may move to strike any irrelevant, false, or improper matter from any pleading [CCP §§ 435(b)(1), 436(a)].

**Examples:**

Examples of materials that may been stricken include:

- A moot question affecting the entire subject matter of the complaint [ *Honan v. Title Ins. & Trust Co.* (1935) 9 CA2d 675, 679, 50 P2d 1068 ].
- A conclusory allegation [ *Bartling v. Glendale Adventist Med. Ctr.* (1986) 184 CA3d 961, 969, 229 CR 360 ].
- An indemnity action filed subsequent to a good faith settlement barring further action against the defendant [ *Greshko v. County of Los Angeles* (1987) 194 CA3d 822, 830, 239 CR 846 ; *Hale v. Laden* (1986) 178 CA3d 668, 673, 224 CR 182 ].
- Redundant matter in a complaint [ *Henke v. Eureka Endowment Asso.* (1893) 100 C 429, 433, 34 P 1089 ].
- Language that goes "into unnecessary detail" in setting forth a cause of action [ *Smithson v. Sparber* (1932) 123 CA 225, 232, 11 P2d 90 ].
- A pleading that is in disregard of or violative of orderly judicial administration [ *Kronsberg v. Milton J. Wershow Co.* (1965) 238 CA2d 170, 173, 47 CR 592 ].
- An improper claim for punitive damages [see e.g., *College Hosp., Inc. v. Superior Court* (1994) 8 C4th 704, 34 CR2d 898 ; *Erlich v. Menezes* (1999) 21 C4th 543, 87 CR2d 886 ].

**Distinguish:**

Failure to state facts sufficient to constitute a cause of action should be attacked either by demurrer [CCP § 430.10(e)] or by a motion for judgment on the pleadings [ *Pierson v. Sharp Mem. Hosp., Inc.* (1989) 216 CA3d 340, 343, 264 CR 673 ]. General uncertainty in the complaint should be attacked by demurrer [see CCP § 430.10(f); *Allerton v. King* (1929) 96 CA 230, 234, 274 P 90 ].

**Warning:**

When citing decisions based on former CCP § 453, which governed motions to strike before its 1982 repeal, be aware that the word "sham" in the prior statute, although used in decisions post-dating the repeal [see *Roberts v. Los Angeles County Bar Assn.* (2003) 105 CA4th 604, 613, 129 CR2d 546 ; *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel et. al* (1992) 6 CA4th 157, 162, 8 CR2d 139 ] is not interchangeable with the word "false," as used in the current CCP § 436(a). The different phraseology utilized in the two different statutes is presumed to show an intent to change the law [ *Garcia v. Sterling* (1985) 176 CA3d 17, 21, 221 CR 349 ]. A dictionary definition of "false" taken from the American Heritage Dictionary (2d College Ed. 1982), "contrary to fact or truth," has been relied on to distinguish it from "sham" [ *Garcia v. Sterling* (1985) 176 CA3d 17, 21, 221 CR 349 ]. A "sham" allegation is so inherently and utterly devoid of merit as to be "radically insufficient" on which to found a cause of action [ *McClung v. Watt* (1922) 190 C 155, 160, 211 P 17 ].

**12.08[2] Pleading Not Drawn or Filed in Accordance With Law.** Any party, or the court itself, may move to strike all or part of any pleading not drawn or filed in conformity with state law, court rules or court order [CCP §§ 435(b)(1), 436(b)].

**Examples:**

Materials that have been stricken include:

- An amended complaint that merely repeated allegations to which a demurrer had been sustained and made no appreciable effort to meet the objections [ *Taliaferro v. Prettner* (1955) 135 CA2d 157, 159, 286 P2d 977 ].
- An amended complaint that did not conform to previous rulings of the court [ *Janis v. California State Lottery Comm'n* (1998) 68 CA4th 824, 829, 80 CR2d 549 ; *Kronsberg v. Milton J. Wershow Co.* (1965) 238 CA2d 170, 173, 47 CR 592 ].
- A complaint in a suit "filed solely to circumvent the court's prior adverse ruling" in a case arising from the same facts is subject to a motion to strike [ *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel et. al* (1992) 6 CA4th 157, 162, 8 CR2d 139 ].
- The pleading of a nonparty [ *Milstein v. Turner* (1951) 107 CA2d 184, 185, 236 P2d 606 ].
- Any untimely filed pleading [ *Buck v. Morrossis* (1952) 114 CA2d 461, 464, 250 P2d 270 ].
- An unsigned pleading, when the omission of the signature was not rectified after called to the attention of the attorney and the party [CCP § 128.7; *Vaccaro v. Kaiman* (1998) 63 CA4th 761, 767-768, 73 CR2d 829 ].
- A complaint failing to state facts showing a primary right by plaintiff or a primary duty devolving on defendant or a wrong done by defendant [CCP § 425.10; *Lodi v. Lodi* (1985) 173 CA3d 628, 631, 219 CR 116 ].



- Allegations in a complaint for punitive damages when punitive damages are not available [ *Grieves v. Superior Court* (1984) 157 CA3d 159, 163-164, 203 CR 556 ] or a complaint that improperly states the amount of punitive damages being sought [ *Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 CA4th 1291, 1298, 13 CR2d 585, 13 CR 2 ].
- A complaint brought in the absence of subject matter jurisdiction of the court [ *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1036, 25 CR2d 539 ].
- An unverified pleading, when a verified pleading is required [ *Hearst v. Hart* (1900) 128 C 327, 328, 60 P 846 ; *Henderson v. Palmer Union Oil Co.* (1923) 64 CA 81, 84, 220 P 672 ].
- A pleading filed by a corporation that is prohibited by statute from maintaining or defending an action in a California court [ *Mediterranean Exports, Inc. v. Superior Court* (1981) 119 CA3d 605, 616, 174 CR 169 ].
- An amended pleading filed after a motion for judgment on the pleadings has been granted with leave to amend, if the pleading is untimely or violates the court's prior ruling on the motion [CCP § 438(i)(1)(A)].

**Distinguish:**

If an evidentiary showing is necessary, then summary judgment or another motion is proper [ *Mediterranean Exports, Inc. v. Superior Court* (1981) 119 CA3d 605, 616, 174 CR 169 ].

**Warning:**

A motion to strike presenting only objections that the complaint failed to state facts sufficient to constitute a cause of action may be treated as a general demurrer [see, e.g., *Ferraro v. Camarlinghi* (2008) 161 CA4th 509, 529, 75 CR3d 19 ].

**Cross Reference:**

Demurrers generally, see Ch. 11, Demurrers and Motions for Judgment on Pleadings.

**Cross References:**

See Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction; Ch. 11, Demurrers and Motions for Judgment on the Pleadings; Ch. 38, Summary Judgment. Format of citations to legal sources, see Ch. 7, *Complaints*, 7.06[9]. Exclusion or redaction of social security and financial account numbers from documents filed in the court's public file, see Ch. 7, *Complaints*, 7.06[10].

**12.08[3] Unsupported Damages or Relief Is Sole Ground in Limited Civil Cases.** In general, civil cases involving an amount in controversy of \$25,000 or less are classified as limited civil cases [CCP §§ 85(a), 86] and all other cases are unlimited civil cases [CCP § 88]. The only permissible ground for a motion to strike in a limited civil case is that the damages or relief sought are not supported by the allegations of the complaint [CCP § 92(d)].

A case may be removed from the auspices of the limited civil case rules on a showing that it is impractical to prosecute or defend within the limited civil case limitations [CCP § 91(c)].

**Cross Reference:**

Classification of case as "limited" or "unlimited," see Ch. 15, *Reclassification of Cases*, 15.04.

**12.08[4] Special Statutory Grounds for Motion.**

**12.08[4][a] Failure to File Certificate in Action Against Architect, Engineer, or Land Surveyor.** In actions, including cross-complaints for damages or indemnity, "arising out of the professional negligence" of a person holding an architect's certificate, professional engineer registration, or land surveyor's license, failure to file the certificate required by *CCP* § 411.35(b) is grounds for a motion to strike or demurrer [*CCP* §§ 411.35(g), 430.10(h); *Price v. Dames & Moore* (2001) 92 CA4th 355, 360, 112 CR2d 65 ].

However, leave to amend is routinely and liberally granted in order to allow plaintiff to cure the defect of not filing the required certificate [ *Price v. Dames & Moore* (2001) 92 CA4th 355, 360, 112 CR2d 65 ].

**12.08[4][b] Failure to Obtain Leave to Bring Suit in Civil Conspiracy Action Against Attorney Under CC § 1714.10.** A plaintiff bringing a civil conspiracy suit against an attorney under *CC* § 1714.10 must first obtain a court order authorizing the suit. The attorney defendant may move to strike the complaint if the plaintiff has failed to first obtain the order [*CC* § 1714.10(b)].

The basic characteristics of a 1714.10 civil conspiracy suit are [*CC* § 1714.10(a)]:

- It alleges a conspiracy between attorney and client.
- The alleged conspiracy arises from an attempt to contest or compromise a claim or dispute.
- The alleged conspiracy is based on the attorney's representation of the client.

**Cross Reference:**

Special civil proceeding against attorney for conspiracy under *CC* § 1714.10, see California Forms of Pleading and Practice, Ch. 126, Conspiracy (Matthew Bender).

**Warning:**

Failure to raise timely the defense of lack of compliance with the court order requirement will constitute a waiver of the requirement [*CC* § 1714.10(b); *Villa Pacific Bldg. Co. v. Superior Court* (1991) 233 CA3d 8, 9, 284 CR 227 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeIrrelevant MattersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeRedundant Matters



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Chapter 12 Motions to Strike  
II. MAKING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.09*

**12.09 Contents of Motion to Strike.**

**12.09[1] Papers Included.** A motion to strike includes the following elements:

- A notice of motion to strike [*Cal Rules Ct, Rule 3.1322(a)*; forms, *see 12.23, 12.24*].
- Supporting memorandum [*Cal Rules Ct, Rule 3.1113*; *see California Points and Authorities, Ch. 160, Motions to Strike (Matthew Bender)*].
- Proof of service [*see Ch. 27, Service of Papers, 27.29*].
- Proposed order, if desired [form, *see 12.25*].

**12.09[2] Format Requirements for Notice of Motion.** The notice of motion must quote in full the portions sought to be stricken except when the motion is to strike an entire paragraph, cause of action, count, or defense [*Cal Rules Ct, Rule 3.1322(a)*].

Specifications in the notice of motion must be numbered consecutively [*Cal Rules Ct, Rule 3.1322(a)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 12 Motions to Strike  
II. MAKING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.10*

**12.10 Serving and Filing Motion Papers.**

Serve and file the papers by:

- Serving a conformed copy of the notice of motion, proof of service, and accompanying papers on the other party's attorney, or on the other party if he or she has no attorney in accordance with *CCP §§ 1005, 1010.6, 1013, 1015* and *Cal Rules Ct, Rules 3.1103, 3.1300* [see *Ch. 27, Service of Papers, 27.29*].
- Delivering the originals of the notice of motion and accompanying papers to the court clerk's office for filing at least 16 court days, plus any applicable additional period, before the hearing and pay the required fee [see *Ch. 27, Service of Papers, 27.29*]. If not filed with the original papers, deliver the proof of service of the moving papers for filing no later than five court days before the time appointed for the hearing [see *Cal Rules Ct, Rule 3.1300*].

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure, 26.39*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 12 Motions to Strike  
II. MAKING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.11*

**12.11 Responding to Opposing Party's Papers.**

When responding to plaintiff's opposition papers:

- Prepare any reply declarations and any reply memorandum in response to any counter-declarations and opposing memorandum filed by the opposing party. For memoranda opposing motions to strike, see California Points and Authorities, Ch. 160, Motions to Strike (Matthew Bender).
- Serve a conformed copy of each declaration and reply memorandum on opposing counsel and file the originals at least five court days before the hearing [*CCP* §§ 1005, 1015; *Cal Rules Ct*, Rule 3.1300(a); see Ch. 26, *Law and Motion Procedure*, 26.46].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeMotion PracticeOpposing Memoranda



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Chapter 12 Motions to Strike  
II. MAKING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.12*

**12.12 Order and Notice of Ruling.**

**12.12[1] Prevailing Party Prepares Order.** If the court grants the motion to strike, counsel for the prevailing defendant ordinarily prepares the formal order for the judge's signature. When the court denies the motion, counsel for the prevailing plaintiff may prepare the formal order for the judge's signature. More typically, no order is prepared if the motion is denied, unless a party intends to take a writ from the denial.

**12.12[2] Prevailing Party Must Follow Notice Requirements.** The prevailing party must give notice to all other parties or their attorneys [see *CCP § 1015*] the notice required by *CCP § 1019.5(a)* in the manner provided in *CCP §§ 1010-1020*, unless the court otherwise orders or unless notice is waived by all parties in open court and is entered in the minutes [see *CCP § 1019.5(a)*]. The prevailing party must, pursuant to *CCP § 1019.5*:

- Prepare a notice of the court's order and a proof of service [see *Ch. 26, Law and Motion Procedure*, 26.62];
- Serve the ruling on opposing counsel; and
- File the original of the notice and proof of service with the court.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 12 Motions to Strike  
II. MAKING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.13*

**12.13 Considerations When Motion to Strike Granted.**

**12.13[1] Direct Appeal Is Generally Not Available.** In general, an order granting a motion to strike is not directly appealable, but it can be reviewed on appeal from final judgment [ *Oeth v. Mason* (1967) 247 CA2d 805, 808, 56 CR 69 ].

However, if the court order on the motion to strike has removed from the case the pleader's only cause of action or defense, or leaves no further issue to be determined between the pleader and his or her adversary, the order is directly appealable [ *Timberidge Enters., Inc. v. City of Santa Rosa* (1978) 86 CA3d 873, 878-879, 150 CR 606 ].



**Cross Reference:**

Appellate review, see 12.21.

Counsel can seek relief by writ proceeding, although it is unlikely to be granted.

**12.13[2] If Stricken Pleading Is Complaint, Court May Grant Leave to Amend.**

**12.13[2][a] Court May Allow Amendment on Terms It Deems Proper.** If a motion to strike is granted, the court may order that an amendment or amended pleading be filed on terms it deems proper [CCP § 472a(d)]. If the defect in the pleading is capable of cure, the court should allow leave to amend [ *Vaccaro v. Kaiman* (1998) 63 CA4th 761, 768, 73 CR2d 829 ].



**Cross Reference:**

Amendment of pleadings, see Ch. 34, Amended and Supplemental Pleadings.

The granting of a motion to strike at the same time as the sustaining of a demurrer includes an implied leave to amend [ *B.F.G. Builders v. Weisner & Coover Co.* (1962) 206 CA2d 752, 758-759, 23 CR 815 ].



**Warning:**

If the plaintiff fails to amend within the time specified by the court, then either party may move for

dismissal. Thereafter, the court may enter a judgment of dismissal [*CCP* § 581(f)(4)]. It appears such a dismissal is with prejudice. Although section (f) of 581 does not state *with prejudice*, the fact that the other sections refer to without prejudice would suggest that this dismissal is dispositive.

**12.13[2][b] Defendant May Recover Expenses and Fees of Bringing Motion.** As a condition of being granted leave to amend the complaint, the plaintiff may be ordered to pay the defendant's expenses in bringing the motion to strike [*CCP* § 436; *Vaccaro v. Kaiman* (1998) 63 CA4th 761, 769, 73 CR2d 829 ].

**12.13[2][c] If Court Denies Leave to Amend, Party May Move for Dismissal.** If a motion to strike the whole of a complaint is granted without leave to amend, either party may move for dismissal, allowing the court to enter a judgment of dismissal [*CCP* § 581(f)(3)].



**Cross Reference:**

Moving for voluntary dismissal, see *Ch. 39, Voluntary Dismissal, 39.09*.

**12.13[3] If Stricken Pleading Is Demurrer, Court Will Allow Time for Answer.** If a motion to strike a demurrer is granted and there is no answer filed, the court shall allow an answer to be filed on terms that are "just" [*CCP* §§ 436, 472a(c)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview





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Chapter 12 Motions to Strike  
II. MAKING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.14*

**12.14 Considerations When Motion to Strike Denied.**

**12.14[1] Direct Appeal Is Not Available.** In general, an order denying a motion to strike is not directly appealable, but it can be reviewed on appeal from final judgment [ *Oeth v. Mason (1967) 247 CA2d 805, 808, 56 CR 69* ].

► **Cross Reference:**

Appellate review, see 12.22.

**12.14[2] Moving Party Must Have Opportunity to File Answer.** If a motion to strike a complaint, cross-complaint, or portion thereof, is denied, then the court must allow the moving party to file an answer [*CCP 472a(d)*].

► **Cross Reference:**

See *Ch. 14, Answers, 14.03*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 12 Motions to Strike  
III. OPPOSING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.15*

**12.15 CHECKLIST: Opposing Motion to Strike.**

☐ Examine the notice of motion and memorandum for the following:

☐ Timeliness of service.

☐ Issues raised by the motion:

☐ Issues raised are not evident from the face of the pleading.

☐ Issues raised are inappropriate for the cause of action.

☐ Improper evidentiary showing.

☐ Oppose?

☐ Not oppose?

**Authority:**

CCP §§ 91, 92(d), 437(a); *Cal Rules Ct, Rule 3.1322*

**Discussion:**

*See 12.05, 12.06, 12.08*

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.46*

☐ Prepare the following papers:

- ☐ Opposition memorandum.
- ☐ Any applicable certificates, affidavits or documentation of proof of service.

☐ Serve and file the opposition memorandum on the moving party or the moving party's attorney, whichever is appropriate, keeping in mind the following:

- ☐ Time limits.
- ☐ Allowable methods of service.

☐ File the originals with the clerk of court and pay filing fee.

**Authority:**

CCP §§ 1005, 1011, 1012, 1015

**Discussion:**

See 12.17 -12.19

☐ Upon denial of motion:

- ☐ Challenge on review of final judgment.

☐ Upon granting of motion:

- ☐ Amend.
- ☐ Move to dismiss.
- ☐ Challenge on review of final judgment.

**Authority:**

CCP § 436

**Discussion:**

See 12.13, 12.14

**Exceptions:**

If the court order on the motion to strike has removed from the case the pleader's only cause of action or defense, or leaves no further issue to be determined between the pleader and his or her adversary, the order is directly appealable [ *Timberidge Enters., Inc. v. City of Santa Rosa* (1978) 86 CA3d 873, 878, 150 CR 606 ].



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Chapter 12 Motions to Strike  
III. OPPOSING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.16*

**12.16 Options and Strategies for Opposing Party.**

If the pleading does contain superfluous and offensive materials, the plaintiff should agree to their elimination from the pleading. The basic strategy for opposing is to show that the pleading is, in fact, justified by the legal principles that underlie the claims.



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III. OPPOSING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.17*

**12.17 Time Limitations for Opposing Party.**

A party's response to the motion to strike must generally be filed at least 9 court days before the designated time of the hearing [*CCP* § 1005(b); *Cal Rules Ct*, Rule 3.1300].



**Cross Reference:**

General timing requirements, see 12.06.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 12 Motions to Strike  
III. OPPOSING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.18*

**12.18 Contents of Opposing Papers.**

Papers to be served and filed when opposing a motion to strike include:

- Opposing memorandum [*see Ch. 26, Law and Motion Procedure, 26.43; see also California Points and Authorities, Ch. 160, Motions to Strike (Matthew Bender), for examples of memoranda in opposition to a motion to strike*].
- Proof of service [*see Ch. 27, Service of Papers, 27.29*].
- Proposed order, if desired.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing Memoranda



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Chapter 12 Motions to Strike  
III. OPPOSING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.19*

**12.19 Serving and Filing Motion Papers.**

Serve and file the papers by:

- Serving a conformed copy of the above described papers on the other party's attorney, or on the other party if he or she has no attorney, at least 9 court days before the hearing [*see CCP § 1005(a)(13), (b), Cal Rules Ct, Rule 3.1300(a); see Ch. 27, Service of Papers, 27.29*].
- Attaching a copy of proof of service to the papers.
- Delivering the originals of the notice of motion and accompanying papers to the court clerk's office for filing at least nine court days before the hearing and pay the required fee [*see Ch. 27, Service of Papers, 27.29*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 12 Motions to Strike  
III. OPPOSING MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.20*

**12.20 Order and Notice of Ruling.**

For discussion of the order and notice of ruling, see § 12.12. Issues to be considered are:

- Defendant prepares order if motion granted.
- Plaintiff prepares order if motion denied.





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Chapter 12 Motions to Strike  
IV. REVIEWING GRANT OR DENIAL OF MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.21*

**12.21 Appellate Review of Granting of Motion to Strike.**

In general, an order granting a motion to strike is interlocutory and not immediately subject to appellate review [ *Oeth v. Mason* (1967) 247 CA2d 805, 808, 56 CR 69 ].

**12.21[1] Review by Appeal.**

**12.21[1][a] Review Is From Final Judgment.** An order granting a motion to strike that operates "to remove from the case the only cause of action alleged" and "to leave no issues to be determined" is appealable as a "final judgment" [ *Wilson v. Sharp* (1954) 42 C2d 675, 677, 268 P2d 1062 ; *Adohr Milk Farms, Inc. v. Love* (1967) 255 CA2d 366, 370, 63 CR 123 ; CCP § 904.1(a)(1)].

If the parties to a complaint and cross-complaint are not the same, an order striking a cross-complaint is "immediately appealable" [ *Herrscher v. Herrscher* (1953) 41 C2d 300, 303 ; *Lerner v. Ehrlich* (1963) 222 CA2d 168, 170, 35 CR 106 ]

**Example:**

An order striking a complaint in intervention is a final determination by that court of the interveners' rights. Therefore, it is the equivalent of judgments of dismissal and is appealable [ *Timberidge Enters., Inc. v. City of Santa Rosa* (1978) 86 CA3d 873, 878, 150 CR 606 ].

In an action against an attorney for civil conspiracy, an order granting a motion to strike under CC § 1714.10(b) that determines the rights of a petitioner or an attorney against whom a pleading has been or is proposed to be filed, will be appealable as a final judgment in a civil action [CC § 1714.10(d)].

**Distinguish:**

Review by extraordinary writ [see 12.21[2]].

**12.21[1][b] Standard of Review.** The decision of a court to strike a pleading is reviewed under the "abuse of discretion" standard [ *Leader v. Health Indus. of Am., Inc.* (2001) 89 CA4th 603, 612, 107 CR2d 489 ].

The burden of proof to establish that the trial court abused its discretion is on the party against whom the motion was granted [ *Leader v. Health Indus. of Am., Inc.* (2001) 89 CA4th 603, 612, 107 CR2d 489 ; *Harding v. Collazo* (1986)

177 CA3d 1044, 1054, 223 CR 329 ].

**Example:**

A motion to strike an allegation of punitive damages was reversed when sufficient facts were pled to support the damages even though plaintiffs might not be able to collect punitive damages on a common law claim and specific remedies under statutory causes of action that also were pled [ *Clauson v. Superior Court* (1998) 67 CA4th 1253, 1256, 79 CR2d 747 ].

**12.21[2] Review by Extraordinary Writ.** In some instances, interlocutory review of an order granting a motion to strike is available by extraordinary writ [ *Clauson v. Superior Court* (1998) 67 CA4th 1253, 1255, 79 CR2d 747 ].

**Example:**

A motion striking an affirmative defense of collateral estoppel is appealable by extraordinary writ [ *Ford Motor Co. v. Superior Court* (1971) 16 CA3d 442, 449, 94 CR 127 ].

**Distinguish:**

Appeal as from a final judgment [see 12.21[1][a]].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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IV. REVIEWING GRANT OR DENIAL OF MOTION TO STRIKE

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.22*

**12.22 Appellate Review of Denial of Motion to Strike.**

**12.22[1] Review by Appeal.** In general, the denial of a motion to strike is reviewed as part of an appeal of the final judgment in a matter.

**12.22[2] Review by Extraordinary Writ.** In some instances, interlocutory review of an order denying a motion to strike may be available by extraordinary writ [see *Evans v. Superior Court* (1977) 67 CA3d 162, 170, 136 CR 596 ].

**Example:**

Writ of mandate issued to direct trial court to enter order striking cross-complaint [ *Evans v. Superior Court* (1977) 67 CA3d 162, 170-171, 136 CR 596 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 12 Motions to Strike  
V. FORMS

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.23*

**12.23 Notice of Motion for Order to Strike Entire Pleading.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                       |
|---------------|---|---------------------------------------|
| _____ [name], | ) |                                       |
| Plaintiff,    | ) | NOTICE OF MOTION AND MOTION TO STRIKE |
| vs.           | ) | _____ [specify pleading]              |
| _____ [name], | ) | Date: _____                           |
| Defendant.    | ) | Time: _____                           |
|               | ) | Location: _____                       |
|               | ) | Judge: _____                          |
|               | ) | Date Action Filed: _____              |
|               | ) | Trial Date: _____                     |
|               | ) |                                       |

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., Defendant Mary Jones] will, and hereby does, move pursuant to *Code of Civil Procedure Sections 435 and 436* for an order striking the \_\_\_\_\_ [complaint or answer to the complaint] on file herein. The motion will be made on the ground[s] that \_\_\_\_\_ [specify, e.g., the complaint is unverified and is required to be verified]. The motion will be made on the ground[s] that \_\_\_\_\_ [specify, e.g., the portions of the paragraphs sought to be stricken are irrelevant and redundant].

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [names(s)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

NOTES.

**Authority:**

CCP § 435



**Timing:**

See 12.06

**Drafting Motion:**

See 12.09

**Related Form of Order:**

See 12.25

**Related Forms of Memoranda:**

See California Points and Authorities, Ch. 160, Motions to Strike (Matthew Bender)



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Chapter 12 Motions to Strike  
V. FORMS

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.24*

**12.24 Notice of Motion for Order Striking Portion of Pleading.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                       |
|---------------|---|---------------------------------------|
| _____ [name], | ) |                                       |
| Plaintiff,    | ) | MOTION AND NOTICE OF MOTION TO STRIKE |
| vs.           | ) | PORTION[S] OF                         |
| _____ [name], | ) | _____ [specify pleading]              |
| Defendant.    | ) | Date: _____                           |
|               | ) | Time: _____                           |
|               | ) | Location: _____                       |
|               | ) | Judge: _____                          |
|               | ) | Date Action Filed: _____              |
|               | ) | Trial Date: _____                     |

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

[EITHER, if motion concerns entire count, cause of action, or defense]

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., Defendant Mary Jones] will, and hereby does, move pursuant to *Code of Civil Procedure Sections 435 and 436* for an order striking \_\_\_\_\_ [specify count, cause of action, or defense to be stricken, e.g., the Second Cause of Action] appearing on page \_\_\_\_\_ [number], line \_\_\_\_\_ [number], of

the \_\_\_\_\_ [*specify, e.g., complaint or answer to the complaint*] on file herein. The motion will be made on the ground[s] that \_\_\_\_\_ [*specify, e.g., the allegations in it are false*].

[OR, if motion concerns whole paragraph(s)]

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., Defendant Mary Jones] will, and hereby does, move pursuant to *Code of Civil Procedure Sections 435 and 436* for an order striking paragraph(s) \_\_\_\_\_ [number(s)] \_\_\_\_\_ [appearing on page \_\_\_\_\_ (number), lines \_\_\_\_\_ (numbers), respectively, or commencing on page \_\_\_\_\_ (number), line \_\_\_\_\_ (number), through page \_\_\_\_\_ (number), line \_\_\_\_\_ (number),] of [*specify subdivision, if any, of paper in which the paragraphs appear, e.g., the First Cause of Action of*] the \_\_\_\_\_ [complaint or answer to the complaint] on file herein. The motion will be made on the ground[s] that \_\_\_\_\_ [*specify, e.g., the paragraph contains allegations in support of punitive damages, which are unavailable*].

[OR, if motion concerns part of paragraph]

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., Defendant Mary Jones] will, and hereby does, move pursuant to *Code of Civil Procedure Sections 435 and 436* for an order striking that portion of [*specify subdivision, if any, of paper in which the paragraphs appear, e.g., the Third Affirmative Defense of*] the \_\_\_\_\_ [complaint or answer to the complaint] on file herein, \_\_\_\_\_ [appearing on page \_\_\_\_\_ (number), lines \_\_\_\_\_ (numbers), inclusive, or commencing on page \_\_\_\_\_ (number), line \_\_\_\_\_ (number), through page \_\_\_\_\_ (number), line \_\_\_\_\_ (number),] reading as follows: " \_\_\_\_\_ " [*specify*]. The motion will be made on the ground[s] that \_\_\_\_\_ [*specify, e.g., the portion of the paragraphs sought to be stricken is irrelevant*].

[OR, if motion concerns parts of paragraph]

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., Defendant Mary Jones] will, and hereby does, move pursuant to *Code of Civil Procedure Sections 435 and 436* for an order striking the following portions of [*specify subdivision, if any, of paper in which the paragraphs appear, e.g., the Sixth Count of*] the \_\_\_\_\_ [complaint or answer to the complaint] on file herein:

1. That portion of paragraph \_\_\_\_\_ [number] on page \_\_\_\_\_ [number], line \_\_\_\_\_ [number], through page \_\_\_\_\_ [number], line \_\_\_\_\_ [number], reading as follows: " \_\_\_\_\_ " [*specify*].

2. [Repeat for each item to be stricken].

[OR, if motion concerns matter set forth in attached exhibit]

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., Defendant Mary Jones] will, and hereby does, move pursuant to *Code of Civil Procedure Sections 435 and 436* for an order striking those portions of the \_\_\_\_\_ [complaint or answer to the complaint] on file herein that are described and set forth verbatim in Exhibit A, which is attached hereto and made a part hereof. The motion will be made on the ground[s] that \_\_\_\_\_ [specify, e.g., the portion of the paragraphs sought to be stricken are false].

[CONTINUE]

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [names(s)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

#### NOTES.

#### Authority:

CCP §§ 435, 436



#### Timing:

See 12.06

#### Drafting Motion:

See 12.09

#### Related Form of Order:

See 12.25

#### Related Form of Memoranda:

See California Points and Authorities, Ch. 160, Motions to Strike (Matthew Bender)





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Chapter 12 Motions to Strike  
V. FORMS

*1-12 MB Practice Guide: CA Pretrial Civil Procedure 12.25*

**12.25 Order Granting or Denying Motion to Strike.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                              |
|---------------|---|------------------------------|
| _____ [name], | ) |                              |
| Plaintiff,    | ) |                              |
| vs.           | ) |                              |
| _____ [name], | ) | No. _____ ORDER [GRANTING    |
| Defendant.    | ) | or DENYING] MOTION TO STRIKE |
|               | ) |                              |
|               | ) |                              |

\_\_\_\_\_

The motion of \_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] for an order striking [portions of] the  
\_\_\_\_\_ [specify challenged pleading] herein came on regularly for hearing by the court on  
\_\_\_\_\_ [date]. \_\_\_\_\_ [Name] appeared as counsel for defendant. The matter having  
been argued and submitted, and good cause appearing therefor,

[EITHER, if denied]

IT IS ORDERED that the motion be, and it hereby is, denied, and \_\_\_\_\_ [moving party, e.g.,  
Defendant Mary Jones] is hereby granted \_\_\_\_\_ [number] days after notice, in which to serve and file  
\_\_\_\_\_ [designate pleading, e.g., an answer to the complaint].

[OR if granted in whole without leave to amend]

IT IS ORDERED that the motion be, and is hereby, granted and that the \_\_\_\_\_ [*designate pleading, e.g., complaint*] be, and hereby is, stricken.

[*OR if granted in whole with leave to amend*]

IT IS ORDERED that the motion be, and is hereby, granted and that the \_\_\_\_\_ [*designate pleading, e.g., complaint*] be, and hereby is, stricken.

IT IS FURTHER ORDERED that the plaintiff be, and is hereby, granted \_\_\_\_\_ [*number*] days, after notice of this order, in which to serve and file a \_\_\_\_\_ [*designate pleading, e.g., first amended*] complaint.

[*OR if granted in part*]

IT IS ORDERED that the motion be, and is hereby, granted as to \_\_\_\_\_ [*designate portion or portions to be stricken*] and that the same be, and hereby is/are, stricken.

IT IS FURTHER ORDERED that the plaintiff be, and is hereby, granted \_\_\_\_\_ [*number*] days, after notice of this order, in which to serve and file a \_\_\_\_\_ [*designate pleading, e.g., first amended*] complaint.

[*ADD if order strikes a demurrer in whole or part and no answer has been filed*]

IT IS FURTHER ORDERED that the defendant be, and is hereby, granted \_\_\_\_\_ [*number*] days, after notice of this order, in which to serve and file an answer to the \_\_\_\_\_ [*specify the pleading a demurrer to which has been denied, e.g., second amended complaint*].

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*signature*]

Judge of the Superior Court

NOTES.

**Authority:**

CCP § 436



**Timing:**

See 12.06

**Related Forms of Motions:**

See 12.23, 12.24



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Chapter 13 Anti-SLAPP Motions

*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.syn*

**§ 13.syn Synopsis to Chapter 13: Anti-SLAPP Motions**

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Chapter 13 Anti-SLAPP Motions  
I. STRATEGY

*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.01*

**13.01 Scope.**

This chapter covers the special motion to strike available in SLAPP (Strategic Litigation Against Public Participation) suits, including the following topics:

- Objectives, strategy, and procedure for bringing an anti-SLAPP motion to strike [*see 13.03-13.13; Forms: see 13.24, 13.25*].
- Objectives, strategy, and procedure for opposing an anti-SLAPP motion to strike [*see 13.14-13.22*].
- Reviewing the grant or denial of an anti-SLAPP motion to strike [*see 13.23*].

**Core Statute:**

*CCP § 425.16*





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Chapter 13 Anti-SLAPP Motions  
I. STRATEGY

*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.02*

**13.02 Objective and Strategy.**

The special motion to strike under *CCP* § 425.16 is available to a defendant who has been targeted with a lawsuit filed primarily to chill the defendant's exercise of *First Amendment* Rights. This type of suit is known as a "SLAPP" suit, the acronym referring to "Strategic Litigation Against Public Participation" [see *CCP* § 425.16; *Bradbury v. Superior Court* (1996) 49 CA4th 1108, 1113, 57 CR2d 207 ; see 13.06[1][a] (defining "SLAPP" suit)]. The special motion to strike under *CCP* § 425.16, also known as an "anti-SLAPP motion," affords the defendant an opportunity to have nonmeritorious actions that chill the valid exercise of freedom of speech exposed and dismissed at an early stage of the litigation [see *CCP* § 425.16(a); *Averill v. Superior Court* (1996) 42 CA4th 1170, 1175, 50 CR2d 62 ].

The court applies a two-part test under *CCP* § 425.16 to determine whether a special motion to strike should be granted [see *Matson v. Dvorak* (1995) 40 CA4th 539, 548, 46 CR2d 880 ]:

- The movant/defendant must first make a *prima facie* showing that the action is a SLAPP suit subject to a motion to strike [see 13.06].
- If the action is subject to *CCP* § 425.16, the burden shifts to the plaintiff to establish the probability of prevailing on the complaint [see 13.18].

On considering an anti-SLAPP motion to strike, the court reviews not only pleadings, but also supporting and opposing affidavits of the parties [*CCP* § 425.16(b)(2)].

Because the SLAPP motion is a powerful weapon for the defendant, parties have attempted to stretch the outer limits of the applicability of the statute. As the statute states that it should be "construed broadly," it has been successfully utilized in actions for abuse of process and barratry [ *Ramona Unified School Dist. v. Tsiknas* (2005) 135 CA4th 510, 525, 37 CR3d 381 ], libel [ *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.* (1995) 37 CA4th 855, 864, 44 CR2d 46 ], defamation and conspiracy to restrain trade [ *Wilcox v. Superior Court* (1994) 27 CA4th 809, 816, 33 CR2d 446 ], malicious prosecution [ *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 C4th 728, 741, 3 CR3d 636, 31 C4th 728, 3 CR3d 636, 74 P3d 737 ], actions involving disputes over political campaigns [ *Roberts v. Los Angeles County Bar Assn.* (2003) 105 CA4th 604, 614-615, 129 CR2d 546 ], actions over the exercise of rights during litigation [ *Equilon Enters. v. Consumer Cause, Inc.* (2002) 29 C4th 53, 67, 124 CR2d 507, 52 P3d 685 ], actions for unfair competition and nuisance [ *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 CA4th 1138 ], petitions for

permanent injunctive relief against civil harassment [ *Thomas v. Quintero* (2005) 126 CA4th 635, 652 (but not an application for TRO)], and workplace violence [ *City of Los Angeles v. Animal Def. League* (2005) 135 CA4th 606, 628, 37 CR3d 632 ], and to challenges to a rebuttal argument in a voter's pamphlet [ *Moraga-Orinda Fire Prot. Dist. v. Weir* (2004) 115 CA4th 477, 483 ].

In response to what the Legislature finds as a "disturbing abuse" of anti-SLAPP motions and recognition that continued participation in matters of public significance should not be chilled through abuse of the judicial process or use of *CCP* § 425.16 [*CCP* § 425.17(a)], the scope of § 425.16 has been limited and the motion may not be used in the following types of actions [*CCP* § 425.17(b), (c)]:

- Specified actions brought solely in the public interest or on behalf of the general public.
- Specified actions brought against a person primarily engaged in the business of selling or leasing goods or services.

These exceptions to the use of anti-SLAPP motions have their own limitations, and do not apply if the matter involves [*CCP* § 425.17(d)]:

- Specified persons engaged in the dissemination of ideas to the public.
- Specified actions based on the creation and dissemination of various political and artistic works.
- Specified nonprofit organizations.

The *CCP* § 425.17 limitations now require a thorough analysis of all parties and causes before deciding on the use of an anti-SLAPP motion, and involve the delicate task of determining exceptions to the exceptions.

#### **Judge's Perspective:**

Anti-SLAPP motions are becoming increasingly more popular with defense counsel. However, counsel need to think through all of the ramifications of such a motion prior to service. While these motions are powerful tools in fending off SLAPP suits, counsel need to satisfy themselves that such a motion is merited. The reason is twofold: first, the granting of the motion summarily ends the action or cause of action and flags appellate review for the plaintiff rather immediately; second, denial of the motion, if appealed, stays the entirety of the action pending final appellate review. If the trial court's denial is affirmed on appeal the potential for sizeable attorneys fees to be awarded the plaintiff is quite significant. These motions focus the court quickly as to the allegations contained in the complaint and the arguments of the defense. While this may be warranted in some cases, the overuse of these motions can nullify the intended affect of the statute.

Effective January 1, 2006, *CCP* § 425.18 is added to the Code concerning the application of special motions to strike under *CCP* § 425.16 to actions for malicious prosecution and abuse of process against instigators of SLAPP actions, and provides new protections for victims of SLAPP actions. The provisions, applicable to the aforementioned types of actions after the underlying action is dismissed by a grant of a special motion to strike under 425.16, prevent the SLAPP litigant from obtaining costs and fees and an automatic stay of discovery in the victim's action for damages arising from the SLAPP action. The only relief to the SLAPPback defendant is dismissal of the tort action, while the tort plaintiff retains the ability to obtain costs and fees for an anti-SLAPPback motion filed frivolously or only for purposes of unnecessary delay.

#### **Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 376, Motions to Strike: Anti-SLAPP (Matthew Bender).

California Points and Authorities, Ch. 160, Motions to Strike (Matthew Bender).



**Cross References:**

Ch. 38, Summary Judgment.

For tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 13 Anti-SLAPP Motions  
II. MAKING ANTI-SLAPP MOTION

*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.03*

**13.03 CHECKLIST: Making Anti-SLAPP Motion.**

☐ Examine pleading at issue to determine whether it would be susceptible to an anti-SLAPP motion to strike:

☐ A suit targeting a written statement, oral statement or writing made:

☐ Before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;

☐ In connection with an issue under consideration by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

☐ In a place open to the public or in a public forum in connection with an issue that is of public interest; or

☐ A suit targeting any other conduct in furtherance of the right of free speech, as guaranteed by the United States or California Constitutions, in connection with a public issue of an issue of public interest.

**Authority:**

*CCP § 425.16(e)*

**Discussion:**

*See 13.06[2]*

☐ Determine whether any exceptions to availability of anti-SLAPP motion apply:

☐ Statutory exceptions for certain actions:

☐ Specified actions brought solely in the public interest or on behalf of the general public.

☐ Specified actions brought against a person primarily engaged in the business of selling or leasing goods or services.

☐ Action does not involve persons engaged in dissemination of ideas to the public, is not based on the creation and dissemination of various political and artistic works, or is not brought against specified nonprofit organizations.

☐ Enforcement action brought in name of people of State of California by Attorney General, district attorney, or city attorney, acting as public prosecutor.

☐ The act is illegal, irrespective of free speech element.

☐ The defendant has validly waived anti-SLAPP protections.

**Authority:**

*CCP §§ 425.16(d), 425.17; Navellier v. Sletten (2002) 29 C4th 82, 94, 124 CR2d 530, 52 P3d 703 ; Paul for Council v. Hanyecz (2001) 85 CA4th 1356, 1366, 102 CR2d 864*

**Discussion:**

See 13.06[3]



**Timing:** Consider timing issues:

☐ Motion must be made within 60 days of the service of the complaint or, per discretion of the court, at a later time on terms the court deems proper.

☐ Motion must be scheduled for hearing not more than 30 days after service unless the docket conditions necessitate a later hearing.

**Authority:**

*CCP § 425.16(f)*

**Discussion:**

See 13.05

☐ Examine effect on discovery:

☐ All discovery proceedings are stayed on the filing of a notice of motion.

☐ Stay remains in effect until notice of entry of the order ruling on the motion.

☐ Specified discovery may be still conducted if ordered by the court on noticed motion and for good cause shown.

**Authority:**

*CCP § 425.16(g)*

**Discussion:**

*See 13.05[4]*

**Exception:**

When anti-SLAPP discovery rules directly conflict with federal rules in SLAPP actions brought in federal court, federal rules control [*see 13.05[4][b]*].

☐ Prepare the following papers:

☐ Notice of motion to strike.



**Timing:**

Motion must be scheduled for hearing not more than 30 days after service unless the docket condition of the court requires a later date [*CCP § 425.16(f)*]

☐ Declarations or affidavits in support of motion.

☐ Statement regarding oral evidence proposed to be introduced and reasonable time estimate for hearing.

☐ Supporting memorandum.

☐ Proof of service.

☐ Proposed order.

☐ Consider options other than a special anti-SLAPP motion to strike, if available.

**Authority:**

*CCP § 425.16*

**Discussion:**

*See 13.05[2]; 13.08*

**Forms:**

*See 13.24, 13.25*

☐ Serve the notice and declarations on the opposing party or the party's attorney.

☐ File the originals with the clerk of court and pay filing fee.

☐ File copies of motion papers with Judicial Council.

**Authority:**

*CCP §§ 425.16(j)(1), 1005, 1010-1013*

**Discussion:**

*See 13.09, 13.10*

☐ Follow standard noticed motion procedure.

**Exception:**

A standard motion to strike does not require an evidentiary showing, but a special anti-SLAPP motion to strike does [*see CCP §§ 425.16(b), 435-437*].

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.39*



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Chapter 13 Anti-SLAPP Motions  
II. MAKING ANTI-SLAPP MOTION

*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.04*

**13.04 Options and Strategies for Defendant.**

A *CCP* § 425.16 motion presents extraordinary advantages. It, in effect, provides an immediate motion for summary judgment without a 60-day waiting period and 75-day notice period. Moreover, because discovery is stayed while the motion (and any appeal) is pending, the defendant can save significant expense. To conduct discovery, the plaintiff must bring a motion and demonstrate to the court "good cause." In addition, if the defendant prevails on the anti-SLAPP motion, he or she is entitled to attorney's fees and costs as a matter of right. A prevailing plaintiff may only collect attorney's fees and costs if the special motion to strike was "frivolous or solely intended to cause unnecessary delay." Thus, a *CCP* § 425.16 motion is often preferable to filing a demurrer, a regular motion to strike, or waiting until a summary judgment motion can be served and heard.

However, if a cause of action would be subject to a demurrer or regular motion to strike if not eliminated by the anti-SLAPP motion, the defendant should demurrer or make a regular motion to strike in addition to making the *CCP* § 425.16 motion.

The limitations imposed by *CCP* § 425.17 add a whole new set of issues to consider when deciding to use an anti-SLAPP motion. Before bringing the motion, conduct a thorough analysis of the parties and causes of action to assess whether the restrictions of *CCP* § 425.17 clearly apply or if the factual issues required for the restrictions will be the subject of extended litigation. If the motion is proper but the facts supporting the decision are likely to be contested, thoroughly develop the facts in the motion's supporting declarations and consider whether specified discovery will be required after the motion is filed.

**Judge's Perspective:**

Once counsel for the defendant has analyzed the pleading for a determination as to the nature of the allegations, the decision then turns on what procedural device should be employed to challenge the action. Demurrers are quite limited as to what can be challenged since the court must accept all charging allegations as true. Moreover, with demurrers the court is not permitted to review matters outside the pleading itself. While summary judgment motions offer a more expansive record, there are still procedural formats that must be rigidly followed and therefore do not provide the flexibility of the anti-SLAPP motion. However, it bears repeating that the anti-SLAPP motion has significant risks if improperly used. In addition to attorneys fees that can be assessed the risk of losing credibility with the court can have long lasting effects.



**Distinguish:**

The principal differences between an anti-SLAPP motion and a motion for summary judgment are that:

- A defendant seeking summary judgment may not make the motion until 60 days after the complaint was filed, and must give 75-days notice of the hearing, while an anti-SLAPP Motion must be filed within 60 days of service of the complaint (unless the court allows a later motion) and will be scheduled for hearing within 30 days after service (unless docket conditions require later hearing) [*compare CCP § 437c(a) with CCP § 425.16(f)*];
- A defendant seeking summary judgment must produce competent facts defeating plaintiff's alleged causes of action or establishing a defense, while on the anti-SLAPP motion, the defendant only need show that his or her conduct falls within the statute's protection [*compare CCP § 437c(a), (o), (p)(2) with CCP § 425.16(b), (e)*]; and
- A defendant seeking summary judgment must present a statement of undisputed material facts, which is not required for an anti-SLAPP motion [*see CCP § 437c(b)(1)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 13 Anti-SLAPP Motions  
II. MAKING ANTI-SLAPP MOTION

*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.05*

**13.05 Timing of Anti-SLAPP Motion.**

**13.05[1] Filing of Motion.**

**13.05[1][a] Defendant Has 60 Days After Service of Complaint; Otherwise Court Permission Required.** A motion to strike under *CCP* § 425.16 (also referred in this chapter to as an "anti-SLAPP motion") may be filed within 60 days of the service of the complaint. In the court's discretion, on "terms it deems proper," the motion to strike may be filed at a later time [*CCP* § 425.16(f); see *Platypus Wear, Inc. v. Goldberg* (2008) 166 CA4th 772, 784-787, 83 CR3d 95 (abuse of discretion to consider anti-SLAPP motion two years after filing of complaint in absence of extenuating circumstances)].



**Warning:**

A stipulation without a court order is ineffective to extend the 60-day period. Anti-SLAPP motion does not exceed the bounds of reason if the conduct of the defendant does not reflect the defendant's desire to effectuate the statute's allowance for "prompt exposure and dismissal of SLAPP suits" [*Morin v. Rosenthal* (2004) 122 CA4th 673, 681 ].

A plaintiff opposing a late anti-SLAPP motion need not demonstrate prejudice [ *Olsen v. Harbison* (2005) 134 CA4th 278, 287 ].

**13.05[1][b] Service of Amended Complaint Resets 60-Day Period.** If an amended complaint is the target of a special anti-SLAPP motion to strike, the 60-day time period within which a motion may be filed without seeking approval from the court begins to run with the service of the amended complaint [ *Lam v. Ngo* (2001) 91 CA4th 832, 842, 111 CR2d 582 ].

**13.05[1][c] Remand From Federal Court Resets 60-Day Period, But Transfer Between Superior Courts Does Not.** In an action remanded from federal court to state court, the 60-day time period within which an anti-SLAPP motion may be filed without seeking approval from the court is reset as of the date of service of notice of remand [ *Morin v. Rosenthal* (2004) 122 CA4th 673, 679 ]. Conversely, the time in which to file an anti-SLAPP motion is not reset or tolled during the pendency of a motion to transfer the case to another superior court district or another court

within a superior court district. Nothing prevents a defendant from filing the motion while the transfer motion is pending, which would stay the hearing on the anti-SLAPP motion [ *Morin v. Rosenthal* (2004) 122 CA4th 673, 679 ].

**13.05[1][d] Five-Day Extension for Service by Mail.** The extra five days added for mailing prescribed by CCP § 1013 applies to the 60-day time period prescribed for the filing of a special anti-SLAPP motion to strike [ *Lam v. Ngo* (2001) 91 CA4th 832, 842-843, 111 CR2d 582 ].



**Cross Reference:**

Ch. 27, Service of Papers.

**13.05[1][e] Motion Must Be Filed and Granted Before Plaintiff Dismisses Voluntarily.** If a plaintiff voluntarily dismisses his or her claims before the defendant files an anti-SLAPP motion, there is nothing left for the court to strike [ *S. B. Beach Properties v. Berti* (2006) 39 C4th 374, 383, 46 CR3d 380, 138 P3d 713 ; *Chambers v. Miller* (2006) 140 CA4th 821, 825 (motion untimely)]. Similarly, the trial court loses jurisdiction to rule on an anti-SLAPP motion upon the voluntary dismissal of the action [ *Law Offices of Andrew L. Ellis v. Yang* (2009) 178 CA4th 869, 879, 881, 100 CR3d 771 ].



**Cross Reference:**

For discussion of the impact of voluntary dismissal on defendant's right to attorney fees, see 13.13[5].

**13.05[2] Motion Must Be Scheduled for Hearing Within 30 Days of Service Unless Court Docket Conditions Require Later Hearing.** Effective October 5, 2005 [see Stats 2005, ch 535, § 4], the clerk of court must schedule the motion to be heard within 30 days of service of the motion unless the docket conditions of the court require a later hearing [CCP § 425.16(f)].

**Prerequisite:**

In order for the court clerk to ascertain whether a given hearing date will be within 30 days of service of the motion, it would appear that this amendment requires service of motion prior to obtaining the hearing date. Therefore, it appears to require obtaining the hearing date after service of the motion and, therefore, a notice of hearing separate from the notice of motion. As a general practice, counsel file and serve the notice of motion and motion with "TBD" in the caption regarding the date of the motion; "TBD" meaning "to be determined by the court."



**Warning:**

Amended CCP § 425.16(f), effective October 5, 2005, are intended to overrule *Decker v. U.D. Registry, Inc.* (2003) 105 CA4th 1382, 1387-1390, 129 CR2d 892 and *Fair Political Practices Comm'n v. American Civil Rights Coalition, Inc.* (2004) 121 CA4th 1171, 1174-1178, 18 CR3d 157 , 121 CA4th 1171, 18 CR3d 157 [Cal Stat 2005, ch 535, § 3; *Hall v. Time Warner, Inc.* (2007) 153 CA4th 1337, 1348-1349, 63 CR3d 798 (reversing denial of motion because of untimely hearing)]. It would appear that the same logic applies to render obsolete the ruling on timeliness in *Greka Integrated, Inc. v. Lowrey* (2005) 133 CA4th 1572, 1577-1578, 35 CR3d 684 , as well.

**Example:**

A court may continue the hearing to a later date so that the discovery it authorized can be completed [ *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.* (1995) 37 CA4th 855, 868, 44 CR2d 46 ].



**Cross References:**

Filing anti-SLAPP motion within 60 days of filing of complaint, see 13.05[1].

Service of motion on other parties with 16 court days plus additional days for method of service, see 13.09.

Continuances, see Ch. 30, Continuances.

**13.05[3] Response Due at Least Nine Court Days Before Hearing.** The anti-SLAPP statute does not establish a specific time limit for a response to a special anti-SLAPP motion to strike [See CCP § 425.16(f)]. However, all opposing papers must be filed at least nine court days before the designated time of the hearing [CCP § 1005(b); *Cal Rules Ct, Rule 3.1300*].

**13.05[4] Effect on Pending Discovery.**

**13.05[4][a] Mandatory Stay on Filing of Anti-SLAPP Motion.** All discovery proceedings in an action will be stayed on the filing of a 425.16 notice of motion and the stay will remain in effect until notice of entry of the order ruling on the motion [CCP § 425.16(g); *Britts v. Superior Court (2006) 145 CA4th 1112, 1127* (includes pending discovery motions)].

**Exception:**

On "noticed motion and for good cause shown" the court may order that specified discovery be conducted notwithstanding the mandatory stay provision [CCP § 425.16(g); *Robertson v. Rodriguez (1995) 36 CA4th 347, 357, 42 CR2d 464*; see *1-800 Contacts, Inc. v. Steinberg (2003) 107 CA4th 568, 593-594, 132 CR2d 789*]. The factors that the trial court considers in deciding whether to grant a motion for limited discovery for good cause include [ *The Garment Workers Ctr. v. Superior Court (2004) 117 CA4th 1156, 1162*, *12 CR3d 506* ]:

- Whether evidence necessary to establish the plaintiff's prima facie case is in the hands of the defendant or a third party;
- Whether the information the plaintiff seeks to obtain through formal discovery proceedings is readily available from other sources or can be obtained through informal discovery;
- The plaintiff's need for discovery in the context of the issues raised in the anti-SLAPP motion, such as whether the complaint is legally sufficient, whether requested discovery concerns contested issues, and whether other issues could preclude success for which discovery is not sought; and
- The relative circumstances of the parties and the importance of freezing discovery as protection for the defendant.



**Warning:**

Counsel must carefully consider whether forcing discovery is necessary to have a sufficient record to succeed on the anti-SLAPP motion, because the remedy after the fact of a writ of coram nobis is "drastic" [ *Daniels v. Robbins (2010) 182 CA4th 204, 228, 105 CR3d 683* ].



**Cross Reference:**

Writs of coram nobis, see Matthew Bender(R) Practice Guide: Trial and Post-Trial Civil Procedure, Ch. 19, *Introduction to Judgments*, § 19.27[2].

**Prerequisite:**

A plaintiff in a defamation action subject to the constitutional malice standard must demonstrate that the allegedly defamatory statements are provably false factual assertions in order to establish "good cause" under *CCP* § 425.16(g) for an exception to conduct discovery concerning actual malice [ *Paterno v. Superior Court* (2008) 163 CA4th 1342, 1345-1346, 78 CR3d 244 ].



#### **Warning:**

An ex parte motion for discovery under *CCP* § 425.16(g) may be denied for failing to comply with the requirement of a noticed motion for discovery under that statute [ *Contemporary Servs. Corp. v. Staff Pro Inc.* (2007) 152 CA4th 1043, 1061-1062, 61 CR3d 434 ].



#### **Strategic Point:**

Because of the speed in which these motions are generally heard, motions to lift the discovery stay are not common. The motion may be appropriate, however, if some information needs to be gathered right away so as to preserve testimony or evidence.

**13.05[4][b] Specific Discovery Limitations of CCP § 425.16 Inapplicable in Federal Court Action.** The mandatory stay on discovery does not apply when a defendant attempts to assert the anti-SLAPP motion in a *federal court* action [ *Metabolife Int'l, Inc. v. Wornick* (9th Cir 2001) 264 F3d 832, 846 ].

The combination of subsections (f) and (g) of *CCP* § 425.16 creates "a default rule that allows the defendant served with a complaint to immediately put the plaintiff to his or her proof before the plaintiff can conduct discovery" [ *Rogers v. Home Shopping Network, Inc.* (CD Cal 1999) 57 F Supp2d 973, 980 ]. The applicable federal rule on summary judgment, *Fed R Civ P*, Rule 56, does not limit discovery in order to ensure that adequate discovery occurs prior to consideration of a summary judgment motion. Because the pertinent subsections of § 425.16 do limit discovery and make discovery after the filing of a special anti-SLAPP motion to strike an exception to the general rule, the discovery-limiting aspect of the two subsections directly collides with federal discovery rules. Consequently, the discovery stay cannot apply to a SLAPP action in federal court [ *Metabolife Int'l, Inc. v. Wornick* (9th Cir 2001) 264 F3d 832, 846 ].



#### **Cross Reference:**

Availability of anti-SLAPP motion in federal court actions, see 13.06[7].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 13 Anti-SLAPP Motions  
II. MAKING ANTI-SLAPP MOTION

*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.06*

**13.06 Availability of Anti-SLAPP Motion to Defendant.**

**13.06[1] Nature of SLAPP Action.**

**13.06[1][a] "SLAPP" Defined.** For the anti-SLAPP motion to be available to a defendant, the plaintiff's lawsuit must be a qualifying SLAPP action [*see CCP § 425.16(b)(1), (e)*].

The acronym "SLAPP" stands for "strategic lawsuit against public participation" [ *Equilon Enters., LLC v. Consumer Cause, Inc. (2002) 29 CA4th 53, 57, 124 CR2d 507, 52 P3d 685* ].

A SLAPP action is "a meritless suit filed primarily to chill the defendant's exercise of *First Amendment* rights" [ *Bradbury v. Superior Court (1996) 49 CA4th 1108, 1113, 57 CR2d 207* ]. The anti-SLAPP statute, *CCP § 425.16*, refers to a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" [*CCP § 425.16(b)*].

**Examples:**

The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill political or legal opposition to the developer's plans. Although SLAPP suits often arise out of environmental disputes, such suits are not limited to environmental litigation. The favored causes of action in SLAPP suits are defamation, malicious prosecution, various business torts such as interference with prospective economic advantage, nuisance, and intentional infliction of emotional distress [ *Chavez v. Mendoza (2001) 94 CA4th 1083, 1087-1090, 114 CR2d 825* ; *Wilcox v. Superior Court (1994) 27 CA4th 809, 815-816, 33 CR2d 446* ].

Petitions for permanent injunctive relief against tenants' civil harassment consisting of protests outside a landlord's church are SLAPP suits [ *Thomas v. Quintero (2005) 126 CA4th 635, 652, 24 CR3d 619* ].

Tenants' complaint alleging wrongful service of a termination notice is a SLAPP suit [ *Birkner v. Lam (2007) 156 CA4th 275, 283-284, 67 CR3d 190* ].

Declaratory relief action against defendant, along with her attorney, requesting a determination of

whether the restaurant's food products complied with Proposition 65 was a SLAPP action [ *CKE Restaurants, Inc. v. Moore* (2008) 159 CA4th 262, 271, 70 CR3d 921 ].

For purposes of CCP § 425.16(b)(1), the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity [ *Episcopal Church Cases* (2009) 45 C4th 467, 477, 87 CR3d 275] .

#### **Examples:**

The following cases illustrate causes of action that do not arise from protected activity.

- Dispute over ownership of property by general and local churches, while motivated by *First Amendment* right of local church to disaffiliate from general church, was based in right to own and control property not protected by the anti-SLAPP statute, not in free-speech rights of the local church [ *Episcopal Church Cases* (2009) 45 C4th 467, 476-478, 87 CR3d 275] .
- Certification of products as complying with a proposed industry "organic" standard and commercial advertising [ *All One God Faith, Inc. v. Organic and Sustainable Industry Standards, Inc.* (2010) 183 CA4th 1186, 1203, 107 CR3d 861] .
- Termination of a public contract in accordance with its terms and sealing a contract with another vendor without competitive bid [ *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 CA4th 1207, 1218, 104 CR3d 692] .
- Litigation concerning an attorney's breach of the duty of loyalty in violation of *Cal Rules Prof Conduct*, Rule 3-310 [ *Oasis West Realty, LLC v. Goldman* (2010) 182 CA4th 688, 696, 106 CR3d 539] .
- Defective expert testimony on behalf of the plaintiff in an underlying action [ *Robles v. Chalilpoyil* (2010) 181 CA4th 566, 575-580, 104 CR3d 628] .
- Petitioning activity undertaken in a foreign country [ *Guessous v. Chrome Hearts, LLC* (2009) 179 CA4th 1177, 1186, 102 CR3d 214] .
- A client's action against his or her attorney, whether pleaded as a malpractice claim, a breach of fiduciary duty claim, or any other theory of recovery, is not subject to the anti-SLAPP statute merely because some of the allegations refer to the attorney's actions in court [ *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 CA4th 1264, 1275, 99 CR3d 805] .
- Breach of a settlement agreement after the underlying action is concluded is not protected activity [ *Applied Bus. Software, Inc. v. Pacific Mtg. Exch., Inc.* (2008) 164 CA4th 1108, 1118, 79 CR3d 849] .
- Attorney's disbursement of the proceeds of personal injury settlements without notifying respondent medical providers or satisfying the medical liens was not protected activity [ *California Back Specialists Medical Group v. Rand* (2008) 160 CA4th 1032, 1037, 73 CR3d 268] .
- Pursuing a nonjudicial foreclosure sale does not qualify as constitutionally protected activity [ *Garretson v. Post* (2007) 156 CA4th 1508, 1525, 68 CR3d 230] .

- There is no constitutional right to have a ballot initiative appear on the ballot, so a suit challenging the validity of an initiative petition does not arise from protected activity [ *City of Riverside v. Stansbury* (2007) 155 CA4th 1582, 1590-1593, 66 CR3d 862 ] .

- Legal malpractice committed during representation of a party is not constitutionally protected *First Amendment* activity [ *Freeman v. Schack* (2007) 154 CA4th 719, 732, 64 CR3d 867 ; *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 CA4th 1532, 1537-1540, 52 CR3d 712 ] .

- A second lawsuit that arises from the same underlying controversy cannot be a SLAPP suit against the first action filed concerning that controversy [ *Visher v. City of Malibu* (2005) 126 CA4th 364, 370, 23 CR3d 816 ] .

#### Cross References:

Discussion of causes of action most implicated in SLAPP suits, see California Forms of Pleading and Practice, Ch. 340, Libel and Slander; Ch. 362, Mental Suffering and Emotional Distress; Ch. 391, Nuisance; Ch. 418, Pollution and Environmental Matters; and Ch. 565, Unfair Competition, § 565.130 et seq. (Matthew Bender).

**13.06[1][b] Anti-SLAPP Provisions Construed Broadly.** Anti-SLAPP provisions contained in *CCP* § 425.16 are to be construed broadly so as to best serve the legislative intent behind the anti-SLAPP motion. The Legislature has stated that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process [*CCP* § 425.16(a); *Briggs v. Eden Council For Hope & Opportunity* (1999) 19 C4th 1106, 1118, 81 CR2d 471, 969 P2d 564 ] .

#### **13.06[2] Lawsuits Subject to Anti-SLAPP Motion.**

**13.06[2][a] Four Categories of Protected Conduct.** The defendant pursuing an anti-SLAPP motion must make an initial prima facie showing that plaintiff's suit arose from an act in furtherance of defendant's right of petition or free speech. A defendant can meet this burden by demonstrating that the act underlying the plaintiff's cause arises out of one of the four categories listed in *CCP* § 425.16(e) [ *Braun v. Chronicle Publ'g Co.* (1997) 52 CA4th 1036, 1042-1043, 61 CR2d 58 ]:

- Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law [*CCP* § 425.16(e)(1); see 13.06[2][b]].
- Any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other official proceeding authorized by law [*CCP* § 425.16(e)(2); see 13.06[2][b]].
- Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest [*CCP* § 425.16(e)(3); see 13.06[2][c]].
- Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest [*CCP* § 425.16(e)(4); see 13.06[2][c]].

These four categories are not intended to be all-inclusive, and other types of acts in furtherance of the right of petition or free speech in connection with a public issue may also be protected [see *Averill v. Superior Court* (1996) 42 CA4th 1170, 1175, 50 CR2d 62 ] .



**Exceptions:**

As noted in 13.06[3], several exceptions will disqualify a defendant from using the anti-SLAPP motion, even if one or more of the above categories applies.

**13.06[2][b] Motion Can Apply to Exercise of Free Speech or Petition Rights in Connection With Official Proceeding.** Without any other evidentiary showing, a suit may qualify as a SLAPP action if the targeted act by the defendant is a written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other proceeding authorized by law, or a written or oral statement with an issue under consideration by such a body. The issue of whether an event qualifies as an official proceedings is broadly construed [CCP § 425.16(e)(1), (2); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 C4th 1106, 1113, 81 CR2d 471, 969 P2d 564 ].

Where a cause of action alleges both protected and unprotected activity concerning an official proceeding, the cause of action will be subject to an anti-SLAPP motion unless the protected conduct is "merely incidental" to the unprotected conduct. It is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [ *Raining Data Corp. v. Barrenechea* (2009) 175 CA4th 1363, 1369, 97 CR3d 196 ].

**Examples:**

■ The litigation privilege of CC § 47(b) may serve as an aid in determining whether a given communication falls within the scope of CCP § 425.16(e)(1), (2) [ *Flatley v. Mauro* (2006) 39 C4th 299, 322-323, 48 CR3d 606 ], but is a substantively different statute that serves quite different purposes [ *Flatley v. Mauro* (2006) 39 C4th 299, 322, 323-324, 48 CR3d 606 ]. Thus, the fact that CC § 47(b) may limit the liability of a party for a communication with the opposing party of proposed litigation does not mean that the communication is also a protected communication for purposes of CCP § 425.16(e)(1), (2) [ *Flatley v. Mauro* (2006) 39 C4th 299, 325, 48 CR3d 606 ]. Consequently, while some communications protected by CC § 47(b) may also be the basis for an anti-SLAPP motion in litigation [ *Taheri Law Group v. Evans* (2008) 160 CA4th 482, 489, 72 CR3d 847 (communications between the client and defendant about pending lawsuits against the client); *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 CA4th 1, 5-6 (letter concerning litigation to members of association)], and others may not be entitled to protection under either statute [e.g., *Robles v. Chalilpoyil* (2010) 181 CA4th 566, 580-582, 104 CR3d 628 (claims against expert witness analogous to legal malpractice claims); *Haneline Pacific Props., LLC v. May* (2008) 167 CA4th 311, 320, 83 CR3d 919 (attempt at persuasion and negotiation between co-owners of property regarding how best to manage their property); *A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc.* (2006) 137 CA4th 1118, 1126, 41 CR3d 1 (stop notices and collection efforts)], litigation-related communications that do not involve a public issue [ *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 C4th 1106 ; *Garretson v. Post* (2007) 156 CA4th 1508, 1519, 68 CR3d 230 (private nonjudicial foreclosure);] or to which a statutory exception to the coverage of CCP § 425.16(e)(1), (2) applies [see *Flatley v. Mauro* (2006) 39 C4th 299, 325, 328-333, 48 CR3d 606 (extortionate demand letter as illegal activity)] are not entitled to anti-SLAPP protection even if they are subject to protection from liability under CC § 47(b). Similarly, litigation-related communications to which a statutory exception to the protection from liability under CC § 47(b) does not apply may still be the basis for an anti-SLAPP motion [ *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 C4th 728, 737 (malicious prosecution actions not protected by CC § 47(b))].

 **Cross Reference:**

Illegal communications not covered by anti-SLAPP statute, see 13.06[3][d].

■ A claim for relief filed in federal district court is a statement or writing made before a judicial proceeding for purposes of the CCP § 425.16 special anti-SLAPP motion to strike [ *Navellier v. Sletten*

(2002) 29 C4th 82, 90 ].

While demonstrating that plaintiff's suit arises from a written or oral statement made in a public place or otherwise targeting conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest requires a showing that the issue is of public significance [CCP § 425.16(e)(3), (4); see 13.06[2][c]], demonstrating that the action arises from a written or oral statement made in connection with an official proceeding does not [ *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 C4th 1106, 1123, 81 CR2d 471, 969 P2d 564 ; *Olaes v. Nationwide Mut. Ins. Co.* (2006) 135 CA4th 1501, 1506-1510, 38 CR3d 467 (corporations sexual harassment dispute resolution procedure was not quasi-judicial proceeding)].

**Distinguish:**

"Official proceedings" included within the scope of CCP § 425.16(e)(2) are not limited to proceedings by governmental entities [ *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 C4th 192, 201-203, 46 CR3d 41, 138 P3d 193 ]. A comprehensive scheme of government regulation that incorporates a proceeding conducted by peers may be an "official proceeding authorized by law" subject to anti-SLAPP protection [ *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 C4th 192, 199-200, 46 CR3d 41, 138 P3d 193 ], especially if the results of that process are made subject to judicial review by statute [ *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 C4th 192, 200, 46 CR3d 41, 138 P3d 193 (hospital peer review process under B&P Code § 809(a)(8) has both characteristics and is official proceeding authorized by law subject to anti-SLAPP protection)].

**Distinguish:**

A private, contractual arbitration is not an "official proceeding" for purposes of 425.16(e)(1), (2), because it was a nongovernmental activity not reviewable by administrative mandate or required by statute [Century 21 *Chamberlain & Associates v. Haberman.* (2009) 173 CA4th 1, 7-8, 92 CR3d 249 (denying anti-SLAPP motion based on statements in arbitration)].

**Distinguish:**

Where no litigation is ever commenced, even if possibly contemplated by one side or another, and instead, an agreement is entered into to resolve the parties' disputes, a later suit alleging breach of that agreement and related tortious conduct does not constitute the sort of activity encompassed by the anti-SLAPP statute's protection of communications made in connection with official proceedings [ *Delois v. Barrett Block Partners* (2009) 177 CA4th 940, 948-949, 99 CR3d 609] .

**Distinguish:**

As for when an official proceeding becomes a proceeding, the courts have looked to the application of the litigation privilege under CC § 47(b). Accordingly, just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege, those statements are equally entitled to the benefits of CCP § 425.16. The protection of CCP § 425.16 arises at the point in time when litigation is no longer a mere possibility, but has instead ripened into a proposed proceeding that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute. A complaint does not have to be drafted before the protection will apply [ *Rohde v. Wolf* (2007) 154 CA4th 28, 36, 64 CR3d 348 (litigation was actually contemplated and seriously considered at time of prelitigation statements)].

**Examples:**

Statements made in connection with an official proceeding include:

- Lawful settlement negotiations [ *Seltzer v. Barnes* (2010) 182 CA4th 953, 963, 106 CR3d 290

(between homeowner and homeowners association)].

- Filing a lawful lis pendens [ *Park 100 Investment Group II, LLC. v. Ryan* (2009) 180 CA4th 795, 805-806, 812-813, 103 CR3d 218 ] .

- An attorney's communication with opposing counsel on behalf of a client regarding pending litigation [ *Genethera, Inc. v. Troy & Gould P.C.* (2009) 171 CA4th 901, 908, 90 CR3d 218 (settlement offer)].

- Police officers' statements supporting criminal charges against plaintiff in connection with an issue under consideration by the district attorney [ *Schaffer v. City and County of San Francisco* (2008) 168 CA4th 992, 1003, 85 CR3d 880 , *modified and rehearing denied*, *Schaffer v. City and County of San Francisco* (2008) 2008 Cal. App. LEXIS 2457 ].

- Employer's attorney's letter to the employer's customers that accused the employee of breach of contract and misappropriation of trade secrets and indicated that the employer intended to commence litigation against the employee, which the employer subsequently did [ *Neville v. Gregory Chudacoff* (2008) 160 CA4th 1255, 1269, 73 CR3d 383 ].

- Communications between the client and defendant about pending lawsuits against the client [ *Taheri Law Group v. Evans* (2008) 160 CA4th 482, 489, 72 CR3d 847 ].

- The conduct underlying a properly pleaded abuse of process action are official proceedings [ *Booker v. Rountree* (2007) 155 CA4th 1366, 1370-1371, 66 CR3d 733 (abuse of process claims are subject to anti-SLAPP statute, citing *Rusheen v. Cohen* (2006) 37 C4th 1048, 39 CR3d 516, 128 P3d 713 as example)].

- Initiation of a State Bar-sponsored attorney fee arbitration proceeding [ *Philipson & Simon v. Gulsvig* (2007) 154 CA4th 347, 358, 64 CR3d 504 ].

- Statements and communicative conduct of hearing officers in handling an employee's grievances in an official administrative proceeding subject to statutory hearing procedures [ *Vergos v. McNeal* (2007) 146 CA4th 1387, 1396-1399, 53 CR3d 647 ].

- City councilor's discussion of zoning enforcement matter with city planning staff [ *Levy v. City of Santa Monica* (2004) 114 CA4th 1252, 1259].

- Communications seeking official investigations into perceived wrongdoing, which may culminate in criminal prosecution or other official proceedings [ *Salma v. Capon* (2008) 161 CA4th 1275, 1287, 74 CR3d 873 (contacting police and district attorney); *Mann v. Quality Old Time Serv., Inc.* (2004) 120 CA4th 90, 103, 15 CR3d 215 (no privilege necessary for solicitation of investigation of business competitor's activities)].

- Statements made in a newspaper concerning pending lawsuit [ *Annette F. v. Sharon S.* (2004) 119 CA4th 1146, 1160 ].

Statements that are not made in connection with an official proceeding include:

- A city's attempt to use land-use guidelines to alter the backfilling standards for a particular landfill

operation [ *USA Waste of Cal., Inc. v. City of Irwindale* (2010) 184 CA4th 53, 62-63, 108 CR3d 466] .

- Request for subpoena for information pursuant to an action filed in another state's court [Tendler v. www.jewishsurvivors.blogspot.com (2008) 164 CA4th 802, 809, 79 CR3d 407] .

- Landlord's unlawful housing discrimination in violation of housing discrimination, disability discrimination and civil rights laws, despite their connection to a rent control removal proceeding [ *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 CA4th 1273, 1284, 65 CR3d 469] .

- Landlord's notice to tenant terminating tenancy [ *Clark v. Mazgani* (2009) 170 CA4th 1281, 1286-1287, 89 CR3d 24 (fraudulent removal of rent control unit); *Marlin v. Aimco Venezia, LLC* (2007) 154 CA4th 154, 162, 64 CR3d 488 (landlord's claim that action arose from landlord's subsequent unlawful retainer action was not accepted)] .

- Statement concerning an issue not under consideration or review in the proceeding but related to a contractual transaction from which the proceeding arose [ *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 CA4th 790, 809-810, 811, 63 CR3d 575] .

- Drafting a legal document to terminate a trust [ *Moore v. Shaw* (2004) 116 CA4th 182, 197] .

- A court-ordered sale of property [ *Blackburn v. Brady* (2004) 116 CA4th 670, 677 , 10 CR3d 696] .

- An allegation by plaintiff insurer against defendant consulting company for assisting insurance policyholders in preparing earthquake damage estimates in violation of a state statute. Although "some of the reports eventually were used in official proceedings or litigation, they were not created 'before' or 'in connection' with an issue under consideration or review" in a proceeding delineated by the anti-SLAPP statute [ *People ex. rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 CA4th 280, 283-285, 103 CR2d 71] .

**13.06[2][c] Motion Can Apply to Exercise of Free Speech or Petition Rights in Public Forum or in Connection With Issue of Public Interest.** An anti-SLAPP motion to strike is available to attack a suit targeting any written or oral statement or writing made in a place open to the public or public forum, or targeting any other conduct in furtherance of the exercise of constitutional rights of petition or free speech or in connection with a public issue or an issue of public interest [CCP § 425.16(e)(3), (4)].

Written or oral statements made in a public forum must be speech protected by the *First Amendment*. Thus, actions based on unprotected "true threats," i.e., statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, are not subject to anti-SLAPP motions [ *D.C. v. R.R.* (2010) 182 CA4th 1190, 1218, 106 CR3d 399] .

A "public forum" is not limited to a physical setting [ *ComputerXpress, Inc. v. Jackson* (2001) 93 CA4th 993, 1006, 113 CR2d 625] . Whether a statement is "made in a place open to the public or in a public forum" depends on whether the means of communicating the statement permits open debate [ *Wilbanks v. Wolk* (2004) 121 CA4th 883, 896, 17 CR3d 497 ; see *Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP* (2007) 146 CA4th 841, 846, 53 CR3d 256 (letter sent to CEO of HMO not in public forum)] .

#### **Examples:**

- Magazines are public fora within the meaning of CCP § 425.16(e)(3) [ *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 CA4th 1027, 1038, 72 CR3d 210 ].
- Statements made in Internet chat room regarding a publicly traded company involved matters of public significance [ *Ampex Corp. v. Cargle* (2005) 128 CA4th 1569 ; *ComputerXpress, Inc. v. Jackson* (2001) 93 CA4th 993, 1007, 113 CR2d 625; ]. However, an internet posting must occur in the context of an ongoing controversy [ *Du Charme v. International Brotherhood of Elec. Workers, Local 45* (2003) 110 CA4th 107, 119, 1 CR3d 501 ].
- A magazine's five-page composition concerning an extremely popular genre of music, and that is a creatively crafted, whimsical editorial commentary on the many bands whose musical works have contributed to the development of the genre, which included a listing of the name of plaintiffs' band in a graphic, was done in connection with a public issue or an issue of public interest, because there is a public interest that attaches to people who, by their accomplishments, mode of living, professional standing, or calling, create a legitimate and widespread attention to their activities [ *Stewart v. Rolling Stone LLC* (2010) 181 CA4th 664, 677-678, 105 CR3d 98] .
- Statements posted on a website concerning the character of candidates for public office [ *Vogel v. Felice* (2005) 127 CA4th 1006, 22 CR3d 724 ].
- Statements at a meeting of a homeowners' association board of directors [ *Damon v. Ocean Hills Journalism Club* (2000) 85 CA4th 468, 475-476, 102 CR2d 205 ].
- Publication of consumer protection information is a contribution to the public debate [ *Wilbanks v. Wolk* (2004) 121 CA4th 883, 899, 17 CR3d 497 ].
- Allegations of domestic abuse against a political consultant [ *Sipple v. Foundation For Nat'l Progress* (1999) 71 CA4th 226, 238, 83 CR2d 677 ].
- A suit to compel municipal officers to certify the vote on a voter initiative [ *City of Santa Monica v. Stewart* (2005) 126 CA4th 43 ].



#### **Warning--Moving Party:**

A claim asserted in an action that "arguably" was filed in retaliation against free speech or petition rights is not automatically subject to CCP § 425.16 if the claim did not arise from the exercise of those rights [ *ComputerXpress, Inc. v. Jackson* (2001) 93 CA4th 993, 1002, 113 CR2d 625 ]. The "act underlying the plaintiff's cause" or "the act which forms the basis for the plaintiff's cause of action" must "itself have been an act in furtherance of the right of petition or free speech" [ *Santa Monica Rent Control Board v. Pearl Street, LLC* (2003) 109 CA4th 1308, 1316-1319, 135 CR2d 903 ; *ComputerXpress, Inc. v. Jackson* (2001) 93 CA4th 993, 1003, 113 CR2d 625 ; *Braun v. Chronicle Publ'g Co.* (1997) 52 CA4th 1036, 1043, 61 CR2d 58 ; *Dowling v. Zimmerman* (2001) 85 CA4th 1400, 1417, 103 CR2d 174 ].

On the other hand, an omission may constitute an "act underlying the plaintiff's cause," where it is the refusal to comply with an unconstitutional statute attempting to compel speech in contravention of the right to freedom of speech, which includes the right to not speak [ *ARP Pharmacy Servs., Inc. v. Gallagher Bassett Servs., Inc.* (2006) 138 CA4th 1307, 1323, 42 CR3d 256 (plaintiff's action under unconstitutional statute was SLAPP)].

#### **Distinguish:**

A "connection with a public issue" generally requires the statement or activity to be educational, informative, or political advocacy. Furthermore, the requisite connection is only implicated if the subject of the statement or activity underlying the claim, regardless whether it is intermingled with issues of only private interest [ *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 CA4th 515, 525, 44 CR3d 517 ; *Jewett v. Capital One Bank* (2003) 113 CA4th 805 ]:

- Was a person or entity in the public eye;
- Could affect large numbers of people beyond the direct participants; or
- Involved a topic of widespread, public interest.

Thus, "public interest" in a defamation context does not equate with mere curiosity. A matter of public interest should be something of concern to a substantial number of people, so that a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Furthermore, there should be some degree of closeness between the challenged statements and the asserted public interest; the assertion of a broad and amorphous public interest is not sufficient. In addition, the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy. Finally, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure [ *Terry v. Davis Community Church* (2005) 131 CA4th 1534, 1547, 33 CR3d 145 ].

**Example:**

The trial court applied the considerations outlined in *Terry* to university administrators' statements concerning plaintiff's employment termination as a university's sports coach qualified plaintiff's defamation action based on those statements for anti-SLAPP treatment. Plaintiff's termination was of concern to a substantial number of people, and there was great "closeness" between the topic of the public interest (the termination) and the challenged statements (the reasons for the termination). For the focus of the speakers' statements was to respond to the public interest rather than a mere effort to gather ammunition for another round of private controversy. Finally, defendants did not by their conduct create a defense by thrusting plaintiff into the public eye. Plaintiff's role as head coach of a local university's football team already made plaintiff a public figure, and the termination of the coach's employment was already a topic of widespread public interest [ *McGarry v. University of San Diego* (2007) 154 CA4th 97, 110, 111, 64 CR3d 467 ].

Where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public, such as a private group, organization, or community; the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute, or discussion [ *Hailstone v. Martinez* (2008) 169 CA4th 728, 738, 87 CR3d 347 (controversy of interest to 10,000 members of union); *Ruiz v. Harbor View Comm. Ass'n* (2005) 134 CA4th 1456, 1468-1470, 37 CR3d 133 (private communications with organization members concerning developer's development plans were in the public interest)].

Similarly, statements about corporate activity constitute an issue of public importance upon considering the following pertinent factors [ *Ampex Corp. v. Cargle* (2005) 128 CA4th 1569 (Internet message board postings were in public interest)]:

- Whether the company is publicly traded,
- The number of investors, and

- Whether the company has promoted itself by means of numerous press releases.

**Distinguish:**

Allegedly wrongful conduct and speech attributed to defendants that was committed entirely in a business capacity directed at a competitor's associates and customers for the sole purpose of promoting the competing business was not in the public interest [ *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 C4th 1561, 1569-1570, 1572-1574, 92 CR3d 227 ].

**Distinguish:**

A portrayal of a private person as a rebellious slacker is not a matter of public interest where there is no public interest in the person's persona [ *Dyer v. Childress* (2007) 147 CA4th 1273, 1281, 55 CR3d 544 ].

**Distinguish:**

When allegations of nonprotected activity are incidental or collateral to a plaintiff's claim challenging primarily the exercise of the rights of free speech or petition, they may be disregarded in determining whether the cause of action arises from protected activity. When the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity do not subject the cause of action to the anti-SLAPP statute [ *Gallanis-Politis v. Medina* (2007) 152 CA4th 600, 614, 61 CR3d 701 ; *Martinez v. Metabolife Internat., Inc.* (2003) 113 CA4th 181, 188, 6 CR3d 494 ].

**Distinguish:**

While an action for malicious prosecution based on the defendant's initiation of a civil suit [ *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 C4th 728, 741, 3 CR3d 636, 31 C4th 728, 3 CR3d 636, 74 P3d 737 ] or participation in procurement of a criminal prosecution [ *Dickens v. Provident Life & Accident Ins. Co.* (2004) 117 CA4th 705, 716, 11 CR3d 877 ] is an action arising from an act in furtherance of the right of petition or free speech, a malicious prosecution action based on the defendant's citizen's arrest of the plaintiff is not [ *Wang v. Hartunian* (2003) 111 CA4th 744, 752 ].

**Distinguish:**

Drafting a legal document to terminate a trust is not an exercise of the rights of free speech or petition [ *Moore v. Shaw* (2004) 116 CA4th 182, 197 ], nor is an attorney's failure to exercise his or her client's right to petition [ *Jespersen v. Zubiate-Beauchamp* (2003) 114 CA4th 624, 632 (malpractice action)].

**Distinguish:**

Acts of governance mandated by law, without more, are not exercises of free speech or petition, and suits challenging those acts are not SLAPP suits [ *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2005) 125 CA4th 343, 22 CR3d 724 ].

Unlike CCP § 425.16(e)(1)-(3), which pertain to oral or written statements, CCP § 425.16(e)(4) pertains to *conduct*. The protected conduct must consist of an act of that person in furtherance of the person's right of petition or free speech [ *Castillo v. Pacheco* (2007) 150 CA4th 242, 250-252, 58 CR3d 305 ].

**Example:**

Conduct in furtherance of the exercise of constitutional rights of petition or free speech in connection with a public issue or an issue of public interest includes:

- The visitation of, filming of an interview with, and broadcasting the interview with a private person suffering dementia in a retirement home named heir in the will of a famous actor [ *Hall v. Time Warner, Inc.* (2007) 153 CA4th 1337, 1347, 63 CR3d 798 ].

Conduct that does not have that purpose includes:

- An act of a person in furtherance of the person's right of free exercise of religion [ *Castillo v. Pacheco* (2007) 150 CA4th 242, 250-252, 58 CR3d 305 (ceremonial fires for purposes of religious ritual not protected by CCP § 425.16)].
- Homeowners association's written demands to a homeowner concerning the conditions, covenants, and restrictions on the homeowner's property [ *Turner v. Vista Pointe Ridge Homeowners Ass'n* (2009) 180 CA4th 676, 687, 102 CR3d 750] .

**13.06[2][d] Motion Can Apply to Private Communications.** The anti-SLAPP protections of CCP § 425.16 can apply "to events that transpire between two private individuals" [ *Terry v. Davis Community Church* (2005) 131 CA4th 1534, 33 CR3d 145 ; *Navellier v. Sletten* (2002) 29 C4th 82, 91 ]. Private communications may be covered if the communications concern a public issue [ *Averill v. Superior Court* (1996) 42 CA4th 1170, 1174, 50 CR2d 62 ].

**Examples:**

- Statements made to an employer [ *Averill v. Superior Court* (1996) 42 CA4th 1170, 1175, 50 CR2d 62 ].
- Letter from law firm stating intent to file complaint with Attorney General [ *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 CA4th 777, 784, 54 CR2d 830 ].

**13.06[2][e] Plaintiff's Specific Intent to Chill Speech Need Not Be Demonstrated.** CCP § 425.16 does not require that in order to prevail on an anti-SLAPP motion, a defendant must demonstrate that the plaintiff brought the cause of action complained of with the intent of chilling the defendant's exercise of speech or petition rights [ *Equilon Enters., LLC v. Consumer Cause, Inc.* (2002) 29 C4th 53, 58, 124 CR2d 507, 52 P3d 685 ; *City of Cotati v. Cashman* (2002) 29 C4th 69, 75, 124 CR2d 519, 53 P3d 695 ].

**13.06[2][f] Mixed Causes of Action Have Differing Interpretations in the Courts of Appeal.** Some courts of appeal have held that a mixed cause of action (alleging both protected and unprotected conduct) is subject to a special motion to strike if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity [see *Salma v. Capon* (First Dist., Div. Five 2008) 161 CA4th 1275, 1287, 74 CR3d 873 ; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (First Dist., Div. Three 2005) 133 CA4th 658, 672, 35 CR3d 31] , while others have held that mixed causes of action come within the ambit of the special motion to strike if the gravamen or principal thrust of the claim is protected activity [see *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton, LLP* (First Dist., Div. Four 2009) 171 CA4th 1617, 1625, 90 CR3d 669 ; *California Back Specialists Medical Group v. Rand* (Second Dist., Div. Six 2008) 160 CA4th 1032, 1036-1037, 73 CR3d 268 ; *Freeman v. Schack* (Fourth Dist., Div. One 2007) 154 CA4th 719, 727, 64 CR3d 867] .

**13.06[3] Exceptions Where Anti-SLAPP Motion Unavailable.**

**13.06[3][a] CCP § 425.17 Exceptions to Use of Anti-SLAPP Motion.** CCP § 425.17 establishes exceptions to the use of anti-SLAPP motions and prohibits their use in two circumstances. First, an anti-SLAPP motion may not be used in any action brought solely in the public interest or on behalf of the general public if three conditions are met [CCP § 425.17(b)].



**Distinguish:**

The use of the term "solely" in 425.17(b) expressly conveys the Legislative intent that it not apply to an action that seeks a more narrow advantage for a particular plaintiff. Such an action would not be brought "solely" in the public's interest. The statutory language of 425.17(b) is unambiguous and bars a litigant seeking "any" personal relief from relying on the 425.17(b) exception [Club Members for an *Honest Election v. Sierra Club*, 45 C4th 309, 316-317, 86 CR3d 288] . In addition, the word "solely" applies separately to both "in the public interest" and "on behalf of the general public" [Club Members for an *Honest Election v. Sierra Club*, 45 C4th 309, 317 n6, 86 CR3d 288] .

**Warning:**

While the two statutes are similar in certain ways, the Supreme Court specifically disapproves of the use of caselaw determining eligibility for an attorney fee award under the private attorney general doctrine codified in CCP § 1021.5 in interpreting the preamble to 425.17(b) [Club Members for an *Honest Election v. Sierra Club*, 45 C4th 309, 315, 317-319, 86 CR3d 288]

**Example:**

Complaint that brought action related to participation in elections within environmental organization advanced both a personal advantage and the public interest, where relief sought included installment of defeated candidates into seats on the organization's board of directors [Club Members for an *Honest Election v. Sierra Club*, 45 C4th 309, 317, 86 CR3d 288 (reversing court of appeals' partial grant of anti-SLAPP motion to strike)].

**Distinguish:**

The "public interest" referred to in 425.17(b), does not simply describe topics that members of the public might find interesting. Instead the term "public interest" is used to define suits brought for the public's good or on behalf of the public. To qualify under the 425.17(b) exception, suits must be brought solely to secure this public benefit. In so holding, the Supreme Court specifically disapproved of the use of caselaw defining "public interest" as used in the anti-SLAPP statute itself, CCP § 425.16.

**Warning:**

Given the Supreme Court's interpretation of "public interest" as used in 425.17(b), the "principal thrust or gravamen" applied to 425.16 is inappropriate for applying 425.17(b) [Club Members for an *Honest Election v. Sierra Club*, 45 C4th 309, 318, 319-320, 86 CR3d 288] .

The three conditions that must be met under CCP § 425.17(b) are as follows:

- The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member; and a claim for attorney's fees, costs, or penalties does not constitute greater or different relief;
- The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons; and

**Example:**

- Notwithstanding a large number of the recipients, there is no public interest principle

being vindicated by a suit challenging a company's sending of demand letters to purchasers of a device that could allow them to steal the company's satellite TV programming [ *Blanchard v. DIRECTV, Inc. (2004) 123 CA4th 903, 914*].

- Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

**Example:**

- If plaintiffs' personal stake in a lawsuit far exceeds the effect that this lawsuit could possibly have on the public at large, then the financial burden on the plaintiffs is not disproportionate [ *Blanchard v. DIRECTV, Inc. (2004) 123 CA4th 903, 915* ].

Second, an anti-SLAPP motion may not be used in any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if two conditions exist [CCP § 425.17(c)].

**Exception:**

A cause of action arising from a lawyer's conduct, when the conduct includes advice to a prospective client on pending litigation, does not fall within the statutory exemption in CCP § 425.17(c) [ *Taheri Law Group v. Evans (2008) 160 CA4th 482, 490, 72 CR3d 847* ].

**Example:**

Filing an involuntary bankruptcy petition is "conduct" under CCP § 425.17(c) [ *Brill Media Co. v. TCW Group, Inc. (2005) 132 CA4th 324, 340* ].

The two conditions are as follows:

- The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services, [CCP § 425.17(c)(1)], and

**Examples:**

- A nonprofit trade association is not "a person primarily engaged in the business of selling or leasing goods or services" [ *All One God Faith, Inc. v. Organic and Sustainable Industry Standards, Inc. (2010) 183 CA4th 1186, 1212, 187 CR3d 861* ].
- A magazine's use of the name of a rock band on its cover does not constitute "representations of fact about the operations, goods, or services" of the publisher [ *Stewart v. Rolling Stone LLC (2010) 181 CA4th 664, 677, 105 CR3d 98* ].
- Defendants' act of filing an underlying action for defamation and unfair competition does not fall within CCP § 425.17(c)(1), because plaintiff was not in the business of litigating claims against defendants [ *Contemporary Servs. Corp. v. Staff Pro Inc. (2007) 152 CA4th 1043, 1053-1054, 61 CR3d 434* ].

- Statements made during the administrative and litigation process in an effort to forestall environmental approval of plaintiff's project were not made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, defendant's goods or services and were likewise not made in the course of delivering the defendant's goods or services [ *Sunset Millennium Associates, LLC v. LHO Grafton Hotel, L.P.* (2006) 146 CA4th 300, 313, 52 CR3d 828 ].

- Under CCP § 425.17(c)(1), large financial management and services conglomerates involved in the purchase and sale of financial instruments and investing in companies are "primarily engaged in the business of selling ... goods or services, including ... securities, or financial instruments," and a statement made and conduct engaged in as part of an effort to secure control of the party bringing suit is a "statement or conduct ... made in the course of delivering the person's goods or services" [ *Brill Media Co. v. TCW Group, Inc.* (2005) 132 CA4th 324, 341 ].

- The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue. [CCP § 425.17(c)(2)].

**Example:**

Under CCP § 425.17(c)(2), statements made by large financial management and services conglomerates involved in the purchase and sale of financial instruments and investing in companies to potential buyers of the party bringing suit are an "intended audience [who] is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer" [ *Brill Media Co. v. TCW Group, Inc.* (2005) 132 CA4th 324, 341 ].

**Distinguish:**

CCP § 425.17(c)(2) does not require that the customer or buyer be one entering into a commercial relationship with the defendant [ *Brill Media Co. v. TCW Group, Inc.* (2005) 132 CA4th 324, 342 ].

CCP § 425.17(c) is intended to exempt from anti-SLAPP motions those causes of action arising from the business' commercial speech or activity [ *Brill Media Co. v. TCW Group, Inc.* (2005) 132 CA4th 324, 342 ].

**Examples:**

- Statements by seller of chicken products directed to the sale of the products [ *Physicians Com. for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 CA4th 120, 127 ].

- An advertisement's purported quote from the review of a movie by a nonexistent movie critic [ *Rezec v. Sony Pictures Entm't, Inc.* (2004) 116 CA4th 135, 141 ]

- A manufacturer's list of ingredients on a product [ *Scott v. Metabolife Int'l, Inc. (2004) 115 CA4th 404, 423, 9 CR3d 242* ] is commercial speech.
- On the other hand, a statement that is educational in nature, and does not propose a commercial transaction, is not commercial speech, and an action based on it is not subject to anti-SLAPP motions [ *Bernardo v. Planned Parenthood Fed'n of Am. (2004) 115 CA4th 322, 347* ].
- An interpretation of scientific evidence concerning the safety of abortion on a website of a family planning provider is educational noncommercial speech [ *Bernardo v. Planned Parenthood Fed'n of Am. (2004) 115 CA4th 322, 359* (not within speaker's own knowledge)].

The exceptions of *CCP* § 425.17(b) and (c) have their own exceptions, and do not apply to any of the following [*CCP* § 425.17(d)]:

- Any person enumerated in *Cal Const, art I, § 2(b)* (liberty of speech and press), *Evid Code* § 1070 (newsperson's privilege), or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public.
- Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

**Example:**

Mailing letters and taking out advertisements in support of political candidates are activities falling within the exception for dissemination of political work that itself is an exception from the exemption of public interest litigation and commercial speech from the use of anti-SLAPP motions [ *Major v. Silna (2005) 134 CA4th 1485, 1494-1497, 36 CR3d 875* ].

- Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.

When enacting these exceptions and counter exceptions, the Legislature specifically found and declared that there has been a disturbing abuse of *CCP* § 425.16, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of § 425.16; and that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or § 425.16 [*CCP* § 425.17(a)].

The exceptions in *CCP* § 425.17(b) apply to all actions decided after the effective date of the statutory amendment, January 1, 2004, because the anti-SLAPP statute is procedural in nature [ *Brenton v. Metabolife Internat., Inc. (2004) 116 CA4th 679, 710, 10 CR3d 702* ]. Any action in which an appeal was pending on January 1, 2004 is subject to the exceptions [ *Physicians Com. for Responsible Medicine v. Tyson Foods, Inc. (2004) 119 CA4th 120* (exception applied to reverse decision of trial court); *Metcalf v. U-Haul Int'l, Inc. (2004) 118 CA4th 1261, 1265, 13 CR3d 686* ].

**13.06[3][b] Enforcement Actions by Attorney General, District Attorney, or City Attorney.** Enforcement actions "brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor" are not subject to an anti-SLAPP motion to strike [*CCP* § 425.16(d); *City of Long Beach v. California Citizens for Neighborhood Empowerment (2003) 111 CA4th 302, 308* ; *People v. Health*

*Labs. of N. Am., Inc. (2001) 87 CA4th 442, 451, 104 CR2d 618 ].*

**Distinguish:**

Only actions brought by a governmental agency to enforce laws aimed generally at public protection qualify for this exemption to anti-SLAPP scrutiny; and a municipality's workplace violence petitions on behalf of two employees does not constitute civil enforcement actions [ *City of Los Angeles v. Animal Def. League (2005) 135 CA4th 606, 618, 37 CR3d 632 ].*

**13.06[3][c] Defendant Has Waived CCP § 425.16 Rights.** A person may validly waive the right to speak or petition regarding a given issue of public importance, and thereby relinquish the right to bring an anti-SLAPP motion to strike [Navellier v. Sletten (2002) 29 C4th 82, 94, 124 CR2d 530, 52 P3d 703].

**Example:**

A valid contract not to speak on an issue within the scope of CCP § 425.16 acts as a waiver of the person's right to the protections established by CCP § 425.16 and an anti-SLAPP motion is not available to the person on a subsequent breach of the contract [ *DaimlerChrysler Motors Co. v. Lew Williams, Inc. (2006) 142 CA4th 344, 351, 48 CR3d 233 ; Navellier v. Sletten (2002) 29 C4th 82, 94, 124 CR2d 530, 52 P3d 703 ].*

**13.06[3][d] Defendant Has Committed Illegal Act.** Illegal acts, even if in furtherance of otherwise-protected free speech rights, are not covered under the anti-SLAPP provisions. In order to bar an anti-SLAPP motion, either the defendant must concede that his or her conduct was illegal, or it must be illegal as a matter of law [ *Flatley v. Mauro (2006) 39 C4th 299, 314-318, 320, 48 CR3d 606 ].*

**Distinguish:**

An allegation of illegality without evidentiary support may not preclude use of the SLAPP statute [ *Vargas v. City of Salinas (2009) 45 C4th 1, 20-41, 92 CR3d 286, 205 P3d 207* (informational communications by municipality were not illegal campaigning under Gov Code § 54964); *Paul For Council v. Hanyecz (2001) 85 CA4th 1356, 1366, 102 CR2d 864 ; People ex. rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc. (2000) 86 CA4th 280, 285, 103 CR2d 71 ].* Thus, disputed allegations that the communication that is the subject of the suit against which an anti-SLAPP motion is made was itself illegal cannot be the basis for a claim that the anti-SLAPP statute does not apply [ *Cabral v. Martins (2009) 177 CA4th 471, 482, 99 CR3d 394* (legality of estate plan change was disputed); *City of Los Angeles v. Animal Def. League (2005) 135 CA4th 606, 618, 37 CR3d 632* (legality of protest was disputed)].

**Examples:**

- Extortion [ *Flatley v. Mauro (2006) 39 C4th 299, 333, 48 CR3d 606 ; Cohen v. Brown (2009) 173 CA4th 302, 317, 93 CR3d 24* (informational communications by municipality were not illegal campaigning under Gov Code § 54964)].
- Conspiracy to commit harassment, infliction of emotional distress, intrusion, and trespass [ *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc. (2006) 143 CA4th 1284, 1296, 50 CR3d 27 ].*
- Money laundering [ *Paul For Council v. Hanyecz (2001) 85 CA4th 1356, 1366, 102 CR2d 864 ].*
- Insurance fraud [ *People ex. rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc. (2000)*

86 CA4th 280, 285, 103 CR2d 71 ].

- Arson [ *Wilcox v. Superior Court* (1994) 27 CA4th 809, 820, 33 CR2d 446 ].

#### **13.06[4] Parties Protected Under Anti-SLAPP Statute.**

**13.06[4][a] Persons Targeted Because of Having Exercised Their Own Rights.** Any person who has been targeted by a cause of action "arising from any act of that person in furtherance of the person's" protected rights is covered by the anti-SLAPP statute [CCP § 425.16(b)(1), (e)].

##### **Exceptions:**

As noted in 13.06[3], a targeted defendant will be disqualified from using the anti-SLAPP motion to strike if the defendant has waived his or her rights under CCP § 425.16, the defendant has committed illegal acts, or the action is an enforcement action instituted by the Attorney General, or a district or city attorney, acting as public prosecutor [CCP § 425.16(d); *Navellier v. Sletten* (2002) 29 C4th 82, 94, 124 CR2d 530, 52 P3d 703 ; *Paul For Council v. Hanyecz* (2001) 85 CA4th 1356, 1366, 102 CR2d 864 ].

**13.06[4][b] Persons Targeted Because of Speaking on Behalf of Others.** Protected statements or writings made by a SLAPP suit defendant need not have been made on the defendant's own direct behalf in order for the defendant to use a special anti-SLAPP motion to strike against the SLAPP complaint [ *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 C4th 1106, 1116, 81 CR2d 471, 969 P2d 564 ].

##### **Examples:**

- An attorney being sued for malicious prosecution for statements concerning the underlying litigation made inside the courtroom [see *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 CA4th 1179, 1188, 121 CR2d 794 ] or sued for defamation for statements concerning the underlying litigation made outside the courtroom [ *Shekhter v. Financial Indem. Co.* (2001) 89 CA4th 141, 153, 106 CR2d 843 ].
- Counseling a tenant in a dispute with a landlord in anticipation of litigation [ *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 C4th 1106, 1115, 81 CR2d 471, 969 P2d 564 ].
- Funding legitimate litigation [ *Ludwig v. Superior Court* (1995) 37 CA4th 8, 18, 43 CR2d 350 ].
- Encouraging others to participate at a public hearing on a matter of public interest [ *Ludwig v. Superior Court* (1995) 37 CA4th 8, 18, 43 CR2d 350 ].

**13.06[4][c] Governmental Entities and Employees.** The anti-SLAPP motion CCP § 425.16 is available to a governmental entity and its representatives who are sued for their written and verbal comments concerning an official investigation [ *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara Cty. Ass'n of Gov'ts* (2008) 167 CA4th 1229, 1237-1238, 84 CR3d 714 ; *Bradbury v. Superior Court* (1996) 49 CA4th 1108, 1111, 57 CR2d 207 ].

##### **Examples:**

- CCP § 425.16 extends to government entities and employees who issue reports and take positions on

issues of public interest relating to their official duties [ *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara Cty. Ass'n of Gov'ts* (2008) 167 CA4th 1229, 1237-1238, 84 CR3d 714 ].

- The protections of CCP § 425.16 encompass "utterances by a district attorney on a matter of public interest, even if erroneous" [ *Bradbury v. Superior Court* (1996) 49 CA4th 1108, 1111, 57 CR2d 207 ].

- The preparation of an environmental impact report for a county is protected by CCP § 425.16 [ *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 CA4th 713, 729, 77 CR2d 1 ].

#### **Distinguish:**

- A defendant may not utilize the anti-SLAPP motion against enforcement actions brought by governmental officials or entities [CCP § 425.16(d); see 13.06[3][a]].

- Acts of governance mandated by law, without more, are not exercises of free speech or petition, and suits challenging those acts are not SLAPP suits [ *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2005) 125 CA4th 343, 354 , 22 CR3d 724 ].

**13.06[4][d] Corporations.** The word "person" as used in CCP § 425.16 includes a corporation, and the 425.16 anti-SLAPP motion to strike is available to corporate defendants [ *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 CA4th 1179, 1188, 121 CR2d 794 ; *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.* (1995) 37 CA4th 855, 862-863, 44 CR2d 46 ].

**13.06[4][e] Persons Not Subject to CCP § 425.17 Exceptions to Use of Anti-SLAPP Motion.** Even if the CCP § 425.17(b) and (c) exceptions to the use of anti-SLAPP motions apply [see § 13.06[3][a]], an anti-SLAPP motion may be brought for any of the following persons [CCP § 425.17(d)]:

- Any person enumerated in *Cal Const, art I, § 2(b)* (liberty of speech and press), *Evid Code § 1070* (newsperson's privilege), or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public [ *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 CA4th 1179, 1188, 121 CR2d 794 ; *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.* (1995) 37 CA4th 855, 862-863, 44 CR2d 46 ].

- Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

- Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.

**13.06[5] Applicability of Motion to Cross-Complaints, Amended Complaints, and Petitions.** For purposes of the special anti-SLAPP motion to strike, "complaint" includes "cross-complaint" and "petition" [CCP § 425.16(h); *City of Cotati v. Cashman* (2002) 29 C4th 69, 78, 124 CR2d 519, 52 P3d 695 ]. The term "complaint" as used in CCP § 425.16, also includes "amended complaint" [ *Lam v. Ngo* (2001) 91 CA4th 832, 842, 111 CR2d 582 ].

**Warning:**

As a practical matter, a compulsory cross-complaint on a related cause of action [see *CCP* §§ 426.10, 426.30] would rarely qualify as a SLAPP suit arising from petition activity, although sanctions may be available under *CCP* § 128.7 for a meritless retaliatory countersuit [see *Kajima Eng'g & Constr., Inc. v. City of Los Angeles* (2002) 95 CA4th 921, 933-934, 116 CR2d 187 ].

**Distinguish:**

*CCP* § 425.16 does not authorize a superior court to grant a motion to strike an arbitration claim filed only in an agreed arbitral forum and not asserted by the claimant in any complaint, cross-complaint, or petition filed in court [ *Sheppard v. Lightpost Museum Fund* (2006) 146 CA4th 315, 318, 324, 52 CR3d 821 ].

**13.06[6] Applicability of Motion to Action Brought in State Court Under Federal Statute.** The anti-SLAPP provisions of *CCP* § 425.16 generally apply to federal statutory claims (e.g., civil rights claims under 42 USCS § 1983) brought in California state court. In such actions, state procedural rules control unless the applicable federal statute mandates otherwise [see *Bradbury v. Superior Court* (1996) 49 CA4th 1108, 1118, 57 CR2d 207 ].

**Distinguish:**

Actions in federal court, see 13.06[7].

**13.06[7] Applicability of Motion in Federal Court Actions.** The anti-SLAPP motion under *CCP* § 425.16 has substantive elements for purposes of an analysis under the *Erie* doctrine. Consequently, the motion can apply in actions in federal court that qualify as SLAPP actions [ *United States ex. rel. Newsham v. Lockheed Missiles & Space Co., Inc.* (9th Cir 1999) 190 F3d 963, 973 , cert. denied, 530 US 1203 (2002) ; see generally *Erie R.R. Co. v. Tompkins* (1938) 114 A.L.R. 1487, 304 US 64, 58 S Ct 817, 82 L Ed 1188, 11 Ohio Op. 246 ].

*CCP* § 425.16 applies to state law counterclaims asserted in federal court diversity actions [ *United States ex. rel. Newsham v. Lockheed Missiles & Space Co., Inc.* (9th Cir 1999) 190 F3d 963, 973 , cert. denied, 530 US 1203 (2002) ].

In addition, *CCP* § 425.16 applies in federal court to state law claims brought pendent to federal question claims [ *Globetrotter Software, Inc. v. Elan Computer Group, Inc.* (ND Cal 1999) 63 F Supp2d 1127, 1130 ].

**Warning:**

An anti-SLAPP motion under § 425.16 will not alter discovery timelines in federal court if the anti-SLAPP statute conflicts with federal discovery rules [ *Metabolife Int'l, Inc. v. Wornick* (9th Cir 2001) 264 F3d 832, 846 ; see 13.05[4][b]].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech General Overview Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Forums





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**13.07 Determining Whether Plaintiff Has Probability of Prevailing in Suit.**

If the defendant establishes that the plaintiff's action is a SLAPP action covered by 425.16, the plaintiff must establish by admissible evidence a probability of prevailing in the suit in order to defeat the motion [CCP § 425.16(b)(1)]. In determining whether the plaintiff has established a probability of prevailing on the claim, the court will consider the pleadings and supporting and opposing affidavits [CCP § 425.16(b)(2)].



**Cross Reference:**

Showing required by plaintiff on anti-SLAPP motion, see 13.18.

Potential grounds for challenging the plaintiff's factual showing include the following [ *Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.* (2003) 106 CA4th 1219, 1235-1239, 132 CR2d 57 ; *Church of Scientology of Cal. v. Wollersheim* (1996) 42 CA4th 628, 654-656, 49 CR2d 620 ]:

- Plaintiff has not based his or her prima facie showing on admissible evidence.
- Plaintiff has based averments on information and belief.
- Plaintiff has merely relied on allegations in its own pleadings.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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**13.08 Contents of Anti-SLAPP Motion.**

An anti-SLAPP motion includes the following elements:

- Notice of motion to strike under *CCP* § 425.16 [for timing, *see* 13.05; for form, *see* 13.24].
- Supporting declarations or affidavits [for form, *see* 13.25].

**Distinguish:**

A standard motion to strike does not require an evidentiary showing, but a special anti-SLAPP motion to strike does [*see CCP* §§ 425.16(b), 435-437].

- Supporting memorandum [*see Ch. 26, Law and Motion Procedure*, 26.43[5]; *see also* California Points and Authorities, Ch. 160, Motions to Strike (Matthew Bender), for examples of memoranda in support of an anti-SLAPP motion].
- Proof of service [*see Ch. 27, Service of Papers*, 27.32-27.35].
- Proposed order, if desired.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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**13.09 Serving and Filing Motion Papers.**

Serve and file the papers by:

- Serving a conformed copy of the notice of motion, proof of service, and accompanying papers on the other party's attorney, or on the other party if he or she has no attorney in accordance with *CCP §§ 1005, 1010.6, 1013, 1015* and *Cal Rules Ct, Rules 3.1103, 3.1300* [see *Ch. 27, Service of Papers, 27.32-27.35*].
- Delivering the originals of the notice of motion and accompanying papers to the court clerk's office for filing at least 16 court days, plus any applicable additional period, before the hearing and pay the required fee [see *Ch. 27, Service of Papers, 27.32-27.35*]. If not filed with the original papers, deliver the proof of service of the moving papers for filing no later than five court days before the time appointed for the hearing [see *Cal Rules Ct, Rule 3.1300*].
- If there is a statement regarding oral testimony, file it no later than three days before the hearing; and if it is filed less than five court days before the hearing, serve a conformed copy of it on the opposing party in a manner to assure delivery no later than two days before the hearing [see *Cal Rules Ct, Rule 3.1306(a)*].

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure, 26.39*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**13.10 Defendant Must File Copies of Specified Motion Papers With Judicial Council.**

Any party who files a special motion to strike under *CCP* § 425.16 must promptly transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed-filed caption page of the motion, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to *CCP* § 425.16, including any order granting or denying a special motion to strike, discovery, or fees [*CCP* § 425.16(j)(1)].

Instructions on how to transmit and access documents required by *CCP* § 425.16(j) are available in a PDF file on the Judicial Council's website. See [www.courtinfo.ca.gov/reference/documents/transmit.pdf](http://www.courtinfo.ca.gov/reference/documents/transmit.pdf).

The Judicial Council will maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media [*CCP* § 425.16(j)(2)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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**13.11 Responding to Opposing Party's Papers.**

When responding to plaintiff's opposition's papers:

- Prepare any reply declarations and any reply memorandum in response to any counter-declarations and opposing memorandum filed by the opposing party.
- Serve a conformed copy of each declaration and reply memorandum on opposing counsel and file the originals at least five court days before the hearing [*CCP §§ 1005, 1015; Cal Rules Ct, Rule 3.1300(a); see Ch. 26, Law and Motion Procedure, 26.44*].
- Object to the admissibility of evidence presented by plaintiff.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral Overview



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**13.12 Order and Notice of Ruling.**

**13.12[1] Prevailing Party Prepares Order.** If the court grants the anti-SLAPP motion, counsel for the prevailing defendant ordinarily prepares the formal order for the judge's signature. When the court denies the motion, counsel for the prevailing plaintiff usually prepares the formal order for the judge's signature.



**Strategic Point:**

*CCP § 425.16* contains no requirement for a statement of decision when a trial court grants an anti-SLAPP motion [ *Lien v. Lucky United Props. Inv., Inc. (2008) 163 CA4th 620, 624, 77 CR3d 707* ].

**13.12[2] Prevailing Party Must Follow Notice Requirements.** The prevailing party must give to all other parties or their attorneys the notice required by *CCP § 1019.5(a)* in the manner provided in *CCP §§ 1010-1020*, unless the court otherwise orders or unless notice is waived by all parties in open court and is entered in the minutes [*CCP § 1019.5(a)*]. The prevailing party must, pursuant to *CCP § 1019.5*:

- Prepare a notice of the court's order and a proof of service [see *Ch. 26, Law and Motion Procedure, 26.44[4]*];
- Serve the ruling on opposing counsel; and
- File the original of the notice and proof of service with the court.

**13.12[3] Ruling May Be Reconsidered.** A motion for reconsideration under *CCP § 1008(b)* is permitted in the context of anti-SLAPP motions [ *Kunysz v. Sandler (2007) 146 CA4th 1540, 1543, 53 CR3d 779* ].



**Timing:**

Such motions, however, must also take into account the timeliness provision of the anti-SLAPP statute itself, and meet the requirements of both statutes [ *Kunysz v. Sandler (2007) 146 CA4th 1540, 1543, 53 CR3d 779* (motion for reconsideration was untimely where filed more than 60 days after complaint

served)].



**Warning:**

A motion for reconsideration of a ruling on a special motion to strike that is not valid when filed does not extend the appeal period on the ruling on the special motion to strike [ *Branner v. Regents of Univ. of Cal.* (2009) 175 CA4th 1043, 1049-1050, 96 CR3d 690 (appeal of ruling on special motion to strike dismissed because motion for reconsideration not accompanied by required affidavit)].



**Strategic Point:**

Rather than filing a motion to reconsider long after the initial ruling on an anti-SLAPP motion (after answer is filed, etc.), which likely will be denied [see *Kunysz v. Sandler* (2007) 146 CA4th 1540, 1543, 53 CR3d 779 ], counsel should consider whether the same issues may be the basis for a motion for summary judgment or a motion for judgment on the pleadings.



**Cross Reference:**

Motions for reconsideration, see Ch. 29, Motions for Reconsideration and Renewed Motions.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**13.12A No Right to Amend Pleadings After Ruling.**

There is no express or implied right for the plaintiff to amend a SLAPP complaint once the motion has been granted [ *Schaffer v. City and Cty. of San Francisco* (2008) 168 CA4th 992, 1005, 85 CR3d 880 (motion to amend properly denied); *Simmons v. Allstate Ins. Co.* (2001) 92 CA4th 1068, 1074, 112 CR2d 397 ] even if the amendment is filed before the ruling on the motion [ *Salma v. Capon* (2008) 161 CA4th 1275, 1294, 74 CR3d 873 (amendment rejected)]. A plaintiff may not amend the complaint if the motion is denied and the defendant appeals the ruling [ *Roberts v. Los Angeles County Bar Assn.* (2003) 105 CA4th 604, 614-615, 129 CR2d 546 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**13.13 Recovery of Attorney's Fees and Costs by Prevailing Defendant.**

**13.13[1] Prevailing Defendant Entitled to Attorney's Fees and Costs.** The anti-SLAPP statute provides that a defendant who prevails on a special anti-SLAPP motion to strike is entitled to recover attorney's fees and costs [CCP § 425.16(b), (c)]. Even though CCP § 425.16(c)(1) refers to recovery of attorney's fees pursuant to CCP § 128.5, a code section interpreted not to apply *generally* to actions filed after December 31, 2004, the authority for recovery of fees is derived from CCP § 425.16(c)(1) and not from CCP § 128.5, thus the provisions of CCP § 128.5 are still applicable under this statute [see *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 C4th 804, 819, 11 CR3d 298, 86 P3d 354].

**Exception:**

Effective January 1, 2010, an award of attorney fees is not available under CCP § 425.16(c)(1) in actions brought under Gov Code § 6259, 11130, 11130.3, 54960, or 54960.1 [CCP § 425.16(c)(2)].

**Distinguish:**

A defendant is the prevailing party so long as the granting of the motion to strike significantly narrows the scope of the lawsuit [ *Mann v. Quality Old Time Service, Inc.* (2006) 139 CA4th 328, 339-340, 42 CR3d 607 (result does not have to be the elimination of all causes of action)]. A plaintiff who alleges limited or no effect of the granting of an anti-SLAPP motion for purposes of reducing or preventing the award of costs and fees to the defendant has the burden of proof [see *Morrow v. Los Angeles Unified School Dist.* (2007) 149 CA4th 1424, 1446, 57 CR3d 885].

**Examples:**

The following are prevailing defendants for purposes of entitlement to attorney's fees and costs:

- A defendant who successfully defends an action under a statute by having the statute declared unconstitutional [ *ARP Pharmacy Servs., Inc. v. Gallagher Bassett Servs., Inc.* (2006) 138 CA4th 1307, 1323, 42 CR3d 256 ].
- A prevailing defendant whose fees were paid by a third party may, nevertheless, recover fees on prevailing in an anti-SLAPP motion [ *Macias v. Hartwell* (1997) 55 CA4th 669, 675-676, 64 CR2d 222 ].

].

- A defendant in a SLAPP action who initially appears pro se but retains counsel prior to successfully bringing a successful special anti-SLAPP motion is entitled to award of attorney's fees [ *Dowling v. Zimmerman* (2001) 85 CA4th 1400, 1422-1423, 103 CR2d 174 ].

The following is not a prevailing defendant for purposes of entitlement to attorney's fees and costs:

- The striking of a cause of action for conspiracy, which is based on the facts of underlying causes of action not stricken, does not constitute prevailing in the action necessary for an award of attorney fees [ *Endres v. Moran* (2006) 135 CA4th 952, 954-956, 37 CR3d 786 ].



#### **Warning:**

A prevailing *plaintiff* also may recover if the special anti-SLAPP motion to strike is itself determined to be frivolous or solely intended to cause unnecessary delay [see 13.22].



#### **Strategic Point:**

The resolution of the underlying action provides the basis for determining the prevailing party entitled to costs and attorney's fees. The disposition, even by involuntary dismissal, such as for bar of the claim by statute of limitations [ *White v. Lieberman* (2002) 103 CA4th 210, 220-221, 126 CR2d 608 (demurrer)], the unconstitutionality of the statute basing a statutory claim [ *ARP Pharmacy Servs., Inc. v. Gallagher Bassett Servs., Inc.* (2006) 138 CA4th 1307, 1323-1324, 42 CR3d 256 (judgment on the pleadings)], or lack of standing [ *Moraga-Orinda Fire Prot. Dist. v. Weir* (2004) 115 CA4th 477, 480, 10 CR3d 13 (challenge to rebuttal argument in voter's pamphlet not exempt from general rule)], does not moot a prevailing defendant's request for fees and costs under the anti-SLAPP statute.



#### **Strategic Point:**

In a subsequent malicious prosecution action, the successful plaintiff (defendant in the action involving the anti-SLAPP motion) is permitted to recover all the costs of defending the prior action, including reasonable attorney fees. To the extent there is an overlap in legal services covered by that award and the award of attorney fees for an anti-SLAPP motion under 425.16(c) in the underlying action, the court properly requires a setoff to prevent a double recovery [ *Jackson v. Yarbray* (2009) 179 CA4th 75, 98, 101 CR3d 303] ,



#### **Cross References:**

Recovery of fees and costs on appeal from grant or denial of motion, see 13.23[3].

Recovery of costs and attorney's fees generally, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Chs. 24, Costs, and 25, Attorney's Fees.

**13.13[2] Parameters of Recoverable Fees and Costs.** A defendant who prevails on a special anti-SLAPP motion to strike may recover attorney's fees that will adequately compensate the defendant for the expense of responding to a baseless lawsuit [ *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 CA4th 777, 785, 54 CR2d 830 ; see *Russell v. Foglio* (2008) 160 CA4th 653, 662, 73 CR3d 87 (trial court's determination of reasonable rate for junior associate affirmed)].

**Warning:**

Division Five of the First Appellate District [ *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 CA4th 1379, 1384, 46 CR2d 542 ], Division Seven of the Second Appellate District [ *Jackson v. Yarbray* (2009) 179 CA4th 75, 92, 101 CR3d 303 ], and Division Three of the Fourth Appellate District [ *Christian Research Institute v. Alnor* (2008) 165 CA4th 1315, 1320, 81 CR3d 866 ] have limited the fees and costs recoverable to those related only to the special anti-SLAPP motion to strike rather than to the entire suit. The Fourth District cited the Supreme Court and quoted its reference to the First District's decision and legislative analysis to the effect that CCP § 425.16(c) "applies only to the motion to strike, and not to the entire action" in *S. B. Beach Properties v. Berti* (2006) 39 C4th 374, 381, 46 CR3d 380, 138 P3d 713 , although the Supreme Court's references are arguably dicta, in that they are not necessary to the Supreme Court's ruling that the prevailing defendant's motion for fees was not timely made. Of course, the legislative analysis may carry the day in any subsequent Supreme Court decision directly deciding the merits of the issue.

**Strategic Point--Plaintiff:**

Counsel for plaintiff seeking to challenge claim for fees by defendant prevailing on special motion to strike must provide evidence in the form of declarations in support of their opposition to the fees claimed in the motion [see *Premier Med. Mgmt. Systems, Inc. v. Cal. Ins. Guar. Ass'n* (2008) 163 CA4th 550, 564, 77 CR3d 695 (plaintiff's challenges denied for failure to rebut defendant's evidence on fees claimed)]

**Distinguish:**

An award of sanctions is markedly different from an award of attorney fees under CCP § 425.16. Like a punitive damages award in civil litigation, an award of sanctions is intended to punish a party for bad faith conduct, not to compensate or reward the opposing party. CCP § 425.16(c), on the other hand, is intended to compensate the SLAPP defendant for attorney fees incurred in bringing a motion to strike, not to punish the SLAPP plaintiff [ *Witte v. Kaufman*, 141 CA4th 1201, 1209, 46 CR3d 845 ].

**Example:**

Attorneys bringing suit on behalf of themselves or their firm are working on behalf of their own interests. For that reason, they are not entitled to attorney fees after successfully bringing an anti-SLAPP motion in a case of that nature [ *Witte v. Kaufman*, 141 Cal. App. 4th 1201, 1209-1211, 46 CR3d 845 (fees denied self-represented attorney)]. However, to the extent that they can document attorney fees attributable to a hired attorney, rather than to their own labor, they may obtain those fees after a successful anti-SLAPP motion [ *Witte v. Kaufman*, 141 Cal. App. 4th 1201, 1212-1213, 46 CR3d 845 (trial court ordered to determine number of hours hired attorney actually worked on case)].

That a defendant only partially prevails on an anti-SLAPP motion to strike but prevails sufficiently to be a prevailing party requires that the partial success be a factor in calculating the award under the lodestar method [ *Jackson v. Yarbray* (2009) 179 CA4th 75, 92, 101 CR3d 303 ; *Mann v. Quality Old Time Service, Inc.* (2006) 139 CA4th 328, 339-340, 42 CR3d 607 (result does not have to be the elimination of all causes of action)].

**Cross Reference:**

Calculation of fee award using lodestar method, see 13.13[6].

**13.13[3] Adequate Record Must Be Maintained for Use on Appeal.** An adequate record must be supplied to the appellate court by the appealing party on appeal from proceedings pertaining to attorney's fees. Failure to provide the record will allow the appellate court to resolve the claim of inappropriate findings against the appealing party [

*Ketchum v. Moses* (2001) 24 C4th 1122, 1141, 104 CR2d 377, 17 P3d 735 ].

**13.13[4] No Automatic Stay of Judgment Pending Appeal.** The perfection of an appeal from a judgment awarding attorney's fees and costs to a defendant who has prevailed on a CCP § 425.16 anti-SLAPP motion to strike will not automatically stay enforcement of the judgment. Because this type of judgment has been interpreted as being for "money or the payment of money," some other undertaking is necessary to stay enforcement, *e.g.*, an appeal bond [CCP § 917.1(a)(1), (d); *Dowling v. Zimmerman* (2001) 85 CA4th 1400, 1427-1433, 103 CR2d 174 ].

**13.13[5] Defendant May Recover Fees Even If Plaintiff Voluntarily Dismisses Suit.**

**13.13[5][a] Court Retains Jurisdiction Over Fees After Voluntary Dismissal.** The filing of a CCP § 425.16 motion by a defendant and a hearing on the motion does not preclude the plaintiff from having a voluntary dismissal of the action entered by the clerk prior to the court's ruling on the motion [ *Kyle v. Carmon* (1999) 71 CA4th 901, 908 n4, 84 CR2d 303 ].

The court retains jurisdiction over the issue of attorney's fees related to a CCP § 425.16 special motion to strike filed prior to a voluntary dismissal of the targeted SLAPP action [ *Coltrain v. Shewalter* (1998) 66 CA4th 94, 107, 77 CR2d 600 ].



**Warning:**

The failure to file the motion to strike before the plaintiff files a voluntary dismissal bars an award of attorney fees and costs to the prevailing defendant under the anti-SLAPP statutes [ *S. B. Beach Properties v. Berti* (2006) 39 C4th 374, 383, 46 CR3d 380, 138 P3d 713 (motion untimely); *Chambers v. Miller* (2006) 140 CA4th 821, 825-826 (fees denied)].



**Strategic Point--Plaintiff:**

A plaintiff wishing to voluntarily dismiss after the defendant has filed an anti-SLAPP motion should consider seeking a voluntary waiver of costs and fees from the defendant.

**Distinguish:**

An order striking a complaint pursuant to CCP § 425.16 is void due to a lack of jurisdiction when a plaintiff validly dismisses the action prior to a ruling on the CCP § 425.16 motion [ *Kyle v. Carmon* (1999) 71 CA4th 901, 908 n4, 84 CR2d 303 ].

A voluntary dismissal during the pendency of a special motion to strike precludes CCP § 128.7 operating as an alternative to the provisions of CCP § 425.16 governing attorney's fees and costs [ *Liu v. Moore* (1999) 69 CA4th 745, 752, 81 CR2d 807 ].



**Cross Reference:**

Discussion of recovery of attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 25, Attorney's Fees.

**13.13[5][b] Standard for Determining "Prevailing Party" on Voluntary Dismissal Is Unsettled.** Courts have disagreed as to the standard for determining who is the "prevailing party" for purposes of an attorney's fee award after a voluntary dismissal during the pendency of a anti-SLAPP motion. Several courts have stated that the fee motion is wholly dependent on a determination of the merits of the anti-SLAPP motion itself [ *Pfeiffer Venice Props. v. Bernard* (2002) 101 CA4th 211, 218, 123 CR2d 647 ; *Liu v. Moore* (1999) 69 CA4th 745, 751, 81 CR2d 807 ]. However, one court has indicated that the plaintiff's reasons for voluntarily dismissing the action should bear on the issue of attorney's

fees; this court stated that "the critical issue is which party realized its objectives in the litigation." The court implied that a SLAPP plaintiff could prevail by showing "it actually dismissed because it had substantially achieved its goals through a settlement or other means, because the defendant was insolvent, or for other reasons unrelated to the probability of success on the merits" [ *Coltrain v. Shewalter* (1998) 66 CA4th 94, 107, 77 CR2d 600 ].

**13.13[5][c] Court Retains Jurisdiction Over Costs and Fees After Amendment of Complaint.** The plaintiff's amendment of the complaint as a matter of right under CCP § 472 after the filing of, but before the determination on defendant's anti-SLAPP motion, does not prevent the imposition of attorney fees and costs on the plaintiff for the original complaint [ *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 CA4th 1049, 1054, 18 CR3d 882 ].



#### Strategic Point--Plaintiff:

A plaintiff wishing to amend the complaint after the defendant has filed an anti-SLAPP motion should consider seeking a voluntary waiver of costs and fees from the defendant.

**13.13[6] Fees Calculable by Lodestar Adjustment Method.** The fee-recovery provision of CCP § 425.16 permits the use of the lodestar adjustment method of determining attorney's fees [CCP § 425.16(c); *Ketchum v. Moses* (2001) 24 C4th 1122, 1131, 104 CR2d 377, 17 P3d 735 ].

#### Exception:

A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether [ *Ketchum v. Moses* (2001) 24 C4th 1122, 1137, 104 CR2d 377, 17 P3d 735 ; *Christian Research Institute v. Alnor* (2008) 165 CA4th 1315, 1322, 81 CR3d 866 ].

The lodestar is the basic fee for comparable legal services in the community and may be adjusted by the court based on factors including, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award [ *Ketchum v. Moses* (2001) 24 C4th 1122, 1132, 104 CR2d 377, 17 P3d 735 ; *Serrano v. Priest* (1977) 20 C3d 25, 49, 141 CR 315, 569 P2d 1303 ].

#### Example:

The court of appeals upheld the trial court's award of \$ 30,000 as attorney fees to one defendant, consisting of 75 hours at \$ 400 per hour; \$ 14,000 as attorney fees to a second defendant, consisting of 70 hours at \$ 200 per hour; and \$ 14,600 as attorney fees to a third defendant, consisting of three hours at \$ 200 per hour for one attorney and 80 hours at \$ 175 per hour for another attorney. In each instance, the court expressly found that the hours expended and the hourly rate were reasonable for an attorney with the experience of the counsel for whose services on the anti-SLAPP motion the fees were awarded [ *Cabral v. Martins* (2009) 177 CA4th 471, 490, 99 CR3d 394 ] .

In determining the lodestar amount, a prevailing party generally may not recover for work on causes of action on which the party was unsuccessful. Therefore, a defendant who partially prevails on an anti-SLAPP motion to strike but prevails sufficiently to be a prevailing party may be limited to the amount attributable to the successful part of the motion, depending on the balancing of two public policies [ *Mann v. Quality Old Time Service, Inc.* (2006) 139 CA4th 328, 342-344, 42 CR3d 607 (result does not have to be the elimination of all causes of action)]:

- The public policy to discourage meritless SLAPP claims by compelling a SLAPP plaintiff to bear a defendant's litigation costs incurred to eliminate the claim from the lawsuit; and
- The public policy to provide a plaintiff who has facially valid claims to exercise his or her

constitutional petition rights by filing a complaint and litigating those claims in court.

When causes contested by an anti-SLAPP motion are overlapping, and some are struck and some are not, then the court has discretion to award fees for all of the work on the combined motion, or to apportion the fees [ *Mann v. Quality Old Time Service, Inc.* (2006) 139 CA4th 328, 344-345, 42 CR3d 607 (no entitlement to all fees as matter of right; court must balance specific considerations)].

#### **Cross References:**

Discussion of attorneys fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 25, Attorney's Fees. California Forms of Pleading and Practice, Ch. 174, Costs and Attorney's Fees (Matthew Bender).

**13.13[7] Three Ways for Defendant to Seek Attorney Fees and Costs.** There are three ways in which a defendant may seek an award of attorney fees and costs in connection with a special motion to strike under CCP § 425.16 [see *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 468, 59 CR3d 839 (separate motion for fees)]:

- Including a motion may seek attorney fees in its moving papers,
- Bringing a separate, subsequently filed motion for fees and costs, or
- Seeking attorney fees as part of a cost memorandum at the conclusion of the litigation.

#### **Timing--Attorney's Fees:**

The timing of a motion for attorney fees under CCP § 425.16(c) is governed by *Cal Rules Ct, Rule 3.1702* [see *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 462-468, 59 CR3d 839 ]. A defendant's motion for attorney fees under CCP § 425.16(c) for services up to and including the rendition of judgment in the trial court, which may include attorney's fees on an appeal before the rendition of judgment in the trial court, must be served and filed within the time for filing a notice of appeal under *Cal Rules Ct, Rules 8.104 and 8.108* [*Cal Rules Ct, Rule 3.1702(b)(1)*]. Under that rule, the deadlines in Rules 8.104 and 8.108 apply from the entry of final judgment in the action, rather than from the determination on the anti-SLAPP motion, because "the rendition of judgment" means the signing and filing of the court's findings, conclusions, and final judgment in a case [ *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 466 and n.9, 468, 59 CR3d 839 (finding plaintiff's motion filed before entry of judgment timely)].

#### **Timing--Costs:**

A memorandum for costs from an anti-SLAPP motion must be filed within the time specified by *Cal Rules Ct, Rule 3.1700* [ *Daniels v. Robbins* (2010) 182 CA4th 204, 229, 105 CR3d 683] .

#### **Distinguish:**

For purposes of Rule 3.1700, a minute order granting the motion does not trigger the 15-day deadline for filing for costs, only a judgment or dismissal after the order is granted does that under CCP § 581 [ *Daniels v. Robbins* (2010) 182 CA4th 204, 229, 105 CR3d 683] .

#### **Prerequisite:**

The law is clear that an award of attorney fees may be based on counsel's declarations,

without production of detailed time records [ *Raining Data Corp. v. Barrenechea* (2009) 175 CA4th 1363, 1375, 97 CR3d 196 (counsel's declarations not controverted)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview



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Chapter 13 Anti-SLAPP Motions  
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*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.14*

**13.14 CHECKLIST: Opposing Anti-SLAPP Motion.**

- ☐ Examine the motion, notice, and supporting documents.
  - ☐ Determine whether motion was timely filed.
  - ☐ Determine whether motion was properly set for hearing within 30 days of its filing.
  - ☐ Review motion for defects.
  - ☐ Consider whether complaint is supported by a sufficient prima facie showing of facts to sustain a favorable judgment if plaintiff's evidence is credited.
  - ☐ Determine if statutory exceptions for certain actions prohibit use of motion:
    - ☐ Specified actions brought solely in the public interest or on behalf of the general public.
    - ☐ Specified actions brought against a person primarily engaged in the business of selling or leasing goods or services.
    - ☐ Action does not involve persons engaged in dissemination of ideas to the public, is not based on the creation and dissemination of various political and artistic works, or is not brought against specified nonprofit organizations.

**Authority:**

*CCP § 425.17(b), (c)*



**Discussion:**

See 13.06[3][a], 13.17A

- ☐ Decide whether to oppose the motion.
- ☐ Consider possibility of voluntary dismissal.
  - ☐ If agreeing to voluntary dismissal, try to get agreement for voluntary waiver of fees from defendant.

**Authority:**

CCP § 425.16(b)(1)

**Discussion:**

See 13.05, 13.06, 13.13[5], 13.17, 13.18

- ☐ Prepare:
  - ☐ Declarations and/or affidavits.
  - ☐ Opposing memorandum.
  - ☐ Documentation of proof of service.
  - ☐ Proposed order, if desired.

**Authority:**

CCP §§ 425.16, 2009, 2015.5

**Discussion:**

See 13.19

- ☐ Serve and file the opposing memorandum on the moving party or the moving party's attorney, keeping in mind the following:

- ☐ Time limits.
- ☐ Allowable methods of service.

- ☐ File the originals with the clerk of court and pay filing fee.
- ☐ File copies of motion papers with Judicial Council.

**Authority:**

*CCP §§ 1005, 1010-1013*

**Discussion:**

*See 13.20, 13.21*

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.39*



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**13.15 Options and Strategies for Plaintiff.**

Plaintiff's first strategy should be to thoroughly brief the issue of whether the SLAPP statute applies. This is a purely legal question.

If the statute is applicable, plaintiff must be able to show that he or she has a probability of prevailing. Plaintiff can utilize declarations and other matters subject to judicial notice to support claim. The plaintiff must ensure that every legal defense which has been raised in the anti-SLAPP motion is addressed as a single defense to the entire action can cause the motion to be granted. For example, in a malicious prosecution action, to show a probability of prevailing, the plaintiff must establish that the underlying action was filed without probable cause, there was a favorable determination in the underlying action, and the underlying action was filed with malice. If any of the elements is defeated, the anti-SLAPP motion can be granted.

The addition of *CCP* § 425.17, with its exceptions to the filing of anti-SLAPP motions, and exceptions to the exceptions, requires a thorough analysis of the factual issues that invoke the prohibitions. Be prepared to submit declarations supporting assertions that *CCP* § 425.17(b) and (c) apply to the case and prohibit the use of the motion.



**Strategic Point:**

In opposing an anti-SLAPP motion, the plaintiff would be well advised to not hold anything back for strategic reasons but to put the best case forward immediately. The risk of losing is too great to try to sandbag the defense.

If plaintiff opts for voluntary dismissal of the action, plaintiff should ask defendant for a voluntary waiver of fees.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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**13.16 Time Limitations for Plaintiff.**

A plaintiff's response to the anti-SLAPP motion must generally be filed at least nine court days before the designated time of the hearing [*CCP § 1005(b)*; *Cal Rules Ct, Rule 3.1300*].

A plaintiff may challenge the defendant's anti-SLAPP motion as untimely if it was filed more than 60 days after service of the complaint (or amended complaint) and the court did not extend the 60-day period [*see CCP § 425.16(f)*; *Lam v. Ngo (2001) 91 CA4th 832, 842, 111 CR2d 582*]. A five-day extension to the 60-day period applies when service is by mail [*see CCP § 1013, Cal Rules Ct, Rule 3.1300*].



**Timing:**

General timing requirements, see *13.05[1]-[3]*.

Both plaintiff's and defendant's discovery are stayed pending resolution of the motion. On noticed motion, the court may allow that specified discovery be conducted [*CCP § 425.16(g)*].



**Cross Reference:**

Stay of discovery, see *13.05[4]*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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**13.17 Rebutting Defendant's Argument That Case Is a SLAPP.**

The plaintiff has two general grounds on which to attack a SLAPP motion:

- The action is not a SLAPP action to which *CCP* § 425.16 is applicable [*see* 13.06].
- The plaintiff has a probability of prevailing in the suit [*see* 13.18].

If the court determines that the action is not a SLAPP action, the probability of prevailing does not need to be addressed [ *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecomms. Eng'rs* (1996) 49 CA4th 1591, 1603, 57 CR2d 491 ]. Consequently, plaintiff should always consider whether the motion can be attacked on the ground that 425.16 is inapplicable.

To make its initial showing that the case is a SLAPP, the defendant will argue that the act underlying plaintiff's cause of action is protected. Protected actions include the following [*see CCP* § 425.16(b)(1), (e)]:

- Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law [*CCP* § 425.16(e)(1); *see* 13.06[2][b]].
- Any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other official proceeding authorized by law [*CCP* § 425.16(e)(2); *see* 13.06[2][b]].
- Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest [*CCP* § 425.16(e)(3); *see* 13.06[2][c]].
- Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest [*CCP* § 425.16(e)(4); *see* 13.06[2][c]].

To overcome this showing, the defendant must demonstrate that the targeted action is not one protected by *CCP* § 425.16.



**Cross Reference:**

Discussion of availability of anti-SLAPP motion, see *13.06*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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**13.17A Asserting CCP § 425.17 Exceptions to Use of Anti-SLAPP Motion.**

The plaintiff may oppose an anti-SLAPP motion on the grounds that the motion may not be brought when [CCP § 425.17(b)-(d)]:

- The action is brought solely in the public interest or on behalf of the general public, and specific requirements are met.
- The action is brought against a person primarily engaged in the business of selling or leasing goods or services, and specific requirements are met.
- The action does not involve persons engaged in dissemination of ideas to the public, is not based on the creation and dissemination of various political and artistic works, or is not brought against specified nonprofit organizations, as specified.

CCP § 425.17(c) does not provide an independent basis for upholding the trial court's denial of the motion and only excludes certain claims that would otherwise fall within the reach of an anti-SLAPP statute [ *Mann v. Quality Old Time Serv., Inc.* (2004) 120 CA4th 90 ].



**Cross Reference:**

Discussion of CCP § 425.17(b)-(d) and specific conditions and requirements, see 13.06[3][a].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.18*

**13.18 Determining Whether Plaintiff Has Probability of Success in Suit.**

**13.18[1] Plaintiff May Defeat Motion If Probability of Prevailing in Suit Is Shown.** If a court ruling on an anti-SLAPP motion concludes the challenged cause of action arises from protected speech or petitioning, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. To satisfy this prong, the plaintiff must state and substantiate a legally sufficient claim. Specifically, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited [ *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 C4th 728, 741 ].

If a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on any part of the claim, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure [ *Mann v. Quality Old Time Serv., Inc.* (2004) 120 CA4th 90, 100 ]. In a case involving protected and unprotected activity, the court does not have to consider defenses that do not relate to the defendant's protected petitioning activity [ *Mann v. Quality Old Time Serv., Inc.* (2004) 120 CA4th 90, 107 ].

**13.18[2] Basis for Determination by Court.** In making a determination on an anti-SLAPP motion to strike, the court will consider the pleadings, and supporting and opposing affidavits stating the facts on which the liability or defense is based [CCP § 425.16(b)(2); *Nguyen-Lam v. Cao* (2009) 171 CA4th 858, 871, 90 CR3d 205 (facts developed at hearing on motion to strike may establish probability of prevailing on merits); *Gallant v. City of Carson* (2005) 128 CA4th 705 ].

The court may rule on the admissibility of evidence submitted in support or opposition to a finding of probability of prevailing in the underlying action [see *Raining Data Corp. v. Barrenechea* (2009) 175 CA4th 1363, 1372, 97 CR3d 196 (right waived)].



**Warnings:**



- Because averment on information and belief is inadmissible at trial, it cannot be utilized to demonstrate the probability of prevailing for purposes of a special anti-SLAPP motion to strike [*Evid Code* § 702(a); *Beilenson v. Superior Court* (1996) 44 CA4th 944, 952, 52 CR2d 357]. The plaintiff's showing must be made by competent admissible evidence within the personal knowledge of the declarant(s) [*Gallant v. City of Carson* (2005) 128 CA4th 705, 710].

- The failure to challenge the trial court's determination of whether particular evidence may be considered in its determination of the probability of success waives the right to challenge it on appeal [*Gallant v. City of Carson* (2005) 128 CA4th 705, 710; *Gallagher v. Connell* (2004) 123 CA4th 1260, 1264]. Furthermore, even if objection is entered, the failure to obtain the trial court's ruling on it constitutes a waiver of the objection [*Gallant v. City of Carson* (2005) 128 CA4th 705, 713].

**Example:**

Two of cross-complainant's declarations were inadmissible pursuant to *CCP* § 2015.5 because they were not executed under California law. Four other declarations contained matters without proper foundation and hearsay. The separate statement of material facts and evidence offered in opposition to the anti-SLAPP motion was an unauthorized attempt to circumvent the page limits on defendants' opposition brief. As a result, cross-complainant failed to meet the burden of proof of the probability of prevailing on the merits [*Raining Data Corp. v. Barrenechea* (2009) 175 CA4th 1363, 1372, 97 CR3d 196].

The court must consider the substantive merits of the plaintiff's complaint, as well as all available defenses to it, including, but not limited to, constitutional defenses [*ARP Pharmacy Servs., Inc. v. Gallagher Bassett Servs., Inc.* (2006) 138 CA4th 1307, 1323, 42 CR3d 256; *Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 CA4th 392, 398].

**Examples:**

Defenses that have precluded a finding that the plaintiff has probability of prevailing in a suit subject to an anti-SLAPP motion to strike include:

- Collateral estoppel for failure to exhaust judicial remedies to administrative decision [*Miller v. City of Los Angeles* (2008) 169 CA4th 1373, 1383, 87 CR3d 510 (plaintiff's Fair Employment and Housing Act claim was collaterally estopped by his dismissal of judicial appeal of civil service commission decision)].

- The statute grounding plaintiff's cause of action was not yet enacted when the cause of action accrued [*Cabral v. Martins* (2009) 177 CA4th 471, 484-485, 99 CR3d 394].

- Statements that come under the protection of the official-duty privilege of *CC* § 47(a) [*Morrow v. Los Angeles Unified School Dist.* (2007) 149 CA4th 1424, 1439-1444, 57 CR3d 885; *Tutor-Saliba Corp. v. Herrera* (2006) 136 CA4th 604, 615-616, 39 CR3d 21].

- Lack of standing on the face of the complaint [*Major v. Silna* (2005) 134 CA4th 1485, 1497-1503; 36 CR3d 875].

- *First Amendment* rights to freedom of speech and of the press [*Stewart v. Rolling Stone LLC* (2010) 181 CA4th 664, 680, 105 CR3d 98 (misappropriation under *CC* § 3344)].

- Litigation privilege under *CC* § 47(b) [*Seltzer v. Barnes* (2010) 182 CA4th 953, 972, 106 CR3d 290 (settlement negotiations); *Daniels v. Robbins* (2010) 182 CA4th 204, 216, 105 CR3d 683 (abuse of process, negligence, intentional infliction torts); *Cabral v. Martins* (2009) 177 CA4th 471, 485-490, 99

*CR3d 394* ; *Kashian v. Harriman* (2002) 98 CA4th 892, 926-927, 120 CR2d 576 (defamation action); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 CA4th 777, 783-785, 54 CR 2d 830 (prelitigation communication)].

■ Minor's statements to police, her parents, and her paralegal alleging child abuse were covered by the litigation privilege in *CC § 47(b)*, and plaintiff failed to show a probability of prevailing on a liability claim for false report of child abuse under *Pen Code § 11172* filed by the alleged victim of the abuse, even though a similar report by a third party is not entitled to protection under the litigation privilege from *§ 11172* liability [ *Chabak v. Monroy* (2007) 154 CA4th 1502, 1514, 1516-1519, 65 CR3d 641 (citing *Siam v. Kizilbash* (2005) 130 CA4th 1563, 1577, 31 CR3d 368 )].

The court thus determines whether the defendant's opposing evidence defeats the plaintiff's showing as a matter of law [ *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 CA4th 688, 700, 61 CR3d 29 ; *Mann v. Quality Old Time Serv., Inc.* (2004) 120 CA4th 90, 106 ].

**Example:**

A plaintiff suing a public employee who is statutorily protected from liability for injury caused by his or her instituting or prosecuting a judicial or administrative proceeding within the scope of his or her employment, which applies even if he or she acts maliciously and without probable cause [*Gov Code § 821.6*], has no probability of success in the suit [see *Miller v. Filter* (2007) 150 CA4th 652, 665-667, 58 CR3d 671 ].

The determination will come from the ability of the parties to put forth their prima facie cases, not from a weighing of the evidence [ *Kyle v. Carmon* (1999) 71 CA4th 901, 907-908, 84 CR2d 303 ]. Essentially, the trial court is to test each party's prima facie case against each other [see, e.g., *Booker v. Rountree* (2007) 155 CA4th 1366, 1371-1373, 66 CR3d 733 ].

**Example:**

A defendant has prima facie probability of prevailing on a slander of title claim arising from a lis pendens filed in reference to two arbitration proceedings, because lis pendens may not be used for arbitration proceedings [ *Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 CA4th 1040, 1052-1054, 93 CR3d 457 (anti-SLAPP motion granted)].

**Example:**

A public figure must allege facts sufficient to show actual malice on the part of the defendant in a libel action. A conclusory boilerplate allegation that a defendant acted maliciously and oppressively, and in conscious disregard of the plaintiff's rights is insufficient to state a cause of action in a case where "actual malice" of the *Sullivan* type is required [ *Vogel v. Felice* (2005) 127 CA4th 1006, 1018 , 22 CR3d 724 ].

In making its determination, the trial court does not read allegations in isolation [ *Clauson v. Superior Court* (1998) 67 CA4th 1253, 1255, 79 CR2d 747 ]. The trial court may consider permissible inferences from the parties' evidence [see, e.g., *Booker v. Rountree* (2007) 155 CA4th 1366, 1372, 66 CR3d 733 ]. Likewise, courts must consider the pertinent burden of proof in ascertaining whether the plaintiff has shown a probability of prevailing [ *Ampex Corp. v. Cargle* (2005) 128 CA4th 1569, 1578 ].

**Example:**

Limited purpose public figures such as respondents who sue for defamation must establish a probability that they can produce clear and convincing evidence that the allegedly defamatory statements were made with knowledge of their falsity or with reckless disregard of their truth or falsity [ *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 CA4th 688, 700, 61 CR3d 29 ; *Ampex Corp. v. Cargle* (2005) 128

CA4th 1569, 1578 ].



#### Strategic Point:

In contesting the plaintiff's probability of prevailing, both parties must be prepared to vigorously argue the merits of the claims and defenses on the underlying action [see *Annette F. v. Sharon S. (2004)* 119 CA4th 1146, 1166 ]. The plaintiff must be prepared to respond if the defendant establishes a defense that shifts the burden of proof back to the plaintiff [see *Mann v. Quality Old Time Serv., Inc. (2004)* 120 CA4th 90, 108 (defendant failed to show conditional privilege, so plaintiff did not have to show statements were made with malice)].

#### Distinguish:

- A defamation claim fails as a matter of law if the publication was not reasonably susceptible of a defamatory meaning and cannot be reasonably understood in the defamatory sense pleaded by the plaintiffs [ *Balzaga v. Fox News Network, LLC (2009)* 173 CA4th 1325, 1342-1343, 93 CR3d 782 (anti-SLAPP motion granted)].
- In a case involving protected and unprotected activity, the court does not have to consider defenses that do not relate to the defendant's protected petitioning activity [ *Mann v. Quality Old Time Serv., Inc. (2004)* 120 CA4th 90, 107 ].
- The fact that the plaintiff prevailed in a subsequently filed timely action is irrelevant to whether the plaintiff could prevail in an earlier untimely action on the same cause [ *City of Santa Monica v. Stewart (2005)* 126 CA4th 43, 75-76 ].
- A plaintiff has no chance of success in a lawsuit for invasion of privacy resulting from a newspaper's publication of information gathered from public sources, so that the plaintiff cannot stave off an anti-SLAPP motion filed in the case [ *Gates v. Discovery Communications, Inc. (2004)* 34 C4th 679, 696 ].
- Grounds for a standard motion to strike must be evident solely from the face of the pleading [see *Ch. 12, Motions to Strike, 12.08*].

#### Example:

Two of cross-complainant's declarations were inadmissible pursuant to *CCP § 2015.5* because they were not executed under California law. Four other declarations contained matters without proper foundation and hearsay. The separate statement of material facts and evidence offered in opposition to the anti-SLAPP motion was an unauthorized attempt to circumvent the page limits on defendants' opposition brief. As a result, cross-complainant failed to meet the burden of proof of the probability of prevailing on the merits [ *Raining Data Corp. v. Barrenechea (2009)* 175 CA4th 1363, 1372, 97 CR3d 196 ].

**13.18[2A] Special Considerations in Malicious Prosecution Actions.** The question of probability of prevailing in considering an anti-SLAPP motion and the lack-of-probable-cause element of malicious prosecution are perhaps similarly focused, but they are not duplicates. Given that lack of probable cause is not the only element of a malicious prosecution claim, such a claim may lack merit even if the plaintiff can prove lack of probable cause [ *Jarrow Formulas, Inc. v. LaMarche (2003)* 31 C4th 728, 741 ]. Conversely, a plaintiff may have probable cause even if the suit lacked merit [ *Paulus v. Bob Lynch Ford, Inc. (2006)* 139 CA4th 659, 675, 43 CR3d 148 (anti-SLAPP motion granted

where lack of probable cause not shown)].

The denial of initial motions for nonsuit on a cause of action subsequently nonsuited properly on a new motion based on additional facts does not constitute a determination that probable cause existed to bar a determination of the probability that the defendant in the nonsuited case would prevail in a malicious prosecution action in which the nonsuited plaintiff brings an anti-SLAPP motion where other evidence supported the finding of a probability of prevailing due to a lack of probable cause [ *Slaney v. Ranger Ins. Co. (2004) 115 CA4th 306, 318* ]. The same rule applies to the entry of a default against the plaintiff, because the judgment was not the result of a full adversary hearing [ *Bergman v. Drum (2005) 129 CA4th 11, 21-23* ].

The 2005 amendment to *CCP* § 425.16(b)(3) barring use later in the proceeding or in subsequent proceedings of the trial court's denial of a determination on an anti-SLAPP motion that plaintiff has a probability of prevailing in the case did not abrogate the well-settled rule that in a malicious prosecution action, the denial of a summary judgment motion in the underlying action establishes probable cause to file that lawsuit [ *Hutton v. Hafif (2007) 150 CA4th 527, 549, 59 CR3d 109* (citing *Wilson v. Parker, Covert & Chidester (2002) 28 C4th 811, 824, 123 CR2d 19, 50 P3d 733* for the rule)].



#### **Strategic Point:**

The 2005 amendment to *CCP* § 425.16(b)(3) barring use later in the proceeding or in subsequent proceedings of the trial court's denial of a determination on an anti-SLAPP motion that plaintiff has a probability of prevailing in the case abrogated the separate holding in *Wilson* [see *Wilson v. Parker, Covert & Chidester (2002) 28 C4th 811, 821-822, 123 CR2d 19, 50 P3d 733*)] that denial of an anti-SLAPP motion demonstrates there was probable cause to commence that action [ *Hutton v. Hafif (2007) 150 CA4th 527, 547-550, 59 CR3d 109* ]. Accordingly, the denial of defendant's anti-SLAPP motion in the underlying action is no longer a probable-cause defense to the defendant's subsequent SLAPPback malicious prosecution action [see *Hutton v. Hafif (2007) 150 CA4th 527, 549, 550, 59 CR3d 109* ].

A defendant's dismissal on summary judgment for lack of sufficient evidence in the action underlying a malicious prosecution action is not proof as a matter of law that the defendant can prevail in a subsequent malicious prosecution action or that the plaintiff lacked probable cause or acted with malice for purposes of determining whether the plaintiff meets the prima facie showing necessary on those elements of a subsequent malicious prosecution action for avoiding the granting of an anti-SLAPP motion [ *Jarrow Formulas, Inc. v. LaMarche (2003) 31 C4th 728, 741* ]. The dismissal on summary judgment is some, but not necessarily sufficient evidence, in support of a finding that there was no probable cause [ *Slaney v. Ranger Ins. Co. (2004) 115 CA4th 306, 318* ].

Findings made in support of sanctions under *Fed R Civ P, Rule 11* that the underlying claim was meritless are evidence that the underlying action was filed without probable cause [ *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps (2002) 99 CA4th 1179, 1191, 121 CR2d 794* ].

The fact that the action forming the basis for a subsequent malicious prosecution action was itself dismissed on an anti-SLAPP motion does not establish a prima facie showing in the SLAPPback action that the SLAPP action was brought with malice [ *Soukup v. Law Offices of Herbert Hafif (2006) 39 C4th 260, 295-296, 46 CR3d 638* ].



#### **Cross Reference:**

Motions to strike in SLAPPback actions, see 13.22A et seq.

Objection to the judicial notice of or consideration of the statement of decision of the underlying case for determining if

malicious-prosecution plaintiff met its burden must be made before the trial court hearing the malicious prosecution action [ *HMS Capital, Inc. v. Lawyers Title Co. (2004) 118 CA4th 204, 217, 12 CR3d 786* ].

**13.18[3] Plaintiff's Securing of Preliminary Injunction Does Not Preclude Anti-SLAPP Motion to Strike by Defendant.** The issue before a court on a motion for a preliminary injunction is not only "the likelihood that plaintiff will prevail at trial" but also "the interim harm that the plaintiff will likely sustain if the injunction were denied," which is not the same standard for granting a defendant's anti-SLAPP motion. Therefore, collateral estoppel does not mandate the denial of a defendant's special anti-SLAPP motion to strike when a plaintiff has already succeeded in obtaining a preliminary injunction [ *Lam v. Ngo (2001) 91 CA4th 832, 843, 111 CR2d 582* ]. However, the facts behind the granting of an injunction may support the denial of an anti-SLAPP motion [ *Slauson P'ship v. Ochoa (2003) 112 CA4th 1005, 1026-1029* ].



#### **Cross Reference:**

Discussion of preliminary injunctions, see Ch. 18, TROs and Preliminary Injunctions.

#### **Distinguish:**

The denial of the anti-SLAPP motion to strike on the basis that plaintiff has shown a probability of success precludes the defendant from bringing a malicious prosecution claim unless plaintiff prevailed on the anti-SLAPP motion via fraud or perjury [ *Wilson v. Parker, Covert & Chidester (2002) 28 C4th 811, 820, 123 CR2d 19, 50 P3d 733* ].

**13.18[4] Determination on Probability of Success Not Admissible in Evidence.** If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination will be admissible in evidence at any later stage of the case or in any subsequent action, and no burden of proof or degree of proof otherwise applicable will be affected by that determination in any later stage of the case or in any subsequent proceeding [ *CCP § 425.16(b)(3)*; *Hutton v. Hafif (2007) 150 CA4th 527, 547, 59 CR3d 109* (2005 amendment to *CCP § 425.16(b)(3)* did not affect case law holding that denial of a summary judgment motion in an underlying lawsuit demonstrates there was probable cause to commence that action); *Robertson v. Rodriguez (1995) 36 CA4th 347, 355, 42 CR2d 464* ].

#### **Example:**

The 2005 amendment to *CCP § 425.16(b)(3)* barring use later in the proceeding or in subsequent proceedings of the trial court's denial of a determination on an anti-SLAPP motion that plaintiff has a probability of prevailing in the case abrogated prior caselaw holding that denial of an anti-SLAPP motion demonstrates there was probable cause to commence that action [ *Hutton v. Hafif (2007) 150 CA4th 527, 547-550, 59 CR3d 109* (citing *Wilson v. Parker, Covert & Chidester (2002) 28 C4th 811, 821-822, 123 CR2d 19, 50 P3d 733* )].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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**13.19 Contents of Opposing Papers.**

Papers to be served and filed when opposing an anti-SLAPP motion under *CCP* § 425.16 include:

- Declarations or affidavits.
- Opposing memorandum [*see Ch. 26, Law and Motion Procedure, 26.43[5]; see also California Points and Authorities, Ch. 160, Motions to Strike (Matthew Bender), for examples of memoranda in opposition to an anti-SLAPP motion*].
- Proof of service [*see Ch. 27, Service of Papers, 27.32-27.35*].
- Proposed order, if desired.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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**13.20 Serving and Filing Motion Papers.**

Serve and file the papers by:

- Serving a conformed copy of the above described papers on the other party's attorney, or on the other party if he or she has no attorney, at least nine court days before the hearing [see *CCP* § 1005(a)(13), (b); *Cal Rules Ct*, Rule 3.1300(a); see *Ch. 27, Service of Papers*, 27.32-27.35].
- Attaching a copy of proof of service to the papers.
- Delivering the originals of the notice of motion and accompanying papers to the court clerk's office for filing at least nine court days before the hearing and paying the required fee.

Any party who opposes a special motion to strike under *CCP* § 425.16 must promptly transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed-filed caption page of the opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to *CCP* § 425.16, including any order granting or denying a special motion to strike, discovery, or fees [*CCP* § 425.16(j)(1)].

Instructions on how to transmit and access documents required by *CCP* § 425.16(j) are available in a PDF file on the Judicial Council's website. See [www.courtinfo.ca.gov/reference/documents/transmit.pdf](http://www.courtinfo.ca.gov/reference/documents/transmit.pdf).

The Judicial Council will maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media [*CCP* § 425.16(j)(2)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**13.21 Order and Notice of Ruling.**

For discussion of the order and notice of ruling, see § 13.12. Issues to be considered are:

- Defendant prepares order if motion granted.
- Plaintiff prepares order in motion denied.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**13.22 Recovery of Attorney's Fees and Costs by Prevailing Plaintiff.**

**13.22[1] Denial of Frivolous Anti-SLAPP Motion Entitles Plaintiff to Attorney Fees.** If the court finds that an anti-SLAPP motion is frivolous or is solely intended to cause unnecessary delay, the court will award costs and reasonable attorney's fees to the plaintiff [CCP § 425.16(c)]. A determination of frivolousness requires a finding the motion is "totally and completely without merit" in that "any reasonable attorney would agree such motion is totally devoid of merit" [ *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 469, 59 CR3d 839 (citing CCP § 128.5(b)(2))].

**Example:**

Given that unlawful workplace activity was not necessarily an issue of public interest, the trial court did not abuse its discretion in finding that the special motion to strike was frivolous [ *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 472, 59 CR3d 839 ].



**Timing:**

The timing of a motion for attorney fees under CCP § 425.16(c) is governed by *Cal Rules Ct, Rule 3.1702* [see *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 462-468, 59 CR3d 839 ]. A plaintiff's motion for attorney fees under CCP § 425.16(c) for services up to and including the rendition of judgment in the trial court, which may include attorney's fees on an appeal before the rendition of judgment in the trial court, must be served and filed within the time for filing a notice of appeal under *Cal Rules Ct, Rules 8.104 and 8.108* [ *Cal Rules Ct, Rule 3.1702(b)(1)* ]. Under that rule, the deadlines in Rules 8.104 and 8.108 apply from the entry of final judgment in the action, rather than from the determination on the anti-SLAPP motion, because "the rendition of judgment" means the signing and filing of the court's findings, conclusions, and final judgment in a case [ *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 466 and n.9, 468, 59 CR3d 839 (finding motion filed before entry of judgment timely)].

Failure of the court to adequately state grounds for sanction and to follow procedural requirements of CCP § 128.5 will obviate sanction order [ *Morin v. Rosenthal* (2004) 122 CA4th 673, 682 ]. To justify a sanctions award, the trial court must state no more than a written factual recital, with reasonable specificity, of the circumstances that led it to find the

conduct before it sanctionable [ *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 470, 59 CR3d 839 ].

**Example:**

The trial court's statement of reasons, although brief, for its finding that the motion to strike was frivolous incorporated by reference both defendants' moving papers and a previous appellate opinion in the case affirming the denial of the special motion to strike adequately stated the trial court's grounds for awarding attorney fees to the plaintiff [ *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 470, 59 CR3d 839 ].



**Warning:**

If the *defendant* prevails on an anti-SLAPP motion, defendant is entitled to recover attorney's fees and costs [CCP § 425.16(c)]. Even if the plaintiff voluntarily dismisses the action [ *Coltrain v. Shewalter* (1998) 66 CA4th 94, 107, 77 CR2d 600 ] or amends the complaint as a matter or right under CCP § 472 [ *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 CA4th 1049, 1054, 18 CR3d 882 ] after the anti-SLAPP motion is filed but before the court determines the motion, the court may impose costs and fees on the plaintiff for the original complaint.



**Strategic Point--Plaintiff:**

A plaintiff wishing to voluntarily dismiss or amend the complaint after the defendant has filed an anti-SLAPP motion should consider seeking a voluntary waiver of costs and fees from the defendant.



**Cross References:**

Recovery of costs on anti-SLAPP motion by prevailing defendant, see 13.13.

Recovery of fees and costs on appeal, see 13.23[3].

Discussion of recovery of costs and attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Chs. 24, Costs, and 25, Attorney's Fees.

**13.22[2] Three Ways for Plaintiff to Seek Attorney Fees.** There are three ways in which a plaintiff may seek an award of attorney fees and costs in connection with a special motion to strike under CCP § 425.16 [ *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 468, 59 CR3d 839 (separate motion for fees)]:

- Including a motion may seek attorney fees in its moving papers,
- Bringing a separate, subsequently filed motion for fees and costs, or
- Seeking attorney fees as part of a cost memorandum at the conclusion of the litigation.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**13.22A CHECKLIST: Making and Opposing Anti-SLAPPback Motions.**

**13.22A[1] Making Anti-SLAPPback Motion.**



Check timing.



Anti-SLAPPback motion must be filed within 120 days of service of complaint unless permission of court is obtained for later filing.

**Authority:**

*CCP § 425.18(d)(1)*

**Discussion:**

See 13.22D



Determine whether action is SLAPPback:



Action must be for malicious prosecution or abuse of process arising from the filing or maintenance of the underlying action described below.



Underlying action must have been brought by defendant in present action.



Underlying action must have been dismissed by grant of special motion to strike under *CCP § 425.16*.

**Authority:**

*CCP § 425.18(b)(1)*

**Discussion:**

See 13.22C

- ☐ Determine whether anti-SLAPPback procedures apply.
- ☐ Party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law may not file an anti-SLAPPback motion.
- ☐ The regular anti-SLAPP provisions, not the anti-SLAPPback provisions, do apply to SLAPPbacks filed by public entities.

**Authority:**

*CCP § 425.18(h), (i)*

**Discussion:**

See 13.22C

- ☐ Follow standard procedure for making special motion to strike under *CCP § 425.16*.

**Standard Procedure Checklist:**

See 13.03

**13.22A[2] Opposing an Anti-SLAPPback Motion.**

- ☐ Follow standard procedure for opposing special motion to strike under *CCP § 425.16*.

**Standard Procedure Checklist:**

See 13.14

- ☐ If discovery is needed for showing probability of prevailing on the merits, file ex parte application for continuance to conduct discovery.

**Authority:**

*CCP § 425.18(e)*

**Discussion:**

See 13.22E

- ☐ If anti-SLAPPback motion is frivolous or filed only for purposes of delay, file motion for costs and reasonable attorney's fees.

**Authority:**

*CCP § 425.18(f)*

**Discussion:**

See 13.22F



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**13.22B Options and Strategies.**

By urgency legislation effective October 5, 2005 [Cal. Stats 2005, ch 535, § 4], the Legislature limited the scope of relief available from a special motion to strike under *CCP* § 425.16 in any action, now known as a "SLAPPback" action, for malicious prosecution or abuse of process in which the underlying action was itself dismissed under *CCP* § 425.16. The change extends the time in which to file a special motion to strike a SLAPPback action, but limits review of denial of the motion to writ review.

In the words of the Legislature, "a SLAPPback is distinguishable in character and origin from the ordinary malicious prosecution action. The Legislature further finds and declares that a SLAPPback cause of action should be treated differently, as provided in this section, from an ordinary malicious prosecution action because a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP (strategic lawsuit against public participation) litigation and by its restoration of public confidence in participatory democracy" [*CCP* § 425.18(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**13.22C SLAPPback Is Malicious Prosecution or Abuse of Process Action Based on SLAPP Dismissed Under CCP § 425.16.**

A "SLAPPback" is a cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under CCP § 425.16 [CCP § 425.18(b)(1)]. A special motion to strike under CCP § 425.16 may be filed against a SLAPPback [see CCP § 425.18(c)].

**Exceptions:**

A special motion to strike may not be filed against a SLAPPback by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law [CCP § 425.18(h)]. The filing or maintenance of the prior cause of action was illegal as a matter of law if either [ *Soukup v. Law Offices of Herbert Hafif* (2006) 39 C4th 260, 286-287, 46 CR3d 638 ]:

- The defendant concedes the illegality of the assertedly protected activity, or
- The illegality is conclusively established by the evidence presented in connection with the motion to strike.



**Trap:**

The burden of proof that the underlying action was illegal as a matter of law is on the plaintiff in the SLAPPback action [ *Soukup v. Law Offices of Herbert Hafif* (2006) 39 C4th 260, 287, 46 CR3d 638 ].

**Distinguish:**

As a matter of law, the filing or maintenance of a SLAPPback of which *any* material part does *not* violate a statute cannot be "illegal as a matter of law" for purposes of CCP § 425.18(h) [ *Hutton v. Hafif* (2007) 150 CA4th 527, 545, 59 CR3d 109 (affirming order granting anti-SLAPP motion in SLAPPback in which material part did not violate any statute)].

**Example:**

Defendant's retaliatory conduct was not illegal as a matter of law under *Lab Code* § 1102.5(b), because at

the time of conduct, plaintiff did not meet the requirement of that statute that she be an employee of the defendant [ *Soukup v. Law Offices of Herbert Hafif* (2006) 39 C4th 260, 287-289, 46 CR3d 638 ].



#### **Strategic Point:**

Even if the court finds that the filing and maintenance of the prior cause of action was not illegal as a matter of law, it still applies the usual anti-SLAPP analysis concerning whether the plaintiff has a probability of prevailing on the merits [ *Soukup v. Law Offices of Herbert Hafif* (2006) 39 C4th 260, 290-291, 46 CR3d 638 ].

#### **Example:**

Defendant's retaliatory conduct was not illegal as a matter of law, but the plaintiff demonstrated a probability of prevailing on the malicious prosecution claim, so the anti-SLAPP motion was denied in the SLAPPback action [ *Soukup v. Law Offices of Herbert Hafif* (2006) 39 C4th 260, 292-297, 46 CR3d 638 ].



#### **Cross Reference:**

Determining plaintiff's probability of prevailing, see 13.18.

In doing so, the plaintiff must identify with particularity [ *Soukup v. Law Offices of Herbert Hafif* (2006) 39 C4th 260, 287, 46 CR3d 638 ]:

- The statute or statutes violated by the filing and maintenance of the underlying action, and
- The specific manner in which the statute or statutes were violated with reference to their elements.

#### **Distinguish:**

The provisions of CCP § 425.18 do not apply to SLAPPback actions filed by public entities [CCP § 425.18(i)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General

Overview Torts Intentional Torts Abuse of Process General Overview Torts Intentional Torts Malicious Prosecution Civil Rights Actions



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Chapter 13 Anti-SLAPP Motions  
IV. MAKING AND OPPOSING ANTI-SLAPBACK MOTIONS

*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.22D*

**13.22D Anti-SLAPPback Motion, Without Permission of Court for Later Filing, Must Be Filed Within 120 Days of Service of Complaint.**

A special motion to strike a SLAPPback under *CCP* § 425.16 must be filed within 120 days of the service of the complaint.

**Exception:**

The trial court has the discretion to permit filing of the motion within six months of the service of the complaint or, in extraordinary cases due to no fault of the defendant and upon written findings of the court stating the extraordinary case and circumstance, at any later time [*CCP* § 425.18(d)(1)].

Upon filing of the motion, the clerk of the court must schedule the hearing on the motion not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing [*CCP* § 425.18(d)(2)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview





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**13.22E No Automatic Stay of Discovery, But Opposing Party May Obtain Continuance for Discovery on Motion.**

The provision calling for an automatic stay of discovery for anti-SLAPP motions [*CCP* § 425.16(*g*); *see* 13.05[4]] do not apply to anti-SLAPPback motions [*CCP* § 425.18(*c*)].

However, a party opposing a special motion to strike a SLAPPback may file an ex parte application for a continuance to obtain necessary discovery. If it appears that facts essential to justify opposition to that motion may exist, but cannot then be presented, the court must grant a reasonable continuance to permit the party to obtain affidavits or conduct discovery or may make any other order as may be just [*CCP* § 425.18(*e*)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral Overview



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IV. MAKING AND OPPOSING ANTI-SLAPBACK MOTIONS

*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.22F*

**13.22F Moving Party May Not Obtain Fees and Costs, But Plaintiff May Obtain Costs for Frivolous or Delaying Motion.**

The provision allowing the moving party to obtain costs and fees from the plaintiff upon the grant of anti-SLAPP motions [*see CCP § 425.16(c)*; 13.13] does not apply to anti-SLAPPback motions [*CCP § 425.18(c)*; *Hutton v. Hafif* (2007) 150 CA4th 527, 540, 59 CR3d 109 (order granting fees reversed)].

However, an opposing party prevailing on an anti-SLAPPback motion may obtain an award of costs and reasonable attorney's fees if the court finds that the anti-SLAPPback motion is frivolous or solely intended to cause unnecessary delay [*CCP § 425.18(f)*].

➡ **Cross References:**

Discussion of plaintiff's recovery of costs and fees upon prevailing on anti-SLAPP motion, see 13.22.

Recovery of costs and attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Chs. 24, Costs, and 25, Attorney's Fees.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral Overview



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Chapter 13 Anti-SLAPP Motions  
V. REVIEWING GRANT OR DENIAL OF ANTI-SLAPP OR ANTI-SLAPP BACK MOTION

*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.23*

**13.23 Obtaining Appellate Review of Decision on Anti-SLAPP Motion.**

**13.23[1] Order on Anti-SLAPP Motion Is Appealable If Not Subject to CCP § 425.17 Exceptions.** An order granting or denying a motion for an anti-SLAPP motion to strike is appealable [CCP §§ 425.16(i), 904.1(a)(13)]. An award of attorney fees under the anti-SLAPP statute is also appealable [ *Johnston v. Corrigan* (2005) 127 CA4th 553, 556 , 25 CR3d 657 ].



**Trap:**

If the court issues judgment without ruling on a request for attorney fees, that constitutes final judgment for appeal purposes, and the notice of appeal must be filed within 60 days of that judgment. The failure to do so by waiting to file an appeal after the court rules on the request for attorney fees will forfeit the right of appeal if the notice of appeal is filed more than 60 days after the entry of judgment on the merits [ *Maughan v. Google Technology, Inc.* (2006) 143 CA4th 1242, 1246-1247, 49 CR3d 861 (appeal on merits dismissed)]. Counsel must not wait for a ruling on the request for attorney fees to file an appeal on an anti-SLAPP motion.



**Trap:**

The granting of an anti-SLAPP motion is a judgment for purposes of CCP § 577 and therefore starts the filing period under CCP § 904.1(a)(2) for appealing rulings on orders made after judgment [ *Melbostad v. Fisher* (2008) 165 CA4th 987, 996, 81 CR3d 354 ]. Counsel must therefore file appeals of any such orders within 60 days of the granting of the special motion to strike.

**Exceptions:**

- If any trial court denies an anti-SLAPP motion on the grounds that the action or cause of action is exempt pursuant to CCP § 425.17, the appeal provisions of CCP §§ 425.16(j) and 904.1(a)(13) do not apply [CCP § 425.17(e)]. Even where this provision applies, a party with valid grounds may still bring a writ petition [ *Goldstein v. Ralphs Grocery Co.* (2004) 122 CA4th 229 ].

- The appellate court may dismiss the appeal of the denial of an anti-SLAPP motion if the appeal is brought solely for purposes of delay [People ex rel. *Lockyer v. Brar* (2004) 115 CA4th 1315, 1318 ("appeal practically has the words 'brought for reasons of delay' virtually tattooed on its forehead")].

### 13.23[2] Determine the Standard of Review.

**13.23[2][a] Court Applies Independent Judgment Review to Decision on Motion.** When reviewing the granting of an anti-SLAPP motion to strike, the appellate court uses independent judgment to determine whether defendants acted in furtherance of their right of petition or free speech in connection with a public issue [ *Seelig v. Infinity Broad. Corp.* (2002) 97 CA4th 798, 806-807, 119 CR2d 108 ; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 CA4th 713, 721, 77 CR2d 1 ].

The defendant bears the burden of making the prima facie case as to the action involving free speech or petition rights, but when the burden is met, the appellate court then considers whether the plaintiff has produced sufficient admissible evidence to establish the probability of prevailing on the merits on every cause of action asserted [ *Navellier v. Sletten* (2003) 106 CA4th 763, 768, 131 CR2d 201 ; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 CA4th 713, 721, 77 CR2d 1 ].



#### Strategic Point:

If the trial court did not reach the issue of probability of the plaintiff's prevailing, but the issue was fully litigated in the trial court, the appellate court may choose to decide the issue if it finds grounds for reversing the trial court on the issue of protected activity and the issue was fully litigated before the trial court [see, e.g., *Booker v. Rountree* (2007) 155 CA4th 1366, 1371, 66 CR3d 733 ]. Counsel for plaintiff should therefore consider briefing and arguing the issue before the appellate court, and counsel for the defense should be prepared for that possibility.

The plaintiff may waive the right on appeal to establish a probability of prevailing on the merits [ *Raining Data Corp. v. Barrenechea* (2009) 175 CA4th 1363, 1372, 97 CR3d 196 (right waived)].

**13.23[2][b] Court Applies Abuse of Discretion Review to Evidentiary Rulings.** When reviewing the evidentiary rulings made pursuant to an anti-SLAPP motion to strike, the reviewing court applies the standard of abuse of discretion [ *Morrow v. Los Angeles Unified School Dist.* (2007) 149 CA4th 1424, 1440, 1444, 57 CR3d 885 ].

As it involves a trial court's assessment of an attorney's declaration, an appeal of a motion for attorney fees by the prevailing party is subject to the same standard of review [ *Christian Research Institute v. Alnor* (2008) 165 CA4th 1315, 1323, 81 CR3d 866 ].

### 13.23[3] Fees and Costs Pertaining to Appeal Are Recoverable.

**13.23[3][a] Defendant Prevailing on Appeal May Recover Reasonable Attorney Fees Incurred on Appeal.** A defendant who prevails on an anti-SLAPP motion to strike will recover attorney's fees and costs related to an appeal on the issue [ *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 CA4th 777, 785, 54 CR2d 830 ; *Church of Scientology of Cal. v. Wollersheim* (1996) 42 CA4th 628, 659, 49 CR2d 620 ].



#### Warning:

A defendant may recover fees reasonably incurred in connection with an appeal even when the plaintiff who initially appeals the granting of a special motion to strike against it does not pursue the appeal to a final determination [ *Wilkerson v. Sullivan* (2002) 99 CA4th 443, 448, 121 CR2d 275 ].

**Example:**

A post-judgment order awarding costs and attorney fees may include costs and fees for a challenge to an inadequate undertaking submitted to stay enforcement of an award of attorney fees under § 425.16(c) [ *Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 CA4th 15, 21, 45 CR3d 633 ].

**13.23[3][b] Plaintiff Prevailing on Appeal from Anti-SLAPP Motion May Recover Attorney Fees Under Certain Circumstances.** A plaintiff prevailing on the appeal of a trial court determination of an anti-SLAPP motion to strike may recover attorney fees if the defendant's anti-SLAPP motion was frivolous or filed only for purposes of delay [see *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 462-468, 59 CR3d 839 (plaintiff awarded fees incurred on appeal from frivolous motion)].

**13.23[3][c] Timing of Motion Depends on Whether Appeal Includes Final Judgment.** *Cal Rules Ct, Rule 3.1702* sets forth timing for seeking attorney fees by the prevailing party on appeal from judgment on an anti-SLAPP motion to strike [see *Cal Rules Ct, Rule 3.1702(a)*; *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 462-468, 59 CR3d 839 ].

**Distinguish:**

On the one hand, a motion for attorney fees under *CCP* § 425.16(c) made *before* trial court judgment for services up to and including the rendition of judgment in the trial court, including attorney's fees on an appeal before the rendition of judgment in the trial court, must be served and filed within the time for filing a notice of appeal under *Cal Rules Ct, Rules 8.104* and *8.108* [*Cal Rules Ct, Rule 3.1702(b)(1)*]. Under that rule, the deadlines in *Rules 8.104* and *8.108* apply from the entry of final judgment in the action, rather than from the determination on the anti-SLAPP motion, because "the rendition of judgment" means the signing and filing of the court's findings, conclusions, and final judgment in a case [ *Carpenter v. Jack in the Box Corp.* (2007) 151 CA4th 454, 466 and n.9, 468, 59 CR3d 839 (citing *Cal Rules Ct, Rule 3.1702(b)(1)* in finding motion filed before entry of judgment timely)]. On the other hand, notice of motion to claim attorney's fees incurred on other appeals must be served and filed within the time for serving and filing the memorandum of costs under *Cal Rules Ct, Rule 8.278(c)* [*Cal Rules Ct, Rule 3.1702(c)(1)*]. In either case, time for appeal may be extended by stipulation under specified conditions [*Cal Rules Ct, Rule 3.1702(b)(2), (c)(2)*].

**13.23[4] Decision on Request for Attorney Fees Not Subject to Appeal Before Judgment.** The plain meaning of the words used in *CCP* § 425.16(i) manifests the Legislature's intent to limit this exception to the one final judgment rule to allow the appeal of the court's ruling on the special motion to strike itself, not to make related, but ancillary, rulings or orders separately appealable, including rulings on requests for attorney fees by the prevailing party on an anti-SLAPP motion [ *Doe v. Luster*, 145 CA4th 139, 146, 150, 51 CR3d 403 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 13 Anti-SLAPP Motions  
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*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.23A*

**13.23A Automatic Stay Upon Perfection of Appeal from Denial of Anti-SLAPP Motion.**

Under *CCP* § 916(a), the perfecting of an appeal from the denial of a special motion to strike under *CCP* § 425.16 automatically stays all further trial court proceedings on the merits upon the causes of action affected by the anti-SLAPP motion. The appeal divests the trial court of subject matter jurisdiction over the matters embraced by the anti-SLAPP motion during the pendency of the appeal [ *Varian Medical Systems, Inc. v. Delfino* (2005) 35 C4th 180, 193-197 (new trial ordered)].

**Distinguish:**

Further proceedings on matters not subject to the anti-SLAPP motion are not stayed by the appeal [ *Varian Medical Systems, Inc. v. Delfino* (2005) 35 C4th 180, 195 ]. Specifically, matters that do not go to the merits of the causes of action subject to the motion to strike are not stayed [ *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 CA4th 1284, 1302, 50 CR3d 27 (granting of preliminary injunction did not go to merits of case)].

In addition, the appeal of the denial of a motion to strike on the grounds that a cause of action is exempt under *CCP* § 425.17 is not subject to the automatic stay [ *Varian Medical Systems, Inc. v. Delfino* (2005) 35 C4th 180, 195 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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**13.23B Obtaining Appellate Review of Decision on Anti-SLAPPback Motion.**

Upon entry of an order denying a special motion to strike a SLAPPback claim, or granting the special motion to strike as to some but less than all causes of action alleged in a complaint containing a SLAPPback claim, an aggrieved party may, within 20 days after service of a written notice of the entry of the order, petition an appropriate reviewing court for a peremptory writ [*CCP* § 425.18(*g*)].

The provision allowing the moving party to appeal the grant or denial of anti-SLAPP motions [*see CCP* § 425.16(*i*); *see also* 13.23[1]] do not apply to anti-SLAPPback motions [*CCP* § 425.18(*c*)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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Chapter 13 Anti-SLAPP Motions  
VI. FORMS

*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.24*

**13.24 Anti-SLAPP Motion to Strike--Motion and Notice of Hearing on Motion.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant,

)  
)  
) MOTION AND NOTICE OF HEARING FOR SPE-  
) CIAL MOTION TO STRIKE  
) \_\_\_\_\_ [specify, e.g., COMPLAINT  
) FOR INTERFERENCE WITH PROSPECTIVE  
) ECONOMIC ADVANTAGE][, SUPPORTING  
) \_\_\_\_\_ (AFFIDAVIT or DECLAR-  
) ATION) OF \_\_\_\_\_ (name), AND  
) SUPPORTING MEMORANDUM]  
) [Telephone Appearance]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon  
thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of]  
this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [



party, e.g., Defendant Mary Jones] will, and hereby does, move pursuant to *Code of Civil Procedure Section 425.16* for an order striking \_\_\_\_\_ [all or specify portions] of the \_\_\_\_\_ [specify, e.g., complaint or second cause of action], denominated as an action for \_\_\_\_\_ [specify, e.g., interference with prospective economic advantage]. The motion will be made on the ground that the cause(s) of action alleged against the defendant arise(s) from an act of defendant in furtherance of the defendant's right of \_\_\_\_\_ [specify, e.g., free speech] under the United States or California Constitution in connection with a public issue and that such right will be chilled if the \_\_\_\_\_ [specify, e.g., complaint or second cause of action] is allowed to stand and plaintiff is allowed to continue prosecuting it.

The motion will be based on this motion and notice of hearing, on the declaration(s) of \_\_\_\_\_ [names(s)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

#### NOTES.

#### Authority:

*CCP § 425.16(b)(1)*

#### Prerequisite to Motion:

*See 13.06*



#### Timing:

*See 13.05*

#### Drafting, Serving and Filing Motion:

*See 13.08, 13.09*

#### Related Form of Declaration:

*See 13.25*

#### Related Forms of Memoranda:

California Points and Authorities, §§ 160.39, 160.40, 160.70 (Matthew Bender)



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Chapter 13 Anti-SLAPP Motions  
VI. FORMS

*1-13 MB Practice Guide: CA Pretrial Civil Procedure 13.25*

**13.25 Anti-SLAPP Motion to Strike--Declaration in Support of Motion.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],  
Plaintiff,  
vs.  
\_\_\_\_\_[name],  
Defendant,

)  
) DECLARATION OF \_\_\_\_\_ [name]  
) IN SUPPORT OF DEFENDANT'S SPECIAL MO-  
) TION TO STRIKE \_\_\_\_\_ [specify,  
) e.g., COMPLAINT FOR INTERFERENCE WITH  
) PROSPECTIVE ECONOMIC ADVANTAGE]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

I, \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [declarant, e.g., Defendant Mary Jones] and hereby make this declaration in support of defendant's special motion to strike \_\_\_\_\_ [specify, e.g., complaint for interference with prospective economic advantage].

2. \_\_\_\_\_ [Here, and in subsequent paragraphs, set forth applicable facts to which declarant is competent to testify, or of which the court must take judicial notice, or of which the court may take judicial notice with request that it do so. If additional facts not within declarant's personal knowledge and not subject to judicial notice are

*required, secure from persons competent to testify to those facts additional declarations setting forth those facts, and attach those declarations to 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]

\_\_\_\_\_ [typed name]

NOTES.

**Authority:**

CCP § 425.16(b)(2)

**Related Form of Motion:**

See 13.24



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Chapter 14 Answers

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.syn*

**§ 14.syn Synopsis to Chapter 14: Answers**

14.01 Scope.

14.02 Objective and Strategy.

14.03 CHECKLIST: Responding to Complaint or Cross-Complaint.

14.04 Defendant May Move to Quash Service of Summons, to Stay or Dismiss for Inconvenient Forum, or to Dismiss for Delay in Prosecution Without Making a General Appearance.

14.05 Defendant May Object to Complaint by Answer or Demurrer.

14.06 Subject to Limited Exceptions, Objections Are Waived If Not Pleaded.

14.07 Answering Original Complaints and Cross-Complaints.

14.07[1] Distinguishing Civil Actions From Special Proceedings.

14.07[2] Complaints in Civil Actions Must Be Answered Within 30 Days of Service.

14.07[3] Cross-Complaints Must Be Answered Within 30 Days of Service.

14.07[4] Forcible Entry, Forcible Detainer, and Unlawful Detainer Complaints Must Be Answered Within Five Days of Service.

14.07[5] Trial Court Delay Reduction Act May Affect Answer Deadlines.

14.08 Answering Amended Complaints.

14.08[1] Most Amended Complaints Must Be Answered Within 30 Days of Service.

14.08[2] Amended Complaints in Forcible Entry, Forcible Detainer, and Unlawful Detainer Actions Must Be

Answered Within Five Days.

14.08[3] Trial Court Delay Reduction Act May Affect Deadlines for Answering Amended Complaints.

14.09 Filing Other Responses Affects Deadline for Answer.

14.09[1] Moving to Quash, Stay, or Dismiss Extends Time to Answer.

14.09[2] Filing Petition for Writ of Mandate Following Denial of CCP § 418.10 Motion Further Extends Time to Answer.

14.09[3] Filing Motion to Strike Extends Time to Answer.

14.09[4] Demurring to Complaint Extends Time to Answer.

14.09[5] Courts Allow Answer Following Overruling or Striking of Demurrer.

14.10 Computing Time to Answer.

14.11 Court May Extend Time to Answer or Allow Answer to Be Made Beyond Statutory Deadline.

14.12 CHECKLIST: Preparing the Answer: Form and Content.

14.13 Answer Must Contain Denials or New Matter to Raise Triable Issues.

14.14 Making General Denials.

14.14[1] General Denials May Be Used to Answer Unverified Complaints and, in Most Limited Civil Cases, Verified Complaints.

14.14[2] General Denials Controvert All Allegations, Put Material Allegations in Issue.

14.15 Making Specific Denials.

14.15[1] Verified Complaints in Unlimited Civil Cases Require Specific Denials.

14.15[2] Verified Complaints in Limited Civil Cases Usually Do Not Require Specific Denials.

14.15[3] Specific Denials Controvert Specific Allegations of Complaint.

14.15[4] Specific Denial That Fails to Controvert the Entire Allegation May Imply Admission.

14.16 Affirmative Allegations Can Constitute Denials.

14.17 Making Admissions.

14.17[1] Express Admissions Are Necessary Only If Making a Qualified General Denial.

14.17[2] Failing to Controvert Allegation Results in Admission.

14.18 Pleading Affirmative Defenses in the Answer.

14.18[1] Failure to Plead Affirmative Defenses Results in Waiver.

14.18[2] "New Matter" Stated in the Answer Constitutes Affirmative Defense.

14.18[3] Pleading Ultimate Facts Raises Affirmative Defense.

14.18[4] Defenses and Admissions May Be Inconsistent With Each Other But Must Be Internally Consistent.

14.18[5] Defenses Must Be Stated and Numbered Separately, and Refer to Cause of Action Answered.

14.19 Raising Specific Affirmative Defenses.

14.19[1] Commonly Asserted Affirmative Defenses.

14.19[2] Pleading Setoff As an Affirmative Defense.

14.19[3] When Setoff Is Not Allowed.

14.20 Answers Must Be Signed.

14.20[1] Attorney or Unrepresented Party Must Sign Answer.

14.20[2] Signature Certifies That Specific Conditions Have Been Met.

14.20[3] Violations of Conditions May Result in Sanctions.

14.21 Verifying Answers.

14.21[1] Verification Is Affidavit or Declaration Verifying Truth of Matters Stated in Answer.

14.21[2] Complaints Usually Do Not Require Verified Answers.

14.21[3] Verified Answer Is Required If Complaint Is Verified.

14.21[4] Person With Knowledge Verifies Answer.

14.21[5] Corporate Officer Verifies Corporation's Pleadings.

14.22 Elements Required in Answer.

14.23 Judicial Council Answer Forms Are Available but Not Required in Most Cases.

14.24 Answer Must Be Filed With Court and Served on Parties.

14.25 Defendants May Contest Complex Case Designation.

14.26 CHECKLIST: Responding to Answer.

14.27 Options and Strategies for Responding to Answer.

14.28 No Response Is Necessary, or Permitted, to Controvert New Matter Stated in Answer.

14.29 Party May Object to Answer by Demurrer.

14.30 Party May Move for Judgment on the Pleadings.

14.31 Party May Move to Strike Answer.

14.32 Party May Move for Summary Judgment.

14.33 Answer--Composite Format.

14.34 Judicial Council Form PLD-050-General Denial.

14.35 Specific Denials.

14.36 Express Admission of Certain Allegations of Cause of Action with General Denial of All Other Allegations.

14.37 Denial Combined With Affirmative Allegation.



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Chapter 14 Answers  
I. STRATEGY

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.01*

**14.01 Scope.**

This chapter covers:

- Objectives and strategies for responding to a complaint [see 14.04, 14.05].
- Ascertaining deadlines for serving and filing answers, including obtaining extensions of time and how other responses to a complaint may affect answer deadline [ see 14.07 -14.11].
- Elements that must/may be included in an answer (general and specific denials, affirmative defenses, objections, admissions) [ see 14.13 -14.19].
- Waiver of defenses [see 14.18[1]].
- Verifying answers and the signature requirement [see 14.20, 14.21].
- Filing and serving answers [see 14.24].
- Responding to answers [ see 14.26 -14.32].

Other ways to respond to a complaint or cross-complaint, other than by answering, are covered in detail elsewhere in this publication. These include:

- Motion for change of venue [see Ch. 6, Determining Forum].
- Application to proceed *in forma pauperis* [see Ch. 7, Complaints, 7.26[4]].
- Motion to quash service of summons for lack of personal jurisdiction [see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction].
- Motion to stay or dismiss for inconvenient forum [see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction].



- Demurrer [*see* Ch. 11, Demurrers and Motions for Judgment on the Pleadings].
- Motion to strike [*see* Ch. 12, Motions to Strike].
- SLAPP motion [*see* Ch. 13, Anti-SLAPP Motions].
- Cross-complaint [*see* Ch. 16, Cross-Complaints].
- Removal to federal court [*see* Ch. 17, Removal to Federal Court].
- Motion for sanctions, security, or restrictions on vexatious litigants [*see* Ch. 35, Sanctions].

**Core Statutes:**

*CCP §§ 431.10, 431.20, 431.30*



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Chapter 14 Answers  
I. STRATEGY

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.02*

**14.02 Objective and Strategy.**

Counsel for a defendant in a newly filed action should first consult the general checklists for pretrial action by defendants provided in Chapter 1, for an overview of possible avenues of response. For responses such as proposing or compelling arbitration [see Ch. 6, Determining Forum], offering to settle [see Ch. 37, Settlement and Release], seeking removal to federal court [see Ch. 17, Removal to Federal Court], or concerning a plaintiff who is a vexatious litigant [see 35.15A et seq.], consult the respective chapter, keeping in mind, where necessary, the deadline for filing an answer. For other responses, consult the checklist in 14.03 for details of possible courses of action.

If you are moving forward with a response discussed in this chapter, and your client would like to avoid the publicity that can come with the filing of an action, counsel should consider the chances of success in court of filing with the response a motion to seal sensitive portions of it (as well as the complaint and any subsequent filings), as well as a motion for a gag order, although in the latter case the courts rarely oblige.

➤ **Cross References:**

Discussion of sealing court records, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 2.11 et seq.

Discussion of gag orders, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 2.30 et seq.

An answer is a pleading filed by a defendant or cross-defendant in a civil action in response to a complaint or cross-complaint, which apprises the plaintiff of the defendant's or cross-defendant's position with respect to the allegations of the complaint [see CCP § 431.30(a), (b)]. In this chapter, all references to defendants include cross-defendants, and references to plaintiffs include cross-complainants, unless otherwise indicated [see CCP § 431.30(a)(2)].

The answer performs two essential functions; first, it serves as an appearance in the action, unless filed simultaneously with a motion to quash service of summons, stay or dismiss based on inconvenient forum, or dismiss based on delay in prosecution [CCP §§ 418.10(d), (e), 1014]. Appearing in a case entitles the defendant to notice of all subsequent proceedings for which notice must be given, as well as service of papers in the action [CCP § 1014].

Second, the answer raises the material issues of fact to be tried [see *Fuentes v. Tucker* (1947) 31 C2d 1, 4, 187 P2d 752 ]. For there to be triable issues in a case, the answer must controvert, either through general or specific denials, the material allegations of the complaint, and/or raise new matter constituting a defense to the claims asserted [see CCP § 431.30(b); see also *Fuentes v. Tucker* (1947) 31 C2d 1, 7, 187 P2d 752 ; *Amusing Sandwich, Inc. v. City of Palm Springs* (1985) 165 CA3d 1116, 1130, 211 CR 911 ]. Although fact issues are raised by the material allegations of the complaint, only those issues joined through a defendant's denials and affirmative defenses, set forth in the answer and deemed denied by the plaintiff, must be tried [see CCP § 431.20(b); *Carlton v. Superior Court* (1968) 261 CA2d 282, 289, 67 CR 568 ].

#### **Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 3, Abatement of Actions; Ch. 6, Accord and Satisfaction; Ch. 26, Answers; Ch. 345, Limitations of Actions; Ch. 380, Negligence; Ch. 425, Pretrial Proceedings; Ch. 492, Res Judicata (Matthew Bender).



#### **Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsAnswers



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Chapter 14 Answers

## II. RESPONDING TO COMPLAINT OR CROSS-COMPLAINT

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.03*

### 14.03 CHECKLIST: Responding to Complaint or Cross-Complaint.

☐ Determine when client was served with complaint, cross-complaint, or amended complaint.

☐ Obtain proof of service from client.

☐ Obtain complaint from client.

☐ Determine if motion to quash service of summons, to stay or dismiss for inconvenient forum or dismiss for delay in prosecution is appropriate.

**Authority:**

*CCP § 418.10(d), (e)*

**Discussion:**

*See 14.04*



**Timing:**

Motion(s) must be filed within 30 days after service of summons.

☐ Determine if objection to complaint should be brought by affirmative defense or demurrer.

**Authority:**

*CCP §§ 430.10, 430.30(a), (b), (c); Four Star Elec., Inc. v. F & H Constr. (1992) 7 CA4th 1375, 1379, 10 CR2d 1*

**Discussion:**

*See 14.05*

- ☐ Analyze relief requested, which dictates type of action.

**Authority:**

*CCP §§ 20, 21, 23, 25-30*

**Discussion:**

See 14.07[1]

- ☐ Determine timing of response to complaint.

- ☐ Answer original complaint in a civil action within 30 days after service of summons.

**Authority:**

*CCP § 412.20(a)(3)*

**Discussion:**

See 14.07[2]

- ☐ Answer cross-complaints within 30 days after service.

**Authority:**

*CCP § 432.10*

**Discussion:**

See 14.07[3]

- ☐ Answer forcible entry, forcible detainer, and unlawful detainer complaints within five days after service.

**Authority:**

*CCP § 1167*

**Discussion:**

See 14.07[4]

- ☐ Answer complaints in certain defamation actions within 20 days after service.

**Authority:**

See *CCP § 460.7(a)*; see also *CCP § 460.5(a)* (on application of plaintiff for good cause shown)

**Discussion:**

See 14.07[2]

- ☐ Determine procedural posture of case, the effect other responsive pleadings have on answer deadline, and develop strategy for responding to answer.

- ☐ If complaint has been amended, serve answer within 30 days after service of amendments or amended complaint, and if complaint has been amended "of course," serve answer within 30 days after

notice of amendment.

**Authority:**

*CCP §§ 471.5, 472*

**Discussion:**

See 14.08

- ☐ Determine if court has set specific time limit for responding to an amended complaint.

**Authority:**

See *CCP §§ 471.5, 472; Gov Code § 68600 et seq.*

**Discussion:**

See 14.08[3]

- ☐ Answer amended complaints in certain defamation actions within 10 days.

**Authority:**

*CCP §§ 460.5(b), 460.7(b), 586*

**Discussion:**

See 14.08[1]

- ☐ If defendant files a *CCP § 418.10* motion and it is denied, defendant must file answer, demurrer, or motion to strike 15 days after he or she is served with written notice of the entry of an order denying the motion.

**Authority:**

*CCP § 418.10(b)*

**Discussion:**

See 14.06[1]

☐ If defendant files a demurrer or motion to strike simultaneously with a *CCP § 418.10* motion, and all motions are denied, defendant must answer within 15 days after he or she is served with written notice of entry of order denying motions.

☐ Time to respond after *CCP § 418.10* motion may be extended by court for an additional 20 days upon a showing of good cause.

**Authority:**

*CCP § 418.10(b)*

**Discussion:**

See 14.09[1]

- ☐ Defendant may file petition for writ of mandate seeking appellate review of denial of *CCP §*

418.10 motion, which extends time to plead until 10 days after defendant is served with notice of final judgment in mandate proceeding.

☐ Time to plead may be extended by court for an additional 20 days upon a showing of good cause.

**Authority:**

*CCP § 418.10(c)*

**Discussion:**

*See 14.09[2]*

☐ Consider filing motion to strike which extends the time to answer until date set by court.

**Authority:**

*CCP § 435(c)*

**Discussion:**

*See 14.09[3]*

☐ Consider filing a demurrer. A demurrer to any cause of action within complaint extends deadline for answering entire complaint until at least 10 days after ruling on demurrer is made.

**Authority:**

*Cal Rules Ct, Rule 3.1320(j); CCP § 472a(b), (c)*

**Discussion:**

*See 14.09[4]*

☐ Consider moving to strike, demur, or otherwise plead to complaint or remaining causes of action within 10 days of:

☐ Overruling of demurrer to less than all causes of action;

☐ Amendment of complaint or expiration of time to do so if demurrer sustained with leave to amend;

or

☐ Sustaining of demurrer to less than all causes of action if demurrer was sustained without leave to amend.

**Authority:**

*Cal Rules Ct, Rule 3.1320(j)*

**Discussion:**

*See 14.09[4]*

☐ If no answer has been filed, following overruling of demurrer, answer complaint within 10 days.

**Authority:***Cal Rules Ct, Rule 3.1320(g)***Discussion:***See 14.09[5]*

- ☐ Compute date when answer (and/or other response) is due.
- ☐ Exclude day of service and include last day, unless it is a weekend or holiday.

**Authority:***CCP §§ 10, 12, 12a, 135***Discussion:***See 14.10*

- ☐ Calendar deadline for serving and filing answer (and/or other response).
- ☐ Check Local Rules of Court for jurisdiction's rules, which might allow extensions of time to answer.

**Authority:***Gov Code § 68600 et seq.***Discussion:***See 14.07[5]*

- ☐ Determine if verification of answer is required. If it is, allow sufficient time to obtain client's signature on verification.

**Authority:***CCP § 446***Discussion:***See 14.21*

- ☐ If unable to answer or otherwise respond to complaint by statutory deadline, try to obtain stipulation of the parties for extension of time, and/or seek enlargement or extension of time to answer from court.

**Authority:***CCP §§ 283(1), 473(a)(1), 1054***Discussion:***See 14.11*





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## II. RESPONDING TO COMPLAINT OR CROSS-COMPLAINT

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### **14.04 Defendant May Move to Quash Service of Summons, to Stay or Dismiss for Inconvenient Forum, or to Dismiss for Delay in Prosecution Without Making a General Appearance.**

A defendant may move to quash service of summons, to stay or dismiss an action on the grounds of inconvenient forum, or to dismiss for delay in prosecution, and simultaneously answer, demur, or move to strike the complaint, without being deemed to have made a general appearance until an order denying the motion is entered [*CCP* § 418.10(d), (e)].



#### **Warning:**

The failure to bring a *CCP* § 418.10 motion at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, defective summons, inadequacy of service of process, inconvenient forum, and delay in prosecution [*CCP* § 418.10(e)(3)]. A party wishing to contest personal jurisdiction, process, forum, or prosecution of the case based on delay should bring a *CCP* § 418.10 motion prior to, or simultaneously with, filing his or her answer [*see CCP* § 418.10(e)].



#### **Cross Reference:**

Discussion, see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Jurisdiction Personal Jurisdiction & In Rem Actions In Personam Actions Consent



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## II. RESPONDING TO COMPLAINT OR CROSS-COMPLAINT

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.05*

### **14.05 Defendant May Object to Complaint by Answer or Demurrer.**

A defendant responding to a complaint may make one or more of the following objections either as an affirmative defense in the answer, or by demurrer [CCP § 430.10]:

- Court does not have subject matter jurisdiction [CCP § 430.10(a)];
- Plaintiff lacks legal capacity to sue [CCP § 430.10(b)];
- Another action is pending between the same parties on the same cause of action [CCP § 430.10(c)];
- There is a defect or misjoinder of parties [CCP § 430.10(d)];
- Complaint does not state facts sufficient to constitute a cause of action [CCP § 430.10(e)];
- Complaint is uncertain (applies if complaint is ambiguous or unintelligible) [CCP § 430.10(f)];
- In an action founded on contract, it cannot be ascertained from the complaint whether the contract is written or oral, or whether it is implied by conduct [CCP § 430.10(g)];
- Certificate required by CCP § 411.35 (relating to actions against architects, engineers, or land surveyors) was not filed [CCP § 430.10(h)].

If the ground for objection does not appear on the face of the pleading, the objection may be taken by answer [CCP § 430.30(b)]. If the ground for objection appears from the face of the complaint, or from a matter of which the court must or may take judicial notice, the objection may be raised by demurrer [CCP § 430.30(a); *Four Star Elec., Inc. v. F & H Constr.* (1992) 7 CA4th 1375, 1379, 10 CR2d 1 ]. A party objecting to a complaint may demur and answer at the same time [CCP § 430.30(c)].



#### **Cross References:**

Discussion, see Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction; Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil  
ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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## II. RESPONDING TO COMPLAINT OR CROSS-COMPLAINT

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### **14.06 Subject to Limited Exceptions, Objections Are Waived If Not Pleased.**

If the defendant fails to object to the complaint, either by demurrer or answer, the party is deemed to have waived the objection, unless the objection is one of the following [*CCP* § 430.80(a)]:

- That the court has no jurisdiction over the subject of the cause of action alleged in the pleading; or
- That the pleading does not state facts sufficient to constitute a cause of action.

#### **Strategic Point:**



Even though the defenses may be raised later, it is advisable to raise all known objections to the complaint at the earliest stage possible in an attempt to obtain a judgment in your client's favor at the least expense.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Waiver & Preservation



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## II. RESPONDING TO COMPLAINT OR CROSS-COMPLAINT

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### **14.07 Answering Original Complaints and Cross-Complaints.**

**14.07[1] Distinguishing Civil Actions From Special Proceedings.** The two types of judicial remedies, "actions" and "special proceedings," are distinguished by the relief the parties are seeking [*see CCP §§ 20, 21*]. An "action" seeks the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense [*CCP § 22*]. *CCP §§ 307-1062.20* sets forth the procedural rules applicable to them.

A "special proceeding" exists when the parties seek any remedy other than those sought in an "action" [*CCP § 23*]. *CCP §§ 1063-1822.60* sets forth the procedural rules applicable to them. The time for responding to a complaint in a special proceeding is usually established in the statutes governing the specific type of proceeding [*see, e.g., CCP §§ 1167, 1167.3, 1170* (establishing answer deadline for forcible entry, forcible detainer, or unlawful detainer proceeding)].

**14.07[2] Complaints in Civil Actions Must Be Answered Within 30 Days of Service.** An answer to a complaint in a civil action must be served and filed on all parties who have appeared in the action within 30 days after service of summons [*see CCP §§ 412.20(a)(3), 1014*].

#### **Exception:**

In certain defamation actions involving candidates for public office, the defendant must respond to the complaint within 20 days after service of summons [*CCP § 460.7(a)*] and, in cases where continuing publication is alleged, the court may order the defendant, for good cause shown, to respond to the complaint within 20 days after service of summons [*CCP § 460.5*].

**14.07[3] Cross-Complaints Must Be Answered Within 30 Days of Service.** A party served with a cross-complaint in a civil action must, within 30 days after service, move, demur, or otherwise plead to the cross-complaint in the same manner as to an original complaint [*CCP § 432.10*].

**14.07[4] Forcible Entry, Forcible Detainer, and Unlawful Detainer Complaints Must Be Answered Within Five Days of Service.** Complaints alleging forcible entry, forcible detainer, or unlawful detainer must be answered within five days after service [*CCP § 1167*].

**14.07[5] Trial Court Delay Reduction Act May Affect Answer Deadlines.** Local delay reduction rules under the

Trial Court Delay Reduction Act [*Gov Code § 68600 et seq.*] can affect the date by which a party must respond to a complaint.

Local delay reduction rules may not require responsive pleadings to be filed less than 30 days after service of the complaint, the parties may stipulate to an additional 15 days to respond, and the courts may make exceptions for longer periods of time to respond [*Gov Code § 68616(b)*].

**Cross Reference:**

Discussion of service of summons, see Ch. 8, Service of Summons.

**Warning:**

The failure to answer or otherwise respond timely to the complaint within the statutory deadlines enables the plaintiff to seek an entry of default, and obtain judgment against the defendant [*CCP § 585(a)-(c)*]. Similarly, a failure to respond to a cross-complaint entitles the cross plaintiff to judgment [*CCP § 585(e)*], and a failure to file an answer after the court rules on a *CCP § 418.10* motion or dilatory pleas, such as demurrers and motions to strike, also may result in a default judgment against the defendant [*CCP § 586*].

**Cross Reference:**

Rules for obtaining relief from entry of default and default judgment, see Ch. 36, Defaults and Motions for Relief.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsAnswers



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Chapter 14 Answers

## II. RESPONDING TO COMPLAINT OR CROSS-COMPLAINT

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### 14.08 Answering Amended Complaints.

**14.08[1] Most Amended Complaints Must Be Answered Within 30 Days of Service.** An answer to an amended complaint in a civil action must be served and filed within 30 days after the amendments or complaint as amended is served, or such other time as the court may direct [*CCP* §§ 471.5, 586]. When a complaint is amended "of course," the time within which the defendant must respond is computed from the date of notice of the amendment [*CCP* § 472].

#### **Exception:**

In certain defamation actions, the time to respond to an amended complaint is 10 days [*CCP* §§ 460.7(b), 586]. Also, in any action where continuous defamatory publication is alleged, if the court shortened the time to respond to the original complaint to 20 days, the time to respond to amended complaint or amend answer is 10 days [*CCP* §§ 460.5(b), 586].

**14.08[2] Amended Complaints in Forcible Entry, Forcible Detainer, and Unlawful Detainer Actions Must Be Answered Within Five Days.** The time allowed for a defendant to respond to an amended complaint in an action for forcible entry or detainer, or for unlawful detainer, will not exceed five days, unless otherwise ordered on good cause shown [*CCP* § 1167.3].

**14.08[3] Trial Court Delay Reduction Act May Affect Deadlines for Answering Amended Complaints.** Local rules promulgated pursuant to the Trial Court Delay Reduction Act may affect the date by which a party must respond to an amended complaint [*see Gov Code* § 68616(b); *see, e.g.,* Los Angeles Super Ct Rules, Rule 7.7(b)].



#### **Cross Reference:**

Discussion of amended and supplemental pleadings, see Ch. 34, Amended and Supplemental Pleadings.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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## II. RESPONDING TO COMPLAINT OR CROSS-COMPLAINT

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### **14.09 Filing Other Responses Affects Deadline for Answer.**

**14.09[1] Moving to Quash, Stay, or Dismiss Extends Time to Answer.** Before or on a defendant's last day to plead, or within any additional time the court may allow for good cause, the defendant may serve and file a notice of motion to quash service of summons on the ground of lack of personal jurisdiction, which will extend the time to answer [CCP § 418.10(a)(1)]. A defendant also may file a notice of motion to stay or dismiss the action based on inconvenient forum [CCP § 418.10(a)(2)], or move to dismiss based on delay in prosecution [CCP § 418.10(a)(3)], to similar effect.

Bringing the 418.10 motion will extend the defendant's time to plead until 15 days after he or she is served with written notice of the entry of an order denying his or her motion unless, for good cause shown, the court extends the defendant's time to plead for an additional period not exceeding 20 days [CCP § 418.10(b)].

A defendant may bring the 418.10 motion simultaneously with filing an answer, demurrer, or motion to strike. In such a case, defendant will not be deemed to have made a general appearance until entry of a final order denying the 418.10 motion [CCP § 418.10(e)(1)].

**14.09[2] Filing Petition for Writ of Mandate Following Denial of CCP § 418.10 Motion Further Extends Time to Answer.** If a CCP § 418.10 motion is denied, within 10 days after the defendant is served with written notice of entry of the court's order, or within any additional time not exceeding 20 days which the court grants for good cause shown, the defendant may petition a reviewing court for a writ of mandate to require the trial court to quash the service of summons or stay or dismiss the action [CCP § 418.10(c)]. The defendant's service and filing of a notice of a petition for writ of mandate extends the time to plead until 10 days after he or she is served with written notice of the final judgment in the mandate proceeding [CCP § 418.10(c)].

**14.09[3] Filing Motion to Strike Extends Time to Answer.** If a defendant serves and files a notice of motion to strike without demurring to the complaint, the time to answer is extended and default may not be entered against that defendant, except as provided in CCP §§ 585 and 586 [CCP § 435(c)].

► **Cross Reference:**



Discussion of motions to strike, see Ch. 12, Motions to Strike.

**14.09[4] Demurring to Complaint Extends Time to Answer.** Filing a demurrer to any cause of action within the complaint obviates the need to answer the other causes of action alleged in the complaint until a ruling on the demurrer [*Cal Rules of Ct, Rule 3.1320(j)*]. Following a ruling on a demurrer, unless otherwise ordered, leave to answer within 10 days is deemed granted [*Cal Rules of Ct, Rule 3.1320(g)*].

**Exception:**

In actions for forcible entry or detainer, or unlawful detainer, five days' leave to answer is deemed granted following a ruling on a demurrer [*Cal Rules of Ct, Rule 3.1320(g)*].

When a demurrer has been made to fewer than all the causes of action alleged in a complaint, unless otherwise ordered by the court, the defendant has 10 days to move to strike, demur, or otherwise plead to the complaint or to the remaining causes of action after any of the following [*Cal Rules of Ct, Rule 3.1320(j)*]:

- Overruling of the demurrer;
- Amendment of the complaint or the expiration of the time to amend if the demurrer was sustained with leave to amend;
- Sustaining of the demurrer if the demurrer was sustained without leave to amend.

 **Cross Reference:**

Discussion of objections a defendant can make by answer or demurrer, see 14.05.

**14.09[5] Courts Allow Answer Following Overruling or Striking of Demurrer.** If the court overrules or strikes defendant's demurrer and no answer has been previously filed, the court will allow an answer to be filed on such terms as are just [*CCP § 472a(b), (c)*].

 **Cross Reference:**

Discussion of demurrers, see Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions



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### **14.10 Computing Time to Answer.**

The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or holiday, in which case it is also excluded and the period is extended to and includes the next day that is not a holiday [*CCP* §§ 10, 12, 12a, 12b, 135].



#### **Cross Reference:**

Discussion of computing time within which to perform an act, see Ch. 27, Service of Papers.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsTime LimitationsComputation



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## Chapter 14 Answers

## II. RESPONDING TO COMPLAINT OR CROSS-COMPLAINT

## 1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.11

**14.11 Court May Extend Time to Answer or Allow Answer to Be Made Beyond Statutory Deadline.**

The court may, in furtherance of justice and on such terms as may be proper, extend the time for an answer to be filed, or allow an answer to be made beyond the statutory deadline [*CCP* § 473(a)(1)].

Extensions of time may also be granted under *CCP* § 1054 (for good cause shown), *CCP* § 1054.1 (where attorney is member of California Legislature), or on the stipulation of the parties pursuant to *CCP* § 283(1) (authority of attorney to bind client).

**Warning:**

Local trial court delay reduction rules may limit or prescribe specific procedures for obtaining extensions of time to plead [*see Gov Code* § 68600 *et seq.*]. Such rules should be checked before assuming an extension or enlargement of time will be obtainable.

**Strategic Point:**

An ex parte application for extension of time to serve pleadings may be considered without a personal appearance of the applicant [*Cal Rules Ct, Rule 3.1207(2)*].

**Strategic Point:**

When stipulating to an extension of time in which the defendant may file an answer, specifying that the extension applies only to the filing of an answer and nothing else, or additional named motions or responses, can preclude the defendant from filing other motions [*see Olinick v. BMG Entertainment (2006) 138 CA4th 1286, 1295, 42 CR3d 268* (plaintiff's letter extending time for defendant "to answer or otherwise respond to Complaint" allowed motion for inconvenient forum that would have otherwise been untimely)].

**Cross References:**

Discussion of obtaining extensions of time, see Ch. 30, Continuances; see also Ch. 34, Amended and

Supplemental Pleadings.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensions



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Chapter 14 Answers

III. PREPARING THE ANSWER: FORM AND CONTENT

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.12*

**14.12 CHECKLIST: Preparing the Answer: Form and Content.**

☐ Determine whether to file general or specific denials to plaintiff's allegations considering:

☐ Use general denial to answer most unverified complaints.

**Authority:**

CCP § 431.30(d)

**Discussion:**

See 14.14[1]

☐ Cannot use general denial to answer verified complaint.

**Exception:**

General denial may be used to answer a verified complaint in a limited civil case that is not a third party collection claim.

**Authority:**

CCP § 431.30(d)

**Discussion:**

See 14.15[2]

☐ Must use Judicial Council Form PLD-050 (General Denial) if action in which demand for money or value of property at issue does not exceed \$1,000.

**Authority:**

CCP § 431.40(a); *Cal Rules Ct, Rule 1.31*

**Discussion:**

See 14.23

**Form:**

See 14.34

☐ May use Judicial Council Form PLD-050 (General Denial) if the complaint is not verified or the action is subject to economic litigation procedures in limited civil cases.

**Authority:**

CCP § 431.30(d)

**Form:**

See 14.34

☐ General denial will put only material allegations at issue.

**Authority:**

CCP § 431.30(b)(1), (d)

**Discussion:**

See 14.14[2]

☐ If making specific denials:

☐ Make specific denials:

☐ Positively, or

☐ According to information and belief; or

☐ By stating that defendant has insufficient information or belief to answer allegation.

**Authority:**

CCP § 431.30(b), (d), (e)

**Discussion:**

See 14.15

**Form:**

See 14.35

☐ Word specific denials carefully, avoiding implied admissions.

☐ Re-read allegation being denied; test all possible implications of language; make sure denial addresses full scope of allegation.

**Authority:**

*CCP § 431.20(a); see also Kennedy v. Rosecrans Gardens, Inc. (1952) 114 CA2d 87, 89, 249 P2d 593*

**Discussion:**

See 14.15[4]

☐ When appropriate, deny by affirmative allegation.

**Authority:**

*Burris v. People's Ditch Co. (1894) 104 C 248, 253, 37 P 922 ; Blume v. MacGregor (1944) 64 CA2d 244, 253, 148 P2d 656*

**Discussion:**

See 14.16

☐ Ensure that all allegations have been controverted by general or specific denial.

**Authority:**

*CCP § 431.20(a)*

**Discussion:**

See 14.14

☐ Raise new matter as needed.

☐ Evaluate whether issue sought to be raised is "new matter," i.e., issue relied on by defendant outside of complaint, rather than "controverting matter," which serves only to controvert an allegation of the complaint.

**Authority:**

*CCP § 431.30(b)(2); see also Walsh v. W. Valley Mission Cmty. Coll. Dist. (1998) 66 CA4th 1532, 1546, 78 CR2d 725*

**Discussion:**

See 14.18[2]

☐ Determine whether to raise new matter by demurrer or affirmative defense.

☐ Raise by demurrer if:

☐ Grounds exist as listed in *CCP § 430.10*.

☐ Grounds for objection appear on face of complaint or from matters subject to judicial notice.

☐ Raise as affirmative defense in answer if:

☐ Grounds listed in *CCP* § 430.10; and

☐ Ground for objection does not appear on face of complaint or from matter subject to judicial notice.

**Authority:**  
CCP § 430.10

**Discussion:**  
See 14.05, 14.19

☐ Assert affirmative defenses.

☐ Affirmative defenses which are not raised are waived.

**Authority:**  
*California Acad. of Scis. v. County of Fresno* (1987) 192 CA3d 1436, 1442, 238 CR 154

**Discussion:**  
See 14.18[1]

☐ Defenses may be inconsistent with each other but must be internally consistent.

**Authority:**  
*Allstate Ins. Co. v. Kim W.* (1984) 160 CA3d 326, 334, 206 CR 609

**Discussion:**  
See 14.18[4]

☐ State and number defenses separately, and refer to cause of action answered.

**Authority:**  
CCP § 431.30(g); *Cal Rules Ct, Rule 2.112*

**Discussion:**  
See 14.18[5]

☐ Determine whether defendant could claim setoff.

☐ Plaintiff has sued defendant.



☐ Plaintiff and defendant had cross demands for money at any point when neither claim was barred by limitations.

☐ Irrelevant that defendant's claim would be barred by statute of limitations if brought as separate action.

☐ Defendant's claim does not have to be liquidated.

**Authority:**  
CCP § 431.70

**Discussion:**

See 14.19[2]

☐ Setoff unavailable if:

☐ Defendant failed to raise earlier as compulsory cross-complaint;

☐ Money sought by setoff is exempt from execution; or

☐ Defendant is an employer seeking setoff from employee-plaintiff in employee's suit for unpaid wages.

**Authority:**

CCP § 431.70; *Kruger v. Wells Fargo Bank* (1974) 11 C3d 352, 367, 113 CR 449, 521 P2d 441 (exempt monies); *Barnhill v. Robert Saunders & Co.* (1981) 125 CA3d 1, 4-6, 177 CR 803 (employer's setoff claim)

**Discussion:**

See 14.19[3]

☐ Plead admissions if appropriate.

☐ Consider expressly admitting specific allegation(s) to preclude admission of potentially inflammatory or prejudicial evidence at trial.

**Authority:**

See CCP §§ 431.20(a), 431.30(f)

**Discussion:**

See 14.17[1]

**Form:**

See 14.36

☐ Consider using Judicial Council Answer forms.

☐ Available but not required for personal injury, property damage, wrongful death, contract, unlawful detainer actions.

☐ Required in cases not exceeding \$1,000.

**Authority:**

See *CCP* § 425.12; *Cal Rules Ct*, *Rules* 1.35, 1.45

**Discussion:**

See 14.23

☐ Draft answer and confirm all answer requirements are met.

☐ Answer must contain the following [*Cal Rules Ct*, *Rule* 2.100 *et seq.*]:

☐ Identification of attorney or party;

☐ Title of Court;

☐ Title of Case;

☐ Case number;

☐ Nature of paper;

☐ In any case having multiple parties, identification of complaining party and complaint being answered;

☐ Designation, if appropriate and filed in a unified court, as "Limited Civil Case";

☐ Introductory language (optional);

☐ Body, which should contain one or both of the following:

☐ At least one general or specific denial, or affirmative allegation controverting allegation(s) of complaint;

☐ Affirmative defenses to cause(s) of action;

☐ Signature by attorney or party (if unrepresented); and

- ☐ Verification in superior court action (if complaint is verified or verification is otherwise required).

**Authority:**

CCP §§ 92(b), 128.7, 422.30(b), 431.30(b), 446

**Discussion:**

See 14.22

 **Cross References:**

Format of citations to legal sources, see *Ch. 7, Complaints*, 7.06[9]. Exclusion or redaction of social security and financial account numbers from documents filed in the court's public file, see *Ch. 7, Complaints*, 7.06[10].

- ☐ Send answer to client for review and, if applicable, signature of verification.

**Authority:**

CCP §§ 128.7, 446

**Discussion:**

See 14.20, 14.21

- ☐ Sign answer and attach client verification if applicable.

- ☐ Attorney must sign answer unless party appears in pro per.
- ☐ Attorney may verify answer if client out of county or has sufficient information to verify answer.
- ☐ Verification of corporate defendant made by corporate officer.

**Authority:**

CCP §§ 128.7(a), 446

**Discussion:**

See 14.20, 14.21

**Form:**

See 14.33

- ☐ Avoid possibility of sanctions by ensuring that:

- ☐ Answer is not being presented for an improper purpose;
- ☐ Claims, defenses, and other legal contentions set forth in answer are warranted by existing law or by nonfrivolous argument for change of law;

- ☐ Evidentiary support exists for allegations and other factual contentions; and
- ☐ Denials of factual contentions are warranted on the evidence or on lack of information and belief.

**Authority:**

CCP § 128.7(b)

**Discussion:**

See 14.20[2], [3]

- ☐ Make complex case designation if appropriate (complete civil cover sheet).

☐ Defendant may contest plaintiff's complex case designation (or failure to so designate) by a counterdesignation.

**Authority:***Cal Rules Ct Rule 3.402(a), (b)***Discussion:**

See 14.25

- ☐ Serve answer on all parties in action, and file answer and proof of service with court.

**Authority:**

CCP § 465

**Discussion:**

See 14.24



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### III. PREPARING THE ANSWER: FORM AND CONTENT

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#### **14.13 Answer Must Contain Denials or New Matter to Raise Triable Issues.**

For there to be triable issues in a case, the answer must controvert, either by general or specific denials, the material allegations of the complaint, or raise new matter constituting a defense to the claims asserted [see *CCP* § 431.30(b); see also *Fuentes v. Tucker* (1947) 31 C2d 1, 7, 187 P2d 752 ].

Although fact issues are raised by the material allegations of the complaint, only those issues joined through a defendant's denials and affirmative defenses, set forth in the answer and deemed denied by the plaintiff, must be tried [see *CCP* § 431.20(b); *Carlton v. Superior Court* (1968) 261 CA2d 282, 289, 67 CR 568 ].

#### **Cross Reference:**

Form for answer, see 14.33, 14.34.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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III. PREPARING THE ANSWER: FORM AND CONTENT

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#### 14.14 Making General Denials.

**14.14[1] General Denials May Be Used to Answer Unverified Complaints and, in Most Limited Civil Cases, Verified Complaints.** Defendants may use general denials to answer unverified complaints and, in most limited civil cases, even verified complaints [CCP § 431.30(d)].

##### Exception:

Verified complaints in limited civil cases that involve third party collection claims must be answered "positively" or "according to information and belief" [CCP § 431.30(d)].

##### ➡ Cross References:

Discussion of limited versus unlimited civil actions, see Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction; see also Ch. 6, Determining Forum.

**14.14[2] General Denials Controvert All Allegations, Put Material Allegations in Issue.** A general denial controverts, usually in a single sentence, each and every allegation of the complaint [see CCP § 431.30(b)(1); *Advantec Group, Inc. v. Edwin's Plumbing Co., Inc.* (2007) 153 CA4th 621, 628, 63 CR3d 195 (statutorily required allegation of plaintiff's capacity is denied by general denial)].

However, a general denial puts in issue only the material allegations of the complaint [CCP § 431.30(d); see *FPI Dev. Inc. v. Nakashima* (1991) 231 CA3d 367, 383, 282 CR 508 (action for breach of promissory note)].



##### Warning:

In responding to unverified complaints or verified complaints in limited civil actions (other than third party collection claims), it is almost always preferable to make a general denial, rather than specific denials, of all of the allegations of the complaint. This avoids many of the pitfalls associated with specific denials, such as the hazardous task of restating the allegations of the complaint and ensuring that each one is denied specifically or generally, and the danger of phrasing a specific denial in such a way that it is deemed to contain an admission.

**Prerequisite:**

When the demand, exclusive of interest, or the value of the property in controversy does not exceed \$1,000, a defendant filing a general denial must use Judicial Council Form PLD-050. The form sets forth a general written denial and allows for a brief statement of any new matter constituting a defense [*CCP* § 431.40(a)].

**Cross Reference:**

Judicial Council Form PLD-050, see 14.34.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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III. PREPARING THE ANSWER: FORM AND CONTENT

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#### 14.15 Making Specific Denials.

**14.15[1] Verified Complaints in Unlimited Civil Cases Require Specific Denials.** In any unlimited civil case, a defendant must answer the allegations of a verified complaint with specific denials [*CCP* § 431.30(d)].



##### **Cross Reference:**

Form for specific denial, see 14.35.

**14.15[2] Verified Complaints in Limited Civil Cases Usually Do Not Require Specific Denials.** In limited civil cases, the answer usually may be made by general denial, even if the complaint is verified [*CCP* § 431.30(d)].

##### **Exception:**

If the cause of action asserted in a verified complaint is a third party collection claim, the allegations must be answered "positively" or "according to information and belief" [*CCP* § 431.30(d)].

**14.15[3] Specific Denials Controvert Specific Allegations of Complaint.** Specific denials identify specific allegations of the complaint that the defendant disputes [*see CCP* § 431.30(b)(1), (f), (g)], and positively, or according to information and belief, deny each allegation in turn [*CCP* § 431.30(d)]. If a defendant has insufficient information or belief to answer certain allegations, he or she may state his or her denials on that ground [*CCP* § 431.30(e)].

A defendant may deny the allegations in the following ways [*CCP* § 431.30(f)]:

- By denying paragraphs or specific parts of the complaint;
- By expressly admitting certain, enumerated allegations, and generally denying all allegations not so admitted;
- By denying certain, enumerated allegations on information and belief, and generally denying all allegations not so denied or expressly admitted; or
- By denying certain, enumerated allegations based on a lack of sufficient information or belief to



answer the allegations, and generally denying all allegations not so denied or expressly admitted.



**Warning:**

In making specific denials, it is extremely important to verify that all specific denials, including those being made contemporaneously with express admissions and/or general denials, accurately reference the paragraphs or parts of the complaint they are intended to answer. This can be done by thoroughly proofreading the answer, and will ensure that the defendant does not inadvertently admit or improperly deny allegations of the complaint.

**14.15[4] Specific Denial That Fails to Controvert the Entire Allegation May Imply Admission.** California courts have read specific denials to contain implied admissions when it was grammatically possible to do so, even when the defendants did not intend to make admissions [see, e.g., *Kennedy v. Rosecrans Gardens, Inc.* (1952) 114 CA2d 87, 89, 249 P2d 593 ]. The careless wording of a specific denial can be perilous, as such a denial might be held to contain a "negative pregnant," e.g., a denial implying its affirmative opposite by seeming to deny only a portion, rather than the entirety, of the allegation [see *Kennedy v. Rosecrans Gardens, Inc.* (1952) 114 CA2d 87, 89, 249 P2d 593 ].



**Warning:**

When drafting specific denials, it is advisable to address the substance, rather than the form of the allegations. For example, the statement, "Defendant denies that said allegation is true in manner and form as stated" is not a clear specific denial, and could be deemed an admission that the substance of the allegation is true.

**Examples:**

Examples of situations in which specific denials were deemed to contain implied admissions include:

- In response to plaintiff's allegation that the whole of certain property was necessary for a particular purpose, defendant answered that the whole of the property was not so needed. That was held to be an admission that a portion of the property was needed [ *Cal. Corrugated Culvert Co. v. Stewart* (1932) 215 C 120, 123, 8 P2d 1013 ].
- In response to plaintiff's allegation that defendant "made, executed, and delivered" a contract, defendant's response that he did not "make, execute, and deliver" the contract was held to be an admission that he did two of the three [ *Janeway & Carpenter v. Long Beach Paper & Paint Co.* (1922) 190 C 150, 153, 211 P 6 ]. This example of a conjunctive denial could have been fixed by denying that the defendant "made, executed, or delivered" the contract.
- Real party in interest ex-husband's answer denying that child was born as the "issue of" marriage, but not that he was the child's father, was a negative pregnant, impliedly admitting allegation of paternity [ *Craig v. Superior Court of Sacramento County* (1975) 45 CA3d 675, 119 CR 692, 696 (recognizing *Cal. Corrugated Culvert Co. v. Stewart* (1932) 215 C 120, 123, 8 P2d 1013 )].
- In response to plaintiff's allegation that defendant owed him \$1,000, defendant's specific denial stating that he did not owe plaintiff \$1,000 was held to be an admission that he owed plaintiff some sum other than \$1,000 [ *Kennedy v. Rosecrans Gardens, Inc.* (1952) 114 CA2d 87, 89, 249 P2d 593 ]. The admission could have been avoided by denying that defendant owed \$1,000 "or any other sum."
- Defendant's denial that debt in question was "wholly due and payable" was held to be an admission that all but a dollar of the debt in question was due and payable [ *Armer v. Dorton* (1942) 50 CA2d 413,

*415, 123 P2d 94 ; see also Conn. Mut. Life Ins. Co. v. Most (1940) 39 CA2d 634, 640, 103 P2d 1013 ].*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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#### **14.16 Affirmative Allegations Can Constitute Denials.**

In addition to general or specific denials, affirmative allegations made in the answer can controvert allegations of the complaint [see, e.g., *Blume v. MacGregor* (1944) 64 CA2d 244, 253, 148 P2d 656]. Any allegation in the answer that, if found to be true, necessarily shows that an allegation of the complaint as to the same matter is untrue, is sufficient as a denial [see, e.g., *Simoneau v. Pac. Elec. Ry. Co.* (1911) 159 C 494, 502, 115 P 320]. Examples include:

- Plaintiff's allegation that rail car was in city intersection disputed by answer stating rail car was in private right of way [ *Simoneau v. Pac. Elec. Ry. Co.* (1911) 159 C 494, 502, 115 P 320 ].
- Defendant's allegation that a ditch had not been widened or deepened contravened plaintiff's allegation of deepening and widening of ditch [ *Burris v. People's Ditch Co.* (1894) 104 C 248, 253, 37 P 922 ].
- Defendant's allegation that property parcels were located in block 22 rather than in Channel Street, as alleged by plaintiff, put location of property in issue [ *People ex rel. Bd. of State Harbor Comm'rs v. S. Pac. Co.* (1918) 177 C 555, 557, 171 P 294 ].
- Defendant's affirmative allegation of ownership of particular property equivalent to denial of plaintiff's allegation that plaintiff owned the property [ *Blume v. MacGregor* (1944) 64 CA2d 244, 253, 148 P2d 656 ; *Elliott v. Bertsch* (1943) 59 CA2d 543, 547, 139 P2d 332 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### III. PREPARING THE ANSWER: FORM AND CONTENT

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#### 14.17 Making Admissions.

**14.17[1] Express Admissions Are Necessary Only If Making a Qualified General Denial.** Unless defense counsel decides to couple an express admission of certain allegations with a general denial of all allegations not so admitted, there is usually no need to make an express admission [see *CCP* §§ 431.20(a), 431.30(f)]. However, one might do so in order to preclude the plaintiff from offering proof on the matter [see *Evid Code* §§ 210, 350].



#### Cross References:

Form for express admission of certain allegations with general denial of all others, see 14.36.

Form for denial with affirmative allegation, see 14.37.



#### Strategic Point:

When a defendant admits an allegation, plaintiff no longer has the obligation, or ability, to present evidence in support of the allegation at trial [see *Fuentes v. Tucker* (1947) 31 C2d 1, 7, 187 P2d 752 ; see also *Evid Code* §§ 210, 350]. Therefore, a defendant who wishes to preclude the plaintiff from presenting potentially inflammatory or prejudicial evidence on certain allegations should consider admitting the allegations [see *Lever v. Garoogian* (1974) 41 CA3d 37, 39, 115 CR 856 (evidence cannot be used to establish issue that parties have not made in pleadings)].

#### Exceptions:

The introduction of evidence even on admitted facts is permissible if the admission is ambiguous in form or limited in scope, or when, during trial, a party seeks to deprive his or her opponent of the legitimate force and effect of material evidence by the bald admission of a probative fact [ *Fuentes v. Tucker* (1947) 31 C2d 1, 7, 187 P2d 752 ].

**14.17[2] Failing to Controvert Allegation Results in Admission.** Allegations in a complaint may be admitted expressly or by the simple failure to controvert them [see *CCP* §§ 431.20(a), 431.30(f); see also *Fuentes v. Tucker* (1947) 31 C2d 1, 5, 187 P2d 752 ; *Amusing Sandwich, Inc. v. City of Palm Springs* (1985) 165 CA3d 1116, 1130, 211 CR 911 ]. Thereafter, barring any amendments to the pleadings, such allegations will be taken as true [CCP § 431.20].

**Warning:**

To avoid inadvertent admissions, after drafting the desired response for each allegation of the complaint, go through every allegation of each paragraph of the complaint again and, in setting forth denials and defenses, ensure that each is separately stated (except in the case of one general denial that encompasses a number of allegations), references accurately the allegation or cause of action it is intended to answer, and answers the entire scope of the allegation.

**Cross Reference:**

Discussion of rules for amending pleadings, Ch. 34, Amended and Supplemental Pleadings.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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#### 14.18 Pleading Affirmative Defenses in the Answer.

**14.18[1] Failure to Plead Affirmative Defenses Results in Waiver.** A party who fails to plead affirmative defenses waives them [ *Cal. Acad. of Scis. v. County of Fresno* (1987) 192 CA3d 1436, 1442, 238 CR 154 ].

##### Exceptions:

It is well-settled rule that a defense of illegality based on public policy is not waived by the defendant's failure to include it as an affirmative defense in the answer to the complaint [ *Yoo v. Robi* (2005) 126 CA4th 1089, 1103, 24 CR3d 740 ].

Unlike the related doctrine of res judicata, which precludes the relitigation of claims, collateral estoppel, which precludes the relitigation of issues, is not waived if it is not pleaded [ *Rodgers v. Sargent Controls & Aerospace* (2006) 136 CA4th 82, 88-89, 38 CR3d 528 ]

**14.18[2] "New Matter" Stated in the Answer Constitutes Affirmative Defense.** A defendant may raise "new matter" in his or her answer, which may constitute an affirmative defense to the plaintiff's claims [CCP § 431.30(b)(2)]. Whether something is a denial ("controverting matter"), rather than an affirmative defense ("new matter"), depends on whether it denies allegations of the complaint, or asserts the existence of a defense even if the plaintiff's allegations are true [see *Lever v. Garoogian* (1974) 41 CA3d 37, 39, 115 CR 856 ].

Facts that show the untruth of an essential allegation of the complaint constitute denials, not new matter [ *Bevill v. Zoura* (1994) 27 CA4th 694, 698, 32 CR2d 635 ].

##### Examples:

- A general denial of allegation claiming breach of contract put plaintiff's nonperformance under contract in issue, obviating the need to plead the defense as a new matter [ *Walsh v. W. Valley Mission Cmty. Coll. Dist.* (1998) 66 CA4th 1532, 1546, 78 CR2d 725 ].

- The defense of good faith reliance on advice of counsel is directed to an essential element of the plaintiff's insurance bad faith claim; it does not constitute new matter that must be specifically alleged [ *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 CA3d 721, 725, 279 CR 116 ].

Facts that indicate plaintiff had no cause of action at the time the action was brought, regardless of the truth of the complaint's allegations, constitute new matter [see, e.g., *W. Pipe & Steel Co. v. Tuolumne Gold Dredging Corp.* (1944) 63 CA2d 21, 27-28, 146 P2d 61 (defense of another pending action)]. "New matter" is also something relied on by the defendant that is not put in issue by the plaintiff [see *Goddard v. Fulton* (1863) 21 C 430, 436 ; *Four Star Elec., Inc. v. F & H Constr.* (1992) 7 CA4th 1375, 1382, 10 CR2d 1 ]; the answer may allege any new matter constituting a defense not otherwise disclosed by the pleadings [CCP § 431.30(b)(2); *Jetty v. Craco* (1954) 123 CA2d 876, 880, 267 P2d 1055 ].

**14.18[3] Pleading Ultimate Facts Raises Affirmative Defense.** Each affirmative defense should plead the ultimate facts that establish the defense such that, if the defense were admitted as pleaded, judgment would have to be for the defendant [see *Greiss v. State Inv. and Ins. Co.* (1893) 98 C 241, 244, 33 P 195 ; see also *California Packing Corp. v. Larsen* (1921) 187 C 610, 612, 203 P 102 ; *FPI Development, Inc. v. Nakashima* (1991) 231 CA3d 367, 384, 282 CR 508 ].

**14.18[4] Defenses and Admissions May Be Inconsistent With Each Other But Must Be Internally Consistent.** A defendant may set up as many defenses as he or she may have [CCP § 431.30(b)(2)]. The defendant may plead defenses that are inconsistent with each other, but each defense must be consistent in itself [ *Allstate Ins. Co. v. Kim W.* (1984) 160 CA3d 326, 334, 206 CR 609 ; *Poe v. Francis* (1933) 132 CA 330, 335, 22 P2d 801 ]. Each defense or response set forth in an answer will be considered separately, without regard to any other defense or response [ *Miller & Lux, Inc. v. San Joaquin Light & Power Corp.* (1932) 120 CA 589, 601, 8 P2d 560 ].

If one portion of an answer denies all allegations of the complaint, the plaintiff will be required to prove the material allegations of the complaint even if some were admitted in another portion of the answer [ *S. Shore Land Co. v. Petersen* (1964) 226 CA2d 725, 734, 38 CR 392 ]. A defendant may deny certain material allegations of the complaint and, in an affirmative defense, allege that the same allegations are true, yet the allegations in the affirmative defense will not constitute an admission of the truth of those allegations in the complaint [ *Edger v. Foster* (1941) 48 CA2d 580, 583, 120 P2d 134 ].



#### **Warning:**

When a defendant alleges facts in a pleading in one action, and those facts are inconsistent with a position taken by that party in a subsequent action, statements made in that party's pleading in the first action may be used against the defendant in the subsequent action as an admission against interest [see *Jones v. Tierney-Sinclair* (1945) 71 CA2d 366, 374, 162 P2d 669 (allegations in verified answer contrary to party's claim in subsequent action); *Fibreboard Paper Prods. Corp. v. E. Bay Union of Machinists* (1964) 227 CA2d 675, 711-712, 39 CR 64 (statements in unverified appeal board document admitted in subsequent action, as admissions against interest)].

**14.18[5] Defenses Must Be Stated and Numbered Separately, and Refer to Cause of Action Answered.** Defenses must be separately stated, separately numbered, and refer to the causes of action they are intended to answer, in a manner by which they may be intelligibly distinguished [ *Cal Rules of Ct, Rule 2.112* ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Pleading & Practice Pleadings Answers



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Chapter 14 Answers

III. PREPARING THE ANSWER: FORM AND CONTENT

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.19*

#### **14.19 Raising Specific Affirmative Defenses.**

**14.19[1] Commonly Asserted Affirmative Defenses.** Commonly asserted affirmative defenses include:

- Claim is barred for failure to raise as compulsory cross-complaint in prior related action [*CCP* §§ 426.10(c), 426.30].
- Related action is pending.
- Action is premature (failure to state a cause of action).
- Assumption of risk.
- Comparative negligence.
- Misjoinder or nonjoinder of a party or parties.
- Plaintiff lacks legal capacity to sue.
- Expiration of statute of limitations period.
- Accord and satisfaction.
- Duress or undue influence.
- Fraud or mistake.
- Res judicata.



**Warning:**



When raising the affirmative defense that the action is barred by the statute of limitations, the defendant must either state the specific section of the Code of Civil Procedure that establishes the limitations period or state the facts showing the defense [CCP § 458]. It is better practice to do both.

#### **Cross Reference:**

Table of Affirmative Defense Forms, California Forms of Pleading and Practice, Ch. 26, Answers, Appendix VI, § 26.150 et seq.

**14.19[2] Pleading Setoff As an Affirmative Defense.** If cross demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one of those persons, the defendant may assert the defense of payment, in that the two demands for payment are compensated to the extent that they equal each other [CCP § 431.70]. This defense is known as "setoff," and may be raised in the answer [CCP § 431.70]. In this context, a money judgment is considered a "demand for money" [CCP § 431.70].

A setoff claim may be raised by cross-complaint as well as by affirmative defense [see *American Nat'l Bank v. Stanfill* (1988) 205 CA3d 1089, 1097, 252 CR 861 ], and a defendant should plead his or her cross demand in a cross-complaint if [see CCP § 428.80]:

- The cross demand exceeds or might exceed the amount awarded the plaintiff; and
- The claim is not barred by the statute of limitations.

**14.19[3] When Setoff Is Not Allowed.** Setoff is not allowed when:

- The cross demand is barred for failure to raise it as a compulsory cross-complaint under CCP § 426.30 [CCP § 431.70];
- The money sought in the cross demand is exempt from execution [ *Kruger v. Wells Fargo Bank* (1974) 11 C3d 352, 367, 113 CR 449, 521 P2d 441 ];
- The cross recovery is sought from an employee when the employee brought suit for unpaid wages [ *Barnhill v. Robert Saunders & Co.* (1981) 125 CA3d 1, 4-6, 177 CR 803 ].

#### **Drawback:**

A defendant may only assert setoff to defeat all or part of the plaintiff's claim. Setoff under CCP § 431.70 cannot be used to obtain an award of affirmative relief against the plaintiff [ *Constr. Protective Servs., Inc. v. Tig Specialty Ins. Co.* (2002) 29 C4th 189, 197-198, 126 CR2d 908, 57 P3d 372 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview



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#### **14.20 Answers Must Be Signed.**

**14.20[1] Attorney or Unrepresented Party Must Sign Answer.** Every pleading must be signed by at least one attorney of record or, if the party is not represented by an attorney, by the party [CCP § 128.7(a)]. Every pleading must also state the signer's address and telephone number [CCP § 128.7(a)].

An unsigned pleading must be stricken unless the omission of the signature is corrected promptly after being called to the attorney's or party's attention [CCP § 128.7(a)].

**14.20[2] Signature Certifies That Specific Conditions Have Been Met.** An attorney's or party's signature on an answer constitutes a certification that:

- The answer is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in litigation costs [CCP § 128.7(b)(1)];
- The claims, defenses, and other legal contentions set forth in the answer are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law, or the establishment of new law [CCP § 128.7(b)(2)];
- There is evidentiary support for the allegations and other factual contentions or, if specifically so identified, the allegations and other factual contentions are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery [CCP § 128.7(b)(3)];
- 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)].

**14.20[3] Violations of Conditions May Result in Sanctions.** The court may, on its own motion or the motion of a party, impose sanctions under CCP § 128.7 if it appears the certification of any of the conditions is false, after the party is given an opportunity to withdraw or correct the challenged pleading [CCP § 128.7(c)].

➡ **Cross Reference:**

Discussion of sanctions, see Ch. 35, Sanctions.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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III. PREPARING THE ANSWER: FORM AND CONTENT

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#### 14.21 Verifying Answers.

**14.21[1] Verification Is Affidavit or Declaration Verifying Truth of Matters Stated in Answer.** Verification consists of an affidavit verifying the truth of the matters stated in the document to which the affidavit refers [*see Star Motor Imports, Inc. v. Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 ].

To verify an answer, the answering party must state in an affidavit that the content of the answer is true of his or her own knowledge, except where it is stated that matters are stated on information or belief, and as to those matters, the affiant believes them to be true [CCP § 446(a)].

A declaration, certified pursuant to [CCP § 2015.5], is typically used to verify a pleading.

#### ► Cross Reference:

Form of answer with verification, see 14.33.

**14.21[2] Complaints Usually Do Not Require Verified Answers.** Unless specifically required by statute, a complaint need not be verified and, if a complaint is not verified, the answer need not be verified [CCP § 446(a)].

#### Exception:

If the plaintiff is the state, a county, city, school district, district, public agency, or public corporation, or an officer of such an entity acting in his or her official capacity, the answer must be verified unless an admission of the truth of the complaint might subject the party to criminal prosecution, or if an officer of one of the listed entities is a defendant in his or her official capacity [CCP § 446(a)].

**14.21[3] Verified Answer Is Required If Complaint Is Verified.** If the complaint is verified and is filed in a superior court, the answer must be verified [*see CCP § 446(a)*].

#### Exception:

If the complaint is subject to CCP § 90 *et seq.*, which includes most limited civil cases, a verified answer is not required even if the complaint is verified [CCP § 92(b)], subject to certain narrow exceptions [*see CCP § 91(b), (c)*].

**14.21[4] Person With Knowledge Verifies Answer.** The affidavit or declaration verifying an answer must be made by the defendant or cross-defendant unless [CCP § 446(a)]:

- The defendant is absent from the county where defendant's attorney has his or her office;
- The defendant is otherwise unable to verify the answer; or
- The facts are within the knowledge of the defendant's attorney or other person making the verification.

When the pleading is verified by the attorney, or any person other than one of the parties, the affidavit must set forth the reasons why it is not made by one of the parties [CCP § 446(a)].

When the verification is made by the attorney because the party is absent from the county where the attorney has his or her office, or for some other reason is unable to verify the answer, the affidavit must state that the attorney has read the pleading and that he or she is informed and believes the matters therein to be true and on that ground alleges that the matters stated therein are true [CCP § 446(a)].

**14.21[5] Corporate Officer Verifies Corporation's Pleadings.** An officer of a corporation may verify the corporation's pleadings [CCP § 446(a)]. The officer's affidavit or declaration must state that he or she has read the pleading, that he or she is informed and believes the matters stated in the pleading to be true, and on that ground alleges that the matters stated therein are true [CCP § 446(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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Chapter 14 Answers

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#### **14.22 Elements Required in Answer.**

In answering a complaint, a defendant (or his or her attorney) should confirm that the answer includes the following elements [*Cal Rules Ct, Rule 2.100 et seq.*]:

- Identification of attorney or party;
- Title of court;
- Title of case;
- Case number;
- Nature of paper;
- In any case having multiple parties, identification of complaining party and complaint being answered;
- Designation, if appropriate and filed in a unified court, as "Limited Civil Case" [*CCP § 422.30(b)*];
- Introductory language (optional);
- Body, which should contain one or both of the following [*CCP § 431.30(b)*]:
  - ☐ At least one general or specific denial, or affirmative allegation controverting allegation(s) of complaint;
  - ☐ Affirmative defenses to cause(s) of action;
- Subscription by attorney or party (if unrepresented) [*CCP § 128.7*];

■ Verification in superior court action (if complaint is verified or verification is otherwise required) [CCP §§ 92(b), 446, 2015.5].

**Cross References:**

Format of citations to legal sources, see *Ch. 7, Complaints, 7.06[9]*. Exclusion or redaction of social security and financial account numbers from documents filed in the court's public file, see *Ch. 7, Complaints, 7.06[10]*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### III. PREPARING THE ANSWER: FORM AND CONTENT

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#### **14.23 Judicial Council Answer Forms Are Available but Not Required in Most Cases.**

The Judicial Council has approved preprinted answers, which may be used at the defendant's option [see *CCP* § 425.12; *Cal Rules Ct, Rules 1.35, 1.45*], in the following types of actions:

- Actions based on personal injury, property damage, or wrongful death [see Judicial Council Form PLD-PI-003].
- Actions on contracts [see Judicial Council Form PLD-C-010].
- Proceedings for unlawful detainer [see Judicial Council Form UD-105].



#### **Cross Reference:**

For fillable versions of these answers, see LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at [www.lexis.com/forms](http://www.lexis.com/forms).

#### **Exception:**

Judicial Council Form PLD-050 is required in any civil action in which the demand or value of property in controversy does not exceed \$1,000 [*CCP* § 431.40; *Cal Rules Ct, Rule 1.31*]. Form PLD-050 also may be used to file a general denial to an unverified complaint or if the action is subject to the economic litigation procedures in a limited civil case [*Cal Rules Ct, Rule 1.35; see 14.34*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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III. PREPARING THE ANSWER: FORM AND CONTENT

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**14.24 Answer Must Be Filed With Court and Served on Parties.**

All pleadings subsequent to the complaint must be filed with the clerk or judge, together with a proof of service unless a summons needs to be issued. In addition, copies must be served on the adverse party or his or her attorney, and other parties who have appeared in the action [*CCP* § 465; *see also CCP* §§ 1010-1020 and *Cal Rules Ct, Rules 2.100 et seq., 3.100 et seq.* (comprehensive rules for filing and serving papers)].



**Cross References:**

See Ch. 27, Service of Papers.

Discussion of filing in drop boxes at court offices, see *Ch. 26, Law and Motion Procedure*, 26.44[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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III. PREPARING THE ANSWER: FORM AND CONTENT

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#### **14.25 Defendants May Contest Complex Case Designation.**

If a plaintiff has indicated on the civil cover sheet mandated by *Cal Rules Ct, Rule 3.220* [Judicial Council Form CM-010] that the case is a complex case pursuant to *Cal Rules Ct, Rule 3.401*, the defendant may contest that designation, no later than its first appearance, by filing a counter civil case cover sheet designating the action as a non complex case [*Cal Rules Ct, Rule 3.402(a)*]. The court then determines whether the action is complex [*Cal Rules Ct, Rule 3.402*].

#### **Cross References:**

Discussion of complex cases, see *Ch. 23, Case Management, 23.12*.

Mandatory civil case cover sheet, see *Ch. 7, Complaints, 7.43*.



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**14.26 CHECKLIST: Responding to Answer.**

☐ Review answer, including new matter and controverting matter alleged by defendant.

☐ No response is required or permitted to controvert new matter presented by defendant.

**Authority:**  
CCP § 431.20(b)

**Discussion:**  
See 14.28

☐ Track responses to material allegations of the complaint and make note of any allegations not controverted either by denial or affirmative allegation(s).

**Authority:**  
CCP § 431.20(b)

**Discussion:**  
See 14.14

☐ Demur to answer if appropriate:

☐ Grounds:

☐ Answer does not state facts sufficient to constitute a defense;

☐ Answer is uncertain (*i.e.*, ambiguous or unintelligible); or

☐ Answer pleads a contract and it cannot be ascertained from the answer whether the contract is written or oral.

**Authority:**

CCP § 430.20

**Discussion:**

See 14.29

☐ Grounds must appear on face of answer or from matter subject to judicial notice.

**Authority:**

CCP § 430.30(a)

**Discussion:**

See 14.29

☐ Determine timing for demurrer.

☐ Demur within 10 days after answer is served.

**Authority:**

CCP § 430.40(b)

**Discussion:**

See 14.29

☐ Demur within 10 days after amended answer is served.

**Authority:**

CCP § 471.5(b)

**Discussion:**

See 14.29

☐ Failure to demur waives objection unless objection is that answer fails to state facts sufficient to state cause of action.

**Authority:**

CCP § 430.80(b)

**Discussion:**

See 14.29

☐ Bring motion for judgment on the pleadings, if appropriate:

☐ Grounds:

☐ Answer does not state facts sufficient to constitute a defense to the complaint.

**Authority:**

CCP § 438(c)(1)(A)

**Discussion:**

See 14.30

☐ Time to demur to answer has expired with no demurrer made, or a demurrer to the answer was previously overruled but there has been a material change in the law since the ruling on the demurrer.

**Authority:**

CCP § 438(f)(1), (g)

**Discussion:**

See 14.29

☐ File motion to strike answer, if appropriate:

☐ Grounds:

☐ Answer contains irrelevant, false or improper matter; or

☐ Answer is not drawn or filed in conformity with laws, court rules, or court orders.

☐ Grounds for motion must appear on face of answer or from matter of which court must or may take judicial notice.

**Exception:**

Motion to strike not allowed in limited civil cases except when damages or relief sought are not supported by the allegations of the complaint.

**Authority:**

CCP §§ 91, 92(d), 436, 437(a)

**Discussion:**

See 14.31

☐ File motion for summary judgment if there is no defense to action.

☐ 60 days must have elapsed since general appearance of defendant.

- ☐ Serve notice of motion and all supporting papers at least 75 days before hearing date.
- ☐ Motion must be heard no later than 30 days before date of trial, except by order of court for good cause shown.
- ☐ File other responsive pleading(s) as necessary, as filing motion does not extend time to plead.

**Authority:**

CCP § 437c(a)

**Discussion:**

See 14.32

- ☐ Seek extension of time to respond to answer if necessary.

**Authority:**

CCP §§ 1054, 1054.1

**Discussion:**

See 14.11



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**14.27 Options and Strategies for Responding to Answer.**

Scrutinize the contents of the answer and hold the defendant to the required pleading standards. Avoid waiver of issues by demurring or moving to strike inartful or sloppy pleading at the outset. This is the opportunity to get the defendant pinned down to his or her position and force the defendant's hand at the earliest possible time. Other responses such as moving for judgment on the pleading or for summary judgment occur later along the litigation time line, but review these statutes to avoid waiver of issues that could have been brought immediately after the filing of the answer.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsAnswers



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**14.28 No Response Is Necessary, or Permitted, to Controvert New Matter Stated in Answer.**

The statement of any new matter in the answer, in avoidance or constituting a defense in a civil action, is deemed controverted by the opposing party [CCP § 431.20(b); *Arciniega v. Bank of San Bernardino* (1997) 52 CA4th 213, 226, 60 CR2d 495 ]. A response to the answer is not necessary or permitted [CCP §§ 422.10, 431.20(b), 590(2)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsAnswers





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**14.29 Party May Object to Answer by Demurrer.**

A party against whom an answer has been filed may object to it by demurrer on any one or more of the following grounds [CCP § 430.20]:

- The answer does not state facts sufficient to constitute a defense;
- The answer is uncertain; "uncertain" includes ambiguous and unintelligible; or,
- When the answer pleads a contract, it cannot be ascertained from the answer whether the contract is written or oral.

A demurrer is proper, however, only when the ground for objection appears on the face of the answer or from any matter of which the court must or may take judicial notice [CCP § 430.30(a); see CCP § 430.20].

The demurrer may be to the whole answer or to any one or more of the several defenses set up in the answer [CCP § 430.50(b)]. The time for filing a demurrer to an amended answer is within 10 days of service [CCP §§ 471.5(b), 472]. If a party against whom an answer has been filed fails to demur to it, that party is deemed to have waived the objection unless the objection is that the answer does not state facts sufficient to constitute a defense [CCP § 430.80(b)].



**Timing:**

Demurrer must be filed within 10 days after service of the answer [CCP § 430.40(b)].



**Cross Reference:**

Discussion, see Ch. 11, Demurrers and Motions for Judgments on the Pleadings.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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**14.30 Party May Move for Judgment on the Pleadings.**

A party responding to an answer may move for judgment on the pleadings if the answer does not state facts sufficient to constitute a defense to the complaint [CCP § 438(c)]. The ground must appear on the face of the pleading or be subject to judicial notice [CCP § 438(d)]. A CCP § 438 motion may be made as to the entire answer, or as to one or more of the affirmative defenses set forth in the answer [CCP § 438(c)(2)(B)].

The objection that the answer fails to state facts sufficient to constitute a defense is not waived by failure to raise it by demurrer [see CCP § 430.80(b)], and plaintiff may move for a judgment on the pleadings after the defendant has answered if such a defect exists [see CCP § 438(g)(2); *MacIsaac v. Pozzo* (1945) 26 C2d 809, 812-813, 161 P2d 449 ].



**Timing:**

A party may bring a motion for judgment on the pleadings if the time to demur to the answer has expired with no demurrer having been made, or if a demurrer to the answer was previously overruled but there has been a material change in the law since the ruling on the demurrer [CCP § 438(f)(1), (g)]. Unless otherwise permitted by the court, a motion for judgment on the pleadings may not be brought if a pretrial conference has been ordered pursuant to CCP § 575, or within 30 days of the date the action is initially set for trial, whichever is later [CCP § 438(e)]. The court has discretion to accept a motion filed late without good cause [CCP § 438(e); *Burnett v. Chimney Sweep LLC* (2004) 123 CA4th 1057, 1063, 20 CR3d 562 ].



**Cross Reference:**

Discussion, see Ch. 11, Demurrers and Motions for Judgments on the Pleadings.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial JudgmentsJudgment on the Pleadings



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IV. RESPONDING TO ANSWER

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.31*

**14.31 Party May Move to Strike Answer.**

A party responding to an answer may move to strike all or part of the answer [CCP § 435(b)(1)]. The grounds for a motion to strike must appear from the face of the challenged pleading, or from matter subject to judicial notice [CCP §§ 437(a), (b)]. The notice of motion must specify a hearing date, set in accordance with CCP § 1005 [CCP § 435(b)(2)].



**Timing:**

A party may bring a motion to strike "within the time allowed to respond to a pleading" [CCP § 435(b)(1)]. Since the time for filing a demurrer to an answer is 10 days after service, the motion to strike limit is the same [CCP §§ 435(d), 430.40(b)].

The time limitation set forth in CCP § 435(b)(1) does not apply if the motion is to strike an untimely or otherwise improper amended pleading, filed after a motion for judgment on the pleadings has been granted under CCP § 438(i)(1)(A) [CCP § 435(b)(1), (e)].

**Exception:**

Motions to strike an answer are not allowed in limited civil cases except when damages or relief sought are not supported by the allegations of the complaint [CCP §§ 91, 92(d)].



**Cross Reference:**

See Ch. 12, Motions to Strike.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Strike General Overview



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IV. RESPONDING TO ANSWER

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**14.32 Party May Move for Summary Judgment.**

Plaintiff may move for summary judgment on the grounds no material fact is in dispute and there is no defense to the action [CCP § 437c(a)].



**Timing:**

The plaintiff may move for summary judgment once 60 days have elapsed after the defendant's general appearance, or at any earlier time following such appearances as the court may direct on good cause shown [CCP § 437c(a)]. The notice of motion and supporting papers must be served on all parties at least 75 days before the appointed hearing date, and additional notice may be required depending on the method of service [CCP § 437c(a)]. The motion must be heard no later than 30 days before the date of trial unless the court orders otherwise for good cause [CCP § 437c(a)]. The filing of the motion will not extend the time within which a party must otherwise file a responsive pleading [CCP § 437c(a)].



**Cross Reference:**

Forms and procedure, see Ch. 38, Summary Judgment.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral Overview



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V. FORMS

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.33*

**14.33 Answer--Composite Format.**

Jane Lee (Bar Number 123456)  
50 South Main St., Suite 100  
Farallon City, California 90000  
Phone 555-999-9999  
Attorney for Defendant  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF FARALLON

|             |   |                                     |
|-------------|---|-------------------------------------|
| John Smith, | ) |                                     |
| Plaintiff,  | ) | No. 1232456                         |
| vs.         | ) | ANSWER [see below for alternatives] |
| Mary Jones, | ) | [LIMITED CIVIL CASE]                |
| Defendant   | ) | Judge: Hon. Henry Higgins           |
|             | ) | Department: _____                   |
|             | ) |                                     |

---

[Use any of the following titles for the nature of the paper, as appropriate]  
ANSWER OF DEFENDANT MARY JONES TO COMPLAINT OF JOHN SMITH

[or]

ANSWER OF DEFENDANT MARY JONES

[or]

ANSWER OF DEFENDANTS MARY JONES and STEVE JONES

[or]

ANSWER TO CROSS-COMPLAINT

[or]

ANSWER TO AMENDED COMPLAINT

[or]

AMENDED ANSWER TO [SECOND or THIRD, etc.] AMENDED COMPLAINT

*[Continue with the introduction as follows]*

Defendant answers the complaint herein as follows:

*[or for two or more defendants]*

Defendants answer the complaint herein as follows:

*[or for one of multiple defendants]*

Defendant Mary Jones answers the complaint as follows:

*[or when defendant is sued under incorrect name]*

Defendant Mary Jones, sued herein as Mary Joens, answers the complaint as follows:

*[or for corporation]*

Defendant Jones, Inc., a California [or other state] corporation, answers the complaint herein as follows:

*[or for minor]*

Defendant, a minor under the age of 18 years, by Gillian A. Leiter, her guardian ad litem, answers the complaint herein as follows:

*[or for incompetent]*

Defendant Mary Jones, an incompetent person, by Gillian A. Leiter, his guardian ad litem [or guardian], answers the complaint herein as follows:

*[or for decedent's representative]*

Defendant John Smith, as executor of the will of Mary Jones [or administrator of the estate of Mary Jones or administrator with the will annexed of the estate of Mary Jones or special administrator of the estate of Mary Jones] deceased, [and individually,] answers the complaint herein as follows:

*[or for assignee]*

Defendant Mary Jones, as assignee [for the benefit of the creditors] of Deborah Danforth, answers the complaint herein as follows:

*[Continue with the body of the answer]*

*[If complaint contains sections so titled]*

#### [GENERAL ALLEGATIONS]

1. \_\_\_\_\_ *[Set forth in this and subsequently numbered paragraphs, if any, in the order in which they are alleged, a denial of each material allegation controverted].*

2. \_\_\_\_\_ *[Denials or admissions as above].*

*[If complaint state separate causes of action]*

#### [FIRST CAUSE OF ACTION]

3. \_\_\_\_\_ *[If paragraph incorporates by reference general allegations, state, e.g., Defendant incorporates herein by reference its responses to paragraphs 1 through 2, above].*

4. \_\_\_\_\_ *[Denials or admissions as above].*

5. \_\_\_\_\_ *[Denials or admissions as above].*

*[If complaint state multiple causes of action]*

#### [SECOND CAUSE OF ACTION]

6. \_\_\_\_\_ *[If paragraph incorporates by reference general allegations and allegations of first cause of action, state, e.g., Defendant incorporates herein by reference its responses to paragraphs 1 through 5, above].*

#### AFFIRMATIVE DEFENSES

##### FIRST AFFIRMATIVE DEFENSE

1. \_\_\_\_\_ *[Set forth in this and, if necessary, subsequently numbered paragraphs the defense(s) and, if necessary, the facts establishing the defense(s), e.g., The complaint and each of its causes of action are barred by the statute of limitations of Code of Civil Procedure Section 335.1 in that an action on personal injury must be brought within two years of the wrongful act or neglect of another, and the date this action was filed is more than two years from the date of the alleged wrongful act or neglect stated on the face of plaintiff's complaint].*

##### SECOND AFFIRMATIVE DEFENSE

*[If affirmative defense applies to one or more but not all causes of action of the complaint]*

2. \_\_\_\_\_ *[Set forth in this and, if necessary, subsequently numbered paragraphs the defense(s) to a specific cause of action and, if necessary, the facts establishing it].*

*[Continue with the prayer]*

WHEREFORE, defendant prays as follows:

1. That plaintiff take nothing by his/her complaint herein;
2. For reasonable attorney's fees;
3. For costs of suit; and;
4. For such other and further relief as the court deems proper.

Dated: \_\_\_\_\_

Lee & Roe, LLP

By: \_\_\_\_\_ *[signature]*

Jane Lee

Attorney for Defendant Mary Jones

*[Continue with the verification, if appropriate]*

#### VERIFICATION

I, \_\_\_\_\_ *[name]*, declare that I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ *[signature]*

NOTES.

#### **Authority:**

*CCP §§ 431.10-431.30, 446, 2015.5*





**Timing:**

See *14.03 -14.11*

**Related Forms:**

See *14.35, 14.36, 14.37*



**Cross References:**

Using general denials, see *14.14*

Raising affirmative defenses, see *14.18*

Format generally, see *14.20 -14.23*

Signature requirement, see *14.20*

Verification, see *14.21*



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Chapter 14 Answers  
V. FORMS

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.34*

**14.34 Judicial Council Form PLD-050-General Denial.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*CCP § 431.30(b); Cal Rules Ct, Rules 1.31, 1.35, 1.45*

**Discussion:**

*See 14.14[2], 14.23*



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Chapter 14 Answers  
V. FORMS

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.35*

**14.35 Specific Denials.**

*[Specific denial of plaintiff's corporate status]*

Defendant denies that the plaintiff was, or is, a corporation as alleged in Paragraph \_\_\_\_\_ of the complaint or at all.

*[OR specific denial by reference to specific paragraph of complaint]*

Defendant denies each and every allegation of Paragraph \_\_\_\_\_ of the complaint.

*[OR specific denial by reference to specific paragraph of complaint--on information and belief]*

Defendant denies on information and belief each and every allegation of Paragraph \_\_\_\_\_ of the complaint herein.

*[OR specific denial by reference to specific paragraph of complaint--lack of information or belief]*

Defendant has no information or belief sufficient to enable him/her to answer the allegations of Paragraph \_\_\_\_\_ of the complaint herein, and basing his/her denial on that ground, denies each and every allegation thereof.

NOTES.

**Authority:**

*CCP § 431.30(b)*



**Timing:**

*See 14.03 -14.11*

**Drafting specific denials:**

*See 14.15*



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Chapter 14 Answers  
V. FORMS

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.36*

**14.36 Express Admission of Certain Allegations of Cause of Action with General Denial of All Other Allegations.**

Defendant denies each and every allegation set forth in the first cause of action of the complaint, except that he/she admits that [*state nature of admission, e.g., he was the owner of the 2001 Ford automobile, VIN 123XYZ456 at the time specified in the complaint*].

NOTES.

**Authority:**

CCP §§ 431.20(a), 431.30(f); see also *Fuentes v. Tucker* (1947) 31 C2d 1, 5, 187 P2d 752



**Timing:**

See 14.03 -14.11



**Cross Reference:**

Drafting express admission with general denial, see 14.14, 14.15



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Chapter 14 Answers  
V. FORMS

*1-14 MB Practice Guide: CA Pretrial Civil Procedure 14.37*

**14.37 Denial Combined With Affirmative Allegation.**

Defendant denies each and every, plural and singular, allegation contained in Paragraph \_\_\_\_\_ of the complaint, and in this connection, defendant affirmatively alleges \_\_\_\_\_ [state nature of affirmative allegation, e.g., that defendant held both legal and equitable title to the real property in question].

NOTES.

**Authority:**

*Burris v. People's Ditch Co. (1894) 104 C 248, 253, 37 P 922 ; Blume v. MacGregor (1944) 64 CA2d 244, 253, 148 P2d 656 ; People ex rel. Board of State Harbor Comsrs. v. Southern Pacific Company (1918) 177 C 555, 557, 171 P 294*



**Timing:**

See 14.03 -14.11



**Cross Reference:**

Drafting denial by affirmative allegation, see 14.16



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Chapter 15 Reclassification of Cases

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.syn*

**§ 15.syn Synopsis to Chapter 15: Reclassification of Cases**

15.01 Scope.

15.02 Objective and Strategy.

15.03 CHECKLIST: Determining Appropriate Classification.

15.04 Case May Be Classified As Limited Civil Case or Unlimited Civil Case.

15.05 Limited Civil Cases Involve \$25,000 or Less and Not All Types of Relief Are Available.

15.05[1] Limited Civil Cases Are Determined by Amount in Controversy, Relief Sought, and Type of Action.

15.05[2] Amount in Controversy Is Limited to \$25,000, Exclusive of Attorneys' Fees, Interest, and Costs.

15.05[2][a] Prayer of Complaint Is Relevant in Assessing Amount in Controversy.

15.05[2][b] Court May Hold Pretrial Hearing to Determine Amount in Controversy.

15.05[3] Actions Which May Qualify As Limited Civil Cases.

15.05[3][a] Cases at Law With Demand or Property Value in Controversy of \$25,000 or Less Are Generally Limited Civil Cases.

15.05[3][b] Dissolution of Partnership May Qualify If Assets Do Not Exceed \$25,000.

15.05[3][c] Interpleader Actions Are Limited Civil Cases If Money or Property Is \$25,000 or Less.

15.05[3][d] Actions to Cancel, Rescind, or Revise Contract Are Limited Civil Cases If \$25,000 or Less.

15.05[3][e] Eviction Actions Qualify If Damages Do Not Exceed \$25,000.

15.05[3][f] Actions for Enforcement of Personal Property Liens Which Are \$25,000 or Less Are Limited Civil Actions.

15.05[3][g] Actions for Enforcement of Mechanics' Liens and Similar Liens Are Limited Civil Cases As Long As Aggregate Claims Are \$25,000 or Less.

15.05[3][h] Declaratory Relief May Be Available Under Limited Circumstances.

15.05[3][i] Court in Limited Civil Cases May Grant TROs, Preliminary Injunctive Relief and Accountings, and Appoint Receivers.

15.05[3][j] Court May Determine Title to Personal Property Seized in Limited Civil Cases.

15.05[3][k] Creditors' Suits Are Limited Civil Cases If Property or Interest Is Less Than \$25,000.

15.05[3][l] Arbitration-Related Petitions Are Limited Civil Cases Under Defined Conditions.

15.05[3][m] Long-Term Health Care Cases Qualify If Amount Does Not Exceed \$25,000.

15.05[3][n] Certain Cases in Equity Qualify As Limited Civil Cases.

15.05[4] Relief Sought Must Be Described by Statutes Which Classify Action As Limited Civil Case.

15.06 Unlimited Civil Cases Are Those That Do Not Match Criteria for Limited Civil Cases.

15.06[1] Unlimited Civil Case Is Case Other Than Limited Civil Case.

15.06[2] Cases Which Request Relief in Excess of \$25,000 Are Unlimited Civil Cases.

15.06[3] Permanent Injunctive Relief May Only Be Granted With Unlimited Civil Case.

15.06[4] Only Unlimited Civil Case May Determine Title to Real Property.

15.06[5] [Reserved].

15.06[6] Declaratory Relief May Be Granted Through Unlimited Civil Case.

15.07 CHECKLIST: Obtaining Reclassification.

15.07[1] Plaintiff's Checklist for Obtaining Reclassification.

15.07[2] Defendant's Checklist for Obtaining Reclassification.

15.08 Options and Strategies for Seeking Appropriate Classification.

15.08[1] Plaintiff's Options and Strategies.

15.08[2] Defendant's Options and Strategies.

15.09 Plaintiff Classifies Case in Initial Pleading.



#### 15.10 Plaintiff May Reclassify Case.

15.10[1] Case May Be Reclassified by Amending Initial Pleading.

15.10[2] Plaintiff May Bring Motion to Reclassify.

15.10[3] Right to Amend Pleadings Is Not Affected.

#### 15.11 Parties May Stipulate to Reclassification.

15.11[1] Stipulation Must Occur Within Time for Responding to Initial Pleading.

15.11[2] Title of Stipulation Must Indicate Reclassification.

15.11[3] Fee Is Required If Case Is Reclassified As Unlimited Civil Case.

#### 15.12 Filing Cross-Complaint May Reclassify Case.

15.12[1] Cross-Complaint May Reclassify Limited Civil Case to Unlimited Civil Case.

15.12[2] Cross-Complainant Must Pay Reclassification Fee.

15.12[3] Right to Amend Pleadings Is Not Affected.

#### 15.13 Defendant May Move for Reclassification.

15.13[1] Motion May Be Filed Within Time to Respond to Initial Pleading.

15.13[1][a] Motion Is Mandatory If It Is Timely.

15.13[1][b] Motion Does Not Extend Time to Respond.

15.13[1][c] Motion Constitutes Appearance.

15.13[2] If Motion Filed After Expiration of Time to Respond to Initial Pleading, Ruling Is Not Mandatory.

#### 15.14 Court May Reclassify Case on Own Motion.

15.14[1] Court May Act at Any Time.

15.14[2] Court Must Give Parties Notice and Opportunity to Be Heard.

15.15 Case May Continue as Limited Civil Case if Amount in Excess of Jurisdiction Is Remitted.

#### 15.16 Costs and Fees Are Due on Reclassification.

15.16[1] Reclassification Fee Is Usually Due When Case Is Reclassified As Unlimited.

15.16[2] No Fee Is Required When Case Is Reclassified As Limited.

15.16[3] Party Responsible for Reclassification Must Pay Fee.

15.17 Failure to Pay Reclassification Fee Results in Dismissal.

15.17[1] No Further Action Permitted Until Reclassification Fee Is Paid.

15.17[2] If Reclassification Fee Is Not Paid in 30 Days, Court May Dismiss Case.

15.18 CHECKLIST: Obtaining Appellate Review of Order Granting or Denying Reclassification.

15.19 Appellate Review of Order Granting or Denying Reclassification.

15.19[1] Petition for Writ of Mandate May Be Filed by Aggrieved Party.

15.19[2] Petition Must Be Filed Within 20 Days After Service of Order of Reclassification.

15.19[3] Court of Appeal May Stay Proceedings Pending Decision.

15.20 Notice of Motion and Motion to Reclassify Case Within Time Allowed for Responding to Initial Pleading.

15.21 Notice of Motion and Motion to Reclassify Case After Time to Amend or Respond to Initial Pleading.

15.22 Order Granting Motion to Reclassify.



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Chapter 15 Reclassification of Cases  
I. STRATEGY

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.01*

**15.01 Scope.**

This chapter covers:

- Objectives and strategy for reclassifying actions [*see 15.02*].
- How to determine the proper classification of a case [*see 15.05, 15.06*].
- Proper classification of a case in the initial pleading [*see 15.09*].
- Reclassification of a case by the plaintiff [*see 15.10*; Forms: *see 15.20, 15.21*].
- Reclassification of a case by stipulation of the parties [*see 15.11*].
- Reclassification of a case by filing a cross-complaint [*see 15.12*].
- Reclassification of a case by the defendant [*see 15.13*; Forms: *see 15.20, 15.21*].
- Costs and fees due on reclassification, and the consequences of failure to pay costs and fees [*see 15.16, 15.17*].
- Appellate review of an order granting or denying reclassification [*see 15.19*].

**Core Statutes:**

*CCP §§ 85, 86, 580, 403.010-403.090*



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Chapter 15 Reclassification of Cases  
I. STRATEGY

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.02*

**15.02 Objective and Strategy.**

The jurisdictional classification of a case means its classification as a limited civil case or an unlimited civil case [*CCP* § 32.5].

Limited civil cases have abridged pleading, discovery, and evidentiary procedures relative to unlimited civil cases [*see CCP* §§ 90-100]. Therefore, limited civil cases are less expensive to pursue and may be resolved more quickly than unlimited civil cases. However, recovery in a limited civil case is generally limited to \$25,000, and the abridged pleading, discovery, and evidentiary procedures may not be well-suited to complex issues. It is important to determine the proper classification of a case at the outset. If the plaintiff does not properly classify the case in the initial pleading, reclassification will be required.

**Detailed Discussion/Forms:**

See California Points and Authorities, Ch. 133, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).



**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in Controversy



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Chapter 15 Reclassification of Cases  
II. DETERMINING APPROPRIATE CLASSIFICATION

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.03*

**15.03 CHECKLIST: Determining Appropriate Classification.**

☐ Determine classification as either limited or unlimited; case is unlimited unless it falls within criteria for limited civil case, which are:

☐ Amount in controversy is limited to \$25,000.

☐ Relief sought is type that may be recovered in limited civil case, which does not include:

☐ Permanent injunctive relief, except as otherwise authorized by statute.

☐ Determination of title to real property.

☐ Declaratory relief, except as provided in *CCP* § 86.

☐ Relief sought is described by statutes classifying action as limited civil case.

**Authority:**

*CCP* §§ 85, 86, 88, 580(b)

**Discussion:**

See 15.05, 15.05[3][h], 15.06

**Exception:**

Declaratory relief may be granted in limited civil cases in certain situations [*CCP* § 86(a)(7)].

☐ In determining value of case, exclude from \$25,000 determination:

- ☐ Attorneys' fees.
- ☐ Interest.
- ☐ Costs.

**Authority:**

*CCP § 85(a)*

**Discussion:**

*See 15.05[2]*



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Chapter 15 Reclassification of Cases  
II. DETERMINING APPROPRIATE CLASSIFICATION

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.04*

**15.04 Case May Be Classified As Limited Civil Case or Unlimited Civil Case.**

A civil case may be classified as either a limited civil case or an unlimited civil case [CCP § 32.5].

Generally, limited civil cases have a jurisdictional limit of \$25,000 or less and do not allow for all types of relief that may be available in an unlimited civil case, such as permanent injunctive relief [see CCP § 85(a)]. A civil case that is not a limited civil case is referred to as an unlimited civil case [CCP § 88].

**Consider:**

The definition of what constitutes a limited civil case parallels the jurisdiction of the now-abolished municipal courts. Case law construing the limits of municipal court jurisdiction may be persuasive in determining issues relating to the classification of civil cases as limited or unlimited until more case law on classification has developed [see *Stern v. Superior Court* (2003) 105 CA4th 223, 227, 129 CR2d 275 (prior substantive and procedural law continues to govern how a trial court determines whether a case should be reclassified)].



**Strategic Point--Plaintiff:**

Before filing a case valued at slightly over \$25,000, exclusive of attorneys' fees, interests, and costs, consider whether to waive the value in excess of \$25,000 so that the case can be filed as a limited civil case. Weigh the additional expense of prosecuting the case as an unlimited civil case against the value in excess of \$25,000 and the likelihood of recovering that value. Also consider restrictions on pleadings and discovery that generally apply to limited civil cases in evaluating whether to file as limited or unlimited. Note, though, that a party may move to withdraw a limited civil case from those restrictions entirely [CCP § 91(c)] or may move for additional discovery [CCP § 95]. On the other hand, keep in mind that the court in a limited civil case may not grant relief exceeding \$25,000 [CCP §§ 85(a), 580(b)(1)]. However, the fact that a case could be reclassified upon proper motion and payment of the reclassification fee by a party does not affect the court's fundamental subject matter jurisdiction over the matter [ *Pajaro Valley Water Mgmt. Agency v. McGrath* (2005) 128 CA4th 1093, 1101-1104, 27 CR3d 741 ].



**Warning:**

If you opt to classify a claim with a value exceeding \$25,000 as a limited civil case to take advantage of the abridged procedures, you will waive the right to recover amounts in excess of \$25,000. However, if there is any potential for recovery of more than \$25,000, before filing an action as a limited civil case, counsel should disclose the limitation to the client to get the client's written agreement to file as a limited civil case.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter  
JurisdictionAmount in Controversy





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Chapter 15 Reclassification of Cases  
II. DETERMINING APPROPRIATE CLASSIFICATION

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.05*

**15.05 Limited Civil Cases Involve \$25,000 or Less and Not All Types of Relief Are Available.**

**15.05[1] Limited Civil Cases Are Determined by Amount in Controversy, Relief Sought, and Type of Action.**

An action is treated as a limited civil case if all of the following three conditions are satisfied [*CCP* § 85]:

- The amount in controversy does not exceed \$25,000 [*see* 15.05[2]].
- The relief sought is a type that may be granted in a limited civil case [*see* 15.05[3]].
- The relief sought is described in one or more statutes classifying actions as limited civil cases [*see* 15.05[4]].

An action is not a limited civil case if any of these conditions is not satisfied.

**15.05[2] Amount in Controversy Is Limited to \$25,000, Exclusive of Attorneys' Fees, Interest, and Costs.**

**15.05[2][a] Prayer of Complaint Is Relevant in Assessing Amount in Controversy.** For a case to be classified as a limited civil case, the amount in controversy cannot exceed \$25,000. "Amount in controversy" means the amount of the demand, the recovery sought, the value of the property, or the amount of the lien that is in controversy in the action, exclusive of attorneys' fees, interest, and costs [*CCP* § 85(a)].

The nature and amount of the demand are normally shown by the prayer of the complaint [*see CCP* § 425.10(b)]. Thus, the prayer or demand for relief in the complaint is relevant to valuation of 2d [ *Stern v. Superior Court* (2003) 105 CA4th 223, 233, 129 CR2d 275 ].

Before unification of the trial courts, a case whose amount in controversy did not meet the jurisdictional minimum was subject to transfer from the superior court to the municipal court. With municipal courts no longer in existence, the statutory scheme now authorizes reclassification. The "amount in controversy" continues to provide a ground for reclassifying an action, and prior case law on this issue continues to determine whether a case should be classified [ *Stern v. Superior Court* (2003) 105 CA4th 223, 229-230, 129 CR2d 275 ].

**15.05[2][b] Court May Hold Pretrial Hearing to Determine Amount in Controversy.** A trial court has authority to conduct a pretrial hearing to obtain information about whether the amount of the judgment will require reclassification [ *Stern v. Superior Court* (2003) 105 CA4th 223, 230, 129 CR2d 275 ; *Walker v. Superior Court* (1991) 53 C3d 257, 262, 279 CR 576, 807 P2d 418 (pre-unification case)]. A matter can be reclassified only when it is clear that the matter will "necessarily" result in a verdict below the jurisdictional amount [ *Stern v. Superior Court* (2003) 105 CA4th 223, 230-231, 129 CR2d 275 ; *Walker v. Superior Court* (1991) 53 C3d 257, 262, 279 CR 576, 807 P2d 418 (pre-unification case)].

A party moving to reclassify a case from limited to unlimited must present evidence to demonstrate a possibility that the damages will exceed \$25,000. The trial court, without adjudicating the merits of the underlying case, should review the record to determine whether a judgment in excess of \$25,000 is obtainable. If a jurisdictionally appropriate verdict may result, (i.e., if such a verdict is not virtually unobtainable) the court should grant the motion to reclassify the case as "unlimited." Concomitantly, the court may deny the motion only where it appears to a legal certainty that the plaintiff's damages will necessarily be \$25,000 or less [ *Ytuarte v. Superior Court* (2005) 129 CA4th 266, 279, 28 CR3d 474 ].

The trial court evaluates the amount fairly in controversy, not the merits of the claim. It must reasonably determine that the verdict will "necessarily" fall short of the \$25,001 required for an unlimited civil case [ *Stern v. Superior Court* (2003) 105 CA4th 223, 233, 129 CR2d 275 ; *Chahal v. Superior Court* (1999) 73 CA4th 399, 402, 86 CR2d 428 (pre-unification case)]. Reviewing the record to determine whether the result is obtainable, the trial court looks to the possibility of a jurisdictionally appropriate verdict, not to its probability [ *Stern v. Superior Court* (2003) 105 CA4th 223, 233, 129 CR2d 275 ; *Maldonado v. Superior Court* (1996) 45 CA4th 397, 402, 52 CR2d 805 (pre-unification case)].

### **15.05[3] Actions Which May Qualify As Limited Civil Cases.**

**15.05[3][a] Cases at Law With Demand or Property Value in Controversy of \$25,000 or Less Are Generally Limited Civil Cases.** All cases at law in which the demand, exclusive of interest, or the value of the property in controversy amounts to \$25,000 or less, are limited civil cases [CCP § 86(a)(1)].

#### **Exception:**

This provision does not apply to cases involving the legality of a tax, impost, assessment, toll, or municipal fine, but does apply to actions to enforce payment of delinquent unsecured personal property taxes if the legality of the tax is not contested by the defendant [CCP § 86(a)(1)].

**15.05[3][b] Dissolution of Partnership May Qualify If Assets Do Not Exceed \$25,000.** Actions to dissolve partnerships when the total partnership assets do not exceed \$25,000 are limited civil cases [CCP § 86(a)(2)].

#### **Cross Reference:**

Discussion, see California Forms of Pleading and Practice, Ch. 406, Partnerships: Dissolution (Matthew Bender).

**15.05[3][c] Interpleader Actions Are Limited Civil Cases If Money or Property Is \$25,000 or Less.** Interpleader actions are limited civil cases when the amount of money or the value of the property involved does not exceed \$25,000 [CCP § 86(a)(2)].

#### **Cross Reference:**

Discussion, see California Forms of Pleading and Practice, Ch. 314, Interpleader (Matthew Bender).

**15.05[3][d] Actions to Cancel, Rescind, or Revise Contract Are Limited Civil Cases If \$25,000 or Less.** Limited civil cases include:

- Actions to cancel or rescind a contract sought in connection with an action to recover money not exceeding \$25,000 or property of a value not exceeding \$25,000 paid or delivered under, or in consideration of, the contract.

- Actions to revise a contract when sought in an action upon the contract if the action is otherwise a limited civil case [*CCP* § 86(a)(3)].

#### ➡ **Cross References:**

Discussion/forms relating to actions to revise a contract, see California Forms of Pleading and Practice, Ch. 488, Reformation of Instruments (Matthew Bender).

Discussion of actions seeking rescission, see California Forms of Pleading and Practice, Ch. 490, Rescission and Restitution (Matthew Bender).

**15.05[3][e] Eviction Actions Qualify If Damages Do Not Exceed \$25,000.** Proceedings in forcible entry, forcible detainer, or unlawful detainer when the whole amount of damage claimed is \$25,000 or less are limited civil cases [*CCP* § 86(a)(4)].

#### ➡ **Cross Reference:**

Discussion of eviction actions, see California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Action (Matthew Bender).

**15.05[3][f] Actions for Enforcement of Personal Property Liens Which Are \$25,000 or Less Are Limited Civil Actions.** Actions to enforce and foreclose liens on personal property when the amount of the lien is \$25,000 or less are limited civil cases [*CCP* § 86(a)(5)].

#### ➡ **Cross Reference:**

Discussion, see California Forms of Pleading and Practice, Ch. 342, Liens and Wage Preferences (Matthew Bender).

**15.05[3][g] Actions for Enforcement of Mechanics' Liens and Similar Liens Are Limited Civil Cases As Long As Aggregate Claims Are \$25,000 or Less.** When the amount of the lien is \$25,000 or less, actions to enforce and foreclose, or petitions to release, liens of mechanics, material persons, artisans, laborers, and of all other persons to whom liens are given under the Civil Code [*see CC* § 3109 *et seq.* (works of improvement)] are limited civil cases [*CCP* § 86(a)(6)]. In addition, actions to enforce and foreclose an assessment lien on a common interest development as defined in *CC* § 1351 are limited civil cases when the amount of the lien is \$25,000 or less [*CCP* § 86(a)(6)].

#### **Distinguish:**

On the other hand, when an action to enforce the lien affects property that is also affected by a similar pending action that is not a limited civil case, or when the total amount of the liens sought to be foreclosed against the same property aggregates an amount in excess of \$25,000, the action is not a limited civil case [*CCP* § 86(a)(6)].

#### ➡ **Cross Reference:**

Discussion of mechanics' liens, see California Forms of Pleading and Practice, Ch. 361, Mechanics' Liens (Matthew Bender).

**15.05[3][h] Declaratory Relief May Be Available Under Limited Circumstances.** Declaratory relief actions may be available in limited civil cases [*CCP* § 86(a)(7)]:

- When brought by way of (1) a cross-complaint as to a right of indemnity with respect to the relief demanded in the complaint or (2) a cross-complaint in an action that is otherwise a limited civil case.
- When brought to conduct a trial after a nonbinding fee arbitration between an attorney and client [*see B&P Code § 6200 et seq.*] when the amount in controversy is \$25,000 or less.

Other than these two situations, declaratory relief may not be granted in a limited civil case [*CCP § 580(b)(4)*].

#### **Cross Reference:**

Discussion of declaratory relief, see California Forms of Pleading and Practice, Ch. 182, Declaratory Relief (Matthew Bender).

**15.05[3][i] Court in Limited Civil Cases May Grant TROs, Preliminary Injunctive Relief and Accountings, and Appoint Receivers.** The court in a limited civil case has jurisdiction to take the following actions when necessary to preserve the property or rights of any party to a limited civil case [*CCP § 86(a)(8)*]:

- Issue temporary restraining orders and preliminary injunctions, and to take accounts, when necessary to preserve the property or rights of any party to a limited civil case.
- Make any order or perform any act, pursuant to the Enforcement of Judgment Law [*see CCP § 680.010 et seq.*].
- Appoint a receiver [*see CCP §§ 564-570*].

#### **Cross References:**

Discussion of temporary injunctive relief, see Ch. 18, TROs and Preliminary Injunctions.

Discussion of receivers, see California Forms of Pleading and Practice, Ch. 486, Receivers (Matthew Bender).

**15.05[3][j] Court May Determine Title to Personal Property Seized in Limited Civil Cases.** The court in a limited civil case has jurisdiction to determine title to personal property seized in a limited civil case [*CCP § 86(a)(8)*].

**15.05[3][k] Creditors' Suits Are Limited Civil Cases If Property or Interest Is Less Than \$25,000.** Actions relating to creditors' suits [*see CCP § 708.210 et seq.*] to recover an interest in personal property or to enforce the liability of the debtor of a judgment debtor when the interest claimed adversely is of a value not exceeding \$25,000 or the debt denied does not exceed \$25,000 are limited civil cases [*CCP § 86(a)(9)*].

**15.05[3][l] Arbitration-Related Petitions Are Limited Civil Cases Under Defined Conditions.** All arbitration-related petitions filed pursuant to *CCP § 1292 et seq.*, except for uninsured motorist arbitration proceedings [*see Ins Code § 11580.2*], are limited civil cases if either [*CCP § 86(a)(10)(A)*]:

- The petition is filed before the arbitration award becomes final and the matter to be resolved by arbitration is a limited civil case under *CCP § 86(a)(1)-(9)*.
- The petition is filed after the arbitration award becomes final and the amount of the award and all other rulings, pronouncements, and decisions made in the award are within *CCP § 86(a)(1)-(9)*.

All arbitration petitions filed to confirm, correct, or vacate a fee arbitration award between an attorney and client that is

binding or has become binding pursuant to *B&P Code § 6200 et seq.* are limited civil cases if the arbitration award is \$25,000 or less [*CCP § 86(a)(10)(B)*].

**15.05[3][m] Long-Term Health Care Cases Qualify If Amount Does Not Exceed \$25,000.** An action brought pursuant to the Long-Term Care, Health, Safety, and Security Act of 1973 [*see H&S Code § 1417 et seq.*] is a limited civil case if civil penalties are not sought or amount to \$25,000 or less [*CCP § 86.1*].

**15.05[3][n] Certain Cases in Equity Qualify As Limited Civil Cases.** The following cases in equity are limited civil cases [*CCP § 86(b)*]:

- Cases in equity to try title to personal property when the amount involved is not more than \$25,000.
- Cases when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case.
- Cases to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect.

**15.05[4] Relief Sought Must Be Described by Statutes Which Classify Action As Limited Civil Case.** In a limited civil case, the relief sought, whether in the complaint, a cross-complaint, or otherwise, must be exclusively of a type described in one or more statutes that classify an action as a limited civil case or that provide that an action is within the original jurisdiction of the municipal court, including but not limited to, the following provisions [*CCP § 85(c)*]:

- *CC § 798.61* (abandoned mobile homes).
- *CC § 1719* (passing a check on insufficient funds).
- *CC § 3342.5* (dog bites).
- *CCP § 86* (jurisdiction).
- *CCP § 86.1* (long-term health care).
- *CCP § 1710.20* (enforcement of sister state judgments of \$25,000 or less).
- *F&A Code §§ 7581, 12647, 27601, 52514, 53564* (abatement as a public nuisance of various products that are contaminated or otherwise not in compliance with law).
- *F&A Code § 31503* (loss or damage of livestock caused by a dog).
- *F&A Code § 31621* (vicious dogs).
- *Gov Code § 53069.4* (appeal of fine or penalty imposed under local ordinance).
- *Gov Code §§ 53075.6, 53075.61* (impounding vehicle operated by person without valid certificate, license, or permit).
- *PU Code § 5411.5* (arrest, seizure, and impoundment of vehicles at airport or Mexican border).
- *Veh Code § 9872.1* (impoundment of vessel with hull identification number removed).

- *Veh Code § 10751* (disposition of vehicle or part thereof the identification number of which has been removed, defaced, altered, or destroyed).

- *Veh Code § 14607.6* (impoundment and forfeiture of vehicle driven by unlicensed driver).

- *Veh Code § 40230* (parking violation appeals).

- *Veh Code § 40256* (notice of toll evasion appeals).

#### **Cross References:**

Discussion of jurisdiction, see *15.05[3]*.

Discussion of long-term health care, see *15.05[3][m]*.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil  
ProcedurePartiesInterpleadersGeneral Overview



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Chapter 15 Reclassification of Cases  
II. DETERMINING APPROPRIATE CLASSIFICATION

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.06*

**15.06 Unlimited Civil Cases Are Those That Do Not Match Criteria for Limited Civil Cases.**

**15.06[1] Unlimited Civil Case Is Case Other Than Limited Civil Case.** An unlimited civil case is any civil action or proceeding that is not a limited civil case [CCP § 88]. In an unlimited civil case, the court can award relief not available in a limited civil case [see 15.06[2] -[6]].

**15.06[2] Cases Which Request Relief in Excess of \$25,000 Are Unlimited Civil Cases.** Relief exceeding \$25,000 may be awarded only in an unlimited civil case. The court in a limited civil case may not grant relief exceeding \$25,000, exclusive of attorneys' fees, interest, and costs [CCP §§ 85(a), 580(b)(1)].

**15.06[3] Permanent Injunctive Relief May Only Be Granted With Unlimited Civil Case.** The court in an unlimited civil case may grant a permanent injunction. In a limited civil case, the court may not grant a permanent injunction, except as otherwise authorized by statute [CCP § 580(b)(2)].

**15.06[4] Only Unlimited Civil Case May Determine Title to Real Property.** The court in an unlimited civil case may determine title to real property. In a limited civil case, the court may not grant as relief a determination of title to real property [CCP § 580(b)(3)].

**15.06[5] [Reserved].**

**15.06[6] Declaratory Relief May Be Granted Through Unlimited Civil Case.** The court in an unlimited civil case may grant declaratory relief. In a limited civil case, the court may not grant declaratory relief, except as authorized by CCP § 86(a)(7) [CCP § 580(b)(4)].

**➡ Cross Reference:**

Discussion of declaratory relief available in limited civil cases, see 15.05[3][h].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in Controversy



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Chapter 15 Reclassification of Cases  
III. OBTAINING RECLASSIFICATION

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.07*

**15.07 CHECKLIST: Obtaining Reclassification.**

**15.07[1] Plaintiff's Checklist for Obtaining Reclassification.**

- ☐ Choose method for reclassification:
- ☐ Amend initial pleading.
  - ☐ Move to reclassify.
  - ☐ Obtain stipulation for reclassification from other parties.

**Authority:**

*CCP §§ 403.020, 403.040, 403.050*

**Discussion:**

*See 15.08[1]*

- ☐ If plaintiff is seeking reclassification through amendment of complaint:
- ☐ Prepare amended complaint.
  - ☐ Draft caption to indicate that action is being reclassified by this pleading, stating either:
    - ☐ Case is limited civil case reclassified as an unlimited case.



- ☐ Case is an unlimited civil case reclassified as a limited civil case.
- ☐ Present amended complaint to clerk for filing within time for filing amendments.
- ☐ At time of filing, pay reclassification fee of \$125 if case is being reclassified from limited civil case to unlimited civil case.
- ☐ If amended pleading is properly captioned and any required reclassification fee is paid, no further action is required to obtain reclassification; clerk promptly reclassifies matter.

**Authority:**

*CCP § 403.020*

**Discussion:**

*See 15.10[1]*

**Form:**

*See Ch. 34, Amended and Supplemental Pleadings, 34.46*

**Timing:**

Reclassification does not expand time for filing amendment to complaint.

- ☐ If plaintiff is seeking reclassification through motion:
  - ☐ Draft motion and notice of motion for reclassification, with supporting declaration and memorandum.
  - ☐ Draft proposed order.
  - ☐ Serve and file motion, following standard noticed motion procedure.
  - ☐ Calendar response and hearing dates.
  - ☐ Be prepared to pay reclassification fee if motion is granted.

**Authority:**

*CCP § 403.040*

**Discussion:**

*See 15.10[2]*

**Form:**

*See 15.20, 15.21*

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.39*

**Timing:**

If motion is filed after time to amend complaint has expired, state grounds for not seeking reclassification earlier.

- ☐ If parties are stipulating to reclassification:
- ☐ Draft stipulation:
    - ☐ Have title state that case is reclassified by the stipulation.
    - ☐ Have caption state that case is limited civil case reclassified as unlimited civil case, or unlimited civil case reclassified as limited civil case.
  - ☐ If classification is changed from limited to unlimited, decide who will pay reclassification fee.
  - ☐ File stipulation with court within time to respond to initial pleading.
  - ☐ Pay reclassification fee.

**Authority:**

*CCP § 403.050*

**Discussion:**

See 15.11

**Timing:**

Stipulation must be filed within time allowed to respond to initial pleading.

**15.07[2] Defendant's Checklist for Obtaining Reclassification.**

- ☐ Choose method for reclassification:
- ☐ File cross-complaint.
  - ☐ Move to reclassify.
  - ☐ Obtain stipulation for reclassification from other parties.

**Authority:**

*CCP §§ 403.030-403.050*

**Discussion:**

See 15.08[2], 15.11-15.13

☐ If defendant is seeking reclassification through cross-complaint:

- ☐ Prepare cross-complaint.
- ☐ Draft caption to indicate that action is limited civil case to be reclassified by cross-complaint, or words to that effect.
- ☐ Present cross-complaint to clerk for filing.
- ☐ At time of filing, pay reclassification fee.
- ☐ If cross-complaint is properly captioned and reclassification fee is paid, no further action is required to obtain reclassification; clerk promptly reclassifies matter.

**Authority:**

*CCP § 403.030*

**Discussion:**

See 15.12

**Forms:**

See Ch. 16, Cross-Complaints

☐ If defendant is moving for reclassification:

- ☐ Draft motion and notice of motion for reclassification, with supporting declaration and memorandum.
- ☐ Draft proposed order.
- ☐ Serve and file motion, following standard noticed motion procedure.
- ☐ Calendar response and hearing dates.
- ☐ Be prepared to pay reclassification fee if motion is granted.

**Authority:**

*CCP § 403.040*

**Discussion:**

See 15.13

**Forms:**

See 15.20, 15.21

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**Timing:**

File motion within time allowed to respond to complaint; if later, argue good cause for not seeking reclassification earlier.

- ☐ If parties are stipulating to reclassification:
  - ☐ Draft stipulation:
    - ☐ Have title state that case is reclassified by the stipulation.
    - ☐ Have caption state that case is limited civil case reclassified as unlimited civil case, or unlimited civil case reclassified as limited civil case.
  - ☐ If classification is changed from limited to unlimited, decide who will pay reclassification fee.
  - ☐ File stipulation with court within time to respond to initial pleading.
  - ☐ Pay reclassification fee.

**Authority:**

*CCP § 403.050*

**Discussion:**

See 15.11

**Timing:**

Stipulation must be filed within time allowed to respond to initial pleading.



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Chapter 15 Reclassification of Cases  
III. OBTAINING RECLASSIFICATION

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**15.08 Options and Strategies for Seeking Appropriate Classification.**

**15.08[1] Plaintiff's Options and Strategies.** Ideally, a case will be properly classified in the complaint or other initial pleading, and there will be no need to consider reclassification [*see 15.09*].

But plaintiff may desire reclassification from a limited civil case to an unlimited civil case if, after filing the initial pleading, it is determined that the plaintiff has damages in excess of \$25,000, or otherwise seeks relief the court is not authorized to grant in a limited civil case.

Plaintiff's options for reclassification are:

- ☐ Reclassification through amendment of the complaint.



**Timing:**

This option is available only if the time for amendments has not expired [*see CCP § 403.010*].

- ☐ Reclassification through a motion.



**Timing:**

This option is available at any time, but if plaintiff moves for reclassification after the time for amendment to the pleadings, plaintiff must establish good cause for not seeking reclassification earlier [*see CCP § 403.040(b)(2)*].

- ☐ Reclassification through stipulation.



**Timing:**

This option is available only during the time allowed to respond to the initial pleading [see *CCP* § 403.050].

 **Cross References:**

Discussion of reclassification by amendment of complaint, see *15.10[1]*, by motion, see *15.10[2]*, by stipulation, see *15.11*.

**15.08[2] Defendant's Options and Strategies.** Defendant's options for reclassification are:

- Filing a cross-complaint that changes classification of the case.
- Filing a motion for reclassification.



**Timing:**

This option is available at any time, but if defendant moves for reclassification after the time for responding to the initial pleading, defendant must establish good cause for not seeking reclassification earlier [see *CCP* § 403.040(b)(2)].



**Warning:**

A motion for reclassification constitutes an appearance.

- Reclassification through stipulation.



**Timing:**

This option is available only during the time allowed to respond to the initial pleading [see *CCP* § 403.050].



**Cross References:**

Discussion of filing cross-complaint that changes classification of the case, see *15.12*.  
 Discussion of filing motion for reclassification, see *15.13*.  
 Discussion of reclassification by stipulation, see *15.11*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in Controversy



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**15.09 Plaintiff Classifies Case in Initial Pleading.**

Plaintiff first classifies a case in the initial pleading. In limited civil cases, the caption of every pleading must state that the case is a limited civil case, and the clerk classifies the case accordingly [*CCP* § 422.30(b); *Cal Rules Ct, Rule 2.111(10)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in Controversy



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**15.10 Plaintiff May Reclassify Case.**

**15.10[1] Case May Be Reclassified by Amending Initial Pleading.** A plaintiff, cross-complainant, or petitioner may reclassify an action by filing an amended complaint or other amended initial pleading [*see CCP § 403.020(a)*].

If the case is reclassified by an amended complaint or other initial pleading, draft the caption of the amended pleading to indicate that the action is reclassified by the pleading. The caption must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or words to that effect [*Cal Rules Ct, Rule 2.111(11)*].

If the amended complaint or other initial pleading changes the jurisdictional classification from limited to unlimited, the plaintiff when filing the amended pleading must pay the reclassification fee [*see CCP § 403.060*], and the clerk must promptly reclassify the case. If the amendment changes the jurisdictional classification from unlimited to limited, no reclassification fee is required, and the clerk must promptly reclassify the case [*CCP § 403.020(a)*].



**Warning:**

Failure to pay the reclassification fee may result in dismissal [*see 15.17*].

**15.10[2] Plaintiff May Bring Motion to Reclassify.** A plaintiff, cross-complainant, or petitioner may file a motion for reclassification within the time allowed for that party to amend the initial pleading. If the motion is filed within the time to amend and the case has been classified in an incorrect jurisdictional classification, the court must grant the motion and enter an order for reclassification, regardless of any fault or lack of fault [*CCP § 403.040(a)*].

A motion for reclassification does not extend the party's time to amend.

**Distinguish:**

When a party files a motion for reclassification after the time to amend the initial pleading, the court may grant the motion and enter an order for reclassification only if both of the following conditions are satisfied [*CCP § 403.040(b)*]:



- The case is incorrectly classified.
- The party shows good cause for not seeking reclassification earlier.

 **Cross Reference:**

Forms, see *15.20*, *15.21*.

**15.10[3] Right to Amend Pleadings Is Not Affected.** The reclassification provisions do not expand or limit the law on whether a plaintiff may file an amended complaint. Nor do the reclassification provisions affect whether and to what extent an amendment relates back to the date of filing the original complaint [*CCP* § 403.010].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in Controversy



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III. OBTAINING RECLASSIFICATION

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**15.11 Parties May Stipulate to Reclassification.**

**15.11[1] Stipulation Must Occur Within Time for Responding to Initial Pleading.** The parties to the action or proceeding may stipulate to reclassification of the case within the time allowed to respond to the initial pleading [*CCP* § 403.050(a)].

**15.11[2] Title of Stipulation Must Indicate Reclassification.** If a case is reclassified by stipulation, the title of the stipulation must state that the case is reclassified by the stipulation. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or words to that effect [*Cal Rules Ct, Rule 2.111(11)*].

**15.11[3] Fee Is Required If Case Is Reclassified As Unlimited Civil Case.** If the stipulation for reclassification changes the jurisdictional classification of the case from limited to unlimited, the reclassification fee provided by statute [*see CCP* § 403.060] must be paid at the time the stipulation is filed [*CCP* § 403.050(b)]. Upon filing of the stipulation and the payment of the reclassification fee, if required, the clerk must promptly reclassify the case [*CCP* § 403.050(c)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**15.12 Filing Cross-Complaint May Reclassify Case.**

**15.12[1] Cross-Complaint May Reclassify Limited Civil Case to Unlimited Civil Case.** A party may reclassify a case by filing a cross-complaint. If a party in a limited civil case files a cross-complaint that causes the action or proceeding to exceed the maximum amount in controversy for a limited civil case or otherwise to fail to satisfy the requirements for a limited civil case, the caption of the cross-complaint must state that the action or proceeding is a limited civil case to be reclassified by cross-complaint, or words to that effect [*CCP* § 403.030].

**15.12[2] Cross-Complainant Must Pay Reclassification Fee.** At the time of filing the cross-complaint, the party must pay the reclassification fee [*see CCP* § 403.060], and the clerk must promptly reclassify the case [*CCP* § 403.030].

**15.12[3] Right to Amend Pleadings Is Not Affected.** The law and procedure related to reclassification does not expand or limit the law on whether a plaintiff or cross-complainant may file an amended complaint or other amended initial pleading. Furthermore, it does not expand or limit the law on whether, and to what extent, an amendment relates back to the date of filing the original complaint or other initial pleading [*CCP* § 403.010].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in Controversy



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**15.13 Defendant May Move for Reclassification.**

**15.13[1] Motion May Be Filed Within Time to Respond to Initial Pleading.**

**15.13[1][a] Motion Is Mandatory If It Is Timely.** If the complaint or other initial pleading erroneously states or fails to state that the action is a limited civil case, the defendant may file a motion for reclassification within the time allowed for the defendant to respond to the initial pleading [CCP § 403.040(a)].

If the defendant files the motion within the time to respond to the initial pleading and the case has been classified in an incorrect jurisdictional classification, the court must grant the motion and enter an order for reclassification, regardless of any fault or lack of fault [CCP § 403.040(a)].

**15.13[1][b] Motion Does Not Extend Time to Respond.** A motion for reclassification does not extend the moving party's time to respond to the initial pleading [CCP § 403.040(a)].

**15.13[1][c] Motion Constitutes Appearance.** A defendant's motion for reclassification constitutes an appearance in the action [CCP § 1014].

**15.13[2] If Motion Filed After Expiration of Time to Respond to Initial Pleading, Ruling Is Not Mandatory.** If a defendant files a motion for reclassification after the time for the defendant to respond to the initial pleading, the court may grant the motion only if [CCP § 403.040(b)]:

- The case is incorrectly classified.
- The defendant shows good cause for not seeking reclassification earlier.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**15.14 Court May Reclassify Case on Own Motion.**

**15.14[1] Court May Act at Any Time.** A case may be reclassified on the court's own motion at any time [*CCP* § 403.040(a)].



**Strategic Point:**

The fact that the court has reclassified an action on its own motion does not appear to preclude a party from filing a subsequent motion to reclassify back to the original classification [*see, e.g., Ytuarte v. Superior Court* (2005) 129 CA4th 266, 279-280, 28 CR3d 474 ].

**15.14[2] Court Must Give Parties Notice and Opportunity to Be Heard.** A court contemplating reclassification on its own motion must provide notice to the parties and provide sufficient opportunity to respond to the issue. Even if no hearing is held, the court must afford the parties an opportunity to contest reclassification [ *Stern v. Superior Court* (2003) 105 CA4th 223, 230, 129 CR2d 275 ; *Walker v. Superior Court* (1991) 53 C3d 257, 271, 279 CR 576, 807 P2d 418 (pre-unification case)]. Lack of notice and an opportunity to be heard requires reversal of the reclassification order [ *Stern v. Superior Court* (2003) 105 CA4th 223, 231, 129 CR2d 275 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**15.15 Case May Continue as Limited Civil Case if Amount in Excess of Jurisdiction Is Remitted.**

In any case in which the erroneous classification is due solely to an excess in amount of the demand, the excess may be remitted and the action may continue as a limited civil case [CCP § 403.040(f)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.16*

**15.16 Costs and Fees Are Due on Reclassification.**

**15.16[1] Reclassification Fee Is Usually Due When Case Is Reclassified As Unlimited.** A reclassification fee is due if any of the following occur:

- Plaintiff files an amended complaint or other pleading that reclassifies a case from limited to unlimited [CCP § 403.020(a)].
- A party files a cross-complaint that reclassifies a limited civil case as an unlimited civil case [CCP § 403.030].
- Parties stipulate to the reclassification of a case from limited to unlimited [CCP § 403.050(a)].
- The court grants a motion for reclassification [CCP § 403.040(c)(1)].

The fee for reclassification of a case from a limited civil case to an unlimited civil case is in addition to any other fee for that appearance or filing in a limited civil case. After reclassification, the fees ordinarily charged in an unlimited case will be charged [CCP § 403.060(a)].

**► Cross References:**

Discussion of reclassification by amended complaint, see 15.10[1], by cross-complaint, see 15.12, by stipulation 15.11, or by motion, see 15.10[2], 15.13.

**15.16[2] No Fee Is Required When Case Is Reclassified As Limited.** When a case is reclassified from an unlimited civil case to a limited civil case, no reclassification fee is required [CCP §§ 403.040(c)(2), 403.060(c)]. After reclassification, the fees ordinarily charged in a limited civil case will be charged [CCP § 403.060(c)].

Parties are not entitled to a refund of the difference between any fees previously paid in an unlimited civil case and the fees due in a limited civil case when the case is reclassified from unlimited to limited [CCP § 403.060(c)].

**15.16[3] Party Responsible for Reclassification Must Pay Fee.** When an amended complaint, a cross-complaint, or other pleading results in reclassification from limited to unlimited, the party filing the pleading must pay the required fee at the time of the filing [*CCP* §§ 403.020(a), 403.030].

When a court grants a motion for reclassification from limited to unlimited, the party whose pleading causes the action to exceed the maximum amount in controversy for a limited civil case or otherwise fails to satisfy the requirements for a limited civil case must pay the reclassification fee [*CCP* § 403.040(c)(1)].

**Exception:**

When the court grants a motion for reclassification and the fee has not been paid within five days after service of notice of the order, any party interested in the case, regardless of whether that party is named in the complaint, may pay the fee. The clerk will then reclassify the case as if the fees had been paid by the proper party [*CCP* § 403.040(d)(2)].

If the reclassification fee is paid by someone other than the person responsible for payment, the fee becomes an item of costs of the party paying it, recoverable if that party prevails in the action. If that party does not prevail, the fee is offset against and deducted from the amount, if any, awarded to the party responsible for the fee, if that party prevails in the action [*CCP* § 403.040(d)(2)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedurePleading & PracticePleadingsComplaintsFiling Fees





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Chapter 15 Reclassification of Cases  
III. OBTAINING RECLASSIFICATION

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.17*

**15.17 Failure to Pay Reclassification Fee Results in Dismissal.**

**15.17[1] No Further Action Permitted Until Reclassification Fee Is Paid.** Until the reclassification fee is paid, the cause of action cannot be further prosecuted in any court [*CCP* § 403.040(d)(2)].

**15.17[2] If Reclassification Fee Is Not Paid in 30 Days, Court May Dismiss Case.** If the reclassification fee is not paid within 30 days after service of notice of an order for reclassification, the court on its own motion or motion of any party may take any of the following actions [*CCP* § 403.040(d)(3)]:

- Order the case to proceed as a limited civil case.
- Dismiss the action or cross-action without prejudice on the condition that no other action or proceeding on the same matters be commenced in any other court until the reclassification fee is paid.
- Take any other action the court deems appropriate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedurePleading & PracticePleadingsComplaintsFiling Fees



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Chapter 15 Reclassification of Cases

#### IV. OBTAINING APPELLATE REVIEW OF ORDER GRANTING OR DENYING RECLASSIFICATION

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.18*

##### **15.18 CHECKLIST: Obtaining Appellate Review of Order Granting or Denying Reclassification.**

- ☐ To challenge order granting or denying motion to reclassify:
  - ☐ Draft petition:
    - ☐ Request writ requiring proper classification of case.
    - ☐ Request stay of proceedings pending ruling on petition.
  - ☐ If needed, seek extended time for filing petition:
    - ☐ Make request before expiration of usual 20-day period for filing petition.
    - ☐ Seek extension of time from superior court.
  - ☐ File petition with both:
    - ☐ Court of appeal for district in which court issuing order is situated.
    - ☐ Superior court where action is pending.
  - ☐ File petition in timely manner, either:
    - ☐ Within 20 days after service of written notice of order of reclassification.

☐ Within extended time granted by court, which cannot exceed 10 days after initial 20-day period.

☐ Calendar response and hearing date.

**Authority:**

*CCP § 403.080*

**Discussion:**

*See 15.19*



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Chapter 15 Reclassification of Cases

#### IV. OBTAINING APPELLATE REVIEW OF ORDER GRANTING OR DENYING RECLASSIFICATION

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.19*

#### **15.19 Appellate Review of Order Granting or Denying Reclassification.**

**15.19[1] Petition for Writ of Mandate May Be Filed by Aggrieved Party.** When an order is made by the superior court granting or denying a motion to reclassify an action, the party aggrieved by the order may petition the court of appeal for the district in which the court granting or denying the motion is situated for a writ requiring proper classification of the action or proceeding [CCP § 403.080].



##### **Strategic Point:**

Orders under CCP § 403.080 reclassifying actions are not appealable [ *Garau v. Torrance Unified School Dist. (2006) 137 CA4th 192, 199, 40 CR3d 108* ]. In the alternative, a party may appeal the final judgment of dismissal of the summarily adjudicated causes of action [ *Garau v. Torrance Unified School Dist. (2006) 137 CA4th 192, 201, 40 CR3d 108* ].

The petitioner must file a copy of the petition in the superior court immediately after the petition is filed in the court of appeal [CCP § 403.080].

**15.19[2] Petition Must Be Filed Within 20 Days After Service of Order of Reclassification.** The petition must be filed within 20 days after service of a written notice of the order of reclassification. The superior court may, for good cause, and prior to the expiration of the initial 20-day period, extend the time for one additional period not to exceed 10 days [CCP § 403.080].



##### **Strategic Point:**

Where the trial court denies a party's motion to reclassify after the court has reclassified an action on its own motion, the moving party may obtain relief by appeal of the denial, without also appealing the court's decision on its own motion [see, e.g., *Ytuarte v. Superior Court (2005) 129 CA4th 266, 273, 28 CR3d 474* ].

**15.19[3] Court of Appeal May Stay Proceedings Pending Decision.** The court of appeal may stay all proceedings in the case pending judgment on the petition becoming final [*CCP* § 403.080].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in Controversy



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Chapter 15 Reclassification of Cases  
V. FORMS

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.20*

**15.20 Notice of Motion and Motion to Reclassify Case Within Time Allowed for Responding to Initial Pleading.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
)  
) NOTICE OF MOTION AND MOTION TO RE-  
) CLASSIFY \_\_\_\_\_ [LIMITED  
) CIVIL CASE AS UNLIMITED *or* UNLIMITED  
) CIVIL CASE AS LIMITED] CIVIL CASE, SUP-  
) PORTING DECLARATION OF  
) \_\_\_\_\_ [name], AND SUPPORTING  
) MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) [Trial Date: \_\_\_\_\_]

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for an order pursuant to *Code of Civil Procedure* section 403.040(a) to reclassify this \_\_\_\_\_ [limited or unlimited] civil case as \_\_\_\_\_ [a limited or an

unlimited] civil case. The motion will be made on the ground that the caption of the \_\_\_\_\_ [*identify pleading and state reason for request, e.g., complaint mistakenly fails to state that the action is a limited civil case*].

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [*name(s)*] and the supporting memorandum set forth below[, on the records and file in this case], and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [*firm name*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

SUPPORTING DECLARATION OF \_\_\_\_\_ [*name*]

I, \_\_\_\_\_ [*name*], declare:

1. I am \_\_\_\_\_ [*declarant, e.g., the defendant in this action*].

2. \_\_\_\_\_ [*state facts establishing that the action or proceeding is not properly classified in as many paragraphs as necessary*].

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*]

SUPPORTING MEMORANDUM

[*Set out memorandum here*]

NOTES.

**Authority:**

CCP § 403.040(a)

**Grounds for Motion to Reclassify Within Time Allowed for Responsive Pleading:**

See 15.13[1]



**Timing:**

See 15.13[1][a]

**Related Form of Order:**

See 15.22

**Related Forms of Memoranda:**

See *California Points and Authorities*, §§ 133.70, 133.71, 133.110, 133.111 (Matthew Bender)





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Chapter 15 Reclassification of Cases  
V. FORMS

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.21*

**15.21 Notice of Motion and Motion to Reclassify Case After Time to Amend or Respond to Initial Pleading.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
)  
) NOTICE OF MOTION AND MOTION TO RE-  
) CLASSIFY \_\_\_\_\_ [LIMITED  
) CIVIL CASE AS UNLIMITED *or* UNLIMITED  
) CIVIL CASE AS LIMITED] CIVIL CASE, SUP-  
) PORTING DECLARATION OF  
) \_\_\_\_\_ [name], AND SUPPORTING  
) MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for an order pursuant to *Code of Civil Procedure* section 403.040(b) to reclassify this \_\_\_\_\_ [limited or unlimited] civil case as \_\_\_\_\_ [a limited or an

unlimited] civil case. The motion will be made on the ground that the caption of the \_\_\_\_\_ [*identify pleading and state reasons for request, e.g.,* complaint mistakenly fails to state the jurisdictional classification of the case and that good cause exists for Defendant Mary Jones not having sought reclassification at an earlier time].

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [*name(s)*] and the supporting memorandum of set forth below[, on the records and file in this case], and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [*firm name*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

SUPPORTING DECLARATION OF \_\_\_\_\_ [*name*]

I, \_\_\_\_\_ [*name*], declare:

1. I am \_\_\_\_\_ [*declarant, e.g.,* the defendant in this action].

2. \_\_\_\_\_ [*state facts establishing that the action or proceeding is not properly classified in as many paragraphs as necessary*].

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*]

SUPPORTING MEMORANDUM

[*Set out memorandum here*]

NOTES.

**Authority:**

CCP § 403.040(b)

**Grounds for Motion to Reclassify:**

See 15.10[2], 15.13[2]



**Timing:**

See 15.10[2], 15.13[2]

**Related Form of Order:**

See 15.22

**Related Forms of Memoranda:**

See *California Points and Authorities*, §§ 133.70, 133.71, 133.110, 133.111 (Matthew Bender)



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Chapter 15 Reclassification of Cases  
V. FORMS

*1-15 MB Practice Guide: CA Pretrial Civil Procedure 15.22*

**15.22 Order Granting Motion to Reclassify.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |       |
|---------------|---|-------|
| _____ [name], | ) |       |
| Plaintiff,    | ) |       |
| vs.           | ) | ORDER |
| _____ [name], | ) |       |
| Defendant.    | ) |       |
|               | ) |       |
|               | ) |       |

The motion of \_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] for an order pursuant to *Code of Civil Procedure Section 403.040(b)* reclassifying this \_\_\_\_\_ [limited or unlimited] civil case as \_\_\_\_\_ [a limited or an unlimited] civil case came on regularly for hearing by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name], and defendant appeared by counsel \_\_\_\_\_ [name].

It appearing to the satisfaction of the court that the caption of the \_\_\_\_\_ [identify initial pleading, e.g., complaint] in this \_\_\_\_\_ [action or proceeding] \_\_\_\_\_ [state reasons for ruling, e.g., is incorrectly classified and good cause appearing for the moving party not having sought reclassification earlier],

IT IS ORDERED that the motion be, and it hereby is, granted and that this \_\_\_\_\_ [action or proceeding or case] be reclassified as \_\_\_\_\_ [a limited or an unlimited] civil case.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 403.040(b)*

**Related Forms of Motion:**

*See 15.20, 15.21*



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Chapter 16 Cross-Complaints

*1-16 MB Practice Guide: CA Pretrial Civil Procedure 16.syn*

**§ 16.syn Synopsis to Chapter 16: Cross-Complaints**

16.01 Scope.

16.02 Objective and Strategy.

16.03 CHECKLIST: Determining Type of Cross-Complaint.

16.04 Format of Cross-Complaint.

16.04[1] Format of Cross-Complaint Is Same As Complaint.

16.04[1][a] General Format Follows Rules for "Papers."

16.04[1][b] Optional California Judicial Council Forms Are Acceptable.

16.04[2] Cross-Complaint Is Separate Document.

16.05 Permissive Cross-Complaints May Be Filed Under Two Circumstances.

16.05[1] Permissive Cross-Complaint May Be Filed on Any Cause of Action Against and Adverse Party.

16.05[2] Permissive Cross-Complaint May Be Filed Against Party or Nonparty Regarding Same Transaction or Occurrence, or Asserting Related Claim, Right, or Interest.

16.06 Cause of Action May Be Precluded If Not Raised in Compulsory Cross-Complaint.

16.06[1] Related Cause of Actions Against Plaintiff Precluded If Not Raised in Cross-Complaint.

16.06[2] Cause of Action Not Precluded If Court Does Not Have Jurisdiction, or Person Did Not File Answer.

16.06[3] Cause of Action Precluded in Subsequent Action If Voluntarily Dismissed Before Adjudication in Prior

Action.

16.07 When Compulsory Cross-Complaint Provisions Apply.

16.07[1] Compulsory Cross-Complaint Provisions Do Not Apply to Special Proceedings.

16.07[2] Compulsory Cross-Complaint Provisions Apply to Plaintiff in Eminent Domain Proceedings.

16.08 When Compulsory Cross-Complaint Provisions Do Not Apply.

16.08[1] Compulsory Cross-Complaint Provisions Do Not Apply If Court Has No Jurisdiction Over Additional Necessary Parties.

16.08[2] Compulsory Cross-Complaint Provisions Do Not Apply If Cause of Action Is Prohibited by Courts.

16.08[3] Compulsory Cross-Complaint Provisions Do Not Apply If Unpleaded Cause of Action Is Subject of a Pending Action.

16.08[4] Compulsory Cross-Complaint Provisions Do Not Apply to Small Claims Court Cases.

16.08[5] Compulsory Cross-Complaint Provisions Do Not Apply to Declaratory Relief Actions.

16.09 Application for Leave to Amend Pleading or File Cross-Complaint.

16.09[1] Party May Seek to Amend Pleading or File Cross-Complaint After Inadvertently Failing to Plead Cause of Action.

16.09[2] Court Must Grant Relief If Party Acted in Good Faith.

16.10 Reclassification of Case by Cross-Complaint.

16.10[1] If Cross-Complaint Causes Limited Civil Case to Be Reclassified, Caption Must So State.

16.10[2] If Amended Cross-Complaint, or Other Amended Initial Pleading, Causes Limited Civil Case to Be Reclassified, Cross-Complainant Must Pay Additional Fee.

16.11 CHECKLIST: Filing and Serving Cross-Complaints.

16.12 Time for Filing Cross-Complaint.

16.12[1] Cross-Complaint Against Party Who Filed Complaint or Cross-Complaint Must Be Filed With Answer.

16.12[2] Cross-Complaints Against Other Adverse Parties May Be Filed Before Trial Date Set.

16.12[3] Party Must Obtain Permission to File All Other Cross-Complaints.

16.13 Service of Summons and Cross-Complaint.

16.13[1] Party Who Has Not Appeared Must Be Served With Summons on Cross-Complaint.

16.13[2] Party Who Has Appeared Must Be Served in Manner Provided for Service of Summons or in CCP § 1010 et

seq.

16.13[3] Cross-Complainant Must Serve Recent Amended Complaint and Answers on Cross-Defendants Who Have Not Appeared.

16.13[4] Cross-Complainant Must Serve ADR Package on New Parties.

16.13[5] Cross-Complainant Must File Proof of Service With Cross- Complaint If Defendant Has Appeared, and Within 30 Days of Filing Cross-Complaint That Adds New Parties.

16.14 Filing and Service of Cross-Complaints and Related Matters Under Local Court Rules.

16.15 Notice of Motion and Motion for Leave to File Permissive Cross-Complaint.

16.16 Declaration in Support of Motion for Leave to File Permissive Cross-Complaint.

16.17 Order on Motion for Leave to File Cross-Complaint.

16.18 Notice of Motion and Motion for Leave to File Compulsory Cross-Complaint After Answer Is Filed.

16.19 Judicial Council Form SUM-110 Summons--Cross-Complaint.





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Chapter 16 Cross-Complaints  
I. STRATEGY

*1-16 MB Practice Guide: CA Pretrial Civil Procedure 16.01*

**16.01 Scope.**

This chapter covers:

- Types of cross-complaints (permissive or compulsory) [*see 16.04 -16.08*; Forms: *see 16.15 -16.17*].
- Reclassification of case by cross-complaint [*see 16.10*].
- Filing and service of cross-complaints [*see 16.11 -16.14*].

**Core Statutes:**

*CCP §§ 426.10 et seq., 428.10 et seq.*



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Chapter 16 Cross-Complaints  
I. STRATEGY

1-16 MB Practice Guide: CA Pretrial Civil Procedure 16.02

### 16.02 Objective and Strategy.

The objective underlying cross-complaints is to have a complete determination of a controversy among the parties in one action, thus avoiding circuitry and multiplicity of actions [ *City of Hanford v. Superior Court* (1989) 208 CA3d 580, 587, 256 CR 274 ; *Sattinger v. Newbauer* (1954) 123 CA2d 365, 369, 266 P2d 586 ].

Cross-complaints are either compulsory or permissive. Compulsory cross-complaints address claims related to those alleged in the plaintiff's complaint (or in a cross-complaint). If a defendant or cross-defendant fails to assert any related claims against the plaintiff, the claims will be barred [CCP § 428.50(a)].

Permissive cross-complaints allow a party to bring any claims against the other party or parties who filed a complaint (or cross-complaint) against the party. Permissive cross-complaints also allow a party to bring claims germane to the action against other parties or nonparties [CCP § 428.50(b)].

The only claims against plaintiff that are compulsory cross-complaints are those that exist at the time they file an answer [see *Crocker Nat'l Bank v. Emerald* (1990) 221 CA3d 852, 864, 270 CR 699 (defendant's claims against plaintiff based on conduct after answer is filed must be asserted in permissive cross-complaint filed pursuant to leave of court)].



#### Warning:

Filing a cross-complaint without probable cause may give rise to a malicious prosecution action [ *Bertero v. National Gen. Corp.* (1974) 13 C3d 43, 50-53, 118 CR 184, 529 P2d 608 ].



#### Strategic Points--Defendant:

- Defendants with claims that must be asserted via compulsory cross-complaint should first determine if they can successfully demur to plaintiff's claims. Even if the demurrer is overruled, plaintiff's opposition may provide valuable assistance in preparation of the cross-complaint. If the demurrer is sustained only as to a portion of plaintiff's claims, or sustained with leave to amend, defendants should

nevertheless file a cross-complaint because if plaintiff later voluntarily dismisses any claims but fails to answer the cross-complaint, all plaintiff's claims arising from the same transaction will be forever barred [see *Carroll v. Import Motors, Inc.* (1995) 33 CA4th 1429, 1436, 39 CR2d 791 ].

- Although a defendant may obtain an *offset* through pleading an affirmative *defense*, the right to *recovery* can be obtained only by filing a cross-complaint. Counsel should discuss thoroughly with their clients, at the outset, all matters that could provide a basis for affirmative relief against the plaintiff. Clients, even those who are fairly sophisticated, sometimes assume that since the plaintiff has brought an action against them, they will automatically be able to assert their claims against the plaintiff. The client should be counseled that if those claims are not raised by a cross-complaint at the outset, they may be lost.

- Defendants should be mindful that the trial court is likely to dismiss as unnecessary a permissive cross-complaint for declaratory relief if the same rights may be asserted by other means, such as by assertion of an affirmative defense [see *C.J.L. Constr., Inc. v. Universal Plumbing* (1993) 18 CA4th 376, 389-391, 22 CR2d 360 (cross-complaint for declaratory relief regarding offset properly dismissed; review of illustrative examples)].

If the cross-complaint is not compulsory, a separate action can be filed for the claims that would otherwise have been included in the cross-complaint. If a new action is filed under these circumstances, the party filing the new action is obligated to file a Notice of Related Cases [see *Cal Rules Ct, Rule 3.300*].

If your client would like to avoid the publicity that can come with filing an action, counsel should consider the chances of success in court of filing with the cross-complaint a motion to seal sensitive portions of it (as well as previously and subsequently filed papers), as well as a motion for a gag order, although in the latter case the courts rarely oblige.

#### **Cross References:**

Discussion of sealing court records, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 2.11 *et seq.*

Discussion of gag orders, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 2.30 *et seq.*

#### **Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 123, Complaints and Cross Complaints (Matthew Bender).

California Points and Authorities, Ch. 61, Cross Complaints (Matthew Bender).

#### **Cross References:**

See Ch. 32, Notice of Related Cases, Consolidation, Coordination, and Severance of Actions.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview



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Chapter 16 Cross-Complaints  
II. DETERMINING TYPE OF CROSS-COMPLAINT

*1-16 MB Practice Guide: CA Pretrial Civil Procedure 16.03*

**16.03 CHECKLIST: Determining Type of Cross-Complaint.**

☐ Decide if a permissive cross-complaint should be filed in response to the complaint.

☐ Determine if defendant has any claims against an adverse party.

**Authority:**  
*CCP § 428.10(a)*

**Discussion:**  
*See 16.05[1]*

☐ Determine if defendant has claims against any party or nonparty either:

☐ Arising out the the same transaction, occurrence, or series of transactions or occurrences, or

☐ Asserting a claim, right, or interest in the same property or controversy.

**Authority:**  
*CCP § 428.10(b)*

**Discussion:**  
*See 16.05[2]*

☐ Determine if a compulsory cross-complaint is necessary to preserve any claim against a plaintiff because defendant's claim is a related cause of action.

- ☐ Determine if defendant's cause of action is related because it arises out of the same transaction, occurrence, or series thereof as the cause brought against him or her.

**Authority:**

*CCP § 426.10(c)*

**Discussion:**

See 16.06[1]

- ☐ If defendant's cause of action is related, determine if it is a type of action that is exempted from the compulsory filing requirement for one of the following reasons:

☐ The defendant's cause of action requires the presence of additional parties over whom the court cannot acquire jurisdiction;

☐ The court hearing plaintiff's action and any court to which defendant's action is transferable under *CCP § 396* are prohibited by federal or state constitution or statute from trying defendant's claim;

☐ The plaintiff's action is a special proceeding or is in small claims court; or

☐ The plaintiff's action is for declaratory relief only.

**Authority:**

*CCP §§ 426.30(a), 426.40, 426.60*

**Discussion:**

See 16.06 -16.08

- ☐ Draft any desired permissive or necessary compulsory cross-complaint cross-complaint.

- ☐ Make cross-complaint a separate document in the same format as a complaint.

**Authority:**

*Cal Rules Ct, Rule 2.100 et seq.; CCP § 428.40*

**Discussion:**

See 16.04

- ☐ If the cross-complaint causes a limited civil case to be reclassified, so identify it in the caption.

**Authority:**

*CCP § 403.030*

**Discussion:**

See 16.10



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Chapter 16 Cross-Complaints  
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1-16 MB Practice Guide: CA Pretrial Civil Procedure 16.04

**16.04 Format of Cross-Complaint.**

**16.04[1] Format of Cross-Complaint Is Same As Complaint.**

**16.04[1][a] General Format Follows Rules for "Papers."** Cross-complaints are "papers" under *Cal Rules Ct, Rule 2.100 et seq.* and should comply with all format requirements of that rule. The cross-complainant is akin to a plaintiff and the cross-defendant is akin to a defendant [ *Wilson, McCall & Daoro v. American Qualified Plans, Inc.* (1999) 70 CA4th 1030, 1036, 83 CR2d 192 ].

**16.04[1][b] Optional California Judicial Council Forms Are Acceptable.** The Judicial Council has approved the general breach-of-contract complaint form [see Judicial Council Form PLD-C-001] for use in cross-complaints, as well as a separate cross-complaint form for use in personal injury, property damage, or wrongful death actions and an attachment pleading for exemplary damages [see Judicial Council Forms PLD-PI-002, PLD-PI-001(6)].



**Cross References:**

See Ch. 7, Complaints.

For fillable versions of the forms in electronic format, see *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at [www.lexis.com/forms](http://www.lexis.com/forms).

**16.04[2] Cross-Complaint Is Separate Document.** The cross-complaint should be a separate document [CCP § 428.40]. It is a separate pleading, based on an independent cause of action. It must adhere to the same completeness and sufficiency standards as the complaint on an independent cause of action [ *Wilson, McCall & Daoro v. American Qualified Plans, Inc.* (1999) 70 CA4th 1030, 1036, 83 CR2d 192 ].

**Exception:**

In accordance with the general rule, in the absence of restrictions imposed by statute or by rules of court, facts alleged in other pleadings in the same case may be incorporated by reference in a subsequent cross-complaint in the case [ *Pine Terrace Apartments, L.P. v. Windscape, LLC* (2009) 170 CA4th 1, 17, 87 CR3d 630] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview



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**16.05 Permissive Cross-Complaints May Be Filed Under Two Circumstances.**

**16.05[1] Permissive Cross-Complaint May Be Filed on Any Cause of Action Against and Adverse Party.** A party against whom a cause of action has been asserted in a complaint or cross-complaint may file a permissive cross-complaint setting forth any cause of action against any of the other parties who filed the complaint or cross-complaint against him [CCP § 428.10(a)]. A cross-complaint against an adverse party need not have any factual relationship to the claims in the original adverse pleading against the cross-complainant [see Assembly Legislative Committee Comment to CCP § 428.10].



**Timing:**

In some cases filing a cross-complaint may be premature [*compare Babb v. Superior Court* (1971) 3 C3d 841, 846-847, 92 CR 179, 479 P2d 379 (malicious prosecution cross-complaint premature), with *English v. English* (1937) 9 C2d 358, 364, 70 P2d 625 (single breach of continuing contract not premature)].

**16.05[2] Permissive Cross-Complaint May Be Filed Against Party or Nonparty Regarding Same Transaction or Occurrence, or Asserting Related Claim, Right, or Interest.** A party against whom a cause of action has been asserted in a complaint or cross-complaint may file a permissive cross-complaint setting forth any cause of action he or she has against a person alleged to be liable thereon, whether or not that person is already a party to the action, if the cause of action asserted in his or her cross-complaint does one of the following [CCP § 428.10(b); see, e.g., *Leko v. Cornerstone Bldg. Inspection Serv.* (2001) 86 CA4th 1109, 1119, 103 CR2d 858 (cross-complaint for equitable indemnity, contribution, declaratory relief)]:

- Arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or her.
- Asserts a claim, right, or interest in the property or controversy that is the subject of the cause brought against him or her.

**Examples:**



- In a negligence case arising from a construction project, a transactionally related cross-complaint is one against others who participated in the same project and whose negligence may have contributed to the damages [ *NewhallLand & Farming Co. v. McCarthy Constr. (2001)* 88 CA4th 769, 773, 106 CR2d 10 ].

- An attorney's cause of action against clients for unpaid legal fees is a "related cause of action" to the clients' causes of action for legal malpractice and breach of fiduciary duty asserted against the attorney, and therefore the attorney's cross-complaint is compulsory [ *K.R.L. P'ship v. Superior Court (2004)* 120 CA4th 490, 498, 15 CR3d 517 ].

- A defendant may file a cross-complaint against any person from whom the defendant seeks total or partial indemnity on the basis of comparative fault. Without a special relationship among parties, a cross-complaint for equitable indemnity is not subject to dismissal solely because an apportionment of fault is available through the assertion of affirmative defenses. On a claim from a real estate transaction, a cross-complaint protected the buyer's brokers from the possibility that the seller's brokers could be dismissed as a result of a settlement [ *Paragon Real Estate Group of San Francisco, Inc. v. Hansen (2009)* 178 CA4th 177, 182-191, 100 CR3d 234 ].



#### **Warning--Carefully Analyze Limitations Period:**

The limitations period applicable to the claim set forth in the cross-complaint may bar the action on the cross-complaint [see, e.g., *Jang v. State Farm Fire & Cas. Co. (2000)* 80 CA4th 1291, 1296-1303, 95 CR2d 917 (cross-complaint in foreclosure action was action on insurance policy, barred by one-year limitations period)]. However, in some instances the limitations period is tolled for compulsory cross-complaints (or amendments thereto), e.g., for actions not barred when the original action was filed [see *Sidney v. Superior Court (1988)* 198 CA3d 710, 713-714, 244 CR 31 (different injury caused by same accident)].

#### **Exception--No Cross-Complaint for Legal Malpractice Indemnity:**

A lawyer sued by a former client for legal malpractice may not cross-complain against plaintiff's present lawyer for indemnity or contribution [see, e.g., *Austin v. Superior Court (1999)* 72 CA4th 1126, 1129, 85 CR2d 644 ; see also *Musser v. Provencher (2002)* 28 C4th 274, 281, 121 CR2d 373, 48 P3d 408 (public policy disfavors suits between past and present counsel); *Kroll & Tract v. Paris & Paris (1999)* 72 CA4th 1537, 1542-1545, 86 CR2d 78 (no equitable indemnity between insurance and *Cumis* counsel, on cross-complaint filed by defendant insurance counsel in legal malpractice action); but see *Parker v. Morton (1981)* 117 CA3d 751, 767, 173 CR 197 (cause of action for indemnity and contribution could be asserted by defendant lawyer against successor lawyer)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsCross-ClaimsPermissive Cross-Claims



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**16.06 Cause of Action May Be Precluded If Not Raised in Compulsory Cross-Complaint.**

**16.06[1] Related Cause of Actions Against Plaintiff Precluded If Not Raised in Cross-Complaint.** Except as between plaintiffs and defendants, there is no compulsory cross-complaint in California procedure [ *Banerian v. O'Malley* (1974) 42 CA3d 604, 612, 116 CR 919 ]. If a party against whom a complaint or cross-complaint has been filed and served fails to allege in a cross-complaint any related cause of action that (at the time of serving the answer to the complaint) he or she has against the plaintiff, that party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded. This provision applies except as otherwise provided by statute [CCP §§ 426.10(a) (definition of complaint includes cross-complaint), 426.30(a)]. A "plaintiff" means a person who files a complaint or cross-complaint [CCP § 426.10(b)].

A related cause of action means a cause of action that arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action that the plaintiff alleges in the complaint [CCP § 426.10(c)].

**Example:**

In one action in which the assignee of a claim brought an action against a party who had previously sued the assignor on a related claim, the defendant's demurrer to the complaint was sustained on the ground that the assignor failed to file a compulsory cross-complaint on that claim at the time of filing its answer to that complaint, even though the claim against the assignor was voluntarily dismissed [ *AL Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75 CA4th 1310, 1313, 89 CR2d 918 ].

**Distinguish:**

The bar on related actions brought after conclusion of first action does not apply if the related cause of action did not exist at the time the answer was due [ *Babb v. Superior Court* (1971) 3 C3d 841, 846-847, 92 CR 179, 479 P2d 379 (malicious prosecution cross-complaint premature before conclusion of legal malpractice action); *Align Technology, Inc. v. Tran* (2009) 179 CA4th 949, 960, 102 CR3d 343 (related cause of action barred because it existed at time answer was due)].

When a defendant has failed to allege a related cause of action by cross-complaint in a prior action, the bar of compulsory cross-complaint rule is raised by demurrer in the subsequent action [see also *AL Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75 CA4th 1310, 1313, 89 CR2d 918 ].

 **Cross Reference:**

See Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

**16.06[2] Cause of Action Not Precluded If Court Does Not Have Jurisdiction, or Person Did Not File**

**Answer.** *CCP* § 426.30 does not apply if either of the following are established [*CCP* § 426.30(b)]:

- The court in which the action is pending does not have jurisdiction to render a personal judgment against the person who failed to plead the related cause of action.
- The person who failed to plead the related cause of action did not file an answer to the complaint against him or her.

**16.06[3] Cause of Action Precluded in Subsequent Action If Voluntarily Dismissed Before Adjudication in**

**Prior Action.** The bar of compulsory cross-complaint rule may be raised in the subsequent action when the same claim was alleged in a cross-complaint in the prior action but was voluntarily dismissed before being adjudicated [ *Hill v. City of Clovis* (1998) 63 CA4th 434, 445, 73 CR2d 638 ; *Carroll v. Imported Motors, Inc.* (1995) 33 CA4th 1429, 1436, 39 CR2d 791 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsTransactional Requirement



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**16.07 When Compulsory Cross-Complaint Provisions Apply.**

**16.07[1] Compulsory Cross-Complaint Provisions Do Not Apply to Special Proceedings.** *CCP § 426.10 et seq.* applies only to civil actions and does not apply to special proceedings [*CCP § 426.60(a)*].

**16.07[2] Compulsory Cross-Complaint Provisions Apply to Plaintiff in Eminent Domain Proceedings.** *CCP § 426.10 et seq.* applies to eminent domain proceedings, notwithstanding *CCP § 426.60(a)*, set forth above [*CCP § 426.70(a)*]. The related cause of action may be asserted by cross-complaint in an eminent domain proceeding whether or not the party asserting the cause of action has presented a claim in compliance with *Gov Code § 900 et seq.* to the plaintiff in the original eminent domain proceeding [*CCP § 426.70(b)*].

**Distinguish:**

However, *CCP § 426.70(b)* eliminates the claim against the public entity requirement only as against the plaintiff. Actions against third parties are not affected, nor are any relevant statutes of limitations [*CCP § 426.70*, Law Revision Comm'n cmt].

**➡ Cross Reference:**

California Forms of Pleading and Practice, Ch. 247, Eminent Domain (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview



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**16.08 When Compulsory Cross-Complaint Provisions Do Not Apply.**

**16.08[1] Compulsory Cross-Complaint Provisions Do Not Apply If Court Has No Jurisdiction Over Additional Necessary Parties.** *CCP § 426.10 et seq.* does not apply if the cause of action not pleaded requires for its adjudication the presence of additional parties over whom the court cannot acquire jurisdiction [*CCP § 426.40(a)*].

**16.08[2] Compulsory Cross-Complaint Provisions Do Not Apply If Cause of Action Is Prohibited by Courts.** *CCP § 426.10 et seq.* does not apply if both the court in which the action is pending and any other court to which the action is transferrable pursuant to *CCP § 396* (transfer to court with jurisdiction over action or proceedings) are prohibited by the federal or state constitution or by a statute from entertaining the cause of action not pleaded [*CCP § 426.40(b)*].

**16.08[3] Compulsory Cross-Complaint Provisions Do Not Apply If Unpleaded Cause of Action Is Subject of a Pending Action.** Compulsory cross-complaint provisions do not apply if at the time the action was commenced, the cause of action not pleaded was the subject of another pending action [*CCP § 426.40(c)*].

**16.08[4] Compulsory Cross-Complaint Provisions Do Not Apply to Small Claims Court Cases.** *CCP § 426.10 et seq.* do not apply to actions in the small claims court [*CCP § 426.60(b)*].



**Cross Reference:**

California Forms of Pleading and Practice, Ch. 526, Small Claims (Matthew Bender).

**16.08[5] Compulsory Cross-Complaint Provisions Do Not Apply to Declaratory Relief Actions.** *CCP § 426.10 et seq.* do not apply when the only relief sought is a declaration of the rights and duties of the respective parties in an action for declaratory relief under *CCP § 1060 et seq.* [*CCP § 426.60(c)*]. The rationale for this rule is that declaratory relief actions afford a prompt adjudication of the parties' legal rights and duties, unencumbered by the litigation of other related disputes between the parties. Further, *CCP § 1062.3(b)* explicitly precludes an award of purely declaratory relief from limiting the availability of other types of relief on the same facts [ *Mycogen Corp. v. Monsanto Co* (2002) 28 *C4th* 888, 898, 123 *CR2d* 432, 51 *P3d* 297 ], and the same matters can sometimes be raised as affirmative defenses [see, e.g., *C.J.L. Constr., Inc. v. Universal Plumbing* (1990) 18 *CA4th* 376, 22 *CR2d* 360, 369-371 (worker's compensation insurer can seek offset for employer negligence as affirmative defense without requiring employer

undergo participation in law suit without its consent)].



**Cross Reference:**

Pleading declaratory actions, see 7.12[6][g].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview



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**16.09 Application for Leave to Amend Pleading or File Cross-Complaint.**

**16.09[1] Party May Seek to Amend Pleading or File Cross-Complaint After Inadvertently Failing to Plead Cause of Action.** A party that fails to plead a cause of action subject to the requirements of *CCP § 426.10 et seq.*, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend the pleading, or to file a cross-complaint, to assert that cause at any time during the course of the action [*CCP § 426.50*].



**Cross Reference:**

Ch. 34, Amended and Supplemental Pleadings.

**16.09[2] Court Must Grant Relief If Party Acted in Good Faith.** The court, after notice to the adverse party, shall grant, on such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert the cause if the party who failed to plead the cause acted in good faith. *CCP § 426.50* must be liberally construed to avoid forfeiture of causes of action [*CCP § 426.50*].

"Bad faith" is the opposite of good faith. Generally, it implies or involves actual or constructive fraud, a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation. Bad faith conduct is prompted not by an honest mistake, but rather by some interested or sinister motive; not simply by bad judgment or negligence, but rather by the conscious doing of a wrong because of dishonest purpose or moral obliquity. It contemplates a state of mind affirmatively operating with furtive design or ill will [ *Silver Org. Ltd. v. Frank* (1990) 217 CA3d 94, 100, 265 CR 681 ].

**Example:**

A motion seeking leave to file a cross-complaint should have been granted when the defendant attempted to settle the case in propria persona, then sought counsel, at first unsuccessfully. The attorney he finally retained conducted discovery, causing him to find grounds for the cross-complaint under *CCP § 426.50*. Although the motion was made shortly before trial, the defendant acted in good faith [ *Silver Org. Ltd. v. Frank* (1990) 217 CA3d 94, 99-101, 265 CR 681 ].

**Strategic Point:**

Although courts are required to construe the statute authorizing permissive cross-complaints liberally, parties should be mindful that leave to file cross-complaints is subject to a rule of reason, and denial of leave to amend will be reviewed on appeal only for abuse of discretion [*see Flynn v. Page (1990) 218 CA3d 342, 347, 266 CR 830* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview





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**16.10 Reclassification of Case by Cross-Complaint.**

**16.10[1] If Cross-Complaint Causes Limited Civil Case to Be Reclassified, Caption Must So State.** If a party in a limited civil case files a cross-complaint that causes the action or proceeding to exceed the maximum amount in controversy for a limited civil case or otherwise fail to satisfy the requirements for a limited civil case as prescribed by *CCP* § 85, the caption of the cross-complaint must state that the action or proceeding is a limited civil case to be reclassified by cross-complaint, or words to that effect [*CCP* § 403.030; see generally *CCP* § 403.010 et seq.; see also *CCP* §§ 403.040 (motion for reclassification), 403.050 (stipulation for reclassification)].

**16.10[2] If Amended Cross-Complaint, or Other Amended Initial Pleading, Causes Limited Civil Case to Be Reclassified, Cross-Complainant Must Pay Additional Fee.** If a plaintiff, cross-complainant, or petitioner files an amended complaint or other amended initial pleading that changes the jurisdictional classification from limited to unlimited, the party at the time of filing the pleading must pay the reclassification fee provided in *CCP* § 403.060, and the clerk shall promptly reclassify the case [*CCP* § 403.020(a)].

**Distinguish--No Fee If Classification Is to Limited Civil Case:**

If the amendment changes the jurisdictional classification from unlimited to limited, no reclassification fee is required, and the clerk shall promptly reclassify the case [*CCP* § 403.020(a)].

**➡ Cross Reference:**

Ch. 15, Reclassification of Cases.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedurePleading & PracticePleadingsComplaintsFiling FeesCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview



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**16.11 CHECKLIST: Filing and Serving Cross-Complaints.**

- ☐ File the cross-complaint before or with answer.
- ☐ If cross-complaint has not been filed before or with the answer, consider filing a motion for leave to file the cross-complaint at a later time during trial.

**Authority:**

*CCP § 426.50*

**Discussion:**

*See 16.09*

**Form:**

*See 16.18*

**Grounds:**

Oversight, inadvertence, mistake, neglect, or other cause [*CCP § 426.50*]

- ☐ Consult local court rules to assure compliance with all procedural requirements.

**Discussion:**

*See 16.14*

- ☐ Determine whether to file a permissive cross-complaint alleging any cause of action defendant (or cross-defendant) has against the plaintiff.

**Authority:**

*CCP § 428.10(a)*

- ☐ If appropriate, prepare and file permissive cross-complaint.

**Discussion:**

See 16.05[1]

**Forms:**

See 16.15-16.17

- ☐ Determine whether to file a compulsory cross-complaint alleging any cause of action defendant (or cross-defendant) has against a person (party or nonparty) possibly liable in this cause of action, if defendant's cause of action does one of the following:

☐ Arises out of the same transaction, occurrence, or series of transactions or occurrences as this cause of action;

☐ Asserts a claim, right, or interest in the property or controversy that is the subject of this cause of action.

**Authority:**

CCP § 428.10(b)

- ☐ If appropriate, prepare and file compulsory cross-complaint.

**Discussion:**

See 16.05[2]

**Form:**

See 16.18

- ☐ Determine if service of cross complaint is required.

☐ If service is required, prepare summons on mandatory Judicial Council Form SUM-110, Summons--Cross-Complaint.

**Authority:**

CCP § 428.60, *Cal Rules Ct, Rule 1.31*

**Discussion:**

See 16.13

**Form:**

See 16.19

- ☐ File cross-complaints against the plaintiff (or cross-complainant) before or with your answer.

- ☐ File any other cross-complaints prior to the court's setting a date for trial.

**Authority:**

*CCP § 428.50*

- ☐ If cross-complaint not filed at the appropriate time, consider filing a motion for leave to file the cross-complaint at a later time during trial.

**Grounds:**

Interests of justice [*CCP § 428.50(c)*]

**Discussion:**

See 16.09

- ☐ Consult local rules to assure compliance with all local procedural requirements.

**Discussion:**

See 16.14



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**16.12 Time for Filing Cross-Complaint.**

**16.12[1] Cross-Complaint Against Party Who Filed Complaint or Cross-Complaint Must Be Filed With Answer.** A party must file a cross-complaint against any of the parties who filed the complaint or cross-complaint against him or her before or at the same time as the answer to the complaint or cross-complaint [*CCP* § 428.50(a)].

**16.12[2] Cross-Complaints Against Other Adverse Parties May Be Filed Before Trial Date Set.** A party may file any other cross-complaints, other than those filed against adverse parties, at any time before the court has set a date for trial [*CCP* § 428.50(b)]. These cross-complaints may be filed without leave of the court at any time before the court has set a date for trial [*see City of Hanford v. Superior Court* (1989) 208 CA3d 580, 587, 256 CR 274 ].

**16.12[3] Party Must Obtain Permission to File All Other Cross-Complaints.** A party must obtain leave of court to file any cross-complaint except one filed within the time specified in *CCP* § 428.50(a) or (b). Leave may be granted in the interest of justice at any time during the course of the action [*CCP* § 428.50(c)]. *CCP* § 428.50(c) addresses all other cross-complaints not subject to *CCP* § 428.50(a) or (b) [*see City of Hanford v. Superior Court* (1989) 208 CA3d 580, 587, 256 CR 274 ].

**Exception--No Cross-Complaint After Final Judgment:**

A party may not file a cross-complaint after final judgment has been entered on the underlying complaint [ *City of Hanford v. Superior Court* (1989) 208 CA3d 580, 587, 256 CR 274 ].



**Cross Reference:**

Forms, see 16.12-16.14.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*1-16 MB Practice Guide: CA Pretrial Civil Procedure 16.13*

**16.13 Service of Summons and Cross-Complaint.**

**16.13[1] Party Who Has Not Appeared Must Be Served With Summons on Cross-Complaint.** If a party has not appeared in the action, a summons on the cross-complaint must be issued and served on him or her in the same manner as on commencement of an original action [*CCP* § 428.60(1); *see CCP* § 413.10 (person on whom summons may be served)]. The Judicial Council has approved Form SUM-110, Summons--Cross-Complaint, for mandatory use in filing cross-complaints [*see Cal Rules Ct, Rule 1.31*].

➤ **Cross References:**

Form of summons on cross-complaint (Judicial Council Form SUM-110), *see 16.19. Ch. 8, Service of Summons.*

**16.13[2] Party Who Has Appeared Must Be Served in Manner Provided for Service of Summons or in CCP § 1010 et seq.** If a party has appeared in the action, the cross-complaint must be served on his or her attorney, or on the party if he has appeared without an attorney, in the manner provided for service of summons or in the manner provided by *CCP* § 1010 et seq. [*CCP* § 428.60(2); *see CCP* § 413.10 (person on whom summons may be served)].

**16.13[3] Cross-Complainant Must Serve Recent Amended Complaint and Answers on Cross-Defendants Who Have Not Appeared.** A cross-complainant must serve a copy of the most recently amended complaint and any answers on cross-defendants who have not previously appeared [*Cal Rules Ct, Rule 3.222*].

**16.13[4] Cross-Complainant Must Serve ADR Package on New Parties.** Cross-complainants in a general civil case must serve a copy of the ADR information package on any new parties to the action along with the cross-complaint [*Cal Rules Ct, Rule 3.221(c)*].

➤ **Cross Reference:**

Ch. 24, Pretrial ADR.

**16.13[5] Cross-Complainant Must File Proof of Service With Cross- Complaint If Defendant Has Appeared, and Within 30 Days of Filing Cross-Complaint That Adds New Parties.** A cross-complaint against a party who has appeared in the action must be accompanied by proof of service of the cross-complaint at the time it is filed. If the

cross-complaint adds new parties, the cross-complaint must be served on all parties and proofs of service on the new parties must be filed within 30 days of the filing of the cross-complaint [*Cal Rules Ct, Rule 3.110(c)*].

**Cross References:**

Local court rules, see 16.14.

Ch. 8, Service of Summons.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**16.14 Filing and Service of Cross-Complaints and Related Matters Under Local Court Rules.**

Local rules of court commonly reiterate the requirements of *Cal Rules Ct, Rule 3.110* for time and service requirements of cross-complaints. However, local rules do provide some variations that should be checked before preparing, serving, and filing a cross-complaint. Examples include:

- The court may extend the time standards for serving and filing a cross-complaint on noticed motion, but the parties may not do so by stipulation [Los Angeles Super Ct Rules, Rule 7.7(b)].
- A cross-complainant may not grant any cross-defendant an extension of time to file a responsive pleading to a cross-complaint beyond the date set for the case evaluation conference; a cross-complaint against an existing or new party must be served within 10 days of its filing unless a Certificate of Progress is filed indicating why service has not been effected and what is being done to effect service; and the court, on noticed motion by any party or its own motion, may sever a cross-complaint when continued processing of the cross-complaint will result in undue delay in bringing the underlying complaint to trial [Orange Super Ct Rules, Rule 440].
- A blank copy of the Judicial Council Case Management Statement and a copy of the local rules governing case management must be served along with the cross-complaint; and the 30-day time period after answering in which to file any cross-complaint is extended to 50 days if compliance with a government claims statute is a prerequisite to the cross-complaint [San Mateo Super Ct Rules, Rule 2.3(d)(2)].

Be sure to review the local rules regarding time extensions, sanctions, and orders to show cause for failing to follow delay reduction rules.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Pleading & Practice Pleadings Cross-Claims General Overview





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Chapter 16 Cross-Complaints  
IV. FORMS

*1-16 MB Practice Guide: CA Pretrial Civil Procedure 16.15*

**16.15 Notice of Motion and Motion for Leave to File Permissive Cross-Complaint.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                 |
|---------------|---|---------------------------------|
| _____ [name], | ) | No. _____                       |
| Plaintiff.    | ) | NOTICE OF MOTION AND MOTION FOR |
| vs.           | ) | LEAVE TO FILE CROSS-COMPLAINT   |
| _____ [name], | ) | Date: _____                     |
| Defendant.    | ) | Time: _____                     |
|               | ) | Location: _____                 |
|               | ) | [Judge: _____]                  |
|               | ) | Date Action Filed: _____        |
|               | ) | [Trial Date: _____]             |

To \_\_\_\_\_ [party, e.g., plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., defendant Mary Jones] will, and hereby does, move for an order granting leave of court to file a cross-complaint herein, a copy of which is attached hereto as Exhibit A and incorporated by reference. The motion will be made on the grounds that the proposed cross-complaint is permitted pursuant to Subsection \_\_\_\_\_ [(a) or (b)] of CCP § 428.10, that the proposed cross-complaint was not filed \_\_\_\_\_ [with \_\_\_\_\_ (moving party and pleading, e.g., defendant's answer to the complaint herein or before the court set the date for trial of this action] because \_\_\_\_\_ [specify reasons], and that the interests of justice

require that leave be granted in that \_\_\_\_\_ [*specify, e.g., circuitry and multiplicity of actions may be avoided*].

The motion will be based on this notice of motion, on the declaration of \_\_\_\_\_ [*name*] served and filed herewith, on the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

[*moving party's status or name*]

NOTES.

**Authority:**

*CCP § 428.10*

**Discussion:**

*See 16.05[1]*

**Related Form of Declaration:**

*See 16.16*

**Related Forms of Memoranda:**

*See California Points and Authorities, Ch. 61, Cross Complaints (Matthew Bender)*

**Related Form of Order:**

*See 16.17*

**Related Form of Motion for Leave to File Compulsory Cross-Complaint:**

*See 16.18*

**Related Form of Summons--Cross-Complaint:**

*See 16.19*



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Chapter 16 Cross-Complaints  
IV. FORMS

1-16 MB Practice Guide: CA Pretrial Civil Procedure 16.16

**16.16 Declaration in Support of Motion for Leave to File Permissive Cross-Complaint.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],

Plaintiff.

vs.

\_\_\_\_\_[name],

Defendant.

)

)

)

)

)

)

)

)

)

)

)

No. \_\_\_\_\_

DECLARATION OF \_\_\_\_\_ [name]

IN SUPPORT OF MOTION FOR LEAVE TO FILE

PERMISSIVE CROSS-COMPLAINT

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Location: \_\_\_\_\_

[Judge: \_\_\_\_\_]

Date Action Filed: \_\_\_\_\_

[Trial Date: \_\_\_\_\_]

I \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for defendant, \_\_\_\_\_ (name)].

2. \_\_\_\_\_ [Set forth facts, e.g., On or about \_\_\_\_\_ (date), defendant \_\_\_\_\_ (name) filed an answer to the complaint herein. Defendant has a cause of action against \_\_\_\_\_ (name), which is set forth in the copy of the cross-complaint attached to the notice of motion as Exhibit A].

3. \_\_\_\_\_ [If the intended cross-complaint is against a person who is not a party to the action, state evidentiary facts showing that the cause of action to be asserted in the cross-complaint either arose out of the transaction on which plaintiff's action is brought, or that it asserts an interest in the property or controversy to which the action relates].

4. The cross-complaint was not filed because \_\_\_\_\_ [state evidentiary facts explaining why the cross-complaint was not filed within the time prescribed by CCP § 428.50(a) or (b) ].

5. It is in the interests of justice that leave be granted to file the cross-complaint in that \_\_\_\_\_ [state evidentiary facts, e.g., if leave is not granted, defendant will file a separate action against plaintiff, which will require a separate trial, whereas if leave is granted, all controversies between the parties can be resolved in this action].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

NOTES.

**Authority:**

CCP § 428.50

**Related Form of Motion:**

See 16.15

**Related Form of Order:**

See 16.17



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Chapter 16 Cross-Complaints  
IV. FORMS

*1-16 MB Practice Guide: CA Pretrial Civil Procedure 16.17*

**16.17 Order on Motion for Leave to File Cross-Complaint.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |           |
|---------------|---|-----------|
| _____ [name], | ) |           |
| Plaintiff.    | ) |           |
| vs.           | ) | No. _____ |
| _____ [name], | ) | ORDER     |
| Defendant.    | ) |           |
|               | ) |           |
|               | ) |           |

\_\_\_\_\_

The motion of \_\_\_\_\_ [moving party, e.g., defendant Mary Jones] for an order permitting \_\_\_\_\_ [name] to file a cross-complaint in this action, naming \_\_\_\_\_ [name] as cross-defendant, came on regularly for hearing on \_\_\_\_\_ [date]. \_\_\_\_\_ [Name] appeared by counsel \_\_\_\_\_ [name], and \_\_\_\_\_ [name] appeared by counsel \_\_\_\_\_ [name].

On proof being made to the satisfaction of the court that the motion should be \_\_\_\_\_ [granted or denied],

IT IS ORDERED that \_\_\_\_\_ [the motion is granted and permission is hereby granted to \_\_\_\_\_ (name) to file a cross-complaint in this action, naming therein \_\_\_\_\_ (name) as cross-defendant or the motion is denied].

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

CCP §§ 426.50, 428.50

**Related Form of Motion:**

See 16.15

**Related Form of Declaration:**

See 16.16

**Related Form of Summons--Cross-Complaint:**

See 16.19



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Chapter 16 Cross-Complaints  
IV. FORMS

1-16 MB Practice Guide: CA Pretrial Civil Procedure 16.18

**16.18 Notice of Motion and Motion for Leave to File Compulsory Cross-Complaint After Answer Is Filed.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                 |
|---------------|---|---------------------------------|
| _____ [name], | ) | No. _____                       |
| Plaintiff.    | ) | NOTICE OF MOTION AND MOTION FOR |
| vs.           | ) | LEAVE TO FILE CROSS-COMPLAINT   |
| _____ [name], | ) | Date: _____                     |
| Defendant.    | ) | Time: _____                     |
|               | ) | Location: _____                 |
|               | ) | [Judge: _____]                  |
|               | ) | Date Action Filed: _____        |
|               | ) | [Trial Date: _____]             |

To \_\_\_\_\_ [party, e.g., plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., defendant Mary Jones] will, and hereby does, move for an order granting leave of court to file a cross-complaint herein, a copy of which is attached hereto as Exhibit A and incorporated by reference. The motion will be made on the grounds that the cause of action asserted in the proposed cross-complaint is a related cause of action as that term is defined in CCP § 426.10(c), that the cross-complaint was not filed before serving \_\_\_\_\_ [name of moving party]'s answer because \_\_\_\_\_ of [oversight or inadvertence or mistake or neglect or specify other cause] in that \_\_\_\_\_ [specify reason], and that

\_\_\_\_\_ [name of moving party] has acted in good faith in that \_\_\_\_\_ [set forth facts evidencing good faith].

The motion will be based on this notice of motion, on the declaration of \_\_\_\_\_ [name] served and filed herewith, on the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[moving party's status or name]

NOTES.

**Authority:**

CCP § 426.50

**Discussion**

See 16.09

**Related Form of Memoranda:**

See California Points and Authorities, Ch. 61, Cross Complaints (Matthew Bender)

**Related Form of Motion for Leave to File Permissive Cross-Complaint:**

See 16.15

**Related Form of Summons--Cross-Complaint:**

See 16.19





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Chapter 16 Cross-Complaints  
IV. FORMS

*1-16 MB Practice Guide: CA Pretrial Civil Procedure 16.19*

**16.19 Judicial Council Form SUM-110 Summons--Cross-Complaint.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*CCP § 428.60.* Judicial Council Form SUM-110 has been adopted for mandatory use when serving cross-complaint [*Cal Rules Ct, Rule 1.31*]

**Discussion:**

See 16.13

**Related Form of Summons--Complaint:**

See 8.43

**Related Form of Motion for Leave to File Permissive Cross-Complaint:**

See 16.15

**Related Form of Motion for Leave to File Compulsory Cross-Complaint:**

See 16.18

**Related Form of Memoranda:**

See California Points and Authorities, Ch. 61, Cross Complaints (Matthew Bender)



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Chapter 17 Removal to Federal Court

*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.syn*

**§ 17.syn Synopsis to Chapter 17: Removal to Federal Court**

17.01 Scope.

17.02 Objective and Strategy.

17.03 CHECKLIST: Removing Action to Federal Court.

17.04 Options and Strategies for Party Seeking to Remove Action.

17.05 Grounds for Removal to Federal District Court.

17.05[1] Federal Court Must Have Original Jurisdiction.

17.05[2] Federal Question Is Basis for Removal.

17.05[3] Diversity of Citizenship Is Basis for Removal.

17.05[4] Special Removal Statute Is Basis for Removal.

17.06 Federal Statute Prohibits Removal in Certain Actions.

17.07 The Parties May Not Consent to Removal.

17.08 Defendant May Waive Removal Right.

17.09 Actions Involving a Federal Question Are Removable to Federal Court.

17.09[1] Action Founded on a Claim or Right Arising Under U.S. Constitution, Laws, or Treaties Is Removable.

17.09[2] Specific Statutes Confer Jurisdiction on the Federal District Courts.

17.09[3] "Well-Pleaded Complaint Rule" Means Federal Question Must Appear on the Face of Plaintiff's Claim.

17.09[4] "Artful Pleading Exception" to "Well-Pleaded Complaint" Rule.

17.09[5] Complete Preemption by Federal Statute May Necessitate Removal.

17.10 Actions Involving Diversity Jurisdiction Are Removable to Federal Court.

17.10[1] Action Involving Diversity of Citizenship and Matter in Controversy Exceeding \$75,000 Is Removable.

17.10[2] Diversity Case Removable Only If No Party Legitimately Joined As a Defendant Is a Citizen of the State Where the Action Is Brought.

17.10[3] Diversity Must Exist When the State Action Is Filed and When the Defendant Petitions for Removal.

17.10[4] Citizenship of Fictitious Defendant Is Irrelevant.

17.10[5] Fraudulent Joinder of Parties to Defeat Diversity May Preclude Removal.

17.10[6] Minimal Diversity Jurisdiction Is Basis for Removal.

17.10[7] Class Actions With Diversity of Plaintiffs and Involving More Than \$5,000,000 May Be Removable.

17.10[7][a] Removal Statute Authorizes Removal of All Class Actions, Regardless of Whether A Defendant Is Citizen of State in Which Action Is Brought.

17.10[7][b] Federal Courts Have Jurisdiction of Class Actions Involving A Minimum of Diversity and More Than \$5,000,000.

17.10[7][c] Federal Courts Have Jurisdiction of Mass Actions Constituting Class Actions.

17.10[7][d] Federal Jurisdiction Is Excepted for Certain Cases Where Two-Thirds of Class Members and Certain Defendants Are In-State.

17.10[7][e] Federal District Court Has Discretion to Decline Jurisdiction If More Than One-Third But Less Than Two-Thirds of Class Members and All Primary Defendants Are In-State.

17.10[7][f] Determination of Citizenship of Class Members.

17.11 Action May Be Removable Under Special Removal Statute.

17.11[1] Removal Available If Defendant Is United States or Its Agencies or Officers.

17.11[2] Removal of Certain Civil Rights Actions Available.

17.11[3] Removal Available if Defendant Is Foreign State.

17.11[4] Removal Available in Foreclosure Actions Against the United States.

17.11[5] Involvement of Certain Federal Agencies Is Basis for Removal.

17.11[6] Removal Available in Claims Related to Bankruptcy Cases.

17.12 When Federal Question Claim Is Joined With a State Claim, the Entire Case Is Removable.

17.13 Party Must File Notice of Removal.

17.13[1] Party Must File Notice in District Court.

17.13[2] Notice Must Contain Statement of Grounds for Removal.

17.13[3] Notice Must Be Filed Within 30 Days of Defendant Receiving Initial Pleading.

17.13[4] Removing Party Must Notify All Adverse Parties and File Copy of Notice With State Court.

17.14 All Defendants Must Join in Removal.

17.15 Party May File Notice of Removal If Amended Pleading or Motion Renders Case Removable.

17.16 Party May File Notice of Removal If Dismissal of a Resident Defendant Creates Diversity.

17.17 Plaintiff May Waive Objection to Notice of Removal by Appearing in District Court.

17.18 Removal Provides District Court With Immediate Jurisdiction.

17.18[1] Filing of Notice of Removal and Notice to Adverse Parties Effects Removal.

17.18[2] District Court May Determine Whether It Has Jurisdiction After Removal Is Effected.

17.18[3] Changes in Case Ordinarily Do Not Defeat Federal Jurisdiction.

17.18[4] Federal Court May Exercise Supplemental Jurisdiction to Hear State Law Claims.

17.18[5] Federal Rules of Civil Procedure Apply to Removed Action.

17.18[6] Federal Court May Issue Orders and Process.

17.19 Removal Terminates State Court's Jurisdiction.

17.20 Federal Court Takes Removed Case As It Finds It.

17.21 Court Has Several Options When Plaintiff Joins New Defendant After Removal.

17.22 Defendant Who Has Not Answered As of Time of Removal Generally Has 20 Days to Do So.

17.23 Party May Demand Jury Trial After Removal.

17.24 CHECKLIST: Moving to Remand and Seeking Appellate Review of Removal.

17.24[1] Checklist for Party Making Motion to Remand.

17.24[2] Checklist for Party Opposing Motion to Remand.

17.25 Options and Strategies for Party Moving to Remand and Seeking Appellate Review of Removal.

#### 17.26 Grounds for Remand.

17.26[1] Lack of Subject Matter Jurisdiction Is Basis for Remand.

17.26[2] Defect in Removal Procedure Is Basis for Remand.

17.26[3] Federal Court May Not Remand for Discretionary Reasons.

#### 17.27 Party May Challenge Removal by Making Motion to Remand.

17.27[1] Any Party May Move for Remand.

17.27[2] Motion to Remand Must Generally Be Made Within 30 Days of Filing Notice of Removal.

17.27[3] District Court May Remand Action on its Own Motion.

#### 17.28 Remand Order Terminates Federal Court's Jurisdiction.

#### 17.29 Court May Award Remanding Party Costs and Attorney's Fees Incurred Due to Removal.

#### 17.30 Party May Seek Review of District Court Order Denying Motion to Remand.

17.30[1] Order Is Reviewable by Interlocutory Appeal or Appeal From Final Judgment.

17.30[2] Appellate Court Will Review Whether Removal Was Proper.

#### 17.31 District Court Order Remanding Action Is Generally Not Reviewable.

#### 17.31A Interlocutory Review of Grant or Denial of Remand of Class Action.

#### 17.32 Unchallenged Removal May Be Reviewed After Judgment.

#### 17.33 Defendant Has 30 Days to File a Response on Remand.

#### 17.34 Notice of Removal From State Court to Federal District Court [28 USC §§ 1441,1446].

#### 17.35 Allegation of Ground for Removal--Diversity of Citizenship [28 USC §§ 1332, 1441(b)]--In General.

#### 17.36 Notice of Filing Removal Notice [28 USC § 1446(d)].

#### 17.37 Notice of Motion and Motion to Remand Removed Actions [28 USC § 1447(c)].



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Chapter 17 Removal to Federal Court  
I. STRATEGY

*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.01*

**17.01 Scope.**

This chapter covers:

- Options and strategies for removal of a cause to federal court [*see 17.04*].
- Options and strategies for remanding an action back to state court [*see 17.25*].
- Circumstances in which removal to federal court is available [*see 17.05*].
- Removal to federal court when a federal question is involved [*see 17.09*].
- Removal to federal court when there is diversity of citizenship [*see 17.10*].
- Procedures for removing an action to federal court [*see 17.13 -17.17*; Forms: *see 17.34 -17.36*].
- Procedures in federal court once an action has been removed [*see 17.18 -17.23*].
- Grounds and procedures for remanding an action back to state court and seeking review after the court rules on a motion to remand [*see 17.24 -17.33*; Form: *see 17.37*].

**Core Statutes:**

*28 USC §§ 1441-1452*



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Chapter 17 Removal to Federal Court  
I. STRATEGY

*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.02*

**17.02 Objective and Strategy.**

Removal is a procedure used by defendants to remove an action from a state court to a federal district court. A party may move to remand the action if there was a defect in the removal procedure or the district court lacks subject matter jurisdiction.

Removal is sought by defendants for several reasons:

- A preference for the Federal Rules of Civil Procedure;
- A preference for the federal bench, such as its perceived relative proclivity to deny certification of class in class actions;
- Differing federal standards applicable to a motion for summary judgment;
- A desire to have certain issues decided by the federal bench when they are more frequently litigated in federal court and thus the federal judge is more familiar with the issues;
- The federal courts have exclusive jurisdiction over the action (e.g., ERISA) [*see* 17.09[2],[5]];
  - Preference for the applicable provisions of federal law, such as the "Consumer Class Action *Bill of Rights*" [*see* 28 USC § 1711 *et seq.*].

Depending on the jurisdiction, the federal court may move faster or slower than state court proceedings and thus counsel should consider the likely timing of the action in considering whether or not to remove.

**Detailed Discussion/Forms:**

See Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 3, Removing a State Court Case to Federal Court (Matthew Bender);

California Forms of Pleading and Practice, Ch. 265, Federal Courts: Jurisdiction and Removal (Matthew Bender);

Moore's Federal Practice, Ch. 107, Removal (Matthew Bender 3d ed.).



**Cross References:**

For discussion and forms useful in federal actions, see Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California;

Bender's Federal Practice Forms (Matthew Bender);

Bender's Forms of Discovery (Matthew Bender);

Federal Litigation Guide (Matthew Bender);

Moore's Federal Practice (Matthew Bender 3d ed.);

Moore's Manual--Federal Practice and Procedure (Matthew Bender);

Moore's Manual--Forms (Matthew Bender); and

Weinstein's Evidence, United States Rules (Matthew Bender).

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureRemovalGeneral Overview





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Chapter 17 Removal to Federal Court  
II. REMOVING ACTION TO FEDERAL COURT

*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.03*

**17.03 CHECKLIST: Removing Action to Federal Court.**

☐ Determine whether federal court has original jurisdiction over action:

☐ Federal question involving a claim or right arising out of the Constitution, treaties, or laws of the United States.

**Authority:**

*28 USC § 1441(b)*

**Discussion:**

*See 17.05[2], 17.09*

☐ Action involving diversity of citizenship.

☐ No defendant is a citizen of California.

☐ Matter in controversy exceeds \$75,000 exclusive of interest and costs.

**Authority:**

*28 USC §§ 1332(a), 1441(b)*

**Discussion:**

*See 17.05[3], 17.10*

☐ Actions brought against the United States or its agencies or officers.

**Authority:**

*28 USC § 1442(a)(1)*

**Discussion:**

*See 17.11[1]*

- ☐ Actions brought by an alien against a non-resident federal civil officer.

**Authority:**

*28 USC § 1442(b)*

**Discussion:**

*See 17.11[1]*

- ☐ Certain civil rights actions.

**Authority:**

*28 USC § 1443*

**Discussion:**

*See 17.11[2]*

- ☐ Actions against foreign states.

**Authority:**

*28 USC § 1441(d)*

**Discussion:**

*See 17.11[3]*

- ☐ Foreclosure Actions against the United States.

**Authority:**

*28 USC § 1444*

**Discussion:**

*See 17.11[4]*

- ☐ Actions involving certain federal agencies.

**Authority:**

*12 USC § 1441a(a)(11)* (Resolution Trust Corporation); *12 USC § 1819(b)(2)(B)* (Federal Deposit Insurance Corporation)

**Discussion:**

*See 17.11[5]*

- ☐ Claims related to bankruptcy cases.

**Authority:**

28 USC § 1452(a)

**Discussion:**

See 17.11[6]

☐ Action involving "minimal diversity" that arises from single accident at a discrete location with at least 75 fatalities, if one of the following exists:

☐ A defendant reside sin one state and a substantial part of the accident took place in another state or other location, regardless of whether that defendant is also a resident of the state where a substantial part of the accident took place;

☐ Any two defendants reside in different states, regardless of whether those defendants are also residents of the same state or states; or

☐ Substantial parts of the accident took place in different states.

**Authority:**

28 USC §§ 1369(a), 1441(e)

**Discussion:**

See 17.10[6]

☐ Class action, and certain mass actions otherwise qualifying for class action jurisdiction, that involve an amount in controversy greater than \$5,000,000 and one of the following applies:

☐ Any class member is a citizen of a state different from any defendant;

☐ Any class member is a foreign state or a citizen or subject of a foreign state, and any defendant is a citizen of a state; or

☐ Any class member is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.

**Authority:**

28 USC §§ 1332(d)(2), 1453(b)

**Exceptions:**

Exceptions to federal district court jurisdiction of class actions in these categories exist for certain actions involving covered securities or securities under the Securities Act of 1933 and the Securities and Exchange Act of 1934, state law claims concerning internal affairs or corporate governance of corporations, governmental defendants, small classes, and certain cases in which more than two-thirds of class members are citizens on the same state. Further, the federal court may decline under statutory criteria to exercise jurisdiction over class actions in which more than one-third but less than two-thirds of class members are citizens on the same state.

**Discussion:**

See 17.10[7]

☐ Determine if action is non-removable:

- ☐ An action against a railroad or its receivers or trustees arising under 45 USC §§ 51-60.
- ☐ An action against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments arising under 49 USC § 11706 or 14706, unless the matter in controversy exceeds \$10,000, exclusive of interest and costs.
- ☐ An action arising under state worker's compensation laws.
- ☐ An action arising under section 40302 of the Violence Against Women Act of 1994 [see 42 USC § 13981].

**Authority:**

28 USC § 1445

**Discussion:**

See 17.06

☐ Verify defendant has not waived right to removal by:

- ☐ Filing permissive counterclaim;
- ☐ Filing third party complaint; or
- ☐ Other qualifying action.

**Authority:**

*California Republican Party v. Mercier* (CD Cal 1986) 652 F Supp 928, 931-932

**Discussion:**

See 17.08

☐ Obtain all defendants' agreement to remove action.

**Authority:**

*Varney v. Johns-Manville Corp.* (ND Cal 1987) 653 F Supp 839, 840 n1

**Exception:**

Removal of a class action does not require the consent of any other defendant [28 USC § 1453(b)].

**Discussion:**

See 17.14

☐ File notice of removal in federal district court for district and division where action is pending.

- ☐ Include short, plain statement of grounds for removal.
- ☐ Sign the notice pursuant to *Fed R Civ P, Rule 11*.
- ☐ Include a copy of all process, pleadings, and orders served in state action.

**Authority:**

28 USC § 1446(a)

**Discussion:**

See 17.15

**Forms:**

See 17.34, 17.35



Determine timing:

- ☐ File notice within the shorter of thirty days after:
  - ☐ Defendant's receipt of a copy of the initial pleading, or
  - ☐ Service of summons on defendant.

**Authority:**

28 USC § 1446(b)

**Exception:**

In an action removed under 28 USC § 1441(e)(1) the notice of removal may also be filed before trial of the state court action within 30 days after defendant first becomes a party to a minimal diversity action under 28 USC § 1369 that arises from the same accident as the state court action, or at a later time with leave of the district court [28 USC § 1441(e)(1)].

**Discussion:**

See 17.13[3]

☐ When case as stated by initial pleadings is not removable, but subsequently becomes removable, defendant must file notice of removal within 30 days after receipt of copy of pleading, motion, order, or other paper that first demonstrates that a case has become removable.

**Authority:**

28 USC § 1446(b)

**Discussion:**

See 17.15

**Exception:**

A case may not be removed on the basis of diversity of citizenship more than one year after commencement of the action [28 USC §§ 1332, 1446(b)], unless the action is a class action [28 USC § 1453(b)].

- ☐ Give written notice to all adverse parties, including other defendants not joining in the removal of a class action.

**Timing:**

Promptly after filing the notice of removal.

**Authority:**

28 USC § 1446(d)

**Discussion:**

See 17.13[4]

- ☐ File copy of notice with state court.

**Authority:**

28 USC § 1446(d)

**Discussion:**

See 17.13[4]

**Form:**

See 17.36



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**17.04 Options and Strategies for Party Seeking to Remove Action.**

The removing party must consider the appropriate timing for removal [see 17.13[3]]. One should ensure that the client did not receive a "courtesy copy" of the complaint without taking action, which may defeat the 30-day timing requirement for removal.

The party should also consider the local state and federal dockets to assess the relative timing of the suit in state or federal court.

A federal judge will not be happy to receive a case of either de minimis value or without a truly significant legal question. Parties should consider the need for the consent of all parties. One option for a defendant is to offer the plaintiff the opportunity to stipulate that the damages sought are not in excess of \$75,000 in return for an agreement that the matter will not be removed to federal court.

Under the federal Class Action Fairness Act of 2005 [Pub L 109-2], a single defendant may remove a qualifying case to federal court even before certification of class. This use of a version of minimal diversity [see *StateFarm Fire & Cas. Co. v. Tashire*, 386 US 523, 530, 87 S Ct 1199, 18 L Ed2d 270 (1967)] along with the relative proclivity of federal judges to deny class certification makes this provision advantageous to even single defendants opposing making the action a class action. Furthermore, the Act broadens the right to remove cases to test jurisdiction and to interlocutory appeal of remand decisions to federal appellate courts, giving defendants every opportunity to have federal rather than state courts deciding the extent of their jurisdiction under the complicated and unrefined provisions of the Act.

The defendant must recognize that the federal court procedures do not allow the equivalent of a disqualification of a judge by peremptory challenge [see *CCP § 170.6*]. Thus, if there are any members of the local federal bench not desirable for a particular case, removal should be carefully considered.

➤ **Cross Reference:**

Discussion, see Ch. 22, Disqualification of Judge.

➤ **Investigating Judges Using Online Resources:**

Many resources are available online for investigating judges. These resources can help you find

information and cases pertaining to your assigned judge. For example, helpful resources at *lexis.com* include:

- For opinions or decisions affirming or reversing a judge's rulings, search in, search the biographies in Legal tab > Cases--U.S. > All Courts--By Circuit > 9th Circuit--Federal and State Cases, Combined

☐ Sample search: For appellate rulings regardless of topic, use the HISTORY segment with the judge's last name in this format: *history (first name /3 last name /3 j or judge or judicial or mag or hon!)*.

- To find biographical information about a federal judge, search the biographies in Legal tab > Reference > Law > Judicial Staff Directory

☐ Sample search: For a particular judge, try: *name (first name /3 lastname)*.

- To find news articles about a judge, search in the California news files Legal tab > States Legal--U.S. > California > Search News > General News > California News Publications

☐ Sample search: For a particular judge, try a simple search: *first name/3 last name*.

- To find articles about a judge or legal articles written by the judge both before and after the judge took the bench, search the law reviews and other periodicals in Legal tab > Secondary Legal > Law Reviews, CLE, Legal Journals & Periodicals, Combined

☐ Sample search: For legal articles written by a particular judge, try a simple search: *firstname /3 last name*.

Most federal courts employ magistrate judges for discovery disputes. This may be an advantage or disadvantage, depending on the particular circumstances of the case. The timing and meet and confer requirements for discovery motions also differ in federal court.

#### ➤ **Cross Reference:**

Discussion, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 16.24; or

Moore's Federal Practice, Ch. 16, Pretrial Conferences; Scheduling; Management (Matthew Bender 3d ed.).

The Federal Rules of Civil Procedure provide for voluntary disclosures of evidence, as well as an entirely different procedure for the disclosure of expert witness information [see *Fed R Civ P 26*]. Federal courts generally impose far more significant requirements for pretrial orders and procedures, which should be considered as well.

#### ➤ **Cross References:**

Discussion, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, Ch. 21, Discovery Strategy and Planning;

Ch. 22, Regulation of Discovery by Stipulation and Motion; and

Ch.23, Methods of Discovery.



The Federal Rule 11 sanctions provisions are generally thought to have more "teeth" than the sanction provisions under state law.

**Cross References:**

Discussion, see Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 25, Motion to Compel and Discovery Sanctions; Ch. 33, Rule 11 Sanctions; and Ch. 34, Other Sanction Provisions.

Moore's Federal Practice, Ch. 11, Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalGeneral Overview



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**17.05 Grounds for Removal to Federal District Court.**

**17.05[1] Federal Court Must Have Original Jurisdiction.** Generally, any civil action in which a federal district court has original jurisdiction may be removed from state court to the federal district court for the district and division embracing the place where the state action is pending [28 USC § 1441(a)].

**Exceptions:**

Congress has specified certain instances in which civil actions in a state court are not removable to federal court. For a discussion of these exceptions, see 17.06.

The Supreme Court has held that the All Writs Act [28 USC § 1651], either by itself or in conjunction with the doctrine of ancillary enforcement jurisdiction, does not supply a basis of removal jurisdiction over a state court action that does not fall within the original jurisdiction of the federal courts [ *Syngenta Crop Prot., Inc. v. Henson* (2002) 537 US 28, 123 S Ct 366, 154 L Ed2d 368 ].

It appears that cases involving special proceedings as well as civil proceedings are removable to federal court [see, e.g., *Drainage Dist. No.19 v. Chicago, M. & St. P. Ry. Co.* (WD Mo 1912) 198 F 253 6 (assessment proceeding)].

**Distinguish:**

The Ninth Circuit has held that a court-like proceeding conducted by a state administrative agency is not subject to removal [ *Oregon Bureau of Labor & Indus., ex rel. Richardson v. U.S. W. Communications, Inc.* (9th Cir 2002) 288 F3d 414, 417-420 (state administrative agency proceeding)]. By adopting a literal reading of the general removal statute, the court rejected the "functional test" approach that focuses on the nature of the proceeding rather than the nature of the tribunal [see, e.g., *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd.* (1st Cir 1972) 454 F2d 38 ; *Wirtz Corp. v. United Distillers & Vintners, N. Am., Inc.* (7th Cir 2000) 224 F3d 708 ].

**➤ Cross Reference:**

Discussion, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.05

; or

Moore's Federal Practice, § 107.14 (Matthew Bender 3d ed.).

**17.05[2] Federal Question Is Basis for Removal.** Removal to federal court is available in cases involving a claim or right arising under the Constitution, treaties, or laws of the United States (federal question) [28 USC § 1331].

 **Cross References:**

Discussion, see 17.09.

Additional analysis of federal question, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.09.

**17.05[3] Diversity of Citizenship Is Basis for Removal.** Removal to federal court is available in actions brought between citizens of different states when the matter in controversy exceeds \$75,000, exclusive of interest and costs [28 USC § 1332].

 **Cross References:**

Discussion, see 17.10.

Additional analysis of diversity, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.10.

In addition, class actions, including certain mass actions treated as class actions, for more than \$5,000,000 involving minimal diversity jurisdiction may be removable to federal court [28 USC § 1332(d)].

 **Cross Reference:**

Detailed discussion, see Cabraser, *California Class Actions Practice and Procedure*, Ch. 11, Removal and Remand of Class Actions Filed in State Court (Matthew Bender).

**17.05[4] Special Removal Statute Is Basis for Removal.** Certain federal statutes allow for removal to federal court, in some cases even when the federal court does not have original jurisdiction. Such statutes include:

- Removal of actions brought against certain federal agencies and officers [28 USC § 1442; see 17.11[1]];
- Removal of certain civil rights actions [28 USC § 1443; see 17.11[2]];
- Civil actions against foreign states [28 USC § 1441(d); see 17.11[3]];
- Foreclosure actions against the United States [28 USC §§ 1444; see 17.11[4]];
- Resolution Trust Corporation cases [12 USC § 1441a(l)(3); see 17.11[5]];
- Federal Deposit Insurance Corporation cases [12 USC § 1819(b)(2)(A); see 17.11[5]]; and
- Claims related to bankruptcy cases [28 USC § 1452(a); see 17.11[6]].

 **Cross References:**

Discussion, see 17.11.

Additional analysis of special removal statutes, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.13.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureRemovalBasisActions Against Foreign StatesCivil ProcedureRemovalBasisCases Involving Federal OfficersCivil ProcedureRemovalBasisClaims Related to BankruptcyCivil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalBasisForeclosure Actions Against United StatesCivil ProcedureRemovalNonremovable Actions



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**17.06 Federal Statute Prohibits Removal in Certain Actions.**

Congress has specified certain civil actions that are not removable to federal district court. These include the following:

- An action against a railroad or its receivers or trustees arising under 45 USC §§ 51-60 [28 USC § 1445(a)].
- An action against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments arising under 49 USC § 11706 or 14706, unless the matter in controversy exceeds \$10,000, exclusive of interest and costs [28 USC § 1445(b)].
- An action arising under state worker's compensation laws [28 USC § 1445(c)].
- An action arising under section 40302 of the Violence Against Women Act of 1994 [28 USC § 1445(d); see 42 USC § 13981].

**Distinguish:**

The Ninth Circuit has held that the statutory bar against removal of workers' compensation cases does not bar removal of a city's claim against the transit board for recovery of workers' compensation benefits paid to a police officer injured while on duty, even though the city served the state court complaint on the other defendants before removal. The city's claim was first properly filed in federal court and the other defendants waived their right to remand the city's claim to state court [ *Vasquez v. North County Transit Dist.* (9th Cir 2002) 292 F3d 1049, 1060-1062 ]. The court noted that the unusual circumstances of this case permitted removal.

**➡ Cross Reference:**

Discussion of statutes prohibiting removal, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.14.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalNonremovable Actions



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**17.07 The Parties May Not Consent to Removal.**

Removal of an action from state court to federal court is purely statutory in nature and cannot be conferred by consent of the parties [ *Pennsylvania v. Union Gas Co.* (1989) 491 US 1, 26, 109 S Ct 2273, 105 L Ed2d 1 ; *American Fire & Cas. Co. v. Finn* (1951) 341 US 6, 17-18, 18, 71 S Ct 534, 95 L Ed 702 n17 .

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalGeneral Overview



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**17.08 Defendant May Waive Removal Right.**

Certain affirmative actions by a defendant in state court can constitute waiver and defeat the defendant's right to remove the action to federal court.

**Examples:**

The filing of a permissive counterclaim, filing of a third-party complaint, and seeking of a continuance in an unlawful detainer proceeding all constitute waiver [ *Schmitt v. Insurance Co. of North America*, (9th Cir 1988) 845 F2d 1546, 1548 ; *California Republican Party v. Mercier* (CD Cal 1986) 652 F Supp 928, 931-932 ].

The following have all been held not to constitute a waiver:

- Filing an answer [ *Haun v. Retail Credit Co.* (WD Pa 1976) 420 F Supp 859, 864 ].
- Filing a demurrer [ *Hildreth v. General Instrument, Inc.* (D SC 1966) 258 F Supp 29, 30-31 ].
- Motion to abate and dismiss, and appearance in opposition to a temporary injunction [ *Bedell v. HRC Ltd.* (ED Ky 1981) 522 F Supp 732, 738 ].



**Strategic Point:**

A defendant's action taken before it is apparent that the case can be removed will not constitute waiver [ *Akin v. Ashland Chem. Co.* (10th Cir 1998) 156 F3d 1030, 1036 ; *California Republican Party v. Mercier* (CD Cal 1986) 652 F Supp 928, 931-932 ].



**Cross Reference:**

Discussion of waiver of removal, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.06; or  
Moore's Federal Practice, § 107.18 (Matthew Bender 3d ed.).



**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalWaivers



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**17.09 Actions Involving a Federal Question Are Removable to Federal Court.**

**17.09[1] Action Founded on a Claim or Right Arising Under U.S. Constitution, Laws, or Treaties Is Removable.** When a plaintiff's cause of action presents a substantial dispute over the effect of a federal law and the result turns on the federal question, the federal courts have federal question jurisdiction and the case is removable to federal court [28 USC §§ 1331, 1441(a), (b)].

**Distinguish:**

The federal law upon which federal question jurisdiction is based must provide a private right of action in order for the case to raise a substantial federal question. Otherwise, the action is properly a state law action based on the violation of a federal law [ *Merrell Dow Pharm. v. Thompson* (1986) 478 US 804, 813-814, 478 US 804, 92 L Ed2d 650 ; *Utley v. Varian Assocs., Inc.* (9th Cir 1987) 811 F2d 1279, 1283, 1286 ].

**➡ Cross Reference:**

Discussion of federal question, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.09; or  
Moore's Federal Practice, §§ 103.30-103.33; 107.14[3] (Matthew Bender 3d ed.).

**17.09[2] Specific Statutes Confer Jurisdiction on the Federal District Courts.** Certain federal statutes specifically confer jurisdiction on federal district courts. Examples of specific federal question statutes include:

- Actions against foreign states pursuant to the Foreign Sovereign Immunities Act [28 USC § 1330 (exclusive federal jurisdiction)];
- Suits arising under patent, trademarks, copyright, and plant-protection laws (exclusive federal jurisdiction) [28 USC § 1338];
- Suits arising under any act of Congress regulating interstate commerce or protecting trade and commerce against restraints and monopolies (concurrent jurisdiction) [28 USC § 1337];

- Bankruptcy actions (exclusive federal jurisdiction) [28 USC § 1334];
- Actions involving the Internal Revenue Service (exclusive federal jurisdiction) [28 USC § 1340];
- Admiralty Cases (exclusive jurisdiction) [28 USC § 1333];
- Civil rights actions (concurrent jurisdiction) [28 USC § 1343];
- Certain specific actions against the United States (concurrent jurisdiction) [28 USC §§ 1346(a), (d), 1491], including tort claims [28 USC § 1346(b)];
- Securities actions based on federal statutes (exclusive jurisdiction) [15 USC § 78aa];
- Suits arising under any laws relating to the post office (concurrent jurisdiction) [28 USC § 1339];
- Employment discrimination actions arising under Title VII (exclusive jurisdiction) [42 USC § 2000e-5(f)];
- Pension benefits actions arising under ERISA (exclusive jurisdiction) [29 USC § 1132(e)]; and
- Actions for environmental damage brought under CERCLA (exclusive jurisdiction) [42 USC § 9613(b)].

#### **Cross Reference:**

Discussion of specific removal statutes, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.13; or  
Moore's Federal Practice, §§ 104.05-104.55; 107.14[5] (Matthew Bender 3d ed.).

**17.09[3] "Well-Pleaded Complaint Rule" Means Federal Question Must Appear on the Face of Plaintiff's Claim.** "[T]he 'well-pleaded complaint rule' provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint" [ *Aetna Health, Inc. v. Juan Davila Cigna Healthcare of Texas, Inc.* (2004) 542 US 200, 124 S Ct 2488, 159 L Ed2d 312 ; *Caterpillar, Inc. v. Williams* (1987) 482 US 386, 107 S Ct 2425, 96 L Ed2d 318 ; *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.* (9th Cir 1993) 992 F2d 932, 934 ]. Plaintiff's statement of his or her claim must demonstrate the existence of a federal question, and a right or immunity created by the United States Constitution, laws, or treaties must be an essential element of plaintiff's cause of action. This is known as the "well-pleaded complaint" rule [ *FranchiseTax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.* (1983) 463 US 1, 9-12, 103 S Ct 2841, 77 L Ed2d 420 ; *Ramirez v. Fox Television Station, Inc.* (9th Cir 1993) 998 F2d 743, 747 ; *Carpenters S. Cal. Admin. Corp. v. Majestic Housing* (9th Cir 1984) 743 F2d 1341, 1344 ].



#### **Strategic Point:**

The well-pleaded complaint rule means, for practical purposes, that there is no federal question jurisdiction when plaintiff pleads a state law cause of action, even if a federal defense is available to defendant.

#### **Cross Reference:**

Discussion of well-pleaded complaint rule, see *Matthew Bender(R) Practice Guide: Federal Pretrial*

*Civil Procedure in California*, 2.07[2]; or  
Moore's Federal Practice, §§ 103.40-103.47 (Matthew Bender 3d ed.).

**17.09[4] "Artful Pleading Exception" to "Well-Pleaded Complaint" Rule.** In certain cases a plaintiff may attempt to plead a state law claim in order to defeat the defendant's right to a federal forum (the "artful pleading exception"). If the only remedy available to the plaintiff is federal, and the court must necessarily look to federal law to adjudicate the claim, the case is removable to federal court [ *Salveson v. Western States Bankcard Ass'n* (9th Cir 1984) 731 F2d 1423, 1426-1427 ; *Sullivan v. First Affiliated Sec., Inc.* (9th Cir 1987) 813 F2d 1368, 1372 ].

Exception to "Well-Pleaded Complaint" Rule: When removal is expressly authorized by statute [ *Mesa v. California* (1989) 489 US 121, 134-136, 109 S Ct 959, 103 L Ed2d 99 ].



#### **Warning:**

This is a narrow exception and will be applied only if the complained of conduct is governed exclusively by federal law [ *Sullivan v. First Affiliated Sec., Inc.* (9th Cir 1987) 813 F2d 1368, 1372 ].



#### **Cross Reference:**

Discussion of artful pleading exception, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 2.07[2][c]; or  
Moore's Federal Practice, § 103.43 (Matthew Bender 3d ed.).

**17.09[5] Complete Preemption by Federal Statute May Necessitate Removal.** In some areas, a federal law may completely preempt state laws. In such a situation, an action framed by a plaintiff as being based on state law is removable to federal court despite the "well-pleaded complaint" rule because of the complete preemption by federal law [see *Beneficial Nat'l Bank v. Anderson* (2003) 539 US 1, 4, 123 S Ct 2058, 156 L Ed2d 1 ; *Ramirez v. Fox Television Station, Inc.* (9th Cir 1993) 998 F2d 743, 747 ; see also *Caterpillar v. Williams* (1987) 482 US 386, 392-393, 107 S Ct 2425, 96 L Ed2d 318 ; *Metropolitan Life Ins.Co. v. Taylor* (1987) 481 US 58, 63-64, 107 S Ct 1542, 95 L Ed2d 55 ].

#### **Examples:**

Complete preemption has been found in the following cases:

- *Beneficial Nat'l Bank v. Anderson* (2003) 539 US 1, 5, 123 S Ct 2058, 156 L Ed2d 1 (state law usury claims against national bank completely preempted by National Bank Act).
- *Aetna Health, Inc. v. Juan Davila Cigna Healthcare of Texas, Inc.* (2004) 542 US 200, 124 S Ct 2488, 159 L Ed2d 312 (state statutory claims against health maintenance organizations for alleged failures to exercise ordinary care in the handling of coverage decisions preempted by ERISA (29 USC § 1132(a) et seq.)).
- *Metropolitan Life Ins. Co. v. Taylor* (1987) 481 US 58, 64, 107 S Ct 1542, 95 L Ed2d 55 (state contract and tort claims for improper processing of disability claim and wrongful termination completely preempted by and within civil enforcement provisions of ERISA).
- *Oneida Indian Nation of New York v. County of Oneida* (1974) 414 US 661, 675-676, 94 S Ct 772, 39 L Ed2d 73 (state law complaint alleging right of possession to Indian tribal lands completely preempted).
- *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers* (1968) 390 US 557, 559-561, 88 S Ct 1235, 20 L Ed2d 126 (state law action to enforce collective bargaining contracts).

completely preempted by § 301 of *Labor Management Relations Act*).

- *Falkowski v. Imation Corp.* (9th Cir 2002) 309 F3d 1123, 1129-1131 (Securities Litigation Uniform Standards Act (SLUSA) completely preempts employees state court class action claims alleging that their employer fraudulently induced them to remain by misrepresenting the worth of stock options).

- *Stikes v. Chevron USA, Inc.* (9th Cir 1991) 914 F2d 1265, 1267 (state law claim based on *Cal Const, art I, § 1* for an employer's alleged violation of employee's right to privacy completely preempted by *Section 301 of the Labor Management Relations Act of 1947 29 USC § 185*).

#### **Distinguish:**

The above situation only applies when federal law has completely preempted state law in a given circumstance. In other cases, a defendant may simply raise preemption as a defense to plaintiff's state law claim, and a court determining whether removal is proper must look to the true nature of plaintiff's complaint and whether Congress intended complete preemption [see *Metropolitan Life Ins. Co. v. Taylor* (1987) 481 US 58, 66-67, 107 S Ct 1542, 95 L Ed2d 55 ; see also *Caterpillar v. Williams* (1987) 482 US 386, 393, 107 S Ct 2425, 96 L Ed2d 318 ; *Ramirez v. Fox Television Station, Inc.* (9th Cir 1993) 998 F2d 743, 747 ].

#### **Cross Reference:**

Discussion of complete preemption, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.09[4];

California Forms of Pleading and Practice, Ch. 265, Federal Courts: Jurisdiction and Removal (Matthew Bender); or

Moore's Federal Practice, § 107.14[4] (Matthew Bender 3d ed.).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint RuleCivil ProcedureRemovalBasisActions Against Foreign StatesCivil ProcedureRemovalBasisClaims Related to BankruptcyCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption



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**17.10 Actions Involving Diversity Jurisdiction Are Removable to Federal Court.**

**17.10[1] Action Involving Diversity of Citizenship and Matter in Controversy Exceeding \$75,000 Is Removable.** Federal district courts have jurisdiction in civil actions in which the matter in controversy exceeds \$75,000, exclusive of interest and costs, and the action is between either [28 USC § 1332(a)]:

- Citizens of different states;
- Citizens of a state and citizens or subjects of a foreign state;
- Citizens of different states and in which citizens or subjects of a foreign state thereof are additional parties;
- A foreign state as plaintiff and citizens of a state or of different states.

For purposes of diversity jurisdiction, the citizenship of a corporation is its state of incorporation and the state where its principal place of business is located [28 USC § 1332(a)(c)(1)].

➡ **Cross Reference:**

Discussion of diversity jurisdiction, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.10;

California Forms of Pleading and Practice, Ch. 265, Federal Courts: Jurisdiction and Removal (Matthew Bender); or

Moore's Federal Practice, Ch. 102, Diversity Jurisdiction; Ch. 107, Removal, § 107.14[2] (Matthew Bender 3d ed.).

**17.10[2] Diversity Case Removable Only If No Party Legitimately Joined As a Defendant Is a Citizen of the State Where the Action Is Brought.** In order for a diversity case to be removable, no party in interest properly joined as a defendant may be a citizen of the state in which the action is brought [28 USC § 1441(b); *City & County of San Francisco v. Civil Serv. Comm'n* (NDCal 2002) 2002 US Dist LEXIS 13523, at \*20-21 ; *Motor Vehicle Cas. Co. v.*

*Russian River County Sanitation Dist. (ND Cal 1981) 538 F Supp 488, 491 n5 ].*

If it is not facially evident from the complaint that more than \$ 75,000 is in controversy, the court may look to the removal notice and extrinsic evidence. The moving party must prove by a preponderance of the evidence that the amount in controversy meets the jurisdictional threshold [ *Valdez v. Allstate Ins. Co. (9th Cir 2004) 372 F3d 1115, 1117* (conclusory allegation insufficient proof)].

 **Cross Reference:**

Discussion of diversity requirements, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.10; or  
Moore's Federal Practice, § 107.14[2][c] (Matthew Bender 3d ed.).

**17.10[3] Diversity Must Exist When the State Action Is Filed and When the Defendant Petitions for Removal.** For a diversity case to be removed, diversity of citizenship must exist both when the action is filed in state court and at the time defendant petitions for removal [ *Miller v. Grgurich (9th Cir 1985) 763 F2d 372, 373* ; *Strasser v. KLM Royal Dutch Airlines (CD Cal 1986) 631 F Supp 1254, 1256* ].

**Exception:**

There is an important exception to this rule known as the "voluntary-involuntary" rule. This exception provides that federal jurisdiction still lies when dismissal of a nondiverse defendant results from plaintiff's voluntary act, even though diversity was lacking when the action was originally filed in state court [ *Strasser v. KLM Royal Dutch Airlines (CD Cal 1986) 631 F Supp 1254, 1256* ; *Schmidt v. Capitol Life Ins. Co. (ND Cal 1986) 626 F Supp 1315, 1318* ]. This exception is meant to prevent a situation where plaintiff files suit against a nondiverse defendant solely to defeat federal jurisdiction and then dismisses that defendant at a later time. An "involuntary" termination of the case against a defendant, such as a summary judgment over the plaintiff's objection does not qualify [ *Strasser v. KLM Royal Dutch Airlines (CD Cal 1986) 631 F Supp 1254, 1256* ].

 **Cross Reference:**

Discussion of diversity requirements, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.10; or  
Moore's Federal Practice, § 107.14[2][d] (Matthew Bender 3d ed.).

**17.10[4] Citizenship of Fictitious Defendant Is Irrelevant.** For purposes of removal, the citizenship of "Doe" defendants sued under fictitious names is disregarded [28 USC § 1441(a)].

 **Cross Reference:**

Discussion of fictitious defendants, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.10[2][a]; or  
Moore's Federal Practice, § 107.14[2][c][iii] (Matthew Bender 3d ed.).

**17.10[5] Fraudulent Joinder of Parties to Defeat Diversity May Preclude Removal.** If a defendant raises a claim that plaintiff has "fraudulently" joined a defendant solely to defeat diversity of citizenship and preclude removal, the court may look beyond the pleadings to determine whether to disregard the joinder. If the court finds that no cause of action is stated against the nondiverse defendant or that no cause of action exists against that defendant, the district court may disregard the joinder and retain jurisdiction [ *Morris v. Princess Cruises, Inc., (9th Cir 2001) 236 F3d 1061, 1067* ].

 **Cross Reference:**

Discussion of fraudulent joinder, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil*

*Procedure in California*, 3.10[2][a]; or  
Moore's Federal Practice, § 107.14[2][c][iv] (Matthew Bender 3d ed.).

**17.10[6] Minimal Diversity Jurisdiction Is Basis for Removal.** The Multiparty, Multiforum Trial Jurisdiction Act of 2002 provides special jurisdictional and procedural provisions for civil cases arising from accidents that result in at least 75 deaths [see 28 USC §§ 1369, 1391(g), 1441(e), (f), 1697, 1785; Pub L 107-273, § 11020 (effective Nov. 2, 2002)]. Under the modified requirements for diversity jurisdiction, the district courts have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single, sudden accident (including a natural event culminating in an accident), if at least 75 natural persons have died in the accident at a discrete location [see 28 USC § 1369(c)(4)], and if one of the following circumstances exists [28 USC § 1369(a)]:

- A defendant resides in one state and a substantial part of the accident took place in another state or other location, regardless of whether that defendant is also a resident of the state where a substantial part of the accident took place;
- Any two defendants reside in different states, regardless of whether those defendants are also residents of the same state or states; or
- Substantial parts of the accident took place in different states.

For purposes of these provisions, "minimal diversity" exists between adverse parties if any party is a citizen of one state and at least one adverse party is diverse [28 USC § 1369(c)(1)].

A minimal diversity action may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place [28 USC § 1391(g)].

The district court in which the action is filed must promptly notify the Judicial Panel on Multidistrict Litigation of the pendency of the action [28 USC § 1369(e)].



**Warning:**

A district court must abstain from hearing a minimal diversity action if [28 USC § 1369(b)]:

- The substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens; and
- The claims asserted will be governed primarily by the laws of that state.



**Cross Reference:**

Discussion of minimal diversity requirements, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.10[4]; or  
Moore's Federal Practice, § 107.11[4] (Matthew Bender 3d ed.).

**17.10[7] Class Actions With Diversity of Plaintiffs and Involving More Than \$5,000,000 May Be Removable.**

**17.10[7][a] Removal Statute Authorizes Removal of All Class Actions, Regardless of Whether A Defendant Is Citizen of State in Which Action Is Brought.** Under the main removal provision enacted by the federal Class Action Fairness Act of 2005 [Pub L 109-2], applicable to any action commenced on or after the date of its enactment, February 18, 2005 [119 Stat. 4, § 9 (2005)], a single defendant may remove any class action [28 USC § 1453(a); see 28 USC § 1332(d)(1)] from state court to federal court regardless of whether any defendant is a citizen of the state in which



the action is brought [28 USC § 1453(b)]. General removal procedures [28 USC § 1446] apply except as provided [28 USC § 1453(b)].



**Warning:**

The scope of authorized removal of class actions is much broader than the actual diversity jurisdiction of federal courts to hear class actions. While this breadth ensures that a defendant can obtain a federal court ruling on its jurisdiction over a given class action, counsel for defendants should be careful that their justification for requesting removal is sufficiently valid under the jurisdiction provisions so as to avoid actions under federal law and rules.

**Exceptions:**

The provisions on removal of class actions do not apply to class actions concerning covered securities under the Securities Act and the Securities Exchange Act, state law on internal affairs or corporate governance of business enterprises, or rights, duties, or obligations regarding specified securities under the Securities Act [28 USC § 1453(d)].

**Distinguish:**

An action commences for purposes of the applicability of federal Class Action Fairness Act of 2005 when the original complaint is filed in state court, not when it is removed to federal court [ *Bush v. Cheaptickets, Inc.* (9th Cir 2005) 425 F3d 683, 685 ].



**Cross Reference:**

Detailed discussion, see Cabraser, California Class Actions Practice and Procedure, Ch. 11, Removal and Remand of Class Actions Filed in State Court (Matthew Bender).

**17.10[7][b] Federal Courts Have Jurisdiction of Class Actions Involving A Minimum of Diversity and More Than \$5,000,000.** Under the Class Action Fairness Act of 2005, federal district courts have jurisdiction of class actions involving an aggregated amount in controversy by all class members [28 USC § 1332(d)(6)] of more than \$5,000,000, excluding interest and costs, and a minimum level of diversity among the parties. The necessary diversity consists of [28 USC § 1332(d)(2)]:

- A class member who is a citizen of a different state than a defendant;
- A class members that is a foreign state or a citizen of a foreign state and a defendant is a citizen of a state; or
- A class member is a citizen of a state and a defendant is a foreign state or citizen of a foreign state.

**Exceptions:**

Federal district court jurisdiction of class actions is precluded against primary defendants that are a state, state officials, or other governmental entities [28 USC § 1332(d)(5)(A)], and class actions by a class of fewer than 100 members [28 USC § 1332(d)(5)(B)].

The provisions on removal of class actions also do not apply to class actions concerning covered securities under the Securities Act and the Securities Exchange Act, state law on internal affairs or corporate governance of business enterprises, or rights, duties, or obligations regarding specified securities under the Securities Act [28 USC § 1332(d)(9)].

**Distinguish:**

First, the class does not have to be certified before jurisdiction attaches to an action in state court [28

*USC § 1332(d)(8)*]. Second, the class member establishing diversity does not have to be a plaintiff under the definition of "class members" [*see 28 USC § 1332(d)(1)(D)*].

**17.10[7][c] Federal Courts Have Jurisdiction of Mass Actions Constituting Class Actions.** A "mass action" is removable as a class action if it otherwise meets the requirements for a class action. For these purposes, unless excluded by a statutory exception, a "mass action" is a civil action in which 100 or more persons claim at least \$75,000 in damages in an action tried jointly because the claims all involve common question of law or fact [*28 USC § 1332(d)(11)*].

**17.10[7][d] Federal Jurisdiction Is Excepted for Certain Cases Where Two-Thirds of Class Members and Certain Defendants Are In-State.** A federal district court's jurisdiction over class actions does not extend to those in which all primary defendants and two-thirds or more of the class members are citizens of the state in which the action is filed [*28 USC § 1332(d)(4)(B)*]. In addition, it does not extend to cases in which more than two-thirds of the plaintiffs and one defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the class claims are citizen of the state in which the class action is filed, and in which no class action was filed during the preceding 3-year period on similar factual allegations against any of the defendants on behalf of the same or other persons [*28 USC § 1332(d)(4)(A)*].

**17.10[7][e] Federal District Court Has Discretion to Decline Jurisdiction If More Than One-Third But Less Than Two-Thirds of Class Members and All Primary Defendants Are In-State.** In class actions in which more than one-third but less than two-thirds of class members and all primary defendants are citizens of the state in which the action is filed, the federal district court has discretion to decline jurisdiction. The court must exercise its discretion in the interests of justice and in light of the totality of the circumstances, based on consideration of [*28 USC § 1332(d)(3)*]:

- Whether claims involve matters of national or interstate interest;
- Which state's law will govern;
- Whether the matter was pleaded to avoid federal jurisdiction;
- Whether the forum in which the action was brought has a distinct nexus with the class members, the harm, or the defendants;
- The proportion of class members in each state in which class members are citizens; and
- Whether other similar class actions have been filed in the past three years.

**17.10[7][f] Determination of Citizenship of Class Members.** The citizenship of members of proposed plaintiff classes is determined as of the date of the filing of the complaint or amended complaint. However, if federal jurisdiction attaches subsequent to initial pleadings, citizenship is determined on the date of service of an amended pleading or other paper indicating federal jurisdiction [*28 USC § 1332(d)(7)*].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalElementsRemovabilityCivil ProcedureRemovalProceedingsFraudulent JoinderCivil ProcedurePartiesFictitious Names



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**17.11 Action May Be Removable Under Special Removal Statute.**

**17.11[1] Removal Available If Defendant Is United States or Its Agencies or Officers.** Removal to federal court is available in civil actions brought against the United States or any of its agencies or any officer of the United States sued in either official or individual capacity for any act under color of office. Removal is also available in a civil action against a property holder whose title is derived from a federal officer. In the above cases, removal is available when the action affects the validity of a federal law, an officer of the federal judiciary, or a member of Congress [28 USC § 1442(a)].

Removal to federal court is also available in an action commenced in state court by an alien against a federal civil officer who is not a resident of that state where the state's jurisdiction was obtained by personal service [28 USC § 1442(b)].

► **Cross Reference:**

Discussion of actions against federal agencies or officers, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.13[1]; or  
Moore's Federal Practice, § 107.15[1] (Matthew Bender 3d ed.).

**17.11[2] Removal of Certain Civil Rights Actions Available.** Removal is available of (1) actions in which the defendant is denied or cannot enforce his or her civil rights in the state court, or (2) actions in which the defendant is being sued for an act he or she committed under color of authority derived from a law providing for equal rights, or for refusing to do an act on the ground that it would be inconsistent with such law [28 USC § 1443].

► **Cross Reference:**

Discussion of civil rights actions, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.13[3]; or  
Moore's Federal Practice, § 107.15[3] (Matthew Bender 3d ed.).

**17.11[3] Removal Available if Defendant Is Foreign State.** Removal to federal court is available in civil actions brought in a state court against a foreign state [28 USC § 1441(d)]. In multiple-defendant actions, a foreign state

defendant may remove the entire action without the consent or joinder of other defendants [ *Chuidian v. Philippine Nat'l Bank* (9th Cir 1990) 912 F2d 1095, 1098-1099 ].

➡ **Cross Reference:**

Discussion of action against foreign state, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.13[4]; or  
Moore's Federal Practice, § 107.15[4] (Matthew Bender 3d ed.).

**17.11[4] Removal Available in Foreclosure Actions Against the United States.** A state court action brought against the United States seeking to quiet title to, foreclose a mortgage or other lien on, or partition or condemn real or personal property on which the United States claims a mortgage or other lien may be removed by the United States [28 USC § 1444; see 28 USC § 2410; *Hood v. United States* (9th Cir 1958) 256 F2d 522, 526 n9].

➡ **Cross Reference:**

Discussion of foreclosure action against United States, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.13[5]; or  
Moore's Federal Practice, § 107.15[5] (Matthew Bender 3d ed.).

**17.11[5] Involvement of Certain Federal Agencies Is Basis for Removal.** Removal to federal court is available in actions involving specific federal agencies as provided by statute [see, e.g., 12 USC § 1441a(a)(1) (Resolution Trust Corporation); 12 USC § 1819(b)(2)(B) (Federal Deposit Insurance Corporation)].

➡ **Cross Reference:**

Discussion of certain federal agencies, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.13[6], [7]; or  
Moore's Federal Practice, § 107.15[6], [7] (Matthew Bender 3d ed.).

**17.11[6] Removal Available in Claims Related to Bankruptcy Cases.** Any party to a state court claim or cause of action that falls within bankruptcy jurisdiction may remove that claim or cause of action, but not the entire civil action (unless the district court has independent jurisdiction over the other claims) to the district court where the related bankruptcy is pending [28 USC § 1452(a); see 28 USC § 1334(b)]. All civil proceedings arising under the Bankruptcy Code and all claims and causes of action arising in or related to such proceedings fall within bankruptcy jurisdiction [28 USC § 1334(b)].

➡ **Cross Reference:**

Discussion of bankruptcy cases, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.13[8]; or  
Moore's Federal Practice, § 107.15[8] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalBasisActions Against Foreign StatesCivil ProcedureRemovalBasisCases Involving Federal OfficersCivil ProcedureRemovalBasisClaims Related to BankruptcyCivil ProcedureRemovalBasisForeclosure Actions Against United States



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**17.12 When Federal Question Claim Is Joined With a State Claim, the Entire Case Is Removable.**

A case is removable in its entirety when a separate and independent claim based on a federal question is joined with one or more otherwise non removable claims. The district court has the option of determining all the claims or remanding the state claims back to state court [28 USC §§ 1331,1441(c)].

**Distinguish:**

Conversely, a separate and independent claim based on diversity jurisdiction does not allow the entire action to be removed to federal court. The entire action must be "anchored" by a federal question claim rather than a diversity claim in order to be removable in its entirety [28 USC §§ 1331,1441(c)].

By definition, when an action is premised on a single wrong to the plaintiff arising from an interlocked series of transactions, there is no separate and independent claim under 28 USC § 1441(c) [ *American Fire & Cas. Co. v. Finn* (1951) 341 US 6, 13-14, 71 S Ct 534, 95 L Ed 702 ; *Motor Vehicle Cas. Co. v. Russian River County Sanitation Dist.* (ND Cal 1981) 538 F Supp 488, 494 ].

**Examples:**

A negligence claim against a driver and a bad faith claim against an insurer were considered separate and independent claims [ *Boggs v. Lewis* (9th Cir 1988) 863 F2d 662, 664-665 ]. Conversely, an appeal is not a separate and independent claim [ *Resolution Trust Corp. v. Bayside Developers* (9th Cir 1994) 43 F3d 1230, 1240 ].

**➡ Cross Reference:**

Discussion of joined federal and state claims, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.09[3][b]; or  
Moore's Federal Practice, § 107.31[9] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalElementsRemovability



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**17.13 Party Must File Notice of Removal.**

**17.13[1] Party Must File Notice in District Court.** The notice of removal must be filed in the district court of the United States for the district and division within which the action is pending [28 USC § 1446(a); *Fed R Civ P 11*].

➤ **Cross Reference:**

Discussion of notice to district court, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.17, 3.19[1]; or  
Moore's Federal Practice, § 107.30[2][a] (Matthew Bender 3d ed.).

**17.13[2] Notice Must Contain Statement of Grounds for Removal.** The notice of removal must contain a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served on the party in the action [28 USC § 1446(a)]. The party is not required to serve copies of discovery documents such as interrogatories and notices of deposition [ *Visicorp v. Software Arts, Inc.* (ND Cal 1983) 575 F Supp 1528, 1531 ].

➤ **Cross References:**

Forms, see 17.34 -17.36.

Discussion of contents and preparation of notice, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.18.

Additional forms, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.34 -3.37.

**17.13[3] Notice Must Be Filed Within 30 Days of Defendant Receiving Initial Pleading.** The notice of removal must be filed within 30 days after the receipt by the defendant of a copy of the initial pleading setting forth plaintiff's claim for relief, or within 30 days after the service of summons on the defendant if that initial pleading has been filed in court and is not required to be served on defendant, whichever period is shorter [28 USC § 1446(b); see *Blankenberg v. Commercial Ins. Co. of Newark, N.J.* (ND Cal 1987) 655 F Supp 223, 225 ].

**Exceptions:**

- In some instances, the statute authorizing removal to federal court may specify its own time period for filing a notice of removal [*see, e.g., 12 USC § 1441a(1)(3)(A); 12 USC § 1819(b)(2)(B)*].
- When the fraudulence of a defendant's joinder makes that defendant irrelevant for purposes of determining diversity, then the date of service on that defendant does not commence the 30-day removal period [ *United Computer Sys., Inc. v. AT&T Corp.* (9th Cir 2002) 298 F3d 756, 762-763 ].
- In an action removed under *28 USC § 1441(e)(1)* the notice of removal may also be filed before trial of the state court within 30 days after the defendant first becomes a party to a federal minimal diversity action under *28 USC § 1369* that arises from the same accident as the state court action, or at a later time with leave of the district court [*28 USC § 1441(e)(1)*].

 **Cross Reference:**

Discussion of timely notice, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.20; or  
 Moore's Federal Practice, § 107.30[3][a] (Matthew Bender 3d ed.).

**17.13[4] Removing Party Must Notify All Adverse Parties and File Copy of Notice With State Court.** The defendant seeking removal must give written notice of the removal to all adverse parties and must file a copy of the notice of removal with the clerk of the state court. The state court clerk must then effect the removal and the state court must proceed no further in the case [*28 USC § 1446(d)*].

**Trap:**

Although the Class Action Fairness Act of 2005 did not amend *28 USC § 1446(d)* to make clear that it is required, counsel for the defendant(s) removing a class action to federal court should assume that "adverse party" includes other defendants not consenting to the removal and give them the same notice as other adverse parties to eliminate any due process concerns with respect to the other defendants.

 **Cross Reference:**

Discussion of notice to adverse parties and state court, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.19[3]; or  
 Moore's Federal Practice, § 107.30[2][b] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Removal Proceedings Notices Civil Procedure Removal Proceedings Time Limitations



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**17.14 All Defendants Must Join in Removal.**

Where there is more than one defendant, all defendants must file or join in a notice of removal [ *Parker v. DOT, California Hwy. Patrol* (ND Cal 1999) 1999 US Dist LEXIS 2260, at \*4 ; *Varney v. Johns-Manville Corp.* (ND Cal 1987) 653 F Supp 839, 840 n1 ].

**Exceptions:**

A single defendant may remove any class action [see 28 USC § 1332(d)(1)] to federal court without the consent of any other defendant in the action [28 USC § 1453(b)]. The "rule of unanimity" does not apply to nominal, unknown or fraudulently joined parties [ *Emrich v. Touche Ross & Co.* (9th Cir 1988) 846 F2d 1190, 1193 n1 ].

**Distinguish:**

The Ninth Circuit Court of Appeals does not require a defendant who has not been served to join in removal [ *Salveson v. Western States Bankcard Ass'n* (9th Cir 1984) 731 F2d 1423, 1429 ].

**➡ Cross Reference:**

Discussion of defendants joining removal, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.18[4];

Cabraser, *California Class Actions Practice and Procedure*, Ch. 11, Removal and Remand of Class Actions Filed in State Court (Matthew Bender); or  
Moore's Federal Practice, § 107.11[1][c]-[e] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Removal Proceedings Unanimity





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**17.15 Party May File Notice of Removal If Amended Pleading or Motion Renders Case Removable.**

In some instances, a case may become removable by virtue of an amended pleading, motion, order, or other paper despite the fact that it was not removable based on the initial pleading. In this situation, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of the paper from which it was ascertained that the case was removable [28 USC § 1446(b); see *Ruston v. Atlantic Richfield Co.* (CD Cal 1985) 618 F Supp 210, 211 n1 ].



**Warning:**

A case removed on the basis of diversity jurisdiction pursuant to 28 USC § 1332 may not be removed more than one year after commencement of the action [28 USC §§ 1332, 1446(b)].

**Exception:**

The rule limiting removal to one year after commencement of the action does not apply to class actions [28 USC § 1453(b)].



**Trap:**

When there is more than one defendant, and the defendants receive notice of the removability of the case at different times, the 30-day filing requirement of 28 USC § 1446(b) begins when the first defendant receives notice that the case has become removable [ *Varney v. Johns-Manville Corp.* (ND Cal 1987) 653 F Supp 839, 840 ].



**Cross Reference:**

Discussion of amended pleading, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.20[4][b]; or  
Moore's Federal Practice, § 107.30[3][a][iv][B] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureRemovalElementsRemovabilityCivil ProcedureRemovalProceedingsNotices



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**17.16 Party May File Notice of Removal If Dismissal of a Resident Defendant Creates Diversity.**

A party may file a notice of removal within 30 days of the dismissal or abandonment of a resident defendant when that dismissal or abandonment creates complete diversity between the parties [28 USC § 1446(b); see *Schmidt v. Capitol Life Ins. Co.* (ND Cal 1986) 626 F Supp 1315, 1318 ].

**Exception:**

A class action is removable to federal court regardless of whether any defendant is a citizen of the state in which the action is brought [28 USC § 1453(b)].

➡ **Cross Reference:**

Discussion, see Moore's Federal Practice, § 107.14[2][h] (Matthew Bender 3d ed.); or  
Cabraser, California Class Actions Practice and Procedure, Ch. 11, Removal and Remand of Class  
Actions Filed in State Court (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalElementsRemovability



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**17.17 Plaintiff May Waive Objection to Notice of Removal by Appearing in District Court.**

A plaintiff who appears repeatedly in the district court before raising an objection to the timeliness of defendant's notice of removal waives the right to object on that ground [ *Meadows v. Bicrodyne Corp.* (9th Cir 1986) 785 F2d 670, 672 ].



**Cross Reference:**

Discussion, see Moore's Federal Practice, § 107.41[1][d][iii] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalGeneral Overview



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**17.18 Removal Provides District Court With Immediate Jurisdiction.**

**17.18[1] Filing of Notice of Removal and Notice to Adverse Parties Effects Removal.** The filing of the notice of the removal with the district court, along with the filing of the copy of the notice with the state court and the provision of written notice to adverse parties effects removal to the federal district court immediately [28 USC § 1446(d)].

► **Cross References:**

Discussion, see 17.15, 17.16.

Forms, see 17.34 -17.36.

*Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.21; or  
Moore's Federal Practice, § 107.31 (Matthew Bender 3d ed.).

**17.18[2] District Court May Determine Whether It Has Jurisdiction After Removal Is Effected.** The district court has the power to determine whether federal jurisdiction is properly invoked [ *Schroeder v. Trans World Airlines, Inc.* (9th Cir 1983) 702 F2d 189, 191 ]. In making this determination, the district court may consider the pleadings at the time of removal, a plaintiff's subsequent attempt to amend the complaint, the notice of removal, and supporting affidavits [ *Bright v. Bechtel Petroleum, Inc.* (9th Cir 1986) 780 F2d 766, 769, 769 n3 ; *Schroeder v. Trans World Airlines, Inc.* (9th Cir 1983) 702 F2d 189, 191 ; *Green v. Mutual of Omaha (ND Cal 1982)* 550 F Supp 815, 818 ].

The party seeking removal has the burden of establishing federal jurisdiction [ *Sullivan v. FirstAffiliated Sec., Inc.* (9th Cir 1987) 813 F2d 1368, 1371 ].

**17.18[3] Changes in Case Ordinarily Do Not Defeat Federal Jurisdiction.** Changes occurring subsequent to removal ordinarily do not defeat federal jurisdiction. For example, changes in citizenship, parties, the amount involved, or the cause of action pleaded will not defeat federal jurisdiction [ *Lopez v. General Motors Corp.* (9th Cir 1983) 697 F2d 1328, 1332 ].

**Exception:**

When an indispensable party is joined and that party destroys diversity of citizenship, the case may be remanded back to state court [ *Takeda v. N.W. Nat'l Life Ins. Co.* (9th Cir 1985) 765 F2d 815, 819-821 ].

 **Cross Reference:**

Discussion, see 17.24 -17.33.

**17.18[4] Federal Court May Exercise Supplemental Jurisdiction to Hear State Law Claims.** After removal, the federal district court may hear the entire case, including state law claims sharing a common nucleus of operative facts with the federal law claims. The federal court exercises what is known as supplemental jurisdiction over the state law claims [28 USC § 1367].

The federal court's supplemental jurisdiction is discretionary, and the federal court may decline to exercise it if the court determines that the state law claims properly belong in state court. In such a situation, the federal court will either dismiss the state law claims without prejudice or remand the state law claims back to state court [ *Carnegie-Mellon Univ. v. Cohill* (1988) 484 US 343, 350-351, 357, 108 S Ct 614, 98 L Ed2d 720 ; *Milt v. Oakland Hous. Auth.* (ND Cal 2002) 2002 US Dist LEXIS 2581, at \*3 ].

 **Cross Reference:**

Discussion of supplemental jurisdiction, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 2.27 -2.30; or  
Moore's Federal Practice, § 107.31[9] (Matthew Bender 3d ed.).

**17.18[5] Federal Rules of Civil Procedure Apply to Removed Action.** Following removal, the Federal Rules of Civil Procedure apply to the action [*Fed R Civ P* 81(c)].

**17.18[6] Federal Court May Issue Orders and Process.** Following removal, the federal district court may issue all necessary orders and process in order to bring all proper parties to the case, including completing incomplete process or issuing new process if prior process or service was defective or incomplete [28 USC §§ 1447(a), 1448]. The court may also require the party seeking removal to file in the federal court copies of all records and proceedings in the state court [28 USC § 1447(b)].

 **Cross Reference:**

Discussion of federal jurisdiction after removal, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.21; or  
Moore's Federal Practice, § 107.31[1] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent ClaimsCivil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalProceedingsNotices



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**17.19 Removal Terminates State Court's Jurisdiction.**

After removal is effected, the federal court has exclusive jurisdiction of the matter and the state court may not resume jurisdiction unless the federal court remands the case back to state court. If the federal court dismisses the action, the state court may not resume jurisdiction [ *Sugimoto v. Exportadorade Sal, S.A. de C.V.* (1991) 233 CA3d 165, 168-169, 284 CR 275 ; *Allstate Ins. Co. v. Superior Court* (1982) 132 CA3d 670, 674-676, 183 CR 330 ; see 28 USC § 1446(d)].



**Warning:**

A plaintiff may not attempt to circumvent the federal court's jurisdiction by re-filing a second state law action alleging the same claims as a federal law action after an unsuccessful attempt to remand a case back to state court [see *Takeda v. N.W. Nat'l Life Ins. Co.* (9th Cir 1985) 765 F2d 815, 817-818 ].



**Cross Reference:**

Discussion of federal powers after removal, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.21[2]; or  
Moore's Federal Practice, § 107.31[2] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalGeneral Overview



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**17.20 Federal Court Takes Removed Case As It Finds It.**

After removal, everything that transpired in the case prior to removal is treated as though it occurred in federal court [ *Butner v. Neustadter* (9th Cir 1963) 324 F2d 783, 785 ; *Sun Forest Corp. v. Shvili* (SDNY 2001) 152 F Supp2d 367, 387 ; *Salveson v. Western States Bankcard Ass'n* (ND Cal 1981) 525 F Supp 566, 578 , *aff'd in part*, 731 F2d 1423 (9th Cir 1984) ; *see Fed R Civ P 81(c)*].

**Examples:**

- A default judgment entered in state court must be regarded by the federal court as valid until the federal court sets it aside [ *Butner v. Neustadter* (9th Cir 1963) 324 F2d 783, 785-786 ].
- All bonds, undertakings, or securities given by a party prior to removal remain valid and effectual following removal [28 USC § 1450].
- All injunctions and orders had in the action prior to removal remain in full force and effect after removal [28 USC § 1450].



**Cross Reference:**

Discussion of prior state orders, *see Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.21[2]; or  
Moore's Federal Practice, § 107.31[3] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalGeneral Overview



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**17.21 Court Has Several Options When Plaintiff Joins New Defendant After Removal.**

Plaintiff must obtain leave of the court or written consent of the defendant before joining an additional defendant subsequent to removal [ *Desert Empire Bank v. Insurance Co. of N. Am.* (9th Cir 1980) 623 F2d 1371, 1374-1375 ; see *Fed R Civ P 15*, 20]. If plaintiff seeks to join a necessary, non-diverse party after an action requiring complete diversity has been removed, the federal district court has the following three options [28 USC § 1447(e); *Fed R Civ P 19*; *Yniques v. Cabral* (9th Cir 1993) 985 F2d 1031, 1034-1035 ]:

- The court may deem the party indispensable and dismiss the case.
- The court may deem the party not indispensable and continue its jurisdiction over the case without joinder.
- The court may allow the joinder and remand the case back to state court due to the destruction of diversity.



**Cross Reference:**

Discussion, see Moore's Federal Practice, § 107.41[2][d] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalProceedingsGeneral Overview





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**17.22 Defendant Who Has Not Answered As of Time of Removal Generally Has 20 Days to Do So.**

A defendant who did not answer the complaint or cross-complaint prior to removal of the action must do so within the longest of [*Fed R Civ P 81(c)*]:

- Twenty days after the receipt through service or otherwise of a copy of the initial pleading;
- Twenty days after the service of summons on the initial pleading, then filed; or
- Five days after the filing of the notice of removal.

➡ **Cross Reference:**

Discussion of responding to complaint, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 8.05; or  
Moore's Federal Practice, § 107.31[7] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**17.23 Party May Demand Jury Trial After Removal.**

If the party demanding a jury trial is the defendant, he or she must demand a jury trial within 10 days after the notice of removal is filed. If the party demanding a jury trial is not the defendant, the demand must be served within 10 days after service on the party of the notice of filing the notice of removal [*Fed R Civ P 81(c)*]. If the party made a demand for a jury trial prior to removal, he or she need not make a demand after removal. If the applicable state law does not require a demand for jury trial, the parties need not make a demand for jury trial unless the district court directs that they do so [*Fed R Civ P 81(c)*].



**Warning:**

The right to jury trial may be waived if a party fails to properly and promptly demand a jury trial in federal court [*Fed R Civ P 38(d)*].



**Cross Reference:**

Discussion of jury trial demand, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.21[6], [7]; or  
Moore's Federal Practice, §§ 38.52; 107.31[8] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureRemovalGeneral OverviewCivil ProcedureTrialsJury TrialsJury Demands



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*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.24*

# **17.24 CHECKLIST: Moving to Remand and Seeking Appellate Review of Removal.**

## **17.24[1] Checklist for Party Making Motion to Remand.**

☐ Determine if there are grounds for making motion to remand:

☐ Federal district court lacks subject matter jurisdiction.

☐ Defect in removal procedure.

### **Authority:**

*28 USC § 1447(c)*

### **Discussion:**

See 17.26[1], [2]



Determine timing for motion to remand:

☐ Motion to remand on basis other than lack of subject matter jurisdiction must be made within 30 days of filing of notice of removal.

### **Authority:**

*28 USC § 1447(c)*

### **Discussion:**

See 17.27[2]

☐ Remand on basis of lack of subject matter jurisdiction may be made at any time before final

judgment.

**Authority:**

*28 USC § 1447(c)*

**Discussion:**

See 17.26[1]

- ☐ Prepare, file, and serve notice of motion and memorandum of points and authorities in support of motion to remand.

**Authority:**

*28 USC § 1447(c); Fed R Civ P 5, 7(b), 11*

**Discussion:**

See 17.27

**Form:**

See 17.37

- ☐ Request costs and attorney's fees incurred as a result of removal.

**Authority:**

*28 USC § 1447(c)*

**Discussion:**

See 17.29

- ☐ If motion to remand is denied, consider seeking review by interlocutory appeal or by appeal from final judgment.

**Authority:**

*O'Halloran v. University of Washington (9th Cir 1988) 856 F2d 1375, 1378-1379 ; 28 USC § 1453(c)*

**Discussion:**

See 17.30, 17.31A

- ☐ If removal was not challenged by moving to remand, consider challenging removal based on subject matter jurisdiction after judgment on appeal.

**Authority:**

*Grubbs v. General Elec. Credit Corp. (1972) 405 US 699, 702, 92 S Ct 1344, 31 L Ed2d 612 ;  
Harperv. San Diego Transit Corp. (9th Cir 1985) 764 F2d 663, 666 n1*

**Discussion:**

See 17.32

**17.24[2] Checklist for Party Opposing Motion to Remand.**

- ☐ Prepare, serve, and file opposing papers.

**Authority:**

*28USC § 1447(c); Fed R Civ P 5, 7(b), 11*

☐ Order remanding an action based on lack of subject matter jurisdiction or a defect in the removal procedure is generally not reviewable.

**Authority:**

*28 USC § 1447(d)*

**Discussion:**

*See 17.31*

**Exceptions:**

Remand orders based on grounds other than those stated above may be reviewable on appeal. *See 17.31.*

The court of appeals may accept interlocutory appeals of a remand order filed in a class action within 7 days of the issuance of the order.

**Authority:**

*28 USC § 1453(c)*

**Discussion:**

*See 17.31A*



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*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.25*

#### **17.25 Options and Strategies for Party Moving to Remand and Seeking Appellate Review of Removal.**

It is generally more expensive to litigate in the federal courts and an action of de minimis value is probably better off in state court. If the matter has been removed on the basis of diversity jurisdiction and the plaintiff genuinely believes that the amount in controversy is less than \$75,000, the plaintiff should consider stipulating that recovery in excess of that amount will not be sought.

The federal court rules and procedures are generally viewed to be more favorable to defendants. Many plaintiffs with legitimate grounds will move for remand. However, this view is not universally held, and may not be accurate for certain kinds of cases.

The parties should carefully consider any circumstances in which there is a potential that the action may proceed in part in state court and in part in the federal court due to lack of diversity and only partial subject matter jurisdiction in the federal court. If the federal court declines to exercise its jurisdiction over the remainder of the claims, the parties must evaluate whether (1) it is rational to litigate in both forums simultaneously; (2) one of the actions should be stayed; or (3) there should be a stipulation to remand the entire action to the state court in order to allow all of the proceedings to remain in the same forum.

#### **Cross Reference:**

Discussion of strategies and procedures for moving to remand action, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.23 *et seq.*



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**17.26 Grounds for Remand.**

**17.26[1] Lack of Subject Matter Jurisdiction Is Basis for Remand.** If it appears, at any time before the final judgment, that the district court lacks subject matter jurisdiction, the case will be remanded back to state court [28 USC § 1447(c)].

► **Cross Reference:**

Discussion of grounds for remand, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.26; or  
Moore's Federal Practice, § 107.41[1][c][i] (Matthew Bender 3d ed.).

**17.26[2] Defect in Removal Procedure Is Basis for Remand.** A case may also be remanded back to state court due to a defect in the removal procedure [28 USC § 1447(c)].

► **Cross Reference:**

Discussion of grounds for remand, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.26; or  
Moore's Federal Practice, § 107.41[1][c][ii] (Matthew Bender 3d ed.).

**17.26[3] Federal Court May Not Remand for Discretionary Reasons.** A district court may not remand a properly removed action for discretionary reasons; for example, because the federal docket is too crowded [ *Thermtron Prods., Inc. v. Hermansdorfer* (1976) 423 US 336, 344-345, 96 S Ct 584, 46 L Ed2d 542 ].

► **Cross Reference:**

Discussion of grounds for remand, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.26; or  
Moore's Federal Practice, § 107.41[1][e][iii] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalPostremoval RemandsMotions for Remand





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**17.27 Party May Challenge Removal by Making Motion to Remand.**

**17.27[1] Any Party May Move for Remand.** Generally, the party who brought the action in state court will be the one moving for remand. However, the party who filed the notice of removal may also move for remand [ *American Fire & Cas. Co. v. Finn* (1951) 341 US 6, 17-18, 71 S Ct 534, 95 L Ed 702 ].



**Warning:**

The Ninth Circuit has held that a plaintiff's failure to contest facts alleged on removal constitutes an admission of those facts and bars the plaintiff from challenging removal on appeal on the basis of those facts [ *Schnabel v. Lui* (9th Cir 2002) 302 F3d 1023, 1031-1032 ].



**Cross Reference:**

Discussion of who may make motion for remand, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.25; or  
Moore's Federal Practice, § 107.41[1][b] (Matthew Bender 3d ed.).

Form, see 17.37.

**17.27[2] Motion to Remand Must Generally Be Made Within 30 Days of Filing Notice of Removal.** A motion to remand made on any other basis except subject matter jurisdiction must be made within 30 days of the filing of the notice of removal in federal court [28 USC § 1447(c)].



**Cross Reference:**

Discussion of timeliness of motion, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.27; or  
Moore's Federal Practice, § 107.41[1][d] (Matthew Bender 3d ed.).

**17.27[3] District Court May Remand Action on its Own Motion.** A federal district court has an immediate and continuing duty to remand an action on its own motion when it does not have jurisdiction over the action [28 USC § 1447(c); *Strasser v. KLM Royal Dutch Airlines* (CD Cal 1986) 631 F Supp 1254, 1258 ].

A district court may also remand a case on the basis of a procedural defect, but may not do so after the 30-day period to remand based on procedural grounds has expired [ *Maniar v. F.D.I.C.* (9th Cir 1992) 979 F2d 782, 785-786 , *but see Page v. City of Southfield* (6th Cir 1995) 45 F3d 128, 132-134 (recognizing circuit court split)].



**Cross Reference:**

Discussion of who may make motion for remand, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.25; or  
Moore's Federal Practice, § 107.41[1][a] (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval  
RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural Defects



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#### **17.28 Remand Order Terminates Federal Court's Jurisdiction.**

A remand order terminates the federal court's jurisdiction [ *Seedman v. U.S. Dist. Court (9th Cir 1988) 837 F2d 413, 414* ; *Pelleport Investors v. Budco Quality Theatres (9th Cir 1984) 741 F2d 273, 279 n3* ]. The order is resjudicata as to the removal issue [ *Mertanv. E.R. Squibb & Sons, Inc. (CD Cal 1980) 581 F Supp 751, 753* ].

##### **Exception:**

The district court retains jurisdiction after remand to determine whether attorney's fees should be awarded. For a more detailed discussion of attorney's fees awards in the context of removal and remand, see 17.29.

##### **➡ Cross Reference:**

Discussion of remand order terminating jurisdiction, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.31; or  
Moore's Federal Practice, § 107.43 (Matthew Bender 3d ed.).

##### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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#### **17.29 Court May Award Remanding Party Costs and Attorney's Fees Incurred Due to Removal.**

Upon remand, the federal district court has discretion to award costs and any actual expenses, including attorney's fees, incurred by plaintiff as a result of removal [28 USC § 1447(c)]. The court has discretion as to whether to award attorney's fees, and a finding of bad faith is not required [ *Moore v. Permanente Med. Group, Inc.* (9th Cir 1992) 981 F2d 443, 446, 448 ].

The standard for reviewing an award of attorney's fees on appeal is whether the district court abused its discretion [ *Moore v. Permanente Med. Group, Inc.* (9th Cir 1992) 981 F2d 443, 447 ].



#### **Cross Reference:**

Discussion of fees, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.29; or  
Moore's Federal Practice, § 107.41[3] (Matthew Bender 3d ed.).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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**17.30 Party May Seek Review of District Court Order Denying Motion to Remand.**

**17.30[1] Order Is Reviewable by Interlocutory Appeal or Appeal From Final Judgment.** A district court's order denying a motion to remand is reviewable either by an interlocutory appeal of the order or by an appeal after the final judgment [see, e.g., 28 USC § 1292; *O'Halloran v. University of Washington* (9th Cir 1988) 856 F2d 1375, 1378-1379 ; *Sullivan v. First Affiliated Sec., Inc.* (9th Cir 1987) 813 F2d 1368, 1371 (interlocutory appeal); *Carpenters S. Cal. Admin. Corp. v. Majestic Hous.* (9th Cir 1984) 743 F2d 1341, 1343 (review after summary judgment); *Salveson v. WesternStates Bankcard Ass'n* (9th Cir 1984) 731 F2d 1423, 1426 (review after dismissal)].

► **Cross Reference:**

Discussion of appellate review, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.33; or  
Moore's Federal Practice, § 107.44 (Matthew Bender 3d ed.).

**17.30[2] Appellate Court Will Review Whether Removal Was Proper.** On appeal, the standard of review for an order denying remand is whether removal was proper in the first place. The court is to strictly construe the removal statute against removal jurisdiction [ *Clinton v. Acequia, Inc.* (9th Cir 1996) 94 F3d 568, 573 ; *Takeda v. Northwestern Nat'l Life Ins. Co.*, (9th Cir 1985) 765 F2d 815, 818 ; *Salveson v. Western States Bankcard Asso.* (9th Cir 1984) 731 F2d 1423, 1426 ].

► **Cross Reference:**

Discussion of appellate review, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.33; or  
Moore's Federal Practice, § 107.44 (Matthew Bender 3d ed.).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalPostremoval RemandsAppellate Review



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#### **17.31 District Court Order Remanding Action Is Generally Not Reviewable.**

An order remanding an action based on lack of subject matter jurisdiction or a defect in the removal procedure is not reviewable on appeal or otherwise [28 USC § 1447(d); see *Powerex Corp. v. Reliant Energy Servs., Inc.* (2007) \_\_\_\_ US \_\_\_\_, 127 S Ct 2411, 168 L Ed 2d 112, 121, 2007 US LEXIS 7898 at 16] .

#### **Exceptions:**

Remand orders based on grounds other than lack of subject matter jurisdiction or a defect in the removal procedure maybe reviewable by appeal. For example:

- Actions removed pursuant to 28 USC § 1443 (civil rights cases) are reviewable by appeal or otherwise [28 USC § 1447(d)];
- A remand based on the overcrowded federal dockets was reviewable by appeal [ *Thermtron Prods., Inc. v. Hermansdorfer* (1976) 423 US 336, 344-345, 96 S Ct 584, 46 L Ed2d 542 ]; or
- Review is possible when a district court reaches the merits of the case in ruling on a motion to remand [see, e.g., *Pelleport Investors, Inc. v. Budco Quality Theatres* (9th Cir 1984) 741 F2d 273, 276-277 (remand based on forum selection clause)].

If an order granting remand is reviewable, the standard of review on appeal is whether the district court's order was erroneous as a matter of law [ *Survival Sys. Division of Whittaker Corp. v. U.S. Dist. Court* (9th Cir 1987) 825 F2d 1416, 1419 n2 ].



#### **Cross Reference:**

Discussion of appellate review, see *Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California*, 3.33; or  
Moore's Federal Practice, § 107.44[2][a] (Matthew Bender 3d ed.).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.31A*

**17.31A Interlocutory Review of Grant or Denial of Remand of Class Action.**

While *28 USC § 1447* applies generally to removal of a class action to federal court, the federal court of appeals may accept the interlocutory appeal of a district court order granting or denying a motion to remand a class action. The application for appeal must be filed within 7 days after entry of the order [*28 USC § 1453(c)(1)*]. The appeals court must decide the appeal within 60 days [*28 USC § 1453(c)(2)*] unless extension of that time is granted by the parties or, for up to 10 days, on good cause shown [*28 USC § 1453(c)(3)*]. The appeal is automatically denied if the court does not decide it within the time allowed [*28 USC § 1453(c)(4)*].

➡ **Cross Reference:**

Discussion of removal of class actions, see *17.10[7]*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalPostremoval RemandsAppellate Review





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*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.32*

**17.32 Unchallenged Removal May Be Reviewed After Judgment.**

When a case is removed to federal court and plaintiff does not make a motion to remand, the issue of whether the federal court had subject matter jurisdiction may be raised on appeal [ *Grubbs v. General Elec. Credit Corp.* (1972) 405 US 699, 702, 92 S Ct 1344, 31 L Ed2d 612 ; *Harper v. San Diego Transit Corp.* (9th Cir 1985) 764 F2d 663, 666 n1 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalGeneral Overview



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Chapter 17 Removal to Federal Court  
III. MOVING TO REMAND ACTION AND SEEKING APPELLATE REVIEW OF REMOVAL

*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.33*

**17.33 Defendant Has 30 Days to File a Response on Remand.**

If the case is remanded for improper removal and the defendant has not generally appeared in either the state or federal court and the original court has not already ruled on a similar motion, the defendant may within 30 days [CCP § 430.90(a)(1)]:

- Move to dismiss the action pursuant to CCP § 583.250; or
- Move to quash service of summons or to stay or dismiss the action pursuant to CCP § 418.10.

If the defendant has not filed an answer in the state court, the defendant may within 30 days [CCP § 430.90(a)(2)]:

- Answer the complaint; or
- Demur or move to strike all or a portion of the complaint if:
  - ☐ An answer was not filed in the federal court; and
  - ☐ A demurrer or motion to strike raising similar issues was not filed and ruled on in either the original court prior to removal or the federal court prior to remand.

The 30-day period is calculated from the date the state court receives the order of remand [CCP § 430.90(b)].



**Cross References:**

See Ch. 8, Service of Summons;  
Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction;  
Ch. 11, Demurrers and Motions for Judgment on the Pleadings; and  
Ch. 14, Answers.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
[Civil Procedure](#)[Removal](#)[Postremoval Remands](#)[General Overview](#)



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Chapter 17 Removal to Federal Court  
IV. FORMS

*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.34*

**17.34 Notice of Removal From State Court to Federal District Court [28 USC §§ 1441,1446].**

UNITED STATES DISTRICT COURT

for the \_\_\_\_\_ District of California

\_\_\_\_\_ [name(s)], )

Plaintiff(s), )

vs. )

\_\_\_\_\_ [name(s)], )

Defendant(s). )

)

)

)

Civil Action, File No. \_\_\_\_\_

NOTICE OF REMOVAL

To the Judges of the United States District Court for the \_\_\_\_\_ District of California,  
\_\_\_\_\_ Division:

The notice of removal of \_\_\_\_\_ [name] [, by and with written consent of the other defendant(s) herein,] respectfully shows:

1. On \_\_\_\_\_ [date], an action was commenced against defendant in the Superior Court of California, County of \_\_\_\_\_, No. \_\_\_\_\_, entitled \_\_\_\_\_ [name], Plaintiff vs. \_\_\_\_\_ [name], Defendant.

2. On \_\_\_\_\_ [date], service was made on defendant of a summons and complaint, copies of which are annexed to this notice. \_\_\_\_\_ [No further proceedings have been had in the state court action or list and attach all other process, pleadings, and orders.]

3. The above-described action is a civil action of which this court has original jurisdiction under the provisions of the United States Code, Title \_\_\_\_\_, Section \_\_\_\_\_, and is one that may be removed to this court by defendant, pursuant to \_\_\_\_\_ [*United States Code, Title 28, Section 1441 or other appropriate reference*], according to the following facts: \_\_\_\_\_ [*setout short and plain statements of facts for each ground that entitle defendant to removal: see, e.g., 17.05 for allegation of ground of removal*].

[4. Defendant(s) \_\_\_\_\_ (name(s)), and its/their attorney(s), join in and consent to the removal of this cause to the United States District Court for the \_\_\_\_\_ District of California, \_\_\_\_\_ Division.]

WHEREFORE, defendant prays that the above action now pending against him/her/it in the Superior Court of California, County of \_\_\_\_\_, be removed therefrom to this Court.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for Petitioner

Office and P.O. Address

\_\_\_\_\_

\_\_\_\_\_

NOTES.

**Authority:**

28 USC §§ 1441,1446

**Grounds for Removal:**

See 17.05



**Timing:**

See 17.13[3]

**Drafting Notice of Removal:**

See 17.13

**Related Form of Allegation:**

See 17.35

**Related Form of Notice of Filing Removal Notice:**

See 17.36



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Chapter 17 Removal to Federal Court  
IV. FORMS

*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.35*

**17.35 Allegation of Ground for Removal--Diversity of Citizenship [28 USC §§ 1332, 1441(b)]--In General.**

The above-described action is a civil action of which this court has original jurisdiction under the provisions of *Title 28, Section 1332 of the United States Code*, and is one that may be removed to this court by defendant, pursuant to *Title 28, Section 1441 of the United States Code*, in that it is a civil action wherein the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states.

*[EITHER, if individual plaintiff and individual defendant]*

Plaintiff \_\_\_\_\_[*name*], at the time this action was commenced, was and still is a citizen of the State of \_\_\_\_\_. Defendant \_\_\_\_\_[*name*], at the time this action was commenced, was and still is a citizen of the State of \_\_\_\_\_, and was not and is not a citizen of the State of California, wherein this action was brought.

*[OR, if individual plaintiff and corporate defendant]*

Plaintiff \_\_\_\_\_[*name*], at the time this action was commenced, was and still is a citizen of the State of \_\_\_\_\_. Defendant \_\_\_\_\_[*name*], at the time this action was commenced, was and still is a corporation incorporated under the laws of the State of \_\_\_\_\_, with its principal place of business in the State of \_\_\_\_\_, and was not and is not incorporated under the laws of the State of California, wherein this action was brought.

NOTES.

**Authority:**

*28 USC § 1441*

**Grounds for Removal:**

See 17.05



**Timing:**

See 17.13[3]

**Drafting Notice of Removal:**

See 17.13

**Related Form of Notice of Removal:**

See 17.34

**Related Form of Notice of Filing Removal Notice:**

See 17.36



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Chapter 17 Removal to Federal Court  
IV. FORMS

*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.36*

**17.36 Notice of Filing Removal Notice [28 USC § 1446(d)].**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name(s)], )  
Plaintiff(s), )  
vs. \_\_\_\_\_ [name(s)], )  
Defendant(s). )  
)  
)

NO. \_\_\_\_\_  
NOTICE OF FILING NOTICE OF REMOVAL  
[28 USC § 1446(d)]

To \_\_\_\_\_ [name], attorney for plaintiff:

[EITHER]

NOTICE IS HEREBY GIVEN that \_\_\_\_\_ [name], defendant in the above-entitled action, has on \_\_\_\_\_ [this date or specify other date] filed his/her/its notice of removal, a copy of which is attached hereto, in the Office of the Clerk of the United States District Court for the \_\_\_\_\_ District of California, \_\_\_\_\_ Division.

[OR]

NOTICE IS HEREBY GIVEN that a notice of removal of the above-entitled action from the \_\_\_\_\_ Court of the State of California, County of \_\_\_\_\_, to the United States District Court for the



\_\_\_\_\_ District of California, \_\_\_\_\_ Division, [a copy of which is attached hereto,]  
was/were duly filed this day in the United States District Court for the \_\_\_\_\_ District of California.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant \_\_\_\_\_ [name]

NOTES.

**Authority:**

28 USC § 1446(d)

**Grounds for Removal:**

See 17.05



**Timing:**

See 17.13[3]

**Drafting Notice of Filing Removal Notice:**

See 17.13[4]

**Related Form of Notice of Removal:**

See 17.34



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Chapter 17 Removal to Federal Court  
IV. FORMS

*1-17 MB Practice Guide: CA Pretrial Civil Procedure 17.37*

**17.37 Notice of Motion and Motion to Remand Removed Actions [28 USC § 1447(c)].**

UNITED STATES DISTRICT COURT

for the \_\_\_\_\_ District of California

|                  |   |                              |
|------------------|---|------------------------------|
| _____ [name(s)], | ) |                              |
| Plaintiff(s),    | ) | Civil Action, File No. _____ |
| vs.              | ) | NOTICE OF MOTION AND         |
| _____ [name(s)], | ) | MOTION TO REMAND REMOVED     |
| Defendant(s).    | ) | ACTION                       |
|                  | ) | [28 USC § 1447(c)]           |
|                  | ) | Date: _____                  |
|                  | ) | Time: _____                  |
|                  | ) |                              |

To defendant \_\_\_\_\_ [name] and to his/her/its attorney of record:

PLEASE TAKE NOTICE that the undersigned will, and hereby does, move this court at Room \_\_\_\_\_  
United States District Court House, \_\_\_\_\_ [street address], \_\_\_\_\_ [city], on  
\_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, for an  
order remanding this cause to the \_\_\_\_\_ Court of the State of California for the [City and] County of  
\_\_\_\_\_. This motion is made on the ground that the cause was improperly removed [and is not within  
the jurisdiction of this court], in that \_\_\_\_\_ [select one or more of the following grounds for improper  
removal]

[EITHER]

the notice of removal was not timely filed

[AND/OR]

defendant did not promptly give notice to the plaintiff of the filing of the notice of removal

this cause was removable, if at all, when defendant filed his/her/its answer to the \_\_\_\_\_ [original or amended pleading]. Defendant failed to move for removal within the thirty days required by *Section 1446(b) of Title 28 of the United States Code*

[AND/OR]

the matter in controversy does not exceed \$75,000, exclusive of interest and costs

[AND/OR]

this court has no jurisdiction of the claim asserted in the complaint

[AND/OR]

no separate and independent claim or cause of action is asserted by plaintiff against defendant  
\_\_\_\_\_ [name]

[AND/OR]

the complaint herein does not present a claim or right arising under the Constitution, treaties, or laws of the United States

[AND/OR]

\_\_\_\_\_ [name], properly joined and served as a defendant in this action, is a citizen of the State of California, wherein this action was originally brought

[AND/OR]

all of the defendants did not join in the notice of removal

[AND/OR]

defendant is not one of the parties referred to in *Section 1442 of Title 28 of the United States Code*

[AND/OR]

defendant is not a member of the armed forces referred to in *Section 1442a of Title 28 of the United States Code*

[AND/OR]

this is a civil action arising under the worker's compensation laws of the State of California

[AND/OR]

this action is not a civil rights case within *Section 1443 of Title 28 of the United States Code*

[AND/OR]

this action is a civil action against a railroad or its receivers or trustees, arising under *Sections 51-60 of Title 45 of the United States Code*, and therefore, cannot be removed to this court

[AND/OR]

this action is a civil action against a carrier or its receivers or trustees to recover damages for loss of shipments, arising under *Section 11706 or 14706 of Title 49 of the United States Code*, and is not removable because the matter in controversy does not exceed \$50,000, exclusive of interest and costs

[AND/OR]

this action is a civil action arising under section 40302 of the Violence Against Women Act of 1994

[AND/OR]

the controversy is not wholly between citizens of different states, defendant \_\_\_\_\_[*name*] being a citizen of \_\_\_\_\_, the same state as that of which plaintiff is a citizen.

[AND/OR]

this action is not a civil action within Section 1441(a) of Title 28 of the United States Code.

[OR specify some other grounds]

[CONTINUE as part of same paragraph]

[, all of which more clearly appears in the affidavit(s) of \_\_\_\_\_[*name(s)*] attached hereto as Exhibit(s) \_\_\_\_\_ and made a part hereof]. Plaintiff further moves this court for an order that defendant \_\_\_\_\_[*name*] pay plaintiff for all his/her/its costs and actual expenses, including attorney's fees, incurred by reason of the removal proceedings. All attached exhibits and a memorandum of law in support of the above motion are attached hereto and made a part hereof.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature*]

Attorney for Plaintiff

Office and P.O. Address

\_\_\_\_\_  
\_\_\_\_\_

NOTES.

**Authority:**

28 USC § 1447(c)

**Grounds for Motion to Remand Removed Action:**

See 17.26



**Timing:**

See 17.27[2]

**Drafting Notice of Motion to Remand Removed Action:**

See 17.27



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Chapter 8 Service of Summons

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.syn*

**§ 8.syn Synopsis to Chapter 8: Service of Summons**

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8.02 Objective and Strategy.

8.03 CHECKLIST: Drafting Summons.

8.04 Judicial Council Summons Forms Mandatory When Applicable.

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8.05[2] Title and Case Number, If Available.

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8.05[4] Directions, Legends, and Warnings.

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8.12 Verifying That Defendant Is Not Immune From Service.

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8.13[3] Registered Process Servers.

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8.14 Selecting Method for Service of Summons.

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8.27[3] Substituted Service on Department of Motor Vehicles.

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8.28 Serving Owner or Operator of Motor Vehicle--Nonresident.

8.28[1] Nonresident's Statutory Consent to Service of Process.

8.28[2] Methods of Service on California Resident Outside California.

8.28[3] Substituted Service on Department of Motor Vehicles.

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8.29 Serving Nonresident Executor or Administrator.

8.29[1] Appointment Constitutes Consent to Secretary of State as Agent for Service of Process.

8.29[2] Substituted Service on Secretary of State.

8.29[3] Personal Service Also Valid.

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8.29[5] Service Under Code of Civil Procedure Also Valid.

8.30 Serving Out-of-State Insurers, Agents, and Brokers.

8.30[1] Substituted Service on Insurance Commissioner Authorized.

8.30[2] Serving Insurance Commissioner.

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8.30[4] Service Under Code of Civil Procedure Also Valid.

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8.31[2] Nonresident Licensees--Substituted Service on Department of Real Estate Authorized.

8.31[3] Nonresident Subdividers--Substituted Service on Secretary of State.

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8.32 Serving Defendant Under Corporate Securities and Franchise Investment Laws.

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8.32[2] Prohibited Conduct Constitutes Implied Appointment of Commissioner as Agent.

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8.36[4][f] Proof of Service: Service by Posting on Premises (Unlawful Detainer Action).

8.36[4][g] Proof of Service: Service Requirements of Specific Statutes.

8.36[5] Proof of Service Outside California.

8.36[5][a] Proof of Service Requirements Outside California.

8.36[5][b] Proof of Service Under California Statute.

8.36[5][c] Proof of Service When Summons Was by Court Order.

8.36[5][d] Proof of Service Under Law of Place of Service.

- 8.36[5][e] Proof of Service: Service by Posting on Premises (Unlawful Detainer Action).
- 8.36[6] Include Registered Process Server's County and Registration Number.
- 8.36[7] Proof of Service by Admission of Party.
  - 8.37 Proof of Service Must Be Filed Unless Defendant Has Made General Appearance.
  - 8.38 CHECKLIST: Responding to Service of Summons.
  - 8.39 Evaluating the Complaint and Deciding on Course of Action.
- 8.39[1] Determining Whether Court Properly Obtained Jurisdiction Through Service of Summons.
- 8.39[2] Determining Whether Grounds Exist to Seek Dismissal of Action.
  - 8.39[2][a] Seeking Dismissal Based on Forum Non Conveniens.
  - 8.39[2][b] Seeking Dismissal Based on Delay of Prosecution.
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- 8.40 Time for Filing Response Is Based Upon Manner of Service.
- 8.41 Preparing Responsive Pleading.
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- 8.42 Serving and Filing Response.
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- 8.43 Judicial Council Form SUM-100 Summons.
- 8.44 Judicial Council Form SUM-200(A) Additional Parties Attachment--Attachment to Summons.
- 8.45 Judicial Council Form POS-010 Proof of Service of Summons.
- 8.46 Judicial Council Form POS-015, Notice and Acknowledgment of Receipt--Civil.
- 8.47 Application for Order for Publication of Summons.
- 8.48 Order for Publication of Summons.
- 8.49 Declaration of Mailing of Copy of Summons, of Complaint, and of Order for Publication to Defendant Pursuant to Order for Publication of Summons.

8.50 Ex Parte Application for Order Permitting Service of Summons on Defendant Corporation by Delivery to Secretary of State.

8.51 Order Directing Service of Summons on Defendant Corporation by Delivery to Secretary of State.



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Chapter 8 Service of Summons  
I. STRATEGY

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.01*

**8.01 Scope.**

This chapter covers:

- Objectives and strategy for service of a summons [see 8.02].
- Drafting a summons [see 8.03 -8.06; Forms: see 8.43, 8.44].
- Serving a summons [see 8.07 -8.35; Forms: see 8.45 -8.51].
- Electronic filing and service of summons [see 8.09].
- Selecting the person to serve the summons [see 8.13].
- Permissible methods for serving a summons, and when those methods can be used [see 8.14 -8.17].
- Serving a person in a foreign country [see 8.16].
- Serving particular types of defendants [see 8.18 -8.34].
- Return of summons and proof of service [see 8.36, 8.37; Forms: see 8.45, 8.46].
- Responding to service of a summons [see 8.38 -8.42].
- Failure of service of summons [Form: see 8.52].

**Core Statutes:**

*CCP §§ 412.10-418.11*

Service of summons within California is generally governed by *CCP* §§ 413.10-417.40 [*CCP* § 413.10(a)]. The prefatory phrase of *CCP* § 413.10, stating that these sections apply "except as otherwise provided by statute," suggests that the methods of service set forth in *CCP* § 413.10 may be used in all civil actions, even when another statute

prescribes a special method of service, unless the other statute expressly prohibits use of the methods set forth in the general statutes or conditions their use on court approval. In any case, many or most of the specialized service statutes [see 8.18 -8.35] expressly validate service under *CCP* §§ 413.10-417.40.

Service of summons outside of California, but within the United States, also is generally governed by *CCP* §§ 413.10-417.40, or as prescribed by the law of the place where the person is served [*CCP* § 413.10(b)].

Service of summons outside the United States also is generally governed by *CCP* §§ 413.10-417.40, or as directed by the court in which the action is pending, or if reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority. The rules for service of process outside the United States are subject to the provisions of the Hague Service Convention [*CCP* § 413.10(c); see also 20 UST 361; TIAS 6638 (Hague Convention)]. For discussion, see 8.16.

Various other specialized statutes govern service on specific types of defendants, or in specific situations. For discussion, see 8.18 -8.35.





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Chapter 8 Service of Summons  
I. STRATEGY

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.02*

## 8.02 Objective and Strategy.

A summons is a form of written notice, typically served with the complaint. Service of a summons is the usual manner by which a court acquires jurisdiction over the person of a defendant and over the subject of an action [see *CCP* § 410.50; *MJS Enters., Inc. v. Superior Court* (1984) 153 CA3d 555, 557, 200 CR 286 ]. Properly served, the summons fulfills procedural due process requirements, affording the defendant reasonable notice of a claim and an opportunity to be heard [see *US Const, amend XIV*, § 1; *Dresser v. Superior Court* (1968) 231 CA2d 68, 76, 41 CR 473 ].

### Strategic Point--Plaintiff:



It may not always be possible to have a summons issued at the same time the complaint is filed (*e.g.*, because a guardian ad litem has not been appointed for a minor plaintiff). To protect the statute of limitations, consider filing the complaint even though the summons is not issuable.



### Warning:

A defendant's knowledge of the existence of a lawsuit does not obviate the need for the plaintiff to properly serve the defendant with summons and complaint in the matter [ *Honda Motor Co., Ltd. v. Superior Court* (1992) 10 CA4th 1043, 1049, 12 CR2d 861 ].



### Cross Reference:

For tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.



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Chapter 8 Service of Summons  
II. DRAFTING A SUMMONS

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.03*

### 8.03 CHECKLIST: Drafting Summons.

☐ Determine whether a Judicial Council Form summons would be applicable (and consequently mandatory) for use in the case:

☐ Summons for General Use (Judicial Council Form SUM-100).

**Form:**

See 8.43

☐ Summons--Joint Debtor (Judicial Council Form SUM-120).

☐ Summons--Unlawful Detainer--Eviction (Judicial Council Form SUM-130).

☐ Summons--Storage Lien Enforcement (Judicial Council Form SUM-140).

☐ Summons--Enforcement of State Housing Law (Judicial Council Form SUM-145).

☐ Summons--Family Law (Judicial Council Form FL-110).

☐ Joinder (family law proceeding) (Judicial Council Form FL-375).

 **Cross Reference:**

Summons for serving cross-complaint, see *Ch. 16, Cross-Complaints, 16.13, 16.19*

☐ Summons must be directed to the defendant.

☐ Summons must be signed by court clerk or judge and issued under the seal of the court in which the action is pending.

**Authority:**

*CCP § 412.20(a)*; see also *CCP § 153(b)* (seal)

**Discussion:**

See 8.04, 8.43 Notes

☐ Fill out summons form, including:

☐ Names of all defendants (including fictitiously named defendants), exactly as they appear in the caption of the complaint.

☐ If there is not enough room on summons to list all the parties, use Judicial Council Form SUM-200(A), Additional Party Attachment Form.

**Form:**

See 8.44

☐ Title and number of case, which must be inserted after the case is filed.

☐ Title and address of court.

☐ Name, address, and telephone number of plaintiff or plaintiff's attorney.

☐ Face of summons must set forth the capacity or capacities in which defendant is served.

**Authority:**

*CCP §§ 412.20(a)(1), (2), 413.10-416.90*

**Discussion:**

See 8.05, 8.43 Notes

**Form:**

See 8.43

☐ Determine whether summons should include request for restraining order:

☐ In action for marital dissolution, legal separation, annulment, or to restrain domestic violence.

**Authority:**

*Fam Code §§ 231-235, 2040, 7700*

 **Cross Reference:**

California Forms of Pleading and Practice, Ch. 221, Dissolution of Marriage: Procedure;  
Ch. 293, Harassment and Domestic Violence (Matthew Bender).

- ☐ In actions under the Uniform Parentage Act [*see Fam Code §§ 7600-7730*].

**Authority:**

*Fam Code § 7700*



**Cross Reference:**

California Forms of Pleading and Practice, Ch. 412, Paternity (Matthew Bender).

- ☐ Determine number of original summons to file with court (normally one original for each defendant named in the action).

**Authority:**

*See CCP § 412.10*

**Discussion:**

*See 8.06*



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Chapter 8 Service of Summons  
II. DRAFTING A SUMMONS

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#### **8.04 Judicial Council Summons Forms Mandatory When Applicable.**

Use of Judicial Council Form SUM-100, or one of the other summons forms adopted by the Judicial Council [see 8.03], when applicable, is mandatory [CCP § 412.20; Gov Code § 68511; Cal Rules Ct, Rule 1.31].

#### **➡ Cross Reference:**

Form of summons (Judicial Council Form SUM-100), see 8.43.

The other summons forms are:

- Summons (Cross-Complaint), used for filing cross-complaint [Judicial Council Form SUM-110; see 16.19].
- Summons (Joint Debtor), used for enforcing a judgment against a joint debtor who was not a party to the action underlying the judgment [Judicial Council Form SUM-120; see Matthew Bender(R) Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer; California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.340 et seq. (Matthew Bender)].
- Summons--Unlawful Detainer--Eviction, used in unlawful detainer proceedings [Judicial Council Form SUM-130; see California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Actions (Matthew Bender)].
- Summons--Storage Lien Enforcement, used in proceedings to enforce a storage lien [Judicial Council Form SUM-140; see California Forms of Pleading and Practice, Ch. 517, Self-Service Storage Facilities (Matthew Bender)].
- Summons (Enforcement of State Housing Law), used for actions enforcing state housing law [Judicial Council Form SUM-145; see California Forms of Pleading and Practice, Ch. 579, Zoning and Planning, 579.130 et seq. (Matthew Bender)].
- Summons (Family Law), used in proceedings for dissolution of marriage, nullity of marriage, or separation, and in proceedings under the Uniform Parentage Act [Judicial Council Form FL-110; see

California Forms of Pleading and Practice, Ch. 221, Dissolution of Marriage: Procedure (Matthew Bender)].

■ Summons (Joinder), used to bring a third party into a family law proceeding [Judicial Council Form FL-375; *see* California Forms of Pleading and Practice, Ch. 221, Dissolution of Marriage: Procedure (Matthew Bender)].

If there is not enough room on the form to list all parties in the action, use an Additional Parties Attachment to Summons Form, Judicial Council Form 982(a)(9)(A).



**Cross Reference:**

Additional parties attachment to summons form (Judicial Council Form SUM-200(A)), *see* 8.44.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Service of Process Summons Content & Form



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Chapter 8 Service of Summons  
II. DRAFTING A SUMMONS

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.05*

**8.05 Information Required in Judicial Council Form Summons.**

**8.05[1] Names of All Parties.** The summons must contain the names of the parties to the action [CCP § 412.20(a)(2)]. Each plaintiff and defendant, including fictitiously named defendants [see CCP § 474], must be named in the title of the case.



**Strategic Point--Plaintiff:**

A default or default judgment cannot be taken against a person served as a fictitiously named defendant unless notice of such service appears on the face of the summons [CCP § 474].



**Cross Reference:**

Discussion of the service of fictitiously named defendants, see 8.35.

**8.05[2] Title and Case Number, If Available.** The title and case number must be inserted in the appropriate box of the Judicial Council Form when assigned on filing of the complaint and issuance of the summons.

**8.05[3] Title and Address of Court.** The title of the court in which the action is filed must be included on the summons, along with the post office and street address of the court or branch of the court [CCP § 412.20(a)(1)].

**8.05[4] Directions, Legends, and Warnings.** The Judicial Council summons form provides notice to a defendant that "YOU ARE BEING SUED" by the plaintiff, and a warning that a response is required within 30 days of the service of summons. The form advises the defendant that he or she may seek legal counsel. The directions, legends, and warnings are in English and Spanish [CCP § 412.20(a), (b)].

**8.05[5] Name of Plaintiff or Plaintiff's Attorney.** The summons must include the name, address, and telephone number of plaintiff's attorney, or plaintiff's name and address, if the plaintiff has no attorney.

**8.05[6] Capacity or Capacities of Defendant.** The summons must state the capacity or capacities in which the defendant is served [CCP §§ 413.10-416.90].

**Warning:**

If notice of capacity does not appear on the copy of the summons with which a defendant is served, no default may be taken against the person individually or in its representative capacity [CCP § 412.30].

If a defendant is served in *more than one* capacity, the notice on the face of the summons must indicate that service is being made in more than one capacity. Absent such notice, a default judgment may not be taken [CCP § 412.20] and service is ineffective [ *Tresway Aero, Inc. v. Superior Court* (1971) 5 C3d 431, 435, 96 CR 571, 487 P2d 1211 ; *Schering Corp. v. Superior Court* (1975) 52 CA3d 737, 741-742, 125 CR 337 ].

**Warning:**

A process server's oral statements to the person served of any fact omitted from the face of the summons do not cure the absence of the required notice on the face of the summons [ *Schering Corp. v. Superior Court* (1975) 52 CA3d 737, 741, 125 CR 337 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Service of Process Summons Content & Form





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Chapter 8 Service of Summons  
II. DRAFTING A SUMMONS

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.06*

#### **8.06 File One Summons for Each Defendant.**

A summons must be issued for each defendant [see CCP §§ 412.10, 412.20]. The clerk must keep the original summons in the court records, and will provide a copy of each summons issued to the plaintiff who requested issuance of the summons [CCP § 412.10].



#### **Cross Reference:**

Procedures for proof of service and filing, see 8.36, 8.37.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Pleading & Practice Service of Process Summons Issuance



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Chapter 8 Service of Summons  
III. SERVING SUMMONS

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.07*

**8.07 CHECKLIST: Serving Summons**



Timing: Review applicable local court rules regarding timing and procedure for service of process.



Review and calendar time limits for service of summons:



**Warning:**

The act of filing the complaint causes the time limits for service of process to begin to run [see *Cal Rules Ct, Rule 3.110(a)*]. Penalties for failure to serve the summons within applicable time periods can include sanctions [see *Gov Code § 68608(b)*; *Cal Rules Ct, Rule 3.110(f)*], and in extreme cases even dismissal of the action [see *CCP § 583.150*; see also *8.08[1][a]*, [2], [3]]. Service of process can take time, especially when out of state defendants are involved or substituted service must be made. Attorneys who wait until the last minute run the risk of incurring sanctions or, worse, committing legal malpractice. It is essential to review the applicable time limits at the outset and calendar them so that they are not inadvertently missed.



60-day filing period under trial court delay reduction rules.



**Warning:**

The 60-day period includes return of service as well as service itself [see *8.36[1]*]. Time for return of proof of service must be included in calculating the 60-day period.

**Authority:**

*Cal Rules Ct, Rule 3.110*

**Discussion:**

See 8.08[1][a]

- ☐ Any longer periods or exceptions to 60-day rule may be available by local court rule.

**Authority:***Gov Code § 68616(a)***Discussion:**

See 8.08[1][b]

- ☐ Two-year period for discretionary dismissal for delay in prosecution.

**Authority:***CCP § 583.410***Discussion:**

See 8.08[2]

- ☐ Three-year mandatory limit for service.

**Authority:***CCP § 583.210(a)***Discussion:**

See 8.08[3]

- ☐ File summons with clerk of court.

- ☐ Pay fees.

- ☐ Have clerk of court sign and issue summons and provide copy to serve on defendant.

**Authority:***CCP §§ 412.10, 412.20(a)***Discussion:**

See 8.09

- ☐ Review local rules to determine whether electronic filing and service of summons are permitted; if so, local procedure may be utilized [see *CCP § 1010.6; Cal Rules of Ct, Rules 2.255 et seq., 2.500 et seq.*].

- ☐ An amended summons may be issued when a complaint is amended before service, or when a new party defendant is added.

**Authority:***CCP § 412.10*

☐ Determine where defendant is located.

☐ Addresses:

☐ Residence address.

☐ Place of employment or business address.

☐ For business entities, location of main office and any California offices.

☐ Jurisdiction:

☐ Within California.

☐ Outside California, but within United States.

☐ Outside United States.

**Authority:**

*CCP §§ 413.10-417.40; see also Hague Service Convention, 20 UST 361, TIAS 6638*

**Discussion:**

*See 8.11, 8.14, 8.16*

☐ Verify that defendant is not immune from service of process.

**Discussion:**

*See 8.12*

☐ Determine who will serve summons, and confirm that the person is legally and professionally qualified.

**Authority:**

*CCP § 414.10; B&P Code §§ 22350-22360; Gov Code § 26665*

**Discussion:**

*See 8.13*

☐ Determine manner of service:

☐ Personal service (hand delivery).

**Authority:**

*CCP § 415.10*

**Discussion:**

See 8.14[1]

☐ Substituted service, if available:

☐ Determine if defendant has authorized anyone to accept process on defendant's behalf.

☐ Determine whether substituted service is authorized by any statute applicable to that particular defendant.

**Authority:**

*CCP § 416.90*

**Discussion:**

See 8.14[2]. Various forms of substituted service applicable to particular classes of defendants are discussed as appropriate in 8.18-8.34

☐ Make sure that method used is reasonably calculated to provide actual notice.

☐ Combination service:

☐ Combination of substituted service and service by mail.

☐ Can be made on business, public entity, or individual.

**Authority:**

*CCP §§ 416.10-416.90, 415.20, 415.95*

**Discussion:**

See 8.14[3]

☐ Service by mail and acknowledgment of receipt:

☐ Send copy of summons and copy of complaint, together with two copies of notice and acknowledgment of receipt.

☐ Sending to post office box address is sufficient.

☐ Notice and acknowledgment must be substantially in form prescribed by statute or in form approved by the Judicial Council.

**Form:**

See 8.46

- ☐ Service is completed on date written acknowledgment of receipt is executed by defendant.
- ☐ If defendant refuses to return acknowledgment of service, serve by other means and then petition court for award of reasonable additional cost of serving defendant.

**Authority:**

CCP § 415.30

**Discussion:**

See 8.14[4]

- ☐ Service by certified or registered mail for person outside California:

- ☐ Service is deemed completed on 10th day after mailing.
- ☐ No executed acknowledgment of receipt is required.

**Authority:**

CCP § 415.40

**Discussion:**

See 8.14[5]

- ☐ Service by publication:

- ☐ Use only as last resort if other methods of service have been unsuccessful.
- ☐ Prepare following documents:
  - ☐ Application for court order authorizing service by publication.
  - ☐ Affidavit in support of application.
  - ☐ Proposed order authorizing service by publication.
- ☐ File application and supporting documents with court.
- ☐ Court order is necessary prior to publication.
- ☐ Publish service in accordance with statutory requirements and court order.

- ☐ Service is deemed complete at end of publication period.

**Forms:**

See 8.47, 8.48

**Authority:**

*CCP §§ 415.50, 2015.5*

**Discussion:**

See 8.14[6]

- ☐ Service in unlawful detainer proceeding:

- ☐ Procedure is same as in other civil actions.

**Authority:**

*CCP §§ 413.10-417.40, 1167*

**Discussion:**

See 8.14[7]

- ☐ If desired, transmit process by telegraph for service anywhere.

**Authority:**

*CCP § 1017*

**Discussion:**

See 8.14[8]

- ☐ If it appears that no service statute is specifically applicable to defendant or circumstances of case apply to court for order regarding manner of service.

**Authority:**

*CCP § 413.30; see CCP § 187 (implied powers of court)*

**Discussion:**

See 8.15

- ☐ Serve person in foreign country as follows:

- ☐ Determine if Hague Convention is applicable.

- ☐ If Hague Convention governs:

- ☐ Determine foreign country's central authority for service of process.

- ☐ Obtain required forms for Hague Convention service.

☐ Complete forms in appropriate language.

☐ If necessary, have summons and complaint translated into appropriate language.

☐ Deliver forms to processing authority in foreign country, or qualified process server in foreign country to be forwarded to processing authority.

☐ Await return of certificate of service from processing authority following completion or failure of service.

☐ If country permits service by methods other than those specified in Hague Convention, determine which method is best and make service accordingly.

**Authority:**

*CCP § 413.10(c); 20 UST 361; TIAS 6638*

**Discussion:**

*See 8.16[1], [2]*

☐ If Hague Convention is inapplicable:

☐ Serve in any manner that would be valid under California law; or

☐ Seek court order regarding manner of service; or

☐ Serve defendant under law of place where person is served, if court (before or after service) finds that the service is reasonably calculated to give actual notice.

☐ If serving a foreign state or its political subdivisions and agencies or instrumentalities, follow requirements of Foreign Sovereign Immunities Act.

**Authority:**

*CCP § 413.10(c); 28 USC §§ 1602-1611*

**Discussion:**

*See 8.16[3], [4]*

☐ Serve person not otherwise specified in general summons statutes [*CCP §§ 416.10-416.80*] by delivering summons to person or person's representative.

**Authority:**

*CCP § 416.90*

**Discussion:**



See 8.17

☐ Serve active domestic corporation:

☐ Under California Code of Civil Procedure, as follows:

☐ On designated agent.

☐ On corporation's officers.

☐ If a bank, on a cashier or assistant cashier.

☐ Under California Corporations Code, as follows:

☐ By hand delivery to a designated agent, or

☐ By substituted service on the Secretary of State.

**Authority:**

*CCP § 416.10; Corp Code §§ 1701, 1702*

**Discussion:**

See 8.18

**Forms:**

See 8.50, 8.51

☐ Serve active foreign corporation:

☐ Under California Code of Civil Procedure, as follows:

☐ On designated agent.

☐ On corporation's officers.

☐ If a bank, on a cashier or assistant cashier.

☐ Under California Corporations Code, as follows:

☐ By hand delivery to a designated agent, or

☐ By substituted service on the Secretary of State.

**Authority:**

*CCP § 416.10; Corp Code §§ 2110, 2110.1, 2111*

**Discussion:**

*See 8.18[6]*

**Forms:**

*See 8.50, 8.51*

☐ Serve defunct domestic corporation by:

- ☐ Delivery of copy of summons to trustee, if any.
- ☐ Service as authorized by statute for defunct domestic corporation under Corporations Code.

**Authority:**

*CCP § 416.20; Corp Code § 2011(b)*

**Discussion:**

*See 8.19*

☐ Serve defunct foreign corporation by:

- ☐ Delivery of copy of summons to trustee, if any.
- ☐ Service in same manner as authorized for defunct domestic corporation under Corporations Code.
- ☐ Service in same manner as authorized for active foreign corporation under Corporations Code.

**Authority:**

*CCP § 416.20; Corp Code §§ 2011(b), 2110, 2110.1, 2111, 2114*

**Discussion:**

*See 8.19*

☐ Serve joint stock company or association as follows:

- ☐ Serve active company or association in the same manner as an active corporation.
- ☐ Serve defunct company or association in the same manner as a defunct corporation.

**Authority:**

*CCP § 416.10; Corp Code §§ 1701, 1702, 2011, 2110, 2110.1, 2111, 2114*

**Discussion:**

See 8.20

☐ Serve partnerships and other unincorporated associations as follows:

- ☐ Serve designated agent, general partner, or general manager of general or limited partnership.
- ☐ Serve designated agent, officer, or other authorized representative of unincorporated association other than partnership.

**Authority:***CCP § 416.40(a), (b); Corp Code § 24003***Discussion:**

See 8.21[1], [2]

- ☐ If partnership is domiciled outside California and has no regular place of business in California, serve designated agent or, if the designated agent is a corporation, to any person named in the designated agent's last certificate.

**Authority:***Corp Code §§ 15800, 24003(e)***Discussion:**

See 8.21[3][a]

- ☐ If partnership cannot be successfully served by other means, serve Secretary of State:

- ☐ Provide copy of summons, statement of last known address, and fee.
- ☐ Partnership has 30 days after receipt of service from Secretary of State to appear.

**Authority:***Corp Code § 15800; Gov Code § 12197 (fee)***Discussion:**

See 8.21[3][b]

**Forms:**

See 8.50, 8.51 (similar forms for corporations)

- ☐ If party to be served is unincorporated association member, and no agent has been designated, or agent cannot be found after reasonable diligence:

- ☐ Obtain court order for service on association member.

☐ On court order, service by mail to member is considered equivalent to personal service on unincorporated association.

**Authority:**

*CCP § 2015.5; Corp Code § 24007*

**Discussion:**

See 8.21[3][c]

☐ Serve registered limited liability partnership with principal office outside California or foreign limited liability partnership:

☐ As generally permitted for unincorporated associations.

☐ By hand delivery to agent or to office of corporate agent.

☐ By substituted service on Secretary of State, if there is no agent designated or agent cannot be found:

☐ Obtain court order authorizing service on Secretary of State.

☐ Hand deliver copy of summons to Secretary of State, with authorization order and fee.

**Authority:**

*CCP § 416.40; Corp Code §§ 1505, 16962(b), (c), (e), (f)*

**Discussion:**

See 8.21[4]

**Forms:**

See 8.50, 8.51 (similar forms for corporations)

☐ Serve limited liability company as follows:

☐ Personally serve designated agent, corporate agent, or Secretary of State if appointed by company to receive service of process.

☐ Service may also be made on any company member who has consented in writing.

☐ If there is no agent designated, or agent cannot be found, serve Secretary of State:

☐ Obtain court order authorizing service on Secretary of State.

☐ Hand deliver copy of summons to Secretary of State, with authorization order and fee.

**Authority:**

*CCP §§ 413.10-417.40; Corp Code §§ 17001(x), 17061, 17456(d)*

**Discussion:**

See 8.22

☐ Serve business organizations, form unknown, as follows:

☐ Conduct search of public records to determine form of business organization and whether service of process is governed by statute specific to form of business.

☐ Review Secretary of State database [<http://kepler.ss.ca.gov.list/html>] to determine if business organization is a corporation with a registered agent for service of process. If registered agent listed, follow previous checklists for serving active or defunct corporation.

☐ If business form is unknown, serve summons by:

☐ Leaving copy of summons and complaint during usual business hours with person who is apparently in charge of the office of that business organization.

☐ Thereafter mailing a copy of summons and complaint to person to be served at the place where the copy of summons and complaint were left.

**Authority:**

*CCP § 415.95*

**Discussion:**

See 8.22A

☐ Serve public entity as follows:

☐ Consult Roster of Public Agencies or county clerk to determine proper official to serve.

☐ Deliver copy of summons to clerk, officer, or other head of governing body.

☐ If there is no appropriate officer, obtain court order permitting other manner of service, including service on Secretary of State:

☐ Service on Secretary of State requires two copies of summons, two copies of court order, and a fee.

- ☐ Serve Secretary of State by personal service or registered return-receipt mail.

**Authority:**

*CCP § 416.50; Gov Code §§ 960.3, 960.8, 53050, 53051*

**Exception:**

Claims against State of California must be served on Attorney General [*Gov Code § 955.4*].

**Exception:**

Claims for inverse condemnation must be serve on either Attorney General or the Director of Department of Transportation or the Director of Department of Water Resources [*Gov Code §§ 955.6, 955.8*].

**Discussion:**

See 8.23

- ☐ Serve minor as follows:

- ☐ Serve summons on minor's parent, guardian, conservator or similar fiduciary.
- ☐ If parent, guardian, conservator or similar fiduciary cannot be found with reasonable diligence, serve person having care or control of minor or with whom minor resides, or by whom minor is employed.
- ☐ Give copy to minor if minor is age 12 or older.

**Authority:**

*CCP § 416.60*

**Discussion:**

See 8.24

- ☐ Serve person, other than minor, for whom guardian, conservator, or other fiduciary has been appointed, by delivering copy of summons and complaint to guardian, conservator, or fiduciary, and to person.

**Authority:**

*CCP § 416.70*

**Discussion:**

See 8.25

- ☐ Serve candidate for public office for matters relating to person's candidacy as provided in Elections Code:
- ☐ Personal service on candidate; or

☐ If personal service cannot be made in exercise of due diligence, obtain court order authorizing substituted service on Secretary of State.

**Authority:**

*CCP § 416.80; Elec Code § 12*

**Discussion:**

See 8.26

☐ Serve California resident motor vehicle owner or operator of motor vehicle outside California in matter relating to ownership or operation of motor vehicle as follows:

☐ Option: Serve DMV:

☐ Serve by hand delivery or return-receipt mailing of copy of summons to director of Department of Motor Vehicles (DMV).

☐ Also provide notice to defendant of service on DMV, either personally or by registered mail.

☐ Service is deemed complete when return receipt received from DMV.

☐ Resident defendant has 60 days to respond.

☐ Option: Serve by first-class return-receipt mail under Code of Civil Procedure:

☐ Service is deemed complete on 10th day after mailing.

☐ No extension of time for responsive pleading based on manner of service.

☐ Resident defendant has 30 days to respond.

☐ Option: Serve in any other manner authorized by Code of Civil Procedure.

**Authority:**

*CCP §§ 412.20(a)(3), 413.20, 415.40; Veh Code §§ 17454-17456, 17459-17462*

**Discussion:**

See 8.27

☐ Serve motor vehicle owner or operator who is not a California resident in matter relating to operation of vehicle in California as follows:

☐ Option: Serve DMV:

- ☐ Serve by hand delivery or return-receipt mailing of copy of summons to director of Department of Motor Vehicles (DMV).
- ☐ Also provide notice to defendant of service on DMV, either personally or by registered mail.
- ☐ Service is deemed complete when return receipt is received from DMV.
- ☐ Nonresident defendant has 60 days to respond.
- ☐ Option: Serve by first-class return-receipt mail under Code of Civil Procedure:
  - ☐ Service is deemed complete on 10th day after mailing.
  - ☐ No extension of time for responsive pleading based on manner of service.
  - ☐ Nonresident defendant has 30 days to respond.
- ☐ Option: Serve in any other manner authorized by Code of Civil Procedure.

**Authority:**

*CCP §§ 412.20(a)(3), 415.30; Veh Code §§ 17450-17455, 17462*

**Discussion:**

See 8.28

- ☐ Serve nonresident executor or administrator as follows:
  - ☐ Option: Serve by delivery of two copies of summons and complaint on Secretary of State.
  - ☐ Option: Serve nonresident executor or administrator personally wherever found.
  - ☐ Option: Make service in any manner authorized by Code of Civil Procedure for service on a nonresident or by return-receipt mail.

**Authority:**

*CCP §§ 415.10-415.50; Prob Code §§ 8572-8574*

**Discussion:**

See 8.29

- ☐ Serving nonresident insurance carriers, agents, and brokers:



☐ Option: Serve California Insurance Commissioner:

☐ Deliver two copies of summons and compliant to Commissioner for each person or party defendant, plus payment of fee for each.

☐ Notify defendant by certified or registered mail of service on Commissioner.

☐ File affidavit of compliance stating that notification was made.

☐ Option: Serve by return-receipt mail or any manner provided by Code of Civil Procedure for service of nonresident defendants.

**Authority:**

*CCP §§ 415.10-415.50; Ins Code §§ 1452, 1605, 1612, 11104, 11105, 12931*

**Discussion:**

See 8.30

☐ Serve nonresident real estate licensee or subdivider as follows:

☐ Option: Serve Department of Real Estate, if defendant is nonresident real estate licensee.

☐ Option: Serve Secretary of State, if defendant is nonresident subdivider.

☐ Option: Serve as authorized by Code of Civil Procedure for nonresidents, or by return-receipt mail.

**Authority:**

*B&P Code §§ 10151.5, 11007; CCP §§ 415.10-415.50*

**Discussion:**

See 8.31

☐ Serve nonresident defendant in action under California Corporate Securities Law or Franchise Investment Law as follows:

☐ Option: Serve Commissioner of Corporations by doing all of following:

☐ Leave copy of process at Commissioner's office.

☐ Notify defendant by certified or registered mail of service on Commissioner.

☐ File affidavit of compliance stating that notification was made.

- ☐ Option: Serve as authorized by Code of Civil Procedure for nonresidents, or by return receipt mail.

**Authority:**

CCP §§ 415.40, 2015.5; Corp Code §§ 25102(h)(4), 25165, 25240, 31155

**Discussion:**

See 8.32

- ☐ Serve person in gated community by doing either of following:

☐ Informing guard at gate that person serving process is a process server and providing valid identification and badge or process server registration, and demanding access for purposes of serving defendant.

☐ If guard denies access, serve guard with process.

**Authority:**

CCP §§ 415.20, 415.21; *Bein v. Brechtel-Jochim Group, Inc.* (1992) 6 CA4th 1387, 8 CR2d 351

**Discussion:**

See 8.33

- ☐ Serve fictitiously named defendants as follows:

☐ Do not do anything to effect service until true identity of fictitiously named defendant has been ascertained.

☐ When identity of a fictitiously named defendant is ascertained, file amendment to complaint to reflect true name.

☐ Serve summons and amendment to complaint on person whose name has been identified in same manner as service of original summons and complaint.

☐ Include language in summons stating fictitious name under which defendant was originally named.

**Authority:**

CCP § 474

**Discussion:**

See 8.35

- ☐ Make proof of service as follows:



File proof of service with court in which action was commenced within 60 days after complaint

was initially filed, unless longer period is provided by local rule.

**Authority:**

*Cal Rules Ct, Rule 3.110(b); Gov Code § 68616(a); but see CCP § 583.210*

**Discussion:**

See 8.36[1], [2]

☐ Complete one of following forms:

**Authority:**

*CCP § 417.10(a)*

**Discussion:**

See 8.36[3]

☐ Judicial Council proof of service form [Judicial Council Form POS-010].

**Form:**

See 8.45

☐ Proof of service form that complies with *Cal Rules Ct, Rule 2.150(a)*, prepared by word processor, typewriter, or similar process.

☐ Complete proof of service form to reflect manner in which service was made:

☐ Personal service under *CCP § 415.10* or another statute governing specific form of personal service.

**Discussion:**

See 8.36[4][b]

☐ Combination service under *CCP § 415.20*.

**Discussion:**

See 8.36[4][c]

☐ Service by mail under *CCP § 415.30*.

☐ Include acknowledgment of receipt of summons by defendant [*CCP § 417.10(a)*].

**Discussion:**

See 8.36[4][d]

☐ Service by publication under *CCP § 415.50*:

- ☐ Include affidavit or declaration of publisher or printer showing time and place of publication.
- ☐ Attach copy of summons to affidavit.

**Discussion:**

See 8.36[4][e]

- ☐ Substituted service in accordance with requirements of statute under which substituted service was made.

**Discussion:**

See 8.18 -8.33, 8.36[4][g]

**Strategic Point--Plaintiff:**

As noted throughout this chapter, numerous statutes provide for substituted service on particular public agencies in specific types of actions. The requirements for service and proof of service vary depending on the statute involved. In most cases, when substituted service is made by serving process on a state agency, the agency is required to provide notification to the plaintiff that service was made. The governing statutes (discussed in the appropriate sections of this chapter) should be consulted for the specific requirements.

- ☐ In unlawful detainer action, service by posting summons on the premises, if party cannot with reasonable diligence be served in a manner other than publication.

**Authority:**

CCP §§ 415.10, 415.45

**Discussion:**

See 8.36[4][f]

- ☐ When service is made under another statute, as prescribed by that statute.

**Discussion:**

See 8.36[4][g]

- ☐ If proof of service is for service of summons outside California, proof of service should reflect requirements for manner of service:

**Authority:**

CCP §§ 413.10(b), (c), 413.30, 415.40, 415.45, 417.10, 417.20; see also *Bolkiah v. Superior Court* (1999) 74 CA4th 984, 1000-1001, 88 CR2d 540 ; *Stamps v. Superior Court* (1971) 14 CA3d 108, 110, 92 CR 151

**Discussion:**

See 8.36[5]

- ☐ Proof of service under general California service statutes.

**Authority:**

*CCP §§ 415.40, 417.20(a); see also Bolkiah v. Superior Court (1999) 74 CA4th 984, 1000-1001, 88 CR2d 540 ; Stamps v. Superior Court (1971) 14 CA3d 108, 110, 92 CR 151*

**Discussion:**

See 8.36[5][b]

- ☐ Strict compliance with statute is required if service is made by certified or registered mail.

- ☐ If service is made pursuant to court order, in manner prescribed in that order.

**Authority:**

*CCP §§ 413.30, 417.20(b)*

**Discussion:**

See 8.36[5][c]

- ☐ In manner prescribed by the law of the place where the person was served, subject to any additional requirements imposed by court in which action is pending.

**Authority:**

*CCP §§ 413.10(b), 417.20(c)*

**Discussion:**

See 8.36[5][d]

- ☐ In unlawful detainer action, by affidavit or declaration of person who posted the premises.

**Authority:**

*CCP §§ 415.45, 417.20(e)*

**Discussion:**

See 8.36[5][e]

- ☐ By written permission of the party served.

- ☐ Include registered process server's county and registration number.

**Authority:**

*B&P Code § 22360; CCP § 417.40*

**Discussion:**

See 8.36[6]

☐ Once summons is served, file timely proof of service of summons.

☐ File proof of service of summons within applicable time limits.

**Discussion:**

See 8.36[1], [2]; see 8.08

☐ Proof of service of summons need not be filed if defendant has already made a general appearance.

**Authority:**

*CCP § 413.20-417.40*

**Discussion:**

See 8.37



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**8.08 Reviewing Applicable Time Limits for Service of Summons.**

**8.08[1] 60-Day Filing Period.**

**8.08[1][a] 60-Day Filing Period Generally Applicable.** Under trial court delay reduction rules, the complaint generally must be served on all named defendants, and proof of service must be filed with the court, within 60 days after the complaint is filed [*Cal Rules Ct, Rule 3.110*].

**Exception:**

The time limit in *Cal Rules Ct, Rule 3.110* does not apply to unlawful detainer proceedings, proceedings under the Family Code, and any other proceedings for which different service requirements are prescribed by law [*Cal Rules Ct, Rule 3.110(a)*].



**Warning:**

Sanctions are the ordinary remedy for failure to file documents within the time permitted by the trial court delay reduction rules, and judges are "encouraged" by statute to impose sanctions to achieve the purposes of the Trial Court Delay Reduction Act [*Gov Code § 68608(b)*; see *Cal Rules Ct, Rule 3.110(f)*]. Courts also have the authority to dismiss an action to enforce delay reduction programs if less severe sanctions would be ineffective, after taking into account the effect of previous sanctions or previous lack of compliance in the case [see *CCP § 583.150* (authority of court to dismiss action pursuant to local rule); *Gov Code § 68608(b)*; see also *Intel Corp. v. USAIR, Inc. (1991) 228 CA3d 1559, 1566, 279 CR 569* (dismissal of fast-track case under former *Gov Code § 68609(d)* upheld in light of previous lack of compliance in case and ineffectiveness of previous sanctions)]. Therefore, if the plaintiff has failed to meet the local deadline for service of the complaint, the action may be dismissed for failure to complete service, even if the three-year or two-year period of *CCP §§ 583.210* or *583.420* for mandatory or discretionary dismissal (discussed below) has not yet elapsed [see, e.g., *Los Angeles Super Ct Rules, Rule 7.7(a), (c)*].



**Cross Reference:**

Discussion of service of summons in unlawful detainer proceedings, see Matthew Bender(R) Practice

Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer.

**8.08[1][b] Local Rules May Impact Filing Period.** Local trial court delay reduction rules cannot require that service of a complaint be made within less than 60 days after filing, but may provide for granting exceptions for longer periods of time by local rule [*Gov Code § 68616(a)*]. Inquiry should be made to determine whether any such rules apply. Local court rules most commonly track *Cal Rules Ct, Rule 3.110*.

**Examples:**

- Los Angeles Super Ct Rules, Rule 7.7(a)(1) (complaint must be served *and* proof of service returned within 60 days of filing date unless appearance is made within that time).
- San Diego Super Ct Rules, Div. II, Rule 2.5 (certificate of service must be filed within 60 days of filing of complaint, unless certificate of progress has been filed indicating why service was not effected).
- San Francisco Super Ct Rules, Rule 3.3 (simply requiring compliance with *Cal Rules Ct, Rule 3.110*).

**8.08[1][c] Application for Extension of Time.** The court has authority to extend or otherwise modify the 60-day filing period on its own motion or on application of a party. Extensions must be granted on a showing that service could not reasonably be achieved within the time required with the exercise of due diligence consistent with the amount in controversy [*Gov Code § 68616(a)*]. Such an application must be filed before the 60-day period has elapsed. The application must be accompanied by a declaration showing why service was not effected, documenting the efforts that have been made to effect service, and specifying the date by which service is proposed to be effected [*Cal Rules Ct, Rule 3.110(e)*]. Local trial court rules also may provide for exceptions to the 60-day filing period [*Gov Code § 68616(a)*].

**8.08[2] Discretionary Dismissal After Two Years for Delay in Prosecution.** If service is not made within two years after the complaint is filed, the action may be dismissed on motion of the court or defendant, if it appears appropriate under the circumstances [*CCP § 583.410*; see *CCP § 583.210* (action is commenced at time complaint is filed)].

➤ **Cross References:**

Motion seeking discretionary dismissal for delay in prosecution, see *8.39[2][b]*.

Motion seeking discretionary dismissal--time requirements and factors considered by court, see *Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction, 9.42[2]*.

**8.08[3] Three-Year Mandatory Limit.**

**8.08[3][a] Mandatory Dismissal.** The summons and complaint must be served on the defendant within three year limit after an action is commenced [*CCP § 583.210(a)*; see *CCP § 583.240* (computation of three year period)]. Failure to adhere to this three-year time limit for service of summons results in mandatory dismissal on motion of the court or any person interested in the action, whether or not a party [*CCP § 583.250*].

➤ **Cross Reference:**

Motion seeking mandatory dismissal for delay in prosecution, see *8.39[2][b]*.

**8.08[3][b] Exceptions to Three-Year Limit.** The three-year limit does not apply if the defendant enters into a stipulation in writing or makes a general appearance in the action. A stipulation extending the time within which service



must be made [see CCP § 583.230], a motion to dismiss for delay in prosecution, or an extension of time to plead after a motion to dismiss for delay in prosecution, do not constitute a general appearance for this purpose [CCP § 583.220].

**8.08[3][c] Extensions of Three-Year Limit.** The three-year limit is not subject to exception, excuse, or exception except as expressly provided by statute [CCP § 583.250(b)]. By statute, the three-year limit may be extended by either of the following methods [CCP § 583.230]:

- Written stipulation, which need not be filed but must be brought to the a court's attention if relevant to a motion for dismissal.
- Oral agreement in open court, if entered in the minutes of the court or a transcript is made.

In addition, the computation of time within which service must be made does not include periods during which any of the following conditions existed [CCP § 583.240]:

- The defendant was not amenable to the process of the court.
- The prosecution of the action or proceedings in the action was stayed and the stay affected service.
- The validity of service was the subject of litigation by the parties.
- Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control. Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control for this purpose.

**8.08[3][d] Equitable Estoppel Applicable to Three-Year Limit.** The doctrine of equitable estoppel is applicable to motions to dismiss for failure to effectuate service within three years [ *Tresway Aero, Inc. v. Superior Court* (1971) 5 C3d 431, 437-439, 96 CR 571, 487 P2d 1211 ; *Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview* (1990) 218 CA3d 502, 267 CR 76 ]. If a trial court finds statements or conduct by a defendant that lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel is available to prevent the defendant from profiting from his or her own deception [ *Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview* (1990) 218 CA3d 502, 267 CR 76 ; *Tejada v. Blas* (1987) 196 CA3d 1335, 1341, 242 CR 538 ].

**8.08[4] When Action Is "Commenced."** For purposes of the discretionary two-year and mandatory three-year rules discussed in 8.08[2] and 8.08[3], an action is "commenced" at the time the complaint is filed [CCP §§ 583.210(a), 583.420(b); see also CCP § 411.10; *Warren v. Atchison, T. & S.F. Ry. Co.* (1971) 19 CA3d 24, 38, 96 CR 317 (decided under predecessor statute)] and generally is not extended by an amendment to the original complaint [ *Rhode v. National Medical Hosp. of Monterey Park, Inc.* (1979, 2nd Dist) 93 CA3d 528, 537, 155 CR 797 (decided under predecessor statute)]. The same rule applies when the defendant was named in the original complaint by fictitious name. When a new party is added to the action, however, the action commences as to that party on the date of the order, or the date of filing of the pleading, naming that party as a new party [ *Warren v. Atchison, T. & S.F. Ry. Co.* (1971) 19 CA3d 24, 38, 96 CR 317 (decided under predecessor statute); *Elling Corp. v. Superior Court* (1975) 48 CA3d 89, 94, 123 CR 734 (decided under predecessor statute)]. One court has held that an alter ego defendant added as a new defendant in an amended complaint must be served with the amended complaint and summons within three years after the filing of the amended complaint first naming that defendant, as opposed to three years from the date the original complaint was filed [ *Hennessey's Tavern, Inc., v. American Air Filter Company, Inc.* (1988) 204 CA3d 1351, 1360, 251 CR 859 ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewCivil ProcedurePleading &  
PracticeService of ProcessTime LimitationsDismissalsCivil ProcedurePleading & PracticeService of ProcessTime  
LimitationsExtensions



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**8.09 Obtaining Summons From Clerk.**

After the plaintiff or cross-complainant pays the applicable fees [see *CCP* § 412.10; *Gov Code* §§ 70611-70614], the court clerk will sign the original summons [see *CCP* § 412.20(a)], will keep the original summons for court records, and will provide a copy of each summons to the plaintiff to be used in serving the defendant [*CCP* § 412.10; see *Maginn v. City of Glendale* (1999) 72 CA4th 1102, 85 CR2d 639 ]. Any number of summonses may be issued [*CCP* § 412.10]. The seal of the court must be affixed to the summons [*CCP* § 153(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeService of ProcessSummonsIssuance



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**8.10 Checking Local Rules on Electronic Filing and Service of Summons.**

Courts may adopt local rules that allow for electronic filing and service of summons, subject to Judicial Council rules and other conditions [CCP § 1010.6; *Cal Rules Ct, Rule 2.259(f)*; see, e.g., Los Angeles Super Ct Rules, Rule 18.0(g)]. On adoption of local rules, when an electronic complaint is filed, the trial court must issue at the plaintiff's request a summons bearing the court seal and the case number to be kept in its records and may electronically transmit a copy of the summons to the party filing the complaint [CCP § 1010.6(a)(5); *Cal Rules Ct, Rule 2.259(f)(2)*].

If the court electronically transmits a summons to a party, the court must notify the party of its intent to electronically transmit the summons to the address provided on filing the complaint [CCP § 1010.6(a)(5); see also *Cal Rules Ct, Rule 2.259(f)(1)*]. The printed electronic summons may be served personally, and has the same legal effect as personal service of an original summons [CCP § 1010.6(a)(5); *Cal Rules Ct, Rule 2.259(f)(3)*].

Filing a document electronically does not alter any filing deadline [*Cal Rules Ct, Rule 2.252(e)(2)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePleading & PracticeService of ProcessSummonsIssuance



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### 8.11 Determining Where Defendant Is Located.

Before determining the best way to serve the summons on defendant, an effort should be made to obtain basic information about the defendant. This information will determine how to go about serving the defendant, and may assist the process server in locating the defendant if personal service is used:

- Defendant's residence address.
- Defendant's place of employment or business address.
- Where defendant is physically located at the time of service.
- If defendant is an entity rather than an individual, location of defendant's headquarters or main office, and any offices in California.

#### ➡ Locating Parties Using Online Resources.

Many resources are available online for investigating whether individuals have died and, if not, the location of living persons. For example, helpful resources at *lexis.com* include:

- Public Records tab > Public Records > Person Locator > Person Locator by State > CA Person Locator.



Sample Search: To find a possible Los Angeles address of an individual, try a NAME and ADDRESS segment search in the People Locator databases such as: *name (first name /3 last name) and address (los angeles)*.

- Public Records tab > Public Records > Find a Person > Locate a Person (Nationwide).



Sample Search: To find a possible California address of an individual, try a NAME and ADDRESS segment search in the People Locator databases such as: *name (first name*

*/3 last name) and address (ca).*

■ Public Records tab > Public Records > Marriage, Divorce & Death Records > Social Security Death Records.

○ Sample Search: To determine whether a potential party or witness is deceased, use a NAME segment search in the Social Security Death Records, such as: *name (first name /3 last name).*

Note: Social Security Numbers can be searched and displayed in this source.



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#### **8.12 Verifying That Defendant Is Not Immune From Service.**

Certain people are immune from the effect of service of summons, including heads of foreign diplomatic mission, members of the California legislature during a legislative session [*see* Cal Const, art IV, § 14; *Harmer v. Superior Court* (1969) 275 CA2d 345, 348, 79 CR 855 ], people who come to California to testify pursuant to court order or subpoena [*see* Pen Code §§ 1334.4, 1334.5], and people who are brought into California on or after waiver of extradition [*see* Pen Code § 1555].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral Overview



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### 8.13 Selecting Person to Serve Summons.

**8.13[1] Meeting Basic Legal Qualifications.** Generally, any person may serve the summons as long as he or she [CCP § 414.10]:

- Is at least 18 years of age; and
- Is not a party to the action.



**Warning:**

Some code provisions expressly require service by specified persons, such as a sheriff or marshal.



**Cross Reference:**

Persons who may serve process, see *California Forms of Pleading and Practice*, Ch. 518, *Service of Summons and Papers*, § 518.20 (Matthew Bender).

**8.13[2] Sheriff or Marshal May Serve Summons.** Any duly qualified and acting marshal or sheriff of any county in California may serve process [Gov Code § 26665; see Gov Code §§ 26608 (duty of sheriff), 71265 (marshals)]. The sheriff's or marshal's office charges a statutory fee (currently \$30) for serving process (including substituted service) [Gov Code §§ 26720.9, 26721, 71265; see also Gov Code § 26736 (cancellation fee)].

**8.13[3] Registered Process Servers.** Summons may also be served by registered process servers licensed under B&P Code §§ 22350-22360.



**Decision Point--Selecting Process Server:**

Most attorneys prefer to have either a sheriff or a registered process server serve the summons when personal service will be made. Service by a sheriff is generally less expensive than service by a process server because the fee is set by statute, but is often slower because it may not be given top priority by the sheriff's department. Service by a registered process server is often faster but can be more expensive,



especially if multiple attempts at service are required or the defendant is trying to avoid service. Registered process servers are likely to be more persistent when service is difficult.

If the attorney does not have a pre-existing relationship with a registered process server in the locale where service is to be attempted, attorneys practicing law in that locale may be good sources for a recommendation as to a reliable process server. Process servers in the attorney's home area may also be able to recommend reliable counterparts in the geographic area where service is to be made.

**8.13[4] When Using Method Other Than Personal Service.** If service will be made by some method other than personal service (*e.g.*, substituted service, or service by mail or publication), use of a sheriff or registered process server is not necessary. Service normally will be made by the attorney or some other law office personnel.



**Strategic Point--Plaintiff:**

For obvious reasons, it is rare for attorneys to personally serve summons. However, when some method other than personal service is used, it may be advantageous to have the attorney's office handle the service to assure that the procedures required for substituted service are properly followed.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral Overview



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#### 8.14 Selecting Method for Service of Summons.

**8.14[1] Personal Delivery.** A summons may be served by personally delivering a copy of the summons and complaint to the person to be served. Service is complete at the time of delivery [CCP § 415.10]. In some situations (discussed in the appropriate sections of this chapter), a good-faith attempt to effect personal service is a prerequisite to using other methods of service.

Personal service of a printed form of an electronic summons issued pursuant to local rules has the same legal effect as personal service of an original summons [CCP § 1010.6(a)(5); see 8.10].



**Cross Reference:**

Discussion of electronic filing, see 8.10.



**Warning--Defendant:**

If it is reasonably obvious that a person is making an attempt at personal service, the defendant cannot later deny that personal service was had due to lack of delivery just because the defendant declined or refused to accept service. In this instance, the server can effect service by leaving the summons in a place likely to come to the attention of the person on whom service was attempted [ *Crescendo Corp. v. Shelton, Inc.* (1968) 267 CA2d 209, 213, 72 CR 776 (default judgment upheld)].

**8.14[2] Substituted Service.** Substituted service may be accomplished by delivery of the summons and complaint to a person whom the defendant or the law has authorized to receive service on the defendant's behalf [see CCP § 416.90]. Various California statutes permit particular methods of substituted service. Examples of substituted service include service on an agent for service of process [see *Warner Bros. Records, Inc. v. Golden W. Music Sales* (1974) 36 CA3d 1012, 1017-1019, 112 CR 71 ; see also *Corp Code* § 1701], the California Secretary of State [CCP § 416.10; *Corp Code* §§ 1702, 2111], or the director of the Department of Motor Vehicles [*Veh Code* §§ 17451, 17454, 17455].



**Cross Reference:**

See 8.18 -8.34 (specific forms of permissible substituted service are discussed with respect to particular

classes of defendants).

The form of substituted service used must be reasonably calculated to give the party actual notice of the proceedings and an opportunity to be heard to satisfy traditional notices of fair play and substantial justice [ *Bein v. Brechtel-Jochim Group, Inc.* (1992) 6 CA4th 1387, 1392, 8 CR2d 351 ; see also *Warner Bros. Records, Inc. v. Golden W. Music Sales* (1974) 36 CA3d 1012, 1017, 112 CR 71 ].



#### **Warning:**

To obtain personal jurisdiction by substituted service, maintain strict compliance with statutory procedures [ *Zirbes v. Stratton* (1986) 187 CA3d 1407, 1416, 232 CR 653 ; but see *Summers v. McClanahan* (2006) 140 CA4th 403, 411, 44 CR3d 338 (liberal construction recognized but inapplicable where complete failure to comply with statutes) and *Stafford v. Mach* (1998) 64 CA4th 1174, 1182-1183, 75 CR2d 809 (pre-1969 service of process statutes requiring strict compliance are now more liberally construed to find service if actual notice was received by defendant)].

### **8.14[3] Combination Service.**

**8.14[3][a] Combines Physical Service on Responsible Person and Service by Mail.** Combination service is a form of service that includes a good faith attempt at physical service on a responsible person, in addition to notice of the action by mail [ *Khourie, Crew & Jaeger v. Sabek, Inc.* (1990) 220 CA3d 1009, 1013-1014, 269 CR 687 ].

**8.14[3][b] May Be Used to Serve Businesses and Public Entities in Lieu of Personal Service.** Combination service on businesses and public entities may be made by: (1) leaving a copy of the summons and complaint in the office of the person to be served during normal business hours and left with the person who is apparently in charge of the office, or if no physical address is known, at the business or entity's usual mailing address, other than a United States Postal Service post office box; followed by (2) mailing a copy of the summons and complaint by first-class mail, postage prepaid, to the person to be served at the business address where the summons and complaint were left [CCP § 415.20(a)]. If service is effected by leaving a copy of the summons and complaint at a mailing address, the papers being served must be left with a person at least 18 years of age, who must be informed of the contents of the served papers [CCP § 415.20(a)]. As to business and public entities, combination service may be used in lieu of personal service; no prior attempt to effect personal service is required [see CCP § 415.20(a)]. Combination service is also permitted when the form of the business organization is unknown [CCP § 415.95(a)].



#### **Cross Reference:**

Discussion of service of summons on business organization, form unknown, see 8.22A.



#### **Strategic Point--Plaintiff:**

When a business does not have a physical address but does have a business address with a commercial mail facility instead of a U.S. postal box, CCP § 415.20(b) permits service of summons by leaving the summons and complaint with the person apparently in charge of the commercial mail facility, with subsequent mailing of the summons and complaint to that address.

**8.14[3][c] May Be Used to Serve Individual Defendant After Personal Service Unsuccessful.** After the unsuccessful exercise of reasonable diligence to effect personal service on an individual defendant, a plaintiff may use combination service to complete service by leaving a copy of the summons at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address (other than a United States Postal Service post office box) as follows [CCP § 415.20(b)]:

- The papers must be left in the presence of a competent member of the household or a person apparently in charge of the office, place of business or usual mailing address of the defendant, who is at least 18 years of age.
- The server must advise the person with whom the summons is left of the contents of the served papers.
- Thereafter, the plaintiff must mail the summons and complaint by first-class mail, postage prepaid, to the person to be served at the place where the copies were left.

**Warnings:**

- Combination service on an individual defendant is permitted *only after the plaintiff exercised reasonable diligence in attempting to effect personal service* [CCP § 415.20(b); *Evartt v. Superior Court* (1979) 89 CA3d 795, 799, 152 CR 836 ; see also *Stafford v. Mach* (1988) 64 CA4th 1174, 1182-1183, 75 CR2d 809 (reasonable diligence was satisfied after three attempts at personal service)]. If the defendant received actual notice, the issue of whether there has been reasonable diligence is liberally construed to effectuate service and uphold the court's jurisdiction [ *Espindola v. Nunez* (1988) 199 CA3d 1389, 1391-1393, 245 CR 596 ].
- The individual defendant's usual mailing address cannot be a United States Postal Service post office box [CCP § 415.20(b)], but may include a private or commercial post office box [ *Ellard v. Conway* (2001) 94 CA4th 540, 546, 114 CR2d 399 ].

**8.14[3][d] Service Deemed Complete on 10th Day After Mailing.** Whether made on a business, public entity, or individual defendant, combination service is deemed completed on the 10th day after mailing [CCP § 415.20].

**8.14[4] Service by Mail and Acknowledgment of Receipt.**

**8.14[4][a] Mailing Requirements for Service by Mail.** A party may serve a copy of the summons by mail by sending a copy of the summons and complaint, along with two copies of the notice and acknowledgment of receipt, with a return envelope addressed to the sender, postage prepaid, by first-class or airmail to the person to be served [CCP § 415.30(a)].

**Decision Point:**

Service by mail may be used in lieu of personal service. The statutes do not require that an attempt at personal service precede service by mail. However, service by mail may delay prosecution of the action if the defendant does not accept service by refusing to execute and return the acknowledgment of receipt.

**Strategic Points--Plaintiff:**

- When the party being served is a party who, under the circumstances of the case, will not object to the service of the summons and complaint, it is common to seek an agreement that service can be made by mail with a return receipt of the summons and complaint. Obviously, this is a far less expensive alternative, and can expedite service of the complaint.

- A post office box is a sufficient address for mail service under *CCP* § 415.30 if the plaintiff knows that the person to be served receives mail at that address. In fact, if the plaintiff knows that the defendant uses a post office box and does not first attempt service by mail, service by publication may not be permitted [see *Transamerica Title Ins. Co. v. Hendrix* (1995) 34 CA4th 740, 745, 40 CR2d 614 ].

**8.14[4][b] Form of Notice of Acknowledgment--Judicial Council Form.** The notice and acknowledgment of receipt of summons sent by mail must substantially comply with a prescribed statutory form [see *CCP* § 415.30(b)]. Judicial Council Form POS-015, Notice and Acknowledgment of Receipt--Civil is mandatory for this purpose.



**Cross References:**

Discussion of proof of service requirements for mail service, see 8.36[4][d].  
Judicial Council Form POS-015, see 8.46.

**8.14[4][c] Service Is Complete on the Date Written Acknowledgment of Receipt Is Executed.** The person being served is supposed to sign the acknowledgment of service and return it to the sender within 20 days from the date of mailing. Service is deemed complete on the date the acknowledgment is received [see *CCP* § 415.30(c), (d)].



**Warning: Drawback--Defendant:**

Failure to respond to service by mail in an attempt to delay or avoid service can backfire on the defendant. A defendant who fails to complete and return the acknowledgment of service by mail is liable for reasonable expenses incurred in obtaining service by another method, whether or not the plaintiff is otherwise entitled to recover costs in the action [*CCP* § 415.30(d)].

**8.14[5] Certified or Registered Mail to Person Outside California.**

**8.14[5][a] Copy of Summons and Complaint May Be Mailed by Return Receipt Mail.** A summons may be served on a person outside California by sending a copy of the summons and complaint by return receipt first class prepaid mail to the person to be served [*CCP* § 415.40]. *CCP* §§ 415.40 and 417.20 when read together permit completion of service by mail when the return receipt is signed by a person so authorized by the defendant, and the personal signature of the defendant is not required [ *Cruz v. Fagor America, Inc.* (2007) 146 CA4th 488, 498, 502, 52 CR3d 862 ]. Unlike mail service within California [see 8.14[4] for discussion], an executed acknowledgment of receipt is *not* required to validate this method of service [ *Bolkiah v. Superior Court* (1999) 74 CA4th 984, 1000, 88 CR2d 540 ].



**Strategic Point--Plaintiff:**

A summons may be served on a person outside California by any of the means that may be used to serve someone in California [*CCP* § 415.40]. This method of mail service is in addition to the other methods specified by law. This method of mail service may be used to deliver process only to a person who is outside California [see *CCP* § 415.40].



**Warning: Impact of Hague Convention.**

Before attempting any type of service on a defendant in a foreign country, counsel must consider the preemptive impact of the Hague Service Convention. The Convention provides detailed procedures for notice and service. If the foreign country where the defendant can be served is a signatory to the Convention, the Convention's procedures may be the only means of service available [*CCP* § 413.10(c); *Kott v. Superior Court* (1996) 45 CA4th 1126, 1135-1136, 53 CR2d 215 ].

 **Cross Reference:**

Discussion of service on a person outside the United States, see 8.16.

**8.14[5][b] Service Complete on 10th Day After Mailing.** Service by mail on a person outside California under *CCP* § 415.40 is deemed complete on the 10th day after mailing [*CCP* § 415.40].

 **Warning--Defendant:**

The time by which a responsive pleading must be filed (30 days) is not extended when the summons is served by mail, and the 5-day extension of time set forth in *CCP* § 1013 is inapplicable to service of summons by mail [*CCP* §§ 412.20(a)(3), 413.20].

**8.14[6] Service by Publication.**

**8.14[6][a] Used Only When Party Cannot Be Otherwise Served.** A party who cannot be served with reasonable diligence in any other manner can be served by publication in a newspaper [*CCP* § 415.50].

**8.14[6][b] Preparing Affidavit or Declaration.** Filing an affidavit or declaration is a prerequisite to obtaining an order for service by publication [*CCP* §§ 415.50, 2015.5]. The affidavit or declaration must state that:

- In the pending action, after reasonable diligence, service was not possible by hand delivery, combination service, mail, acknowledgment service, or certified or registered mail [*CCP* § 415.50(a); see *Watts v. Crawford* (1995) 10 C4th 743, 748-749, 42 CR2d 81, 896 P2d 807 ].
- Either (1) a cause of action exists against the party on whom service is sought or the party is a necessary party to the action; or (2) the party served has or claims an interest in real or personal property in California that is subject to the court's jurisdiction or the relief demanded in the action consists wholly or in part in excluding the party from any interest in the property [*CCP* § 415.50(a)].

 **Cross References:**

Form of declaration included in application, see 8.47.

Discussion of the format for affidavits and declarations, see California Forms of Pleading and Practice, Ch. 15, Affidavits, Certificates, and Declarations (Matthew Bender).

**8.14[6][c] Preparing Ex Parte Application.** An application to the court for an order authorizing publication must be prepared to accompany the affidavit or declaration.

 **Cross Reference:**

Form of application for order authorizing publication, see 8.47.

**8.14[6][d] Preparing Proposed Court Order Authorizing Publication.** A proposed court order authorizing publication must also be prepared.

 **Cross References:**

Form of order authorizing publication, see 8.48.

Discussion of the preparation of proposed orders, see California Forms of Pleading and Practice, Ch. 372, Motions and Orders (Matthew Bender).

**8.14[6][e] Filing Application.** The affidavit, application, and proposed order must be filed with the court in which the action is pending [*see CCP § 415.50(a)*].

**8.14[6][f] Issuance of Court Order for Publication.** If the court is satisfied that the party to be served cannot with reasonable diligence be served in any other permissible manner and that the requirements specified in 8.14[6][b] are met, it must order the summons to be published in a designated newspaper published in California that is most likely to provide the party to be served with actual notice. Additionally, if the party to be served resides or is located out of California, that court may also order the summons be published in an out of state newspaper that is most likely to give actual notice to that party [*CCP § 415.50(b)*].

**8.14[6][g] Manner and Frequency of Publication.** Except as provided by statute or ordered by the court [*CCP § 415.50(b)*], publication is made once a week for four consecutive weeks. Four publications in a newspaper regularly published at least once a week, with at least five days intervening between the respective publication dates (not counting the publication dates) will suffice. The period of notice commences with the first day of publication and terminates at the end of the 28th day, including the first day [*Gov Code § 6064*].

**8.14[6][h] Mailing If Address Is Subsequently Ascertained.** The court order must include a direction that if the address of the party to be served is discovered prior to publication, the summons and complaint be mailed to that address [*CCP § 415.50(b)*].



**Strategic Point--Plaintiff:**

Notwithstanding an order for publication, a summons may be served in another manner authorized by the general service of summons statutes (*CCP §§ 413.10-417.40*). That service supersedes service by publication [*CCP § 415.50(d)*].

**8.14[6][i] Service Complete at End of Publication Period.** Service of summons by publication is deemed complete following completion of the statutory publication period [*CCP § 415.50(c)*; *see Gov Code § 6064*].



**Cross Reference:**

Discussion of the rules governing return of service when service is made by publication, *see 8.36[4][e]*.

**8.14[7] Service in Unlawful Detainer Proceeding.** The plaintiff in an unlawful detainer, forcible entry, or forcible detainer proceeding must serve the summons in the same manner as a summons in other civil actions [*CCP § 1167*; *see CCP §§ 413.10-417.40*], including by a combination of posting on premises and mailing [*CCP § 415.45*] or by certified mail [*CCP § 415.47*].



**Cross References:**

Matthew Bender(R) Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer.

California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Actions.

**8.14[8] Service by Telegraph.** A summons may be transmitted by telegraph service for service at any location [*CCP § 1017*]. The telegraphic copy may be served or executed by the officer or person to whom it is sent for that purpose, and returned by that person in the same manner and with the same effect as an original, which had been delivered by personal service. The person serving the telegraphic summons has the same authority and is subject to the same liabilities as if the telegraphic copy were the original. There is no need to include a description of the court seal [*CCP § 153(b)*; *see 8.04*] in the telegram, but the seal may be expressed in the telegraphic copy by the letters "L.S." or the word "seal" [*CCP § 1017*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeService of ProcessMethodsMailCivil ProcedurePleading & PracticeService of  
ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsPublicationCivil  
ProcedurePleading & PracticeService of ProcessMethodsService Upon Agents





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#### **8.15 Obtaining Court Order If No Statutory Methods Apply.**

If no particular statute regarding manner of service of summons applies to a case, the court in which the action is pending may direct that summons be served in a manner reasonably calculated to provide the party to be served with actual notice [*CCP § 413.30; see also CCP § 187*].



#### **Strategic Point--Plaintiff:**

Given the comprehensive and sometimes overlapping nature of the service statutes, it is difficult to conceive of a situation in which none of the service statutes would apply. However, plaintiffs' attorneys should be aware of the availability of this procedure.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Pleading & Practice Service of Process Methods Special Court Orders



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## **8.16 Serving Person in Foreign Country.**

### **8.16[1] Determining If Hague Convention Applies.**

**8.16[1][a] Scope of Hague Convention.** The California rules governing service of process are subject to the Hague Service Convention [20 UST 361; TIAS 6638], an international treaty [CCP § 413.10(c)]. The Hague Service Convention applies in all cases, in civil or commercial matters, when there is occasion to transmit a judicial or extrajudicial document for service abroad. It does not apply when the address of the person to be served with the document is not known.

The Hague Service Convention is formally entitled "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters." The full text is available on [lexis.com](http://lexis.com) at 1969 UST LEXIS 152, and it is reprinted in the International Agreements volume of the United States Code Service.

#### **Cross Reference:**

Discussion of requirements for service under the Hague Convention, see 8.16[2].

**8.16[1][b] Participating Nations.** Most of the Western European countries, Canada, Japan, and many other nations have ratified the convention. If uncertainty exists as to whether or not the country of defendant's residence is a current signatory to the treaty, the embassy or consulate of the country in question should be contacted.

#### **Cross Reference:**

A current list of the nations that have ratified the Hague Convention may be found on the website of the U.S. State Department, Bureau of Consular Affairs at [www.travel.state.gov/hague\\_service.html](http://www.travel.state.gov/hague_service.html).

**8.16[1][c] State Laws Preempted.** In the United States, the Hague Convention is binding on the states and, by virtue of the Supremacy Clause of the U.S. Constitution, preempts inconsistent methods of service prescribed by state law in all cases to which it applies [US Const art VI, cl 2; *Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988) 486 US 694, 699, 108 S Ct 2104, 100 LE2d 722; *Kott v. Superior Court* (1996) 45 CA4th 1126, 1133, 53 CR2d 215 ].

**Warning:**

A state court may not assume jurisdiction in a case if doing so would violate the Hague Convention [ *Shoei Kako Co. v. Superior Court* (1973) 33 CA3d 808, 819, 109 CR 402 ; see also CCP § 413.10(c)]. Failure to comply with the Hague Convention when it is applicable renders the service void, even if the defendant had actual notice of the lawsuit [ *Floveyor Int'l, Ltd. v. Superior Court* (1997) 59 CA4th 789, 69 CR2d 457 ].

**8.16[1][d] Inapplicable If Address Is Unknown.** If the plaintiff does not know the address of the person to be served, the Hague Convention is inapplicable and service by publication is appropriate [ *People v. Parcel No. 056-500-09* (1997) 58 CA4th 120, 125, 68 CR2d 51 ]. However, service by publication may not be upheld if the plaintiff fails to exercise due diligence in attempting to ascertain the address of the party to be served [ *Kott v. Superior Court* (1996) 45 CA4th 1126, 1137-1138, 53 CR2d 215 ; see also CCP § 415.50].

**8.16[1][e] Inapplicable If Document Is Not Transferred Abroad.** If service on a foreign entity is made in a manner that does not require transmission of a document abroad, the Hague Convention is inapplicable. For example, it does not apply when process is served on a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation's involuntary agent for service of process [ *Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988) 486 US 694, 706-708, 108 S Ct 2104, 100 L Ed2d 722 ; *Yamaha Motor Co., LTD v. Superior Ct.* (2009) 174 CA4th 264, 269-270, 94 CR3d 494] .

**8.16[2] Effecting Service Under Hague Convention.**

**8.16[2][a] Determining Country's Central Authority for Service of Process.** The Hague Convention requires that each signatory nation designate a central authority through which service of process may be effected. That authority receives documents and serves them in accordance with either the internal law of the receiving state or a compatible method requested by the sender. A nation may allow other methods of service within its boundaries, and may also object to the use of a particular method of transmission [see *Kott v. Superior Court* (1996) 45 CA4th 1126, 1134, 53 CR2d 215 ] .

**Example:**

Mexico has in fact objected to service through the alternative methods specified in the Hague Convention, Art. 10. Therefore, service through Mexico's Central Authority is the exclusive method by which a plaintiff can serve a defendant in Mexico [ *OGM, Inc. v. Televisa, S.A. de C.V.* (C.D. Cal., April 15, 2009), 2009 U.S. Dist. LEXIS 33409 at 10 (citing Restatement (Third) of Foreign Relations Law § 471 cmt. (1987))].

To determine the central authority of the country in question, contact that country's embassy or consulate. In some cases this information may be determined from the Internet through the country's government website, or from the website of the U.S. State Department, Bureau of Consular Affairs at [www.travel.state.gov/judicial\\_assistance.html](http://www.travel.state.gov/judicial_assistance.html).

**8.16[2][b] Obtaining Required Forms.** The attorney must obtain three or more copies of the following documents which are prescribed by and appended to the Hague Convention:

- Request for Service Abroad of Judicial or Extrajudicial Documents.
- Summary of the Documents to be Served.

These documents can be obtained from any office of a United States Marshal. The text of the forms can also be found on the website of the Hague Conference on Private International Law at [www.hcch.net/e/index.html](http://www.hcch.net/e/index.html).

**8.16[2][c] Completing Forms in Appropriate Languages.** The forms must be completed in triplicate. If English

is not an official language of the country where the summons will be served, one complete set of forms must be prepared in English and another set in the appropriate foreign language, with each labeled accordingly [ *Julen v. Larson* (1972) 25 CA3d 325, 328, 101 CR 796 ]. The identity and address of the applicant and the identity of the receiving authority in the foreign country must be set forth on the request form.

**8.16[2][d] Translating Summons and Complaint If Required.** If English is not the official language of the country, the attorney must have two copies of the summons and complaint translated into the appropriate foreign language [see *Julen v. Larson* (1972) 25 CA3d 325, 101 CR 796 ].

**8.16[2][e] Delivering Forms to Authority in Foreign Country.** The forms, summons, complaint, and translations must be delivered to the appropriate receiving authority in the foreign country [see 8.16[2][a]] or to the local process server to be forwarded to the receiving authority.

**8.16[2][f] Return of Certificate Following Completion or Failure of Service.** The process server in the foreign country completes the certificate on the reverse side of the request form. The certificate on the reverse side of the request form will be returned by the receiving authority, showing whether service was effected. The completed certificate should be filed as proof of service [Hague Convention, Art. 6; OGM, Inc. v. Televisa, S.A. de C.V. (C.D. Cal., April 15, 2009), 2009 U.S. Dist. LEXIS 33409 at 5 (service not complete where certificate not returned from central authority)].

**Exception:**

A California court may hold that service is complete even if the foreign country's central authority has not returned a certificate under the Hague Convention, Art. 6, if the following three conditions are satisfied [Hague Convention, Art. 15; OGM, Inc. v. Televisa, S.A. de C.V. (C.D. Cal., April 15, 2009), 2009 U.S. Dist. LEXIS 33409 at 11 n2 (requirements of Hague Convention, Art. 15 not met)]:

- The document was transmitted by one of the methods provided for in the Hague Convention.
- A period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document.
- No certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

 **Cross Reference:**

Discussion of proof of service requirements when service is made outside California, see 8.36[5][a].

**8.16[3] Other Means of Service.** If the Hague Convention is inapplicable, or if the country in question has authorized service by other means, process may be served on an individual outside the United States as follows [CCP § 413.10(c)]:

- In the same manner as would be appropriate for a similar summons served in California; or
- As directed by the court in which the action is pending; or
- If the court, before or after service, finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority in response to a letter rogatory.

**Strategic Point--Plaintiff:**

If the country of destination does not object, it is permissible to use alternatives to service as prescribed by the Hague Convention. Alternatives include sending the summons by postal channels directly to the person to be served, service of summons through judicial officers, officials, or other competent persons of the country by any interested person or by judicial officers, officials, and other competent persons of origin country [see *Honda Motor Co. v. Superior Court* (1992) 10 CA4th 1043, 1045, 12 CR2d 861 ].

**Trap:**

The danger in serving a defendant in another country under California law is that the judgment may not be recognized (and therefore would be unenforceable) in that country if the service does not meet that country's requirements. Some countries recognize foreign judgments only if service was made in accordance with the countries' own laws. Thus, even if service under California law would be valid in California courts under *CCP § 413.10(c)*, any resulting judgment may not be enforceable outside California (or the United States). The importance of this depends in any particular case in whether the defendant has sufficient assets in California (or the United States) on which a judgment could be executed.

**8.16[4] Serving Summons on Foreign Government.** Service on a foreign state or its subdivisions, agencies, and instrumentalities, may be made only under the Foreign Sovereign Immunities Act [see *28 USC §§ 1602-1611*], and service of process on a sovereign state must strictly comply with the requirements of the Act [ *Bolkiah v. Superior Court* (1999) 74 CA4th 984, 88 CR2d 540 ].

**Cross Reference:**

A State Department circular containing a checklist of procedures under the FSIA is posted on the website of the State Department's Bureau of Consular Affairs at [www.travelstate.gov/fsia.html](http://www.travelstate.gov/fsia.html).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeService of ProcessMethodsForeign Service



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**8.17 Serving Class Not Otherwise Provided for in Service Statutes.**

A person not otherwise specified in the service statutes [see *CCP* §§ 416.10-416.80] may be served by delivering a copy of the summons to that person, or anyone authorized by that person to receive service of summons on the person's behalf [*CCP* § 416.90]. In this instance it is not necessary that the agent be specifically appointed to receive service of process. However, the principal-agent relationship must be such that it is highly probable that a defendant will receive actual notice if the agent is served [ *Warner Bros. Records, Inc. v. Golden W. Music Sales* (1974) 36 CA3d 1012, 1017, 112 CR 71 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral Overview



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## 8.18 Serving Active Corporations.

**8.18[1] Delivery to Agent for Service of Process.** A summons on an active corporation may be served by delivering a copy of the summons and complaint to the person designated as the corporation's statutory agent for service of process [*CCP* § 416.10(a); *see Corp Code* §§ 202, 1502, 2105, 2107].

The name and address of the agent for service of process of a corporation can be found by contacting the California Secretary of State or by going to the Secretary of State's website at [www.ss.ca.gov](http://www.ss.ca.gov) and looking under business filings.



### Strategic Point--Plaintiff:

Personal service of summons on the agent for service of process is not required, and combination service [*CCP* § 415.20(a) (leaving a copy of the summons and complaint during usual business hours with a person apparently in charge of the business, followed by mailing the documents to the agent)] is a common alternative practice.



### Cross Reference:

Discussion of combination service, *see* 8.14[3].

**8.18[2] Delivery to Officer of Corporation.** A summons on an active corporation may also be served on any of the following corporate officers: the president, chief executive officer, or other head of an active corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or another person authorized by the corporation to receive service of process [*CCP* § 416.10(b); *see also Pasadena Medi-Center Associates v. Superior Court of Los Angeles County* (1973) 9 C3d 773, 779 n4, 108 CR 828, 511 P2d 1180 ; *Gibble v. Car-Lene Research, Inc.* (1998) 67 CA4th 295, 303, 78 CR2d 892 ].

### Example:

A sales representative with regular contact with the corporation may constitute a "general manager" [ *Yamaha Motor Co., LTD v. Superior Ct.* (2009) 174 CA4th 264, 273-275, 94 CR3d 494 ] .

**8.18[3] Delivery to Bank Cashier, or Assistant Cashier, or Other Authorized Person.** If a corporation is a bank, a summons may also be served by delivering the summons to a cashier, assistant cashier, or other authorized person [CCP § 416.10(c); see CCP § 416.10(a), (b) (authorized persons)].

**8.18[4] Hand Delivery to Designated Agent.** A corporation may be served by hand delivering a copy of the summons to a natural person designated by it as agent, or to any person named in the latest certificate of the corporate agent, at the corporate agent's office [Corp Code § 1701; see Corp Code § 1505].

**8.18[5] Substituted Service on Secretary of State If No Corporate Agent.**

**8.18[5][a] When Substituted Service May Be Made.** Substituted service on a domestic corporation may be made by hand delivery to the Secretary of State, or an assistant Secretary of State in the following situations [Corp Code § 1702(a)]:

- If the corporation's agent for service has resigned and not been replaced;
- The agent could not be found at the address designated after the exercise of reasonable diligence; or
- No agent has been designated.

**8.18[5][b] Court Order Required for Substituted Service.** A party must obtain a court order to make substituted service on the Secretary of State on behalf of a domestic corporation [Corp Code § 1702(a)]. If the action has been filed in a court of another state or in a federal court, the order may be obtained from that court [Corp Code § 1702(d)].



**Cross Reference:**

Forms, see 8.50, 8.51.

**8.18[5][c] Secretary of State Will Notify Corporation.** Following substituted service on the Secretary of State, the Secretary of State provides notice of service to the corporation by forwarding the summons to the corporation's principal executive office by registered or certified return-receipt mail. If the Secretary of State does not have an address for the corporation's principal executive office, notification is made by forwarding the summons in the same manner to the last designated agent for service of process. If the agent for service of process has resigned and has not been replaced, and the records of the Secretary of State do not give an address for its principal executive office, the Secretary of State may take no action [Corp Code § 1702(b)].

**8.18[5][d] Service Deemed Complete on 10th Day.** Substituted service on the Secretary of State is deemed completed on the 10th day after delivery of the process to the Secretary of State [Corp Code § 1702(a)].

**8.18[6] Serving Foreign Corporation.** A summons may be served on a foreign corporation in any of the following ways:

- Any method authorized under CCP §§ 413.10-417.40 [Corp Code § 2110.1].
- Hand delivery of the summons to any of the following [Corp Code § 2110]:
  - ☐ An officer or general manager of the corporation in California.
  - ☐ If corporation is a bank, to a cashier or assistant cashier.
  - ☐ Any natural person the corporation has designated as an agent for service of



process. A copy of the corporation's statement and designation, or a copy of the latest statement filed under *Corp Code* § 2117, is sufficient evidence of the appointment of an agent for service of process.

- ☐ If the corporation has designated a corporate agent, to any person named as a corporate agent in the most recent certificate filed under *Corp Code* § 1505.

The name and address of a foreign corporation's agent for service of process can be obtained online from the Corporate Records pages of the Secretary of State's website at [www.ss.ca.gov](http://www.ss.ca.gov).

- If other methods of service have been unsuccessful, substituted service by delivery to the Secretary of State [see *Corp Code* § 2111]. A court order must be obtained for service in this manner [*Corp Code* § 2111(a)].

- If foreign corporation has surrendered its right to transact business in California, summons may be served in any action on a liability or obligation incurred in California *before* the surrender by delivery of the process to the Secretary of State as described above. No court order is required for this type of service [*Corp Code* § 2114(b)].



#### **Strategic Point--Plaintiff:**

A corporation actually doing business in California is subject to service in California regardless of whether it is registered to do business in the state or whether the extent of its contacts require it to register [ *Raynolds v. Volkswagenwerk Aktiengesellschaft* (1969) 275 CA2d 997, 1001, 80 CR 610 ; see also *Watts v. Crawford* (1995) 10 C4th 743, 42 CR2d 81, 896 P2d 807 ]. A foreign corporation that has transacted intrastate business in California and later withdraws from California may nevertheless be served with process [see *Corp Code* §§ 2110, 2111] in an action brought in California arising out of that business, even if the corporation never complied with California statutes governing foreign corporations [*Corp Code* § 2114(a); see *Corp Code* §§ 2100-2117.1].



#### **Cross References:**

Forms, see 8.50, 8.51.

Discussion regarding special service provisions applicable to service of process on nonresidents in actions under the Corporate Securities Law or the Franchise Investment Law, see 8.32.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Service of Process Methods Service Upon Agents



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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.19*

**8.19 Serving Defunct Corporation.**

A defunct corporation, a corporation that has forfeited its charter or its right to do business, or one that has dissolved, may be served by delivering a copy of the summons and complaint to any of the following [*CCP* § 416.20(a); *Corp Code* § 2114(c)]:

- A trustee of the corporation and its stockholders or members; or
- As authorized on an officer, director, person having charge of the assets, or agent, or by serving the Secretary of State, as authorized by law for domestic and foreign corporations [*CCP* § 416.20(b); see *Corp Code* §§ 2011 (domestic corporation), 2114 (foreign corporation)].

A foreign corporation that has had its right to do business in California forfeited by the Franchise Tax Board under the Corporation Tax Law may also be served by hand delivery to an officer or agent of the corporation, or to the Secretary of State [see *Corp Code* §§ 2110, 2111], as if the right to transact business had not been forfeited [*Corp Code* § 2114(c)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral Overview



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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.20*

#### **8.20 Serving Joint Stock Company or Association.**

A joint stock company or association may be served by delivering a copy of the summons and complaint to the following [CCP § 416.30]:

- For an active company or association, to its agent, president, or other officer [see CCP § 416.10].
- For a company or association that has forfeited its charter or its right to do business, to a person who is a trustee of the corporation and of its stockholders or members; or to others authorized to receive service by *Corp Code* §§ 2011, 2114 [see CCP § 416.20].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.21*

**8.21 Serving Unincorporated Association or Partnership.**

**8.21[1] Serving General or Limited Partnership by Delivery to Agent, General Partner, or General Manager.** Service is made on a general or limited partnership or other association by serving a copy of the summons and complaint on the designated agent (if any), general partner, or general manager of the partnership [*CCP* § 416.40(a); *Corp Code* § 16310; see *Corp Code* §§ 15627, 15901.16, (service on limited partnerships)]. Service may be by personal service under *CCP* § 415.10(a), combination service under *CCP* § 415.20(a), or mail service under *CCP* § 415.30(a).



**Cross References:**

Personal service, see 8.14[1].  
Combination service, see 8.14[3].  
Service by mail, see 8.14[4].



**Strategic Point--Plaintiff:**

Domestic general partnerships *may* designate an agent by filing a Statement of Partnership Authority (Form GP-1) [see *Corp Code* § 16310] with the Secretary of State's office. Filing Form GP-1 is optional under *Corp Code* § 16303. At this time, general partnership records cannot be searched online. They are obtainable from the Secretary of State's office by mail on written request (the Secretary of State's office advises that this may take 2 to 3 week processing time), or over the counter at the Secretary of State's Sacramento office.

Domestic limited partnerships *must* designate an agent on the Certificate of Limited Partnership (Form LP-1) they are required to file with the Secretary of State's office [see *Corp Code* §§ 15614(b), 15621(a)(4), 15901.14(a)(2), 15901.16(d)(1)]. Limited partnership records may be checked online at the business filings section of the California Secretary of State's website.

**8.21[2] Serving Unincorporated Association Other Than General or Limited Partnership by Delivery to Designated Agent, Officer or Other Representative.** Service is made on an unincorporated association that is not a

general or limited partnership by serving a copy of the summons and complaint on the designated agent (if any), officer, or other authorized representative [see *CCP* § 416.40(b); *Corp Code* § 18200].



**Strategic Point--Plaintiff:**

Filing a statement designating an agent (Form UNA-100) is optional for domestic unincorporated associations other than partnerships [see *Corp Code* § 18055] under *Corp Code* § 18200. At this time, records of unincorporated associations (other than limited partnerships) cannot be searched online. They are obtainable from the Secretary of State's office by mail on written request (the Secretary of State's office advises that such requests may take two to three weeks processing time), or over the counter at the Secretary of State's Sacramento office.

**8.21[3] Serving Foreign Unincorporated Association or Partnership.**

**8.21[3][a] Delivery to Designated Agent or Person Named in Corporate Agent's Last Certificate.** A foreign unincorporated association or partnership may be served by hand delivery of a copy of the summons and complaint to the designated agent or at the corporate agent's office [*Corp Code* §§ 16310(b), 18200(e)].

**Exception:**

Foreign unincorporated associations and partnerships (other than limited partnerships and commercial or banking partnerships) having no regular place of business in California must file a statement with the Secretary of State designating a natural person or corporation as an agent for purposes of service of process [*Corp Code* § 15800]. Foreign limited partnerships are separately required to register with the Secretary of State (Form LP-5) and designate agents for service of process [*Corp Code* §§ 15627, 15692(c), 15901.16(a), (b), 16953].



**Warning--Defendant:**

A partnership must appear within 30 days after service on the person designated for service under the above procedure [see *Corp Code* § 15800(c)].

**8.21[3][b] Serving Secretary of State If Agent Cannot Be Found.** If a foreign partnership has not designated an agent, if the person designated as the agent cannot be found, if after due diligence delivery to a corporate agent [see *Corp Code* § 16310] cannot be made, or if the agent is no longer authorized to act, a copy of the summons and complaint may be served by personal delivery on the Secretary of State [*Corp Code* § 15800]. *Corp Code* § 15800 does not require that a court order authorizing this method of service be obtained.

Alternatively, if the agent of a partnership has resigned and has not been replaced, or the agent cannot be found after reasonable diligence [see *Corp Code* § 16310(d)(1)], a plaintiff can obtain a court order on an affidavit or declaration [see *CCP* § 2015.5] satisfactory to the court that the association cannot be served in a manner provided by *CCP* §§ 415.10, 415.20(a), or 415.30. The court order permits personal service on the partnership by delivering one copy of the process for each defendant to be served, together with a copy of the order authorizing the service, by hand to the Secretary of State [*Corp Code* § 16310(d)(1)].

The party seeking service must pay a \$50 service fee [*Gov Code* § 12197] and provide a signed statement to the Secretary of State, setting forth the last known address of the partnership. The Secretary of State will forward the summons to the partnership by registered or certified [see *Corp Code* § 8], return-receipt mail, to the address provided in the statement [*Corp Code* §§ 15800(b), 16310(d)(2)].



**Warning--Defendant:**

Under § 15800, a partnership must appear within 30 days after delivery of process to the Secretary of State [see *Corp Code* § 15800(c)]. Service under § 16310 is deemed complete on the 10th day after delivery of the process to the Secretary of State [*Corp Code* § 16310(d)(1)].

**8.21[3][c] Court Order Can Permit Service of Summons on Members of Unincorporated Association Other Than a Partnership.** If an unincorporated association other than a partnership [see *Corp Code* § 18055] has not designated an agent to receive service of process, or the agent cannot be found after reasonable diligence [see *Corp Code* § 18220], a plaintiff can obtain a court order on an affidavit or declaration [see *CCP* § 2015.5] satisfactory to the court that the association cannot be served in a manner provided by *CCP* §§ 415.10, 415.20(a), or 415.30. The court order permits personal service on the association by delivery of a copy of the process to one or more of the association's members designated in the order and by mailing a copy of the process to the association at its last known address [*Corp Code* § 18220].



**Strategic Point--Plaintiff:**

Although not required, it is best to include a copy of the court order with each copy of the summons and complaint mailed to association members.

**8.21[4] Serving Domestic or Foreign Limited Liability Partnership by Delivery to Agent or Secretary of State.** A domestic or foreign registered limited liability partnership may be served as follows:

- To a general partner or general manager of the partnership [*CCP* § 416.40(a); see *Corp Code* § 16310].
- By hand delivery of a copy of the summons to the designated agent [*Corp Code* § 16962(b)].
- If the designated agent is a corporate agent, to any person named on the latest certificate of the corporate agent [see *Corp Code* § 1505] at the office of the corporate agent [*Corp Code* § 16962(b)].
- If the designated agent resigned or cannot be found after reasonable diligence, or if no agent was designated, and if other methods of service have been unsuccessful, by substituted service by delivery to the Secretary of State. A court order must be obtained for service in this manner [*Corp Code* § 16962(c)]. Service is made by hand delivery of a copy of the summons and complaint to the Secretary of State, along with a copy of the order authorizing service, and the \$50 fee [*Corp Code* § 16962(c); see *Gov Code* § 12197(b) (fee)]. Service is deemed complete on the 10th day after delivery to the Secretary of State [*Corp Code* § 16962(c)]. The certificate of the Secretary of State, under seal, certifying receipt of process, notice, and forwarding the process [see *Corp Code* § 16962] is competent and prima facie evidence of receipt [*Corp Code* § 16962(e)]. A foreign court, federal court, or a court of another state may make the court order permitting service on the Secretary of State if the action has been filed in one of those courts [*Corp Code* § 16962(f)].



**Cross Reference:**

Forms, see 8.50, 8.51.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Service of Process Methods General Overview Civil Procedure Pleading & Practice Service of Process Methods Service Upon Agents



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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.22*

## 8.22 Serving Limited Liability Company.

A limited liability company (LLC) may be served by any of the following [*Corp Code § 17061*]:

- Any method of service provided by *CCP §§ 413.10-417.40*.
- Personal service of a copy of the summons and complaint on the LLC's designated agent. If the designated agent is a corporate agent, service may be made on any person named in the most recently filed certificate of the corporate agent under *Corp Code § 1505*.
- In the case of a foreign LLP that has transacted business in California *without* registering in California, by service on the Secretary of State [*Corp Code § 17061(b)*; *see Corp Code § 17456(d)*]. In this situation, service on the Secretary of State is made by hand delivery of the summons, along with the court order permitting service, and by paying the fee [*Corp Code § 17061(b)*].
- If the foreign LLC has registered and if the designated agent resigned or cannot be found after reasonable diligence, and if other methods of service have been unsuccessful, by substituted service by delivery to the Secretary of State. A court order must be obtained for service in this manner [*Corp Code § 17061(c)(1)*]. Service is made by hand delivery of a copy of the summons and complaint to the Secretary of State, along with a copy of the order authorizing service [*Corp Code § 17061(c)(1)*]. Service is deemed complete on the 10th day after delivery to the Secretary of State [*Corp Code § 17061(c)(1)*]. The certificate of the Secretary of State, under seal, certifying receipt of process, notice, and forwarding the process [*see Corp Code § 17061(c)(2)*] is competent and prima facie evidence of service of process [*Corp Code § 17061(c)(3)*].



### Strategic Points--Plaintiff:

- Every LLC, domestic or foreign, is required to appoint an agent for service of process in its articles of organization (for domestic LLCs) [Form LLC-1] and its application for registration in California (for foreign LLCs) [*Corp Code § 17061(d)(1)*; Form LLC-5]. LLC records may be checked online at the

Business Search Page on the California Secretary of State's website to determine the identity of a LLC's agent for service of process.

■ A foreign LLC that conducts business in California without having registered is deemed to have appointed the Secretary of State as its agent for service of process with respect to any causes of action arising out of the transaction of business in California [*Corp Code § 17456(d)*]. A court order is *not* required for service in this situation.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.22A*

**8.22A Serving Business Organization When Form Unknown.**

When the defendant is a "business organization, form unknown," summons may be served by [CCP § 415.95(a)]:

- Leaving a copy of the summons and complaint, during usual office hours, with the person who is apparently in charge of the office of that business organization; and
- Thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid, to the person served at the place where a copy of the summons and complaint was left.

Service of summons in this manner is complete on the 10th day after mailing.



**Warning--Plaintiff:**

Service of summons under CCP § 415.95(a) is not valid for a corporation with a registered agent for service of process listed with the Secretary of State [CCP § 415.95(b)]. Service of summons on these corporations must follow statutes directing personal or combination service [see CCP §§ 415.20, 416.10, 416.20].



**Cross References:**

Combination service, see 8.14[3]; serving active corporations, see 8.18.



**Strategic Points--Plaintiff:**

- This method for serving summons may be used in those instances where a business has not completed the formalities of operating as a business entity or where a business has not identified, or is refusing to identify, its owners.
- This method for serving summons requires the defendant to be a "business organization, form

unknown." The term is not defined by *CCP* § 415.95 or the Code of Civil Procedure, and the degree to which the plaintiff must make inquiries about the business organization before making this type of service may be subject to future judicial interpretation. As a precaution, plaintiff should conduct a thorough search of the Secretary of State's database and keep a record of the results before attempting this method of service. Additional precaution would be to search county fictitious business statements.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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## 8.23 Serving Public Entities.

**8.23[1] Delivery of Process to Clerk, Officer, or Other Head of Entity.** A public entity [see *CCP* § 416.50(b) ("public entity" defined)] may be served by delivering a copy of the summons and complaint to the clerk, officer, or other head of the governing body [*CCP* § 416.50(a)].



### Strategic Point--Plaintiff:

Personal service of summons on the clerk, officer, or other head of the governing body is not required, and combination service [*CCP* § 415.20(a) (leaving a copy of the summons and complaint during usual business hours with a person apparently in charge of the business, followed by mailing the documents to the clerk, officer, or other head of the governing body)] is a common alternative practice.



### Cross Reference:

Combination service, see 8.14[3].

**8.23[2] Locating Appropriate Official to Serve.** Service of process in an action or proceeding against a public agency may be made in conformity with the information contained in the statement in the Roster of Public Agencies pertaining to that public agency which is on file at the time of service. Service in this manner constitutes personal service upon the public agency if it otherwise complies with law [*Gov Code* § 960.8].

The Roster of Public Agencies (also known as the California Roster) is maintained by the Secretary of State's office [see *Gov Code* § 53051(c)]. The roster can be viewed online in.pdf format, or obtained in print by contacting the Sacramento office of the Secretary of State. The roster is issued annually. The latest roster can be accessed on the Internet at: [www.ss.ca.gov/executive/ca\\_roster/ca\\_roster.htm](http://www.ss.ca.gov/executive/ca_roster/ca_roster.htm). County clerks are also required to establish and maintain a roster [see *Gov Code* § 53051(c)].

**8.23[3] Substituted Service If No Appropriate Officer Can Be Found.** If an appropriate officer cannot be located, the plaintiff must file an affidavit with the court stating that service of summons cannot be made pursuant to

CCP § 416.50(a). The court may then order that service of summons be made on the public entity by either of the following methods [Gov Code § 960.3(b)]:

- Leaving two copies of the process for each public agency defendant to be served, together with two copies of the order authorizing the service, at the Secretary of State's Sacramento office; or
- Mailing two copies of the process for each public agency defendant to be served, together with two copies of the order authorizing the service, to the office of the Secretary of State in Sacramento by certified or registered mail, addressee only, return receipt requested.

A \$50 fee is charged for each public agency served in this manner [Gov Code § 960.3(d)]. Service is effective as of the day the return receipt is received from the Secretary of State [Gov Code § 960.3(b)(2)].

**Exceptions:**

The summons and complaint in claims, particularly tort claims, against the State of California must be served on the Attorney General [Gov Code § 955.4; *House v. State of California* (1981) 119 CA3d 861, 873, 174 CR 279 ]. The summons and complaint in actions for inverse condemnation against the Department of Transportation or the Department of Water Resources must be served on either the Director of those departments or the Attorney General [Gov Code §§ 955.6, 955.8].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**8.24 Serving Minors.**

**8.24[1] Serving Minor's Parent, Guardian, Conservator, or Similar Fiduciary.** Service on a minor must be made on the minor's parent, guardian, conservator, or similar fiduciary if it can be accomplished with reasonable diligence, and on the minor if the minor is at least 12 years old [CCP § 416.60].

**8.24[2] Serving Person Having Care or Control of Minor, With Whom Minor Resides, or by Whom Minor Is Employed.** If the minor's parent, guardian, conservator, or other fiduciary cannot be served with reasonable diligence, service may be made by delivering a copy of the summons and complaint to any of the following [CCP § 416.60]:

- Any person having care or control of the minor.
- Any person with whom the minor resides.
- Any person by whom the minor is employed.

In addition, a copy of the summons must be given to the minor if he or she is at least 12 years of age [CCP § 416.60; *see also Miller v. Superior Court (1961) 56 C2d 49, 51, 13 CR 673, 362 P2d 497 (decided under prior law)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**8.25 Serving Person Other Than Minor for Whom Guardian, Conservator or Fiduciary Has Been Appointed.**

A person other than a minor for whom a guardian, conservator, or similar fiduciary has been appointed must be served by delivery of copy of summons and complaint to the guardian, conservator, or fiduciary, and to the person. For good cause shown, the court in which the action is pending may dispense with the requirement of delivery to such person [CCP § 416.70].

**Legal Topics:**

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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.26*

#### **8.26 Serving Candidate for Public Office.**

**8.26[1] Personal Service on Candidate.** For matters relating to the person's candidacy for public office, personal service must be attempted on the candidate [*CCP* § 416.80 (referencing *Elec Code* § 12)].

**8.26[2] Substituted Service on Secretary of State or County Elections Official.** A candidate for public office appoints the Secretary of State, or the county elections official with whom the candidate filed for election, as agent for service of process [*Elec Code* § 12]. If personal service on the candidate cannot be made with the exercise of due diligence, the plaintiff may request the court to order that service be made on the candidate by hand delivery of the summons and court order on the Secretary of State or county elections official [*Elec Code* § 12].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.27*

**8.27 Serving Owner or Operator of Motor Vehicle--California Resident.**

**8.27[1] Statutory Consent to Service of Process.** A California resident who accepts a certificate of ownership or a certificate of registration of any motor vehicle (or any renewal) thereby consents to service of process either within or outside California, whether or not the person is then a California resident, in any action brought in a California court arising out of the ownership or operation of the vehicle [*Veh Code § 17459*]. A California resident who accepts or retains a California driver's license similarly consents to service of process in any action brought in California court arising out of the person's operation of a motor vehicle anywhere in California [*Veh Code § 17460*].

**8.27[2] Methods of Service on California Resident Outside California.** In an action regarding the ownership or operation of a motor vehicle, if the defendant is a California resident who has owned or registered the motor vehicle in California, or has accepted or retained a California driver's license, the defendant may be served *outside California* by either of the following methods [*Veh Code § 17461*]:

- As provided in the general service provisions of the Code of Civil Procedure [*CCP §§ 413.10-417.40*]; or
- Substituted service on the Department of Motor vehicles as specified in *Veh Code §§ 17454, 17455, and 17456*.

Service may be made on a person outside California under either *CCP §§ 415.10-415.50* or *Veh Code §§ 17454-17456*. If made under the Code of Civil Procedure, the defendant has 30 days to respond [*CCP § 412.20(a)(3)*]. If service is made under the Vehicle Code, the defendant has 60 days to respond [*Veh Code § 17462*].



**Decision Point--Plaintiff:**

The plaintiff has a choice between these methods. Attempted personal service is not a prerequisite to substituted service with the DMV, nor is a court order required.



**Cross References:**

General service provisions, see *8.14*.



Substituted service on DMV, see 8.27[3].



**Strategic Point--Plaintiff:**

Personal service on the nonresident, wherever found outside California, is the equivalent of service by mail [*Veh Code* § 17455].

**8.27[3] Substituted Service on Department of Motor Vehicles.** Substituted service on the DMV for a California resident outside California is made by doing either of the following [*Veh Code* § 17454]:

- Leaving one copy of the summons and complaint at the office of the Director of the Department of Motor Vehicles at the Director's office in Sacramento served, together with two copies of the order authorizing the service, at the Secretary of State's Sacramento office; or
- Mailing a copy of the summons and complaint to the Director's office in Sacramento by certified or registered mail, addressee only, return receipt requested.

A \$2.00 fee must be paid to the DMV at the time of service [*Veh Code* § 17454]. The plaintiff or the plaintiff's attorney thereafter must "forthwith" send the defendant a notice of service and a copy of the summons and complaint by registered mail [*Gov Code* § 17455]. Service is effective as of the day the return receipt is received from the DMV office [*Veh Code* § 17454].

An affidavit by the plaintiff or plaintiff's attorney showing the mailing, together with the return receipt of the U.S. Postal Service bearing the defendant's signature, must be appended to the original summons when it is filed with the court. The summons must be returned "within such time as the court may allow" [*Veh Code* § 17456].

**8.27[4] Proof of Personal Service Outside California.** If personal service was made outside California, compliance with *Veh Code* § 17455 may be proved by the return of any duly constituted public officer, qualified to serve like process of and in the state or jurisdiction where the defendant is found, showing that service was made. The return must be appended to the original summons when it is filed with the court [*Veh Code* § 17456].



**Cross Reference:**

Proof of service requirements generally, see 8.36.



**Warning--Defendant:**

A resident motorist served outside California has 60 days in which to appear in the action in which the summons was issued [*Veh Code* § 17462].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**8.28 Serving Owner or Operator of Motor Vehicle--Nonresident.**

**8.28[1] Nonresident's Statutory Consent to Service of Process.** A nonresident [*see Veh Code § 17450* (definition)] of California who operates a motor vehicle anywhere in California, whose agent operates a vehicle in the state, who otherwise accepts the rights and privileges conferred by the Vehicle Code, or who owns a motor vehicle that is operated by anyone in California with the owner's express or implied permission, thereby appoints the director of the Department of Motor Vehicles as agent for service of process for any action against the nonresident owner or operator growing out of any accident or collision resulting from operation of the motor vehicle in California [*Veh Code § 17451; see also Miller v. Superior Court (1961) 195 CA2d 779, 16 CR 36*]. This appointment is irrevocable, and is binding on the nonresident's executor or administrator [*Veh Code §§ 17451-17453*].

**8.28[2] Methods of Service on California Resident Outside California.** In an action against a nonresident arising out of the operation of a motor vehicle in California, the nonresident defendant may be served outside California by either of the following methods:

- As provided in *CCP § 415.40*, which generally governs service on persons outside California [*see 8.14[5]* for discussion of service under this statute]; or
- Substitute service on the Department of Motor vehicles as specified in *Veh Code §§ 17454, 17455, and 17456* [*see 8.28[3], see also 8.27[2]*].



**Decision Point--Plaintiff:**

If service is made under the Vehicle Code, the defendant has 60 days to respond [*Veh Code § 17462*]. When service is made pursuant to *CCP § 415.40*, the defendant has 30 days to respond [*CCP § 412.20(a)(3); see Anderson v. Sherman (1981) 125 CA3d 228, 234-237, 178 CR 38* (upholding shorter period under Code of Civil Procedure)].

**8.28[3] Substituted Service on Department of Motor Vehicles.** Substituted service on the DMV for nonresident of California is made under *Veh Code § 17454* [*see Veh Code § 17454*]. A copy of the summons and complaint must also be sent "forthwith" to the defendant by registered mail [*Veh Code § 17455*].

 **Cross Reference:**

Substituted service on DMV pursuant to *Veh Code § 17454*, see 8.27[3].

**8.28[4] Proof of Personal Service Outside California.** Compliance with *Veh Code § 17455* may be proved by the return of any duly constituted public officer, qualified to serve like process of and in the state or jurisdiction where the defendant is found, showing that service was made. The return must be appended to the original summons when it is filed with the court [*Veh Code § 17456*].

 **Cross Reference:**

Proof of service requirements generally, see 8.36.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**8.29 Serving Nonresident Executor or Administrator.**

**8.29[1] Appointment Constitutes Consent to Secretary of State as Agent for Service of Process.** A nonresident who accepts appointment as a personal representative thereby irrevocably appoints the Secretary of States as agent for service of process. The appointment of the nonresident personal representative also extends to any personal representative of a deceased nonresident personal representative [*Prob Code § 8572(a)*; see *Prob Code § 58* (personal representative defined)].

**8.29[2] Substituted Service on Secretary of State.** Summons against a nonresident personal representative may be served on the Secretary of State if the action or proceeding (1) is with respect to the estate, or (2) is founded on or arises out of the acts or omissions of the nonresident personal representative in that capacity [*Prob Code § 8572(b)*; see *Prob Code § 8576(a)* (effect of service)].

Service on a nonresident personal representative is made by delivering to and leaving with the Secretary of State two copies of the summons and complaint or notice of motion and either of the following [*Prob Code § 8574(a)*]:

- A copy of the statement of address filed by the nonresident personal representative with the court that appointed the personal representative [see *Prob Code § 8573*]; or
- If the nonresident personal representative has not filed a statement of address, a copy of the letters issued to the nonresident personal representative, together with a written statement signed by the party or attorney of the party seeking service that sets forth an address for use by the Secretary of State.



**Strategic Points--Plaintiff:**

- Although personal service is also valid [*Prob Code § 8574(c)*], there is no requirement that personal service be attempted before using substituted service through the Secretary of State.

- Every California superior court has its own website. Some counties, such as San Francisco, have all court papers and filings available online. Others do not. In the latter counties, it may be necessary to contact the probate clerk and have the clerk research the court records to obtain the statement of address of the nonresident personal representative. The clerk may charge a fee for this research. Information on how to contact the clerk for this information is usually available on the court's website.

After receiving the process, the Secretary of State will promptly mail by registered mail one copy of the summons and complaint or notice of motion to the nonresident personal representative at the address shown on the statement delivered to the Secretary of State [*Prob Code § 8574(b)*].

**8.29[3] Personal Service Also Valid.** Personal service of process on the nonresident personal representative, wherever found, is the equivalent of service on the Secretary of State [*Prob Code § 8574(c)*].

**8.29[4] Proof of Service.** Special proof of service is applicable when service is made on a nonresident personal representative [*Prob Code § 8575*]:

- If the Secretary of State made service by mail, the certificate of the Secretary of State showing the mailing must be filed with the court.
- If personal service was made outside California, the return of service by a duly constituted public officer qualified to serve the process in the jurisdiction where the nonresident personal representative is found must be included. The return must be attached to the original summons and filed with the court.

A nonresident personal representative served under *Prob Code § 8574* "may" appear and answer the complaint within 30 days from the date of service [*Prob Code § 8576(b)*].

**8.29[5] Service Under Code of Civil Procedure Also Valid.** Notwithstanding the provisions of the Probate Code, the general provisions in the Code of Civil Procedure applicable to service of persons outside California also apparently applies to service on an out-of-state personal representative [*see CCP § 415.40*]. This provision permits service in any manner specified in *CCP §§ 415.10-415.50*.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

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**8.30 Serving Out-of-State Insurers, Agents, and Brokers.**

**8.30[1] Substituted Service on Insurance Commissioner Authorized.** Service of process can be made on the California Insurance Commissioner in specified situations involving out-of-state insurance companies, agents and brokers [*Ins Code § 12931(b)*; see *Ins Code §§ 1452* (reciprocal insurance exchanges), *1605* (admitted foreign or alien insurers), *1612* (nonadmitted insurers), *11105* (admitted and formerly admitted fraternal benefit societies)]. The text of *Ins Code § 12931(b)* should be consulted in appropriate cases to determine the details regarding which insurers are subject to these provisions.

**8.30[2] Serving Insurance Commissioner.** Service on the Insurance Commissioner is made by delivering to the commissioner or a deputy two copies of the summons and complaining, for each person or party defendant so served, accompanied by a fee of \$12 for each person or party being served [*Ins Code § 12931(a)*]. The Commissioner's office will then mail one of the copies to the person being served by certified or registered mail [*Ins Code § 12931(c)*].

**8.30[3] Notifying Defendant of Service by Registered or Certified Mail.** Within 10 days after process is delivered to the Insurance Commissioner, the plaintiff or plaintiff's attorney must notify the defendant by certified or registered return-receipt mail of service on the Commissioner, and provide a copy of the complaint with the notification. The plaintiff or the plaintiff's attorney must then file an affidavit showing compliance with the notification requirement with the clerk of the court in which the action is pending on or before the date the defendant is required to appear [*Ins Code § 12931(d)*].



**Cross Reference:**

Proof of service requirements generally, see 8.36.

**8.30[4] Service Under Code of Civil Procedure Also Valid.** An out-of-state insurer also may be served under the general provisions in the Code of Civil Procedure [*CCP §§ 415.10-415.50*], or by sending a copy of the summons and complaint by first-class mail, postage prepaid with return receipt, to the person to be served [*CCP § 415.40*]. Service in this form is deemed complete on the 10th day after mailing [*CCP § 415.40*].

**Legal Topics:**

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**8.31 Serving Nonresident Real Estate Licensee or Subdivider**

**8.31[1] Attempt Personal Service First.** When serving a nonresident real estate licensee or subdivider, personal service must be attempted first, before attempting substituted service on the Department of Real Estate (for real estate licensees) or Secretary of State (for subdividers) [*B&P Code §§ 10151.5(c)* (real estate licensees), *11007* (subdividers)].

**8.31[2] Nonresident Licensees--Substituted Service on Department of Real Estate Authorized.** If service of process cannot be made in California on a nonresident holder of a California real estate license, service may be made on the Department of Real Estate. Every nonresident applicant for a real estate license, must file an irrevocable consent to service on the Department of Real Estate if service of process cannot be made in California after exercise of due diligence [*B&P Code § 10151.5(c)*].

The statute does not specify any detailed requirements or procedures for service on the Department of Real Estate. It specifies only that valid service can be made by "delivering the process" to the Department of Real Estate [*B&P Code § 10151.5(c)*].

**8.31[3] Nonresident Subdividers--Substituted Service on Secretary of State.** If service of process cannot be made in California on a nonresident subdivider after the exercise of due diligence, service may be made on the Secretary of State. Every nonresident applicant for a real estate license, and every nonresident subdivider, must file an irrevocable consent to service on the Secretary of State if service of process cannot be made in California after exercise of due diligence [*see B&P Code § 11007*].

The statute does not specify any detailed requirements or procedures for service on the Secretary of State. It specifies only that the provisions of former *CCP § 1018* (repealed 1999) are applicable insofar as possible [*B&P Code § 11007*].

**8.31[4] Serving Nonresident Real Estate Licensees or Subdividers as Authorized by Code of Civil Procedure or by Return-Receipt Mail.** A nonresident real estate licensee or subdivider, like any other person or entity being served outside California, can also be served in any manner provided by *CCP §§ 415.10-415.50*, or by sending, by first-class mail, postage prepaid with return receipt, a copy of the summons and complaint to the person to be served. Service in this form is deemed complete on the 10th day after mailing [*CCP § 415.40*].



**Legal Topics:**

For related research and practice materials, see the following legal topics:

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### **8.32 Serving Defendant Under Corporate Securities and Franchise Investment Laws.**

**8.32[1] Who Must Designate Corporations Commissioner as Agent for Service of Process.** Persons attempting to qualify to sell securities in California, or filing a request for or notice of an exemption from qualification, or applying for a certificate as an agent, broker-dealer, or investment adviser, must irrevocably consent to the appointment of the Commissioner of Corporations as their attorney to receive service of process in noncriminal actions or proceedings arising under the Corporate Securities Law. Service on the Commissioner has the same force and validity as if personally served on the person who filed the consent [*Corp Code* §§ 25165 (securities qualification or exemption), 25240 (agents, broker-dealers, and investment advisers); see *Corp Code* §§ 25102(h)(4) (designation of agent under California "small offering" securities exemption), 25211(a), (b)(3) (agent, broker-dealer), 25231(a) (investment adviser)]. A similar provision applies to applicants (other than California corporations, limited partnerships, and limited liability companies), for registration of an offer to sell franchises under the Franchise Investment Law [*Corp Code* § 31155].

#### **Cross Reference:**

Discussion of the general Corporations Code sections applicable to service of process on foreign corporations, see 8.18[6] (the provisions discussed in this section apply specifically to actions under the Corporate Securities Law and the Franchise Investment Law).

**8.32[2] Prohibited Conduct Constitutes Implied Appointment of Commissioner as Agent.** In addition to the express appointments of the Corporations Commissioner as agent for service of process, *Corp Code* § 25550 provides that if any person, including a nonresident, engages in any conduct prohibited under the Corporate Securities Law, if personal jurisdiction cannot otherwise be obtained over that person in California, that person's conduct will be considered equivalent to that person's appointment of the Commissioner as the person's agent for service of process in any action or proceeding growing out of that conduct and brought under any law, rule, or order under the Corporate Securities Law. *Corp Code* § 31420 contains similar provisions for service in actions or proceedings arising out of a violation of the Franchise Investment Law.

**8.32[3] Making Substituted Service on Commissioner of Corporations.** Substituted service on the Corporations Commissioner may be made by leaving a copy of the process in the Commissioner's office [*Corp Code* §§ 25102(h)(4),

25165, 25240, 25550, 31155, 31420].

Service is effective only if the plaintiff then "forthwith" sends notice of service along with a copy of the summons and complaint by registered or certified mail to the defendant at the defendant's last address on file with the Commissioner [*Corp Code §§ 25102(h)(4), 25165, 25240, 25550, 31155, 31420* (notice to defendant's "last known address" or "other steps which are reasonably calculated to give actual notice")].

Lastly, the plaintiff must file an affidavit of compliance with the foregoing requirements on or before the day for return of the process, or within the time allowed by the court in which the action is pending [*Corp Code §§ 25102(h)(4), 25165, 25240, 25550, 31155, 31420*].



#### **Cross Reference:**

Discussion of the proof of service requirements generally, see 8.36.

**8.32[4] Serving Process Under Corporate Securities Law and Franchise Investment Law as Authorized by Code of Civil Procedure or by Return-Receipt Mail.** Service of process pursuant to *CCP §§ 413.10-417.40* is not prohibited by the other methods for service of process under the Securities and Franchise Investment Laws. Therefore, a summons under these laws can also be served in any manner provided by *CCP §§ 415.10-415.50*, or by sending, by first class mail, postage prepaid with return receipt, a copy of the summons and complaint to the person to be served. Service in this form deemed complete on the 10th day after mailing [*CCP § 415.40*].



#### **Cross Reference:**

Discussion of methods for service of summons, see 8.14.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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### **8.33 Serving Person in Gated Community.**

**8.33[1] Process Servers May Access Gated Communities for Reasonable Time to Effect Service.** Process servers must be granted access to gated communities for a reasonable period of time for the purpose of performing lawful service of process or service of a subpoena, provided the gated community in question is staffed by a guard or other security personnel at the time service of process is attempted [CCP § 415.21]. The process server must identify to the guard the person or persons to be served, and display a current driver's license or other identification and one of the following [CCP § 415.21(a)]:

- A badge or other confirmation that the individual is acting in his or her capacity as a representative of a county sheriff or marshal.
- Evidence of current registration as a process server.

**8.33[2] Making Substituted Service on Guard.** A residential gate guard who denies a process server access to a gated community in which the person to be served resides is considered a competent member of the household of the person to be served, permitting substituted service on the guard [ *Bein v. Brechtel-Jochim Group, Inc. (1992) 6 CA4th 1387, 1393-1394, 8 CR2d 351 ; see also CCP § 415.20*].

#### **Legal Topics:**

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**8.34 Serving Person in Military.**

The law does not impose any special requirements or limitations on serving persons in active military service. Thus, such individuals should be served by the same methods applicable to other categories of defendants. Older cases have clearly rejected the existence of any immunity from service by military personnel either on public policy grounds [ *Murrey v. Murrey* (1932) 216 C 707, 714, 16 P2d 741 ; *Tulley v. Superior Court* (1941) 45 CA2d 24, 27, 113 P2d 477 ] or under the federal Servicemembers Civil Relief Act [ *McFadden v. Shore* (ED Pa 1945) 60 F Supp 8, 9 ; see 50 USC app §§ 501-594].

Note, however, that the federal Servicemembers Civil Relief Act [50 USC app §§ 501-594] and comparable California legislation [M&V Code §§ 400-420] provide for the temporary suspension of various legal proceedings, obligations, and liabilities for persons in military service.

**Legal Topics:**

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### 8.35 Serving Fictitious Defendants.

Although fictitious defendants must be listed in their fictitious capacities on the summons, it is obviously impossible to effect service on a fictitious defendant until that person has been identified.

When a fictitious defendant is ultimately identified, the plaintiff amends the complaint or files an amendment to the complaint to name the newly identified party in place of one of the fictitious defendants. Service of the summons and complaint then is made as in any other case, although proof of service is subject to special requirements. The summons or other process (or, if there is no summons or other process, the copy of the first pleading or other notice served on the defendant) must contain on its face a notice stating: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)." If that notice does not appear, no default judgment may be taken against the defendant so designated [*CCP* § 474].

#### Cross References:

Discussion of proof of service, see 8.36[4][b].

Discussion of amending complaint to name identified defendant, see Ch. 34, Amended and Supplemental Pleadings.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

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### 8.36 Complying With Proof of Service Requirements.

**8.36[1] Basic 60-Day Time Limit.** Proof of service generally must be filed within 60 days after the *filing* (not the *service*) of the complaint [*Cal Rules Ct, Rule 3.110(b)*].

**Exceptions:**

The time limit in *Cal Rules Ct, Rule 3.110* does not apply to unlawful detainer proceedings, proceedings under the Family Code, and any other proceedings for which different service requirements are prescribed by law [*Cal Rules Ct, Rule 3.110(a)*]. Similarly, the 60-day rule does not apply to collections cases as defined in *Cal Rules Ct, Rule 3.740(a)* [*Cal Rules Ct, Rules, 3.110(a), 3.740(c)(1)*]. Instead, the complaint must be served and proof of service filed, or an order for summons obtained, within 180 days of the filing of the complaint in those cases [*Cal Rules Ct, Rule 3.740(d)*].

➤ **Cross Reference:**

Discussion of "collections case" as defined in *Cal Rules Ct, Rule 3.740(a)*, see *Ch. 23, Case Management, 23.04[1][i]*.

**Distinguish:**

The requirement of *CCP § 583.210(b)* that proof of service of the summons must be filed within 60 days after the time defendant is *served* with the summons and complaint is enforced by mandatory dismissal of an action on the motion of the court or any party [see *CCP § 583.250*; see also *8.39[2][b]*], whereas the requirements of *Gov Code § 68616(a)* that the complaint must be served within 60 days of its filing, plus any extension, and of *Cal Rules Ct, Rule 3.110(b)* that the proof of service of the summons must be filed within 60 days after the time the complaint is filed are enforced by discretionary sanctions that may include dismissal under specified circumstances [see *Gov Code § 68608(b)*; see also *8.08[1][a]*].

➤ **Cross Reference:**

Discussion of the various time periods applicable to service of the summons and complaint, see *8.08*.

**8.36[2] Local Rules May Affect Actual Time Available.** Local rules generally track *Cal Rules Ct, Rule 3.110(b)*.

For example:

- Los Angeles Super Ct Rules, Rule 7.7(a)(1) (complaint must be served *and* proof of service returned within 60 days of filing date unless appearance is made within that time).
- San Diego Super Ct Rules, Div. II, Rule 2.5 (certificate of service must be filed within 60 days of filing of complaint, unless certificate of progress has been filed indicating why service was not effected).
- San Francisco Super Ct Rules, Rule 3.3 (simply requiring compliance with *Cal Rules Ct, Rule 3.110*).

Because the requirements of local rules are not identical, however, they should be reviewed at the time the complaint is filed.

**8.36[3] Completing Proof of Service.** The person who has served the defendant must complete a valid proof of service in order for service of the summons to be effective [*CCP § 417.10(a)*]. Proofs of personal service must be made on forms approved by the Judicial Council [*CCP § 417.10(f)*]. Accordingly, the proof of service must be one of the following:

- Judicial Council Form POS-010, the Judicial Council's proof of service of summons form. This form is designated as mandatory in all civil actions [*see CCP § 417.10(f)*].



**Cross Reference:**

Form, see 8.45.

- Drafted Form. In addition, it is permissible to use a form prepared entirely by word processor, typewriter, or similar process, if the following format requirements are followed [*Cal Rules Ct, Rule 2.150*]:

- ☐ The general format requirements for court papers prescribed by *Cal Rules Ct, Rule 2.100 et seq.* apply except as noted below. Numbered lines are not required.
- ☐ The left, right, and bottom margins must be at least one-half inch. The top margin shall be at least three-quarters of an inch. The typeface must be Times, Courier, Arial, or an equivalent typeface not smaller than 9 points. Text must be single spaced and a blank line must precede each main numbered item.
- ☐ The title and all text of Judicial Council Form POS-010 not accompanied by a check box must be copied word for word, except for instructions, which need not be copied. The optional text describing the particular method of service used must be copied word for word, except that the check boxes must not be copied. Any optional text not describing the method of service used need not be included. The Judicial Council number of the Proof of Service of Summons form must be typed as follows either in the left margin of the first page opposite the last line of text or at the bottom of each page: "Judicial Council Form form POS-010."
- ☐ The text of form Judicial Council Form POS-010 must be copied in the same order as it appears on the printed form using the same item numbers. A declaration of diligence



may be attached to the proof of service or inserted as item 5b(5). Areas marked "For Court Use" must be copied in the same general locations and occupy approximately the same amount of space as on the printed form.

- ☐ The telephone number of the attorney or party must appear flush with the left margin and below the attorney's or party's address.
- ☐ The name of the court must be flush with the left margin. The address of the court is not required.
- ☐ Material that would have been typed onto the printed form must be typed with each line indented three inches from the left margin.

#### **8.36[4] Content of Proof of Service.**

**8.36[4][a] Manner of Showing Proof of Service.** The proof of service must comply with the requirements listed in 8.36[4][b]-[f], depending on the manner of service [*see CCP § 417.10*]. The attorney should verify that the proof of service is properly completed before filing it, to avoid problems later.

**8.36[4][b] Proof of Service: Personal Delivery.** When service was by personal delivery under *CCP § 415.10* [*see 8.14* (personal service)], the proof of service must state [*CCP § 417.10(a)*]:

- The time, place, and manner of service;
- Facts indicating that the summons was lawfully served;
- The name of the person served;
- If the defendant was originally named as a fictitious defendant, the affidavit must state the fictitious name under which the defendant was served and that the fact that notice of identity was given by endorsement on the document served as required under *CCP § 474* [*see 8.35*];
- The person's title and capacity; and
- If applicable, that the notice required by *CCP § 412.30* in actions against corporations, unincorporated associations, and partnerships [*see 8.18, 8.21*] appeared on the copy of the summons served.

**8.36[4][c] Proof of Service: Combination Service.** For combination service under *CCP § 415.20*, the affidavit must show, in addition to the items noted in 8.36[4][b], the mailing of an additional copy of the complaint to person or entity served [*CCP §§ 415.20, 417.10(a)*]. If combination service was made on an individual, the affidavit or declaration must show that personal service could not have been made with reasonable diligence [*CCP §§ 415.20(b), 417.10(a)*].

#### **Cross Reference:**

See 8.14[3].

**8.36[4][d] Proof of Service: Service by Mail.** For service by mail under *CCP § 415.30* [*see 8.14[4]* (service by mail)], the proof of service must specify the time and place of mailing, type of mailing used, and the address to which

the mail was sent. The acknowledgment of receipt of summons contained in *CCP* § 415.30 [Judicial Council Form POS-015; Form, see 8.46], or other written acknowledgment of receipt of summons satisfactory to the court, must be attached [*CCP* § 417.10(a)].

#### **Cross References:**

See 8.14[4] (service by mail).

Form, see 8.46 (Notice and Acknowledgment of Receipt--Civil).

**8.36[4][e] Proof of Service: Service by Publication.** If service was made by publication [see *CCP* § 415.50], the publisher, printer, or the publisher's or printer's foreman or principal clerk, may make proof of service by affidavit or declaration, showing the time and place of publication [*CCP* § 417.10(b); see *CCP* § 2010]. A copy of the summons should be attached [*CCP* § 2010].

If the summons is also mailed, an affidavit showing the time and place a copy of the summons and complaint were mailed to the party to be served must also be filed.

#### **Cross Reference:**

See 8.14[6] (service by publication).

**8.36[4][f] Proof of Service: Service by Posting on Premises (Unlawful Detainer Action).** If the proceeding is an unlawful detainer action and service was made by posting [see *CCP* § 415.45], the person who posted the premises makes proof of service by affidavit or declaration, showing the time and place of posting [*CCP* § 417.10(e)].

If the summons is also mailed, an affidavit showing the time and place a copy of the summons and complaint were mailed to the party to be served must also be filed [*CCP* § 417.10(e)].

**8.36[4][g] Proof of Service: Service Requirements of Specific Statutes.** If another California statute imposes its own proof of service requirements in specified situations, proof of service must be made in accordance with those statutory requirements. Otherwise, the requirements of *CCP* § 417.10 control [*CCP* § 417.10(c)].

#### **8.36[5] Proof of Service Outside California.**

**8.36[5][a] Proof of Service Requirements Outside California.** If the summons was served outside California, proof of service must be made in by one of the methods specified in *CCP* § 417.20. Use of the word "or" in that section implies that when more than one method of proof of service applies in a particular transaction, any of the applicable methods can be used.

**8.36[5][b] Proof of Service Under California Statute.** If summons was served outside California in a manner specified by a California statute, the proof of service must be made in the manner prescribed in *CCP* § 417.10 [*CCP* § 417.20(a)]. If service is made by mail pursuant to *CCP* § 415.30, proof of service must include the acknowledgment of receipt of summons in the form provided by that section or other written acknowledgment of receipt of summons satisfactory to the court [*CCP* § 417.20(a)].

#### **Cross References:**

See 8.36[4][d].

Form, see 8.46.



#### **Warning:**

If service is made outside California by certified or registered mail [*CCP* § 415.40; see also 8.14[5]], proof of service must strictly comply with the requirements of *CCP* § 417.20(a) [ *Bolkiah v. Superior*

*Court (1999) 74 CA4th 984, 1000, 88 CR2d 540 ].* The proof of service must include evidence satisfactory to the court establishing actual delivery to the person to be served, either by a signed return receipt or other evidence [CCP § 417.20(a); *see also Stamps v. Superior Court (1971) 14 CA3d 108, 110, 92 CR 151 ].*

**8.36[5][c] Proof of Service When Summons Was by Court Order.** If service was made outside California pursuant to court order [*see CCP §§ 413.10(b), (c), 413.30*], proof of service must be made in the manner prescribed in the order [CCP §§ 413.30, 417.20(b)].

**8.36[5][d] Proof of Service Under Law of Place of Service.** Subject to any additional requirements that may be imposed by the court in which the action is pending, proof of service may be made in the manner prescribed by the law of the place where the person is served for proof of service in an action in its courts of general jurisdiction [CCP § 417.20(c); *see CCP § 413.10(b)* (service outside California but within the United States), (c) (service outside United States)].

**8.36[5][e] Proof of Service: Service by Posting on Premises (Unlawful Detainer Action).** If the proceeding is an unlawful detainer action and service was made by posting [*see CCP § 415.45*], the person who posted the premises makes proof of service by affidavit, showing the time and place of posting [CCP § 417.20(e)].

If the summons is also mailed, an affidavit showing the time and place a copy of the summons and complaint were mailed to the party to be served must also be filed [CCP § 417.20(e)].

**8.36[6] Include Registered Process Server's County and Registration Number.** A proof of service signed by a registered process server or a registered process server's employee or independent contractor must indicate the county in which he or she is registered, and the applicable registration number. Any proof of service signed by a registered process server, the process server's employee, or an independent contractor must provide registration information [CCP § 417.40; *B&P Code § 22360*].

**8.36[7] Proof of Service by Admission of Party.** Under CCP §§ 417.10(d) (applicable to service within California) and 417.20(d) (service outside California), in addition to the usual methods for making proof of service, proof of service may be shown by the written admission of a party served. Such a written admission of service is equivalent to filing a formal proof of service as required by CCP § 417.10(a), (b), or (c) [CCP §§ 417.10(d), 417.20(d), Judicial Council Comment; *see Shirran v. Dallas (1913) 21 CA 405, 411, 132 P 454 ; but see Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 CA 4th 74, 85, 15 CR 2d 585* (although defendant's pleadings and the declarations of its general partners indicated that defendant had actual knowledge of entry of sister state judgment, they did not constitute an admission that the notice was served on them)]].



#### Strategic Point:

Plaintiffs' attorneys should be aware of this alternative method of proving service, and defense counsel should bear in mind that written statements admitting that the summons was served may constitute proof of service under this statute.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeService of ProcessProofGeneral Overview



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III. SERVING SUMMONS

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.37*

**8.37 Proof of Service Must Be Filed Unless Defendant Has Made General Appearance.**

After a summons has been served, proof of service of summons, as provided in *CCP* § 417.10 or *CCP* § 417.20, must be filed unless the defendant has previously made a general appearance [*CCP* § 417.30].

► **Cross Reference:**

Timely filing of proof of service of summons, see 8.36[1], [2].

**Distinguish:**

Amendments to *CCP* § 417.30 effective January 1, 2006 require only proof of service being filed, and have eliminated the requirement of returning the original summons after service, or of filing an affidavit if the summons was lost after service [Stats 2005, ch 300, § 3]. The original summons is now kept in the court's file and copies are issued to the plaintiff for service on the defendant [*CCP* § 412.10].



**Strategic Point--Plaintiff:**

Once the proof of service is filed, a rebuttable presumption that service was proper is created if the proof of service complies with applicable statutory requirements [*Evid Code* § 647; see also *Floveyor Int'l, Ltd. v. Superior Court* (1997) 59 CA4th 789, 795, 69 CR2d 457 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeService of ProcessProofGeneral Overview



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Chapter 8 Service of Summons  
IV. RESPONDING TO SERVICE OF SUMMONS

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.38*

**8.38 CHECKLIST: Responding to Service of Summons.**

- ☐ Determine following facts:
  - ☐ Date, time, place and manner in which summons was served on client.
  - ☐ Facts necessary to determine:
    - ☐ Veracity of the allegations.
    - ☐ Affirmative defenses.
    - ☐ Cross actions.
- ☐ Determine whether court has jurisdiction over defendant by service of summons.
  - ☐ Was service properly effected on defendant under applicable statute?
  - ☐ Was there proper basis for personal jurisdiction existing between defendant and state?
- ☐ Determine whether the action should be dismissed or stayed on the ground of forum non conveniens.
- ☐ Determine whether the action was filed in a proper venue.
- ☐ Determine whether the action is subject to dismissal for delay in prosecution.

**Discussion:**

See 8.39[2][b]; see also 8.08 (time limits for service of summons)

- ☐ Determine whether other actions are pending between same parties for same cause, and whether and how issue can be raised by demurrer.

**Discussion:**

See 8.39[2][c]

- ☐ Determine whether action is barred by doctrine of res judicata and whether to raise issue by demurrer, affirmative defense in the answer, or by motion for summary judgment.

**Authority:**

CCP §§ 396b(a), 410.10, 418.10(a)(2), 430.10(c), (e), 430.30(b), 437c, 583.110-583.430

**Discussion:**

See 8.39[2][d]

- ☐ Determine when defendant must file a responsive pleading or motion extending time to plead to avoid default.

- ☐ Determine when defendant must respond to complaint based on service of summons:

- ☐ Personal service: 30 days from date a copy of summons and complaint were served.
- ☐ Substituted service: within 40 days from date copy of summons and complaint were mailed.
- ☐ Service by mail and acknowledgment of receipt: within 30 days from date the acknowledgment of service is executed if returned to sender.
- ☐ Service by publication: within 30 days after the last date of publication.
- ☐ Service by other statute, pursuant to guidelines set forth in statute.
- ☐ Extension of time within which to appear or respond.

**Authority:**

CCP §§ 412.20(a)(3), 415.10-415.50, 430.40; see Gov Code § 6064

**Discussion:**

See 8.40

- ☐ Determine what type of responsive pleading to file:

- ☐ Answer or Demurrer:

☐ Must file original and serve copy on plaintiff.

☐ If demurrer is filed, it requires supporting memorandum.

☐ Cross-Complaints.

☐ Motions and Supporting Affidavits:

☐ To strike.

☐ To change venue.

☐ To quash.

☐ To dismiss for inconvenient forum.

☐ To dismiss for delay in prosecution.

☐ To dismiss for lack of subject matter jurisdiction.

☐ To reclassify action.

☐ Prepare proof of service.

**Authority:**

*CCP §§ 396b(a), 403.040(a), 418.10(a)(1)-(3), (d), 2009, 2015.5; Cal Rules Ct, Rule 3.1320(c)*

**Discussion:**

*See 8.41*

☐ Service and Filing of Response

☐ Must serve copy of answer, cross-complaint, and/or demurrer or motions (and accompanying papers) on plaintiff or plaintiff's counsel by mail or as otherwise provided by statute.

☐ Originals of responsive pleadings must be filed with the clerk of court in which action is pending.

**Authority:**

*CCP §§ 465, 1011, 1013, 1015*

**Discussion:**

*See 8.42*



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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.39*

**8.39 Evaluating the Complaint and Deciding on Course of Action.**

**8.39[1] Determining Whether Court Properly Obtained Jurisdiction Through Service of Summons.** The circumstances of service should be evaluated to determine whether service was properly effected under the applicable statute, and whether there was a proper basis for jurisdiction. If service was not proper, the defendant can file a motion to quash service on the grounds of lack of personal jurisdiction [*CCP* § 418.10(a)(1)].



**Warning:**

A defendant waives the right to challenge the personal jurisdiction of the court over the defendant or the inadequacy of service, inconvenience of the forum, or delay in service of summons if the defendant files any other responsive pleading before filing a motion to quash or dismiss under *CCP* § 418.10 [*CCP* § 418.10(e)(3)]. A defendant may, however, file an answer, demurrer, or motion to strike concurrently with filing a motion to quash or dismiss [*CCP* § 418.10(e)].

**Exception:**

A defendant may appear at a hearing to challenge any ex parte relief sought by the defendant, without waiving the right to later file a motion to quash under *CCP* § 418.10 [*CCP* § 418.11].

**8.39[2] Determining Whether Grounds Exist to Seek Dismissal of Action.**

**8.39[2][a] Seeking Dismissal Based on Forum Non Conveniens.** A defendant, on or before the last day of his or her time to plead or within any further time that the court may allow for good cause, may serve and file a notice of motion to stay or dismiss the action on the ground of inconvenient forum [*CCP* § 418.10(a)(2)].



**Cross Reference:**

Discussion of the basis for a motion to stay or dismiss under the doctrine of inconvenient forum, see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction.

**8.39[2][b] Seeking Dismissal Based on Delay of Prosecution.** A defendant may bring a motion to dismiss pursuant to *CCP* § 418.10(a)(3) for delay in prosecution [*CCP* §§ 583.110-583.430] based, on any of the following



grounds relating to service:

- Failure to serve the summons and complaint within three years after the action is commenced against the defendant [CCP § 583.210(a)]. The court, after notice to the parties, *must* dismiss the action upon its own motion or the motion of any interested person, whether or not a party to the action, if service is not made within that time [CCP § 583.230(a)], unless the defendant enters into a written stipulation or does another act that constitutes a general appearance [CCP § 583.220; see CCP § 583.250(b) (limits not subject to extension or excuse except as expressly provided)].

- Failure to file proof of service within 60 days after the time when the summons and complaint must be served on the defendant [CCP § 583.210(b)]. The court, after notice to the parties, *must* dismiss the action upon its own motion or the motion of any interested person, whether or not a party to the action, if service is not made within that time [CCP § 583.230(a)], unless the defendant enters into a written stipulation or does another act that constitutes a general appearance [CCP § 583.220; see CCP § 583.250(b) (limits not subject to extension or excuse except as expressly provided)].

- Failure to make service within two years after the action is commenced against the defendant [CCP § 583.420(a)(1)]. Dismissal on this basis is discretionary. The court may dismiss on its own motion or on motion of the defendant if dismissal appears appropriate to the court under the circumstances of the case [CCP § 583.410(a)]. The court may grant or deny the motion or, if the facts warrant, continue or defer its ruling on the matter pending performance by either party of any conditions relating to trial or dismissal of the case that may be required by the court to effectuate substantial justice [Cal Rules Ct. Rule 3.1342(f)].

#### Cross References:

Discussion of time limits, exceptions, and when action is "commenced" for these purposes, see 8.08[2] (discretionary two-year period), [3] (mandatory three-year period).

Procedures for filing motion, see Ch. 9, *Motions to Quash and Other Objections to Personal Jurisdiction*, 9.42[1] (mandatory three-year period), [2] (discretionary two-year period).

*California Forms of Pleading and Practice*, Ch. 212, *Dismissal*, § 212.60 et seq. (Matthew Bender).

**8.39[2][c] Seeking Dismissal on Ground That Other Actions Are Pending.** The action may be dismissed if there is another action pending between the same parties on the same cause of action [CCP § 430.10(c)].

#### Decision Point:

If other actions are pending between the parties, it is necessary to consider whether to raise this issue by demurrer pursuant to CCP § 430.10(c) seeking judicial notice of the pending action [CCP §§ 430.30(a), 430.70], or by affirmative defense in the answer [CCP §§ 430.10(c), 430.30(b), 431.30(b)(2)].

#### Cross References:

Motions for dismissal based on inconvenient forum, see Ch. 9, *Motions to Quash and Other Objections to Personal Jurisdiction*, §§ 9.23 -9.39.

Raising issue of pending action by demurrer, see Ch. 11, *Demurrers and Motions for Judgment on the Pleadings*, 11.09[5].

Pleading affirmative defense in answer, see Ch. 14, *Answers*, 14.18.

**8.39[2][d] Seeking Dismissal Based on Res Judicata.** The action may be dismissed if it is attempting to relitigate a previously adjudicated claim.

 **Cross Reference:**

Grounds for res judicata, see California Forms of Pleading and Practice, Ch. 491, Res Judicata (Matthew Bender).

 **Decision Point:**

In asserting that the action is barred by res judicata [*see CCP § 1908*], the defendant must determine whether to raise the issue by demurrer [*CCP § 430.10(e)*], invoking judicial notice [*CCP §§ 430.30(a), 430.70*] of a prior action [*Evid Code § 452(d)*], by affirmative defense in an answer [*CCP §§ 430.10(e), 430.30(b), 431.30(b)(2)*], or by motion for summary judgment [*CCP § 437c*].

 **Cross References:**

See Ch. 11, Demurrers and Motions for Judgment on the Pleadings; Ch. 14, Answers; Ch. 38, Summary Judgment.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureVenueForum Non ConveniensCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata



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**8.40 Time for Filing Response Is Based Upon Manner of Service.**

The time within which a response must be filed is based on the manner in which the summons and complaint were served. The following response times apply:

- If personal service was made on defendant, response is required 30 days from date of service [see *CCP* §§ 412.20(a)(3), 415.10, 430.40].
- If substituted service was made, response is required within 40 days from date copy of summons and complaint were mailed [see *CCP* §§ 412.20(a)(3), 415.20, 430.40].
- If service was by mail with notice of acknowledgment of receipt, response is required within 30 days from the date the acknowledgment of service is executed, if returned [see *CCP* §§ 412.20(a)(3), 415.30, 430.40].
- If service by publication, response is required within 30 days of the last date of publication [see *CCP* §§ 412.20(a)(3), 415.50, 430.40; *Gov Code* § 6064].
- If service is made by first class mail outside state, response is required within 40 days after mailing [see *CCP* §§ 412.20(a)(3), 415.40, 430.40].
- If service is made pursuant to another statute or court order, response is required in accord with guidelines of statute or as directed by the court.



**Cross Reference:**

Time for responding to complaint, see *Ch. 14, Answers, 14.07* et seq.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Answers



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### 8.41 Preparing Responsive Pleading.

**8.41[1] Preparing Answer or Demurrer and Accompanying Papers.** Three copies of the responsive pleading (original for filing, copy for service on plaintiff, and office copy) must be prepared. A demurrer requires a supporting memorandum and the notice of a hearing [*see Cal Rules Ct, Rules 3.1100, 3.1113(a), 3.1320(c)*].

**8.41[2] Preparing Responsive Motions.** Motions (to strike, transfer, quash service, stay or dismiss action for inconvenience or prosecutorial delay [*CCP §§ 396b, 418.10(a), (d), 435*]) must be prepared and filed with a supporting affidavit [*CCP § 2009*] or declaration [*CCP § 2015.5*], if any, and a supporting memorandum [*see Cal Rules Ct, Rules 3.1100, 3.1113*].



#### Cross References:

See Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction; Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction; Ch. 12, Motions to Strike; Ch. 14, Answers; Ch. 16, Cross-Complaints; Ch. 26, Law and Motion Procedure; Ch. 40, Dismissal for Delay in Bringing to Trial.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAnswers



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**8.42 Serving and Filing Response.**

**8.42[1] Serving Plaintiff or Plaintiff's Counsel by Mail or as Otherwise Provided by Statute.** Responsive pleadings must be served on the plaintiff or the plaintiff's counsel [CCP §§ 465, 1015] either by mail [CCP § 1013] or as provided in CCP § 1011.



**Cross References:**

See Ch. 11, Demurrers and Motions for Judgment on the Pleadings; Ch. 14, Answers.

**8.42[2] Filing Originals With Clerk of Court in Which Action Is Pending.** The original copy of the responsive pleadings must be filed with the clerk of the court in which the action is pending [CCP § 465].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsAnswers



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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.43*

**8.43 Judicial Council Form SUM-100 Summons.**

Click here to view image.

Go to Interactive Fillable Form.

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*CCP §§ 412.20(a), (c), 412.30, 474, 417.10; Gov Code § 68511.* Judicial Council Form SUM-100 has been adopted for mandatory use when applicable *Cal Rules Ct, Rule 1.31*

**Use of Judicial Council Summons Forms:**

*See 8.04*

**Filling Out Summons Form:**

*See 8.05*

**Completing Proof of Service:**

*See 8.36[3]*

**Related Form of Additional Party Attachment:**

*See 8.44*

**Related Form of Summons--Cross-Complaint:**

*See 16.19*

**Other Summons Forms:**

The Judicial Council has adopted six other summons forms (not illustrated in this publication) for mandatory use in the appropriate situations:

- Summons (Joint Debtor), used for enforcing a judgment against a joint debtor who was not a party to the action underlying the judgment [Judicial Council Form SUM-120; *see* California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 354.340 *et seq.* (Matthew Bender)].
- Summons--Unlawful Detainer--Eviction, used in unlawful detainer proceedings [Judicial Council Form SUM-130; *see* Matthew Bender(R) Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer; California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Actions (Matthew Bender)].
- Summons--Storage Lien Enforcement, used in proceedings to enforce a storage lien [Judicial Council Form SUM-140; discussion, *see* California Forms of Pleading and Practice, Ch. 517, Self-Service Storage Facilities (Matthew Bender)].
- Summons (Enforcement of State Housing Law), used for actions enforcing state housing law [Judicial Council Form SUM-145; *see* California Forms of Pleading and Practice, Ch. 579, Zoning and Planning, 579.130 *et seq.* (Matthew Bender)].
- Summons (Family Law), used in proceedings for dissolution of marriage, nullity of marriage, or separation, and in proceedings under the Uniform Parentage Act [Judicial Council Form FL-110; *see* California Forms of Pleading and Practice, Ch. 221, Dissolution of Marriage: Procedure (Matthew Bender)].
- Summons (Joinder), used to bring a third party into a family law proceeding [Judicial Council Form FL-375; *see* California Forms of Pleading and Practice, Ch. 221, Dissolution of Marriage: Procedure (Matthew Bender)].



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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.44*

**8.44 Judicial Council Form SUM-200(A) Additional Parties Attachment--Attachment to Summons.**

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Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

California Judicial Council Form SUM-200(A). This form has been adopted for mandatory use as an attachment to any summons in civil actions and proceedings if space does not permit the listing of all parties on the summons

**Discussion:**

See 8.04

**Related Form of Summons With Proof of Service:**

See 8.43





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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.45*

**8.45 Judicial Council Form POS-010 Proof of Service of Summons.**

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NOTES.

**Authority:**

*CCP § 417.10(f)*. Judicial Council Form POS-010 has been adopted for mandatory use [*Cal Rules Ct, Rules 1.31, 2.150(a)*]

**Completing Proof of Service Form:**

See 8.36[3], [4]



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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.46*

**8.46 Judicial Council Form POS-015, Notice and Acknowledgment of Receipt--Civil.**

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[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*CCP § 415.30; Gov Code § 68511.* Judicial Council Form POS-015 has been adopted for mandatory use  
[*Cal Rules Ct, Rule 1.31*]

**Acknowledgment of Receipt:**

*See 8.14[4]*

**Proof of Service:**

*See 8.36*



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*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.47*

**8.47 Application for Order for Publication of Summons.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                          |
|---------------|---|--------------------------|
| _____ [name], | ) |                          |
| Plaintiff,    | ) | NO. _____                |
| vs.           | ) | EX PARTE APPLICATION FOR |
| _____ [name], | ) | ORDER FOR PUBLICATION OF |
| Defendant.    | ) | SUMMONS                  |
|               | ) |                          |
|               | ) |                          |

*[EITHER, if defendant resides or is located in state]*

Application is hereby made for an order directing that summons in this action be served on defendant \_\_\_\_\_ [name], hereinafter referred to as "Defendant," by publication of the summons in \_\_\_\_\_ [name of newspaper], which is a newspaper of general circulation in this state and is most likely to give defendant actual notice of the pendency of this action because \_\_\_\_\_ [state reasons]. In support of this application the undersigned states:

*[OR, if defendant resides or is located out of state]*

Application is hereby made for an order directing that summons in this action be served on defendant \_\_\_\_\_ [name], hereinafter referred to as "Defendant," by publication of the summons in

\_\_\_\_\_ [name of newspaper], which is a newspaper of general circulation in this state and is most likely to give defendant actual notice of the pendency of this action because \_\_\_\_\_ [state reasons]; and in \_\_\_\_\_ [name of newspaper], which is a newspaper of general circulation in \_\_\_\_\_ [name of state], which is a newspaper of general circulation in that state and is most likely to give defendant actual notice of the pendency of this action because the Defendant resides or is located in that state and because \_\_\_\_\_ [state reasons]. In support of this application the undersigned states:

[CONTINUE]

1. The complaint, which is for \_\_\_\_\_ [specify], was filed on \_\_\_\_\_ [date], and summons was duly issued on \_\_\_\_\_ [date].

2. As shown by the \_\_\_\_\_ [affidavit or declaration] of \_\_\_\_\_ [specify, e.g., plaintiff] attached as Exhibit A and incorporated by reference, \_\_\_\_\_ [select one of the following alternatives:]

[EITHER]

a cause of action for \_\_\_\_\_ [specify] exists in favor of plaintiff against Defendant, based on \_\_\_\_\_ [specify].

[OR]

Defendant is a \_\_\_\_\_ [necessary or proper] party to this action in that \_\_\_\_\_ [specify].

[OR]

Defendant \_\_\_\_\_ [has or claims] the following interest in the \_\_\_\_\_ [describe property], which is \_\_\_\_\_ [situated or located] in California at \_\_\_\_\_ [specify place] and is subject to the jurisdiction of this court: \_\_\_\_\_ [describe interest].

[OR]

the relief demanded in this action consists \_\_\_\_\_ [wholly or in part] of excluding defendant from any interest in the \_\_\_\_\_ [describe property], which is \_\_\_\_\_ [situated or located] in California at \_\_\_\_\_ [specify place] and is subject to the jurisdiction of this court, in that \_\_\_\_\_ [describe interest and relief sought].

[CONTINUE]

3. The undersigned has made the following efforts to learn defendant's whereabouts: \_\_\_\_\_ [state in detail acts done and date and result of each; these acts should include ascertaining identity and address of defendant's relatives, friends, last known landlord, last known employer, and other persons likely to know defendant's whereabouts, checking with these persons, examining the latest city directory, phone directory, tax rolls, and voter register, and any

*attempts made by the person signing this application to serve the defendant or to have defendant served].*

4. As shown by the \_\_\_\_\_ [affidavit or declaration or certificate] of \_\_\_\_\_ [name], a \_\_\_\_\_ [registered process server or (deputy) \_\_\_\_\_ (sheriff or marshal) or describe other person], hereinafter referred to as "process server," which is attached Exhibit B and incorporated by reference, attempts to serve defendant with process in this action were made by the process server at the places, on the dates, and at the times indicated, and were unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

Attorney for Plaintiff

NOTES.

**Authority:**

*CCP §§ 415.50, 2002(1), 2003, 2010, 2011, 2015.5*

**Local Forms:**

Some trial courts provide their own preprinted form of application for an order for publication

**Requirements for Service by Publication:**

*See 8.14[6]*

**Related Form of Order:**

*See 8.48*

**Local Rules:**

Local Rules may require a showing of other or additional facts than those required by *CCP § 415.50*, and should be consulted before drafting and filing a completed application

**Related Forms of Memoranda:**

*California Points and Authorities, Ch. 132, Jurisdiction: Personal Jurisdiction and Inconvenient Forum, § 132.120 (Matthew Bender)*



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Chapter 8 Service of Summons  
V. FORMS

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.48*

**8.48 Order for Publication of Summons.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                       |
|---------------|---|-----------------------|
| _____ [name], | ) |                       |
| Plaintiff,    | ) | NO. _____             |
| vs.           | ) | ORDER FOR PUBLICATION |
| _____ [name], | ) | OF SUMMONS            |
| Defendant.    | ) |                       |
|               | ) |                       |
|               | ) |                       |

\_\_\_\_\_

On reading and filing the evidence consisting of plaintiff's application and \_\_\_\_\_ [affidavit or declaration] for this order[, and the \_\_\_\_\_ (affidavit(s) *and/or* declaration(s)) of \_\_\_\_\_ (name(s))], and it satisfactorily appearing that defendant, \_\_\_\_\_ [name], cannot be served with summons in any other manner specified in *Sections 415.10 through 415.40 of the Code of Civil Procedure*, and that

[EITHER]

a cause of action exists in favor of plaintiff against defendant:

[OR]

defendant is a \_\_\_\_\_ [necessary or proper] party to this action:

[OR]

defendant \_\_\_\_\_ [has or claims] an interest in the \_\_\_\_\_ [describe property] which is \_\_\_\_\_ [situated or located] in this state and is subject to the jurisdiction of this court:

[OR]

the relief demanded in this action consists \_\_\_\_\_ [wholly or in part] in excluding defendant from any interest in the \_\_\_\_\_ [describe property], which is \_\_\_\_\_ [situated or located] in this state and is subject to the jurisdiction of this court:

[CONTINUE]

IT IS ORDERED that the summons be served by publication in \_\_\_\_\_ [name], a newspaper of general circulation published in \_\_\_\_\_, California, hereby designated as the newspaper most likely to give defendant actual notice of the action, and that the publication be made once a week for four successive weeks.

[ADD, if defendant resides or is located out of state]

IT IS FURTHER ORDERED that the summons be served by publication in \_\_\_\_\_ [name], a newspaper of general circulation published in \_\_\_\_\_, \_\_\_\_\_ [city, state], hereby designated as the newspaper in that state most likely to give defendant actual notice of the action, and that the publication be made once a week for four successive weeks.

[CONTINUE]

IT IS FURTHER ORDERED that a copy of the summons, a copy of the complaint, and a copy of this order be forthwith mailed to defendant if his/her address is ascertained before expiration of the time herein prescribed for publication of summons.

Dated: \_\_\_\_\_.

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

CCP § 415.50(b); Gov Code § 6064

**Requirements for Service by Publication:**

See 8.14[6]

**Related Form of Application:**

See 8.47

**Local Forms:**

Individual courts may provide printed forms of orders for publication of summons





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Chapter 8 Service of Summons  
V. FORMS

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.49*

**8.49 Declaration of Mailing of Copy of Summons, of Complaint, and of Order for Publication to Defendant Pursuant to Order for Publication of Summons.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name],

Defendant.

)  
)  
)  
)  
)  
)  
)

NO. \_\_\_\_\_

DECLARATION OF MAILING OF SUMMONS  
AND COMPLAINT PURSUANT TO ORDER FOR  
PUBLICATION OF SUMMONS

\_\_\_\_\_

I, \_\_\_\_\_[name], declare:

I am, and at all times herein mentioned was, over the age of 18 and not a party to the above-entitled action. My \_\_\_\_\_[residence or business] address is \_\_\_\_\_[specify] and I am \_\_\_\_\_[a resident of or employed in] \_\_\_\_\_County, California [county where mailing occurred].

On \_\_\_\_\_[date], I deposited a true and correct copy of the Complaint filed in this action, a true and correct copy of the Summons, and a true and correct copy of the order for publication issued in this action in the United States mail in \_\_\_\_\_[city], California, in a sealed envelope, with postage fully prepaid, addressed to the defendant as follows: \_\_\_\_\_[state full name and address of defendant as they appeared on the envelope].

[At that time there was regular delivery of United States mail between the places of deposit and address.]

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 and title]

NOTES.

**Authority:**

*CCP §§ 415.50, 417.10(b), 2010, 2011*

**Discussion:**

*See 8.14[6]*



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Chapter 8 Service of Summons  
V. FORMS

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.50*

**8.50 Ex Parte Application for Order Permitting Service of Summons on Defendant Corporation by Delivery to Secretary of State.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |                                      |
|----------------------------------|---|--------------------------------------|
| _____ [name],                    | ) |                                      |
| Plaintiff,                       | ) |                                      |
| vs.                              | ) | NO. _____                            |
| _____ [name],                    | ) | EX PARTE APPLICATION FOR ORDER DIR-  |
| a _____ [state or country of in- | ) | ECTING SERVICE OF SUMMONS ON DEFEND- |
| corporation] Corporation,        | ) | ANT CORPORATION BY DELIVERY OF PRO-  |
| Defendant.                       | ) | CESS TO SECRETARY OF STATE           |
|                                  | ) |                                      |

Application is hereby made for an order directing that process in this action be served on defendant Smith Enterprises, hereinafter referred to as "Defendant," by personally delivering to the Secretary of State of California, or to an assistant or deputy Secretary of State, \_\_\_\_\_ [one copy or two copies] of the summons and complaint, together with \_\_\_\_\_ [one copy or two copies] of the order herein requested. In support of this application, the undersigned states:

1. The complaint in this action, which is for \_\_\_\_\_ [specify], was filed on \_\_\_\_\_ [date], and summons was duly issued on \_\_\_\_\_ [date].
2. Defendant \_\_\_\_\_ [is or was] a corporation organized and existing under the laws of \_\_\_\_\_ [state or country] [and authorized to do business in California (if applicable: as a bank)], with its principal place of business in California located at \_\_\_\_\_ [address]. \_\_\_\_\_ [If

*defendant has forfeited its charter or right to do business in California or has dissolved, specify in detail the circumstances of these events. If appropriate, incorporate relevant documents (e.g., court judgment) by reference as exhibits.]*

[EITHER]

3. As shown by the Certificate of the Secretary of State of California, which is attached as Exhibit C and incorporated by reference, \_\_\_\_\_ [Defendant has failed to designate an agent for service of process or Defendant's designated agent for service of process, \_\_\_\_\_ (name), has resigned and has not been replaced or Defendant's designated agent for service of process, \_\_\_\_\_ (name), is no longer authorized to act for the defendant].

[OR]

3. As shown by the Certificate of the Secretary of State of California, which is attached as Exhibit C and incorporated by reference, Defendant has designated \_\_\_\_\_ [name], a \_\_\_\_\_ [natural person, whose designated \_\_\_\_\_ (business or residence) address is \_\_\_\_\_ (specify) or a corporation], as its agent for service of process. [If agent is a corporation, add: The corporate agent's certificate on file in the Secretary of State's office, a certified copy of which is attached as Exhibit D and incorporated by reference, sets forth as the address(es) of its office(s) in California where any corporation designating it as agent for service of process may be served. It designates the following named employees at (each) office to whom the corporate agent authorizes delivery of a copy of any such process: \_\_\_\_\_ (specify). The agent's certificate contains its consent that delivery of process to any such person at the office where the person is employed will constitute delivery of any such copy to it, as agent.]

[CONTINUE]

4. Plaintiff has been unable to effect service of process on defendant by delivery of a copy of the summons and complaint [to defendant's designated agent for service of process in any manner specified by *Sections 415.10, 415.20(a), or 415.30(a), of the Code of Civil Procedure* or] to any of the \_\_\_\_\_ [other] persons listed in Section \_\_\_\_\_ [416.10(a) and (b) of the Code of Civil Procedure or 416.20(a) of the Code of Civil Procedure or 2110 of the California Corporations Code], although plaintiff has made diligent efforts to do so as follows: \_\_\_\_\_ [specify efforts made and results within personal knowledge of person signing this application; if any such efforts or results are not within that person's personal knowledge, an affidavit or declaration of the person having that knowledge should be executed, attached to this application, and incorporated in this application by reference].

[5. The (name and title of the person to whom and) address to which the process is to be sent by the Secretary of State is/are as follows: \_\_\_\_\_ (specify).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

Attorney for Plaintiff

NOTES.

**Authority:**

*Cal Rules Ct, Rule 2.111(6), CCP §§ 415.10, 416.10(d), 2015.5, Corp Code §§ 1702(a), 2110, 2111(a)*

**When Corporation May Be Served Through Secretary of State:**

*See 8.18[5], [6]*

**Related Form of Order:**

*See 8.51*



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Chapter 8 Service of Summons  
V. FORMS

*1-8 MB Practice Guide: CA Pretrial Civil Procedure 8.51*

**8.51 Order Directing Service of Summons on Defendant Corporation by Delivery to Secretary of State.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |                                    |
|----------------------------------|---|------------------------------------|
| _____ [name],                    | ) |                                    |
| Plaintiff,                       | ) |                                    |
| vs.                              | ) | NO. _____                          |
| _____ [name],                    | ) | ORDER DIRECTING SERVICE OF SUMMONS |
| a _____ [state or country of in- | ) | ON DEFENDANT CORPORATION BY DELIV- |
| corporation] Corporation,        | ) | ERY OF PROCESS TO SECRETARY STATE  |
| Defendant.                       | ) |                                    |
|                                  | ) |                                    |

On reading and filing the evidence consisting of plaintiff's application and \_\_\_\_\_ [affidavit or declaration] for this order [and the \_\_\_\_\_ (affidavit(s) and/or declaration(s) and/or certificate(s)) of \_\_\_\_\_ (name(s)), attached to and incorporated by reference in the application,] and it satisfactorily appearing to me therefrom that defendant \_\_\_\_\_ [name] is a

[EITHER, for a domestic corporation]

domestic corporation and that \_\_\_\_\_ [defendant \_\_\_\_\_ (name) has failed to designate an agent for service of process or defendant \_\_\_\_\_ (name)'s designated agent for service of process, \_\_\_\_\_ (name), \_\_\_\_\_ (either: has resigned and has not been replaced or cannot with reasonable diligence be found at \_\_\_\_\_ (address), which is the address designated for personal delivery of the process)], and process against defendant corporation cannot be served with reasonable diligence on

[defendant's designated agent for service of process in the manner provided in *Sections 415.10, 415.20(a), or 415.30(a), of the Code of Civil Procedure* or on] defendant in the manner provided in *Sections \_\_\_\_\_ [416.10(a) and (b) or 416.10(a) and (c) or 416.20(a)]*, of the Code of Civil Procedure,

[OR, for a foreign corporation]

foreign corporation and that \_\_\_\_\_ [defendant \_\_\_\_\_ (*name*) has failed to designate an agent for service of process or defendant \_\_\_\_\_ (*name*)'s designated agent for service of process, \_\_\_\_\_ (*name*), is no longer authorized to act for the defendant or \_\_\_\_\_ (*name*)'s designated agent for service of process is a natural person, \_\_\_\_\_ (*name*), and cannot with due diligence be found at \_\_\_\_\_ (*address*), which is the address stated in the designation or defendant \_\_\_\_\_ (*name*)'s designated agent for service of process is a corporation, \_\_\_\_\_ (*name*), and no person can be found with due diligence to whom the delivery authorized by *Section 2110 of the California Corporations Code* can be made for the purpose of delivery to that corporate agent,] and none of the officers or agents of the corporation specified in *Section 2110 of the California Corporations Code* can be found after diligent search,

[CONTINUE]

IT IS ORDERED that service on defendant \_\_\_\_\_ [*name*] be made by personal delivery to the Secretary of State of California, or to an assistant or deputy Secretary of State, of \_\_\_\_\_ [one copy or two copies] of the summons and complaint, together with \_\_\_\_\_ [one copy or two copies] of this order.

[IT IS FURTHER ORDERED that the (*name and title of the person to whom*, and the) address to which the process and order are to be sent by the Secretary of State \_\_\_\_\_ (is or are) as follows: \_\_\_\_\_ (*specify*).]

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*signature*]

Judge of the Superior Court

NOTES.

**Authority:**

*Corp Code §§ 1702, 2111, 2114(a)-(c), 2105*

**When Corporation May Be Served Through Secretary of State:**

*See 8.18[5], [6]*

**Related Form of Application:**

*See 8.50*



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Chapter 9 Motions to Quash and Other Objections to Personal Jurisdiction

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.syn*

**§ 9.syn Synopsis to Chapter 9: Motions to Quash and Other Objections to Personal Jurisdiction**

9.01 Scope.

9.02 Objective and Strategy.

9.03 CHECKLIST: Making a Motion to Quash.

9.04 Options and Strategies for Moving Party.

9.04[1] Consider Whether Motion for Inconvenient Forum Is More Appropriate.

9.04[2] Consider Whether to File Additional Pleadings With Motion to Quash.

9.04[3] Consider Motion to Extend Time to Plead or Stipulation.

9.05 Motion to Quash Objects to Court's Authority Over Persons and Property.

9.05[1] Motion Is Procedure to Assert Court's Lack of Jurisdiction Over Nonresident.

9.05[2] California's Long-Arm Statute Confers Broadest Possible Jurisdiction.

9.05[3] Trial Court Has Jurisdiction to Determine Personal Jurisdiction.

9.05[4] Actions Are Classified As in Personam, in Rem, or Quasi in Rem.

9.05[4][a] In Personam Actions Have Authority Over Person.

9.05[4][b] In Rem Actions Have Authority Over Property.

9.05[4][c] Quasi in Rem Actions Affect Interests of Persons in Property.



9.05[5] Personal Jurisdiction Is Either General or Limited.

9.05[5][a] General Jurisdiction Confers Jurisdiction for All Causes of Action Against Defendant.

9.05[5][b] Limited Jurisdiction Is Specific to Cause of Action.

9.05[6] No Personal Jurisdiction If Due Process Violated.

9.05[6][a] Judgment Rendered in Violation of Due Process Is Void.

9.05[6][b] Defendant Must Be Given Reasonable Notice and Opportunity for Hearing.

9.05[6][c] Nonresident Defendant Must Have Minimum Contacts With State.

9.06 Time for Making Motion.

9.06[1] Motion Must Be Served and Filed on or Before Last Day to Plead.

9.06[2] Time to Plead May Be Extended by Stipulation or Motion.

9.06[3] Hearing on Motion Must Be Within 30 Days After Filing of Notice.

9.06[4] Motion Extends Defendant's Time to Plead After Denial of Motion.

9.07 General Appearance May Waive Personal Jurisdiction and Other Objections.

9.07[1] California Adopts Federal Practice for Appearances.

9.07[2] Special Appearance Limits Appearance to Jurisdictional Issue.

9.07[3] Effect of Waiver by General Appearance.

9.07[3][a] Trial Court Gains Personal Jurisdiction Over Entire Case.

9.07[3][b] The Issue of Personal Jurisdiction May Not Be Appealed.

9.07[4] General Appearance Made When Defendant Takes Action That Recognizes Court's Authority to Proceed With Case.

9.07[5] General Appearance Made When Raising Issue of Subject Matter Jurisdiction.

9.07[6] Bringing and Reviewing a CCP § 418.10 Motion Is Not General Appearance.

9.07[7] Applying for or Stipulating to Extension of Time to Plead Is Not General Appearance.

9.07[8] Appearing at Hearing for Ex Parte Relief Is Not General Appearance.

9.07[9] Motion for Relief From Default or Hybrid Motion Are Not General Appearances.

9.07[10] Party May Appear by Attorney.

9.07[10][a] Attorney Is Presumed to Have Authority to Appear but Presumption Rebuttable.

9.07[10][b] Appearance by Unauthorized Attorney Does Not Bind Party.

9.07[10][c] Defendant May Attack Unauthorized Appearance Before Judgment.

9.07[10][d] Defendant May Set Aside Void Judgment Based on Unauthorized Appearance and Use Against Defense of Res Judicata.

9.08 Grounds for Proving Lack of Personal Jurisdiction.

9.08[1] No Personal Jurisdiction If Summons or Service Was Defective.

9.08[1][a] Failure to Serve Summons.

9.08[1][b] Summons Is Defective.

9.08[1][c] Service of Summons Was Defective.

9.08[1][d] Substituted Service Was Defective.

9.08[1][e] Summons Served Was Not One Authorized for Civil Actions.

9.08[2] No Limited Personal Jurisdiction Over Nonresident If Minimum Contacts Absent and Jurisdiction Unreasonable.

9.08[2][a] California's Long-Arm Statute Confers Broadest Possible Jurisdiction.

9.08[2][b] Judicial Council Comments to Long-Arm Statute Elaborate Bases for Limited Personal Jurisdiction.

9.08[2][c] Fourteenth Amendment Protects Nonresident Defendants.

9.08[2][d] Due Process Requires Nonresident Defendants to Have Minimum Contacts With Forum State.

9.08[2][e] Mechanical Tests Are Inappropriate to Determine Minimum Contacts.

9.08[2][f] Nonphysical Entry Into Forum State Requires Purposeful Availment to Satisfy Minimum Contacts.

9.08[2][f1] Limited Personal Jurisdiction Requires Cause of Action Derived from Forum Activities.

9.08[2][g] No Jurisdiction Despite Minimum Contacts If Limited Jurisdiction Offends Traditional Notions of Fair Play and Substantial Justice.

9.08[2][h] Foreign National Defendants Afforded Extra Consideration.

9.08[3] No Personal Jurisdiction If Defendant Is Immune to Service or Suit.

9.08[3][a] Diplomats, Legislators, and Members of Congress Are Immune to Civil Actions.

9.08[3][b] Witnesses in Criminal Proceedings Not Subject to Service of Process.

9.08[3][c] Extradited Criminal Defendants Not Subject to Service of Process for Specified Period.

9.08[3][d] Other Parties and Witnesses Not Protected.

9.08[3][e] National Banks Without a Branch Office in California Not Subject to Suit.

9.09 Burden of Proof on Motion to Quash.

9.09[1] Plaintiff Must Prove Jurisdictional Elements by Preponderance of Evidence.

9.09[2] Once Plaintiff Shows Minimum Contacts, Burden Shifts to Defendant to Show Jurisdiction Unreasonable.

9.09[3] Evidence Must Consist of Specific Evidentiary Facts.

9.09[3][a] Evidence Must Be Supported by Affidavit or Declaration.

9.09[3][b] Vague Assertions of Ultimate Facts Are Insufficient.

9.09[3][c] Verified Complaint May Serve As Counter-Declaration.

9.09[3][d] Unverified Complaint Is Insufficient.

9.09[4] Plaintiff May Conduct Discovery for Motion.

9.10 Contents of Motion to Quash.

9.11 Serving and Filing Papers.

9.12 Responding to Opposing Party's Papers and Request for Discovery.

9.13 Order and Notice of Ruling.

9.13[1] Prevailing Party Prepares Order.

9.13[2] Prevailing Party Must Follow Notice Requirements.

9.13[3] Defendant May Be Entitled to Contractual Costs.

9.14 CHECKLIST: Opposing a Motion to Quash.

9.15 Options and Strategies for Opposing Party.

9.15[1] Consider Whether to Oppose Motion.

9.15[2] Consider How Other Pleadings May Defeat Motion to Quash.

9.15[3] Consider Stipulation or Motion to Extend Time to File Opposition.

9.16 Opposition Papers Must Be Filed and Served at Least Nine Court Days Before Hearing.

9.17 Grounds for Proving Personal Jurisdiction Over Defendant.

9.17[1] Defendant Can Waive Challenge to Court's Personal Jurisdiction.

9.17[1][a] Failure to Bring Timely Motion to Quash Waives Lack of Personal Jurisdiction Defense.

9.17[1][b] Failure to File Motion to Quash at Time of Filing Demurrer or Motion to Strike Waives Lack of Personal Jurisdiction and Related Defenses.

9.17[1][c] Defendant Waives Personal Jurisdiction Objection by General Appearance.

9.17[2] Court Has Jurisdiction Over Defendant From Time Summons Served.

9.17[3] Defendant Is Within the Reach of California's Long-Arm Statute.

9.17[3][a] Long-Arm Statute Confers Broadest Possible Jurisdiction.

9.17[3][b] Judicial Council Comments to Long-Arm Statute Elaborate Bases for Personal Jurisdiction.

9.17[4] Long-Arm Statute Provides Personal Jurisdiction Over Individuals.

9.17[4][a] Voluntary Presence in State Confers Jurisdiction.

9.17[4][b] Person Domiciled in California Is Subject to Jurisdiction.

9.17[4][c] California Resident Is Subject to Jurisdiction.

9.17[4][d] Citizenship May Confer Jurisdiction.

9.17[4][e] Party Who Consents Is Subject to Jurisdiction.

9.17[4][f] General Appearance Confers Jurisdiction.

9.17[4][g] Doing Business in State As Individual Confers Jurisdiction.

9.17[4][h] Doing Act in State As Individual Confers Jurisdiction.

9.17[4][i] Causing Effect in State by Act Done Elsewhere As Individual Confers Jurisdiction.

9.17[4][j] Individual Ownership, Use, or Possession of Thing in State Confers Jurisdiction.

9.17[4][k] Other Individual Relationships May Confer Jurisdiction.

9.17[5] Long-Arm Statute Provides Personal Jurisdiction Over General Partnership and Partners.

9.17[6] Long-Arm Statute Provides Personal Jurisdiction Over Domestic Corporations.

9.17[7] Long-Arm Statute Provides Personal Jurisdiction Over Foreign Corporations.

9.17[7][a] Consent Confers Jurisdiction.

9.17[7][b] Appointment of Agent for Service or Jurisdiction Over Agent or Representative May Confer Jurisdiction Over Principal-Foreign Corporation.

9.17[7][c] Appearance Confers Jurisdiction.

9.17[7][d] Doing Business in State As Corporation Confers Jurisdiction.

9.17[7][e] Doing Act in State As Corporation Confers Jurisdiction.

9.17[7][f] Causing Effect in State by Act Done Elsewhere As Corporation Confers Jurisdiction.

9.17[7][g] Corporate Ownership, Use, or Possession of Tangible Thing in State Confers Jurisdiction.

9.17[7][h] Other Corporate Relationships May Confer Jurisdiction.

9.17[8] Long-Arm Statute Provides Personal Jurisdiction Over Plaintiff.

9.17[9] Contractual Provisions May Provide Personal Jurisdiction.

9.17[10] Court May Exercise Personal Jurisdiction When Defendant Has Minimum Contacts With State and Jurisdiction Is Reasonable.

9.17[11] Defendant Who Is Not Immune From Service Is Subject to Personal Jurisdiction.

9.17[12] Prior Judgment Retains Personal Jurisdiction for Enforcement Action.

9.18 Burden of Proof.

9.19 Discovery for Purposes of Motion.

9.20 Contents of Opposition Papers.

9.21 Service and Filing of Papers.

9.22 Order and Notice of Ruling.

9.23 CHECKLIST: Making a Motion to Stay or Dismiss Under Doctrine of Inconvenient Forum.

9.24 Options and Strategies.

9.25 Inconvenient Forum Concedes Personal Jurisdiction but Seeks Stay or Dismissal on Equitable Grounds.

9.25[1] Inconvenient Forum Is an Equitable Doctrine.

9.25[2] Doctrine Concedes Jurisdiction, Which May Be Limited by Special Appearance.

9.25[3] Defendant May Seek Alternative Relief to Stay or Dismiss Action.

9.26 Time for Motion.

9.26[1] Motion Under CCP § 418.10.

9.26[1][a] Motion Must Be Served and Filed on or Before Last Day to Plead.

9.26[1][b] Hearing on Motion Must Be Within 30 days After Filing of Notice.

9.26[1][c] Party May Apply for an Extension of Time to Plead for Good Cause.

9.26[1][d] Motion Extends Defendant's Time to Plead After Denial of Motion.

9.26[2] Motion Under CCP § 410.30 May Be Made At Any Time.

9.26[3] Even If Forum Non Conveniens Motion Under CCP § 418.10 Was Denied, Court May Dismiss or Stay on Forum Non Conveniens Grounds On Its Own Motion Under CCP § 410.30.

9.27 Asserting a Forum Selection Clause.

9.27[1] Clause Enforced Unless Unreasonable.

9.27[2] Clause May Apply to Both Contract and Tort Actions.

9.27[3] Clause May Be Reciprocal.

9.27[4] Clause Enforced by Motion to Stay or Dismiss.

9.27[5] Defendant Not a Party to Agreement Lacks Standing Unless Third-Party Beneficiary or Closely Related to Parties.

9.27[6] Clause Must Be Enforced Unless Unreasonable.

9.27[7] Some Clauses Are Void by Statute.

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9.50[1] Defendant May Not Appeal Denial of Motion.

9.50[2] Defendant May Petition for Writ of Mandate.

9.50[2][a] Petition Must Be Filed Within 10 Days After Being Served With Notice of Entry of Court's Order.

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9.51 Notice of Motion to Quash Service of Summons for Lack of Personal Jurisdiction.

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9.53 Order Granting Motion to Quash Service of Summons for Lack of Personal Jurisdiction.



9.54 Notice of Motion to Stay or Dismiss Action on Ground of Inconvenient Forum.

9.55 Declaration in Support of Motion to Stay or Dismiss Action on Ground of Inconvenient Forum.

9.56 Order Granting Motion to Stay or Dismiss Action on Ground of Inconvenient Forum.



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I. STRATEGY

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.01*

**9.01 Scope.**

This chapter covers:

- Objectives and strategy for moving to quash service of summons for lack of personal jurisdiction and moving to stay or dismiss an action for inconvenient forum [see 9.02].
- Objecting on the basis of lack of personal jurisdiction [see 9.03; Forms: see 9.51-9.53].
- Fundamentals of personal jurisdiction [see 9.05].
- Avoiding waiver of personal jurisdiction issues and type of appearance [see 9.07].
- Grounds for proving lack of personal jurisdiction [see 9.08].
- Procedures for making a motion to quash [see 9.10-9.13].
- Opposing motions to quash service of summons [see 9.14-9.22].
- Moving to stay or dismiss an action on the basis of inconvenient forum [see 9.23-9.32; Forms: see 9.54-9.56].
- Opposing a motion to stay or dismiss an action on the basis of inconvenient forum [see 9.33-9.39].
- Moving to dismiss on the basis of delay in serving summons [see 9.40-9.44].
- Opposing a motion to dismiss on the basis of delay in serving summons [see 9.45-9.47].
- Reviewing an order granting or denying a *CCP* § 418.10 motion [see 9.48-9.50].

**Core Statute:**  
*CCP* § 418.10



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## 9.02 Objective and Strategy.

Motions to quash and motions to stay or dismiss the action brought under *CCP* § 418.10 provide the defendant with an opportunity to end an action immediately without making a general appearance, which would have the effect of submitting to the court's jurisdiction to proceed with the case [*see CCP* §§ 418.10, 1014]. The objections that can be raised are:

- Lack of personal jurisdiction (via motion to quash service of summons).
- Inconvenient forum (via motion to stay or dismiss the action).
- Dismissal for delay in serving summons (via motion to stay or dismiss the action).

These issues must be the first ones to be raised. Making another response before doing so will constitute a general appearance submitting to the court's jurisdiction and waiving any claim of lack of personal jurisdiction [*see CCP* § 1014].



### Trap:

Failure to make a 418.10 motion at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in serving summons [*CCP* § 418.10(e)(3)].

Until January 1, 2003, if a party moving to quash responded to the complaint beyond making a *CCP* § 418.10 motion, the party would have made a general appearance and waived the grounds for the 418.10 motion. However, *CCP* § 418.10(e), as amended by Stats 2002, ch 69 (effective January 1, 2003), allows a party making a 418.10 motion to simultaneously answer, demur, or move to strike the complaint or cross-complaint. It provides: "Notwithstanding [*CCP*] Section 1014 [appearance by defendant], no act by a party who makes a motion under this section, including filing an answer, demurrer, or motion to strike constitutes an appearance, unless the court denies the motion made under this section. If the court denies the motion made under this section, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion" [*CCP* § 418.10(e)(1); *see CCP* § 418.10(e)(2) (general appearance further postponed until any proceedings on writ of mandate are concluded)].

This new language significantly reduces, and given the "no act ... including" language, may even eliminate, the danger of inadvertently making a general appearance by asking too much at the time of making a 418.10 motion. Thus, the amendment appears to have abrogated the strict rule that failure to limit the motion to the jurisdictional issue may result in a general appearance, which in essence waived the claim of lack of personal jurisdiction [see, e.g., *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1036-1037, 25 CR2d 539, 863 P2d 784 ]. When adding CCP § 418.10(e), the Legislature expressly provided: "It is the intent of the Legislature in enacting this act to conform California practice with respect to challenging personal jurisdiction to the practice under *Rule 12(b) of the Federal Rules of Civil Procedure*" [Stats 2002, ch 69, § 2]. *Fed R Civ P*, *Rule 12* includes several provisions designed to prevent a litigant from using a series of motions as a dilatory tactic and when read together, the consolidation and waiver provisions make clear that to avoid waiving most available Rule 12 defenses or objections, a party must raise them in one initial motion or, if none is filed, in the first responsive pleading [see *Moore's Federal Practice*, § 12.20 (3d ed. Matthew Bender)].



#### **Strategic Point--Defendant:**

The past procedure can have a substantial effect on the manner in which these disputes are litigated since lawyers, of course, must be extremely sensitive about waiving through appearances, discovery, or briefing what may be the most significant defense the out-of-state party has. Real problems can arise if the substantive defense and the jurisdictional defense overlap. Two examples are: (1) a breach of contract case in which the out-of-state defendant argues that no contract was formed and there was no minimum contact sufficient for jurisdiction (e.g., when the negotiations/sale involved an agent); (2) a product liability case in which the defendant argues that the product to which the plaintiff was exposed (e.g. asbestos) was not its product and that its products were never sold in state. (Although the latter situation is usually litigated as a product identification issue, not as a jurisdictional issue.) In those situations, the plaintiff can argue that the defendant was arguing the merits and not limiting its arguments to the jurisdictional issues.

#### **Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances (Matthew Bender).

California Points and Authorities, Ch. 132, Jurisdiction: Personal Jurisdiction and Inconvenient Forum (Matthew Bender).



#### **Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.



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### 9.03 CHECKLIST: Making a Motion to Quash.



Examine relevant timing issues:

- ☐ Motion must be filed and served on or before last day to plead, i.e., 30 days after service of summons.
- ☐ Determine whether to apply for extension of time to plead or seek stipulation extending time.
  - ☐ Stipulated extension is limited to 15 days.
  - ☐ Court-ordered extension is limited to 30 days without adverse party's consent.

#### Authority:

*CCP §§ 418.10(a), (b), 1054; Gov Code § 68616(b); Cal Rules of Ct, Rule 3.110(d)*

#### Discussion:

See 9.06

☐ Examine grounds for proving lack of jurisdiction:

- ☐ Defects in summons and service of summons:
  - ☐ Failure to serve summons.
  - ☐ If the defendant did not receive a copy of the summons and complaint, determine

how he or she found out about the case.

☐ Summons was defective.

☐ Service of summons was defective.

☐ Examine when, where, and how the summons and complaint were served; obtain the copies served.

☐ Determine whether a proof of service of summons on the defendant has been filed; and if so, obtain a copy.

☐ Substitute service was defective.

☐ Summons served was one not authorized for civil actions.

☐ Absence of specific basis of personal jurisdiction under California's long-arm statute:

☐ Over an individual.

☐ Over a general partnership and the partners.

☐ Over a domestic corporation.

☐ Over a foreign corporation.

☐ Over the plaintiff.

☐ Due process requirements have not been satisfied:

☐ Defendant is not a resident or person served in California.

☐ Defendant has not been afforded reasonable notice and an opportunity to be heard.

☐ Nonresident defendant has insufficient minimum contacts with California:

☐ Examine extent of physical and/or nonphysical entry into California.

☐ Apply test of fair play and substantial justice.

- ☐ Consider effect on reasonableness test if defendant is a foreign national.
- ☐ If minimum contacts are inadequate for general jurisdiction, determine if available grounds for exercise of limited jurisdiction.
- ☐ Defendant is immune to service or suit:
  - ☐ Heads of foreign missions and their staffs having diplomatic rank.
  - ☐ California state legislators during, and for five days before and after, a legislative session.
  - ☐ Witnesses in criminal proceedings.
  - ☐ Extradited defendants, if acquitted.
- ☐ Any combination of the above.

**Authority:**

*CCP §§ 410.50, 418.10, 22 USCS § 254d, Cal Const, art IV, § 14*

**Discussion:**

See 9.08

**Form:**

See 9.51

- ☐ Examine whether contract provisions control jurisdiction.

**Discussion:**

See 9.27

- ☐ Consider what pleadings to include with motion to quash and effect on general appearance.
  - ☐ Motion to quash, coupled with:
    - ☐ Answer.
    - ☐ Demurrer.
    - ☐ Motion to Strike.
  - ☐ Failure to move to quash at time of filing demurrer or motion to strike waives issues of lack of

personal jurisdiction, inadequacy of process and service of process, inconvenient forum, and delay in serving summons.

- ☐ Simultaneous motion to quash and answer, demurrer, or motion to strike the complaint or cross-complaint does not constitute a general appearance by the defendant.
- ☐ A *CCP* § 473 or 473.5 motion for relief from default may be joined with a motion to quash without constituting a general appearance.

**Authority:**

*CCP* § 418.10(d), (e)

**Discussion:**

See 9.04, 9.07

- ☐ Determine whether appearance by counsel is unauthorized.

**Authority:**

*CCP* § 418.10(a)

**Discussion:**

See 9.07

- ☐ Prepare declarations with specific evidentiary facts.

- ☐ Identify proper declarant.

**Authority:**

*CCP* §§ 2009, 2015.5

**Discussion:**

See 9.09

**Form:**

See 9.52

- ☐ Prepare notice of motion to quash and accompanying papers:

- ☐ Notice of motion.
- ☐ Supporting declarations.
- ☐ Written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing.
- ☐ Supporting memorandum.



☐ Proof of service.

☐ Proposed order.

☐ File and serve motion:

☐ Follow standard noticed motion procedure.



**Timing:**

■ Motion must be filed and served on or before last day to plead, i.e., 30 days after service of summons.

■ Hearing date must be no more than 30 days after filing notice of motion.

■ Service of motion must be with at least 16 court days' notice.

**Authority:**

*CCP §§ 418.10(b), 1005(a)(4), (b)*

**Discussion:**

*See 9.10, 9.11*

**Forms:**

*See 9.51, 9.52, 9.53*

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.39*

☐ Prepare reply if motion opposed:

☐ Prepare any reply declarations and any reply memorandum.

☐ Serve reply papers on opposing party at least five court days before the hearing.

**Authority:**

*CCP §§ 1005, 1015; Cal Rules Ct, Rule 3.1300*

**Discussion:**

*See 9.12*

☐ Prevailing party submits order conforming to judge's ruling.

☐ Prevailing party files and serves notice of ruling.

**Authority:**

*CCP § 1019.5; Cal Rules Ct, Rules 3.1304 et seq.*

**Discussion:**

See 9.13



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**9.04 Options and Strategies for Moving Party.**

**9.04[1] Consider Whether Motion for Inconvenient Forum Is More Appropriate.** If the facts of the case show that the defendant will likely come under the personal jurisdiction of a California court, a motion to stay or dismiss for inconvenient forum may be a better choice. Remember that a motion to stay or dismiss for inconvenient forum concedes personal jurisdiction, and seeks to stay or dismiss that action under equitable principles.



**Strategic Points--Defendant:**

A defendant may make the tactical decision to forego a motion to quash and to focus on an inconvenient forum motion because litigants need to "pick their battles" and focus on the arguments that have the highest probability of success to enhance the party's and lawyer's credibility. On the other hand, the statutory change seems to allow making both motions simultaneously, and there certainly could be cases in which the combination of the arguments might have a synergistic effect and allow the judge to see the merits of both arguments, while providing the judge some options as to how to decide the issues.

**9.04[2] Consider Whether to File Additional Pleadings With Motion to Quash.** A defendant or cross-defendant who files a demurrer or motion to strike without making a *CCP § 418.10* motion at the same time waives the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in serving summons [*CCP § 418.10(e)(3)*]. *CCP § 418.10(e)*, in the text preceding (e)(1), allows, but does not require, a defendant or cross-defendant making a 418.10 motion to simultaneously answer, demur, or move to strike the complaint or cross-complaint without it constituting a general appearance.

When adding *CCP § 418.10(e)*, the Legislature expressly provided: "It is the intent of the Legislature in enacting this act to conform California practice with respect to challenging personal jurisdiction to the practice under *Rule 12(b) of the Federal Rules of Civil Procedure*" [Stats 2002, ch 69, § 2].



**Strategic Point--Defendant:**

Notwithstanding the ability to safely do so, there does not seem to be much point in filing an other pleadings or motion with the motion to quash because if you prevail on the motion to quash, you will not have to incur the time and expense of preparing any other pleading or motion.

**Distinguish:**

Failure to make a *CCP § 418.10* motion does not prevent the same party from filing a *CCP § 473(d)* motion at any time to vacate on extrinsic evidence a default judgment good on its face that is void for lack of personal jurisdiction [ *Strathvale Holdings v. E.B.H. (2005) 126 CA4th 1241, 1248 , 25 CR3d 372* ].

 **Cross Reference:**

Discussion of relief from default judgments void under *CCP § 473(d)* and related equitable relief, see *Ch. 36, Defaults and Motions for Relief, 36.72 et seq.*

**9.04[3] Consider Motion to Extend Time to Plead or Stipulation.** A defendant may want to consider a motion extending time to plead or a stipulation extending this time if the pleading cut off date is close and/or insufficient facts are needed for the motion and discovery is needed [see 9.06[2]].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Venue Forum Non Conveniens Civil Procedure Pleading & Practice Pleadings Time Limitations Extensions



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.05*

**9.05 Motion to Quash Objects to Court's Authority Over Persons and Property.**

**9.05[1] Motion Is Procedure to Assert Court's Lack of Jurisdiction Over Nonresident.** A motion to quash service of summons for lack of personal jurisdiction objects to a court's power to compel nonresidents to defend suits brought against them in the state's courts [see *Cornelison v. Chaney* (1976) 16 C3d 143, 147, 127 CR 352, 545 P2d 264 ].

**9.05[2] California's Long-Arm Statute Confers Broadest Possible Jurisdiction.** California long-arm statute provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States" [CCP § 410.10; see, e.g., *Cornelison v. Chaney* (1976) 16 C3d 143, 147, 127 CR 352, 545 P2d 264 ]. California's long-arm statute intends to confer on California courts the broadest possible personal jurisdiction, limited only by constitutional considerations [ *Sibley v. Superior Court* (1976) 16 C3d 442, 445, 128 CR 34, 546 P2d 322 ; see, e.g., *Asahi Metal Indus. Co. v. Superior Court* (1987) 480 US 102, 106, 107 S Ct 1026, 94 L Ed2d 92 ].

**9.05[3] Trial Court Has Jurisdiction to Determine Personal Jurisdiction.** A trial court's jurisdiction to determine personal jurisdiction, distinct from its general jurisdiction to make a binding determination on the merits, is plenary and may not be terminated or inhibited by other courts until the jurisdictional issues are determined [ *Ziller Elecs. Lab GmbH v. Superior Court* (1988) 206 CA3d 1222, 1228, 254 CR 410 ].

**9.05[4] Actions Are Classified As in Personam, in Rem, or Quasi in Rem.**

**9.05[4][a] In Personam Actions Have Authority Over Person.** In personam actions are based on the court's authority over the defendant's person and the court "can impose a personal obligation on the defendant in favor of the plaintiff" [ *Shaffer v. Heitner* (1977) 433 US 186, 199, 97 S Ct 2569, 53 L Ed2d 683 ].

**Example:**

In personam judgments include actions imposing contract or tort liability by awarding the plaintiff a sum of money, and actions to enforce a duty of support or other personal obligation in a parent-child relationship [ *Hartford v. Superior Court* (1956) 47 C2d 447, 454, 304 P2d 1 ; see also *Kulko v. Superior Court* (1978) 436 US 84, 91, 98 S Ct 1690, 56 L Ed2d 132 ].

**9.05[4][b] In Rem Actions Have Authority Over Property.** In rem or quasi in rem actions are based on the court's authority over the property in its territory, and does not impose a personal liability on the property owner since the owner is not before the court; and a judgment in rem affects the interest of all persons in the designated property [ *Shaffer v. Heitner* (1977) 433 US 186, 199, 97 S Ct 2569, 53 L Ed2d 683 , *Title & Document Restoration Co. v. Kerrigan* (1906) 150 C 289, 306-308, 88 P 356 ]. Personal jurisdiction over the defendant is ordinarily not required, but the court must have jurisdiction over the res [see *Titus v. Superior Court* (1972) 23 CA3d 792, 798, 100 CR 477 ; *People v. \$6,500 U.S. Currency* (1989) 215 CA3d 1542, 1546, 264 CR 294 ].

**Example:**

In rem actions include real property title actions, actions to determine marital status, and actions to invalidate a redevelopment plan [see, e.g., *In re Marriage of Hanley* (1988) 199 CA3d 1109, 1119, 245 CR 441 ; see also *Bernardi v. City Council* (1997) 54 CA4th 426, 436, 63 CR2d 347 ].

**9.05[4][c] Quasi in Rem Actions Affect Interests of Persons in Property.** A judgment quasi in rem affects the interests of particular persons in designated property found within the territorial jurisdiction of the court [ *Shaffer v. Heitner* (1977) 433 US 186, 199 n17, 97 S Ct 2569, 53 L Ed2d 683 ; *Title & Document Restoration Co. v. Kerrigan* (1906) 150 C 289, 308, 88 P 356 ]. There are two types of quasi in rem actions: 1) the plaintiff seeks to secure a preexisting claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons [ *Shaffer v. Heitner* (1977) 433 US 186, 199 n17, 97 S Ct 2569, 53 L Ed2d 683 ], and 2) the plaintiff seeks to apply what he or she concedes to be property of the defendant to the satisfaction of a claim that plaintiff has against the defendant [ *Shaffer v. Heitner* (1977) 433 US 186, 199 n17, 97 S Ct 2569, 53 L Ed2d 683 ].

 **Cross Reference:**

Discussion of limitations on quasi in rem actions, see *California Forms of Pleading and Practice*, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*, § 323.12[3][e][iv] (Matthew Bender).

**9.05[5] Personal Jurisdiction Is Either General or Limited.**

**9.05[5][a] General Jurisdiction Confers Jurisdiction for All Causes of Action Against Defendant.** General jurisdiction arises when a nonresident defendant's activities in the forum are so substantial and continuous that due process does not require a connection between the cause of action pleaded and the nature of the defendant's activities in the state [ *Perkins v. Benguet Consol. Mining Co.* (1952) 342 US 437, 446-447, 72 S Ct 413, 96 L Ed 485, 47 Ohio Op. 216, 63 Ohio Law Abs. 146 ; *Cornelison v. Chaney* (1976) 16 C3d 143, 147, 127 CR 352, 545 P2d 264 ; *Hunt v. Erie Ins. Group* (9th Cir 1984) 728 F2d 1244, 1246 ]. General jurisdiction confers jurisdiction for all causes of action against the defendant, and it is not necessary that the specific cause of action alleged be connected with the forum [ *Cornelison v. Chaney* (1976) 16 C3d 143, 147, 127 CR 352, 545 P2d 264 ].

**9.05[5][b] Limited Jurisdiction Is Specific to Cause of Action.** If the nonresident defendant's activities within the state are not so pervasive as to justify the court's exercise of general jurisdiction, the court may nevertheless, in certain cases, exercise a limited, sometimes referred to as specific, jurisdiction over the defendant with respect to a given cause [ *Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 474-475, 105 S Ct 2174, 85 L Ed2d 528 ; *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 446, 58 CR2d 899, 926 P2d 1085 ]. Three-part test for specific jurisdiction includes [ *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 C4th 1054, 1060-1061, 35 C4th 1054, 112 P3d 28 ; *Pedus Building Services, Inc. v. Allen* (2002) 96 CA4th 152, 164, 116 CR2d 542 ]:

- The nonresident defendant must perform some act or consummate some transaction with the forum by which the defendant purposefully avails itself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- The claim must be one that arises out of or results from the defendant's forum-related activities; and

- Exercise of jurisdiction must be reasonable.



### Strategic Point--Plaintiff:

Specific jurisdiction is usually sufficient to achieve what the plaintiff wants. Making a general jurisdiction argument without sufficient facts may jeopardize the plaintiff's credibility and it certainly will cause the defendant to more vigorously argue at least that part of the argument because it has significance beyond just the one case. On the other hand, a general jurisdiction argument involves somewhat broader and different issues and can dovetail with a specific jurisdiction argument.



### Cross Reference:

Discussion of limited personal jurisdiction over nonresident, see 9.08[2].

## 9.05[6] No Personal Jurisdiction If Due Process Violated.

**9.05[6][a] Judgment Rendered in Violation of Due Process Is Void.** "A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere" [ *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 US 286, 291, 100 S Ct 559, 62 L Ed2d 490 ]. For a judgment to impose a personal obligation or duty in favor of a plaintiff to be valid, the court must have jurisdiction over the person of the defendant [ *Kulko v. Superior Court* (1978) 436 US 84, 91, 98 S Ct 1690, 56 L Ed2d 132 ; *International Shoe Co. v. Washington* (1945) 161 A.L.R. 1057, 326 US 310, 316, 66 S Ct 154, 90 L Ed 95 ; see also CCP § 1917]. A judgment void for lack of personal jurisdiction may be attacked by a CCP § 473(d) motion at any time [ *Strathvale Holdings v. E.B.H.* (2005) 126 CA4th 1241, 1248 , 25 CR3d 372 ].



### Cross Reference:

Discussion of relief from void judgments under CCP § 473(d) and related equitable relief, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 29.24 et seq.

**9.05[6][b] Defendant Must Be Given Reasonable Notice and Opportunity for Hearing.** Due process requires notice and opportunity to be heard [see *Hanson v. Denckla* (1958) 357 US 235, 245, 78 S Ct 1228, 2 L Ed2d 1283 ; *In re Raner* (1963) 59 C2d 635, 642-643, 30 CR 814, 381 P2d 638 ].



### Cross Reference:

See Ch. 8, Service of Summons.

**9.05[6][c] Nonresident Defendant Must Have Minimum Contacts With State.** For a state court to exercise personal jurisdiction over a nonresident defendant, the defendant must have certain minimum contacts with the forum state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice [ *International Shoe Co. v. Washington* (1945) 161 A.L.R. 1057, 326 US 310, 316, 66 S Ct 154, 90 L Ed 95 ; *Pavlovich v. Superior Court* (2002) 29 C4th 262, 268, 127 CR2d 329, 58 P3d 2 ].



### Cross Reference:

Discussion of minimum contacts, see 9.08[2].

## Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil

ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil  
ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm JurisdictionCivil  
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Chapter 9 Motions to Quash and Other Objections to Personal Jurisdiction  
II. MAKING A MOTION TO QUASH

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.06*

**9.06 Time for Making Motion.**

**9.06[1] Motion Must Be Served and Filed on or Before Last Day to Plead.** A notice of motion to quash service of summons on the ground of lack of jurisdiction of the court over the defendant must be served and filed on or before the last day of the time to plead, or within any further time that the court may for good cause allow [*CCP § 418.10(a)*].



**Timing:**

A responsive pleading to a civil action complaint must be filed within 30 days after service of summons [*CCP § 412.20(a)(3)*].

No default may be entered against the defendant before expiration of the time to plead [*CCP § 418.10(d)*].

No motion under *CCP § 418.10* or under *CCP § 473* or *473.5* for relief from default, when joined with a motion under *CCP § 418.10*, or application to the court or stipulation of the parties for an extension of the time to plead, constitutes a general appearance by the defendant [*CCP § 418.10(d)*].



**Cross Reference:**

Discussion of appearances, see 9.07.

**9.06[2] Time to Plead May Be Extended by Stipulation or Motion.** The parties may stipulate to one 15-day extension of the time to file a responsive pleading to the complaint [*Gov Code § 68616(b)*; *Cal Rules Ct, Rule 3.110(d)*]. The court may grant an extension of the time to file a responsive pleading of up to 30 days, or longer if the adverse party does not object [*CCP §§ 418.10(a), (b), 1054*]. Neither an extension by stipulation nor by court order is considered a general appearance by the defendant [*CCP § 418.10(d)*].



**Cross Reference:**

Discussion and forms for extending time, see Ch. 27, Service of Papers.

**9.06[3] Hearing on Motion Must Be Within 30 Days After Filing of Notice.** For most causes of action, the notice of motion must designate a hearing date not more than 30 days after the *filing* of the notice [*CCP § 418.10(b)*].

**Exception:**

In a proceeding for unlawful detainer, forcible entry, or forcible detainer, the time for making the motion is not less than three days nor more than seven days after the filing of the notice [*CCP* § 1167.4(a); *Cal Rules Ct*, Rule 3.1327(a)].

**9.06[4] Motion Extends Defendant's Time to Plead After Denial of Motion.** The service and filing of the notice of motion extends the defendant's time to plead until 15 days after service on the defendant of a written notice of entry of an order denying the motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days [*CCP* § 418.10(b)].

**Exception:**

In a proceeding for unlawful detainer, forcible entry, or forcible detainer, the defendant's time to plead is extended to *five* days after the defendant is served with a written notice of the entry of an order denying the motion, except that for good cause shown the court may extend a defendant's time to plead for an additional period not exceeding 15 days [*CCP* § 1167.4(b); *Cal Rules Ct*, Rule 3.1327(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallenges



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Chapter 9 Motions to Quash and Other Objections to Personal Jurisdiction  
II. MAKING A MOTION TO QUASH

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.07*

### **9.07 General Appearance May Waive Personal Jurisdiction and Other Objections.**

**9.07[1] California Adopts Federal Practice for Appearances.** A defendant "appears" in an action when the defendant [*CCP § 1014*]:

- Answers.
- Demurs.
- Files a notice of motion to strike.
- Files a notice of motion to transfer under *CCP § 396b* (motion to change venue).
- Moves for reclassification under *CCP § 403.040*.
- Gives the plaintiff written notice of his or her appearance or when an attorney gives notice of appearance for the defendant.

Case law interpreted the words "appear," "appeared," and "appearance," standing alone as usually meaning a "general" rather than a "special" appearance, and answers, demurrers, and motions to strike were considered a general appearance under the language of *CCP § 1014* [*see Goodwine v. Superior Court* (1965) 63 C2d 481, 484, 47 CR 201, 407 P2d 1 ; *Chitwood v. County of Los Angeles* (1971) 14 CA3d 522, 526, 92 CR 441 ]. However amended *CCP § 418.10(e)* provides that "[n]otwithstanding Section 1014," a defendant's simultaneous answer, demurrer, and motion to strike filed with a 418.10 motion do not constitute a general appearance until the motion is denied.

The Legislature's express intent in amending *CCP § 418.10* effective January 1, 2003, with respect to challenging personal jurisdiction is to conform California practice to federal practice under *Fed R Civ P, Rule 12(b)*. The Federal Rules of Civil Procedure abolished the technical distinction between general and special appearances in all federal courts, including those exercising diversity jurisdiction, the principal method for attacking the court's jurisdiction over the person of a defendant is a Rule 12(b)(2) motion [*Moore's Federal Practice*, § 12.31 (3d ed. Matthew Bender)]. It

remains to be seen just how much federal practice will be used in interpreting *CCP § 418.10(e)* given the differing language of Section 418.10 and *Fed R Civ P, Rule 12(b)*.

In light of these legislative developments, and given that general and special appearance law is still applicable until case law interprets the new statutory language, the following sections on general and special appearance law are provided. Practitioners may draw on this information for fashioning arguments that will help define the effect of the 2003 amendments to Section 418.10.

**9.07[2] Special Appearance Limits Appearance to Jurisdictional Issue.** A special appearance is made when a defendant appears in court for the sole purpose of objecting to the court's lack of jurisdiction over the defendant's person, without submitting to the court's jurisdiction [see *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1036-1037, 25 CR2d 539, 863 P2d 784 ; *Titus v. Superior Court* (1972) 23 CA3d 792, 800-801, 100 CR 477 ; *Josephson v. Superior Court* (1963) 219 CA2d 354, 361, 33 CR 196 ].

### **9.07[3] Effect of Waiver by General Appearance.**

**9.07[3][a] Trial Court Gains Personal Jurisdiction Over Entire Case.** A general appearance in an action waives any objection to personal jurisdiction, and the defendant submits to the personal jurisdiction of the court [see, e.g., *Titus v. Superior Court* (1972) 23 CA3d 792, 800-801, 100 CR 477 ; *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1036-1037, 25 CR2d 539, 863 P2d 784 ]. A general appearance is equivalent to personal service of summons on that party [CCP § 410.50(a); see also *Harrington v. Superior Court* (1924) 194 C 185, 189, 228 P 15 ; *S. Pac. Transp. Co. v. State Bd. of Equalization* (1985) 175 CA3d 438, 442, 221 CR 12 ; *Hamilton v. Asbestos Corp.* (2000) 22 C4th 1127, 1147, 95 CR2d 701, 998 P2d 403 ].

**9.07[3][b] The Issue of Personal Jurisdiction May Not Be Appealed.** Waiver of lack of personal jurisdiction by a general appearance of the defendant waives the right to raise the jurisdictional question on appeal [ *State Farm General Ins. Co. v. JT's Frames, Inc.* (2010) 181 CA4th 429, 437, 104 CR3d 573 ].

**9.07[4] General Appearance Made When Defendant Takes Action That Recognizes Court's Authority to Proceed With Case.** A general appearance is made when a defendant either enters an appearance in an action without limiting the purpose of the appearance or, except as otherwise provided by statute, when the defendant asks for relief that only a court with personal jurisdiction over the defendant can give or recognizes the authority of the court to proceed [see *Davenport v. Superior Court* (1920) 183 C 506, 511, 191 P 911 ; *Hamilton v. Asbestos Corp.* (2000) 22 C4th 1127, 1147, 95 CR2d 701, 998 P2d 403 (defendant's participation in consolidated action constituted appearance in one of the actions in which defendant had not been served)].



### **Warning:**

Even if moving party designates motion to quash as a "special appearance," if the moving party seeks relief on any basis other than lack of personal jurisdiction, the party makes a general appearance [ *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1036-1037, 25 CR2d 539, 863 P2d 784 ; see also *Goodwine v. Superior Court of Los Angeles County* (1965) 63 C2d 481, 484, 47, CR201, 63 C2d 481, 47 CR 201, 407 P2d 1 ].

A party waives an otherwise available jurisdictional defense by arguing defenses on the merits [ *Mansour v. Superior Court* (1995) 38 CA4th 1750, 1756 (if defendant raises any other question, or asks for any relief that can only be granted on the hypothesis that the court has jurisdiction of the person, the appearance is general)]. Any arguments that go beyond jurisdictional issues, to the substance and/or the procedural aspects of the claims constitute a general appearance and waive any personal jurisdictional objections [ *Geary St., L.P. v. Superior Court* (1990) 219 CA3d 1186, 1194 ]. A request for discovery constitutes a general appearance [ *Factor Health Mgmt. v. Superior Court* (2005) 132 CA4th 246, 250 , 33 CR3d 599 ]. A party who seeks relief independent and apart from the plea to the jurisdiction of the

person, that, if successful, would work a dismissal of the action on an entirely distinct legal ground waives the question of jurisdiction and submits to the jurisdiction of the court [ *Olcese v. Justice's Court of First Judicial Township* (1909) 156 C 82, 88, 103 P 317 ; see *Zobel v. Zobel* (1907) 151 C 98, 101 (defendant who appears and asks for relief that can only be granted on the hypothesis that the court has jurisdiction submits to the jurisdiction of the court)].

**Warning:**

Even a nonparty that is not named in the pleadings makes a general appearance and submits to the court's personal jurisdiction by participating in the proceedings in an aforementioned manner [ *Serrano v. Stefan Merli Plastering Company, Inc.* (2008) 162 CA4th 1014, 1029, 76 CR3d 559 (nonparty found to have entered general appearance by agreeing that trial court would determine validity and reasonableness of expedited transcript fees and opposing on the merits a party's motion for relief from those fees)].

**Distinguish:**

A general appearance is entered when the court can grant any affirmative relief on the merits of the defendant's papers. This is distinguished from a mere request for a dismissal based on a statutory provision, which is not a general appearance [ *Dial 800 v. Fesbinder* (2004) 118 CA4th 32, 53 ; *Berard Construction Co., Inc. v. Municipal Court* (1975) 49 CA3d 710, 713-720, 122 CR 825 (statutory motion to dismiss on ground of inconvenient forum); *Brock v. Fouchy* (1946) 76 CA2d 363, 370, 172 P2d 945 ].

**Warning:**

A motion for contractual attorney fees premised on the theory that a defendant is the prevailing party in an action on a contract that is dismissed on grounds other than lack of personal jurisdiction is an affirmative request for relief sufficient for a general appearance [ *Dial 800 v. Fesbinder* (2004) 118 CA4th 32, 54 ].

There are, however, situations in which the merits of the personal jurisdictional challenge are so intertwined with other issues, that no waiver has been found. It has been stated that when in personam jurisdiction is claimed on the basis of a foreign defendant's alleged forum-related activities in connection with the cause of action pleaded, facts relevant to the question of jurisdiction often bear on the basic merits of the complaint. If in personam jurisdiction depends on the validity of the substantive claim against the foreign defendant, it is to be expected that the defendant's showing on the motion to quash may also negate the existence of the claim [ *Regents of Univ. of N.M. v. Superior Court* (1975) 52 CA3d 964, 970 n7 ; *Malone v. Equitas Reinsurance* (2000) 84 CA4th 1430, 1441 ].

**Example:**

A plaintiff sues within the four year written contract statute of limitations period and alleges that there is a written contract, but fails to attach the contract or to plead "in hac verba." The defendant alleges that there was an exchange of correspondence but nothing sufficient to establish that a contract was formed, by writing or otherwise. The defendant might decide to challenge jurisdiction on the ground that the exchange of mere negotiation correspondence was not sufficient to allow personal jurisdiction, and that the plaintiff had failed to sufficiently plead the existence of a written contract by failing to plead its terms.

**Warning:**

Seeking review by writ of the denial of a motion to quash does not grant defendant immunity from making a general appearance in the litigation; and initiating discovery unrelated to the issue of jurisdiction and participating in an evaluation conference pursuant to local court rules waives jurisdictional objection and appeal of denial of motion to quash [see *Mansour v. Superior Court* (1995) 38 CA4th 1750, 1757, 46 CR2d 191 ]. However, the *Mansour* decision predates the addition of CCP §

418.10(e)(3) which provides, in part that the defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded. Whether *Mansour* remains valid given the statute's amendment remains to be seen.

**9.07[5] General Appearance Made When Raising Issue of Subject Matter Jurisdiction.** Challenging the court's subject matter jurisdiction constitutes a general appearance and cannot be raised in a motion to quash service of summons [ *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1036-1037, 25 CR2d 539, 863 P2d 784 (court ultimately found there was no subject matter jurisdiction)].

**Exceptions:**

- The issue of lack of subject matter jurisdiction may be raised on a motion to quash in an unlawful detainer action, in which a demurrer is not available [ *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1036, 25 CR2d 539, 863 P2d 784 ].

- A general appearance made after the mandatory period for service of summons has run [see CCP § 583.210] does not give the court jurisdiction over the defendant when the summons has not been timely served [ *Dale v. ITT Life Ins. Corp.* (1989) 207 CA3d 495, 499, 255 CR 8 ].

**9.07[6] Bringing and Reviewing a CCP § 418.10 Motion Is Not General Appearance.** No motion, made by a defendant within the time to respond to a complaint, to quash service of summons for lack of personal jurisdiction, to stay or dismiss for inconvenient forum, or to dismiss for delay in serving summons under CCP § 583.110 *et seq.* is to be deemed a general appearance by the defendant [CCP § 418.10(d)].

An answer, demurrer, motion to strike simultaneously filed with a 418.10 motion does not constitute a general appearance until the court denies the motion, and the defendant is not deemed to have generally appeared until entry of the order denying the motion [CCP § 418.10(e)(1)]. If the denial of the motion is taken up by a writ of mandate, the defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded [CCP § 418.10(e)(2)].

An objection to interrogatories on the ground that they are oppressive, made during the pendency of a motion to quash service of summons, does not constitute a general appearance [ *1880 Corp. v. Superior Court* (1962) 57 C2d 840, 843, 22 CR 209, 371 P2d 985 ].

A motion to reconsider the denial of a CCP § 418.10 motion does not constitute a general appearance, so long as it is limited to the same grounds as the original motion [see *Josephson v. Superior Court* (1963) 219 CA2d 354, 358, 362, 33 CR 196 (reconsideration of denial of motion to quash service of summons on cross-complaint)].

**9.07[7] Applying for or Stipulating to Extension of Time to Plead Is Not General Appearance.** No application to the court or stipulation of the parties for an extension of time to plead is a general appearance by the defendant [CCP § 418.10(d)].

**9.07[8] Appearing at Hearing for Ex Parte Relief Is Not General Appearance.** An appearance at a hearing at which ex parte relief is sought or an appearance at a hearing for which an ex parte application for a provisional remedy is made, is not a general appearance and does not constitute a waiver of the right to make a motion under CCP § 418.10 [CCP § 418.11].



**Warning:**

An ex parte application for discovery in response to petition for preliminary injunction is not an ex parte application for a provisional remedy under CCP § 418.11 and constitutes a general appearance [ *Factor Health Mgmt. v. Superior Court* (2005) 132 CA4th 246, 250-251 , 33 CR3d 599 ].

**9.07[9] Motion for Relief From Default or Hybrid Motion Are Not General Appearances.** A motion under CCP § 473 or 473.5 when joined with a CCP § 418.10 motion does not constitute a general appearance [CCP § 418.10(d); see *Floveyor Int'l, Ltd. v. Superior Court* (1997) 59 CA4th 789, 792, 69 CR2d 457 ]. A hybrid motion to quash/dismiss concerning a claim of Indian sovereign immunity and federal preemption is not construed as a general appearance [ *Great W. Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 CA4th 1407, 1415-1418, 88 CR2d 828 ].

#### **9.07[10] Party May Appear by Attorney.**

**9.07[10][a] Attorney Is Presumed to Have Authority to Appear but Presumption Rebuttable.** In the absence of any statutory requirement that the authority of an attorney be evidenced by a writing, the act of an attorney in entering the appearance of a defendant carries with it a presumption of due authority to do so [see *Gagnon Co., Inc. v. Nevada Desert Inn* (1955) 45 C2d 448, 459, 289 P2d 466 ]. However, the presumption is rebuttable [ *Sullivan v. Dunne* (1926) 198 C 183, 190, 244 P 343 ; see also *Milrot v. Stamper Med. Corp.* (1996) 44 CA4th 182, 187, 51 CR2d 424 ].

**9.07[10][b] Appearance by Unauthorized Attorney Does Not Bind Party.** When an attorney, having no authority to do so, enters the appearance of a defendant who has not been served with process, the entry of an appearance is void for that defendant [ *Garrison v. McGowan* (1874) 48 C 592, 599-600 ]. When the only basis for jurisdiction of the person in a particular case is appearance, the purported appearance by an unauthorized attorney cannot confer jurisdiction [ *Neihaus v. Superior Court* (1977) 69 CA3d 340, 346, 137 CR 905 ; also *Milrot v. Stamper Med. Corp.* (1996) 44 CA4th 182, 186, 51 CR2d 424 ].



#### **Warning:**

The fact that an attorney may possess the necessary authority to represent a client in one case is not evidence of the attorney's authority to represent the client in another and distinct proceeding [ *Sullivan v. Dunne* (1926) 198 C 183, 190, 244 P 343 ].

**9.07[10][c] Defendant May Attack Unauthorized Appearance Before Judgment.** Any dispute as to the authority of the counsel of record to act for the party he or she purports to represent may be raised in the trial court [ *Abeles v. State Bar* (1973) 9 C3d 603, 609, 108 CR 359, 510 P2d 719 .

A defendant seeking to raise the issue of an unauthorized appearance by an attorney must do so promptly after discovery [ *Parkside Realty Co. v. MacDonald* (1914) 167 C 342, 347, 139 P 805 ; *Machado v. Machado* (1944) 66 CA2d 401, 406, 152 P2d 457 ].

The issue as to an attorney's lack of authority may be raised by a motion to withdraw the appearance [see *Omega Video Inc. v. Superior Court* (1983) 146 CA3d 470, 476, 194 CR 574 ; *Neihaus v. Superior Court* (1977) 69 CA3d 340, 346, 137 CR 905 ].

Additionally or alternatively, if the attorney's unauthorized appearance was made by the filing of a demurrer, answer, or other paper constituting an appearance [see CCP § 1014], the defendant may move to strike the pleading or paper [see CCP § 436(b); *Sullivan v. Dunne* (1926) 198 C 183, 186-187, 244 P 343 (motion to strike demurrer); *Kellar v. Hendey* (1961) 189 CA2d 86, 87-88, 10 CR 748 (motion to strike answer)].

If the motion to strike is granted, the defendant will be required to file a responsive pleading to avoid a default if the

court has otherwise obtained jurisdiction over the defendant by service of the summons and complaint [see *CCP* § 585]. If service was not valid, the defendant may wish to combine the motion to strike with a motion to quash service of summons on the ground of lack of jurisdiction of the court over the defendant [*CCP* § 418.10(a)(1)].

A motion for relief from default [*CCP* §§ 473(b), 473.5] is proper when a defendant not served with summons has had a judgment taken against him or her in an action in which the defendant was represented by an attorney who had no authority to do so [see *Zirbes v. Stratton* (1986) 187 CA3d 1407, 1412-1413, 232 CR 653]. The motion may be combined with a motion to strike the pleading or paper that constitutes the unauthorized appearance [*CCP* § 436(b)]. The motion may also be combined with a motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss the action for inconvenient forum [*CCP* § 418.10(d)].

#### **Cross Reference:**

Discussion of relief from default judgments under *CCP* § 473(b) and related equitable relief, see *Ch. 36, Defaults and Motions for Relief*, 36.66 et seq.

**9.07[10][d] Defendant May Set Aside Void Judgment Based on Unauthorized Appearance and Use Against Defense of Res Judicata.** A void judgment may be set aside on the motion of either party [*CCP* § 473(d)]. Once an appeal has been taken, the issue of an unauthorized appearance by the attorney in the trial court and in taking the appeal must be raised in the appellate court [ *Parkside Realty Co. v. MacDonald* (1914) 167 C 342, 346, 139 P 805 ].

#### **Cross Reference:**

Discussion of relief from judgments and orders under *CCP* § 473(d) and related equitable relief, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 29.24 et seq.

When the action is based on a foreign judgment, the lack of authority of an attorney to appear for the defendant in an action in another state may be alleged in a California state court in an answer to a complaint to establish the judgment of the other state as a California judgment [ *Slack v. Slack* (1966) 241 CA2d 530, 539, 50 CR 763 ].

The issue as to the authority of an attorney to appear for a party in an action in another state may also be raised in a California action against the defense of res judicata based on the sister-state judgment [ *Gagnon Co., Inc. v. Nevada Desert Inn* (1955) 45 C2d 448, 457, 289 P2d 466 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsent





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Chapter 9 Motions to Quash and Other Objections to Personal Jurisdiction  
II. MAKING A MOTION TO QUASH

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.08*

## **9.08 Grounds for Proving Lack of Personal Jurisdiction.**

### **9.08[1] No Personal Jurisdiction If Summons or Service Was Defective.**

**9.08[1][a] Failure to Serve Summons.** A court does not have personal jurisdiction when the plaintiff fails to serve the summons on a defendant who has not made a general appearance in the action [*CCP* § 410.50(a)].

**9.08[1][b] Summons Is Defective.** A court does not have personal jurisdiction when the summons is defective [*see, e.g., Tresway Aero, Inc. v. Superior Court* (1971) 5 C3d 431, 435, 96 CR 571, 487 P2d 1211 ; *see also Ch. 8, Service of Summons*, 8.03 et seq.].

**9.08[1][c] Service of Summons Was Defective.** A court does not have personal jurisdiction when service of the summons was defective [*see, e.g., Eagle Elec. Mfg. Co. v. Keener* (1966) 247 CA2d 246, 250, 55 CR 444 ; *see also Ch. 8, Service of Summons*, 8.07 et seq.].

**9.08[1][d] Substituted Service Was Defective.** A court does not have personal jurisdiction if the plaintiff did not serve the defendant with a copy of the summons and the substituted service was not reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard [*see Zirbes v. Stratton* (1986) 187 CA3d 1407, 1416, 232 CR 653 ].

**9.08[1][e] Summons Served Was Not One Authorized for Civil Actions.** A court does not have personal jurisdiction if the summons served on the defendant was not the one authorized for civil actions and provides a shorter period for response than that required by statute for civil actions [*see Delta Imp., Inc. v. Mun. Court* (1983) 146 CA3d 1033, 1035-1036, 194 CR 685 (use of five-day unlawful detainer summons was improper because complaint did not state a cause of action for forcible entry or forcible or unlawful detainer)].

### **9.08[2] No Limited Personal Jurisdiction Over Nonresident If Minimum Contacts Absent and Jurisdiction Unreasonable.**

**9.08[2][a] California's Long-Arm Statute Confers Broadest Possible Jurisdiction.** California long-arm statute provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States" [*CCP* § 410.10].

California's long-arm statute [CCP § 410.10; see, e.g., *Asahi Metal Indus. Co. v. Superior Court* (1987) 480 US 102, 106, 107 S Ct 1026, 94 L Ed2d 92] intends to confer on California courts the broadest possible personal jurisdiction, limited only by constitutional considerations [ *Sibley v. Superior Court* (1976) 16 C3d 442, 445, 128 CR 34, 546 P2d 322 ].

#### **9.08[2][b] Judicial Council Comments to Long-Arm Statute Elaborate Bases for Limited Personal**

**Jurisdiction.** While California's long-arm statute is very short, there is a lengthy Judicial Council Comment that was issued when the statute was added to the Code in 1970, and includes multiple bases for establishing personal jurisdiction [see Bases of Judicial Jurisdiction--1969 Report of the Judicial Council of California to the Governor and the Legislature]. The complete text of the Comments follows CCP § 410.10 in Deering's California Code Annotated.



#### **Strategic Point--Defendant:**

When making a motion to quash, the defendant needs to review the Judicial Council Comments and determine if any of the bases for jurisdiction are present, and to assert the reasons why certain bases are inapplicable under the due process inquiry for minimum contacts.



#### **Cross Reference:**

Discussion of personal jurisdiction factors based on Judicial Council Comments, see 9.17[3]-[9].

**9.08[2][c] Fourteenth Amendment Protects Nonresident Defendants.** The *due process clause of the Fourteenth Amendment* [US Const, amend 14] operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants [see *Shaffer v. Heitner* (1977) 433 US 186, 198-200, 97 S Ct 2569, 53 L Ed2d 683 ].

#### **Distinguish:**

The fact that the plaintiff is a nonresident who acquired rights to intellectual property at issue in an action involving defendants dealing directly with a California corporation at the time of the contacts giving rise to jurisdiction for services to be performed entirely in California showed that none of the defendants had any reason to anticipate that a dispute under the agreement would be adjudicated anywhere but in California [ *Epic Communications, Inc. v. Richwave Technology, Inc.* (2009) 179 CA4th 314, 337, 101 CR3d 572 ].

#### **9.08[2][d] Due Process Requires Nonresident Defendants to Have Minimum Contacts With Forum State.**

For a state to exercise personal jurisdiction over a nonresident defendant, the defendant must have certain minimum contacts with the forum state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice [ *International Shoe Co. v. Washington* (1945) 161 A.L.R. 1057, 326 US 310, 316, 66 S Ct 154, 90 L Ed 95 ; *Pavlovich v. Superior Court* (2002) 29 C4th 262, 268, 127 CR2d 329, 58 P3d 2 ]. A state may not make binding a personal judgment against an individual or a corporate defendant with which the state has no contacts, ties, or relations [ *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 US 286, 294, 100 S Ct 559, 62 L Ed2d 490 ; *Haisten v. Grass Med. Reimbursement* (9th Cir 1986) 784 F2d 1392, 1396 ].

The key to whether a particular exercise of personal jurisdiction comports with constitutional due process is whether the defendant *purposefully* established minimum contacts in the forum state [ *Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 474, 105 S Ct 2174, 85 L Ed2d 528 ; see also *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 US 286, 291, 100 S Ct 559, 62 L Ed2d 490 ]. The rule applies to individual defendants as well as to corporate defendants [ *Arnesen v. Raymond Lee Org., Inc.* (1973) 31 CA3d 991, 996, 107 CR 744 ].

In determining whether a particular exercise of a state court's jurisdiction is consistent with due process, the inquiry

must focus on the relationship among the defendant, the forum, and the litigation [ *Keeton v. Hustler Magazine, Inc.* (1984) 465 US 770, 775, 104 S Ct 1473, 79 L Ed2d 790 ; *Secrest Mach. Corp. v. Superior Court* (1983) 33 C3d 664, 668, 190 CR 175, 660 P2d 399 ].

**Distinguish:**

The Supreme Court has not required a *plaintiff* to have minimum contacts with the forum state before permitting that state to assert personal jurisdiction over a nonresident defendant [see *Keeton v. Hustler Magazine, Inc.* (1984) 465 US 770, 779, 104 S Ct 1473, 79 L Ed2d 790 ].

Jurisdiction over an out-of-state corporation does not necessarily mean that the court may also assert jurisdiction over its employees, nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary. Each individual's contacts with the forum state must be assessed individually [ *Keeton v. Hustler Magazine, Inc.* (1984) 465 US 770, 781, 104 S Ct 1473, 79 L Ed2d 790 ; see also *Serafini v. Superior Court* (1998) 68 CA4th 70, 78, 80 CR2d 159 ].

**Example:**

Allegations of conspiracy do not establish as a matter of law that if one conspirator comes within the personal jurisdiction of California's courts, then California may exercise jurisdiction over other nonresident defendants alleged to be part of that same conspiracy [ *In re Automobile Antitrust Cases I & II* (2005) 135 CA4th 100, 113, 118-119, 37 CR3d 258 (grant of motion to quash upheld where no evidence linked defendant's acts in California to conspiracy)].

 **Cross Reference:**

Discussion of jurisdiction over foreign corporation on basis other than direct acts by its employees, see 9.17[7].

**Prerequisite:**

Minimum contacts must be found before moving to the second part of the analysis: Whether personal jurisdiction comports with fair play and substantial justice [ *Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 476, 105 S Ct 2174, 85 L Ed2d 528 ; *Cornelison v. Chaney* (1976) 16 C3d 143, 147-148, 127 CR 352, 545 P2d 264 ].

 **Cross Reference:**

Discussion of the fair play and substantial justice standard, see 9.08[2][g].

 **Warning:**

Sufficient minimum contacts are not required when a nonresident is served with a summons while in the forum state [see *Silverman v. Superior Court* (1988) 203 CA3d 145, 150, 249 CR 724 ]. However, the court may still conclude that California is an inconvenient forum and decline to exercise jurisdiction on that ground.

 **Cross Reference:**

Discussion of the doctrine of inconvenient forum, see 9.25.

**9.08[2][e] Mechanical Tests Are Inappropriate to Determine Minimum Contacts.** The minimum contacts test is not susceptible of mechanical application; rather the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present [ *Kulko v. Superior Court* (1978) 436 US 84, 92, 98 S Ct 1690, 56 L Ed2d 132 ; *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 C4th 1054, 1061, 35 C4th 1054, 112 P3d 28 ].

**9.08[2][f] Nonphysical Entry Into Forum State Requires Purposeful Availment to Satisfy Minimum**

**Contacts.** A nonresident defendant may not avoid personal jurisdiction merely because the defendant did not physically enter the forum state. So long as a commercial actor's efforts are purposefully directed toward residents of another state, the absence of physical contacts cannot defeat personal jurisdiction there [ *Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 476, 105 S Ct 2174, 85 L Ed2d 528 ]. "Purposeful availment" occurs when the nonresident defendant reaches out with its business activities beyond one state to create continuing relationships and obligations between the nonresident defendant and residents of the forum, purposefully directs its activities at residents of the forum, purposefully derives benefit from its activities in the forum, creates a substantial connection with the forum, or deliberately has engaged in significant activities within the forum [ *Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 CA4th 969, 978-979, 81 CR3d 535 ; *Boschetto v. Hansing* (9th Cir. 2008) 539 F.3d 1011, 1017 , cert. denied, *Boschetto v. Hansing* (2009) 129 S. Ct. 1318, 173 L. Ed. 2d 585 ].

A forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that the products will be purchased by consumers in the forum state [ *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 US 286, 297-298, 100 S Ct 559, 62 L Ed2d 490 ]. If the sale of a product of a manufacturer or distributor, for example, is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states, it is not unreasonable to subject the manufacturer or distributor to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owners or to others [ *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 US 286, 297, 100 S Ct 559, 62 L Ed2d 490 ].

A manufacturer's placement of goods in the stream of commerce with the expectation that the goods will be purchased or used by consumers in California constitutes purposeful availment if the income earned by the manufacturer from the sale or use of its product in California is substantial [ *Luberski, Inc. v. Oleificio F.LLI Amato S.R.L.* (2009) 171 CA4th 409, 419, 89 CR3d 774 ; *Bridgestone Corp. v. Superior Court* (2002) 99 CA4th 767, 774-775, 121 CR 2d 673 ]. However, "foreseeability" that a manufacturer's product would enter or cause injury in California, alone, has never been a sufficient benchmark for personal jurisdiction; rather, it is the defendant's conduct and connection with California that is the main element, not the mere likelihood that a product will find its way into the state [ *Carretti v. Italpast* (2002) 101 CA4th 1236, 1253-1254, 125 CR2d 126 ].

The requisite minimum contacts may be electronic [ *Luberski, Inc. v. Oleificio F.LLI Amato S.R.L.* (2009) 171 CA4th 409, 419, 89 CR3d 774 (negotiations via long-distance communications were minimum contacts); see *Hall v. LaRonde* (1997) 56 CA4th 1342, 1344, 66 CR2d 399 (use of electronic mail and telephone by party in another state may establish sufficient minimum contacts with California to support personal jurisdiction)].

With respect to whether an Internet website constitutes minimum contacts, "[a]t one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet website that is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website" [ *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 C4th 1054, 1063, 35 C4th 1054, 112 P3d 28 (website allowing hotel reservations falls in middle ground and constitutes purposeful availment) quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* (WDPA 1997) 952 F Supp 1119, 1124 ].

**Judicial Perspective:**

It should be noted that in *Snowney*, the Supreme Court has now distanced itself from the precedent previously set forth in *Circus Circus Hotels, Inc. v. Superior Court* (1981) 120 CA3d 546 (advertising

activities targeted at forum residents can never establish purposeful availment). While attempting to adopt some middle ground for interactive internet solicitations and advertising, the reality of the holding is to now make subject to California jurisdiction any and all businesses that advertise and have interactive websites. Specifically, in *Snowney* the issue involved a Las Vegas Casino that had a website that was interactive such that it permitted the taking of room reservations. The allegations concerned alleged violations of *B&P § 17200* for an energy surcharge. Having written and issued the lower court opinion in *Snowney* that eventually made its way to the Supreme Court, this jurist feels he is in a unique position to comment on the effect of the California Supreme Court's ruling. The trial court opinion relied heavily on the analysis set forth in *Circus Circus*, and naturally the internet has come along way since 1981. However, the opinion in *Snowney* would appear to now subject every casino in Las Vegas that has an interactive website to California *B&P § 17200* claims. As a final note, Harrah's Casino sought review by the U. S. Supreme Court, and the writ of certiorari was denied [ *Harrah's Entertainment, Inc. v. Snowney* (2005) 126 S Ct 659 ].

A random and fortuitous contact, by itself, does not establish a concerted effort by a party to interject itself into California commerce and benefit from the forum [ *Aquila, Inc. v. Superior Court* (2007) 148 CA4th 556, 573-574, 55 CR3d 803 (randomness demonstrated by fact that insurance policy for California property of subsidiary also provided coverage for 37 properties outside California); see *Dorel Inds., Inc. v. Superior Court* (2005) 134 CA4th 1267, 1276, 36 CR3d 742 ]. A contract alone does not automatically establish minimum contacts in the plaintiff's home forum [ *Boschetto v. Hansing* (9th Cir. 2008) 539 F.3d 1011, 1017, cert. denied, *Boschetto v. Hansing* (2009) 129 S. Ct. 1318, 173 L. Ed. 2d 585 (transaction was a "one-shot affair" for the seller in California, contract for the sale did not establish minimum contacts)].

An attorney's mere physical presence or absence in California is not determinative of jurisdiction over the attorney and the attorney's firm when the practice of law in the state occurs by the attorney advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means [ *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 C4th 119, 128-129, 70 CR2d 304, 949 P2d 1 ; cf. *Simons v. Steverson* (2001) 88 CA4th 693, 713, 106 CR2d 193 (sufficient minimum contacts existed for jurisdiction over out-of-state attorney and firm, because attorney, licensed in California, performed legal services for California residents and therefore practiced law in state)].

Traditional notions of fair play and substantial justice do not allow the exercise of jurisdiction over a defendant who merely maintains a web site advertisement in one state and has no contacts with the forum state other than maintaining an essentially passive home page that is accessible to citizens of the forum state, and everyone else, over the Internet [ *Cybersell, Inc. v. Cybersell, Inc.* (9th Cir 1997) 130 F3d 414, 415-420 (distinguishing cases involving interactive web sites and greater levels of actual contact)].

#### **Example:**

Selling a car as the result of a Californian contacting the out-of-state seller who viewed the seller's noninteractive website containing a credit application listing California did not constitute grounds for special jurisdiction over claim arising from condition of car where no files were exchanged via the Web site or that any business was actually conducted via the site [ *Shisler v. Sanfer Sports Cars, Inc.* (2006) 146 CA4th 1254, 1261-1262, 53 CR3d 335 ].

Nor may California assert jurisdiction over nonresident defendants based on their contracting with one or more Internet service providers who happen to maintain offices in California, so as to permit defendants to operate a passive website from their New York residence when the Internet providers were engaged by a corporate defendant from its computer in New York [see *Jewish Def. Org., Inc. v. Superior Court* (1999) 72 CA4th 1045, 1057-1062, 85 CR2d 611 (defamation action)].

If a defendant's personal jurisdiction is based on Internet use, and the defendant's sole contact with California is the posting of source code on an Internet website accessible to any person with Internet access, and the defendant owns no property, has no telephone listing, and conducts no business in California, jurisdiction does not exist even though it may be foreseeable that the defendant's tortious conduct would cause injury in California [ *Pavlovich v. Superior Court* (2002) 29 C4th 262 CR2 329, 58 P3d 2 (test was whether the defendant could reasonably anticipate being hauled into court in California); see also *Nam Tai Elecs., Inc. v. Titzer* (2001) 93 CA4th 1301, 1311-1313, 113 CR2d 769 (registering a nickname or alias with Yahoo!, a California-based Internet message board, agreeing to Yahoo!'s terms of service, and posting allegedly defamatory messages on Yahoo! do not justify, without more, subjecting a nonresident defendant to California jurisdiction for purposes of a lawsuit brought by a third party allegedly defamed by the messages) (disapproved to the extent it is contrary to the holding in *Pavlovich*)].

A case for specific jurisdiction resting in part on defendant's payment of a nonemployee's seminary expenses in California, and in part on defendant's alleged assignment of the nonemployee to a California parish with knowledge of his propensity to molest children did not establish sufficient availment to confer jurisdiction for claims of molestation by the nonemployee in California [ *Doe v. The Roman Catholic Archbishop of Cashel & Emly* (2009) 177 CA4th 209, 219-221, 99 CR3d 158 (personal jurisdiction over archbishop who sent priest to California denied)].

**9.08[2][f1] Limited Personal Jurisdiction Requires Cause of Action Derived from Forum Activities.** The second requirement for limited or specific personal jurisdiction is that there must be a substantial connection between the dispute and the defendant's forum activities [ *Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 CA4th 969, 985, 81 CR3d 535 ; *Roman v. Liberty University, Inc.* (2008) 162 CA4th 670, 679-680, 75 CR3d 828 ], so that the defendants could reasonably anticipate being subject to litigation in California in the event their forum activities caused an injury to a California resident [ *Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 CA4th 969, 985, 81 CR3d 535 ].

**Example:**

Plaintiffs' six counts for intentional misrepresentation, fraudulent concealment, securities fraud, breach of fiduciary duty, negligent misrepresentation, and an accounting all were based on alleged misrepresentations in or omissions from statements made to them in California by defendant's agents in an effort to solicit business from California residents. The fact that the alleged harm related directly to defendant's activities in California established a substantial connection between the dispute and defendant's forum activities [ *Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 CA4th 969, 985, 81 CR3d 535 ].

**Distinguish:**

Plaintiff's claims for personal injuries off campus arising from activities with his college roommate in Virginia were not substantially connected to the defendant-university's very limited recruitment-related activities in California [ *Roman v. Liberty University, Inc.* (2008) 162 CA4th 670, 680-681, 75 CR3d 828 ].

**9.08[2][g] No Jurisdiction Despite Minimum Contacts If Limited Jurisdiction Offends Traditional Notions of Fair Play and Substantial Justice.** The due process clause forbids a state from exercising personal jurisdiction over a defendant under circumstances that would offend "traditional notions of fair play and substantial justice" [ *Asahi Metal Indus. Co. v. Superior Court* (1987) 480 US 102, 113, 107 S Ct 1026, 94 L Ed2d 92 ; *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 444, 58 CR2d 899, 926 P2d 1085 ]. Once it has been decided that a defendant purposefully established minimum contacts with the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction comports with fair play and substantial justice [ *Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 476, 105 S Ct 2174, 85 L Ed2d 528 ; *Cornelison v. Chaney* (1976) 16 C3d 143, 147-148, 127 CR 352, 545 P2d 264 ]. Due process requires that the quality and nature of the defendant's activity be such that it is reasonable and fair to require the defendant to conduct a defense in the state [ *Kulko v. Superior Court* (1978) 436 US 84, 92, 98 S Ct 1690, 56 L Ed2d 132 ; *Snowney v. Harrah's Entertainment, Inc.*

(2005) 35 C4th 1054, 35 C4th 1054, 112 P3d 28 ].

#### **Cross Reference:**

Discussion of minimum contacts standard, see 9.08[2][d]-[f].

The minimum requirements of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities [ *Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 477, 105 S Ct 2174, 85 L Ed2d 528 ; *Haisten v. Grass Valley Medical Reimbursement* (9th Cir 1986) 784 F2d 1392, 1397 ].

The facts of each case must always be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice [ *Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 486-487, 105 S Ct 2174, 85 L Ed2d 528 ; *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 475, 58 CR2d 899, 926 P2d 1085 ].

To determine whether personal jurisdiction would comport with fair play and substantial justice, the courts may consider [ *Asahi Metal Indus. Co. v. Superior Court* (1987) 480 US 102, 113, 107 S Ct 1026, 94 L Ed2d 92 ; *Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 476-477, 105 S Ct 2174, 85 L Ed2d 528 ; *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 US 286, 292, 100 S Ct 559, 62 L Ed2d 490 ; *Jewish Def. Org., Inc. v. Superior Court* (1999) 72 CA4th 1045, 1054, 85 CR2d 611 ; *Great-West Life Assurance Co. v. Guarantee Co. of N. Am.* (1988) 205 CA3d 199, 209, 252 CR 363 ]:

- The burden on the defendant.
- The forum state's interest in adjudicating the dispute.
- The plaintiff's interest in obtaining convenient and effective relief.
- The interstate judicial system's interest in obtaining the most efficient resolution of controversies.
- The shared interest of the several states in furthering fundamental substantive social policies.

These considerations sometimes serve to establish the reasonableness of jurisdiction on a lesser showing of minimum contacts than would otherwise be required [ *Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 476-477, 105 S Ct 2174, 85 L Ed2d 528 ; *Haisten v. Grass Valley Med. Reimbursement* (9th Cir 1986) 784 F2d 1392, 1397 ; *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 448, 58 CR2d 899, 926 P2d 1085 ].

#### **Example:**

When the offending events occur outside California and there are insufficient contacts between the nonresident defendant and California to justify the exercise of general jurisdiction, limited jurisdiction may nevertheless be invoked when there exists a substantial nexus between the plaintiff's cause of action and the defendant's activities in California [ *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 C4th 1054, 1068, 35 C4th 1054, 112 P3d 28 (cause of action for false advertising and fraud regarding cost of hotel room directly arose from contacts consisting of advertisements and website); *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 448, 58 CR2d 899, 926 P2d 1085 ; see *Keeton v. Hustler Magazine, Inc.* (1984) 465 US 770, 773-774, 104 S Ct 1473, 79 L Ed2d 790 (corporation's regular circulation of magazines in forum state was sufficient to support assertion of jurisdiction in libel action by nonresident plaintiff based on contents of magazine)].

#### **Cross References:**

Discussion of general versus limited jurisdiction, see 9.05[5].

Discussion of the doctrine of inconvenient forum, see 9.25.

**9.08[2][h] Foreign National Defendants Afforded Extra Consideration.** The unique burdens placed on a foreign national to defend itself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders; however, when minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant [ *Asahi Metal Indus. Co. v. Superior Court* (1987) 480 US 102, 114, 107 S Ct 1026, 94 L Ed2d 92 (jurisdiction was not justified in the case, which involved a claim for indemnification by a Taiwanese corporation against a Japanese company); *Doe v. The Roman Catholic Archbishop of Cashel & Emly* (2009) 177 CA4th 209, 221, 99 CR3d 158 (personal jurisdiction denied over archbishop who sent priest to California)].

**9.08[3] No Personal Jurisdiction If Defendant Is Immune to Service or Suit.**

**9.08[3][a] Diplomats, Legislators, and Members of Congress Are Immune to Civil Actions.** Heads of foreign diplomatic missions and members of their staffs having diplomatic rank are immune to civil actions and proceedings; this immunity does not extend to consular officers who are mainly concerned with the commercial interests of their nationals [see 22 USCS § 254d; Restatement (Second) of Foreign Relations Law of the United States §§ 73, 74, 81].

Members of the California legislature are immune to civil process during, and for five days before and after, a legislative session [Cal Const, art IV, § 14; see *Harmer v. Superior Court* (1969) 275 CA2d 345, 348, 79 CR 855 ].

Members of the United States Congress are subject to civil process [see *Long v. Ansell* (1934) 293 US 76, 81-83, 55 S Ct 21, 79 L Ed 208 ].

**9.08[3][b] Witnesses in Criminal Proceedings Not Subject to Service of Process.** A person who comes into California in obedience to a subpoena directing the person to attend and testify in this state is not, while in California pursuant to the subpoena or order, subject to arrest or the service or process, civil or criminal, in connection with matters that arose before the person's entrance into this state under the subpoena [*Pen Code* § 1334.4].

A similar exemption exists in favor of a person passing through California while going to or returning from another state in obedience to a subpoena or order to attend and testify in that state [*Pen Code* § 1334.5].

**9.08[3][c] Extradited Criminal Defendants Not Subject to Service of Process for Specified Period.** A person brought into California on or after waiver of extradition based on a criminal charge is not subject to service of process in civil actions arising out of the same facts as the criminal proceedings for which the person is returned until the person has been convicted in the criminal proceeding or, if acquitted, until the person has had reasonable opportunity to return to the state from which the person was extradited [*Pen Code* § 1555].

**9.08[3][d] Other Parties and Witnesses Not Protected.** In light of California's long-arm statutes [*CCP* §§ 410.10, 413.10, 415.10], a person subject to the personal jurisdiction of the California courts may properly be served with process while under a subpoena, because the person could have been properly served at his or her place of domicile [ *Severn v. Adidas Sportschuhfabriken* (1973) 33 CA3d 754, 757-762, 109 CR 328 (foreign individual was served with California summons while attending trial in Florida)].

Likewise, nonresident parties may also be served with process while in California [ *Silverman v. Superior Court* (1988) 203 CA3d 145, 149, 249 CR 724 ].

**Exception:**

If this rule would result in the unfairness of an inconvenient forum, the defendant may seek to stay or dismiss the action [*CCP* § 410.30].



**9.08[3][e] National Banks Without a Branch Office in California Not Subject to Suit.** A national bank coming within the provisions of 12 USCS § 94 and having no branch in California is not subject to suit in California [see *Citizens & S. Nat'l Bank v. Bougas* (1977) 434 US 35, 38, 98 S Ct 88, 54 L Ed2d 218 ; *Kaiser Aetna v. Deal* (1978) 86 CA3d 896, 899, 150 CR 615 ].

A national bank may be subject to suit in California when it intentionally does an act elsewhere knowing that the effect of that act will be experienced in California [ *United Cal. Bank v. First Bank of Oak Park* (1979) 98 CA3d 439, 442-444, 159 CR 607 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil  
 ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil  
 ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm JurisdictionCivil  
 ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil  
 ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss



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Chapter 9 Motions to Quash and Other Objections to Personal Jurisdiction  
II. MAKING A MOTION TO QUASH

1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.09

**9.09 Burden of Proof on Motion to Quash.**

**9.09[1] Plaintiff Must Prove Jurisdictional Elements by Preponderance of Evidence.** The burden is on the plaintiff to establish the facts of jurisdiction [ *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 C4th 1054, 1062, 35 C4th 1054, 112 P3d 28 ] by a preponderance of the evidence [ *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 449, 58 CR2d 899, 926 P2d 1085 ].

The plaintiff must prove:

- The validity of service of process [ *Floveyor Int'l, Ltd. v. Superior Court* (1997) 59 CA4th 789, 793, 69 CR2d 457 ].
- That minimum contacts exist between the defendant and the forum state to justify imposition of personal jurisdiction [ *Taylor-Rush v. Multitech Corp.* (1990) 217 CA3d 103, 110, 265 CR 672 ].
- For specific jurisdiction rather than general jurisdiction, the controversy is related to or arises out of the defendant's contacts with the forum [ *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 C4th 1054, 1062, 35 C4th 1054, 112 P3d 28 ].



**Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**9.09[2] Once Plaintiff Shows Minimum Contacts, Burden Shifts to Defendant to Show Jurisdiction Unreasonable.** Once the plaintiff has established facts showing minimum contacts (*e.g.*, that the defendant has purposely directed activity at forum residents), the burden then shifts to the defendant to supply facts demonstrating that the assumption of jurisdiction would be unreasonable [ *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 C4th 1054, 1062, 35 C4th 1054, 112 P3d 28 ; *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 449, 58 CR2d 899, 926 P2d 1085 ].

### Cross Reference:

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

### **9.09[3] Evidence Must Consist of Specific Evidentiary Facts.**

**9.09[3][a] Evidence Must Be Supported by Affidavit or Declaration.** The defendant serves and files affidavits or declarations supporting the motion, and the plaintiff ordinarily serves and files opposing affidavits or declarations, setting forth the facts establishing jurisdiction [see *CCP* §§ 2009, 2015.5].

**9.09[3][b] Vague Assertions of Ultimate Facts Are Insufficient.** Declarations are insufficient to support the assertions for which they are offered if they consist primarily of vague assertions of ultimate facts rather than specific evidentiary facts permitting the court to form an independent conclusion on the issue [ *Jewish Def. Org., Inc. v. Superior Court* (1999) 72 CA4th 1045, 1055, 85 CR2d 611 ].

**9.09[3][c] Verified Complaint May Serve As Counter-Declaration.** A verified complaint may serve as a counter-affidavit or counter-declaration, if the complaint alleges the essential probative facts establishing jurisdiction [ *Arnesen v. Raymond Lee Org., Inc.* (1973) 31 CA3d 991, 995, 107 CR 744 ; see *Crea v. Busby* (1996) 48 CA4th 509, 514, 55 CR2d 513 ].

### **Exception:**

A complaint that alleges only ultimate facts, which is normally the case, and that omits any allegation of probative facts may not be used as a substitute for a counter-affidavit or counter-declaration [ *Thomas J. Palmer, Inc. v. Turkiye Is Bankasi A.S.* (1980) 105 CA3d 135, 148-149, 164 CR 181 ].



### **Strategic Point--Plaintiff:**

It is almost always better practice to draft and file a new declaration explaining the factual basis for jurisdiction than to rely on a verified complaint, where the issue is likely to have been treated in a more cursory fashion, and which might not contain all the facts to make the showing necessary to defeat the motion.

**9.09[3][d] Unverified Complaint Is Insufficient.** Allegations in an unverified complaint may not be used to establish jurisdiction [ *Jewish Def. Org., Inc. v. Superior Court* (1999) 72 CA4th 1045, 1055, 85 CR2d 611 ; *Goehring v. Superior Court* (1998) 62 CA4th 894, 908-909, 73 CR2d 105 ].

**9.09[4] Plaintiff May Conduct Discovery for Motion.** The plaintiff generally has the right to conduct discovery with regard to the issue of jurisdiction to develop the facts necessary to sustain the burden of proof [ *Magnecomp Corp. v. Athene Co., Ltd.* (1989) 209 CA3d 526, 533, 257 CR 278 ; *Goehring v. Superior Court* (1998) 62 CA4th 894, 911, 73 CR2d 105 ].



### **Strategic Point:**

While it is clear that the plaintiff is entitled to conduct discovery, there are issues as to how much discovery the court will allow. Because more discovery usually makes the plaintiff's case stronger, the plaintiff will want to conduct, subject to economic constraints, considerable discovery, while the defendant will argue that it should not be put through the burden of extensive discovery when the point of the jurisdictional defense is that it would be unfair for the court to exercise jurisdiction over the out of state or foreign party. Often there will be a motion for a protective order and court-imposed limits

regarding the extent of discovery that the court will allow.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil  
ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss



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**9.10 Contents of Motion to Quash.**

A motion to quash includes the following elements:

- A notice of motion to quash service of summons for lack of personal jurisdiction [*see 9.51 for form*].
- Supporting declarations [*see 9.52 for form*].
- Written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing [*see Ch. 26, Law and Motion Procedure*].
- Supporting memorandum.
- Proof of service.
- Proposed order, if desired [*see 9.53 for form*].

➡ **Cross Reference:**

Examples of memoranda in support of a motion to quash, see California Points and Authorities, Ch. 132, Jurisdiction: Personal Jurisdiction and Inconvenient Forum (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Dismiss



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II. MAKING A MOTION TO QUASH

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### 9.11 Serving and Filing Papers.

Serve and file the papers by:

- Serving a conformed copy of the notice of motion, proof of service, and accompanying papers on the other party's attorney, or on the other party if he or she has no attorney in accordance with *CCP* §§ 1005, 1010.6, 1013, 1015 and *Cal Rules Ct, Rules 3.1103, 3.1300* at least 16 court days before the hearing date.
- Delivering the originals of the notice of motion and accompanying papers to the court clerk's office for filing at least 16 court days (but not more than 30 days), plus any applicable additional period, before the hearing and pay the required fee [*CCP* §§ 418.10(b), 1005]. If not filed with the original papers, deliver the proof of service of the moving papers for filing no later than five court days before the time appointed for the hearing [*see Cal Rules Ct, Rule 3.1300*].
- If there is a statement regarding oral testimony, file it no later than three days before the hearing; and if it is filed less than five court days before the hearing, serve a conformed copy of it on the opposing party in a manner to assure delivery no later than two days before the hearing [*see Cal Rules Ct, Rule 3.1306(b)*].



**Cross Reference:**

Ch. 27, Service of Papers.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Dismiss



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### **9.12 Responding to Opposing Party's Papers and Request for Discovery.**

When responding to opposition's papers:

- Prepare any reply declarations and any reply memorandum in response to any counter-declarations and opposing memorandum filed by the opposing party.
- Serve a conformed copy of each declaration and reply memorandum on opposing counsel and file the originals at least five court days before the hearing [*CCP* §§ 1005, 1015; *Cal Rules Ct*, Rule 3.1300(a)].



#### **Strategic Point--Defendant:**

While any party is permitted to request discovery to help determine a motion [*CCP* § 1017(a)], inspect the scope of the plaintiff's discovery requests to ensure they are relevant to the motion to quash and not an attempt to explore discovery avenues prior to the full exchange of information later in the action. If necessary, file a motion to quash discovery or move for a protective order.

#### **Judge's Perspective:**

Motions that challenge jurisdictional issues frequently give rise to requests for discovery by the plaintiff. Counsel who wish to request jurisdictional discovery must be circumspect in the requests concerning not only the types of discovery devices to be utilized but also the issues to be encompassed in the discovery. For purposes of the motion, counsel would be well advised to limit the nature of the discovery to actual jurisdictional questions and nothing else.



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### 9.13 Order and Notice of Ruling.

**9.13[1] Prevailing Party Prepares Order.** When the court grants the motion to quash service of summons or to stay or dismiss the action, counsel for the defendant ordinarily prepares the formal order for the judge's signature. When the court denies the motion to quash service of summons or to stay or dismiss the action, counsel for the plaintiff usually prepares the formal order for the judge's signature.

**9.13[2] Prevailing Party Must Follow Notice Requirements.** The prevailing party must give to all other parties or their attorneys [see *CCP § 1015*] the notice required by *CCP § 1019.5(a)* in the manner provided in *CCP §§ 1010-1020*, unless the court otherwise orders or unless notice is waived by all parties in open court and is entered in the minutes [*CCP § 1019.5(a)*]. The prevailing party must, pursuant to *CCP § 1019.5*:

- Prepare a notice of the court's order and a proof of service;
- Serve the ruling on opposing counsel; and,
- File the original of the notice and proof of service with the court.



**Cross Reference:**

Ch. 26, Law and Motion Procedure.

**9.13[3] Defendant May Be Entitled to Contractual Costs.** Where the result of a grant of a motion to quash for lack of personal jurisdiction is that the complaint was dismissed in its entirety and the plaintiff obtained nothing, the defendant may be entitled to an award of contractual costs as the prevailing party under *CC § 1717* and *CCP § 1032* [see *Profit Concepts Mgmt., Inc. v. Griffith* (2008) 162 CA4th 950, 955-956, 76 CR3d 396 ].



**Cross References:**

Costs, see Matthew Bender(R) Practice Guide: California Trial and Posttrial Civil Procedure, Ch. 24, Costs.



Obtaining award of attorney fees, see Matthew Bender(R) Practice Guide: California Trial and Posttrial Civil Procedure, Ch. 25A, Recovering Attorney's Fees From Opposing Party.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss



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**9.14 CHECKLIST: Opposing a Motion to Quash.**

☐ Consider alternatives to opposing motion:

☐ If the motion is timely and its supporting papers establish a solid ground for relief, consider whether to stipulate that the motion be granted to avoid sanctions for opposing a motion in bad faith.

☐ If the motion is timely and its supporting papers establish an arguable ground for relief, consider time and expense in opposing motion and options for filing action in another jurisdiction.

**Authority:**

*CCP §§ 283, 2009, 2015.5*

**Discussion:**

See 9.15

☐ Determine if defendant has waived objections to personal jurisdiction:

☐ Failure to bring timely motion.

☐ Failure to file motion at time of answer, demurrer, or motion to strike.

☐ General appearance.

**Authority:**

*CCP § 418.10*

**Discussion:**

See 9.17[1]



Evaluate relevant timing issues:

- ☐ Motion must be filed and served on or before the last day of the defendant's time to plead; or within any further time the court allowed.
- ☐ Hearing date must be within 30 days of filing motion.
- ☐ Opposition papers must be filed and served at least 9 court days before hearing.



Evaluate need for extensions:

- ☐ Consider whether to request an extension of time to file opposing papers due to:
  - ☐ Necessity of discovery in regard to the issue of jurisdiction to develop the facts necessary to sustain the burden of proof.
  - ☐ Any other circumstance that would require extra time to respond to motion.
- ☐ Consider whether to extend time for pleading by:
  - ☐ Application to court for extension of time to plead, and whether to make application ex parte.
  - ☐ Stipulation between parties.

**Authority:**

*CCP § 418.10(b)*

**Discussion:**

See 9.16



Evaluate grounds for proving personal jurisdiction:

- ☐ No defects in summons and service of summons:
  - ☐ Summons served.

- ☐ Summons not defective.
- ☐ Service of summons properly made.
- ☐ Substitute service complied with statutory requirements.
- ☐ Summons served is one authorized for civil actions.
- ☐ Specific basis for personal jurisdiction under California's long-arm statute:
  - ☐ Over an individual.
  - ☐ Over a general partnership and the partners.
  - ☐ Over a domestic corporation.
  - ☐ Over a foreign corporation.
- ☐ Due process requirements have been satisfied:
  - ☐ Defendant is a resident or person served in California.
  - ☐ Defendant has been afforded reasonable notice and an opportunity to be heard.
  - ☐ Nonresident defendant has sufficient minimum contacts with California:
    - ☐ Consider extent of physical and/or nonphysical entry into California.
    - ☐ Apply test of fair play and substantial justice.
    - ☐ Consider effect on reasonableness test if defendant is a foreign national.
    - ☐ If minimum contacts are not adequate for general jurisdiction, is action related to available grounds for exercise of limited jurisdiction.
- ☐ Defendant is not immune to service or suit:
  - ☐ Defendant is not a head of foreign missions or their staffs having diplomatic rank.
  - ☐ Defendant is not a California state legislator and service not during, and for five days before and

after, a legislative session.

☐ Witnesses is not in criminal proceedings.

☐ Defendant is not extradited and acquitted.

**Authority:**

*CCP §§ 418.10, 418.50 22 USCS § 254d, Cal Const, art IV, § 14*

**Discussion:**

*See 9.17[2]-[11]*

☐ Prepare declarations with specific evidentiary facts.

☐ Identify proper declarant.

☐ Verified complaint may serve as counter-declaration.

**Authority:**

*CCP §§ 2009, 2015.5*

**Discussion:**

*See 9.18*

☐ Prepare opposition papers:

☐ Supporting counter-declarations.

☐ Written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing.

☐ Opposing memorandum.

☐ Proof of service.

☐ Proposed order.

☐ File and serve response:

☐ Follow standard noticed motion procedure.

**Authority:**

*CCP §§ 418.10(b), 1005(b)*

**Discussion:**

See 9.20, 9.21

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.46

- ☐ Prevailing party submits order conforming to judge's ruling.
- ☐ Prevailing party notices ruling.

**Authority:**

*CCP § 1019.5; Cal Rules Ct, Rules 3.1304 et seq.*

**Discussion:**

See 9.22



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**9.15 Options and Strategies for Opposing Party.**

**9.15[1] Consider Whether to Oppose Motion.** If the facts of the case show that the defendant has a high probability of succeeding on the motion to quash service of summons for lack of personal jurisdiction, consider whether to stipulate that the motion be granted [see CCP § 283]. Sanctions may be imposed for bad-faith actions or tactics, which include both the making and opposing of motions [see CCP § 128.6].



**Warning:**

Defendant does not forfeit a collateral right to attorney fees by choosing to assert the right to challenge the court's in personam jurisdiction [ *Shisler v. Sanfer Sports Cars, Inc. (2008) 167 CA4th 1, 7, 83 CR3d 771* (assessing attorney fees under Florida statute on California plaintiff who lost motion to quash)].



**Strategic Point--Plaintiff:**

If the case involves a suit against a U.S. subsidiary and foreign parent, it might make sense to investigate to try to determine the subsidiary's ability to satisfy any likely judgment and to consider dismissing the parent with prejudice while preserving the option to amend a judgment to add the parent under an alter ego or *Abbey of the Chimes* argument post-judgment. In *Mirabito v. San Francisco Dairy*, a judgment was amended to add the parent corporation well after there had been judgment entered against the subsidiary and, in fact, after the subsidiary had appealed the case to the California Supreme Court. The Court of Appeal affirmed the amendment of the judgment [ *Mirabito v. San Francisco Dairy (1935) 8 CA2d 54* ].

**9.15[2] Consider How Other Pleadings May Defeat Motion to Quash.** CCP § 418.10(e) allows a defendant or cross-defendant making a 418.10 motion to simultaneously answer, demur, or move to strike the complaint or cross-complaint. Review these pleadings to determine if the defendant has made factual admissions in them that may be used to defeat the motion to quash.

**9.15[3] Consider Stipulation or Motion to Extend Time to File Opposition.** A plaintiff may want to consider a

stipulation or motion extending the time to file opposing papers if the filing deadline is close, or to conduct discovery to uncover additional facts to establish personal jurisdiction.



**Cross Reference:**

Extending time, see *9.06[2]*.





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**9.16 Opposition Papers Must Be Filed and Served at Least Nine Court Days Before Hearing.**

Papers opposing a motion to quash service of summons must be served and filed at least nine court days before the hearing [see *CCP* §§ 418.10(b), 1005(a)(4), (b); *Cal Rules Ct*, Rule 3.1300(a)].

➡ **Cross Reference:**

Discussion of motion time requirements, see 9.06.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeOpposing Memoranda



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## **9.17 Grounds for Proving Personal Jurisdiction Over Defendant.**

### **9.17[1] Defendant Can Waive Challenge to Court's Personal Jurisdiction.**

**9.17[1][a] Failure to Bring Timely Motion to Quash Waives Lack of Personal Jurisdiction Defense.** A notice of motion to quash service of summons on the ground of lack of jurisdiction of the court over the defendant must be served and filed on or before the last day of the time to plead, or within any further time that the court may for good cause allow [*CCP* § 418.10(a)].

**9.17[1][b] Failure to File Motion to Quash at Time of Filing Demurrer or Motion to Strike Waives Lack of Personal Jurisdiction and Related Defenses.** Failure to make a motion under *CCP* § 418.10 at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in serving summons [*CCP* § 418.10(e)(3)].

**9.17[1][c] Defendant Waives Personal Jurisdiction Objection by General Appearance.** A general appearance in an action waives any objection to personal jurisdiction, and the defendant submits to the personal jurisdiction of the court [see, e.g., *Titus v. Superior Court* (1972) 23 CA3d 792, 800-801, 100 CR 477 ; *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1036-1037, 25 CR2d 539, 863 P2d 784 ].



#### **Cross Reference:**

Discussion of general appearance waiving personal jurisdiction and other objections, see 9.07.

**9.17[2] Court Has Jurisdiction Over Defendant From Time Summons Served.** Except as otherwise provided by statute, the court in which the action is pending has jurisdiction over a party from the time the summons is properly served [*CCP* § 410.50(a)].

The plaintiff must prove the validity of summons and service [ *Floveyor Int'l, Ltd. v. Superior Court* (1997) 59 CA4th 789, 793, 69 CR2d 457 ]. Facts to be proven include:

- Summons was served.

- Summons was proper and not defective.
- Service of summons conformed to statutory requirements.
- Substitute service conformed to statutory requirements.
- Summons was one authorized for civil actions.



#### Cross References:

Discussion of defective service of process to defeat personal jurisdiction, see 9.08[1].

Discussion of service of process, see *Ch. 8, Service of Summons*, 8.07 et seq.

### 9.17[3] Defendant Is Within the Reach of California's Long-Arm Statute.

**9.17[3][a] Long-Arm Statute Confers Broadest Possible Jurisdiction.** California's Long-Arm Statute states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States" [*CCP § 410.10*]. This statute intends to confer on California courts the broadest possible personal jurisdiction, limited only by constitutional considerations [ *Sibley v. Superior Court* (1976) 16 C3d 442, 445, 128 CR 34, 546 P2d 322 ].

**9.17[3][b] Judicial Council Comments to Long-Arm Statute Elaborate Bases for Personal Jurisdiction.** The Judicial Council Comment that was issued when *CCP § 410.10* was promulgated includes multiple bases for establishing personal jurisdiction [see *Bases of Judicial Jurisdiction--1969 Report of the Judicial Council of California to the Governor and the Legislature*]. The Comment is examined below. The complete text of the Comment follows *CCP § 410.10* in Deering's California Code Annotated.



#### Strategic Point--Plaintiff:

When opposing a motion to quash, the plaintiff needs to review the Judicial Council Comment discussed below and determine if any of the bases for jurisdiction are present, and to assert the reasons why certain bases are applicable or constitutional under the due process inquiry for minimum contacts.

### 9.17[4] Long-Arm Statute Provides Personal Jurisdiction Over Individuals.

**9.17[4][a] Voluntary Presence in State Confers Jurisdiction.** A state has power to exercise judicial jurisdiction over an individual who is physically present within its territory, whether permanently or temporarily, if at that time the individual is properly served with process [see *CCP § 410.10* Judicial Council Comment; see also *Silverman v. Superior Court* (1988) 203 CA3d 145, 150, 249 CR 724 ].

The presence in the state must usually be voluntary, and the court may decline to exercise jurisdiction if force or fraud was used to effect the presence [see *Guardianship of Smith* (1957) 147 CA2d 686, 691, 306 P2d 86 ].



#### Warning:

Temporary presence in the state when summons is served may not be sufficient in and of itself to give the forum state personal jurisdiction over the person of a nonresident defendant for all causes of action [see *Burnham v. Superior Court* (1990) 495 US 604, 621, 110 S Ct 2105, 109 L Ed2d 631 (only four justices held that presence alone is a sufficient contact with state to support exercise of personal jurisdiction over nonresident defendant by California court in any cause of action)].

 **Cross Reference:**

Discussion of immunity from judicial jurisdiction while present in the state, see 9.08[3].

**9.17[4][b] Person Domiciled in California Is Subject to Jurisdiction.** A state may exercise judicial jurisdiction over an individual who is domiciled in the state but may be absent from the state. A person's domicile is usually the place where the person has his or her home, and no person has more than one domicile at a time [see CCP § 410.10 Judicial Council Comment; see also *Milliken v. Meyer* (1940) 132 A.L.R. 1357, 311 US 457, 462-464, 61 S Ct 339, 85 L Ed 278 ; *Allen v. Superior Court* (1953) 41 C2d 306, 310-311, 259 P2d 905 ].

**9.17[4][c] California Resident Is Subject to Jurisdiction.** A state may exercise judicial jurisdiction over an individual who is a resident of the state unless the individual's relationship to the state is so attenuated as to make the exercise of jurisdiction unreasonable [see CCP § 410.10 Judicial Council Comment; but see *Muckle v. Superior Court* (2002) 102 CA4th 218, 229-230, 125 CR2d 303 (past residency found insufficient for personal jurisdiction)].

**9.17[4][d] Citizenship May Confer Jurisdiction.** A state may exercise judicial jurisdiction over an individual who is a citizen of the state unless the individual's relationship to the state is so attenuated as to make the exercise of jurisdiction unreasonable [see CCP § 410.10 Judicial Council Comment].

**9.17[4][e] Party Who Consents Is Subject to Jurisdiction.** A state may exercise judicial jurisdiction over a competent individual who has consented either by words or conduct [see CCP § 410.10 Judicial Council Comment; see *Nat'l Equip. Rental v. Szukhent* (1964) 375 US 311, 316-316, 84 S Ct 411, 11 L Ed2d 354 ].

**Exception:**

A party's consent to the exercise of state jurisdiction may not enlarge the competency of the court to include a type of case that a court is not authorized to hear [see CCP § 410.10 Judicial Council Comment].

**9.17[4][f] General Appearance Confers Jurisdiction.** A state may exercise judicial jurisdiction over an individual who has entered a general appearance as a defendant in the action [see CCP § 410.10 Judicial Council Comment].

 **Cross Reference:**

Discussion of general appearance waiving personal jurisdiction and other objections, see 9.07.

**9.17[4][g] Doing Business in State As Individual Confers Jurisdiction.** A state may exercise judicial jurisdiction over an individual who (1) does business in the state with respect to causes of action arising out of that business; (2) did business in the state, before the action was brought, with respect to causes of action arising out of that business; or (3) does business in the state with respect to causes of action that do not arise from that business, if the business is so continuous and substantial as to make the exercise of jurisdiction reasonable [see CCP § 410.10 Judicial Council Comment].

 **Cross Reference:**

Discussion of minimum contacts and reasonableness tests, see 9.08[2][d]-[g].

**9.17[4][h] Doing Act in State As Individual Confers Jurisdiction.** A state may exercise judicial jurisdiction over an individual who has done, or has caused to be done, an act in the state (1) with respect to any cause of action in tort arising from the act; and (2) with respect to any cause of action not in tort arising from the act unless the nature of the act and of the individual's relationship to the state and to other states make the exercise of jurisdiction unreasonable [see CCP § 410.10 Judicial Council Comment; see also *Kaiser Aetna v. Deal* (1978) 86 CA3d 896, 900, 150 CR 615 (tort action); *Floyd J. Harkness Co. v. Amezcua* (1976) 60 CA3d 687, 691, 131 CR 667 ].

 **Cross Reference:**

Discussion of minimum contacts and reasonableness tests, see 9.08[2][d]-[g].

**9.17[4][i] Causing Effect in State by Act Done Elsewhere As Individual Confers Jurisdiction.** A state may exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects, unless the nature of the effects and of the individual's relationship to the state makes the exercise of jurisdiction unreasonable [see CCP § 410.10 Judicial Council Comment; see *Calder v. Jones* (1984) 465 US 783, 788-790, *aff'd* *Jones v. Calder* (1982), 138 CA3d 128, 132, 187 CR 825; *Jewish Def. Org., Inc. v. Superior Court* (1999) 72 CA4th 1045, 1057, 85 CR2d 611 ].

When the act was done with the intention of causing effects in the state, the state may exercise the same judicial jurisdiction over the defendant as to any cause of action arising from the effects as the state could have exercised had the effects resulted from an act done within its territory [see CCP § 410.10 Judicial Council Comment; see also *Kaiser Aetna v. Deal* (1978) 86 CA3d 896, 904, 150 CR 615 ].

When the act was not done with the intention of causing effects in the state and could not reasonably have been expected to do so, the state may not exercise jurisdiction over the defendant unless the defendant is found to have an extensive relationship with the state [see *Kaiser Aetna v. Deal* (1978) 86 CA3d 896, 904, 150 CR 615; see also CCP § 410.10 Judicial Council Comment].

When the act, although not done with the intention of causing effects in the state, could reasonably have been expected to do so, the mere causing of an effect in the forum is not sufficient, without more, to afford a constitutional basis for jurisdiction [ *Mansour v. Superior Court* (1995) 38 CA4th 1750, 1761, 46 CR2d 191; *Kaiser Aetna v. Deal* (1978) 86 CA3d 896 ]. The forum state's exercise of personal jurisdiction depends on several factors, including the extent of the relationship of the state to the defendant and to the plaintiff, the nature and quality of the effects resulting from the act, and the degree of inconvenience that would result to the defendant from being forced to stand suit in the state on the particular cause of action. Personal jurisdiction based on a defendant's out-of-state acts requires more than the mere foreseeability that the tortious conduct might have an effect in California [ *Pavlovich v. Superior Court* (2002) 29 C4 262, 277 ].

 **Cross Reference:**

Discussion of minimum contacts and reasonableness tests, see 9.08[2][d]-[g].

**9.17[4][j] Individual Ownership, Use, or Possession of Thing in State Confers Jurisdiction.** A state may exercise judicial jurisdiction over an individual who has owned, used, or possessed (1) an immovable thing in the state with respect to any cause of action arising from the thing while it was owned, used, or possessed by the individual or (2) a chattel in the state with respect to any cause of action arising from the chattel while it was in the state and was so, owned, used, or possessed, unless the nature of the chattel and of the individual's relationship to the state makes the exercise of jurisdiction unreasonable [see CCP § 410.10 Judicial Council Comment; see *Ind. Ins. Co. v. Pettigrew* (1981) 115 CA3d 862, 864-868, 171 CR 770 ].

 **Cross Reference:**

Discussion of minimum contacts and reasonableness tests, see 9.08[2][d]-[g].

**9.17[4][k] Other Individual Relationships May Confer Jurisdiction.** A state may exercise judicial jurisdiction over an individual in other situations, not specifically enumerated, when the individual has such a relationship to the state that it is reasonable for the state to exercise jurisdiction [Restatement (Second) of Conflict of Laws, § 39 (1971); see CCP § 410.10 Judicial Council Comment].

**9.17[5] Long-Arm Statute Provides Personal Jurisdiction Over General Partnership and Partners.**

Jurisdiction over a partnership does not necessarily permit a court to assume jurisdiction over the individual partners; even though individual partners are jointly and severally liable for torts of the partnership, jurisdiction over each defendant must be established individually. A California court has jurisdiction over only those individual partners who personally established minimum contacts with California [ *Goehring v. Superior Court* (1998) 62 CA4th 894, 904-905, 73 CR2d 105 ].



#### **Cross Reference:**

Discussion of minimum contacts and reasonableness tests, see 9.08[2][d]-[g].

**9.17[6] Long-Arm Statute Provides Personal Jurisdiction Over Domestic Corporations.** A state may exercise judicial jurisdiction over a domestic corporation [Restatement (Second) of Conflict of Laws, § 41 (1971)], even though the corporation does no business in the state. Incorporation in the state gives the state a basis for exercising judicial jurisdiction over the corporation in any action that may be brought against the corporation in the state [see CCP § 410.10 Judicial Council Comment].

#### **9.17[7] Long-Arm Statute Provides Personal Jurisdiction Over Foreign Corporations.**

**9.17[7][a] Consent Confers Jurisdiction.** A state may exercise judicial jurisdiction over a foreign corporation that has consented to the exercise of jurisdiction [see CCP § 410.10 Judicial Council Comment; see, e.g., CCP § 410.40 (providing for jurisdiction over a foreign corporation or nonresident person based on consent to jurisdiction as expressed in specified contracts)].

**9.17[7][b] Appointment of Agent for Service or Jurisdiction Over Agent or Representative May Confer Jurisdiction Over Principal-Foreign Corporation.** A state may exercise judicial jurisdiction over a foreign corporation that has authorized an agent or public official to accept service of process in actions brought against the corporation in the state as well as to all causes of action to which the authority of the agent or official to accept service extends [see CCP § 410.10 Judicial Council Comment].

The Courts of Appeal have utilized several tests for determining when a parent corporation is subject to personal jurisdiction due to activities of a subsidiary in California. If it were up to the Second District, Division Three Court of Appeals, the only test of whether a parent company purposefully avails itself of forum benefits through the activities of its subsidiary, as required to justify the exercise of specific personal jurisdiction, would be if and only if the parent deliberately directs the subsidiary's activities in, or having a substantial connection with, the forum state [ *HealthMarkets, Inc. v. Superior Court* (2009) 171 CA4th 1160, 1169, 90 CR3d 527 (finding less than minimum contacts)]. But as this court noted, there are at least three other tests used by other Courts of Appeal to find minimum contacts by a parent corporation through the activities of its subsidiary: subsidiary as agent, alter ego, and representative services [see *HealthMarkets, Inc. v. Superior Court* (2009) 171 CA4th 1160, 1166, 90 CR3d 527 ].

While an ordinary domestic subsidiary formed by a parent foreign corporation does not confer jurisdiction over a foreign corporation, agency principles will confer general jurisdiction under the long-arm statute over a parent foreign corporation that exercises control over the day-to-day operations of the domestic subsidiary whose actions are the subject of suit [ *Dorel Inds., Inc. v. Superior Court* (2005) 134 CA4th 1267, 1275-1277, 36 CR3d 742 (no jurisdiction because control was not extensive enough)].

On the other hand, an out-of-state corporation may be subject to specific jurisdiction if they have minimum contacts within the state even while operating through a subsidiary [ *Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 CA4th 969, 982, 81 CR3d 535 ].



#### **Strategic Point:**

The court need not decide whether the parent corporation is the alter ego of its subsidiary. Thus, a parent corporation's purposefully causing its subsidiary to engage in forum contacts may constitute purposeful availment by the parent even if the separateness of the corporations is maintained and alter ego is not established [ *Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 CA4th 969, 982, 81 CR3d 535 ].

The representative services doctrine, a variant of agency principles, confers general jurisdiction under the long-arm statute over a parent foreign corporation that uses its subsidiary in the forum state as its representative to provide services beyond mere solicitation and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the foreign corporation's own officials would undertake to perform substantially similar services [ *Dorel Inds., Inc. v. Superior Court* (2005) 134 CA4th 1267, 1277-1280, 36 CR3d 742 ]. Accordingly, the control of the subsidiary must be so pervasive and continual that the local subsidiary functions as an agent or instrumentality of the parent corporation, despite the maintenance of separate corporate structures [ *Aquila, Inc. v. Superior Court* (2007) 148 CA4th 556, 577, 55 CR3d 803 ].

**Example:**

Where parent corporation imported and sold products manufactured by subsidiary, which sold its own products in California, foreign corporation was subject to general jurisdiction of California courts under representative services doctrine, because the evidence showed that the subsidiary manufactured products for parent that parent had previously manufactured itself for sale to non-California customers and that subsidiary performed a function that was compatible with and assisted parent in the pursuit of parent's own business, even though parent never sold its products in California before acquiring subsidiary [ *Dorel Inds., Inc. v. Superior Court* (2005) 134 CA4th 1267, 1277-1280, 36 CR3d 742 ].

**Distinguish:**

The representative services doctrine does not support general jurisdiction over a subsidiary held by a true holding company, the business of which is not operations but passive investment in a subsidiary company [ *In re Automobile Antitrust Cases I & II* (2005) 135 CA4th 100, 121, 37 CR3d 258 ].

**9.17[7][c] Appearance Confers Jurisdiction.** A state may exercise judicial jurisdiction over a foreign corporation that enters an appearance as defendant in the action [see CCP § 410.10 Judicial Council Comment; Restatement (Second) of Conflict of Laws, § 45].

**9.17[7][d] Doing Business in State As Corporation Confers Jurisdiction.** A state may exercise judicial jurisdiction over a foreign corporation that does business in the state with respect to causes of action arising from the business done in the state, and with respect to causes of action that do not arise from the business done in the state if the business is so continuous and substantial as to make it reasonable for the state to exercise jurisdiction [see CCP § 410.10 Judicial Council Comment; Restatement (Second) of Conflict of Laws § 47].

A state may also exercise judicial jurisdiction over a foreign corporation that did business in the state before the action is brought, with respect to causes of action arising from the business done in the state [see CCP § 410.10 Judicial Council Comment; Restatement (Second) of Conflict of Laws § 48].

 **Cross Reference:**

Discussion of minimum contacts and reasonableness tests, see 9.08[2][d]-[g].

**9.17[7][e] Doing Act in State As Corporation Confers Jurisdiction.** A state may exercise judicial jurisdiction over a foreign corporation that has done, or has caused to be done, an act in the state with respect to any cause of action in tort arising from the act, and any cause of action not in tort arising from the act, unless the nature of the act and of the corporation's relationship to the state makes the exercise of jurisdiction unreasonable [see CCP § 410.10 Judicial Council Comment; Restatement (Second) of Conflict of Laws § 49].



**9.17[7][f] Causing Effect in State by Act Done Elsewhere As Corporation Confers Jurisdiction.** A state may exercise judicial jurisdiction over a foreign corporation that causes effects in the state by an act done elsewhere with respect to any cause of action arising from the effects, unless the nature of the effects and of the corporation's relationship to the state makes the exercise of jurisdiction unreasonable [see *CCP § 410.10* Judicial Council Comment; Restatement (Second) of Conflict of Laws § 50; *Secrest Mach. Corp. v. Superior Court* (1983) 33 C3d 664, 669, 190 CR 175, 660 P2d 399 ].

**9.17[7][g] Corporate Ownership, Use, or Possession of Tangible Thing in State Confers Jurisdiction.** A state may exercise judicial jurisdiction over a foreign corporation that has owned, used, or possessed an immovable thing or a chattel in the state, with respect to any cause of action arising from the immovable thing while it was owned, used, or possessed by the corporation or arising from the chattel while it was in the state and was so owned, used, or possessed, unless the nature of the chattel and of the corporation's relationship to the state make the exercise of jurisdiction unreasonable [*CCP § 410.10* Judicial Council Comment; Restatement (Second) of Conflict of Laws § 51].

**9.17[7][h] Other Corporate Relationships May Confer Jurisdiction.** A state may exercise judicial jurisdiction over a foreign corporation in other situations, not specifically enumerated, if the foreign corporation has such a relationship to the state that it is reasonable for the state to exercise jurisdiction [see *CCP § 410.10* Judicial Council Comment; Restatement (Second) of Conflict of Laws § 52].

**9.17[8] Long-Arm Statute Provides Personal Jurisdiction Over Plaintiff.** A state may exercise judicial jurisdiction over an individual or a foreign corporation who brings an action in the state, in that action and in any other action that the defendant may bring against the individual or corporation by way of cross-complaint to the extent that the local law of the state provides at the bringing of the action [see *CCP §§ 410.10, 428.80* Judicial Council Comment; Restatement (Second) of Conflict of Laws §§ 34, 46].

**9.17[9] Contractual Provisions May Provide Personal Jurisdiction.** Parties may agree contractually, in advance, on the forum for resolving disputes between them, assuming that jurisdiction in that forum would, in any case, be proper. Courts generally give effect to forum-selection clauses, unless the clauses are unfair or unreasonable [ *The Bremen et al. v. Zapata Off-Shore Co.* (1972) 407 US 1, 15, 92 S Ct 1907, 32 L Ed2d 513 ; *Smith Valentino & Smith, Inc. v. Superior Court* (1976) 17 C3d 491, 495-496, 131 CR 374, 551 P2d 1206 ; *Hunt v. Superior Court* (2000) 81 CA4th 901, 908, 97 CR2d 215 ].

#### **Cross Reference:**

Discussion of forum selection clauses, see 9.27.

**9.17[10] Court May Exercise Personal Jurisdiction When Defendant Has Minimum Contacts With State and Jurisdiction Is Reasonable.** For a state to exercise personal jurisdiction over a nonresident defendant, the defendant must have certain minimum contacts with the forum state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice [ *International Shoe Co. v. Washington* (1945) 161 A.L.R. 1057, 326 US 310, 316, 66 S Ct 154, 90 L Ed 95 see *Jewish Def. Org. v. Superior Court* (1999) 72 CA4th 1045, 1054, 85 CR2d 611 ].

#### **Cross Reference:**

Discussion of minimum contacts and reasonableness tests, see 9.08[2][d]-[g].

**9.17[11] Defendant Who Is Not Immune From Service Is Subject to Personal Jurisdiction.** Certain defendants may assert immunity from service of summons to defeat personal jurisdiction. These defendants include:

- Diplomats, legislators, and members of congress.



- Witnesses in criminal proceedings.
- Extradited defendants.
- Other parties and witnesses.
- National banks.



#### **Cross Reference:**

Discussion of immunity from service, see 9.08[3].

**9.17[12] Prior Judgment Retains Personal Jurisdiction for Enforcement Action.** Courts have continuing personal jurisdiction over a judgment debtor to renew the judgment via the statutory procedure [ *Goldman v. Simpson* (2008) 160 CA4th 255, 262, 72 CR3d 729] . The passage of time between an original California litigation and a subsequent revival action, during which the nonresident defendant has had no additional contacts with the State of California, does not defeat limited or specific personal jurisdiction as concerns the enforcement of the original judgment [ *The Cadle Company II, Inc. v. Fiscus* (2008) 163 CA4th 1232, 1241, 78 CR3d 238] .

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil  
 ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsDoing BusinessCivil  
 ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsDomicileCivil  
 ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm JurisdictionCivil  
 ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum Contacts



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.18*

### **9.18 Burden of Proof.**

The burden is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence [ *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 449, 58 CR2d 899, 926 P2d 1085 ; *Serafini v. Superior Court* (1998) 68 CA4th 70, 77, 80 CR2d 159 ; *Magnecomp Corp. v. Athene Co.* (1989) 209 CA3d 526, 533, 257 CR 278 ; *Felix v. Bomoro Kommanditgesellschaft* (1987) 196 CA3d 106, 110, 241 CR 670 ].

Topics to be reviewed are:

- Plaintiff must prove service of process.
- Plaintiff must prove minimum contacts exist between defendant and California.
- Evidence must consist of specific evidentiary facts:
  - ☐ Vague assertions of ultimate facts are insufficient.
  - ☐ Verified complaint may serve as a counter-declaration.
  - ☐ Unverified complaint is insufficient.
- Plaintiff may conduct discovery before court issues ruling.
- Once plaintiff establishes facts supporting burden of proof by a preponderance, burden shifts to the defendant to supply facts demonstrating that the assumption of jurisdiction would be unreasonable.



#### **Cross Reference:**

Discussion of burden of proof, see 9.09.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallenges



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.19*

### 9.19 Discovery for Purposes of Motion.

The plaintiff generally has the right to conduct discovery with regard to the issue of jurisdiction to develop the facts necessary to sustain the burden of proof [ *Magnecomp Corp. v. Athene Co., Ltd.* (1989) 209 CA3d 526, 533, 257 CR 278 ; *Goehring v. Superior Court* (1998) 62 CA4th 894, 911, 73 CR2d 105 ].

Discovery methods may include oral or written depositions, interrogatories, inspections of documents, things, and places, physical and mental examinations, and requests for admissions [CCP § 2019.010].



#### **Warning--Plaintiff:**

If additional facts are needed to oppose the motion to quash, consider the amount of time required for the discovery and the impact it will have on the time requirements. Because the hearing of a motion to quash cannot be set more than 30 days after the date the motion is filed, a plaintiff wishing to take jurisdictional discovery to oppose the motion will usually have to seek orders shortening the usual time allowed for responding to discovery, and may also have to obtain a stipulation or seek an order continuing the hearing date until after the discovery is completed and the plaintiff has time to prepare its opposition papers containing any new information discovered. Consider how the discovery held at this point can be used to more fully develop later discovery while remaining within the relevance requirements for discovery pertinent to the motion.



#### **Cross Reference:**

Discussion of discovery, see Matthew Bender(R) Practice Guide: California Civil Discovery.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallenges



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.20*

#### **9.20 Contents of Opposition Papers.**

Papers to be served and filed when opposing a motion to quash service of summons include:

- Counter-declarations.
- Written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing.
- Opposing memorandum.
- Proof of service [*see* Ch. 27, Service of Papers].
- Proposed order, if desired.



#### **Cross References:**

Ch. 26, Law and Motion Procedure.

Examples of memoranda in opposition to a motion to quash, see California Points and Authorities, Ch. 132, Jurisdiction: Personal Jurisdiction and Inconvenient Forum (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Dismiss



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.21*

#### **9.21 Service and Filing of Papers.**

Serve and file the papers by:

- Serving a conformed copy of the above described papers on the other party's attorney, or on the other party if he or she has no attorney, at least nine court days before the hearing [see CCP §§ 418.10(b), 1005(a)(4), (b) and *Cal Rules Ct, Rule 3.1300(a)*].
- Attach a copy of proof of service to the papers.
- Delivering the originals of the notice of motion and accompanying papers to the court clerk's office for filing at least nine court days before the hearing and pay the required fee.
- If there is a statement regarding oral testimony, file it no later than three days before the hearing; and if it is filed less than five court days before the hearing, serve a conformed copy of it on the opposing party in a manner to assure delivery no later than two days before the hearing [see *Cal Rules Ct, Rule 3.1306(b)*].



#### **Cross Reference:**

Ch. 27, Service of Papers.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Motions to Dismiss



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.22*

#### **9.22 Order and Notice of Ruling.**

For discussion of the order and notice of ruling, see 9.13. Issues to be considered are:

- Defendant prepares order if motion granted.
- Plaintiff prepares order if motion denied.
- Procedures for notice of ruling.



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**9.23 CHECKLIST: Making a Motion to Stay or Dismiss Under Doctrine of Inconvenient Forum.**

- ☐ Consider whether the doctrine of inconvenient forum applies:
  - ☐ Motion to stay or dismiss the action is the proper means for a non-California resident to object on the ground of inconvenient forum.
  - ☐ Consider whether action may be more appropriately and justly tried elsewhere because:
    - ☐ Action possesses no substantial connection with a defendant's activities in California.
    - ☐ California cannot provide an adequate forum.
    - ☐ California has no interest in fostering the litigation.
- ☐ Apply the doctrine to a contractual forum-selection clause:
  - ☐ Clause is enforceable unless unreasonable.
  - ☐ Consider whether the clause is void by statute.

**Authority:**  
*CCP § 418.10(a)(2)*

**Discussion:**



See 9.23-9.30

**Forms:**

See 9.50, 9.51, 9.52

☐ Determine whether alternative forum is a suitable place for trial:

- ☐ Consider private versus public interests.
- ☐ Weigh the advantage to the plaintiff's choice of forum.
- ☐ Weigh the advantage to the plaintiff as California resident.

**Authority:**

*CCP § 410.30.*

**Discussion:**

See 9.28

☐ Prepare notice of motion to stay or dismiss the action and accompanying papers:

- ☐ Notice of motion.
- ☐ Supporting declarations.
  - ☐ Consider who is proper declarant for evidentiary facts.
- ☐ Written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing.
- ☐ Supporting memorandum.
- ☐ Proof of service.
- ☐ Proposed order.

☐ Serve and file motion on or before last day for pleading:

- ☐ Follow standard noticed motion procedure.

**Authority:**

*CCP § 418.10(b)*

**Discussion:**

See 9.29, 9.30

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**Forms:**

See 9.54, 9.55

- ☐ Prepare reply if motion opposed:
  - ☐ Prepare any reply declarations and any reply memorandum.
  - ☐ Serve reply papers on opposing party at least five court days before the hearing.

**Authority:**

*CCP § 1005; Cal Rules Ct, Rule 3.1300*

**Discussion:**

See 9.31

- ☐ Prevailing party submits order conforming to judge's ruling.
- ☐ Prevailing party prepares and serves notice of ruling.

**Authority:**

*CCP § 1019.5; Cal Rules Ct, Rules 3.1304 et seq.*

**Discussion:**

See 9.32

**Form:**

See 9.56



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.24*

### 9.24 Options and Strategies.

A motion to stay or dismiss for inconvenient forum may be brought by a non-California resident who does not want to be hauled into a California court to litigate a dispute that has little connection to California other than the residence of the plaintiff. The motion concedes the court's jurisdiction [ *Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney* (1988) 202 CA3d 1424, 1430, 249 CR 559 ]. Before filing a motion based on inconvenient forum, perform a thorough analysis of whether a motion to quash service of summons might be granted and the expense involved in filing the motion.

Although an inconvenient forum claim may be raised by special appearance on a *CCP* § 418.10 motion to stay or dismiss, the issue may also be raised by a motion to stay or dismiss after a general appearance [*CCP* §§ 410.30(b), 418.10]. If raised after a general appearance, the motion is made under *CCP* § 410.30 not *CCP* § 418.10 [see *CCP* § 410.30(b)].



#### Strategic Point:

To preserve the protections of a special appearance, the motion under *CCP* § 418.10 must be made in compliance within the specific time deadlines for doing so [see 9.26[1]]. After the expiration of those deadlines, the motion may only be made under *CCP* § 410.30, but at any time after making a general appearance [ *Britton v. Dallas Airmotive, Inc.* (2007) 153 CA4th 127, 133-134, 62 CR3d 487 ].

A motion based on inconvenient forum may seek alternative relief of either dismissing or staying the action. While it is almost always preferable to a moving defendant to have the action dismissed, dismissal will rarely be granted if the plaintiff is a California resident.



#### Cross Reference:

Motions to stay or dismiss for forum nonconveniens, see California Forms of Pleading & Practice, Ch. 323, Jurisdiction: Inconvenient Forum and Appearance (Matthew Bender).

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedureVenueForum Non Conveniens



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.25*

### **9.25 Inconvenient Forum Concedes Personal Jurisdiction but Seeks Stay or Dismissal on Equitable Grounds.**

**9.25[1] Inconvenient Forum Is an Equitable Doctrine.** The doctrine of inconvenient forum, otherwise referred to as forum non conveniens [see *CCP* §§ 410.30(a), 418.10(a)(2)], is an equitable doctrine permitting a court to decline to exercise jurisdiction over a cause of action, because the action may be more appropriately and justly tried elsewhere [ *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556, 819 P2d 14 ].

The doctrine authorizes the dismissal or stay of an action filed in California if the action possesses no substantial connection with a defendant's activities in California, when California cannot provide an adequate forum, and when California has no interest in fostering the litigation [*CCP* §§ 410.30, 418.10; see *Henderson v. Superior Court* (1978) 77 CA3d 583, 588, 142 CR 478 ]. The inquiry on the motion is not whether another forum is better than California, but whether California is a seriously inconvenient forum for the defendant [ *Ford Motor Co. v. Ins. Co. of N. Am.* (1995) 35 CA4th 604, 611 CR2 342].

The doctrine permits a court to stay or dismiss an action even when jurisdiction and venue are technically proper [see *Outboard Marine Corp. v. Superior Court* (1976) 59 CA3d 434, 437, 130 CR 642 ]. The normal remedy when the plaintiff is a California resident is to stay rather than dismiss the action [ *Berg v. MTC Elecs. Technologies Co., Ltd.* (1998) 61 CA4th 349, 356, 71 CR2d 523 ]. Dismissal of an action is appropriate only in the exceptional case in which neither party resides in or has any connection with California [see *Henderson v. Superior Court* (1978) 77 CA3d 583, 598, 142 CR 478 ].

An example of a situation in which there is no personal jurisdiction argument is a "service of suit" clause found in many insurance policies, by which the insurer consent to jurisdiction in any of the courts of the United States. Notwithstanding this clause, California may not be the appropriate forum to try the case, and it is subject to a motion to stay or dismiss under the doctrine of inconvenient forum [See, e.g., *Appalachian Ins. Co. v. Superior Court* (1984) 162 CA3d 427 (service of suit clause was not intended to give plaintiff the right to sue in a state bearing no relationship to the claim)].

**9.25[2] Doctrine Concedes Jurisdiction, Which May Be Limited by Special Appearance.** An argument that a court is an inconvenient forum concedes the court's jurisdiction [ *Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney* (1988) 202 CA3d 1424, 1430-1431, 249 CR 559 ].

Although an inconvenient forum claim may be raised by special appearance on a *CCP* § 418.10 motion to stay or dismiss, the issue may also be raised by a *CCP* § 410.30(b) motion to stay or dismiss after a general appearance [*CCP* §§ 410.30(b), 418.10].

**Timing:**

To preserve the protections of a special appearance, the motion under *CCP* § 418.10 must be made in compliance within the specific time deadlines for doing so [see 9.26[1]]. After the expiration of those deadlines and after making a general appearance, the motion may only be made under *CCP* § 410.30. A forum non conveniens motion under *CCP* § 410.30 should be used when it is "necessary to conduct discovery to develop the factual underpinnings of a forum non conveniens motion." Although the motion can be brought under that section after a general appearance, the court may deny the motion if it finds that the defendant has unreasonably delayed bringing the motion [ *Britton v. Dallas Airmotive, Inc.* (2007) 153 CA4th 127, 133-134, 62 CR3d 487 ].

**9.25[3] Defendant May Seek Alternative Relief to Stay or Dismiss Action.** A defendant may seek alternative relief either to stay the action or to dismiss the action [*CCP* § 418.10(a)(2)]. When a court finds, on motion by a party or on its own motion, that in the interest of substantial justice an action should be heard in a forum outside California, it must stay or dismiss the action in whole or in part on any conditions that may be just [*CCP* § 410.30].

**Cross Reference:**

Discussion of whether to stay or dismiss, see 9.28[6].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Venue Forum Non Conveniens



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.26*

## 9.26 Time for Motion.

### 9.26[1] Motion Under CCP § 418.10.

**9.26[1][a] Motion Must Be Served and Filed on or Before Last Day to Plead.** A notice of motion under *CCP* § 418.10(a) to stay or dismiss on the ground of inconvenient forum must be served and filed on or before the last day of the time to plead, or within any further time that the court may for good cause allow [*CCP* § 418.10(a)]. The motion does not constitute a general appearance in the action by the defendant [*CCP* § 418.10(d)].



#### Cross Reference:

Discussion of appearances, see 9.19-9.21.

**9.26[1][b] Hearing on Motion Must Be Within 30 days After Filing of Notice.** The notice of motion must designate a hearing date not more than 30 days after the *filing* of the notice [*CCP* § 418.10(b)].

#### Exception:

In a proceeding for unlawful detainer, forcible entry, or forcible detainer, the time for making the motion is not less than three days nor more than seven days after the filing of the notice [*CCP* § 1167.4(a); *Cal Rules Ct*, Rule 3.1327(a)].

**9.26[1][c] Party May Apply for an Extension of Time to Plead for Good Cause.** For purposes of a *CCP* § 418.10 motion, the court may grant an extension of time to plead for good cause shown [*CCP* § 418.10(a); see *CCP* § 1054]. An extension of time may be made by application to the court or by stipulation, and neither act is deemed a general appearance by the defendant [*CCP* § 418.10(d)].

#### Example:

Plaintiff's letter extending time for defendant "to answer or otherwise respond to Complaint" allowed motion for inconvenient forum that would have otherwise been untimely [ *Olinick v. BMG Entertainment* (2006) 138 CA4th 1286, 1295, 42 CR3d 268 ].

Application for an extension of time may be made ex parte, and an appearance at a hearing for ex parte extension of

time does not constitute a general appearance or a waiver of the right to make a 418.10 motion [CCP § 418.11].



**Warning:**

An extension of time must be requested during the period in which the act must be done, and the extension cannot exceed 30 days without the consent of the adverse party [see CCP § 1054].



**Cross Reference:**

Discussion of extending time, see *Ch. 27, Service of Papers, 27.14 et seq.*

**9.26[1][d] Motion Extends Defendant's Time to Plead After Denial of Motion.** The service and filing of the notice of motion extends the defendant's time to plead until 15 days after service on the defendant of a written notice of entry of an order denying the motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days [CCP § 418.10(b)].

**Exception--Extended pleading times are shorter for some causes:**

In a proceeding for unlawful detainer, forcible entry, or forcible detainer, the defendant's time to plead is extended to *five* days after the defendant is served with a written notice of the entry of an order denying the motion, except that for good cause shown the court may extend a defendant's time to plead for an additional period not exceeding 15 days [CCP § 1167.4(b); *Cal Rules Ct, Rule 3.1327(a)*].

**9.26[2] Motion Under CCP § 410.30 May Be Made At Any Time.** A defendant who has generally appeared without filing a demurrer or motion to strike may later make a forum non conveniens motion under CCP § 410.30 at any time, not only on or before the last day to plead [ *Britton v. Dallas Airmotive, Inc. (2007) 153 CA4th 127, 133, 62 CR3d 487* ] (waiver under CCP § 418.10(e)(3) applies only if the defendant files a demurrer or motion to strike and does not raise forum non conveniens). A forum non conveniens motion under CCP § 410.30 should be used when it is "necessary to conduct discovery to develop the factual underpinnings of a forum non conveniens motion." That does not mean that defendants can unreasonably delay bringing forum non conveniens motions with impunity. Any delay would be relevant to whether the motion should be granted [ *Britton v. Dallas Airmotive, Inc. (2007) 153 CA4th 127, 135, 62 CR3d 487* ].

**9.26[3] Even If Forum Non Conveniens Motion Under CCP § 418.10 Was Denied, Court May Dismiss or Stay on Forum Non Conveniens Grounds On Its Own Motion Under CCP § 410.30.** The failure to make a motion under CCP § 418.10 at the time of filing a demurrer or motion to strike constitutes a waiver of personal jurisdiction, inadequacy of process, inadequacy of service of process, and delay in prosecution and inconvenient forum [CCP § 418.10(e)(3); *Britton v. Dallas Airmotive, Inc. (2007) 153 CA4th 127, 133, 62 CR3d 487* ]. If the issue has been waived by failing to raise forum non conveniens when filing a demurrer or motion to strike, then the defendant may not raise forum non conveniens later in the litigation, even after general appearance under CCP § 410.30(b). However, if forum non conveniens was raised by a motion under both CCP § 418.10(2) and CCP § 410.30 and the motion was denied, the court still can grant a motion under CCP § 410.30 on its own motion, whether or not the motion that brought the issue to the court's attention satisfied the requirements of a motion for reconsideration under CCP § 1008 [ *Britton v. Dallas Airmotive, Inc. (2007) 153 CA4th 127, 134, 62 CR3d 487* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureVenueForum Non Conveniens





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Chapter 9 Motions to Quash and Other Objections to Personal Jurisdiction  
IV. MOVING TO STAY OR DISMISS UNDER DOCTRINE OF INCONVENIENT FORUM

1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.27

### 9.27 Asserting a Forum Selection Clause.

**9.27[1] Clause Enforced Unless Unreasonable.** A forum-selection clause, by which parties agree contractually in advance on the forum for resolving disputes, is generally given effect unless unfair or unreasonable [ *The Bremen et al. v. Zapata Off-Shore Co.* (1972) 407 US 1, 15, 92 S Ct 1907, 32 L Ed2d 513 ; *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 C3d 491, 495-496, 131 CR 374, 551 P2d 1206 ; cf. *Nam Tai Elecs., Inc. v. Titzer* (2001) 93 CA4th 1301, 1311-1313, 113 CR2d 769 (nonnegotiable forum clause was contract of adhesion and unenforceable)]. Courts generally apply the normal forum non conveniens analysis to permissive forum selection clauses, i.e. clauses that merely provide submission to jurisdiction but do not expressly mandate litigation exclusively in a particular forum [ *Berg v. MTC Electronics Technologies Co.* (1998) 61 CA4th 349, 358-360, 71 CR2d 523 ]. However, mandatory forum selection that expressly mandate litigation in a particular forum will ordinarily be given effect without any analysis of convenience; the only question is whether enforcement of the clause would be unreasonable [ *Intershop Communications AG v. Superior Court* (2002) 104 CA4th 191, 196, 127 CR2d 847 ].

**9.27[2] Clause May Apply to Both Contract and Tort Actions.** A forum-selection clause may apply to both contractual and tort causes of action [ *Bancomer, S.A. v. Superior Court* (1996) 44 CA4th 1450, 1461, 52 CR2d 435 ].

**9.27[3] Clause May Be Reciprocal.** A forum-selection clause may be reciprocal [ *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 C3d 491, 494, 131 CR 374, 551 P2d 1206 (plaintiff agreed to bring all actions arising out of agreement only in Pennsylvania, home state of defendant corporation, and defendant agreed to bring all actions arising out of agreement only in Los Angeles, plaintiff's place of business)].

**9.27[4] Clause Enforced by Motion to Stay or Dismiss.** A defendant seeking to challenge the plaintiff's choice of forum on the basis of a forum-selection clause may move to stay or dismiss the action on the grounds of inconvenient forum [see CCP §§ 410.30(a), 418.10(a)(2)].

A court must stay or dismiss an action under any conditions that may be just if the court finds in the interest of substantial justice that the action should be heard in a forum outside California [CCP § 410.30(a)].

The factors that generally apply to a forum non conveniens motion do not control in a case involving a mandatory forum selection clause [ *Berg v. MTC Electronics Technologies Co.* (1998) 61 CA4th 349, 358-359, 71 CR2d 523 ].

**9.27[5] Defendant Not a Party to Agreement Lacks Standing Unless Third-Party Beneficiary or Closely Related to Parties.** A defendant that is not a party to an agreement containing a forum-selection clause lacks standing to assert the clause unless the defendant is a third-party beneficiary to the agreement or is closely related to the contractual relationship between the parties to the agreement [ *Bancomer, S.A. v. Superior Court* (1996) 44 CA4th 1450, 1458-1461, 52 CR2d 435 ; see also *Berclain America Latina v. Baan Co.* (1999) 74 CA4th 401, 403, 405-408, 87 CR2d 745 ].

To establish that it was closely related to the contractual relationship, a defendant must show one of the following by specific conduct or express agreement [ *Bancomer, S.A. v. Superior Court* (1996) 44 CA4th 1450, 1461, 52 CR2d 435 ; accord *Bugna v. Fike* (2000) 80 CA4th 229, 233, 95 CR2d 161 ]:

- The defendant agreed to be bound by the terms of the agreement.
- The contracting parties intended the defendant to benefit from the agreement.
- There is sufficient evidence of a defined and intertwining business relationship with a contracting party.

A plaintiff also may be closely related to the contractual relationship of the parties if the plaintiff stands in the shoes of those whom it purports to represent, such as a consumer group representing customers in an unfair business practice action [ *Net2phone v. Superior Court* (2003) 109 CA4th 583, 589 ].

**9.27[6] Clause Must Be Enforced Unless Unreasonable.** A court must enforce a forum-selection clause unless it would be unreasonable to do so on the facts of the case [ *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 C3d 491, 495-496, 131 CR 374, 551 P2d 1206 ; *Cal-State Business Prods. & Servs., Inc. v. Ricoh* (1993) 12 CA4th 1666, 1679, 16 CR2d 417 ].

Enforcement of a non-negotiated forum-selection clause in a form contract is reasonable when [ *Carnival Cruise Lines, Inc. v. Shute* (1991) 499 US 585, 593-595, 111 S Ct 1522, 113 L Ed2d 622 (court enforced clause in cruise ticket selecting Florida as forum against plaintiffs from Washington)]:

- There was no indication that the defendant had chosen the forum to discourage legitimate claims;
- There was no evidence that the plaintiffs' accession to the clause was obtained through fraud or overreaching; and
- Plaintiffs conceded they had received notice of the clause and therefore presumably had the option of rejecting the contract with impunity.

If, however, the plaintiff did not have sufficient notice of the clause prior to entering into the contract, the requisite mutual consent to that contractual term is lacking and there is no valid contract with respect to that clause [ *Carnival Cruise Lines, Inc. v. Superior Court* (1991) 234 CA3d 1019, 1025, 1027, 286 CR 323 ; see *Hunt v. Superior Court* (2000) 81 CA4th 901, 908-909, 97 CR2d 215 ].

**9.27[7] Some Clauses Are Void by Statute.** The following forum-selection clauses are void by statute:

- A provision in a franchise agreement restricting venue to a forum outside California, with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within California [ *Bus & Prof Code* § 20040.5].

- A provision in any contract or agreement with a supplier that requires jurisdiction or venue outside California, with respect to a claim otherwise enforceable under *Bus & Prof Code* § 22900 *et seq.*, relating to equipment dealers [*Bus & Prof Code* § 22927].
- A provision in an agreement between a beer manufacturer and a beer wholesaler for the sale and distribution of beer in California, which restricts venue to a forum outside California, with respect to a claim arising under or relating to the agreement involving a beer wholesaler operating within California [*Bus & Prof Code* § 25000.6].
- Provisions in a contract between a contractor and a subcontractor with principal offices in California, for the construction of a public or private work of improvement in California, requiring any dispute to be litigated, arbitrated, or otherwise determined outside California or precluding a party from commencing a proceeding or obtaining a judgment or other resolution in California or the courts of California [*CCP* § 410.42].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Venue Forum Non Conveniens Contracts Law Contract Conditions & Provisions Forum Selection Clauses



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## 9.28 Burden of Proof and Factors for Decision.

### 9.28[1] Burden of Proof Depends on Whether Forum Selection Clause Exists.

**9.28[1][a] Defendant Has Burden When No Forum Selection Clause Exists.** The defendant, as the moving party, bears the burden of proof on an inconvenient forum motion [ *Stangvik v. Shiley, Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556, 819 P2d 14 ; *Chong v. Superior Court* (1997) 58 CA4th 1032, 1036, 68 CR2d 427 ].

#### ► Cross Reference:

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**9.28[1][b] Plaintiff Has Burden When Opposing Enforcement of Forum Selection Clause.** When the forum non conveniens motion is based on a forum-selection clause in a contract, the party opposing enforcement of the forum-selection clause (generally, the plaintiff) bears the burden of proof and must demonstrate that enforcement of the clause would be unreasonable under the circumstances of the case, that is, that the selected forum would be unavailable or unable to accomplish substantial justice [ *Intershop Communications AG v. Superior Court* (2002) 104 CA4th 191, 198, 127 CR2d 847 ; *Nam Tai Elecs., Inc. v. Titzer* (2001) 93 CA4th 1301, 1311-1313, 113 CR2d 769 ].

The choice-of-law requirement must have some rational basis in light of the facts underlying the transaction to be reasonable. Neither inconvenience nor additional expense is part of the test of unreasonability. However, a forum-selection clause will not be enforced if enforcement will bring about a result that is contrary to the forum's public policy [ *CQL Original Prods., Inc. v. Nat'l Hockey League Players' Ass'n* (1995) 39 CA4th 1347, 1353-1354, 46 CR2d 412 (court enforced forum-selection clause; difference in law in two competing forums pertaining to forfeitures in license agreements did not amount to conflict involving fundamental policy in California)].

#### ► Cross Reference:

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**9.28[2] Trial Court Has Discretion to Apply Doctrine.** Other than the nondiscretionary threshold for determination whether the alternative forum is a place suitable for trial [ *Am. Cemwood Corp. v. Am. Home Assurance Co.* (2001) 87 CA4th 431, 436, 104 CR2d 670 ], the question whether the doctrine of inconvenient forum should be applied in a particular case rests in the discretion of the trial court. The case law is in conflict on the standard of appellate review of a motion to enforce a forum selection clause, one line of cases stating that the trial court must act in a particular way if the court finds sufficient evidence to invalidate a binding contract and review is limited to the substantial evidence standard, while the other line of cases states review is subject to the abuse of discretion standard [ *Intershop Communications AG v. Superior Court* (2002) 104 CA4th 191, 198-199, 127 CR2d 847, citing *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 C3d 491, 496, 131 CR 374 for proposition that trial court retains measure of discretion].

A court has exercised discretion appropriately when it acts within the range of options available under governing legal criteria in light of the evidence before it [ *Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 CA4th 753, 758, 59 CR2d 229 ]. For the moving party to prevail, there must be evidence, not merely bald assertions, to support the trial court's determination [ *Ford Motor Co. v. Insurance Co. of North America* (1995) 35 CA4th 604, 610, 41 CR2d 342 ].

The trial court's discretion may not be arbitrary; the discretion must be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede the ends of substantial justice [ *Corrigan v. Bjork Shiley Corp.* (1986) 182 CA3d 166, 173, 176, 227 CR 247, disapproved on other grounds in *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 1 CR2d 556, 819 P2d 14 ]. If the balance weighs heavily in a defendant's favor, it becomes the trial court's duty to apply the doctrine [ *Outboard Marine Corp. v. Superior Court* (1976) 59 CA3d 434, 439, 130 CR 642 (issuing writ of mandate directing trial court to dismiss action for inconvenient forum)].

**9.28[3] Court Must Determine Whether Alternate Forum Available.** In deciding whether to grant a forum non conveniens motion, a court must first determine whether the alternate forum is a "suitable" place for trial [ *Stangvik v. Shiley, Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556, 819 P2d 14; *Morris v. AGFA Corp.* (2006) 144 CA4th 1452, 1464, 51 CR3d 301 ("suitable alternative forum ... is critical"). This is a nondiscretionary determination [ *Am. Cemwood Corp. v. Am. Home Assurance Co.* (2001) 87 CA4th 431, 436, 104 CR2d 670; *Chong v. Superior Court* (1997) 58 CA4th 1032, 1036, 68 CR2d 427 ].

The threshold evidentiary showing required is that the alternate forum is a suitable place for trial [ *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556, 819 P2d 14 ]. A forum is suitable if the action can be brought, although not necessarily won, in the alternative forum [ *Roman v. Liberty University, Inc.* (2008) 162 CA4th 670, 683, 75 CR3d 828; *Morris v. AGFA Corp.* (2006) 144 CA4th 1452, 1464, 51 CR3d 301 ].

#### **Distinguish:**

Comparative law questions are irrelevant to a forum non conveniens analysis, except when the alternate forum provides no remedy at all [see *Roman v. Liberty University, Inc.* (2008) 162 CA4th 670, 683, 75 CR3d 828 ]. The "no remedy at all" exception applies only in rare circumstances, such as where the alternative forum is a foreign country whose courts are ruled by a dictatorship, so that there is no independent judiciary or due process of law. Plaintiffs must show more than general allegations of corruption, lack of due process, or other factors making an alternative forum unsuitable [ *Guimei v. General Electric Co.* (2009) 172 CA4th 689, 697, 91 CR3d 178 (general allegation's that China's courts are "sub-par" insufficient to deny inconvenient forum)].

It is sufficient that there is jurisdiction and no statute of limitations bar to the action [ *Roman v. Liberty University, Inc.* (2008) 162 CA4th 670, 682-683, 75 CR3d 828; *Morris v. AGFA Corp.* (2006) 144 CA4th 1452, 1464, 51 CR3d 301 ].

Accordingly, a court will not dismiss a case on the basis of inconvenient forum when the statute of limitations has run in the other jurisdiction and the result would be that the claims would never be litigated [ *Delfosse v. C.A.C.I.*,

*Inc.-Federal* (1990) 218 CA3d 683, 688-689, 690-691, 267 CR 224 (conditional dismissal subject to agreement to waive statute of limitations may provide appropriate remedy in such situations)].

**Exception:**

A suitable alternate forum is available to the plaintiff if the court is willing to accept the defendant's stipulation that he or she will not raise the defense of statute of limitations in the alternate forum [ *Roman v. Liberty University, Inc.* (2008) 162 CA4th 670, 682-683, 75 CR3d 828 (court accepted defendant's stipulation that statute of limitation in alternate forum did not bar action in that forum as stipulation that defense would not be raised in alternate forum)].

**9.28[4] Relevant Factors After Determining Availability of Alternate Forum.**

**9.28[4][a] Court Must Weigh Private Versus Public Interests.** After determining that the alternate forum is a suitable place for trial, the court must then consider the private interests of the litigants and the interests of the public in retaining the action in California [ *Guimei v. General Electric Co.* (2009) 172 CA4th 689, 702, 91 CR3d 178] .

Public interest factors make trial and the enforcement of any judgment expeditious and relatively inexpensive and include the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. Public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that jurors are not called on to decide cases of little concern to the local community, and weighing the competing interests of California and the alternate jurisdiction [ *Stangvik v. Shiley, Inc.* (1991) 54 C3d 744, 752, 1 CR2d 556, 819 P2d 14 ; *Guimei v. General Electric Co.* (2009) 172 CA4th 689, 702, 91 CR3d 178 (courts of China were more convenient forum); *Chong v. Superior Court* (1997) 58 CA4th 1032, 1037, 68 CR2d 427 ].

The court may take into account any consideration that legitimately bears on the relative suitability or convenience of the alternate forum [ *Delfosse v. C.A.C.I., Inc.-Federal* (1990) 218 CA3d 683, 687-688, 267 CR 224 ].

California courts have considered the following factors [ *Great Northern Ry. Co. v. Superior Court* (1970) 12 CA3d 105, 113-115, 90 CR 461 (listing factors below); see *Henderson v. Superior Court*, (1978) 77 CA3d 583, 595-597, 142 CR 478 (applying *Great Northern* list of factors); *Jagger v. Superior Court* (1979) 96 CA3d 579, 585-586, 158 CR 163 (listing 11 factors)]:

- Amenability of defendant to personal jurisdiction in alternative forum.
- Relative convenience to parties and witnesses to trial in alternative forum.
- Choice of law (difference between California's conflict-of-law rules and those in alternative forum).
- Defendant's principal place of business and inconvenience to defend in local forum.
- Extent to which situation, transaction, or events out of which action arose occurred in or had substantial relationship to California [see, e.g., *Jagger v. Superior Court* (1979) 96 CA3d 579, 585-586, 158 CR 163 (California marital dissolution action by wife of British rock star stayed to allow action in England to proceed when parties were international residents with limited relationship to California)].
- Substantial disadvantage to any party by having to try action in California or alternative forum.
- Inconvenience to witnesses by having action heard in California or alternative forum.

- Relative expense to parties of proceeding in California or alternative forum.
- Necessity or helpfulness in viewing of premises by trier of fact.
- Burden placed on California's judicial resources that is unfair, inequitable, or disproportionate to the relationship of the parties or cause of action to California.
- Obligation of any party, due to relationship to California, to participate in judicial proceedings in California state courts.
- Interest of California in providing a forum for some or all of the parties to the action [*see MagnecompCorp. v. Athene Co. (1989) 209 CA3d 526, 539, 257 CR 278* (when tortious acts are committed against California citizens, California courts should liberally construe and interpret jurisdictional principles to accomplish substantial justice for California citizens)].
- Interest of California in regulating the situation or conduct involved [*see MagnecompCorp. v. Athene Co. (1989) 209 CA3d 526, 538-539, 257 CR 278* (rejecting personal jurisdiction under facts of case would suggest that foreign corporation could continually avoid liability for tortious conduct against California residents merely by acting through its agents)].
- Avoidance of multiplicity of suits and inconsistent adjudications.
- Relative availability and access to sources of evidence and proof.
- Availability of compulsory process to secure the attendance of witnesses in California and the alternative forum [*see Hemmelgarn v. Boeing Co. (1980) 106 CA3d 576, 586, 165 CR 190*, disapproved on other grounds in *Stangvik v. Shiley, Inc. (1991) 54 C3d 744, 1 CR2d 556, 819 P2d 14* ].
- Relative advantages and obstacles to a fair trial in California and the alternative forum.
- Imposition of jury duty on community having no relation to litigation.
- Injustice to and burden on local courts and taxpayers.
- Difficulties and inconvenience--to moving party, the court, and jurors hearing the case--attending presentation of evidence by deposition.
- Other practical considerations that make trial of a case convenient, expeditious, and inexpensive.

It is important to bear in mind, however, that courts are not limited to the above factors. In ruling on a forum non conveniens motion, courts examine all of the circumstances, balance the private and public interests and look to the relative convenience and fairness to the parties, the witnesses, and the courts [ *Delfosse v. C.A.C.I., Inc.-Federal (1990) 218 CA3d 683, 688, 267 CR 224* ].

If the action is against a California manufacturer by a foreign plaintiff for an injury sustained outside the country, the court must consider: (1) the competitive disadvantage to California business that would result if California manufacturers were called on to defend lawsuits involving extraterritorial injuries and (2) the interests and policy concerns in the litigation of the countries of residence of the foreign plaintiffs [ *Stangvik v. Shiley Inc. (1991) 54 C3d 744, 760, 1 CR2d 556, 819 P2d 14* ].

Finally, the relative financial condition of the parties is a factor that the court must take into account to some degree in determining the convenience or inconvenience of the forum [ *Allison v. Superior Court* (1979) 99 CA3d 993, 1001, 160 CR 309 ].

**9.28[4][b] No Undue Emphasis to Any One Element.** The court must apply the private and public interests flexibly, without giving undue emphasis to any one element [ *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 753, 1 CR2d 556, 819 P2d 14 ].

**9.28[4][c] Plaintiff's Choice of Forum Presumed Convenient.** If the plaintiff is a resident of the jurisdiction in which the suit is filed, the plaintiff's choice of forum is presumed to be convenient [ *Piper Aircraft Co. v. Reyno* (1981) 454 US 235, 255-256 ; *Thomson v. Continental Ins. Co.* (1967) 66 C2d 738, 744-745, 59 CR 101, 427 P2d 765 ].

If the plaintiff is a resident of the jurisdiction in which the suit is filed, the state has a strong interest in assuring its own residents an adequate forum for the redress of grievances [ *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 754-755, 1 CR2d 556, 819 P2d 14 ; *Archibald v. Cinerama Hotels* (1976) 15 C3d 853, 859, 126 CR 811, 544 P2d 947 ].

In California, the plaintiff's choice of forum is entitled to great weight even when the plaintiff is a nonresident [ *Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 CA4th 753, 760, 59 CR2d 229 ; *Ford Motor Co. v. Ins. Co. of N. Am.* (1995) 35 CA4th 604, 610, 41 CR2d 342 ].

#### Exception:

When the plaintiff is a citizen of a foreign country, the plaintiff's choice of forum is much less reasonable and is not entitled to the same preference as a resident of the state in which the action was filed [ *Piper Aircraft Co. v. Reyno* (1981) 454 US 235, 259-261, 102 S Ct 252, 70 L Ed2d 419 ; *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 755, 1 CR2d 556, 819 P2d 14 ; *Campbell v. Parker-Hannifin Corp.* (1999) 69 CA4th 1534, 1543, 82 CR2d 202 ]. The fact that an alternate jurisdiction's law is less favorable to a litigant than the law of the forum state should not be accorded any weight, as long as some remedy is afforded in the foreign jurisdiction [ *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 753 n5, 1 CR2d 556, 819 P2d 14 ; *Campbell v. Parker-Hannifin Corp.* (1999) 69 CA4th 1534, 1541, 1543-1544, 82 CR2d 202 ]. It is a relevant consideration only if the remedy in the alternative forum "is so clearly inadequate or unsatisfactory that it is no remedy at all" [ *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 753, 1 CR2d 556, 819 P2d 14 , quoting *Piper Aircraft Co. v. Reyno* (1981) 454 US 235 LEd 2d 419, 102 SC 25 ]. When a remedy is found to exist in the alternate forum, the fact that California law would likely provide the plaintiff with certain advantages of procedural or substantive law cannot be considered as a factor in plaintiff's favor for forum non conveniens purposes [ *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 754, 1 CR2d 556, 819 P2d 14 ].

**9.28[4][d] Stay or Dismissal of Action Filed by California Resident Rare.** The doctrine of forum non conveniens ordinarily may not be invoked to deprive a resident plaintiff of access to the California courts [ *Gould, Inc. v. Health Sciences, Inc.* (1976) 54 CA3d 687, 693, 126 CR 726 ; *Hadler v. Western Greyhound Racing Circuit* (1973) 34 CA3d 1, 5-6, 109 CR 502 ]. Thus, the court ordinarily may not dismiss an action if a party is a California resident, although it may stay an action involving a California resident if it concludes that the controversy can be better resolved in a foreign forum [ *Archibald v. Cinerama Hotels* (1976) 15 C3d 853, 857-858, 126 CR 811, 544 P2d 947 ; *Ferreira v. Ferreira* (1973) 9 C3d 824, 838-839, 109 CR 80, 512 P2d 304 ; see *Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 CA4th 753, 761, 59 CR2d 229 ]. However, it has been stated that a stay of an action filed by a California resident is rare [ *Berg v. MTC Elecs. Technologies Co., Ltd.* (1998) 61 CA4th 349, 362, 71 CR2d 523 (finding stay was justified under circumstances of case)].



#### Warning:



A 1986 amendment to *CCP* § 410.30 [see Cal Stats 1986, ch 968, § 4, urgency eff. Sept. 22, 1986] stated "[t]he domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action" [italics added]. Following that amendment, a line of cases developed stating that the court has the power to stay or dismiss an action even if the sole plaintiff is a California resident [for discussion of the effect of the 1986 amendment, see *Northrop Corp. v. American Motorists Ins. Co.* (1990) 220 CA3d 1553, 1561-1562, 270 CR 233 ]. However, that amendment expired by its own terms on Jan. 1, 1992 [see Cal Stats 1986, ch 968, § 7] and cases decided under that amendment therefore should be viewed with caution.

#### Judge's Perspective:

The better practice is for the trial judge to stay the action. The reason for this is to enable the plaintiff to have a safe harbor should the alternative forum decide to dismiss based on other grounds, i.e. statute of limitations.

The defendant's residence is also a factor to be considered in the balance of convenience. There is a presumption that a California state forum is convenient to a defendant who is a resident of California. If a corporation is the defendant, the state of its incorporation and the place where its principal business is located is presumptively a convenient forum [ *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 755, 1 CR2d 556, 819 P2d 14 ]. This presumption, however, is not conclusive, and a resident defendant may overcome this presumption by evidence that the alternate jurisdiction is a more convenient place for trial of the action, even if the defendant is a corporation that has its principal place of business in California and the tort was allegedly committed in California [ *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 756, 760-761, 1 CR2d 556, 819 P2d 14 ; *Campbell v. Parker-Hannifin Corp.* (1999) 69 CA4th 1534, 1541, 82 CR2d 202 ].

**9.28[4][e] Forum Law More Favorable to Plaintiff Not Accorded Any Weight.** The fact that the foreign plaintiff chose to file the complaint in California is not a substantial factor in favor of retaining California jurisdiction [ *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 755, 1 CR2d 556, 819 P2d 14 , citing *Piper Aircraft Co. v. Reyno* (1981) 454 US 235, 70 LEd 2d 419, 102 S Ct 252 ; *Guimei v. General Electric Co.* (2009) 172 CA4th 689, 702-703, 91 CR3d 178 (trial court properly disregarded foreign plaintiff's choice of forum)].

#### Exception:

The fact that a large national corporation conducts some business in California does not bring it within the favored position, for forum non conveniens purposes, of a plaintiff residing solely in California [ *Appalachian Ins. Co. v. Superior Court* (1984) 162 CA3d 427, 436, 208 CR 627 ; *Gould, Inc. v. Health Sciences, Inc.* (1976) 54 CA3d 687, 693, 126 CR 726 ]. For example, in a case in which 22 of the 25 criteria listed in 9.28[4][a] weighed in favor of dismissal of a California action, the fact that both parties maintained substantial business operations in California did not automatically provide California with an interest in the dispute [ *Appalachian Ins. Co. v. Superior Court* (1984) 162 CA3d 427, 436, 208 CR 627 ].

A forum in which an action may be brought, although not necessarily won, is a suitable forum, provided that [ *Boaz v. Boyle & Co., Inc.* (1995) 40 CA4th 700, 711, 46 CR2d 888 ]:

- Defendant is amenable to process there;
- There is no procedural bar that would prevent the foreign court from reaching the issues on their merits; and
- Adjudication in the alternative forum is by an independent judiciary applying what is generally regarded by American courts as due process of law.

**9.28[5] Determining Whether to Grant or Stay on Finding of Inconvenient Forum.** Once the court determines that a forum other than California would be more convenient, the court may either dismiss or stay the action [CCP § 410.30(a)].

A stay is the usual remedy so that, if obstacles to litigation develop in the convenient forum, the parties may resume litigation in the California court [ *Jagger v. Superior Court* (1979) 96 CA3d 579, 589, 158 CR 163 ; see, e.g., *Chong v. Superior Court* (1997) 58 CA4th 1032, 1035, 68 CR2d 427 (court stayed California proceedings; real party would have opportunity to apply to lift the stay if it could show a breakdown of the rule of law in Hong Kong)].

In dismissing the suit, the court loses jurisdiction and thereby deprives itself of the power to protect the interests of the plaintiff [see *Archibald v. Cinerama Hotels* (1976) 15 C3d 853, 857-858, 126 CR 811, 544 P2d 947 ]. Therefore, dismissal is an exceptional remedy, which is usually not available unless neither party resides in or has any connection to California [ *Henderson v. Superior Court* (1978) 77 CA3d 583, 597-598, 142 CR 478 ].

**9.28[6] Conditions on Grant or Stay of Dismissal.** The court may stay or dismiss the action in whole or in part on any conditions that may be just [CCP § 410.30(a); *Stangvik v. Shiley Inc.* (1991) 54 C3d 744, 750, 1 CR2d 556, 819 P2d 14 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureVenueForum Non ConveniensCivil ProcedureVenueMotions to TransferChoice of ForumCivil ProcedureVenueMotions to TransferConvenience of PartiesCivil ProcedureVenueMotions to TransferConvenience of WitnessesContracts LawContract Conditions & ProvisionsForum Selection Clauses



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.29*

### **9.29 Contents of Motion to Stay or Dismiss for Inconvenient Forum.**

A motion to stay or dismiss and action on the grounds of inconvenient forum includes the following elements:

- A notice of motion to stay or dismiss and action on the grounds of inconvenient forum [*see* 9.54 for form].
- Supporting declarations [*see* 9.55 for form].
- Written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing.
- Supporting memorandum.
- Proof of service.
- Proposed order, if desired [*see* 9.56 for form].



#### **Cross References:**

Ch. 26, Law and Motion Practice.

Examples of memoranda in support of a motion to stay or dismiss for inconvenient forum, see California Points and Authorities, Ch. 132, Jurisdiction: Personal Jurisdiction and Inconvenient Forum (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Venue Forum Non Conveniens Civil Procedure Pleading & Practice Motion Practice Content & Form



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.30*

### 9.30 Serving and Filing Papers.

A motion to stay or dismiss an action for inconvenient forum is served and filed by:

- Serving a conformed copy of the notice of motion, proof or service, and accompanying papers on the other party's attorney, or on the other party if he or she has no attorney in accordance with *CCP §§ 1005, 1010.6, 1013, 1015* and *Cal Rules Ct, Rules 3.1103, 3.1300*.
- Delivering the originals of the notice of motion and accompanying papers to the court clerk's office for filing at least 16 court days, plus any applicable additional period, before the hearing and pay the required fee. If not filed with the original papers, deliver the proof of service of the moving papers for filing no later than five court days before the time appointed for the hearing [*see Cal Rules Ct, Rule 3.1300*].
- If there is a statement regarding oral testimony, file it no later than three days before the hearing; and if it is filed less than five court days before the hearing, serve a conformed copy of it on the opposing party in a manner to assure delivery no later than two days before the hearing [*see Cal Rules Ct, Rule 3.1306(b)*].



#### **Cross Reference:**

Ch. 27, Service of Papers.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.31*

### **9.31 Responding to Opposing Party's Papers.**

When responding the opposition's papers:

- Prepare any reply declarations and any reply memorandum in response to any counter-declarations and opposing memorandum filed by the opposing party.
- Serve a conformed copy of each declaration and reply memorandum on opposing counsel and file the originals at least five court days before the hearing [*CCP §§ 1005, 1015; Cal Rules Ct, Rule 3.1300(a), (c); see Ch. 26, Law and Motion Procedure*].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeMotion PracticeOpposing Memoranda



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.32*

### **9.32 Order and Notice of Ruling.**

A hearing on a motion to stay or dismiss an action for inconvenient forum is procedurally the same as a motion to quash service of summons. Issues to be considered are:

- Order and notice of ruling:
  - ☐ Prevailing party prepares order conforming to judge's ruling.
  - ☐ Prevailing party prepares and serves notice of ruling.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.33*

**9.33 CHECKLIST: Opposing a Motion to Stay or Dismiss Under Doctrine of Inconvenient Forum.**

- ☐ Consider whether the doctrine of inconvenient forum applies:
  - ☐ Consider whether action may be more appropriately and justly tried elsewhere because:
    - ☐ Action possesses no substantial connection with a defendant's activities in California.
    - ☐ California cannot provide an adequate forum.
    - ☐ California has no interest in fostering the litigation.
  - ☐ Apply the doctrine to a contractual forum-selection clause:
    - ☐ Clause is enforceable unless unreasonable.
    - ☐ Consider whether the clause is void by statute.
- ☐ Consider whether alternative forum is a suitable place for trial:
  - ☐ Consider private versus public interests.
  - ☐ Weigh the advantage to the plaintiff's choice of forum.

- ☐ Weigh the advantage to the plaintiff as California resident.

**Authority:**

*CCP § 410.30*

**Discussion:**

See 9.34, 9.36

- ☐ Prepare opposition papers:

- ☐ Supporting counter-declarations.

- ☐ Consider who is proper declarant for evidentiary facts.

- ☐ Written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing.

- ☐ Opposing memorandum.

- ☐ Proof of service.

- ☐ Proposed order.

- ☐ Serve and file response:

- ☐ Follow standard noticed motion procedure.

**Authority:**

*CCP §§ 418.10(b); 1005(b)*

**Discussion:**

See 9.37, 9.38

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.46

- ☐ Prevailing party submits order conforming to judge's ruling.

- ☐ Prevailing party prepares and serves notice of ruling.

**Authority:**

*CCP § 1019.5; Cal Rules Ct, Rules 3.1304 et seq.*

**Discussion:**



See 9.32

**Form:**

See 9.56



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.34*

### **9.34 Options and Strategies.**

If a court determines the equitable remedy of inconvenient forum should be applied, a stay is the usual remedy so that, if obstacles to litigation develop in the convenient forum (for example, the statute of limitations may have run), the parties may resume litigation in the California court. If the suit is dismissed, the court loses jurisdiction and deprives itself of the power to protect the interests of the plaintiff. Therefore, dismissal is rarely granted unless neither party resides in or has any connection to California.



#### **Strategic Point--Plaintiff:**

Assert in the opposition papers that the doctrine does not apply, but provide in the alternative that the most appropriate remedy is a stay rather than a dismissal should the court grant the motion.



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.35*

### 9.35 Time for Opposition Papers.

Papers opposing a motion to stay or dismiss an action for inconvenient forum must be served and filed at least nine court days before the hearing [see *CCP* §§ 418.10(b), 1005(a)(4), (b); *Cal Rules Ct*, Rule 3.1300(a)].



#### **Warning--Opposing Party:**

Although there does not appear to be specific California authority for granting a continuance of a hearing so the plaintiff can conduct discovery on forum non conveniens issues, because there is authority for doing so to enable the plaintiff to conduct discovery on jurisdictional issues to oppose a motion to quash under *CCP* § 418.10 [ *Goehring v. Superior Court* (1998) 62 CA4th 894, 911, 73 CR2d 105 ], a plaintiff should ask for a continuance (by stipulation, if possible) if he or she has a reasonable basis for doing so. The plaintiff may also need to seek orders shortening the usual time allowed for responding to discovery. Consider how the discovery held at this point can be used to more fully develop later discovery while remaining within the relevance requirements for discovery pertinent to the motion.



#### **Cross Reference:**

Discussion of opposition papers, see Ch. 26, Law and Motion Procedure.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeOpposing Memoranda



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1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.36

### 9.36 Proving Forum Selection Clause and Jurisdiction Are Fair and Reasonable.

**9.36[1] Forum Selection Clauses Upheld Unless Unfair or Unreasonable.** A forum-selection clause, by which parties agree contractually in advance on the forum for resolving disputes, is generally given effect unless unfair or unreasonable [ *The Bremen et al. v. Zapata Off-Shore Co.* (1972) 407 US 1, 15, 92 S Ct 1907, 32 L Ed2d 513 ] and courts generally enforce mandatory forum-selection clauses and apply the normal forum non conveniens analysis to permissive forum-selection clauses [ *Berg v. MTC Elecs. Technologies Co., Ltd.* (1998) 61 CA4th 349, 358-359, 71 CR2d 523 ].

#### ► Cross Reference:

Asserting forum selection clause, see 9.27.

**9.36[2] Burdens of Proof and Factors for Decision.** The plaintiff will want to set forth in the counter-declaration all those factors that militate in favor of the court's retention of jurisdiction [see, e.g., *Corrigan v. Bjork Shiley Corp.* (1986) 182 CA3d 166, 173-174, 176, 227 CR 247, disapproved on other grounds in *Stangvik v. Shiley, Inc.* (1991) 54 C3d 744, 764, 1 CR2d 556, 819 P2d 14 ].

#### ► Cross References:

Burden of proof involving a forum selection clause, see 9.28.

#### ► Cross Reference:

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Contracts LawContract Conditions & ProvisionsForum Selection Clauses



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.37*

### **9.37 Contents of Opposing Papers.**

Papers to be served and filed when opposing a motion to stay or dismiss an action for inconvenient forum include:

- Counter-declarations.
- Written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing.
- Opposing memorandum.
- Proof of service.
- Proposed order, if desired.



#### **Cross References:**

Ch. 26, Law and Motion Procedure.

Examples of memoranda in opposition to a motion to quash, see California Points and Authorities, Ch. 132, Jurisdiction: Personal Jurisdiction and Inconvenient Forum (Matthew Bender).

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeContent & Form



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.38*

### **9.38 Filing and Serving Papers.**

Serve and file the papers by:

- Serving a conformed copy of the above described papers on the other party's attorney, or on the other party if he or she has no attorney, at least nine court days before the hearing [see CCP §§ 418.10(b), 1005(a)(4), (b) and *Cal Rules Ct, Rule 3.1300(a)*].
- Attach a copy of proof of service to the papers.
- Delivering the originals of the notice of motion and accompanying papers to the court clerk's office for filing at least nine court days before the hearing and pay the required fee.
- If there is a statement regarding oral testimony, file it no later than three days before the hearing; and if it is filed less than five court days before the hearing, serve a conformed copy of it on the opposing party in a manner to assure delivery no later than two days before the hearing [see *Cal Rules Ct, Rule 3.1306(b)*].



#### **Cross Reference:**

Ch. 27, Service of Papers.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.39*

### **9.39 Order and Notice of Ruling.**

A hearing on a motion to stay or dismiss an action for inconvenient forum is procedurally the same as a motion to quash service of summons. Issues to be considered are:

■ Order and notice of ruling:

- ☐ Prevailing party prepares order conforming to judge's ruling
- ☐ Prevailing party prepares and serves notice of ruling.



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.40*

**9.40 CHECKLIST: Moving to Dismiss for Delay in Serving Summons.**

☐ Consider whether there are grounds for a mandatory dismissal under *CCP* §§ 583.210-583.250:

☐ Did plaintiff serve summons and complaint within three years of filing complaint?

**Exception:**

Take into account time excluded from computation of the three-year period.

☐ Did plaintiff file proof of service within 60 days after the time limit for serving summons and complaint?

**Authority:**

*CCP* §§ 418.10(a)(3), 583.210-583.240

**Discussion:**

See 9.42

☐ Consider whether there are grounds for a discretionary dismissal under *CCP* § 583.420:

☐ Did plaintiff serve summons and complaint within two years after filing the complaint?

**Exception:**

Take into account time excluded from computation of the three-year period.

**Authority:**

*CCP* §§ 418.10(a)(3), 583.420, 583.430

**Discussion:**



See 9.42

☐ Motion to dismiss the action is the proper means to object on the ground of delay in prosecution.

- ☐ May be by special appearance.
- ☐ May be brought after general appearance.

**Exception:**

If grounds for the motion exist at the time of filing an answer, a demurrer, or motion to strike, failure to raise the issue of delay in service of summons by a *CCP* § 418.10 motions waives the issue.

**Authority:**

*CCP* §§ 418.10(e)(3), 583.210-583.240

**Discussion:**

See 9.42, 9.43



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.41*

#### **9.41 Options, Strategy, and Effect of Trial Court Delay Reduction.**

The Trial Court Delay Reduction Act [*Gov Code § 68600 et seq.*] and the Differential Case Management rules [*Cal Rules Ct, Rules 3.710 et seq.*] provide oversight of civil cases and impose strict time lines. Under these rules, the summons and complaint must be served within 60 days after the complaint is filed, unless a longer period is set by local rule [*Gov Code § 68616(a); Cal Rules Ct, Rule 3.110(b)*] or an extension is obtained prior to the expiration of the 60-day period [*Gov Code § 68616(a); Cal Rules Ct, Rule 3.110(e)*]. Well before the statutes on discretionary and mandatory dismissal for delay in serving summons come into play, failure to abide by the 60-day requirement may result in having to file a certificate or the court issuing an order to show cause why a specific service has not been made [*see Cal Rules Ct, Rule 3.110(f)* (order to show cause); San Diego Super Ct Rules, Rule 2.5 (certificate of progress)].

#### **➤ Cross Reference:**

Requirements for service of summons under Trial Court Delay Reduction Act, see *8.08[1]*.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Service of Process Time Limitations General Overview



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.42*

#### **9.42 Dismissal for Delay in Serving Summons.**

**9.42[1] Dismissal Mandatory for Failure to Serve Summons and Complaint Within Three Years of Commencing Action.** If service of the summons and complaint is not made within three years after action commenced, or if there is a failure to file proof of service within 60 days after the time when the summons and complaint must be served on the defendant, the action must be dismissed, either on the court's own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties [CCP §§ 583.210, 583.250].

##### **Exception:**

Specified periods of time are excluded from the computation of the three-year service of summons period. This includes time when [CCP § 583.240]:

- Defendant is not amenable to process.
- A stay of the action affects service.
- Validity of service is being litigated.
- Service would be impossible, impracticable, or futile for reasons beyond plaintiff's control, not including plaintiff's failure to discover facts or evidence.

##### **➡ Cross References:**

Discussion of time limits, exceptions, and when action is "commenced" for purposes of computing of three year period, see 8.08.

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 212, Dismissal (Matthew Bender).

**9.42[2] Dismissal Discretionary for Failure to Serve Summons and Complaint Within Two Years of Commencing Action.**

**9.42[2][a] Court Has Discretion to Dismiss If Summons Is Not Served Within Two Years.** If service of summons and complaint is not made in an action within two years after action commenced, the court may dismiss an action for delay in prosecution on its own motion or on motion of the defendant [CCP §§ 583.410, 583.420(a)].

Computation of the two-year period is subject to the same rules as in the case of mandatory dismissal [CCP § 583.420(b)].



**Cross References:**

When action "commences" for purpose of serving summons, see 8.08[4].

Discussion, see California Forms of Pleading and Practice, Ch. 212, Dismissal (Matthew Bender).

**9.42[2][b] Serving and Filing Notice of Motion--Time Limits.** A party seeking dismissal of a case under the discretionary two-year rule must serve and file a notice of motion at least 45 days before the date set for hearing of the motion. With the memorandum, the moving party may serve and file an affidavit or declaration stating facts in support of the motion [Cal Rules Ct, Rule 3.1342(a)].



**Strategic Point--Opposing Party:**

The filing of the notice of motion does not preclude the opposing party from further prosecution of the case to bring it to trial [Cal Rules Ct, Rule 3.1342(a)].

**9.42[2][c] Filing Written Opposition--Time Limits.** Within 15 days after service of the notice of motion, the opposing party may serve and file a written opposition [Cal Rules Ct, Rule 3.1342(b)].



**Warning:**

The court may construe a failure by the opposing party to serve and file written opposition as an admission that the motion is meritorious, and in such a case may grant the motion without a hearing on the merits [Cal Rules Ct, Rule 3.1342(b)].

**9.42[2][d] Filing Moving Party's Response to Written Opposition; Reply--Time Limits.** Within 15 days after service of the written opposition, if any, the moving party may serve and file a response [Cal Rules Ct, Rule 3.1342(c)]. Within five days after service of the response, if any, the opposing party may serve and file a reply [Cal Rules Ct, Rule 3.1342(d)].

**9.42[2][e] Factors Court Must Consider in Ruling on Motion.** In ruling on a motion for discretionary dismissal, the court must consider all matters relevant to a proper determination of the motion, including [Cal Rules Ct, Rule 3.1342(e)]:

- The court's file in the case.
- The affidavits, declarations, and supporting data submitted by the parties.
- When applicable, the availability of the moving party and other essential parties for service of process.
- The diligence in seeking to effect service of process.
- The extent to which the parties engaged in any settlement negotiations or discussions.

- The diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party.
- The nature and complexity of the case.
- The law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case.
- The nature of any extensions of time or other delay attributable to either party.
- The condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial.
- Whether the interests of justice are best served by dismissal or trial of the case; and any other fact or circumstance relevant to a fair determination of the issue.

**9.42[2][f] Court May Dismiss, Grant, or Deny Motion.** The court may dismiss on its own motion or on motion of the defendant if dismissal appears appropriate to the court under the circumstances of the case [*CCP* § 583.410(a)]. The court may grant or deny the motion or, if the facts warrant, continue or defer its ruling on the matter pending performance by either party of any conditions relating to trial or dismissal of the case that may be required by the court to effectuate substantial justice [*Cal Rules Ct, Rule 3.1342(f)*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Service of Process Time Limitations Dismissals



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**9.43 Motion to Dismiss Must Be Made on or Before Last Day of Time to Plead.**

A notice of motion to dismiss for delay in prosecution must be served and filed on or before the last day of the time to plead, or within any further time that the court may for good cause allow [CCP §§ 418.10(a)(3), 583.250(a)(2)]. A defendant may move to dismiss an action on the ground of delay in prosecution without making a general appearance. Failure to raise the issue of delay of service of summons at that time waives it [CCP § 418.10(e)(3)]. Of course, if the case is not brought to trial in a timely fashion, a motion for delay in prosecution may be brought at the appropriate time [CCP §§ 583.310, 583.420(a)(2)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Service of Process Time Limitations Dismissals Civil  
Procedure Dismissals Involuntary Dismissals Failures to Prosecute



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#### **9.44 Procedure for Making Motion Same As Motion to Quash.**

The procedures for making a motion to dismiss for delay in prosecution are generally the same as motion to quash service of summons except that the facts focus on the delay involved.

#### **► Cross Reference:**

Discussion of preparing, filing and serving motion to quash, see 9.10-9.13.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Service of Process Time Limitations Dismissals



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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.45*

**9.45 CHECKLIST: Opposing a Motion to Dismiss for Delay in Prosecution.**

See checklist at 9.40.





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*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.46*

**9.46 Opposing Papers Must Be Filed Nine Court Days Before Hearing.**

Papers opposing a motion to quash service of summons must be served and filed at least nine court days before the hearing [see *CCP* §§ 418.10(b), 1005(a)(4), (b); *Cal Rules Ct*, Rule 3.1300(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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Chapter 9 Motions to Quash and Other Objections to Personal Jurisdiction  
VII. OPPOSING A MOTION TO DISMISS FOR DELAY IN SERVING SUMMONS

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.47*

#### **9.47 Procedure for Opposing Motion Same As Motion to Quash.**

The procedures for opposing a motion to dismiss for delay in serving summons are generally the same as motion to quash service of summons except that the facts focus on the delay involved.



#### **Cross Reference:**

Discussion of preparing, filing and serving motion to quash, see 9.10-9.13.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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Chapter 9 Motions to Quash and Other Objections to Personal Jurisdiction  
VIII. REVIEWING AN ORDER GRANTING OR DENYING A CCP § 418.10 MOTION

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.48*

#### **9.48 CHECKLIST: Reviewing an Order Granting or Denying a Motion Made Under CCP § 418.10.**

☐ Plaintiff can appeal if order grants the motion.



##### **Timing:**

60 days after date of service stated on served notice of entry of judgment or a file-stamped copy of the order, 60 days after service of notice by a party, or 180 days after entry of judgment.

##### **Authority:**

*CCP §§ 904.1(a)(3), 904.2(d); Cal Rules of Ct, Rule 8.104(a)*

##### **Discussion:**

See 9.49[1]

☐ Defendant may petition for writ of mandate if the court denies the motion.



##### **Timing:**

10 days after service of a written notice of entry of the court's order.

##### **Exception:**

For good cause, up to 20 days.

##### **Exception:**

The initial 10-day period is extended when service is by mail.

##### **Authority:**

*CCP § 418.10(c)*

**Discussion:**

See 9.50

☐ Filing and serving notice of petition for writ of mandate extends defendant's time for pleading until 10 days after the defendant is served with written notice of the final judgment in the writ proceeding.

**Exception:**

For good cause shown, up to 20 days.

**Authority:**

*CCP § 418.10(c)*

**Discussion:**

See 9.50[2]



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VIII. REVIEWING AN ORDER GRANTING OR DENYING A CCP § 418.10 MOTION

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.49*

#### **9.49 When Trial Court Grants Motion.**

**9.49[1] Plaintiff May Appeal When Motion Granted.** A plaintiff may appeal from the granting of a motion to quash service of summons or to stay an action for inconvenient forum or from a written order of dismissal under *CCP* § 581d following issuance of an order granting a motion to dismiss for inconvenient forum [*CCP* §§ 904.1(a)(3), 904.2(d); *Strathvale Holdings v. E.B.H.* (2005) 126 CA4th 1241, 1248 , 25 CR3d 372 ; *Thomas J. Palmer, Inc. v. Turkiye Is Bankasi A.S.* (1980) 105 CA3d 135, 138, 164 CR 181 ]. The entry date of an appealable order is the date it is entered in the permanent minutes of the court unless the minute order directs the preparation of a written order [ *Strathvale Holdings v. E.B.H.* (2005) 126 CA4th 1241, 1248 , 25 CR3d 372 ].

#### **9.49[2] Reviewing Grant of Motion to Quash.**

**9.49[2][a] Plaintiff Has Initial Burden of Proof As to Jurisdiction; Substantial Evidence Rule Applies.** The principles guiding review on appeal relating to the issue of minimum contacts are [ *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 449, 58 CR2d 899, 926 P2d 1085 ; *Serafini v. Superior Court* (1998) 68 CA4th 70, 77, 80 CR2d 159 ]:

- When a defendant properly moves to quash out-of-state service of process for lack of jurisdiction, the plaintiff has the initial burden to demonstrate facts justifying the exercise of jurisdiction.
- If those facts are established, the burden shifts to the defendant to show that the exercise of jurisdiction would be unreasonable.
- If the evidence conflicts, the trial court's factual determinations will not be disturbed if they are supported substantial evidence.
- If the evidence does not conflict, the question is purely one of law and the appellate court will engage in an independent review of the record.

Substantial evidence is not synonymous with any evidence, but is evidence of ponderable legal significance, that is, evidence that is reasonable in nature, credible, and of solid value [ *Magnecomp Corp. v. Athene Co., Ltd.* (1989) 209

CA3d 526, 533, 257 CR 278 ].

 **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**9.49[2][b] Evidence Not Properly Before Trial Court May Not Be Considered on Appeal.** The appellate court may not consider any evidence not properly before the trial court [ *Crea v. Busby* (1996) 48 CA4th 509, 514, 55 CR2d 513 ].

**9.49[3] Direct Estoppel Applies If Plaintiff Fails to Seek Appellate Review.** If the plaintiff fails to seek reconsideration or appellate review of the granting of a motion to quash service of summons for lack of personal jurisdiction, the plaintiff may be barred from relitigating the issue by direct estoppel [ *Sabek, Inc. v. Engelhard Corp.* (1998) 65 CA4th 992, 997, 76 CR2d 882 ].

**9.49[4] Defendant May Be Entitled to Contractual Costs.** On review of a grant of a motion to quash for lack of personal jurisdiction, the defendant may be entitled to an award of contractual costs under CC § 1717 and CCP § 1032 [see *Profit Concepts Mgmt., Inc. v. Griffith* (2008) 162 CA4th 950, 957, 76 CR3d 396 (defendant prevailing at trial and on appeal awarded costs on appeal)].

 **Cross References:**

Costs, see Matthew Bender(R) Practice Guide: California Trial and Posttrial Civil Procedure, Ch. 24, Costs.

Obtaining award of attorney fees, see Matthew Bender(R) Practice Guide: California Trial and Posttrial Civil Procedure, Ch. 25A, Recovering Attorney's Fees From Opposing Party.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureDismissalsInvoluntary DismissalsAppellate Review



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VIII. REVIEWING AN ORDER GRANTING OR DENYING A CCP § 418.10 MOTION

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.50*

### **9.50 When Trial Court Denies Motion.**

**9.50[1] Defendant May Not Appeal Denial of Motion.** A defendant may not appeal an order denying a motion to quash service of summons [ *Varra v. Superior Court* (1960) 181 CA2d 12, 14, 4 CR 920 ; *Kneeland v. Ethicon Suture Labs.* (1952) 113 CA2d 335, 337-338, 248 P2d 447 ].

### **9.50[2] Defendant May Petition for Writ of Mandate.**

**9.50[2][a] Petition Must Be Filed Within 10 Days After Being Served With Notice of Entry of Court's Order.** If the trial court denies a CCP § 418.10 motion, the defendant, within 10 days after being served with a written notice of entry of the court's order, or within further time not exceeding 20 days that the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action [CCP § 418.10(c)].

#### **Cross Reference:**

Form, see *California Forms of Pleading and Practice*, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*, § 323.155 (Matthew Bender).

**9.50[2][b] Time for Petition May Be Extended.** The initial 10-day period is extended when service is by mail [see CCP § 1013(a); *Shearer v. Superior Court* (1977) 70 CA3d 424, 426, 138 CR 824 ].

CCP § 418.10(c) is not, however, jurisdictional in the sense that it deprives the trial court of the power to grant relief under CCP § 473(b), from a default judgment or order when the defendant failed to apply for an extension of time within the original 10-day period. Rather, during the period within which time could have been extended, the trial court may, on a proper showing, grant relief from default in the form of an extension of time. When the trial court would have been authorized to grant relief from default under equitable principles or under CCP § 473, a reviewing court may grant similar relief [ *Cornell Univ. Med. College v. Superior Court* (1974) 38 CA3d 311, 314-315, 113 CR 291 ; see also *Quattrone v. Superior Court* (1975) 44 CA3d 296, 301, 118 CR 548 ].

**9.50[2][c] Petition Extends Time for Defendant to Plead.** The defendant must file or enter a responsive pleading in the reviewing court within the time prescribed by CCP § 418.10(b) unless, on or before the last day of the time to

plead, the defendant serves on the adverse party and files with the court a notice that the defendant has petitioned for a writ of mandate.

The service and filing of the notice extends the defendant's time to plead until 10 days after the defendant is served with a written notice of the final judgment in the mandate proceeding. The time to plead may, however, for good cause shown, be extended by the trial court for an additional period not exceeding 20 days [*CCP* § 418.10(c); *see also Cal Rules Ct, Rule 8.491* (extension until 10 days after Supreme Court files order denying petition seeking review of court of appeal's denial of writ of mandate)].

**9.50[2][d] Defendant Does Not Make General Appearance Until Writ Concluded.** If a *CCP* § 418.10 motion is denied and the defendant or cross-defendant petitions for a writ of mandate pursuant to *CCP* § 418.10(c), that defendant or cross-defendant is not deemed to have generally appeared until the proceeding on the writ petition is finally concluded [*CCP* § 418.10(e)(2)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureRemediesWritsCommon Law WritsMandamus





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Chapter 9 Motions to Quash and Other Objections to Personal Jurisdiction  
IX. FORMS

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.51*

**9.51 Notice of Motion to Quash Service of Summons for Lack of Personal Jurisdiction.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|              |   |                                      |
|--------------|---|--------------------------------------|
| _____ [name] | ) |                                      |
| Plaintiff,   | ) | Case No. _____                       |
| vs.          | ) | NOTICE OF MOTION AND MOTION TO QUASH |
| _____ [name] | ) | SERVICE OF SUMMONS                   |
| Defendant.   | ) | Date: _____                          |
|              | ) | Time: _____                          |
|              | ) | Location: _____                      |
|              | ) | Judge: _____                         |
|              | ) | Date Action Filed: _____             |
|              | ) | [Trial Date: _____]                  |

To \_\_\_\_\_ [name], plaintiff, and to \_\_\_\_\_ [name], his/her attorney of record:

NOTICE IS GIVEN that defendant \_\_\_\_\_ [name] appears specially to make this motion only and, so specially appearing, does and will, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], move for an order quashing the service of summons on this defendant [and staying or dismissing the action]. The motion will be made on the ground(s) that the court lacks jurisdiction over the person of this defendant [and that California is an inconvenient forum and this action, in the interest of substantial justice, should be heard in a forum outside this state].

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)], and the

supporting memorandum served and filed with this notice of motion, on the records and file in this action, and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name]

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant \_\_\_\_\_ [name]

NOTES.

**Authority:**

*CCP § 418.10(a)(1)*

**Grounds for Lack of Personal Jurisdiction:**

*See 9.08*

**Related Form of Declaration in Support of Motion to Quash Service of Summons for Lack of Personal Jurisdiction:**

*See 9.52*

**Related Form of Order Granting Motion to Quash Service of Summons for Lack of Personal Jurisdiction:**

*See 9.53*

**Related Forms of Memoranda:**

*See California Points and Authorities, §§ 132.70-132.90 (Matthew Bender)*



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IX. FORMS

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.52*

**9.52 Declaration in Support of Motion to Quash Service of Summons for Lack of Personal Jurisdiction.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_ [name]

Plaintiff,

vs.

\_\_\_\_\_ [name]

Defendant.

)

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)

)

Case No. \_\_\_\_\_

DECLARATION IN SUPPORT OF MOTION TO  
QUASH SERVICE OF SUMMONS

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Location: \_\_\_\_\_

Judge: \_\_\_\_\_

Date Action Filed: \_\_\_\_\_

[Trial Date: \_\_\_\_\_]

I, \_\_\_\_\_ [name] declare:

1. I am \_\_\_\_\_ [identify declarant, e.g., the defendant in this action or an attorney at law duly authorized to practice before all the courts of the State of California and the attorney of record for the defendant], and I make this declaration in support of \_\_\_\_\_ [specify my or defendant's] motion to quash service of summons for lack of jurisdiction [and to stay or dismiss the action for inconvenient forum]. [My authority in this case is limited to appearing on behalf of defendant \_\_\_\_\_ [name] on this motion and for no other purpose].

2. \_\_\_\_\_ [Set forth specific evidentiary or probative facts and, if appropriate, reference to the court's record and file in the case, that establish the ground of the motion to quash service, such as, defendant lacks sufficient minimum contacts with California, e.g., As shown by the complaint, this action arose out of a vehicle collision in

Colorado between a car owned and being driven by plaintiff, then a resident of Nevada and now a resident of California, and a car owned and being driven by defendant. As shown by defendant's declaration, defendant now is, and at the time of the collision was, a resident of Colorado and was \_\_\_\_\_ (served with process in this action in that state *or* and is amenable to service of process in that state). As further shown by defendant's declaration, defendant has never resided in or done business of any kind in California (and his/her only connection with this state was his/her laying over in San Francisco on August 14, 2003, on his/her way to vacation in Honolulu, Hawaii, at which time he/she was personally served with the summons and complaint)).

[CONTINUE]

3. \_\_\_\_\_ [Set forth specific evidentiary or probative facts and, if appropriate, reference to the court's record and file in the case, that establish the ground of the motion to stay or dismiss for inconvenient forum].

[CONTINUE]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: \_\_\_\_\_.

\_\_\_\_\_ [signature]

NOTES.

**Authority:**

CCP § 418.10(a)(1)

**Grounds for Lack of Personal Jurisdiction:**

See 9.08

**General vs. Special Appearances:**

See 9.07

**Related Form of Notice of Motion to Quash Service of Summons for Lack of Personal Jurisdiction:**

See 9.51

**Related Form of Order Granting Motion to Quash Service of Summons for Lack of Personal Jurisdiction:**

See 9.53



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IX. FORMS

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.53*

**9.53 Order Granting Motion to Quash Service of Summons for Lack of Personal Jurisdiction.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_ [name]

Plaintiff,

vs.

\_\_\_\_\_ [name]

Defendant.

)  
)  
)  
)  
)  
)  
)

Case No. \_\_\_\_\_

ORDER GRANTING MOTION TO QUASH SER-  
VICE OF SUMMONS

The motion of defendant \_\_\_\_\_ [name], who appeared specially only, for an order quashing service of summons [and staying or dismissing the action on the ground of inconvenient forum] came on regularly for hearing by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

On proof made to the satisfaction of the court that the court has no jurisdiction over the person of the defendant, [and that California is an inconvenient forum for the trial of this action, which in the interest of substantial justice, should be tried in the proper court in the State of \_\_\_\_\_ (specify, e.g., Colorado),] the motion therefore ought to be granted.

IT IS ORDERED that the motion is granted and that the service of summons on the defendant \_\_\_\_\_ [name] is quashed and the above-entitled action is \_\_\_\_\_ (stayed on the condition that \_\_\_\_\_ (specify) or dismissed)].

Date: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 418.10(a)(1)*



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Chapter 9 Motions to Quash and Other Objections to Personal Jurisdiction  
IX. FORMS

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.54*

**9.54 Notice of Motion to Stay or Dismiss Action on Ground of Inconvenient Forum.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|              |   |                                     |
|--------------|---|-------------------------------------|
| _____ [name] | ) |                                     |
| Plaintiff,   | ) | Case No. _____                      |
| vs.          | ) | NOTICE OF MOTION AND MOTION TO STAY |
| _____ [name] | ) | OR DISMISS ACTION                   |
| Defendant.   | ) | Date: _____                         |
|              | ) | Time: _____                         |
|              | ) | Location: _____                     |
|              | ) | Judge: _____                        |
|              | ) | Date Action Filed: _____            |
|              | ) | [Trial Date: _____]                 |

To \_\_\_\_\_ [name], plaintiff, and to \_\_\_\_\_ [name], his/her attorney of record:

NOTICE IS GIVEN that defendant \_\_\_\_\_ [name] appears specially to make this motion only and, so specially appearing, does and will, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], move for an order staying or dismissing the action [and/or quashing the service of summons on this defendant]. The motion will be made on the ground(s) that California is an inconvenient forum and this action, in the interest of substantial justice, should be heard in a forum outside this state [and that the court lacks jurisdiction over the person of this defendant].

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)], and the

supporting memorandum served and filed with this notice of motion, on the records and file in this action, and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name]

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant \_\_\_\_\_ [name]

NOTES.

**Authority:**

*CCP § 418.10(a)(2)*

**Inconvenient Forum:**

See 9.23-9.32

**Related Form of Declaration in Support of Motion to Stay or Dismiss Action on Ground of Inconvenient Forum:**

See 9.55

**Related Form of Order Granting Motion to Stay or Dismiss Action on Ground of Inconvenient Forum:**

See 9.56

**Related Forms of Memoranda:**

See *California Points and Authorities*, §§ 132.130, 132.150-132.154 (Matthew Bender)





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IX. FORMS

1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.55

### 9.55 Declaration in Support of Motion to Stay or Dismiss Action on Ground of Inconvenient Forum.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_ [name]

Plaintiff,

vs.

\_\_\_\_\_ [name]

Defendant.

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Case No. \_\_\_\_\_

DECLARATION IN SUPPORT OF MOTION TO  
STAY OR DISMISS ACTION

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Location: \_\_\_\_\_

Judge: \_\_\_\_\_

Date Action Filed: \_\_\_\_\_

[Trial Date: \_\_\_\_\_]

I, \_\_\_\_\_ [name] declare:

1. I am \_\_\_\_\_ [identify declarant, e.g., the defendant in this action or an attorney at law duly authorized to practice before all the courts of the State of California and the attorney of record for the defendant], and I make this declaration in support of \_\_\_\_\_ [specify my or defendant's] motion to stay or dismiss the action for inconvenient forum [and to quash service of summons for lack of jurisdiction]. [My authority in this case is limited to appearing on behalf of defendant \_\_\_\_\_ (name) on this motion and for no other purpose].

2. \_\_\_\_\_ [Set forth specific evidentiary or probative facts and, if appropriate, reference to the court's record and file in the case, that establish the ground of the motion to stay or dismiss the action, e.g., As shown by the complaint, this action arose out of a vehicle collision in Colorado between a car owned and being driven by plaintiff,

then a resident of Nevada and now a resident of California, and a car owned and being driven by defendant. As shown by defendant's declaration, defendant now is, and at the time of the collision was, a resident of Colorado and was \_\_\_\_\_ (served with process in this action in that state *or* and is amenable to service of process in that state). As further shown by defendant's declaration, defendant has never resided in or done business of any kind in California (and his/her only connection with this state was his/her laying over in San Francisco on August 14, 2003, on his/her way to vacation in Honolulu, Hawaii, at which time he/she was personally served with the summons and complaint)].

3. [On \_\_\_\_\_ (date), I phoned the \_\_\_\_\_ (law enforcement investigative agency) in Colorado and in response to my inquiry was informed that an accident report covering the subject collision had been prepared and filed by \_\_\_\_\_ (name of investigating officer), a \_\_\_\_\_ (title or rank) assigned to \_\_\_\_\_ (investigating agency) and whose unit address and phone number were \_\_\_\_\_. On the same day, I phoned the investigating officer who confirmed that he/she had prepared and filed an accident report and that he/she would send me a verified copy of it. Thereafter, on or about \_\_\_\_\_ (date), I received a copy of the accident report verified by the affidavit of \_\_\_\_\_ (name), the investigating officer. A copy of this report and affidavit are attached as Exhibit A and made a part hereof. This report concludes that the collision was caused by plaintiff's (describe negligent act). In his/her cover letter accompanying the report and affidavit, a copy of which is attached as Exhibit B and made a part hereof, the investigating officer expresses a desire to furnish me with whatever information he/she has and a willingness to testify as a witness in any trial held in Colorado, but specifically declines to attend any trial in California. As further shown by the report, the names of the witnesses to the collision, all of whom gave a Colorado address, are as follows: \_\_\_\_\_ (set forth names of witnesses).]

4. [On \_\_\_\_\_ (date), I phoned each of these witnesses at his or her home in Colorado and ascertained from each facts from which I concluded that each was a percipient witness to the collision and that the testimony of each would be required at the trial of this action. Of these witnesses, \_\_\_\_\_ (name(s)) categorically stated that they would not come to California for trial or for any other purpose. Witness \_\_\_\_\_ (name) told me that he/she would come to California only if he/she could bring his/her spouse and children and all their expenses were paid by defendant. On the other hand, each of these witnesses would, if the action were filed in Colorado, either testify willingly or be subject to subpoena in that state.]

[CONTINUE]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: \_\_\_\_\_.

\_\_\_\_\_ [signature]

NOTES.

**Authority:**

CCP § 418.10(a)(2)

**Inconvenient Forum:**

See 9.23-9.32

**General vs. Special Appearances:**

See 9.07

**Related Form of Notice of Motion to Stay or Dismiss Action on Ground of Inconvenient Forum:**

See 9.54

**Related Form of Order Granting Motion to Stay or Dismiss Action on Ground of Inconvenient Forum:**

See 9.56



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Chapter 9 Motions to Quash and Other Objections to Personal Jurisdiction  
IX. FORMS

*1-9 MB Practice Guide: CA Pretrial Civil Procedure 9.56*

**9.56 Order Granting Motion to Stay or Dismiss Action on Ground of Inconvenient Forum.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_ [name]

Plaintiff,

vs.

\_\_\_\_\_ [name]

Defendant.

)  
)  
)  
)  
)  
)  
)

Case No. \_\_\_\_\_

ORDER GRANTING MOTION TO STAY OR DIS-  
MISS FOR INCONVENIENT FORUM

The motion of defendant \_\_\_\_\_ [name], who appeared specially only, for an order staying or dismissing the action on the ground of inconvenient forum [and quashing service of summons] came on regularly for hearing by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

On proof made to the satisfaction of the court that California is an inconvenient forum for the trial of this action, which in the interest of substantial justice, should be tried in the proper court in the State of \_\_\_\_\_ [specify, e.g., Colorado], [and that the court has no jurisdiction over the person of the defendant,] the motion therefore ought to be granted.

IT IS ORDERED that the motion is granted and that the above-entitled action is \_\_\_\_\_ [stayed on the condition that \_\_\_\_\_ (specify) or dismissed] [and service of summons on the defendant \_\_\_\_\_ (name) is quashed].

Date: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 418.10(a)(2)*



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Chapter 10 Dismissal for Lack of Subject Matter Jurisdiction

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.syn*

**§ 10.syn Synopsis to Chapter 10: Dismissal for Lack of Subject Matter Jurisdiction**

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Chapter 10 Dismissal for Lack of Subject Matter Jurisdiction  
I. STRATEGY

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.01*

**10.01 Scope.**

This chapter covers:

- Objective and strategy for seeking dismissal for lack of subject matter jurisdiction [*see 10.02*].
- Determining whether a court has subject matter jurisdiction [*see 10.03, 10.04*].
- Resolving concurrent jurisdiction issues [*see 10.05*; Form: *see 10.15*].
- Moving to transfer for lack of subject matter jurisdiction [*see 10.06*].
- Moving to dismiss for lack of subject matter jurisdiction [*see 10.07, 10.08*; Forms: *see 10.13, 10.14*].
- Challenging lack of subject matter jurisdiction on appeal [*see 10.09 -10.12*].

**Core Statutes:**

Cal Const, art VI; CCP §§ 85, 396



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Chapter 10 Dismissal for Lack of Subject Matter Jurisdiction  
I. STRATEGY

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.02*

### 10.02 Objective and Strategy.

The term "jurisdiction," used continuously in a variety of situations, has so many different meanings that no single statement entirely suffices as a definition. Essentially, jurisdictional errors are of two types: unfortunately, even California courts have not always maintained the distinction nor properly applied the very different rules applying to the two types [see *People v. American Contractors Indem. Co.* (2004) 33 C4th 653, 660 ; *Abelleira v. Dist. Court of Appeal* (1941) 17 C2d 280, 287, 109 P2d 942 ].

The type of subject matter jurisdiction often referred to as "fundamental" is the authority of the court over causes, parties, and objects [see 10.04[6], [8]]. In contrast, the exercise of "excess jurisdiction" consists of an act or decision of the court that exceeds its power granted over those causes, parties, and objects [see 10.04[7], [8]].



#### Warning:

The distinction between fundamental subject matter jurisdiction and excess jurisdiction is crucial to proper application of rules for challenging lack of subject matter jurisdiction [see 10.04[8], [9]].

As a lack of authority to make any decision concerning the particular causes, parties, and objects subject to suit, a lack of subject matter jurisdiction in the fundamental sense renders a decision void. On the other hand, the exercise of excess jurisdiction, being only the rendering of a disposition of causes, parties, or objects over which the court has fundamental jurisdiction, merely renders the particular erroneous disposition voidable [see 10.04[8]].



#### Warning:

The voidability of decisions in excess of jurisdiction require action on the part of the aggrieved party in order to effect the avoidance of the error. The right to effect avoidance is time limited. The mistaken perception that an error of jurisdiction is fundamental, and thus automatically void, rather than merely in excess of jurisdiction and requiring timely action, can result in a party missing the deadline for obtaining avoidance of the error.



#### Timing:

A judgment made without fundamental subject matter jurisdiction is subject to collateral attack at any time. In sharp contrast, an judgment in excess of jurisdiction that becomes final is res judicata, and

therefore must be attacked as error in a timely manner after judgment or on appeal, if not during trial [see 10.04[8][b]].

While a lack of fundamental subject matter jurisdiction cannot be waived, the right to raise excess jurisdiction is subject to preclusion by, in addition to res judicata, estoppel and disfavor of collateral attack [see 10.04[9]].



#### **Warning:**

Because estoppel, the disfavor of collateral attack, and res judicata can limit the ability to challenge decisions in excess of jurisdiction, such decisions should receive the immediate attention of the aggrieved party in order to preserve the party's right to obtain avoidance and perhaps to prevent other sanctions or imposition of costs. The party should seek dismissal during an action, or vacation or appeal of order or judgment, as appropriate, as soon as possible upon discovering the action exceeded the court's jurisdiction.



#### **Strategic Point:**

Even though fundamental subject matter jurisdiction cannot be waived, the issue should be raised at the earliest opportunity. If the issue is not raised and a party prevails on an issue, the opposing party can render the success meaningless. Taking the gamble that the lack of subject matter jurisdiction will not be raised is rarely worth the risk. If the opposing party does not recognize the defect, it is highly likely that the court--particularly an appellate court--will identify the issue [see, e.g., *Indiana Gas Co. v. Home Ins. Co.* (7th Cir 1998) 141 F3d 314, 316 ]. The dissent in that case notes that "one of the country's premier appellate litigators" was hit 45 seconds into his oral argument in the Court of Appeals with a subject matter jurisdiction issue that had never been briefed and that ultimately resulted in dismissal of the appeal and the case [ *Indiana Gas Co., Inc. v. Home Ins. Co.* (7th Cir 1998) 141 F3d 314, 320, n1 ].

#### **Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

California Points and Authorities, Ch. 133, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).



#### **Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview



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Chapter 10 Dismissal for Lack of Subject Matter Jurisdiction  
II. DETERMINING IF THE COURT HAS SUBJECT MATTER JURISDICTION

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.03*

**10.03 CHECKLIST: Determining If the Court Has Subject Matter Jurisdiction.**

☐ Determine what relief is sought in complaint or other pleading.

☐ Determine whether chosen court has jurisdiction to grant that relief.

**Authority:**

*Cal Const, art VI, §§ 10-12*

**Discussion:**

*See 10.04[1] -[6]*

☐ If the court lacks subject matter jurisdiction, consider moving to transfer or to dismiss the case.

**Authority:**

CCP §§ 396, 430.10

**Discussion:**

*See 10.06, 10.08*

**Forms:**

*See 10.13 (notice of motion and motion to dismiss for lack of subject matter jurisdiction with supporting declaration), 10.14 (order on motion to dismiss for lack of subject matter jurisdiction)*

☐ Even if court has subject matter jurisdiction in general, determine whether court acted or will be required to act in excess of its subject matter jurisdiction because:

☐ Court only has power to act in particular manner.

**Authority:***CCP § 1917***Discussion:***See 10.04[6] -[8]*

- ☐ Review the complaint for areas of concurrent or exclusive jurisdiction:
  - ☐ When federal court has jurisdiction:
    - ☐ If the court shares jurisdiction with the federal court, consider whether removal to federal court is advantageous.
    - ☐ If the federal court has exclusive jurisdiction, move for dismissal of the state court action.
  - ☐ When the court has concurrent jurisdiction with another California court, and the other court acquired jurisdiction first:
    - ☐ If the parties and issues are identical, file a statutory plea in abatement.
    - ☐ If the parties are not identical but both courts have subject matter jurisdiction and jurisdiction over all parties involved in both actions, raise the issue of exclusive concurrent jurisdiction by demurrer or move for stay of proceedings.
  - ☐ If concurrent jurisdiction is shared with a court of another state, move to stay the later-filed action.

**Authority:***28 USC §§ 1441-1452***Discussion:***See 10.05***Form:***See 10.15 (demurrer on ground of exclusive concurrent jurisdiction)*



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Chapter 10 Dismissal for Lack of Subject Matter Jurisdiction  
II. DETERMINING IF THE COURT HAS SUBJECT MATTER JURISDICTION

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.04*

**10.04 Fundamentals of Subject Matter Jurisdiction.**

**10.04[1] Subject Matter Jurisdiction Is the Power of the Court Over a Cause of Action.** Jurisdiction, in its broadest sense, is the power to hear and determine causes [ *Abelleira v. Dist. Court of Appeal (1941) 17 C2d 280, 288, 109 P2d 942* ; *People v. Nat'l Auto. & Cas. Ins. Co. (2000) 82 CA4th 120, 125-126, 97 CR2d 858* (defining lack of jurisdiction)]. Subject matter jurisdiction is one of the two principal categories of jurisdiction: subject matter jurisdiction and personal jurisdiction.

➡ **Cross Reference:**

For discussion of personal jurisdiction, see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction.

Subject matter jurisdiction is "the power of the court over a cause of action or to act in a particular way" [ *Greener v. Workers' Comp. Appeals Bd. (1993) 6 C4th 1028, 1035, 25 CR2d 539, 863 P2d 784* ]. It is the authority of a court to try actions of the type or class to which the suit belongs.

**Drawback:**

A question of subject matter jurisdiction may involve a choice of forum. Because all legally cognizable grievances may be considered in some forum, a claim that a particular court does not have authority to adjudicate such a grievance implies that another court or agency does have such power [ *Hughes v. Blue Cross of N. Cal. (1989) 215 CA3d 832, 849, 263 CR 850* ].

**Counter-Attack:**

A formal motion to dismiss may be used to dismiss a cause that is not legally cognizable and preclude its transfer to another court.

➡ **Cross Reference:**

Discussion, see *10.08[3]*.

**10.04[2] Subject Matter Jurisdiction of the California Supreme Court.** The California Supreme Court has

jurisdiction in the following matters:

- Original jurisdiction in habeas corpus proceedings, and proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition [*Cal Const, art VI, § 10*].
- Appellate jurisdiction when judgment of death has been pronounced [*Cal Const, art VI, § 11*; see *Pen Code § 1506*; see also *Cal Rules Ct, Rule 8.600(a)* (authorizing appeal to Supreme Court from superior court order in certain habeas corpus proceedings involving a defendant sentenced to death)].
- Appellate jurisdiction through transfer to itself of a cause in a court of appeal, or transfer to itself of one or more issues in a case pending in the court of appeal [*Cal Const, art VI, § 12(a)*; see *Cal Rules Ct, Rules 8.268, 8.500, 8.512, 8.516, 8.528, 8.552*].
- Acceptance of certified questions of state law from the United States Supreme Court, a United States Court of Appeals, or the court of last resort in any state, territory, or commonwealth [see *Cal Rules Ct, Rule 8.548*].
- Appellate jurisdiction to review the decision of a court of appeal in any cause [*Cal Const, art VI, § 12(b)*; see *Cal Rules Ct, Rule 8.500 et seq.*].
- Appellate jurisdiction to review, reverse, correct, or annul orders of administrative agencies [see *PU Code §§ 1756(a), (f), (g), 1759* (Public Utilities Commission); *Lab Code § 5955* (Workers' Compensation Appeals Board); *B&P Code § 23090* (Department of Alcoholic Beverage Control)].
- Jurisdiction over petitions for review of determinations of the Commission on Judicial Performance to retire, remove, censure, admonish, or disqualify a judge or former judge [*Cal Const, art VI, § 18(d)*].
- The power to admit attorneys to practice and to suspend or disbar attorneys, and to review State Bar proceedings relating to attorneys [see *B&P Code §§ 6060, 6062, 6081-6084, 6100, 6102*; see also *Cal Rules Ct, Rule 9.13*].



#### **Cross References:**

For detailed discussion of the subject matter jurisdiction of the California Supreme Court, see California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

Transfer of petition or appeal improperly filed in superior court to court of appeals or supreme court, see 10.06.

**10.04[3] Subject Matter Jurisdiction of the California Courts of Appeal.** The California courts of appeal have jurisdiction in the following matters:

- Original jurisdiction in habeas corpus proceedings, and proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition [*Cal Const, art VI, § 10*].
- Except for criminal cases in which a death penalty has been imposed, appellate jurisdiction over all cases of which the superior courts have original jurisdiction [*Cal Const, art VI, § 11*].
- Appellate jurisdiction over certain causes as prescribed by statute, including certification to a court of appeal of cases on appeal to the superior court [see *CCP § 911*; *Cal Rules Ct, Rules 8.268, 8.1000 et seq.*], when a court of appeal, in its discretion, has transferred to itself a case from the appellate

department of the superior court to secure uniformity of decision or to settle important questions of law [see *CCP* § 911; *Cal Rules Ct*, Rules 8.1005, 8.1008, 8.1018].

- Appellate jurisdiction to review, reverse, correct, or annul orders of administrative agencies [see *PU Code* §§ 1756(a), (f), (g), 1759 (Public Utilities Commission); *Lab Code* § 5955 (Workers' Compensation Appeals Board); *B&P Code* § 23090 (Department of Alcoholic Beverage Control)].

#### **Cross References:**

Detailed discussion of the subject matter jurisdiction of the California courts of appeal, see California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

Transfer of petition or appeal improperly filed in superior court to court of appeals or supreme court, see 10.06.

### **10.04[4] Subject Matter Jurisdiction of the California Superior Courts.**

**10.04[4][a] Original Jurisdiction.** Superior courts have original jurisdiction in the following matters:

- Habeas corpus proceedings and proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition [*Cal Const*, art VI, § 10]. These matters are examples of concurrent subject matter jurisdiction of the California Supreme Court, Court of Appeal, and Superior Court.

- All causes except those given by statute to other trial courts [*Cal Const*, art VI, § 10; *Walker v. Superior Court* (1991) 53 C3d 257, 264, 279 CR 576, 807 P2d 418 ] or to the Public Utilities Commission [*Cal Const*, art XII, § 8; *City of Anaheim v. Pacific Bell Tel. Co.* (2004) 119 CA4th 838, 842 ]. In other words, superior courts are courts of general jurisdiction.

#### **Example:**

As of February 2001, all counties have elected to unify their trial courts and there are no more municipal courts in the state. The superior court has jurisdiction over all causes which had been in the jurisdiction of the municipal court. These are called limited civil cases [see *Cal Const*, art VI, § 23; *CCP* § 86].

#### **Exception:**

The perfecting of an appeal of denial of a motion appealable under *CCP* § 916(a) automatically stays all further trial court proceedings on the merits of the causes of action affected by the motion. The appeal divests the trial court of subject matter jurisdiction over the matters embraced by the motion during the pendency of the appeal [ *Varian Medical Systems, Inc. v. Delfino* (2005) 35 C4th 180, 193-197 (anti-SLAPP)].

#### **Cross Reference:**

For detailed discussion of limited and unlimited civil cases, see Ch. 15, Reclassification of Cases.

**10.04[4][b] Appellate Jurisdiction.** Superior courts have appellate jurisdiction in the following matters:

- The superior court's appellate division has original jurisdiction of proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in limited civil cases [*Cal Const*, art VI, § 10; *CCP* §§ 77(e), 85.1, 1068(b), 1085(b), 1103(b)].

- Except for the cases placed in the appellate jurisdiction of the Supreme Court and courts of appeal by



*Cal Const, art VI, § 11(a)*, the appellate divisions of superior court have appellate jurisdiction in causes prescribed by statute [*Cal Const, art VI, § 11(b)*].

- Appeals in limited civil cases [*see CCP § 77(e)*; *see also CCP § 904.2* (list of appealable judgments and orders in limited civil cases)].

- Appeals filed by defendants from small claims court judgments [*CCP § 116.710*].

#### ➤ **Cross Reference:**

Transfer of petition or appeal improperly filed in superior court to court of appeals or supreme court, *see 10.06*.

**10.04[4][c] Jurisdictional Classification of Civil Cases.** Within the superior court, civil cases must be classified as unlimited or limited civil cases depending on the amount of damages pled and the nature of the relief sought. For limited civil cases, the amount in controversy cannot exceed \$25,000 [*CCP § 85(a)*].

#### ➤ **Cross Reference:**

Detailed discussion of classifying and reclassifying cases as limited or unlimited civil cases, *see Ch. 15, Reclassification of Cases*.

**10.04[4][d] Jurisdiction Over Native Americans.** Congress has given California courts jurisdiction over civil causes of action arising in Native American tribal territory and between individual Native Americans or to which Native Americans are parties, to the same extent that those courts have jurisdiction over other civil causes of action.

#### **Exception:**

This jurisdiction extends only over individuals and not over the Native American tribes [*see 28 USC § 1360*].

#### ➤ **Cross Reference:**

For detailed discussion of jurisdiction over Native Americans, the immunity of Native American tribes, and waiver of that immunity, *see California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender)*.

### **10.04[5] Subject Matter Jurisdiction of the California Small Claims Courts.**

**10.04[5][a] Jurisdictional Limit of Amount in Controversy.** The small claims courts, which are divisions of the superior courts [*CCP § 116.210*], were established to resolve minor civil disputes expeditiously and inexpensively [*see CCP § 116.120*]. The small claims courts have jurisdiction in actions when the amount of the demand or the property to be recovered does not exceed \$5,000 [*see CCP § 116.220(a)*] or, if the action is brought by a natural person, \$7,500 [*CCP § 116.221*].

**10.04[5][b] Equitable Relief Available.** In any action seeking relief within that jurisdictional limit, the small claims court also may grant equitable relief in the form of rescission, restitution, reformation, and specific performance, in lieu of, or in addition to, money damages [*CCP § 116.220(b)*].

**10.04[6] A Court Lacks Fundamental Subject Matter Jurisdiction When It Has No Authority to Act.** "Lack of jurisdiction" means a court is without authority to act [ *In re Jody R. (1990) 218 CA3d 1615, 1622, 267 CR 746* ; *see Barnick v. Longs Drug Stores, Inc., 203 CA3d 377, 379, 250 CR 10 (1988)* (without subject matter jurisdiction, a court has no authority to determine a case)]. In its most fundamental sense, lack of jurisdiction signifies an entire absence of power to hear or determine the particular subject matter of the case [ *People v. American Contractors Indem. Co.*

(2004) 33 C4th 653, 660 ; *Abelleira v. Dist. Court of Appeal* (1941) 17 C2d 280, 288 ].

#### **Cross References:**

Discussion of dismissal for lack of subject matter jurisdiction, see 10.08.

See also California Forms of Pleading and Practice, Ch. 489, Relief from Judgments and Orders (Matthew Bender).

**10.04[7] Excess Jurisdiction Occurs When Court Acts Outside Its Defined Powers.** Although a court may have jurisdiction, in the fundamental sense, over the subject matter and the parties, its power may be limited to acting only in a particular manner, to giving only certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. Acts that exceed the defined power of the court are described as acts in "excess of jurisdiction" [ *People v. American Contractors Indem. Co.* (2004) 33 C4th 653, 661, 93 P3d 1020 ; *Abelleira v. Dist. Court of Appeal* (1941) 17 C2d 280, 287, 109 P2d 942 .

#### **Cross References:**

Discussion on challenging judicial acts in excess of jurisdiction, see 10.10.

Effect of agreement to arbitrate on extent of court's power, see *Ch. 6, Determining Forum*, 6.06[3], 6.10[2].

See also California Forms of Pleading and Practice, Ch. 489, Relief from Judgments and Orders (Matthew Bender).

**10.04[8] Lack of Fundamental Jurisdiction Renders Judgment Void, While Excess Jurisdiction Renders Judgment Merely Voidable.**

**10.04[8][a] No Time Bar to Relief Against Lack of Fundamental Subject Matter Jurisdiction.** The jurisdiction sufficient to sustain a court record is jurisdiction over the cause, over the parties, and over any object that is the subject of the judgment [CCP § 1917]. Accordingly, when a court lacks jurisdiction in this fundamental sense, its decision is void [ *People v. American Contractors Indem. Co.* (2004) 33 C4th 653, 660 ; *Barquis v. Merchants Collection Assn.* (1972) 7 C3d 94, 119, 101 CR 745, 496 P2d 817 ].



#### **Timing:**

A judgment void on its face because it was rendered by a court without fundamental subject matter jurisdiction is subject to collateral attack at any time [ *People v. American Contractors Indem. Co.* (2004) 33 C4th 653, 661 ; *Barquis v. Merchants Collection Assn.* (1972) 7 C3d 94, 119, 101 CR 745, 496 P2d 817 ].

#### **Cross Reference:**

Challenging lack of fundamental subject matter jurisdiction, see 10.10 et seq.

**10.04[8][b] Voidable Judgment Must Be Challenged While the Trial Court or Court of Appeal Can Still Correct the Mistake.** When a statute authorizes a prescribed procedure, and the court acts contrary to the authority thus conferred, it exceeds its jurisdiction [ *People v. American Contractors Indem. Co.* (2004) 33 C4th 653, 661 ; *Abelleira v. Dist. Court of Appeal* (1941) 17 C2d 280, 287, 109 P2d 942 ]. When a court has fundamental subject matter jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable [ *People v. American Contractors Indem. Co.* (2004) 33 C4th 653, 661 ; *In re Marriage of Goddard* (2004) 33 C4th 49, 55 ].

**Timing:**

A voidable judgment in excess of the court's jurisdiction is valid until it is set aside. A party may be precluded from setting it aside by disfavor of collateral attack or res judicata [ *People v. American Contractors Indem. Co. (2004) 33 C4th 653, 661* ]. Errors in excess of jurisdiction must be challenged directly, such as by motion to dismiss or to vacate the judgment, or on appeal. They are not subject to collateral attack once the judgment is final, unless unusual circumstances are present that prevent an earlier and more appropriate attack [ *People v. American Contractors Indem. Co. (2004) 33 C4th 653, 661* ; *Pacific Mut. Life Ins. Co. v. McConnell (1955) 44 C2d 715, 727, 285 P2d 636* ]. A voidable judgment must be challenged while the trial court or court of appeal can still correct the mistake [ *People v. American Contractors Indem. Co. (2004) 33 C4th 653, 665* ].

**Warning:**

The inexcusable failure to challenge the exercise of excess jurisdiction will result in the loss of that right [ *People v. American Contractors Indem. Co. (2004) 33 C4th 653, 665* (failure until after summary judgment became final to challenge court's entry of summary judgment before last day in which to set aside forfeiture of bail bond was res judicata)].

**Cross Reference:**

Challenging excess jurisdiction, see 10.10 et seq.

Effect of agreement to arbitrate on extent of court's power, see Ch. 6, *Determining Forum*, 6.06[3], 6.10[2].

**10.04[9] Applicability of Waiver or Estoppel Depends on Type of Lack of Jurisdiction.** The lack of subject matter jurisdiction in a fundamental sense is such a basic defect that it is not subject to waiver or estoppel [ *Miranda v. 21st Century Ins. Co. (2004) 117 CA4th 913, 920* ; *Parrott v. Mooring Townhomes Ass'n, Inc. (2003) 112 CA4th 873, 876* ].

**Warning:**

Fundamental subject matter jurisdiction cannot be conferred on a court by consent [ *Housing Group v. United Nat'l Ins. Co. (2001) 90 CA4th 1106, 1113, 109 CR2d 497* ].

In contrast, a party may be precluded from setting aside a voidable judgment in excess of jurisdiction by estoppel or collateral attack [ *People v. American Contractors Indem. Co. (2004) 33 C4th 653, 665, 16 CR3d 76, 93 P3d 1020* ; *People v. Bankers Ins. Co. (2010) 182 CA4th 1377, 1382, 106 CR3d 680* ]. Whether the party will be estopped depends on the importance of the irregularity not only to the parties but to the functioning of the courts and in some instances on other considerations of public policy. A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to contest jurisdiction when "to hold otherwise would permit the parties to trifle with the courts" [ *Mt. Holyoke Homes, LP v. California Coastal Com. (2008) 167 CA4th 830, 842, 84 CR3d 452* ].

**Distinguish:**

Do not confuse equitable estoppel with estoppel to contest jurisdiction. A valid claim for equitable estoppel requires [ *Simmons v. Ghaderi (2008) 44 C4th 570, 584, 80 CR3d 83, 187 P3d 934* ; *Mt. Holyoke Homes, LP v. California Coastal Com. (2008) 167 CA4th 830, 843, 84 CR3d 452* ]:

- A representation or concealment of material facts,

- made with knowledge, actual or virtual, of the facts,
- to a party ignorant, actually and permissibly, of the truth,
- with the intention, actual or virtual, that the ignorant party act on it, and
- that party was induced to act on it.

The doctrine of estoppel to contest jurisdiction, however, "provides that when a court has subject matter jurisdiction over an action, a party who seeks or consents to action beyond the court's power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction," and does not require reliance or ignorance by the party seeking to assert estoppel [ *Simmons v. Ghaderi* (2008) 44 C4th 570, 584, 80 CR3d 83, 187 P3d 934 ; *Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 CA4th 830, 843, 84 CR3d 452 ].



#### Warning:

Given the applicability of estoppel to the right to avoidance of decisions in excess of jurisdiction, a party should seek to obtain avoidance of the order or decision as soon as possible after the discovery of the error.



#### Cross Reference:

Discussion of equitable estoppel, see *California Forms of Pleading and Practice*, Ch. 251, Equity, 251.161.

**10.04[10] Court Has Jurisdiction to Determine Jurisdiction.** Although a court may not act in a matter over which it has no jurisdiction, it has jurisdiction to determine its own jurisdiction [ *Abelleira v. Dist. Court of Appeal* (1941) 17 C2d 280, 302-303, 109 P2d 942 ; *Ziller Elecs. Lab GmbH v. Superior Court* (1988) 206 CA3d 1222, 1228, 254 CR 410 ]. Thus, a court has inherent power to inquire into its jurisdiction of a matter on its own motion, regardless of whether the issue is raised by the litigants.



#### Warning:

The exercise of jurisdiction to determine jurisdiction is a preliminary step, not a final one, and no interference in the tribunal's inquiry is permitted [ *Abelleira v. District Court of Appeal* (1941) 17 C2d 280, 302-303 ].



#### Strategic Point:

Once a court decides that it has jurisdiction, any subsequent act is subject to inquiry by a higher court [ *Abelleira v. Dist. Court of Appeal* (1941) 17 C2d 280, 302-303, 109 P2d 942 ; see *Bernardi v. City Council* (1997) 53 CA4th 718, 61 CR2d 895 .

#### **10.04[11] Exhaustion of Administrative Remedies Is a Jurisdictional Requirement, Where Applicable.**

**10.04[11][a] Move to Dismiss Action for Failure to Exhaust Administrative Remedies.** If a claim is cognizable in the first instance by an agency alone, the doctrine of exhaustion of administrative remedies applies. When an administrative remedy has been provided by statute, it must be exhausted before a court can act [ *Jonathan Neil & Assocs., Inc. v. Jones* (2004) 33 C4th 917, 930, 94 P3d 1055 ; *American Employers Group, Inc. v. Employment Development Dept.* (2007) 154 CA4th 836, 843, 65 CR3d 233 ]. This exhaustion of administrative remedies requirement is jurisdictional; accordingly, petitioner has the burden of showing that the exact issue must have been presented to the

administrative agency [ *Sierra Club v. City of Orange* (2008) 163 CA4th 523, 535-536, 78 CR3d 1 ]. However, the extent of administrative relief that must be sought extends only to the specific requirements of the statute [ *State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 C4th 963, 972-974, 89 CR3d 576, 201 P3d 457 (exhaustion of remedies under *Gov Code* § 8547.8(c) limited to rendering of findings by California Personnel Board)].



### Warning:

In an action filed on a claim that was heard by an administrative agency with jurisdiction to render a final civil judgment, the complaint or cross-complaint generally must also establish that the plaintiff exhausted his or her judicial remedies for review of the agency's decision [ *Miller v. City of Los Angeles* (2008) 169 CA4th 1373, 1382-1383, 87 CR3d 510 (plaintiff's Fair Employment and Housing Act claim was collaterally estopped by his dismissal of judicial appeal of civil service commission decision); compare *State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 C4th 963, 975-976, 89 CR3d 576, 201 P3d 457 (exhaustion of judicial remedies not required where decision not final under governing statute)].

### Distinguish:

The doctrine does not apply if the administrative agency lacks jurisdiction to make the determination that is the subject of the dispute [ *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 C4th 1072, 1081-1082, 29 CR3d 234, 112 P3d 623 (tribunal lacked jurisdiction)], including when the agency loses jurisdiction while the action is pending [see, e.g., *County of Los Angeles Dept. of Health Services v. Civil Service Com. of County of Los Angeles* (2009) 180 CA4th 391, 401, 102 CR3d 684 (Los Angeles Civil Service Commission lost jurisdiction of action when petitioning employee retired); *Brand v. Regents of University of California* (2008) 159 CA4th 1349, 1365-1367, 72 CR3d 419 (administrative tribunal lost jurisdiction under *Gov. Code*, § 8547.10 by failing to decide within statutory time for decision)].

Administrative procedures created by a collective bargaining agreement, rather than statute, and culminating in an arbitration do not have to be exhausted before filing for judicial relief [ *Ortega v. Contra Costa Community College Dist.* (2007) 156 CA4th 1073, 1084-1086, 67 CR3d 832 (community college district's internal grievance procedures did not bar coach's claim)].

A plaintiff need not exhaust administrative remedies provided by statute if the agency has already rejected the claim, announced its position on the claim, or made clear it will not consider the plaintiff's evidence [ *Farahani v. San Diego Community College Dist.* (2009) 175 CA4th 1486, 1497, 96 CR3d 900 (showing of exhaustion of remedies not required)].

**10.04[11][b] Consider Moving to Stay Action When Court May Defer to an Administrative Agency.** Even when not required, some issues may be determined by administrative agencies. In such instances, the primary jurisdiction doctrine applies, rather than the exhaustion of administrative remedies [ *Econ. Empowerment Found. v. Quackenbush* (1997) 57 CA4th 677, 683-684, 67 CR2d 323 ].

Under the primary jurisdiction doctrine, a court has discretion to defer ruling on a claim within its original jurisdiction pending an administrative determination of the claim if the interests of justice so require. In exercising this discretion, the court may consider various factors, including [Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 C4th 917, 932-934, 16 CR3d 849, 94 P3d 1055; *Wise v. Pacific Gas & Electric Co.* (1999) 77 CA4th 287, 295-296, 91 CR2d 479 ]:

- The need for administrative expertise; and
- The promotion of uniformity in applying regulatory law.

**Strategic Point:**

The proper procedure in applying the doctrine of primary jurisdiction is not to dismiss the action, but to stay it pending resolution of the issues within the administrative body's expertise [ *South Bay Creditors Trust v. General Motors Acceptance Corp.* (1999) 69 CA4th 1068, 1081, 82 CR2d 1 ]. Thus, the primary jurisdiction doctrine creates a timing issue, not a jurisdictional issue [ *Piscioneri v. City of Ontario* (2002) 95 CA4th 1037, 1052, 116 CR2d 38 ].

**Distinguish:**

The trial court does not abuse its discretion by refusing to defer litigation that presents issues that are within the conventional competence of the courts if the judgment of a technically expert body would not aid judicial decisionmaking [ *Blue Cross of California, Inc. v. Superior Court* (2009) 180 CA4th 138, 102 CR3d 615 ].

**10.04[11][c] Scope of Court's Review Depends on Applicable Doctrine.** In the case of the doctrine of exhaustion of remedies, the administrative agency must initially decide the "entire controversy." However, under the primary jurisdiction doctrine, the court makes its own decision that is based in part on the agency's decision on an issue or issues within the case [ *Jonathan Neil & Associates, Inc. v. Jones* (2004) 33 C4th 917, 932-934, 16 CR3d 849, 94 P3d 1055 ].

**10.04[12] Court May Refuse to Exercise Equitable Jurisdiction Under Abstention Doctrine.** A court may abstain from adjudicating a suit that seeks equitable remedies if [ *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 CA4th 471, 496, 104 CR3d 545 (reversing abstention from claims under Unfair Competition Law for injunctive relief); *Blue Cross of California, Inc. v. Superior Court* (2009) 180 CA4th 138, 102 CR3d 615 (affirming refusal to abstain on any of the three possible grounds); *Alvarado v. Selma Convalescent Hospital* (2007) 153 CA4th 1292, 1298, 64 CR3d 250 (abstention from determining complex economic policy under the Unfair Competition Law and from burdensome injunctive relief) ]:

- Granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency.
- The lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency.
- Granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Administrative Law Judicial Review Reviewability Exhaustion of Remedies Civil Procedure Jurisdiction Subject Matter Jurisdiction Amount in Controversy Civil Procedure Jurisdiction Subject Matter Jurisdiction Jurisdiction Over Actions General Overview Governments Courts Small Claims Courts



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Chapter 10 Dismissal for Lack of Subject Matter Jurisdiction  
II. DETERMINING IF THE COURT HAS SUBJECT MATTER JURISDICTION

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.05*

**10.05 Concurrent Jurisdiction Issues.**

**10.05[1] Between State and Federal Courts.**

**10.05[1][a] State Courts Generally May Assume Subject Matter Jurisdiction Over Federal Causes of Action.**

Some federal statutes creating a right of action expressly give the state and federal courts concurrent jurisdiction to enforce the right [*see, e.g., 8 USC § 1421(b)(5)(B)* (naturalization proceedings); *28 USC § 1352* (action on a bond executed under any law of the United States except matters within the jurisdiction of the Court of International Trade); *45 USC § 56* (claims under the Federal Employers' Liability Act)].

The general rule is that state courts may assume subject matter jurisdiction over a federal cause of action, absent a provision by Congress to the contrary or a disabling incompatibility between the federal and state court adjudication [ *Tafflin v. Levitt* (1990) 493 US 455, 459, 110 S Ct 792, 107 L Ed2d 887 ].

The presumption of concurrency also may be defeated when a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts [ *Haywood v. Drown* (2009) \_\_\_ US \_\_\_, 129 S Ct 2108, 173 L Ed2d 920, 928].



**Strategic Point--Defendant:**

Notwithstanding concurrent jurisdiction, a defendant may, in certain cases, have an action removed from state to federal courts [*see 28 USC §§ 1441-1452*].



**Cross Reference:**

For further discussion of removal, see Ch. 17, Removal to Federal Court.

**10.05[1][b] Federal Courts or Agencies Have Exclusive Subject Matter Jurisdiction Where Federal Law So Provides.** California courts lack jurisdiction over the subject matter of a cause of action when jurisdiction is vested by federal law exclusively in a federal court or agency [*see, e.g., 46 USC § 688* (Jones Act claims, *see Donaldson v. National Marine* (2005) 35 C4th 503, 509 ; *46 USC § 761* (Death on the High Seas Act claim; *see also Donaldson v.*



*National Marine* (2005) 35 C4th 503, 509, 25 CR3d, 107 P3d 254 ; *Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 CA4th 1413, 1422 ; *Kingston Constructors, Inc. v. Wash. Metro. Area Transit Auth.* (1997) 14 C4th 939, 943-947, 59 CR2d 866, 928 P2d 581 ].

### 10.05[2] Between California Courts When Parties and Issues Are Identical.

**10.05[2][a] Once a Court Acquires Jurisdiction of the Parties, the Other Court Ordinarily Must Abate on Demand.** When two California courts have concurrent jurisdiction over the same parties and subject matter, the tribunal that first acquires jurisdiction of the parties is entitled to retain it exclusively, and the other court ordinarily must abate its proceedings on demand [ *Mission Imports, Inc. v. Superior Court* (1982) 31 C3d 921, 926 n.3, 184 CR 296, 647 P2d 1075 ; see *County of San Diego v. State of California* (1997) 15 C4th 68, 87-88, 61 CR2d 134, 931 P2d 312 ].



#### Timing:

In applying this rule, it is the tribunal where process is served first that has priority, regardless of which action was filed first [ *Mungia v. Superior Court* (1964) 225 CA2d 280, 283, 37 CR 285 ].

#### Prerequisite:

In determining whether the causes of action are the same for purposes of pleas in abatement, the rule is that such a plea may be maintained when a judgment in the first action would be a complete bar to the second action [ *Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 CA3d 781, 787-788, 274 CR 147 ].

**10.05[2][b] A Plea in Abatement May Be Made by Demurrer.** If there is another action pending between the same parties on the same cause of action, a plea in abatement may be made by demurrer [see CCP § 430.10(c)].



#### Warning:

If a demurrer is sustained on the ground of another action pending, the proper order is not dismissal, but abatement of further proceedings pending termination of the first action [ *Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 CA3d 781, 788, 274 CR 147 ].



#### Cross References:

Detailed discussion of Demurrers, see Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

Further discussion of abatement, see *California Forms of Pleading and Practice*, Ch. 3, Abatement of Actions, § 3.50 et seq. (Matthew Bender).

### 10.05[3] Between California Courts When Parties and Issues Are Not Identical.

**10.05[3][a] Rule of Exclusive Concurrent Jurisdiction May Apply If First Court to Acquire Jurisdiction Can Litigate All Issues and Grant All Relief to Which Parties May Be Entitled.** Under the rule of exclusive concurrent jurisdiction, if two trial courts of equal jurisdiction have concurrent jurisdiction over the subject matter and all parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until all necessarily related matters have been resolved [ *Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 CA3d 781, 786-787, 274 CR 147 ; see *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 CA4th 1168, 1175 ].

#### Distinguish:

Unlike the statutory plea of abatement [see 10.05[2][a]], the rule of exclusive concurrent jurisdiction does not require absolute identity of parties, causes of action, or remedies sought in the initial and subsequent actions [ *California Attorneys, etc. v. Schwarzenegger* (2010) 182 CA4th 1424, 1430, 106 CR3d 702 ].



**Examples:**

The first and second action must arise from the same transaction. The rule of exclusive concurrent jurisdiction may apply [ *Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 CA3d 781, 788-789, 274 CR 147 ]:

- Where the parties in the second action are not identical, if the court exercising original jurisdiction has the power to bring before it all the necessary parties;
- Where the remedies sought in the separate actions are not identical, if the court exercising original jurisdiction has the power to litigate all the issues and to grant all the relief to which any of the parties might be entitled under the pleadings; or
- Where the judgment rendered in the first action is not res judicata in the second.

**Distinguish:**

The exclusive jurisdiction rule does not apply where the parties and legal issues are so different that both [ *California Attorneys, etc. v. Schwarzenegger* (2010) 182 CA4th 1424, 1432, 106 CR3d 702 (nonapplication of rule affirmed)]:

- Judgment in the first case is not binding on the parties as to the issues in the second case.
- The second case does not threaten or produce a conclusion that is irreconcilable with the judgment in the first case.

**10.05[3][b] Issue of Exclusive Concurrent Jurisdiction Should Be Raised by Demurrer.** The assertion that exclusive concurrent jurisdiction applies should be raised by demurrer if the issue appears on the face of the complaint and by answer if factual issues must be resolved. The ruling may constitute a ground of abatement of the subsequent action [ *People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 CA4th 760, 770-772, 25 CR2d 192 ].

**Distinguish:**

The rule of exclusive concurrent jurisdiction does not present a ground for dismissal. A court's erroneous refusal to stay further proceedings on the grounds of exclusive concurrent jurisdiction does not render those further proceedings void for lack of jurisdiction [ *County of San Diego v. State of California* (1997) 15 C4th 68, 88, 61 CR2d 134, 931 P2d 312 ; *People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 CA4th 760, 772, 25 CR2d 192 ].

 **Cross Reference:**

Form of demurrer on the ground of exclusive concurrent jurisdiction, see 10.15.

**10.05[4] Between Departments of a Superior Court.**

**10.05[4][a] Principle of Priority of Jurisdiction Applies in Multi-Department Superior Court.** The principle of priority of jurisdiction has been applied in cases in which two departments of the superior court attempt to exercise jurisdiction over the same case. As a general rule, the first department to validly assume and exercise control over the matter acquires exclusive jurisdiction over it [ *People v. Madrigal* (1995) 37 CA4th 791, 796, 43 CR2d 498 ; *Silverman v. Superior Court* (1988) 203 CA3d 145, 151, 249 CR 724 ].

**Prerequisites:**

The principle provides that no other department can interfere with a department's power over a

proceeding if [ *Wozniak v. Lucutz* (2002) 102 CA4th 1031, 1040-1041, 126 CR2d 310 ]:

- It has been duly assigned for hearing and determination,
- By the presiding justice of the court,
- In conformity with the court rules, and
- The proceeding has not been finally disposed of.

Even though a superior court is divided into branches or departments, there is only one superior court in a county, and jurisdiction is vested in that court, rather than in any particular judge or department [see *Cal Const*, art VI, § 4; *Glade v. Glade* (1995) 38 CA4th 1441, 1449, 45 CR2d 695 ].

#### **Distinguish:**

Because jurisdiction is vested in the court as a whole, if a department to which a matter was not assigned exercises authority in a matter, this does not amount to a defect in jurisdiction [ *Wozniak v. Lucutz* (2002) 102 CA4th 1031, 1041, 126 CR2d 310 ].

#### **10.05[4][b] Principle of Priority Also Applies to Departments That Exercise Distinct Subject Matter**

**Jurisdiction.** The principle of priority of jurisdiction applies not only to ordinary departments, but also to departments that exercise subject matter jurisdiction that is distinct [ *Glade v. Glade* (1995) 38 CA4th 1441, 1450, 45 CR2d 695 ].

#### **Example:**

When a dissolution proceeding is pending in the family court, another department of the superior court may not interfere with the family court's exercise of its power in that proceeding [ *Dale v. Dale* (1998) 66 CA4th 1172, 1183, 78 CR2d 513 ]. Accordingly, it was proper for a family law court in which a marital dissolution action was pending, which vested it with jurisdiction over alleged community property, to stay a later commenced foreclosure action pending in another superior court department concerning a community property residence. The family law court had priority of jurisdiction [ *Glade v. Glade* (1995) 38 CA4th 1441, 1456, 45 CR2d 695 ].

#### **10.05[5] Between Courts of Different States.**

**10.05[5][a] Abatement Is Discretionary.** Abatement is only mandatory if the multiple actions are pending in courts of the same state. If the actions are pending in courts of different states, the determination whether to stay the later-filed action is discretionary. [ *Leadford v. Leadford* (1992) 6 CA4th 571, 575, 8 CR2d 9 ].

#### **Cross Reference:**

Discussion of abatement, see 10.05[2][a].

**10.05[5][b] Abatement Should Be Raised by a Motion to Stay the Proceedings.** Because the determination is discretionary, it should be raised by a motion to stay the proceedings, not by demurrer [ *Leadford v. Leadford* (1992) 6 CA4th 571, 574, 8 CR2d 9 ].

**10.05[5][c] Injunction to Enjoin Party From Proceeding in Another State Is Not Available.** A California trial court may not enjoin a party from proceeding in another state even when the California action was filed first [see *Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 C4th 697, 706-708, 128 CR2d 172, 59 P3d 231 (California Supreme Court seems to have rejected a "first to file" rule in favor of a "first to judgment" rule); *Biosense Webster, Inc. v. Superior Court* (2006) 135 CA4th 827, 836-838, 37 CR3d 759 (rule applies whether or not action in other state is

actually pending)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent Jurisdiction



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Chapter 10 Dismissal for Lack of Subject Matter Jurisdiction  
III. MOVING TO TRANSFER CASE FOR LACK OF SUBJECT MATTER JURISDICTION

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.06*

#### **10.06 Transfer of Petition or Appeal from Superior Court to Court of Appeals or Supreme Court.**

**10.06[1] Petition or Appeal to Be Transferred, Not Dismissed.** No appeal or petition filed in the superior court shall be dismissed solely because the appeal or petition was not filed in the proper state court [*CCP* § 396(a)].

##### **Cross References:**

Reclassification of cases as limited or unlimited, see Ch. 15, *Reclassification of Cases*.

Transfers for coordination of noncomplex actions, see Ch. 32, *Notice of Related Cases, Consolidation, Coordination, and Severance of Actions*, 32.14 et seq.

Transfers for coordination of complex actions, see Ch. 32, *Notice of Related Cases, Consolidation, Coordination, and Severance of Actions*, 32.18 et seq.

Discussion of motions to transfer, see California Forms of Pleading and Practice, Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender).

**10.06[2] Transfer of Petition or Appeal to Court With Jurisdiction.** If the superior court lacks jurisdiction of an appeal or petition, and a court of appeal or the supreme court would have jurisdiction, the appeal or petition must be transferred to the court having jurisdiction. The transfer may be made upon terms as to costs or otherwise as may be just. The court having jurisdiction is to proceed with the petition or appeal as if it had originally been regularly filed in that court [*CCP* § 396(b)].

##### **Cross Reference:**

Discussion of motions to transfer, see California Forms of Pleading and Practice, Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender).



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Chapter 10 Dismissal for Lack of Subject Matter Jurisdiction  
IV. MOVING TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.07*

**10.07 CHECKLIST: Moving to Dismiss for Lack of Subject Matter Jurisdiction.**

- ☐ Determine legal basis for lack of subject matter jurisdiction:
  - ☐ California or federal constitution or statute or ordinance, of which the court must take judicial notice [*see Evid Code § 451(a)*].
  - ☐ Records of another court, of which the court where the action is pending may be requested to take judicial notice [*see Evid Code §§ 452(d), 453*].
  - ☐ Case law.
- ☐ Determine evidence from which lack of jurisdiction will be established:
  - ☐ Face of complaint or other pleading.
  - ☐ Matters of which court must or may take judicial notice.
  - ☐ Extrinsic evidence and who can provide that evidence.
- ☐ Determine manner of raising issue of lack of subject matter jurisdiction:
  - ☐ By demurrer if lack of jurisdiction appears from the face of the complaint or other pleading.

**Authority:**

CCP § 430.30(a)

- ☐ By affirmative defense in answer.
- ☐ By statutory motion to transfer to a California court having subject matter jurisdiction.

**Authority:**

CCP § 396(b)

**Discussion:**

See 10.06[2]

- ☐ By a nonstatutory motion to dismiss for lack of subject matter jurisdiction if no California court has subject matter jurisdiction:

- ☐ Draft motion and notice of motion to dismiss for lack of subject matter jurisdiction.
- ☐ Draft proposed order.
- ☐ Follow standard noticed motion procedure for serving and filing motion.
- ☐ Calendar response and hearing dates.

**Discussion:**

See 10.08

**Forms:**

See 10.13, 10.14

**Standard Procedure Checklist:**See Ch. 26, *Law and Motion Procedure*, 26.23



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IV. MOVING TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.08*

**10.08 Dismissal for Lack of Subject Matter Jurisdiction.**

**10.08[1] Raised by Demurrer to Complaint.** A challenge to subject matter jurisdiction may be properly brought by demurrer to the complaint [ *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1036, 25 CR2d 539, 863 P2d 784 ]. A demurrer may be used only if the lack of jurisdiction appears from the face of the complaint or other pleading or from matter subject to judicial notice [see CCP §§ 430.10(a), 430.30(a), 430.70].

**Distinguish:**

Dismissal under CCP § 430.10(a) on the basis of a forum selection clause is error. The court may only decline jurisdiction based on such a clause in accordance with CCP § 410.30(a) or CCP § 418.10(e)(3) [ *Miller-Leigh LLC v. Henson* (2007) 152 CA4th 1143, 1149, 1150, 62 CR3d 83 ; for discussion of forum selection, see 9.23 et seq.].

➡ **Cross Reference:**

For detailed discussion of demurrers, see Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

**10.08[2] Raised by Affirmative Defense in Answer.** If the lack of subject matter jurisdiction does not appear on the face of the complaint or from matter subject to judicial notice, lack of subject matter jurisdiction may be raised by affirmative defense in the answer, and by a subsequent motion for separate trial of that defense [see CCP §§ 430.30(b), 597].

➡ **Cross Reference:**

For detailed discussion of raising affirmative defenses in the answer to the complaint, see Ch. 14, Answers.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil

ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers





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Chapter 10 Dismissal for Lack of Subject Matter Jurisdiction

## V. CHALLENGING LACK OF SUBJECT MATTER JURISDICTION LATER IN PROCEEDING OR ON APPEAL

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.09*

### 10.09 CHECKLIST: Challenging Later in Proceeding or on Appeal.

☐ Choose appropriate method of challenging subject matter jurisdiction at any point during or after the proceedings:

☐ For acts in excess of jurisdiction:

☐ Use a writ of certiorari or prohibition to challenge judicial acts made in excess of a court's jurisdiction.

☐ Use a writ of administrative mandate to challenge validity of any final administrative order or decision.

#### **Authority:**

*CCP § 1068* (certiorari); *CCP §§ 1102, 1103* (writ of prohibition); *CCP § 1094.5* (writ of mandate)

#### **Discussion:**

See *10.10*

☐ File post-judgment motion to set aside or vacate any judgment made by court lacking subject matter jurisdiction.

#### **Authority:**

*CCP § 473(d)*

#### **Discussion:**

See *10.11*

☐ File direct appeal.

**Discussion:**

See *10.12*



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*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.10*

### **10.10 Challenge Judicial or Administrative Acts in Excess of Jurisdiction by Writ.**

**10.10[1] Judicial Acts May Be Restrained by Writ of Prohibition or Annulled on Certiorari.** Judicial acts made in excess of a court's jurisdiction may be challenged on petition for a writ of certiorari [CCP § 1068(a)] or prohibition [CCP §§ 1102, 1103]. A writ of prohibition will issue to review or prohibit acts in excess of jurisdiction when there is no plain, speedy, and adequate remedy in the ordinary course of law [see *Crittenden v. Superior Court* (1964) 61 C2d 565, 567, 39 CR 380, 393 P2d 692 ]. A writ of certiorari, also called a writ of review, will issue when there is no plain, speedy, and adequate remedy [see *Times Mirror Co. v. Superior Court* (1991) 53 C3d 1325, 1333, 283 CR 893, 813 P2d 240 ; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 C2d 450, 454-455, 20 CR 321, 369 P2d 937 ].

Generally, any act that exceeds the defined power of a court, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction and may be restrained by prohibition or annulled on certiorari [ *Abelleira v. Dist. Court of Appeal* (1941) 17 C2d 280, 291, 109 P2d 942 ].

**10.10[2] Administrative Acts May Be Invalidated by Writ of Mandate.** Mandate is the appropriate remedy to inquire into the validity of any final administrative order or decision made without or in excess of jurisdiction [CCP § 1094.5(b); see CCP § 1094.5(a)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil  
ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition



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*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.11*

### **10.11 Motion to Vacate or Set Aside Void Judgment.**

A judgment void on its face because it was rendered by a court without fundamental subject matter jurisdiction is subject to collateral attack at any time. On the other hand, judgments in excess of jurisdiction must be challenged before they become final, unless unusual circumstances are present that prevent an earlier and more appropriate attack [ *People v. American Contractors Indem. Co. (2004) 33 C4th 653, 661, 16 CR3d 76, 93 P3d 1020* ]. A court may set aside any void judgment or order on motion of either party after notice to the other party [CCP § 473(d)].

#### **➤ Cross Reference:**

Discussion of relief from void judgments and orders under CCP § 473(d) and related equitable relief, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 29.24 et seq.*

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil  
ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentVoid  
Judgments



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Chapter 10 Dismissal for Lack of Subject Matter Jurisdiction

V. CHALLENGING LACK OF SUBJECT MATTER JURISDICTION LATER IN PROCEEDING OR ON APPEAL

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.12*

#### **10.12 Appeal of Motion to Set Aside Judgment.**

If the judgment is void, it is subject to collateral attack in the first instance by a motion to vacate or set aside. An order denying a motion to vacate or set aside is a special order made after entry of judgment that may be directly attacked on appeal. Appeal is allowed because an order giving effect to a void judgment is also void and appealable. This rule constitutes an exception to the ordinary rule precluding an appeal from an order denying a motion to vacate a judgment in order to prevent an appellant from having two opportunities to appeal [ *Residents for Adequate Water v. Redwood Valley County Water Dist.* (1995) 34 CA4th 1801, 1805, 41 CR2d 123 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments



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Chapter 10 Dismissal for Lack of Subject Matter Jurisdiction  
VI. FORMS

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.13*

**10.13 Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction With Supporting Declaration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],  
Plaintiff,  
vs.  
\_\_\_\_\_[name],  
Defendant.

)  
) No. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION TO DIS-  
) MISS FOR LACK OF SUBJECT MATTER JURIS-  
) DICTION, SUPPORTING DECLARATION OF  
) \_\_\_\_\_ [name], AND SUPPORTING  
) MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
Date Action Filed: \_\_\_\_\_  
[Trial Date: \_\_\_\_\_]

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [address], \_\_\_\_\_ [party, e.g., Defendant Mary Jones] \_\_\_\_\_ [name] will, and hereby does, move for an order dismissing this \_\_\_\_\_ [action or proceeding or case]. The motion will be made on the ground that this court lacks jurisdiction over the subject of the

\_\_\_\_\_ [action or proceeding or case] and that there is no California court having jurisdiction of the subject matter.

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)] and the supporting memorandum set forth below \_\_\_\_\_ [, on the records and file in this case], and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

SUPPORTING DECLARATION OF \_\_\_\_\_ [Name]

I, \_\_\_\_\_ [Name], declare:

1. I am \_\_\_\_\_ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant \_\_\_\_\_ (name) in the action described above].

2. This court lacks jurisdiction of the subject of this \_\_\_\_\_ [action or proceeding or case] for the following reason(s): \_\_\_\_\_ [set forth reasons, e.g., this action is to quiet title to land that, as shown by the allegations of the verified complaint on file herein, is situated in the country of Mexico].

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]

SUPPORTING MEMORANDUM

[Set out memorandum here]

NOTES.

**Grounds for Motion to Dismiss:**

See 10.08[3]

**Related Form of Order:**

See 10.14

**Related Forms of Memoranda:**

See *California Points and Authorities*, Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*, §§ 133.20-133.22 (Matthew Bender)





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VI. FORMS

*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.14*

**10.14 Order on Motion to Dismiss for Lack of Subject Matter Jurisdiction.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |           |
|---------------|---|-----------|
| _____ [name], | ) |           |
| Plaintiff,    | ) |           |
| vs.           | ) | No. _____ |
| _____ [name], | ) | ORDER     |
| Defendant.    | ) |           |
|               | ) |           |
|               | ) |           |

The motion of \_\_\_\_\_ [party, e.g., Defendant Mary Jones] for an order dismissing this  
\_\_\_\_\_ [action or proceeding or case] came on regularly for hearing by the court on  
\_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; Defendant appeared by  
counsel \_\_\_\_\_ [name].

On proof made to the satisfaction of the court that the determination of this \_\_\_\_\_ [action or  
proceeding or case] will necessarily involve the determination of questions not within the jurisdiction of this court,

IT IS ORDERED that the motion be, and it hereby is, granted and that this \_\_\_\_\_ [action or  
proceeding or case] hereby is dismissed.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Related Form of Motion:**

See *10.13*



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*1-10 MB Practice Guide: CA Pretrial Civil Procedure 10.15*

**10.15 Demurrer on Ground of Exclusive Concurrent Jurisdiction.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                             |
|---------------|---|-----------------------------|
| _____ [name], | ) | No. _____                   |
| Plaintiff,    | ) | DEMURRER OF _____ [name] TO |
| vs.           | ) | COMPLAINT                   |
| _____ [name], | ) | Date: _____                 |
| Defendant.    | ) | Time: _____                 |
|               | ) | Location: _____             |
|               | ) | Judge: _____                |
|               | ) | Date Action Filed: _____    |
|               | ) | [LIMITED CIVIL CASE]        |

Defendant demurs to the complaint on the following ground:

There is another action pending in which another trial court has exclusive concurrent jurisdiction over the subject matter at issue and all parties. That action is Case No. \_\_\_\_\_, filed on \_\_\_\_\_ [date], in the \_\_\_\_\_ [name of court] by \_\_\_\_\_ [name], plaintiff, against \_\_\_\_\_ [name], defendant, alleging a cause of action for \_\_\_\_\_ [specify] based on \_\_\_\_\_ [describe the transaction], and seeking the following relief: \_\_\_\_\_ [specify]. Summons was issued in that action and served on \_\_\_\_\_ [date]. [A certified copy of the complaint and a certified copy of the proof of service of summons are attached hereto as Exhibits "1" and "2," respectively, and made a part hereof.]

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for Defendant \_\_\_\_\_

NOTES.

**Authority:**

CCP § 430.30(a)

**Grounds for Demurrer:**

See 10.05[3]



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Chapter 11 Demurrers and Motions for Judgment on the Pleadings

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.syn*

**§ 11.syn Synopsis to Chapter 11: Demurrers and Motions for Judgment on the Pleadings**

11.01 Scope.

11.02 Objective and Strategy.

11.03 CHECKLIST: Demurring to a Pleading.

11.04 Options and Strategies for Demurring Party.

11.05 Demurrer Is Used to Object to Another Pleading.

11.05[1] Demurrer Is One of Four Types of Pleadings.

11.05[2] Demurrer Objects to Complaint, Cross-Complaint, or Answer.

11.05[3] Allegations in Challenged Pleading Generally Taken As True, but Demurrer Can Allege or Deny Facts by Reference to Judicial Notice.

11.05[4] Demurrer Only Raises Issues of Law.

11.06 Courts and Attorneys Distinguish Between "General" and "Special" Demurrers.

11.07 Type of Action Determines Whether Demurrer Is Permissible.

11.07[1] Demurrer Permissible in Civil Action.

11.07[2] Special Demurrers Not Permissible in Limited Civil Cases.

11.07[3] Special Proceedings Entail Separate Demurrer Rules.

11.07[3][a] Demurrer Expressly Permitted in Certain Proceedings.

11.07[3][b] Demurrer Impliedly Permitted in Certain Proceedings.

11.07[3][c] Demurrer Not Permitted in Certain Proceedings.

11.07[4] Common Counts Generally Not Subject to Demurrer.

11.08 General Demurrer to Complaint or Cross-Complaint.

11.08[1] Use When Complaint or Cross-Complaint Fails to State Cause of Action.

11.08[2] Grounds for General Demurrer Are Generally Not Waivable.

11.08[3] Substantive Law of State Where Action Arose Governs Demurrer Determination.

11.08[4] Specific Grounds for Failing to State a Cause of Action.

11.08[4][a] When Complaint or Cross-Complaint Omits Essential Element.

11.08[4][b] When Complaint or Cross-Complaint Fails to State Cause of Action on Any Theory.

11.08[4][c] When Complaint or Cross-Complaint Shows Action Is Premature.

11.08[4][d] When Complaint or Cross-Complaint Shows Pleader Lacks Standing to Sue.

11.08[4][e] When Complaint or Cross-Complaint Shows Action Is Barred by Affirmative Defense.

11.09 Special Demurrer to Complaint or Cross-Complaint.

11.09[1] Special Demurrers Specified by Statute.

11.09[2] Federal Preemption Is a Basis for Special Demurrer.

11.09[3] Use When Court Has No Jurisdiction of the Subject of the Cause of Action.

11.09[3][a] Limited to Subject Matter Jurisdiction.

11.09[3][b] Subject Matter Jurisdiction Is Not Waivable.

11.09[3][c] Court Must Transfer Action to Court Having Jurisdiction.

11.09[4] Use When Person Who Filed Pleading Does Not Have Legal Capacity to Sue.

11.09[4][a] Lack of Capacity to Sue Distinguished From Lack of Standing to Sue.

11.09[4][b] Waived If Not Raised by Demurrer or Answer.

11.09[5] Use When Another Action Is Pending Between Same Parties on Same Cause of Action.

11.09[5][a] Same Cause of Action Arises from Same Primary Right:

- 11.09[5][b] Ground Generally Appears From Judicially Noticeable Facts.
- 11.09[5][c] Waived If Not Raised by Demurrer or Answer.
- 11.09[5][d] Interlocutory Judgment Issued If Demurrer Sustained.
- 11.09[5][e] Writ of Prohibition May Be Sought If Demurrer Overruled.
- 11.09[6] Use When There Is Defect of Parties.
  - 11.09[6][a] Defect of Parties Must Be Evident From Pleadings.
  - 11.09[6][b] Waived If Not Raised by Demurrer or Answer.
- 11.09[7] Use When There Is Misjoinder of Parties.
  - 11.09[7][a] Generally Only Available to Misjoined Defendant or Cross-Defendant.
  - 11.09[7][b] Waived If Not Raised by Demurrer or Answer.
- 11.09[8] Use When Pleading Is Uncertain.
  - 11.09[8][a] Uncertainty Includes Ambiguous and Unintelligible Pleadings.
  - 11.09[8][b] Uncertain Facts Must Be Material or Not Within Demurring Party's Knowledge.
  - 11.09[8][c] Waived If Not Raised by Demurrer or Answer.
  - 11.09[8][d] Demurrer Should Specify Which Portion of Pleading Is Uncertain.
- 11.09[9] Use When Unable to Ascertain Type of Contract.
  - 11.09[9][a] Pleading Must State Whether Contract Is Written, Oral, or Implied by Conduct.
  - 11.09[9][b] Waived If Not Raised by Demurrer or Answer.
- 11.09[10] Use When Certificate in Specified Professional Negligence Cases Not Filed.
  - 11.09[10][a] Certificate Is Prerequisite for Professional Negligence Action Against Architect, Professional Engineer, or Land Surveyor.
  - 11.09[10][b] Failure to File Certificate May Not Be Raised by Answer.
  - 11.09[10][c] Waived If Not Raised by Demurrer or Motion to Strike.
- 11.10 Demurrer to Answer.
  - 11.10[1] Demurrer Is Only Pleading Available to Respond to Answer.
  - 11.10[2] Party May File General Demurrer to Answer on Ground Insufficient Facts Stated to Constitute a Defense.

11.10[3] Party May Demur on Ground That Answer Is Uncertain.

11.10[4] Party May Demur on Ground That It Is Uncertain Whether Contract Is Written or Oral.

11.11 Demurrer to Complaint in Intervention.

11.11[1] Available When Intervening Party Is Regarded As Plaintiff.

11.11[2] Available When Intervening Party Is Regarded As Defendant.

11.12 Timing of Demurrer.

11.12[1] Demurrer to Complaint or Cross-Complaint Must Generally Be Filed and Served Within 30 Days After Service of Complaint or Cross-Complaint.

11.12[2] Demurrer to Answer Must Generally Be Filed and Served Within 10 Days After Service of Complaint or Cross-Complaint.

11.12[3] Defendant Has 10 Days to Respond to Causes of Action Not Demurred to Following Overruling of Demurrer, Amendment of Complaint, or Sustaining of Demurrer Without Leave to Amend.

11.12[4] Defendant Has 30 Days to Demur or Otherwise Plead Following Ruling on Motion to Transfer.

11.12[5] Timing of Demurrer Differs in Certain Special Proceedings.

11.13 Demurrer Must Be Taken Either to Entire Pleading or to Entire Cause of Action.

11.13[1] Entire Pleading or Entire Cause of Action Rule Is Statutory.

11.13[2] "Cause of Action" Defined As Set of Facts Giving Rise to Basis for Relief.

11.13[3] Demurrer Goes to Entire Pleading When Complaint or Cross-Complaint States Only One Cause of Action.

11.13[4] When Complaint or Cross-Complaint States Multiple Causes of Action, Demurrer Must Specify Causes of Action Being Challenged.

11.13[5] Separate Causes of Action Must Stand Alone.

11.13[6] Judicial Council Form Complaint Equally Subject to Demurrer.

11.14 Joint Demurrers by Multiple Defendants Are Permissible.

11.15 Format Requirements for Demurrer.

11.15[1] Cause of Action Demurred to Must Be Specified in Demurrer.

11.15[2] Demurrer Must Specify Grounds for Demurrer.

11.15[3] Format Requirements Must Conform to Rules of Court.



11.16 Accompanying Papers to Be Served and Filed With Demurrer.

11.16[1] Notice of Hearing Must Be Served and Filed 16 Court Days Prior to Hearing.

11.16[2] Supporting Memorandum Must Be Served and Filed.

11.16[3] Request for Judicial Notice Must Be Served and Filed.

11.16[3][a] No Request Necessary for Mandatory Judicial Notice.

11.16[3][b] Request Required for Matters Subject to Permissive Judicial Notice.

11.16[3][c] Request to Be Made in Separate Document.

11.16[4] Proof of Service Must Be Filed.

11.16[5] Filing Fee May Include First Filing Fee.

11.16[6] Reply to Opposition Must Be Filed and Served at Least Five Court Days Before Hearing.

11.17 Demurrer May Be Filed Concurrently With Answer or Motion to Strike.

11.17[1] Party May File Demurrer With Answer.

11.17[2] Party May File Demurrer With Motion to Strike.

11.17[3] Party May File Demurrer Without Answering Other Causes.

11.18 Demurrer May Be Amended.

11.19 Party May Waive Demurrer by Failing to Prosecute.

11.20 CHECKLIST: Responding to Demurrer.

11.21 Options and Strategy for Responding to Demurrer.

11.22 Alternatives to Opposition and Adjudication.

11.22[1] Party May Amend Challenged Pleading.

11.22[1][a] Demurrer Will Generally Be Taken Off Calendar When Pleading Is Amended.

11.22[1][b] Party May Not Amend Pleading Simply by Omitting Objectionable Matters or Contradicting Original Allegations.

11.22[2] Party May Seek Stipulation to Continue Demurrer Hearing.

11.23 Opposing Party May Serve and File Opposing Memorandum Nine Court Days Before Hearing.

11.24 Object to Judicial Notice If Request Improperly Made or Overreaching.

11.25 Demurrer Is Subject to Motion to Strike.

11.26 CHECKLIST: Hearing on Demurrer and Reacting to Orders on Demurrer.

11.27 Court's Hearing on Demurrer.

11.27[1] Trial Courts May Have Tentative Ruling Systems.

11.27[2] Parties May Generally Appear by Telephone.

11.27[3] When Party Fails to Appear at Hearing.

11.27[3][a] Court Has Discretion to Rule on Merits When Moving Party Fails to Appear at Hearing.

11.27[3][b] Court Should Dispose of Demurrer on Merits When Opposing Party Fails to Appear at Hearing.

11.27[3][c] Court Has Discretion When Both Parties Fail to Appear at Hearing.

11.27[4] Court Has Discretion When Demurrer and Motion to Strike Filed Concurrently.

11.27[5] Court Must Allow Oral Argument.

11.28 Standards Used by Court in Ruling on Demurrer.

11.28[1] Court May Consider Only Challenged Pleading and Matters Subject to Judicial Notice.

11.28[2] Court Will Consider Allegations of Pleading As True.

11.28[3] General Demurrer Does Not Admit Contentions or Conclusions.

11.28[4] Court Must Construe Challenged Pleading Liberally.

11.28[5] Court Must Disregard Errors Not Affecting Rights of Parties.

11.28[6] Court May Sustain General Demurrer Without Leave to Amend Only If Complaint Shows No Basis for Relief.

11.29 Court May "Sustain" or "Overrule" Demurrer.

11.29[1] Overruled Demurrer.

11.29[1][a] When Court Overrules Demurrer to Complaint or Cross-Complaint, Leave to Answer Is Deemed Granted.

11.29[1][b] When Court Overrules Demurrer to Answer, Action Proceeds As If No Demurrer.

11.29[2] When Court Sustains Demurrer, Leave to Amend Is Generally Granted.

11.29[2][a] Court Must Specify Ground for Sustaining Demurrer.

11.29[2][b] Court May Grant Leave to Amend Pleading.

11.29[2][c] Court May Specify Time Limits for Amending Pleading.

11.29[3] Court Need Not Issue Statement of Decision.

11.29[4] When Court Takes Demurrer Under Advisement, Clerk Notifies Parties of Ruling.

11.30 Parties' Options After Ruling on Demurrer.

11.30[1] When Demurrer Is Sustained With Leave to Amend, Party Can Amend Complaint or Suffer Dismissal or Default Judgment.

11.30[2] When Demurrer Is Sustained Without Leave to Amend, Party Can File Motion for Reconsideration or Seek Appellate Review of Judgment.

11.31 Motion for Reconsideration May Be Made When Demurrer Sustained Without Leave to Amend.

11.32 Plaintiff's Voluntary Dismissal of Complaint After Demurrer.

11.32[1] Plaintiff May Voluntarily Dismiss Complaint Before Ruling Made on Demurrer.

11.32[2] Plaintiff May Voluntarily Dismiss Complaint Before Time to Amend Expires.

11.32[3] Plaintiff May Not Dismiss Complaint After Demurrer Sustained.

11.33 Judgment After Ruling on Demurrer.

11.33[1] Court May Dismiss Complaint After Demurrer Sustained Without Leave to Amend.

11.33[2] Court May Dismiss Complaint When Party Fails to Amend.

11.33[3] Default Judgment May Be Appropriate in Certain Circumstances.

11.33[3][a] Default Judgment May Be Appropriate After Demurrer Sustained With Leave to Amend.

11.33[3][b] Default Judgment May Be Appropriate After Demurrer Overruled.

11.33[3][c] Default Judgment May Be Appropriate After Demurrer to Answer Sustained.

11.33[3][d] Default Judgment May Be Appropriate in Unlawful Detainer, Forcible Detainer, and Forcible Entry Proceedings.

11.34 CHECKLIST: Appellate Review of Demurrer.

11.35 Aggrieved Party Seeks Appellate Review of Judgment of Dismissal After Demurrer Sustained, Not the Order on Demurrer.

11.35[1] Order Sustaining or Overruling Demurrer Is Generally Not Appealable.

11.35[2] Proper Procedure Is to Appeal From Subsequent Judgment or Order of Dismissal.

11.35[3] Orders May Be Reviewable by Extraordinary Writ.

11.35[3][a] Order Sustaining Demurrer May Be Reviewable by Writ.

11.35[3][b] Order Overruling Demurrer Generally Not Reviewable by Writ.

11.36 Standard of Review on Appeal.

11.36[1] Appellate Court Makes Several Determinations When Reviewing Demurrer Sustained Without Leave to Amend.

11.36[1][a] Court Has Two-Step Analysis for Demurrer Sustained Without Leave to Amend.

11.36[1][b] Appellate Court Should Find Abuse of Discretion If There Is a Reasonable Possibility That Defect Can Be Cured by Amendment.

11.36[2] Appellate Court Must Review Complaint to Determine If It States a Cause of Action.

11.36[3] Appellate Court Must Reverse Ruling Sustaining Demurrer When Plaintiff Has Stated Cause of Action Under Any Theory.

11.36[4] Appellate Court Must Affirm Trial Court's Correct Ruling Regardless of Grounds Stated by Trial Court.

11.36[5] Demurring Party May Present New Theories on Appeal.

11.36[6] Appellate Court May Consider Any Facts Subject to Judicial Notice.

11.37 When Order Sustaining Demurrer Is Reversed on Appeal, Amended Complaint Must Be Filed Within 30 Days.

11.38 CHECKLIST: Motions for Judgment on the Pleadings.

11.38[1] Moving Party.

11.38[2] Opposing Party.

11.39 Options and Strategy for Motions for Judgment on the Pleadings.

11.40 Motion for Judgment on the Pleadings Can Be Comparable to General or Special Demurrer.

11.40[1] Motion for Judgment on the Pleadings Comparable to General Demurrer.

11.40[2] Special Demurrer Based on Lack of Subject Matter Jurisdiction Available for Defendant.

11.40[3] Motion for Judgment on the Pleadings Cannot Be Brought Until Time for Demurrer Has Expired.

11.40[4] Party May Not Demur and File Motion for Judgment on the Pleadings on the Same Grounds Without Change in Law.

11.40[5] Party May Make Motion for Judgment on the Pleadings If No Demurrer Filed on Same Grounds.

11.40[6] Court Will Consider Allegations of Pleading As True.

11.40[7] Court May Consider Matters Only on Face of Pleadings and Matters Subject to Judicial Notice.

11.41 Motion for Judgment on the Pleadings May Be Brought by Any Party or on Motion of the Court.

11.42 Motion for Judgment on the Pleadings May Be Made in Civil and Special Proceedings.

11.43 Court May Treat Other Motions As Motion for Judgment on the Pleadings.

11.44 Grounds for Motion for Judgment on the Pleadings.

11.44[1] Plaintiff May File Motion for Judgment on the Pleadings Only When the Answer Does Not State Facts Sufficient to Constitute a Defense.

11.44[2] Defendant May File Motion for Judgment on the Pleadings on Two Different Grounds.

11.44[3] When Court Brings Motion for Judgment on the Pleadings, Grounds May Be the Same As If Plaintiff or Defendant Were Bringing the Motion.

11.45 Timing and Format Requirements for Motions for Judgment on the Pleadings.

11.45[1] Defendant May Make Motion for Judgment on the Pleadings After Time to Demur to Complaint Has Expired.

11.45[2] Plaintiff May Make Motion for Judgment on the Pleadings After Time to Demur to Answer Has Expired.

11.45[3] Motion for Judgment on the Pleadings May Not Be Brought After Pretrial Conference Order or Within 30 Days of Date Initially Set for Trial.

11.45[4] Noticed Motion Inferred From Statute, Provides 16 Court Days' Notice of Motion.

11.46 Hearing on and Court's Determination of Motion for Judgment on the Pleadings.

11.46[1] Opposing Party Is Entitled to Hearing.

11.46[2] Court Must Treat All Allegations in Pleadings As True.

11.46[3] When Plaintiff Brings Motion, Court Considers Allegations of Complaint and Defenses Stated in Answer.

11.46[4] When Defendant Brings Motion, Court Considers Whether Complaint States a Cause of Action or Whether There Is Lack of Subject Matter Jurisdiction.

11.47 Court's Order on Motion for Judgment on the Pleadings.

11.47[1] Court May Grant Motion With or Without Leave to Amend.

11.47[2] Court Must Grant Motion With Leave to Amend If Curing Defect Is Possible.

11.47[3] If Motion Is Granted With Leave to Amend, Court Must Allow 30 Days to Amend.

11.47[4] If Party Does Not Amend in a Timely or Proper Fashion, Moving Party May Move for Judgment.

11.47[5] If Motion Is Granted Without Leave to Amend, Court Will Enter Judgment.

11.47[6] Losing Party May Move for a New Trial.

11.48 Obtaining Review of Ruling on Motion for Judgment on the Pleadings.

11.48[1] Order Itself Is Not Reviewable; Subsequent Judgment Is.

11.48[2] Standard of Review on Appeal Is Identical to Demurrer.

11.48[3] Appellate Court Must Accept As True All Well Pled Allegations and Facts.

11.48[4] Reviewing Court May Consider Facts Subject to Judicial Notice As Well As Admissions.

11.48[5] Appellate Court May Also Review Decision to Grant Motion Without Leave to Amend.

11.48[6] Review of Ruling May Be Available by Mandate.

11.49 Notice of Hearing on Demurrer.

11.50 Stipulation Postponing Hearing on Demurrer and Order.

11.51 General Demurrer to Complaint or Cross-Complaint--No Cause of Action Stated.

11.52 Special Demurrer to Complaint or Cross-Complaint--No Subject Matter Jurisdiction.

11.53 Special Demurrer to Complaint or Cross-Complaint--Another Action Pending.

11.54 Special Demurrer to Complaint or Cross-Complaint--Defect of Parties.

11.55 Special Demurrer to Complaint or Cross-Complaint--Pleading Is Uncertain.

11.56 Demurrer to Answer--No Defense Stated.

11.57 Special Demurrer to Answer--Pleading Is Uncertain.

11.58 Order on Demurrer.

11.59 Notice of Court's Ruling on Demurrer.

11.60 Notice of Motion for Order Striking Untimely Amended Complaint and Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend.

11.61 Ex Parte Application for Order Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend and Order.

11.62 Order Dismissing Action on Plaintiff's Failure to File Amended Pleading.

11.63 Notice of Motion for Judgment on the Pleadings--Failure to State Cause of Action or Defense.

11.64 Order Granting or Denying Motion for Judgment on the Pleadings.

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Chapter 11 Demurrers and Motions for Judgment on the Pleadings  
I. STRATEGY

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.01*

**11.01 Scope.**

This chapter covers:

- Objectives and strategies for demurrers and motions for judgment on the pleadings [*see 11.02*].
- General principles relating to demurrers and when they are appropriate [*see 11.05 -11.07*].
- Appropriate grounds for filing a demurrer to a complaint or cross-complaint [*see 11.03, 11.04, 11.08, 11.09*; Forms: *see 11.51 -11.55*].
- Appropriate grounds for filing a demurrer to an answer [*see 11.10*; Forms: *see 11.56, 11.57*].
- Appropriate grounds for filing a demurrer to a complaint in intervention [*see 11.11*].
- Rules for drafting, filing, and serving demurrers and related papers [*see 11.03, 11.04, 11.12-11.19*; Forms: *see 11.49 -11.57*].
- Responses to demurrers [*see 11.20, 11.21, 11.22-11.25*].
- Adjudication and appellate review of demurrers and demurrer orders [*see 11.26 -11.37*; Forms: *see 11.58 -11.62*].
- Grounds for, drafting of, response to, adjudication of, and appellate review of motions for judgment on the pleadings [*see 11.38 -11.48*; Forms: *see 11.63 -11.67*].

**Core Statutes:**

CCP §§ 430.10, 430.20, 430.30, 430.40, 430.50, 430.60, 430.70, 430.80, 430.90, 472a, 472b, 472c, 472d (demurrers), 438 (motions for judgment on the pleadings)





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Chapter 11 Demurrers and Motions for Judgment on the Pleadings  
I. STRATEGY

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**11.02 Objective and Strategy.**

Demurrers and motions for judgment on the pleadings are both means of testing the pleadings based on matters that appear on the face of those pleadings. A court ruling on a demurrer or a motion for judgment on the pleading may not consider any extrinsic evidence other than matters subject to judicial notice.

A demurrer is a pleading filed in response to another pleading; demurrers are governed by *CCP* §§ 430.10-430.90. A motion for judgment on the pleadings challenges the sufficiency of the pleadings and requests that the court enter judgment solely based on the matter stated in those pleadings. Motions for judgment on the pleadings are governed by *CCP* § 438.



**Timing:**

Demurrers must be filed within 30 days after service of a complaint or cross-complaint, or within 10 days after service of an answer [*CCP* § 430.40]. This 30-day period may, however, be extended by the court, and the parties may stipulate to an additional 15 days [*CCP* §§ 1054, 1054.1; *Gov Code* § 68616(b)]. Motions for judgment on the pleadings cannot be filed until after the time to demurrer has expired [*CCP* § 438(f)].

**Distinguish:**

The list of grounds for challenging the sufficiency of the pleadings by demurrer is larger than the grounds available for a motion for judgment on the pleadings. Demurrers may include objections to the pleadings on the following grounds [*CCP* § 430.10]:

- Lack of subject matter jurisdiction.
- Lack of legal capacity to sue.
- Another action is pending between the same parties on the same cause of action.
- Defect or misjoinder of parties.

- Insufficient facts to constitute a cause of action.
- Uncertain, ambiguous, or unintelligible pleadings.
- Inability to determine whether contract is written, oral, or implied by conduct.
- No certificate filed for professional negligence action.

Motions for judgment on the pleadings, however, may include objections to the pleadings only on the following grounds [*CCP* § 438(c)]:

- For plaintiffs, the answer does not state facts sufficient to constitute a defense to the complaint.
- For defendants:
  - ☐ Lack of subject matter jurisdiction.
  - ☐ The complaint does not state facts sufficient to constitute a cause of action against the defendant.

The limited scope of motions for judgment on the pleadings means a party would waive several valuable objections if not presented by demurrer. A party could wait to raise the one objection available to both sides under both procedures (insufficient facts to state a cause of action or defense), but this would mean litigating on a defective complaint, and all the uncertainties associated with that cause of action, including the difficulty of having an unclear pleading as the basis for any later dispositive motion. Nevertheless, there are circumstances in which one may wish to delay educating the opponent of certain defects in its pleading until a later point in the case.



#### **Warning--Only One Bite at the Apple:**

A motion for judgment on the pleadings cannot raise the same grounds objected to and overruled on demurrer. However, there is one exception to this rule: it does not apply if there has been a material change in applicable case law or statute since the ruling on the demurrer [*see CCP* § 438(g)].

#### **Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, Ch. 372, Motions and Orders (Matthew Bender).

California Points and Authorities, Ch. 71, Demurrers and Motions for Judgment on the Pleadings (Matthew Bender).



#### **Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePretrial

Judgments Judgment on the Pleadings



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II. DEMURRING TO A PLEADING

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**11.03 CHECKLIST: Demurring to a Pleading.**



Determine timing for serving and filing demurrer:



Defendant or cross-defendant generally has 30 days after service of complaint or cross-complaint to serve and file a demurrer.



Plaintiff or cross-complainant generally has 10 days after service of answer to file demurrer to answer.

**Exception:**

The court may extend the time for service and filing of demurrers, and parties may stipulate to an additional 15 days.

**Authority:**

*CCP §§ 430.40(a), (b), 432.10; Gov Code § 68616(b)*

**Discussion:**

See 11.12



Determine timing of hearing date for demurrer:



Demurrer must be set for hearing not more than 35 days following the filing of the demurrer, or the first date available to the court thereafter.

**Exception:**

The court may set an earlier or later hearing date for good cause.

**Authority:**

*Cal Rules Ct, Rule 3.1320(d)*

**Discussion:**

See 11.16[1]

**Forms:**

See 11.49, 11.50

- ☐ Following a motion to transfer, a defendant has 30 calendar days after the decision on the motion to demur or otherwise plead.

**Authority:**

*Cal Rules Ct, Rule 3.1326*

**Discussion:**

See 11.12[4]



Timing may vary in forcible or unlawful detainer actions or forcible entry actions.

**Authority:**

*CCP §§ 1167, 1167.3, 1170* (five days to demur)

**Discussion:**

See 11.12[5]

- ☐ If demurring to a complaint or cross-complaint, determine whether general or special demurrer is appropriate.

☐ General demurrer challenges complaint or cross-complaint on ground that pleading fails to state facts sufficient to constitute a cause of action, *i.e.*, any of the following:

- ☐ Essential element of claim omitted.
- ☐ Failure to state cause of action on any theory.
- ☐ Action is premature.
- ☐ Pleader lacks standing to sue.
- ☐ Action is barred by affirmative defense that is apparent on the face of the pleading or from judicially noticeable facts.

☐ Special demurrer is based on one of the many grounds enumerated by statute:

- ☐ Court has no subject matter jurisdiction.
- ☐ Pleader does not have legal capacity to sue.
- ☐ Another action is pending between the same parties on the same cause of action.
- ☐ There is a defect or misjoinder of parties.
- ☐ The pleading is uncertain, ambiguous, or unintelligible.
- ☐ In a contract case, it cannot be ascertained from the complaint or cross-complaint whether the contract is written, oral, or implied by conduct.
- ☐ In a professional negligence case involving an architect, engineer, or land surveyor, the certificate required by *CCP* § 411.35 has not been filed.
- ☐ There is a purely legal issue of federal preemption on the face of the complaint or cross-complaint.

**Authority:**  
*CCP* § 430.10

**Discussion:**  
See 11.08, 11.09

**Forms:**  
See 11.51 -11.56

- ☐ If demurring to an answer, determine the ground for demurrer:
  - ☐ The answer does not state facts sufficient to constitute a defense.
  - ☐ The answer is uncertain.
  - ☐ If the answer pleads a contract, it is uncertain whether the contract is written or oral.

**Authority:**  
*CCP* § 430.20

**Discussion:**  
See 11.10[2] -[4]

**Form:**  
See 11.56, 11.57

☐ If demurring to complaint in intervention, determine whether intervening party is regarded as plaintiff or defendant:

☐ If intervening party is regarded as plaintiff, a demurrer may be made on any of the grounds available for demurrers to complaints or cross-complaints.

☐ If intervening party is regarded as defendant, a demurrer may be made on any of the grounds available for demurrers to answers.

**Authority:**

*CCP §§ 430.10, 430.20; Timberidge Enters., Inc. v. City of Santa Rosa (1978) 86 CA3d 873, 879-880, 150 CR 606*

**Discussion:**

*See 11.11*

☐ Determine whether all or a portion of complaint or cross-complaint will be demurred to.

☐ A demurrer may not be taken to a partial cause of action.

**Authority:**

*CCP § 430.50*

**Discussion:**

*See 11.13*

☐ In the case of demurrer to an answer, determine whether the demurrer will be taken to the whole answer or to one or more of the defenses stated in the answer.

**Authority:**

*CCP § 430.50(b)*

**Discussion:**

*See 11.13*

☐ Determine whether other defendants or cross-defendants will jointly demur.

**Authority:**

*Wise v. S. Pac. Co. (1963) 223 CA2d 50, 76, 35 CR 652 (overruled on other grounds in Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 C4th 503, 510, 521, 28 CR2d 475, 869 P2d 454 )*

**Discussion:**

*See 11.14*

☐ Determine whether demurrer will be filed concurrently with a motion to strike and/or an answer.

- ☐ If filed jointly with motion to strike, motion to strike and demurrer must be heard at the same time.

**Authority:**

*CCP § 430.30; Cal Rules Ct, Rules 1.5(b), 3.1100, 3.1103(b), 3.1322(b)*

**Discussion:**

*See 11.17*

- ☐ Draft demurrer.

- ☐ Demurrer must specify which causes of action are being demurred to.
- ☐ Demurrer must specify grounds for demurrer and the pleading or portion of the pleading against which objection is made.
- ☐ Demurrer papers must meet requirements specified by Rules of Court.

**Authority:**

*CCP § 430.60; Cal Rules Ct, Rules 2.100 et seq., 3.1110, 3.1112*

**Discussion:**

*See 11.11[1], 11.15[1]-[3], 11.16[1]*

**Forms:**

*See 11.51 -11.57*

- ☐ Prepare notice of hearing.

- ☐ A notice period of 16 court days is required, increased by the applicable provisions for mailing, etc.

**Authority:**

*CCP § 1005(b); Cal Rules Ct, Rules 3.1112, 3.1320*

**Discussion:**

*See 11.16[1]*

**Form:**

*See 11.49*

- ☐ Prepare accompanying papers to be served and filed with demurrer.

- ☐ Notice of hearing.
- ☐ Supporting memorandum.



- ☐ Request for judicial notice, if applicable.
- ☐ Separate request for judicial notice is required in cases of permissive but not mandatory judicial notice.
- ☐ Proof of service.

**Authority:**

*CCP § 1013a; Evid Code §§ 451-453; Cal Rules Ct, Rules 3.1113(a), 3.1306*

**Discussion:**

*See 11.16[1] -[4]*

- ☐ Serve copies of demurrer and accompanying papers on the opposing party and all other parties who have appeared in the action.

- ☐ Personal service must normally be made 16 court days before the hearing date; this period is extended depending on whether the service is by mail, fax transmission, express mail, or another method of overnight delivery.

**Authority:**

*CCP §§ 465, 1005, 1011, 1012, 1010.5, 1015; Cal Rules Ct, Rules 1.6(15), (19), 1.21(a), 3.1100, 3.1103(b), 3.1320(c), 2.300 et seq.*

**Discussion:**

*See 11.16[1]*

- ☐ File originals of demurrer and accompanying papers with the court at least 16 court days before the scheduled hearing date.

- ☐ Pay filing fee, and initial filing fee if demurrer is the first paper filed by the party.

**Authority:**

*CCP § 1014; Gov Code §§ 70611, 70614*

**Discussion:**

*See 11.16[5]*

- ☐ If opposition papers are filed, draft, serve, and file reply to opposition.

- ☐ Reply must be served and filed at least five court days before the scheduled hearing.
- ☐ Service must be made by a method reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the opposing papers are filed.

**Authority:**

*CCP § 1005(b), (c)*

**Discussion:**

See 11.25



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**11.04 Options and Strategies for Demurring Party.**

Demurrers are the primary means of objecting to actions based on improper subject matter jurisdiction, parties without the capacity to sue, improper parties, redundant litigation, and the very common malady of poorly drafted complaints, cross-complaints, and answers. Demurrers force the pleading parties to nail down their position before subjecting other parties and the court to the time and expense of the litigation.

Equally important, demurrers challenge new causes of action and defenses being brought before the court. Plaintiffs are often in search of new causes of action when they cannot find an existing cause of action to support their perceived wrong. Plaintiffs also will plead novel remedies to existing causes of action when recognized, permissible remedies do not allow for the relief sought. Defendants are equally as innovative in pleading new defenses when available defenses do not provide the protection they seek. Demurrers are the method to challenge these pleadings as a matter of law and obtain a ruling before undertaking any further litigation. In cases in which the appellate courts develop new areas of law, a demurrer is often the procedural starting point of the matter on review.

**Judge's Perspective:**

Demurrers for uncertainty are disfavored. Moreover, demurrers that are interposed to resolve ambiguities as to the nature of plaintiff's case are likewise not well received. Too often, demurrers have been interposed unnecessarily. Because amendments to pleadings are liberally granted, the frequent use of the demurrer serves only to assist the plaintiff in how to better plead his or her case. It is always best to preserve by way of affirmative defense those matters that need to be preserved and then proceed with a judgment on the pleadings at a time wherein prejudice would occur if leave to amend was requested by the plaintiff.



**Warning:**

On demurrer, the Court of Appeal accepts all the facts pled as true. Caution should be used in disposing of a case with "bad facts" by demurrer. The adage that "bad facts" make "bad law" has been frequently proven on appeals from demurrers that have been sustained without leave to amend.

A motion to strike is filed in connection with a demurrer when it is necessary to strike a portion of a cause of action. A motion to strike is the only pleading that allows an attack on a part of a cause of action, or particular language contained in the pleading [see CCP §§ 435-437]. Demurrers, motions for judgment on the pleadings, and motions for summary

judgment, all require the disposition of an entire cause of action in order to be granted [*see CCP §§ 430.50, 437c(a), (f), 438(c)(2)*]. Thus, a motion to strike is typically filed with a demurrer when the moving party wishes to eliminate a claim for damages. For example, it may be used for emotional distress damages that are not recoverable in a legal malpractice action, scurrilous or inflammatory allegations, or language supporting a claim for punitive damages when a demurrer is filed on the basis that punitives are not recoverable.

**Cross Reference:**

Detailed coverage of motions to strike, see Ch. 12, Motions to Strike.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers



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*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.05*

**11.05 Demurrer Is Used to Object to Another Pleading.**

**11.05[1] Demurrer Is One of Four Types of Pleadings.** There are four types of pleadings used in civil procedure: complaints, cross-complaints, demurrers, and answers [*CCP* § 422.10]. A demurrer can be used to object to any of the other three pleadings [*CCP* §§ 430.10, 430.20].

**11.05[2] Demurrer Objects to Complaint, Cross-Complaint, or Answer.** A demurrer is used to object to a complaint, a cross-complaint, or an answer on the ground that the pleading contains a defect that appears from examination of the pleading itself or from examination of the pleading together with judicially noticed facts [*CCP* § 430.30].

**11.05[3] Allegations in Challenged Pleading Generally Taken As True, but Demurrer Can Allege or Deny Facts by Reference to Judicial Notice.** Unlike the other types of pleadings, demurrers may not allege or deny facts or otherwise refer to extrinsic evidence other than evidence subject to judicial notice [*see, e.g., Cook v. De La Guerra* (1864) 24 C 237, 239 ; *Hayward v. Henderson* (1979) 88 CA3d 64, 71, 151 CR 505 ; *see also Gould v. Maryland Sound Indus., Inc.* (1995) 31 CA4th 1137, 1144, 37 CR2d 718 ].

**11.05[4] Demurrer Only Raises Issues of Law.** A demurrer's function is to test the legal sufficiency of the factual allegations in the complaint, cross-complaint, or answer, not to determine the truth of disputed facts [*see, e.g., Boyle v. City of Redondo Beach* (1999) 70 CA4th 1109, 1114 n2, 83 CR2d 164 (demurrer tests legal sufficiency of factual allegations in complaint); *accord Stevens v. Superior Court* (1999) 75 CA4th 594, 608-609, 89 CR2d 370 ; *see also Ball v. GTE Mobilnet of Cal.* (2000) 81 CA4th 529, 534-535, 96 CR2d 801 (demurrer only used to challenge legal sufficiency of complaint, not truth of plaintiff's factual allegations or plaintiff's ability to prove those allegations); *CrossTalk Prods., Inc. v. Jacobson* (1998) 65 CA4th 631, 635, 76 CR2d 615 (demurrer not appropriate for determining truth of disputed facts or what inferences should be drawn when competing inferences are possible)].

**Exception:**

Questions of fact may be resolved on demurrer only when there is only one legitimate inference to be drawn from the allegations of the complaint. [ *Tracfone Wireless, Inc. v. County Of Los Angeles* (2008) 163 CA4th 1359, 1368, 78 CR3d 466 ].



**Cross Reference:**

Discussion of the specific grounds for demurrers, see *11.08 -11.11*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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**11.06 Courts and Attorneys Distinguish Between "General" and "Special" Demurrers.**

A "general" demurrer challenges a complaint or cross-complaint on the ground that the pleading fails to state facts sufficient to constitute a cause of action [CCP § 430.10(e)]. Similarly, it challenges an answer on the ground that the answer does not state facts sufficient to constitute a defense [CCP § 430.20(a)].

A "special" demurrer challenges a pleading based on one of the other grounds enumerated by statute [CCP §§ 430.10, 430.20; see *Timberidge Enters., Inc. v. City of Santa Rosa* (1978) 86 CA3d 873, 879-880, 150 CR 606 (demurrer to answer); *Buss v. J.O. Martin Co.* (1966) 241 CA2d 123, 133, 50 CR 206 (demurrer to complaint or cross-complaint)].

**Distinguish:**

The terms "general" and "special" demurrer are commonly used by the courts and attorneys, but they do not appear in the statutes governing demurrers. One exception is in the statute governing limited civil cases [CCP § 92 (special demurrers are not allowed in limited civil cases)].

**➡ Cross References:**

Discussion of "general" demurrers, see 11.08.  
Discussion of grounds for "special" demurrers, see 11.09.  
Discussion of demurrers in limited civil cases, see 11.07[2].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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**11.07 Type of Action Determines Whether Demurrer Is Permissible.**

**11.07[1] Demurrer Permissible in Civil Action.** A demurrer is one of the four pleadings allowed in a civil action [CCP § 422.10]. A civil action is distinguished from a criminal action and a special proceeding [CCP §§ 21-32].

**11.07[2] Special Demurrers Not Permissible in Limited Civil Cases.** Special demurrers are not allowed in limited civil cases [CCP §§ 91(a), 92(c)].

**Exception:**

This rule does not apply to small claims actions or to unlawful detainer, forcible entry, and forcible detainer actions [CCP § 91(b)]. Special demurrers are permissible in those actions.



**Cross Reference:**

Classification of case as limited civil case, see *Ch. 15, Reclassification of Cases, 15.05*.

**11.07[3] Special Proceedings Entail Separate Demurrer Rules.**

**11.07[3][a] Demurrer Expressly Permitted in Certain Proceedings.** For special proceedings of a civil nature, many of the statutes pertaining to the special proceeding state whether demurrers are permissible. The following are examples of special proceedings and their corresponding statutes permitting demurrers:

- Certiorari [CCP § 1069.1];
- Mandate [CCP § 1089];
- Prohibition [CCP § 1105];
- Unlawful or forcible detainer or forcible entry [CCP § 1170]; and
- Eminent domain [CCP § 1250.350].



**11.07[3][b] Demurrer Impliedly Permitted in Certain Proceedings.** In some cases, special proceeding statutes will incorporate the provisions of Part 2 of the Code of Civil Procedure, which includes the demurrer statutes [see *CCP* §§ 422.10, 430.10-430.80, 472a-472d, 581, 591]. In this case, a demurrer is permissible in such a special proceeding.

**11.07[3][c] Demurrer Not Permitted in Certain Proceedings.** In some proceedings, demurrers are specifically prohibited by statute [see, e.g., *Cal Rules Ct, Rule 5.108* (prohibiting demurrers in proceedings under Family Law Act)].

**11.07[4] Common Counts Generally Not Subject to Demurrer.** Claims alleging common counts are generally not subject to general or special demurrer [ *Farmers Ins. Exchange v. Zerin* (1997) 53 CA4th 445, 460, 61 CR2d 707 ].

**Exception:**

There may be an exception to the common count rule in cases in which a complaint pleads a single cause of action in different counts [ *Farmers Ins. Exchange v. Zerin* (1997) 53 CA4th 445, 460, 61 CR2d 707 ].

 **Cross Reference:**

Discussion of common counts, see California Forms of Pleading and Practice, Ch. 121, Common Counts (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.08*

**11.08 General Demurrer to Complaint or Cross-Complaint.**

**11.08[1] Use When Complaint or Cross-Complaint Fails to State Cause of Action.** A party may demur to a complaint or cross-complaint on the ground that it does not state facts sufficient to constitute a cause of action [CCP § 430.10(e)]. This is known as a "general" demurrer, while all other grounds for demurrer listed under CCP § 430.10 are referred to as "special" demurrers [see 11.06].



**Cross Reference:**

Form of general demurrer to complaint or cross-complaint--no cause of action stated, see 11.51.

**11.08[2] Grounds for General Demurrer Are Generally Not Waivable.** The objection that the complaint or cross-complaint does not state facts sufficient to constitute a cause of action is not waived by failure to raise it by demurrer or answer [CCP § 430.80(a); see *Wilson v. Sharp* (1954) 42 C2d 675, 677, 268 P2d 1062; *Andrews v. Mobile Aire Estates* (2005) 125 CA4th 578, 585; *Wilson v. Houston Funeral Home* (1996) 42 CA4th 1124, 1132, 50 CR2d 169]. For example, the objection can later be made by motion for judgment on the pleadings, by motion for summary judgment, by an objection at trial to the introduction of evidence, or on appeal [CCP § 438 (motion for judgment on the pleadings); see, e.g., *Parker v. Bowron* (1953) 40 C2d 344, 349-350, 254 P2d 6 (by objection at trial); *Andrews v. Mobile Aire Estates* (2005) 125 CA4th 578, 585 (on appeal); *Bowden v. Robinson* (1977) 67 CA3d 705, 710, 136 CR 871 (motion for summary judgment)].

**11.08[3] Substantive Law of State Where Action Arose Governs Demurrer Determination.** In determining whether a complaint or cross-complaint states facts sufficient to constitute a cause of action, the court must review the substantive law that governs the action in question. For example, if the events in question occurred in a state other than California, the substantive law of that state may govern the determination of whether the complaint states facts sufficient to constitute a cause of action [see, e.g., *Pac. Diamond Co. v. Superior Court* (1978) 85 CA3d 871, 875-878, 149 CR 813 (Colorado law governs issue of whether innkeeper is liable on account of theft of diamonds from guest in guest's room at innkeeper's Denver hotel)].

**11.08[4] Specific Grounds for Failing to State a Cause of Action.**

**11.08[4][a] When Complaint or Cross-Complaint Omits Essential Element.** A general demurrer is proper if a

complaint or cross-complaint omits an essential element of a cause of action.

**Examples:**

- In a negligence action, a complaint or cross-complaint fails to state a cause of action if it fails to allege facts showing the existence of a legal duty, the breach of a legal duty, or proximate cause [see, e.g., *Beauchene v. Synanon Found., Inc.* (1979) 88 CA3d 342, 348, 151 CR 796 (existence of legal duty); *Marsiglia v. Dozier* (1911) 161 C 403, 405, 119 P 505 (breach of duty); *Potter v. Richards* (1955) 132 CA2d 380, 384-385, 282 P2d 113 (proximate cause of damage)].

- If the action stated in the complaint or cross-complaint requires an exhaustion of administrative or contract remedies as a prerequisite to a lawsuit, then failure to allege exhaustion of these remedies in the complaint or cross-complaint is a ground for demurrer [see, e.g., *State v. Superior Court* (2004) 32 C4th 1234, 1242-1243, 90 P3d 116 (Tort Claims Act); *Hood v. Hacienda La Puente Unified Sch. Dist.* (1998) 65 CA4th 435, 439-441, 76 CR2d 448 (administrative remedies)].

**11.08[4][b] When Complaint or Cross-Complaint Fails to State Cause of Action on Any Theory.** If a complaint or cross-complaint fails to state a cause of action on any of the theories stated, a general demurrer is proper [see, e.g., *Otworth v. S. Pac. Transp. Co.* (1985) 166 CA3d 452, 461, 212 CR 743 (complaint failed to allege essential facts for any of causes of action alleged, including conversion, breach of contract, unjust enrichment, and violation of due process)].

**11.08[4][c] When Complaint or Cross-Complaint Shows Action Is Premature.** If a complaint or cross-complaint shows on its face that the action is premature, a general demurrer is proper [see, e.g., *Breneric Assocs. v. City of Del Mar* (1998) 69 CA4th 166, 188, 81 CR2d 324 ]. Accordingly, a general demurrer will not be granted when the ripeness of the controversy cannot be determined on the face of the complaint [ *County of Santa Clara v. Superior Court* (2009) 171 CA4th 119, 131, 89 CR3d 520] .

**11.08[4][d] When Complaint or Cross-Complaint Shows Pleader Lacks Standing to Sue.** If a complaint or cross-complaint shows on its face that the plaintiff or cross-complainant lacks standing to sue, a general demurrer is proper [CCP § 367; see *Parker v. Bowron* (1953) 40 C2d 344, 351, 254 P2d 6 ; *Peterson v. Cellico Partnership* (2008) 164 CA4th 1583, 1589-1590, 80 CR3d 316 ].

**Distinguish:**

The ground that the pleader lacks standing to sue, which is a basis for general demurrer, is distinguishable from the ground that the pleader lacks legal capacity to sue, which is a ground for special demurrer [see 11.09[4] regarding demurrers based on the ground that the pleader lacks legal capacity to sue].

**11.08[4][e] When Complaint or Cross-Complaint Shows Action Is Barred by Affirmative Defense.** If a complaint or cross-complaint shows on its face or from judicially noticeable facts that it is barred by an affirmative defense, a general demurrer is proper [ *McKenney v. Purepac Pharmaceutical Co.* (2008) 167 CA4th 72, 78, 83 CR3d 810 ; *Halvorsen v. Aramark Unif. Servs., Inc.* (1998) 65 CA4th 1383, 1391, 77 CR2d 383 ]. The affirmative defense must appear clearly on the face of the complaint or cross-complaint [ *McKenney v. Purepac Pharmaceutical Co.* (2008) 167 CA4th 72, 79, 83 CR3d 810 ; *CrossTalk Prods., Inc. v. Jacobson* (1998) 65 CA4th 631, 635, 76 CR2d 615 ]. Examples are as follows:

- A general demurrer to a wrongful death complaint was proper because the complaint showed on its face that the action was barred by the decedent's willful misconduct [ *Sissle v. Stefenoni* (1979) 88

CA3d 633, 635-636, 152 CR 56 ].

- A general demurrer on the ground that the action was time-barred was proper because the complaint alleged every fact defendant would be required to prove if defendant were to plead the statute of limitations as an affirmative defense [ *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 CA4th 875, 881, 110 CR2d 877 ].

- A general demurrer is proper if, the allegations of the complaint, in conjunction with other matters that may be judicially noticed, demonstrate that all possible recovery is barred by the defense of federal preemption [ *McKenney v. Purepac Pharmaceutical Co.* (2008) 167 CA4th 72, 79, 83 CR3d 810 ].

- A general demurrer is proper if, on its face, a complaint or cross-complaint pleads facts constituting a statute of frauds defense [ *Gressley v. Williams* (1961) 193 CA2d 636, 640-641, 14 CR 496 ].

- A general demurrer is proper if, on its face, a complaint or cross-complaint pleads facts showing a res judicata defense [ *Weil v. Barthel* (1955) 45 C2d 835, 837, 291 P2d 30 ; cf. *Ferraro v. Camarlinghi* (2008) 161 CA4th 509, 529, 75 CR3d 19 ].

- A general demurrer is proper on grounds of collateral estoppel in an action filed on a claim that was heard by an administrative agency with jurisdiction, but the complaint or cross-complaint fails to establish that the plaintiff exhausted his or her judicial remedies for review of the agency's decision [ *Miller v. City of Los Angeles* (2008) 169 CA4th 1373, 1382-1383, 87 CR3d 510 ].

- A general demurrer is proper in a defamation action if it is apparent from the face of the complaint and from judicially noticeable facts that the speech was protected by absolute privilege [ *Goodley v. Sullivan* (1973) 32 CA3d 619, 625-626, 108 CR 451 (disapproved on other grounds in *Hackethal v. Weissbein* (1979) 24 C3d 55, 61 ); *Donnell v. Linforth* (1935) 11 CA2d 25, 29, 52 P2d 937 ].

- A general demurrer is proper if it appears from the face of the complaint that a governmental immunity is available [ *Universal By-Products, Inc. v. City of Modesto* (1974) 43 CA3d 145, 154, 117 CR 525 ].

- A general demurrer is proper if it appears from the face of the complaint that the only issue being litigated is covered by an arbitration clause and it is apparent from the face of the complaint and judicially noticeable facts that the pleader has not exhausted the arbitration remedy [ *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 C3d 888, 899, 95 CR 53, 484 P2d 1397 ].



#### **Strategic Point--Defendant or Cross-Defendant:**

If one of the affirmative defenses discussed above is apparent but does not appear on the face of the complaint or cross-complaint or by matters that are subject to judicial notice, the proper tactic is to plead the defense in the answer [CCP §§ 430.30(b), 431.30(b)(2)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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Chapter 11 Demurrers and Motions for Judgment on the Pleadings  
II. DEMURRING TO A PLEADING

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.09*

**11.09 Special Demurrer to Complaint or Cross-Complaint.**

**11.09[1] Special Demurrers Specified by Statute.** Objecting to a complaint or cross-complaint on the grounds of *CCP § 430.10(e)* that the pleading does not state facts sufficient to constitute a cause of action is a "general" demurrer [see *11.08[1]*]. All other grounds for demurrer listed under *CCP § 430.10* are referred to as "special" demurrers [see *11.06*]. Special demurrers include:

- Court has no jurisdiction of the subject matter of the cause of action [*CCP § 430.10(a)*].
- Person who filed the pleading lacks legal capacity to sue [*CCP § 430.10(b)*].
- Another action is pending between the same parties on the same cause of action [*CCP § 430.10(c)*].
- Defect or misjoinder of parties [*CCP § 430.10(d)*].
- Pleading is uncertain, ambiguous, or unintelligible [*CCP § 430.10(f)*].
- If action founded on contract, cannot ascertain from pleadings whether contract is written, oral, or implied by conduct [*CCP § 430.10(g)*].
- No certificate for professional negligence action filed [*CCP § 430.10(h)*].

**11.09[2] Federal Preemption Is a Basis for Special Demurrer.** A purely legal issue of federal preemption is properly addressed by special demurrer [see, e.g., *Ross v. Universal Studios Credit Union* (2002) 95 CA4th 537, 539, 115 CR2d 712 (preemption by federal bankruptcy law)].

**11.09[3] Use When Court Has No Jurisdiction of the Subject of the Cause of Action.**

**11.09[3][a] Limited to Subject Matter Jurisdiction.** A party may demur to a complaint or cross-complaint on the ground that the court has no jurisdiction of the subject of the cause of action alleged in the pleading [*CCP § 430.10(a)*; *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 CA4th 238, 244, 107 CR3d 373 (patent law)].

**Distinguish:**

Lack of subject matter jurisdiction is the only jurisdictional objection that may be properly raised by demurrer. The appropriate response to a lack of jurisdiction over the person (personal jurisdiction) is a motion to quash pursuant to *CCP § 418.10(a)*.

**Cross References:**

Form of special demurrer to complaint or cross-complaint--no subject matter jurisdiction, see 11.52.

Motions to quash, see Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction.

Discussion of subject matter jurisdiction, see California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

**11.09[3][b] Subject Matter Jurisdiction Is Not Waivable.** The objection to a pleading based on subject matter jurisdiction is not waived by failure to raise it in a demurrer or answer [*CCP § 430.80(a)*]. This objection may be raised at any time [ *People v. Coit Ranch, Inc. (1962) 204 CA2d 52, 57, 21 CR 875* ].

**11.09[3][c] Court Must Transfer Action to Court Having Jurisdiction.** If a court sustains a demurrer on the ground of lack of subject matter jurisdiction, it must transfer the case to a court that does have subject matter jurisdiction, or if no such court exists in California, it may dismiss the action [*CCP §§ 396, 399*].

**11.09[4] Use When Person Who Filed Pleading Does Not Have Legal Capacity to Sue.**

**11.09[4][a] Lack of Capacity to Sue Distinguished From Lack of Standing to Sue.** A party may demur to a complaint or cross-complaint on the ground that the person who filed the pleading does not have the legal capacity to sue [*CCP § 430.10(b)*]. Incapacity is merely a legal disability, which deprives a party of the right to come into court to assert a cause of action, and is a special plea in abatement. Lack of standing to sue means the pleader has the capacity to bring a court action but has no right to the relief sought, and this is a ground for general demurrer [see *CCP § 430.10(e)*].

**Example:**

Incapacity to sue would include a minor who is not represented by a guardian ad litem [see *CCP § 372(a)*].

**Cross References:**

Discussion of lack of standing to sue as a ground for general demurrer, see 11.08[4][d].

Form of special demurrer to complaint or cross-complaint--no legal capacity to sue, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.124* (Matthew Bender).

**11.09[4][b] Waived If Not Raised by Demurrer or Answer.** If the party responding to the complaint or cross-complaint does not raise the objection of lack of capacity to sue by demurrer or answer, the objection is waived [*CCP § 430.80*].

**11.09[5] Use When Another Action Is Pending Between Same Parties on Same Cause of Action.**

**11.09[5][a] Same Cause of Action Arises from Same Primary Right:** This ground for demurrer depends on a showing that the two actions are based on the same primary right of the plaintiff and the defendant's breach of corresponding primary duty [ *Pitts v. City of Sacramento (2006) 138 CA4th 853, 855-857, 41 CR3d 838* ].

**Distinguish:**

Causes of action that are not based on the same evidentiary focus do not involve the defendant's breach of the same primary duty to the plaintiff [ *Pitts v. City of Sacramento* (2006) 138 CA4th 853, 855-856, 41 CR3d 838 (trial court grant of demurrer was improper because second action involved primary right different from primary right underlying first action)].

**11.09[5][b] Ground Generally Appears From Judicially Noticeable Facts.** A party may demur to a complaint or cross-complaint on the ground that there is another action pending between the same parties on the same cause of action [CCP § 430.10(c)]. Although the ground of special demurrer that another action is pending between the parties is not generally evident on the face of the complaint, it is normally based on matters of which the court can take judicial notice [CCP §§ 430.30(a), 430.70].

 **Cross Reference:**

Form of special demurrer to complaint or cross-complaint--another action pending, see 11.53.

**11.09[5][c] Waived If Not Raised by Demurrer or Answer.** The ground of special demurrer that there is another action pending between the parties is deemed waived if it is not raised by demurrer or answer [CCP § 430.80(a); *but see* CCP §§ 472 (answer may be amended), 473 (relief from failure to raise objection in answer), 576 (judge may allow amendment of pleading before trial)].

**11.09[5][d] Interlocutory Judgment Issued If Demurrer Sustained.** If a demurrer based on the ground that another action is pending between the same parties on the same cause of action is sustained, the court will enter an interlocutory judgment to the effect that no trial will be had until final determination of the action [CCP § 597]. The other action is considered completed after final determination for appeal, or after time for appeal has passed or judgment is satisfied [CCP § 1049].

**11.09[5][e] Writ of Prohibition May Be Sought If Demurrer Overruled.** If the demurrer is overruled and as a result there are two actions pending between the same parties on the same cause of action, the defendant or cross-defendant has a ground of abatement in the second cause of action and may seek a writ of prohibition to restrain the court from proceeding with the case [CCP §§ 1102-1105; *see Browne v. Superior Court* (1940) 16 C2d 593, 597, 107 P2d 1 ; *Kresteller v. Superior Court* (1967) 248 CA2d 545, 549, 56 CR 771 ].

 **Cross Reference:**

Discussion, see California Forms of Pleading and Practice, Ch. 3, Abatement of Actions; Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

**11.09[6] Use When There Is Defect of Parties.**

**11.09[6][a] Defect of Parties Must Be Evident From Pleadings.** A party may demur to a complaint or cross-complaint on the ground that there is a defect of parties [CCP § 430.10(d)]. A defendant may not make allegations of defect of parties in the demurrer if the pleadings do not disclose the existence of the matter relied on; that objection must be taken by plea or answer [ *Harboring Villas Homeowners Assn. v. Superior Court* (1998) 63 CA4th 426, 429, 73 CR2d 646 ].

 **Cross Reference:**

Form of Special Demurrer--Defect of Parties, see 11.54.

**11.09[6][b] Waived If Not Raised by Demurrer or Answer.** If the party objecting to the complaint or cross-complaint on the ground that there is a defect of parties does not raise this objection by demurrer or answer, it is deemed waived [CCP § 430.80(a); *but see* CCP §§ 472 (answer may be amended), 473 (relief from failure to raise

objection in answer), 576 (judge may allow amendment of pleading before trial)].

**Exception:**

If the defect in parties is the nonjoinder of an indispensable party, the defect is considered jurisdictional and is therefore not waivable [ *Bank of Cal. v. Superior Court* (1940) 16 C2d 516, 522-523, 106 P2d 879 ; *Vanoni v. County of Sonoma* (1974) 40 CA3d 743, 746, 115 CR 485 ].

 **Cross Reference:**

Discussion of joinder of parties, see Ch. 5, Parties.

**11.09[7] Use When There Is Misjoinder of Parties.**

**11.09[7][a] Generally Only Available to Misjoined Defendant or Cross-Defendant.** A party may demur to a complaint or cross-complaint on the ground that there is a misjoinder of parties [CCP § 430.10(d)]. This ground is generally only available to a defendant or cross-defendant who is misjoined because a defendant or cross-defendant's interests are not normally prejudiced by the misjoinder of another defendant [see, e.g., *Wuest v. Wuest* (1942) 53 CA2d 339, 344, 127 P2d 934 (misjoinder of parties defendant); *Div. of Labor Law Enforcement v. Barnes* (1962) 205 CA2d 337, 345, 23 CR 55 (misjoinder of parties cross-defendant; *disapproved on another ground in White Lighting Co. v. Wolfson* (1968) 68 C2d 336, 351 n9, 66 CR 697, 438 P2d 345 ]. A defendant may not make allegations of misjoinder of parties in the demurrer if the pleadings do not disclose the existence of the matter relied on; that objection must be taken by plea or answer [ *Harboring Villas Homeowners Assn. v. Superior Court* (1998) 63 CA4th 426, 429, 73 CR2d 646 ].

 **Cross Reference:**

Form of special demurrer--misjoinder of parties, *California Forms of Pleading and Practice*, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*, § 206.127 (Matthew Bender).

**11.09[7][b] Waived If Not Raised by Demurrer or Answer.** The objection of misjoinder of parties is waived if it is not raised by demurrer or answer [CCP § 430.80(a); *but see* CCP §§ 472 (answer may be amended), 473 (relief from failure to raise objection in answer), 576 (judge may allow amendment of pleading before trial)].

**11.09[8] Use When Pleading Is Uncertain.**

**11.09[8][a] Uncertainty Includes Ambiguous and Unintelligible Pleadings.** A party may demur to a complaint or cross-complaint on the ground that the pleading is uncertain, which includes ambiguous and unintelligible pleadings [CCP § 430.10(f); see, e.g., *Gonzales v. State of California* (1977) 68 CA3d 621, 631, 137 CR 681 ].

 **Cross Reference:**

Form of special demurrer used if pleading is uncertain, see 11.55.

**11.09[8][b] Uncertain Facts Must Be Material or Not Within Demurring Party's Knowledge.** A party may not demur on the ground of uncertainty if the facts alleged to be uncertain are immaterial or presumptively within the knowledge of the demurring party [ *Dumm v. Pac. Valves* (1956) 146 CA2d 792, 799, 304 P2d 738 ]. If the allegations are sufficiently clear to apprise the party of the issues in the case, a demurrer for uncertain pleading is improper [ *Gonzales v. State of Cal.* (1977) 68 CA3d 621, 631, 137 CR 681 ].

**11.09[8][c] Waived If Not Raised by Demurrer or Answer.** The objection of uncertain, ambiguous, or unintelligible pleading is waived if not raised by demurrer or answer [CCP § 430.80(a); *but see* CCP §§ 472 (answer may be amended), 473 (relief from failure to raise objection in answer), 576 (judge may allow amendment of pleading before trial)].

**11.09[8][d] Demurrer Should Specify Which Portion of Pleading Is Uncertain.** A demurrer on the ground that



a pleading is uncertain should identify the specific portions of the pleading that are uncertain [see *Jones v. Iverson* (1900) 131 C 101, 103-104, 63 P 135 ].

### **11.09[9] Use When Unable to Ascertain Type of Contract.**

**11.09[9][a] Pleading Must State Whether Contract Is Written, Oral, or Implied by Conduct.** A party may demur to a complaint or cross-complaint, in an action founded on a contract, on the ground that it cannot be ascertained from the pleading whether the contract is written, oral, or implied by conduct [CCP § 430.10(g)].



#### **Cross Reference:**

Form of special demurrer if unable to ascertain type of contract, see *California Forms of Pleading and Practice*, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*, § 206.129 (Matthew Bender).



#### **Strategic Point--Defendant or Cross-Defendant:**

If a written contract has not been attached to the complaint or not pled with specificity, counsel should contact the opponent and determine whether it will agree to amend to attach the contract, or stipulate to the use of the contract in a demurrer if the contract is necessary for purposes of raising the demurrable issue.

**11.09[9][b] Waived If Not Raised by Demurrer or Answer.** The objection of ambiguous pleading of a contract is waived if not raised by demurrer or answer [CCP § 430.80(a); but see CCP §§ 472 (answer may be amended), 473 (relief from failure to raise objection in answer), 576 (judge may allow amendment of pleading before trial)].

### **11.09[10] Use When Certificate in Specified Professional Negligence Cases Not Filed.**

**11.09[10][a] Certificate Is Prerequisite for Professional Negligence Action Against Architect, Professional Engineer, or Land Surveyor.** A party may demur to a complaint or cross-complaint, in an action for professional negligence of a certified architect, registered professional engineer, or licensed land surveyor, on the ground that the certificate required by CCP § 411.35 has not been filed [CCP §§ 430.10(h), 411.35(g)]. This includes actions for equitable indemnity arising out of the rendition of professional services.



#### **Cross Reference:**

Form of special demurrer used if no certificate filed in professional negligence action, see *California Forms of Pleading and Practice*, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*, § 206.130 (Matthew Bender).



#### **Warning:**

At least one court of appeal has held that it is error for a trial court to sustain a demurrer on this ground without leave to amend if it is "reasonably possible" for the plaintiff to cure the defect of failing to properly file the certificate required by CCP § 411.35 [ *Price v. Dames & Moore* (2001) 92 CA4th 355, 359, 112 CR2d 65 ].

**11.09[10][b] Failure to File Certificate May Not Be Raised by Answer.** CCP § 411.35, which provides that the failure to file a certificate may be raised by demurrer or motion to strike, does not mention raising this objection by answer. Therefore, it appears that this objection may not be raised by answer.

**11.09[10][c] Waived If Not Raised by Demurrer or Motion to Strike.** The objection of failure to file a certificate pursuant to CCP § 411.35 is waived if not raised by demurrer or motion to strike [CCP § 430.80(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Defects of Form Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers Civil Procedure Joinder of Claims & Remedies Misjoinder Civil Procedure Remedies Writs Common Law Writs Prohibition



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Chapter 11 Demurrers and Motions for Judgment on the Pleadings  
II. DEMURRING TO A PLEADING

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**11.10 Demurrer to Answer.**

**11.10[1] Demurrer Is Only Pleading Available to Respond to Answer.** Any objection to an answer must be raised by demurrer, because it is the only available responsive pleading for an answer [CCP §§ 422.10, 430.20, 430.30]. The three grounds for demurring to an answer are [CCP § 430.20]:

- The answer does not state facts sufficient to constitute a defense.
- The answer is uncertain, ambiguous, or unintelligible.
- If the answer pleads a contract, one is unable to ascertain whether that contract is written or oral.



**Strategic Point--Plaintiff or Cross-Complainant:**

As a practical matter, demurrers to answers are rarely seen, and unless there is a strategic necessity for such a demurrer, a court may not look favorably upon it. If utilized, a demurrer to an answer should only be filed in the event that one of the three grounds specified in CCP § 430.20 is met. In other cases, any new matter alleged in the answer is automatically deemed to be controverted by the opposing party, so no response is necessary [CCP § 431.20(b)].

**11.10[2] Party May File General Demurrer to Answer on Ground Insufficient Facts Stated to Constitute a Defense.** A party may demur to an answer on the ground that the answer does not state facts sufficient to constitute a defense [CCP § 430.20(a)].



**Cross Reference:**

Discussion of general demurrers, see 11.08.

**11.10[3] Party May Demur on Ground That Answer Is Uncertain.** A party may demur to an answer on the ground that the answer is uncertain, which includes ambiguous and unintelligible answers [CCP § 430.20(b)].

 **Cross Reference:**

Discussion of ground that a pleading is uncertain, see *11.09[8]*.

**11.10[4] Party May Demur on Ground That It Is Uncertain Whether Contract Is Written or Oral.** If an answer pleads a contract, a party may demur to the answer on the ground that it cannot be ascertained from the answer whether the contract is written or oral [*CCP* § 430.20(c)].

 **Cross Reference:**

Discussion of ground that it cannot be ascertained whether a contract is written or oral, see *11.09[9]*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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**11.11 Demurrer to Complaint in Intervention.**

**11.11[1] Available When Intervening Party Is Regarded As Plaintiff.** If an intervening party joins with a plaintiff or is otherwise in the role of a plaintiff in an action, a demurrer to the complaint in intervention may be made on the grounds specified in *CCP* § 430.10, pertaining to demurrers to complaints and cross-complaints [see *Timberidge Enters., Inc. v. City of Santa Rosa* (1978) 86 CA3d 873, 879-880, 150 CR 606 ].

➡ **Cross Reference:**

Discussion of grounds for demurrer under *CCP* § 430.10, see 11.08, 11.09.

**11.11[2] Available When Intervening Party Is Regarded As Defendant.** If an intervening party is regarding as or unites with a defendant, a demurrer to a complaint in intervention has the legal effect of a demurrer to an answer. In this situation, the grounds for demurrer to answer outlined in *CCP* § 430.20 apply [see *Timberidge Enters., Inc. v. City of Santa Rosa* (1978) 86 CA3d 873, 879-880, 150 CR 606 ].

➡ **Cross Reference:**

Discussion of grounds for demurrer under *CCP* § 430.20 (demurring to answer), see 11.10.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil  
ProcedurePartiesInterventionGeneral Overview



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**11.12 Timing of Demurrer.**

**11.12[1] Demurrer to Complaint or Cross-Complaint Must Generally Be Filed and Served Within 30 Days After Service of Complaint or Cross-Complaint.** A demurrer to a complaint or cross-complaint must be served and filed with the court within 30 days after service of the complaint or cross-complaint [*CCP* §§ 430.40(a), 432.10].

**Exception:**

The court may extend the time for service and filing of demurrers [*CCP* §§ 1054, 1054.1] and the parties may stipulate to an additional 15 days [*see Gov Code* § 68616(b)].

► **Cross References:**

Discussion of notice requirements for serving demurrer papers, *see* 11.16[1].

Discussion of extensions of time, *see Ch. 27, Service of Papers*, 27.14 et seq.

**11.12[2] Demurrer to Answer Must Generally Be Filed and Served Within 10 Days After Service of Complaint or Cross-Complaint.** A demurrer to an answer to a complaint or cross-complaint must be served and filed with the court within 10 days after service of the answer [*CCP* § 430.40(b)].

**Exception:**

The court may extend the time for service and filing of demurrers [*CCP* §§ 1054, 1054.1] and the parties may stipulate to an additional 15 days [*see Gov Code* § 68616(b)].

► **Cross Reference:**

Discussion of extensions of time, *see Ch. 27, Service of Papers*, 27.14 et seq.

**11.12[3] Defendant Has 10 Days to Respond to Causes of Action Not Demurred to Following Overruling of Demurrer, Amendment of Complaint, or Sustaining of Demurrer Without Leave to Amend.** Unless otherwise ordered, a defendant has 10 days to move to strike, demur, or otherwise plead to the complaint or the remaining causes of action after any of the following [*Cal Rules Ct, Rule* 3.1320(j)]:

- The overruling of the demurrer.
  - Amendment of the complaint or the expiration of the time to amend, if the demurrer was sustained with leave to amend [see *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 CA4th 1020, 1035-1036, 100 CR3d 875 (when plaintiff files amended pleading in response to order sustaining prior demurrer to cause of action with leave to amend, amended cause of action is treated as new pleading and defendant is free to respond with demurrer on any ground)].
- The sustaining of the demurrer, if the demurrer was sustained without leave to amend.

**Distinguish:**

It is possible for a party to demur to one cause of action in the complaint, have that demurrer be overruled, and subsequently serve and file a second demurrer to a different cause of action within the 10 day time period discussed above [see, e.g., *Skrbina v. Fleming Cos.* (1996) 45 CA4th 1353, 1363-1365, 53 CR2d 481 (second demurrer to complaint containing two causes of action was not procedurally improper because first cause of action actually pled three causes of action, defendants' first demurrer was only directed to one of three and was overruled without trial court ordering defendants to answer complaint, and second demurrer was timely pursuant to 10 day rule)].

**Warning:**

Some courts may not look favorably on a second demurrer on issues that could have been addressed in the first demurrer [see, e.g., *Bennett v. Suncloud* (1997) 56 CA4th 91, 96-97, 65 CR2d 80 (where a prior demurrer was sustained as to some causes of action but overruled as to others, a defendant may not demur again on the same grounds to those portions of an amended pleading as to which the prior demurrer was overruled)].

**Cross Reference:**

Discussion of a demurrer to a complaint or cross-complaint not directed to all causes of action, see 11.13.

**11.12[4] Defendant Has 30 Days to Demur or Otherwise Plead Following Ruling on Motion to Transfer.** If a defendant has made an unsuccessful motion to transfer a case pursuant to *CCP* § 396b, the defendant has 30 calendar days to move to strike, demur, or otherwise plead if the defendant has not previously filed a response [*Cal Rules Ct, Rule 3.1326*].

If the motion to transfer was successful, the defendant has 30 calendar days to demur or otherwise plead after the date the receiving court mails notice of receipt of the case and its new case number [*Cal Rules Ct, Rule 3.1326*].

**11.12[5] Timing of Demurrer Differs in Certain Special Proceedings.** Statutes authorizing demurrer in forcible or unlawful detainer actions or forcible entry actions contain timelines different from those applicable in other civil proceedings. In those actions, a party has five days to demur [*CCP* §§ 1167, 1167.3, 1170].

**Cross Reference:**

Discussion of demurrers in special proceedings, see 11.07[3].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers



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**11.13 Demurrer Must Be Taken Either to Entire Pleading or to Entire Cause of Action.**

**11.13[1] Entire Pleading or Entire Cause of Action Rule Is Statutory.** A demurrer to a complaint or cross-complaint may be taken to the whole complaint or cross-complaint or to any of the causes of action stated therein [CCP § 430.50(a)].

A demurrer to an answer may be taken to the whole answer or to any one or more of the several defenses set up in the answer [CCP § 430.50(b)].

**11.13[2] "Cause of Action" Defined As Set of Facts Giving Rise to Basis for Relief.** A "cause of action" is a set of facts giving rise to a basis for relief [ *California Ass'n of Psychology Providers v. Rank* (1990) 51 C3d 1, 7 n3, 270 CR 796, 793 P2d 2 ]. A "cause of action" for purposes of demurrer rules has also been defined as the following:

- A primary right of the plaintiff;
- A corresponding primary duty imposed on the defendant; *and*
- The defendant's delict or wrongful act that constitutes a breach of that primary right and duty. [ *Skrbina v. Fleming Cos.* (1996) 45 CA4th 1353, 1363-1365, 53 CR2d 481 (cause of action is based on plaintiff's injuries); *Miranda v. Shell Oil Co.* (1993) 17 CA4th 1651, 1658, 26 CR2d 655; *Crowley v. Katleman* (1994) 8 C4th 666, 681-683, 34 CR2d 386, 881 P2d 1083 (violation of one primary right gives rise to one cause of action)].

**Distinguish:**

A "count," as distinguished from a "cause of action," is a separate theory of entitlement to a remedy based on the same cause of action [ *Eichler Homes of San Mateo, Inc. v. Superior Court* (1961) 55 C2d 845, 847-848, 13 CR 194, 361 P2d 914 ]. A single "count" can state more than one cause of action if two different primary rights are involved [ *Skrbina v. Fleming Cos.* (1996) 45 CA4th 1353, 1364, 53 CR2d 481 ].

➡ **Cross Reference:**



Discussion of the terms "cause of action" and "count," see California Forms of Pleading and Practice, Ch. 123, Complaints and Cross Complaints (Matthew Bender).

**11.13[3] Demurrer Goes to Entire Pleading When Complaint or Cross-Complaint States Only One Cause of Action.** If a complaint or cross-complaint states a single cause of action, the demurrer necessarily goes to the whole pleading, because a party may not demur to a part of a cause of action [see *Campbell v. Genshlea* (1919) 180 C 213, 217, 180 P 336 ; *Fin. Corp. of Am. v. Wilburn* (1987) 189 CA3d 764, 778, 234 CR 653 ].

**11.13[4] When Complaint or Cross-Complaint States Multiple Causes of Action, Demurrer Must Specify Causes of Action Being Challenged.** A demurrer to a complaint or cross-complaint that states more than one cause of action must specify the particular cause of action or count that is being challenged [*Cal Rules Ct, Rule 3.1112(d)(4)*]. This rule applies to general as well as special demurrers [see, e.g., *Jones v. Iverson* (1900) 131 C 101, 104, 63 P 135 (special demurrer), *Warren v. Atchison, T. & S.F. Ry. Co.* (1971) 19 CA3d 24, 29, 96 CR 317 (general demurrer), *W. Title Ins. Co. v. Bartolacelli* (1954) 124 CA2d 690, 694, 269 P2d 165 (general demurrer)].

**11.13[5] Separate Causes of Action Must Stand Alone.** Each cause of action or count stated in a complaint is severable from the others and therefore must stand on its own as far as being subject to demurrer [ *W. Title Ins. Co. v. Bartolacelli* (1954) 124 CA2d 690, 694, 269 P2d 165 ]. In a complaint pleading a single cause of action in different counts (i.e. separately stated theories of relief for the same cause of action or injury), a count premised on detailed factual allegations made in another count must stand or fall with the other count [ *Lambert v. S. Counties Gas Co.* (1959) 52 C2d 347, 353, 340 P2d 608 ].

This contrasts with the motion to strike, which can attack a portion of a cause of action [see *CCP §§ 435, 436*]

**11.13[6] Judicial Council Form Complaint Equally Subject to Demurrer.** A Judicial Council form complaint must still state the necessary ultimate facts essential to a cause of action, and therefore the form complaint is equally subject to demurrer [ *People ex rel. Dep't of Transp. v. Superior Court* (1992) 5 CA4th 1480, 1486, 7 CR2d 498 ; see also *Setliff v. E.I. Du Pont De Nemours & Co.* (1995) 32 CA4th 1525, 1529-1538, 38 CR2d 763 ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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**11.14 Joint Demurrers by Multiple Defendants Are Permissible.**

Two or more defendants may demur jointly to a complaint or cross-complaint; however, in the case of a special demurrer, if the complaint is good as to any of the defendants, the demurrer must be overruled [ *Wise v. S. Pac. Co.* (1963) 223 CA2d 50, 76, 35 CR 652 (overruled on other grounds in *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 510, 521, 28 CR2d 475, 869 P2d 454 )].

**Distinguish:**

The rule regarding overruling complaints that are good as to any defendant does not apply to a general demurrer, because a defendant may raise at any time the defect that a plaintiff has not stated facts sufficient to constitute a cause of action [ *Majestic Realty Co. v. Pac. Lighting Corp.* (1974) 37 CA3d 641, 642-643, 112 CR 423 ].



**Warning:**

The joint demurrer is rarely used. It should be considered very carefully from a strategic standpoint, as the defeat as to another defendant defeats one's own rights.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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**11.15 Format Requirements for Demurrer.**

**11.15[1] Cause of Action Demurred to Must Be Specified in Demurrer.** If the complaint or cross-complaint states more than one cause of action, the demurrer must specify which cause of action or causes of action are being challenged [*Cal Rules Ct, Rule 3.1112(d)(4)*].

► **Cross References:**

Discussion, see *11.13*.

Forms demonstrating specification of cause of action demurred to, see *11.51 -11.55*.

Additional forms, see California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings (Matthew Bender).

**11.15[2] Demurrer Must Specify Grounds for Demurrer.** A demurrer must distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken; otherwise, it may be disregarded [*CCP § 430.60*].

► **Cross References:**

Forms demonstrating different grounds for demurrers, see *11.51 -11.55*.

Additional forms, see California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings (Matthew Bender).

**11.15[3] Format Requirements Must Conform to Rules of Court.** *Cal Rules Ct, Rule 2.100 et seq.* sets out the rules for form of papers filed with the court. *Cal Rules Ct, Rules 3.1110, 3.1112* provide additional requirements.

A demurrer must state on the first page immediately below the number of the case the name of the party filing the demurrer and the name of the party whose pleading is the subject of the demurrer [*Cal Rules Ct, Rule 3.1320(e)*].

**Strategic Point--Defendant or Cross-Defendant:**

Be sure to check local rules for the appropriate jurisdiction as well. Although local rules concerning demurrers and the form or format of papers are generally preempted by the California Rules of Court, there may be an exception for local rules adopted under the Trial Court Delay Reduction Act [*Cal Rules Ct, Rule 3.20*].

**Cross Reference:**

Form of demurrer, see 11.51 -11.55.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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**11.16 Accompanying Papers to Be Served and Filed With Demurrer.**

**11.16[1] Notice of Hearing Must Be Served and Filed 16 Court Days Prior to Hearing.** A party must accompany a demurrer with a notice of hearing that specifies a hearing date within the notice period required by *CCP* § 1005(b) [*Cal Rules Ct, Rules 3.1112(a), 3.1320(c)*]. The written notice of motion and accompanying papers must be served and filed at least 16 court days before the hearing.

The 16-day service period is increased for nonpersonal service depending on the type of service and location of the person served [*CCP* § 1005(b)]:

- 5 calendar days if the papers are served by mail and the place of mailing and address are in California.
- 10 calendar days if either the place of mailing or the address is outside of California, but within the United States.
- 20 calendar days if either the place of mailing or address is outside the United States.
- 2 calendar days if served by fax, express mail, or other method of overnight delivery.

A two court day extension may apply to electronic service, subject to local rules authorizing this type of service [*CCP* § 1010.6].

**Exception:**

The court may prescribe a shorter time [*CCP* § 1005(b)].



**Timing--Hearing:**

A demurrer must be set for hearing not more than 35 days following the filing of the demurrer, or on the first date available to the court thereafter, unless good cause is shown for an earlier or later hearing date [*Cal Rules Ct, Rule 3.1320(d)*].

 **Cross References:**

Form of notice of hearing, see 11.49.

Form of stipulation postponing hearing on demurrer, see 11.50.

Discussion of service requirements, see Ch. 27, Service of Papers.

**11.16[2] Supporting Memorandum Must Be Served and Filed.** A party filing a demurrer must serve and file a supporting memorandum to be relied on [*Cal Rules Ct, Rule 3.1113(a)*]. The court may construe the absence of the memorandum as an admission that the demurrer is not meritorious, as cause for its denial, and as a waiver of all grounds not supported [*Cal Rules Ct, Rule 3.1113(a)*].

 **Cross References:**

Discussion and forms of memoranda, see Ch. 26, Law and Motion Procedure.

Additional discussion of memoranda, see California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender).

Specific memoranda in support of and in opposition to demurrers, see California Points and Authorities, Ch. 71, Demurrers and Motions for Judgment on the Pleadings (Matthew Bender).

**11.16[3] Request for Judicial Notice Must Be Served and Filed.**

**11.16[3][a] No Request Necessary for Mandatory Judicial Notice.** If a party is relying on matters subject to mandatory judicial notice, no separate request for judicial notice need be made [*Evid Code § 451; Cal Rules Ct, Rule 3.1306(c)*].

**11.16[3][b] Request Required for Matters Subject to Permissive Judicial Notice.** If a party is relying on matters subject to permissive judicial notice, the party must specify the matter in the demurrer or in the supporting memorandum [*CCP § 430.70; see StorMedia Inc. v. Superior Court (1999) 20 C4th 449, 456 n9, 84 CR2d 843, 976 P2d 214*].

The party must also make a separate request that the court take notice of these matters [*Evid Code §§ 452, 453; Cal Rules Ct, Rules 3.1113(l), 3.1306(c)*].

**11.16[3][c] Request to Be Made in Separate Document.** When a request for judicial notice is required, it must be made in a separate document listing the specific matters for which judicial notice is requested. The party must also provide the court and the other parties with a copy of the material. If the material is part of a court file, the party must specify in writing the part of the court file referenced and the party must make arrangements with the clerk to have the court file in the courtroom at the time of the hearing on the demurrer [*CCP § 430.70; Cal Rules Ct, Rule 3.1306*].



**Trap:**

It is important to make the arrangements to have the file in the courtroom in advance. This requirements is often ignored, and it can be a trap for the unwary.



**Warning:**

The California Courts of Appeal have utilized three different approaches at the demurrer stage as to accepting the accuracy of the contents of judicially noticed documents [ *C.R. v. Tenet Healthcare Corp (2009) 169 CA4th 1094, 1103, 87 CR3d 424* ] .

**Strategic Point--Defendant or Cross-Defendant:**

It is always wise to check the appropriate county's local rules for further judicial notice requirements.

**Cross References:**

Discussion of judicial notice, see Ch. 26, Law and Motion Procedure.

Detailed discussion of judicial notice, see California Forms of Pleading and Practice, Ch. 321, Judicial Notice (Matthew Bender).

**11.16[4] Proof of Service Must Be Filed.** A proof of prior service on the adverse party or adverse party's attorney must be attached to the originals of the demurrer papers and presented to the court clerk for filing [*Cal Rules Ct, Rules 1.21, 3.1100, 3.1103(b)*].

**11.16[5] Filing Fee May Include First Filing Fee.** When a demurrer is the first paper filed by the party, the normal filing fee must be paid along with the filing of the demurrer [*CCP § 1014; Gov Code §§ 70611, 70614*].

**11.16[6] Reply to Opposition Must Be Filed and Served at Least Five Court Days Before Hearing.** All reply papers to papers opposing a demurrer must be filed with the court and a copy served on each party at least 5 court days before the hearing [*CCP § 1005(b)*]. Service on the opposing party must be made by a method reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the opposition papers are filed [*CCP § 1005(c)*].

**Exception:**

The court may prescribe a shorter time [*CCP § 1005(b)*].

**Warning:**

The time extensions of *CCP § 1013* to exercise a right or an act may be done to not apply to reply papers on a demurrer [*see CCP § 1005(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersEvidenceJudicial NoticeGeneral Overview



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**11.17 Demurrer May Be Filed Concurrently With Answer or Motion to Strike.**

**11.17[1] Party May File Demurrer With Answer.** A party may file a demurrer and an answer at the same time [CCP § 430.30(c)]. The concurrent filing of an answer and a demurrer does not waive the demurrer [CCP § 472a(a)].

► **Cross Reference:**

Discussion and forms relating to Answers, see Ch. 14, Answers.

**11.17[2] Party May File Demurrer With Motion to Strike.** If a motion to strike part of a pleading is made at the same time as a demurrer, the motion to strike must be noticed for hearing and heard at the same time as the demurrer [CCP § 435; *Cal Rules Ct, Rules 1.5(b), 3.1100, 3.1103(b), 3.1322(b)*].

► **Cross Reference:**

Discussion and forms relating to motions to strike, see Ch. 12, Motions to Strike.

**11.17[3] Party May File Demurrer Without Answering Other Causes.** A demurrer to a cause of action may be filed without answering other causes of action [*Cal Rules Ct, Rule 3.1320(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers





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**11.18 Demurrer May Be Amended.**

A trial court may properly allow an amendment to a demurrer under *CCP* §§ 472, 473 [see *Baxter v. Boston-Pac. Oil Co.* (1927) 81 CA 187, 189, 253 P 185 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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**11.19 Party May Waive Demurrer by Failing to Prosecute.**

Failure on the part of any person filing a demurrer to prosecute the demurrer may be construed as a waiver of the demurrer [*CCP* § 591].

**Exceptions:**

The grounds of failure to state a cause of action and lack of subject matter jurisdiction may not be waived [*CCP* § 430.80].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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**11.20 CHECKLIST: Responding to Demurrer.**

☐ Review the demurrer and accompanying papers for any defects:

☐ Is demurrer timely?

☐ Demurrer and accompanying papers must be filed within 30 days after service of complaint or cross-complaint, or within 10 days after service of answer.

☐ Demurrer and accompanying papers must be served at least 16 court days prior to hearing date (this is extended by 5 calendar days for mailing within California and by 2 calendar days for fax or express mail).

**Authority:**

*CCP §§ 430.40(a), (b), 432.10, 1005(b)*

**Discussion:**

*See 11.12, 11.16[1]*

☐ Does the demurrer specify grounds for objection to the pleading as well as which causes of action are demurred to?

**Authority:**

*CCP § 430.60; Cal Rules Ct, Rule 3.1112(d)(4)*

**Discussion:**

*See 11.15*

☐ Choose from three options for opposing party when its pleading has been demurred to:

☐ Party may voluntarily amend pleading to correct the alleged defect.

☐ Party must serve and file amended pleading prior to date set for hearing, or else seek stipulation for continuance of hearing.

☐ In this situation, demurrer will normally be taken off calendar.

☐ If demurrer is untimely or otherwise improper, opposing party may move to strike the demurrer.

☐ Party may serve and file a memorandum in opposition to demurrer.

☐ Opposition must be served and filed at least nine court days before the scheduled hearing.

☐ Service must be made by a method reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the opposing papers are filed.

**Authority:**

*CCP §§ 422.10, 472, 1005(b), (c)*

**Discussion:**

*See 11.22[1], 11.23, 11.24, 11.25*

**Form:**

*See 11.50*



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**11.21 Options and Strategy for Responding to Demurrer.**

Consider whether the demurrer is well taken and whether a defect on the face of the pleading may indeed exist. If the defect is quite obvious, consider amending the pleading to avoid sanctions for frivolously opposing the demurrer. If the demurrer is not timely filed, consider a motion to strike the pleading. If the demurrer is properly filed, but reasonable questions exist about the propriety of the pleading challenged, oppose the demurrer.

Demurrers can involve novel questions of law and challenges to new causes of action or defenses. Be prepared to support new causes of action or defenses with appropriate legal precedent and assert how the law has progressed to the point where the court should recognize the new developments.

**Judge's Perspective:**

If a demurrer challenges the pleading in such a way that an amendment would be required, then counsel against whom the demurrer has been interposed should consider filing an amended pleading rather than forcing a hearing before the court.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers



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**11.22 Alternatives to Opposition and Adjudication.**

**11.22[1] Party May Amend Challenged Pleading.**

**11.22[1][a] Demurrer Will Generally Be Taken Off Calendar When Pleading Is Amended.** A party may amend the challenged pleading one time to correct the alleged defects and serve and file the amended pleading prior to the time of the hearing on the demurrer [*CCP* § 472]. In this situation, the demurrer is usually taken off the calendar.



**Cross Reference:**

Form of stipulation that demurrer be dropped off calendar, see *11.50*.

**Distinguish:**

One defendant's filing of an answer does not divest plaintiff of the right to amend the complaint with respect to the causes of action brought against other demurring defendants [ *Barton v. Khan* (2007) 157 CA4th 1216, 1220-1221, 69 CR3d 238 ].

**11.22[1][b] Party May Not Amend Pleading Simply by Omitting Objectionable Matters or Contradicting Original Allegations.** A party may not amend an objectionable pleading by simply omitting the allegations that undermine the cause of action without explanation [see *Reichert v. Gen. Ins. Co.* (1968) 68 C2d 822, 836, 69 CR 321, 442 P2d 377 ; see also *Freeman v. San Diego Assn. of Realtors* (1999) 77 CA4th 171, 178 n3, 91 CR2d 534 ].

A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that are inconsistent with [ *Freeman v. San Diego Assn. of Realtors* (1999) 77 CA4th 171, 178 n3, 91 CR2d 534 ] or contradict the facts pleaded in the earlier pleadings [ *McClain v. Octagon Plaza, LLC* (2008) 159 CA4th 784, 799, 71 CR3d 885 ; *Cont'l Ins. Co. v. Lexington Ins. Co.* (1997) 55 CA4th 637, 646, 64 CR2d 116 ] or by suppressing facts that prove previously pleaded facts false [ *McClain v. Octagon Plaza, LLC* (2008) 159 CA4th 784, 799, 71 CR3d 885 ]. Likewise, the plaintiff may not plead facts that contradict the facts or positions that the plaintiff pleaded in earlier actions or suppress facts that prove the facts pleaded in those actions false [ *McClain v. Octagon Plaza, LLC* (2008) 159 CA4th 784, 799, 71 CR3d 885 ].

**Distinguish:**

It is permissible for a party to change the legal theory of recovery and in the process omit factual

allegations that are irrelevant and immaterial to the new legal theory asserted [*see, e.g., Berman v. Bromberg* (1997) 56 CA4th 936, 948-949, 65 CR2d 777 ].

**11.22[2] Party May Seek Stipulation to Continue Demurrer Hearing.** If a party wishes to amend the challenged pleading, the party may seek a stipulation to continue the demurrer hearing to allow more time for amendment of the pleading.



**Cross References:**

Form of stipulation postponing hearing on demurrer and order, see 11.50.

Discussion of continuances, see Ch. 30, Continuances.



**Warning:**

Be sure to check local rules for any restrictions on continuances.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**11.23 Opposing Party May Serve and File Opposing Memorandum Nine Court Days Before Hearing.**

Although not expressly authorized by statute or the California Rules of Court, practice permits counsel for the adverse party to oppose the demurrer by filing a memorandum in opposition to the demurrer.



**Warning:**

Failure to oppose a motion results in a waiver on appeal of any objection to the resulting order [ *Bell v. Am. Title Ins. Co.* (1991) 226 CA3d 1589, 1602, 277 CR 583 (party neither filed opposition nor objected at hearing)].



**Timing:**

The opposition must be served and filed at least nine court days before the scheduled hearing [CCP § 1005(b)]. Service on the opposing party must be made by a method reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the opposing papers are filed [CCP § 1005(c)]. Service of opposition papers must also conform to the requirements of CCP §§ 1010-1013 [CCP § 1005(c)].



**Cross References:**

Discussion of motion practice, see Ch. 26, Law and Motion Procedure.

Discussion of serving papers, see Ch. 27, Service of Papers.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeMotion PracticeOpposing Memoranda





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III. RESPONDING TO DEMURRER

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.24*

**11.24 Object to Judicial Notice If Request Improperly Made or Overreaching.**

When a demurring party is relying on matters subject to permissive judicial notice, the party must make a separate request that the court take notice of these matters and party must also provide the court and the other parties with a copy of the material [*Cal Rules Ct, Rules 3.1113(l), 3.1306(c)*]. Judicial notice of the matters sought may well be the heart of the demurrer, such as when the demurrer is based on another action pending between the parties on the same cause of action. Be sure the request is properly made and vigorously oppose any requests for documents that are not subject to permissive notice under *Evid Code § 452*.



**Trap:**

*Evid Code §§ 452, 453* permit the trial court to take judicial notice of the *existence* of judicial opinions and court documents, along with the truth of the results reached--in the documents such as orders, statements of decision, and judgments. The court cannot, however, take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact [ *People v. Woodell* (1998) 17 C4th 448, 455, 71 CR2d 241 ; *see also* *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 CA3d 39, 45-47, 170 CR 533 (allowing judicial notice of facts within appellate court opinion)]. The truthfulness and proper interpretation of a judicially noticed document are disputable [ *StorMedia Inc. v. Superior Court* (1999) 20 C4th 449, 457 n9, 84 CR2d 843, 976 P2d 214 ; *Aquila, Inc. v. Superior Court* (2007) 148 CA4th 556, 569, 55 CR3d 803 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.25*

**11.25 Demurrer Is Subject to Motion to Strike.**

An improperly filed demurrer is subject to a motion to strike [see CCP § 422.10; see also *Baxter v. Boston-Pac. Oil Co.* (1927) 81 CA 187, 253 P 185 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral Overview



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*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.26*

# **11.26 CHECKLIST: Hearing on Demurrer and Reacting to Orders on Demurrer.**

☐ Prior to hearing:

- ☐ Check to determine tentative ruling system for jurisdiction.
- ☐ Give notice of desire to appear at hearing by telephone, if applicable.

## **Authority:**

*Cal Rules Ct, Rules 3.670(g)(1), 3.1308*

## **Discussion:**

See 11.27[1], [2]

## **➡ Cross Reference:**

Discussion of appearance by telephone, see *Ch. 26, Law and Motion Procedure, 26.18 et seq.*

☐ Plaintiff's option prior to court's ruling on demurrer:

- ☐ Party may dismiss complaint or cross-complaint without prejudice at any time before court issues a decision.

## **Authority:**

*Datner v. Mann Theatres Corp. (1983) 145 CA3d 768, 770-771, 193 CR 676*

## **Discussion:**

See 11.32

☐ Parties' options when court overrules demurrer to complaint or cross-complaint:

- ☐ Defendant or cross-defendant has 10 days to answer the complaint or cross-complaint.

**Authority:**

*Cal Rules Ct, Rule 3.1320(g)*

**Discussion:**

*See 11.29[1]*

☐ Parties' options when court overrules demurrer to answer:

- ☐ The action proceeds as if there had been no demurrer.

**Authority:**

*CCP § 431.20(b)*

**Discussion:**

*See 11.29*

☐ Parties' options when court sustains demurrer to complaint, cross-complaint, or answer:

- ☐ Court will generally grant leave to amend the pleading within a specified time, and party may amend the pleading.

- ☐ Parties' options when demurrer is sustained with leave to amend:

☐ Party may refuse to amend the pleading and appeal from the resulting judgment of dismissal or default.

☐ Move for default if opposing party fails to file new pleading.

- ☐ Parties' options when demurrer is sustained without leave to amend:

☐ Party may file a motion for reconsideration of the order sustaining the demurrer.

☐ Party may seek appellate review of the judgment resulting from the order sustaining the demurrer.

☐ Either party may move for dismissal as long as no motion for reconsideration has been filed.

**Authority:**

*CCP §§ 472a(c), 581(f)(1), 904.1(a)(1), 904.2(a), 1008*

**Discussion:**

See 11.29[2], 11.30[1], [2], 11.32, 11.33



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1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.27

**11.27 Court's Hearing on Demurrer.**

**11.27[1] Trial Courts May Have Tentative Ruling Systems.** A superior court adopting one of the permitted tentative ruling procedures allowed by *Cal Rules Ct, Rule 3.1308(a)* must include the procedure in its local rules of court. The court must describe the procedure and set forth the telephone number and time for obtaining the ruling [*Cal Rules Ct, Rule 3.1308(c)*].



**Warning:**

All jurisdictions have different local rules pertaining to tentative rulings. Be sure to check the pertinent local rules carefully. Tentative ruling systems can also vary from courtroom to courtroom, necessitating inquiry into the individual judge's practices.



**Cross Reference:**

Discussion of tentative ruling procedures, see *Ch. 26, Law and Motion Procedure, 26.52 et seq.*

**11.27[2] Parties May Generally Appear by Telephone.** The parties may generally appear at a law and motion hearing by telephone. If an attorney wishes to do so, he or she must place the phrase "Telephone Appearance" below the title of the moving, opposing, or reply papers or else notify the court and all other parties of the intent to appear by telephone at least three court days before the appearance. This can be done orally or by a written notice entitled "Notice of Intent to Appear by Telephone." This document generally must be filed with the court at least three court days before the hearing and the notice must be served on all other parties by means reasonably calculated to ensure delivery to the parties no later than the close of the next business day [*Cal Rules Ct, Rule 3.670(g)(1)*].

**Exception:**

The court does have discretion to require a personal appearance on a case by case basis [*Cal Rules Ct, Rule 3.670(f)*].



**Warning:**

If an attorney or party who has given notice of a telephone appearance subsequently decides to appear in

person, the attorney or party must notify the court and all other parties by telephone at least two court days before the scheduled hearing [*Cal Rules Ct, Rule 3.670(g)(3)*].

 **Cross Reference:**

Discussion of appearance by telephone, see *Ch. 26, Law and Motion Procedure, 26.18 et seq.*

**11.27[3] When Party Fails to Appear at Hearing.**

**11.27[3][a] Court Has Discretion to Rule on Merits When Moving Party Fails to Appear at Hearing.** When the party who has filed the demurrer fails to appear at the hearing, the demurrer may be disposed of on the merits unless the hearing is continued for good cause. In the case of a special demurrer, the court may construe the failure to appear as an admission that the demurrer is not meritorious and as a waiver of all the demurrer's grounds [*Cal Rules Ct, Rule 3.1320(f)*; see *CCP § 591*].

**11.27[3][b] Court Should Dispose of Demurrer on Merits When Opposing Party Fails to Appear at Hearing.** When the party opposing the demurrer fails to appear at the hearing, the demurrer should be disposed of on the merits at the request of the demurring party unless the hearing is continued for good cause [*Cal Rules Ct, Rule 3.1320(f)*].

**11.27[3][c] Court Has Discretion When Both Parties Fail to Appear at Hearing.** The court has several options in a case when neither party appears at a scheduled demurrer hearing [*Cal Rules Ct, Rule 3.1320(f)*]:

- Dispose of the demurrer on its merits.
- Drop the demurrer from the calendar and restore it on notice or on other terms of the court's choosing.
- Continue the hearing to a date ordered by the court.

**11.27[4] Court Has Discretion When Demurrer and Motion to Strike Filed Concurrently.** When a demurrer and motion to strike are filed concurrently, the court has the discretion to place the motion to strike off calendar if it sustains the demurrer and to place the demurrer off calendar if it grants the motion to strike. The same holds true when general and special demurrers are filed concurrently: the court may sustain a general demurrer, for example, and take the special demurrers off calendar.

 **Cross Reference:**

Discussion of filing demurrer and motion to strike concurrently, see *11.17*.

**11.27[5] Court Must Allow Oral Argument.** Because a demurrer is considered a "critical pretrial matter," the court must provide the opportunity for oral argument at the hearing on the demurrer [ *Medix Ambulance Serv., Inc. v. Superior Court* (2002) 97 CA4th 109, 117, 118 CR2d 249 (local court procedure where court's ruling was accessible via the Internet and there was no procedure for oral argument was improper)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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### 11.28 Standards Used by Court in Ruling on Demurrer.

**11.28[1] Court May Consider Only Challenged Pleading and Matters Subject to Judicial Notice.** Normally, the court may take into account only the challenged pleading and matters subject to judicial notice under *Evid Code* §§ 451, 452 in ruling on a demurrer [see *CCP* §§ 430.30(a), 430.70; see also *Gould v. Maryland Sound Indus., Inc.* (1995) 31 CA4th 1137, 1144, 37 CR2d 718 ]. A demurrer is not the appropriate procedure for determining the truth of disputed facts in documents presented through judicial notice [ *Unruh-Haxton v. Regents of University of California* (2008) 162 CA4th 343, 365, 73 CR3d 146 ; *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 CA4th 97, 113, 55 CR3d 621 ].



#### Warning:

The California Courts of Appeal have utilized three different approaches at the demurrer stage as to accepting the accuracy of the contents of judicially noticed documents [ *C.R. v. Tenet Healthcare Corp* (2009) 169 CA4th 1094, 1103, 87 CR3d 424 ] .

#### Exception:

Case law indicates that the court may consider admissions contained in the plaintiff's complaint and in the plaintiff's opposition papers in order to negate the plaintiff's ability to state a cause of action [see, e.g., *Casterson v. Superior Court* (2002) 101 CA4th 177, 181, 123 CR2d 637 (statutory affirmative defense was evident on face of complaint); *Rodas v. Spiegel* (2001) 87 CA4th 513, 517, 104 CR2d 439 (court took judicial notice of admissions in plaintiff's opposition to demurrer); *Setliff v. E.I. Du Pont De Nemours & Co.* (1995) 32 CA4th 1525, 1534, 1536-1537, 38 CR2d 763 ; *Knoell v. Petrovich* (1999) 76 CA4th 164, 168-169, 90 CR2d 162 ].

**11.28[2] Court Will Consider Allegations of Pleading As True.** When a party files a general demurrer, the court will treat the allegations of the challenged pleading as true for purposes of the demurrer [see, e.g., *Blank v. Kirwan* (1985) 39 C3d 311, 318, 216 CR 718, 703 P2d 58 ; *Martinez v. Socoma Cos., Inc.* (1974) 11 C3d 394, 399, 113 CR 585, 521 P2d 841 ; *StorMedia Inc. v. Superior Court* (1999) 20 C4th 449, 453 n3, 84 CR2d 843, 976 P2d 214 (court assumes truth of well-pled allegations in complaint); *Roskind v. Morgan, Stanley Dean Witter & Co.* (2000) 80 CA4th 345, 349, 95 CR2d 258 (ability of plaintiff to prove allegations of complaint not at issue in demurrer); *Gervase v.*



*Superior Court* (1995) 31 CA4th 1218, 1224, 37 CR2d 875 (for purposes of testing pleading, demurrer admits all material facts that are properly pled); *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 CA4th 1397, 1403, 44 CR2d 339; *Rodas v. Spiegel* (2001) 87 CA4th 513, 517, 104 CR2d 439; *Wilner v. Sunset Life Ins. Co.* (2000) 78 CA4th 952, 958, 93 CR2d 413 ].

**Distinguish:**

This rule also means that the court accepts as true facts appearing in the exhibits attached to the complaint, although if the facts in the exhibits contradict the facts in the complaint, the facts stated in the exhibits take precedence [ *Mead v. Sanwa Bank Cal.* (1998) 61 CA4th 561, 567-568, 71 CR2d 625; *Breneric Assocs. v. City of Del Mar* (1998) 69 CA4th 166, 180, 81 CR2d 324; *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.* (1996) 49 CA4th 472, 484, 56 CR2d 756; *Holland v. Morse Diesel Int'l, Inc.* (2001) 86 CA4th 1443, 1447, 104 CR2d 239 ].

**11.28[3] General Demurrer Does Not Admit Contentions or Conclusions.** A general demurrer does not admit the following [ *Blank v. Kirwan* (1985) 39 C3d 311, 318, 216 CR 718, 703 P2d 58; *Martinez v. Socoma Cos., Inc.* (1974) 11 C3d 394, 399, 113 CR 585, 521 P2d 841; *William S. Hart Union High Sch. Dist. v. Reg'l Planning Comm'n* (1991) 226 CA3d 1612, 1616 n2, 277 CR 645 ]:

- Contentions;
- Deductions;
- Conclusions of fact or law;
- Facts impossible in law;
- Allegations contrary to facts of which a court may take judicial notice.

**11.28[4] Court Must Construe Challenged Pleading Liberally.** In considering a demurrer, the court must construe the challenged pleading's allegations liberally and draw reasonable inferences from the facts pled [see *Wilner v. Sunset Life Ins. Co.* (2000) 78 CA4th 952, 958, 93 CR2d 413; see also CCP § 452; *Chazen v. Centennial Bank* (1998) 61 CA4th 532, 542, 71 CR2d 462; *C & H Foods Co. v. Hartford Ins. Co.* (1984) 163 CA3d 1055, 1062, 211 CR 765 ].

**Exception:**

A plaintiff's complaint need not be construed liberally if (1) the plaintiff has filed a defective complaint, (2) the defect is pointed out by demurrer, (3) the demurrer is sustained with leave to amend, and (4) the plaintiff is unwilling or unable to remove the defect [see *Truta v. Avis Rent A Car System, Inc.* (1987) 238 CR 806 ].

**11.28[5] Court Must Disregard Errors Not Affecting Rights of Parties.** In considering the challenged pleading, the court must disregard any error or defect in the pleading that does not affect the substantial rights of the parties [CCP § 475].

**11.28[6] Court May Sustain General Demurrer Without Leave to Amend Only If Complaint Shows No Basis for Relief.** A general demurrer may be sustained without leave to amend only if the complaint lacks any sufficient allegations to entitle the plaintiff to relief [see *Chazen v. Centennial Bank* (1998) 61 CA4th 532, 542, 71 CR2d 462 ].

**Strategic Point:**



In considering whether there is a reasonable probability a defect in the complaint can be cured by amendment, courts may consider counsel's statements at oral argument [ *Bassett v. Lakeside Inn, Inc.* (2006) 140 CA4th 863, 870, 44 CR3d 827 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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## **11.29 Court May "Sustain" or "Overrule" Demurrer.**

### **11.29[1] Overruled Demurrer.**

**11.29[1][a] When Court Overrules Demurrer to Complaint or Cross-Complaint, Leave to Answer Is Deemed Granted.** When a court overrules a demurrer to a complaint or cross-complaint, leave to answer the complaint or cross-complaint within 10 days will be deemed granted [*Cal Rules Ct, Rule 3.1320(g)*].

#### **Exception:**

In forcible entry, forcible detainer, or unlawful detainer actions, only 5 calendar days to answer will be deemed granted after the overruling of a demurrer to a complaint or cross-complaint [*Cal Rules Ct, Rule 3.1320(g)*].

**11.29[1][b] When Court Overrules Demurrer to Answer, Action Proceeds As If No Demurrer.** When a court overrules a demurrer to an answer, the action must proceed as if there had been no demurrer, and any new matter alleged in the answer is considered denied [*CCP §§ 431.20(b), 472a(b)*].

### **11.29[2] When Court Sustains Demurrer, Leave to Amend Is Generally Granted.**

**11.29[2][a] Court Must Specify Ground for Sustaining Demurrer.** When a court sustains a demurrer, the court must include in its decision or order a statement of the specific ground or grounds upon which the decision or order is based. This may be by reference to appropriate pages and/or paragraphs or the demurrer [*CCP § 472d*]. The party against whom the demurrer has been sustained may waive these requirements [*CCP § 472d; see Krawitz v. Rusch (1989) 209 CA3d 957, 962, 257 CR 610*].

#### **Distinguish:**

Generally, a mere reference to the moving paper's memorandum does not satisfy the requirement of *CCP § 472d*. However, if the court is sustaining a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, the court may simply state that it appears from the memorandum that the complaint does not state facts sufficient to constitute a cause of action [*Mautner v. Peralta (1989) 215 CA3d 796, 801-802, 263 CR 535*].

**11.29[2][b] Court May Grant Leave to Amend Pleading.** It is in the court's discretion whether to grant leave to amend the pleading when the court sustains a demurrer [CCP § 472a(c); see *Baldwin v. Daniels* (1955) 132 CA2d 560, 563, 282 P2d 522 ]. However, it is considered an abuse of discretion for a court to sustain a demurrer without leave to amend unless it is clear that the pleading cannot be amended to correct the defect [see, e.g., *Schwarz v. Regents of University of California* (1990) 226 CA3d 149, 153, 276 CR 470 ; *Murray v. Wright* (1958) 166 CA2d 589, 591, 333 P2d 111 ; *Kadota Fig Ass'n v. Case-Swayne Co.* (1946) 73 CA2d 796, 804, 167 P2d 518 ; *Angie M. v. Superior Court* (1995) 37 CA4th 1217, 1227, 44 CR2d 197 ].



**Strategic Point--Plaintiff:**

The burden is on the plaintiff to show how the complaint can be amended and how the amendment will change the legal effect of its pleading [ *McKelvey v. Boeing N. Am., Inc.* (1999) 74 CA4th 151, 163, 86 CR2d 645 , *superseded by statute as stated in* *Bonds v. Nicoletti Oil, Inc.* (2008) 2008 U.S. Dist. LEXIS 47054 ].



**Cross Reference:**

Discussion of amending pleadings, see 11.22[1].

**11.29[2][c] Court May Specify Time Limits for Amending Pleading.** When the court sustains a demurrer with leave to amend, the court will often specify the time within which the amendment or amended pleading must be filed [CCP § 472a(c)].

If the court fails to specify the time limits for amendments, leave to amend within 10 days is granted, except in the case of forcible entry, forcible detainer, or unlawful detainer actions, in which 5 calendar days to amend is deemed granted [Cal Rules Ct, Rule 3.1320(g)].

The time for filing the amended pleading runs from the service of the notice of order, unless the notice is waived, in which case it runs from the hearing date [CCP § 472b].

**11.29[3] Court Need Not Issue Statement of Decision.** Because a demurrer ruling does not involve factual questions, the court is not required to prepare a statement of decision under CCP § 632 [see *Hayward v. Henderson* (1979) 88 CA3d 64, 70-71, 151 CR 505 ].

**11.29[4] When Court Takes Demurrer Under Advisement, Clerk Notifies Parties of Ruling.** When the court takes a demurrer under advisement, the clerk must notify the parties of the ruling when it is made. The notification must meet the following requirements [Cal Rules Ct, Rule 3.1109]:

- Specifically identify the matter ruled on.
- If the case has multiple parties, it must name the moving party and the party against whom relief was requested and specifically identify the demurrer ruled on.
- The notification may be given by mail.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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### **11.30 Parties' Options After Ruling on Demurrer.**

**11.30[1] When Demurrer Is Sustained With Leave to Amend, Party Can Amend Complaint or Suffer Dismissal or Default Judgment.** When a demurrer is sustained with leave to amend, the party whose pleading was objected to has the following options:

- Refuse to amend the pleading, in which case a dismissal or default judgment will occur. The party may then appeal from the judgment [*see, e.g., Stowe v. Fritzie Hotels, Inc. (1955) 44 C2d 416, 420, 282 P2d 890*].
- Amend the pleading.
- Amend a multi-count pleading against which a demurrer was sustained with leave to amend by deleting one or more pleadings and amending one or more others, appeal the grant of demurrer against the deleted pleadings, and proceed on the other counts as amended [ *National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Servs. Group, Inc. (2009) 171 CA4th 35, 44-45, 89 CR3d 473* ] .
- When a plaintiff amends a complaint after a demurrer is sustained with leave to amend, that plaintiff may add a new cause of action that supports recovery on the original obligation sued on under a different legal theory [ *Datig v. Dove Books, Inc. (1999) 73 CA4th 964, 983 n19, 87 CR2d 719* ].

#### **Distinguish:**

When a pleading is amended subsequent to a demurrer, the court's order sustaining the demurrer is deemed "open on appeal" when the order did not sustain the demurrer as to the entire complaint or cross-complaint or as to the entire answer. This, in practical terms, means that the party aggrieved by the order may challenge the order on appeal from the final judgment [*CCP § 472c*].

**11.30[2] When Demurrer Is Sustained Without Leave to Amend, Party Can File Motion for Reconsideration or Seek Appellate Review of Judgment.** When the court sustains a demurrer without leave to amend, the party whose pleading was objected to has the following options:

- File a motion for reconsideration of the order sustaining the demurrer [*CCP* § 1008; *see also* *Rains v. Superior Court* (1984) 150 CA3d 933, 943, 198 CR 249 ].

- Seek appellate review of the judgment resulting from the order sustaining the demurrer [*CCP* § 472c; *see* *Timberidge Enters., Inc. v. City of Santa Rosa* (1978) 86 CA3d 873, 878, 150 CR 606 ; *see also* *McKelvey v. Boeing N. Am., Inc.* (1999) 74 CA4th 151, 157 n8, 86 CR2d 645 , *superseded by statute as stated in* *Bonds v. Nicoletti Oil, Inc.* (2008) 2008 U.S. Dist. LEXIS 47054 ].

In addition, a plaintiff may bring a motion for a new trial from a judgment of dismissal resulting from the sustaining of a demurrer [ *Carney v. Simmonds* (1957) 49 C2d 84, 88, 90-91, 315 P2d 305 ; *20th Century Ins. Co. v. Superior Court* (2001) 90 CA4th 1247, 1261 ].



#### **Cross References:**

Discussion of motions for reconsideration, *see* 11.31

Discussion of appeals from orders on demurrers, *see* 11.34.

Discussion of motions for new trial, *see* Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 21, Motion for New Trial.

Motions after trial, *see* *California Forms of Pleading and Practice*, Ch. 371, *Motions After Trial*, § 371.60 *et seq.* (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, *see* the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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### **11.31 Motion for Reconsideration May Be Made When Demurrer Sustained Without Leave to Amend.**

A party against whom a demurrer was sustained without leave to amend may file a motion to reconsider the matter. The motion must be supported by a proposed pleading containing new allegations or facts not previously included [*CCP* § 1008; *see also Rains v. Superior Court* (1984) 150 CA3d 933, 943, 198 CR 249 ].

#### **Prerequisite:**

A party who files a motion for reconsideration must provide the trial court with a satisfactory explanation as to why the party failed to produce the evidence at an earlier time. The party may face sanctions as a result of the failure to do so [*CCP* § 1008; *see Lucas v. Santa Maria Pub. Airport Dist.* (1995) 39 CA4th 1017, 1027-1028, 46 CR2d 177 ].



#### **Warning:**

A motion for reconsideration should be carefully considered before it is filed. Courts generally disfavor these motions, and some judges may be inclined to award sanctions on this type of motion.



#### **Cross Reference:**

Discussion of and forms relating to motions for reconsideration, *see* Ch. 29, *Motions to Reconsider and Renewed Motions*.

#### **Legal Topics:**

For related research and practice materials, *see* the following legal topics:  
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### **11.32 Plaintiff's Voluntary Dismissal of Complaint After Demurrer.**

**11.32[1] Plaintiff May Voluntarily Dismiss Complaint Before Ruling Made on Demurrer.** A plaintiff may voluntarily dismiss a complaint without prejudice at any time before a demurrer is heard and submitted for decision. This applies even when the trial court has issued a tentative ruling but has not yet heard oral argument and made a final decision [ *Datner v. Mann Theatres Corp.* (1983) 145 CA3d 768, 770-771, 193 CR 676 ].



#### **Strategic Point:**

Case law suggests that a voluntary dismissal may be made after the demurrer has been submitted for decision but before the final decision is made [see *Wells v. Marina City Props., Inc.* (1981) 29 C3d 781, 789-790, 176 CR 104, 632 P2d 217 (dictum); *Kyle v. Carmon* (1999) 71 CA4th 901, 909-910, 84 CR2d 303 (applying *Wells* dictum to CCP § 425.16 motion)].

**11.32[2] Plaintiff May Voluntarily Dismiss Complaint Before Time to Amend Expires.** When a demurrer is sustained with leave to amend, a plaintiff may obtain a voluntary dismissal without prejudice before the time to amend expires [ *Christensen v. Dewor Devs.* (1983) 33 C3d 778, 785, 191 CR 8, 661 P2d 1088 ; see also *Parsons v. Umansky* (1994) 28 CA4th 867, 870-871, 34 CR2d 144 ].

**11.32[3] Plaintiff May Not Dismiss Complaint After Demurrer Sustained.** Once a general demurrer is sustained, a plaintiff can no longer voluntarily dismiss the action without prejudice. The reason for this is that a "trial" has taken place within the meaning of CCP § 581 [see *Wells v. Marina City Properties, Inc.* (1981) 29 C3d 781, 789, 176 CR 104, 632 P2d 217 ; *Berri v. Superior Court* (1955) 43 C2d 856, 859, 279 P2d 8 ; *Tokerud v. CapitolBank Sacramento* (1995) 38 CA4th 775, 781, 45 CR2d 345 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers Civil Procedure Dismissals Voluntary Dismissals General Overview





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Chapter 11 Demurrers and Motions for Judgment on the Pleadings  
IV. HEARING ON DEMURRER AND REACTING TO ORDERS ON DEMURRER

1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.33

### 11.33 Judgment After Ruling on Demurrer.

**11.33[1] Court May Dismiss Complaint After Demurrer Sustained Without Leave to Amend.** After a demurrer is sustained without leave to amend, either party may move for dismissal under *CCP* § 581(f)(1). An informal request is sufficient as long as there has been no motion for reconsideration [ *Berri v. Superior Court* (1955) 43 C2d 856, 860, 279 P2d 8 ; *Rudolph v. Fulton* (1960) 178 CA2d 339, 343, 2 CR 807 ].



#### Warning--Demurring Party:

The demurring party should not neglect to follow up and obtain an order of dismissal after the demurrer has been sustained.

Once dismissal is ordered, the entry of judgment follows. When the dismissal is in the form of a written order signed by the court and filed, the order constitutes the judgment [*CCP* § 581d].

**11.33[2] Court May Dismiss Complaint When Party Fails to Amend.** If a demurrer to a complaint is sustained with leave to amend and the plaintiff fails to amend the complaint within the time allotted, the court may dismiss the complaint on the motion of either party or on its own motion [*CCP* § 581(f)(2); *Sousa v. Capital Co.* (1963) 220 CA2d 744, 755, 34 CR 71 (court may dismiss action on its own motion when plaintiff fails to amend complaint)]. Dismissal under *CCP* § 581(f)(2) may even be granted after the plaintiff files amended pleadings that do not correct the defect found on demurrer [see *Cano v. Glover* (2006) 143 Cal. App. 4th 326, 329-330, 48 Cal. Rptr. 3d 871 ].



#### Strategic Point:

If the party amends the pleading in an untimely fashion, the demurring party should file a noticed motion to strike the amendment before moving to dismiss the action [ *Gitmed v. Gen. Motors Corp.* (1994) 26 CA4th 824, 827-828, 31 CR2d 625 ].



#### Cross Reference:

See Ch. 12, Motions to Strike.

The trial court has discretion to grant or deny defendant's motion if plaintiff opposes the motion and promptly submits an amended complaint [ *Cano v. Glover* (2006) 143 Cal. App. 4th 326, 329, 48 Cal. Rptr. 3d 871 ; *Contreras v. Blue Cross of Cal.* (1988) 199 CA3d 945, 948, 245 CR 258 (applying former CCP § 581(f)(2))]. However, if it grants dismissal, the dismissal is with prejudice [ *Cano v. Glover* (2006) 143 Cal. App. 4th 326, 329-330, 48 Cal. Rptr. 3d 871 ] and the defendant is entitled to costs [ *Cano v. Glover* (2006) 143 Cal. App. 4th 326, 331, 48 Cal. Rptr. 3d 871 ].

#### Cross References:

Form of ex parte motion to dismiss the action and order granting motion, see 11.61.

Form of notice of motion to strike an amended complaint as untimely and to dismiss the action, see 11.60.

### **11.33[3] Default Judgment May Be Appropriate in Certain Circumstances.**

**11.33[3][a] Default Judgment May Be Appropriate After Demurrer Sustained With Leave to Amend.** When a demurrer to a complaint is sustained with leave to amend and the plaintiff amends, files, and serves the complaint but the defendant fails to answer or demur to the amended complaint, a default judgment may be entered against the defendant within 30 days after the complaint was served on the defendant [see CCP § 586(a)(1)].

#### Cross Reference:

Detailed coverage of default judgments, see Ch. 36, Defaults and Motions for Relief.

**11.33[3][b] Default Judgment May Be Appropriate After Demurrer Overruled.** When a defendant demurs to a complaint without answering and the demurrer is overruled, the court may enter a default judgment against defendant when defendant fails to answer the complaint after the demurrer is overruled [CCP § 586(a)(2)].

**11.33[3][c] Default Judgment May Be Appropriate After Demurrer to Answer Sustained.** If a plaintiff's demurrer to an answer was sustained and the defendant fails to amend the answer within the time established by the court, the court may enter a default judgment against the defendant [CCP § 586(a)(5)].

**11.33[3][d] Default Judgment May Be Appropriate in Unlawful Detainer, Forcible Detainer, and Forcible Entry Proceedings.** In unlawful detainer, forcible detainer, and forcible entry proceedings, a defendant has only five days to answer the complaint after a demurrer is overruled or after a demurrer to an answer is sustained. Otherwise, a defendant may be subject to a default hearing [CCP §§ 586(a)(2), 586(a)(5), 1167.3].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePretrial JudgmentsDefaultDefault Judgments



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**11.34 CHECKLIST: Appellate Review of Demurrer.**

- ☐ Secure judgment based on order regarding demurrer.
  - ☐ Order on demurrer not appealable.
  - ☐ Judgment of dismissal after demurrer sustained is appealable order.

**Authority:**

*CCP §§ 904.1(a)(1), 904.2(a)*

- ☐ Determine if review by extraordinary writ is available.

**Discussion:**

*See 11.35*

- ☐ Draft, serve, and file appeal or writ.
  - ☐ Add new theories supporting position, if applicable.
  - ☐ Request judicial notice, if applicable.

**Discussion:**

*See 11.36*

- ☐ If order on demurrer reversed, file amended complaint within 30 days after notice from court.

**Authority:**

*CCP § 472b*

**Discussion:**

See *11.37*



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**11.35 Aggrieved Party Seeks Appellate Review of Judgment of Dismissal After Demurrer Sustained, Not the Order on Demurrer.**

**11.35[1] Order Sustaining or Overruling Demurrer Is Generally Not Appealable.** Orders sustaining or overruling demurrers are not appealable [see *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 C4th 893, 912-913, 55 CR2d 724, 920 P2d 669 (order overruling demurrer); *Youngblood v. Bd. of Supervisors* (1978) 22 C3d 644, 651, 150 CR 242, 586 P2d 556 (order sustaining demurrer without leave to amend); *Jones v. H.F. Ahmanson & Co.* (1969) 1 C3d 93, 119, 81 CR 592, 460 P2d 464 (order overruling demurrer); see also *People ex rel. Lungren v. Superior Court* (1996) 14 C4th 294, 299-300, 58 CR2d 855, 926 P2d 1042 ].

**Exception--Class Action:**

In a class action, an order sustaining a demurrer without leave to amend has been held to have the legal effect of a final judgment [ *Kennedy v. Baxter Healthcare Corp.* (1995) 43 CA4th 799, 807, 50 CR2d 736 ].



**Warning:**

Some appellate courts have treated an appeal from an order sustaining a demurrer as an appeal from the judgment of dismissal subsequently entered. The court simply deems the order sustaining the demurrer to contain a judgment of dismissal and therefore reviews the order on that basis [see *Beazell v. Schrader* (1963) 59 C2d 577, 579-580, 30 CR 534, 381 P2d 390 ; *Conley v. Roman Catholic Archbishop* (2000) 85 CA4th 1126, 1130 ; *Thaler v. Household Fin. Corp.* (2000) 80 CA4th 1093, 1098, 95 CR2d 779 ; *Lumpkin v. Jordan* (1996) 49 CA4th 1223, 1226 n1, 57 CR2d 303 ]. Other appellate courts have declined to be so lenient and have refused to treat nonappealable orders as appealable [see, e.g., *Jordan v. Malone* (1992) 5 CA4th 18, 22-23, 6 CR2d 454 (appeal from tentative written decision not permitted); *Munoz v. Florentine Gardens* (1991) 235 CA3d 1730, 1731, 1 CR2d 609 (case involving appeal from minute order granting motion to dismiss for failure to prosecute); *Cohen v. Equitable Life Assurance Soc'y* (1987) 196 CA3d 669, 671, 242 CR 84 (court allowed appeal from order sustaining demurrer but stated it would not "bail out" careless attorneys in the future)].

**11.35[2] Proper Procedure Is to Appeal From Subsequent Judgment or Order of Dismissal.** A ruling on a

demurrer may properly be reviewed on appeal from a subsequent judgment or order of dismissal [*CCP* § 472c; see *Timberidge Enters., Inc. v. City of Santa Rosa* (1978) 86 CA3d 873, 878, 150 CR 606 ; see also *McKelvey v. Boeing N. Am., Inc.* (1999) 74 CA4th 151, 157 n8, 86 CR2d 645 , superseded by statute as stated in *Bonds v. Nicoletti Oil, Inc.* (2008) 2008 U.S. Dist. LEXIS 47054 ]. A judgment of dismissal entered after a demurrer to a complaint has been sustained, either without leave to amend or after plaintiff failed to amend the complaint, is appealable [see *CCP* §§ 904.1(a)(1), 904.2(a); see also *Irwin v. City of Manhattan Beach* (1966) 65 C2d 13, 16, 51 CR 881, 415 P2d 769 ; *Battle v. Kessler* (1983) 149 CA3d 853, 855, 197 CR 170 ].

This rule applies equally to a situation where a judgment applies only to certain defendants, and plaintiff's case continues against other defendants [ *Tinsley v. Palo Alto Unified Sch. Dist.* (1979) 91 CA3d 871, 880, 154 CR 591 (judgment dismissing the complaint as to some, but not all, defendants is appealable)].

### **11.35[3] Orders May Be Reviewable by Extraordinary Writ.**

**11.35[3][a] Order Sustaining Demurrer May Be Reviewable by Writ.** In certain situations, an order sustaining a demurrer may be reviewable by extraordinary writ. When a demurrer is granted as to part of a case but does not dispose of the entire case, review by mandate may be available [ *Vasquez v. Superior Court* (1971) 4 C3d 800, 806-807, 94 CR 796, 484 P2d 964 ; see also *N. Am. Chem. Co. v. Superior Court* (1997) 59 CA4th 764, 773, 69 CR2d 466 ].

**11.35[3][b] Order Overruling Demurrer Generally Not Reviewable by Writ.** An order overruling a demurrer is not generally reviewable by extraordinary writ. However, in certain cases it may be appropriate. Examples include:

- When an issue is purely legal in nature and of significant legal import and the facts are undisputed [ *City of Huntington Park v. Superior Court* (1995) 34 CA4th 1293, 1297, 41 CR2d 68 ].
- When there is a significant issue of law and resolution of the issue in petitioner's favor would result in final disposition as to that party [ *Curry v. Superior Court* (1993) 20 CA4th 180, 183, 24 CR2d 495 ].
- When the issue raised is considered jurisdictional [ *County of Santa Barbara v. Superior Court* (1971) 15 CA3d 751, 754-755, 93 CR 406 ].



#### **Cross Reference:**

Detailed discussion of extraordinary writs, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender).

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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### **11.36 Standard of Review on Appeal.**

#### **11.36[1] Appellate Court Makes Several Determinations When Reviewing Demurrer Sustained Without Leave to Amend.**

**11.36[1][a] Court Has Two-Step Analysis for Demurrer Sustained Without Leave to Amend.** When an appellate court reviews a trial court's ruling sustaining a demurrer without leave to amend, the court goes through two different determinations [see, e.g., *Filet Menu, Inc. v. Cheng* (1999) 71 CA4th 1276, 1279-1280, 84 CR2d 384 ; *Hernandez v. City of Pomona* (1996) 49 CA4th 1492, 1497-1498, 57 CR2d 406 ; *G.L. Mezzetta, Inc. v. City of Am. Canyon* (2000) 78 CA4th 1087, 1091-1092, 93 CR2d 292 ; *Lazar v. Hertz Corp.* (1999) 69 CA4th 1494, 1501, 82 CR2d 368 ]:

- A de novo review of the complaint to determine if it contains facts sufficient to state a cause of action, i.e., whether the trial court erred in sustaining the demurrer.
- A determination of whether the trial court abused its discretion in sustaining the demurrer without leave to amend.

**11.36[1][b] Appellate Court Should Find Abuse of Discretion If There Is a Reasonable Possibility That Defect Can Be Cured by Amendment.** A trial court has abused its discretion in sustaining a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment [ *Minsky v. City of Los Angeles* (1974) 11 C3d 113, 118, 113 CR 102, 520 P2d 726 ; *Schulz v. Neovi Data Corp.* (2007) 152 CA4th 86, 91-92, 60 CR3d 810 ].

A plaintiff has the burden of proving there is a reasonable possibility that the defect can be cured by amendment. This includes showing how the plaintiff can amend its complaint and how the amendment will change the complaint's legal effect [ *Palm Springs Tennis Club v. Rangel* (1999) 73 CA4th 1, 7-8, 86 CR2d 73 ; see *McKelvey v. Boeing N. Am., Inc.* (1999) 74 CA4th 151, 163, 86 CR2d 645 , *superseded by statute as stated in* *Bonds v. Nicoletti Oil, Inc.* (2008) 2008 U.S. Dist. LEXIS 47054 ]. Plaintiff must set forth the applicable substantive law and the legal basis for amendment as well as factual allegations that correspond to all required elements of the cause of action [ *Rakestraw v. Cal. Physicians' Serv.* (2000) 81 CA4th 39, 43-44, 96 CR2d 354 ].

**Distinguish:**

When a plaintiff's previous attempts to mend a defective complaint have failed, it may not be abuse of discretion for a trial court to sustain a subsequent demurrer without leave to amend [see, e.g., *Wilner v. Sunset Life Ins. Co.* (2000) 78 CA4th 952, 958-959, 93 CR2d 413 ; *Lee v. Interinsurance Exch.* (1996) 50 CA4th 694, 724, 57 CR2d 798 ; *Alexandria S. v. Pac. Fertility Med. Ctr., Inc.* (1997) 55 CA4th 110, 115, 64 CR2d 23 ].

**11.36[2] Appellate Court Must Review Complaint to Determine If It States a Cause of Action.** On appeal, the reviewing court must examine the complaint and deem its allegations true in order to determine whether the complaint states a viable cause of action [ *Stevenson v. Superior Court* (1997) 16 C4th 880, 885, 66 CR2d 888, 941 P2d 1157 ; *Snyder v. Michael's Stores, Inc.* (1997) 16 C4th 991, 995, 68 CR2d 476, 945 P2d 781 ]. The court should construe the complaint liberally to determine whether a cause of action is stated [ *Biles v. Richter* (1988) 206 CA3d 325, 328-329, 253 CR 414 ; *Picton v. Anderson Union High Sch. Dist.* (1996) 50 CA4th 726, 730, 733, 57 CR2d 829 ].

**11.36[3] Appellate Court Must Reverse Ruling Sustaining Demurrer When Plaintiff Has Stated Cause of Action Under Any Theory.** If the complaint shows entitlement to relief on any possible legal theory, the appellate court must reverse the trial court's ruling sustaining the demurrer [ *Hernandez v. City of Pomona* (1996) 49 CA4th 1492, 1497, 57 CR2d 406 ; *Tafoya v. Hastings Coll.* (1987) 191 CA3d 437, 440, 236 CR 395 ; *Terhell v. Am. Commonwealth Assocs.* (1985) 172 CA3d 434, 438, 218 CR 256 ; *Thaler v. Household Fin. Corp.* (2000) 80 CA4th 1093, 1098, 95 CR2d 779 ; *Cellular Plus, Inc. v. Superior Court* (1993) 14 CA4th 1224, 1231, 18 CR2d 308 ].

**11.36[4] Appellate Court Must Affirm Trial Court's Correct Ruling Regardless of Grounds Stated by Trial Court.** CCP § 472d requires that when a demurrer is sustained, the trial court must include in its decision or order a statement of the ground or grounds upon which the decision is based [CCP § 472d]. A reviewing court may properly affirm the sustaining of a demurrer as long as grounds for sustaining the demurrer exist, regardless of the reasons stated by the trial court [see, e.g., *Weinstock v. Eissler* (1964) 224 CA2d 212, 224-225, 36 CR 537 ; *Zappas v. King Williams Press, Inc.* (1970) 10 CA3d 768, 771, 89 CR 307 ; *California State Employees' Assn. v. Williams* (1970) 7 CA3d 390, 395, 86 CR 305 ; *CAMSI IV v. Hunter Tech. Corp.* (1991) 230 CA3d 1525, 1533, 282 CR 80 ].

**11.36[5] Demurring Party May Present New Theories on Appeal.** On appeal, a demurring party is not limited to the reasons and arguments advanced in the trial court. The party may present any and all reasons in support of the trial court's order sustaining the demurrer [see *Sanchez v. Truck Ins. Exch.* (1994) 21 CA4th 1778, 1787, 26 CR2d 812 ; *Zumbrun v. Univ. of S. Cal.* (1972) 25 CA3d 1, 8-9, 101 CR 499 ; see also *Zappas v. King Williams Press, Inc.* (1970) 10 CA3d 768, 771, 89 CR 307 ].

**11.36[6] Appellate Court May Consider Any Facts Subject to Judicial Notice.** In reviewing a ruling on a demurrer, an appellate court may consider both facts judicially noticed by the trial court and those which the trial court could have properly noticed [ *StorMedia Inc. v. Superior Court* (1999) 20 C4th 449, 456 n9, 84 CR2d 843, 976 P2d 214 ; see also *Cantu v. Resolution Trust Corp.* (1992) 4 CA4th 857, 877, 6 CR2d 151 ; *City of Chula Vista v. County of San Diego* (1994) 23 CA4th 1713, 1719, 29 CR2d 89 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers





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**11.37 When Order Sustaining Demurrer Is Reversed on Appeal, Amended Complaint Must Be Filed Within 30 Days.**

When an order sustaining a demurrer without leave to amend is reversed or remanded by an appellate court, any amended complaint must be filed within 30 days after the clerk of the appellate court mails notice of the issuance of the remittitur [CCP § 472b; *Pagarigan v. Aetna U.S. Healthcare of California, Inc.* (2007) 158 CA4th 38, 42-43, 69 CR3d 627 ].



**Strategic Point:**

Even if a matter calls for compulsory notice, or is appropriate for optional notice, and the appellant fully complies with the procedural requirements, refusal to take notice is merely error. Whether it is reversible error depends on the state of the record, and also involves considerations of estoppel and waiver. Likewise, the improper taking of notice is subject to harmless error analysis [ *Aquila, Inc. v. Superior Court* (2007) 148 CA4th 556, 569, 55 CR3d 803 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers



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# **11.38 CHECKLIST: Motions for Judgment on the Pleadings.**

## **11.38[1] Moving Party.**

☐ Moving party:

☐ If plaintiff:

☐ Assert complaint states facts sufficient to constitute a cause of action, and the answer does not state facts sufficient to constitute a defense.

☐ If defendant:

☐ Assert court has no jurisdiction of the subject of the cause of action against that defendant.

☐ Assert the complaint does not state facts sufficient to constitute a cause of action against that defendant.

### **Authority:**

*CCP § 438(c)(1)*

### **Discussion:**

See 11.44[1], [2]



Determine timing for bringing motion for judgment on the pleadings:

- ☐ Motion for judgment on the pleadings may not be brought after a pretrial conference order or within 30 days of the date initially set for trial, whichever is later.
- ☐ Plaintiff must wait until time to demur to answer has expired before bringing motion for judgment on the pleadings.
- ☐ Defendant must wait until time to demur to complaint has expired before bringing motion for judgment on the pleadings.

**Authority:**

*CCP § 438(e), (f)*

**Discussion:**

*See 11.45[1] -[3]*

- ☐ Prepare, serve, and file notice of motion.

**Timing:**

The moving papers must be filed and served 16 court days prior to the date of the hearing, with time extensions based on method of service and address of person served.

**Authority:**

*CCP §§ 438(d), 1005(b)*

**Discussion:**

*See 11.45[4]*

- ☐ Prepare, serve, and file motion and accompanying papers:

- ☐ Memorandum in support of motion.
- ☐ Request for judicial notice, if applicable.
- ☐ Proof of service.

**Authority:**

*CCP §§ 465, 1013a; Cal Rules Ct, Rule 3.1113*

**Discussion:**

*See 11.45[4]*

- ☐ If opposition papers are filed, draft, serve, and file reply to opposition.
  - ☐ Reply must be served and filed at least five court days before the scheduled hearing.

☐ Service must be made by a method reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the opposing papers are filed.

**Authority:**

*CCP § 1005(b)*

**Discussion:**

*See 11.45[4]*

☐ If court grants motion with leave to amend, the court will allow 30 days to the party against whom the motion was granted to file an amended complaint or answer.

**Authority:**

*CCP § 438(h)(2)*

**Discussion:**

*See 11.47[3]*

☐ If amended pleading is filed after the time specified or otherwise violates the court's ruling on the motion, move to strike the amended pleading and move for entry of judgment.

**Authority:**

*CCP §§ 435(b)(1), (e), 438(h)(4)(A), (B), (i)(1)(A)*

**Discussion:**

*See 11.47[4]*

☐ If opposing party fails to file an amended pleading, move for entry of judgment.

**Authority:**

*CCP § 438(h)(4)(C), (i)(1)(B)*

**Discussion:**

*See 11.47[4]*

☐ If judgment is entered, anticipate that opposing party may seek appellate review of the judgment.

**Authority:**

*CCP §§ 904.1(a)(1), 904.2(a); Cream v. Wheatcraft (1953) 115 CA2d 517, 522, 252 P2d 637*

**Discussion:**

*See 11.48*

☐ If court denies motion for judgment on the pleadings and the issue is purely legal and of significant legal import, seek review by writ of mandate if available.

**Authority:**

*Am. Int'l Group, Inc. v. Superior Court (1991) 234 CA3d 749, 755, 285 CR 765*

**Discussion:**

See 11.48[6]

**11.38[2] Opposing Party.**

- ☐ Serve and file memorandum in opposition to motion.
- ☐ Serve and file at least nine court days before the scheduled hearing.
- ☐ Serve by method reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the opposing papers are filed.

**Authority:**

CCP § 1005(b)

**Discussion:**

See 11.45[4]

- ☐ If the court grants the motion with leave to amend, file amended complaint or answer within 30 days.

**Authority:**

CCP § 438(h)(2)

**Discussion:**

See 11.47[3]

- ☐ If the court grants the motion without leave to amend, appeal judgment of dismissal.

**Discussion:**

See 11.48



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**11.39 Options and Strategy for Motions for Judgment on the Pleadings.**

Motions for judgment on the pleadings challenge the sufficiency of the pleadings after the time for filing a demurrer has run. The grounds for judgment on the pleadings, which are a subset of the grounds for demurring to a pleading, are lack of subject matter jurisdiction and insufficient facts to constitute a cause or action or defense. In either case, the grounds must appear from the face of the pleadings or from facts subject to judicial notice [*CCP* § 438(d)].

A party must decide whether to raise either of these two objections by demurrer or by a motion for judgment on the pleadings. The logical and cost saving decision is to raise the issues by demurrer rather than litigating on a defective pleading or in a court without subject matter jurisdiction. There is one caveat to this approach. A motion for judgment on the pleading cannot raise the same grounds objected to and overruled on demurrer unless there has been a material change in applicable case law or statute since the ruling on the demurrer [*see CCP* § 438(g)]. If for some reason a party does not have the time, facts, or resources to file a complete and well reasoned demurrer, a motion for judgment on the pleadings can be used as a back up plan. A motion for judgment on the pleadings is also a back up procedure when, for whatever reason, a defect in the pleadings was not discovered and a demurrer was not filed on time. A motion for judgment on the pleadings is also a method to protect your client when substituting in as counsel mid-litigation and discovering that prior counsel did not file a demurrer to pleadings that fail to state facts sufficient to constitute a cause or action or defense.



**Cross Reference:**

Discussion of motions for judgment, including a comparison with motion for judgment on the pleadings, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 13, Motion for Judgment.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial JudgmentsJudgment on the Pleadings



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**11.40 Motion for Judgment on the Pleadings Can Be Comparable to General or Special Demurrer.**

**11.40[1] Motion for Judgment on the Pleadings Comparable to General Demurrer.** A motion for judgment on the pleadings may be based on the same grounds as a general demurrer, i.e., insufficient facts stated to constitute a cause of action or defense [*CCP* § 438(c)(1)(A), (B)(ii)].

► **Cross Reference:**

Discussion of grounds for general demurrer, see 11.08.

**11.40[2] Special Demurrer Based on Lack of Subject Matter Jurisdiction Available for Defendant.** A motion for judgment on the pleadings may also be made on the ground of lack of subject matter jurisdiction (sometimes referred to a special demurrer), but may be raised only by the defendant [*see CCP* § 438(c)(1)(B)(i); *see also CCP* § 430.10(a)].

► **Cross Reference:**

Discussion of special demurrer on the ground of lack of subject matter jurisdiction, see 11.09[3].

**11.40[3] Motion for Judgment on the Pleadings Cannot Be Brought Until Time for Demurrer Has Expired.** If the moving party is a plaintiff and the defendant has filed his or her answer to the complaint, a motion for judgment on the pleadings cannot be brought until the time for plaintiff to demur to the answer has expired [*CCP* § 438(f)(1)].

If the moving party is a defendant, a motion for judgment on the pleadings cannot be brought until the time for the defendant to demur to the complaint has expired [*CCP* § 438(f)(2)].

► **Cross Reference:**

Discussion of time limitations on filing demurrers, see 11.12.

**11.40[4] Party May Not Demur and File Motion for Judgment on the Pleadings on the Same Grounds Without Change in Law.** A party may not demur to a complaint or answer and subsequently file a motion for judgment on the pleadings on the same grounds unless there has been a material change in applicable case law or statute

since the ruling on the demurrer [CCP § 438(g)(1)].

**11.40[5] Party May Make Motion for Judgment on the Pleadings If No Demurrer Filed on Same Grounds.**

A party may make a motion for judgment on the pleadings if the party did not demur to the complaint or answer on the same grounds as the motion for judgment on the pleadings [CCP § 438(g)(2); see *Yancey v. Superior Court* (1994) 28 CA4th 558, 562, 33 CR2d 777 ].



**Strategic Point--Moving Party:**

It is therefore possible to demur to a complaint on one ground, and if the demurrer is overruled, file a motion for judgment on the pleadings on a separate ground, as long as the ground has not been waived by failure to assert it in the demurrer.



**Cross Reference:**

Discussion of grounds for demurrer that may be waived, see 11.09.

**11.40[6] Court Will Consider Allegations of Pleading As True.** A motion for judgment on the pleadings is analogous to a demurrer in that the court will consider of all material facts pled to be true unless contrary to law or facts of which the court may take judicial notice [see *Parnell v. Adventist Health System/West* (2005) 35 C4th 595, 598 ; *CD Investment Co. v. California Insurance Guarantee Assn.* (2000) 84 CA4th 1410, 1417, 101 CR2d 806 ; *Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn.* (1998) 63 CA4th 211, 219, 73 CR2d 586 ; *Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 CA4th 672, 677, 78 CR2d 225 ].

**11.40[7] Court May Consider Matters Only on Face of Pleadings and Matters Subject to Judicial Notice.** As with a demurrer, the grounds for a motion for judgment on the pleadings must appear on the face of the challenged pleading or from any matter of which the court may take judicial notice [CCP § 438(d)]. Matters of which the court must take judicial notice under *Evid Code* § 451 or may take judicial notice under *Evid Code* § 452 may be considered by the court in ruling on a motion for judgment on the pleadings as long as the matter to be noticed is specified in the notice of motion or memorandum [CCP § 438(d)].

**Exceptions:**

- The court may consider other facts when the parties enter into a written stipulation concerning those facts and authorize the court to consider that stipulation for purposes of the motion [see *North Side Prop. Owners' Ass'n v. Hillside Mem'l Park* (1945) 70 CA2d 609, 613-614, 161 P2d 618 ].
- If a motion for summary judgment is treated as a motion for judgment on the pleadings, the court may properly consider the parties' statements of undisputed facts [see *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 CA4th 1761, 1768, 29 CR2d 26 ].
- The court may be able to consider judicial admissions contained in a party's pleadings and in a party's opposition papers [see *Setliff v. E.I. Du Pont De Nemours & Co.* (1995) 32 CA4th 1525, 1534, 1536-1537, 38 CR2d 763 (court held judicial admissions in plaintiff's amended complaint negated plaintiff's ability to state a cause of action for negligence and products liability under traditional theories and admissions contained in plaintiff's opposition to demurrer also negated plaintiff's ability to state cause of action for products liability under certain theories)].



**Trap:**



*Evid Code* §§ 452, 453 permit trial court to take judicial notice of the *existence* of judicial opinions and court documents, along with the truth of the results reached--in the documents such as orders, statements of decision, and judgments--but the court cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact [ *People v. Woodell* (1998) 17 C4th 448, 455, 71 CR2d 241 ; *see also* *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 CA3d 39, 45-47, 170 CR 533 (allowing judicial notice of facts within appellate court opinion)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePretrial  
JudgmentsJudgment on the Pleadings



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Chapter 11 Demurrers and Motions for Judgment on the Pleadings  
VI. MOTIONS FOR JUDGMENT ON THE PLEADINGS

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.41*

**11.41 Motion for Judgment on the Pleadings May Be Brought by Any Party or on Motion of the Court.**

Any party may move for judgment on the pleadings or the court may, upon its own motion, grant a motion for judgment on the pleadings [*CCP* § 438(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial JudgmentsJudgment on the Pleadings



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*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.42*

**11.42 Motion for Judgment on the Pleadings May Be Made in Civil and Special Proceedings.**

A motion for judgment on the pleadings is available in civil proceedings and special proceedings in which demurrers may properly be filed [*see, e.g., Knoff v. City and County of San Francisco* (1969) 1 CA3d 184, 200, 81 CR 683 (mandate proceeding); *Estate of Marler* (1957) 148 CA2d 30, 33, 306 P2d 105 (will contest)].



**Cross Reference:**

Discussion of demurrers in special proceedings, *see* 11.07[3].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial JudgmentsJudgment on the Pleadings



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*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.43*

**11.43 Court May Treat Other Motions As Motion for Judgment on the Pleadings.**

A court may treat a motion for summary judgment as a motion for judgment on the pleadings when a motion for summary judgment challenges the sufficiency of the pleadings rather than the evidence supporting the pleadings [see *Taylor v. Lockheed Martin Corp.* (2000) 78 CA4th 472, 479, 92 CR2d 873 ; see also *Am. Airlines, Inc. v. County of San Mateo* (1996) 12 C4th 1110, 1117-1118, 51 CR2d 251, 912 P2d 1198 ].

A court has also treated a motion to dismiss as a motion for judgment on the pleadings [see *Saltarelli & Steronovich v. Douglas* (1995) 40 CA4th 1, 4-5, 46 CR2d 683 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial JudgmentsJudgment on the Pleadings



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*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.44*

#### **11.44 Grounds for Motion for Judgment on the Pleadings.**

**11.44[1] Plaintiff May File Motion for Judgment on the Pleadings Only When the Answer Does Not State Facts Sufficient to Constitute a Defense.** When the moving party is a plaintiff, the following ground is the only one available for a motion for judgment on the pleadings [*CCP* § 438(c)(1)(A)]:

- The complaint states facts sufficient to constitute a cause or causes of action against the defendant and that the answer does not state facts sufficient to constitute a defense to the complaint. This is analogous to a general demurrer.

#### **► Cross Reference:**

Discussion of the grounds for general demurrer, see *11.08*.

**11.44[2] Defendant May File Motion for Judgment on the Pleadings on Two Different Grounds.** When the moving party is a defendant, the following grounds are available for a motion for judgment on the pleadings [*CCP* § 438(c)(1)(B)]:

- The court has no jurisdiction of the subject of the cause of action against that defendant. This is analogous to a ground of special demurrer.
- The complaint does not state facts sufficient to constitute a cause of action against that defendant. This is analogous to a general demurrer.

#### **► Cross References:**

Discussion of the grounds for general demurrer, see *11.08*.

Discussion of special demurrer on the ground that the court does not have subject matter jurisdiction, see *11.09[3]*.

**11.44[3] When Court Brings Motion for Judgment on the Pleadings, Grounds May Be the Same As If Plaintiff or Defendant Were Bringing the Motion.** When the court rules on a motion for judgment on the pleadings

brought on its own motion, the same grounds apply as if the motion were brought by plaintiff or defendant [*CCP* § 438(c)(3)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial JudgmentsJudgment on the Pleadings



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*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.45*

**11.45 Timing and Format Requirements for Motions for Judgment on the Pleadings.**

**11.45[1] Defendant May Make Motion for Judgment on the Pleadings After Time to Demur to Complaint Has Expired.** A defendant may make a motion for judgment on the pleadings only after the defendant has filed an answer and the time to demur to the complaint has expired [*CCP* § 438(f)(2)].

► **Cross Reference:**

Discussion of time limitations for demurring to a complaint, see 11.12[1].

**11.45[2] Plaintiff May Make Motion for Judgment on the Pleadings After Time to Demur to Answer Has Expired.** A plaintiff may make a motion for judgment on the pleadings only after the defendant has filed an answer and the time to demur to the answer has expired [*CCP* § 438(f)(1)].

► **Cross Reference:**

Discussion of time limitations for demurring to an answer, see 11.12[2].

**11.45[3] Motion for Judgment on the Pleadings May Not Be Brought After Pretrial Conference Order or Within 30 Days of Date Initially Set for Trial.** A motion for judgment on the pleadings may not be brought after a pretrial conference order has been entered pursuant to *CCP* § 575 or within 30 days of the date the action is initially set for trial, whichever is later, unless the court orders otherwise [*CCP* § 438(e)]. Good cause is not statutorily required for a court to accept a motion filed late [ *Burnett v. Chimney Sweep LLC* (2004) 123 CA4th 1057, 1063 ].

**11.45[4] Noticed Motion Inferred From Statute, Provides 16 Court Days' Notice of Motion.** While *CCP* § 438 does not specifically state that a noticed motion is required, it refers to a noticed motion in requiring that judicially noticed matters be specified in the notice of motion or memorandum [*CCP* § 438(d)]. Additionally, a motion to strike an amended pleading filed after a motion for judgment on the pleading is granted with leave to amend must be made under *CCP* § 1010 requiring written notice [*CCP* § 438(i)]. Because of the catch-all language of *CCP* § 1005(a)(13) prescribing notice for proceedings not specified by law or court, provide 16 court days' notice for the motion and include time extensions based on method of service [see *CCP* § 1005(b)].



**Cross References:**

Discussion of notice requirements for demurrers, see *11.16[1]*.

Discussion of notice of motion, see Ch. 26, Law and Motion Procedure, and Ch. 27, Service of Papers.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial JudgmentsJudgment on the Pleadings





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1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.46

**11.46 Hearing on and Court's Determination of Motion for Judgment on the Pleadings.**

**11.46[1] Opposing Party Is Entitled to Hearing.** The party whose pleading is being challenged by the motion is entitled to a hearing [see *CCP* § 1005.5; *McDonald v. Severy* (1936) 6 C2d 629, 631, 59 P2d 98 ].

**11.46[2] Court Must Treat All Allegations in Pleadings As True.** In ruling on a motion for judgment on the pleadings, the court must treat all allegations stated in the pleadings as true, unless contrary to law or fact of which the court may take judicial notice [see *Sullivan v. County Los Angeles* (1974) 12 C3d 710, 714-715 n3, 117 CR 241, 527 P2d 865 ; *IMO Dev. Corp. v. Dow Corning Corp.* (1982) 135 CA3d 451, 457, 185 CR 341 ; *Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 CA4th 672, 677, 78 CR2d 225 ]. Therefore, the court's determination is strictly one of law [ *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 CA4th 592, 603, 98 CR2d 277 ].

**11.46[3] When Plaintiff Brings Motion, Court Considers Allegations of Complaint and Defenses Stated in Answer.** When a court rules on a plaintiff's motion for judgment on the pleadings, the court considers the following:

- Whether or not the complaint states a cause of action, and if it does;
- Whether or not the answer states facts sufficient to constitute a defense.

If the complaint states a cause of action, and the answer does not state a defense, the motion is properly granted [*CCP* § 438(c)(1)(A); see *MacIsaac v. Pozzo* (1945) 26 C2d 809, 812-813, 161 P2d 449 ; *Adjustment Corp. v. Hollywood etc. Co.* (1939) 35 CA2d 566, 569, 96 P2d 161 ].

**11.46[4] When Defendant Brings Motion, Court Considers Whether Complaint States a Cause of Action or Whether There Is Lack of Subject Matter Jurisdiction.** The court must grant defendant's motion for judgment on the pleadings if it finds either of the following [*CCP* § 438(c)(1)(B)]:

- The complaint does not state facts sufficient to constitute a cause of action against the defendant [see *Hibernia S. & L. Soc. v. Thornton* (1897) 117 C 481, 482-483, 49 P 573 (failure to state cause of action); *Trewin v. State of Cal.* (1984) 150 CA3d 975, 981, 198 CR 263 (failure to state cause of action)].

- The court has no jurisdiction of the subject of the cause of action alleged in the complaint.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.47

**11.47 Court's Order on Motion for Judgment on the Pleadings.**

**11.47[1] Court May Grant Motion With or Without Leave to Amend.** The court may grant a motion for judgment on the pleadings with or without leave to amend the complaint or answer [CCP § 438(h)(1)].

**11.47[2] Court Must Grant Motion With Leave to Amend If Curing Defect Is Possible.** A court must grant a motion for judgment on the pleadings with leave to amend if an amendment curing the defect is possible [see *Beverage v. Canton Placer Mining Co.* (1955) 43 C2d 769, 778, 278 P2d 694 ; *Smiley v. Citibank* (1995) 11 C4th 138, 164 n18, 44 CR2d 441, 900 P2d 690 ; *Cloud v. Northrop Grumman Corp.* (1998) 67 CA4th 995, 1011, 79 CR2d 544 ]. It has been held an abuse of discretion for a court to grant a motion for judgment on the pleadings as to an original complaint without leave to amend when the pleading did not show on its face that it was incapable of amendment [see, e.g., *Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn.* (1998) 63 CA4th 211, 219, 73 CR2d 586 ; *Virginia G. v. ABC Unified Sch. Dist.* (1993) 15 CA4th 1848, 1852, 19 CR2d 671 ; *Schonfeldt v. State of Cal.* (1998) 61 CA4th 1462, 1465, 72 CR2d 464 ].



**Strategic Point--Opposing Party:**

The burden of proving there is a reasonable possibility the defect can be cured by amendment rests with the party whose pleading is attacked [see *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 CA3d 1131, 1141, 261 CR 146 ]. A plaintiff should indicate the nature of the proposed amendment or the manner in which he or she would amend the complaint [see *Tiffany v. Sierra Sands Unified Sch. Dist.* (1980) 103 CA3d 218, 226, 162 CR 669 ].



**Cross References:**

Form of order on a motion for judgment on the pleadings, see 11.64.

Form of judgment for a motion for judgment on the pleadings, see 11.67.

**11.47[3] If Motion Is Granted With Leave to Amend, Court Must Allow 30 Days to Amend.** When a motion for judgment on the pleadings is granted with leave to file an amended complaint or answer, the court will grant 30 days to the party against whom the motion was granted to file an amended complaint or answer [CCP § 438(h)(2)].

**11.47[4] If Party Does Not Amend in a Timely or Proper Fashion, Moving Party May Move for Judgment.** If the amended pleading is filed after the time specified in the court's order, the moving party may file a motion to strike the amended pleading and move for entry of judgment in the moving party's favor [CCP §§ 435(b)(1), (e), 438(h)(4)(A), (B), (i)(1)(A)]. The moving party may also move for entry of judgment if the amended pleading violates the court's prior ruling on the motion [CCP §§ 435(b)(1), (e), 438(i)(1)(A)]. If the opposing party fails to file an amended pleading, the moving party must move for entry of judgment in its favor and judgment will be entered [CCP § 438(h)(4)(C), (i)(1)(B)].

All motions for judgment pursuant to CCP § 438(i) must be made pursuant to CCP § 1010 [CCP § 438(i)(2)].



#### **Cross References:**

Form of notice of motion to strike and enter judgment if amended pleading after motion for judgment on the pleadings was not timely filed or was in violation of prior ruling, see 11.65.

Form of notice of motion to enter judgment after motion for judgment on the pleadings was granted with leave to amend, but party failed to amend, see 11.66.

Form of judgment on the pleadings after motion was granted with leave to amend and party failed to amend, see 11.67.

**11.47[5] If Motion Is Granted Without Leave to Amend, Court Will Enter Judgment.** If a motion for judgment on the pleadings is granted with respect to the entire complaint or answer, without leave to amend, judgment will be entered forthwith in accordance with the motion granting judgment to the moving party [CCP § 438(h)(3)].

A party may seek review of the trial court's determination that leave to amend should not be granted. Denial of leave to amend constitutes an abuse of discretion if the pleading on its face does not show that it is incapable of amendment [see *Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn.* (1998) 63 CA4th 211, 219, 73 CR2d 586 ].

**11.47[6] Losing Party May Move for a New Trial.** A party may seek relief from judgment on the pleadings in the trial court by moving for a new trial in accordance with CCP § 659 [Carney v. Simmonds (1957) 49 C2d 84, 88-90, 315 P2d 305; Olson v County of Sacramento (1969) 274 CA2d 316, 322, 79 CR 140].



#### **Cross Reference:**

Discussion of motions for new trial, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 21, Motion for New Trial.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial JudgmentsJudgment on the Pleadings



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1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.48

**11.48 Obtaining Review of Ruling on Motion for Judgment on the Pleadings.**

**11.48[1] Order Itself Is Not Reviewable; Subsequent Judgment Is.** An order on a motion for judgment on the pleadings is not itself reviewable. The proper procedure is to appeal from the subsequent judgment [ *Cream v. Wheatcraft* (1953) 115 CA2d 517, 522, 252 P2d 637 ].

**11.48[2] Standard of Review on Appeal Is Identical to Demurrer.** A judgment on the pleadings is equivalent to a judgment entered after a demurrer is sustained. Therefore, the standard of review of the two judgments on appeal is identical [see *Kempton v. City of Los Angeles* (2008) 165 CA4th 1344, 1347-1348, 81 CR3d 852 ; *Pardee Constr. Co. v. Ins. Co. of the West* (2000) 77 CA4th 1340, 1361 n25, 92 CR2d 443 ]. The standard of review when a motion for judgment on the pleadings is denied is the same as the standard for reviewing an overruled demurrer [ *McCutchen v. City of Montclair* (1999) 73 CA4th 1138, 1144, 87 CR2d 95 ].

➡ **Cross Reference:**

Discussion of appellate review of demurrers, see 11.34 -11.36.

**11.48[3] Appellate Court Must Accept As True All Well Pled Allegations and Facts.** In reviewing a ruling on a motion for judgment on the pleadings, an appellate court must accept as true all well pled allegations and facts [see, e.g., *Hong Soo Shin v. Oyoung Kong* (2000) 80 CA4th 498, 502 (court accepts as true all well pled allegations in complaint); *Sebago, Inc. v. City of Alameda* (1989) 211 CA3d 1372, 1379-1380, 259 CR 918 (court accepts as true all properly pled facts in answer and cross-complaint and disregards controverted allegations in complaint); *Lumbermens Mut. Cas. Co. v. Vaughn* (1988) 199 CA3d 171, 178, 244 CR 567 (facts alleged in attacked pleading accepted as true)].

**11.48[4] Reviewing Court May Consider Facts Subject to Judicial Notice As Well As Admissions.** In addition to the pleadings, the appellate court may take into account the following:

- Any matter of which a trial court may take judicial notice, even if the trial court refused to take judicial notice of the matter [see CCP § 459; *Sebago, Inc. v. City of Alameda* (1989) 211 CA3d 1372, 1380, 259 CR 918 ].
- A party's admissions or concessions that cannot reasonably be controverted [ *Pang v. Beverly*

*Hosp., Inc. (2000) 79 CA4th 986, 989-990, 94 CR2d 643 ].*

- Judicial admissions contained in a plaintiff's pleading or opposition papers [see *Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 CA4th 1525, 1534, 1536-1537, 38 CR2d 763 ].*

**11.48[5] Appellate Court May Also Review Decision to Grant Motion Without Leave to Amend.** If a trial court grants a motion for judgment on the pleadings without leave to amend, the decision to not allow amendment is reviewable. It has been held an abuse of discretion for a court to grant a motion for judgment on the pleadings as to an original complaint without leave to amend when the pleading did not show on its face that it was incapable of amendment [see *Kempton v. City of Los Angeles (2008) 165 CA4th 1344, 1347-1348, 81 CR3d 852 ; Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn. (1998) 63 CA4th 211, 219, 73 CR2d 586 ].*

**11.48[6] Review of Ruling May Be Available by Mandate.** Review by mandate may be appropriate in the following situations:

- When an order grants a motion for judgment on the pleadings and disposes to one or more causes of action, parties, or defenses, but does not dispose of the entire case [see, e.g., *La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 CA3d 1131, 1140-1141, 261 CR 146 ].*
- When a motion for judgment on the pleadings is denied and the issue is purely legal in nature and if significant legal import [ *Am. Int'l Group, Inc. v. Superior Court (1991) 234 CA3d 749, 755, 285 CR 765 ].*

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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Chapter 11 Demurrers and Motions for Judgment on the Pleadings

# VII. FORMS

## A. Demurring to a Pleading

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.49*

### 11.49 Notice of Hearing on Demurrer.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                  |
|------------------------------|---|----------------------------------|
| _____ [name],                | ) |                                  |
| Plaintiff, vs. _____ [name], | ) | NO. _____                        |
| Defendant.                   | ) | NOTICE OF HEARING ON DEMURRER OF |
|                              | ) | _____ [party, e.g., DEFENDANT    |
|                              | ) | MARY JONES] TO _____ [specify    |
|                              | ) | pleading, e.g., COMPLAINT] OF    |
|                              | ) | _____ [party, e.g., PLAINTIFF    |
|                              | ) | JOHN SMITH]                      |
|                              | ) | Date: _____                      |
|                              | ) | Time: _____                      |
|                              | ) | Location: _____                  |
|                              | ) | Judge: _____                     |
|                              | ) | Date Action Filed: _____         |
|                              | ) | Trial Date: _____                |

To the above-named \_\_\_\_\_ [specify, e.g., plaintiff] and to \_\_\_\_\_ [name], his/her/its attorney:

NOTICE IS HEREBY GIVEN that \_\_\_\_\_ [party, e.g., Defendant Mary Jones's] demurrer to the \_\_\_\_\_ [specify pleading, e.g., complaint], a copy of which is served herewith, has been set for hearing on \_\_\_\_\_ [date not later than 35 days following filing of demurrer or first date available thereafter], at

\_\_\_\_\_[*time*], or as soon thereafter as the matter may be heard, in the courtroom of  
[\_\_\_\_\_] (Department or Division) \_\_\_\_\_ of] the above-entitled court, located [in the  
\_\_\_\_\_] (*name of building*)] at \_\_\_\_\_ [*street address and city*], California.

[Dated: \_\_\_\_\_.]

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

[*party's status and name*]

#### NOTES.

##### **Authority:**

*CCP § 1005(b)*



##### **Timing:**

*See 11.16[1]*

##### **Drafting Notice of Hearing:**

*See 11.16[1]*

##### **Related Form of Demurrer to Complaint or Cross-Complaint:**

*See 11.51 -11.54*

##### **Related Form of Demurrer to Answer:**

*See 11.55*





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# VII. FORMS

## A. Demurring to a Pleading

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.50*

### 11.50 Stipulation Postponing Hearing on Demurrer and Order.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                      |
|------------------------------|---|--------------------------------------|
| _____ [name],                | ) |                                      |
| Plaintiff, vs. _____ [name], | ) | NO. _____                            |
| Defendant.                   | ) | STIPULATION OF _____ [party,         |
|                              | ) | e.g., DEFENDANT MARY JONES] AND      |
|                              | ) | _____ [party, e.g., PLAINTIFF        |
|                              | ) | JOHN SMITH] TO POSTPONE HEARING DATE |
|                              | ) | ON DEMURRER, AND ORDER               |
|                              | ) | Date: _____                          |
|                              | ) | Time: _____                          |
|                              | ) | Location: _____                      |
|                              | ) | Judge: _____                         |
|                              | ) | Date Action Filed: _____             |
|                              | ) | Trial Date: _____                    |

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective counsel that the hearing on the demurrer of \_\_\_\_\_ [party, e.g., Defendant Mary Jones] to the \_\_\_\_\_ [specify pleading, e.g., complaint] in this action, filed on \_\_\_\_\_ [date], and noticed for hearing on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], be postponed to \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter can be heard, for the following reason(s): \_\_\_\_\_ [specify, e.g., Both plaintiff's and defendant's counsel will be out of the county on the scheduled hearing day as directed by summons to testify before the state legislature].

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Plaintiff \_\_\_\_\_ [name]

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant \_\_\_\_\_ [name]

It is so ordered.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

CCP §§ 283(1), 595.2

**Continuing Demurrer Hearing by Stipulation:**

See 11.22[2]

**Related Form of Notice of Demurrer:**

See 11.49



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Chapter 11 Demurrers and Motions for Judgment on the Pleadings

# VII. FORMS

## A. Demurring to a Pleading

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.51*

### 11.51 General Demurrer to Complaint or Cross-Complaint--No Cause of Action Stated.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                                    |
|------------------------------|---|----------------------------------------------------|
| _____ [name],                | ) |                                                    |
| Plaintiff, vs. _____ [name], | ) | NO. _____                                          |
| Defendant.                   | ) | DEMURRER OF _____ [party,                          |
|                              | ) | e.g., DEFENDANT MARY JONES] TO                     |
|                              | ) | _____ [COMPLAINT or CROSS-                         |
|                              | ) | COMPLAINT] OF _____ [party,                        |
|                              | ) | e.g., PLAINTIFF JOHN SMITH], SUPPORTING            |
|                              | ) | MEMORANDUM, AND NOTICE OF HEARING                  |
|                              | ) | [This demurrer is accompanied by a Request for Ju- |
|                              | ) | dicial Notice]                                     |
|                              | ) | [This demurrer is accompanied by a Notice of Mo-   |
|                              | ) | tion to Strike]                                    |
|                              |   | Date: _____                                        |
|                              |   | Time: _____                                        |
|                              |   | Location: _____                                    |
|                              |   | Judge: _____                                       |
|                              |   | Date Action Filed: _____                           |
|                              |   | Trial Date: _____                                  |

\_\_\_\_\_ [Identify party, e.g., Defendant Mary Jones] demurs to [\_\_\_\_\_ (e.g., the First Cause of Action) of] the \_\_\_\_\_ [complaint or cross-complaint] of \_\_\_\_\_ [e.g.,

Plaintiff John Smith] in this action on the ground that it does not state facts sufficient to constitute a cause of action.

[WHEREFORE, defendant prays that this/these demurrer(s) be sustained (without leave to amend), that plaintiff take nothing by his/her/its complaint, that defendant have judgment for his/her/its costs, and for all other proper relief.]

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

#### SUPPORTING MEMORANDUM

[Add required memorandum supporting the demurrer]

#### NOTICE OF HEARING

[Attach required notice of hearing]

NOTES.

#### **Authority:**

CCP § 430.10(e)

#### **Grounds for General Demurrer:**

See 11.08



#### **Timing:**

See 11.12

#### **Drafting Demurrer:**

See 11.15, 11.16

#### **Related Form of Notice of Hearing:**

See 11.49

#### **Related Form of Order:**

See 11.58

#### **Related Forms of Memoranda:**

See California Points and Authorities, Ch. 71, Demurrers and Motions for Judgment on the Pleadings,

§§ 71.20-71.29 (*Matthew Bender*)



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# VII. FORMS

## A. Demurring to a Pleading

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.52*

### 11.52 Special Demurrer to Complaint or Cross-Complaint--No Subject Matter Jurisdiction.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                                    |
|------------------------------|---|----------------------------------------------------|
| _____ [name],                | ) |                                                    |
| Plaintiff, vs. _____ [name], | ) | NO. _____                                          |
| Defendant.                   | ) | DEMURRER OF _____ [party,                          |
|                              | ) | e.g., DEFENDANT MARY JONES] TO                     |
|                              | ) | _____ [COMPLAINT or CROSS-                         |
|                              | ) | COMPLAINT] OF _____ [party,                        |
|                              | ) | e.g., PLAINTIFF JOHN SMITH], SUPPORTING            |
|                              | ) | MEMORANDUM, AND NOTICE OF HEARING                  |
|                              | ) | [This demurrer is accompanied by a Request for Ju- |
|                              | ) | dicial Notice]                                     |
|                              | ) | [This demurrer is accompanied by a Notice of Mo-   |
|                              | ) | tion to Strike]                                    |
|                              |   | Date: _____                                        |
|                              |   | Time: _____                                        |
|                              |   | Location: _____                                    |
|                              |   | Judge: _____                                       |
|                              |   | Date Action Filed: _____                           |
|                              |   | Trial Date: _____                                  |

\_\_\_\_\_ [Identify party, e.g., Defendant Mary Jones] demurs to [\_\_\_\_\_ (e.g., the First Cause of Action) of] the \_\_\_\_\_ [complaint or cross-complaint] of \_\_\_\_\_ [e.g.,

Plaintiff John Smith] in this action on the ground that the court has no jurisdiction of the subject of the cause of action therein alleged [for the following reasons: \_\_\_\_\_ (*specify, e.g., The action filed in this Superior Court may only be filed in the Supreme Court or Court of Appeal*)].

[WHEREFORE, defendant prays that this/these demurrer(s) be sustained (without leave to amend), that plaintiff take nothing by his/her/its complaint, that defendant have judgment for his/her/its costs, and for all other proper relief.]

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

[*party's status and name*]

#### SUPPORTING MEMORANDUM

[*Add required memorandum supporting the demurrer*]

#### NOTICE OF HEARING

[*Attach required notice of hearing*]

#### NOTES.

##### **Authority:**

*CCP § 430.10(a)*

##### **Grounds for Special Demurrer:**

*See 11.09[3]*



##### **Timing:**

*See 11.12*

##### **Drafting Demurrer:**

*See 11.15, 11.16*

##### **Related Form of Notice of Hearing:**

*See 11.49*

##### **Related Form of Order:**

*See 11.58*

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 71, Demurrers and Motions for Judgment on the Pleadings*, §§ 71.60, 71.61 (Matthew Bender)





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# VII. FORMS

## A. Demurring to a Pleading

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.53*

### 11.53 Special Demurrer to Complaint or Cross-Complaint--Another Action Pending.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                                    |
|------------------------------|---|----------------------------------------------------|
| _____ [name],                | ) |                                                    |
| Plaintiff, vs. _____ [name], | ) | NO. _____                                          |
| Defendant.                   | ) | DEMURRER OF _____ [party,                          |
|                              | ) | e.g., DEFENDANT MARY JONES] TO                     |
|                              | ) | _____ [COMPLAINT or CROSS-                         |
|                              | ) | COMPLAINT] OF _____ [party,                        |
|                              | ) | e.g., PLAINTIFF JOHN SMITH], SUPPORTING            |
|                              | ) | MEMORANDUM, AND NOTICE OF HEARING                  |
|                              | ) | [This demurrer is accompanied by a Request for Ju- |
|                              | ) | dicial Notice]                                     |
|                              | ) | [This demurrer is accompanied by a Notice of Mo-   |
|                              | ) | tion to Strike]                                    |
|                              |   | Date: _____                                        |
|                              |   | Time: _____                                        |
|                              |   | Location: _____                                    |
|                              |   | Judge: _____                                       |
|                              |   | Date Action Filed: _____                           |
|                              |   | Trial Date: _____                                  |

\_\_\_\_\_ [Identify party, e.g., Defendant Mary Jones] demurs to [\_\_\_\_\_ (e.g., the First Cause of Action) of] the \_\_\_\_\_ [complaint or cross-complaint] of \_\_\_\_\_ [e.g.,

Plaintiff John Smith] in this action on the ground that there is another action pending between the same parties on the same cause of action, to wit, an action entitled John Smith, Plaintiff, vs. Mary Jones, Defendant, No. \_\_\_\_\_, now pending in the \_\_\_\_\_ Court of \_\_\_\_\_, and in which summons was served on \_\_\_\_\_ [date]. [This court is hereby requested to take judicial notice of this other pending action as set forth in the accompanying Request for Judicial Notice, and, for that purpose, certified copies of the (records and) files in that action attached to the Request for Judicial Notice.]

[WHEREFORE, defendant prays that this/these demurrer(s) be sustained (without leave to amend), that plaintiff take nothing by his/her/its complaint, that defendant have judgment for his/her/its costs, and for all other proper relief.]

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

#### SUPPORTING MEMORANDUM

[Add required memorandum supporting the demurrer]

#### NOTICE OF HEARING

[Attach required notice of hearing]

NOTES.

#### **Authority:**

CCP § 430.10(c)

#### **Grounds for Special Demurrer:**

See 11.09[5]



#### **Timing:**

See 11.12

#### **Drafting Demurrer:**

See 11.15, 11.16

#### **Related Form of Notice of Hearing:**

See 11.49

**Related Form of Order:**

See 11.58

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 71, Demurrers and Motions for Judgment on the Pleadings, § 71.65 (Matthew Bender)*



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# VII. FORMS

## A. Demurring to a Pleading

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.54*

### 11.54 Special Demurrer to Complaint or Cross-Complaint--Defect of Parties.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                                    |
|------------------------------|---|----------------------------------------------------|
|                              | ) |                                                    |
|                              | ) | NO. _____                                          |
|                              | ) | DEMURRER OF _____ [party,                          |
|                              | ) | e.g., DEFENDANT MARY JONES] TO                     |
| _____ [name],                | ) | _____ [COMPLAINT or CROSS-                         |
| Plaintiff, vs. _____ [name], | ) | COMPLAINT] OF _____ [party,                        |
| Defendant.                   | ) | e.g., PLAINTIFF JOHN SMITH], SUPPORTING            |
|                              | ) | MEMORANDUM, AND NOTICE OF HEARING                  |
|                              | ) | [This demurrer is accompanied by a Request for Ju- |
|                              | ) | dicial Notice]                                     |
|                              | ) | [This demurrer is accompanied by a Notice of Mo-   |
|                              | ) | tion to Strike]                                    |
|                              |   | Date: _____                                        |
|                              |   | Time: _____                                        |
|                              |   | Location: _____                                    |
|                              |   | Judge: _____                                       |
|                              |   | Date Action Filed: _____                           |
|                              |   | Trial Date: _____                                  |

\_\_\_\_\_ [Identify party, e.g., Defendant Mary Jones] demurs to the [\_\_\_\_\_ (e.g., the First Cause of Action) of] the \_\_\_\_\_ [complaint or cross-complaint] of \_\_\_\_\_ [e.g.,

Plaintiff John Smith] in this action on the ground that there is a defect or nonjoinder of parties \_\_\_\_\_  
 [plaintiff or defendant or cross-complainant or cross-defendant] in that \_\_\_\_\_ [specify party who  
 should have been joined, or explain basis of nonjoinder, e.g., The contract on which this action is based shows on its  
 face that it was signed by both the Plaintiff and the Plaintiff's spouse, Jane Smith, who is not joined as a plaintiff in this  
 action].

[WHEREFORE, defendant prays that this/these demurrer(s) be sustained (without leave to amend), that plaintiff take  
 nothing by his/her/its complaint, that defendant have judgment for his/her/its costs, and for all other proper relief.]

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

#### SUPPORTING MEMORANDUM

[Add required memorandum supporting the demurrer]

#### NOTICE OF HEARING

[Attach required notice of hearing]

#### NOTES.

##### **Authority:**

CCP § 430.10(d)

##### **Grounds for Special Demurrer:**

See 11.09[6]



##### **Timing:**

See 11.12

##### **Drafting Demurrer:**

See 11.15, 11.16

##### **Related Form of Notice of Hearing:**

See 11.49

##### **Related Form of Order:**

See 11.58

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 71, Demurrers and Motions for Judgment on the Pleadings*, §§ 71.66, 71.67 (Matthew Bender)



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# VII. FORMS

## A. Demurring to a Pleading

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.55*

### 11.55 Special Demurrer to Complaint or Cross-Complaint--Pleading Is Uncertain.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                                    |
|------------------------------|---|----------------------------------------------------|
| _____ [name],                | ) |                                                    |
| Plaintiff, vs. _____ [name], | ) | NO. _____                                          |
| Defendant.                   | ) | DEMURRER OF _____ [party,                          |
|                              | ) | e.g., DEFENDANT MARY JONES] TO                     |
|                              | ) | _____ [COMPLAINT or CROSS-                         |
|                              | ) | COMPLAINT] OF _____ [party,                        |
|                              | ) | e.g., PLAINTIFF JOHN SMITH], SUPPORTING            |
|                              | ) | MEMORANDUM, AND NOTICE OF HEARING                  |
|                              | ) | [This demurrer is accompanied by a Request for Ju- |
|                              | ) | dicial Notice]                                     |
|                              | ) | [This demurrer is accompanied by a Notice of Mo-   |
|                              | ) | tion to Strike]                                    |
|                              |   | Date: _____                                        |
|                              |   | Time: _____                                        |
|                              |   | Location: _____                                    |
|                              |   | Judge: _____                                       |
|                              |   | Date Action Filed: _____                           |
|                              |   | Trial Date: _____                                  |

\_\_\_\_\_ [Identify party, e.g., Defendant Mary Jones] demurs to the [\_\_\_\_\_ (e.g., the First Cause of Action) of] the \_\_\_\_\_ [complaint or cross-complaint] of \_\_\_\_\_ [e.g.,

Plaintiff John Smith] in this action on the ground that it is uncertain in that \_\_\_\_\_ [*specify, e.g., in Paragraph 3, on page 9, lines 12 through 18, the alleged negligent act is without a date nor does it specify the county and location of the alleged vehicle collision*].

[WHEREFORE, defendant prays that this/these demurrer(s) be sustained (without leave to amend), that plaintiff take nothing by his/her/its complaint, that defendant have judgment for his/her/its costs, and for all other proper relief.]

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

[*party's status and name*]

#### SUPPORTING MEMORANDUM

[*Add required memorandum supporting the demurrer*]

#### NOTICE OF HEARING

[*Attach required notice of hearing*]

#### NOTES.

##### **Authority:**

*CCP § 430.10(f)*

##### **Grounds for Special Demurrer:**

*See 11.09[8]*



##### **Timing:**

*See 11.12*

##### **Drafting Demurrer:**

*See 11.15, 11.16*

##### **Related Form of Notice of Hearing:**

*See 11.49*

##### **Related Form of Order:**

*See 11.58*



**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 71, Demurrers and Motions for Judgment on the Pleadings*, §§ 71.68-71.71 (Matthew Bender)



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Chapter 11 Demurrers and Motions for Judgment on the Pleadings

# VII. FORMS

## A. Demurring to a Pleading

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.56*

### 11.56 Demurrer to Answer--No Defense Stated.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                                    |
|------------------------------|---|----------------------------------------------------|
|                              | ) |                                                    |
|                              | ) | NO. _____                                          |
|                              | ) | DEMURRER OF _____ [name of                         |
|                              | ) | plaintiff/cross-complainant] TO ANSWER OF          |
| _____ [name],                | ) | _____ [name of defendant/                          |
| Plaintiff, vs. _____ [name], | ) | cross-defendant, e.g., DEFENDANT MARY              |
| Defendant.                   | ) | JONES], SUPPORTING MEMORANDUM, AND                 |
|                              | ) | NOTICE OF HEARING                                  |
|                              | ) | [This demurrer is accompanied by a Request for Ju- |
|                              | ) | dicial Notice]                                     |
|                              | ) | [This demurrer is accompanied by a Notice of Mo-   |
|                              | ) | tion to Strike]                                    |
|                              |   | Date: _____                                        |
|                              |   | Time: _____                                        |
|                              |   | Location: _____                                    |
|                              |   | Judge: _____                                       |
|                              |   | Date Action Filed: _____                           |
|                              |   | Trial Date: _____                                  |

\_\_\_\_\_ [Identify party, e.g., Plaintiff John Smith] demurs to the [\_\_\_\_\_ (e.g., Third  
Affirmative Defense) of the] answer of \_\_\_\_\_ [identify party, e.g., Defendant Mary Jones] to the

\_\_\_\_\_ [complaint *or* cross-complaint] in this action on the ground that it does not state facts sufficient to constitute a defense.

[WHEREFORE, plaintiff/cross-complainant prays that this/these demurrer(s) be sustained (without leave to amend), that plaintiff/cross-complainant take judgment as prayed for in his/her/its complaint on file herein.]

[Dated: \_\_\_\_\_.]

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

#### SUPPORTING MEMORANDUM

[Add required memorandum supporting the demurrer]

#### NOTICE OF HEARING

[Attach required notice of hearing]

NOTES.

#### **Authority:**

CCP §§ 430.20(a), 430.30

#### **Grounds for Demurrer to Answer:**

See 11.10[2]



#### **Timing:**

See 11.12[2]

#### **Drafting Demurrer:**

See 11.15, 11.16

#### **Related Form of Notice of Hearing:**

See 11.49

#### **Related Form of Order:**

See 11.58

#### **Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 71, Demurrers and Motions for Judgment on the Pleadings*, §§ 71.102, 71.103 (Matthew Bender)



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# VII. FORMS

## A. Demurring to a Pleading

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.57*

### 11.57 Special Demurrer to Answer--Pleading Is Uncertain.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                                    |
|------------------------------|---|----------------------------------------------------|
|                              | ) |                                                    |
|                              | ) | NO. _____                                          |
|                              | ) | DEMURRER OF _____ [name of                         |
|                              | ) | plaintiff/cross-complainant] TO ANSWER OF          |
| _____ [name],                | ) | _____ [name of defendant/                          |
| Plaintiff, vs. _____ [name], | ) | cross-defendant, e.g., DEFENDANT MARY              |
| Defendant.                   | ) | JONES], SUPPORTING MEMORANDUM, AND                 |
|                              | ) | NOTICE OF HEARING                                  |
|                              | ) | [This demurrer is accompanied by a Request for Ju- |
|                              | ) | dicial Notice]                                     |
|                              | ) | [This demurrer is accompanied by a Notice of Mo-   |
|                              | ) | tion to Strike]                                    |
|                              |   | Date: _____                                        |
|                              |   | Time: _____                                        |
|                              |   | Location: _____                                    |
|                              |   | Judge: _____                                       |
|                              |   | Date Action Filed: _____                           |
|                              |   | Trial Date: _____                                  |

\_\_\_\_\_ [Identify party, e.g., Plaintiff John Smith] demurs to the [\_\_\_\_\_ (e.g., Third  
Affirmative Defense) of the] answer of \_\_\_\_\_ [identify party, e.g., Defendant Mary Jones] to the

\_\_\_\_\_ [complaint or cross-complaint] in this action on the ground that it is uncertain in that  
 \_\_\_\_\_ [specify, e.g., in Paragraph 5, on page 3, lines 12-20 of the answer, defendant denies that  
 plaintiff and defendant entered into an oral contract on or about March 1, 2003, as alleged in the complaint, or into any  
 contract at all, oral or written, on this or any other date, and in Paragraph 10, on page 6, lines 8-14 of the answer,  
 defendant expressly admits the truth of the allegations contained in Paragraph 6 of the complaint herein, which  
 paragraph realleges the parties' making of an oral contract on or about March 1, 2003, and specifically alleges the terms,  
 conditions, and agreements of the parties under that contract; it therefore cannot be ascertained from the answer whether  
 defendant is admitting or denying that the parties entered into an oral contract as described in the complaint on or about  
 March 1, 2003].

[WHEREFORE, plaintiff/cross-complainant prays that this/these demurrer(s) be sustained (without leave to amend),  
 that plaintiff/cross-complainant take judgment as prayed for in his/her/its complaint on file herein.]

[Dated: \_\_\_\_\_.]

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

#### SUPPORTING MEMORANDUM

[Add required memorandum supporting the demurrer]

#### NOTICE OF HEARING

[Attach required notice of hearing]

NOTES.

#### Authority:

CCP § 430.20(b)

#### Grounds for General Demurrer to Answer:

See 11.10[3]



#### Timing:

See 11.12[2]

#### Drafting Demurrer:

See 11.15, 11.16

**Related Form of Notice of Hearing:**

See 11.49

**Related Form of Order:**

See 11.58

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 71, Demurrers and Motions for Judgment on the Pleadings, § 71.104 (Matthew Bender)*



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VII. FORMS

B. Hearing on Demurrer and Reacting to Orders on Demurrer

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.58*

**11.58 Order on Demurrer.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                    |   |                               |
|------------------------------------|---|-------------------------------|
| _____ [name],                      | ) |                               |
| Plaintiff [and Cross-Defendant],   | ) |                               |
| vs. _____ [name],                  | ) |                               |
| Defendant [and Cross-Complainant]. | ) | NO. _____                     |
| [vs. _____ [name],                 | ) | ORDER _____ [describe ruling, |
| Cross-Defendant.]                  | ) | e.g., OVERRULING DEMURRER]    |
|                                    | ) |                               |
|                                    | ) |                               |
|                                    | ) |                               |

The demurrer of \_\_\_\_\_ [Defendant or Cross-defendant or Plaintiff or Cross-complainant]  
\_\_\_\_\_ [name] to the \_\_\_\_\_ [designate pleading, e.g., First Amended Complaint of  
Plaintiff John Smith] came on regularly for hearing by the court on \_\_\_\_\_ [date].  
\_\_\_\_\_ [Name] appeared as counsel for \_\_\_\_\_ [party, e.g., Plaintiff John Smith], and  
\_\_\_\_\_ [name] appeared as counsel for \_\_\_\_\_ [party, e.g., Defendant Mary Jones].  
After hearing, the matter was submitted to the court for a ruling [and taken under advisement by the court]. The court,  
having read and considered the supporting and opposing memoranda and having heard and considered the arguments of  
counsel, and good cause appearing,

[EITHER, if overruled]



IT IS ORDERED that the demurrer be, and hereby is, overruled [, and \_\_\_\_\_ (defendant or cross-defendant) is granted \_\_\_\_\_ days, after notice, in which to serve and file his/her/its answer to the \_\_\_\_\_ (*designate pleading e.g., First Amended Complaint*), subject to the following terms: \_\_\_\_\_ (*specify*)].

[OR, if sustained with leave to amend]

IT IS ORDERED that the demurrer be, and is, sustained on the ground \_\_\_\_\_ [*specify, e.g., that the Complaint does not state facts sufficient to constitute a cause of action in that it shows on its face that the action is barred by the statute of limitations*], and Plaintiff is hereby granted \_\_\_\_\_ days, after notice, in which to serve and file a First Amended Complaint].

[OR, if sustained without leave to amend]

IT IS ORDERED that the demurrer be, and hereby is, sustained without leave to amend on the ground \_\_\_\_\_ [*specify, e.g., that the First Amended Complaint does not state facts sufficient to constitute a cause of action in that it shows on its face that the action is barred by the statute of limitations*].

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

CCP §§ 472a, 472b, 472d

**Requirements for Order:**

See 11.29

**Related Form of Notice of Court's Ruling on Demurrer:**

See 11.59



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VII. FORMS

B. Hearing on Demurrer and Reacting to Orders on Demurrer

1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.59

**11.59 Notice of Court's Ruling on Demurrer.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                      |   |                                     |
|--------------------------------------|---|-------------------------------------|
| _____ [name],                        | ) |                                     |
| Plaintiff [and Cross-Defendant], vs. | ) | NO. _____                           |
| _____ [name],                        | ) | NOTICE OF COURT'S ORDER             |
| Defendant [and Cross-Complainant].   | ) | _____ [describe ruling, e.g., OVER- |
| [vs.                                 | ) | RULING DEMURRER]                    |
| _____ [name],                        | ) | Date: _____                         |
| Cross-Defendant.]                    | ) | Time: _____                         |
|                                      | ) | Location: _____                     |
|                                      | ) | Judge: _____                        |
|                                      | ) | Date Action Filed: _____            |
|                                      | ) | Trial Date: _____                   |

To the above-named \_\_\_\_\_ [party against whom ruling was made] and to  
\_\_\_\_\_ [name], his/her/its attorney:

[EITHER, if demurrer overruled]

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], the court overruled your demurrer to the  
\_\_\_\_\_ [designate pleading, e.g., First Amended Complaint] in this action [and granted you  
\_\_\_\_\_ days in which to serve and file your answer to the \_\_\_\_\_ (designate

*pleading, e.g., First Amended Complaint*) [on the following terms \_\_\_\_\_ (*specify*)].

[OR, if *demurrer sustained*]

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [*date*], the court sustained \_\_\_\_\_  
[Defendant's or Cross-defendant's or Plaintiff's or Cross-complainant's] demurrer to the \_\_\_\_\_  
[*designate pleading, e.g., First Amended Complaint*] in this action[, without leave to amend,] on the ground  
\_\_\_\_\_ [*specify, e.g., that the First Amended Complaint does not state facts sufficient to constitute a*  
cause of action] [and granted you \_\_\_\_\_ days in which to serve and file a \_\_\_\_\_  
(*designate pleading, e.g., Second Amended Complaint*)].

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

[*party's status and name*]

NOTES.

**Authority:**

*Cal Rules Ct, Rules 3.1100, 3.1109*

**Related Form of Order on Demurrer:**

*See 11.58*



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VII. FORMS

B. Hearing on Demurrer and Reacting to Orders on Demurrer

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.60*

**11.60 Notice of Motion for Order Striking Untimely Amended Complaint and Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff, vs. \_\_\_\_\_ [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR OR-  
) DER STRIKING UNTIMELY AMENDED COM-  
) PLAINT AND DISMISSING ACTION FOR FAIL-  
) URE TO AMEND COMPLAINT AFTER DEMUR-  
) RER SUSTAINED WITH LEAVE TO AMEND  
) AND SUPPORTING MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To Plaintiff \_\_\_\_\_ [name] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon  
thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of]  
this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], defendant will, and hereby

does, move pursuant to *Code of Civil Procedure Section 581(f)(2)* and *California Rules of Court, Rule 3.1320(h)*, for an order striking the \_\_\_\_\_ [*specify, e.g., Second Amended Complaint*] and dismissing this action on the ground that plaintiff failed to file an amended complaint within the time required by \_\_\_\_\_ [*law or this court's order made and entered on* \_\_\_\_\_ (*date*), sustaining defendant's demurrer to the complaint herein and granting plaintiff \_\_\_\_\_ days in which to serve and file an amended complaint].

The motion will be based on this notice of motion[, on the declaration(s) of \_\_\_\_\_ (*name(s)*)] and the supporting memorandum served and filed herewith, on the papers, records, and file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

[*party's status and name*]

#### SUPPORTING MEMORANDUM

[*Add required memorandum supporting the motion to strike*]

NOTES.

#### **Authority:**

*CCP § 581(f)(2), Cal Rules Ct, Rule 3.1320(h)*



#### **Timing:**

See 11.31

#### **Drafting Motion for Reconsideration of Ruling on Demurrer:**

See 11.31

#### **Related Form of Ex Parte Application for Order Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend:**

See 11.61

#### **Related Form of Order Dismissing Action on Plaintiff's Failure to File Amended Pleading:**

See 11.62



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VII. FORMS

B. Hearing on Demurrer and Reacting to Orders on Demurrer

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.61*

**11.61 Ex Parte Application for Order Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend and Order.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name], )  
Plaintiff, vs. \_\_\_\_\_ [name], )  
Defendant. )

NO. \_\_\_\_\_  
EX PARTE APPLICATION FOR ORDER DIS-  
MISSING ACTION FOR FAILURE TO AMEND  
COMPLAINT AFTER DEMURRER WAS SUS-  
TAINED WITH LEAVE TO AMEND, DECLARA-  
TION OF NOTICE, DECLARATION OF  
\_\_\_\_\_, [name], SUPPORTING  
MEMORANDUM [AND ORDER]

[EITHER]

Defendant \_\_\_\_\_ [name] hereby moves for an order dismissing the above-entitled action [as to this defendant] pursuant to *Code of Civil Procedure Section 581(f)(2)* and *California Rules of Court, Rule 3.1320(h)* on the ground that, on \_\_\_\_\_ [date], this court sustained defendant's demurrer to the complaint with \_\_\_\_\_ days leave to amend, that, as shown by the records and file herein of which the court is requested to take judicial notice, plaintiff, at the hearing on the demurrer, in open court, orally waived service of notice of the court's ruling on the demurrer, and the waiver was entered in the court's minutes, that plaintiff has failed to [serve or] file an amended complaint, and that the time for doing so has expired.

[OR]

Defendant \_\_\_\_\_ [name] hereby moves for an order dismissing the above-entitled action [as to this defendant] pursuant to *Code of Civil Procedure Section 581(f)(2)* and *California Rules of Court, Rule 3.1320(h)* on the ground that, on \_\_\_\_\_ [date], this court sustained \_\_\_\_\_ [this] defendant's demurrer to the complaint with \_\_\_\_\_ days leave to amend, that, as shown by the records and file herein of which the court is requested to take judicial notice, notice of the court's ruling was served on plaintiff on \_\_\_\_\_ [date], that plaintiff has failed to [serve or] file an amended complaint, and that the time for doing so has expired.

[CONTINUE]

[Defendant \_\_\_\_\_ (name) further represents that, at no time, by stipulation or otherwise, has he/she granted plaintiff an extension of time within which to file an amended complaint.]

[I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.]

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant \_\_\_\_\_ [name]

#### DECLARATION OF NOTICE OF APPLICATION FOR EX PARTE ORDER

[Add required declaration of notice to opposing party of application]

#### DECLARATION IN SUPPORT OF EX PARTE APPLICATION

[Add required declaration supporting application]

#### SUPPORTING MEMORANDUM

[Add required memorandum supporting the application]

#### ORDER

It appearing from the records of this court that defendant's demurrer to the plaintiff's complaint in this action was sustained on \_\_\_\_\_ [date], with \_\_\_\_\_ days leave to amend, that plaintiff \_\_\_\_\_ [waived service of notice of the ruling or was properly served with notice of the court's ruling], that no extension of this time was granted by the court, that plaintiff has failed to file an amended complaint within the time allowed or at all, and that the time for doing so has expired, and, on the further representation to this court, that defendant \_\_\_\_\_ [name] has at no time, by stipulation or otherwise, granted plaintiff an extension of time within which to file the amended complaint,

IT IS SO ORDERED THAT the above-entitled action [or complaint as to defendant \_\_\_\_\_ (name)] be, and hereby is, dismissed [without prejudice] and that defendant recover costs in the sum of \$\_\_\_\_\_.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 581(f)(2); Cal Rules Ct, Rule 3.1320(h)*



**Timing:**

*See 11.33[2]*

**Drafting Ex Parte Application for Order Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend:**

*See 11.33[2]*

**Related Form of Notice of Motion Striking Untimely Amended Complaint and Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend:**

*See 11.60*

**Related Order Dismissing Action on Plaintiff's Failure to File Amended Pleading:**

*See 11.62*





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VII. FORMS

B. Hearing on Demurrer and Reacting to Orders on Demurrer

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.62*

**11.62 Order Dismissing Action on Plaintiff's Failure to File Amended Pleading.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                         |
|------------------------------|---|-------------------------|
| _____ [name],                | ) |                         |
| Plaintiff, vs. _____ [name], | ) | NO. _____               |
| Defendant.                   | ) | ORDER DISMISSING ACTION |
|                              | ) |                         |
|                              | ) |                         |

Defendant's motion for an order dismissing this action came on regularly for hearing by the court on \_\_\_\_\_ [date]. Defendant appeared by counsel \_\_\_\_\_ [name]; plaintiff appeared by counsel \_\_\_\_\_ [name].

It appearing from the records and file herein that the demurrer of defendant \_\_\_\_\_ [name] to the complaint of plaintiff \_\_\_\_\_ [name] was sustained on \_\_\_\_\_ [date], [with \_\_\_\_\_ days leave to amend], that \_\_\_\_\_ [plaintiff, at the hearing on the demurrer, in open court, orally waived service of notice of the court's ruling on the demurrer and the waiver was entered in the minutes of the court or notice of the court's ruling on the demurrer was served (by mail) on plaintiff on \_\_\_\_\_ (date)], that the time so limited by the court in which to file an amended pleading \_\_\_\_\_ [was not extended by stipulation of the parties or order of the court or was extended \_\_\_\_\_ days by \_\_\_\_\_ (stipulation of the parties or order of the court) dated \_\_\_\_\_ (date)], that \_\_\_\_\_ [the period has or both the original and extended periods have] expired, and that no amended complaint has been filed with the court, now, therefore.

IT IS ORDERED that the above-entitled action be, and it hereby is, dismissed [without prejudice] and that defendant recover costs herein incurred in the sum of \$\_\_\_\_\_.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

CCP §§ 581d, 581(f)(2)



**Timing:**

See 11.33[2]

**Drafting Order for Dismissal of Action After Plaintiff Has Failed to File Amended Complaint:**

See 11.33[2]

**Related Form of Notice of Motion Striking Untimely Amended Complaint and Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend:**

See 11.60

**Ex Parte Application for Order Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend:**

See 11.61



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VII. FORMS

C. Motions for Judgment on the Pleadings

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.63*

**11.63 Notice of Motion for Judgment on the Pleadings--Failure to State Cause of Action or Defense.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                       |
|------------------------------|---|---------------------------------------|
| _____ [name],                | ) |                                       |
| Plaintiff, vs. _____ [name], | ) | NO. _____                             |
| Defendant.                   | ) | MOTION AND NOTICE OF MOTION FOR JUDG- |
|                              | ) | MENT ON THE PLEADINGS                 |
|                              | ) | Date: _____                           |
|                              | ) | Time: _____                           |
|                              | ) | Location: _____                       |
|                              | ) | Judge: _____                          |
|                              | ) | Date Action Filed: _____              |
|                              | ) | Trial Date: _____                     |

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., Defendant Mary Jones], will, and hereby does, move pursuant to *Code of Civil Procedure Section 438* for entry of judgment on the pleadings in favor of \_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] and against \_\_\_\_\_ [party against whom motion is directed, e.g., Plaintiff John Smith]. The motion will be made on the ground that the \_\_\_\_\_ [complaint states facts sufficient to constitute a cause of action and the answer does not state facts sufficient to constitute a defense or court lacks subject matter jurisdiction of the cause of

action alleged in the complaint *or* complaint does not state facts sufficient to constitute a cause of action].

The motion will be based on this notice of motion, on the supporting memorandum served and filed herewith, [on the stipulation of the parties attached hereto,] and on the records and file herein.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

NOTES.

**Authority:**

CCP § 438

**Grounds for Motion for Judgment on the Pleadings:**

See 11.44



**Timing:**

See 11.45

**Drafting Motion for Judgment on the Pleadings:**

See 11.45

**Related Form of Order:**

See 11.64

**Related Form of Notice of Motion to Strike and to Enter Judgment--Amended Pleading After Motion for Judgment on the Pleadings Not Timely Filed or in Violation of Prior Ruling:**

See 11.65

**Related Form of Notice of Motion to Enter Judgment--Failure to File Amended Pleading After Motion for Judgment on the Pleadings Was Granted With Leave to Amend and Party Failed to Amend:**

See 11.66

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 71, Demurrers and Motions for Judgment on the Pleadings*, §§ 71.130-71.133, 71.150 (Matthew Bender)



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VII. FORMS

C. Motions for Judgment on the Pleadings

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.64*

# **11.64 Order Granting or Denying Motion for Judgment on the Pleadings.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                     |
|------------------------------|---|-------------------------------------|
| _____ [name],                | ) |                                     |
| Plaintiff, vs. _____ [name], | ) | NO. _____                           |
| Defendant.                   | ) | ORDER _____ [GRANTING or            |
|                              | ) | DENYING] MOTION FOR JUDGMENT ON THE |
|                              | ) | PLEADINGS                           |

The motion of \_\_\_\_\_ [moving party] for judgment on the pleadings came on regularly for hearing by the court on \_\_\_\_\_ [date], on notice duly and regularly given. \_\_\_\_\_ [Name] appeared as counsel for plaintiff, and \_\_\_\_\_ [name] appeared as counsel for defendant. The matter having been argued and submitted and it appearing [from the \_\_\_\_\_ (specify pleadings) filed herein and the stipulation that the parties entered into and consented to be considered by this court] that the \_\_\_\_\_ [complaint states facts sufficient to constitute a cause of action and the answer does not state facts sufficient to constitute a defense or court lacks subject matter jurisdiction of the cause of action alleged in the complaint or complaint does not state facts sufficient to constitute a cause of action].

IT IS ORDERED that the motion be, and hereby is, \_\_\_\_\_ [denied or granted] (and \_\_\_\_\_ (specify party) is given 30 days in which to serve and file an amended \_\_\_\_\_ (specify pleading)).

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 438*

**Related Form of Notice of Motion for Judgment on the Pleadings--Failure to State Cause of Action or Defense:**

*See 11.63*

**Related Form of Notice of Motion to Strike and to Enter Judgment--Amended Pleading After Motion for Judgment on the Pleadings Not Timely Filed or in Violation of Prior Ruling:**

*See 11.65*

**Related Form of Notice of Motion to Enter Judgment--Failure to File Amended Pleading After Motion for Judgment on the Pleadings Was Granted With Leave to Amend and Party Failed to Amend:**

*See 11.66*



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VII. FORMS

C. Motions for Judgment on the Pleadings

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.65*

**11.65 Notice of Motion to Strike and to Enter Judgment--Amended Pleading After Motion for Judgment on the Pleadings Not Timely Filed or in Violation of Prior Ruling.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                       |
|------------------------------|---|---------------------------------------|
| _____ [name],                | ) |                                       |
| Plaintiff, vs. _____ [name], | ) | NO. _____                             |
| Defendant.                   | ) | MOTION AND NOTICE OF MOTION TO STRIKE |
|                              | ) | AMENDED PLEADING AND TO ENTER JUDG-   |
|                              | ) | MENT                                  |
|                              | ) | Date: _____                           |
|                              | ) | Time: _____                           |
|                              | ) | Location: _____                       |
|                              | ) | Judge: _____                          |
|                              | ) | Date Action Filed: _____              |
|                              | ) | Trial Date: _____                     |

\_\_\_\_\_

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., Defendant Mary Jones], will, and hereby does, move pursuant to *Code of Civil Procedure Sections 435(e), 436, 438(h)(4), and 438(i)(1)(a)* for an order to strike \_\_\_\_\_ [specify pleading, e.g., first amended complaint] and to enter judgment. The motion will be made on the ground that the \_\_\_\_\_ [specify

*pleading, e.g., first amended complaint*] \_\_\_\_\_ [was not filed within the time allowed in *and/or* violates] this Court's order of \_\_\_\_\_ [*date*] granting \_\_\_\_\_ [*moving party, e.g., Defendant Mary Jones's*] motion for judgment on the pleadings.

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [*name(s)*] and supporting the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

[*party's status and name*]

NOTES.

**Authority:**

*CCP § 438(h)(4)*



**Timing:**

*See 11.47[4]*

**Drafting Motion to Strike and Enter Judgment:**

*See 11.47[4]*

**Related Form of Notice of Motion for Judgment on the Pleadings:**

*See 11.63*

**Related Form of Notice of Motion to Enter Judgment--Failure to File Amended Pleading After Motion for Judgment on the Pleadings Was Granted With Leave to Amend and Party Failed to Amend:**

*See 11.66*





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C. Motions for Judgment on the Pleadings

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.66*

**11.66 Notice of Motion to Enter Judgment--Failure to File Amended Pleading After Motion for Judgment on the Pleadings Was Granted With Leave to Amend and Party Failed to Amend.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                      |
|------------------------------|---|--------------------------------------|
|                              | ) |                                      |
|                              | ) | NO. _____                            |
|                              | ) | MOTION AND NOTICE OF MOTION TO ENTER |
|                              | ) | JUDGMENT                             |
| _____ [name],                | ) | Date: _____                          |
| Plaintiff, vs. _____ [name], | ) | Time: _____                          |
| Defendant.                   | ) | Location: _____                      |
|                              | ) | Judge: _____                         |
|                              | ) | Date Action Filed: _____             |
|                              | ) | Trial Date: _____                    |

\_\_\_\_\_

To \_\_\_\_\_ [party, e.g., plaintiff] \_\_\_\_\_ [name] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., Defendant Mary Jones], will, and hereby does, move pursuant to *Code of Civil Procedure Section 438(h)(4)(C)* for an order to enter judgment. The motion will be made on the ground that the \_\_\_\_\_ [party against whom motion is directed, e.g., Plaintiff John Smith] failed to file an amended \_\_\_\_\_ [specify pleading, e.g., complaint] within the time allowed in this Court's order of \_\_\_\_\_ [date]

granting \_\_\_\_\_ [*moving party, e.g., Defendant Mary Jones's*] motion for judgment on the pleadings.

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

[*party's status and name*]

NOTES.

**Authority:**

CCP § 438(h)(4)(C)



**Timing:**

See 11.47[4]

**Drafting Motion to Enter Judgment:**

See 11.47[4]

**Related Form of Notice of Motion for Judgment on the Pleadings:**

See 11.63

**Related Form of Order Granting or Denying Motion for Judgment on the Pleadings:**

See 11.64



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VII. FORMS

C. Motions for Judgment on the Pleadings

*1-11 MB Practice Guide: CA Pretrial Civil Procedure 11.67*

**11.67 Judgment on the Pleadings--After Motion Was Granted With Leave to Amend and Party Failed to Amend.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |           |
|------------------------------|---|-----------|
| _____ [name],                | ) |           |
| Plaintiff, vs. _____ [name], | ) | NO. _____ |
| Defendant. _____             | ) | JUDGMENT  |
|                              | ) |           |
|                              | ) |           |

\_\_\_\_\_

The motion of \_\_\_\_\_ [party, e.g., Defendant Mary Jones] for judgment on the pleadings came on regularly for hearing by the court on \_\_\_\_\_ [date]. \_\_\_\_\_ [Name] appeared as counsel for plaintiff, and \_\_\_\_\_ [name] appeared as counsel for defendant. After hearing, the motion was granted [and \_\_\_\_\_ (party, e.g., Plaintiff John Smith) was granted 30 days within which to serve and file an amended \_\_\_\_\_ (specify pleading)].

[EITHER, if moving party is plaintiff]

It appearing that:

1. Defendant has failed to file an amended answer \_\_\_\_\_ [within the time allowed by or conforming to] the court's order of \_\_\_\_\_ [date], sustaining plaintiff's motion for judgment on the pleadings with leave to amend, and]

2. The complaint in this action states a cause of action entitling plaintiff to the relief prayed for and the answer fails to state any facts sufficient to constitute a defense to the complaint or to any portion of it,

IT IS ORDERED AND ADJUDGED that plaintiff \_\_\_\_\_ [*specify relief, e.g.,* have and recover from defendant the sum of \$ \_\_\_\_\_ as prayed for in the complaint], together with his/her/its costs herein incurred in the sum of \$ \_\_\_\_\_.

[OR, if moving party is defendant]

It appearing that:

1. Plaintiff has failed to file an amended complaint \_\_\_\_\_ [within the time allowed by or conforming to] the court's order of \_\_\_\_\_ [date], sustaining defendant's motion for judgment on the pleadings with leave to amend, and

2. The complaint fails to state facts sufficient to constitute a cause of action,

IT IS ORDERED AND ADJUDGED that plaintiff take nothing by his/her complaint and that defendant recover his/her costs herein incurred in the sum of \$ \_\_\_\_\_.

[CONTINUE]

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

CCP § 438(i)

**Grounds for Judgment After Motion for Judgment on Pleadings Was Granted With Leave to Amend and Party Failed to Amend:**

See 11.47[4], [5]



**Timing:**

See 11.47[4]

**Related Form of Notice of Motion for Judgment on the Pleadings:**

See 11.63

**Related Form of Order Granting or Denying Motion for Judgment on the Pleadings:**

See 11.64

**Related Form of Notice of Motion to Strike and to Enter Judgment--Amended Pleading After Motion for**

**Judgment on the Pleadings Not Timely Filed or in Violation of Prior Ruling:**

See 11.65



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Chapter 18 TROs and Preliminary Injunctions

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.syn*

**§ 18.syn Synopsis to Chapter 18: TROs and Preliminary Injunctions**

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18.11[4] Procedure to Obtain Preliminary Injunction Against Party Who Has Appeared in Action.

18.11[4][a] Based on Motion and Notice of Motion for Preliminary Injunction, Including Affidavits or Declarations and Supporting Memorandum.

18.11[4][b] All Papers Must Be Served on Opposing Party.

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18.20[1] Service of Notice.

18.20[2] Actual Notice.

18.21 Filing Motion for Contempt.

18.21[1] Elements to Establish Contempt.

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18.23 Appeal.

18.23[1] TRO.

18.23[1][a] Appeal May Be Taken From Order Granting, Denying, Dissolving, or Refusing to Dissolve TRO.

18.23[1][b] Standard of Review Is Abuse of Discretion.

18.23[2] Preliminary Injunction.

18.23[2][a] Appeal May Be Taken From Order Granting, Denying, Dissolving, or Refusing to Dissolve Preliminary Injunction.

18.23[2][b] Standard of Review Is Abuse of Discretion.

18.23[2][c] Appellate Court Will Not Reweigh Evidence.

18.23[2][d] Grant of Mandatory Injunction Given More Scrutiny on Appeal.

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18.27 Ex Parte Application and Supporting Declaration for TRO and Order to Show Cause, and Supporting Declaration Re Advance Notification.

18.28 Order to Show Cause Re Preliminary Injunction and TRO.

18.29 Motion and Notice of Motion for Preliminary Injunction, Supporting Declaration, and Supporting Memorandum.

18.30 Order Granting Preliminary Injunction and Requiring Undertaking.

18.31 Declaration Opposing Application for Preliminary Injunction.

18.32 Demurrer to Complaint for Injunctive Relief, Supporting Memorandum, and Notice of Hearing.

18.33 Order Denying Preliminary Injunction and Dissolving TRO.

18.34 Motion and Notice of Motion for Order Dissolving or Modifying TRO or Injunction, Supporting Declaration, and Supporting Memorandum.

18.35 Order Dissolving or Modifying TRO or Injunction.



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Chapter 18 TROs and Preliminary Injunctions  
I. STRATEGY

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.01*

**18.01 Scope.**

This chapter covers:

- Objectives and strategy for injunctions [see 18.02].
- Situations subject to injunctive relief [see 18.05 -18.06].
- Seeking injunctive relief [see 18.03, 18.04, 18.07-18.11; Forms: see 18.26 -18.30] and opposing injunctive relief [see 18.12 -18.14; Forms: see 18.31 -18.33].
- Dissolving or modifying an injunction [see 18.15 -18.18; Forms: see 18.34, 18.35].
- Enforcing an injunction [see 18.19, 18.20], including filing a motion for contempt [see 18.21].
- Appealing the grant or denial of injunctive relief [see 18.22 -18.25].

This chapter does not discuss permanent injunctions. For discussion, see California Forms of Pleading and Practice, Ch. 303, Injunctions (Matthew Bender).

**Core Statutes:**

*CCP §§ 525-534*



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Chapter 18 TROs and Preliminary Injunctions  
I. STRATEGY

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.02*

**18.02 Objective and Strategy.**

An injunction is an equitable remedy used to prevent a party from committing a particular act (prohibitory injunction) or to compel a party to do an affirmative act (mandatory injunction).

A temporary restraining order (TRO) is issued to preserve the status quo for a very short period pending a determination of whether a party is entitled to a preliminary injunction. A TRO may be issued ex parte. A preliminary injunction is issued to preserve the status quo during litigation pending a decision on the merits.

**Strategic Point--Review Local Court Rules:**



Although *Cal Rules Ct, Rule 3.20* preempts most local court rules governing provisional remedies, some local rules remain concerning certain procedural matters. You should consult those local rules.

**Strategic Point:**



Counsel need to make sure that the act or acts sought to be restrained or prohibited are imminent. Even if the harm threatened is irreparable it must still be imminent. Specifically, notwithstanding the scheduled destruction of an object if that destruction is not going to take place for a number of months--do not show up requesting an immediate TRO. These are extraordinary remedies that require not only the court's immediate attention but caution in fashioning the appropriate remedy so that there is no interference with someone's rights and due process.

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 303, Injunctions (Matthew Bender).

California Points and Authorities, Ch. 116, Injunctions (Matthew Bender).



**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Injunctions General Overview Civil Procedure Remedies Injunctions Temporary Restraining Orders





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Chapter 18 TROs and Preliminary Injunctions  
II. SEEKING INJUNCTIVE RELIEF

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.03*

**18.03 CHECKLIST: Seeking Injunctive Relief.**

☐ Determine nature of relief sought:

- ☐ Mandatory injunction;
- ☐ Prohibitory injunction; or
- ☐ Mixture of both.

**Discussion:**

See 18.07

☐ Decide whether to seek TRO.

**Authority:**

CCP § 527(c)

**Discussion:**

See 18.10[3][b]

☐ Determine whom to enjoin, what class of parties to enjoin, or both.

**Discussion:**

See 18.08

☐ Decide whether to also seek damages.

**Discussion:**

See 18.04[2]

☐ If seeking TRO:

☐ Prepare and file:

☐ Complaint, verified if it is to be used to prove facts.

☐ Ex parte application, supporting declaration, and supporting memorandum for TRO and order to show cause, and supporting declaration re advance notification.

**Authority:**

CCP § 527(c); Cal Rules Ct, Rules 3.1150(e), 3.1201

**Content Note:**

The application must state the fact and result of any previous application to a judicial officer for similar relief.

**Discussion:**

See 18.10[3][a], [b]

**Forms:**

See 18.26 (complaint), 18.27 (application)

☐ Proposed order to show cause and TRO.

**Prerequisite:**

If the action is initiated on the same day as the order to show cause is sought, complaint must be filed first. If the action was initiated earlier, request that court file be made available to the judge hearing the application.

**Timing:**

The hearing on the order to show cause must be held not later than 15 days or, if good cause appears to the court, 22 days after the date that the TRO is issued.

**Authority:**

CCP § 527(d)(1); Cal Rules Ct, Rules 3.1150(b), 3.1200 et seq.

**Discussion:**

See 18.10[3][b]; 18.10[4][g]

**Form:**

See 18.28

☐ Appear at TRO hearing.

**Authority:**

*Cal Rules Ct, Rule 3.1150(d)*

**Discussion:**

See 18.10[3][c]

- ☐ If TRO is granted ex parte, serve on opposing party:
- ☐ Order to show cause on opposing party as to why preliminary injunction should not be granted.

**Authority:**

*CCP § 527(d)(1), (2); Cal Rules Ct, Rules 3.1150(a)*

**Discussion:**

See 18.10[4][a]

- ☐ All affidavits or declarations and memorandum in support of application.

**Authority:**

*CCP § 527(d)(2)*

**Discussion:**

See 18.10[4][c]

- ☐ Complaint, if not previously served.

**Timing:**

The opposing party must be served with the order to show cause, verified complaint, declarations or affidavits, and supporting memorandum within five days after the date that the TRO was issued or two days prior to the hearing, whichever is earlier, or the TRO will be dissolved.

**Authority:**

*CCP § 527(d)(2)*

**Discussion:**

See 18.10[4][c], [d]

- ☐ If unable to serve the opposing party within the required time period, file an affidavit stating that the opposing party could not be served within the time required and ask the court to reissue the order to show cause and the TRO.

**Authority:**

*CCP § 572(d)(5)*

**Discussion:**

See 18.10[4][e]

- ☐ If TRO granted with notice to opposing party, serve motion and notice of motion for preliminary injunction, supporting declaration, and supporting memorandum.

**Authority:**

*Cal Rules Ct, Rule 3.1150(a)*

**Discussion:**

*See 18.10[4][b]*

**Form:**

*See 18.29*

- ☐ File an undertaking if required by the court.

**Discussion:**

*See 18.10[4][f], 18.11[6]*

- ☐ If TRO is not granted:

- ☐ Appeal decision, or

**Checklist for Appealing Denial of TRO:**

*See 18.22[2]*

**Authority:**

*CCP § 904.1(a)(6)* (unlimited civil cases); *CCP § 904.2(g)* (limited civil cases)

**Discussion:**

*See 18.10[5][a]*

- ☐ Follow procedure to obtain preliminary injunction.

**Discussion:**

*See 18.10[5][b]*

- ☐ If only preliminary injunction is sought:

- ☐ Prepare and file:

☐ If not previously filed, complaint for preliminary injunction, and damages (if damages are also sought).

☐ Supporting affidavits or declarations and a supporting memorandum.

**Discussion:**

*See 18.11[3][a]*

**Form:**

See 18.26 (complaint)

- ☐ Order to show cause as to why preliminary injunction should not be granted.

**Exception:**

If opposing party has already appeared in the action, an order to show cause is not needed. You can seek a preliminary injunction by motion with *CCP § 1005* notice. You must file a motion and notice of motion for preliminary injunction, including affidavits or declarations and supporting memorandum.

**Form:**

See 18.29

**Prerequisite:**

If the action is initiated on the same day that an order to show cause is filed, complaint must be filed first.

**Authority:**

*Cal Rules Ct, Rule 3.1150(a), (b)*

**Discussion:**

See 18.11[3][a], [4][a]

**Form:**

See 18.28

- ☐ Obtain judge's signature on order to show cause.

- ☐ Serve on opposing party:

- ☐ If not previously served, verified complaint.
- ☐ Affidavits or declarations and a memorandum in support of the application.
- ☐ Order to show cause.

**Exception:**

If opposing party has already appeared in the action, instead of serving an order to show cause, serve the motion and notice of motion for preliminary injunction, including affidavits or declarations and supporting memorandum, following standard noticed motion procedure.

**Form:**

See 18.29

**Authority:**

*CCP § 527(a); Cal Rules Ct, Rule 3.1150(a)*

**Discussion:**

See 18.11[3][b], [4][b]

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

☐ If preliminary injunction is granted:

☐ Obtain undertaking in amount ordered by court.

**Exception:**

Undertaking requirement not applicable to:

- Either spouse against the other in a proceeding for legal separation or dissolution of marriage.
- The applicant for an order under the Domestic Violence Prevention Act [*see Fam Code §§ 6200-6219*].
- The federal or California state government, counties, cities, districts or other political subdivisions of the state or officers of those public entities acting in their official capacity [*see CCP § 995.220*].
- A poor or indigent applicant.
- Waiver by defendant.



**Timing:**

The undertaking must be presented to the judge with the proposed preliminary injunction order within one court day after the granting of the injunction, unless otherwise ordered by the court.

**Authority:**

*CCP § 529(a); Cal Rules Ct, Rule 3.1150(f)*

**Discussion:**

See 18.11[5][a], [6]

☐ Present order to the judge for signature.

**Content Note:**

The terms of the order must not be vague or so uncertain or ambiguous that the opposing party cannot determine from the order what that party may or may not do.



**Timing:**

The order must be presented to the judge within one court day after the granting of the injunction, unless otherwise ordered by the court.

**Authority:**

*Cal Rules Ct, Rule 3.1150(f)*

**Discussion:**

See 18.11[5][b], [c]

**Form:**

See 18.30

- ☐ Serve preliminary injunction order signed by judge on opposing party.

**Discussion:**

See 18.11[5][d]

- ☐ If preliminary injunction is not granted:

- ☐ Appeal decision, or
- ☐ Proceed to trial on the merits of the underlying action.

**Authority:**

*CCP §§ 904.1(a)(6) (unlimited civil cases), 904.2(g) (limited civil cases)*

**Discussion:**

See 18.11[8]



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Chapter 18 TROs and Preliminary Injunctions  
II. SEEKING INJUNCTIVE RELIEF

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.04*

#### **18.04 Options and Strategies for Applicant.**

**18.04[1] TRO Allows Prompt Action to Maintain Endangered Status Quo.** Unlike a preliminary injunction, a TRO may be granted on shortened or no notice. This requires the recital of specific facts tending to show that great or irreparable injury will result to the applicant before the matter could be heard on notice [*see CCP § 527(c)*].

##### **Cross Reference:**

Discussion of procedure for obtaining a TRO, see *18.10*.

**18.04[2] Injunction and Monetary Damages Can Be Sought in Same Action.** Although an injunction is an equitable remedy, an action can seek both injunctive relief and money damages.

##### **Example:**

A construction company sought damages in a breach of contract action against a sewer district and also sought an injunction to prevent the district from expending any monies for the construction from a specified fund. The court granted a preliminary injunction on the grounds that the district's alleged insolvency was a proper matter for consideration when contemplating an injunction because otherwise the district could have stripped itself of all assets and made it impossible to pay any judgment that might be secured [ *West Coast Constr. Co. v. Oceano Sanitary Dist. (1971) 17 CA3d 693, 700, 95 CR 169* ].

**18.04[3] Injunctive Relief Can Be Sought in a Class Action.** A TRO or a preliminary injunction, or both, may be granted in a class action, in which one or more of the parties sues or defends for the benefit of numerous parties on the same grounds as in other actions, whether or not the class has been certified [*CCP § 527(b)*].

##### **Cross Reference:**

Discussion, see *Ch. 33, Class Actions, 33.35*.

**18.04[4] Decide Whether to Seek Mandatory or Prohibitory Injunction.** Whether the injunction sought is mandatory or prohibitory largely depends on what remedy is sought. If you seek to restrain a party from a course of conduct or to stop a particular condition, then the injunction is likely prohibitory. If you seek to compel a party to perform a certain act, then the injunction is likely mandatory. An injunction can contain both mandatory and prohibitory



features. Although only mandatory injunctions are automatically stayed on appeal, courts are reluctant to grant them absent of a clear finding of irreparable injury if the injunction is not granted.



#### **Strategic Point--Plaintiff:**

Whenever possible, frame the injunctive relief as prohibitory rather than mandatory so that it is clear that the relief is prohibitory. For example, to retain the status quo in a dispute over the right to cut trees, rather than seeking an injunction ordering defendant to maintain the trees, seek an order that defendant refrain from cutting them. Although there is no real difference and analytically either injunction would be prohibitory, the latter phrasing makes this immediately apparent.



#### **Cross References:**

Discussion of mandatory versus prohibitory injunctions, see 18.07.

Examples of mandatory injunctions, see *California Forms of Pleading and Practice*, Ch. 303, *Injunctions*, § 303.11[4] (Matthew Bender).

**18.04[5] Automatic Stay Upon Appeal of Special Motion to Strike Does Not Preclude Granting Preliminary Injunction.** While the appeal of the trial court's decision on an anti-SLAPP special motion to strike removes the trial court's jurisdiction over the merits of the case, it does not preclude the trial court from granting a preliminary injunction based on the court's evaluation of the controversy on the record before it at the time of its ruling [ *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 CA4th 1284, 1302, 50 CR3d 27 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Injunctions Mandatory Injunctions Civil Procedure Remedies Injunctions Temporary Restraining Orders



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Chapter 18 TROs and Preliminary Injunctions  
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*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.05*

### 18.05 Situations Subject to Injunctive Relief.

**18.05[1] Authorized by Statute and Case Law.** There are numerous situations that warrant injunctive relief. Some situations are authorized by statute and others by case law.

#### ➤ Cross References:

List of some of the statutory provisions that authorize the granting of injunctive relief, see *California Forms of Pleading and Practice, Ch. 303, Injunctions, § 303.102[9]* (Matthew Bender).

List of decisions in which injunctive relief has been granted, see *California Forms of Pleading and Practice, Ch. 303, Injunctions, § 303.104[19]* (Matthew Bender).

Discussion of obtaining a gag order, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, § 2.30 et seq.*

**18.05[2] Harassment.** The procedures for obtaining a TRO and injunction prohibiting harassment are contained in *CCP §§ 527.6, 527.10*.

**18.05[3] Workplace Violence.** The procedures for an employer obtaining a TRO and injunction on behalf of an employee prohibiting unlawful violence or threats of violence by a third party are contained in *CCP §§ 527.8, 527.10*.

**18.05[4] Private Postsecondary Education Violence.** The procedures for a chief administrative officer of a private postsecondary educational institution obtaining a TRO and injunction on behalf of a student suffering a credible threat of violence made off the school campus or facility from any individual, which can reasonably be construed to be carried out or to have been carried out at the school campus or facility, are contained in *CCP § 527.85*.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Injunctions Temporary Restraining Orders



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*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.06*

#### **18.06 Situations Not Subject to Injunctive Relief.**

Just as there are numerous factual situations in which injunctive relief is available, there are numerous situations in which injunctive relief is prohibited.

##### **➡ Cross References:**

List of some of the statutory provisions that prohibit the granting of injunctive relief, see *California Forms of Pleading and Practice, Ch. 303, Injunctions, § 303.102[10]* (Matthew Bender).

List of decisions in which injunctive relief has been denied, see *California Forms of Pleading and Practice, Ch. 303, Injunctions, § 303.104[20]* (Matthew Bender).



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*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.07*

**18.07 Mandatory v. Prohibitory Injunction.**

**18.07[1] Courts Look to Substance, Not Form, As Determining Factor.** An injunction is mandatory if it compels performance of an affirmative act that changes the position of the parties and prohibitory if it requires a person to refrain from a particular act [ *People ex rel. Brown v. iMergent, Inc.* (2009) 170 CA4th 333, 343, 87 CR3d 844 (injunction compelling parties to abide by their agreement and to maintain the status quo that was established when they stipulated to final judgment and permanent injunction in prior action was prohibitory); *Davenport v. Blue Cross of Cal.* (1997) 52 CA4th 435, 446, 60 CR2d 641 ]. In deciding whether an injunction is mandatory or prohibitory, courts will look to the substance and not the form of the injunction as the determining factor [ *People ex rel. Brown v. iMergent, Inc.* (2009) 170 CA4th 333, 343, 87 CR3d 844 ; *Davenport v. Blue Cross of Cal.* (1997) 52 CA4th 435, 447, 60 CR2d 641 ].

**18.07[2] Courts Rarely Grant Mandatory Injunctions.** A preliminary mandatory injunction is rarely granted, and it is not permitted except in extreme cases in which the right is clearly established and it appears that irreparable injury will flow from its refusal [ *Board of Supervisors v. McMahon* (1990) 219 CA3d 286, 295, 268 CR 219 ].

**18.07[3] Mandatory Injunction Is Automatically Stayed Pending Appeal.** The question of whether the injunction is mandatory or prohibitory becomes important on appeal because only mandatory injunctions are automatically stayed on appeal [ *Agricultural Labor Relations Bd. v. Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 706, 238 CR 780, 739 P2d 140 ].



**Cross Reference:**

Discussion of stays pending appeal, see 18.24.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Injunctions Mandatory Injunctions



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*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.08*

**18.08 Injunction May Extend to Nonparties.**

Any person, even one who was not a party to the original action, may be enjoined and held guilty of contempt for noncompliance. An injunction can run to classes of persons through whom the enjoined person may act, such as agents, servants, employees, aiders, and abettors [ *People ex rel. Gallo v. Acuna* (1997) 14 C4th 1090, 1124-1125, 60 CR2d 277, 929 P2d 596 ; *Berger v. Superior Court* (1917) 175 C 719, 721, 167 P 143 ].



**Strategic Point--Applicant:**

To be able to enforce an injunction against a person, it is necessary that the person either be included in the injunction order or have been acting in concert with an enjoined person [ *Berger v. Superior Court* (1917) 175 C 719, 722, 167 P 143 ("there can be no disobedience of an injunction by a person who is not included in the mandate of the court, either by name or as a member of a class of persons which is properly included, and who is not acting as an aider and abettor of one so included in the assertion of his [or her] claims")]. Therefore, the injunction order should include the classes of persons through whom the enjoined person may act.



**Cross Reference:**

Discussion of filing a motion for contempt to enforce an injunction order, see 18.21.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Injunctions Contempt



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**18.09 Where to File Complaint or Application.**

**18.09[1] Jurisdiction Is in Superior Court.** An injunction must be sought in superior court because the Supreme Court and the courts of appeals lack jurisdiction to issue injunctions [ *Modern Barber Coll., Inc. v. Cal. Employment Stabilization Comm'n* (1948) 31 C2d 720, 730, 192 P2d 916 ]. A TRO or a preliminary injunction may be granted by the court in which the action is brought or by a judge of that court, and when granted by a judge, it may be enforced as an order of the court [see CCP § 525].

**18.09[2] Action Seeking Permanent Injunction Must Be Filed As Unlimited Civil Case.** An action seeking permanent injunctive relief must be filed as an unlimited civil case, except as otherwise authorized by statute [CCP §§ 88, 580(b)(2)].

**18.09[3] TROs and Preliminary Injunctions May Be Issued in Limited As Well As Unlimited Civil Cases.** In a limited civil case, superior courts have jurisdiction to grant only TROs and preliminary injunctions, but not permanent injunctions, except as otherwise authorized by statute [CCP §§ 86(a)(8), 580(b)(2)].

**18.09[4] No Special Venue Rules Apply to Injunctive Relief.** To grant an injunction the court must have personal jurisdiction over the person enjoined [ *Rothschild v. Erda* (1968) 258 CA2d 750, 753, 66 CR 209 ]. Venue is generally proper in the county in which the opposing party resides at the time of commencement of the action [CCP § 395(a)]. If the opposing party is a corporation, the provisions on venue for corporations apply [CCP §§ 392-395.5].



**Cross Reference:**

Discussion of venue, see *Ch. 6, Determining Forum*, 6.31 et seq.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Injunctions Permanent Injunctions Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions Civil Procedure Remedies Injunctions Temporary Restraining Orders



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*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.10*

**18.10 TRO.**

**18.10[1] When Permitted.** A TRO may be granted in the same situations as a preliminary injunction may be granted.

➡ **Cross Reference:**

See 18.11[1].

**18.10[2] When Not Permitted.** A TRO may not be granted in the same situations as a preliminary injunction may not be granted.

➡ **Cross Reference:**

See 18.11[2].

**18.10[3] Procedure to Obtain TRO.**

**18.10[3][a] Based on Verified Complaint, Declarations or Affidavits, With Supporting Memorandum and Proposed Order.** A TRO can be obtained by filing a verified complaint or affidavits or declarations and a proposed order. If the TRO is sought ex parte, a supporting memorandum is required [*CCP §§ 527(d)(2)(a), 2015.5; Cal Rules Ct, Rule 3.1201*]. If the action is initiated on the same day that a TRO or order to show cause is sought, the complaint must be filed first [*Cal Rules Ct, Rule 3.1150(b)*]. If an application for a TRO is made in an existing action, the applicant must request that the court file be made available to the judge hearing the application. [*Cal Rules Ct, Rule 3.1150(b)*]. An application for a TRO must state the fact and result of any previous application to a judicial officer for similar relief [*Cal Rules Ct, Rule 3.1150(e)*].

**Exception:**

Unless otherwise ordered by the court, a memorandum is not required in order to obtain a TRO under *CCP § 527.6* (harassment) or *CCP § 527.8* (workplace violence) [*Cal Rules Ct, Rule 3.1152(b)*].



**Warning--Criminal Penalties for Perjury:**

Because injunctive relief may be issued only on a satisfactory showing of sufficient facts under oath, the declarants are subject to criminal sanctions for perjury [ *Ancora-Citronelle Corp. v. Green* (1974) 41 CA3d 146, 148-149, 115 CR 879 ].



#### **Strategic Points--Applicant:**

Although declarations or affidavits are not required, it is advisable not to rely solely on a verified complaint because CCP § 446 limits the evidentiary value of a verified complaint. In addition, an ex parte TRO will not be granted solely on statements made on information and belief [ *Low v. Low* (1956) 143 CA2d 650, 654, 299 P2d 1022 ].

If declarations or affidavits are filed, the complaint need not be verified.



#### **Strategic Point--Supporting Memorandum:**

Although a memorandum is not required in support of a TRO, unless sought ex parte [CCP § 527(d)(2); *Cal Rules Ct, Rule 3.1201*], citation to any authority supporting the issuance of the TRO is advisable to bolster the request for a TRO.



#### **Cross References:**

Form, see 18.26. Format of citations to legal sources, see *Ch. 7, Complaints*, 7.06[9]. Exclusion or redaction of social security and financial account numbers from documents filed in the court's public file, see *Ch. 7, Complaints*, 7.06[10].

Memoranda supporting the issuance of injunctions, see California Points and Authorities, Ch. 116, Injunctions (Matthew Bender).

**18.10[3][b] TRO May Be Issued Ex Parte.** A TRO may be obtained ex parte if, in the judge's discretion, it appears from facts shown by affidavit or declaration, or by the verified complaint, that great or irreparable injury will result to the applicant before the matter could be heard on notice [CCP § 527(c)(1)]. The affidavit, declaration, or verified complaint must state the specific facts on which relief is sought [ *Low v. Low* (1956) 143 CA2d 650, 654, 299 P2d 1022 ]. The applicant or the party's attorney must certify, under oath or by declaration under penalty of perjury, one of the following [CCP § 527(c)(2); *Cal Rules Ct, Rules 3.1150(g), 3.1204(b)*]:

- No later than 10:00 a.m. on the court day prior to the application, the applicant informed the opposing party or the party's attorney of the time and place that the application would be made and that, within the applicable time under *Cal Rules Ct, Rule 3.1203*, the applicant informed the opposing party where and when the application would be made.
- The applicant in good faith attempted to inform the opposing party or the party's attorney of the time and place that the application would be made, but was unable to do so, specifying the efforts made.
- For reasons specified, the applicant should not be required to inform the opposing party or the opposing party's attorney of the time and place that the application would be made.

The ex parte application must also include a proposed TRO [*Cal Rules Ct, Rule 3.1201(5)*].

#### **Exceptions:**



- The certification requirement does not apply to orders issued under the Family Code [CCP § 527(g)].
- Notice later than 10:00 a.m. on the court day before the ex parte appearance can be given if the declaration regarding notice explains the exceptional circumstances that justify the shorter notice, or in unlawful detainer proceedings, explains why the notice given is reasonable [Cal Rules Ct, Rule 3.1204(c)].
- An injunction may not be allowed after the defendant has answered, unless on notice or on an order to show cause [CCP § 528].

#### **Cross References:**

Form, see 18.27, Ex Parte Application for TRO.

Form, see 18.28, Order to Show Cause Re Preliminary Injunction and TRO.

**18.10[3][c] Personal Presence at Hearing Is Required.** A TRO will not be granted unless the applicant or counsel is personally present at the hearing [Cal Rules Ct, Rule 3.1150(d)].

#### **18.10[4] If TRO Is Granted.**

**18.10[4][a] If TRO Granted Without Notice, Order to Show Cause As to Why Preliminary Injunction Should Not Be Granted Must Be Served on Opposing Party.** If the TRO was granted without notice in the manner described in 18.10[3][b], the order served on the opposing party must be accompanied by an order to show cause why a preliminary injunction should not be granted [CCP § 527(d)(1); Cal Rules Ct, Rule 3.1150(a)]. Although the two orders can be in the same document, the order to show cause and the TRO must be stated separately, with the order to show cause stated first [Cal Rules Ct, Rule 3.1150(c)]. The restraining language sought in an order to show cause and the TRO must be separately stated in the order to show cause and the TRO and may not be incorporated by reference. The order to show cause must describe the injunction to be sought at the hearing. The TRO must describe the activities to be enjoined pending the preliminary injunction hearing [Cal Rules Ct, Rule 3.1150(c)].



#### **Warning:**

If the TRO was granted ex parte, the order to show cause is necessary even if the opposing party has actual notice of the action [ *Chrysler Credit Corp. v. Waegle* (1972) 29 CA3d 681, 688, 105 CR 914 ("until legal service of process has been made, the court has no jurisdiction to render judgment, even though the defendant may have actual knowledge of the pendency of the action")].

#### **Cross Reference:**

Form, see 18.28.

**18.10[4][b] If TRO Granted After Appearance of Opposing Party, Motion and Notice of Motion for Preliminary Injunction on Opposing Party, Including Supporting Declarations, and Supporting Memorandum, May Be Served.** If the TRO was granted after the opposing party had already appeared in the action, the order need not be accompanied by an order to show cause. Instead, a motion and notice of motion for preliminary injunction is served on the opposing party, including supporting declarations or affidavits and a supporting memorandum [Cal Rules Ct, Rule 3.1150(a)].



#### **Cross References:**

Form, see 18.29.

For memoranda supporting the issuance of injunctions, see California Points and Authorities, Ch. 116, Injunctions (Matthew Bender).

**18.10[4][c] If Not Previously Served, Verified Complaint, Declarations or Affidavits, and Supporting Memorandum, Must Be Served on Opposing Party.** If the TRO was granted without notice in the manner described in 18.10[3][b], and if not previously served, you must serve the opposing party with the verified complaint, declarations or affidavits, and supporting memorandum filed with the court pursuant to discussion in 18.10[3][a] [CCP § 527(d)(2)].

**18.10[4][d] Timing of Service of Papers, If TRO Granted Without Notice.** If the TRO was granted without notice in the manner described in 18.10[3][b], the opposing party must be served with the order to show cause, complaint, declarations or affidavits, and supporting memorandum within five days after the date that the TRO was issued or two days prior to the hearing, whichever is earlier [CCP § 527(d)(2)]. The court may for good cause, on motion of the applicant or on its own motion, shorten the time required for service on the opposing party [CCP § 527(d)(2)].



**Warning:**

If copies of the order to show cause, complaint, declarations or affidavits, and supporting memorandum are not served within the required time period, the court must dissolve the TRO [CCP § 527(d)(3)].

**18.10[4][e] TRO Can Be Reissued If Notice Could Not Be Served Within Required Time.** If the opposing party could not be served within the time required by CCP § 527(d)(2), the court, on the filing of an affidavit by the applicant that the opposing party could not be served within the time required, may reissue any TRO previously issued. The time for hearing is measured from the date of reissuance. No fees are charged for reissuing the order [CCP § 527(d)(5)].



**Cross Reference:**

Form, see *California Forms of Pleading and Practice*, Ch. 303, Injunctions, § 303.142 (Matthew Bender).

**18.10[4][f] Court Has the Authority to Require an Undertaking.** Although an undertaking is not absolutely required for the issuance of a TRO, the court does have the authority to require an undertaking [ *Biasca v. Superior Court* (1924) 194 C 366, 367, 228 P 861 ].



**Strategic Point--Make Arrangements for Undertaking in Advance:**

Because an undertaking may be required during the duration of a TRO and is absolutely required for a preliminary injunction (subject to certain specific exceptions), you should obtain financial information from the client and make arrangements from a bonding company for a bond in advance of seeking injunctive relief, subject only to the amount.



**Cross Reference:**

Discussion of the requirement for an undertaking and exemptions, see 18.11[6].

**18.10[4][g] Deadline for Preliminary Injunction Hearing.** The hearing on the order to show cause must be held not later than 15 days or, if good cause appears to the court, 22 days after the date that the TRO is issued [CCP § 527(d)(1)].



**Warning:**

If the applicant is not ready to proceed at the time of the preliminary injunction hearing, the court must

dissolve the TRO [CCP § 527(d)(3)].

**18.10[4][h] TRO Limited in Duration.** A TRO expires under any of the following circumstances:

- After the expiration of the 15-day or 22-day time period in which to hold a hearing on the order to show cause, if no action is taken [CCP § 527(d)(1)].
- If a preliminary injunction is denied [ *Landmark Holding Group, Inc. v. Superior Court* (1987) 193 CA3d 525, 529, 238 CR 475 ].
- If a preliminary injunction is granted, after the required undertaking is obtained and the necessary notice is given [ *Houser v. Superior Court* (1932) 121 CA 31, 35, 8 P2d 483 ].

**18.10[5] If TRO Not Granted.**

**18.10[5][a] Decision to Deny TRO Is Separately Appealable.** The decision to deny a TRO is separately appealable [CCP § 904.1(a)(6) (unlimited civil cases); CCP § 904.2(g) (limited civil cases); *McLellan v. McLellan* (1972) 23 CA3d 343, 357, 100 CR 258 ].

 **Cross Reference:**

Discussion of the aspects of appealing the denial of a TRO, see 18.23[1].

**18.10[5][b] Preliminary Injunction Can Be Sought.** Instead of appealing the denial of a TRO, the applicant can file an application for a preliminary injunction, if one was not sought in the original complaint for a TRO. Even if the TRO was originally granted, but later expired without the grant or denial of a preliminary injunction, the applicant can still seek and obtain a preliminary injunction [ *McDonald v. Superior Court* (1937) 18 CA2d 652, 656, 64 P2d 738 ].

 **Cross Reference:**

Discussion of procedure for seeking a preliminary injunction, see 18.11[3], [4].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Injunctions Temporary Restraining Orders



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**18.11 Preliminary Injunction.**

**18.11[1] When Permitted.**

**18.11[1][a] Applicant Likely to Prevail on Merits and Harm to Opposing Party Outweighed by Harm to Applicant.** An injunction may be granted when it appears by the complaint that the applicant is entitled to the relief demanded and that the relief, or any part of it, consists of restraining the commission or continuance of the act complained of (or commanding certain conduct), either for a limited period or perpetually [*CCP* § 526(a)(1)]. In deciding whether an injunction should issue, the trial court must evaluate two interrelated factors: (1) the likelihood that the applicant will prevail on the merits at trial; and (2) the interim harm that the applicant is likely to sustain if the injunction were denied, as compared to the harm that the opposing party is likely to suffer if the preliminary injunction were issued [ *Langford v. Superior Court* (1987) 43 C3d 21, 28, 233 CR 387, 729 P2d 822 ; *IT Corp. v. County of Imperial* (1983) 35 C3d 63, 69-70, 196 CR 715, 672 P2d 121 ].



**Warning:**

The more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. This is especially true when the requested injunction maintains, rather than alters, the status quo. The presence or absence of these interrelated factors is usually a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his or her favor [ *Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 CA4th 336, 342, 72 CR3d 678 ]. At the same time, be sure the court considers both elements and is reflected in the order. Even if the applicant makes a sufficiently strong showing of the likelihood of success on the merits, the preliminary injunction will not be upheld if the court failed to consider the relative balance of hardships [ *White v. Davis* (2003) 30 C4th 528, 560-561, 133 CR2d 648 ]. Likewise, a trial court's denial of a preliminary injunction, without any consideration of the "likelihood of prevailing on the merits" factor, is clearly erroneous [ *Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 CA4th 336, 344, 72 CR3d 678 (remanded for determination)].

**18.11[1][b] To Prevent Waste or Irreparable Injury.** An injunction may be granted if it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action [CCP § 526(a)(2); *City of Torrance v. Transitional Living Ctrs. for Los Angeles, Inc.* (1982) 30 C3d 516, 526, 179 CR 907, 638 P2d 1304 ].

**18.11[1][c] To Prevent Violation of Rights.** An injunction may be granted if it appears during the litigation that a party to the action is doing, threatens, is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action and tending to render the judgment ineffectual [CCP § 526(a)(3)].

**18.11[1][d] Legal Remedy Inadequate.** An injunction may be granted if pecuniary compensation would not afford adequate relief [CCP § 526(a)(4)]. This basis for granting injunctive relief factually overlaps with the irreparable injury basis [ *Jessen v. Keystone Savings & Loan Assn.* (1983) 142 CA3d 454, 457, 191 CR 104 (irreparable injury is one not susceptible to monetary valuation or one involving item so unique that its loss deprives possessor of intrinsic values not replaceable by money or in kind)].



**Warning:**

"Pecuniary compensation" is not limited to monetary damages. Other legal remedies may be adequate and preclude the issuance of a preliminary injunction, such as an administrative remedy that has not been exhausted [ *Teeter v. City of Los Angeles* (1930) 209 C 685, 687, 290 P 11 ], quo warranto [ *Hallinan v. Mellon* (1963) 218 CA2d 342, 344-348, 32 CR 446 ], a writ of mandate [ *Moore v. Superior Court* (1936) 6 C2d 421, 423-424, 57 P2d 1314 ], or the availability of an appeal, a motion to vacate, or a motion to modify a court's judgment [ *Lezama v. Justice Court* (1987) 190 CA3d 15, 21, 235 CR 238 ].

**18.11[1][e] Monetary Damages Difficult to Ascertain.** An injunction may be granted if it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief [CCP § 526(a)(5)].

**Distinguish:**

The orientation of an action for injunctive relief is prospective, not retrospective. If a plaintiff can show that defendant's conduct threatens him with unlawful injury, plaintiff's inability to quantify the harm already suffered, or likely to be suffered, is not a ground for denying injunctive relief. On the contrary, extreme difficulty in ascertaining damages is a factor favoring injunctive relief. The fact that a party is not prepared to provide a precise calculation of damages at a preliminary stage of litigation does not preclude a court from determining that the party will be able, at trial, to prove damages with sufficient certainty to support compensatory relief [ *Huong Que, Inc. v. Luu* (2007) 150 CA4th 400, 418, 58 CR3d 527 ].

**18.11[1][f] To Avoid Multiplicity of Suits.** An injunction may be granted if it is necessary to prevent a multiplicity of judicial proceedings [CCP § 526(a)(6)]. There are two classes of cases in which injunctions are issued to prevent a multiplicity of actions: (1) cases in which many claims that have not been adjudicated are brought into equity to be made the subject of a single trial and decree; and (2) cases that are shown to be vexatious suits on causes of action that have been settled by former adjudication [ *Verdier v. Verdier* (1962) 203 CA2d 724, 735, 22 CR 93 ].

**18.11[1][g] To Enforce Trust Obligation.** An injunction may be granted if the obligation involved arises from a trust [CCP § 526(a)(7)].

**18.11[1][h] If Authorized Specifically by Statute.** If a statute authorizes the granting of a preliminary injunction for its violation and if the statutory conditions for the injunction's issuance are met, the applicant need not show irreparable injury or inadequacy of a remedy at law [ *In re Marriage of Van Hook* (1983) 147 CA3d 970, 984-985, 195 CR 541 ].

### Cross Reference:

Listing of statutes authorizing the grant of an injunction without a showing of irreparable injury and inadequacy of a remedy at law, see *California Forms of Pleading and Practice*, Ch. 303, *Injunctions*, § 303.40[8] (*Matthew Bender*).

### **18.11[2] When Not Permitted.**

**18.11[2][a] To Stay Pending Judicial Proceeding, Unless Necessary to Prevent Multiplicity of Suits.** An injunction may not be granted to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless the restraint is necessary to prevent a multiplicity of proceedings [CC § 3423(a); CCP § 526(b)(1)].

**18.11[2][b] To Stay Judicial Proceeding in Federal Court.** An injunction may not be granted to stay proceedings in federal court [CC § 3423(b); CCP § 526(b)(2)].

**18.11[2][c] To Stay Judicial Proceeding in Another State on Judgment of Court of That State.** An injunction may not be granted to stay proceedings in another state on a judgment of a court of that state [CC § 3423(c); CCP § 526(b)(3)].

**18.11[2][d] To Prevent the Execution of a Public Statute for Public Benefit by Officers of Law.** An injunction may not be granted to prevent the execution of a public statute or ordinance, for the public benefit, by officers of the law [CC § 3423(d); CCP § 526(b)(4); *Agric. Labor Relations Bd. v. Superior Court* (1976) 16 C3d 392, 401, 128 CR 183, 546 P2d 687 ].

### **Exceptions:**

An injunction against the execution of a statute or ordinance may be permitted if [ *Alfaro v. Terhune* (2002) 98 CA4th 492, 501, 120 CR2d 197 ]:

- The statute is unconstitutional or invalid, and the applicant shows irreparable harm pending a trial on the merits [ *Leach v. City of San Marcos* (1989) 213 CA3d 648, 660-661, 261 CR 805 ].

- The statute or ordinance is valid, but is enforced in an unconstitutional manner [ *Brock v. Superior Court of Los Angeles County* (1939) 12 C2d 605, 605-609, 610, 86 P2d 805 ]. The presumption is that of good faith on the part of the public official, and the burden of proof is on the complaining party [ *City of Banning v. Desert Outdoor Advert., Inc.* (1962) 209 CA2d 152, 155, 25 CR 621 ].

- The statute is valid but, as construed, does not apply to the conduct sought to be enjoined [ *City of San Jose v. Dep't of Health Servs.* (1998) 66 CA4th 35, 47, 77 CR2d 609 ].

- The public official's action exceeds his or her authority [ *Fin. Indem. Co. v. Superior Court* (1955) 45 C2d 395, 402, 289 P2d 233 ].

**18.11[2][e] To Prevent Breach of Contract Not Specifically Enforceable.** An injunction may not be granted to prevent the breach of a contract, if the performance of that contract could not be specifically enforced [CC § 3423(e); CCP § 526(b)(5)].

### **Exception:**

A court may order an injunction to prevent the breach of a contract if the contract meets all of the following requirements [CC § 3423(e); CCP § 526(b)(5)]:

- The contract is in writing.
- The contract is for the rendition or furnishing of personal services from one person to another.
- The contract is for a certain specified minimum annual compensation.
- The contract is one in which the promised services are of a special, unique, unusual, extraordinary, or intellectual character, which gives the contract peculiar value, the loss of which could not be reasonably or adequately compensated in damages in an action at law.

**18.11[2][f] To Enjoin the Lawful Exercise of Public or Private Office by Officeholder.** An injunction may not be granted to prevent the exercise of a public or private office, in a lawful manner, by the person in possession of that office [CC § 3423(f); CCP § 526(b)(6)].

**18.11[2][g] To Prevent Legislative Act by Municipal Corporation.** An injunction may not be granted to prevent a legislative act by a municipal corporation [CC § 3423(g); CCP § 526(b)(7)].

**18.11[2][h] Where an Injunction Would Cause Injury to Public Interest for Which Bond Could Not Compensate.** An injunction may not be granted if it would cause injury to a public interest for which a bond could not compensate.

**Example:**

A communist organization campaign committee sought an injunction to prevent disclosure of its contributor list to the state under campaign finance laws. The court denied an injunction on the basis that the state had a compelling interest in fair disclosure of campaign financing [ *Socialist Workers 1974 Cal. Campaign Comm. v. Brown* (1975) 53 CA3d 879, 889 ].

**18.11[3] Procedure to Obtain Preliminary Injunction Against Party Who Has Not Appeared in Action.**

**18.11[3][a] Based on Verified Complaint for Preliminary Injunction, Including Order to Show Cause, Affidavits or Declarations, and Supporting Memorandum.** If it has not been filed previously, you must file the complaint for preliminary injunction, including affidavits or declarations and a supporting memorandum. In addition, an order to show cause must be filed that, when served on the opposing party, will serve as a notice of the preliminary injunction hearing and a summons giving the court personal jurisdiction over the opposing party. If the action is initiated on the same day that the order to show cause is sought, the complaint must be filed first [Cal Rules Ct, Rule 3.1150(b)]. If the action was initiated prior to the day that the order to show cause is filed, you must request that the court file be made available to the judge hearing the request for injunctive relief [Cal Rules Ct, Rule 3.1150(b)]. A request for an injunction must state the fact and result of any previous request to a judicial officer for similar relief [Cal Rules Ct, Rule 3.1150(e)].



**Warning:**

Because injunctive relief may be issued only on a satisfactory showing of sufficient facts under oath, the declarants are subject to criminal sanctions for perjury [ *Ancora-Citronelle Corp. v. Green* (1974) 41 CA3d 146, 148, 115 CR 879 ].



**Strategic Point:**

Although a supporting memorandum is not required in support of a preliminary injunction, citation to any authority supporting the issuance of the injunction is advisable to bolster the request.



 **Cross References:**

Forms, see 18.26 and 18.28. Format of citations to legal sources, see *Ch. 7, Complaints, 7.06[9]*.  
Exclusion or redaction of social security and financial account numbers from documents filed in the court's public file, see *Ch. 7, Complaints, 7.06[10]*.

Memoranda supporting the issuance of injunctions, see California Points and Authorities, Ch. 116, Injunctions (Matthew Bender).

**18.11[3][b] All Papers Must Be Served on Opposing Party.** A preliminary injunction may not be granted without notice to the opposing party [*CCP § 527(a); Cal Rules Ct, Rule 3.1150(a)*]. The verified complaint, order to show cause, affidavits or declaration, and supporting memorandum must be served on the opposing party.

 **Cross Reference:**

Detailed discussion of the procedures for notice, see Ch. 8, Service of Summons.

**18.11[4] Procedure to Obtain Preliminary Injunction Against Party Who Has Appeared in Action.**

**18.11[4][a] Based on Motion and Notice of Motion for Preliminary Injunction, Including Affidavits or Declarations and Supporting Memorandum.** If the opposing party has already appeared in the action, it is not necessary to have an order to show cause issued. You can seek a preliminary injunction by the noticed--motion procedure under *CCP § 1005 [Cal Rules Ct, Rule 3.1150(a)]*. You must file a motion and notice of motion for preliminary injunction, including affidavits or declarations and a supporting memorandum.



**Warning--Criminal Penalties for Perjury:**

Because injunctive relief may be issued only on a satisfactory showing of sufficient facts under oath, the declarants are subject to criminal sanctions for perjury [ *Ancora-Citronelle Corp. v. Green (1974) 41 CA3d 146, 148, 115 CR 879* ].

 **Cross Reference:**

Form, see 18.29.

**18.11[4][b] All Papers Must Be Served on Opposing Party.** A preliminary injunction may not be granted without notice to the opposing party [*CCP § 527(a); Cal Rules Ct, Rule 3.1150(a)*]. The motion and notice of motion, affidavits or declaration, and supporting memorandum must be served on the opposing party.

 **Cross Reference:**

Detailed discussion of the procedures for notice, see Ch. 8, Service of Summons.

**18.11[5] If Preliminary Injunction Is Granted.**

**18.11[5][a] Obtain Undertaking As Ordered by Court.** On granting a preliminary injunction, the court or judge must require a bond or undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, that the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction [*CCP § 529(a)*]. A deposit may be made in lieu of a bond or undertaking [*CCP § 995.710(a)*]. A preliminary injunction is not operative until an undertaking is furnished. Furthermore, the undertaking in the amount ordered by the court must be presented to the court with the proposed preliminary injunction order within one court day after the granting of the injunction, unless otherwise ordered by the court [*Cal Rules Ct, Rule 3.1150(f)*]. The general requirements for bonds and undertakings are set forth in *CCP §§ 995.010-996.560* and *Cal Rules Ct, Rule 3.1130*.





### Strategic Point--Make Arrangements for Undertaking in Advance:

Because of the importance of and timing for obtaining an undertaking, you should obtain financial information from the client and make arrangements from a bonding company for a bond in advance of seeking injunctive relief, subject only to the amount.



### Cross Reference:

For more detail on the requirement for an undertaking and certain exemptions, see 18.11[6].

**18.11[5][b] Terms of Injunction Order Must Not Be Vague, Ambiguous, or Overbroad.** The terms of the injunction order must not be so vague that people of common intelligence must guess at its meaning and differ as to its application [ *Pitchess v. Superior Court* (1969) 2 CA3d 644, 651, 83 CR 35 ]. In addition, an injunctive order should be limited in scope to the subject of the litigation and must not be so uncertain or ambiguous that the enjoined person cannot determine from the order what that person may and may not do [ *City of Redlands v. County of San Bernardino* (2001) 96 CA4th 398, 415, 117 CR2d 582 ].

**18.11[5][c] Injunction Order Must Be Presented to Judge for Signature Within One Day After Injunction Was Granted.** A draft preliminary injunction order must be presented to the judge for signature within one court day after the injunction was granted, unless otherwise ordered by the court [ *Cal Rules Ct, Rule 3.1150(f)* ].



### Strategic Point--Prepare Draft Order in Advance:

Because of the time limit within which a draft of the preliminary injunction must be presented to the judge for signature, you should prepare a draft in advance of the hearing.



### Cross Reference:

Form, see 18.30.

**18.11[5][d] If No Actual Notice, Serve Preliminary Injunction Order on All Enjoined Parties.** The party enjoined must have notice of the preliminary injunction [ *Golden Gate Consol. Hydraulic Mining Co. v. Superior Court* (1884) 65 C 187, 190, 3 P 628 ]. Although the notice requirement may be satisfied by actual notice [ *Mattos v. Superior Court* (1939) 30 CA2d 641, 647, 86 P2d 1056 ], the notice requirement may also be satisfied by service in the same manner as service of a summons [ *Golden Gate Consol. Hydraulic Mining Co. v. Superior Court* (1884) 65 C 187, 190, 3 P 628 ].



### Cross Reference:

Discussion of methods for service of summons, see Ch. 8, Service of Summons.

### 18.11[6] Undertaking.

**18.11[6][a] Amount of Bond Based on Damages to Opposing Party If Injunction Is Later Found Not Appropriate.** The amount of the bond is fixed on the basis of the amount of damages the opposing party will probably sustain if the court subsequently determines that the applicant was not entitled to an injunction [ *CCP § 529(a)* ]. All bonds and undertakings must comply with *CCP §§ 995.010-996.560* and *Cal Rules Ct, Rule 3.1130*.

**18.11[6][b] Exemptions.** The requirement for an undertaking does not apply to any of the following situations:

- Either spouse against the other in a proceeding for legal separation or dissolution of marriage [ *CCP § 529(b)(1)* ].

- The applicant for an order under the Domestic Violence Prevention Act [CCP § 529(b)(2); *see Fam Code* §§ 6200-6219].

- A public entity or officer described in CCP § 995.220 [CCP § 529(b)(3)].

**18.11[6][c] Undertaking for Construction Project Injunction.** There are specific procedures for requiring an undertaking by any party who seeks to enjoin a construction project that has received all legally required licenses and permits. These specific procedures provide the maximum liability for the applicant and a nonexclusive list of what a construction project includes [CCP § 529.1].

**18.11[6][d] Undertaking for Housing Project Injunction.** There are specific procedures for requiring an undertaking by any party who seeks an injunction against the construction of certain housing projects. These specific procedures include the grounds on which the requirement of an undertaking must be based and the maximum liability for the applicant [CCP § 529.2].

**18.11[6][e] Undertaking Requirement May Be Waived for Poor or Indigent Applicant.** The court has the authority to waive the requirement of an undertaking if the applicant is poor or indigent [CCP § 995.240; *Conover v. Hall* (1974) 11 C3d 842, 850-852, 114 CR 642, 523 P2d 682 ].

**18.11[6][f] Defendant May Waive or Forfeit Requirement of Undertaking.** The duty to require an injunction bond does not apply where the bond requirement has been waived or forfeited [ *City of Los Angeles v. Superior Court* (1940) 15 C2d 16, 23, 98 P.2d 207 (undertaking deemed waived); *Smith v. Adventist Health System/West*, 182 CA4th 729, 740, 744, 106 CR3d 318] .

Waiver of the right to plaintiff's undertaking is a question of fact, and a finding of waiver requires the defendant's showing the intentional relinquishment or abandonment of the right to plaintiff's undertaking. The intent to waive may be expressed in words, either oral or written, or implied by a party's conduct [ *Smith v. Adventist Health System/West*, 182 CA4th 729, 745, 106 CR3d 318 (inferring intent from defendant's conduct)].

The right to require plaintiff to post an undertaking on a preliminary injunction may be forfeited by the untimeliness of the request [ *Smith v. Adventist Health System/West*, 182 CA4th 729, 748, 106 CR3d 318 (undertaking forfeited)].

**18.11[7] Permanent Injunction Usually May Not Be Granted at Preliminary Injunction Hearing.** In determining the propriety of preliminary injunctive relief, neither the trial court nor the appellate court may undertake a final adjudication of the lawsuit [ *Hunt v. Superior Court* (1999) 21 C4th 984, 999, 90 CR2d 236, 987 P2d 705 ].

A permanent injunction granted at the preliminary injunction hearing under any other circumstance is void [ *Paul v. Allied Dairymen, Inc.* (1962) 209 CA2d 112, 122, 25 CR 595 ; *Anderson v. Joseph* (1956) 146 CA2d 450, 454, 303 P2d 1053 ].

**Exception:**

The court may grant a permanent injunction at the preliminary injunction hearing based on a stipulation or other satisfactory showing that warrants submitting the cause on the merits [ *Camp v. Board of Supervisors* (1981) 123 CA3d 334, 357-358, 176 CR 620 (properly granted when only issue was question of law without reference to extrinsic evidence and hearing constituted full trial on merits)].

**18.11[8] If Preliminary Injunction Is Not Granted.**

**18.11[8][a] Decision to Deny Preliminary Injunction Is Immediately Appealable.** The decision to deny a preliminary injunction is immediately appealable [CCP § 904.1(a)(6) (unlimited civil cases); CCP § 904.2(g) (limited

civil cases)]. A reviewing court will not disturb a trial court's decision to grant or deny a motion for a preliminary injunction absent a showing that the trial court abused its discretion [ *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 CA4th 1625, 1634, 83 CR3d 494 ].



**Cross Reference:**

Discussion appealing the denial of a preliminary injunction, see 18.23[2].

**18.11[8][b] Can Proceed to Trial on the Merits.** Instead of filing an appeal of the denial of a preliminary injunction, the applicant can proceed to a trial on the merits and obtain a permanent injunction.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Injunctions Elements Balance of Hardship Civil

Procedure Remedies Injunctions Elements Irreparable Harm Civil Procedure Remedies Injunctions Elements Likelihood of Success Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions



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Chapter 18 TROs and Preliminary Injunctions  
III. OPPOSING INJUNCTIVE RELIEF

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.12*

**18.12 CHECKLIST: Opposing Injunctive Relief.**

☐ Before TRO is granted:

☐ Decide whether to attend hearing and oppose request for TRO or not attend the hearing and wait for outcome.

**Discussion:**

See 18.13[1]

☐ If decision is to oppose the request, follow steps to oppose preliminary injunction.

**Authority:**

CCP § 527(e)

☐ To oppose preliminary injunction:

☐ Determine whether to:

☐ Prepare and file a demurrer to the complaint, or

☐ Prepare and file answer to complaint, including any affirmative defenses.

☐ Prepare and file declarations or affidavits opposing application for TRO or preliminary injunction.

**Discussion:**

See 18.13[2]

**Form:**

See 18.31 (Declaration), 18.32 (Demurrer)

**Timing:**

If the declarations or affidavits are served on the applicant at least two days before the hearing on the order to show cause, the applicant will not be entitled to a continuance.

- ☐ Prepare and file a motion to dissolve or modify the TRO or preliminary injunction.

**Checklist for Dissolving or Modifying Injunction:**

See 18.15

**Authority:**

CCP §§ 532, 533

**Discussion:**

See 18.13[2][d]

**Form:**

See 18.34

**Grounds:**

See 18.16

- ☐ Request a continuance.

**Authority:**

CCP § 527(d)(4)

**Discussion:**

See 18.13[2][e]

- ☐ Prepare and file a petition to remove the action to federal court.

**Discussion:**

See 18.13[2][f]

- ☐ Prepare and file a motion for a change of venue.

**Discussion:**

See 18.13[2][g]

- ☐ Appeal and seek a stay of the TRO pending appeal.

**Checklist for Appealing Grant of TRO or Preliminary Injunction:**

See 18.22[1]

**Authority:**

*CCP § 904.1(a)(6)* (unlimited civil cases); *CCP § 904.2(g)* (limited civil cases)

**Discussion:**

See *18.13[2][i]*, *18.23* (appeal), *18.24* (stay)

- ☐ Comply with TRO and challenge order's validity after an adjudication of contempt.

**Discussion:**

See *18.13[2][j]*

- ☐ Request an undertaking or bond for a specific amount.

**Discussion:**

See *18.13[2][h]*

- ☐ After preliminary injunction has been granted:

☐ Determine whether to:

- ☐ Prepare and file a motion to dissolve or modify the injunction,

**Checklist for Dissolving or Modifying Injunction:**

See *18.15*

**Discussion:**

See *18.13[4][a]*

**Form:**

See *18.34*

**Grounds:**

See *18.16*

- ☐ Appeal and seek a stay of the injunction pending appeal,

**Checklist for Appealing Grant of Preliminary Injunction:**

See *18.22[1]*

**Discussion:**

See *18.13[4][b]*, *18.23* (appeal), *18.24* (stay)

- ☐ Prepare and file a writ of prohibition, or

**Discussion:**

See *18.13[4][c]*

- ☐ Not comply with the injunction order and challenge the order's validity after an adjudication of contempt.

**Discussion:**

See 18.13[4][d]

- ☐ Object to undertaking (only after preliminary injunction is granted) on grounds that surety and/or amount of undertaking is insufficient, including affidavit or declaration that states facts to support claim of insufficiency.

**Discussion:**

See 18.13[4][e]



**Timing:**

The objection to the undertaking must be made within five days after service of the preliminary injunction order, and if the court determines that the undertaking is insufficient and a sufficient one is not filed within the time required, the order granting the injunction must be dissolved.



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Chapter 18 TROs and Preliminary Injunctions  
III. OPPOSING INJUNCTIVE RELIEF

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.13*

### **18.13 Options and Strategies for Opposing Party.**

#### **18.13[1] Before TRO Granted.**

**18.13[1][a] Attend Hearing and Oppose Request for Order.** Assuming that some notice is given, even shortened notice, you could attend the hearing and oppose the request for a TRO. The options available to oppose the order are the same as those available to oppose a grant of a preliminary injunction. Because the notice could be less than 24 hours, it might be difficult to assemble the facts necessary to make a meaningful defense. However, if, for example, the injunctive relief sought is, on its face, prohibited by statute or not permitted under case law, an appearance to challenge on these grounds would be advantageous.

**18.13[1][b] Do Not Attend Hearing and Wait for Outcome.** If the notice does not afford any time to present a meaningful defense and there are no apparent defects in the complaint, one could choose not to attend the hearing. If a TRO is granted, the order can be challenged at or prior to the preliminary injunction hearing.

#### **18.13[2] After TRO Has Been Granted but Before Preliminary Injunction Hearing.**

**18.13[2][a] File Demurrer to Complaint.** A cause of action must exist before injunctive relief can be granted [ *Camp v. Bd. of Supervisors* (1981) 123 CA3d 334, 356, 176 CR 620 ]. Facts concerning the irreparable injury that will result to the applicant unless injunctive relief is granted must be pleaded [ *City of Torrance v. Transitional Living Ctrs. for Los Angeles, Inc.* (1982) 30 C3d 516, 526, 179 CR 907, 638 P2d 1304 ; *E.H. Renzel Co. v. Warehousemen's Union* (1940) 16 C2d 369, 373, 106 P2d 1 ; *Willis v. Lauridson* (1911) 161 C 106, 117, 118 P 530 (complaint for an injunction that does not state facts sufficient to determine how plaintiff's property will be permanently injured by the acts complained of ... does not state facts sufficient to constitute cause of action for equitable relief to enjoin acts complained of)].

#### **Exception:**

A court may grant a preliminary injunction based on a complaint that is subject to general or special demurrer if any defects in the complaint could be corrected by the filing of an amended complaint showing good grounds for the injunction [ *Handyspot Co. v. Buegeleisen* (1954) 128 CA2d 191, 194, 274 P2d 938 ].



 **Cross References:**

Form, see 18.32.

Discussion and forms for demurrers, see Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

**18.13[2][b] Answer Complaint.** A preliminary injunction should not be granted on a complaint alone if a verified answer is filed explicitly and unequivocally denying the allegations of the complaint [ *Martin v. Danziger* (1913) 21 CA 563, 564-565, 132 P 284 ]. The answer should also include any affirmative defenses.

**Exception--Strong Case for Injunctive Relief:**

If the allegations of the complaint make out a strong case for injunctive relief, the opposing party cannot deprive the court of its power and discretion to issue the injunction merely by filing an answer and denials or an affidavit [ *Garner v. Journeyman Barbers', Hairdressers', Cosmetologists' and Proprietors' Int'l Union of Am.* (1963) 223 CA2d 101, 104, 35 CR 693 ; *Lutz v. W. Iron & Metal Co.* (1923) 190 C 554, 560, 213 P 962 (peculiar circumstances in case may justify temporary injunction even in face of absolute denials in answer)].

 **Cross References:**

Discussion and forms for answers, see Ch. 14, Answers.

Discussion of available affirmative defenses, see 18.14.

**18.13[2][c] Oppose Application for Preliminary Injunction.** The application for a preliminary injunction can be opposed by filing declarations or affidavits and a supporting memorandum. If the declarations or affidavits are served on the applicant at least two days before the hearing on the order to show cause, the applicant will not be entitled to a continuance [CCP § 527(e)].

 **Cross References:**

Form of declaration, see 18.31.

For memoranda opposing the issuance of an injunction, see California Points and Authorities, Ch. 116, Injunctions (Matthew Bender).

**18.13[2][d] Seek to Modify or Dissolve TRO.** A court may modify or dissolve a TRO on certain grounds [CCP § 533].

 **Cross Reference:**

Discussion of the grounds for dissolving or modifying a TRO, see 18.16.

**18.13[2][e] Request a Continuance.** A continuance can be sought by the opposing party for a reasonable period of not less than 15 days, or any shorter period requested by the applicant, to enable the opposing party to meet the application for a preliminary injunction [CCP § 527(d)(4)]. If the opposing party obtains a continuance, the TRO remains in effect until the date of the continued hearing [CCP § 527(d)(4)].



**Strategic Point:**

Although a request for a continuance may be more appropriate if a TRO was not granted, see 18.13[3], there may be circumstances in which a continuance is advisable even if a TRO is in effect.

➡ **Cross Reference:**

More detail on obtaining continuances, see Ch. 30, Continuances.

**18.13[2][f] Petition for Removal to Federal Court.** As with any action, there may be strategic reasons for removing the case to federal court.

➡ **Cross Reference:**

More detail on removals of causes of action to federal court, see Ch. 17, Removal to Federal Court.

**18.13[2][g] Make a Motion for Change of Venue.** If the applicant has filed the action in the wrong county, a motion can be made for a change of venue.

➡ **Cross Reference:**

More detail on a change of venue of causes of action, see Ch. 6, *Determining Forum*, 6.45 et seq.

**18.13[2][h] Request Undertaking or Bond.** Although an undertaking is not absolutely required for a TRO, the court does have the power to require one for the period the TRO is in effect [ *Biasca v. Superior Court (1924) 194 C 366, 367, 228 P 861* ].



**Strategic Point:**

Counsel should seek to have the applicant immediately obtain an undertaking or bond prior to a determination of the preliminary injunction application, particularly if a good case can be made that the costs and damages of an improperly obtained injunction are very high.

➡ **Cross Reference:**

Discussion of the requirements for obtaining an undertaking, see 18.11[6].

**18.13[2][i] Appeal Grant of TRO and Obtain a Stay Pending Appeal.** A decision granting a TRO is immediately appealable [CCP § 904.1(a)(6) (unlimited civil cases); CCP § 904.2(g) (limited civil cases)]. If all or a portion of the injunction order has mandatory features, an appeal will automatically stay the operation of the mandatory features pending appeal [ *Agricultural Labor Relations Bd. v. Tex-Cal Land Mgmt., Inc. (1987) 43 C3d 696, 706 n9, 238 CR 780, 739 P2d 140* ]. The court does have the authority to stay a prohibitory injunction [ *City of San Diego v. S. Cal. Tel. Corp. (1954) 42 C2d 110, 120, 266 P2d 14* ].

➡ **Cross References:**

Discussion of mandatory versus prohibitory injunctions, see 18.07.

Discussion of the aspects of appealing the grant of a TRO, see 18.23.

Detail on stays pending appeal, see 18.24.

**18.13[2][j] Decide Not to Comply and Challenge Validity of Injunction After an Adjudication of Contempt.** The opposing party could elect to disobey the TRO and challenge its validity after having been adjudicated in contempt by seeking a writ of habeas corpus, certiorari, or prohibition [ *In re De Silva (1948) 33 C2d 76, 79-80, 199 P2d 6* (habeas corpus); *Brady v. Superior Court (1962) 200 CA2d 69, 72, 19 CR 242* (certiorari); *Harlan v. Superior Court (1949) 94 CA2d 902, 905-906, 211 P2d 942* (prohibition)]. In a challenge, the opposing party may not only attack the validity of the injunction, but may also raise defects in the contempt proceeding.

**Strategic Point:**

Although willful disobedience is an option, because a contempt proceeding is a quasi-criminal procedure with potentially serious ramifications, it is not an advisable strategy. [ *Mason v. U.S. Fid. & Guar. Co.* (1943) 60 CA2d 587, 591, 141 P2d 475 (orderly procedure suggests that if party served believes order is invalid, that party should take proper steps to have order dissolved rather than resort to self help)].

**Strategic Point:**

The options set forth in 18.13[2] are not mutually exclusive. For example, you could request an undertaking and oppose the application for a preliminary injunction. In addition, you could file a demurrer and an answer at the same time [CCP § 430.30(c)].

**Cross Reference:**

Discussion of indirect contempt of court generally, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 23.18 et seq.

**18.13[3] Before Preliminary Injunction Hearing If No TRO Was Issued or Sought.** The options available for the opposing party are much the same in opposing preliminary injunctive relief when no TRO was issued or sought as the options available when a TRO was issued. The opposing party can:

- File a demurrer [see 18.13[2][a]].
- Answer the complaint [see 18.13[2][b]].
- Oppose the application for preliminary injunction [see 18.13[3][c]].
- Request a continuance [see 18.13[3][e]].
- Petition for removal to federal court [see 18.13[3][f]].
- Make a motion for a change of venue [see 18.13[3][g]].

**Strategic Point:**

These options are not mutually exclusive. Regardless of the options chosen, you should always seek a continuance. Because there is no TRO in effect, there is no disadvantage to delaying the date of the preliminary injunction hearing.

**18.13[4] After Preliminary Injunction Has Been Granted.**

**18.13[4][a] Seek to Modify or Dissolve Injunction.** A court may modify or dissolve a preliminary injunction on certain grounds [CCP § 533].

**Cross Reference:**

Discussion of the grounds for dissolving or modifying a preliminary injunction, see 18.16.

**18.13[4][b] Appeal and Attempt to Obtain Stay Pending Appeal.** A decision granting a preliminary injunction

is immediately appealable [CCP § 904.1(a)(6) (unlimited civil cases); CCP § 904.2(g) (limited civil cases)]. If all or a portion of the injunction order has mandatory features, an appeal will automatically stay the operation of the mandatory features pending appeal [ *Agricultural Labor Relations Bd. v. Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 706, 238 CR 780, 739 P2d 140 ]. The court does have the authority to stay a prohibitory injunction [ *City of San Diego v. Southern Cal. Tel. Corp.* (1954) 42 C2d 110, 120, 266 P2d 14 ].

#### **Cross References:**

Discussion of mandatory versus prohibitory injunctions, see 18.07.

Discussion of the aspects of appealing the grant of a preliminary injunction, see 18.23.

Detail on stays pending appeal, see 18.24.

**18.13[4][c] Seek Writ of Prohibition.** A right of appeal does not bar the right to a writ of prohibition if an appeal is not an adequate remedy [ *Bd. of Police Comm'rs v. Superior Court* (1985) 168 CA3d 420, 434, 214 CR 493 ]. An appellate court will issue a writ of prohibition to restrain a trial court from enforcing an injunction if the trial court has acted in excess of its jurisdiction [ *City of Los Angeles v. Superior Court* (1959) 51 C2d 423, 429, 333 P2d 745 ].

#### **Example:**

An appeal is not an adequate remedy to review an injunction order restraining a municipality from enforcing ordinances the validity of which have not yet been determined. [ *City of Santa Monica v. Superior Court* (1964) 231 CA2d 223, 225, 41 CR 824 ].

**18.13[4][d] Decide Not to Comply and Challenge Validity of Injunction After Adjudication of Contempt.** For a discussion of the option of willful non-compliance with the injunction order, see 18.13[2][j].

**18.13[4][e] Object to Undertaking or Bond.** The person enjoined can object to the undertaking within five days after service of the preliminary injunction order and, if the court determines that the undertaking is insufficient and a sufficient one is not filed within the time required, the order granting the injunction must be dissolved [CCP § 529(a)]. The determination of sufficiency must be based on the damages the party may proximately sustain by reason of the injunction if the court finally decides that the applicant was not entitled to the injunction [ *ABBA Rubber Co. v. Seaquist* (1991) 235 CA3d 1, 14, 286 CR 518 ]. The damages must be reasonably foreseeable and can include the amount of attorney's fees necessary for the enjoined party to prosecute an appeal of the injunction or to defend at trial the causes of action on which the injunction was granted [ *ABBA Rubber Co. v. Seaquist* (1991) 235 CA3d 1, 14-16, 286 CR 518 ].

#### **Cross Reference:**

Discussion of the requirements for obtaining an undertaking, see 18.11[6].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Injunctions Contempt Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions Civil Procedure Remedies Injunctions Temporary Restraining Orders Civil Procedure Remedies Writs Common Law Writs Prohibition



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Chapter 18 TROs and Preliminary Injunctions  
III. OPPOSING INJUNCTIVE RELIEF

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.14*

**18.14 Affirmative Defenses.**

**18.14[1] Changed Circumstances.** The denial of an injunction is justified if a change in circumstances has rendered injunctive relief moot or unnecessary [ *Paul v. Milk Depots, Inc.* (1964) 62 C2d 129, 133, 41 CR 468, 396 P2d 924 ; *Donald v. Cafe Royale, Inc.* (1990) 218 CA3d 168, 184 ]. In addition, injunctive relief will be denied if the opposing party has voluntarily discontinued the wrongful conduct [ *Cisneros v. U.D. Registry, Inc.* (1995) 39 CA4th 548, 574, 46 CR2d 233 ]. Whether there is a reasonable probability that the complained of acts will recur lies in the discretion of the court [ *City of Vernon v. Cent. Basin Mun. Water Dist.* (1999) 69 CA4th 508, 517-518, 81 CR2d 650 ].

**18.14[2] Completed Acts.** Because the purpose of an injunction is to prevent future harm to the applicant by ordering the opposing party to refrain from doing a particular act, [see CCP § 525], injunctive relief is available only to prevent threatened injury and has no application to wrongful acts that have been completed [ *Scripps Health v. Marin* (1999) 72 CA4th 324, 332, 85 CR2d 86 ; *Gold v. Los Angeles Democratic League* (1975) 49 CA3d 365, 372, 122 CR 732 ].

**Example:**

A preliminary injunction to prevent the construction of a radio transmitting tower was denied because the tower had been erected prior to service of a TRO [ *McManus v. KPAL Broad. Corp.* (1960) 182 CA2d 558, 563, 6 CR 441 ].

**18.14[3] Balancing of Conveniences or Hardships.** The doctrine of balancing of conveniences may be invoked as a defense to an injunction when the applicant, seeking to vindicate a technical and unsubstantial right, would impose an unusual hardship on the public or the opposing party [ *Fairrington v. Dyke Water Co.* (1958) 50 C2d 198, 200, 323 P2d 1001 ]. The doctrine, also called the doctrine of relative hardships, is often applied to the construction of expensive structures that overhang adjoining property or trespass to a minor degree. If the injunction to remove them were granted as of right, the applicant would be encouraged to engage in what amounted to legal extortion [ *Christensen v. Tucker* (1952) 114 CA2d 554, 560, 250 P2d 660 ]. To deny an injunction on this basis, the following factors must be considered [ *Christensen v. Tucker* (1952) 114 CA2d 554, 563, 250 P2d 660 ]:

- The opposing party must be innocent: the encroachment must not be the result of the opposing

party's willful act, and perhaps not the result of the opposing party's negligence. The court must weigh the applicant's conduct to ascertain if that party is in any way responsible for the situation.

- If the applicant will suffer irreparable injury because of the encroachment, the injunction must be granted regardless of the injury to the opposing party, except, perhaps, if the rights of the public would be adversely affected.
- The hardship to the opposing party by the granting of the injunction must be greatly disproportionate to the hardship caused the applicant by the continuance of the encroachment, and this must clearly appear in the evidence and must be proved by the opposing party.



#### **Warning--Opposing Party:**

The denial of an injunction does not prevent the applicant from receiving damages for the encroachment [ *Christensen v. Tucker* (1952) 114 CA2d 554, 559, 250 P2d 660 ].

**18.14[4] First Amendment Rights Infringed.** An injunction will not be granted if the restraint interferes with freedom of speech [ *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church* (1952) 39 C2d 121, 145, 245 P2d 481 ].

#### **Exception:**

If the court finds the expression to be unlawful, the court may enjoin it without violating the prohibition against prior restraint [ *Aguilar v. Avis Rent-A-Car Sys., Inc.* (1999) 21 C4th 121, 140, 87 CR2d 132, 980 P2d 846 (after jury found that defendant had engaged in employment discrimination in part by permitting plaintiffs to be target of repeated racial epithets of fellow employee, injunction prohibiting employee from using such epithets in future was properly granted)]. That includes a statement judicially found to be defamatory [ *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 C4th 1141, 1155-1156, 57 CR3d 320, 156 P3d 339 ]. The injunction in the case of defamatory statements may not be broader than necessary to provide relief to plaintiff while minimizing the restriction of expression [ *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 C4th 1141, 1160, 57 CR3d 320, 156 P3d 339 ; *Evans v. Evans* (2008) 162 CA4th 1157, 1164, 76 CR3d 859 ].

#### **Example:**

An injunction against defendant's repetition of defamatory statements was overly broad to the extent that it [ *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 C4th 1141, 1160-1161, 57 CR3d 320, 156 P3d 339 ]:

- Extended to defendant's "agents, all persons acting on her behalf or purporting to act on her behalf and all other persons in active concert and participation with her" in the absence of evidence that anyone other than defendant had defamed plaintiff;
- Prevented defendant from presenting her grievances to government officials with relevant enforcement responsibilities; and
- Prohibited defendant from initiating contact with individuals known to defendant to be employees of plaintiff at any time regarding any subject, because there were no restrictions of time, place, and manner.



#### **Cross Reference:**

Discussion of opposing motion for gag order, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, § 2.30 et seq.

**18.14[5] Laches.** Laches may be asserted as an affirmative defense to an action for injunctive relief [ *Vesper v. Forest Lawn Cemetery Ass'n* (1937) 20 CA2d 157, 165, 67 P2d 368 ]. The party seeking to invoke the defense of laches must show not only delay, but prejudice proximately caused by that delay [ *Laing v. Occidental Life Ins. Co.* (1966) 244 CA2d 811, 821, 53 CR 681 ]. There is no rule as to the length of time that gives rise to laches [ *Lusk v. Krejci* (1960) 187 CA2d 553, 556, 9 CR 703 ]. The following are factors that the courts have used to deny an injunction on the basis of laches [ *Tustin Cmty. Hosp., Inc. v. Santa Ana Cmty. Hosp. Ass'n* (1979) 89 CA3d 889, 905, 153 CR 76 ]:

- The length of the delay.
- Excuses for the delay.
- The applicant's knowledge, in advance, that the opposing party had committed the wrongful act.
- Any actual fraud in the opposing party's conduct.
- The applicant's acquiescence or consent, or the appearance thereof, regarding the opposing party's conduct.
- Any prejudice to, or reliance by, the opposing party.
- Possible changes in conditions during the delay.
- The effect of the delay on the availability of evidence.
- Alternatives to injunctive relief.
- The effect on the opposing party of granting injunctive relief versus the effect on the applicant of a denial.
- The effect on the public interest of the parties' conduct and of the ultimate judgment to be rendered.

**18.14[6] Other Legal Remedy Adequate.** An injunction may be denied if the applicant has an adequate legal remedy [ *Wilkison v. Wiederkehr* (2002) 101 CA4th 822, 832, 124 CR2d 631 ; *Thayer Plymouth Ctr. v. Chrysler Motors Corp.* (1967) 255 CA2d 300, 306, 63 CR 148 ].



**Cross Reference:**

Discussion of adequacy of legal remedy, including examples of adequate legal remedies other than monetary damages, see 18.11[1][d].

**18.14[7] Public Interest.** Public policy denies an injunction and permits only the recovery of damages if private property has been put to a public use by a public service corporation and the public interest has intervened [ *Loma Portal Civic Club v. Am. Airlines, Inc.* (1964) 61 C2d 582, 588-589, 39 CR 708, 394 P2d 548 ]. The importance of public policy interests has been embodied in CCP § 731, which prohibits private injunctive relief against certain manufacturing, commercial, or airport operations if the operation is permitted by law and is being carried out in a reasonable and necessary manner.

**Example:**

The public interest in safe and reliable air service prevented an injunction by adjoining landowners to prohibit airlines from flying over their property [ *Loma Portal Civic Club v. American Airlines, Inc.* (1964) 61 C2d 582, 588-589, 39 CR 708, 394 P2d 548 ].

**18.14[8] Terms Contrary to Law.** An injunction will not be granted if the relief would be contrary to law. Courts do not have the power to disregard or set aside express terms of legislation [ *People ex rel. Dept. of Transportation v. Maldonado* (2001) 86 CA4th 1225, 1234, 104 CR2d 66 ; *Armstrong v. Picquelle* (1984) 157 CA3d 122, 129, 203 CR 552 ].

**18.14[9] Unclean Hands.** A opposing party can challenge an action for injunctive relief by asserting that the applicant had unclean hands [ *London v. Marco* (1951) 103 CA2d 450, 453, 229 P2d 401 ]. The conduct by the applicant must relate directly to the transaction concerning which the complaint was made--that is, it must pertain to the very subject matter involved and affect the equitable relations between the parties [ *Jay Bharat Developers, Inc. v. Minidis* (2008) 167 CA4th 437, 445-446, 84 CR3d 267 (fraud claims did not preclude injunctive relief by infecting the cause of action involved and affecting "the equitable relations between the litigants"); *Nutro Prods., Inc. v. Cole Grain Co.* (1992) 3 CA4th 860, 869, 5 CR2d 41 ].



#### **Strategic Point--Applicant:**

The applicant may also assert unclean hands as a defense against the opposing party [ *Hernandez v. Stabach* (1983) 145 CA3d 309, 315, 193 CR 350 (in action by tenants to prevent landlord from maintaining retaliatory unlawful detainer actions, unclean hands precluded defendant from raising overcrowding as defense because landlord had rented to tenants knowing that overcrowding would occur)].



#### **Cross Reference:**

Doctrine of unclean hands generally, see *California Forms of Pleading and Practice*, Ch. 251, Equity, § 251.141 (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Injunctions General Overview Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions





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Chapter 18 TROs and Preliminary Injunctions  
IV. DISSOLVING OR MODIFYING TEMPORARY RESTRAINING ORDER OR INJUNCTION

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.15*

**18.15 CHECKLIST: Dissolving or Modifying TRO or Injunction.**

- ☐ Prepare and file motion and notice of motion for order dissolving or modifying TRO or injunction.

**Grounds:**

See 18.16

**Authority:**

CCP §§ 532, 533

**Form:**

See 18.34

- ☐ Serve motion and notice of motion on applicant.

**Authority:**

CCP § 533 (TRO or preliminary injunction)

- ☐ If TRO or injunction is modified or dissolved:

- ☐ Obtain signature of judge on order.

**Form:**

See 18.35

- ☐ Serve order on applicant.

- ☐ If TRO or injunction is dissolved, decide whether to:

- ☐ File a motion against the principal and surety to enforce the undertaking; or

**Authority:**

*CCP § 996.440*

**Discussion:**

See 18.18



**Timing:**

The motion may not be made until after entry of the final judgment in the action or proceeding in which the undertaking is given and the time for appeal has expired or, if an appeal is taken, until the appeal is finally determined. The motion may not be made or notice of motion served more than one year after the later of these dates.

- ☐ If no undertaking was filed, initiate an action against the applicant for abuse of process or malicious prosecution.

**Authority:**

*Wallace v. Miller (1983) 140 CA3d 636, 642-645, 189 CR 637* (decided under former *CCP §§ 535, 1054(a)*)

**Discussion:**

See 18.18[6]

- ☐ If motion to enforce undertaking is made, make sure to seek recovery of attorney's fees incurred in successfully procuring a final decision dissolving the TRO or preliminary injunction.

**Authority:**

*ABBA Rubber Co. v. Seaquist (1991) 235 CA3d 1, 15-16, 286 CR 518 ; Russell v. United Pac. Ins. Co. (1963) 214 CA2d 78, 85-89, 29 CR 346*

**Discussion:**

See 18.18[4]

- ☐ If TRO is not dissolved or modified:

- ☐ Appeal decision; or
- ☐ Follow steps to oppose application for a preliminary injunction.

**Checklist for Opposing Application for Preliminary Injunction:**

See 18.12

- ☐ If preliminary injunction is not dissolved or modified:

- ☐ Appeal decision; or

- ☐ Proceed to trial on the merits of the action.

**Checklist for Appealing the Refusal to Modify or Dissolve a TRO or Injunction:**

See 18.22[1].



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*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.16*

**18.16 Grounds for Dissolving or Modifying TRO or Preliminary Injunction.**

**18.16[1] Material Change in Facts or Law or to Serve Ends of Justice.** The court may on notice modify or dissolve a TRO or preliminary injunction on a showing that [CCP § 533]:

- There has been a material change in the facts on which the TRO or preliminary injunction was granted;
- The law on which the TRO or preliminary injunction was granted has changed; or
- The ends of justice would be served by the modification or dissolution of the TRO or preliminary injunction.

**Exception:**

Although an injunction granted by an arbitrator is subject to modification or dissolution on a showing of changed circumstances, any assertion of such a change must be raised and presented through arbitration, not in superior court [ *Swan Magnetics v. Superior Court* (1997) 56 CA4th 1504, 1510, 1512, 66 CR2d 541 ].

➡ **Cross Reference:**

Forms, see 18.34, 18.35.

**18.16[2] Injunction Granted Without Notice.** If the injunction was granted without notice to the person enjoined, that person may apply, on reasonable notice to the judge who granted the injunction, or to the court in which the action was brought, to dissolve or modify the injunction [CCP § 532(a)]. The application may be made on the complaint or the affidavit on which the injunction was granted, or on affidavit on the part of the person enjoined, with or without the answer. If the application is made on affidavits on the part of the person enjoined, but not otherwise, the person against whom the application is made may oppose the application by affidavits or other evidence in addition to that on which the injunction was granted [CCP § 532(a)].

**18.16[3] Overbroad, Vague, or Ambiguous Injunction.** An injunctive order must be limited in scope to the

subject of the litigation and must not be so uncertain or ambiguous that the enjoined person cannot determine from the order what that person may and may not do [ *City of Redlands v. County of San Bernardino* (2001) 96 CA4th 398, 415, 117 CR2d 582 (injunction prohibiting county from readopting general plan amendment or any "similar amendment" not overbroad, vague, or ambiguous)].

**18.16[4] No Undertaking or Insufficient Undertaking.** A preliminary injunction issued without an undertaking must be dissolved [ *Neumann v. Moretti* (1905) 146 C 31, 32-33, 79 P 512 ; *Casitas Inv. Co. v. Charles L. Harney, Inc.* (1962) 203 CA2d 811, 816, 21 CR 821 ]. In addition, if the court, on objection by the opposing party, determines that the undertaking is insufficient and a sufficient one is not filed within the time required, the order granting the injunction must be dissolved [CCP § 529(a)]. For the procedures for challenging the sufficiency of an undertaking, see 18.13[4][e].



#### **Cross Reference:**

Discussion of the requirements for obtaining an undertaking, see 18.11[6].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions Civil  
Procedure Remedies Injunctions Temporary Restraining Orders



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**18.17 Decision to Dissolve or Not Dissolve Injunction Is Appealable.**

A direct appeal may be taken from an order dissolving, or refusing to dissolve, a TRO or preliminary injunction [*CCP* § 904.1(a)(6) (appeal in unlimited civil case); *CCP* § 904.2(g) (appeal in limited civil case)].

➡ **Cross Reference:**

Discussion of appealing the dissolution of or refusal to dissolve a TRO or a preliminary injunction, see 18.23.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions Civil  
Procedure Remedies Injunctions Temporary Restraining Orders



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**18.18 Enforcement of Undertaking.**

**18.18[1] Liability on Injunction Undertaking Does Not Require Wrongful Act or Bad Motive.** The liability of a surety on an injunction undertaking depends simply on proof that the injunction was issued, that the enjoined party suffered damage thereby, and that the court has decided that the applicant was not entitled to the injunction. No element of wrongful act or bad motive is necessary [ *Russell v. United Pac. Ins. Co. (1963) 214 CA2d 78, 87, 29 CR 346* ].



**Warning:**

If an injunction is dissolved by mutual agreement, the dissolution is not a confession by the applicant that the applicant had no right to the injunction granted, nor does the dissolution operate as a judgment to that effect [ *Wilshire Mortgage Corp. v. O.A. Graybeal Co. (1940) 41 CA2d 1, 6-7, 105 P2d 996* (under terms of bond, surety obligated only if court decided that plaintiff was not entitled to injunction)].

**18.18[2] Requires Final Determination of Main Action.** The liability on an injunction undertaking may be enforced on motion made in court without the necessity of an independent action [CCP § 996.440(a)]. The motion may not be made until after entry of the final judgment in the action or proceeding in which the undertaking is given and the time for appeal has expired or, if an appeal is taken, until the appeal is finally determined. The motion may not be made or notice of motion served more than one year after the later of these dates [CCP § 996.440(b)].



**Cross Reference:**

Forms, see *California Forms of Pleading and Practice, Ch. 303, Injunctions, §§ 303.140, 303.141* (Matthew Bender).

**18.18[3] Measure of Damages.** Damages recoverable on an injunction undertaking are those that appear with reasonable certainty to be the necessary and proximate result of the injunction, not exceeding the penal sum of the bond [ *Allen v. Pitchess (1973) 36 CA3d 321, 327, 111 CR 658* ]. The amount recoverable is not limited to damages accruing during the time the injunction was operative, but instead includes all damages flowing directly from the wrongful injunction for a period of time beyond the date of its dissolution [ *Russell v. United Pac. Ins. Co. (1963) 214 CA2d 78, 88, 29 CR 346* ].

**18.18[4] Recovery of Attorney's Fees Permitted.** Reasonable attorney's fees and expenses incurred in successfully procuring a final decision dissolving an injunction are recoverable as damages, to the extent that the fees were for services that related to the dissolution. In addition, a successful appeal from an order granting an injunction, after notice and hearing, gives rise to liability on the bond for damages in the amount of the attorney's fees incurred in prosecuting that appeal. If the preliminary injunction is valid and regular on its face, requiring the opposing party to defend against the main action in order to demonstrate that the injunction was wrongfully issued, the opposing party may recover that portion of attorney's fees attributable to defending against those causes of action on which the issuance of the injunction had been based [ *ABBA Rubber Co. v. Seaquist* (1991) 235 CA3d 1, 15-16, 286 CR 518 ; *Russell v. United Pac. Ins. Co.* (1963) 214 CA2d 78, 85-89, 29 CR 346 ].

**Exception:**

If a TRO is dissolved because of the denial of a preliminary injunction, attorney's fees incurred in defending the main action after the dissolution are not recoverable [ *Allen v. Pitchess* (1973) 36 CA3d 321, 328, 111 CR 658 ].



**Cross Reference:**

Discussion of recovery of attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 25, Attorney's Fees.

**18.18[5] Principal's Liability Not Limited to Terms of Bond.** Although the liability of a surety is limited to the amount of the bond, the principal's liability is not so limited (except as otherwise provided by statute) [CCP § 996.470(a)].

**18.18[6] If No Undertaking Was Obtained, Action for Abuse of Process or Malicious Prosecution May Be Available.** If no undertaking is obtained and it is later determined that the applicant was not entitled to an injunction, the statutory remedy under CCP § 996.440(a) may be unavailable. However, the opposing party may be able to file an action for abuse of process or for malicious prosecution [ *Wallace v. Miller* (1983) 140 CA3d 636, 642-645, 189 CR 637 (decided under former CCP §§ 535, 1054(a))].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Bonds Sureties Liability Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions





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V. ENFORCING INJUNCTION

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**18.19 CHECKLIST: Enforcing Injunction.**

- ☐ Serve copy of injunction order on all enjoined parties.

**Discussion:**

See 18.20

- ☐ If enjoined party fails to comply with injunction order, initiate an action for contempt.

**Authority:**

*CCP § 1209(a)(5)*

**Discussion:**

See 18.21



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### **18.20 Enjoined Party Must Have Notice of Injunction.**

**18.20[1] Service of Notice.** The party enjoined must have notice of the injunction order, which may be satisfied by service in the same manner as service of a summons [ *Golden Gate Consol. Hydraulic Mining Co. v. Superior Court* (1884) 65 C 187, 190, 3 P 628 ].



#### **Cross Reference:**

Detailed discussion of the procedures for notice, see Ch. 8, Service of Summons.

**18.20[2] Actual Notice.** A party with actual notice of an injunction is bound by the injunction even though it was not served [ *Golden Gate Consol. Hydraulic Mining Co. v. Superior Court* (1884) 65 C 187, 190, 3 P 628 ]. A party who appeared in court or was represented by counsel at the preliminary injunction hearing is deemed to have actual notice [ *Mattos v. Superior Court* (1939) 30 CA2d 641, 647, 86 P2d 1056 ; but see *Mossman v. Superior Court* (1972) 22 CA3d 706, 711, 99 CR 638 ("disputable" presumption of notice arises if contempt order served on alleged contemnor's attorney, but not on contemnor)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions



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### **18.21 Filing Motion for Contempt.**

**18.21[1] Elements to Establish Contempt.** A person is subject to contempt if he or she refuses to comply with a court's valid injunctive order [see *CCP § 1209(a)(5)*]. The four elements necessary to establish contempt are [ *Conn v. Superior Court (1987) 196 CA3d 774, 784, 242 CR 148* ]:

- The rendition of a valid order.
- Actual knowledge of the order.
- Ability to comply with the order.
- Willful disobedience of the order.

#### **➤ Cross Reference:**

Discussion of indirect contempt of court generally, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 23.18 et seq.*

**18.21[2] Contempt Must Be Proved Beyond Reasonable Doubt.** Because a contempt proceeding is quasi-criminal in nature, an accused contemnor is entitled to a presumption of innocence and cannot be compelled to testify. Also, the contempt must be proved beyond a reasonable doubt [ *In re Martin (1977) 71 CA3d 472, 480, 139 CR 451* ].

#### **➤ Cross Reference:**

Additional discussion of the burden of proof in indirect contempt proceeding, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 23.24.*

Discussion of burdens of proof and persuasion generally, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.*

**18.21[3] Penalty for Contempt.** For each act of contempt, the court may impose a fine not exceeding \$1,000, a jail term of up to five days, or both [CCP § 1218(a)]. In addition, a person who is subject to a court order as a party to the action, or any agent of that person, who is adjudged guilty of contempt for violating that court order may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by that party in connection with the contempt proceeding [CCP § 1218(a)].

➤ **Cross Reference:**

Additional discussion of penalties for indirect contempt of court, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 23.24.

**18.21[4] Injunction Must Be Unambiguous.** To find a person guilty of contempt for violating an injunction, the acts constituting the contempt must be clearly and specifically prohibited by the terms of the injunction [ *Brunton v. Superior Court* (1942) 20 C2d 202, 205, 124 P2d 831 ]. The terms of the injunction order must not be so vague that people of common intelligence must guess at its meaning and differ as to its application [ *Pitchess v. Superior Court* (1969) 2 CA3d 644, 651, 83 CR 35 ]. Any ambiguity in the injunction must be resolved in favor of the enjoined party [ *Gottlieb v. Superior Court* (1959) 168 CA2d 309, 313, 335 P2d 714 ].

➤ **Cross Reference:**

Additional discussion of order violated in proceeding on indirect contempt of court, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 23.20.

**18.21[5] Judge Issuing Contempt Order Must Have Jurisdiction.** An injunction is void if the judge who issued it lacked jurisdiction [ *In re Application of Wood* (1939) 34 CA2d 546, 551, 93 P2d 1058 ].

➤ **Cross Reference:**

Additional discussion of court's jurisdiction for contempt of court proceeding, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 23.19.

More detail on contempt, see California Forms of Pleading and Practice, Ch. 135, Contempt (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Injunctions Contempt



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Chapter 18 TROs and Preliminary Injunctions  
VI. APPEAL OF GRANT, DENIAL, DISSOLUTION, OR REFUSAL TO DISSOLVE TRO OR INJUNCTION

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.22*

**18.22 CHECKLIST: Appeal of Grant, Denial, Dissolution, or Refusal to Dissolve TRO or Preliminary Injunction.**

**18.22[1] Appeal by Opposing Party.**

- ☐ Determine whether to appeal or petition for a writ of prohibition.
- ☐ Seek writ of prohibition if appeal would not be an adequate remedy.

**Authority:**

*Board of Police Comm'rs v. Superior Court (1985) 168 CA3d 420, 434, 214 CR 493*

**Discussion:**

See 18.25

- ☐ If appeal is chosen:
  - ☐ Determine grounds for appeal.
  - ☐ Draft appeal.
  - ☐ Serve and file appeal.
  - ☐ Draft motion for stay pending appeal or petition for writ of prohibition.

**Exception:**

If all or a portion of the injunction order has mandatory features, an appeal will

automatically stay the operation of the mandatory features pending appeal.

**Authority:**

*Rubin v. American Sportsmen Television Equity Soc'y (1951) 102 CA2d 288, 290, 227 P2d 303*

**Discussion:**

See 18.24

☐ Prepare and file a petition for a writ of supersedeas, if trial court mistakenly attempts to enforce a mandatory injunction that should have been automatically stayed on appeal or if injunction order is prohibitory and writ is necessary or proper to the complete exercise of its appellate jurisdiction.

**Authority:**

*Rubin v. American Sportsmen Television Equity Soc'y, Inc. (1951) 102 CA2d 288, 290, 227 P2d 303 ; Wilkman v. Banks (1953) 120 CA2d 521, 523, 261 P2d 299*

**Discussion:**

See 18.24[3]

**18.22[2] Appeal by Applicant.**

☐ Determine whether grounds for appeal exist.

☐ Order denying TRO or preliminary injunction will be overturned only on showing of abuse of discretion.

**Authority:**

*General Distillers, Ltd. v. Wholesale Drivers- Salesmen Union, Local 109 (1943) 57 CA2d 908, 909*

**Discussion:**

See 18.23[1][b] (TRO), 18.23[2][b] (preliminary injunction)

☐ Order denying preliminary injunction will be affirmed if trial court correctly determined *either* of following factors:

☐ Absence of reasonable probability that applicant will prevail on merits; or

☐ Interim harm that applicant is likely to sustain if injunction were denied, compared to harm opposing party is likely to suffer if preliminary injunction were issued.

**Authority:**

*Teachers Ins. & Annuity Ass'n v. Furlotti (1999) 70 CA4th 1487, 1493, 83 CR2d 455*

**Discussion:**

See 18.23[2][b]

- ☐ Appellate court will not reweigh evidence.

**Authority:**

*Shoemaker v. County of Los Angeles* (1995) 37 CA4th 618, 625, 43 CR2d 774

**Discussion:**

See 18.23[2][c]

- ☐ Appellant has burden of proof on issue of abuse of discretion.

**Authority:**

*IT Corp. v. County of Imperial* (1983) 35 C3d 63, 69-70, 196 CR 715, 672 P2d 121

**Discussion:**

See 18.23[2][e]

- ☐ Trial court's decision regarding injunction will be reviewed under law in effect at time appellate court renders its opinion.

**Authority:**

*Hunt v. Superior Court* (1999) 21 C4th 984, 999, 90 CR2d 236, 987 P2d 705

**Discussion:**

See 18.23[4]

- ☐ Appeal order denying TRO or preliminary injunction immediately if appeal is desired.

**Authority:**

CCP § 904.1(a)(6); *Brydon v. City of Hermosa Beach* (1928) 93 CA 615, 620, 270 P 255

**Discussion:**

See 18.23[1][a] (TRO), 18.23[2][a] (preliminary injunction)

- ☐ Draft, file, and serve notice of appeal.

**Discussion:**

See California Forms of Pleading and Practice, Ch. 42, Appeal: Notice of Appeal (Matthew Bender)

Detailed discussion of the appeal process in general, see California Forms of Pleading and Practice, Chs. 40 through 54 (Matthew Bender).



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*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.23*

## 18.23 Appeal.

### 18.23[1] TRO.

#### **18.23[1][a] Appeal May Be Taken From Order Granting, Denying, Dissolving, or Refusing to Dissolve TRO.**

An order granting, denying, dissolving, or refusing to dissolve a TRO is immediately appealable [*CCP* § 904.1(a)(6) (unlimited civil cases); *CCP* § 904.2(g) (limited civil cases); *McLellan v. McLellan* (1972) 23 CA3d 343, 357, 100 CR 258 ]. The intent of *CCP* § 904.1(a)(6) (former *CCP* § 963(2)) is that all orders granting or refusing injunctions, whether temporary or permanent or provisional pending appeal, are appealable [ *Brydon v. City of Hermosa Beach* (1928) 93 CA 615, 620, 270 P 255 ].

**18.23[1][b] Standard of Review Is Abuse of Discretion.** An order granting, denying, dissolving, or refusing to dissolve a TRO will be overturned only on a showing of an abuse of discretion [ *Gen. Distillers, Ltd. v. Wholesale Liquor Drivers-Salesmen Union, Local 109* (1943) 57 CA2d 908, 909 ].

### 18.23[2] Preliminary Injunction.

**18.23[2][a] Appeal May Be Taken From Order Granting, Denying, Dissolving, or Refusing to Dissolve Preliminary Injunction.** An order granting, denying, dissolving, or refusing to dissolve a preliminary injunction is immediately appealable [*CCP* § 904.1(a)(6) (unlimited civil cases); *CCP* § 904.2(g) (limited civil cases)]. The intent of *CCP* § 904.1(a)(6) (former *CCP* § 963(2)) is that all orders granting or refusing injunctions, whether temporary or permanent or provisional pending appeal, are appealable [ *Brydon v. City of Hermosa Beach* (1928) 93 CA 615, 620, 270 P 255 ].

**18.23[2][b] Standard of Review Is Abuse of Discretion.** An order granting, denying, dissolving, or refusing to dissolve a preliminary injunction will be overturned only on a showing of an abuse of discretion [ *Professional Engineers v. Department of Transp.* (1997) 15 C4th 543, 562, 63 CR2d 467, 936 P2d 473 , superseded by statute as stated in *Consulting Engineers & Land Surveyors of California v. Department of Transportation*, 167 Cal. App. 4th 1457, 84 Cal. Rptr. 3d 900 ]. A trial court has abused its discretion only if it has exceeded the bounds of reason or contravened the uncontradicted evidence [ *Continental Baking Co. v. Katz* (1968) 68 C2d 512, 527, 67 CR 761, 439 P2d 889 ]. An appeal from an order granting or denying a preliminary injunction involves a limited review of two



factors [ *Teachers Ins. & Annuity Ass'n v. Furlotti* (1999) 70 CA4th 1487, 1493, 83 CR2d 455 ; *Shoemaker v. County of Los Angeles* (1995) 37 CA4th 618, 624-625, 43 CR2d 774 ]:

- The reasonable probability that the applicant will prevail on the merits.
- The interim harm that the applicant is likely to sustain if the injunction were denied as compared to the harm that the opposing party is likely to suffer if the preliminary injunction were issued.

If the trial court denied a preliminary injunction, the appellate court will affirm if it finds that the trial court correctly determined at least one of these two factors [ *CBS, Inc. v. Block* (1986) 42 C3d 646, 650 n3, 230 CR 362, 725 P2d 470 ; *Cohen v. Bd. of Supervisors* (1985) 40 C3d 277, 286-287, 219 CR 467, 707 P2d 840 ]. However, if the trial court granted a preliminary injunction, the appellate court will reverse if the trial court abused its discretion as to either factor [ *Millennium Rock Mtg., Inc. v. T.D. Serv. Co.*, (2009) 179 CA4th 804, 812, 102 CR3d 544 (if the party that sought the preliminary injunction has no likelihood of prevailing on the merits at trial, then the trial court committed an error of law); *City of Corona v. Naulls* (2008) 166 CA4th 418, 427, 83 CR3d 1 ; *Teachers Ins. & Annuity Ass'n v. Furlotti* (1999) 70 CA4th 1487, 1493, 83 CR2d 455 ].

#### **Exception:**

If review of a decision on a preliminary injunction involves solely a question of a violation of law, the standard of review is not abuse of discretion, but instead an independent review of whether statutory or constitutional law was correctly interpreted and applied by the trial court [ *San Diego Unified Port Dist. v. U.S. Citizens Patrol* (1998) 63 CA4th 964, 969, 74 CR2d 364 ].

#### **Exception:**

If the trial court has refused to consider the "likelihood of prevailing on the merits" factor, the appellate review of the trial court's ruling is under the deferential abuse of discretion standard [ *Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 CA4th 336, 345, 72 CR3d 678 ].

**18.23[2][c] Appellate Court Will Not Reweigh Evidence.** If the evidence before the trial court was in conflict, an appellate court will not reweigh it or determine the credibility of witnesses on appeal [ *City of Corona v. Naulls* (2008) 166 CA4th 418, 427, 83 CR3d 1 ; *Shoemaker v. County of Los Angeles* (1995) 37 CA4th 618, 625, 43 CR2d 774 ]. The substantial evidence rule applies, and the appellate court will interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court's order [ *City of Corona v. Naulls* (2008) 166 CA4th 418, 427, 83 CR3d 1 ; *Volpicelli v. Jared Sydney Torrance Mem'l Hosp.* (1980) 109 CA3d 242, 247, 167 CR 610 ].

**18.23[2][d] Grant of Mandatory Injunction Given More Scrutiny on Appeal.** If a preliminary injunction mandates an affirmative act that changes the status quo, the appellate court will scrutinize it even more closely for abuse of discretion [ *Shoemaker v. County of Los Angeles* (1995) 37 CA4th 618, 625, 43 CR2d 774 ].

**18.23[2][e] Burden of Proof Is on Appellant.** The burden rests with the appellant to make a clear showing of an abuse of discretion [ *IT Corp. v. County of Imperial* (1983) 35 C3d 63, 69-70, 196 CR 715, 672 P2d 121 ; *Socialist Workers 1974 Cal. Campaign Comm. v. Brown* (1975) 53 CA3d 879, 889, 125 CR 915 ].

**18.23[2][f] Grant or Denial of Preliminary Injunction Is Not Final Adjudication of Lawsuit.** The granting or denial of a preliminary injunction does not constitute an adjudication of the ultimate rights in the controversy [ *Cohen v. Board of Supervisors* (1985) 40 C3d 277, 286, 219 CR 467, 707 P2d 840 ]. In determining the propriety of preliminary relief, neither the trial court nor an appellate court may undertake a final adjudication of the lawsuit [ *Hunt v. Superior Court* (1999) 21 C4th 984, 999, 90 CR2d 236, 987 P2d 705 (appellate court erred in directing entry of judgment for appellant after appellant challenged issuance of preliminary injunction)].

**18.23[3] No Separate Appeal by Opposing Party From Order Fixing Amount of Bond.** An order fixing the amount of an undertaking is not separately appealable [ *County of Los Angeles v. City of Los Angeles* (1999) 76 CA4th 1025, 1026, 90 CR2d 799 ].

**18.23[4] Law at Time of Appellate Decision Applicable.** The trial court decision concerning an injunction is reviewed under the law in effect at the time the appellate court renders its opinion [ *Hunt v. Superior Court* (1999) 21 CA4th 984, 999, 90 CR2d 236, 987 P2d 705 ].

**18.23[5] Effect of Reversal on Appeal.** If a preliminary injunction is dissolved because of a judgment on the merits of the underlying action in favor of the opposing party and that judgment is reversed on appeal, the applicant is entitled to the protection that the applicant had earlier secured by the preliminary injunction. However, this reinstatement is not automatic, and an evidentiary hearing is required [ *City of Oakland v. Superior Court* (1982) 136 CA3d 565, 569-570, 186 CR 326 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions Civil  
Procedure Remedies Injunctions Temporary Restraining Orders



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*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.24*

## 18.24 Stay.

### 18.24[1] Stay of Injunction Pending Appeal.

**18.24[1][a] Stay Automatic for Mandatory Injunction.** If all or a portion of the injunction order has mandatory features, an appeal will automatically stay the operation of the mandatory features pending appeal [ *Agricultural Labor Relations Bd. v. Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 706, 238 CR 780, 739 P2d 140 ].

**18.24[1][b] Stay Discretionary for Prohibitory Injunction.** Although there is no automatic stay of a prohibitory injunction, the court does have the authority to stay a prohibitory injunction [ *City of San Diego v. Southern Calif. Tel. Corp.* (1954) 42 C2d 110, 120, 266 P2d 14 (trial court may protect parties on appeal by providing that its injunction order is stayed, under conditions that protect appellant by preserving subject matter of appeal pending outcome of appeal and at same time protect respondent by saving benefits of the judgment in event of affirmance)].

**18.24[2] Injunctive Order to Preserve Status Quo After Denial of Injunction.** If an applicant is denied injunctive relief, the trial court has the authority to issue an injunction to preserve the status quo pending a motion for a new trial or an appeal [ *Pierce v. City of Los Angeles* (1911) 159 C 516, 517-520, 114 P 818 (motion for new trial); *Eisenberg v. Superior Court* (1924) 193 C 575, 577-579, 226 P 617 (appeal)].

**18.24[3] Writ of Supersedeas.** An appellant is entitled as a matter of right to issuance of a writ of supersedeas if the trial court mistakenly attempts to enforce a mandatory injunction that should have been automatically stayed on appeal [ *Rubin v. American Sportsmen Television Equity Soc'y* (1951) 102 CA2d 288, 290, 227 P2d 303 ]. If the injunction order is prohibitory, the appellate court has the inherent power to issue the writ if such action is necessary or proper to the complete exercise of its appellate jurisdiction [ *Wilkman v. Banks* (1953) 120 CA2d 521, 523, 261 P2d 299 ]. Whether appellate jurisdiction will be safeguarded is based on a consideration of the respective rights of the litigants, which contemplates the possibility of affirmance as well as of reversal [ *Board of Dental Exam'rs v. Jameson* (1944) 23 C2d 689, 690, 145 P2d 905 ].

### ➡ Cross Reference:

Detailed discussion of stay pending appeal, see *California Forms of Pleading and Practice*, Ch. 43, *Appeal: Stay of Proceedings*, §§ 43.17, 43.21 (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureRemediesInjunctionsMandatory Injunctions



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### 18.25 Writ of Prohibition.

A right of appeal does not bar the right to a writ of prohibition if an appeal is not an adequate remedy [ *Board of Police Comm'rs v. Superior Court* (1985) 168 CA3d 420, 434, 214 CR 493 ; *City of Santa Monica v. Superior Court* (1964) 231 CA2d 223, 225, 41 CR 824 (appeal not adequate remedy to review injunction order restraining municipality from enforcing ordinances whose validity have not yet been determined)]. An appellate court will also issue a writ of prohibition to restrain a trial court from enforcing an injunction if the trial court has acted in excess of its jurisdiction [ *City of Los Angeles v. Superior Court* (1959) 51 C2d 423, 429, 333 P2d 745 ; *Biosense Webster, Inc. v. Superior Court* (2006) 135 CA4th 827, 834, 836-838, 37 CR3d 759 (prohibition against injunction against possible action in another state)].



#### Cross Reference:

Discussion of writs of prohibition, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender).

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Writs Common Law Writs Prohibition



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Chapter 18 TROs and Preliminary Injunctions

VII. FORMS

A. Seeking Injunctive Relief

2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.26

**18.26 Complaint for TRO, Preliminary Injunction, Permanent Injunction, and Damages.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                     |
|------------------------------|---|-------------------------------------|
| _____ [name],                | ) |                                     |
| Plaintiff, vs. _____ [name], | ) | NO. _____                           |
| Defendant                    | ) | COMPLAINT FOR TEMPORARY RESTRAINING |
|                              | ) | ORDER, PRELIMINARY INJUNCTION, PER- |
|                              | ) | MANENT INJUNCTION, AND DAMAGES      |

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, \_\_\_\_\_ [identify plaintiff and allege capacity in which plaintiff is suing defendants if that capacity is other than as an individual].

2. \_\_\_\_\_ [Allege facts showing that plaintiff has a personal or property right or interest of the kind that injunctive relief is available to protect, such as the ownership or possession of real property, the possession of an occupational or political status or position, or the right to conduct an established business].

3. Defendants \_\_\_\_\_ [name] and \_\_\_\_\_ [name] are, and at all times mentioned in this complaint were, \_\_\_\_\_ [allege status, capacity, and relationship to the subject matter of the controversy of defendants, showing the nature of the duties, if any, owed by defendants to plaintiff].

[4. Defendants Doe I through Doe \_\_\_\_\_, inclusive, are sued in this complaint under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff

will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences alleged in this complaint, and that plaintiff's damages as alleged in this complaint were proximately caused by those defendants.)]

5. Beginning on or about \_\_\_\_\_[*date*], [and continuing to the present time,] defendants, and each of them, wrongfully and unlawfully \_\_\_\_\_[*allege specific facts showing particularly what defendants are doing, threatening to do, refusing to do, or causing or permitting to be done that constitutes the invasion of, infringement on, or interference with plaintiff's protectable rights and interests*] .

[6. *Allege, if appropriate, plaintiff's demand that defendants stop their (threatened) conduct, defendants refusal, and resulting necessity for prompt judicial action to protect plaintiff, e.g., On or about July 1, 2003, (and a number of times since then,) plaintiff has demanded that defendants stop their wrongful (threatened) conduct described above. Defendants, and each of them, have refused and still refuse to refrain from their (threatened) conduct.*]

7. Defendants' [threatened] wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff as \_\_\_\_\_[*specify particular facts indicating how defendants' actions will constitute great and irreparable injury*].

8. Plaintiff has no adequate remedy at law for the injuries \_\_\_\_\_ [currently being suffered or that are threatened] as \_\_\_\_\_ [specify facts in addition to those previously alleged that tend to show the inadequacy of any legal remedy, especially monetary damages, that plaintiff might pursue, e.g., it will be impossible for plaintiff to determine the precise amount of damage that plaintiff will suffer if defendants' conduct is not restrained].

[9. *Allege damages, if any, that have been and may be incurred, e.g., As a proximate result of defendants' wrongful conduct, plaintiff's business has been damaged in the sum of \$87,438. Plaintiff will be further damaged in like manner so long as defendants' conduct continues. The full amount of this damage is not now known to plaintiff, and plaintiff will amend this complaint to state this amount when it becomes known to plaintiff or on proof of the damages.*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For an order requiring defendants to show cause, if any they have, why they should not be enjoined as set forth in this complaint, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them:

a. From \_\_\_\_\_ [specify each of the acts, courses of conduct, and conditions defendants are to be prohibited from doing, commencing, continuing, maintaining, failing to do, etc.];

b. To \_\_\_\_\_ [specify each of the acts, courses of conduct, and conditions defendants are to be commanded to do, undertake, etc.];

3. For damages in the sum of \$ \_\_\_\_\_, plus damages in such further sums as may be sustained and as are ascertained before final judgment in this action;

4. For costs of suit incurred in this action; and

5. For such other and further relief as the court deems proper.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Plaintiff

[Verification, if desired]

#### VERIFICATION

I, \_\_\_\_\_ [name], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know its contents. The same is true of my own knowledge, except as to those matters that are alleged in the complaint on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

#### NOTES.

##### **Authority:**

CCP §§ 526, 527 (TRO and preliminary injunction); CC § 3422 (permanent injunction); CC § 3333 (damages)

##### **Grounds for Injunctive Relief:**

See 18.11[1]

##### **Drafting of Complaint:**

See 18.10[3][a] (TRO) and 18.11[3][a] (preliminary injunction)

##### **Related Form of Order:**

See 18.28





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Chapter 18 TROs and Preliminary Injunctions

VII. FORMS

A. Seeking Injunctive Relief

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.27*

**18.27 Ex Parte Application and Supporting Declaration for TRO and Order to Show Cause, and Supporting Declaration Re Advance Notification.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff, vs. \_\_\_\_\_ [name],  
Defendant

)  
) NO. \_\_\_\_\_  
) EX PARTE APPLICATION, SUPPORTING DE-  
) CLARATION OF \_\_\_\_\_ [name],  
) AND SUPPORTING MEMORANDUM FOR TEM-  
) PORARY RESTRAINING ORDER AND ORDER  
) TO SHOW CAUSE RE PRELIMINARY INJUNC-  
) TION; SUPPORTING DECLARATION OF  
) \_\_\_\_\_ [name] RE ADVANCE NO-  
) TIFICATION  
Date: \_\_\_\_\_  
Time: \_\_\_\_\_  
Location: \_\_\_\_\_  
Judge: \_\_\_\_\_  
Date Action Filed: \_\_\_\_\_  
Trial Date: \_\_\_\_\_

Plaintiff \_\_\_\_\_ [name] applies for a temporary restraining order restraining defendant  
\_\_\_\_\_ [name] [, and his/her agents, servants, and employees,] from \_\_\_\_\_ [specify  
act(s) to be restrained], and an order to show cause why a preliminary injunction should not be granted enjoining

defendant [and his/her agents, servants, and employees,] from \_\_\_\_\_ [committing or performing] the above described act(s) during the pendency of this action. This application is made on the ground(s) that \_\_\_\_\_ [specify one or more grounds listed in CCP § 526 ], and on the further ground that \_\_\_\_\_ [great and/or irreparable] injury will result to plaintiff before the matter can be heard on notice.

Plaintiff \_\_\_\_\_ [has not previously applied for to any judicial officer for similar relief or describe previous application and the result of the application].

This application is based on the complaint on file in this case, [and] on the declaration of \_\_\_\_\_ [specify, e.g., Mary Jones] \_\_\_\_\_ [appended or attached] to this application [, and on the attached supporting memorandum].

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Plaintiff

SUPPORTING DECLARATION OF \_\_\_\_\_ [name]

I, \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [describe status of declarant and relationship to action, e.g., the plaintiff in this action] and make this declaration in support of \_\_\_\_\_ [my or plaintiff's] application for a temporary restraining order and order to show cause re preliminary injunction.

2. \_\_\_\_\_ [Describe act(s) sought to be restrained, the persons committing or performing the act(s) and the relationship of these persons to defendant, and facts showing that the act(s) are without right or are wrongful].

3. \_\_\_\_\_ [Identify any exhibits attached as evidence to this declaration, e.g., Exhibit A attached to and made a part of this application is a photograph taken by Jane Smith on April 3, 2003, showing \_\_\_\_\_ (identify matter depicted and describe its significance). I personally observed the scene in question at the time the photograph was taken, and Exhibit A is a fair and accurate representation of the scene as it occurred on April 3, 2003].

4. \_\_\_\_\_ [Continue with references to and support for exhibits attached to the declaration, identifying and describing the significance of each, as in Paragraph 3].

5. \_\_\_\_\_ [Describe the effect of the act(s) on plaintiff that establish the ground(s) for pendente lite injunctive relief].

6. Unless a temporary restraining order is granted, \_\_\_\_\_ [great and/or irreparable] injury will result to \_\_\_\_\_ [me or plaintiff] as \_\_\_\_\_ [describe injury that will be sustained that cannot be compensated for in money].

[7. On \_\_\_\_\_ (*date*), (and a number of times since then,) \_\_\_\_\_ (I or plaintiff) demanded that defendants stop their wrongful (threatened) conduct described above. Defendants have refused, and still refuse, to refrain from their (threatened) conduct.]

8. The above facts are within my personal knowledge and I am competent to testify to their truth if called as a witness.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [*date*]

\_\_\_\_\_ [*signature*]

#### SUPPORTING MEMORANDUM

[*Add memorandum supporting application.*]

#### SUPPORTING DECLARATION OF \_\_\_\_\_ [*name*] RE ADVANCE NOTIFICATION

I, \_\_\_\_\_ [*name*], declare:

1. I am an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for \_\_\_\_\_ (*specify party, e.g., Mary Jones*) in the above-described action.

[*In succeeding numbered paragraph(s) describe with particularity the actions taken to provide advance notification of the ex parte application in compliance with Cal Rules Ct, Rule 3.1203, 3.1205, e.g.:*]

[*EITHER*]

2. On \_\_\_\_\_ [*date*], at \_\_\_\_\_ [*time not later than 10:00 of the court day before the application*], I informed \_\_\_\_\_ [*defendant(s) or* \_\_\_\_\_ (*defendant's or defendants'*) attorney, \_\_\_\_\_ (*name*),] by \_\_\_\_\_ [*describe manner of notice, e.g., telephone and a faxed letter confirming our conversation*], that the above application for a temporary restraining order and order to show cause would be made on \_\_\_\_\_ [*specify date and time*] at \_\_\_\_\_ [*specify place*].

3. \_\_\_\_\_ [*Describe response or lack of response to notification*]. Therefore, I \_\_\_\_\_ [*expect or do not expect or could not determine whether to expect*] opposition to the application.

[*OR*]

2. In good faith I attempted to inform \_\_\_\_\_ [*defendant(s) or* \_\_\_\_\_ (*defendant's or defendants'*) attorney, \_\_\_\_\_ (*name*),] of the time and place the above application for a temporary restraining order and order to show cause would be made. I \_\_\_\_\_ [*specify efforts made*]. However I

was unable to make contact.

[OR]

2. Notice to \_\_\_\_\_ [defendant(s) or \_\_\_\_\_ (defendant's or defendants') attorney, \_\_\_\_\_ (name),] of the time and place the above application for a temporary restraining order should not be required for the following reason(s): \_\_\_\_\_ [specify].

[CONTINUE]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

NOTES.

**Authority:**

*CCP § 527(c), (d); Cal Rules Ct, Rule 3.1200 et seq.*

**Drafting of Application and Supporting Declarations:**

*See 18.10[3][b]*

**Grounds for TRO:**

*See 18.10[1]*

**Prerequisite for Ex Parte Application:**

*See 18.10[3][a], [b]*

**Related Form of Order:**

*See 18.28*

**Related Forms of Memoranda:**

*See California Points and Authorities, Ch. 116, Injunctions, §§ 116.20-116.29 (Matthew Bender)*



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Chapter 18 TROs and Preliminary Injunctions

VII. FORMS

A. Seeking Injunctive Relief

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.28*

**18.28 Order to Show Cause Re Preliminary Injunction and TRO.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                      |
|------------------------------|---|--------------------------------------|
| _____ [name],                | ) |                                      |
| Plaintiff, vs. _____ [name], | ) | NO. _____                            |
| Defendant                    | ) | ORDER TO SHOW CAUSE RE PRELIMINARY   |
|                              | ) | INJUNCTION AND TEMPORARY RESTRAINING |
|                              | ) | ORDER                                |
|                              | ) | Date: _____                          |
|                              | ) | Time: _____                          |
|                              | ) | Location: _____                      |
|                              | ) | Judge: _____                         |
|                              | ) | Date Action Filed: _____             |
|                              | ) | Trial Date: _____                    |

On reading the [verified] complaint of plaintiff on file in the above-entitled action [and the \_\_\_\_\_ (declaration(s) or affidavit(s))] [and the memorandum submitted therewith], it appears to the satisfaction of the court that this is a proper case for granting an order to show cause for a preliminary injunction [and a temporary restraining order, and that unless the temporary restraining order prayed for be granted, great or irreparable injury will result to plaintiff before the matter can be heard on notice].

IT IS ORDERED that the above-named defendants, and each of them, appear in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [address], \_\_\_\_\_ [city], on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, then

and there to show cause, if any they have, why they and their agents, servants, employees, and representatives, and all persons acting in concert or participating with them, should not be enjoined and restrained during the pendency of this action from engaging in, committing, or performing, directly or indirectly, any and all of the following acts:

- a. \_\_\_\_\_ [*Specify the various acts and lines of conduct or threatened acts and conduct sought to be prohibited, as far as practicable use the same terms as those used in the prayer of the complaint*];
- b. \_\_\_\_\_ [*Continue with such specifications if more than one*].

IT IS FURTHER ORDERED that the above-named defendants, and each of them, appear at the same time and place and show cause, if any they have, why they should not be commanded by order of this court and required [during the pendency of this action] to:

- a. \_\_\_\_\_ [*Specify each of the acts or courses of conduct defendants are to be commanded to do, commence, or continue, and each of the conditions they are to maintain*];
- b. \_\_\_\_\_ [*Continue with such specifications if more than one*].

IT IS FURTHER ORDERED that:

- a. Plaintiff shall serve this order to show cause on defendants in the following time and manner:  
\_\_\_\_\_.
- b. Proof of service must be delivered to the court hearing the order to show cause on: \_\_\_\_\_.
- c. The parties shall adhere to the following briefing schedule: \_\_\_\_\_.
- [d. The temporary restraining order shall expire on: \_\_\_\_\_.]

[IT IS FURTHER ORDERED that, pending the hearing and determination of the order to show cause, the above-named defendants, and each of them, and their officers, agents, employees, representatives, and all persons acting in concert or participating with them, are restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts:]

- [a. \_\_\_\_\_ (Specify acts or conduct to be prohibited pending the order to show cause hearing. Frequently these acts will be merely a repetition of the preceding prohibitory specifications, but counsel may seek a restraining order that is different (usually less extensive) from the preliminary injunction that he or she seeks);]
- [b. \_\_\_\_\_ (Continue with such specifications if more than one).]

[IT IS FURTHER ORDERED that, pending the hearing and determination of the above order to show cause, the above-named defendants, and each of them, are required and ordered to:]

- [a. \_\_\_\_\_ (Specify each of the acts or courses of conduct defendants are to be commanded to do, commence, or continue, and each of the conditions they are to maintain pending the order to show cause hearing. Frequently these acts will be merely a repetition of the preceding mandatory specifications, but counsel may seek a restraining order that is different (usually less extensive) from the preliminary injunction he or she seeks);]
- [b. \_\_\_\_\_ (Continue with such specifications if more than one).]

IT IS FURTHER ORDERED that copies of the complaint [, \_\_\_\_\_ (declaration(s) or affidavits(s)),] [memorandum,] and this order to show cause [and temporary restraining order] be served on \_\_\_\_\_ [defendants or the party against whom this order is made] not later than \_\_\_\_\_ [date].

[Include order fixing bond if counsel for plaintiff knows that same will be required by court e.g., Bond on this temporary restraining order is fixed in the sum of \$\_\_\_\_\_.]

Let the above order issue [on plaintiff's filing a bond in the sum of \$\_\_\_\_\_].

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

[If counsel for plaintiff does not know in advance that the court will require a bond before issuing a temporary restraining order, he or she should not include any reference to a bond in the body of the order. Rather, reference to it may be added to the order later, as follows, e.g., Bond on the above temporary restraining order is fixed in the sum of \$\_\_\_\_\_. The above temporary restraining order may not issue until plaintiff has filed a bond in the above-specified sum.]

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

CCP § 527

**Drafting of Order:**

See 18.10[4][a]

**Exemptions from Undertaking Requirement:**

See 18.11[6][b]

**Related Form of Complaint:**

See 18.26

**Related Form of Application:**

See 18.27



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Chapter 18 TROs and Preliminary Injunctions

VII. FORMS

A. Seeking Injunctive Relief

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.29*

**18.29 Motion and Notice of Motion for Preliminary Injunction, Supporting Declaration, and Supporting Memorandum.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                      |
|------------------------------|---|--------------------------------------|
|                              | ) |                                      |
|                              | ) | NO. _____                            |
|                              | ) | MOTION AND NOTICE OF MOTION FOR PRE- |
|                              | ) | LIMINARY INJUNCTION, SUPPORTING DE-  |
| _____, [name],               | ) | CLARATION OF _____ [name],           |
| Plaintiff, vs. _____ [name], | ) | AND SUPPORTING MEMORANDUM            |
| Defendant                    | ) | Date: _____                          |
|                              | ) | Time: _____                          |
|                              | ) | Location: _____                      |
|                              | ) | Judge: _____                         |
|                              |   | Date Action Filed: _____             |
|                              |   | Trial Date: _____                    |

To \_\_\_\_\_ [e.g., defendant] \_\_\_\_\_ [name] and to \_\_\_\_\_ [name],  
defendant's attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon  
thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located  
at \_\_\_\_\_ [address], \_\_\_\_\_ [city], plaintiff will, and hereby does, move the court for a  
preliminary injunction enjoining and restraining the above-named defendants [and their officers, agents, employees,



representatives, and all persons acting in concert or participating with them,] from engaging in or performing, directly or indirectly, any and all of the following acts:

a. \_\_\_\_\_ [*Specify the various acts and types of conduct or threatened acts and conduct sought to be prohibited*];

b. \_\_\_\_\_ [*Continue with such specifications if more than one*].

Plaintiff will also move the court that the above-named defendants, and each of them, be required and ordered to:

a. \_\_\_\_\_ [*Specify each of the acts or courses of conduct defendants are to be commanded to do, commence, or continue, and each of the conditions they are to maintain*];

b. \_\_\_\_\_ [*Continue with such specifications if more than one*].

The motion will be made on the grounds that \_\_\_\_\_ [*specify grounds, such as those stated in CCP § 526*].

The motion will be based on this notice, on the declaration(s) of \_\_\_\_\_ [name(s)], on the supporting memorandum served and filed with this motion, on the papers and records on file, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for Plaintiff

SUPPORTING DECLARATION OF \_\_\_\_\_ [name]

I, \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [*specify, e.g., the plaintiff in this action*].

2. \_\_\_\_\_ [*Set forth facts showing plaintiff has a property interest of the kind a preliminary injunction is available to protect, e.g., property ownership*].

3. \_\_\_\_\_ [*Set forth facts showing what defendants are doing that interferes with plaintiff's rights, e.g.,*  
On April 12, 2003, defendants erected an embankment adjacent to the aforementioned property, causing flooding on that property].

4. \_\_\_\_\_ [*Set forth facts showing irreparable injury will be sustained if preliminary injunction is not issued, e.g., If defendants are not forced to remove the embankment adjacent to the aforementioned property, the flooding will continue, and the property will be irreparably damaged*].

5. \_\_\_\_\_ [Set forth facts showing inadequacy of legal remedy, e.g., Monetary damages would be inadequate to pay for the loss of use of the land].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

#### SUPPORTING MEMORANDUM

[Add memorandum supporting motion.]

NOTES.

**Authority:**

CCP § 527

**Grounds for Preliminary Injunction:**

See 18.11[1]

**Drafting of Motion:**

See 18.10[4][b] (if TRO was granted) and 18.11[4][a] (if TRO was not sought or was not issued)

**Related Form of Order:**

See 18.30

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 116, Injunctions, §§ 116.20-116.29 (Matthew Bender)*



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Chapter 18 TROs and Preliminary Injunctions

VII. FORMS

A. Seeking Injunctive Relief

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.30*

**18.30 Order Granting Preliminary Injunction and Requiring Undertaking.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                        |
|------------------------------|---|------------------------|
| _____ [name],                | ) |                        |
| Plaintiff, vs. _____ [name], | ) | NO. _____              |
| Defendant                    | ) | PRELIMINARY INJUNCTION |
|                              | ) |                        |
|                              | ) |                        |

The \_\_\_\_\_ [application or motion] of plaintiff for the preliminary injunction came on regularly for hearing by the court this date in accordance with \_\_\_\_\_ [an order to show cause issued by this court on May 15, 2003, or plaintiff's motion for a preliminary injunction]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

On proof made to the court's satisfaction, and good cause appearing:

IT IS ORDERED that during the pendency of this action the above-named defendants, and each of them, and their officers, agents, employees, representatives, and all persons acting in concert or participating with them, are enjoined and restrained from engaging in, committing, or performing, directly or indirectly, by any means whatsoever, any of the following acts:

a. \_\_\_\_\_ [Specify the various acts and types of conduct that are prohibited with sufficient clarity to apprise all of the persons enjoined of what they are prohibited from doing];

b. \_\_\_\_\_[Continue with such specifications if more than one].

IT IS FURTHER ORDERED that the above-named defendants are required and ordered to:

a. \_\_\_\_\_[Specify each of the acts or courses of conduct defendants are required to do, commence, or continue, and each of the conditions they are to maintain];

b. \_\_\_\_\_[Continue with such specifications if more than one].

IT IS FURTHER ORDERED that, before this order shall take effect, plaintiff must file a written undertaking in the sum of \$\_\_\_\_\_, as required by *Code of Civil Procedure Section 529*, for the purpose of indemnifying defendants for the damages as they may sustain by reason of this preliminary injunction if the court finally decides that plaintiff is not entitled to it.

IT IS FURTHER ORDERED that the preliminary injunction as set forth above shall issue on plaintiff filing a written undertaking in the sum specified above. The court reserves jurisdiction to modify this injunction as the ends of justice may require.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 527*

**Exemptions from Undertaking Requirement:**

*See 18.11[6][b]*

**Related Form of Motion:**

*See 18.29*



**Timing:**

*See 18.11[5][c]*



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Chapter 18 TROs and Preliminary Injunctions

VII. FORMS

B. Opposing Injunctive Relief

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.31*

**18.31 Declaration Opposing Application for Preliminary Injunction.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                      |
|------------------------------|---|--------------------------------------|
|                              | ) |                                      |
|                              | ) | NO. _____                            |
|                              | ) | DECLARATION OF _____ [name]          |
| _____ [name],                | ) | OPPOSING APPLICATION FOR PRELIMINARY |
| Plaintiff, vs. _____ [name], | ) | INJUNCTION                           |
| Defendant                    | ) | Date: _____                          |
|                              | ) | Time: _____                          |
|                              | ) | Location: _____                      |
|                              | ) | Judge: _____                         |
|                              | ) | Date Action Filed: _____             |
|                              | ) | Trial Date: _____                    |

I, \_\_\_\_\_ [name], declare:

1. I am one of the defendants in this action. This declaration is made in opposition to plaintiff's application for a preliminary injunction.

2. I have read plaintiff's complaint in the above-entitled action that seeks a preliminary injunction against me. Except as admitted below, [and except as to those allegations of which I have no information or belief,] each and all of the allegations in that complaint [and in the supporting declaration(s) of \_\_\_\_\_ (name) (and \_\_\_\_\_ (name))] are false.

3. I admit that \_\_\_\_\_ [set forth admissions of allegations in complaint].

[4. I further admit that \_\_\_\_\_ (set forth admissions of allegations in declaration(s) supporting complaint).]

5. It is particularly not true that \_\_\_\_\_ [set forth allegations in complaint that are not true and state true facts].

[6. It is also not true that \_\_\_\_\_ (set forth allegations in declaration(s) that are not true and state true facts).]

[7. I have no information or belief as to the truth or falsity of the allegations in the complaint that state that \_\_\_\_\_ (set forth allegations in complaint of which defendant has no information or belief).]

[8. I have no information or belief as to the truth or falsity of the allegations in the declaration(s) of \_\_\_\_\_ (name) (and \_\_\_\_\_ (name)), which state that \_\_\_\_\_ (set forth allegations in declaration(s) of which defendant has no information or belief).]

[9. A temporary restraining order was served on defendants in this action on \_\_\_\_\_ (date). Defendants have complied with the order by \_\_\_\_\_ (state facts showing compliance with order). Compliance with this order is, however, causing defendants damage by \_\_\_\_\_ (state facts indicating ways in which temporary restraining order is damaging defendants).]

10. If the court grants plaintiff a preliminary injunction against defendants, defendants will suffer great harm, in that \_\_\_\_\_ [allege specific facts showing manner in which defendants will be injured if a preliminary injunction is issued].

11. It is not true that plaintiff has no adequate remedy at law and will suffer great or irreparable injury by defendants' conduct unless a preliminary injunction is granted because \_\_\_\_\_ [specify facts showing an adequate remedy at law and lack of any such injury, e.g., defendant is solvent and is capable of responding to any judgment for damages caused to plaintiff by defendants' conduct in an action for \_\_\_\_\_ (specify type of legal action that plaintiff might bring to obtain relief for any damages caused by defendants)].

WHEREFORE, declarant prays that this court deny plaintiff's application for a preliminary injunction [against this declarant] [if a temporary restraining order has been issued, add: and that the temporary restraining order previously issued in this action be dissolved].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

NOTES.

**Authority:**

CCP § 527(e)

**Grounds for Declaration:**

See 18.14



**Timing:**

See 18.13[2][c]

**Related Form of Order:**

See 18.33



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Chapter 18 TROs and Preliminary Injunctions

VII. FORMS

B. Opposing Injunctive Relief

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.32*

**18.32 Demurrer to Complaint for Injunctive Relief, Supporting Memorandum, and Notice of Hearing.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                       |
|------------------------------|---|---------------------------------------|
|                              | ) |                                       |
|                              | ) | NO. _____                             |
|                              | ) | DEMURRER OF _____ [name] TO           |
| _____ [name],                | ) | COMPLAINT FOR INJUNCTIVE RELIEF, SUP- |
| Plaintiff, vs. _____ [name], | ) | PORTING MEMORANDUM, AND NOTICE OF     |
| Defendant                    | ) | HEARING                               |
|                              | ) | Date: _____                           |
|                              | ) | Time: _____                           |
|                              | ) | Location: _____                       |
|                              | ) | Judge: _____                          |
|                              |   | Date Action Filed: _____              |
|                              |   | Trial Date: _____                     |

Defendant demurs to the complaint in this action on the following ground:

[EITHER]

The complaint in this action does not state facts sufficient to constitute a cause of action in that  
\_\_\_\_\_[specify reason that no cause of action for injunctive relief is stated].



[OR]

The complaint in this action does not state facts sufficient to constitute a cause of action in that the complaint alleges only general conclusions and does not contain adequate factual allegations of plaintiff's right to injunctive relief as more fully appears from the accompanying memorandum of points and authorities.

[CONTINUE, if desired]

[WHEREFORE, defendant prays that this demurrer be sustained (without leave to amend), that plaintiff take nothing by his/her/its complaint, that defendant have judgment for his/her/its costs, and for all other proper relief.]

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant \_\_\_\_\_ [name]

#### SUPPORTING MEMORANDUM

[Add memorandum supporting demurrer.]

#### NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in \_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] the above-entitled court, located at \_\_\_\_\_ [address], \_\_\_\_\_ [city], California.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant \_\_\_\_\_ [name]

NOTES.

**Authority:**

*CCP § 430.30(a)* (demurrer); *Cal Rules Ct, Rule 3.1320(c)* (notice of hearing)

**Grounds for Demurrer:**

See *18.13[2][a]*

**Related Form of Order:**

See *18.33*

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 116, Injunctions, §§ 116.23-116.55* (Matthew Bender)



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VII. FORMS

B. Opposing Injunctive Relief

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.33*

**18.33 Order Denying Preliminary Injunction and Dissolving TRO.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                      |
|------------------------------|---|--------------------------------------|
| _____ [name],                | ) |                                      |
| Plaintiff, vs. _____ [name], | ) | NO. _____                            |
| Defendant                    | ) | ORDER DENYING PRELIMINARY INJUNCTION |
|                              | ) | [AND DISSOLVING TEMPORARY RESTRAIN-  |
|                              | ) | ING ORDER]                           |

The \_\_\_\_\_ [application or motion] of plaintiff for a preliminary injunction came on regularly for hearing by the court this date in accordance with \_\_\_\_\_ [an order to show cause issued by this court on \_\_\_\_\_ (date) or plaintiff's motion for a preliminary injunction]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

The matter having been submitted on the pleadings[, on the \_\_\_\_\_ (affidavit(s) or declaration(s)) of \_\_\_\_\_ (name(s)),] [on the memorandum on file herein,] and on the oral and documentary evidence presented at the hearing, and the court being fully advised in the matter:

IT IS HEREBY ORDERED that [the temporary restraining order granted on May 23, 2003, be and hereby is dissolved and vacated, and that] plaintiff's application for a preliminary injunction is denied.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 527*

**Related Form of Declaration:**

*See 18.31*

**Related Form of Demurrer:**

*See 18.32*



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Chapter 18 TROs and Preliminary Injunctions

VII. FORMS

C. Dissolving or Modifying TRO or Injunction

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.34*

**18.34 Motion and Notice of Motion for Order Dissolving or Modifying TRO or Injunction, Supporting Declaration, and Supporting Memorandum.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                             |
|------------------------------|---|---------------------------------------------|
|                              | ) |                                             |
|                              | ) | NO. _____                                   |
|                              | ) | MOTION AND NOTICE OF MOTION FOR OR-         |
|                              | ) | DER [DISSOLVING <i>or</i> MODIFYING]        |
| _____ [name],                | ) | [TEMPORARY RESTRAINING ORDER <i>or</i> PRE- |
| Plaintiff, vs. _____ [name], | ) | LIMINARY INJUNCTION], SUPPORTING DE-        |
| Defendant                    | ) | CLARATION OF _____ [name],                  |
|                              | ) | AND SUPPORTING MEMORANDUM                   |
|                              | ) | Date: _____                                 |
|                              | ) | Time: _____                                 |
|                              | ) | Location: _____                             |
|                              | ) | Judge: _____                                |
|                              | ) | Date Action Filed: _____                    |
|                              | ) | Trial Date: _____                           |

\_\_\_\_\_

To plaintiff \_\_\_\_\_ [name] and to \_\_\_\_\_ [name], plaintiff's attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department *or* Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [address], \_\_\_\_\_ [city], defendant \_\_\_\_\_ [name] will, and

hereby does, move for an order \_\_\_\_\_ [dissolving or modifying] the \_\_\_\_\_  
 [temporary restraining order or preliminary injunction] granted on \_\_\_\_\_ [date].  
 \_\_\_\_\_ [If the injunction is to be modified or only partially dissolved, specify the extent of this change.]  
 The motion will be made on the grounds that \_\_\_\_\_ [specify, e.g., there has been a material change in  
 the facts on which the injunction was granted in that \_\_\_\_\_ (specify)].

The motion will be based on this notice of motion, on the \_\_\_\_\_ [declaration(s) or affidavit(s)] of  
 \_\_\_\_\_ [name(s)], on the supporting memorandum served and filed in this proceeding, on the papers  
 and records on file, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant \_\_\_\_\_ [name]

SUPPORTING DECLARATION OF \_\_\_\_\_ [name]

I, \_\_\_\_\_ [name], declare:

1. I am one of the defendants in the within action.

2. On \_\_\_\_\_ [date], the court granted a \_\_\_\_\_ [temporary restraining order or  
 preliminary injunction] compelling me to \_\_\_\_\_ [describe court's order compelling defendant to do or  
 refrain from doing something].

3. \_\_\_\_\_ [Describe changed circumstances or other reason for motion to modify or dissolve  
 injunction, e.g., At the time of granting the preliminary injunction, the court also ordered plaintiff to post a bond in the  
 amount of \$\_\_\_\_\_, which plaintiff never posted].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

SUPPORTING MEMORANDUM

[Add memorandum supporting motion.]

NOTES.

**Authority:**

*CCP §§ 532(a), 533*

**Grounds for Modifying or Dissolving TRO or Injunction:**

*See 18.16*

**Related Form of Order:**

*See 18.35*



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VII. FORMS

C. Dissolving or Modifying TRO or Injunction

*2-18 MB Practice Guide: CA Pretrial Civil Procedure 18.35*

**18.35 Order Dissolving or Modifying TRO or Injunction.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                             |
|------------------------------|---|---------------------------------------------|
| _____ [name],                | ) |                                             |
| Plaintiff, vs. _____ [name], | ) | NO. _____                                   |
| Defendant                    | ) | ORDER [DISSOLVING <i>or</i> MODIFYING]      |
|                              | ) | [TEMPORARY RESTRAINING ORDER <i>or</i> PRE- |
|                              | ) | LIMINARY INJUNCTION <i>or</i> PERMANENT IN- |
|                              | ) | JUNCTION]                                   |

The motion of defendant for an order \_\_\_\_\_ [modifying *or* dissolving] the \_\_\_\_\_ [temporary restraining order *or* preliminary injunction] granted on \_\_\_\_\_ [date], came on regularly for hearing by the court this date. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

On proof made to the court's satisfaction, and good cause appearing:

IT IS ORDERED that the \_\_\_\_\_ [temporary restraining order *or* preliminary injunction] granted on \_\_\_\_\_ [date], be and hereby is \_\_\_\_\_ [dissolved *or* modified as follows: \_\_\_\_\_ (specify how injunction is modified)].

[If the order or injunction is modified or only partially dissolved, set forth the injunction's revised terms.]

Dated: \_\_\_\_\_.



\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*CCP §§ 532(a), 533*

**Related Form of Motion:**

*See 18.34*



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Chapter 19 Attachment

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.syn*

**§ 19.syn Synopsis to Chapter 19: Attachment**

19.01 Scope.

19.02 Objective and Strategy.

19.03 CHECKLIST: Obtaining Writ of Attachment or Temporary Protective Order.

19.04 Options and Strategies for Plaintiff.

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19.04[1][a] Claim Must Be Monetary and Based on Contract.

19.04[1][b] Claim Must Equal or Exceed \$500.00 and Be Fixed or Readily Ascertainable.

19.04[1][c] Claim Must Be Commercial.

19.04[1][d] Claim Cannot Be Secured by Real Property.

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19.05[2] Application Must Be Executed Under Oath and Include Specific Information.

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19.05[3][b] Set Forth Facts With Particularity.

19.05[3][c] Affiant or Declarant Must Be Competent, and Have Personal Knowledge of Facts.

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19.05[4][h] Defendant and/or Attorney May Be Present at Hearing.

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19.06[1] Defendant Must Be Served With All Necessary Papers.

19.06[2] Required Methods of Service.

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19.07[6] Writ of Attachment Will Be Issued After Plaintiff Files Undertaking.

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19.12 Obtaining Temporary Protective Order on Notice or Ex Parte.

19.12[1] Noticed Hearing Procedure.

19.12[1][a] Application May Be Filed When RTAO Is Sought.

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19.12[3] Court Must Issue Temporary Protective Order If Statutory Grounds Are Satisfied.

19.12[4] Drafting Temporary Protective Order.

19.12[4][a] General Scope Should Reflect Interests of Justice and Equity.

19.12[4][b] May Prohibit Transfer of Property.

19.12[4][c] May Not Prohibit Defendant From Issuing Checks for Specified Purposes.

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19.12[7][a] Lien Is Created on Service.

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19.12[8] Expiration of Temporary Protective Order.

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19.13[1] Undertaking Must Be Filed Before Writ, Temporary Protective Order, or Lien Order Is Issued.

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19.14 CHECKLIST: Opposing Attachment or Temporary Protective Order.

19.15 Options and Strategies for Defendant.

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19.15[2] Filing Notice of Opposition.

19.15[3] Applying to Terminate Ex Parte Order and Writ.

19.15[4] Applying to Terminate, Modify, or Vacate Temporary Protective Order.

19.15[4][a] Interests of Justice and Equity.

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19.15[6] Applying for Release of Attachment on Excess Property.

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19.16[1] File and Serve Notice on Plaintiff No Later Than Five Days Before Hearing.

19.16[2] Notice Must State Grounds, and Be Supported Factually and Legally.

19.16[3] Notice May Include Claim of Exemption.

19.16[3][a] Exemption for Personal Property Described in Plaintiff's Application Will Be Lost If Not Claimed.

19.16[3][b] Exemption Claim for Personal Property Not Described in the Plaintiff's Application or Real Property Described in the Plaintiff's Application Is Optional.

19.16[3][c] Claim of Exemption Must Cite to Statutory Authority.

19.16[3][d] Affidavit or Declaration Required.

19.16[3][e] Claim Must Be Served On Plaintiff Not Less Than Five Days Before Hearing.

19.16[3][f] Plaintiff May Respond to Defendant's Claim of Exemption.

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19.17 Claiming Exemption After Levy Has Been Made.

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19.18 Applying to Set Aside Order and Quash Writ.

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19.19 Applying to Substitute Undertaking for Attached Property.

19.19[1] Application Must Be by Noticed Motion.

19.19[2] Application May Require Additional Statement.

19.19[3] Amount of Undertaking Must Equal Amount of Attached Property, Not Exceeding Amount of Anticipated Judgment.

19.19[4] Special Rules Apply to Actions Against Multiple Defendants.

19.19[4][a] Any Defendant May Make Application.

19.19[4][b] When All Defendants Do Not Join Application, Statement Is Required.

19.19[4][c] Joint Application and Undertaking Required for Two or More Defendants.

19.20 Applying for Release of Attachment on Excess Property.

19.20[1] Applying by Noticed Motion.

19.20[2] Motion Must State Grounds and Be Supported Factually and Legally.

19.20[3] Court Must Determine Value of Interest in Attached Property.

19.20[3][a] Applying Before Judgment.

19.20[3][b] Applying After Judgment.

19.20[3][c] Requesting Consideration of Additional Evidence for Good Cause.

19.21 Vacation or Stay for Military.

19.21[1] Under Federal Servicemembers Civil Relief Act.

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19.22 Moving for Damages for Wrongful Attachment at Conclusion of Plaintiff's Action.

19.22[1] Wrongful Attachment Defined.

19.22[1][a] Action Where Attachment Is Not Authorized.

19.22[1][b] No Recovery of Judgment in Action.

19.22[1][c] Property Is Exempt and Attachment Is Obtained Ex Parte.

19.22[2] Moving to Enforce Liability on Bond.

19.22[2][a] Independent Action Not Necessary.

19.22[2][b] Motion Must Be Made Within One Year After Conclusion of Action.

19.22[2][c] Sureties Must Be Joined.

19.22[3] Plaintiff's Liability for Wrongful Attachment.

19.22[3][a] Damages Limited by Amount of Undertaking.

19.22[3][b] Damages Offset Against Plaintiff's Unsatisfied Judgment.

19.22[3][c] Common Law Remedies Are Available.

19.22[4] Surety's Liability for Wrongful Attachment.

19.23 CHECKLIST: Levy Procedures.



19.23[1] Plaintiff's Checklist.

19.24 Levy on Writ of Attachment.

19.24[1] Direct Writ to Levying Officer.

19.24[2] Include Required Information.

19.24[3] Give Instructions to Levying Officer.

19.24[3][a] Written Instructions Required.

19.24[3][b] Signature Required.

19.24[3][c] Include Correct Names and Addresses.

19.25 Deposit Costs.

19.26 Comply With Service Requirements.

19.26[1] Service of Copy of Summons and Complaint.

19.26[2] Service of Copies of Writ and Notice.

19.26[3] Service of Notice of Attachment.

19.26[4] Advise Defendant Regarding Undertaking.

19.27 Levying Officer Must Execute Writ in Accordance With Statutory Requirements.

19.27[1] Must Act Without Delay.

19.27[2] Must Follow Instructions.

19.27[3] Must Take Custody of Property.

19.28 Levying Officer Must Return Writ, Report, and Inventory of Attached Property.

19.29 Registered Process Server May Levy Certain Types of Property.

19.30 Levy Creates Attachment Lien.

19.30[1] Lien Begins at Time of Levy.

19.30[2] Lien Expires After Three Years.

19.30[3] Plaintiff May Move to Extend Lien for One Year.

19.30[4] Eight-Year Maximum Period.

19.30[5] Attachment Is Not Terminated by Death.

19.31 Any Party Can Act to Preserve Value of Attached Property.

19.31[1] Interested Parties May Apply for Court Order.

19.31[2] Levying Officer May Act Prior to Court Order.

19.32 CHECKLIST: Obtaining a Lien in a Pending Action or Proceeding.

19.32[1] Plaintiff's Checklist.

19.32[2] Defendant's Checklist.

19.33 Obtaining Lien on Pending Actions or Rights Under Judgment.

19.33[1] Money or Property Must Be Subject to Attachment.

19.33[2] Applying for Order Creating Lien.

19.33[3] Making Required Filings Including Undertaking.

19.33[4] Notice of Lien Must Contain Required Information, and Be Served on All Parties.

19.33[4][a] Contents.

19.33[4][b] Service.

19.34 Claiming Exemption.

19.34[1] Exemption in Opposition to Creation of Lien.

19.34[2] Exemption After Creation of Lien.

19.34[2][a] Filing Noticed Motion.

19.34[2][b] Opposing Exemption.

19.34[2][c] Court's Determination of Exemption Claim.

19.35 Plaintiff May Intervene.

19.36 Before Defendant Can Enforce Judgment or Terminate Action, Court Order or Plaintiff's Consent Required.

19.37 CHECKLIST: Obtaining Examination of Third Persons.

19.38 Applying for Court Order.

19.38[1] Ex Parte Application.

19.38[2] Affidavit Required.

19.38[3] Serving Copy of Order on Third Person and Defendant.

19.38[4] Service of Order Creates Lien on Defendant's Interest in Third Person's Property.

19.38[4][a] Property Must Be Identifiable.

19.38[4][b] Lien Continues for One Year.

19.38[5] Order Must Notify Third Person of Potential Sanctions.

19.38[6] Plaintiff Must Tender Mileage Fees to Third Person.

19.39 Requesting Hearing to Determine Third Person's Interest in the Property or the Existence of a Debt.

19.40 Applying for Order Forbidding Transfer or Payment of Property.

19.40[1] Ex Parte Application to Forbid Transfer to Defendant.

19.40[2] Noticed Application to Forbid Transfer to Any Person.

19.41 Judicial Council Form AT-105 Application for Right to Attach Order, Temporary Protective Order, etc. (Attachment).

19.42 Judicial Council Form AT-115 Notice of Application and Hearing for Right to Attach Order and Writ of Attachment (Attachment).

19.43 Judicial Council Form AT-120 Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment (Attachment).

19.44 Judicial Council Form AT-125 Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Resident) (Attachment).

19.45 Judicial Council Form AT-140 Temporary Protective Order (Attachment).

19.46 Judicial Council Form AT-160 Undertaking by Personal Sureties (Attachment--Claim and Delivery).

19.47 Judicial Council Form AT-155 Notice of Opposition to Right to Attach Order and Claim of Exemption (Attachment).

19.48 Judicial Council Form AT-170 Application to Set Aside Right to Attach Order and Release Attached Property, etc. (Attachment).

19.49 Judicial Council Form AT-175 Order to Set Aside Attachment, to Substitute Undertaking, etc. (Attachment).

19.50 Judicial Council Form AT-145 Application and Notice of Hearing for Order to Terminate, Modify, or Vacate Temporary Protective Order (Attachment).

19.51 Judicial Council Form AT-150 Order to Terminate, Modify, or Vacate Temporary Protective Order (Attachment).

19.52 Judicial Council Form AT-135 Writ of Attachment (Attachment).

19.53 Instructions to Levying Officer.

19.54 Judicial Council Form AT-165 Notice of Attachment (Attachment).

19.55 Judicial Council Form AT-138 Application and Order for Appearance and Examination (Attachment--Enforcement of Judgment).



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Chapter 19 Attachment  
I. STRATEGY

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.01*

**19.01 Scope.**

This chapter covers:

- Objectives and strategy of obtaining attachment and/or a temporary protective order [see 19.02].
- Statutory requirements for obtaining attachment and/or a temporary protective order [see 19.04].
- Procedure for obtaining an attachment and/or temporary protective order [see 19.03, 19.05-19.13; Forms: see 19.41 -19.46].
- Procedure for opposing attachment and/or a temporary protective order [see 19.14 -19.22; Forms: see 19.47 -19.51].
- Levy procedures [see 19.23 -19.31; Forms: see 19.52 -19.54].
- Obtaining a lien in a pending action or proceeding [see 19.32 -19.36].
- Obtaining examination of third persons [see 19.37 -19.40; Form: see 19.55].

**Core Statutes:**

*CCP §§ 481.010-493.060*



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Chapter 19 Attachment  
I. STRATEGY

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.02*

**19.02 Objective and Strategy.**

Attachment is a prejudgment remedy limited to cases arising out of commercial transactions, and prohibited in consumer transactions [CCP § 483.010; *Kadison, Phaelzer, Woodard, Quinn & Rossi v. Wilson* (1987), 197 CA3d 1, 4, 242 CR 595 ]. The procedure requires a court to make a preliminary determination of the merits of a dispute involving a creditor and a debtor.

Attachment is governed by Attachment Law, Title 6.5 of the Code of Civil Procedure, CCP §§ 481.010-493.060. The statutes are strictly construed [ *Pacific Decision Sciences Corp. v. Superior Court* (2004) 121 CA4th 1100, 1106, 18 CR3d 104 ; *Bank of America v. Salinas Nissan, Inc.* (1989) 207 CA3d 260, 270, 254 CR 748 ].

An attachment allows a creditor, who has followed the statutory requirements and who has established a prima facie claim, to have a lien recorded against real property and/or the debtor's assets seized and held until final adjudication at trial [ *Lorber Indus. of Cal. v. Turbulence, Inc.* (1985) 175 CA3d 532, 535, 221 CR 233 ].

**Strategic Point:**



Attachment can be a very powerful litigation procedure particularly where the case is strong and there is a real risk that the opposing party may attempt to transfer or conceal assets. Precisely because it is a very powerful litigation procedure, the attachment statutes provide a relatively complex procedure to conform to Constitutional Due Process requirements. Attachment can be an expensive procedure to undertake without some confidence that it is necessary and appropriate. In addition to legal expense, there is a bond requirement that will require the payment of a bond premium and can create a difficult hurdle since the surety may require that the indemnity agreement protecting the surety be collateralized. There also are risks associated with potential liability for abuse of process or malicious prosecution arising from a wrongful attachment.



**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

California Points and Authorities, Ch. 23, Attachment (Matthew Bender).



**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Attachments



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Chapter 19 Attachment

II. OBTAINING WRIT OF ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.03*

**19.03 CHECKLIST: Obtaining Writ of Attachment or Temporary Protective Order.**

☐ Determine whether claim meets statutory requirements for attachment:

- ☐ Claim must be monetary and based on contract.
- ☐ Claim must exceed \$500.00 and be fixed or readily ascertainable.
- ☐ Claim must be commercial.
- ☐ Claim cannot be secured by real property.

**Exception:**

If claim secured by real property has become valueless, attachment is not entirely precluded.

**Authority:**

*CCP § 483.010*

**Discussion:**

*See 19.04*

☐ Determine amount, which is based on defendant's indebtedness, to be secured by attachment.

**Authority:**

*CCP §§ 483.015, 483.020, 487.025, 488.475(a)*

**Discussion:**



See 19.04[2]

- ☐ Determine what property may be attached.

**Authority:**

*CCP § 487.010*

**Discussion:**

See 19.04[3]

- ☐ Determine what property is exempt.

**Authority:**

*CCP § 487.020*

**Discussion:**

See 19.04[4]

- ☐ Determine whether to apply for turnover order along with the writ.

**Authority:**

*CCP § 482.080*

**Discussion:**

See 19.05[1], 19.07[7]

- ☐ Prepare application for a right to attach order (RTAO):

- ☐ Must be under oath.
- ☐ Includes information required by statute to show that attachment is authorized.
- ☐ Requires affidavits or declarations.

**Authority:**

*CCP §§ 482.040, 484.020, 484.030*

**Discussion:**

See 19.05[3]

**Form:**

See 19.41

- ☐ Prepare notice of application:

- ☐ Must inform defendant of all information required by statute.

**Authority:***CCP §§ 484.050, 484.340***Discussion:***See 19.05[4]***Form:***See 19.42*

- ☐ Serve and file papers at least 16 court days before hearing; additional time if service is by mail or fax.

**Authority:***CCP §§ 484.040, 1005(b)***Discussion:***See 19.06*

- ☐ Prepare for hearing on RTAO.

- ☐ Draft RTAO.

**Authority:***CCP §§ 484.080, 484.090***Discussion:***See 19.07***Form:***See 19.43*

- ☐ Obtain additional writs, if necessary, through noticed hearing procedure.

- ☐ Prepare application.

**Authority:***CCP § 484.310***Discussion:***See 19.08[2]***Form:***See 19.41*

- ☐ Prepare notice of application.

**Authority:***CCP § 484.340d***Discussion:**

See 19.08[4]

**Form:**

See 19.42

☐ Serve defendant with notice of application and hearing, and a copy of the application at least 15 days before hearing.

**Authority:**

CCP § 484.330

**Discussion:**

See 19.08[3]

☐ Consider availability of ex parte writ of attachment, if delay would cause great and irreparable injury.

**Authority:**

CCP § 485.010(a)

**Discussion:**

See 19.09, 19.10

☐ Prepare application.

**Authority**

CCP §§ 484.020, 485.210

**Discussion:**

See 19.10[1] -[3]

**Form:**

See 19.41

☐ Prepare RTAO and writ.

**Authority:**

CCP § 485.220(a)

**Discussion:**

See 19.10[4]

**Form:**

See 19.44

☐ If necessary, prepare application for additional writs after ex parte procedure:

☐ Must be executed under oath and contain specific information.

- ☐ Must be supported by affidavit or declaration.

**Authority:**

*CCP §§ 484.020, 485.530*

**Discussion:**

*See 19.11*

**Form:**

*See 19.41*

- ☐ Obtain Temporary Protective Order:

- ☐ Prepare application.

**Authority:**

*CCP § 486.010*

**Discussion:**

*See 19.12*

**Form:**

*See 19.41*

- ☐ Prepare Temporary Protective Order.

**Authority:**

*CCP §§ 486.020, 486.040, 486.050*

**Form:**

*See 19.45*

- ☐ File undertaking:

- ☐ Present to court for approval.

- ☐ Unless otherwise ordered, amount of undertaking shall be \$10,000.

**Authority:**

*CCP §§ 486.020, 489.060, 489.210, 489.220*

**Discussion:**

*See 19.12[3], 19.13*

**Form:**

*See 19.46*



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Chapter 19 Attachment

## II. OBTAINING WRIT OF ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.04*

### 19.04 Options and Strategies for Plaintiff.

#### 19.04[1] Determine That Claim Meets Statutory Requirements.

**19.04[1][a] Claim Must Be Monetary and Based on Contract.** An attachment may be issued only in actions [CCP § 483.010(a)]:

- On a claim or claims for money; and
- Based on a contract, express or implied.

**19.04[1][b] Claim Must Equal or Exceed \$500.00 and Be Fixed or Readily Ascertainable.** The total amount of the claim or claims must be a fixed or readily ascertainable amount, not less than five hundred dollars (\$500), exclusive of costs, interest and attorney's fees [CCP § 483.010(a)].

**19.04[1][c] Claim Must Be Commercial.** If the claim is against a defendant who is a natural person, an attachment may be issued only on a claim arising from the defendant's trade, business, or profession [CCP § 483.010(c)].

**19.04[1][d] Claim Cannot Be Secured by Real Property.** An attachment may not be issued on a claim that is secured by any interest in real property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust, but excluding any security interest in fixtures subject to *Com Code § 9101 et seq.* [CCP § 483.010(b)]).

#### Example:

A guarantee on which the guarantor expressly waives the right to require the creditor to proceed first against the real property security for the loan is not secured by real property. Consequently, the creditor is entitled to a writ of attachment against the guarantor's property if it satisfies statutory requirements [ *United Central Bank v. Superior Ct.* (2009) 179 CA4th 212, 215, 101 CR3d 395 ] .

#### Exception:

An attachment may be issued where the claim was originally secured by an interest in real property, but, without any act of the plaintiff, the security has become valueless, or has decreased in value to less than

the amount owing on the claim [CCP § 483.010(b)].

**19.04[2] Calculate Amount to Be Secured by Attachment.**

**19.04[2][a] How to Compute Amount.** In general, the amount to be secured by an attachment is the sum of [CCP § 483.015(a)]:

- The amount of the defendant's alleged indebtedness; plus
- Any additional amount included under CCP § 482.110 (providing for costs and attorney's fees).

The above total must be reduced by the sum of [CCP § 483.015(b)]:

- The amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable;
- The amount of any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint filed in the action, if the defendant's claim is one on which an attachment could be issued;
- The amount of any claim of the defendant asserted as a defense in the answer pursuant to CCP § 431.70, if the defendant's claim is one on which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations; and
- The value of any security interest in the property of the defendant held by the plaintiff to secure the defendant's indebtedness claimed by the plaintiff.

**Distinguish:**

The fact that the damages are unliquidated is not determinative. It is not necessary that the amount owed appear on the face of the contract. The contract sued on must only furnish a standard by which the amount due may be clearly ascertained, and there must exist a basis upon which the damages can be determined by proof [ *CIT Group/Equipment Financing, Inc. v. Super DVD, Inc. (2004) 115 CA4th 537, 540, 8 CR3d 927* ].

**19.04[2][b] Different Computation for Unlawful Detainer Proceedings.** In unlawful detainer proceedings, the amount to be secured by an attachment is the sum of [CCP § 483.020]:

- The amount of the rent due and unpaid as of the date of filing the complaint in the unlawful detainer proceeding [CCP § 483.020(a)(1)];
- An additional amount included at the discretion of the court, equal to the amount of rent for the period from the date the complaint is filed until the estimated date of judgment, or such earlier estimated date as possession is likely to be delivered to the plaintiff, such amount to be computed at the rate provided in the lease [CCP § 483.020(a)(2), (c)]; and
- Any additional amount included under CCP § 482.110 (providing for costs and attorney's fees) [CCP § 483.020(a)(3)];

The above total must be reduced by the sum of:

- The amount of all of the defendant's claims that would diminish the amount of the plaintiff's recovery [CCP § 483.020(d)]; and

- The amount of any payment or deposit that the plaintiff has received or holds solely to secure the payment of rent [CCP § 483.020(e)].

**19.04[3] Be Aware of Specified Exempt Property.** The following property is exempt from attachment [CCP § 487.020]:

- All property exempt from enforcement of a money judgment.
- Property that is necessary for the support of a defendant who is natural person or the defendant's family supported in whole or in part by the defendant.
- "Earnings," as defined by CCP § 706.011 (compensation pay able by an employer to an employee for personal services performed by the employee, whether wages, salary, commission, bonus or otherwise).
- All property that cannot be attached pursuant to CCP § 487.010 [see 19.04[4]].

In addition, other than that portion of benefits subject to child and spousal support enforcement, federal disability benefits awarded to veterans for service-connected disabilities pursuant to 38 USCS § 1101 *et seq.* are exempt from attachment, levy, or seizure by or under any legal or equitable process [CCP § 483.013].

**19.04[4] Check Statutory Definitions of Property Subject to Attachment.**

**19.04[4][a] All Property Subject to Levy Belonging to Corporation, Partnership, or Association May Be Attached.** If the defendant is a corporation, partnership, or other unincorporated association, all corporate, partnership or association property for which a method of levy is provided by CCP §§ 488.300-488.485 may be attached [CCP § 487.010(a), (b)].

**19.04[4][b] Specified Property of Natural Person May Be Attached.** If the defendant is a natural person, all of the following property is subject to attachment [CCP § 487.010(c)]:

- Interests in real property, except leasehold estates with unexpired terms of less than one year.
- Accounts receivable, chattel paper, and general intangibles arising out of the conduct by the defendant of a trade, business, or profession, equal to or exceeding one hundred fifty dollars (\$150).
- Equipment.
- Farm products.
- Inventory.
- Final money judgments arising out of the conduct by the defendant of a trade, business, or profession.
- Money on the premises where the defendant conducts a trade, business, or profession.
- Except for the first one thousand dollars (\$1,000), money located elsewhere than on such premises and in deposit accounts.

- Negotiable documents of title.
- Instruments.
- Securities.
- Minerals or the like (including oil and gas) to be extracted.

**19.04[4][c] Specified Community Property of Natural Person May Be Attached.** If the following property is community property, it may also be attached if it would be subject to enforcement of a judgment obtained in the action in which an attachment is sought [CCP § 487.010(d)]:

- Interests in real property, except leasehold estates with unexpired terms of less than one year.
- Accounts receivable, chattel paper, and general intangibles arising out of the conduct by the defendant of a trade, business, or profession, equal to or exceeding one hundred fifty dollars (\$150).
- Equipment.
- Farm products.
- Inventory.
- Final money judgments arising out of the conduct by the defendant of a trade, business, or profession.
- Money on the premises where the defendant conducts a trade, business, or profession.
- Except for the first one thousand dollars (\$1,000), money located elsewhere than on such premises and in deposit accounts.
- Negotiable documents of title.
- Instruments.
- Securities.
- Minerals or the like (including oil and gas) to be extracted.

**19.04[4][d] Homestead Property: Special Rules Apply.** Recording of a homestead declaration has no effect on the right to record an attachment lien, regardless of when the homestead was recorded [CCP § 487.025(a)].

**Exception:**

A defendant may protect a homestead by claiming an exemption for necessities pursuant to CCP § 487.020(b) [CCP § 487.025(c)].

**19.04[4][e] Attachment of Property Subject to Pending Action or Special Proceeding Is Restricted.** If property is subject to a pending action or special proceeding, only the following property can be attached [CCP § 488.475(a)]:

- Real property.



- Growing crops, timber to be cut, or minerals or accounts receivable resulting from their sales.
- Tangible personal property in the possession or control of the defendant or in the custody of a levying officer.
- The interest of a defendant in personal property in the estate of a decedent.

Attachment of property subject to a pending action or special proceeding, other than those types of property listed above, is not effective [*CCP* § 488.475(b)].

However, if the defendant is a party in the pending action or proceeding, the plaintiff may nonetheless obtain a lien to secure the amount to be secured by attachment [*CCP* § 488.475(e)].



**Cross Reference:**

Obtaining a lien in a pending action or proceeding, see 19.32 -19.36.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Attachments



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Chapter 19 Attachment

## II. OBTAINING WRIT OF ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.05*

### 19.05 Applying for Right to Attach Order (RTAO) and Writ of Attachment.

**19.05[1] Available on Filing Complaint or Any Time After.** A plaintiff may apply for a right to attach order (RTAO) and a writ of attachment, on filing a complaint or any time thereafter, by filing an application for the order and writ with the court in which the action is brought [CCP § 484.010].

**Consider:**

If the property to be attached is or may be in the possession of the defendant, apply for a turnover order under CCP § 482.080(a), which orders the defendant to relinquish possession to the levying officer, at the same time as the order for attachment [see *Pacific Decision Sciences Corp. v. Superior Court* (2004) 121 CA4th 1100, 1106, 18 CR3d 104 ].

**19.05[2] Application Must Be Executed Under Oath and Include Specific Information.** The application must be executed under oath and must include all of the following information [CCP § 484.020]:

- A statement showing that the attachment is sought to secure the recovery on a claim on which an attachment may be issued.
- A statement of the amount to be secured by the attachment.
- A statement that the attachment is not sought for a purpose other than the recovery on the claim on which the attachment is based.
- A statement that the applicant has no information or belief that the claim is discharged in a USC Title 11 bankruptcy proceeding or that the prosecution of the action is stayed in a Title 11 proceeding.
- A description of the property to be attached and a statement that the plaintiff is informed and believes that the property is subject to attachment.

Concerning the description [CCP § 484.020(e)]:

- If the defendant is a corporation, a reference to "all corporate property, which is subject to attachment pursuant to *CCP* § 487.010(a)," is sufficient.
- If the defendant is a partnership or other unincorporated association, a reference to "all property of the partnership or other unincorporated association which is subject to attachment pursuant to *CCP* § 487.010(b)," is sufficient.
- If the defendant is a natural person, however, the description of the property must be reasonably adequate to permit the defendant to identify the specific property to be attached.



#### **Cross Reference:**

Form of application, see 19.41.

### **19.05[3] Affidavits or Declarations Are Required.**

**19.05[3][a] Show That Plaintiff Would Be Entitled to Judgment on the Claim.** The application must be supported by an affidavit (or a declaration pursuant to *CCP* § 2015.5) showing that on the facts presented, the plaintiff would be entitled to a judgment on the claim on which the attachment is based [*CCP* § 484.030].

**19.05[3][b] Set Forth Facts With Particularity.** Facts stated in each affidavit must be set forth with particularity [*CCP* § 482.040].

**19.05[3][c] Affiant or Declarant Must Be Competent, and Have Personal Knowledge of Facts.** Each affidavit must show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit [*CCP* § 482.040].

The affiant may be any person, whether or not a party to the action, who has knowledge of the facts [*CCP* § 482.040].

### **19.05[4] Specific Notice Is Required.**

**19.05[4][a] Time and Place of Hearing.** The notice must inform the defendant of the time and place of the hearing on plaintiff's application for a right to attach order and a writ of attachment [*CCP* § 484.050(a)].

**19.05[4][b] RTAO Will Be Issued.** The notice must inform the defendant that the RTAO will be issued if the court finds that [*CCP* § 484.050(b)]:

- The plaintiff's claim is probably valid; and
- The other requirements for issuing the order are established.

The notice must also inform the defendant that the hearing [*CCP* § 484.050(b)]:

- Is not for the purpose of determining whether the claim is actually valid;
- That the determination of the actual validity of the claim will be made in subsequent proceedings in the action; and that
- The determination of the actual validity will not be affected by the decisions at the hearing on the application for the order.

**19.05[4][c] Amount to Be Secured.** The notice of application must inform the defendant that the amount to be

secured by the attachment is determined by *CCP* § 482.110 (amount for costs and attorney's fees), *CCP* § 483.010 (cases where attachment is authorized), *CCP* § 483.015 (amount to be secured by attachment), and *CCP* § 483.020 (amount to be secured in unlawful detainer proceeding), and these statutes must be summarized in the notice [*CCP* § 484.050(c)].

**19.05[4][d] Writ of Attachment Will Be Issued.** The notice must inform the defendant that if the RTAO is issued, a writ of attachment will be issued to attach the property described in the plaintiff's application, unless the court determines that [*CCP* § 484.050(d)]:

- The property is exempt from attachment; or
- That the property's value clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment.

The defendant must also be informed that additional writs of attachment may be issued to attach other nonexempt property of the defendant on the basis of the RTAO [*CCP* § 484.050(d)].

**19.05[4][e] Procedures for Opposing Issuance of RTAO.** The notice must inform the defendant that if the defendant desires to oppose the issuance of the RTAO, the defendant must file with the court and serve on the plaintiff a notice of opposition and supporting affidavit as required by *CCP* § 484.060 not later than five (5) court days prior to the date set for the hearing [*CCP* § 484.050(e)].

#### **Cross References:**

See 19.15[2], 19.16.

**19.05[4][f] Defendant Must Designate Exempt Personal Property.** The notice must inform the defendant that if the defendant claims that the personal property described in the application, or a portion thereof, is exempt from attachment, the defendant must include that claim in the notice of opposition filed and served pursuant to *CCP* § 484.060, or must file and serve a separate claim of exemption with respect to the property as provided in *CCP* § 484.070 [*CCP* § 484.050(f)].

The defendant must be informed that if an exemption for described property is not claimed, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the expiration of the time for claiming exemptions [*CCP* § 484.050(f)].

#### **Cross References:**

See 19.16[3], 19.17.

**19.05[4][g] Defendant Is Entitled to Determination of Exemption.** The notice must inform the defendant that the defendant may obtain a determination at the hearing whether real or personal property not described in the application or real property described in the application is exempt from attachment [*CCP* § 484.050(g)]:

- By including the claim of exemption in the notice of opposition filed and served pursuant to *CCP* § 484.060; or
- By filing and serving a separate claim of exemption with respect to the property as provided in *CCP* § 484.070.

The defendant must also be informed that the failure to claim an exemption for real or personal property not described in the application or for real property will not preclude the defendant from making a claim of exemption with respect to

the property at a later time [*CCP* § 484.050(h)].

 **Cross References:**

See 19.16[3], 19.17.

**19.05[4][h] Defendant and/or Attorney May Be Present at Hearing.** The notice must inform the defendant that either the defendant or the defendant's attorney, or both, may be present at the hearing [*CCP* § 484.050(g)].

**19.05[4][i] Required Notice: Consult Attorney.** The notice must contain the following statement [*CCP* § 484.050(g)]: "You may seek the advice of an attorney as to any matter connected with the plaintiff's application. The attorney should be consulted promptly so that the attorney may assist you before the time set for hearing."

 **Cross Reference:**

Form of notice of application, see 19.42.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Provisional Remedies Attachments Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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## II. OBTAINING WRIT OF ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.06*

### **19.06 Complying With Service Requirements.**

**19.06[1] Defendant Must Be Served With All Necessary Papers.** The defendant must be served with all of the following [CCP § 484.040]:

- A copy of the summons and complaint.
- A notice of the application and hearing [see 19.05].
- A copy of the application and any affidavit or declaration in support of the application.
- A copy of the temporary protective order, if one has been granted [CCP § 486.080; see 19.12[5]].

### **19.06[2] Required Methods of Service.**

**19.06[2][a] If Defendant Has Not Appeared.** If the defendant has not appeared in the action, all required documents must be personally served in the same manner as a summons is served [CCP § 482.070(d)].

**19.06[2][b] If Defendant Has Appeared.** If the defendant has appeared in the action, the required documents can be served personally or by mail [CCP § 482.070(a)].

**19.06[3] Service At Least 16 Court Days Before Hearing.** All moving and supporting papers must be served and filed at least 16 court days before the hearing [CCP § 1005(b)]. If notice is served by mail or fax, the 16-day notice period must be increased as follows [CCP § 1005(b)]:

- Two (2) calendar days, if notice is served by fax transmission, express mail, or another method of delivery providing for overnight delivery.
- Five (5) calendar days, if the place of mailing and the place of address are within the state of California.

- Ten (10) calendar days, if either the place of mailing or the place of address is outside the State of California, but within the United States.
- Twenty (20) calendar days, if either the place of mailing or the place of address is outside the United States.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Provisional Remedies Attachments Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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II. OBTAINING WRIT OF ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.07*

### **19.07 Hearing Must Be Held Before Writ Issues.**

**19.07[1] Plaintiff Must Be Ready to Proceed.** The plaintiff must be ready to proceed at the time set for the hearing [CCP § 484.080(a)]. If the plaintiff is not ready, or if he or she has failed to comply with the service requirements of CCP § 484.040 [see 19.06], the court may either [CCP § 484.080(a)]:

- Deny the application for the RTAO; or
- Grant the plaintiff a continuance if good cause is shown.

**19.07[2] Defendant May Apply for Continuance.** The court may, in its discretion and for good cause, grant the defendant a continuance for a reasonable period to enable him or her to oppose the issuance of the right to attach order [CCP § 484.080(b)].

**19.07[3] Court Will Issue RTAO If Statutory Requirements Are Satisfied.** At the hearing, the court will issue an RTAO if it finds all of the following [CCP § 484.090(a)]:

- The claim is one on which an attachment may be issued.
- The plaintiff has established the probable validity of the claim.
- The attachment is not sought for a purpose other than the recovery on the claim.
- The amount to be secured by the attachment is greater than zero.

**19.07[4] Court Must State Amount to Be Secured by Attachment.** If the order is issued, the court must state the amount to be secured by the attachment [CCP § 484.090(a); see 19.04[2]].

**19.07[5] Court Must Determine Existence of Exempt Property.** If the court determines that all or part of the defendant's property is exempt from attachment, the RTAO must describe the exempt property and prohibit its attachment [CCP § 484.090(c)].



► **Cross References:**

See 19.04[4], 19.15[1].

**19.07[6] Writ of Attachment Will Be Issued After Plaintiff Files Undertaking.** If the court finds that the statutory requirements for attachment are met, pursuant to *CCP* § 484.090(a) [see 19.07[3]], it must order a writ of attachment on the filing of an undertaking as provided by *CCP* §§ 489.210, 489.220 [see 19.13].

► **Cross References:**

Form of RTAO after hearing, see 19.43.

Form of undertaking, see 19.46.

**19.07[7] Court May Issue Turnover Order with Attachment Order.** The court may issue a turnover order along with the attachment order [*CCP* § 482.080(a)]. The turnover order is issued in aid of a writ, and not as an independent order; it compels the defendant to cooperate with the levying officer when the levy must be made by taking possession from defendant of the property or documentary evidence of title to property or of a debt [*CCP* § 482.080(a); *Pacific Decision Sciences Corp. v. Superior Court* (2004) 121 CA4th 1100, 1108, 18 CR3d 104 ].

The turnover order must be directed to a levying officer in the county in which the property of the defendant described in the writ may be located; and an order to a levying officer outside of California is void [*CCP* § 488.020(a); *Pacific Decision Sciences Corp. v. Superior Court* (2004) 121 CA4th 1100, 1108, 18 CR3d 104 ].

**Distinguish:**

*CCP* § 482.080(a)(2) does not authorize a turnover order for an account receivable and a deposit account [ *Pacific Decision Sciences Corp. v. Superior Court* (2004) 121 CA4th 1100, 1108, 18 CR3d 104 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Provisional Remedies Attachments Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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## II. OBTAINING WRIT OF ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.08*

### 19.08 Applying for Additional Writs.

**19.08[1] Available by Application.** Any time an RTAO has been issued following a noticed hearing under the Attachment Law, *CCP* §§ 484.010-484.110, or after the court has found pursuant to *CCP* § 485.240 that the plaintiff is entitled to an RTAO, the plaintiff may apply for a writ of attachment by filing an application with the court in which the action is brought [*CCP* § 484.310].

**19.08[2] Application Must Be Executed Under Oath and Contain Specific Information.** The application for additional writs must be executed under oath and must contain all of the following information [*CCP* § 484.320]:

- A statement that the plaintiff has been issued an RTAO under the noticed hearing procedure [*CCP* § 484.010 *et seq.*; *see* 19.05 -19.07] or that the court has found pursuant to the ex parte hearing procedure [*CCP* § 485.240; *see* 19.09 -19.12] that the plaintiff is entitled to an RTAO.
- A statement of the amount to be secured by the attachment.
- A description of the property to be attached under the writ of attachment and a statement that the plaintiff is informed and believes that the property is subject to attachment. The description must be reasonably adequate to permit the defendant to identify the specific property sought to be attached as required by *CCP* § 484.020(e) [*see* 19.05[2]].
- A statement that the applicant has no information or belief that the claim is discharged in a proceeding under Title 11 of the USC (Bankruptcy) or that the prosecution of the action is stayed in a proceeding under Title 11 of the USC.

**19.08[3] Notice and Hearing Are Required.** An additional writ of attachment may be issued only after a hearing. At least 15 days prior to the hearing, the defendant must be served with both of the following [*CCP* § 484.330]:

- A notice of application and hearing.
- A copy of the application.

**19.08[4] Informing Defendant of Specific Information.**

**19.08[4][a] Plaintiff Has Applied for a Writ of Attachment.** The notice must inform the defendant that the plaintiff has applied for a writ of attachment to attach the property described in the application [CCP § 484.340(a)].

**19.08[4][b] Time and Place of Hearing.** The notice must inform the defendant of the time and place of the hearing [CCP § 484.340(b)].

**19.08[4][c] Writ May Be Issued.** The notice must inform the defendant that a writ of attachment will be issued to attach the property described in the plaintiff's application, unless the court determines that [CCP § 484.340(c)]:

- The property is exempt from attachment; or
- The property's value clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment.

**19.08[4][d] Exemptions May Be Claimed.** The notice must inform the defendant that if the defendant claims that any of the property described in the application is exempt from attachment the defendant may file with the court, and serve on the plaintiff a claim of exemption with respect to the property as provided in CCP § 484.350 not later than five (5) days prior to the date set for hearing [CCP § 484.340(d)].

The defendant must also be informed that if the defendant fails to make such a claim with respect to personal property, the defendant may not later claim the exemption in the absence of a showing of a change in circumstances occurring after the expiration of the time for claiming exemptions [CCP § 484.340(d)].

**19.08[4][e] Defendant and/or Attorney May Be Present.** The notice must inform the defendant that the defendant or the defendant's attorney, or both may be present at the hearing [CCP § 484.340(e)].

**19.08[4][f] Defendant Should Consult Attorney.** The notice must contain the following statement [CCP § 484.340(f)]: "You may seek the advice of an attorney as to any matter connected with the plaintiff's application. The attorney should be consulted promptly so that the attorney may assist you before the time set for hearing."

**Cross Reference:**

Form of application, see 19.41.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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## II. OBTAINING WRIT OF ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.09*

### 19.09 Obtaining Ex Parte Writ of Attachment: Great or Irreparable Injury Required.

**19.09[1] Affidavit or Declaration Required.** An RTAO or writ of attachment may be issued ex parte only if the plaintiff shows facts by affidavit or declaration that he or she would suffer great or irreparable injury if the order were delayed until the matter could be heard on notice [*CCP § 485.010(a)*].

**Exception:**

Some statutes expressly permit an ex parte attachment without such a showing [*see, e.g., CCP §§ 492.010-492.090; H&N Code § 495.1; H&S Code § 11501; R&T Code §§ 6713, 8972, 11473, 12680, 19373, 30302, 32352*].

### 19.09[2] Defining Great or Irreparable Injury.

**19.09[2][a] Property May Become Unavailable.** The requirement of great or irreparable injury is satisfied if the plaintiff shows that under the circumstances of the case, it may be inferred that there is a danger that the property sought to be attached would be [*CCP § 485.010(b)(1)*]:

- Concealed;
- Substantially impaired in value; or
- Otherwise made unavailable to levy if the order were delayed until the matter could be heard on notice.

**19.09[2][b] Defendant Has Failed to Pay Debts.** The requirement of great or irreparable injury is also satisfied if the plaintiff shows that under the circumstances of the case, it may be inferred that the defendant has failed to pay the debt underlying the requested attachment and the defendant is insolvent [*CCP § 485.010(b)(2)*].



**Warning:**

If the plaintiff bases the writ solely on this ground, the defendant may ask the court to review the issuance of the writ, and the court must conduct a hearing within five (5) court days after the plaintiff is

served with notice of the defendant's request [*CCP* § 485.010(c)].

**19.09[2][c] Bulk Sales Notice.** The requirement of great or irreparable injury is also satisfied if a bulk sales notice has been recorded and published pursuant to Division 6 of the Commercial Code [*Com Code* §§ 6101-6111] with respect to a bulk transfer by the defendant [*CCP* § 485.010(b)(3)].



**Cross Reference:**

California Forms of Pleading and Practice, Ch. 270, Fraudulent Conveyances (Matthew Bender).

**19.09[2][d] Escrow Opened Concerning the Sale of Liquor License.** The requirement of great or irreparable injury is also satisfied if an escrow has been opened pursuant to the provisions of *B&P Code* § 24074 with respect to the sale by the defendant of a liquor license [*CCP* § 485.010(b)(4)].

**19.09[2][e] Any Other Circumstance Showing Great or Irreparable Injury.** The requirement of great or irreparable injury is satisfied if the plaintiff shows any other circumstance indicating that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice [*CCP* § 485.010(b)(5)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Provisional Remedies Attachments Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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## II. OBTAINING WRIT OF ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.10*

### **19.10 Applying for Ex Parte Writ of Attachment.**

**19.10[1] Filing Application at Time of Complaint or After.** A plaintiff may apply for a right to attach order (RTAO), on filing a complaint or any time thereafter, by filing an application for the order and writ with the court in which the action is brought [*CCP § 485.210(a)*].

#### **19.10[2] Application Requirements.**

**19.10[2][a] Application Must Be Executed Under Oath and Include Specific Information.** The plaintiff's application for an ex parte RTAO and writ of attachment must be executed under oath and must include all of the following information [*CCP § 485.210(b)*; *CCP § 484.020*]:

- A statement showing that the attachment is sought to secure the recovery on a claim on which an attachment may be issued.
- A statement of the amount to be secured by the attachment.
- A statement that the attachment is not sought for a purpose other than the recovery on the claim on which the attachment is based.
- A statement that the applicant has no information or belief that the claim is discharged in a USC Title 11 bankruptcy proceeding or that the prosecution of the action is stayed in a Title 11 proceeding.
- A description of the property to be attached and a statement that the plaintiff is informed and believes that the property is subject to attachment.

Concerning the description [*CCP § 484.020(e)*]:

- If the defendant is a corporation, a reference to "all corporate property, which is subject to attachment pursuant to *CCP § 487.010(a)*," is sufficient.

- If the defendant is a partnership or other unincorporated association, a reference to "all property of the partnership or other unincorporated association which is subject to attachment pursuant to *CCP* § 487.010(b)," is sufficient.

- If the defendant is a natural person, however, the description of the property must be reasonably adequate to permit the defendant to identify the specific property to be attached.

**19.10[2][b] Application Must Show Great and Irreparable Injury.** The plaintiff's ex parte application must include a statement showing that the great and irreparable injury requirement of *CCP* § 485.010 is satisfied [see 19.09].

**19.10[3] Affidavit or Declaration Required.** The plaintiff's ex parte application must be supported by an affidavit or declaration showing all of the following [*CCP* § 485.210(c)]:

- The plaintiff on the facts presented would be entitled to a judgment on the claim on which the attachment is based.
- The plaintiff would suffer "great or irreparable injury" [see 19.09] if issuance of the order were delayed until the matter could be heard on notice.
- The property sought to be attached is not exempt [see 19.04[4], 19.15[1]] from attachment.

When the ex parte attachment is sought on the ground of the defendant's alleged failure to pay debts, the plaintiff's affidavit filed in support of the ex parte attachment must also state [*CCP* § 485.010(b)(2)]:

- The known undisputed debts of the defendant;
- That the debts are not subject to bona fide dispute; and
- The basis for plaintiff's determination that the defendant's debts are undisputed.

#### **Cross Reference:**

Form of application, see 19.41.

**19.10[4] Statutory Requirements Must Be Met.** The court will issue the RTAO and writ if the following statutory requirements are met [*CCP* § 485.220(a)]:

- The claim is one on which an attachment may be issued.
- The plaintiff has established the probable validity of the claim.
- The attachment is not sought for a purpose other than the recovery of the claim.
- The property sought to be attached is not exempt [see 19.04[4], 19.15[1]].
- The plaintiff will suffer "great or irreparable injury" [see 19.09] if the RTAO is delayed until the matter can be heard on notice.
- The amount sought to be secured is greater than zero.

#### **Prerequisite--Undertaking Required:**

Before the RTAO and writ are issued, the plaintiff must file an undertaking [*CCP* § 485.220(a)].

**Cross References:**

Discussion of undertaking, see 19.13.

Form of ex parte RTAO, see 19.44.

Form of undertaking, see 19.46.

**19.10[5] If Great and Irreparable Injury Requirement Is Not Met.** The court will deny the order if the statutory requirements are not met. If the order is denied solely on the ground that the "great and irreparable injury" [see 19.09] is not met, the plaintiff can apply for an RTAO and writ under the noticed procedure [see 19.05] using the same affidavits and supporting papers [*CCP* § 485.220(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment





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Chapter 19 Attachment

## II. OBTAINING WRIT OF ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.11*

### 19.11 Applying for Additional Writs After Ex Parte Procedure.

**19.11[1] Available Ex Parte or on Notice.** Any time after an RTAO and a writ of attachment have been issued under the ex parte procedure, the plaintiff may:

- Apply for additional writs of attachment by filing an application with the court in which the action is brought [CCP § 485.510]; or
- Apply for a new order and writ under the noticed procedure [CCP §§ 484.010-484.110; see 19.05].

**19.11[2] Ex Parte Application Must Be Executed Under Oath and Contain Specific Information.** The application for an additional writ must be executed under oath and must include all of the following [CCP § 485.520]:

- A statement that the plaintiff has been issued an RTAO and a writ of attachment;
- A statement of the amount to be secured by that attachment under the RTAO.
- A description [see 19.05[2]] of the property to be attached under the writ, and a statement that the plaintiff is informed and believes that the property is not exempt [see 19.04[4], 19.15[1]].
- A statement showing that the "great and irreparable injury requirement" [see 19.09] has been satisfied [see CCP § 485.010].

**19.11[3] Affidavit or Declaration Is Required.** The plaintiff's ex parte application must be supported by an affidavit or declaration stating both of the following [CCP § 485.530(a)]:

- The plaintiff would suffer great or irreparable injury [see 19.09] if issuance of the order were delayed until the matter could be heard on notice.
- The property sought to be attached is not exempt [see 19.05[4], 19.15[1]] from attachment.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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## II. OBTAINING WRIT OF ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.12*

### 19.12 Obtaining Temporary Protective Order on Notice or Ex Parte.

#### 19.12[1] Noticed Hearing Procedure.

**19.12[1][a] Application May Be Filed When RTAO Is Sought.** At the time of applying for an RTAO under the noticed hearing procedure, the plaintiff may apply in the alternative for a temporary protective order by filing an application for an order with the court in which the action is brought [CCP § 486.010(a)].

**19.12[1][b] Application Must Specify Relief Requested and Be Supported by Affidavit or Declaration.** The application must specify the relief requested and must be supported by an affidavit or declaration that shows that the plaintiff would suffer "great or irreparable injury" [see 19.09] if the temporary order were not issued [CCP § 486.010(b)].



#### Cross Reference:

Form of application for temporary protective order, see 19.41.

**19.12[2] Court May Issue Temporary Protective Order Instead of RTAO.** After a plaintiff has applied for an RTAO and a writ of attachment under the ex parte hearing procedure, the court may in its discretion deny the RTAO and the writ if it determines that although the statutory requirements [see 19.04[1]] are satisfied, a temporary protective order would be just and equitable to the parties [CCP § 486.030(a)].



#### Strategic Point--Plaintiff:

Always ask the court and prepare orders for both a RTAO and a temporary protective order. Courts will usually preserve the status quo by issuing a temporary protective order instead of a RTAO, particularly when the RTAO is sought ex parte.

**19.12[3] Court Must Issue Temporary Protective Order If Statutory Grounds Are Satisfied.** After examining the application, the supporting affidavit, and the other papers on record, the court must issue a temporary protective order, which states the amount sought to be secured by the attachment if it finds all of the following [CCP § 486.020]:

- The claim is one on which an attachment may be issued.
- The plaintiff has established the probable validity of the claim.
- The order is not sought for a purpose other than the recovery on the claim.
- The plaintiff will suffer "great or irreparable injury" [see 19.09] if the temporary protective order is not issued [see CCP § 485.010].

**Prerequisite--Undertaking Required:**

Before a temporary protective order is granted, the plaintiff must file an undertaking as provided by CCP §§ 489.210, 489.220 [CCP § 486.020].

 **Cross References:**

Discussion of undertaking, see 19.13.

Form of undertaking, see 19.46.

**19.12[4] Drafting Temporary Protective Order.**

**19.12[4][a] General Scope Should Reflect Interests of Justice and Equity.** The temporary protective order must be just and equitable and take into account the circumstances of both parties [CCP § 486.040].

**19.12[4][b] May Prohibit Transfer of Property.** The temporary protective order may prohibit transfer of any of the defendant's property in California that is subject to the writ of attachment. The temporary protective order must describe the property in a manner adequate to permit the defendant to identify the property [CCP § 486.050(a)].

**Exception:**

If the property subject to the temporary protective order is farm products held for sale or is inventory, the temporary protective order may not prohibit the defendant from transferring property in the ordinary course of business, but may impose appropriate restrictions on the disposition of the proceeds from such transfer [CCP § 486.050(b)].

**19.12[4][c] May Not Prohibit Defendant From Issuing Checks for Specified Purposes.** A temporary protective order cannot prohibit the defendant from issuing checks for any amount of any of the following purposes [CCP § 486.060(b)]:

- Payment of any payroll expense (including fringe benefits and taxes and premiums for workers' compensation and unemployment insurance) falling due in the ordinary course of business prior to the levy of a writ of attachment.
- Payment for goods delivered to the defendant C.O.D. for use in the defendant's trade, business, or profession.
- Payment of taxes if payment is necessary to avoid penalties.
- Payment of reasonable legal fees and reasonable costs and expenses required for the representation of the defendant in the action.

**19.12[4][d] May Not Prohibit Defendant From Issuing Checks With Proscribed Monetary Limits.** In addition to the checks permitted to be issued for the purposes specified, the defendant may also issue any number of checks for

any purpose, if the total amount of the checks does not exceed the greater of the following [*CCP* § 486.060(c)]:

- The amount by which the total amount on deposit exceeds the sum of the amounts sought to be secured by the attachment and the amounts of the specifically permitted to be paid pursuant to *CCP* § 486.060(b) [*see* 19.12[4][c]]; or
- \$1000.00



#### **Cross Reference:**

Form of temporary protective order, *see* 19.45.

**19.12[5] Personal Service on Defendant Is Required.** The temporary protective order must be personally served on the defendant together with the following documents [*CCP* §§ 484.040, 486.080]:

- A copy of the summons and complaint.
- A notice of plaintiff's application for a RTAO and the place and time of the hearing.
- A copy of the application and of any affidavit or declaration in support of the application.

**19.12[6] Only Defendant Is Bound by Temporary Protective Order.** In general, a temporary protective order binds only the defendant, whether or not any other person knows of or is served with a copy of it [*CCP* § 486.070].

#### **19.12[7] Temporary Protective Order Creates Lien.**

**19.12[7][a] Lien Is Created on Service.** The service of a temporary protective order creates a lien on any property, or the proceeds of that property, that is described in the order [*CCP* § 486.110(a)].

**19.12[7][b] Lien Terminates on Expiration of Temporary Protective Order.** The lien terminates on the date of expiration of the temporary protective order except on that has been property levied on under a noticed writ of attachment [*CCP* § 486.110(b)].

**19.12[8] Expiration of Temporary Protective Order.** Except as otherwise provided in the Attachment Law, the temporary protective order expires at the earlier of the following times [*CCP* § 486.090]:

- Forty (40) days after the issuance of the order or on an earlier date if the court so orders.
- When a levy of attachment on specific property is made by the plaintiff.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Attachments



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## II. OBTAINING WRIT OF ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.13*

### 19.13 Filing Undertaking.

#### **19.13[1] Undertaking Must Be Filed Before Writ, Temporary Protective Order, or Lien Order Is Issued.**

Before a writ of attachment, temporary protective order, or order permitting a creation of lien is issued, the plaintiff must file an undertaking to pay the defendant any amount the defendant may recover for wrongful attachment [*CCP* § 489.210; *Vershow v. Reiner* (1991) 231 CA3d 879, 882-883, 282 CR 684 ].

**19.13[2] Approval and Filing of Undertaking.** Unless the surety on the undertaking is an admitted surety insurer, all undertakings must be presented to a proper court for approval. On approval, the undertaking must be filed with the court in which the action is pending [*CCP* § 489.060(a), (b)].

**19.13[3] Amount of Undertaking.** Unless otherwise ordered, an undertaking filed pursuant to the Attachment Law is ten thousand dollars (\$10,000) [*CCP* § 489.220(a)].

If, on objection to the undertaking, the court determines that the probable recovery for wrongful attachment exceeds \$10,000, the court must increase the undertaking to the amount determined to be the probable recovery for the wrongful attachment [*CCP* § 489.220(b)].



#### **Cross Reference:**

Form of undertaking, see 19.46.

Discussion of action for wrongful attachment, see 19.22.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### III. OPPOSING ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.14*

#### **19.14 CHECKLIST: Opposing Attachment or Temporary Protective Order.**

☐ Determine if plaintiff has met all statutory requirements.

**Authority:**

CCP § 483.010

**Discussion:**

See 19.04[1]

☐ Determine if plaintiff has attached any exempt property.

**Authority:**

CCP § 487.020

**Discussion:**

See 19.15[1]

☐ In noticed procedures, file and serve notice of opposition no later than five days prior to date set for hearing:

☐ State grounds.

☐ Accompany with affidavit.

☐ Include claim of exemption for any personal property described in plaintiff's application.

☐ May include claim for personal property not described in plaintiff's application and for real property.

**Authority:**

CCP §§ 484.060, 484.070

**Discussion:**

See 19.15[2], 19.16

**Form:**

See 19.47

☐ Apply to terminate any ex parte order and writ.

☐ File notice of motion with court, and serve on plaintiff.

**Authority:**

CCP § 485.240

**Discussion:**

See 19.15[3], 19.18

**Form:**

See 19.48

☐ Make claim of exemption:

☐ As to personal property within 30 days of levy.

☐ As to real property at any time prior to entry of judgment.

☐ For family necessities within 30 days service of notice of attachment.

☐ Prepare order.

**Authority:**

CCP §§ 485.610, 487.020(b), 487.030

**Discussion:**

See 19.17

**Forms:**

See 19.47, 19.49

☐ Apply to terminate, modify, or vacate temporary protective order:

☐ In the interests of justice and equity; or



☐ By filing an undertaking.

☐ Prepare order.

**Authority:**

*CCP §§ 486.100, 489.320*

**Discussion:**

*See 19.15[4]*

**Forms:**

*See 19.46, 19.50, 19.51*

☐ Apply for substitution of undertaking for attached property.

☐ Prepare order.

**Authority:**

*CCP § 489.310*

**Discussion:**

*See 19.15[5], 19.19*

**Forms:**

*See 19.46, 19.48, 19.49*

☐ Apply for release of attachment on excess property:

☐ By noticed motion.

☐ Support with statement of grounds, affidavit, and memorandum.

☐ Prepare order.

**Authority:**

*CCP § 488.720(a), (b)*

**Discussion:**

*See 19.15[6], 19.20*

**Forms:**

*See 19.48, 19.49*

☐ Apply for vacation or stay based on military service.

**Authority:**

*50 USC app § 523; M&V Code § 403(c)*

**Discussion:**

*See 19.21*

- ☐ Move to recover damages for wrongful attachment:
- ☐ May be made by motion to enforce liability on bond.
  - ☐ May be made only at conclusion of plaintiff's action.
  - ☐ Must be made within one year after conclusion of plaintiff's action.
  - ☐ Sureties must be joined.

**Authority:**

*CCP §§ 490.010, 996.430(a), 996.440*

**Discussion:**

*See 19.15[7], 19.22*



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### III. OPPOSING ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.15*

#### 19.15 Options and Strategies for Defendant.

**19.15[1] Opposing Attachment of Property That Is Exempt.** The following property is exempt from attachment [CCP § 487.020]:

- All property exempt from enforcement of a money judgment [see CCP § 704.010, *et seq.*].
- Property that is necessary for the support of a defendant who is natural person or the defendant's family supported in whole or in part by the defendant.
- "Earnings" (compensation payable by an employer to an employee for personal services performed by the employee, whether wages, salary, commission, bonus or otherwise) [CCP § 706.011].
- All property not subject to attachment pursuant to CCP § 487.010 [see 19.04[3]].

#### ➤ Cross Reference:

See 19.04[4].

**19.15[2] Filing Notice of Opposition.** To oppose the issuance of the RTAO sought by plaintiff, or to object to the amount sought to be secured by the attachment, the defendant must file and serve on the plaintiff no later than five (5) court days prior to the date set for the hearing a notice of opposition [CCP § 484.060(a)].

#### ➤ Cross Reference:

See 19.16.

**19.15[3] Applying to Terminate Ex Parte Order and Writ.** Any defendant whose property has been attached by a writ issued ex parte may apply for an order [CCP § 485.240(a)]:

- To set aside the RTAO.

- To quash the writ of attachment.
- To release any property levied on.
- To reduce the amount secured by the attachment.

 **Cross Reference:**

See 19.18.

**19.15[4] Applying to Terminate, Modify, or Vacate Temporary Protective Order.**

**19.15[4][a] Interests of Justice and Equity.** On the defendant's ex parte application, or, if the court so orders, after a noticed hearing, the court may modify or vacate a temporary protective order if the court determines that such action would be in the interests of justice and equity to the parties, taking into account the following factors [CCP § 486.100]:

- The effect on the defendant of the continuance of the original order.
- The effect on the plaintiff of modifying or vacating the order.
- Any other factors.

**19.15[4][b] Filing an Undertaking.** Alternatively, a defendant who has appeared in the action and who been served with a temporary protective order may file an undertaking and apply by noticed motion to the court in which the action is pending for an order terminating the temporary protective order [CCP § 489.320].

The undertaking must equal the amount sought to be secured by the attachment. The court must issue the order terminating the temporary protective order on condition that a sufficient undertaking is filed [CCP § 489.320(b)].

 **Cross References:**

Form of application to terminate, modify, or vacate temporary protective order, see 19.50.  
Form of order, see 19.51.

**19.15[5] Applying for Substitution of Undertaking for Attached Property.** After a writ of attachment is issued, a defendant may apply for an order permitting the defendant to substitute an undertaking for any property in California that has been or is subject to being attached [CCP § 489.310(a)].

 **Cross Reference:**

See 19.19.

**19.15[6] Applying for Release of Attachment on Excess Property.** The defendant may apply for an order releasing the attachment to the extent that the value of the defendant's interest clearly exceeds the amount to be secured by the attachment [CCP § 488.720(a)].

 **Cross Reference:**

See 19.20.

**19.15[7] Seeking Relief for Wrongful Attachment.** At the conclusion of plaintiff's action, a defendant may recover damages for wrongful attachment by a motion to enforce liability on the bond. The motion may be made in the trial court, without the necessity of an independent action [CCP § 996.440(a)].



**Cross Reference:**

See 19.22.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Attachments



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### III. OPPOSING ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.16*

#### **19.16 Requirements for Notice of Opposition.**

**19.16[1] File and Serve Notice on Plaintiff No Later Than Five Days Before Hearing.** If a defendant desires to oppose the issuance of an RTAO, or objects to the amount to be secured by the attachment, the defendant must file and serve notice on the plaintiff no later than five court days prior to the date set for the hearing a notice of opposition [*CCP* § 484.060(a)].

**19.16[2] Notice Must State Grounds, and Be Supported Factually and Legally.** The notice of opposition must [*CCP* § 484.060(a)]:

- State the grounds on which the defendant opposes the issuance of the order or objects to the amount sought to be secured by the attachment;
- Be accompanied by an affidavit supporting any factual issues raised; and
- Be accompanied by a memorandum supporting any legal issues raised.

#### **19.16[3] Notice May Include Claim of Exemption.**

**19.16[3][a] Exemption for Personal Property Described in Plaintiff's Application Will Be Lost If Not Claimed.** If a defendant filing a notice of opposition claims that the personal property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant may include that claim in the notice of opposition [*CCP* §§ 484.060(b), 484.070(a)].

If the defendant files a notice of opposition and:

- Fails to make a claim of exemption; or
- Makes the claim but fails to prove that the personal property is exempt,

the defendant may not later claim the exemption unless there is a change of circumstances [*CCP* §§ 482.100,

484.070(a)].

**19.16[3][b] Exemption Claim for Personal Property Not Described in the Plaintiff's Application or Real Property Described in the Plaintiff's Application Is Optional.** If a defendant filing a notice of opposition desires to claim at the hearing that real or personal property not described in the plaintiff's application, or real property described in the plaintiff's application is exempt from attachment, the defendant may include that claim in the notice of opposition [CCP §§ 484.060(b), 484.070(b)].

Failure to make the claim does not preclude the defendant from later claiming the exemption [CCP § 484.070(b)].



**Warning:**

If the defendant makes a claim, but fails to prove that the property is exempt from attachment, the defendant may not later claim that the property, or a portion thereof, is exempt unless there is a change of circumstances [CCP § 484.070(b), see CCP § 482.100].

**19.16[3][c] Claim of Exemption Must Cite to Statutory Authority.** The claim of exemption must [CCP § 484.070(c)]:

- Describe the property claimed to be exempt.
- Specify the specific statute supporting the claim.



**Cross Reference:**

Form for notice of opposition and claim of exemption, see 19.47.

**19.16[3][d] Affidavit or Declaration Required.** The claim of exemption must be accompanied by an affidavit or declaration supporting any factual issues raised by the claim and by a memorandum supporting any legal issues raised [CCP § 484.070(d)].



**Cross Reference:**

Form of declaration, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

**19.16[3][e] Claim Must Be Served On Plaintiff Not Less Than Five Days Before Hearing.** The claim of exemption, together with any supporting affidavit and memorandum must be filed and served on the plaintiff not less than five (5) days before the date set for the hearing [CCP § 484.070(e)].

**19.16[3][f] Plaintiff May Respond to Defendant's Claim of Exemption.** To oppose the claim of exemption, the plaintiff must file and serve on the defendant, not less than two (2) days before the date set for the hearing, a notice of opposition to the claim [CCP § 484.070(f)].

The plaintiff's notice of opposition must be accompanied by [CCP § 484.070(f)]:

- An affidavit supporting any factual issues raised; and
- A memorandum supporting any legal issues.

If all of the property described in the plaintiff's application is claimed to be exempt and the plaintiff does not file and serve a notice of opposition, no hearing will be held and no right to attach order or writ of attachment will issue, and any temporary protective order issued immediately expires [CCP § 484.070(f)].

**19.16[3][g] If Plaintiff Opposes Exemption, Defendant Has Burden of Proof.** If the plaintiff files and serves a notice of opposition to a defendant's claim of exemption, the defendant has the burden of proving that the property is exempt from attachment [*CCP* § 484.070(*g*)].



**Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### III. OPPOSING ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.17*

#### **19.17 Claiming Exemption After Levy Has Been Made.**

**19.17[1] Make Claim Within 30 Days of Levy.** When real or personal property has been levied on pursuant to a writ of attachment issued on an ex parte application, a claim of exemption must be made within 30 days after the levying officer serves the defendant with the notice of attachment describing the property [*CCP § 485.610*; *Bank of America v. Salinas Nissan, Inc. (1989) 207 CA3d 260, 269-270, 254 CR 748* ].

A claim of exemption as to real property levied on pursuant to a writ of attachment may be claimed at any time prior to the entry of judgment [*CCP §§ 485.610(a), 487.030*].

An exemption for family necessities must be claimed not later than 30 days of the service of the notice of attachment [*CCP § 485.610(b), see CCP § 482.100*]:

#### **Cross References:**

Form of claim of exemption, see *19.47*.

Form of notice of opposition to claim of exemption, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

Form of notice of proceedings for order determining claim of exemption, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

Form of order determining claim of exemption, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

**19.17[2] Claiming Exemption for Real or Personal Property.** A defendant may claim an exemption as to real or personal property levied on pursuant to the ex parte hearing procedure [*see 19.09, 19.10*] by following the procedure set forth for claiming exemptions from post-judgment levies as set forth in *CCP § 703.510 et seq.* [*CCP § 485.610(a)*].

#### **Cross Reference:**

*California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.40 et seq. (Matthew Bender).*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Provisional Remedies Attachments



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### III. OPPOSING ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.18*

#### **19.18 Applying to Set Aside Order and Quash Writ.**

**19.18[1] Filing Notice of Motion to Set Aside RTAO and Quash Writ.** Any defendant whose property has been attached under a writ issued ex parte may apply for an order to set aside the RTAO, to quash the writ of attachment, to release any property levied on, or reduce the amount to be secured by the attachment [*CCP* § 485.240(a)].

The application must be made by filing a notice of motion with the court and serving it on the plaintiff [*CCP* § 485.240(a)].

**19.18[2] Stating Grounds and Supporting Facts and Law.** The notice of motion must [*CCP* § 485.240(b)]:

- State the grounds on which the motion is based;
- Be accompanied by an affidavit or declaration supporting any factual issues raised;
- Be accompanied by a memorandum supporting any legal issues raised.



#### **Warning:**

An assertion that the plaintiff would not have suffered "great or irreparable injury" if issuance or the order had been delayed until the matter could have been heard on notice [*see* 19.09] is not an allowable ground to set aside an order [*CCP* § 485.240(b)].



#### **Cross Reference:**

Form of application and notice of hearing for order to set aside RTAO, *see* 19.48.

**19.18[3] Hearing to Determine Plaintiff's Right to RTAO and Amount to Be Secured.** At the hearing on the motion, the court must determine [*CCP* § 485.240(c)]:

- Whether the plaintiff is entitled to the RTAO; or

- Whether the amount to be secured by the attachment should be reduced.

If the court finds that the plaintiff is not entitled to the RTAO, it will order the RTAO set aside, the writ of attachment quashed, and any property levied on pursuant to the writ released [*CCP* § 485.240(c)].



**Warning:**

If the court finds that the plaintiff is entitled to the RTAO, the plaintiff may apply for additional writs [*CCP* § 485.240(c)].

**19.18[4] Court Will Consider All Relevant Evidence and Legal Argument.** The court's determinations must be made on the basis of the pleadings and other papers in the record. However, on good cause, the court may receive and consider at the hearing additional evidence, and additional memoranda, or it may continue the hearing for the production of such additional evidence or memoranda [*CCP* § 485.240(d)].



**Cross Reference:**

Form of order to set aside RTAO, release attached property, etc., see 19.49.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Provisional Remedies Attachments Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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Chapter 19 Attachment

### III. OPPOSING ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.19*

#### **19.19 Applying to Substitute Undertaking for Attached Property.**

**19.19[1] Application Must Be by Noticed Motion.** Whenever a writ of attachment is issued, a defendant may apply by noticed motion to the court in which the action is pending for an order permitting the defendant to substitute an undertaking for any property in California that has been or is subject to being attached [*CCP § 489.310(a)*].

**19.19[2] Application May Require Additional Statement.** The defendant's application must include a statement, executed under oath, describing the property to be released or protected from attachment if [*CCP § 489.310(b)*]:

- The defendant is applying for an order to release a portion of the property that has been attached; or
- The defendant is applying for an order preventing the attachment of property and the amount of the undertaking to be given is less than the amount to be secured by the attachment.

**19.19[3] Amount of Undertaking Must Equal Amount of Attached Property, Not Exceeding Amount of Anticipated Judgment.** The defendant must file an undertaking to pay the plaintiff the value of the property released, not exceeding the amount of any judgment that may be recovered by the plaintiff in the action against the defendant [*CCP § 489.310(c)*].



#### **Cross Reference:**

Form of undertaking by personal sureties, see 19.46.

#### **19.19[4] Special Rules Apply to Actions Against Multiple Defendants.**

**19.19[4][a] Any Defendant May Make Application.** Where an action is against more than one defendant, any defendant may make the application to file an undertaking [*CCP § 489.310(d)*].

**19.19[4][b] When All Defendants Do Not Join Application, Statement Is Required.** Where all the defendants do not join in the application, the application must include a statement, executed under oath, that [*CCP § 489.310(d)*]:

- Describes the character of the defendant's title to the property;

- Describes the manner in which the defendant acquired such title; and
- States whether any other defendant who has not joined in the application has an interest in the property.

**19.19[4][c] Joint Application and Undertaking Required for Two or More Defendants.** If two or more defendants have an interest in the same property, a joint application and undertaking must be filed to secure the release of the property [*CCP* § 489.310(d)].



**Cross References:**

Form of undertaking by personal sureties, see 19.46.

Form of application and notice of hearing for order to set aside RTAO, see 19.48.

Form of order to set aside RTAO, release attached property, etc., see 19.49.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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### III. OPPOSING ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.20*

#### **19.20 Applying for Release of Attachment on Excess Property.**

**19.20[1] Applying by Noticed Motion.** The defendant may apply for an order releasing the attachment to the extent that the value of the defendant's interest clearly exceeds the amount to be secured by the attachment. The application must be made by noticed motion to the court in which the action is pending or in which the judgment in the action was entered [*CCP* § 488.720(a)].

**19.20[2] Motion Must State Grounds and Be Supported Factually and Legally.** The notice of motion [*CCP* § 488.720(b)]:

- Must contain a statement of the grounds on which the motion is based;
- Be accompanied by an affidavit or declaration supporting any factual issues; and
- Be accompanied by a memorandum supporting any legal issues raised.

#### **➡ Cross Reference:**

Form of application and notice of hearing for order to set aside RTAO, see 19.48.

#### **19.20[3] Court Must Determine Value of Interest in Attached Property.**

**19.20[3][a] Applying Before Judgment.** At the hearing on the motion, the court must determine the value of the defendant's interest in the attached property. The court must order the release of the attachment to the extent that the value of the defendant's interest in the property clearly exceeds the amount necessary to satisfy the amount secured by the attachment [*CCP* § 488.720(c)].

**19.20[3][b] Applying After Judgment.** If the application is made after judgment, the court must also consider the value of any property not attached in the action in determining whether the attachment is clearly excessive [*CCP* § 488.720(c)].

**19.20[3][c] Requesting Consideration of Additional Evidence for Good Cause.** The court's determinations must

be made on the basis of the pleadings and other papers in the record. On good cause shown, however, the court may receive and consider additional oral or documentary evidence, and additional memoranda. The court may also continue the hearing for the production of additional evidence or memoranda [*CCP* § 488.720(d)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Attachments





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### III. OPPOSING ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.21*

#### **19.21 Vacation or Stay for Military.**

**19.21[1] Under Federal Servicemembers Civil Relief Act.** When the defendant is in the military, the court, on its own motion, has discretion to vacate or stay any attachment or garnishment of property, money or debts in the hands of another, before or after judgment [*50 USC app § 501 et seq.*].

#### **► Cross Reference:**

*California Forms of Pleading and Practice, Ch. 489, Relief From Judgments and Orders, §§ 489.110-489.119 (Matthew Bender).*

**19.21[2] Under California Law.** In any action against a service member, before or during the period of the service, or within 60 days after, the court may vacate or stay any attachment [*M&V Code § 403(c)*].

#### **► Cross Reference:**

Forms of application and declaration in support of application to vacate or stay attachment against service member, see *California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender)*.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Provisional Remedies Attachments Civil Procedure Remedies Provisional Remedies Garnishments



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### III. OPPOSING ATTACHMENT OR TEMPORARY PROTECTIVE ORDER

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.22*

#### **19.22 Moving for Damages for Wrongful Attachment at Conclusion of Plaintiff's Action.**

##### **19.22[1] Wrongful Attachment Defined.**

**19.22[1][a] Action Where Attachment Is Not Authorized.** It is a wrongful attachment if the levy under a writ of attachment or the service of temporary protective order was made in an action in which attachment is not authorized [CCP § 490.010].

##### **Exception:**

It is not a wrongful attachment if both of the following are established [CCP § 490.010]:

- The levy was not authorized solely because the claim did not arise out of the defendant's conduct of trade, business, or profession [CCP § 483.010(c); *see* 19.04[1][c]]; and
- The person who sold or leased, or licensed for use, the property, furnished the services, or loaned the money reasonably believed that it would not be used primarily for personal, family, or household use.

**19.22[1][b] No Recovery of Judgment in Action.** It is wrongful attachment if the levy under a writ of attachment or the service of a temporary protective order is in an action in which the plaintiff does not recover judgment [CCP § 490.010].

**19.22[1][c] Property Is Exempt and Attachment Is Obtained Ex Parte.** It is wrongful attachment when property is exempt from attachment and the levy under a writ of attachment is obtained [CCP § 490.010]:

- Pursuant to the ex parte procedure for obtaining additional writs after the noticed hearing procedure [CCP § 484.510 *et seq.*; *see* 19.10]; or
- Pursuant to the ex parte hearing procedure for obtaining a writ of attachment [CCP § 485.010 *et seq.*; *see* 19.08].

**Exception:**

It is not wrongful attachment if the plaintiff shows that he or she reasonably believed that the property attached was not exempt from attachment [CCP § 490.010(c)].

 **Cross Reference:**

Forms of complaints for damages on attachment undertaking, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

**19.22[2] Moving to Enforce Liability on Bond.**

**19.22[2][a] Independent Action Not Necessary.** The defendant may recover damages for wrongful attachment by a motion to enforce liability on the bond. The motion may be made in the trial court without the necessity of an independent action [CCP § 996.440(a)].

 **Cross Reference:**

*California Forms of Pleading and Practice, Ch. 538, Suretyships, Bonds, and Undertakings, § 538.40 et seq.* (Matthew Bender).

**19.22[2][b] Motion Must Be Made Within One Year After Conclusion of Action.** The motion for damages for wrongful attachment may not be filed or notice served on the plaintiff until after [CCP § 996.440(b)]:

- Entry of the final judgment in the action for which damages are sought; or
- Either of the following:
  - ☐ The time for appeal from the judgment has expired.
  - ☐ If an appeal is filed, until the appeal is finally determined.

The motion may not be filed or notice served more than one year after the later of the preceding dates [CCP § 996.440(b)].

**19.22[2][c] Sureties Must Be Joined.** The defendant must join the sureties on an undertaking for wrongful attachment liability, and any liability binds the plaintiff and sureties jointly and severally. However, the liability of a surety is limited to the amount of the undertaking [CCP §§ 996.430(a), 996.470].

**19.22[3] Plaintiff's Liability for Wrongful Attachment.**

**19.22[3][a] Damages Limited by Amount of Undertaking.** The plaintiff's liability for causing a wrongful attachment includes both [CCP § 490.020(a)]:

- All damages proximately caused to the defendant by the wrongful attachment; and
- All costs and expenses, including attorney's fees, reasonably expended in defeating the attachment.

The plaintiff's liability for wrongful attachment is limited by the amount of the undertaking [CCP § 490.020(b)].

**19.22[3][b] Damages Offset Against Plaintiff's Unsatisfied Judgment.** The amount of any recovery for wrongful attachment is offset, insofar as possible, against any unsatisfied amounts owed to the plaintiff by the defendant on the judgment in the action for which wrongful attachment damages are awarded [CCP § 490.040].

**19.22[3][c] Common Law Remedies Are Available.** The defendant may recover for damages caused by an attachment or protective order on any common law theory of recovery [*CCP* § 490.060].



**Cross References:**

California Forms of Pleading and Practice, Ch. 357, Malicious Prosecution and Abuse of Process.

Form of allegations, malicious prosecution, attachment issued without valid claim, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

**19.22[4] Surety's Liability for Wrongful Attachment.** The defendant may also bring an action for damages against the surety on the attachment undertaking [*CCP* §§ 996.410-996.495]. The liability of a surety is limited by the amount of the bond [*CCP* § 996.470(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Attachments



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IV. LEVY PROCEDURES

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.23*

**19.23 CHECKLIST: Levy Procedures.**

**19.23[1] Plaintiff's Checklist.**

☐ Prepare writ containing necessary information and give to levying officer:

**Authority:**

*CCP § 488.010*

**Discussion:**

*See 19.24[2]*

**Form:**

*See 19.52*

☐ Prepare written instructions for levying officer:

☐ Include necessary information.

☐ Include correct names and addresses of persons to be served.

☐ Sign it.

**Authority:**

*CCP §§ 488.030, 488.040*

**Discussion:**

*See 19.24[3]*

**Form:**

See 19.53

- ☐ Deposit costs for levying officer.

**Authority:**

*CCP § 488.050(a)*

**Discussion:**

See 19.25

- ☐ Instruct levying officer regarding service requirements:

- ☐ Summons and complaint must be served with writ of attachment, if not already served.

**Authority:**

*CCP § 488.020(c)*

**Discussion:**

See 19.26[1]

- ☐ Serve copies of writ and notice on defendant.

**Authority:**

*CCP § 488.305*

**Discussion:**

See 19.26[2]

- ☐ Serve notice of attachment.

**Authority:**

*CCP §§ 488.060, 489.230*

**Discussion:**

See 19.26[3], [4]

**Form:**

See 19.54

- ☐ Consider application to the court for a receiver or other action to preserve value of attached property.

**Authority:**

*CCP § 488.700*

**Discussion:**

See 19.31

- ☐ Calendar lien's starting date, and 60 days prior to expiration date:

- ☐ Move to extend lien, not less than ten, nor more than 60 days before the three-year limit expires.

**Authority:**

*CCP §§ 488.500, 488.510*

**Discussion:**

*See 19.30*



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*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.24*

**19.24 Levy on Writ of Attachment.**

**19.24[1] Direct Writ to Levying Officer.** A "levying officer" is a sheriff, or marshal who is authorized to execute a writ under the Attachment Law [CCP § 481.140]. A writ of attachment must be directed to a levying officer in the county in which property of the defendant described in the writ is located and to any registered process server [CCP § 488.020(a)].

**Distinguish:**

A levy turnover order under CCP § 482.080(a) from a California court cannot be directed to either a levying officer outside the county in which the property is located or outside the state [ *Pacific Decision Sciences Corp. v. Superior Court* (2004) 121 CA4th 1100, 1108, 18 CR3d 104 ].

**19.24[2] Include Required Information.** The writ must include the following information [CCP § 488.010]:

- The date of issuance.
- The title of the court that issued the writ and the cause and number of the action.
- The name and address of the plaintiff and the name and last known address of the defendant.
- The amount to be secured by the attachment.
- A description of the property to be levied on.

**➡ Cross Reference:**

Form of writ, see 19.52.

**19.24[3] Give Instructions to Levying Officer.**

**19.24[3][a] Written Instructions Required.** The plaintiff must give the levying officer written instructions containing the information needed or requested by the levying officer to comply with the provisions of the Attachment



Law, including but not limited to the following [*CCP* § 488.030(a)]:

- An adequate description of any property to be levied on.
- A statement as to whether or not the property is a dwelling.
- If the property is a dwelling, whether or not it is real or personal property.

**19.24[3][b] Signature Required.** The instructions must be signed by the plaintiff's attorney of record or by the plaintiff, if he or she does not have an attorney of record [*CCP* § 488.030(a)].

**19.24[3][c] Include Correct Names and Addresses.** If the levying officer is required under the Attachment Law to serve a writ, order, notice or other paper on any person, the plaintiff also must include in the instructions to the levying officer the correct name and address of the person. The plaintiff must use reasonable diligence to ascertain the correct name and address [*CCP* § 488.040].



**Cross Reference:**

Form of instructions, see 19.53.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.25*

**19.25 Deposit Costs.**

The plaintiff must deposit money with the levying officer sufficient to pay the costs of performing any duty performed under the Attachment Law [*CCP* § 488.050(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.26*

## **19.26 Comply With Service Requirements.**

**19.26[1] Service of Copy of Summons and Complaint.** If a copy of the summons and complaint has not previously been served on the defendant, the levying officer must be instructed to serve the summons and complaint at the same time as the writ of attachment [*CCP § 488.020(c)*].

**19.26[2] Service of Copies of Writ and Notice.** On, or promptly after the time of levy, the levying officer must serve a copy of the writ of attachment and notice of attachment on the defendant [*CCP § 488.305*].

**19.26[3] Service of Notice of Attachment.** A notice of attachment must inform the person who is served with the attachment of all of the following [*CCP § 488.060*]:

- The capacity in which the person is notified.
- The specific property sought to be attached.
- The person's rights under attachment, including the right to make a third-party claim pursuant to *CCP § 720.010 et seq.*
- The person's duties under the attachment.

### **Cross References:**

Form of notice of attachment, see *19.54*.

Form of notice of attachment lien, California Secretary of State Form, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

**19.26[4] Advise Defendant Regarding Undertaking.** A notice of attachment must also advise the defendant that the undertaking has been filed and inform the defendant of his or her right to object to the undertaking on any of the following grounds [*CCP §§ 489.230(a), 995.920*]:

- The sureties are insufficient.
- The amount is insufficient.
- The bond is insufficient for any other cause.

A temporary protective order must include a comparable statement [*CCP* § 489.230(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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**19.27 Levying Officer Must Execute Writ in Accordance With Statutory Requirements.**

**19.27[1] Must Act Without Delay.** On receipt of written instructions from the plaintiff or the plaintiff's attorney, the levying officer must levy the writ without delay on the property described in the writ, or so much of that property as is clearly sufficient to satisfy the amount to be secured by the attachment. [CCP § 488.020(b)].

**19.27[2] Must Follow Instructions.** The levying officer must act in accordance with the written instructions to the extent the actions are taken in conformance with the provisions of the Attachment Law [CCP § 488.030(b)].

**Exception:**

If the levying officer has actual knowledge that the information is incorrect, the levying officer may not rely on the information contained in the written instructions [CCP § 488.030(c)].



**Strategic Point:**

Although levying officer must follow instructions, it is advisable for the party seeking to levy on a writ of attachment to coordinate closely with the sheriff or marshal's office to assure that any individual requirements of the office are satisfied.

**19.27[3] Must Take Custody of Property.** Where the method of levy on property requires that property be taken into custody, the levying officer may do so by [CCP § 488.090]:

- Removing the property to a place of safekeeping.
- Installing a keeper.
- Otherwise obtaining possession or control of the property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.28*

**19.28 Levying Officer Must Return Writ, Report, and Inventory of Attached Property.**

The levying officer to whom the writ of attachment is issued must promptly, and no later than 60 days [*CCP* § 488.130]:

- Return the writ to the court from which the writ is issued;
- Provide a report of the levying officer's actions;
- Make and return a full inventory of the property attached.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.29*

**19.29 Registered Process Server May Levy Certain Types of Property.**

The Attachment Law authorizes a registered process server to levy under a writ of attachment on specified property if certain conditions and procedures are met [*CCP* § 488.080].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment





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IV. LEVY PROCEDURES

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.30*

**19.30 Levy Creates Attachment Lien.**

**19.30[1] Lien Begins at Time of Levy.** A levy on property under a writ of attachment creates an attachment lien on the property from the time of the levy until the attachment expires [*CCP § 488.500(a)*].

**19.30[2] Lien Expires After Three Years.** Unless released or discharged sooner, an attachment ceases to be of any force or effect and the property levied on must be released no later than three years from the date of issuance of the writ of attachment [*CCP § 488.510(a)*].

**19.30[3] Plaintiff May Move to Extend Lien for One Year.** To extend a lien, the plaintiff must present a motion showing good cause for the extension not less than 10 nor more than 60 days before the three-year limit expires [*CCP § 488.510(b)*].

**Prerequisite:**

The plaintiff must give the defendant at least five days' notice of the motion [*CCP § 488.510(b)*].

**19.30[4] Eight-Year Maximum Period.** An attachment may be extended from time to time for one-year periods, but the maximum period, including extensions, may not exceed eight years from the date the writ of attachment was issued [*CCP § 488.510(d)*].



**Cross Reference:**

Forms of notice of motion and order to extend attachment on property, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

**19.30[5] Attachment Is Not Terminated by Death.** The death of the defendant whose property is attached does not terminate the attachment [*CCP § 488.510(e)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.31*

**19.31 Any Party Can Act to Preserve Value of Attached Property.**

**19.31[1] Interested Parties May Apply for Court Order.** The plaintiff, defendant, or a person who has filed a third-party claim may apply to the court for an order appointing a receiver, or ordering the levying officer to take any action necessary to preserve the value of the attached property [*CCP* § 488.700(a)].



**Cross Reference:**

Forms of notice of motion and order, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

**19.31[2] Levying Officer May Act Prior to Court Order.** If the levying officer determines that the property is extremely perishable or will greatly depreciate in value before a court order can be maintained, the levying officer may take any action necessary to preserve the value of the property or may sell it [*CCP* § 488.700(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Writs Ancillary Writs Writs of Attachment



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V. OBTAINING A LIEN AGAINST DEFENDANT'S POTENTIAL RECOVERY IN ANOTHER PENDING  
ACTION OR PROCEEDING

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.32*

**19.32 CHECKLIST: Obtaining a Lien in a Pending Action or Proceeding.**

**19.32[1] Plaintiff's Checklist.**

- ☐ Determine if defendant is a party to a pending action or special proceeding.
- ☐ Apply for an order creating a lien.
- ☐ Make required filings.
  - ☐ File notice of lien.
  - ☐ File copy of the RTAO.
  - ☐ File an undertaking
- ☐ Serve copies of the lien on all parties.

**Authority:**  
*CCP § 491.410*

**Discussion:**  
*See 19.33*

- ☐ If defendant claims an exemption, file notice of opposition not less than two days prior to hearing.

**Authority:**

*CCP § 484.070(f)*

**Discussion:**

See 19.34

**19.32[2] Defendant's Checklist.**

- ☐ Determine whether an exemption is authorized and make a claim.
- ☐ File noticed motion for exemption not later than 30 days after notice of lien.

**Authority:**

*CCP § 491.470*

**Discussion:**

See 19.34

- ☐ Obtain plaintiff's consent or court order before enforcing any judgment or terminating action.

**Authority:**

*CCP § 491.440*

**Discussion:**

See 19.36



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## V. OBTAINING A LIEN AGAINST DEFENDANT'S POTENTIAL RECOVERY IN ANOTHER PENDING ACTION OR PROCEEDING

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.33*

### 19.33 Obtaining Lien on Pending Actions or Rights Under Judgment.

**19.33[1] Money or Property Must Be Subject to Attachment.** If the defendant is a party to a pending action or special proceeding other than the action between the plaintiff and defendant, the plaintiff may obtain an attachment lien on both of the following [*CCP* § 491.410(a)]:

- Any cause of action of the defendant for money or property if the money or property would be subject to attachment should the defendant prevail.
- The rights of the defendant to money or property under any judgment subsequently obtained in the action or proceeding if the money or property would be subject to attachment.

**19.33[2] Applying for Order Creating Lien.** The plaintiff may apply for the order permitting creation of the lien in a pending action or special proceeding at the same time the plaintiff applies for an RTAO [*CCP* § 491.415(b)].

If the plaintiff has already obtained an RTAO, an application for an order permitting creation of the lien may be applied for in the same manner as a writ of attachment [*CCP* § 491.415(b)].

#### **Prerequisite--Undertaking Required:**

As a prerequisite to obtaining an order, the plaintiff must also file an undertaking pursuant to *CCP* §§ 489.210, 482.220 [*CCP* § 491.415(b)].

#### **➤ Cross References:**

Discussion of undertaking, see 19.13.

Form of undertaking, see 19.46.

Forms of notice of order and order permitting creation of lien, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

**19.33[3] Making Required Filings Including Undertaking.** To obtain a lien, the plaintiff must file all of the following in the pending action or special proceeding [*CCP* § 491.410(b)]:

- A notice of lien [*see* 19.33[4]].
- A copy of the RTAO.
- A copy of the order permitting creation of a lien in the pending action or special proceeding made by the court that issued the RTAO.

**Prerequisite--Undertaking Required:**

Before an order permitting a creation of lien is issued, the plaintiff must file an undertaking [*CCP* § 489.210].

 **Cross References:**

Discussion of undertaking, *see* 19.13.

Form of undertaking, *see* 19.46.

**19.33[4] Notice of Lien Must Contain Required Information, and Be Served on All Parties.**

**19.33[4][a] Contents.** The notice of lien must contain all of the following information [*CCP* § 491.420]:

- A statement that a lien has been created under *CCP* §§ 491.410-491.470, and the title of the court and the cause and number of the pending action or proceeding in which the notice of lien is filed.
- The name and last known address of the defendant.
- The name and address of the plaintiff.
- The title of the court where the plaintiff's action against the defendant is pending and the cause and number of the action.
- The amount required to secure the amount to be secured by the attachment at the time the notice of lien is filed in the action or proceeding.
- A statement that the lien attaches to any cause of action of the defendant in the pending action or proceeding and to the defendant's rights to money or property under any judgment procured in the action or proceeding.
- A statement that no compromise, dismissal, settlement or satisfaction of the pending action or proceeding or any of the defendant's rights to money or property under any judgment procured may be entered into by or on behalf of the defendant.
- A statement that the defendant may not enforce the defendant's rights to money or property under any judgment procured in the pending action or proceeding by writ or otherwise, unless one of the following requirements is satisfied:
  - The prior approval of the court in which the action or proceeding is pending has been obtained; or

☐ The written consent of the plaintiff has been obtained or the plaintiff has released the lien.

➡ **Cross Reference:**

Form of notice of lien in pending action, see *California Forms of Pleading and Practice*, Ch. 62, Attachment, § 62.193 (*Judicial Council Form AT-180*) (*Matthew Bender*).

**19.33[4][b] Service.** On, or promptly after the filing of the notice of lien and RTAO, the plaintiff must serve on all parties who have made an appearance in the action or special proceeding [*CCP* § 491.410(c)]:

- A copy of the notice of lien; and
- The date when the notice of lien was filed.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Attachments



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Chapter 19 Attachment  
V. OBTAINING A LIEN AGAINST DEFENDANT'S POTENTIAL RECOVERY IN ANOTHER PENDING  
ACTION OR PROCEEDING

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.34*

**19.34 Claiming Exemption.**

**19.34[1] Exemption in Opposition to Creation of Lien.** The defendant may claim an exemption if the money or property sought by the defendant would be exempt from attachment should the defendant prevail in the other action or proceeding [CCP § 491.415(c)].

The exemption must be claimed and determined in the same manner as an exemption is claimed and determined on application for a writ of attachment [CCP § 491.415(c)].

➡ **Cross References:**

See 19.16[3], 19.17.

**19.34[2] Exemption After Creation of Lien.**

**19.34[2][a] Filing Noticed Motion.** If a lien has already been created, the defendant may claim that all or any portion of the money or property that the defendant may recover in the action or special proceedings is exempt from attachment. The application must be filed and served on the plaintiff not later than 30 days after the defendant has notice of the creation of the lien [CCP § 491.470(a)].



**Warning:**

The failure of the defendant to make a claim of exemption constitutes a waiver of the exemption [CCP § 491.470(a)].



**Cross Reference:**

Form of notice of motion, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

**19.34[2][b] Opposing Exemption.** The plaintiff may file a notice of opposition to the exemption not less than two days before the date set for hearing [CCP § 484.070(f)].



**19.34[2][c] Court's Determination of Exemption Claim.** The court may determine the exemption claim at any time prior to the entry of judgment in the action or special proceeding, or it may consolidate the exemption hearing with the hearing on a motion to satisfy the lien after judgment [*CCP* § 491.470(b), *see CCP* § 491.460].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Attachments



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V. OBTAINING A LIEN AGAINST DEFENDANT'S POTENTIAL RECOVERY IN ANOTHER PENDING  
ACTION OR PROCEEDING

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.35*

**19.35 Plaintiff May Intervene.**

The court in which the action or special proceeding subject to the lien is pending may permit a plaintiff who has obtained a lien to intervene [CCP § 491.430(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Attachments



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V. OBTAINING A LIEN AGAINST DEFENDANT'S POTENTIAL RECOVERY IN ANOTHER PENDING  
ACTION OR PROCEEDING

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.36*

**19.36 Before Defendant Can Enforce Judgment or Terminate Action, Court Order or Plaintiff's Consent  
Required.**

Unless the lien is released, or the defendant has not received notice of the lien pursuant to *CCP § 491.410(c)*, a court order or the plaintiff's written consent is required before [*CCP § 491.440*]:

- Enforcement of a judgment recovered in the action or special proceeding.
- Entry by or on behalf of the defendant into a compromise, dismissal, settlement, or satisfaction of the pending action or special proceeding, or the judgment procured therein.



**Cross Reference:**

Form of notice of motion and supporting declaration for order to allow enforcement of judgment or compromise, Dismissal, Settlement, or Satisfaction, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Attachments



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Chapter 19 Attachment  
VI. OBTAINING EXAMINATION OF THIRD PERSONS

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.37*

**19.37 CHECKLIST: Obtaining Examination of Third Persons.**

- ☐ Apply for court order based on filed affidavit:
  - ☐ Affidavit must show that third person has control of property or is indebted to defendant in an amount exceeding \$250.00.
- ☐ Serve order on third person and defendant not less than 10 days prior to date set for examination.
  - ☐ Order must notify third person of potential sanctions.
  - ☐ Tender mileage fees.

**Authority:**  
*CCP § 491.110*

**Discussion:**  
See 19.38

**Form:**  
See 19.55

- ☐ Apply for order forbidding third person's transfer or payment of property.
- ☐ File an undertaking, if required.

**Authority:**

*CCP § 491.170(c), (d)*

**Discussion:**

See 19.39



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## VI. OBTAINING EXAMINATION OF THIRD PERSONS

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.38*

### 19.38 Applying for Court Order.

**19.38[1] Ex Parte Application.** The plaintiff may apply ex parte for a court order directing a third person to appear at a specified time and place to answer questions concerning the property of the defendant or a debt owed to the defendant [CCP § 491.110(a)].

**19.38[2] Affidavit Required.** The plaintiff must prove by affidavit, which may be based on the affiant's information and belief, that [CCP § 491.110(a)]:

- The third person has possession or control of property in which the defendant has an interest or that the third person is indebted to the defendant in an amount exceeding \$250.00.
- The plaintiff has an RTAO.

On such proof, the court will make an order directing the third person to appear before the court or a referee appointed by the court to provide information concerning the property or debt [CCP § 491.110(a)].

**19.38[3] Serving Copy of Order on Third Person and Defendant.** Not less than 10 days prior to the date set for the examination, the plaintiff must serve a copy of the order [CCP § 491.110(b)]:

- Personally on the third person.
- Personally or by mail on the defendant.

### 19.38[4] Service of Order Creates Lien on Defendant's Interest in Third Person's Property.

**19.38[4][a] Property Must Be Identifiable.** If the property or the debt is described in a manner reasonably adequate to permit it to be identified, service of the order on the third person creates a lien on the defendant's interest in the property in the third person's possession or control or on the debt owed to the defendant [CCP § 491.110(c)].

**19.38[4][b] Lien Continues for One Year.** The lien continues for one year from the date of the order unless the

court extends it or terminates it earlier [*CCP* § 491.110(c)].

The lien generally continues even if the property is transferred or encumbered [*CCP* § 491.200].

**19.38[5] Order Must Notify Third Person of Potential Sanctions.** The order must contain the following statement in 14-point boldface type if printed or in capital letters if typed [*CCP* § 491.110(d)]:

"NOTICE TO PERSON SERVED. If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court and the court may make an order requiring you to pay the reasonable attorney's fees incurred by the plaintiff in this proceeding."



**Cross Reference:**

Form of application and order, see 19.55.

**19.38[6] Plaintiff Must Tender Mileage Fees to Third Person.** When the order is served, the person serving the order must tender mileage fees to the third person [*CCP* § 491.110(e)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Attachments



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**19.39 Requesting Hearing to Determine Third Person's Interest in the Property or the Existence of a Debt.**

If the third person claims an interest in the property adverse to the defendant, or denies the debt, the court may, on plaintiff's request, determine the interest in the property or the existence of the debt [CCP § 491.170(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Attachments





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## VI. OBTAINING EXAMINATION OF THIRD PERSONS

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.40*

### **19.40 Applying for Order Forbidding Transfer or Payment of Property.**

**19.40[1] Ex Parte Application to Forbid Transfer to Defendant.** The plaintiff may apply ex parte for the court to make an order forbidding transfer of the property to the defendant or payment of the debt to the defendant until the interests in the property or the existence of the debt is determined [*CCP* § 491.170(c)].

**Consider:**

The court may require an undertaking [*CCP* § 491.170(c)].

► **Cross References:**

Discussion of Undertaking, see 19.13.

Form of Undertaking, see 19.46.

**19.40[2] Noticed Application to Forbid Transfer to Any Person.** On the plaintiff's application on noticed motion, if the court determines that:

- The defendant probably owns an interest in the property; or
- The debt probably is owed to the defendant,

the court may forbid the transfer or other disposition of the property to any person or forbid payment of the debt until the interests in the property or the existence of the debt are determined [*CCP* § 491.170(d)].

**Prerequisite:**

The court will require the plaintiff to furnish an undertaking [*CCP* § 491.170(d)].

► **Cross References:**

Discussion of Undertaking, see 19.13.

Form of Undertaking, see 19.46.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemediesProvisional RemediesAttachments



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VII. FORMS

A. Obtaining Writ of Attachment or Temporary Protective Order.

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.41*

**19.41 Judicial Council Form AT-105 Application for Right to Attach Order, Temporary Protective Order, etc. (Attachment).**

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NOTES.

**Authority:**

*CCP §§ 482.030, 484.020*; California Judicial Council Form AT-105, pictured above, is approved for optional use [*Cal Rules Ct, Rule 1.35*]



**Timing:**

See *19.05[1], 19.08[1], 19.10[1], 19.12[1]*

**Drafting Application:**

See *19.04, 19.05, 19.08, 19.10, 19.12*



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VII. FORMS

A. Obtaining Writ of Attachment or Temporary Protective Order.

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.42*

**19.42 Judicial Council Form AT-115 Notice of Application and Hearing for Right to Attach Order and Writ of Attachment (Attachment).**

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NOTES.

**Authority:**

*CCP §§ 482.030, 484.010*; California Judicial Council Form AT-115, pictured above, is approved for optional use [*Cal Rules Ct, Rule 1.35*]

**Drafting Notice of Application:**

See *19.05[4]*



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VII. FORMS

A. Obtaining Writ of Attachment or Temporary Protective Order.

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.43*

**19.43 Judicial Council Form AT-120 Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment (Attachment).**

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NOTES.

**Authority:**

*CCP § 484.090*; California Judicial Council Form AT-120, pictured above, is approved for optional use  
[*Cal Rules Ct, Rule 1.35*]

**Drafting Order:**

See 19.07



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VII. FORMS

A. Obtaining Writ of Attachment or Temporary Protective Order.

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.44*

**19.44 Judicial Council Form AT-125 Ex Parte Right to Attach Order and  
Order for Issuance of Writ of Attachment (Resident) (Attachment).**

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NOTES.

**Authority:**

*CCP §§ 485.210, 485.220*; California Judicial Council Form AT-125, pictured above, is approved for optional use [*Cal Rules Ct Rule 1.35*]

**Drafting Order:**

See *19.05[4]*



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VII. FORMS

A. Obtaining Writ of Attachment or Temporary Protective Order.

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.45*

**19.45 Judicial Council Form AT-140 Temporary Protective Order (Attachment).**

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NOTES.

**Authority:**

*CCP §§ 486.010, 486.020*; California Judicial Council Form AT-140, pictured above, is approved for optional use [*Cal Rules Ct Rule 1.35*]



**Timing:**

See 19.12[1], [2]

**Drafting Order:**

See 19.12[3], [4]



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VII. FORMS

A. Obtaining Writ of Attachment or Temporary Protective Order.

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.46*

**19.46 Judicial Council Form AT-160 Undertaking by Personal Sureties (Attachment--Claim and Delivery).**

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NOTES.

**Authority:**

*CCP § 489.210*; California Judicial Council Form AT-160, pictured above, is approved for mandatory use [*Cal Rules Ct Rule 1.31*]



**Timing:**

See *19.13[1]*

**Drafting Undertaking:**

See *19.13[2]*, [*3*]





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VII. FORMS

B. Opposing Attachment or Temporary Protective Order

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.47*

**19.47 Judicial Council Form AT-155 Notice of Opposition to Right to Attach Order and Claim of Exemption (Attachment).**

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NOTES.

**Authority:**

*CCP §§ 484.060, 485.610*; California Judicial Council Form AT-155, pictured above, is approved for optional use [*Cal Rules Ct Rule 1.35*]



**Timing:**

See 19.16[1]; 19.17[1], [2][b]

**Drafting Notice of Opposition and Claim of Exemption:**

See 19.16[2], [3]; 19.17

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 23, Attachment, §§ 23.20-23.26* (Matthew Bender)



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B. Opposing Attachment or Temporary Protective Order

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.48*

**19.48 Judicial Council Form AT-170 Application to Set Aside Right to Attach Order and Release Attached Property, etc. (Attachment).**

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NOTES.

**Authority:**

*CCP §§ 485.240, 488.720, 489.220, 489.310, 492.050*; California Judicial Council Form AT-170, pictured above, is approved for optional use [*Cal Rules Ct Rule 1.35*]



**Timing:**

See *19.18, 19.19, 19.20*

**Drafting Application and Notice of Hearing:**

See *19.18, 19.19, 19.20*

**Related Form of Memoranda:**

See *California Points and Authorities, Ch. 23, Attachment, § 23.32 (Matthew Bender)*



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VII. FORMS

B. Opposing Attachment or Temporary Protective Order

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.49*

**19.49 Judicial Council Form AT-175 Order to Set Aside Attachment, to Substitute Undertaking, etc. (Attachment).**

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NOTES.

**Authority:**

*CCP §§ 485.240, 488.720, 489.220, 489.310, 492.050*; California Judicial Council Form AT-175, pictured above, is approved for optional use [*Cal Rules Ct Rule 1.35*]



**Timing:**

See *19.18, 19.19, 19.20*

**Drafting Application and Notice of Hearing:**

See *19.18, 19.19, 19.20*



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VII. FORMS

B. Opposing Attachment or Temporary Protective Order

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.50*

**19.50 Judicial Council Form AT-145 Application and Notice of Hearing for Order to Terminate, Modify, or Vacate Temporary Protective Order (Attachment).**

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NOTES.

**Authority:**

*CCP § 489.320*; California Judicial Council Form AT-145, pictured above, is approved for optional use  
[*Cal Rules Ct Rule 1.35*]



**Timing:**

See 19.15[4]

**Drafting Application:**

See 19.15[4]



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VII. FORMS

B. Opposing Attachment or Temporary Protective Order

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.51*

**19.51 Judicial Council Form AT-150 Order to Terminate, Modify, or Vacate Temporary Protective Order (Attachment).**

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NOTES.

**Authority:**

*CCP § 489.320*; California Judicial Council Form AT-150, pictured above, is approved for optional use  
[*Cal Rules Ct Rule 1.35*]



**Timing:**

See 19.15[4]

**Drafting Application:**

See 19.15[4]



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VII. FORMS  
C. Levy Procedures.

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.52*

**19.52 Judicial Council Form AT-135 Writ of Attachment (Attachment).**

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NOTES.

**Authority:**

*CCP § 488.010*; California Judicial Council Form AT-135, pictured above, is adopted for optional use  
[*Cal Rules Ct Rule 1.35*]

**Drafting Writ:**

See 19.24[1], [2]



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VII. FORMS  
C. Levy Procedures.

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.53*

**19.53 Instructions to Levying Officer.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name], )  
Plaintiff, )  
vs. )  
\_\_\_\_\_[name], )  
[AND DOES I through \_\_\_\_\_] )  
Defendant(s) )  
)  
)  
)

NO. \_\_\_\_\_  
INSTRUCTIONS TO LEVYING OFFICER

To \_\_\_\_\_ [name of levying officer], \_\_\_\_\_ [title of levying officer, e.g. Sheriff] of the  
County of \_\_\_\_\_.

[EITHER, if property in possession of defendant]

You are hereby instructed, pursuant to the accompanying writ of attachment, to levy \_\_\_\_\_ [describe  
the method of levy, e.g., by removing to a place for safekeeping] on the following described property in the possession  
of and belong to defendant: \_\_\_\_\_ [describe property, e.g., a 2003 Hummer, California license  
number 4EZN845], located at \_\_\_\_\_ [describe location].

[OR, if property in possession of third person]

You are hereby instructed, pursuant to the accompanying writ of attachment, to levy on \_\_\_\_\_  
 [describe property, e.g., all moneys owing to defendant] in the possession of \_\_\_\_\_ [name] and located  
 at \_\_\_\_\_ [describe location], up to the amount of \_\_\_\_\_ [specify amount needed to satisfy writ] by  
 \_\_\_\_\_ [describe method of levy, e.g., personally serving on Thelma Thirdperson a copy of the writ of  
 attachment and a notice of attachment].

The described property \_\_\_\_\_ [is or is not] a dwelling [if dwelling, add: and is \_\_\_\_\_  
 (real or personal) property].

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Plaintiff \_\_\_\_\_ [name]

NOTES.

**Authority:**

CCP § 488.030

**Drafting Instructions:**

See 19.24[3]





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Chapter 19 Attachment  
VII. FORMS  
C. Levy Procedures.

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.54*

**19.54 Judicial Council Form AT-165 Notice of Attachment (Attachment).**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*CCP § 488.060*; California Judicial Council Form AT-165, pictured above, is approved for optional use  
[*Cal Rules Ct Rule 1.35*]

**Drafting Notice:**

See 19.26



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Chapter 19 Attachment  
VII. FORMS  
D. Obtaining Examination of Third Persons

*2-19 MB Practice Guide: CA Pretrial Civil Procedure 19.55*

**19.55 Judicial Council Form AT-138 Application and Order for Appearance and Examination  
(Attachment--Enforcement of Judgment).**

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Go to Interactive Fillable Form.

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NOTES.

**Authority:**

*CCP § 491.110*; California Judicial Council Form AT-138, pictured above, is approved for mandatory use [*Cal Rules Ct Rule 1.31*]

**Drafting Notice and Order:**

See 19.55



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Chapter 20 Claim and Delivery

*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.syn*

**§ 20.syn Synopsis to Chapter 20: Claim and Delivery**

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20.31 Judicial Council Form AT-160/CD-140 Undertaking by Personal Sureties (Attachment and Claim and Delivery).

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20.33 Judicial Council Form CD-160 Application and Notice of Application and Hearing for Order to Quash Ex Parte Writ of Possession (Claim and Delivery).

20.34 Judicial Council Form CD-170 Order for Release and Redelivery of Property (Claim and Delivery).

20.35 Judicial Council Form CD-180 Declaration for Ex Parte Writ of Possession (Claim and Delivery).

20.36 Judicial Council Form CD-190 Declaration for Temporary Restraining Order (Claim and Delivery).

20.37 Judicial Council Form CD-200 Temporary Restraining Order (Claim and Delivery).



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Chapter 20 Claim and Delivery  
I. STRATEGY

*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.01*

**20.01 Scope.**

This chapter covers:

- Applying for a writ of possession [see 20.03 -20.12, 20.14; Forms: see 20.27 -20.30, 20.35].
- Filing an undertaking for the writ of possession [see 20.13; Form: see 20.31].
- Ex parte application for a writ of possession [see 20.15; Forms: see 20.33, 20.35].
- Turnover orders and searches of private places not listed in the writ [see 20.16, 20.17].
- Execution of the writ [see 20.18].
- Applying for a temporary restraining order protecting rights in property [see 20.19; Forms: see 20.36, 20.37].
- Opposing writs of possession [ see 20.20 -20.24; Form: see 20.33].
- Filing an undertaking to keep or recover possession of property [see 20.25].
- Seeking relief from the writ following plaintiff's failure to recover judgment in the underlying action [see 20.26; Form: see 20.34].

**Core Statute:**

*CCP § 511.010 et seq.*



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Chapter 20 Claim and Delivery  
I. STRATEGY

*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.02*

**20.02 Objective and Strategy.**

"Claim and delivery" is a provisional remedy that may be used by the plaintiff in any action seeking recovery of particular personal property to obtain immediate temporary possession of that property from the defendant until such time as a final judgment in the action determines the rights to title and possession of that property [see *Simms v. NPCK Enterprises, Inc.* (2003) 109 CA4th 233, 241-244, 134 CR2d 557 ; *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 CA4th 1273, 1281-1282, 116 CR2d 370 ; *Lueter v. State of California* (2002) 94 CA4th 1285, 1300, 115 CR2d 68 ; *Blair v. Pitchess* (1971) 5 C3d 258, 264-265, 96 CR 42, 486 P2d 1242 ]. The remedy is invoked by applying to the court for a "writ of possession" [see CCP § 512.010]. It cannot be employed independently of an underlying action [ *McFaddin v. H.S. Crocker Co.* (1963) 219 CA2d 585, 590, 33 CR 389 ].

One strategic use of claim and delivery is to deprive the defendant of possession of the subject property and thereby hope to stimulate a settlement. However, counsel should be sure the writ of possession is valid and satisfies the statutory criteria and is not used for an ulterior purpose because case opinions have found the improper use of a writ of possession will support an abuse of process action [see *Spellens v. Spellens* (1957) 49 C2d 210, 229-230, 317 P2d 613 (husband's use of claim and delivery for sheriff to come and seal personal property followed by husband's offer to drop claim and delivery in return for wife dropping main suit upheld as abuse of process); *Tranchina v. Arcinas* (1947) 78 CA2d 522, 524, 178 P2d 65 (abuse of process for defendants to use writ of possession to evict plaintiffs from home on the ulterior purpose of circumventing wartime housing regulations)]. A defendant facing such a situation may file a counter-claim asserting abuse of process [see *Spellens v. Spellens* (1957) 49 C2d 210, 229-230, 317 P2d 613 ].

A party seeking a writ of possession should be prepared to answer the court's inquiries about why it is equitable to relieve the defendant of possession of the property before the resolution of the underlying action. Courts have a natural reluctance against changing the position of the parties before complete resolution of the action, recognizing that a provisional remedy later reversed causes more harm than good. Claim and delivery is subject to careful judicial scrutiny, and the former statutory scheme was declared unconstitutional in 1971 on *Fourth* and *Fifth Amendment* grounds and was subsequently rewritten by the Legislature [see *Blair v. Pitchess* (1971) 5 C3d 258, 283, 96 CR 42, 486 P2d 1242 (former claim and delivery statutes violated search and seizure laws and seizure of property without due process)].

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice Ch. 119, Claim and Delivery (Matthew Bender).

California Points and Authorities, Ch. 40, Claim and Delivery (Matthew Bender).



**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Provisional Remedies Replevins



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Chapter 20 Claim and Delivery  
II. APPLYING FOR WRIT OF POSSESSION

*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.03*

**20.03 CHECKLIST: Applying for Writ of Possession.**

☐ Determine whether or not immediate possession of subject property would be advantageous to plaintiff.

- ☐ May help preserve and protect property against loss, damage, or sale by defendant.
- ☐ May help stimulate settlement of action.
- ☐ Conversely, will generate additional time and expense of legal fees, expenses of obtaining undertaking, and fees for execution of writ and storage of property.
- ☐ Potential liability for plaintiff if plaintiff ultimately loses in underlying action [*see CCP § 512.120*].

☐ Determine likelihood of success in obtaining possession of subject property.

- ☐ Is defendant in possession of property?
- ☐ Can plaintiff identify property with sufficient particularity?
- ☐ Can plaintiff make showing of probable validity of plaintiff's claim to possession of property?
- ☐ Does plaintiff have probable cause to believe property is located in a specific place?

**Authority:**

*CCP §§ 512.010(b), 512.060, 512.080*

**Discussion:**

See 20.05[3]

- ☐ Determine best time to apply for writ of possession.
- ☐ Upon filing underlying complaint.
  - ☐ At some later time prior to entry of final judgment.

**Authority:**

*CCP § 512.010(a)*

**Discussion:**

See 20.05[6]

- ☐ Determine whether to apply for a writ of possession ex parte or by noticed motion.
- ☐ Notice and hearing on motion normally is required.
  - ☐ Ex parte application may be made under limited circumstances.

**Authority:**

*CCP § 512.020*

**Discussion:**

See 20.05[7]

- ☐ Determine whether to apply for temporary restraining order in addition to writ of possession.

**Authority:**

*CCP §§ 513.010, 513.020, 516.050*

**Discussion:**

See 20.19

- ☐ Draft application for writ of possession and supporting documents:
- ☐ Notice of Application for Writ of Possession and Hearing.

**Content Note:**

The application must be executed under oath [*CCP § 512.010(a)*].

- ☐ Application for writ of Possession and for temporary Restraining Order (if latter is applicable).

- ☐ Order for Writ of Possession.
- ☐ Writ of Possession.
- ☐ Temporary Restraining Order, if applicable.
- ☐ Declaration for Ex Parte writ of Possession, if applicable.
- ☐ Affidavits satisfying requirements of *CCP* § 512.010(b), if any.
- ☐ Affidavits satisfying additional requirements for ex parte motion under *CCP* § 512.020(b), if applicable.

**Authority:**

*CCP* §§ 511.010, 512.020

**Discussion:**

See 20.06

**Form:**

See 20.28

- ☐ If basis of plaintiff's claim is written instrument, attach copy of instrument to application.

**Authority:**

*CCP* § 512.010(a)

**Discussion:**

See 20.06[3]

- ☐ File application and supporting documents with court in which underlying action was brought.
- ☐ Serve on defendant prior to hearing:

**Exceptions:**

In the case of ex parte applications, these documents must be served on the defendant if a writ of possession is issued following the ex parte application [*CCP* § 512.020(b)]. If the defendant has not appeared in the action, service must be made in the same manner as a summons.

- ☐ Copy of summons and complaint.
- ☐ Notice of Application and Hearing.

- ☐ Copy of application and any supporting affidavits.

**Authority:**

*CCP § 512.030; see CCP § 512.040 (notice of application and hearing)*

**Discussion:**

See 20.11 (noticed application), 20.15[9] (ex parte application)

 **Cross Reference:**

8.07 et seq. (service of summons)

- ☐ File with court and serve on defendant any affidavits and memoranda intended to be relied on at hearing.

**Authority:**

*CCP § 512.050*

**Discussion:**

See 20.12[1]

- ☐ Appear at hearing.

- ☐ Present further evidence or memoranda as necessary and as permitted by court.
- ☐ Establish probable validity of claim of possession.
- ☐ If necessary, show probable cause to enter private place to obtain property sought to be recovered.

**Authority:**

*CCP § 512.050*

**Discussion:**

See 20.12[3]

- ☐ Prior to issuance of writ, obtain and file undertaking with court, unless court waives undertaking requirement.

**Authority:**

*CCP §§ 512.050, 515.010*

**Discussion:**

See 20.13

- ☐ If court issues writ of possession, give writ to levying officer (sheriff or marshal) for execution.

**Authority:**

*CCP §§ 511.060 ("levying officer" defined), 512.080(a)(writ must be directed to levying officer), 514.010(a) (duty of levying officer to search for and take custody of property)*



**Discussion:**

See 20.18

☐ If necessary, apply ex parte in writing to court for endorsement on writ directing levying officer to seize the property at a private place not specified in writ.

☐ Establish by affidavit that there is probable cause to believe that all or part of property may be found at that place.

**Authority:**

*CCP § 512.090*

**Discussion:**

See 20.17

☐ Once levying officer has seized property:

☐ Instruct plaintiff to take delivery of property from levying officer 10 days after levy of writ, if no notice of the filing of an undertaking for redelivery or notice of objection to the plaintiff's undertaking is received within that time.

**Exception:**

If an undertaking for redelivery or notice of objection to plaintiff's undertaking is filed within the 10-day period, see discussion in 20.24, 20.25.

☐ Pay levying officer's fees for taking property and any necessary expenses for keeping property.

**Authority:**

*CCP § 514.030(a)*

**Discussion:**

See 20.18[4]

☐ Draft, file and serve on defendant a "turnover" order.

**Authority:**

*CCP § 512.070*

**Discussion:**

See 20.16

☐ If plaintiff ultimately fails to recover judgment in action, make sure that plaintiff returns property to defendant.

**Authority:**

*CCP § 512.120*

**Discussion:**

See 20.26



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Chapter 20 Claim and Delivery  
II. APPLYING FOR WRIT OF POSSESSION

*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.04*

**20.04 Options and Strategies for Party Applying for Writ.**

Claim and delivery, commonly referred to as a writ of possession, is a provisional remedy used to secure personal property pending the outcome of an action. The purpose of this remedy is to prevent the property from being lost or destroyed during the time it takes to resolve a dispute. Plaintiffs seeking this remedy must be mindful that the court will not grant the writ unless the plaintiff can establish the probable validity of the underlying claim and the plaintiff has provided a sufficient undertaking to cover at least twice the value of the property. The monetary aspects of this remedy may be prohibitive for some plaintiffs.

Before seeking this remedy by writ of possession, determine if the less formal method of a "turnover" order may be used, or if the plaintiff wants to use the turnover order in addition to the writ of possession. The turnover order follows the method of a noticed motion instead of the writ procedure, and carries the penalty of contempt for failure to comply. Also, the plaintiff, in addition to applying for the writ, may opt for injunctive relief in the form of a temporary restraining order that prevents the defendant from disposing of, concealing, or impairing the property. The exigency of the situation and the nature of property, such as perishable goods, may dictate the methods used to protect the property.

Be mindful that the defendant may defeat attempts to gain possession of the property by filing a comparable undertaking. When presented with this situation, object to the sufficiency of the defendant's undertaking using the same grounds that the defendant may use in objecting to the plaintiff's undertaking.



**Warning:**

Do not attempt to recover possession by using a preliminary injunction or by the terms of a contract or lease. Claim and delivery is the proper judicial remedy to secure possession of personal property pending the outcome of an action [ *Simms v. NPCK Enterprises, Inc. (2003) 109 CA4th 233, 243, 134 CR2d 557* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Replevins



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Chapter 20 Claim and Delivery  
II. APPLYING FOR WRIT OF POSSESSION

*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.05*

**20.05 Plaintiff May Use Writ of Possession to Recover Possession of Personal Property Prior to Entry of Final Judgment.**

**20.05[1] Nature of Remedy.** The provisional remedy of claim and delivery may be asserted to secure possession of personal property pending the outcome of an action [see *Simms v. NPCK Enterprises, Inc. (2003) 109 CA4th 233, 241, 134 CR2d 557*; *Sea Rail Truckloads, Inc. v. Pullman, Inc. (1982) 131 CA3d 511, 514-515, 182 CR 560*; CCP § 512.010(a)]. Courts, practitioners, and the Code of Civil Procedure commonly refer to this remedy as one for a writ of possession.

**20.05[2] Property Must Be in Defendant's Possession.** In order to invoke the claim and delivery statutes, the property must be in the possession of the defendant, because the purpose of the claim and delivery statutes is the recovery of actual possession of property. If the property has been lost or destroyed before an action is brought, the appropriate remedy is a cause of action for damages, such as are available in a cause of action for conversion [ *Lueter v. State of California (2002) 94 CA4th 1285, 1300-1302, 115 CR2d 68* ].

**20.05[3] Basic Prerequisites for Obtaining Remedy.** To obtain provisional possession of personal property, the plaintiff generally must provide an undertaking [see 20.13] and establish the probable validity of his or her claim to that property [see CCP §§ 512.010, 512.060, 512.080, 515.010]. Possession of the property is obtained by levying execution of a writ of possession [see 20.18] or, alternatively, by obtaining a "turnover" order from the court [see 20.16].

**20.05[4] Who May Seek Writ of Possession.** The plaintiff may apply for a writ of possession [CCP § 512.010(a)]. For this purpose, "plaintiff" means a person who files a complaint or cross-complaint [CCP § 511.080]. A writ of possession cannot be employed independently of an underlying action [ *McFaddin v. H.S. Crocker Co. (1963) 219 CA2d 585, 590, 33 CR 389* ].

**20.05[5] Application to Court in Which Action Is Brought.** A plaintiff may apply for a writ of possession by filing a written application for the writ with the court in which the action is brought [CCP § 512.010(a)].

**20.05[6] Timing of Application.** An application for a writ of possession may be filed [CCP § 512.010(a)]:

- At the time the complaint is filed.

- At any later time.

Since claim and delivery is a provisional remedy, it is no longer appropriate once final judgment had been entered determining the rights to title and possession of that property [*see Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co. (2002) 95 CA4th 1273, 1281-1282, 116 CR2d 370 ; CCP § 512.120* (return of property if plaintiff fails to obtain final judgment)].

**20.05[7] Noticed Motion Is Usually Required, but May Proceed Ex Parte in Limited Circumstances.** Plaintiff ordinarily must apply for a writ of possession by noticed motion [*CCP §§ 511.020, 512.020(a)*]. Under some circumstances, however, an ex parte application may be made [*see CC § 512.020(b)*].



#### **Cross References:**

See 20.06[3] (noticed motion), 20.15 (ex parte application).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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Chapter 20 Claim and Delivery  
II. APPLYING FOR WRIT OF POSSESSION

*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.06*

**20.06 Preparing Application for Writ of Possession.**

**20.06[1] Statements Must Be in Writing and Executed Under Oath.** Application for a writ of possession must be made in writing [CCP § 512.010(a)] and must be executed under oath [CCP § 512.010(b)].

**20.06[2] Use Judicial Council Form CD-100.** Judicial Council Form CD-100, Application for Writ of Possession, may be used to apply for the writ of possession, either after a hearing or ex parte. It must be used to request a temporary restraining order, if desired. Use of the judicial council form is mandatory [see *Cal Rules Ct, Rule 1.31*; see also CCP § 516.020 (Judicial Council required to promulgate forms)].

➡ **Cross References:**

See 20.19 (temporary restraining order). Form, see 20.27.

**20.06[3] Required Contents of Application for Writ.** The application must include all of the following [CCP § 512.010(b)]:

- A showing of the basis of the plaintiff's claim and that the plaintiff is entitled to possession of the property claimed. If the basis of the plaintiff's claim is a written instrument, a copy of the instrument must be attached.
- A showing that the property is wrongfully detained by the defendant.
- The manner in which the defendant came into possession of the property.
- The reason for the detention according to plaintiff's best knowledge, information, and belief.
- A particular description of the property and a statement of its value.
- A statement of the property's location, according to plaintiff's best knowledge, information, and belief.

- If the property, or some part of it, is within a private place which may have to be entered to take possession, a showing that there is probable cause to believe that the property is located there.
- A statement that the property has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution against the property of the plaintiff; or, if so seized, that it is exempt by statute from such seizure.

**20.06[4] Must Show Basis for Statements Made on Knowledge, Information or Belief.** When making statements based on knowledge, information and belief, the application must state [Law Revision Commission Comment to *CCP* § 516.030]:

- The facts on which belief is based.
- The nature of the information.
- The reliability of the informants, if any.

**20.06[5] Statements May Be in Supporting Affidavits or Verified Complaint.** The application may be supported by one or more separate affidavits or by a verified complaint. This is not required, however, if the application itself satisfies the statutory requirements [*CCP* §§ 512.010(c), 516.030; Legislative Committee Comment to *CCP* § 512.010].



**Cross Reference:**

See 20.10 (affidavit requirements).

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**20.07 Preparing Order for Writ of Possession.**

**20.07[1] Use Judicial Council Form CD-120.** Judicial Council Form CD-120, Order for Writ of Possession, must be used for an order for a writ of possession, either after a hearing or ex parte. Use of the judicial council form is mandatory [see *Cal Rules Ct, Rule 1.31*; see also *CCP § 516.020* (Judicial Council required to promulgate forms)].

➡ **Cross Reference:**

Form, see 20.29.

**20.07[2] Contents of Order for Writ of Possession.** In drafting the order for writ of possession, plaintiff must include all of the following [*CCP § 512.060*]:

- Statement that plaintiff has established the probable validity of plaintiff's claim.
- Statement that plaintiff has satisfied the applicable undertaking requirements.

➡ **Cross Reference:**

20.13 (undertaking requirements).

- If writ will direct levying officer to enter a private place to take possession of any property, statement that there is probable cause to believe the property is located in that place.

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**20.08 Preparing Proposed Writ of Possession.**

**20.08[1] Use Judicial Council Form CD-130.** Judicial Council Form CD-130, Writ of Possession, must be used for an order for a writ of possession, either after a hearing or ex parte. Use of the judicial council form is mandatory [see *Cal Rules Ct, Rule 1.35*; see also *CCP § 516.020* (Judicial Council required to promulgate forms)].



**Cross Reference:**

Form, see *20.30*.

**20.08[2] Contents of Proposed Writ of Possession.** In drafting the proposed writ of possession, plaintiff must do all of the following [*CCP §§ 512.080, 515.010*]:

- Direct the proposed writ of possession to the levying officer within whose jurisdiction the property is located.
- Describe the specific property to be seized.
- Specify any private place that may need to be entered to take possession of the property of some part of it.
- Direct the levying officer to levy on the property if found and to retain it in custody until released or sold.
- Inform defendant of the right to object to plaintiff's undertaking or to obtain redelivery of the property by filing an undertaking.

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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.09*

**20.09 Preparing Notice of Application for Writ of Possession and Hearing.**

**20.09[1] Use Judicial Council Form CD-110.** Judicial Council Form CD-110, Notice of Application for Writ of Possession and Hearing, must be used. Use of the judicial council form is mandatory [*see Cal Rules Ct, Rule 1.35; see also CCP § 516.020* (Judicial Council required to promulgate forms)].



**Cross Reference:**

Form, see 20.28.

**20.09[2] Contents of Notice of Application and Hearing.** The Notice of Application and Hearing must inform the defendant of all of the following [*CCP § 512.040*]:

- A hearing will be held at a place and at a time, to be specified in the notice, on plaintiff's application for a writ of possession.
- The writ will be issued if the court finds that the plaintiff's claim is probably valid and the other requirements for issuing the writ are established. The hearing is not for the purpose of determining whether the claim is actually valid. The determination of the actual validity of the claim will be made in subsequent proceedings in the action and will not be affected by the decision at the hearing on the application for the writ.
- If the defendant desires to oppose the issuance of the writ, the defendant must file with the court either an affidavit providing evidence sufficient to defeat the plaintiff's right to issuance of the writ or an undertaking to stay the delivery of the property in accordance with *CCP § 515.020*.

The notice also must contain the following statement: "If you believe the plaintiff may not be entitled to possession of the property claimed, you may wish to seek the advice of an attorney. Such attorney should be consulted promptly so that he may assist you before the time set for the hearing" [*CCP § 512.040(d)*].

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**20.10 Preparing Supporting Affidavits or Declarations.**

**20.10[1] Form of Affidavit or Declaration.** Affidavits must be filed and served in support of the writ of possession [CCP §§ 512.030, 512.050]. Matters required to be supported by affidavit CCP § 2003 may also be supported by a declaration under penalty of perjury [CCP § 2015.5(a)]. Although either will satisfy the statutory requirements, the common practice is to use a declaration under penalty of perjury.

**20.10[2] Content of Affidavit.** Except when matters are specifically permitted to be shown by information and belief, each affidavit must show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit. The affiant may be any person, whether or not a party to the action, who has knowledge of the facts [CCP § 516.030].

"Person" includes an individual, a corporation, a partnership or other unincorporated association, a limited liability company, and a public entity [CCP § 511.070]. A "public entity" includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state. [CCP § 511.100].

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**20.11 Filing and Service of Application and Supporting Documents.**

**20.11[1] Plaintiff Must Serve and File Required Documents for Noticed Motion.** When proceeding by noticed motion, plaintiff must serve on defendant all of the following [CCP §§ 512.030(a), 1005(a)(2), (b)]:

- A copy of the summons and complaint.
- A notice of application and hearing.
- A copy of the application and any supporting affidavit.
- A proposed order for writ of possession.
- A proposed writ of possession.

If the defendant has not appeared in the action, service must be made in the same manner as a summons [CCP § 512.030(b)].

➤ **Cross References:**

See 20.06, 20.07, 20.09, 20.10.

For service of summons, see Ch. 8, Service of Summons, 8.07 et seq.

**20.11[2] File With Court in Which Action Is Pending.** The proper court to file the application and supporting documents is court in which underlying action is pending [CCP § 512.010(a)].

**20.11[3] Time Requirements for Service.** Time requirements for serving an application for a writ of possession are governed by the general requirements for written motions specified in CCP § 1005(b) [CCP § 1005(a)(2) (specific application to claim and delivery statutes)].

➤ **Cross Reference:**

See Ch. 27, Service of Papers.

All moving and supporting papers must be served and filed at least 16 court days before the hearing unless the court orders otherwise. If the notice is served by mail and both the place of mailing and place of address are in California, the period is 16 court days plus 5 calendar days. The period is 16 court days plus 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 16 court days plus 20 calendar days if either the place of mailing or the place of address is outside the United States. If the notice is served by fax, express mail, or another method of delivery providing for overnight delivery, the notice period is 16 court days plus 2 calendar days [*CCP* § 1005(b)].

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**20.12 Court Hearing on Noticed Application for Writ of Possession.**

**20.12[1] Affidavits and Memoranda.** Each party must file with the court and serve upon the other party within the time prescribed by rule any affidavits and memoranda intended to be relied upon at the hearing within the time prescribed by rule [CCP § 512.050].



**Cross Reference:**

See Ch. 26, Law and Motion Procedure.

**20.12[2] Court Rules Based on Pleadings, Papers of Record, and Additional Evidence and Authorities Presented at Hearing.** At the hearing on plaintiff's motion for a writ of possession, the court makes its determination based on the pleadings and all other papers of record [CCP § 512.050].

**20.12[3] Presentation of Additional Evidence, Memoranda at Hearing.** At the hearing, either party may present additional evidence and authority and show good cause why that evidence must be received. On a showing of good cause, the court may receive and consider that additional evidence and authority; or continue the hearing for the production of additional evidence and authority [CCP § 512.050].

**20.12[4] Plaintiff Must Establish Probable Validity of Claim.** At the hearing, plaintiff must establish the following [CCP § 512.060].

- The probable validity of his or her claim to possession of the property. "Probable validity" means that it is "more likely than not" that the plaintiff will obtain a judgment against the defendant under the underlying claim [CCP § 511.090; see, e.g., *RCA Service Co. v. Superior Court* (1982) 137 CA3d 1, 3, 187 CR 602 (probable validity established by fact that lessee's right to damages for alleged defects in equipment could not possibly defeat lessor's ownership rights and right to reclaim equipment)]. Plaintiff will fail to establish probable validity if defendant shows there is a reasonable probability defendant can assert a successful defense to the action [CCP § 512.060; Legislative Committee Comment/Law Revision Commission comment to CCP § 512.060].

- That plaintiff has satisfied the applicable requirements for an undertaking.

- If writ will direct levying officer to enter any private place to take possession of the property, establish that there is probable cause to believe that the property is located there.



**Cross Reference:**

See *20.18* (execution of writ).

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**20.13 Undertaking Required.**

**20.13[1] Plaintiff Must File Undertaking Before Writ Can Be Granted.** Plaintiff must file an undertaking with the court before the court can grant a writ of possession [*CCP* § 515.010; Law Revision Commission comment to *CCP* § 515.010].

**Exception:**

If the court finds that the defendant has no interest in the property, it must waive the requirement of the plaintiff's undertaking and include in the order for the issuance of the writ the amount of the defendant's undertaking sufficient to satisfy *CCP* § 515.020(b) [*CCP* § 515.010(b)].

**20.13[2] Sureties Bound for Return of Property and Any Sums Awarded to Defendant.** Plaintiff's undertaking must provide that the sureties are bound to the defendant for [*CCP* § 515.010]:

- The return of the property to the defendant, if return of the property is ordered; and
- For the payment to defendant of any sum recovered against plaintiff.

**20.13[3] Undertaking Must Not Be Less Than Twice Value of Defendant's Interest in Property.** The amount of plaintiff's undertaking may not be less than twice the value of defendant's interest in the property. It may be in a greater amount [*CCP* § 515.010]. Plaintiff may, if desired, set the amount of the undertaking at a level sufficient to protect his/her interest in the property should defendant give a release undertaking [Law Revision Commission Comment to *CCP* § 515.010].

Plaintiff must determine the value of defendant's interest in the property by considering all factors necessary to determine that interest, including but not limited to [*CCP* § 515.010]:

- The market value of the property less the amount due and owing on any conditional sales contract or security agreement; and
- All liens and encumbrances on the property.



**20.13[4] Use Judicial Council Form CD-140.** Judicial Council Form CD-140, Undertaking by Personal Sureties, must be used for giving a statutory undertaking by personal sureties in a claim and delivery action. The form may be used for either a plaintiff's or a defendant's undertaking. Use of the judicial council form is mandatory [*see Cal Rules Ct, Rule 1.31; see also CCP § 516.020* (Judicial Council required to promulgate forms)].



**Cross Reference:**

Form, see 20.31.

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**20.14 Issuance of Writ.**

**20.14[1] Writ Must Issue If Plaintiff Meets Requirements.** If plaintiff establishes the probable validity of his or her claim to possession of the property sought to be recovered and provides a sufficient undertaking, the court must issue a writ of possession to plaintiff [*CCP* § 512.060].



**Cross Reference:**

See 20.08[2] (contents of writ).

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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.15*

**20.15 Ex Parte Applications.**

**20.15[1] Ex Parte Application Proper If Property Was Stolen, Is Credit Card, or Was Obtained in Course of Trade for Commercial Purposes.** Plaintiff may apply for a writ of possession ex parte if one of the following conditions exists [*CCP* § 512.020(b); Legislative Committee comment to *CCP* § 512.020]:

- Defendant (including a cross-defendant) feloniously took the property from plaintiff and still has possession of it.

**Exception:**

Plaintiff must apply by noticed motion, not ex parte, if the property was taken by fraud or embezzlement. [*see CCP* § 512.020(b)(1)].

- The property sought to be recovered is a credit card.
- Defendant obtained possession in the ordinary course of defendant's trade or business for commercial purposes, but only if all of the following prerequisites are satisfied [*CCP* § 512.020(b)]:
  - ☐ The property is not necessary for the support of defendant or defendant's family.
  - ☐ There is an immediate danger that the property will become unavailable to levy by reason of being either (1) transferred, concealed, or removed from the state; or (2) substantially impaired in value by acts of destruction or by failure to take care of the property in a reasonable manner [*see Sea Rail Truckloads, Inc. v. Pullman, Inc. (1982) 131 CA3d 511, 515, 182 CR 560* (repossession of leased vans with future intent to sell them did not demonstrate "immediate danger" required for issuance of ex parte writ of possession; "less drastic" remedy of temporary restraining order would have been adequate)].

○ Ex parte issuance of a writ of possession is necessary to protect the property. This has been interpreted to mean that *CCP § 512.020(b)*, permits transfer of possession of property only when less intrusive remedies would be ineffective [see *Sea Rail Truckloads, Inc. v. Pullman, Inc. (1982) 131 CA3d 511, 515, 182 CR 560* ].

### **20.15[2] Preparing Ex Parte Application.**

**20.15[2][a] Content of Ex Parte Application.** Ex parte applications must satisfy all the basic requirements for a writ of prohibition noted in 20.08[2] and, in addition, must include facts showing that one of the conditions for ex parte relief has been satisfied [*CCP § 512.020(b)*; see 20.15[1]].

**20.15[2][b] Use Judicial Council Form CD-100.** Judicial Council Form CD-100, Application for Writ of Possession, must be used for an application for a writ of possession, either after a hearing or ex parte. Use of the judicial council form is mandatory [see *Cal Rules Ct, Rule 1.31*; see also *CCP § 516.020* (Judicial Council required to promulgate forms)].

#### **Cross Reference:**

Form, see 20.27.

### **20.15[3] Preparing Proposed Order for Writ of Possession.**

**20.15[3][a] Contents of Order for Writ of Possession.** For the contents of the proposed order for writ of possession, see 20.07.

**20.15[3][b] Use Judicial Council Form CD-120.** Judicial Council Form CD-120, Order for Writ of Possession, must be used for an order for a writ of possession, either after a hearing or ex parte. Use of the judicial council form is mandatory [see *Cal Rules Ct, Rule 1.31*; see also *CCP § 516.020* (Judicial Council required to promulgate forms)].

#### **Cross References:**

See 20.07. Form, see 20.29.

### **20.15[4] Preparing Proposed Writ of Possession.**

**20.15[4][a] Contents of Writ of Possession.** For the contents of the proposed writ, see 20.08.

**20.15[4][b] Use Judicial Council Form CD-130.** Judicial Council Form CD-130, Writ of Possession, must be used for a proposed writ of possession, either after a hearing or ex parte. Use of the judicial council form is mandatory [see *Cal Rules Ct, Rule 1.31*; see also *CCP § 516.020* (Judicial Council required to promulgate forms)].

#### **Cross References:**

See 20.08. Form, see 20.30.

### **20.15[5] Preparing Affidavits or Declarations.**

**20.15[5][a] Basic Requirements.** General discussion relating to preparation of affidavits and declarations in support of an application for a writ of possession is contained in 20.10.

**20.15[5][b] Use Judicial Council Form CD-180.** Judicial Council Form CD-180, Declaration for Ex Parte Writ of Possession, must be used to satisfy the special requirements applicable to ex parte declarations, as discussed in 20.15[1]. Use of the judicial council form is mandatory [see *Cal Rules Ct, Rule 1.31*; see also *CCP § 516.020* (Judicial Council required to promulgate forms)].

 **Cross Reference:**

Form, see 20.35.

**20.15[6] Filing Documents With Court.** When proceeding ex parte, plaintiff must file the following with the court in which the action is underlying action is brought [see *CCP* §§ 512.010, 512.020(b)]:

- The application and any supporting affidavits.
- A proposed order for writ of possession.
- A proposed writ of possession.

**20.15[7] Undertaking Required for Ex Parte Application.** Plaintiff seeking a writ of application ex parte must file an undertaking [*CCP* §§ 511.090, 512.020(b), 512.060].

 **Cross Reference:**

Requirements for undertaking, see 20.13.

**20.15[8] Court May Issue Writ of Possession Upon Ex Parte Application If It Finds All Required Facts to Be True.** If plaintiff files the required application and undertaking, the court, in its discretion, may issue the requested writ of possession, if it finds the facts stated in the application to be true [*CCP* §§ 512.020(b), 512.060].

**20.15[9] Defendant Must Be Served After Issuance of Writ.** After writ has issued, defendant must be served with all of the following [*CCP* § 512.020(b)]:

- A copy of the summons and complaint.
- A copy of the application and any supporting affidavits.
- A notice [*CCP* § 512.040(c), (d)]:
  - ☐ Informing the defendant that if the defendant desires to oppose the issuance of the writ, he must file with the court either (1) an affidavit providing evidence sufficient to defeat the plaintiff's right to issuance of the writ, or (2) an undertaking to stay the delivery of the property in accordance with *CCP* § 515.020.
  - ☐ Containing the following statement: "If you believe the plaintiff may not be entitled to possession of the property claimed, you may wish to seek the advice of an attorney. Such attorney should be consulted promptly so that he may assist you before the time set for the hearing."
  - ☐ Of his or her rights under *CCP* § 515.020(b).

**20.15[10] Defendant May Appear for Order to Quash Writ.** Any defendant whose property has been taken pursuant to a writ of possession issued under this subdivision may apply for an order that the writ be quashed and any property levied on pursuant to the writ be released [*CCP* § 515.020(b)].

 **Cross Reference:**

Detailed discussion, see 20.23.

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**20.16 Seeking "Turnover" Order.**

**20.16[1] Plaintiff May Seek "Turnover" Order.** In addition to seeking a writ of possession, and in aid of it, plaintiff may also seek an order directing defendant to transfer possession of the property sought to be recovered to plaintiff [CCP § 512.070]. A "turnover" order is not a separate remedy but rather an alternative means of enforcing a writ of possession, permitting the defendant to select a more informal and less expensive method of enforcement than levy of the writ [ *Edwards v. Superior Court* (1991) 230 CA3d 173, 178, 281 CR 30 (defendants who posted bond could not be held in contempt for violation of "turnover" order); citing Law Revision Commission comment to CCP § 512.070].

**20.16[2] Draft, File and Serve Notice and Motion for Turnover Order.** If plaintiff seeks a "turnover" order, plaintiff should draft a notice and motion for such an order, file the notice and motion with the court and serve both on defendant before the hearing on the noticed motion for the writ [CCP § 512.070].

**20.16[3] Turnover Order Must Give Notice Regarding Contempt.** The proposed order must contain a notice to defendant that failure to turn possession of the property to plaintiff may subject defendant to being held in contempt [CCP § 512.070].



**Cross Reference:**

Discussion of contempt of court, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 23, Contempt.

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**20.17 Endorsement for Search of Private Place Not Listed in Writ of Possession.**

**20.17[1] Plaintiff May Seek Endorsement Ex Parte.** If plaintiff wishes the levying officer to seize property at a private place not specified in the writ, after the writ has been issued, plaintiff should draft and file with the court ex parte a written application for an endorsement on the writ directing the levying officer to seize the property at a private place not specific in the writ [CCP § 512.090].

**20.17[2] Affidavit of Probable Cause.** In addition to the application for an endorsement, plaintiff must also draft and file with the court an affidavit establishing probable cause to believe the property (or some part of it) sought to be recovered may be found at that private place [CCP § 512.090].

**20.17[3] Court Must Issue Endorsement If Required Showing Made.** The court is required to make the requested endorsement if plaintiff makes the above showing of probable cause [CCP § 512.090].

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**20.18 Execution of Writ.**

**20.18[1] Sheriff or Marshal Responsible for Executing Writ.** The writ will be directed to the "levying officer" within whose jurisdiction the property is located. It will direct the officer to levy on the property pursuant to *CCP* § 514.010 if found, and to retain it in custody until released or sold pursuant to *CCP* § 514.030 [*CCP* § 512.080(b), (d)]. The "levying officer" is the sheriff or marshal who is directed to execute the writ [*CCP* § 511.060].

**20.18[2] Levying Officer Will Search for and Take Possession of Property.** Upon receipt of the writ of possession the levying officer will search for and take custody of the specified property if it is in the possession of the defendant or defendant's agent, either by removing the property to a place of safekeeping or by installing a keeper [*CCP* § 514.010(a); *see also CCP* § 514.010(b) (special procedure for mobilehome, boat, or other property used as dwelling), (c) (forcible entry on private property)].

**Exception:**

If levying officer reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, he or she must refrain from seizing the property and promptly make a return to the court from which the writ issued setting forth the reasons for his or her belief that the risk exists. In such case, the court must make such orders as may be appropriate [*CCP* § 514.010(c)].

**20.18[3] Levying Officer Must Deliver Writ to Person in Possession.** At the time of levy, the levying officer must deliver all of the following to the person in possession of the property [*CCP* § 514.020(a)]:

- A copy of the writ of possession.
- A copy of the plaintiff's undertaking, if any.
- A copy of the order for issuance of the writ.

If no one is in possession of the property at the time of levy, the levying officer must subsequently serve the writ and attached undertaking on the defendant [*CCP* § 514.020(b) (manner of service)].

**20.18[4] Delivery or Redelivery of Property.** Ordinarily, after the levying officer takes possession pursuant to a writ of possession, the levying officer is required to keep the property in a secure place. If the levying officer does not receive either (1) notice of the filing of an undertaking for redelivery [*see* 20.25]; or (2) notice of objection to the plaintiff's undertaking [*see* 20.24] within 10 days after levy of the writ of possession, the levying officer must deliver the property to plaintiff, upon receiving the levying officer's fees for taking and necessary expenses for keeping the property [*CCP* § 514.030(a)].



**Cross Reference:**

Procedures if a notice of undertaking for redelivery or a notice of objection to plaintiff's undertaking is filed, *see* 20.24 (objection), 20.25 (defendant's undertaking).

**20.18[5] Sale of Perishable Property.** On a showing that the property is perishable, or will greatly deteriorate or depreciate in value, or for some other reason in the best interests of the parties, the court may order that the property be sold and the proceeds deposited in the court until the judgment in the action, if not otherwise provided by contract and if an undertaking for redelivery has not been filed [*CCP* § 514.030(b)].

**20.18[6] Return of Writ to Court.** The levying officer must return the writ of possession to the court in which the action is pending within 30 days after levy, but in no event more than 60 days after the writ is issued [*CCP* § 514.040].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Replevins



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Chapter 20 Claim and Delivery  
II. APPLYING FOR WRIT OF POSSESSION

*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.19*

**20.19 Applying for Injunctive Relief Protecting Plaintiff's Rights in Property.**

**20.19[1] Plaintiff May Apply for a Temporary Restraining Order.** In conjunction with application for a writ of possession, plaintiff may apply for a temporary restraining order prohibiting the defendant from disposing of, concealing, or impairing the value of the property [CCP §§ 513.010(a), 513.020].

**Injunction Statutes Applicable:**

Except when a specific provision of the Claim and Delivery statute applies, the provisions of the Code of Civil Procedure governing injunctive relief generally [CCP § 525 *et seq.*] apply to injunctive relief issued under the Claim and Delivery statute [CCP §§ 513.010, 516.050]. Nothing in the Claim and Delivery Statute precludes the granting of injunctive relief pursuant to the general rules governing such relief. The provisions of the Claim And Delivery Statute are not exclusive regarding such relief [CCP § 516.050; Legislative Committee Commission comment to CCP § 513.010]. While injunction statutes may apply, the use of a preliminary injunction instead of a writ of possession is not permitted [ *Simms v. NPCK Enterprises, Inc.* (2003) 109 CA4th 233, 243, 134 CR2d 557 ].

**20.19[2] Timing for Application for Temporary Restraining Order.** Plaintiff may apply for a temporary restraining order at or after the time plaintiff files the application for a writ of possession [CCP § 513.020(b)].

**20.19[3] Preparing Application for Temporary Restraining Order.**

**20.19[3][a] Use Judicial Council Form CD-100 for Application.** Judicial Council Form CD-100, Application for Writ of Possession, must be used to request a temporary restraining order, if desired. Use of the judicial council form is mandatory [see *Cal Rules Ct, Rule 1.31*; see also CCP § 516.020 (Judicial Council required to promulgate forms)]. If the application for a temporary restraining order is filed concurrently with the application for a writ of possession, both may be requested on the same form.

**➡ Cross Reference:**

Form, see 20.27.

**20.19[3][b] Use Judicial Council Form CD-190 for Declaration.** Judicial Council Form CD-190, Declaration for

Temporary Restraining Order, provides additional information not in Form CD-100 and required in connection with an application for a temporary restraining order under the claim and delivery statutes. Use of the judicial council form is mandatory [see *Cal Rules Ct, Rule 1.35*; see also *CCP § 516.020* (Judicial Council required to promulgate forms)].

 **Cross Reference:**

Form, see 20.36.

**20.19[3][c] Contents of Application.** The application should show grounds justifying issuance of the order [*CCP § 513.020(b)*]:

- The probable validity of plaintiff's claim to possession of the property sought to be recovered.
- That plaintiff has filed an undertaking as required by the claim and delivery statutes.
- The probability that there is an immediate danger that the property claimed may become unavailable to levy by reason of being transferred, concealed, or removed, or may become substantially impaired in value.

 **Cross Reference:**

Undertaking requirements, see 20.13.

**20.19[4] Preparing Proposed Temporary Restraining Order.**

**20.19[4][a] Use Judicial Council Form CD-200.** Judicial Council Form CD-200, Temporary Restraining Order, must be used to prepare a proposed temporary restraining order. Use of the judicial council form is mandatory [see *Cal Rules Ct, Rule 1.35*; see also *CCP § 516.020* (Judicial Council required to promulgate forms)].

 **Cross Reference:**

Form, see 20.37.

**20.19[4][b] Specifying Acts Prohibited by Order.** The temporary restraining order, in the discretion of the court, may prohibit the defendant from doing any or all of the following [*CCP § 513.020*]:

- Transferring any interest in the property by sale, pledge, or grant of security interest, or otherwise disposing of, or encumbering, the property.

**Exception:**

If the property is farm products held for sale or lease [see *CCP § 511.040* (definition)] or is inventory [see *CCP § 511.050* (definition)], the order may not prohibit the defendant from transferring the property in the ordinary course of business, but may impose appropriate restrictions on the disposition of the proceeds from such a transfer [*CCP § 513.020(a)*].

- Concealing or otherwise removing the property in such a manner as to make it less available to seizure by the levying officer.
- Impairing the value of the property either by acts of destruction or by failure to care for the property in a reasonable manner [*CCP § 513.020(c)*]. If the property will perish or deteriorate if not taken care of properly, the court may order defendant to take whatever precautions are necessary to preserve the

property until the time of the hearing [Legislative Committee Comment to *CCP* § 513.020].

**20.19[5] Temporary Restraining Order May Be Issued Ex Parte upon Proper Showing.** A temporary restraining order may be issued ex parte if the statutory requirements are met [see 20.19[3][c], above, for statutory grounds; see also *CCP* § 513.030(b)].

**20.19[6] Dissolution of Temporary Restraining Order or Grant of Preliminary Injunction.** If the court determines at the hearing on issuance of the writ of possession [see 20.12 (hearing)] that the plaintiff is *not* entitled to a writ of possession, the court must dissolve any temporary restraining order. Conversely, if the court determines at the hearing on the application for a writ of possession, that plaintiff is entitled to the writ, the court may issue a preliminary injunction to remain in effect until the property claimed is seized pursuant to the writ of possession. [*CCP* § 513.010(c)].



**Strategic Point:**

Denial of a writ of possession (when denial is due to a close factual case on liability) should not prejudice an application for injunctive relief when an injunction will provide less drastic relief than repossession [Law Revision Commission comment and Legislative Committee Comment to *CCP* § 513.010].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Injunctions Temporary Restraining Orders Civil Procedure Remedies Provisional Remedies Replevin



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Chapter 20 Claim and Delivery  
III. OPPOSING WRIT OF POSSESSION

*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.20*

**20.20 CHECKLIST: Opposing Writ of Possession.**

☐ Contesting noticed application for writ of possession.

☐ Determine grounds for contesting application for writ of possession.

☐ Grounds for contesting validity of service:

☐ Defendant not served with all papers in the manner required by *CCP § 512.030*.

**Authority:**  
*CCP § 512.030*

**Discussion:**  
*See 20.22[1][a]*

☐ Notice of Application and Hearing does not contained all required information.

**Authority:**  
*CCP § 512.040*

**Discussion:**  
*See 20.22[1][b]*

☐ Notice not served on defendant in timely manner.

**Authority:**  
*CCP § 1005(a)(2), (b)*

**Discussion:**

See 20.22[1][c]

☐ Grounds for contesting validity of application.

☐ Application filed prematurely; i.e., prior to filing of a complaint in underlying action involving subject property.

**Authority:**

*CCP § 512.010(a)*

**Discussion:**

See 20.22[1][d]

☐ Application not made to proper court; i.e., court in which underlying application is pending.

**Authority:**

*CCP § 512.010(a)*

**Discussion:**

See 20.22[1][e]

☐ Not executed under oath.

**Authority:**

*CCP § 512.010(a)*

**Discussion:**

See 20.1[f]

☐ Application does not include showings required under *CCP § 512.020(b)*:

**Authority:**

*CCP § 512.020(b)*

**Discussion:**

See 20.22[2]

- ☐ Showing of basis of plaintiff's claim.
- ☐ Showing that plaintiff is entitled to possession of property claimed.
- ☐ Showing that property is wrongfully detained by defendant.
- ☐ Manner in which defendant came into possession of the property.
- ☐ The reason for the detention of the property according to plaintiff's best

knowledge and belief.

☐ A particular statement of the property.

☐ A statement of the property's value.

☐ Statement, according to plaintiff's best knowledge and belief, of the location of the property.

☐ If property is within a private place that may have to be entered, showing that there is probable cause to believe that the property is located there.

☐ Statement that property has not been taken for tax, assessment, or fine, or pursuant to a statute, or seized under an execution against the property of the plaintiff or, if the property was so seized, that it is exempt from such a seizure by statute.

☐ Claim is based on written instrument and plaintiff did not attach copy of instrument to application.

**Authority:**

*CCP § 512.010(b)(1)*

**Discussion:**

See 20.22[2][b]

☐ No showing of "probable validity" that plaintiff will recover; i.e., that it is "more likely than not" that plaintiff will obtain a judgment against defendant on the underlying claim.

**Authority:**

*CCP § 512.060(a)(1); see CCP § 511.090 (definition of "probable validity")*

**Discussion:**

See 20.22[2][c]

☐ Plaintiff has not complied with the applicable undertaking requirements.

**Authority:**

*CCP §§ 512.060(a)(2), 515.010*

**Discussion:**

See 20.22[2][d]

☐ Plaintiff has not shown that there is probable cause to believe property is located in a specific place specified in proposed writ.

**Authority:**

*CCP § 512.060(b)*



**Discussion:**

See 20.22[2][e]

- ☐ Prepare and file affidavits and memoranda in support of argument against issuance of writ.

**Authority:**

CCP §§ 512.050, 1005(c); Cal Rules Ct, Rule 3.1113(a)

**Discussion:**

See 20.22[3][a]

- ☐ Appear at hearing to contest plaintiff's right to issuance of writ.

- ☐ Argue that plaintiff has failed to establish one or more grounds for issuance of writ.

**Authority:**

CCP § 512.060

**Discussion:**

See 20.22[4]

- ☐ Applying for order to quash a writ of possession issued ex parte.

- ☐ Prepare Judicial Council Form CD-160, Application and Notice of Application and Hearing for Order to Quash Ex Parte Writ of Possession.

**Discussion:**

See 20.23[2]

- ☐ Assert grounds for quashing writ.

☐ General procedural and/or substantive requirements for application for writ have not been met--see list of grounds for opposing noticed motion.

**Authority:**

CCP §§ 512.010(b), 512.020(b)

**Discussion:**

See 20.23[3]

- ☐ Special conditions for issuance of ex parte writ were not met.

**Authority:**

CCP § 512.020(b)

**Discussion:**

See 20.15[1], 20.23[3]

☐ Copies of summons and complaint, application and supporting affidavits, and notice satisfying statutory requirements and informs defendant of defendant's rights were not served on defendant or another person required by statute to be served with writ of possession.

**Authority:**

*CCP §§ 512.020(b), 512.040*

**Discussion:**

See 20.15[9], 20.23[3]

- ☐ Prepare affidavits and memoranda in support of motion to quash writ.

**Authority:**

*CCP §§ 512.050, 1005(c); Cal Rules Ct, Rule 3.1113(a)*

**Discussion:**

See 20.23[5]

- ☐ File motion, and supporting affidavits and memoranda with court.

**Authority:**

*CCP §§ 512.020(b), 512.050, 1005(c); Cal Rules Ct, Rule 3.1113(a)*

**Discussion:**

See 20.23[6]

- ☐ Serve application and supporting documents on plaintiff.

**Authority:**

*CCP §§ 512.050, 1005(c)*

**Discussion:**

See 20.23[6]

- ☐ Appear at hearing to assert arguments that writ should be quashed.

- ☐ If court quashes writ of possession:

☐ Court will order release and redelivery to defendant of any property previously levied upon.

☐ Court must award defendant any damages sustained by defendant that were proximately caused by the levy of the writ of possession and the loss of possession of the property as a result of the levy.

**Authority:**

*CCP § 512.020(b)*

**Discussion:**

See 20.23[7]

- ☐ Objecting to plaintiff's undertaking *CCP § 515.030(a)*.

**Authority:**

*CCP § 515.030*

**Discussion:**

See 20.24

- ☐ Prepare Judicial Council Form CD-150, Notice of Exception to Sureties and Hearing on Justification of Sureties.

- ☐ Prepare affidavits and memorandum in support of objection.

**Authority:**

*CCP §§ 515.030, 1005(c); Cal Rules Ct, Rule 3.1113(a)*

**Discussion:**

See 20.24[4]

- ☐ File notice of objection and supporting documents with court within 10 days after levy of writ of possession.

- ☐ Serve notice of objection and supporting documents on plaintiff.

- ☐ Mail notice of objection to levying officer.

**Authority:**

*CCP §§ 515.030, 1005(c)*

**Discussion:**

See 20.24[5]

- ☐ Appear at hearing to assert objection to plaintiff's undertaking.

- ☐ If court determines that plaintiff's undertaking is insufficient and a sufficient undertaking is not filed within time required by statute:

☐ Court must vacate temporary restraining order or preliminary injunction, if any, and writ of possession.

☐ If levy has occurred, court must order levying officer or plaintiff to return the

property to defendant.

- ☐ If court determines that plaintiff's undertaking is sufficient, it must order levying officer to deliver the property to plaintiff.

**Authority:**

*CCP § 515.030(c); see CCP § 514.030(a)(3)*

**Discussion:**

See 20.24[6]

- ☐ Filing Defendant's Undertaking to Obtain Redelivery of Property.

**Authority:**

*CCP § 515.020; see CCP § 514.030(a)(2).*

**Discussion:**

See 20.25

- ☐ Determine whether to file defendant's undertaking to [CCP § 515.020(a)]:
- ☐ Prevent plaintiff from taking possession of property pursuant to writ of possession,  
or
  - ☐ Regain possession of property so taken.
- ☐ Obtain defendant's undertaking in an amount equal to [CCP § 515.020(a)]:
- ☐ Amount of plaintiff's undertaking [see CCP § 515.010(a)]; or
  - ☐ Amount determined by court, if court has found that defendant has no interest in the property and waived requirement of a plaintiff's undertaking [see CCP § 515.010(b)].
  - ☐ Undertaking must provide that if plaintiff recovers judgment, defendant will pay all costs awarded to plaintiff and all damages that plaintiff may sustain by reason of loss of possession of the property, including all damages proximately caused by plaintiff's failure to gain or retain possession [CCP § 515.020(b)].
- ☐ File defendant's undertaking with court in which the action was brought [CCP § 515.020(a)].
- ☐ Defendant's undertaking may be filed at any time before or after levy of writ of possession [CCP § 515.020(c)].
  - ☐ However, undertaking should be filed before levy of writ, or within 10 days after

levy of writ, if possible, to avoid having to obtain recovery from plaintiff.



**Strategic Point--Defendant:**

Once a levy has been made, the levying officer must hold custody of the property for 10 days before turning it over to the plaintiff. After that time, the officer must turn it over to plaintiff unless a defendant's undertaking or objection to plaintiff's undertaking has been filed [CCP § 514.030(a)(2), (3)]. If a notice of defendant's undertaking is filed within that time, and plaintiff does not object to that undertaking, the officer must simply redeliver the property to the plaintiff [CCP §§ 514.030(a)(2), 515.020(d)]. Obviously, from the defendant's point of view, it is likely to be preferable to obtain redelivery from the levying officer rather than from the plaintiff.

- ☐ Serve copy of undertaking on plaintiff.
- ☐ Mail copy of undertaking to levying officer.

**Authority:**

*CCP §§ 515.020(c), 1005(c)*

**Discussion:**

*See 20.25[5]*

- ☐ Plaintiff has right to object to defendant's undertaking within 10 days after undertaking is filed [CCP § 515.030(b); *see* CCP §§ 514.030(a)(2) (redelivery of property to defendant upon expiration of plaintiff's objection period), 515.030(d)].

- ☐ Seeking relief from writ following plaintiff's failure to recover judgment in underlying action.

- ☐ Plaintiff who does not prevail in underlying action must redeliver property to defendant.
- ☐ Plaintiff is liable for defendant's damages proximately caused by operation of any temporary restraining order and preliminary injunction, by levy of the writ of possession, and by loss of possession of property pursuant to the levy or in compliance with an order directing transfer of property to plaintiff.

**Authority:**

*CCP § 512.120*

**Discussion:**

*See 20.26*



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Chapter 20 Claim and Delivery  
III. OPPOSING WRIT OF POSSESSION

*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.21*

**20.21 Options and Strategies for Party Contesting Writ of Possession.**

Courts are mindful that changing possession of property before the final determination of a dispute may well cause more harm than good. Consequently, defendants should consider the maxim of jurisprudence that between those who are equally in the right, or equally in the wrong, the law does not interpose. If the action is not clear cut, assert that keeping the status quo until the final judgment is a more prudent course of action. However, if the plaintiff is clearly entitled to possession, consider releasing possession to the court or a levying officer.

Oppose writs of possession on both procedural and substantive grounds. The writ procedural requirements are fairly extensive, and the plaintiff bears the burden of satisfying all elements. The plaintiff has the burden of proving the probable validity of the underlying claim. Opposing the writ on substantive grounds at the outset of the action may be easier when there are less evidentiary facts available. However, be mindful that the writ may be made later in the proceedings when the plaintiff has the facts to support his or her position. A party opposing a writ of possession can always assert that the plaintiff's undertaking is insufficient to cover the value of the property. As a fallback position if the writ is valid, a party opposing the writ may file their own undertaking to secure the value of the property and retain its possession.

Do not forget that the nature of the property will be a significant factor in the determination of the writ and the procedures sought. Perishable goods or other property that is subject to deterioration or depreciation will more likely be subject to ex parte applications or temporary restraining orders.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Replevins



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Chapter 20 Claim and Delivery  
III. OPPOSING WRIT OF POSSESSION

*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.22*

## **20.22 Contesting Noticed Application for Writ of Possession.**

### **20.22[1] Procedural Grounds for Contesting Application.**

**20.22[1][a] Failure to Properly Serve Defendant With Application and Supporting Papers.** In a noticed application, the defendant must be served with all of the following prior to the hearing [CCP § 512.030(a)]:

- A copy of the summons and complaint.
- A Notice of Application and Hearing.
- A copy of the application and any supporting affidavits.

If the defendant has not appeared in the action, service must be made in the same manner as a summons [CCP § 512.030(b)].

#### **Cross Reference:**

For service of summons, see Ch. 8, Service of Summons, 8.07 et seq.

**20.22[1][b] Notice Must Contain All Required Information.** The Notice of Application and Hearing must inform the defendant of all of the following [CCP § 512.040(a)-(c)]:

- That a hearing will be held at a place and at a time, specified in the notice, on plaintiff's application for a writ of possession.
- That a writ of possession will be issued if the court finds that the plaintiff's claim is probably valid and the other requirements for issuing the writ are established.
- That if the defendant desires to oppose the issuance of the writ, the defendant must file with the court either an affidavit providing evidence sufficient to defeat the plaintiff's right to issuance of the writ or an

undertaking to stay the delivery of the property.

➤ **Cross References:**

Defendant's objection to plaintiff's undertaking, see 20.24. Defendant's undertaking, see 20.25.

The notice also must contain the following statement: "If you believe the plaintiff may not be entitled to possession of the property claimed, you may wish to seek the advice of an attorney. Such attorney should be consulted promptly so that he may assist you before the time set for the hearing" [CCP § 512.040(a)-(c)].

**20.22[1][c] Notice Must Be Served in Timely Manner.** Plaintiff must have served and filed all moving and supporting papers at least 16 court days prior to the hearing. If notice is served by mail, the period is 16 court days plus 5 calendar days if both the place of mailing and place of address are in California, 16 court days plus 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 16 court days plus 20 calendar days if either the place of mailing or the place of address is outside the United States. If the notice is served by fax, express mail, or another method of delivery providing for overnight delivery, the notice period is 16 court days plus 2 calendar days. However, the court may prescribe a shorter time [CCP § 1005(a)(2), (b)].

➤ **Cross Reference:**

See Ch. 27, Service of Papers.

**20.22[1][d] Plaintiff Cannot File for Writ Until Complaint Has Been Filed.** Plaintiff may apply for a writ of possession "upon the filing of the complaint or at any time thereafter" [CCP § 512.010(a)]. An application filed prior to filing a complaint therefore would be premature.

**20.22[1][e] Application Must Be Made to Court in Which Underlying Action Is Pending.** Plaintiff's application must be made in the court in which the underlying action was brought [CCP § 512.010(a)]. Thus, for example, if the property was physically located in a different county, plaintiff could not seek a writ of possession in that county, but rather would be required to proceed in the county where suit was originally filed.

**20.22[1][f] Application Must Be Made Under Oath.** Plaintiff must execute the application under oath [CCP § 512.010(b)].

**20.22[2] Substantive Grounds for Contesting Application.**

**20.22[2][a] Showings Required to Be Made in Application or Accompanying Affidavit.** By statute, all the following showings must be made *in the application* [CCP § 512.010(b)] or in affidavits filed *with the application* [CCP § 512.010(d)]. Presumably, therefore, a failure to include *any* of these showings in the application or accompanying affidavits would render the application insufficient on its face and preclude subsequent consideration of additional information establishing these requirements after the application is filed. However, the plaintiff presumably could file a second application correcting the deficiencies if they can in fact be corrected and the court permits this.

The following showings are required [CCP § 512.010(b)]:

- Showing of the basis of plaintiff's claim.
- Showing that plaintiff is entitled to possession of the property claimed.
- Showing that the property is wrongfully detained by defendant.
- The manner in which defendant came into possession of the property.



- The reason for the detention of the property according to plaintiff's best knowledge and belief.
- A particular statement of the property.
- A statement of the property's value.
- A statement, according to plaintiff's best knowledge and belief, of the location of the property.
- If the property is within a private place that may have to be entered, a showing that there is probable cause to believe that the property is located there.
- A statement that property has not been taken for a tax, assessment, or fine, or pursuant to a statute, or seized under an execution against the property of the plaintiff or, if the property was so seized, that it is exempt from such a seizure by statute.

**20.22[2][b] Written Instrument Must Be Attached.** If the underlying claim is based on a written instrument, plaintiff is required to attach a copy of that instrument to the application for a writ of possession [CCP § 512.010(b)(1)].

**20.22[2][c] Plaintiff Must Show "Probable Validity" of Recovery in Underlying Action.** Plaintiff must establish the "probable validity" of plaintiff's claim in the underlying action in order to be entitled to a writ of possession [CCP § 512.060(a)(1)]. A claim has "probable validity" if it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim [CCP § 511.090]. Thus, defendant should assert that any evidence or defenses that defendant has asserted or intends to assert in the underlying action are sufficiently meritorious as to raise at least a 50-50 chance that defendant will prevail.

**20.22[2][d] Plaintiff Must Have Obtained Undertaking Prior to Issuance of Writ.** Plaintiff must have obtained an undertaking complying with the requirements of CCP § 515.050 before a writ of possession can be issued. If plaintiff does not supply a copy of the undertaking, defendant should argue that the requirements for issuance of a writ have not been met [CCP § 512.060(a)(2)].

**20.22[2][e] Plaintiff Must Show Probable Cause If Authorizing Entry to Private Place.** If the proposed writ directs the levying officer to enter a private place to take possession of the property, the plaintiff must establish probable cause to believe that the property is located there [CCP § 512.060(b)]. In appropriate cases, defendant may wish to argue that the requisite showing has not been made.

### **20.22[3] Preparing and Filing Documents Opposing Writ.**

**20.22[3][a] Preparing Documents Opposing Writ.** Defendant should prepare following documents in opposition to plaintiff's motion for writ of possession [CCP § 512.050]:

- Affidavit(s) providing sufficient evidence to defeat plaintiff's right to issuance of writ [CCP §§ 512.040(c), 512.050].
- Memorandum in support of argument against issuance of writ [CCP § 512.050; *Cal Rules Ct, Rule 3.1113(a)*].



#### **Cross Reference:**

See Ch. 26, Law and Motion Procedure.

**20.22[3][b] Filing and Serving Documents Opposing Writ.** Defendant must file the opposing documents with

the court and serve them on the defendant [*CCP* §§ 512.050, 1005(c)]. Service must be by personal delivery, facsimile transmission, express mail, or other means reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the papers are filed [*CCP* § 1005(c)].

➡ **Cross Reference:**

See Ch. 27, Service of Papers.

**20.22[4] Appearing at Hearing.** Defendant may appear at the hearing to contest plaintiff's right to issuance of writ, and argue that plaintiff has failed to establish one or more grounds for issuance of writ [*CCP* §§ 512.020, 512.060].

➡ **Cross References:**

Procedural grounds for opposing writ, see 20.22[1]. Substantive grounds for opposing writ, see 20.22[2].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Provisional Remedies Replevins



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Chapter 20 Claim and Delivery  
III. OPPOSING WRIT OF POSSESSION

*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.23*

## **20.23 Applying for Order to Quash a Writ Issued Ex Parte.**

**20.23[1] Noticed Motion Used.** The defendant may apply by noticed motion to quash a writ of possession that has been issued ex parte [CCP § 512.020(b)].

**20.23[2] Use Judicial Council Form CD-160.** Judicial Council Form CD-160, Application and Notice of Application and Hearing for Order to Quash Ex Parte Writ of Possession, may be used to apply for an order to quash a writ of possession issued ex parte. Use of the judicial council form is optional [see *Cal Rules Ct, Rule 1.31*; see also CCP § 516.020 (Judicial Council required to promulgate forms)]. However, although the Judicial Council claim and delivery forms were approved for optional use, their use is standard.

### **Cross Reference:**

Form, see 20.33.

**20.23[3] Asserting Grounds for Quashing Writ.** In the application to quash the writ, defendant should assert the grounds for defendant's argument that the ex parte writ should be quashed [CCP § 512.020(b)], such as:

- That one or more general procedural and/or substantive requirements for the application for a writ of possession were not met [CCP §§ 512.010(b), 512.020(b)].

### **Cross Reference:**

For a list of these requirements, see 20.22[1], [2].

- That *none* of the special conditions for issuance of a writ of possession ex parte have been met [CCP § 512.020(b)].

### **Cross Reference:**

For a list of the conditions under which a plaintiff can apply for ex parte relief, see 20.15[1].

- That plaintiff failed to comply with the procedural requirements for an ex parte writ; specifically, that copies of the summons and complaint, application and supporting affidavits, and notice satisfying statutory requirements and informing defendant of defendant's rights were not served on defendant or another person required by statute to be served with a writ of possession [CCP §§ 512.020(b), 512.040].

#### **20.23[4] Preparing Proposed Order for Release and Redelivery.**

**20.23[4][a] Preparing Proposed Order.** Defendant should prepare a proposed order for the release and delivery to defendant of the property subject to the ex parte writ of attachment [see CCP § 512.020(b)].

**20.23[4][b] Use Judicial Council Form CD-170.** Judicial Council Form CD-170, Order for Release and Redelivery of Property, must be used in drafting the order. Use of the judicial council form is mandatory [see *Cal Rules Ct, Rule 1.31*; see also CCP § 516.020 (Judicial Council required to promulgate forms)]. Form CD-170 includes space for the specification and award of damages resulting proximately caused by the levy.

#### **Cross Reference:**

Form, see 20.34.

**20.23[5] Preparing Supporting Documents.** Defendant should prepare the following documents in opposition to plaintiff's motion for writ of possession [CCP §§ 512.020(b), 512.050]:

- Affidavit(s) providing sufficient evidence to support defendant's application to quash writ [CCP §§ 512.020(b), 512.050].



#### **Strategic Point--Defendant:**

Since a prevailing defendant is entitled to an award of damages [see 20.23[8]], defendant should show in the supporting documents the amount of any damages proximately caused by the levy of the writ of possession and the loss of the property as a result of the levy [see CCP § 512.020(b)].

- Memorandum in support of argument to quash writ [CCP § 512.050; *Cal Rules Ct, Rule 3.1113(a)*].

#### **Cross Reference:**

See Ch. 26, Law and Motion Procedure.

**20.23[6] Filing and Serving Application and Supporting Documents.** Defendant must file the opposing documents with the court and serve them on the defendant [CCP §§ 512.050, 1005(c)]. Service must be by personal delivery, facsimile transmission, express mail, or other means reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the papers are filed [CCP § 1005(c)].

#### **Cross Reference:**

See Ch. 27, Service of Papers.

#### **Distinguish:**

Pending the hearing on the defendant's application, the court may order that delivery pursuant any property previously levied upon be stayed [CCP § 512.020(b); see CCP § 514.030].

**20.23[7] Appearing at Hearing.** Defendant may appear at the hearing to argue that the writ should be quashed [

*CCP* §§ 512.020(b), 512.060].

**20.23[8] Prevailing Defendant to Receive Damages.** If the court determines that the plaintiff is not entitled to a writ of possession, the court will quash the writ of possession and order the release and redelivery of any property previously levied upon. The court must also award the defendant any damages sustained by the defendant that were proximately caused by the levy of the writ of possession and the loss of possession of the property due to the levy [*CCP* § 512.020(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Replevins



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Chapter 20 Claim and Delivery  
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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.24*

**20.24 Objecting to Plaintiff's Undertaking.**

**20.24[1] Defendant May Object to Plaintiff's Undertaking.** The defendant may object to the plaintiff's undertaking [*CCP § 515.030(a)*]. The defendant should consider raising such an objection if, for example, concerns exist that the amount of defendant's undertaking is insufficient to protect defendant against loss or damage to the property. A collateral effect of a timely objection ordinarily is to delay or avoid a transfer of possession of the property to the plaintiff [*see CCP §§ 514.030(a), 515.030(c); see also* discussion in 20.25[4]]. The governing statutes do not specify whether or not such an objection may be made *ex parte* or whether a hearing is required.

**20.24[2] Objection Not Later Than 10 Days After Levy.** Any objection to plaintiff's undertaking must be made not later than 10 days after levy of the writ of possession [*CCP § 515.030(a)*]. Apparently there is no bar to defendant raising such an objection before the levy occurs.

**20.24[3] Preparing Supporting Documents.** Defendant should prepare the following documents in opposition to plaintiff's motion for writ of possession [*CCP § 512.050*]:

- Affidavit(s) providing evidence in support of defendant's objection [*CCP §§ 512.050, 515.030*].
- Memorandum in support of defendant's objection [*CCP § 512.050; Cal Rules Ct, Rule 3.1113(a)*].



**Cross Reference:**

Ch. 26, Law and Motion Procedure.

**20.24[4] Filing and Serving Objection and Supporting Documents.** Defendant must file the objection with the court within the prescribed period [*CCP § 515.030(a); see* 20.24[2]]. The defendant must also mail notice of the objection to the levying officer *CCP § 515.030(a)*].

The claim and delivery statutes do not expressly require service on the defendant, but it appears that the general civil procedure statutes operate to require such service [*CCP § 1005(c)*]. Service must be by personal delivery, facsimile transmission, express mail, or other means reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the papers are filed [*CCP § 1005(c)*].

**20.24[5] Writ Vacated If Undertaking Determined Insufficient.** If the court determines that the plaintiff's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the court must do all of the following [*CCP* § 515.030(c); see *CCP* § 514.030(a)(3)]:

- Vacate the temporary restraining order or preliminary injunction, if any.
- Vacate the writ of possession.
- If levy has occurred, order the levying officer or plaintiff to return the property to the defendant.

Conversely, if the court determines that the plaintiff's undertaking is sufficient, the court must order the levying officer to deliver the property to the plaintiff [*CCP* § 515.030(c)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Replevins



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**20.25 Filing Defendant's Undertaking to Keep or Recover Possession of Property.**

**20.25[1] Use Defendant's Undertaking to Keep or Recover Possession.** A defendant who does not wish to give up possession of the property under a writ of possession pending the outcome of the underlying action, or who wishes to regain possession from the plaintiff following levy of a writ of possession, may prevent plaintiff from taking possession of property pursuant to a writ of possession, or regain possession of property so taken, by filing an undertaking in an amount equal to the amount of plaintiff's undertaking [CCP § 515.020(a)]. This undertaking is referred to in the claim and delivery statutes as a "defendant's undertaking" [see CCP § 515.020(c)].

Because the filing of a defendant's bond pursuant to CCP § 515.020 prevents the seizure of property by writ of possession, it also excuses compliance with a "turnover" order issued in aid of a writ of possession [ *Edwards v. Superior Court* (1991) 230 CA3d 173, 178, 281 CR 30 (defendants who posted bond could not be held in contempt for violation of "turnover" order)].

**20.25[2] Required Amount and Terms of Defendant's Undertaking.** The defendant's undertaking must be in an amount equal to the amount of plaintiff's undertaking [CCP § 515.020(a)]. If the court has found that defendant has no interest in the property and has waived requirement of a plaintiff's undertaking [see CCP § 515.010(b)], the amount of the defendant's undertaking will be specified by the court in the order for issuance of the writ [CCP §§ 515.010(b), 515.020(a)].

The undertaking must provide that if plaintiff recovers judgment on the action, the defendant must [CCP § 515.020(b)]:

- Pay all costs awarded to plaintiff, and
- All damages plaintiff may sustain by reason of the loss of possession of the property, including, but not limited to, all damages proximately caused by plaintiff's failure to gain or retain possession.



**Cross Reference:**

See 20.13 (discussion of undertaking requirements).



**20.25[3] Use Judicial Council Form CD-140.** Judicial Council Form CD-140, Undertaking by Personal Sureties, must be used for giving a statutory undertaking by personal sureties in a claim and delivery action. The form may be used for either a plaintiff's or a defendant's undertaking. Use of the judicial council form is mandatory [*see Cal Rules Ct, Rule 1.31; see also CCP § 516.020* (Judicial Council required to promulgate forms)].

 **Cross Reference:**

Form, see 20.31.

**20.25[4] Time for Filing of Defendant's Undertaking.** A defendant's undertaking may be filed at any time before or after levy of the writ of possession [*CCP § 515.020(c)*].

However, the defendant's undertaking should be filed before levy of the writ, or within 10 days after levy of writ, if possible, to avoid having to recover the property from plaintiff. This is because, once a levy has been made, the levying officer must hold custody of the property for 10 days before turning it over to the plaintiff. After that time, the officer must turn it over to plaintiff unless a defendant's undertaking or objection to plaintiff's undertaking has been filed [*CCP § 514.030(a)(2), (3)*]. If a notice of defendant's undertaking is filed within that time, and plaintiff does not object to that undertaking, the officer must simply redeliver the property to the plaintiff [*CCP §§ 514.030(a)(2), 515.020(d)*]. Obviously, from the defendant's point of view, it is likely to be preferable to obtain redelivery from the levying officer rather than from the plaintiff.

**20.25[5] Filing and Serving Defendant's Undertaking.** The defendant must file the defendant's undertaking with the court [*CCP § 515.020(a)*]. The defendant must also mail a copy of the defendant's undertaking to the levying officer [*CCP § 515.020(c)*].

The claim and delivery statutes do not expressly require service on the defendant, but it appears that the general civil procedure statutes operate to require such service [*see CCP § 1005(c)*]. Service must be by personal delivery, facsimile transmission, express mail, or other means reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the papers are filed [*see CCP § 1005(c)*].

**20.25[6] Plaintiff May Object to Defendant's Undertaking.** Plaintiff may object to defendant's undertaking. Plaintiff's objection must be raised not later than 10 days after defendant files its undertaking [*CCP § 515.030(b)*]. The process of objecting to a defendant's undertaking is basically the same as for objecting to a plaintiff's undertaking [*see CCP § 515.030(d)*]. If the court determines that defendant's undertaking is insufficient, defendant may file a sufficient undertaking within the time required by statute [*CCP § 515.030(d)*].

 **Cross Reference:**

See 20.24 (procedure for objection to plaintiff's undertaking).

**20.25[7] Redelivery of Property to Defendant.** If defendant files an undertaking for redelivery and plaintiff does not object to defendant's undertaking, the levying officer must deliver the property to the defendant [*CCP §§ 514.030(a)(2), 515.020(d)*]. If plaintiff previously has been given possession of the property, plaintiff must deliver that property to the defendant [*CCP § 515.020(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Replevins



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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.26*

**20.26 Seeking Relief from Writ Following Plaintiff's Failure to Recover Judgment in Underlying Action.**

**20.26[1] Redelivery of Property to Defendant.** If plaintiff fails to recover judgment in the underlying action, plaintiff must redeliver the property to the defendant [*CCP* § 512.120].

**20.26[2] Defendant May Recover Damages.** If plaintiff fails to recover judgment in the underlying action, plaintiff is also liable to pay defendant all damages sustained by defendant proximately caused by [*CCP* § 512.120]:

- Operation of the temporary restraining order and preliminary injunction, if any.
- The levy of the writ of possession.
- Loss of possession of the property pursuant to the levy of the writ of possession and in compliance with the order directing transfer of possession to plaintiff.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Provisional Remedies Replevins



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Chapter 20 Claim and Delivery  
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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.27*

**20.27 Judicial Council Form CD-100 Application for Writ of Possession (Claim and Delivery).**

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NOTES.

**Authority:**

*CCP § 512.010*; California Judicial Council Form CD-100, pictured above, is approved for optional use  
[*Cal Rules Ct, Rule 1.35*]

**Related Forms of Memoranda:**

See California Points and Authorities, Ch. 40, Claim and Delivery (Matthew Bender)

**Preparing Application and Order:**

See, *20.06, 20.09. Forms, 20.06[2]* (noticed applications), *20.15[2][b]* (ex parte applications),  
*20.19[3][a]* (temporary restraining orders).



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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.28*

**20.28 Judicial Council Form CD-110 Notice of Application for Writ of Possession and Hearing (Claim and Delivery).**

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NOTES.

**Authority:**

*CCP § 512.040*; California Judicial Council Form CD-110, pictured above, is approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Preparing Notice:**

See 20.09.



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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.29*

**20.29 Judicial Council Form CD-120 Order for Writ of Possession (Claim and Delivery).**

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NOTES.

**Authority:**

*CCP § 512.070*; California Judicial Council Form CD-120, pictured above, is approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Preparing Proposed Writ:**

See *20.07*.



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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.30*

**20.30 Judicial Council Form CD-130 Writ of Possession (Claim and Delivery).**

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NOTES.

**Authority:**

*CCP § 512.080*; California Judicial Council Form CD-130, pictured above, is approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Preparing Proposed Writ and Ex Parte Application:**

See *20.08[1]* (noticed applications), *20.15[4][b]*



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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.31*

**20.31 Judicial Council Form AT-160/CD-140 Undertaking by Personal Sureties (Attachment and Claim and Delivery).**

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NOTES.

**Authority:**

*CCP § 515.010*; California Judicial Council Form CD-140, pictured above, is approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Undertakings:**

See *20.13[4]* (plaintiff's undertaking), *20.25[3]* (defendant's undertaking)



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**[Reserved]**

20.32[Reserved]





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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.33*

**20.33 Judicial Council Form CD-160 Application and Notice of Application and Hearing for Order to Quash Ex Parte Writ of Possession (Claim and Delivery).**

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NOTES.

**Authority:**

*CCP § 512.020(b)*; California Judicial Council Form CD-160, pictured above, is approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Applying For Order to Quash:**

See 20.23[2]

**Related Forms of Memoranda:**

See California Points and Authorities, Ch. 40, Claim and Delivery (Matthew Bender)



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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.34*

**20.34 Judicial Council Form CD-170 Order for Release and Redelivery of Property (Claim and Delivery).**

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NOTES.

**Authority:**

*CCP § 512.020(b)*; California Judicial Council Form CD-170, pictured above, is approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Preparing Order For Release and Redelivery:**

See 20.23[4][b]



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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.35*

**20.35 Judicial Council Form CD-180 Declaration for Ex Parte Writ of Possession (Claim and Delivery).**

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NOTES.

**Authority:**

*CCP § 512.010*; California Judicial Council Form CD-180, pictured above, is approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Preparing Affidavits or Declarations:**

See *20.15[5]*



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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.36*

**20.36 Judicial Council Form CD-190 Declaration for Temporary Restraining Order (Claim and Delivery).**

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NOTES.

**Authority:**

*CCP § 513.010*; California Judicial Council Form CD-190, pictured above, is approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Preparing Declaration For Temporary Restraining Order:**

See *20.19[3][b]*



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*2-20 MB Practice Guide: CA Pretrial Civil Procedure 20.37*

**20.37 Judicial Council Form CD-200 Temporary Restraining Order (Claim and Delivery).**

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NOTES.

**Authority:**

*CCP § 513.010*; California Judicial Council Form CD-200, pictured above, is approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Preparing Proposed Temporary Restraining Order:**

See *20.19[4][a]*



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Chapter 21 Lis Pendens

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.syn*

**§ 21.syn Synopsis to Chapter 21: Lis Pendens**

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21.13[5][d] Submission of Supporting Evidence When Motion Seeks Expungement for Lack of Probable Validity of Claim Under CCP § 405.32.

21.13[5][e] Submission of Supporting Evidence When Motion Seeks Expungement Conditioned on Undertaking Under CCP § 405.33.

21.13[5][f] Submission of Supporting Evidence When Motion Seeks Expungement for Procedural Invalidity Under CCP § 405.22.

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Chapter 21 Lis Pendens  
I. STRATEGY

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.01*

## 21.01 Scope.

This chapter covers:

- Filing and serving a notice of lis pendens [see 21.03 -21.09; Form: see 21.38].
- Expunging a lis pendens notice by noticed motion [see 21.10 -21.15; Forms: see 21.39 -21.40].
- Opposing a motion to expunge a lis pendens notice [ see 21.16 -21.21].
- Appealing an order granting or denying expungement of lis pendens [ see 21.22 -21.23].
- Withdrawing a lis pendens notice [see 21.24 -21.26; Form: see 21.43].
- Requiring a claimant to give an undertaking as a condition of maintaining notice in record title [see 21.27 -21.34; Forms: see 21.41 -21.42].
- Exonerating or modifying an undertaking [see 21.35 -21.37].

### Detailed Discussion/Forms:

See California Forms of Pleading and Practice, Ch. 348, Lis Pendens; California Points and Authorities, Ch. 145, Lis Pendens (Matthew Bender).

### Core Statutes:

*CCP §§ 405-405.61*

Note that the current statutes became operative on January 1, 1993. Cases construing former lis pendens statutes are still persuasive authority when the case does not address an aspect of the former law that has been abrogated or altered [ *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 955, 89 CR2d 693 ].

### Distinguish:

The statutes refer to the lis pendens notice as a "notice of pendency of action" or simply "notice" [CCP §

405.2]. Since the term "lis pendens" is still generally used and understood, this chapter uses the traditional term.

**Exception:**

In eminent domain proceedings, lis pendens is governed by *CCP* § 1250.150, and the general lis pendens statutes [*CCP* § 405 *et seq.*] are inapplicable. *CCP* § 1250.150 simply requires the plaintiff (public agency), at the time of the commencement of the proceeding, to record a notice of the pendency of the proceeding in the office of the county recorder of any county in which property described in the complaint is located. A copy of that notice must be served with the summons and complaint.



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Chapter 21 Lis Pendens  
I. STRATEGY

2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.02

## 21.02 Objective and Strategy.

**21.02[1] Preserves Plaintiff's Right to Specific Real Property.** A lis pendens is a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice [ *Palmer v. Zaklama* (2003) 109 CA4th 1367, 1375 ; *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 966, 89 CR2d 693 ]. A lis pendens notice is filed in order to preserve the plaintiff/claimant's rights to specific real estate until the dispute with the owner is resolved. A lis pendens typically is filed when the plaintiff/claimant alleges a right to the title or possession of the real estate specified in the notice. If a lis pendens is not recorded, the plaintiff/claimant runs the risk that the defendant/owner will encumber or convey the property to a third party who is unaware of the dispute. By filing and recording (with proper indexing) a lis pendens notice, any subsequent takers or creditors who take a security interest in the real property, acquire their interest subject to any judgment rendered in the underlying dispute [ *Palmer v. Zaklama* (2003) 109 CA4th 1367, 1375 ]. This consequence clouds the property's title and makes the property generally unmarketable or difficult to secure financing on the property [see, e.g., *Palmer v. Zaklama* (2003) 109 CA4th 1367, 1372-1374 ].

**21.02[2] Provides Constructive Notice of Pending Action.** A notice of lis pendens gives constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice. Any taker of a subsequently created interest in that property takes his or her interest subject to the outcome of that litigation [ *Arrow Sand & Gravel, Inc. v. Superior Court* (1985) 38 C3d 884, 888, 215 CR 288, 700 P2d 1290 ; *Bishop Creek Lodge v. Scira* (1996) 46 CA4th 1721, 1733-1734, 54 CR2d 745 ].



### Strategic Point--Third Party Bound by Judgment:

The effect of a lis pendens is that anyone acquiring an interest in the property after the action was filed will be bound by the judgment [ *Palmer v. Zaklama* (2003) 109 CA4th 1367, 1375 ; *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 966, 89 CR2d 693 ]. The lis pendens remains effective as long as the underlying action is pending unless the notice is withdrawn or expunged.



### Warning--Avoid Doe Defendants:

The recording of a lis pendens provides constructive notice of the noticed action and its pendency against parties who are not fictitiously named [CCP § 405.24]. The constructive notice given extends only to the pendency of the action against named parties other than those fictitiously named pursuant to California's "Doe" pleading practice [CCP § 405.24, comment 2]. A lis pendens against a fictitiously named defendant will not be effective against that defendant or the defendant's successors. For this reason, Doe defendants should not be used in a lis pendens or the underlying action.

**21.02[3] Effectively Precludes Sale of Property During Pendency of Litigation.** The nearly universal use of title insurance means that the recordation of a lis pendens gives a claimant a de facto, if not a de jure, provisional remedy. The cloud created on title generally precludes either sale or encumbrance of the affected property for the duration of the action [CCP § 405.32, comment 2].

**21.02[4] Has Been Used to Force Settlement of Action.** Since the recording of a lis pendens places a cloud upon the title of real property until the pending action is resolved, it has been used to coerce defendants to settle [ *Hilberg v. Superior Court* (1989) 215 CA3d 539, 542, 263 CR 675 ; *Ranchito Ownership Co. v. Superior Court* (1982) 130 CA3d 764, 769, 182 CR 54 ]. Courts recognize that the lis pendens procedure is susceptible to serious abuse, providing unscrupulous plaintiffs with a powerful lever to force the settlement of groundless or malicious suits [ *Malcolm v. Superior Court* (1981) 29 C3d 518, 523 n2, 524, 174 CR 694, 629 P2d 495 , superseded by CCP §§ 405-405.61, *Howard S. Wright Construction Co. v. Superior Court* (2003) 106 CA4th 314, 318, 130 CR2d 641 ]. Though a lis pendens protects the plaintiff against a transfer of the property in derogation of the plaintiff's claim in the property, a lis pendens can also be used as an instrument of oppression [ *Ranchito Ownership Co. v. Superior Court* (1982) 130 CA3d 764, 769, 182 CR 54 ].



#### Strategic Point:

Before filing a lis pendens, careful consideration of the procedure should be given because an improperly recorded lis pendens could give rise to abuse of process and/or slander of title claims, sanctions, or an award of attorney's fees [see *Palmer v. Zaklama* (2003) 109 CA4th 1367, 1378-1380 ]. An improperly recorded lis pendens also can undermine the strength of a legitimate case if the court expunges it early in the action because the claimant cannot prove that the matter involves a "real property claim" or because the plaintiff cannot establish probable validity.

#### Detailed Discussion/Forms:

See California Points and Authorities, Ch. 145, Lis Pendens (Matthew Bender).



#### Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Lis Pendens General Overview





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Chapter 21 Lis Pendens  
II. FILING AND SERVING A LIS PENDENS NOTICE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.03*

**21.03 CHECKLIST: Filing and Serving a Lis Pendens Notice.**

☐ Determine whether filing lis pendens would be advantageous.

☐ Does party in question wish to protect his or her rights to title or possession of specific real property?

**Discussion:**

See 21.02[1]

☐ Does party in question wish to put third parties on notice of pending action, so that any third party acquiring an interest in the property after the action was filed will be bound by judgment?

**Discussion:**

See 21.02[2]

☐ Does party in question wish effectively preclude sale of real property in question during pendency of litigation?

**Discussion:**

See 21.02[3]

☐ Does party in question wish to stimulate settlement of action by "tying up" real property until claim is resolved?

**Discussion:**

See 21.02[4]

☐ Determine whether lis pendens may be filed.

- ☐ Is there a pending action in a California or federal district court?

**Authority:**

*CCP § 405.20; see CCP § 405.5 (applicability to federal court action)*

**Discussion:**

*See 21.04[1]*

- ☐ Does complaint in that action involve a real property claim?

**Authority:**

*CCP §§ 405.4, 405.20*

**Discussion:**

*See 21.04[2]*

- ☐ Does claim involve title to specific real property?

- ☐ Does claim involve right to possession of specific real property?

- ☐ Does claim involve use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility [*see 21.04[2][f]*]?

- ☐ Is claim one of following types judicially held to affect title or possession:

- ☐ Action for specific performance of a real estate sales contract.

**Discussion:**

*See 21.04[2][c]*

- ☐ Action seeking imposition of constructive trust or equitable lien, under some circumstances.

**Warning:**

Availability of lis pendens in actions seeking imposition of a constructive trust or equitable lien on real property is unclear and may depend on the exact circumstances of the action.

**Discussion:**

*See 21.04[2][g]*

- ☐ Does underlying case involve claim by public agency seeking to declare a building uninhabitable?

**Authority:**

*CCP § 405.7*

- ☐ Is claim one of following that will *not* support lis pendens?

- ☐ Action seeking monetary damages only.

**Discussion:**

See 21.04[2][d]

- ☐ Action seeking insurance proceeds from claim involving real property.

**Discussion:**

See 21.04[2][e]

- ☐ Action seeking equitable remedy as collateral means of collecting money damages.

**Discussion:**

See 21.04[2][h]

- ☐ Eminent domain action by public agency.

**Authority:**

CCP §§ 405.6, 1250.150. Note that eminent domain actions are governed by CCP § 1250.150 and are not subject to CCP § 405 *et seq.*

- ☐ Action in foreign court.

**Authority:**

*The Formula Inc. v. Superior Court* (2008) 168 CA4th 1455, 1457-1458, 1459-1462, 86 CR3d 341 .

- ☐ Is party seeking to file lis pendens both:

- ☐ A party to the underlying action, and
- ☐ Asserting a real property claim in that action?

**Authority:**

CCP § 405.20

**Discussion:**

See 21.04[2][h]

- ☐ Prepare lis pendens notice.

**Form:**

See 21.38

- ☐ Include exact names of all parties to action.

**Authority:**

*CCP § 405.20*

**Discussion:**

*See 21.05*

- ☐ Include legal description of property and address if applicable.

**Authority:**

*CCP § 405.20*

**Discussion:**

*See 21.05[1]*

- ☐ Include acknowledgment.

**Discussion:**

*See 21.05[4]*

- ☐ Have notice signed, and approved by court if necessary.

- ☐ Notice ordinarily is signed by attorney of record.

- ☐ On request of party, judge of court in which an action is pending may approve notice.

- ☐ If party is appearing in propria persona, party must sign notice and obtain court approval.

**Authority:**

*CCP § 405.21*

**Discussion:**

*See 21.06*

- ☐ If a lis pendens was previously filed against the property and was subsequently expunged, claimant must obtain leave of court in which action is pending before filing another lis pendens as to the affected property.

**Authority:**

*CCP § 405.36*

**Discussion:**

*See 21.08[1]*

- ☐ Serve lis pendens on all required parties.

☐ Cause copy of lis pendens notice to be mailed by registered or certified mail, return receipt requested, to:

☐ All known addresses of the parties to whom the real property claim is adverse; and

☐ All owners of record of the real property affected by the real property claim as shown by the latest county assessment roll.

**Authority:**  
*CCP § 405.22*

**Discussion:**  
*See 21.07[1]*

☐ If there is no known address for service on an adverse party or owner, prepare and execute declaration under penalty of perjury to that effect.

**Authority:**  
*CCP § 405.22*

**Discussion:**  
*See 21.07[2]*

☐ Prepare and execute proof of service complying with *CCP § 1013a*.

**Authority:**  
*CCP § 405.23*

**Discussion:**  
*See 21.07[3]*

☐ If any adverse parties are later joined in underlying action, serve lis pendens on those parties immediately and in same manner described above.

**Authority:**  
*CCP § 405.22*

**Discussion:**  
*See 21.07[4]*

☐ Record lis pendens as soon as possible.

☐ Record in office of county recorder where all or part of real property is situated.

**Authority:**  
*CCP § 405.22*

**Discussion:**

See 21.08[2]

- ☐ Record proof of service or declaration along with lis pendens notice.

**Authority:**

CCP § 405.23

**Discussion:**

See 21.08[3]

- ☐ File copy of recorded lis pendens with court immediately after recording.

**Authority:**

CCP § 405.22

**Discussion:**

See 21.08[4]

- ☐ Seek other additional remedies as appropriate, including:

☐ Attachment.

☐ In injunction.

☐ Other relief.

**Authority:**

CCP § 405.8

**Discussion:**

See 21.09



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II. FILING AND SERVING A LIS PENDENS NOTICE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.04*

**21.04 Determining Whether Lis Pendens Is Available.**

**21.04[1] Lis Pendens Is Pretrial Remedy.** Lis pendens is a pretrial remedy designed to protect third parties [ *Paglia v. Superior Court* (1989) 215 CA3d 1322, 1326-1327, 264 CR 63 ].

**21.04[2] Underlying Complaint Must Involve Real Property Claim.**

**21.04[2][a] Action Must Involve "Real Property Claim."** A lis pendens may be filed only if the underlying action involves a "real property claim" [CCP § 405.20].

**Prerequisite:**

The complaint must state a cause of action affecting the title or right of possession of the specific real property described in the lis pendens [CCP §§ 405.2 and 405.4]. If it does not do so the lis pendens becomes a nullity [ *Brownlee v. Vang* (1962) 206 CA2d 814, 817, 24 CR 158 ].

**Distinguish:**

An action does not pertain to specific real property if it is a general claim for an interest in a community estate [ *Gale v. Superior Court* (2004) 122 CA4th 1388, 1390, 19 CR3d 554 (divorce action did not list specific property)].

 **Cross Reference:**

Grounds for expunging lis pendens, see 21.12.

**21.04[2][b] What Constitutes "Real Property Claim."** To be a "real property claim" for lis pendens purposes, a claim must be a cause or causes of action in a pleading which would, if meritorious, affect one of the following [CCP § 405.4]:

- Title to specific real property.
- The right to possession of specific real property.

- The use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility.

Case law has determined that certain types of actions do or do not affect title or possession [ *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 967, 89 CR2d 693 ].

**21.04[2][c] Available in Specific Performance Actions.** Lis pendens is available in an action for specific performance of a real estate sales contract [ *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 967, 89 CR2d 693 ].



**Warning:**

CCP § 405.33 addresses undertakings when the lis pendens will be expunged on the basis that adequate relief can be secured by such an undertaking. CCP § 405.33 provides that the presumption of CC § 3387 that real property is unique applies only in the case of real property improved with a single family dwelling which the claimant intends to occupy.

**21.04[2][d] Not Available in Action for Monetary Damages.** An action for monetary damages only will not support a lis pendens [ *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 967, 89 CR2d 693 ; *Ziello v. Superior Court* (1995) 36 CA4th 321, 332, 42 CR2d 251 ].

**21.04[2][e] Not Available in Dispute Over Insurance Proceeds.** The determination of who is entitled to receive earthquake insurance proceeds does not involve the real property itself, but is instead strictly a matter of contract. Such a case would not support the filing of a lis pendens [ *Ziello v. Superior Court* (1995) 36 CA4th 321, 332, 42 CR2d 251 ].

**21.04[2][f] Available in Actions Involving Easements.** CCP § 405.4 expressly includes cases affecting the use of easements within the definition of "real property claim." The lis pendens procedure is available in cases which affect the use of an easement (other than one obtained pursuant to statute by a regulated public utility) upon or appurtenant to the property affected by the action [CCP § 405.4, comment 4].



**Strategic Point:**

Prior statutory law was unclear regarding the availability of the lis pendens procedure in cases involving easements, since an easement does not technically affect title in the sense of changing it, nor does the existence of an easement oust the title holder of possession [CCP § 405.5, comment 5]. However, California title insurance practice treats an easement as both an insurable interest and an exception to title [CCP § 405.4, comment 4]. The conflict between statutory law and title insurance practice created confusion regarding the availability of the lis pendens procedure in cases involving easements [CCP § 405.4, comment 4, citing *Kendall-Brief Co. v. Superior Court* (1976) 60 CA3d 462, 131 CR 515 ; *Woodcourt II Limited v. McDonald Co.* (1981) 119 CA3d 245, 173 CR 836 ].

**21.04[2][g] Unclear If Available in Actions Involving Constructive Trusts or Equitable Liens.** The law is in conflict regarding the availability of the lis pendens procedure in cases claiming a constructive trust or equitable lien [ *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 968-970, 89 CR2d 693 ]. The statutory definition of real property claim neither includes nor excludes claims of constructive trust or equitable lien [CCP § 405.4 and comment 5], and the law in this area is left for judicial development [CCP § 405.4, comment 5; *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 956, 89 CR2d 693 ].

Cases in which the plaintiff seeks a constructive trust relating to real property have been troublesome, in part because of the wide variety of circumstances in which a constructive trust may be an appropriate remedy [ *BGJ Associates v.*



*Superior Court* (1999) 75 CA4th 952, 967, 89 CR2d 693 ]. Two early cases held that an action in which the plaintiff seeks a constructive trust on specific real property affects title to or the right to possession of such property, and therefore supports a lis pendens [ *Coppinger v. Superior Court* (1982) 134 CA3d 883, 890-891, 185 CR 24 ; *Okuda v. Superior Court* (1983) 144 CA3d 135, 141, 192 CR 388 ]. Subsequent cases have rejected this broad interpretation of whether a constructive trust affects real property for purposes of a lis pendens [ *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 968, 89 CR2d 693 ]. It has been held that lis pendens should be narrowly interpreted in constructive trust cases in order to prevent abuse [ *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 955, 89 CR2d 693 ].

A claim for an equitable lien may be treated as other remedies [see 21.04[2][h]], in that they do not support a lis pendens, because they seek an interest in the property for the purpose of securing a claim for money damages [ *Campbell v. Superior Court* (2005) 132 CA4th 904, 919, 34 CR3d 68 ].

**21.04[2][h] Not Available in Action Seeking Equitable Remedies As Collateral Means of Collecting Money Damages.** Allegations of equitable remedies, even if colorable, will not support a lis pendens if, ultimately, those allegations act only as a collateral means to collect money damages [ *Urez Corp v. Superior Court* (1987) 190 CA3d 1141, 1149, 235 CR 837 ; see also *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 89 CR2d 693 (courts must consider whether substance of dispute is essentially a fraud action seeking money damages, with constructive trust allegations appended)].

**21.04[2][i] Available in Actions on Fraudulent Conveyances.** An action for fraudulent conveyance of the real property under the Uniform Fraudulent Transfer Act [CC § 3439 *et seq.*] supports a lis pendens [ *Kirkeby v. Superior Court* (2004) 33 C4th 642, 649 , 15 CR3d 805 , 93 P3d 395 ].

**21.04[2][j] Not Available in Action in Foreign Court.** California lis pendens statutes do not authorize recording a notice of litigation that is pending in the courts of another state [ *The Formula Inc. v. Superior Court* (2008) 168 CA4th 1455, 1457, 1458, 1460, 86 CR3d 341] .

**21.04[3] Must Be Filed by Party Asserting Real Property Claim.** In order to file a valid lis pendens, the filing party must be a party to an underlying action and must be asserting a real property claim in that action [CCP § 405.20].

**21.04[4] Available in Both State and Federal Court.** A lis pendens may be filed in an action in United States District Court, as well as California state courts [CCP § 405.5].

**21.04[5] Probable Validity Not Required to File Notice.** The statutes do not require that the claimant be able to demonstrate the "probable validity" of the claim as a prerequisite to filing the lis pendens notice [see CCP § 405.20]. However, the claimant *will* be required to make such showing at a later time if someone with an interest in the property seeks to have the lis pendens notice expunged [see CCP § 405.32]. "Probable validity," with respect to a real property claim, means that it is more likely than not that the claimant will obtain a judgment against the defendant on the claim [CCP § 405.3].



#### **Strategic Point--Claimant:**

Before filing a lis pendens, the claimant should consider the likelihood of whether or not such a showing can be made if one of the parties subsequently seeks to have the order expunged. Another thing to consider is that the claimant will bear the burden of proof on this issue in any subsequent expungement proceeding, not the party seeking to have the notice expunged [CCP § 405.30]. Also, remember that filing a lis pendens claim without adequate justification could give rise to claims of abuse of process and/or slander of title claims, sanctions, and/or an award of attorney's fees [].



**Cross Reference:**

*21.13[5][d]* (evidence supporting motion to expunge).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Lis Pendens General Overview Real Property Law Priorities & Recording Lis Pendens



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*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.05*

**21.05 Drafting Lis Pendens Notice.**

**21.05[1] Parties Must Be Named.** The notice must contain the names of all parties to the action [*CCP* § 405.20].



**Warning:**

Parties and their counsel should ensure that the names of the parties are spelled correctly. If the names of the property owners are misspelled, the lis pendens may effectively be rendered void and invalid since the doctrine of idem sonans may not apply to a lis pendens. The doctrine of idem sonans (having the same sound) provides that though a person's name has been inaccurately written, the identity of that person will be presumed from the similarity of sounds between the correct pronunciation and the pronunciation as written. Under this doctrine, absolute accuracy in spelling names is not required in legal proceedings. However, this rule does not apply when the written name is material. Since the law of notice by record is addressed to the eye and not the ear, this rule has been held not to apply to an abstract of judgment containing a misspelled name [see *Orr v. Byers (1988) 198 CA3d 666, 244 CR 13*].

**21.05[2] Property Must Be Described.** The notice must contain a description of the property affected by the action [*CCP* § 405.20]. Standard practice is to include a full legal description, as well as the address of the property if applicable.



**Warning:**

The description must be clear enough that it will be picked up on a preliminary title report issued by a title company. For this reason, a street address by itself is probably insufficient.



**Cross Reference:**

California Real Estate Law and Practice, Ch. 81, Drafting Legal Descriptions (Matthew Bender).

**21.05[3] Lis Pendens Notice Need Not State Object of the Action.** Prior law had required that the lis pendens document contain a statement of the object of the action. This requirement was not included in the current law as it served little purpose since the object or purpose of the action was best determined by a review of the pleading

supporting the lis pendens [*CCP* § 405.20, comment 2].

**21.05[4] Acknowledgment Should Be Included.** *Gov Code* § 27287 provides generally that before an instrument can be recorded, its execution must be acknowledged by the person executing it. Though the Lis Pendens Law does not specifically require that the lis pendens be acknowledged, it is prudent to include this acknowledgment even if the county recorder's practice is to accept documents that have not been acknowledged.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Lis Pendens Notices



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Chapter 21 Lis Pendens

## II. FILING AND SERVING A LIS PENDENS NOTICE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.06*

### 21.06 Signature Requirements for Lis Pendens Notice.

**21.06[1] Notice Must Be Properly Signed Before Recordation.** A notice of pendency of action cannot be recorded unless it meets one of the applicable signature requirements [*CCP § 405.21*]:

- It has been signed by the attorney of record;
- It is signed by a party acting in propria persona and approved by a judge of the court in which an action that includes a real property claim is pending; or
- The action is subject to *CCP § 405.6* (eminent domain actions).

**21.06[2] Attorney of Record May Sign Notice.** An attorney of record in an action may sign a lis pendens notice [*CCP § 405.21*].

**21.06[3] Judge May Approve Notice.** A judge of the court in which an action that includes a real property claim is pending may, upon request of a party to the action, approve a lis pendens notice [*CCP § 405.21*].



#### Strategic Point:

The literal language of *CCP § 405.21* contains an arguable inconsistency as to whether or not a party who is represented by an attorney could nevertheless seek judicial approval of a lis pendens notice, rather than simply having the attorney sign it. The second sentence of *CCP § 405.21* merely says that as an alternative to signature by an attorney of record, the judge may approve a lis pendens notice on request of a party to the action. Under this sentence, a party apparently could seek judicial approval of a lis pendens notice even if that party is represented by an attorney, if for some reason the attorney of record was unavailable or reluctant to sign. However, the third sentence of *CCP § 405.21* makes either (1) signature by an attorney; or (2) signature by a party acting in propria persona and approval by a judge, a prerequisite for recording. This sentence appears to require signature by an attorney of record if there is one. In practice, since signature by the attorney of record is simpler than going before a judge to get a lis

pendens notice approved, it is unlikely that there would be any reason to seek judicial approval when there is an attorney of record who can sign.

**21.06[4] Party Appearing in Propria Persona Must Sign Notice and Obtain Court Approval.** A claimant appearing propria persona must sign the lis pendens [CCP § 405.21]. When a party appears in propria persona to request approval of a lis pendens, it is the court's duty pursuant to CCP § 405.21 to confirm that an action containing a real property claim, as defined by CCP § 405.4, is pending, and to approve a lis pendens proper in form if such a claim is pending [CCP § 405.21, comment 2].



**Strategic Point:**

The procedures for hearing and ruling upon such requests, and for establishing a record of approval or rejection, are left to determination by the courts [CCP § 405.21, comment 2]. Inquiry should be made to the court regarding the exact procedure to be used.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Lis Pendens Notices



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*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.07*

**21.07 Serving Lis Pendens.**

**21.07[1] Lis Pendens Usually Must Be Served Prior to Recordation.** Before the lis pendens is recorded, the claimant must cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to [CCP § 405.22]:

- All known addresses of the parties to whom the real property claim is adverse; and
- All owners of record of the real property affected by the real property claim as shown by the latest county assessment roll.

**Exception:**

The above requirement does not apply in eminent domain actions governed by CCP § 405.6 [CCP § 405.22].



**Warning:**

A lis pendens notice is void and invalid as to any adverse party or owner of record unless the service requirements have been met for that party or owner and a proof of service in the form and content specified in CCP § 1013a has been recorded with the lis pendens [CCP § 405.23].

**Distinguish--Effect of Actual Notice:**

The lis pendens law does not affect existing law regarding the effect of actual notice [CCP § 405.24, comment 4]. Thus, a technical defect in service should not void or invalidate a lis pendens when the affected persons have received actual notice of the action [ *Biddle v. Superior Court* (1985) 170 CA3d 135, 138, 215 CR 848 ].

**21.07[2] Declaration Required If Service Is Not Possible.** If there is no known address for service on an adverse party or owner, service on that party or owner is not required. However, as to that party or owner, a declaration under penalty of perjury to that effect may be recorded instead of the proof of service described in 21.07[3] [CCP § 405.22].

**21.07[3] Proof of Service.** The claimant must prepare and execute a proof of service that complies with CCP §

1013a [CCP § 405.23].



**Cross Reference:**

For the proof of service requirements of *CCP § 1013a*, see *Ch. 27, Service of Papers*, 27.29 -27.35.

**21.07[4] Serving Adverse Parties Later Joined in the Action.** The lis pendens must be served immediately, and in the same manner described above, upon each adverse party later joined in the action [*CCP § 405.22*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Lis Pendens General Overview Civil Procedure Remedies Lis Pendens Notices





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*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.08*

**21.08 Filing and Recording Lis Pendens Notice.**

**21.08[1] Obtaining Court Approval Prior to Recording Second Lis Pendens If Prior Lis Pendens Was Expunged.** If a lis pendens was previously filed against the property in the same action and was subsequently expunged, the claimant must obtain leave of the court in which the action is pending before another lis pendens is filed as to the affected property [CCP § 405.36; *Ranchito Ownership Co. v. Superior Court* (1981) 130 CA3d 764, 766, 182 CR 54 ].

**21.08[2] Recording Notice With County Recorder.** The lis pendens notice may be recorded in the office of the recorder of each county in which all or part of the real property is situated [CCP § 405.20].

 **Cross Reference:**

For detailed discussion of recording procedures, see California Real Estate Law and Practice, Ch. 82, Recording of Instruments (Matthew Bender).

 **Warning:**

A lis pendens may not be recorded unless it is signed by an attorney of record or has been preapproved by the court [CCP § 405.21, comment 3].

 **Cross Reference:**

Signing requirements, see 21.06.

 **Warning:**

*Gov Code § 27287* provides generally that before an instrument can be recorded, its execution must be acknowledged by the person executing it. Though the Lis Pendens Law does not specifically require that the lis pendens be acknowledged, it would be prudent to include this acknowledgment even if the county recorder's practice is to accept documents which have not been acknowledged.

 **Cross Reference:**

Acknowledgment, see 21.05[4].



**Strategic Point:**

The claimant should not delay in recording the lis pendens notice. The constructive notice provided by a lis pendens runs from the time of recording the lis pendens notice, not from the time the underlying action is brought. The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, relate back to the date of the recording of the lis pendens notice [CCP § 405.24]. A bona fide purchaser for value who acquires an interest in real property is not charged with constructive notice of a claimant's interest if the recorder's office had not properly indexed the document delivered to it reflecting that interest [ *Dyer v. Martinez* (2007) 147 CA4th 1240, 1246-1247, 54 CR3d 907 ].

**21.08[3] Recording Proof of Service or Declaration Along With Lis Pendens Notice.** Proof of service on each person required to be served, or a declaration under penalty of perjury that there is no known address for service on such a person, must be recorded with the lis pendens notice [CCP § 405.23].



**Warning:**

A lis pendens notice is void and invalid as to any adverse party or owner of record unless the service requirements have been met for that party or owner and a proof of service in the form and content specified in CCP § 1013a has been recorded with the lis pendens [CCP § 405.23].

**21.08[4] Filing Copy of Lis Pendens With Court.** Immediately following recordation, a copy of the lis pendens must also be filed with the court in which the action is pending [CCP § 405.22].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Lis Pendens General Overview Real Property Law Priorities & Recording Lis Pendens



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*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.09*

**21.09 Seeking Other Relief.**

The Lis Pendens Law does not preclude any party from seeking an attachment, an injunction, or other relief in connection with a real property claim [*CCP* § 405.8].

 **Cross References:**

See Ch. 18, TROs and Preliminary Injunctions; Ch. 19, Attachment.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Lis Pendens General Overview Real Property Law Priorities & Recording Lis Pendens



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Chapter 21 Lis Pendens  
III. EXPUNGING A LIS PENDENS NOTICE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.10*

**21.10 CHECKLIST: Expunging a Lis Pendens Notice.**

☐ Decide whether practical advantages of expungement would outweigh additional expense and effort of obtaining expungement order.

☐ Successful expungement enables record owner to deal with property as though no notice of lis pendens had been filed.

☐ Conversely, will require additional time and effort, and generate additional costs and attorney's fees.

**Discussion:**

See 21.11

**Authority:**

*CCP §§ 405.60, 405.61*

☐ Determine whether one or more of following grounds exist for expunging lis pendens:



**Warning:**

The court has the power to award sanctions pursuant to *CCP § 128.5* and attorney's fees under *CCP § 405.38* for frivolous motions to expunge designed to harass the claimant [see *CCP § 405.30*, comment 4]. The moving party's attorney should make certain that a legitimate ground for a motion to expunge exists before filing such a motion.

☐ Lis pendens notice is void and invalid because it was not properly served.

**Authority:**

*CCP § 405.23; CCP § 405.30, comment 2*

**Discussion:**

See 21.12; 21.07 (service requirements)

- ☐ Pleading on which lis pendens notice is based does not contain a real property claim.

**Authority:**

*CCP § 405.31*

**Discussion:**

See 21.12; 21.04[2]

- ☐ Claimant cannot establish by a preponderance of the evidence the "probable validity" of the real property claim.

**Authority:**

*CCP § 405.32; see CCP § 405.3 (definition of "probable validity")*

**Discussion:**

See 21.12

- ☐ An undertaking will provide adequate relief to claimant.

**Authority:**

*CCP § 405.33*

**Discussion:**

See 21.12

- ☐ Determine when motion will be filed.

- ☐ Motion may be filed at any time after the notice has been recorded.

**Authority:**

*CCP § 405.30*

**Discussion:**

See 21.13[1]

- ☐ Determine status of party who wants to file motion:

- ☐ Any party to action may file motion upon application to court.

- ☐ Nonparty with an interest in real property affected by the action may file motion only if party obtains leave of court to intervene at or before the time the party brings the motion to expunge the notice [CCP § 405.30].

- ☐ Motion to intervene should be separate from motion to expunge.

**Authority:**  
*CCP § 405.30*

**Discussion:**  
*See 21.13[2]*

- ☐ Prepare application (motion) to expunge.

**Form:**  
*See 21.39*

- ☐ Prepare proposed expungement order.

**Form:**  
*See 21.40*

- ☐ Prepare any supporting declaration and other evidence to be filed along with motion.

- ☐ Decide whether or not supporting evidence will be presented.

**Authority:**  
*See CCP § 405.30*

**Discussion:**  
*See 21.13[5]*

- ☐ Filing evidence is not mandatory unless moving party has burden of proof.

- ☐ Submission of supporting evidence ordinarily is not necessary to determine existence of a real property claim under *CCP § 405.31*.

- ☐ If motion seeks expungement for lack of probable validity of claim under *CCP § 405.32*:

- ☐ Moving party need not present evidence until claimant has initially met its burden of proof.

**Authority:**  
*CCP § 405.30, comment 4; see Evid Code §§ 500, 550*

**Discussion:**  
*See 21.13[5][b], [c]*

☐ Moving party may choose to present evidence with moving papers in anticipation of claimant's response.

☐ If motion seeks expungement conditioned on undertaking under *CCP* § 405.33, moving party has burden of showing that pecuniary relief in the form of an undertaking will suffice and must file supporting evidence with moving papers.

**Authority:**

*CCP* § 405.30, comment 4; see *Evid Code* §§ 500, 550]

**Discussion:**

See 21.13[5][e]

☐ If motion seeks expungement for procedural invalidity under *CCP* § 405.22:

☐ Moving party need not present evidence until claimant has initially met its burden of proof.

**Authority:**

*Evid Code* §§ 500, 550

**Discussion:**

See 21.13[5][f]

☐ Moving party may choose to present evidence with moving papers in anticipation of claimant's response.

☐ Prepare any supporting evidence, including any affidavits and declarations to be submitted in support of motion.

☐ File motion and supporting documents with court in which underlying action affecting the real property is pending.

**Discussion:**

See 21.13[6]

**Authority:**

*CCP* § 405.30

☐ Serve motion and supporting documents on opposing party. Consider whether it is in your party's interest to serve the motion on non-parties affected by the lis pendens who might decide to intervene and assist in the motion.

**Discussion:**

See 21.13[7]

**Authority:**

See *CCP* § 1005(a)(11), (b)

**Timing:**

- ☐ At least 16 court days before the hearing unless court orders otherwise.
  - ☐ At least 16 court plus 5 days before the hearing if notice is served by mail and both place of mailing and place of address are in California.
  - ☐ At least 16 court plus 10 calendar days before the hearing if notice is served by mail and either place of mailing or place of address is outside California but within United States.
  - ☐ At least 16 court plus 20 days before the hearing if notice is served by mail and either place of mailing or place of address is outside United States.
  - ☐ If notice is served by fax, express mail, or another method of delivery providing for overnight delivery, the 16-day notice period is extended by 2 court days.
- ☐ If discovery is needed in connection with motion, request discovery order from court.

**Authority:**

*CCP § 405.30*

- ☐ If continuance is necessary to complete discovery, request continuance for discovery from court.

**Authority:**

*CCP § 405.30, comment 4*

- ☐ If hearing will be held on motion, appear at hearing.

☐ Hearing ordinarily will be required to determine probable validity of claim if probable validity is at issue.

**Authority:**

*CCP § 405.32, comment 4*

**Discussion:**

*See 21.13[11]*

- ☐ If probable validity is not at issue, hearing apparently is at court's discretion.
- ☐ If hearing is held, present any oral testimony in support of claim, if court permits that evidence to be received.

**Authority:**

*CCP § 405.30*



**Discussion:**

See 21.13[10]

- ☐ Court will issue order if it is satisfied that one of the grounds for expungement has been met.

**Authority:**

CCP §§ 405.31, 405.32, 405.33

**Discussion:**

See 21.14

- ☐ If court finds that real property claim has probable validity, but that an undertaking will be adequate to protect the claimant:

**Authority:**

CCP § 405.33

**Discussion:**

See 21.14[3]

- ☐ Arrange for undertaking in amount set by court.
- ☐ File undertaking with court on or before return day set by court.

- ☐ Record certified copy of court's expungement order.

- ☐ Record order in office where lis pendens was originally recorded.

**Authority:**

See CCP § 405.60

**Discussion:**

See 21.15[1]

- ☐ Record expungement order when period for filing petition for writ of mandate has expired, if no such petition is filed.

**Timing:**

- ☐ Petition must be filed within 20 days of service of written notice by court or any party.

- ☐ Court has the power to extend this 20-day period for an additional 10 days [CCP § 405.39].

**Authority:**

*CCP* §§ 405.35, 405.39

**Discussion:**

See 21.15[2]

☐ If a petition for writ of mandate is filed within that period, record order when proceeding commenced by that petition has been finally adjudicated.

**Authority:**

*CCP* § 405.35

**Discussion:**

See 21.15[2]; see 21.22, 21.23 (appellate review of expungement order)



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*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.11*

**21.11 Purpose and Advantage of Bringing Motion to Expunge Lis Pendens.**

**21.11[1] Expungement Order Removes the Lis Pendens Encumbrance.** An order expunging the notice is intended to remove an encumbrance, and to enable the record owner to deal with his property as though no notice of lis pendens had been filed [ *Ranchito Ownership Co. v. Superior Court* (1982) 130 CA3d 764, 770, 182 CR 54 ].



**Decision Point:**

In general, the advantage of obtaining an expungement order is that it clears record title to the property pending the outcome of the litigation. Therefore, if the property owner wants to encumber, lease, dispose of, or otherwise deal with the property during the pendency of the litigation, expunging the lis pendens may be extremely advantageous. For example, if the owner wants to use the property as security for a loan, removing the lis pendens may be critical. In some cases, the added financial flexibility that may result from expunging the lis pendens may enable the property owner to continue the litigation rather than being forced into an unfavorable settlement for unrelated financial reasons. Conversely, if the property owner has no plans to deal with the property while the underlying claim is being resolved, the added time and expense of obtaining an expungement order may not be worthwhile.

**21.11[2] Constructive Notice Eliminated.** Upon recordation of a certified copy of an order expunging a notice of pendency of action, neither the notice nor any information derived from it, prior to the recording of a certified copy of the judgment or decree issued in the action, constitute actual or constructive notice of any of the matters contained, claimed, alleged, or contended therein, or of any of the matters related to the action, or create a duty of inquiry in any person thereafter dealing with the affected property [CCP § 405.60; see *Knapp Development & Design v. Pal-Mal Properties* (1987) 195 CA3d 786, 790, 240 CR 920 ; see CCP §§ 405.60, 405.61 for the effect of an expunged or withdrawn lis pendens].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Lis Pendens Terminations



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*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.12*

**21.12 Grounds for Expunging Lis Pendens.**

A lis pendens notice may be expunged if any of the following grounds are found to exist:

- The lis pendens notice is void and invalid because it was not properly served [CCP § 405.23; CCP § 405.30, comment 2; see CCP § 405.22 (filing and service requirements)].

► **Cross Reference:**

See 21.07 (service requirements).

- The pleading on which the lis pendens notice is based does not contain a real property claim [CCP § 405.31].

► **Cross Reference:**

See 21.04[2] (determining if real property claim).

- The claimant is unable to establish by a preponderance of the evidence the probable validity of the real property claim [CCP § 405.32]. "Probable validity," with respect to a real property claim, means that it is more likely than not that the claimant will obtain a judgment against the defendant on the claim [CCP § 405.3].

- The claimant is able to demonstrate that the real property claim has probable validity, but adequate relief can be secured to the claimant by the giving of an undertaking [CCP § 405.33].

- The lis pendens was not filed under authority of California lis pendens statutes [ *The Formula Inc. v. Superior Court* (2008) 168 CA4th 1455, 1465, 86 CR3d 341 (expunged for being filed in action in foreign court)].



**Warning:**

The court has the power to award sanctions pursuant to *CCP* § 128.5 and attorney's fees under *CCP* § 405.38 for frivolous motions to expunge designed to harass the claimant [see *CCP* § 405.30, comment 4]. The moving party's attorney should make certain that a legitimate ground for a motion to expunge exists before filing such a motion.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Lis Pendens Terminations



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**21.13 Making Motion to Expunge a Lis Pendens.**

**21.13[1] When Motion May Be Filed.** A motion to expunge a lis pendens notice may be filed at any time after the notice has been recorded [CCP § 405.30].

**21.13[2] Who May File Motion.**

**21.13[2][a] Any Party, or Nonparty With Interest in Subject Property, May File Motion.** Any party, or any nonparty with an interest in the real property affected by the action, may apply to the court in which the action is pending to expunge the notice [CCP § 405.30].

**21.13[2][b] Nonparty Must Obtain Leave to Intervene.** A person who is not a party to the action must obtain leave to intervene from the court at or before the time the party brings the motion to expunge the notice [CCP § 405.30].

**Strategic Point:**



A nonparty who seeks to expunge a lis pendens must file a motion to intervene. This motion should be separate from the motion to expunge since local rules may prevent the combination of motions in one pleading document.



**Cross Reference:**

See Ch. 31, Intervention.

**21.13[3] Contents of Application (Motion) to Expunge.** The lis pendens statutes do not require any specific contents for a motion to expunge a lis pendens. Presumably, however, such a motion should meet the requirements applicable to motions generally and, at a minimum, contain the following:



**Cross Reference:**

Form, see 21.39.

- Statement of purpose of motion; i.e., to expunge lis pendens.
- Location, date, and reference information relating to recordation of lis pendens.
- Identity of claimant who filed lis pendens notice.
- Description of real property as to which notice was filed.
- Grounds for seeking expungement.

**21.13[4] Preparing Accompanying Documents.** The following documents should also be prepared for submission with the motion to expunge:

- Proposed order.

 **Cross Reference:**

Form, see 21.40.

- Supporting memorandum.



**Warning:**

A supporting memorandum is required to be served and filed with this notice of motion [*see CCP §§ 1005, 1010; Cal Rules of Ct, Rule 3.1113(a)*].

 **Cross Reference:**

See *Ch. 26, Law and Motion Procedure*, 26.43[5] (memoranda).

**21.13[5] Preparation of Supporting Declarations and Evidence.**

**21.13[5][a] Evidence or Declarations May Accompany Motions.** Evidence or declarations may accompany the motion to expunge [*CCP § 405.30*].

 **Cross Reference:**

Discussion of evidentiary support for motions and applications, see *Ch. 26, Law and Motion Procedure*, 26.12 et seq.

**21.13[5][b] Filing Evidence Is Not Mandatory Unless Moving Party Has Burden of Proof.** The party moving to expunge may, but is not necessarily required to, file evidence with the moving papers. Whether the moving party is required to file evidence with the moving papers depends upon which party bears the burden of proof on the motion, as noted below [*CCP § 405.30*, comment 4].

 **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**21.13[5][c] Submission of Supporting Evidence Ordinarily Not Needed to Determine Existence of a Real Property Claim Under CCP § 405.31.** A motion to expunge on the basis that the action does not contain a real

property claim [CCP § 405.31] involves only a review of the adequacy of the pleading and normally should not involve evidence from either side, other than possibly that which may be judicially noticed as on a demurrer [CCP § 405.30, comment 4; *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 956-957, 89 CR2d 693 ].



#### Strategic Point:

Addressing whether or not a pleading contains a real property claim concerns judicial examination of allegations only [CCP § 405.31, comment 1; *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 957, 89 CR2d 693 ]. The analysis required of a pleading necessary to support the lis pendens is analogous to, but more limited than, the analysis undertaken by a court on a demurrer. Rather than analyzing whether the pleading states any claim at all, as on a general demurrer, the court must undertake the more limited analysis of whether the pleading states a real property claim [CCP § 405.32; CCP § 405.31, comment 2; *BGJ Associates v. Superior Court* (1999) 75 CA4th 952, 956, 89 CR2d 693 ].

**21.13[5][d] Submission of Supporting Evidence When Motion Seeks Expungement for Lack of Probable Validity of Claim Under CCP § 405.32.** A motion to expunge on the basis that the claim has no probable validity [CCP § 405.32] requires the court to conduct a judicial evaluation of the merits of the underlying claim [CCP § 405.32; *Howard S. Wright Construction Co. v. Superior Court* (2003) 106 CA4th 314, 319, 130 CR2d 641 ], and places the burden of proof on the claimant. The moving party hence need not present evidence until the claimant has initially met its burden [see *Evid Code* §§ 500, 550]. Nevertheless, the moving party may choose to present evidence with the moving papers in anticipation of the claimant's response [CCP § 405.30, comment 4].

**21.13[5][e] Submission of Supporting Evidence When Motion Seeks Expungement Conditioned on Undertaking Under CCP § 405.33.** A motion to expunge on the basis that pecuniary relief in the form of an undertaking will suffice [CCP § 405.33] places the burden of proof upon the moving party by operation of *Evid Code* §§ 500 and 550. Unless the court can find that an undertaking would secure adequate relief, the motion to expunge must be denied. The moving party therefore must file supporting evidence with the moving papers [CCP § 405.30, comment 4].

**21.13[5][f] Submission of Supporting Evidence When Motion Seeks Expungement for Procedural Invalidity Under CCP § 405.22.** A motion to expunge a void and invalid lis pendens places the burden of proof upon the claimant [see *Evid Code* §§ 500, 550]. Unless the court finds that the requirements of CCP § 405.22 have been met, the lis pendens is void and invalid and must be expunged [CCP § 405.30, comment 4]. The moving party hence need not present evidence until the claimant has initially met its burden [see *Evid Code* §§ 500, 550], but, as in the case of a "probable validity" claim, presumably may choose to present evidence with the moving papers in anticipation of the claimant's response [see CCP § 405.30].

**21.13[6] Filing Motion and Supporting Documents.** The motion to expunge the lis pendens, together with any supporting documents, must be filed with the court in which the action affecting the real property is pending [CCP § 405.30].

#### 21.13[7] Serving Motion and Supporting Documents.

**21.13[7][a] Service on Opposing Party.** A copy of the moving and supporting papers filed with the court must be served on the opposing party [see CCP § 1005(b)].



#### Strategic Point:

Consider whether it is advantageous to serve non-parties affected by the filing of the lis pendens who would tend to favor having the lis pendens expunged and might decide to intervene to assist in that



effort.

**21.13[7][b] Time Requirements for Service.** Time requirements for serving a motion for expungement of a lis pendens notice are governed by the general requirements for written motions specified in *CCP § 1005(b)* [*CCP § 1005(a)(11)* (specific application to actions seeking expungement of lis pendens), (b) (time requirements)]:



**Cross Reference:**

See Ch. 27, Service of Papers.

- All moving and supporting papers must be served and filed at least 16 court days before the hearing unless the court orders otherwise.

- If the notice is served by mail and both the place of mailing and place of address are in California, the period is 16 court days plus 5 calendar days.

- The period is 16 court days plus 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 16 court plus 20 calendar days if either the place of mailing or the place of address is outside the United States.

- If the notice is served by fax, express mail, or another method of delivery providing for overnight delivery, the 16-day notice period is extended by 2 court days.

**21.13[8] Requesting Discovery Orders.** The court may make any orders it deems just to provide for discovery by any party affected by a motion to expunge a lis pendens notice [*CCP § 405.30*].



**Cross Reference:**

See Matthew Bender(R) Practice Guide: California Civil Discovery.

**21.13[9] Requesting Continuance for Discovery.** The court retains discretion to continue the motion for further evidence [*CCP § 405.30*, comment 4].



**Strategic Point:**

The party who moves to expunge the lis pendens is more likely to have a continuance request granted, and the court might freely allow it. However, the party that recorded the lis pendens is less likely to have a continuance request granted because the property remains encumbered until resolution of the motion, and a continuance under these circumstances will most likely require a significant showing of good cause. The court may grant a continuance on the condition that the lis pendens be withdrawn pending the outcome of the discovery and expungement hearing.



**Cross Reference:**

See Ch. 30, Continuances.

**21.13[10] Court May Consider Oral Evidence.** The court may permit evidence to be received in the form of oral testimony, but is not required to do so [*CCP § 405.30*].



**Strategic Point:**

Since it is in the court's discretion as to whether or not the court will hear oral testimony, the parties should consider filing written declarations to present any desired evidence--the court may choose not to hear oral testimony.

**21.13[11] Hearing Required to Determine Probable Validity of Claim.** A determination of the probable validity of a claimant's real property claim require a hearing on the merits of the same type as those conducted in attachment and claim and delivery proceedings [*CCP* § 405.32, comment 4].



**Cross Reference:**

See Ch. 20, Claim and Delivery.

**Legal Topics:**

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**21.14 Issuance of Order Expunging Lis Pendens.**

**21.14[1] Expungement on Ground That Pleading Does Not Contain a Real Property Claim.** The court must order the lis pendens expunged if the courts finds that the pleading on which the written notice is based does not state a real property claim [CCP § 405.31]. Expungement is mandated in this situation [CCP § 405.31, comment 2]. The court cannot order an undertaking to be given as a condition of expunging the notice if the court finds that the pleading does not contain a real property claim [CCP § 405.31].

**21.14[2] Expungement on Ground That Claimant Cannot Establish the Probable Validity of Claim.** The court must order the list expunged if it finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim [CCP § 405.32; *Howard S. Wright Construction Co. v. Superior Court* (2003) 106 CA4th 314, 318, 130 CR2d 641 ]. The statute requires the court to conduct a judicial evaluation of the merits of the underlying claim [CCP § 405.32; *Mix v. Superior Court* (2004) 124 CA4th 987, 993 ; *Howard S. Wright Construction Co. v. Superior Court* (2003) 106 CA4th 314, 319, 130 CR2d 641 ]. The court cannot order an undertaking to be given as a condition of expunging the notice if it finds that the claimant has not established the probable validity of the real property claim [CCP § 405.32; see CCP § 405.32, comment 5].

Under the standards of CCP § 405.32, if the claimant who filed the lis pendens loses at trial, the lis pendens must be expunged [ *Mix v. Superior Court* (2004) 124 CA4th 987, 996 ].



**Strategic Point:**

The Legislature's intent was to make the standard on a motion to expunge a notice of lis pendens equivalent to the "probable validity standard" applicable under The Attachment Law [CCP § 484.090] and other provisions for pretrial judicial evaluation [e.g., CCP § 512.060 (writ of possession); CCP § 564 (appointment of receiver); *Corp Code* § 800(c)(1) (shareholder derivative action)] [CCP § 405.32; *Howard S. Wright Construction Co. v. Superior Court* (2003) 106 CA4th 314, 320, 130 CR2d 641 ].

The Lis Pendens Law requires that the claimant objectively establish the probable validity of the real property claim. The court should not consider the claimant's subjective state of mind (e.g., for a proper purpose and in good faith) [CCP

§ 405.32, comment 6].

**21.14[3] Expungement on Ground That Adequate Relief Can Be Secured to the Claimant by an Undertaking.**

**21.14[3][a] Circumstances Requiring Expungement Conditioned Upon an Undertaking to Secure Claimant's Relief.** If the court finds that the real property claim has probable validity, but adequate relief can be secured to the claimant by the giving of an undertaking, the court must order that the notice be expunged on condition that an undertaking be given [CCP § 405.33].



**Warning:**

Establishment of probable validity does not constitute a meritorious opposition to a motion to provide an undertaking in lieu of the lis pendens. The focus is whether monetary damages will fully compensate the claimant [CCP § 405.33, comment 2].

**21.14[3][b] Amount of Undertaking.** The undertaking must be of such a nature and in such an amount as will indemnify the claimant for all damages proximately resulting from the expungement which the claimant may incur if the claimant prevails upon the real property claim [CCP § 405.33].

**21.14[3][c] Return Date for Undertaking.** In its order conditionally expunging the notice, the court must set a return date for the moving party to show fulfillment of the condition. If the moving party fails to show fulfillment of the condition on the return day, the court shall deny the motion to expunge without further notice or hearing [CCP § 405.33].

**21.14[3][d] No Expungement If Monetary Relief Would Be Inadequate.** Unless the court can find that an undertaking would secure adequate relief, the motion to expunge must be denied [CCP § 405.30, comment 4].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**21.15 Recording Expungement Order.**

**21.15[1] Where to Record.** A certified copy of the court order expunging a lis pendens should be recorded in the office where the lis pendens was originally recorded [see *CCP* § 405.60].

**21.15[2] When to Record.** The notice may not be recorded until the period for filing a petition for writ of mandate under *CCP* § 405.39 has expired; or, if a petition for writ of mandate has been filed within that period, until the proceeding commenced by that petition has been finally adjudicated [*CCP* § 405.35]. A petition must be filed within 20 days of service of written notice by the court or any party. The court has the power to extend this 20-day period for an additional 10 days [*CCP* § 405.39]. The expungement order may be recorded upon expiration of this period unless a petition has been filed [*CCP* § 405.35].

**21.15[3] Importance of Recording.** Upon recordation of a certified copy of an order expunging a lis pendens, neither the notice nor any information derived from it, prior to the recording of a certified copy of the judgment or decree issued in the action, constitutes actual or constructive notice of any of the matters contained, claimed, alleged, or contended the action, or of any of the matters related to the action, or creates a duty of inquiry in any person thereafter dealing with the affected property [*CCP* § 405.60]. Recordation of an expungement order eliminates binding knowledge of the pendency of an action to any non-party to the action who becomes a purchaser, transferee, mortgagee or other encumbrancer for value of any interest in the subject real property prior to recordation of judgment in the action [ *Knapp Development & Design v. Pal-Mal Properties* (1987) 195 CA3d 786, 790, 240 CR 920 ]. The record owner can then deal with his property as though no notice of lis pendens had been filed [ *Ranchito Ownership Co. v. Superior Court* (1982) 130 CA3d 764, 770, 182 CR 54 ].

**Legal Topics:**

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**21.16 CHECKLIST: Opposing a Motion to Expunge a Lis Pendens Notice.**

☐ Determine grounds for motion.

**Discussion:**

See 21.17

☐ Determine what grounds exist for opposition of motion.

**Discussion:**

See 21.18

☐ Determine who has burden of proof on motion.

**Authority:**

CCP § 405.30, comment 4

☐ Determine whether to file evidence in opposition to motion.

**Discussion:**

See 21.19[3]

**Authority:**

CCP § 405.30, comment 4

☐ Prepare written evidence in opposition to motion.

☐ File documents opposing motion with court in which underlying action affecting the real property

is pending.

**Discussion:**

See 21.19[3]

**Authority:**

CCP § 405.30

- ☐ Serve documents opposing motion on moving party:

**Discussion:**

See 21.19[4], 21.13[7][b]

**Authority:**

See CCP § 1005(a)(11), (b)



**Timing:**

- ☐ At least 16 court days before the hearing unless court orders otherwise.
  - ☐ At least 16 court days plus 5 calendar days before the hearing if notice is served by mail and both place of mailing and place of address are in California.
  - ☐ At least 16 court days plus 10 calendar days before the hearing if notice is served by mail and either place of mailing or place of address is outside California but within United States.
  - ☐ At least 16 court days plus 20 calendar days before the hearing if notice is served by mail and either place of mailing or place of address is outside United States.
  - ☐ If notice is served by fax, express mail, or another method of delivery providing for overnight delivery, the 16-day notice period is extended by 2 court days.
- ☐ If discovery is needed in connection with motion, request discovery order from court.

**Authority:**

CCP § 405.30

- ☐ If continuance is necessary to complete discovery, request continuance for discovery from court.

**Discussion:**

See 21.20[2]

**Authority:**

CCP § 405.30, comment 4

☐ If hearing will be held on motion, appear at hearing.

☐ Hearing ordinarily will be required to determine probable validity of claim if probable validity is at issue.

**Authority:**

*CCP § 405.32, comment 4*

**Discussion:**

*See 21.13[11]*

☐ If probable validity is not at issue, hearing apparently is at court's discretion.

☐ If hearing is held, present any oral testimony in opposition to motion, if court permits that evidence to be received.

**Authority:**

*CCP § 405.30*

**Discussion:**

*See 21.21*





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**21.17 Determining Grounds for Motion to Expunge.**

Upon receipt of a motion to expunge a lis pendens the claimant should first determine the grounds for the motion, in order to identify possible grounds for opposing it. If none of the grounds noted in 21.18 can be reasonably asserted, then ordinarily the lis pendens cannot be expunged.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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## **21.18 Determining Grounds for Opposition to Motion.**

**21.18[1] Evaluating Existence of Grounds for Opposing Motion.** Before deciding whether to oppose a motion to expunge a lis pendens, the claimant should evaluate the grounds for the motion to determine whether or not any legitimate grounds exist for opposing the motion. This evaluation should be made with specific reference to the grounds asserted in the motion by the moving party.

**21.18[2] Basic Sufficiency of Motion.** For all motions, the following grounds should be considered:

- *Procedural Requirements:* Was the motion filed and served in accordance with the proper procedural requirements?
- *Substantive Sufficiency:* Does the motion assert one of the grounds authorized by statute? If it is based on some other ground, is that ground a legitimate basis for bringing such a motion?

**21.18[3] Opposition When Motion Is Based on Procedural Grounds (CCP § 405.22).** If the motion seeks to expunge the lis pendens based on the claimant's alleged noncompliance with procedural requirements of *CCP* § 405.22:

- Is moving party's assertion of a procedural defect correct?
- If it is correct, can the procedural defect be cured?

### **➡ Cross Reference:**

See 21.13 (making a motion to expunge lis pendens).

**21.18[4] Opposition When Motion Is Based on Lack of Real Property Claim (CCP § 405.31).** If the motion to expunge the lis pendens is based on the assertion that the underlying pleading contains no real property claim, a successful opposition must demonstrate the existence of such a claim.

### **➡ Cross Reference:**

See 21.04[2] for discussion of what does or does not constitute a "real property claim" for purposes of CCP § 405.4.

**21.18[5] Opposition When Motion Is Based on Lack of Probable Validity of Real Property Claim (CCP § 405.32).** If the motion to expunge the lis pendens is based on the assertion that the probable validity of the real property claim has not been established, the motion may be opposed on the ground that probable validity does exist.

 **Cross References:**

See 21.35[d]. See 21.12[2] for the meaning of "probable validity" as defined in CCP § 405.3.

**21.18[6] Opposition When Motion Is Based on Adequacy of Undertaking in Lieu of Lis Pendens (CCP § 405.33).** If the motion to expunge the lis pendens is based on the assertion that the posting of an undertaking by the moving party would provide the claimant with adequate relief, the motion may be opposed on the ground that monetary relief is inadequate.

 **Cross Reference:**

See 21.27 et seq. (undertaking requirements).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### **21.19 Preparation and Filing of Supporting Declarations and Evidence.**

**21.19[1] Determine Whether to Submit Supporting Evidence.** Evidence or declarations may accompany the motion to expunge [CCP § 405.30]. Whether or not the claimant must file supporting evidence depends on who bears the burden of proof on the motion [see CCP § 405.30, comment 4]:

- Submission of supporting evidence ordinarily is not needed to determine existence of a real property claim under CCP § 405.31 [CCP § 405.30, comment 4].

➡ **Cross Reference:**

See 21.13[5][c].

- The claimant must submit supporting evidence when the motion seeks expungement for lack of probable validity of the claim under CCP § 405.32 [see CCP § 405.30, comment 4].

➡ **Cross Reference:**

See 21.13[5][d].

- The claimant *may* submit supporting evidence when the motion the seeks expungement conditioned on an undertaking under CCP § 405.33, and *must* submit such evidence if the moving party has met its burden of proof under Evid Code §§ 500 and 550 [see CCP § 405.30, comment 4].

➡ **Cross Reference:**

See 21.13[5][e].

- The claimant must submit supporting evidence when the motion seeks expungement based on procedural invalidity under CCP § 405.22 [see CCP § 405.30, comment 4].

 **Cross Reference:**

See 21.13[5][f].

**21.19[2] Preparing Additional Evidence.** Additional evidence in the form of affidavits, declarations, and documentary evidence should be prepared for submission to the court.

 **Cross Reference:**

Discussion of evidentiary support for motions and applications, see *Ch. 26, Law and Motion Procedure*, 26.12 et seq.

**21.19[3] Filing Additional Evidence.** Any supporting documents prepared by the claimant must be filed with the court in which the action affecting the real property is pending [see *CCP § 405.30*].

**21.19[4] Serving Additional Evidence.**

**21.19[4][a] Service on Moving Party.** A copy of all papers filed with the court must be served on the moving party [see *CCP § 1005(b), (c)*].

**21.19[4][b] Time Requirements for Service.** Time requirements for serving reply papers relating to a motion for expungement of a lis pendens notice are governed by the general requirements for papers opposing a written motion specified in *CCP § 1005(c)* [*CCP § 1005(a)(11)* (specific application to actions seeking expungement of lis pendens)].

Reply papers must be filed five court days before the hearing [*CCP § 1005(b), (c)*]. All papers opposing a motion and all reply papers must be served by personal delivery, FAX, express mail, or other means consistent with *CCP §§ 1010-1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers are filed [*CCP § 1005(c)*].

 **Cross References:**

See 21.13[7][b]; *Ch. 26, Law and Motion Procedure*, 26.45.

**Legal Topics:**

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## 21.20 Discovery.

**21.20[1] Requesting Discovery Orders.** The court may make any orders it deems just to provide for discovery by any party affected by a motion to expunge a lis pendens notice [CCP § 405.30].



### Cross Reference:

Matthew Bender(R) Practice Guide: California Civil Discovery.

**21.20[2] Requesting Continuance for Discovery.** The court retains discretion to continue the motion for further evidence [CCP § 405.30, comment 4].



### Strategic Point:

The party who moves to expunge the lis pendens is more likely to have a continuance request granted, and the court might freely allow it. However, the party that recorded the lis pendens is less likely to have a continuance request granted because the property remains encumbered until resolution of the motion, and a continuance under these circumstances will most likely require a significant showing of good cause. The court may grant a continuance on the condition that the lis pendens be withdrawn pending the outcome of the discovery and expungement hearing.



### Cross Reference:

See Ch. 30, Continuances.

## Legal Topics:

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### **21.21 Hearing.**

**21.21[1] Court May Consider Oral Evidence.** The court may permit evidence to be received in the form of oral testimony, but is not required to do so [CCP § 405.30].



#### **Strategic Point--Importance of Written Declarations:**

Since it is in the court's discretion as to whether or not the court will hear oral testimony, the parties should consider filing written declarations to present any desired evidence--the court may choose not to hear oral testimony.

**21.21[2] Hearing Required to Determine Probable Validity of Claim.** A determination of the probable validity of a claimant's real property claim require a hearing on the merits of the same type as those conducted in attachment and claim and delivery proceedings [CCP § 405.32, comment 4].



#### **Cross References:**

See 21.13[5][d]; Ch. 20, Claim and Delivery.

### **Legal Topics:**

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V. APPEALING AN ORDER GRANTING OR DENYING EXPUNGEMENT OF LIS PENDENS

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.22*

**21.22 CHECKLIST: Appealing an Order Granting or Denying Expungement of Lis Pendens.**

- ☐ Prepare petition for writ of mandate.

**Authority:**

*CCP § 405.39*

**Discussion:**

See 21.23[1]; see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender)

- ☐ Include request for immediate stay of court order and support with necessary documentation.

**Authority:**

*Mix v. Superior Court (2004) 124 CA4th 987, 996-997 ; Cal Rules Ct, Rule 8.486(a), (b)*

**Discussion:**

See 21.23[1A]

- ☐ File and serve petition:



**Timing:**



Within 20 days after being served with written notice of the order granting or denying expungement.

**Authority:**

*CCP § 405.39*



**Discussion:**

See 21.23[2]

☐ If additional time is needed, request court that issued order to extend initial 20-day period for up to 10 days.

**Warning:**

A request for an extension must be made *before* the initial 10-day period has expired.

**Authority:**

CCP § 405.39

**Discussion:**

See 21.23[3]

☐ With appropriate appellate court.

☐ File copy of petition with court that issued order.

**Authority:**

CCP § 405.39

**Discussion:**

See 21.23[4]



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### 21.23 Procedure for Appellate Review.

**21.23[1] Expungement Order May Be Reviewed on Petition for Writ of Mandate.** An order expunging (or not expunging) a notice of lis pendens may be reviewed on a petition for writ of mandate. Such an order is not otherwise appealable [CCP § 405.39; *Mix v. Superior Court* (2004) 124 CA4th 987, 996 ; *Howard S. Wright Construction Co. v. Superior Court* (2003) 106 CA4th 314, 318, 130 CR2d 641 ].



#### Strategic Point:

In reviewing an expungement motion, one court has applied a standard of review based upon the standards applicable to the grant or denial of a preliminary injunction [ *Howard S. Wright Construction Co. v. Superior Court* (2003) 106 CA4th 314, 319-320, 130 CR2d 641 ].

**21.23[1A] Include Request for Immediate Stay of Trial Court Order.** Petitioner may request an immediate stay of the court's order to maintain the status quo pending the decision on the writ of mandate; and necessary documentation under *Cal Rules Ct, Rule 8.486(a), (b)* to support the stay must accompany the request [ *Mix v. Superior Court* (2004) 124 CA4th 987, 996-997, 21 CR3d 826 (decided under former rule)].

**21.23[2] Time for Filing Petition for a Writ of Mandate.** The petition for writ of mandate must be filed and served within 20 days of service of written notice of the order by the court or any party [CCP § 405.39].

**21.23[3] Extension of Time.** The court that issued the order may, within the initial 20-day period, extend the initial 20-day period for one additional period not to exceed 10 days [CCP § 405.39].

**21.23[4] Copy of the Petition Must Be Filed With Court Clerk.** A copy of the petition for writ of mandate must be delivered to the clerk of the court which issued the order with a request that it be placed in the court file [CCP § 405.39].



#### Strategic Point:

An order expunging a lis pendens is not effective, nor can it be recorded in the office of any county recorder, after a petition for writ of mandate has been filed, until the proceeding commenced by the petition has been finally adjudicated. However, when an expungement order is presented, the county recorder has no duty to determine whether such a petition has been filed [*CCP* § 405.35].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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VI. WITHDRAWING A LIS PENDENS NOTICE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.24*

**21.24 CHECKLIST: Withdrawing a Lis Pendens Notice.**

☐ Prepare notice of withdrawal.

**Authority:**

*CCP § 405.50*

**Discussion:**

*See 21.26[1]*

**Form:**

*See 21.43*

☐ Have notice executed by:

☐ Person who recorded original lis pendens notice; or

☐ That person's successor.

**Authority:**

*CCP § 405.50*

**Discussion:**

*See 21.26[2]*

☐ Have notary execute acknowledgment [*CCP § 405.50*].

**Authority:**

*CCP § 405.50*

**Discussion:**

See 21.26[2][b]

- ☐ Record notice in office of recorder where lis pendens was originally filed.

**Authority:**

CCP § 405.50

**Discussion:**

See 21.26[4]



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**21.25 Effect of Withdrawing Lis Pendens.**

Withdrawal means that the claimant has voluntarily chosen not to assert his or her interest against subsequent purchasers [ *Bishop Creek Lodge v. Scira* (1996) 46 CA4th 1721, 1734-1735, 54 CR2d 745 (decided under prior law)]. Upon the withdrawal of a notice of pendency of action, neither the notice nor any information derived from it, constitute actual or constructive notice of any of the matters contained, claimed, alleged, or contended therein, or of any of the matters related to the action, or create a duty of inquiry in any person thereafter dealing with the affected property [CCP § 405.60].

**Strategic Point:**



Voluntary withdrawal would minimize exposure from an inappropriately recorded lis pendens. Although the lis pendens after withdrawal would not create a duty of inquiry, the prior recording would still appear on the title report and alert prospective purchasers to make prudent inquiries.



**Warning:**

Withdrawing a lis pendens does not automatically preclude an award of attorney fees for an improperly filed lis pendens under CCP § 405.38. The court must still determine which party is the prevailing party based on the trial court's determination of which party realized its objectives in the proceeding [ *Castro v. Superior Court* (2004) 116 CA4th 1010, 1019 , 10 CR3d 865 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Lis Pendens Terminations



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Chapter 21 Lis Pendens  
VI. WITHDRAWING A LIS PENDENS NOTICE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.26*

**21.26 Preparing and Filing Notice of Withdrawal.**

**21.26[1] Preparing Notice.** The governing statute does not specify the contents of a notice of withdrawal, but logic suggests that it should contain the following:

- The date the original lis pendens was filed.
- The name of the party who filed it.
- A description of the property affected
- The fact that the notice is being withdrawn.
- Signature block.
- Space for notarial acknowledgment (required by *CCP* § 405.50).

 **Cross Reference:**

Form, see 21.43.

**21.26[2] Execution Requirements.**

**21.26[2][a] Person Who Recorded Lis Pendens Must Sign.** The document withdrawing the lis pendens must be executed by the party who recorded the notice of pendency of action or by the party's successor in interest [*CCP* § 405.50].

**21.26[2][b] Acknowledgment Must Be Executed.** In order to be valid, the notice of withdrawal must be acknowledged [*CCP* § 405.50].

**21.26[3] Notice May Be Filed at Any Time.** A notice of withdrawal may be filed at any time after the lis pendens has been recorded [*CCP* § 405.50].

**21.26[4] Notice Must Be Recorded.** The notice of withdrawal must be recorded in the office of the recorder in which the lis pendens was originally recorded [*CCP* § 405.50]. Note that there is no requirement that the notice of withdrawal be filed or served on any other party, or on the court in which the underlying action is pending.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Lis Pendens Terminations





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Chapter 21 Lis Pendens

## VII. REQUIRING CLAIMANT TO GIVE UNDERTAKING AS CONDITION OF MAINTAINING NOTICE IN RECORD TITLE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.27*

### 21.27 CHECKLIST: Requiring Claimant to Give Undertaking as Condition of Maintaining Notice in Record Title.

- ☐ Determine whether to seek order requiring claimant to post undertaking, and whether to have the motion for expunging lis pendens request alternative relief.

**Authority:**

*CCP § 405.34*

**Discussion:**

See 21.28

- ☐ Prepare and file motion to require undertaking.



**Timing:**

- ☐ Motion may be filed at any time after lis pendens notice is recorded.

**Authority:**

*CCP § 405.34*

**Discussion:**

See 21.29[1]

- ☐ Motion may be made by any person--party or nonparty--who has an interest in the real property.
- ☐ If person making motion is a nonparty, obtain leave to intervene from court at or before the time

person moves to require an undertaking.

**Authority:**

*CCP § 405.34*

**Discussion:**

*See 21.29[2]*

- ☐ Prepare motion to file undertaking.

**Authority:**

*CCP § 405.34*

**Discussion:**

*See 21.29[3]*

**Form:**

*See 21.41*

- ☐ Prepare proposed order.

**Form:**

*See 21.42*

- ☐ Prepare accompanying documents and file and serve motion.

**Discussion:**

*See 21.29[4], [5]*

- ☐ Present oral testimony, if permitted by court, on relevant issues such as:

- ☐ Why claimant should be required to post an undertaking.
- ☐ Appropriate amount of the undertaking.

**Authority:**

*CCP § 405.34*

**Discussion:**

*See 21.30[1]*

- ☐ If discovery is needed, request court to make appropriate discovery orders.

**Authority:**

*CCP § 405.34*

**Discussion:**

*See 21.30[2]*

☐ Court will determine the nature and amount of any undertaking required from claimant, as court determines to be just [*CCP* § 405.34].

**Authority:**

*CCP* § 405.34

**Discussion:**

See 21.31[1]

☐ Note date in court order by which claimant must show compliance and, if claimant fails to do so by that date, verify that court has ordered lis pendens expunged.

**Authority:**

*CCP* § 405.34

**Discussion:**

See 21.31[1]

☐ If claimant ultimately fails to prevail on real property claim in underlying action and claimant's maintenance of the lis pendens has caused a party to be damaged, file motion seeking recovery on undertaking.

**Authority:**

*CCP* §§ 405.34, 996.440

**Discussion:**

See 21.33



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## VII. REQUIRING CLAIMANT TO GIVE UNDERTAKING AS CONDITION OF MAINTAINING NOTICE IN RECORD TITLE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.28*

### **21.28 Requiring Claimant to Give Undertaking.**

Subject to *CCP § 405.31* (expungement for failure of pleading to contain a real property claim) and *CCP § 405.32* (expungement for failure to establish the probable validity of the real property claim), at any time after a notice of pendency of action has been recorded, and regardless of whether a motion to expunge has been filed, the court, upon motion by any person with an interest in the property, may require the claimant to give the moving party an undertaking as a condition of maintaining the notice in the record title [*CCP § 405.34*]. The court has authority to require an undertaking when appropriate even if the claimant meets the statutory tests imposed on a claimant's lis pendens [*CCP § 405.34*, comment 1].



#### **Strategic Point--Moving Party:**

Requiring a claimant to give an undertaking may be used as a device to discourage the claimant from maintaining the lis pendens in some cases in which grounds for expunging the lis pendens would not exist. Also, when making the motion for expungement, the moving party usually should request alternative relief that the party who recorded the lis pendens be required to post a bond. In cases involving "close calls," the lis pendens may not be expunged but a bond may be ordered. In this way, the court can protect the interests of both parties regardless of which party ultimately prevails.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Lis Pendens General Overview



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## VII. REQUIRING CLAIMANT TO GIVE UNDERTAKING AS CONDITION OF MAINTAINING NOTICE IN RECORD TITLE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.29*

### **21.29 Preparing and Filing Motion.**

**21.29[1] When Motion May Be Filed.** A motion requiring a claimant to give an undertaking as a condition of maintaining a notice in the record title may be filed at any time after the notice has been recorded, regardless of whether or not a motion to expunge has been filed [CCP § 405.34].

### **21.29[2] Who May File Motion.**

**21.29[2][a] Any Person With Interest in Subject Property May Make Motion.** Any person with an interest in the real property may move to require the claimant to give an undertaking [CCP § 405.34].

**21.29[2][b] Nonparty Must Obtain Leave to Intervene.** A person who is not a party to the action must obtain leave to intervene from the court at or before the time the person moves to require an undertaking [CCP § 405.34].

#### **Strategic Point:**



A nonparty who seeks to require a claimant to give an undertaking must file a motion to intervene. This motion should be separate from the motion to give an undertaking, since local rules may prevent the combination of motions in one pleading document.



#### **Cross Reference:**

See Ch. 31, Intervention.

**21.29[3] Contents of Application (Motion) to Require Undertaking.** The governing statute does not require any specific contents for a motion to require a lis pendens claimant to give an undertaking. Presumably, however, such a motion should meet the requirements applicable to motions generally and, at a minimum, contain the following:

- Statement of purpose of motion; i.e., to require claimant to provide undertaking.

- Location and date of recordation of lis pendens.
- Identity of claimant who filed lis pendens notice.
- Description of real property as to which notice was filed.
- Relationship of person seeking undertaking to real property (i.e., owner or other status).

 **Cross Reference:**

Form, see 21.41.

Basic content requirements for motions generally, see Ch. 26, Law and Motion Procedure.

**21.29[4] Preparing Accompanying Documents.** The following documents should also be prepared for submission with the motion to require the claimant to post an undertaking:

- Proposed order.

 **Cross Reference:**

Form, see 21.42.

- Supporting memorandum.

 **Warning:**

A supporting memorandum is required to be served and filed with this notice of motion [see CCP §§ 1005, 1010; Cal Rules of Ct, Rule 3.1113(a)].

 **Cross Reference:**

California Points and Authorities, Ch. 145, Lis Pendens (Matthew Bender).

**21.29[5] Filing and Serving Motion.** Filing and service of the motion is governed by CCP § 1005(a)(13). Follow standard motions practice.

 **Cross Reference:**

Procedure for noticed motions, Ch. 26, Law and Motion Practice, 26.23.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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## VII. REQUIRING CLAIMANT TO GIVE UNDERTAKING AS CONDITION OF MAINTAINING NOTICE IN RECORD TITLE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.30*

### 21.30 Proceedings on Motion.

**21.30[1] Introducing Oral Testimony.** The court may permit evidence to be received in the form of oral testimony and may make any orders it deems just to provide for discovery by any affected party [CCP § 405.34]. Presumably, although the statute does not specify, such evidence would need to address the issues of the necessity and amount of an undertaking.



#### **Warning:**

The governing statute [CCP § 405.34] does not expressly authorize the court to receive written evidence. This is in contrast to the statute governing motions to expunge [CCP § 405.30], which does expressly grant the parties the right to file written declarations or evidence along with the latter type of motion. Although the statute refers to oral testimony and not to "evidence or declarations," the statute's intent appears to be to alert the party seeking the bond and the court to the appropriateness of oral testimony, which presumably would address the harm caused by the lis pendens. As a practical matter, a motion to require the party recording the lis pendens to post an undertaking would almost always be accompanied with, and be an alternative to, a motion to expunge.

#### **Prerequisite:**

A written statement setting forth the nature and the extent of the evidence sought to be introduced and a reasonable time estimate for presentation of such evidence at the hearing must be filed at least three days prior to the hearing [Cal Rules Ct, Rule 3.1306(b)].



#### **Cross Reference:**

See Ch. 26, *Law and Motion Procedure*, 26.15.

**21.30[2] Requesting Order for Discovery.** The court may make any orders it deems just to provide for discovery on a motion to require the claimant to give an undertaking [CCP § 405.34].



**Strategic Point:**

The court may grant a continuance on the condition that the lis pendens be withdrawn pending the outcome of the discovery and expungement hearing.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Lis Pendens General Overview





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RECORD TITLE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.31*

**21.31 Terms of Undertaking.**

**21.31[1] Court Determines Amount of Claimant's Undertaking.** The court will determine the nature and amount of any undertaking required from the claimant, as the court determines to be just [*CCP* § 405.34].

**21.31[2] Court Must Set a Return Date for the Claimant to Show Compliance.** In its order requiring an undertaking, the court will set a return date for the claimant to show compliance [*CCP* § 405.34].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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RECORD TITLE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.32*

**21.32 Expungement for Noncompliance by Return Date.**

The court must order the notice of pendency of action expunged without further notice or hearing if the claimant fails to show compliance on the return date [CCP § 405.34].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Lis Pendens Terminations



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*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.33*

### **21.33 Recovery on a Claimant's Undertaking.**

**21.33[1] Recovery Following Termination of Underlying Proceeding.** Once the underlying proceeding has been resolved, a party may recover on the undertaking on a showing that [CCP § 405.34]:

- The claimant did not prevail on the real property claim; and
- The person seeking recovery suffered damages as a result of the maintenance of the notice.

#### **Cross Reference:**

*California Forms of Pleading and Practice, Ch. 538, Suretyship, Bonds, and Undertakings, § 528.40 et seq. (Matthew Bender).*

**21.33[2] Amount of Recovery.** Recovery may be had up to the amount of the undertaking, but may not exceed that amount [CCP § 405.34]. In assessing damages, the court does not consider the claimant's intent or the presence or absence of probable cause [CCP § 405.34; CCP § 405.32, comment 6]. The property owner cannot recover on a claimant's undertaking for damages unrelated to the filing of the lis pendens [ *On v. Cow Hollow Properties (1990)* 222 CA3d 1568, 1573, 272 CR 535 (prior law)].

**21.33[3] Procedure for Recovery.** Recovery on a claimant's undertaking is made on motion following entry of final judgment in the underlying action, in the manner specified in CCP § 996.440. An independent action for recovery is not required [CCP § 996.440].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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RECORD TITLE

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.34*

**21.34 Undertaking May Be Modified or Exonerated.**

After notice and hearing, for good cause and on such terms as are just, the court may exonerate or modify any undertaking required of the claimant or pursuant to a stipulation made in lieu of such an order [CCP § 405.37]. An order of the court exonerating or modifying a claimant's undertaking may be made conditional upon the giving of a new undertaking [CCP § 405.37].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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VIII. EXONERATING OR MODIFYING AN UNDERTAKING

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.35*

**21.35 CHECKLIST: Exonerating or Modifying an Undertaking.**

- ☐ Determine whether "good cause" may exist to support modification or exoneration.

**Authority:**

*CCP § 405.37*

- ☐ Prepare motion to exonerate or modify undertaking.

- ☐ Prepare documents to be filed with motion.

**Discussion:**

*See 21.37[1]*

- ☐ File documents with court.

- ☐ Serve documents on other party.

- ☐ Appear at hearing on motion and present any evidence in support of motion.

**Discussion:**

*See 21.37[2]*

- ☐ If court orders a new undertaking as a condition for exonerating or modifying undertaking, obtain new undertaking within time frame specified in court's order.

**Authority:**

*CCP § 405.37*



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VIII. EXONERATING OR MODIFYING AN UNDERTAKING

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.36*

**21.36 Court Authority.**

The court has authority to exonerate or modify any undertaking given under to *CCP* § 405.33 (expungement of a lis pendens upon the giving of an undertaking) or *CCP* § 405.34 (a claimant's undertaking in order to maintain the lis pendens), or pursuant to a stipulation made in lieu of such an order [*CCP* § 405.37].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Lis Pendens General Overview



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### **21.37 Procedure for Exonerating or Modifying Order.**

**21.37[1] Preparation of Order and Supporting Materials.** Counsel should prepare and file a motion and supporting documentation to exonerate or modify the undertaking in the same manner as for the other motions discussed in this chapter.



#### **Cross Reference:**

Basic content requirements for motions and orders, see Ch. 26, Law and Motion Procedure.

**21.37[2] Notice and Hearing Required.** A notice and hearing on the motion are required for exoneration or modification of the lis pendens [*CCP* § 405.37].

**21.37[3] Order of Exoneration or Modification Can Impose New Undertaking.** An order of the court under this section may be made conditional upon the giving of a new undertaking [*CCP* § 405.37].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Remedies Lis Pendens General Overview





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*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.38*

**21.38 Notice of Pendency of Action (Lis Pendens).**

Notice of Pendency of Action (Lis Pendens)

Recording requested by \_\_\_\_\_ [name]

When recorded mail to: \_\_\_\_\_ [address]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF \_\_\_\_\_

\_\_\_\_\_ [name],

Plaintiff,

vs.

\_\_\_\_\_ [name],

Defendant.

)

)

)

)

)

)

)

)

No. \_\_\_\_\_

NOTICE OF PENDENCY OF ACTION

NOTICE IS GIVEN that the above-captioned action was commenced on \_\_\_\_\_ [date], in the above-captioned court by \_\_\_\_\_ [name of plaintiff/claimant], against \_\_\_\_\_ [name of defendant/property owner]; the action is now pending in the above court.

The above-captioned action alleges a real property claim affecting certain real property that is situated in \_\_\_\_\_ [county in which notice is to be recorded] County, California, and that this property is described as follows:

[legal description of real property and, if appropriate, the property's street address].

Date: \_\_\_\_\_

\_\_\_\_\_ [signature]  
Attorney for \_\_\_\_\_  
[claimant's name and status]

#### ACKNOWLEDGMENT

State of California  
County of \_\_\_\_\_

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name and title of officer] personally appeared \_\_\_\_\_ [name of document signer] personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signatures(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

\_\_\_\_\_  
Signature of Notary

#### NOTES.

**Authority:**  
CCP § 405.20

**Drafting Notice:**  
See 21.05

**Related Withdrawal of Lis Pendens Notice:**  
See 21.43



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2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.39

**21.39 Motion to Expunge Lis Pendens.**

Motion to Expunge Lis Pendens  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR OR-  
) DER EXPUNGING LIS PENDENS[, SUPPORTING  
) DECLARATION OF \_\_\_\_\_ (name),  
) AND SUPPORTING MEMORANDUM]  
) [Telephone Appearance]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) [Judge: \_\_\_\_\_]  
) Date Action Filed: \_\_\_\_\_  
) [Trial Date: \_\_\_\_\_]

To \_\_\_\_\_ [claimant, e.g., plaintiff John Smith] \_\_\_\_\_ [name], and to his/her attorney  
of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon after  
as the matter may be heard, in [\_\_\_\_\_ (Department or Division) of] the above court, located at  
\_\_\_\_\_, [street address], in the City of \_\_\_\_\_, California, \_\_\_\_\_  
[moving party, e.g., defendant or intervenor] \_\_\_\_\_ [name] will, and hereby does, move for an order to  
expunge the notice of pendency of action (lis pendens) recorded on \_\_\_\_\_ [date], in Book

\_\_\_\_\_, at Page \_\_\_\_\_, of the Official Records of \_\_\_\_\_ County, California. The motion will be made on the grounds that \_\_\_\_\_ [the pleading on which the notice is based does not contain a real property claim *and/or* the real property claim alleged in the pleading on which the notice is based lacks probable validity *and/or* adequate relief can be secured to the claimant by the giving of an undertaking *and/or* the lis pendens is void and invalid for a failure to comply with the \_\_\_\_\_ (service *and/or* filing) requirements of *Code of Civil Procedure Section 405.22*].

The motion further requests that \_\_\_\_\_ [*moving party, e.g., defendant Mary Jones*] be awarded reasonable attorney's fees and costs incurred in connection with this motion pursuant to *Code of Civil Procedure Section 405.38*, in the amount of \$\_\_\_\_\_.

The motion will be based on the following: this notice of motion; the attached declaration(s) of \_\_\_\_\_ [*name(s)*]; the attached supporting memorandum; the papers, records, and files of this action; and any evidence presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

[*moving party's status and name*]

SUPPORTING DECLARATION OF \_\_\_\_\_ [*name*]

I, \_\_\_\_\_ [*name*], declare:

1. I am \_\_\_\_\_ [*identify declarant, e.g., defendant in the above-entitled matter, and the owner of the property on which plaintiff has recorded the notice of lis pendens, which is the subject of this motion to expunge*].

2. \_\_\_\_\_ [*Set forth additional facts from declarant's knowledge that support the motion and the grounds on which it is based, e.g., Plaintiff's lawsuit is based on an alleged loan of money from plaintiff to declarant to finance certain improvements on declarant's property. The alleged loan did not provide for any lien or encumbrance on declarant's property but was evidenced only by a promissory note signed by declarant in which I allegedly personally promised and agreed to pay to plaintiff the sum of \$\_\_\_\_\_ in installments over a period of \_\_\_\_\_ years. Plaintiff's lawsuit is based on declarant's alleged default in payment of that loan, which declarant denies and disputes in my answer on file with this court in the above-entitled matter*].

3. Declarant has incurred expenses as follows in making this motion: \_\_\_\_\_ [*itemize reasonable expenses, including attorney's fees, and explain basis of computing each expense*], for a total of \$\_\_\_\_\_.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

**SUPPORTING MEMORANDUM**

[Add memorandum in support of motion.]

NOTES.

**Authority:**

*CCP § 405.30*



**Timing:**

*See 21.13[1]*

**Related Order Expunging Lis Pendens:**

*See 21.40*

**Related Motion to Require Claimant to Provide Undertaking:**

*See 21.41*

**Related Forms of Memoranda:**

*See California Points and Authorities, Ch. 145, Lis Pendens, §§ 145.20-145.23 (Matthew Bender)*



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Chapter 21 Lis Pendens  
IX. FORMS

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.40*

**21.40 Order Expunging Lis Pendens.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_ [name],

Plaintiff,

vs.

\_\_\_\_\_ [name],

Defendant.

)  
)  
)  
)  
)  
)  
)

No. \_\_\_\_\_

ORDER TO EXPUNGE NOTICE OF PENDENCY  
OF ACTION AND GRANTING ATTORNEYS'  
FEES AND COSTS

\_\_\_\_\_

The motion of \_\_\_\_\_ [name], defendant [*or specify other party*] in the above entitled action, for an order to expunge the Notice of Pendency of Action previously filed by the plaintiff, \_\_\_\_\_ [name], came on for hearing before this court this \_\_\_\_\_ day of \_\_\_\_\_ [month], \_\_\_\_\_ [year], \_\_\_\_\_ [name] appearing as attorney for \_\_\_\_\_ [*claimant, e.g.,* plaintiff], and \_\_\_\_\_ [name] appearing as attorney for \_\_\_\_\_ [*moving party, e.g.,* defendant], and the court being fully advised, having examined all of the evidence introduced at the hearing, both documentary and oral, and good cause appearing therefor;

IT IS HEREBY ORDERED that the above referenced Notice of Pendency of Action recorded by plaintiff upon the real property located in the County of \_\_\_\_\_, State of California, more fully described as follows:

[*insert legal description as contained in the lis pendens*]

, be hereby expunged [*if expungement is conditioned upon posting of a bond in favor of the moving party, add:*, conditioned upon the filing by defendant with this court, on or before \_\_\_\_\_ (*return date as set by court*) of an undertaking in the sum of \$\_\_\_\_\_ to indemnify plaintiff for all damages that proximately result from the expungement, which plaintiff may incur if defendant does not prevail in this action].

[IT IS FURTHER ORDERED that defendant's motion for attorneys' fees and costs be granted and the fees are assessed at \$\_\_\_\_\_.]

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature ]

Judge of the Superior Court

NOTES.

**Authority:**

CCP §§ 405.31, 405.32

**Related Motion to Expunge Lis Pendens:**

See 21.39



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Chapter 21 Lis Pendens  
IX. FORMS

*2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.41*

**21.41 Motion to Require Claimant to Provide Undertaking.**

Motion to Require Claimant to Provide Undertaking  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR OR-  
) DER TO REQUIRE CLAIMANT TO PROVIDE  
) UNDERTAKING AS CONDITION FOR MAIN-  
) TAINING NOTICE OF PENDENCY OF ACTION[,  
) SUPPORTING DECLARATION OF  
) \_\_\_\_\_ (name), AND SUPPORTING  
) MEMORANDUM]  
) [Telephone Appearance]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) [Judge: \_\_\_\_\_]  
) Date Action Filed: \_\_\_\_\_  
) [Trial Date: \_\_\_\_\_]

To \_\_\_\_\_ [claimant, e.g., plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], \_\_\_\_\_ [time], or as soon  
thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of]  
this court, located at \_\_\_\_\_ [street address], in the City of \_\_\_\_\_, California,



\_\_\_\_\_ [moving party, e.g., defendant or intervenor] \_\_\_\_\_ [name] will, and hereby does, move for an order requiring \_\_\_\_\_ [claimant, e.g., plaintiff John Smith], the claimant herein, to give an undertaking to the \_\_\_\_\_ [moving party, e.g., defendant] as a condition of maintaining the notice of pendency of action (lis pendens) that \_\_\_\_\_ [claimant, e.g., plaintiff] had recorded on \_\_\_\_\_ [date], in Book \_\_\_\_\_, at Page \_\_\_\_\_, of the Official Records of \_\_\_\_\_ County, California. The motion will be made on the grounds that the undertaking is necessary to indemnify \_\_\_\_\_ [moving party, e.g., defendant] for all damages proximately resulting from the maintenance of the notice if \_\_\_\_\_ [claimant, e.g., plaintiff] does not prevail on the real property claim.

The motion further requests that \_\_\_\_\_ [moving party, e.g., defendant] be awarded reasonable attorney's fees and costs incurred in connection with this motion pursuant to *Code of Civil Procedure Section 405.38*, in the amount of \$\_\_\_\_\_.

The motion will be based on the following: this notice of motion; the attached declaration(s) of \_\_\_\_\_ [name(s)]; the attached supporting memorandum; the papers, records, and files of this action; and any evidence presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[moving party's status and name]

SUPPORTING DECLARATION OF \_\_\_\_\_ [name]

I, \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record for \_\_\_\_\_, who is the defendant in the above action].

2. \_\_\_\_\_ [Moving party, e.g., Defendant] is seeking an order of this court to require \_\_\_\_\_ [claimant, e.g., plaintiff] \_\_\_\_\_ [name of claimant], claimant, to provide \_\_\_\_\_ [moving party, e.g., defendant] with an undertaking as a condition of maintaining the lis pendens recorded by claimant in the office of the County Recorder of \_\_\_\_\_ County, City of \_\_\_\_\_, California.

3. There is good cause for the order sought by \_\_\_\_\_ [moving party, e.g., defendant] in that \_\_\_\_\_ [set forth facts, e.g., defendant will suffer damages because the real property described in the lis pendens notice will be unmarketable during the pendency of the lawsuit. An undertaking is necessary to protect defendant's financial interest in the event the property decreases in value during the pendency of the lawsuit].

4. \_\_\_\_\_ [*Moving party, e.g., Defendant*] has incurred expenses as follows in making this motion:  
 \_\_\_\_\_ [*itemize reasonable expenses, including attorney's fees, and explain basis of computing each expense*], for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

#### SUPPORTING MEMORANDUM

[Add memorandum in support of motion.]

NOTES.

#### **Authority:**

CCP §§ 405.33, 405.34



#### **Timing:**

See 21.29[1]

#### **Related Motion to Expunge Lis Pendens:**

See 21.39

#### **Related Order Requiring Claimant to Give Undertaking to Moving Party:**

See 21.42

#### **Related Forms of Memoranda:**

See *California Points and Authorities*, Ch. 145, *Lis Pendens*, § 145.24 (Matthew Bender)



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**21.42 Order Requiring Claimant to Give Undertaking to Moving Party.**

Order Requiring Claimant to Give Undertaking to Moving Party

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)  
)  
)  
)  
)  
)  
)

NO. \_\_\_\_\_  
ORDER

The motion of \_\_\_\_\_ [moving party, e.g., defendant or intervenor] \_\_\_\_\_ [name] for an order requiring the giving of an undertaking as a condition of maintaining a notice of pendency of action came on regularly for hearing by the court on this date. Plaintiff appeared by counsel \_\_\_\_\_ [name], and defendant appeared by counsel \_\_\_\_\_ [name]. \_\_\_\_\_ [Identify any other moving parties, claimants, and attorneys who made appearances.]

On proof made to the satisfaction of the court that the motion ought to be granted, IT IS ORDERED that the motion of \_\_\_\_\_ [moving party, e.g., defendant] be, and it hereby is, granted and that \_\_\_\_\_ [claimant, e.g., plaintiff] file with this court on or before \_\_\_\_\_ [date], an undertaking in the amount of \$\_\_\_\_\_ for the indemnification of \_\_\_\_\_ [moving party, e.g., defendant] if \_\_\_\_\_ [claimant, e.g., plaintiff] does not prevail on the real property claim. \_\_\_\_\_ [Claimant, e.g., Plaintiff] must show fulfillment of this condition by \_\_\_\_\_ [date]. If this showing is not made by the return date, this court shall issue an order, without further notice or hearing, expunging the notice of pendency of action recorded on \_\_\_\_\_ [date], in Book \_\_\_\_\_, at Page \_\_\_\_\_

\_\_\_\_\_, of the Official Records of \_\_\_\_\_ County, California.

IT IS FURTHER ORDERED that \_\_\_\_\_ [*claimant, e.g., plaintiff*] pay to \_\_\_\_\_  
[*moving party, e.g., defendant*] the sum of \$ \_\_\_\_\_ as reasonable attorney's fees and costs.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature* ]

Judge of the Superior Court

NOTES.

**Authority:**

*CCP §§ 405.33, 405.34*

**Related Motion to Require Claimant to Provide Undertaking:**

*See 21.41*



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Chapter 21 Lis Pendens  
IX. FORMS

2-21 MB Practice Guide: CA Pretrial Civil Procedure 21.43

**21.43 Withdrawal of Lis Pendens Notice.**

Withdrawal of Lis Pendens Notice  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                     |
|---------------|---|-------------------------------------|
| _____ [name], | ) |                                     |
| Plaintiff,    | ) | NO. _____                           |
| vs.           | ) | WITHDRAWAL OF NOTICE OF PENDENCY OF |
| _____ [name], | ) | ACTION                              |
| Defendant.    | ) | NOTICE IS HEREBY GIVEN THAT:        |
|               | ) |                                     |
|               | ) |                                     |

[EITHER, if notice is being executed by party who executed lis pendens]

On \_\_\_\_\_ [date], the undersigned, \_\_\_\_\_ [name],

[OR, if notice is being executed by successor to party who executed lis pendens]

The undersigned is the successor in interest of \_\_\_\_\_ [name of person who recorded original lis pendens]. On \_\_\_\_\_ [date], \_\_\_\_\_ [name]

[CONTINUE]

recorded a Notice of Pendency of Action (lis pendens) in Book \_\_\_\_\_, at Page \_\_\_\_\_, of the Official Records of \_\_\_\_\_ County, California, with respect to the following described real property:

*[insert legal description as contained in the lis pendens]*

As of the date of recordation of this notice, THE ABOVE REFERENCED NOTICE OF PENDENCY OF ACTION IS HEREBY WITHDRAWN pursuant to *Code of Civil Procedure Section 405.50* and shall be of no further force or effect.

Dated \_\_\_\_\_

\_\_\_\_\_  
*[signature of person who signed original lis pendens notice]*

\_\_\_\_\_ *[typed name]*

#### ACKNOWLEDGMENT

State of California

County of \_\_\_\_\_

On \_\_\_\_\_ *[date]*, before me, \_\_\_\_\_ *[name and title of officer]* personally appeared \_\_\_\_\_ *[name of document signer]* personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signatures(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

\_\_\_\_\_  
Signature of Notary

#### NOTES.

##### **Authority:**

*CCP § 405.50*

##### **Related Notice of Pendency of Action (Lis Pendens):**

*See 21.38*



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Chapter 22 Disqualification of Judge

*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.syn*

**§ 22.syn Synopsis to Chapter 22: Disqualification of Judge**

22.01 Scope.

22.02 Objective and Strategy.

22.03 CHECKLIST: Peremptory Challenge to Judge.

22.04 Options and Strategy for Peremptory Challenge.

22.05 Peremptory Challenge Statute Applies to Judges, Court Commissioners, and Referees but Not to Appellate Justices.

22.06 Grounds for Peremptory Challenge.

22.07 Peremptory Challenge Can Be Used in Addition to Disqualification for Cause or Change in Place of Trial.

22.08 Procedure for Making Peremptory Challenge to Judge.

22.08[1] Challenge by Oral or Written Motion Without Notice.

22.08[2] Motion to Be Supported by Affidavit, Declaration Under Penalty of Perjury, or Oral Statement Under Oath.

22.08[3] Good-Faith Belief of Prejudice Sufficient.

22.09 Timing of Peremptory Challenge Depends on Court's Method of Assigning Cases.

22.09[1] Ten-Day/Five-Day Rule.

22.09[1][a] If Judge Is Known 10 Days Before Trial or Hearing Date Challenge Five Days Before That Date.

22.09[1][b] When Trial Is Postponed.

- 22.09[1][c] When Matter Is Assigned to Department and Not Specific Judge.
- 22.09[1][d] Tentative Rulings.
- 22.09[1][e] Calculation of Five Days.
- 22.09[1][f] Intervening Party.
- 22.09[1][g] Discovery Referees.
- 22.09[2] Master Calendar Rule.
- 22.09[3] All-Purpose Assignment Provision.
  - 22.09[3][a] Motion 10 Days After Notice of Assignment or Later Appearance.
  - 22.09[3][b] Late Appearing Party May Be Precluded From Challenge.
- 22.09[4] Cases Subject to Trial Court Delay Reduction Act.
  - 22.09[4][a] Motion Within 15 Days of Appearance in Direct Calendar Court.
  - 22.09[4][b] Commencement of 15-Day Period.
- 22.09[5] No Challenge Once Trial Has Commenced.
  - 22.09[5][a] Commencement of Trial Cuts Off Right to Peremptory Challenge.
  - 22.09[5][b] When Trial Commences.
- 22.09[6] No Challenge After Hearing Has Commenced.
- 22.09[7] When Proceedings Are Consolidated.
- 22.09[8] Coordinated Proceedings.
- 22.09[9] Motion Must Be Made Before Hearing on Contested Issue.
- 22.09[10] Challenge Allowed After Pretrial Proceeding If Determination of Contested Fact Issues Relating to Merits of Case Was Not Involved.
  - 22.09[10][a] Party May Challenge Judge Who Has Not Determined Contested Issue of Fact Relating to Merits.
  - 22.09[10][b] Demurrers and Motions for Judgment on the Pleadings.
  - 22.09[10][c] Summary Judgment Motions.
  - 22.09[10][d] Motion to Quash.
  - 22.09[10][e] Judge May Not Waive Timeliness Requirement.



22.09[11] Continued Proceedings.

22.09[11][a] Party May Challenge Judge in Subsequent Proceeding That Is Not Continuation of Prior Proceedings.

22.09[11][b] Proceeding Is a Continuation of Initial Action If It Involves Substantially the Same Issues.

22.09[11][c] Challenge Is Allowed in Continued Proceeding If Judge Is Different.

22.10 Number of Peremptory Challenges Is Limited.

22.10[1] Party or Attorney May Make Only One Challenge.

22.10[2] Only One Motion Per Side Where There Are Multiple Plaintiffs or Defendants.

22.10[3] Exception to One Motion Per Side Rule When Parties on Same Side Have Adverse Interests.

22.10[3][a] Parties on Same Side Treated As Separate Parties.

22.10[3][b] Burden of Establishing Adverse Interest.

22.11 Peremptory Challenge After Reversal on Appeal and Remand for New Trial.

22.11[1] Challenge Authorized If Case Is Assigned to Trial Judge Assigned to Prior Proceeding.

22.11[2] Reverse and Remand Scenario Is Exception to One Motion Per Case Restriction for Successful Appellant.

22.11[3] Disqualification Applies Only If a New Trial on Remand.

22.12 Judge Lacks Jurisdiction to Proceed After Proper Peremptory Challenge.

22.12[1] Judge's Orders or Judgment After Challenge Are Void or Voidable.

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22.12[3] Judge May Still Conduct Proceedings Not Involving Contested Issue of Law or Fact.

22.13 Reassignment After Peremptory Challenge.

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- 22.15 CHECKLIST: Disqualifying Judge for Cause.
- 22.16 Options and Strategies in Evaluating Disqualification for Cause.
- 22.17 Disqualification for Cause Statutes Apply to Trial Judges, Commissioners, Referees, and Temporary Judges.
- 22.18 Grounds for Disqualification for Cause.
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- 22.18[2] Judge Has Personal Knowledge of Disputed Evidentiary Facts.
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  - 22.18[2][b] Judge Is Deemed to Have Personal Knowledge If Judge or Close Relative Is Likely to Be Material Witness.
  - 22.18[2][c] Calculating Third Degree of Relationship.
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- 22.18[3] Judge Served As Lawyer in the Proceeding.
  - 22.18[3][a] General Rule.
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- 22.18[4] Judge Has Financial Interest in Subject Matter or Party.
  - 22.18[4][a] General Rule.
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22.18[7][c] Judge Who Believes Party Is Lying.

22.18[7][d] Judge's "Fixed Opinion".

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22.18[8] Judge Has Physical Impairment.

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22.18[10] Court-Appointed Temporary Judge Has Too Close a Connection to Case or Courthouse.

22.19 Factors That Are Not Grounds for Disqualification Under CCP § 170.2.

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22.19[2] Judge Has Expressed View on Legal or Factual Issue in Proceeding.

22.19[3] Judge Has Participated in Efforts to Pass or Defeat Relevant Laws.

22.20 Judge May Recuse Himself or Herself.

22.21 Rule of Necessity Precludes Disqualification.

22.22 Party May File for Disqualification If Judge Refuses to Recuse Himself or Herself.

22.22A Disqualification of Temporary Judge Uses a Different Procedure.

22.23 Statement of Disqualification by Party.

22.23[1] Must Be Made at Earliest Practicable Opportunity.

22.23[2] Statement Must Be Verified and State Facts Showing Grounds.

22.23[3] Statement Must Be Served on Parties and Judge.

22.23[4] Judge's Response to Disqualification Statement.

22.23[4][a] Judge May Strike Legally Insufficient Statement.

22.23[4][b] Judge May Consent to Disqualification Statement.

22.23[4][c] Judge May Request Another Judge Act in His or Her Place.

22.23[4][d] Judge May Make Written Answer.

22.23[4][e] Judge Is Deemed to Consent to Disqualification for Failure to Timely Respond.

22.24 Determination Regarding Disqualification by Another Judge.

22.24[1] Selection of Judge to Hear Disqualification Question.

22.24[2] Judge Has Discretion to Decide Issue on Papers or by Hearing.

22.24[3] Selection of New Judge to Hear Matter.

22.25 Disqualified Judge Has Very Limited Powers to Rule in Case.

22.25[1] Judge's Power to Rule Is Restricted After Disqualification or After Statement of Disqualification Is Filed Until Determination Is Made.

22.25[2] Judge Retains Enumerated Powers.

22.25[3] Trial Judge's Powers If Statement of Disqualification Filed After Trial or Hearing Begins.

22.26 Effect of Disqualification on Rulings Made Prior to Disqualification.

22.26[1] If Judge Has Not Completed Action.

22.26[2] If Judge Has Completed Action.

22.26[3] Arbitration Ordered by Disqualified Judge Is Not Necessarily Tainted.

22.27 CHECKLIST: Waiving Disqualification for Cause.

22.28 Disqualification May Be Waived Affirmatively or by Failure to Timely Request Disqualification.

22.29 Some Grounds for Disqualification Cannot Be Waived.

22.29[1] Judge Has Personal Bias or Prejudice Concerning a Party.

22.29[2] Judge Has Served as an Attorney in the Matter.

22.29[3] Judge Has Been a Material Witness in the Matter.

22.30 Party May Waive Disqualification by Delay in Disclosing Grounds.

22.31 Waiver Must Be Written and on Record.

22.32 Judge's Prohibited Activities Pertaining to Waiver.

22.32[1] Judge May Not Seek to Induce Waiver.

22.32[2] Judge Must Avoid Effort to Discover If Parties Favor or Oppose Waiver.

22.33 CHECKLIST: Obtaining Review of Disqualification Orders.

22.34 Options and Strategy for Review of Orders.

22.35 Review of Orders Pertaining to Disqualification for Cause.

22.35[1] Disqualification Order Is Not Appealable.

22.35[2] Disqualification Order May Be Reviewed by Writ of Mandate.

22.35[3] Writ Petition Generally Must Be Filed and Served Within 10 Days of Service of Notice of Decision.

22.35[4] Writ May Only Be Sought by Parties to the Proceeding.

22.36 Review of Orders Pertaining to Peremptory Challenge.

22.36A Disqualification Orders May Be Reconsidered by the Assigned Judge.

22.37 Written Statement of Disqualification--General Form.

22.38 Stipulation by Parties Agreeing on Judge to Hear Question of Disqualification.

22.39 Stipulation by Parties Waiving Disqualification of Judge.

22.40 Proceedings to Obtain Peremptory Disqualification of Judge, Court Commissioner, or Referee--Written Notice.

22.41 Affidavit in Support of Written or Oral Motion--Statutory Form.

22.42 Declaration in Support of Written or Oral Motion.



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Chapter 22 Disqualification of Judge  
I. STRATEGY

*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.01*

**22.01 Scope.**

This chapter covers:

- Objectives and strategy for a party seeking to disqualify a judge, either for cause or due to alleged prejudice against the party or his or her attorney [see 22.02].
- Procedures for, timing of and implications of a party's peremptory challenge of a judge on the grounds of prejudice [see 22.03 22.14-22.14; Forms: see 22.40-22.42].
- The grounds on which a judge may or may not be disqualified for cause [see 22.18, 22.19].
- The implications of a judge's recusal or refusal to recuse himself or herself and the judge's powers after a disqualification, as well as the potential for sanctions [see 22.20-22.22, 22.25- 22.26; Form: see 22.38].
- The procedures for and timing of a party's attempt to have a judge disqualified for cause [see 22.23-22.24; Form: see 22.37].
- The possibility of the parties' waiver of the disqualification of a judge [see 22.27-22.32; Form: see 22.39].
- Procedures for seeking appellate review of orders regarding disqualification for cause and peremptory challenges [see 22.33-22.36].

**Core Statutes:**

*CCP §§ 170-170.5, 170.6*



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Chapter 22 Disqualification of Judge  
I. STRATEGY

*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.02*

**22.02 Objective and Strategy.**

The procedures for disqualification of judges allow a party to remove an assigned judge from a case.

There are two methods for disqualifying a judge, for cause or by peremptory challenge:

- Disqualification for cause requires a party to set forth a written, verified statement setting forth facts demonstrating that a judge should be disqualified for cause based on one of the grounds enumerated in *CCP § 170.1* [*CCP § 170.3(c)(1)*; see *CCP §§ 170.1-170.5*].
- Disqualification by peremptory challenge requires only that a party or the party's attorney file a motion supported by an affidavit or declaration under penalty of perjury or an oral statement under oath that the judge is prejudiced against a party or the party's attorney so that the party cannot have a fair and impartial hearing or trial [*CCP § 170.6(a)(2)*]. A party (or side) may only make one peremptory challenge in case with very limited exceptions [*CCP § 170.6(a)(3)*].



**Decision Point:**

You may use disqualification to remove a judge you would rather not have hear the case, but particularly before using your one shot at peremptory disqualification, consider the uncertainty of who may next be assigned (in larger courts) or who is likely to be assigned (in smaller courts). If being assigned from a master calendar, wait until you know who the trial judge will be.



**Warning:**

The fewer the judges the greater care that must be exercised. Remember that judges eat lunch together, discuss pending cases together, and when a challenge is issued, take these challenges to heart.

**Judge's Perspective:**

The peremptory challenge, as most judges prefer to call it, bears other names and in common parlance among judges it is likewise known as a "170.6" or "Paper." The peremptory challenge, unlike the challenge for cause, is automatic if filed and executed in a timely manner. The challenge for cause, on the other hand, requires a verified statement of disqualification by counsel. This, in turn, requires the

challenged judge to file a timely but verified answer. Moreover, the challenge for cause must be ruled on by another judge (of either the same or different county) unless the judge challenged decides to strike the pleading pursuant to *CCP § 170.4*.

Counsel should exercise caution when considering either procedure. First, if the challenge for cause is unsuccessful the matter is returned to the very same judge that you have just accused of bias, prejudice, or some other disqualifying act.

Second, with respect to peremptory challenges counsel should carefully assess the risk that they will not be worse off.

The use of either of these procedures must be exercised with great thought. These are not procedures that should be invoked simply because counsel disagree with a judge's ruling.

### **Distinguish:**

Peremptory challenges under *CCP § 170.6* do not require any factual showing. However, only one challenge per side is permitted under *CCP § 170.6(a)(3)* [see 22.10].

Peremptory challenges and disqualification for cause are cumulative remedies, meaning a party can use both within the course of the same action [see 22.07].

### **Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 317, Judges (Matthew Bender).

California Points and Authorities, Ch. 130, Judges (Matthew Bender).

### **Investigating Judges Using Online Resources:**

Many resources are available online for investigating judges. These resources can help you find information and cases pertaining to your assigned judge. For example, helpful resources at *lexis.com* include:

- For written opinions or decisions by a particular judge and relating to a particular topic, search in Legal tab > States Legal--U.S. > California > Find Cases > CA State Cases, Combined.

☐ Sample search: Using the HISTORY segment and the judge's name, try a search in this format: *history (first name /3 last name)*.

- To find biographical information about a federal judge, search the biographies in Legal tab > Reference > Law > Judicial Staff Directory.

☐ Sample search: For a particular judge, try: *name (first name /3 last name)*.

- To find news articles about a judge, search in the California news files Legal tab > States Legal--U.S. > California > Search News > General News > California News Publications.

☐ Sample search: For articles on a particular judge, try a simple search: *first name /3 last name*.



- To find articles about a judge or legal articles written by the judge both before and after the judge took the bench, search the law reviews and other periodicals in Legal tab > Secondary Legal > Law Reviews, CLE, Legal Journals & Periodicals, Combined.

 Sample search: For legal articles written by a particular judge, try a simple search:  
*first name /3 last name.*

Certain bar organizations provide access to unpublished information about judges. For example the Consumer Attorney of Los Angeles maintains a database of anecdotal experiences from members or access to members with specific experiences with a particular judge. These and similar resources including the Los Angeles County Bar Association should be consulted when performing your investigation.

#### **Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

#### **Legal Topics:**

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Chapter 22 Disqualification of Judge  
II. PEREMPTORY CHALLENGE TO JUDGE

*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.03*

**22.03 CHECKLIST: Peremptory Challenge to Judge.**

☐ Determine whether peremptory challenge is appropriate:

☐ Peremptory challenge available if judge, court commissioner, or referee is alleged to be prejudiced against:

☐ A party.

☐ A party's attorney.

☐ The interest of any party or attorney appearing in the action or proceeding.

**Authority:**

*CCP § 170.6(a)(1)*

**Discussion:**

See 22.06

☐ Determine deadline for making peremptory challenge:

☐ If case that is ready for trial is assigned to court that is ready and able to hear it, master calendar rule applies and motion must be made immediately on the announcement of assignment of judge.

☐ If case is assigned to judge for all purposes, motion must be made within 10 days after:

☐ Notice of assignment; or

☐ A party's appearance if the party has not yet appeared at the time of the assignment.

☐ If neither of above rules applies, 10-day/5-day rule may apply, and if judge is known at least 10 days before date set for trial, motion must be made at least five days before trial date.

☐ If trial or hearing judge is not known with reasonable certainty prior to trial or hearing, motion must be made before trial or hearing commences.

☐ Trial commences after name of first juror is drawn, or in non-jury trial, after opening statement by plaintiff's counsel or if none, after any evidence is given.

☐ If case is subject to Trial Court Delay Reduction Act, party must make motion within 15 days of party's first appearance in direct calendar court.

☐ In master calendar court, master calendar rule applies rather than special rule for Trial Court Delay Reduction Act cases.

**Authority:**

*CCP § 170.6(a)(2); Gov Code § 68616(i); People v. Superior Court (1993) 4 C4th 1164, 1175, 1179, 17 CR2d 815, 847 P2d 1031*

**Discussion:**

See 22.09

☐ Verify peremptory challenge is not precluded by judge having determined contested fact issue relating to merits of case during pretrial phase.

**Authority:**

*CCP § 170.6(a)(2)*

**Discussion:**

See 22.09[10]

☐ If proceedings are continuation of previous proceedings, verify proceedings are separate and independent from the previous proceedings.

**Exception:**

If, on remand for new trial after reversal by appellate court, case is assigned to the same judge who heard the previous trial, a party may move to disqualify if function on remand is actual retrial and not ministerial.

**Authority:**

*CCP § 170.6(a)(2); McClenny v. Superior Court (1964) 60 C2d 677, 681, 36 CR 459, 388 P2d 691 ; Spector v. Superior Court (1961) 55 C2d 839, 843, 13 CR 189, 361 P2d 909*

**Discussion:**

See 22.09[11], 22.11

☐ If multiple plaintiffs or defendants are involved, determine:

- ☐ Who on each side will exercise the side's one peremptory challenge.
- ☐ Whether co-plaintiffs or co-defendants have adverse interests.

**Authority:**

*CCP § 170.6(a)(2), (3); The Home Ins. Co. v. Superior Court (2005) 34 C4th 1025, 1033 ; Pappa v. Superior Court (1960) 54 C2d 350, 353-354, 5 CR 703, 353 P2d 311 ; Johnson v. Superior Court (1958) 50 C2d 693, 700, 329 P2d 5 ; Welch v. Superior Court (1974) 41 CA3d 50, 52-53, 115 CR 729*

**Discussion:**

See 22.10

☐ If making peremptory challenge:

- ☐ Make by oral or written motion without notice,
- ☐ Support with one of the following in substantially the form or with the same content set forth in *CCP § 170.6(a)(3)*:

- ☐ Affidavit (same form).
- ☐ Declaration (same content).
- ☐ Oral statement under oath (same content).

**Ground:**

An attorney or party's statement of good-faith belief of a judge's prejudice is sufficient without any further factual showing [*CCP § 170.6(a)(3)*]

**Authority:**

*CCP §§ 170.6(a)(2), 170.6(a)(5)*

**Discussion:**

See 22.08

**Forms:**

See 22.40 (notice), 22.41 (affidavit), 22.42 (declaration)



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*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.04*

**22.04 Options and Strategy for Peremptory Challenge.**

Counsel opting to pursue a peremptory challenge to a judge must be sure to act in a timely fashion. If the challenge fails because it was not timely, counsel will be left in the uncomfortable position of litigating in front of a judge he or she has just challenged.

Particularly in smaller counties, consider the extent to which you may alienate the entire bench by pursuing a peremptory challenge.

Counsel may wish to confer with his or her client before exercising a peremptory challenge so that the client understands the reasons for the challenge.

In a case with multiple parties on one side, if counsel for one party with relatively little at stake wants to exercise a peremptory challenge, he or she should coordinate with other counsel to maintain a cooperative atmosphere for other issues during the litigation.



**Cross Reference:**

Discussion of using online resources for investigating judges, see 22.02.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral Overview



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*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.05*

**22.05 Peremptory Challenge Statute Applies to Judges, Court Commissioners, and Referees but Not to Appellate Justices.**

The statute governing peremptory challenges of judges governs peremptory challenges to court commissioners and referees as well [CCP § 170.6(a)(1)].

CCP § 170.6 does not apply to appellate justices, including judges sitting on the appellate division of a superior court [CCP § 170.7].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.06*

**22.06 Grounds for Peremptory Challenge.**

The peremptory challenge statute permits a party to disqualify a judge who is alleged to be prejudiced against any party, attorney, or interest of any party or attorney by bringing an oral or written motion without notice supported by a simple affidavit, declaration under penalty of perjury, or oral statement under oath [CCP § 170.6(a)(2)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.07*

**22.07 Peremptory Challenge Can Be Used in Addition to Disqualification for Cause or Change in Place of Trial.**

The peremptory challenge remedy is cumulative to the disqualification for cause remedy and to the provisions pertaining to place of trial under *CCP* § 392 *et seq.*, which include change of venue and transfer for lack of jurisdiction [*CCP* § 170.6(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.08*

**22.08 Procedure for Making Peremptory Challenge to Judge.**

**22.08[1] Challenge by Oral or Written Motion Without Notice.** A party to or attorney appearing in a proceeding or action may establish a judge's prejudice by an oral or written motion without notice, supported by an affidavit, declaration, or oral statement under oath [CCP § 170.6(a)(2)].



**Strategic Point:**

Consider an oral peremptory challenge only if trial is being assigned by a master calendar department, or the trial is otherwise going to be in a different department other than the one making the assignment. You do not want to be in the very awkward position of making an oral peremptory challenge in front of the judge you are challenging.

**Judge's Perspective:**

On the rare occasion that the peremptory challenge is made orally, most judges will ask the attorney to fill out the proper form and file it.



**Cross Reference:**

Form of written notice, see 22.40.

**22.08[2] Motion to Be Supported by Affidavit, Declaration Under Penalty of Perjury, or Oral Statement Under Oath.** The oral or written motion making the peremptory challenge must be supported by an affidavit, declaration under penalty of perjury, or an oral statement under oath [CCP § 170.6(a)(2)].

The affidavit, declaration, or statement must be to the effect that the judge, court commissioner, or referee before whom the action or proceeding is pending or to whom it is assigned is prejudiced against a party to or attorney appearing in the action or proceeding so that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial or hearing before the judge, court commissioner, or referee [CCP § 170.6(a)(2)].

Any affidavit of prejudice must be in substantially the form set forth in CCP § 170.6(a)(5). A declaration under penalty

of perjury or an oral statement under oath must include substantially the same contents as the statutory affidavit form [CCP § 170.6(a)(5)].

 **Cross Reference:**

Form of affidavit, see 22.41. Form of declaration, see 22.42.

**22.08[3] Good-Faith Belief of Prejudice Sufficient.** If the motion is duly presented and the affidavit, declaration, or statement under oath is duly made, on that basis and without any further act or proof, a new judge shall be assigned pursuant to the statutory provisions [CCP § 170.6(a)(3)].

As long as an affidavit (or declaration or statement under oath) is timely and properly made, immediate disqualification is mandatory [ *McCartney v. Commission on Judicial Qualifications* (1974) 12 C3d 512, 532 ]. The law assumes that a party who makes a motion for peremptory challenge does so in good faith [ *Brown v. Superior Court* (1981) 124 CA3d 1059, 1061, 177 CR 756 ].

**Exception:**

If a prima facie showing is made that the peremptory challenge was exercised on the ground of an unconstitutional group bias, inquiry into the challenging party's good faith is warranted. If the opposing party makes a prima facie showing that the peremptory challenge was exercised solely on the ground of group bias, the party exercising the challenge has the burden to prove a neutral basis for the challenge. The trial court will then determine whether or not the opposing party has established purposeful discrimination [ *People v. Superior Court* (1992) 8 CA4th 688, 707-713, 10 CR2d 873 ].

 **Cross Reference:**

Discussion of procedure for assignment of new judge, see 22.13.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.09*

**22.09 Timing of Peremptory Challenge Depends on Court's Method of Assigning Cases.**

**22.09[1] Ten-Day/Five-Day Rule.**

**22.09[1][a] If Judge Is Known 10 Days Before Trial or Hearing Date Challenge Five Days Before That Date.**

If the judge is known at least 10 days before the date set for trial or hearing, the peremptory challenge must be made at least five days before that date [*CCP* § 170.6(a)(2)].

**22.09[1][b] When Trial Is Postponed.** When a trial is postponed, a motion filed five days before the postponed date may be timely [ *Eagle Maint. & Supply Co. v. Superior Court* (1961) 196 CA2d 692, 695, 16 CR 745 (trial was postponed for 97 days, but motion presented at least five days before last scheduled date for trial was timely)].

**22.09[1][c] When Matter Is Assigned to Department and Not Specific Judge.** Courts seem to have split over the degree of certainty that is required as to who the judge will be in order for the 10-day/5-day rule to apply. The rule has been held inapplicable when the matter was assigned to a department and not a judge by name [ *Moreira v. Superior Court* (1989) 215 CA3d 42, 45, 265 CR 437, *Bouchard v. Insona* (1980) 105 CA3d 768, 772, 164 CR 505 (10-day/5-day rule does not apply when matter is assigned to a department and not a particular judge), *but see* *People v. Superior Court* (1993) 4 C4th 1164, 1183-1185, 17 CR2d 815, 847 P2d 1031 (dicta; judge must only be known with reasonable certainty) and *Lawrence v. Superior Court* (1988) 206 CA3d 611, 617, 253 CR 748 (actual knowledge of judge not required; rule applies if judge's identity can be learned with further investigation or inquiry)].

**22.09[1][d] Tentative Rulings.** In jurisdictions with tentative ruling systems, a party who has already received a tentative ruling may not make a peremptory challenge to the judge at the time of the hearing unless the regularly assigned judge did not rule on the motion or if the regularly assigned judge has been changed without sufficient notice to the parties [ *Kaiser Found. Hospitals v. Superior Court* (1987) 190 CA3d 721, 725-726, 235 CR 630 ].

**22.09[1][e] Calculation of Five Days.** In counting the five days for purposes of the 10-day/5-day rule, the first day is excluded and the last day is included, unless the last day is a holiday, and then it is also excluded [*CCP* § 12]. For example, when a hearing was scheduled for June 30, a motion to disqualify filed on June 25 was timely [ *Pamela H. v. Superior Court* (1977) 68 CA3d 916, 919, 137 CR 612 ].

**22.09[1][f] Intervening Party.** When an intervener seeks to disqualify a judge, the time the intervener has to make

the motion runs from the date of the court's order authorizing the intervention, not from the later date of filing a formal petition in intervention [ *Hosp. Council of N. Cal. v. Superior Court* (1973) 30 CA3d 331, 339, 106 CR 247 ].

**22.09[1][g] Discovery Referees.** If a referee is appointed for all discovery purposes, a party seeking to disqualify the referee must make the motion to disqualify within 10 days after notice of the appointment, unless the party has not yet appeared in the action, in which case the motion must be made within 10 days after the appearance. If the referee is assigned only for limited discovery purposes, the motion must be made at least five days before the date set for hearing if the referee is known at least 10 days before the date set for hearing [CCP § 639(b)].

**22.09[2] Master Calendar Rule.** In a court that has a master calendar system for handling cases, a motion to disqualify must be made to the judge supervising the master calendar not later than the time the cause is assigned for trial [CCP § 170.6(a)(2)].

Thus, if a master calendar department assigns a trial-ready case to a department ready for immediate trial, the motion to disqualify must be made immediately on the announcement of the assignment [ *People v. Superior Court* (1993) 4 C4th 1164, 1175, 17 CR2d 815, 847 P2d 1031 ].

**Distinguish:**

In the absence of official designation or even informal notification that a court is a master calendar for purposes of CCP § 170.6 motions, that a court assigns trial-ready cases to ready courts on the direction of the assistant supervising judge does not make the master calendar rule applicable to cases it assigns [ *Ruiz v. Appellate Division* (2004) 119 CA4th 282, 291 ].

**22.09[3] All-Purpose Assignment Provision.**

**22.09[3][a] Motion 10 Days After Notice of Assignment or Later Appearance.** If a cause is assigned to a judge for all purposes, a peremptory challenge under CCP § 170.6 must be made within 10 days after the notice of the all-purpose assignment or, if the party has not yet appeared in the action, within 10 days after the party's appearance [CCP § 170.6(a)(2); see also *Sch. Dist. of Okaloosa County v. Superior Court* (1997) 58 CA4th 1126, 1129, 1134-1135, 68 CR2d 612 (Doe defendant served over three years after litigation commenced)].

When the notice of all-purpose assignment is served by mail, the 10-day period is extended by five days [ *Cal. Bus. Council For Equal Opportunity v. Superior Court* (1997) 52 CA4th 1100, 1102, 1106, 62 CR2d 7 (citing CCP § 1013(a))].

For the all-purpose assignment rule to apply, a case assignment must instantly identify the judge who is reasonably certain to preside over substantial remaining matters from that point forward, including the trial [ *People v. Superior Court* (1993) 4 C4th 1164, 1175, 1179, 17 CR2d 815, 847 P2d 1031 ].

**Example:**

Proceedings with different bases of jurisdiction trigger separate filing 10-day deadlines after the appearance of a party [ *Manuel C. v. Superior Court* (2010) 181 CA4th 382, 386, 104 CR3d 787 ].

**22.09[3][b] Late Appearing Party May Be Precluded From Challenge.** Even though a late appearing party has 10 days in which to move for disqualification under CCP § 170.6(a)(2), there are three potential obstacles:

- If another defendant on the same side has already used the side's challenge, the new party may not exercise a peremptory challenge [ *Sch. Dist. of Okaloosa County v. Superior Court* (1997) 58 CA4th 1126, 1134-1135, 68 CR2d 612 ].

■ If judge assigned for all purposes has already decided a contested issue of fact relating to the merits, the late appearing party may not exercise a preemptory challenge [ *Guardado v. Superior Court* (2008) 163 CA4th 91, 93, 99, 77 CR3d 149 (ruling under CC § 3295(c) that plaintiff demonstrated substantial probability that he or she will prevail on claim for punitive damages is not a "determination of contested fact issues relating to the merits" under § 170.6(a)(2)); *Stephens v. Superior Court* (2002) 96 CA4th 54, 64, 116 CR2d 616 ].

■ If the later appearing party has "an identity of interest "with a party appearing in a timely manner, the late appearing party may be held to the deadline for filing a preemptory challenge applicable to the party appearing in a timely manner [see *Guardado v. Superior Court* (2008) 163 CA4th 91, 99, 77 CR3d 149 (denying challenge to preemptory challenge, because partner in partnership that was partner in timely appearing partnership did *not* have identity of interest)].



#### **Warning:**

A late appearing party must get all previous papers in the case to be positive there was no prior 170.6. If a late appearing party makes a 170.6 motion that is barred by a prior motion, they will be faced with the awkwardness of having to try the case before a judge they unsuccessfully tried to disqualify.



#### **Strategic Point:**

If the late appearing party can frame a viable cross-complaint, they can get the opportunity to bring a 170.6 motion. This may undo a case that is well under way, and the late appearing party should consult with counsel for any parties with whom they are naturally aligned before upsetting the case.



#### **Cross Reference:**

Discussion of disqualification on cross-complaint, see 22.13[5].

### **22.09[4] Cases Subject to Trial Court Delay Reduction Act.**

**22.09[4][a] Motion Within 15 Days of Appearance in Direct Calendar Court.** In a case subject to the Trial Court Delay Reduction Act, a party must exercise his or her preemptory challenge to a judge within 15 days of the party's first appearance in a direct calendar court [Gov Code § 68616(i)].

A "direct calendar court" is one where a case is assigned to one judge for all purposes, including trial, and where the judge who would try the case is instantly pinpointed [ *Zilog Inc. v. Superior Court* (2001) 86 CA4th 1309, 1321, 104 CR2d 173 ].

#### **Distinguish:**

If a court is a master calendar court, the provisions of CCP § 170.6 always apply [Gov Code § 68616(i)].



#### **Cross Reference:**

Discussion of master calendar rule, see 22.09[2].

**22.09[4][b] Commencement of 15-Day Period.** When a direct calendar assignment is made more than 15 days after the complaint was filed, plaintiff's first appearance, or defendant's first appearance when defendant already responded to the complaint in direct calendar court, coincides with the direct calendar assignment so that the parties still have their preemptory challenge rights [ *Fight for the Rams v. Superior Court* (1996) 41 CA4th 953, 955-958, 48 CR2d 851 ].

If the assigned judge is changed after a party has appeared, the party has 15 days from receiving notice of the change to challenge the judge [ *Cybermedia, Inc. v. Superior Court* (1999) 72 CA4th 910, 913, 82 CR2d 126 ].

If a direct calendar assignment is made more than 15 days after a party's appearance, the time limits run from the date that the party receives notice of the assignment [ *Motion Picture & Television Fund Hosp. v. Superior Court* (2001) 88 CA4th 488, 492-494, 105 CR2d 872 ].

The 15-day time limit of *Gov Code* § 68616(i) does not apply when a judgment has been reversed on appeal and returned to the trial court for retrial [ *Stubblefield Constr. Co. v. Superior Court* (2000) 81 CA4th 762, 769, 97 CR2d 121 ].

#### **22.09[5] No Challenge Once Trial Has Commenced.**

**22.09[5][a] Commencement of Trial Cuts Off Right to Peremptory Challenge.** A peremptory challenge to a judge may not be made after trial of a cause is commenced [CCP § 170.6(a)(2)].

**22.09[5][b] When Trial Commences.** A jury trial commences after the drawing of the name of the first juror and no challenge may be made once this is done [CCP § 170.6(a)(2)].

In a non-jury trial, the motion for peremptory challenge may not be made after the making of an opening statement by counsel for the plaintiff, or if there is no opening statement, after the giving of any evidence [CCP § 170.6(a)(2)].

**22.09[6] No Challenge After Hearing Has Commenced.** In the case of a hearing (as opposed to a trial), a peremptory challenge must be made no later than the commencement of the hearing [CCP § 170.6(a)(2)].

**22.09[7] When Proceedings Are Consolidated.** When two or more cases are consolidated, a party may bring a separate peremptory challenge against a judge even though the judge was not challenged before consolidation. The challenge, however, unless it is otherwise timely as to the judge, is limited to the cases that were pending before the other judges [ *Nissan Motor Corp. v. Superior Court* (1992) 6 CA4th 150, 154-156, 7 CR2d 801 ].

#### **Example:**

When three cases against the same defendant were consolidated for trial before one of the three judges, and the defendant had 10 days after notice of the consolidation to make a timely peremptory challenge against the judge as to the two transferred cases even though the challenge would be untimely as to the third case, which had already been pending before the judge [ *Nissan Motor Corp. v. Superior Court* (1992) 6 CA4th 150, 154-156, 7 CR2d 801 ].

**22.09[8] Coordinated Proceedings.** For coordinated actions, a peremptory challenge shall be submitted in writing to the assigned judge within 20 days after service of the order assigning the judge to the coordination proceeding. All plaintiffs or similar parties in the included or coordinated actions constitute a side and all defendants or similar parties in the actions constitute a side [Cal Rules Ct, Rule 3.516].

The assignments to be the coordination motion judge and the coordination trial judge are distinct and each is subject to challenge. If the same judge is assigned to each role, the side challenging the judge has 20 days after each specific assignment to file a peremptory challenge [ *Stone v. Superior Court* (1994) 25 CA4th 1144, 1146-1147, 31 CR2d 56 (challenge to coordination trial judge was timely even though more than 20 days after same judge was appointed coordination motions judge)].

An earlier CCP § 170.6 challenge in one of the independent actions before coordination does not restrict the opportunity to make a challenge in the coordinated action [ *Philip Morris Inc. v. Superior Court* (1999) 71 CA4th 116, 122-123, 83 CR2d 671 ].

An add-on party who is joined to the coordinated actions after the 20-day window does not have any right to make a challenge [ *Indus. Indemnity Co. v. Superior Court* (1989) 214 CA3d 259, 263-264, 262 CR 544 ].

**22.09[9] Motion Must Be Made Before Hearing on Contested Issue.** A motion to disqualify under CCP § 170.6 must be made before a hearing is commenced on a contested issue [see CCP § 170.6(a)(2); see, e.g., *Doty v. Doty* (1975) 52 CA3d 672, 677-679, 125 CR 153 (judge's entry of order finding that real property in dispute was not divisible and should be sold as a whole was resolution of contested issue; any peremptory challenge filed thereafter was not timely)].

**22.09[10] Challenge Allowed After Pretrial Proceeding If Determination of Contested Fact Issues Relating to Merits of Case Was Not Involved.**

**22.09[10][a] Party May Challenge Judge Who Has Not Determined Contested Issue of Fact Relating to Merits.** The fact that a judge, court commissioner, or referee has presided at or acted in connection with a pretrial conference or other hearing, proceeding, or motion prior to a trial and not involving a determination of contested fact issues relating to the merits does not preclude the later making of a peremptory challenge [CCP § 170.6(a)(2); *Miller v. Miller* (1970) 11 CA3d 197, 202, 89 CR 643 ].

**Examples:**

In addition to motions discussed in 22.09[10][b] -[d], pre-trial actions without a determination of contested facts related to the merits of the case for purposes of § 170.6(a)(2) include:

- Motions to compel discovery that involve deciding only issues relating to the scope of permissible discovery [ *Swift v. Superior Court* (2009) 172 CA4th 878, 883-885, 91 CR3d 504 ] .
- A ruling under Civ Code § 3295(c) that a plaintiff has demonstrated a substantial probability that he or she will prevail on a claim for punitive damages [ *Guardado v. Superior Court* (2008) 163 CA4th 91, 93, 99, 77 CR3d 149 ] .

**22.09[10][b] Demurrers and Motions for Judgment on the Pleadings.** At least one court has held that a ruling on a demurrer is not a determination of a contested fact issue going to the merits [ *Fight for the Rams v. Superior Court* (1996) 41 CA4th 953, 958-959, 48 CR2d 851 ; but see *Appl v. Lee Swett Livestock Co.* (1987) 192 CA3d 466, 469, 237 CR 433 (disqualification denied when judge earlier sustained demurrer without leave to amend and CCP § 170.6(a)(2) motion was made after entry of judgment; court noted 170.6 motion was surely untimely when made after judge's ruling)].

A ruling on a motion for judgment on the pleadings was also not a determination of contested fact issues relating to the merits of the case [ *Hosp. Council of N. Cal. v. Superior Court* (1973) 30 CA3d 331, 337, 106 CR 247 ]; nor was a judge's issuance of a temporary restraining order at an ex parte proceeding [ *Landmark Holding Group, Inc. v. Superior Court* (1987) 193 CA3d 525, 527-529, 238 CR 475 ].

**22.09[10][c] Summary Judgment Motions.** A judge's ruling on a summary judgment has been held not to involve a determination of contested fact issues relating to the merits within the meaning of CCP § 170.6 [ *Bambula v. Superior Court* (1985) 174 CA3d 653, 655, 657, 220 CR 223 ; see also *Zilog Inc. v. Superior Court* (2001) 86 CA4th 1309, 1322, 104 CR2d 173 ].

In a complex case involving contract interpretation, an appellate court held that the judge's ruling on summary adjudication did constitute a determination of contested fact issues relating to the merits [ *California Fed. Sav. & Loan Assn. v. Superior Court* (1987) 189 CA3d 267, 270-271, 234 CR 413 ].

**22.09[10][d] Motion to Quash.** A judge's ruling on a motion to quash service of summons has been held not to be a determination of contested fact issues relating to the merits of the case within *CCP § 170.6(a)(2)* [ *Sch. Dist. of Okaloosa v. Superior Court* (1997) 58 CA4th 1126, 1131-1134, 68 CR2d 612 ].

**22.09[10][e] Judge May Not Waive Timeliness Requirement.** If a judge has ruled on the merits of the case within the meaning of *CCP § 170.6*, and a peremptory challenge is untimely for that reason, the judge may not waive the timeliness requirement and accept the disqualification [ *Briggs v. Superior Court* (2001) 87 CA4th 312, 318, 104 CR2d 445 ].

#### **22.09[11] Continued Proceedings.**

**22.09[11][a] Party May Challenge Judge in Subsequent Proceeding That Is Not Continuation of Prior Proceedings.** A party may make a peremptory challenge to a judge in a proceeding subsequent to a trial or hearing if the subsequent proceeding is separate and independent from the principal trial or hearing rather than a continuation of the previous proceedings [ *McClenny v. Superior Court* (1964) 60 C2d 677, 681, 36 CR 459, 388 P2d 691 (contempt orders in domestic relations case were continuation); *Stephens v. Superior Court* (2002) 96 CA4th 54, 62-63, 116 CR2d 616 (successive petitions relating to management of trust were continuation)].

**22.09[11][b] Proceeding Is a Continuation of Initial Action If It Involves Substantially the Same Issues.** Matters raised in a subsequent proceeding that are necessarily relevant and material to the issues involved in the original action are "substantially the same" so that the proceeding is considered to be a continuation of the original action for peremptory challenge purposes [ *Bravo v. Superior Court* (2007) 149 CA4th 1489, 1494, 57 CR3d 910 ; *Oak Grove Sch. Dist. v. City Title Ins. Co.* (1963) 217 CA2d 678, 700, 703, 32 CR 288 ].

#### **Distinguish:**

In a supplemental or continued hearing on matters involved in the original proceeding, an application under *CCP § 170.6* for disqualification of the same judge who heard the original proceeding is not proper or timely. The underlying principles of the continuation rule are that [ *Nutrigenetics, LLC v. Superior Ct.* (2009) 179 CA4th 243, 251-261, 101 CR3d 657 ] :

- The second proceeding involves the same parties on both sides of the case as the first proceeding, and
- The second proceeding arises out of the first proceeding, not just out of the same set of facts that gave rise to the first proceeding.

For the continuation rule to apply, the second proceeding must arise out of the first proceeding, not merely out of the same incidents or events that gave rise to the first proceeding [ *Nutrigenetics, LLC v. Superior Ct.* (2009) 179 CA4th 243, 257, 101 CR3d 657 (standard for continuation rule is different than for related cases)]. Accordingly, a lawsuit against a different albeit related defendant alleging additional and different bases of liability as to that defendant is not, without more, a "continuation" [ *Nutrigenetics, LLC v. Superior Ct.* (2009) 179 CA4th 243, 260, 101 CR3d 657 (transfer of arbitration to judge hearing cause of action between the parties was not continuation barring preemptory challenge to judge)].

Even if a subsequent proceeding has a subject matter connection to the prior proceeding, it is not a continued proceeding for purposes of the peremptory challenge rules if it [ *City of Hanford v. Superior Court* (1989) 208 CA3d 580, 592-593, 256 CR 274 ]:

- Does not affect the validity or enforceability of any order made by the judge in the original action, or



- Raises distinct legal issues, seeks different relief, includes new parties, and is broader in scope than the original action.

**Example:**

An order by a judge vacating a prior ruling on a motion and later, in the same order, disqualifying himself constitutes the vacatur of the ruling on the motion prior to the judge's disqualification [ *Bates v. Rubio's Restaurants, Inc.* (2009) 179 CA4th 1125, 1134, 102 CR3d 206] .

**Examples--Continued Proceedings:**

- Issues presented by a motion to modify a custody order were held to be substantially the same as those presented in a prior proceeding involving guardianship and custody [ *Jacobs v. Superior Court* (1959) 53 C2d 187, 191, 1 CR 9, 347 P2d 9 ].

- A contempt hearing to determine whether an injunction has been violated by the original defendant (among others) is a continuation of the proceeding in which the injunction was granted [ *Astourian v. Superior Court* (1990) 226 CA3d 720, 726, 276 CR 657 ].

- A hearing on attorney's fees and sanctions has been held to be a continuation of a contested proceeding for the appointment of a conservator [ *Conservatorship of Durham* (1988) 205 CA3d 548, 553-555, 252 CR 414 ].

- A proceeding to obtain modification of an order for arbitration has been held a continuation of the original proceeding [ *Andrews v. Joint Clerks Port Labor Relations Committee* (1966) 239 CA2d 285, 294, 48 CR 646 ].

- A claim for costs and disbursements has been held to be a continuation of an original eminent domain proceeding [ *Oak Grove Sch. Dist. v. City Title Ins. Co.* (1963) 217 CA2d 678, 699, 32 CR 288 ].

- A hearing to determine attorney's fees has been held a continuation of the original divorce action [ *Haldane v. Haldane* (1962) 210 CA2d 587, 596, 26 CR 670 ].

- A hearing on a motion to continue an injunction in effect pending appeal has been held a continuation of the original action [ *Dennis v. Overholtzer* (1960) 179 CA2d 110, 111-112, 3 CR 458 ].

**Example--Not a Continued Proceeding:**

- A motion to vacate an ex parte order made after judgment in case by one who was never party to action was not continuation of or supplement to anything previously done in action [ *Oksner v. Superior Court* (1964) 229 CA2d 672, 689-690, 40 CR 621 ].

- Action based on new alleged conduct was not a continued proceeding of a prior action involving the same parties but based on other previous, distinct conduct [ *Bravo v. Superior Court* (2007) 149 CA4th 1489, 1494, 57 CR3d 910 ].

**22.09[11][c] Challenge Is Allowed in Continued Proceeding If Judge Is Different.** If a party has not previously filed a peremptory challenge against a judge, the party may challenge the judge in a continued proceeding if the judge is not the one who heard the previous phase of the matter and provided that the challenge is made before the

commencement of the hearing of the supplemental proceedings and within the time limitations specified [ *Spector v. Superior Court* (1961) 55 C2d 839, 843, 13 CR 189, 361 P2d 909 (judicial dissolution of corporation); *Thompson v. Superior Court* (1962) 206 CA2d 702, 706-707, 23 CR 841 (child custody hearing)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**22.10 Number of Peremptory Challenges Is Limited.**

**22.10[1] Party or Attorney May Make Only One Challenge.** No party or attorney may make more than one duly filed *CCP* § 170.6 motion to disqualify a judge in any one action or proceeding [*CCP* § 170.6(a)(3)].



**Warning:**

The peremptory challenge of a discovery referee is included within the rule limiting each side to one peremptory challenge [ *Baugh v. Garl* (2006) 137 CA4th 737, 746, 40 CR3d 539 ].

An untimely motion is not "duly filed." Therefore a party whose motion is dismissed as untimely still has the right to exercise a peremptory challenge should a new judge be assigned in the proceeding [ *Truck Ins. Exchange v. Superior Court* (1998) 67 CA4th 142, 148-149, 78 CR2d 721 (judge initially assigned retired)].

**Exception:**

There is an exception to the one challenge rule for motions made after reversal on appeal [*CCP* § 170.6(a)(2)].



**Cross Reference:**

Discussion of exception, see 22.11.

**22.10[2] Only One Motion Per Side Where There Are Multiple Plaintiffs or Defendants.** In actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding [*CCP* § 170.6(a)(3)].

**22.10[3] Exception to One Motion Per Side Rule When Parties on Same Side Have Adverse Interests.**

**22.10[3][a] Parties on Same Side Treated As Separate Parties.** If parties on the same side have adverse interests, they may be treated as separate parties for purposes of peremptory challenges under *CCP* § 170.6 [ *Johnson v. Superior Court* (1958) 50 C2d 693, 700, 329 P2d 5 (two drivers' automobiles collided and injured plaintiff)].

**22.10[3][b] Burden of Establishing Adverse Interest.** The burden is on the party seeking an exception to the one side rule to establish the adverse interest--substantially adverse interests are not presumed [ *The Home Ins. Co. v. Superior Court* (2005) 34 C4th 1025, 1035, 103 P3d 283 , 22 CR3d 885 , 34 C4th 1025, 103 P3d 283 ; *Pappa v. Superior Court* (1960) 54 C2d 350, 354, 5 CR 703, 353 P2d 311 (defendant in criminal case found not to have adverse interest to co-defendant who had already exercised challenge)].

The party seeking to establish adverse interest must present a specific factual showing of adverse interest; a mere form declaration is insufficient [ *Welch v. Superior Court* (1974) 41 CA3d 50, 53, 115 CR 729 ]. The mere fact that parties are represented by separate counsel does not necessarily establish that their interests are adverse [ *Pappa v. Superior Court* (1960) 54 C2d 350, 355, 5 CR 703, 353 P2d 311 ].

When a plaintiff belatedly names a party as a defendant, that circumstance alone does not establish that the party's interests are substantially adverse to earlier named defendants [ *The Home Ins. Co. v. Superior Court* (2005) 34 C4th 1025, 1037 ]. The mere likelihood of, or potential for, a conflict in lieu of a factually sufficient demonstration of substantially adverse interests is insufficient to show the parties are on different sides [ *The Home Ins. Co. v. Superior Court* (2005) 34 C4th 1025, 1037 (no adverse interest shown between primary insurer and late-added excess insurer)].

#### **Strategic Point:**



A party may be estopped from claiming a unity of interest by having previously taken the contrary position before the court [see *Baugh v. Garl* (2006) 137 CA4th 737, 746, 40 CR3d 539 ]. Counsel should oppose a party's claim to that effect where the opposing party opposes a peremptory challenge on the basis that the "side" has already exercised its right to one peremptory challenge in the case.



#### **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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**22.11 Peremptory Challenge After Reversal on Appeal and Remand for New Trial.**

**22.11[1] Challenge Authorized If Case Is Assigned to Trial Judge Assigned to Prior Proceeding.** If a trial court's decision or final judgment is reversed on appeal and remanded for a new trial, a party can move to disqualify the trial judge in the prior proceeding if that judge is assigned to the new trial [CCP § 170.6(a)(2)].



**Timing:**

The motion must be made within 60 days after the party or the party's attorney is notified of the assignment [CCP § 170.6(a)(2)]. This 60-day limit applies even if the case is subject to Trial Court Delay Reduction Act [ *Stubblefield Constr. Co. v. Superior Court* (2000) 81 CA4th 762, 769, 97 CR2d 121 ].

This rule applies regardless of whether the judgment originated from a judge's decision or a jury verdict, and regardless of whether the new trial was granted as a result of an appeal or as part of writ relief [ *Pandazos v. Superior Court* (1997) 60 CA4th 324, 326, 70 CR2d 669 (applies regardless of whether judgment was judge's decision or jury verdict); *Overton v. Superior Court* (1994) 22 CA4th 112, 115, 27 CR2d 274 (writ relief)]. There is no inconsistency between allowing a peremptory challenge after initial assignment of the coordination judge under *Cal Rules Ct, Rule 3.516* and again under CCP § 170.6(a)(2) after a reversal on appeal, at least where a new trial must be held [ *Paterno v. Superior Court* (2004) 123 CA4th 548, 555 ].

**22.11[2] Reverse and Remand Scenario Is Exception to One Motion Per Case Restriction for Successful Appellant.** Ordinarily, a party may only make one peremptory challenge motion per case [CCP § 170.6(a)(3)]. However, the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion for peremptory challenge in the new proceedings regardless of whether that party had previously done so [CCP § 170.6(a)(2)]. The party who *unsuccessfully* responded to the appeal may also exercise a peremptory challenge to the judge on remand, but not if that party has previously exercised a peremptory challenge [ *Pfeiffer Venice Properties v. Superior Court* (2003) 107 CA4th 761, 764-767, 132 CR2d 400 ].

**22.11[3] Disqualification Applies Only If a New Trial on Remand.** What constitutes a new trial for civil cases is not necessarily the same as that for criminal cases [ *Peracchi v. Superior Court* (2003) 30 C4th 1245, 1253, 135 CR2d

639, 70 P3d 1054 (applying Penal Code definition of new trial to peremptory challenge in criminal case)]. CCP § 656 defines "new trial" as "a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee" [ *Paterno v. Superior Court* (2004) 123 CA4th 548, 557 ; *Hendershot v. Superior Court* (1993) 20 CA4th 860, 865, 24 CR2d 645 ]. The reexamination consists of the revisitation of some factual or legal issue that was in controversy in the prior proceeding [ *Geddes v. Superior Court* (2005) 126 CA4th 417, 424 ; *Paterno v. Superior Court* (2004) 123 CA4th 548, 560 ]. Consistent with this requirement, the following cases have involved a new trial permitting a CCP § 170.6(a)(2) peremptory challenge:

- Consideration of attorney fee award [ *First Federal Bank of California v. Superior Court* (2006) 143 CA4th 310, 313-315, 49 CR3d 296 ; *Pfeiffer Venice Properties v. Superior Court* (2003) 107 CA4th 761, 767, 132 CR2d 400 ].
- Retrial after reversal of summary judgment on the merits [ *Jane Doe 8015 v. Superior Court* (2007) 148 CA4th 489, 494-495 ; *Stubblefield Constr. Co. v. Superior Court* (2000) 81 CA4th 762, 765, 97 CR2d 121 ].
- Consideration of post-judgment restitution [ *Hendershot v. Superior Court* (1993) 20 CA4th 860, 864, 24 CR2d 645 ].
- Retrial of evidentiary ruling [ *Stegs Investments v. Superior Court* (1991) 233 CA3d 572, 574, 284 CR 495 ].

#### **Distinguish:**

A party does not have the right to a peremptory challenge following an appeal that does not compel a new trial [ *State Farm Mutual Automobile Ins. Co. v. Superior Court* (2004) 121 CA4th 490, 499 ].

#### **Examples:**

- Order compelling trial court to issue statement of decision is not grounds for new peremptory challenge [ *Karlsen v. Superior Court* (2006) 139 CA4th 1526, 1530, 43 CR3d 738 ].
- Appeal of motion to determine applicable law, equivalent to motion in limine, does not compel new trial or arise from judgment terminating appealed action [ *State Farm Mutual Automobile Ins. Co. v. Superior Court* (2004) 121 CA4th 490, 502 ].
- Determination of damages on remand after reversal on legal grounds of judgment of no liability is not new trial giving rise to right to § 170.6(a)(2) challenge [ *Paterno v. Superior Court* (2004) 123 CA4th 548, 559-563 ].
- Reversal of grant of summary judgment on procedural grounds [ *Geddes v. Superior Court* (2005) 126 CA4th 417, 424 ].

While the Courts of Appeal for the Second District [see *Hendershot v. Superior Court* (1993) 20 CA4th 860, 864, 24 CR2d 645 (Division 4) ; *Pfeiffer Venice Properties v. Superior Court* (2003) 107 CA4th 761, 767, 132 CR2d 400 and *Stegs Investments v. Superior Court* (1991) 233 CA3d 572, 576, 284 CR 495 (Division 5) ; *Geddes v. Superior Court* (2005) 126 CA4th 417, 424 n4 ], Fourth District [see *Stubblefield Constr. Co. v. Superior Court* (2000) 81 CA4th 762, 765, 97 CR2d 121 (Division 2) ], and Fifth District [see *People v. Superior Court* (2001) 91 CA4th 391, 398, 109 CR2d 897 ] find a new trial state does not arise when the court on remand is to undertake only a ministerial function, the Third District, in a ruling finding no new trial and no right to § 170.6(a)(2) challenge, has rejected that analysis [see *Paterno*

*v. Superior Court (2004) 123 CA4th 548, 561 ].*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**22.12 Judge Lacks Jurisdiction to Proceed After Proper Peremptory Challenge.**

**22.12[1] Judge's Orders or Judgment After Challenge Are Void or Voidable.** When a peremptory disqualification motion is timely made and supported by a sufficient affidavit, declaration, or oral statement, the judge against whom the motion is directed is without jurisdiction to proceed [CCP § 170.6(a)(1); *Hemingway v. Superior Court* (2004) 122 CA4th 1148, 1157 ]. Any subsequent order or judgment entered by that judge is null and void [ *Louisiana-Pacific Corp. v. Philo Lumber Co.* (1985) 163 CA3d 1212, 1222, 210 CR 368 ].

**Example:**

An order by a judge vacating a prior ruling on a motion and later, in the same order, disqualifying himself constitutes the vacatur of the ruling on the motion prior to the judge's disqualification [ *Bates v. Rubio's Restaurants, Inc.* (2009) 179 CA4th 1125, 1134, 102 CR3d 206 ] .

**Example:**

A disqualified judge may not reconsider the judge's own order disqualifying himself or herself. The new judge assigned to the case hears the motion for reconsideration on the basis that the disqualified judge is "unavailable." If the new judge finds the disqualification is erroneous, the disqualified judge's authority to rule on the matter is reinstated [ *Geddes v. Superior Court* (2005) 126 CA4th 417, 425-426 ].



**Warning:**

Orders or judgments of a disqualified judge are more accurately described as voidable rather than void. A party who consents to proceed with a disqualified judge without objection may not later attack the judgment as void due to the judge's disqualification [ *Guedalia v. Superior Court* (1989) 211 CA3d 1156, 1161-1163, 260 CR 99 ; *Stebbins v. White* (1987) 190 CA3d 769, 782-783, 235 CR 656 ; *In re Christian J.* (1984) 155 CA3d 276, 279-280, 202 CR 54 ].

**22.12[2] Judge May Rule on Timeliness of Motion.** A judge challenged by a peremptory disqualification motion may still rule on the timeliness of the motion and reject the motion if it is not timely [ *Micro/Vest Corp. v. Superior Court* (1984) 150 CA3d 1085, 1089, 198 CR 404 ; *Andrews v. Joint Clerks Port Labor Relations Committee* (1966) 239 CA2d 285, 294, 48 CR 646 ].



**22.12[3] Judge May Still Conduct Proceedings Not Involving Contested Issue of Law or Fact.** A judge disqualified under the peremptory challenge statute is barred from trying the case or hearing any matter involving a disputed issue of law or fact, but this does not extend to such proceedings as settlement conferences, which do not involve contested issues of law or fact [ *Mezzetti v. Superior Court* (1979) 94 CA3d 987, 990, 993, 156 CR 802 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**22.13 Reassignment After Peremptory Challenge.**

**22.13[1] In Court With Master Calendar.** In a court with a master calendar, once a peremptory challenge motion is duly presented with a proper affidavit, declaration or oral statement, the supervising judge must assign another judge, court commissioner, or referee to hear the case [CCP § 170.6(a)(3)].

**22.13[2] In Court Without Master Calendar.** In a court without a master calendar, the trial or hearing must be assigned to another judge, court commissioner, or referee of the court in which the trial or matter is pending [CCP § 170.6(a)(3)].

➡ **Cross Reference:**

Form of order of transfer, see *California Forms of Pleading and Practice*, Ch. 317, Judges, § 317.213 (Matthew Bender).

**22.13[3] In Court With No Other Judge to Hear Matter.** If the court in which the trial or matter is pending has no other judge, court commissioner or referee to hear the matter, the Chair of the Judicial Council must assign some other judge, commissioner or referee to hear the matter as promptly as possible [CCP § 170.6(a)(3)].

**22.13[4] Period of Time Without Judge Disregarded for Motion to Dismiss for Delay.** The time between the judge's disqualification and the assignment of the matter to another judge is to be disregarded for purposes of any motion to dismiss for delay in bringing the action to trial [CCP § 583.340; see also *Nail v. Osterholm* (1970) 13 CA3d 682, 686, 91 CR 908 ].

**22.13[5] No Severance of Cross Action Permitted Due to Disqualification.** When a cross-defendant makes a motion for peremptory challenge, the entire case must be assigned to another judge rather than simply the cross action [ *Sunkyoung Trading (H.K.) Ltd. v. Superior Court* (1992) 9 CA4th 282, 287-290, 11 CR2d 504 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**22.14 No Continuance Because of Peremptory Challenge.**

Unless required for the convenience of the court or unless good cause is shown, a continuance of the trial or hearing is not to be granted because of a peremptory challenge motion. If a continuance is granted, the matter is to be continued only from day to day or for other limited periods and is to be reassigned or transferred as promptly as possible [CCP § 170.6(a)(4)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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III. DISQUALIFYING JUDGE FOR CAUSE

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**22.15 CHECKLIST: Disqualifying Judge for Cause.**

- ☐ Determine if ground exists to disqualify judge for cause:
  - ☐ Judge has personal knowledge of disputed evidentiary facts concerning proceeding.
    - ☐ Includes knowledge of judge's spouse or person within third degree of relationship.
  - ☐ Judge has:
    - ☐ Served as a lawyer in the proceeding, or
    - ☐ Served as a lawyer in another proceeding for any party to the present proceeding that involved the same issues as the present proceeding.
    - ☐ Given advice to any party in the present proceeding on any matter involved in the present proceeding.
  - ☐ Judge was associated in private practice with a lawyer in the proceeding within the past two years.
  - ☐ Party in the proceeding was a client of the judge or of a lawyer associated in practice with the judge within the past two years.
  - ☐ Judge has a financial interest in a party to or the subject matter of the proceeding.
    - ☐ Includes financial interest of judge's spouse or minor child living in the household.

- ☐ Includes financial interest of judge or judge's spouse as a fiduciary.
- ☐ Judge is a party to the proceeding or an officer, director, or trustee of a party.
  - ☐ Includes status of judge's spouse or person within third degree of relationship to either of them.
- ☐ A lawyer or spouse of a lawyer in the proceeding:
  - ☐ Is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse, or
  - ☐ Is associated in the practice of law with the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse.
- ☐ Judge is unable to be impartial.
- ☐ Judge has physical impairment rendering judge unable to perceive evidence or properly conduct the proceeding.
- ☐ Judge has arrangement for, or has within last two years discussed, future employment or service as a dispute resolution neutral, or has engaged in such employment or service, and:
  - ☐ The arrangement is, or the prior employment or discussion was, with a party to the proceeding;
  - ☐ The matter before the judge relates to the enforcement of either an agreement to submit a dispute to an alternative dispute resolution process or a final decision by a dispute resolution neutral;
  - ☐ The judge directs the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual or entity with whom the judge has the arrangement, has previously been employed or served, or is discussing or has discussed the employment or service; or
  - ☐ The judge will select a dispute resolution neutral or entity to conduct an alternative dispute resolution process in the matter before the judge, and among those available for selection is an individual or entity with whom the judge has the arrangement, with whom the judge has previously been employed or served, or with whom the judge is discussing or has discussed the employment or service.
- ☐ Court-appointed temporary judge must disqualify himself or herself if required to do so under

Code of Judicial Ethics, or be disqualified if:

- ☐ The attorney, in any type of case, is appearing on the same day in the same courthouse as an attorney or as a party;
- ☐ The attorney, in the same type of case, is presently a party to any action or proceeding in the court; or
- ☐ In a family law or unlawful detainer case, one party is self-represented and the other party is represented by an attorney or is an attorney.

**Authority:**

*CCP § 170.1(a); Cal Rules Ct, Rule 2.818*

**Discussion:**

See 22.18

☐ Verify the ground for disqualification is not specifically excluded by the Code of Civil Procedure as improper:

- ☐ Judge is a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of such a group.
- ☐ Judge has, in any capacity, expressed a view on a legal or factual issue presented in the proceeding.
- ☐ Judge has participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is in issue in the proceeding.

**Authority:**

*CCP § 170.2*

**Discussion:**

See 22.19

☐ Determine whether judge will voluntarily recuse himself or herself.

**Authority:**

*CCP § 170.3(a)(1)*

**Discussion:**

See 22.20

☐ If judge will not recuse himself or herself, file a written verified statement with the clerk setting forth the facts constituting the grounds for disqualification.



**Timing:**

Statement must be filed at "earliest practicable opportunity" after discovery of facts. If a party knows of facts regarding disqualification but waits until the judge makes an unfavorable ruling to file a statement of disqualification, then the party has delayed unnecessarily.

- ☐ Set forth facts, not conclusions, in statement.
- ☐ Serve copy on each party and personally serve copy on the judge's clerk when the judge is present in the courthouse or in chambers. (Although service on the judge is authorized, it is uniformly made on the clerk.)

**Authority:**

*CCP § 170.3(c)*

**Discussion:**

See 22.23

**Forms:**

See 22.37 (general form for written statement of disqualification)

☐ If court-appointed temporary judge will not disqualify himself or herself as required by Judicial Code of Ethics, apply to Presiding Judge for withdrawal of stipulation to temporary judge:

- ☐ Draft declaration of facts establishing good cause to withdraw stipulation.
- ☐ Serve and file notice of application or motion, and mail or deliver copy to presiding judge.
- ☐ Schedule hearing with presiding judge or designated judge.

**Authority:**

*Cal Rules Ct, Rules 2.816(e), 2.818(f)*

**Discussion:**

See 22.22A

☐ If temporary judge requested by the parties will not disqualify himself or herself as required by Judicial Code of Ethics, bring motion to withdraw stipulation of appointment:

- ☐ Draft declaration of facts establishing good cause to withdraw stipulation.
- ☐ Serve and file notice of motion, and mail or deliver copy to temporary judge.
- ☐ Schedule hearing with presiding judge or designated judge.

**Authority:**

*Cal Rules Ct, Rule 2.831(f)*

**Discussion:**

See 22.22A

☐ Judge must file consent or answer within 10 days of filing or service of statement (whichever is later).

☐ Consent to disqualification:

☐ Judge must notify presiding judge of his or her recusal and presiding judge will appoint a replacement.

☐ Written verified answer by judge:

☐ Judge must admit or deny allegations in the statement of disqualification.

☐ Clerk must provide a copy to each party.

☐ Parties must agree on another judge to determine disqualification within five days of notification of judge's answer.

**Exception:**

If the parties cannot agree on a judge to make the determination, the chairperson of the Judicial Council shall select a judge [CCP § 170.3(c)(5)].

☐ Hearing may be ordered, in which case the parties and judge can argue and present evidence if good cause is shown.

☐ If judge fails to file consent or answer within 10 days, he or she is deemed to have consented to disqualification.

☐ In this situation, the clerk shall notify the presiding judge to appoint a replacement.

**Authority:**

CCP § 170.3(c)

**Discussion:**

See 22.23[4]

**Form:**

See 22.38 (stipulation agreeing on judge to hear question of disqualification)





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Chapter 22 Disqualification of Judge  
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*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.16*

**22.16 Options and Strategies in Evaluating Disqualification for Cause.**

The judge may recognize a ground for disqualification and recuse himself or herself in accordance with *CCP* § 170.3(a) or ask the parties to waive the disqualification, as authorized by *CCP* § 170.3(b). At that point, one must weigh the disqualification against the judge's reputation and, to the extent it is predictable, the identity of the next judge likely to be assigned.



**Warning:**

Disqualification for cause is to be used only when a party or attorney for the party has very specific facts that constitute one of the grounds for disqualification under *CCP* § 170.1.

In many instances counsel will be familiar with the judge and aware of potential grounds for disqualification. For example, counsel may be well aware that the recently appointed judge was a member of the firm now representing the opposition.



**Strategic Point:**

Doing your due diligence on the selected judge is critical. The best source of information is from those who have litigated before a particular judge. If you are a member of a bar organization, such as the Consumer Attorneys of Los Angeles, or the Association of Southern California Defense Counsel you can easily obtain names of attorneys who have appeared before the selected judge. Other organizations sponsor online list services in which valuable information can be obtained in a short time span to provide some additional information. Using the California Courts and Judges Handbook (James Publishing), Daily Journal's Judicial Profiles, or doing online research can also provide another level of data.



**Cross Reference:**

Discussion of using online resources for investigating judges, see 22.02.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview



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*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.17*

**22.17 Disqualification for Cause Statutes Apply to Trial Judges, Commissioners, Referees, and Temporary Judges.**

The statutes governing disqualification of judges for cause [CCP §§ 170-170.5] apply to superior court judges, court commissioners, and referees [CCP § 170.5(a)].

Rules of Court require a court appointed temporary judge, or a temporary judge requested by the parties, to disqualify himself or herself as provided under the Code of Judicial Ethics [*Cal Rules Ct, Rules 2.818(a), 2.831(e); see 22.18[10], 22.22A*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewCivil ProcedureJudicial OfficersRefereesRemovals



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Chapter 22 Disqualification of Judge  
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*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.18*

**22.18 Grounds for Disqualification for Cause.**

**22.18[1] Disqualification Is Mandatory If Ground Is Established.** *CCP § 170.1(a)* states that a judge "shall be disqualified" if any of the grounds listed is true. Therefore, the statute is mandatory in nature and the judge must be disqualified unless the ground is waived.



**Cross Reference:**

For a discussion of waiver, see 22.27 et seq.

**22.18[2] Judge Has Personal Knowledge of Disputed Evidentiary Facts.**

**22.18[2][a] General Rule.** A judge is disqualified if he or she "has personal knowledge of disputed evidentiary facts concerning the proceeding" [*CCP § 170.1(a)(1)(A)*].

**22.18[2][b] Judge Is Deemed to Have Personal Knowledge If Judge or Close Relative Is Likely to Be Material Witness.** A judge is deemed to have personal knowledge of facts if the judge or the judge's spouse or a person within the third degree of relationship to either of them or that person's spouse is, to the judge's knowledge, likely to be a material witness in the proceeding [*CCP § 170.1(a)(1)(B)*].

**22.18[2][c] Calculating Third Degree of Relationship.** The "third degree of relationship" is calculated according to the civil law system [*CCP § 170.5(d)*; see *People v. Williams* (1997) 16 C4th 635, 652-653, 66 CR2d 573, 941 P2d 752 (discussing calculation and finding judge was not disqualified because witness was related, if at all, in fifth degree)].

**22.18[2][d] Material Witness Is One With Important Testimony That Only One or Few Can Give.** A material witness is someone "who can give testimony ... no one else, or at least very few, can give" [ *People v. Williams* (1997) 16 C4th 635, 653, 66 CR2d 573, 941 P2d 752 ]. The witness' testimony must also be "important," "more or less necessary," "going to the merits," or have some likelihood of affecting the outcome of the case [ *People v. Williams* (1997) 16 C4th 635, 653, 66 CR2d 573, 941 P2d 752 (quoting from Black's Law Dict. (6th ed. 1990) p. 976, col.2)].

**22.18[3] Judge Served As Lawyer in the Proceeding.**

**22.18[3][a] General Rule.** A judge is disqualified for cause if one of the following is true [CCP § 170.1(a)(2)(A)]:

- The judge served as a lawyer in the proceeding;
- In any other proceeding involving the same issues, the judge served as a lawyer for a party in the present proceeding; or
- The judge gave advice to any party in the present proceeding upon any matter involved in the action or proceeding.

**22.18[3][b] Judge's Former Public Service.** A judge who served as a lawyer for or officer of a public agency that is a party to the proceeding is deemed to have served as a lawyer in the proceeding if the judge personally advised or otherwise represented the public agency concerning the factual or legal issues in the proceeding [CCP § 170.1(a)(2)(C)].

**22.18[3][c] Judge's Advice to Nonparty Does Not Disqualify.** The disqualification for having given advice does not extend to a situation where the judge gave advice to someone who is not a party to the proceeding but has a similar cause of action [ *Lassen Irrigation Co. v. Superior Court* (1907) 151 C 357, 362-363, 90 P 709 (dictum)].

**22.18[3][d] Judge's Former Private Practice of Law.** A judge is deemed to have served as a lawyer in the proceeding, and is therefore disqualified, if within the past two years [CCP § 170.1(a)(2)(B)]:

- A party to the proceeding or an officer, director, or trustee of a party was a client of the judge when the judge was in private practice, or a client of a lawyer with whom the judge was in practice; or
- The judge was formerly associated in private practice with one of the lawyers in the proceeding.

"Private practice of law" includes a fee for service, retainer, or salaried representation of private clients or public agencies. It excludes lawyers who are full-time employees of public agencies and lawyers working exclusively for legal aid offices, public defender offices, or similar nonprofit entities whose clientele is restricted to the indigent [CCP § 170.5(e)].

Courts should liberally construe this provision to insure both actual impartiality and public confidence [ *People v. Thomas* (1972) 8 C3d 518, 520, 105 CR 366, 503 P2d 1374 (judge's former employment as assistant district attorney within two years of prosecution did not disqualify him when crime was committed after his appointment to bench; clearly no personal knowledge and not disqualified from all cases brought in name of the People)].

**Distinguish:**

The judge is disqualified regardless of when the former representation took place if the judge served as a lawyer in the current proceeding or in a proceeding involving the same issues or if the judge gave advice to one of the parties in the current proceeding regarding any matter at issue in the current proceeding. The "within two years" rule for deeming the judge to have served as a lawyer in the proceeding applies if the judge served as a lawyer for one of the parties in the present proceeding on an unrelated matter, if the judge's former law partner served as one of the parties' lawyers within the last two years, or if the judge was formerly in private practice with one of the lawyers in the proceeding. [CCP § 170.1(a)(2)(B); see also *Reeve v. Jahn* (1937) 9 C2d 244, 250, 70 P2d 610 (judge was not disqualified when at least 30 years before he had acted as an attorney and guardian ad litem for minor children of deceased wife in partition proceeding but that property was not in question in subsequent quiet title action)].

**22.18[3][e] Not Subject to Waiver.** The parties cannot waive disqualification for having served as an attorney in the proceeding in controversy [CCP § 170.3(b)(2)(B)].

**22.18[4] Judge Has Financial Interest in Subject Matter or Party.**

**22.18[4][a] General Rule.** A judge is disqualified if the judge, his or her spouse, or his or her minor child living in the household has a financial interest in the subject matter or party, or if the judge or the judge's spouse is a fiduciary who has a financial interest [CCP § 170.1(a)(3)(C)].

"Fiduciary" includes any executor, trustee, guardian, or administrator [CCP § 170.5(g)].

**22.18[4][b] Financial Interest Defined.** "Financial interest" means [CCP § 170.5(b)]:

- Ownership of more than a one percent legal or equitable interest in a party,
- A legal or equitable interest in a party of a fair market value in excess of one thousand five hundred dollars (\$1,500), or
- A relationship as director, advisor, or other active participant in the affairs of a party.

**Exceptions:**

There are three exceptions [CCP § 170.5(b)]:

- Ownership in a mutual or common investment fund that holds securities is not a financial interest in those securities unless the judge participates in the management of the fund.
- An office in an educational, religious, charitable, fraternal, or civic organization is not a financial interest in securities held by the organization.
- The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a financial interest in the organization only if the outcome of the proceeding could substantially affect the value of the interest.

**Strategic Point:**

CCP § 170.1(a)(3) refers to a financial interest in the subject matter of the proceeding or in a party to the proceeding. However, the definition of "financial interest" in CCP § 170.5(b) refers only to a financial interest in a party. Since "financial interest in the subject matter of the proceeding" is not defined anywhere, it may be helpful to analyze such an interest under CCP § 170(a)(6) (interests of justice require recusal or judge has substantial doubt in his or her ability to be impartial). Such an analysis would be helpful, for example, in a case where the validity of a special property tax that will affect the judge's property is being litigated [ *Central & West Basin Water Replenishment Dist. v. Wong* (1976) 55 CA3d 191, 194-195, 127 CR 448 (validity of special property tax affecting judge's property); *Meyer v. City of San Diego* (1898) 121 C 102, 110-111, 53 P 434 (same)].

**22.18[4][c] Judge Has Duty to Inform Himself or Herself.** A judge has a duty to make reasonable efforts to inform himself or herself about his or her personal and fiduciary interests and those of his or her spouse and minor children living in the household [CCP § 170.1(a)(3)].

**22.18[4][d] Disqualification May Occur Even After Judgment.** A judge should still be disqualified even if the judge discovers his or her interest after judgment is rendered [ *Tatum v. S. Pac. Co.* (1967) 250 CA2d 40, 43, 58 CR 238 (judgment vacated and new trial ordered after judge discovered forgotten shares of stock in defendant)].

If a judge disposes of his or her stock after hearing evidence in the case but before rendering judgment, he or she is still disqualified [ *Adams v. Minor* (1898) 121 C 372, 375, 53 P 815 ].

**22.18[5] Judge Is a Party to the Proceeding.** A judge is disqualified if the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of someone within the third degree of relationship to either of them, is a party to the proceeding or an officer, director, or trustee of a party [CCP § 170.1(a)(4)].

The "third degree of relationship" is calculated according to the civil law system [CCP § 170.5(d); see *People v. Williams* (1997) 16 C4th 635, 652-653, 66 CR2d 573, 941 P2d 752 (discussing calculation and finding judge was not disqualified because witness was related, if at all, in fifth degree)].

This disqualification includes cases in which the judge or his or her relative is not a party of record, but nonetheless a real party in interest [see *Lynip v. Alturas Sch. Dist.* (1915) 29 CA 158, 160-161, 155 P 109 (judge's brother is director of bank that is real party in interest, although suit was brought in name of private individual)].

**22.18[6] Judge Has Relationship to Lawyer in Proceeding.** A judge is disqualified if a lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding [CCP § 170.1(a)(5)].

#### **22.18[7] Judge Is Biased or Prejudiced.**

**22.18[7][a] General Rule.** A judge is disqualified if, for any reason, one of the following is true:

- The judge believes his or her recusal would further the interests of justice [CCP § 170.1(a)(6)(A)(i)];
- The judge believes there is a substantial doubt as to his or her capacity to be impartial [CCP § 170.1(a)(6)(A)(ii)]; or
- A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial [CCP § 170.1(a)(6)(A)(iii)].

Bias or prejudice toward a lawyer in the proceeding may be grounds for disqualification under this section [CCP § 170.1(a)(6)(B)].

**22.18[7][b] Bias Is Determined by Objective Test; Actual Bias Is Not Required.** The test for bias under CCP § 170.1(a)(6)(B) is an objective test, not a question of actual bias. The test is whether a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts as to the judge's impartiality [ *Briggs v. Superior Court* (2001) 87 CA4th 312, 318-319, 104 CR2d 445 (judge not disqualified based merely on rumors that would not cause a reasonable member of the public at large to doubt the judge's impartiality); *Ng v. Superior Court* (1997) 52 CA4th 1010, 1024, 61 CR2d 49 (derogatory and unfounded statements concerning counsel and court's unusual and inappropriate desire to keep the case were enough to make a person aware of the facts entertain doubts as to the judge's ability to remain impartial)].



#### **Warning:**

The disqualification statutes were revised in 1984 and now provide for a broader definition of bias. Therefore, cite any cases prior to 1984 with caution.

#### **Example:**

CCP § 170.1(a)(6)(C) requires the disqualification of a judge from an appellate panel reviewing a judgment where that same judge heard a pretrial matter involving a contested factual or legal issue related to the merits, or made a procedural determination that had a substantial effect on the ultimate outcome, or where the determination, though not directly appealable, is related to an issue on appeal from the final judgment. Disqualification under these circumstances is required under CCP § 170.1(a)(6)(C), even though the pretrial "proceeding" heard by the judge is not the one on appeal [ *Housing Authority of Monterrey County v. Jones* (2005) 130 CA4th 1029, 1042 ].

**22.18[7][c] Judge Who Believes Party Is Lying.** Because it is a judge's duty to determine credibility of witnesses, the mere fact that a judge believes a party is not telling the truth is not grounds for disqualification for bias [ *Keating v. Superior Court* (1955) 45 C2d 440, 444, 289 P2d 209 ]. However, if the judge states he or she believes a party has willfully sworn falsely, the judge may be disqualified in a retrial of the case [ *Keating v. Superior Court* (1955) 45 C2d 440, 444, 289 P2d 209 (judge stated he believed party had willfully sworn falsely); *Evans v. Superior Court* (1930) 107 CA 372, 382-383, 290 P 662 (judge believed party had willfully misstated the facts)].

**22.18[7][d] Judge's "Fixed Opinion".** When a judge has expressed a fixed opinion regarding a characteristic of a party to the extent that the judge is prevented from deciding the case based on the evidence, the judge must be disqualified [ *Adoption of Richardson* (1967) 251 CA2d 222, 232-233, 59 CR 323 ].

Also, a judge who offered a gratuitous opinion on a matter not yet pending before him showed bias or prejudice against a party [ *Pacific and Southwest Annual Conference of the United Methodist Church v. Superior Court* (1978) 82 CA3d 72, 84, 147 CR 44 (in ruling on pretrial motion judge offered opinion on merits of case in statement suggesting prejudgment of case)].

**Example:**

A judge who had indicated that he would not approve an adoption of a normal child by deaf-mutes under any circumstances was disqualified from hearing a case in which deaf-mute parents wished to adopt a child who could see and hear [ *Adoption of Richardson* (1967) 251 CA2d 222, 232, 59 CR 323 ].

**22.18[7][e] Examples of Insufficient Grounds for Bias Disqualification.** Generally, courts have held the following alleged grounds to be insufficient to disqualify a judge for bias or prejudice:

- Erroneous rulings against a litigant; for example, rulings regarding admission of evidence [ *McEwen v. Occidental Life Ins. Co.* (1916) 172 C 6, 10-11, 155 P 86 ; *Shakin v. Board of Med. Examiners* (1967) 254 CA2d 102, 116, 62 CR 274 ].
- A judge's expression of his or her opinion, when the expression is made in the discharge of official duties [ *People v. Brown* (1993) 6 C4th 322, 336-337, 24 CR2d 710, 862 P2d 710 (judge expressed frustration with counsel's investigation of irrelevant matters in conversations with juror, defense investigator, and defense counsel but this did not rise to level requiring disqualification); *Taliaferro v. Taliaferro* (1962) 203 CA2d 642, 646-647 (judge stated he "thought of" referring defendant to district attorney for perjury but later apologized and did not refer matter)].
- Erroneous rulings on a question of law [ *In re Morelli* (1970) 11 CA3d 819, 849, 91 CR 72 (judge erroneously would not shorten or extend time for court procedures); *Ryan v. Welte* (1948) 87 CA2d 888, 895, 198 P2d 351 (judge ruled plaintiff could not state a cause of action)].
- A judge's state of mind that at times appears adverse to a party, but is based on the judge's actual observance of witnesses and evidence [ *People v. Yeager* (1961) 55 C2d 374, 391, 10 CR 829, 359 P2d 261 ; *Haldane v. Haldane* (1965) 232 CA2d 393, 395, 42 CR 828 ].



■ A judge who has prior knowledge or opinions regarding a party or the case's background, as long as there is no indication of hostility in the judge's knowledge or opinions [ *In re Morelli* (1970) 11 CA3d 819, 845-846, 91 CR 72 ; *Rohr v. Johnson* (1944) 65 CA2d 208, 211, 150 P2d 5 ].

**22.18[8] Judge Has Physical Impairment.** A judge is disqualified if, by reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding [CCP § 170.1(a)(7)].

**22.18[9] Judge's Prospective Employment As Dispute Resolution Neutral.** A judge is disqualified for certain dealings relating to employment as a dispute resolution neutral. Specifically, a judge is disqualified if [CCP § 170.1(a)(8)(A)]:

■ The judge has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding prospective employment or service as a dispute resolution neutral, or has been engaged in such employment or service, and

■ Any of the following apply:

- ☐ The arrangement is, or the prior employment or discussion was, with a party to the proceeding.
- ☐ The proceeding includes issues relating to the enforcement of either an agreement to submit a dispute to an alternative dispute resolution process or a final decision by a dispute resolution neutral.
- ☐ The judge directs the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual or entity with whom the judge has the arrangement, has previously been employed or served, or is discussing or has discussed the employment or service.
- ☐ The judge will select a dispute resolution neutral or entity to conduct an alternative dispute resolution process in the matter before the judge, and among those available for selection is an individual or entity with whom the judge has the arrangement, with whom the judge has previously been employed or served, or with whom the judge is discussing or has discussed the employment or service.

**Distinguish:**

The Legislature's 2005 amendments to CCP § 170.1(a)(8), concerning among other things prior employment or service of the judge and adding the last two paragraphs above, are intended to construe and clarify the meaning and effect of existing law and to reject the interpretation given to the law in *Hartford Casualty Ins. Co. v. Superior Court* (2004) 125 CA4th 250 , 22 CR3d 507 (superseded by grant of review) [Stats 2005, ch 332, § 2].



**Strategic Point:**

It seems logical that a ruling on the fees of a neutral would fall within this ground for disqualification. However, there is no authority specifically so holding.

In this context, "participating in discussions" or "has participated in discussion" means that the judge [CCP § 170.1(a)(8)(B)(i)]:

- Solicited or otherwise indicated an interest in accepting or negotiating possible employment or service as an alternative dispute resolution neutral, or
- Responded to an unsolicited statement regarding, or an offer of, such employment or service by:
  - ☐ Expressing an interest in that employment or service,
  - ☐ Making any inquiry regarding the employment or service, or
  - ☐ Encouraging the person making the statement or offer to provide additional information about that possible employment or service.

If a judge's response to an unsolicited statement regarding, a question about, or offer of, prospective employment or other compensated service as a dispute resolution neutral is limited to responding negatively, declining the offer, or declining to discuss such employment or service, that response does not constitute participating in discussions [CCP § 170.1(a)(8)(B)(i)].

**Distinguish:**

The Legislature's 2005 amendments to § 170.1(a)(8), adding among other things the definitions above, are intended to construe and clarify the meaning and effect of existing law and to reject the interpretation given to the law in *Hartford Casualty Ins. Co. v. Superior Court* (2004) 125 CA4th 250 , 22 CR3d 507 (superseded by grant of review) [Stats 2005, ch 332, § 2].

A "party" includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding [CCP § 170.1(a)(8)(B)(ii)].

A "dispute resolution neutral" refers to any of the following [CCP § 170.1(a)(8)(B)(iii)]:

- Arbitrator.
- Mediator.
- Temporary judge appointed under *Cal Const*, art VI, § 21.
- Referee appointed under CCP § 638 or 639.
- Special master.
- Neutral evaluator.
- Settlement officer.
- Settlement facilitator.

**22.18[10] Court-Appointed Temporary Judge Has Too Close a Connection to Case or Courthouse. In**

addition to being required to disqualify himself or herself if required to do so under Code of Judicial Ethics, a court-appointed temporary judge, in contrast to a temporary judge requested by the parties, is disqualified from being a temporary judge if [*Cal Rules Ct, Rule 2.818(b)*]:

- The attorney, in any type of case, is appearing on the same day in the same courthouse as an attorney or as a party;
- The attorney, in the same type of case, is presently a party to any action or proceeding in the court; or
- In a family law or unlawful detainer case, one party is self-represented and the other party is represented by an attorney or is an attorney.



**Cross Reference:**

Disqualifying temporary judge procedure, see 22.22A.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPrior Involvements



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**22.19 Factors That Are Not Grounds for Disqualification Under CCP § 170.2.**

**22.19[1] Judge Is Member of Group Whose Rights Are Affected By Proceeding.** It is not grounds for disqualification that a judge is a member of a certain racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of such a group [CCP § 170.2(a)].

**Examples:**

- In a case involving the rights of leafletters spreading gospel in a parking lot, the judge was not disqualified on the basis he was a Roman Catholic [ *Savage v. Trammell Crow Co. (1990) 223 CA3d 1562, 1570, 1581, 273 CR 302* ].
- In a case in which appellate justices were members of a judges' group that had filed an amicus curiae brief in support of the trial court's ruling, the justices' membership did not disqualify them from hearing the case [ *People v. Superior Court (1997) 54 CA4th 407, 410, 62 CR2d 721* ].

**22.19[2] Judge Has Expressed View on Legal or Factual Issue in Proceeding.** It is not grounds for disqualification that a judge has in any capacity expressed a view on a legal or factual issue presented in the proceeding, except as provided in CCP § 170.1(a)(2), (b), or (c) [CCP § 170.2(b)]. Those provisions relate to:

- Having served as a lawyer in the proceeding [CCP § 170.1(a)(2)].
- Disqualification from participating in appellate review after hearing case [CCP § 170.1(b)].
- Order by appellate court that matter be heard by different judge in interests of justice [CCP § 170.1(c)].

Under CCP § 170.2(b) a judge who participated in settlement discussions is not disqualified from hearing the matter [ *Roth v. Parker (1997) 57 CA4th 542, 549, 67 CR2d 250* ].

 **Cross Reference:**

Discussion of *CCP* § 170.1(a)(2), see 22.06[3][b].

**22.19[3] Judge Has Participated in Efforts to Pass or Defeat Relevant Laws.** A judge cannot be disqualified on the basis that he or she has, as a lawyer or public official, participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect, or application of which is in issue in the proceeding unless the judge believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial [*CCP* § 170.2(c)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**22.20 Judge May Recuse Himself or Herself.**

In some circumstances a judge will voluntarily recuse himself or herself from hearing a case. This procedure is governed by *CCP* §§ 170.3-170.4. *CCP* § 170.3 provides that whenever a judge determines himself or herself to be disqualified, the judge shall notify the presiding judge of the court of his or her recusal and shall not participate in the proceeding, except as provided in *CCP* § 170.4, unless the parties waive the disqualification [*CCP* § 170.4(a)(1)].



**Strategic Point:**

The disqualification issue may arise at an early hearing or conference. It is preferable to raise issue and escalate rather than immediately bringing a motion. The judge may well be the one to raise the issue and may recuse himself or herself or suggest that the issue does not rise to level of recusal.

**Judge's Perspective:**

Contrary to popular folklore, judges are very cognizant of disqualifying factors and absent an oversight regarding financial holdings, judges regularly recuse themselves when the situation dictates. From a judicial administrative perspective the court is concerned that the recusal is appropriate and not simply the product of not wanting to preside over a difficult or high profile matter.



**Cross References:**

Discussion of judge's powers after disqualification, see 22.25. Discussion of waiver, see 22.27-22.32.  
Discussion of how a new judge is selected to hear the matter, see 22.24[3].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**22.21 Rule of Necessity Precludes Disqualification.**

Case law has carved out an exception to the disqualification rules when no other judge is available to hear and decide the case [ *Olson v. Cory* (1980) 26 C3d 672, 27 C3d 203, 27 C3d 532, 537, 164 CR 217, 178 CR 568, 609 P2d 991, 636 P2d 532 (judge otherwise disqualified due to personal financial interest not disqualified if no other judge or court is available)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsRule of Necessity



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**22.22 Party May File for Disqualification If Judge Refuses to Recuse Himself or Herself.**

If a judge who should recuse himself or herself fails to do so or refuses to do so, a party may file a statement of disqualification [CCP § 170.3(c)].

If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the ground for disqualification [CCP § 170.3(c)(1)].



**Warning:**

A party may not file more than one statement of disqualification unless new facts emerge or are first learned of after the initial statement. Make certain to include all facts currently known in the initial statement of disqualification [CCP § 170.4(c)(3)].



**Cross Reference:**

Discussion of statement of disqualification, see 22.23. Form, see 22.37.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**22.22A Disqualification of Temporary Judge Uses a Different Procedure.**

Unlike the procedures under for disqualifying a judge, commissioner, or referee under *CCP* § 170.3, disqualification of a temporary judge involves the application or motion to withdraw the stipulation for the temporary judge [*Cal Rules Ct, Rules 2.816(e), 2.818(f), 2.831(f)*].

Whether court-appointed or requested by the parties, a temporary judge must disqualify himself or herself if required to do so under the Code of Judicial Ethics, or as required by any other law [*Cal Rules Ct, Rules 2.818(a), 2.831(e)*]. Court-appointed temporary judges are also disqualified if the attorney is appearing in any type of case on the same day, is presently a party to any action with the same type of case, or one party is self-represented in an unlawful detainer case; however the presiding judge may waive these restrictions for good cause [*Cal Rules Ct, Rule 2.818(b)*]. The temporary judge must notify the presiding judge of the disqualification and stop participation in the proceedings unless the disqualification is waived [*Cal Rules Ct, Rule 2.818(b)*].

For court-appointed temporary judges, the parties may waive in writing a disqualification based on the Code of Judicial Ethics; however, the waiver is not permitted if the temporary judge has a personal bias or prejudice concerning a party, has served as an attorney in the matter, or has been a material witness in the controversy [*Cal Rules Ct, Rule 2.818(c)*].

For court-appointed temporary judges, the party asserting disqualification may request the presiding judge to withdraw the stipulation to the temporary judge, and must bring an application or motion supported by declaration with facts establishing good cause to withdraw the stipulation [*Cal Rules Ct, Rules 2.816(e), 2.818(f)*]. The presiding judge or designated judge must hear the application or motion, it must be served and filed, and the moving party must mail or deliver a copy to the presiding judge [*Cal Rules Ct, Rule 2.816(e)*]. A declaration that a temporary judge's ruling is based on error of fact or law does not establish good cause [*Cal Rules Ct, Rule 2.816(e)(2)*]. If the application or motion is first learned after the temporary judge has made one or more rulings, but before the proceeding is completed, the temporary judge must disqualify himself or herself, and the prior rulings will not be disturbed by a later judicial officer absent good cause [*Cal Rules Ct, Rule 2.816(e)(4)*].

For temporary judges requested by the parties, the party asserting disqualification may request the presiding judge to withdraw the stipulation to the temporary judge, and must bring an application or motion supported by declaration with facts establishing good cause to withdraw the stipulation [*Cal Rules Ct, Rule 2.831(f)*]. The presiding judge or designated judge must hear the application or motion, it must be served and filed, and the moving party must mail or

deliver a copy to the temporary judge [*Cal Rules Ct, Rule 2.831(f)*]. A declaration that a temporary judge's ruling is based on error of fact or law does not establish good cause [*Cal Rules Ct, Rule 2.831(f)*]. If the application or motion is first learned after the temporary judge has made one or more rulings, but before the proceeding is completed, the temporary judge must disqualify himself or herself, and the prior rulings will not be disturbed by a later judicial officer absent good cause [*Cal Rules Ct, Rule 2.831(f)*]. If the motion to withdraw the stipulation is granted, the presiding judge must assign the case for hearing or trial as promptly as possible [*Cal Rules Ct, Rule 2.831(f)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral Overview



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**22.23 Statement of Disqualification by Party.**

**22.23[1] Must Be Made at Earliest Practicable Opportunity.** The statement must be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification [CCP § 170.3(c)(1)].

If the statement is not presented at the earliest practicable opportunity after discovery of such facts, the party risks having the ground waived [see, e.g., *Develop-Amatic Eng'g v. Republic Mortgage Co.* (1970) 12 CA3d 143, 150, 91 CR 193 ; *Shakin v. Bd. of Med. Examiners* (1967) 254 CA2d 102, 115, 62 CR 274 (earliest practicable opportunity rule to prevent dishonest litigants or lawyers from deliberately withholding disqualification statement until they know that filing of statement would disrupt orderly processes of court)].



**Timing:**

Most of the appellate opinions regarding timeliness of a disqualification statement focus on whether the party knew of the disqualifying facts yet failed to raise them until an unfavorable judgment or ruling by the judge. Examples of untimely attempts to disqualify a judge include:

- An oral motion to disqualify a judge at the time of argument on demurrer to second amended complaint when the judge had ruled on a demurrer to the first amended complaint two months before [ *Reichert v. Gen. Ins. Co.* (1968) 68 C2d 822, 838, 69 CR 321, 442 P2d 377 ].
- If a party is aware of grounds for disqualification of a judge but waits until after a pending motion is decided to present the statement of objection, the statement may be stricken as untimely [ *Tri Counties Bank v. Superior Court* (2008) 167 CA4th 1332, 1338, 84 CR3d 835 ].
- Plaintiff learned of facts forming basis for disqualification before hearing on demurrer, yet did not urge disqualification until after judge had sustained demurrer [ *Lagies v. Copley* (1981) 110 CA3d 958, 965-966, 168 CR 368 , overruled on other grounds in *Brown v. Kelly Broad. Co.* (1989) 48 C3d 711, 738 n23, 257 CR 708, 771 P2d 406 ].

If a ground for disqualification is not known until after judgment, disqualification may be urged even at that time [ *Keating v. Superior Court* (1955) 45 C2d 440, 446-447, 289 P2d 209 (case assigned to same judge on remand after appeal); *Adoption of Richardson* (1967) 251 CA2d 222, 229, 233-234, 59 CR 323 (motion for new trial and to vacate judgment based on disqualification); *Oak Grove Sch. Dist. v. City Title Ins. Co.* (1963) 217 CA2d 678, 704, 32 CR 288 (statement made immediately after prior order of disqualification under CCP 170.6 was set aside)]. However, the statutory procedure for disqualification of judges for cause does not apply to statements filed after final judgment [ *North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 CA4th 762, 772, 54 CR3d 644 ].

**22.23[2] Statement Must Be Verified and State Facts Showing Grounds.** The statement must set forth the facts constituting the ground for disqualification [CCP § 170.3(c)(1)]. The disqualification statement should set forth specific facts on which the charges are predicated [ *Mackie v. Dyer* (1957) 154 CA2d 395, 399, 316 P2d 366 ]. In addition, the facts should make the bias appear probable as to the issue or issues to be tried [ *Calhoun v. Superior Court* (1958) 51 C2d 257, 260, 331 P2d 648 ; *Shakin v. Bd. of Med. Examiners* (1967) 254 CA2d 102, 117, 62 CR 274 ].

The statement must be in writing and verified [CCP § 170.3(c)(1)].



#### **Cross References:**

General Form of Written Statement of Disqualification, see 22.37. Discussion of legally insufficient statements, see 22.23[4][a].

**22.23[3] Statement Must Be Served on Parties and Judge.** The statement must be served on each party who has appeared or his or her attorney. It must also be served personally on the judge alleged to be disqualified or on his or her clerk if the judge is present in the courthouse or in chambers [CCP § 170.3(c)(1)].



#### **Strategic Point:**

Service is made on the clerk. However, since the judge must be present in the courthouse, counsel may want to verify that the judge is present before making service. For example, counsel may want to check with the court to make sure that the judge is not on vacation when service is contemplated. Ensuring effective service is important, because the later of filing or service starts the period within which the judge must file a consent or answer, or be deemed to have consented to disqualification under CCP § 170.3(c)(4).

#### **22.23[4] Judge's Response to Disqualification Statement.**

**22.23[4][a] Judge May Strike Legally Insufficient Statement.** The judge against whom a statement of disqualification is filed may order it stricken if [CCP § 170.4(b)]:

- It was untimely filed; or
- On its face it discloses no legal grounds for disqualification.

A judge may also strike a repetitive statement of disqualification not alleging facts suggesting new grounds for disqualification [CCP § 170.4(c)(3)].

A statement may be stricken when it contains, for example [ *In re Morelli* (1970) 11 CA3d 819, 843, 91 CR 72 ; see also *In re Marriage of Lemen* (1980) 113 CA3d 769, 789-791, 170 CR 642 ]:

- Conclusions.

- References to copious transcripts without citation to specific excerpts.
- Allegations of facts not pertinent or appropriate to the issues to be determined in the hearing.
- Material not legally indicative of bias or prejudice, such as:
  - ☐ Judicial opinions expressed in discharge of litigation and judicial ruling;
  - ☐ Judicial reactions based on actual observations in legal proceedings; or
  - ☐ References to circumstances so inconsequential as to be no indication whatsoever of hostility and nonprobative of any bias or prejudice.

#### **Judge's Perspective:**

More and more judges are invoking the motion to strike procedure when there is no disqualifying basis other than displeasure with a court's prior ruling. When the challenge for cause is made subsequent in time to some prior ruling or case management order and the basis made simply invokes an overall contention of bias or prejudice counsel can expect to be met with the judge striking the challenge pursuant to *CCP § 170.4*. There are advantages and disadvantages to this striking order. For the court, the striking order removes the necessity of staying the action pending a hearing on the challenge. For the challenging party, the only remedy available is writ review. The order striking the challenge is non-appealable and can only be reviewed by way of a writ of mandamus. However, for the court this procedure is not without risks. If the reviewing court believes that the striking order was improper and the challenged Judge did not alternatively answer the petition in a verified format then a writ of mandamus will almost assuredly be granted.

**22.23[4][b] Judge May Consent to Disqualification Statement.** A judge may file a consent to the disqualification within 10 days after the statement of disqualification is filed or served, whichever is later [*CCP § 170.3(c)(3)*].

If the judge files a consent, he or she must also notify the presiding judge or the person authorized to appoint a replacement of his or her recusal [*CCP § 170.3(c)(3)*].

**22.23[4][c] Judge May Request Another Judge Act in His or Her Place.** A judge, without conceding his or her disqualification, also has the option of requesting any other judge agreed on by the parties to act in his or her place [*CCP § 170.3(c)(2)*].

**22.23[4][d] Judge May Make Written Answer.** The judge may respond to the party's disqualification statement by filing a written verified answer admitting or denying any or all of the allegations contained in the party's statement and setting forth any additional facts material or relevant to the question of disqualification. The clerk transmits a copy of the judge's answer to each party or his or her attorney [*CCP § 170.3(c)(3)*].

If a judge files a written verified answer, the determination of disqualification must be decided by another judge [*CCP § 170.3(c)(5)*].

#### **Exception:**

A judge may strike a statement of disqualification after initially filing an answer to the statement so long as the judge does so within the 10-day time limit allowed for the judge's response to the statement [ *PBA, LLC v. KPOD, Ltd. (2003) 112 CA4th 965, 972-973* ].

 **Cross Reference:**

Discussion of procedure for other judge to determine disqualification, see 22.24.

**22.23[4][e] Judge Is Deemed to Consent to Disqualification for Failure to Timely Respond.** A judge who fails to file a consent or answer within the time allowed is deemed to have consented to disqualification. The clerk notifies the presiding judge or person authorized to appoint a replacement of the recusal [CCP § 170.3(c)(4)].

The automatic disqualification for failure to answer applies even if the party's statement of disqualification is legally insufficient or untimely [ *Urias v. Harris Farms, Inc. (1991) 234 CA3d 415, 421, 285 CR 659* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**22.24 Determination Regarding Disqualification by Another Judge.**

**22.24[1] Selection of Judge to Hear Disqualification Question.** A judge may not pass on the question of his or her own disqualification [CCP § 170.3(c)(5)]. Once a judge files an answer to a party's statement of disqualification, the parties have five days from the time of notification of the judge's answer to agree on a judge to determine disqualification [CCP § 170.3(c)(5)]. The parties do not need to select a judge from the same court; but the judge must be active, as opposed to retired, and qualified [ 62 Ops. Cal Att'y Gen 295 (1979) ].

If the parties are unable to agree within five days on a judge to hear the disqualification question, the chairperson of the Judicial Council is to select a judge to hear the question as expeditiously as possible. If the chairperson is unable to act, the vice chairperson selects the judge [CCP § 170.3(c)(5)]. The Assigned Judges Program of the Administrative Office of the Courts performs this function on behalf of the Chief Justice.

**Strategic Point:**



Make every effort to arrive at a timely stipulation to determine the judge to hear the matter and avoid having to go to Judicial Council. This will afford the parties some control over who will hear the question [see CCP § 170.3(c)(5) (cannot disqualify the judge selected to hear disqualification question for cause and by peremptory challenge)]. Stipulating to the judge may also avoid some delay.

Consult local practice on the assignment of judges to hear disqualification challenges for cause. For example, in Los Angeles, counsel rarely stipulate and the bulk of challenges for cause are heard by Orange County judges. Conversely, Los Angeles County judges hear the challenges to Orange County judges.

It commonly takes four to six weeks to hear a challenge for cause.



**Cross Reference:**

Form, see 22.38.

**22.24[2] Judge Has Discretion to Decide Issue on Papers or by Hearing.** *CCP § 170.3(c)(6)* gives the judge determining disqualification discretion over how the issue will be decided. The judge may decide the question solely on the basis of the disqualification statements and answer. The judge may also request written arguments or set the matter for hearing as promptly as practicable [*CCP § 170.3(c)(6)*].

If a hearing is ordered, the judge may request representation by the county counsel [*Gov Code § 27647*].

At a hearing on disqualification, the judge deciding the question must permit the parties and the judge to argue the question of disqualification and must for good cause shown hear evidence on any disputed issue of fact [*CCP § 170.3(c)(6)*].

**22.24[3] Selection of New Judge to Hear Matter.** If the judge deciding the question of disqualification determines that the judge is disqualified, he or she shall notify the presiding judge or the person having authority to appoint a replacement of the disqualified judge [*CCP § 170.3(c)(6)*].

If the disqualified judge is the only judge of the court or there is no judge of the court who is qualified to hear the matter, the chairperson or vice chairperson of the Judicial Council assigns a judge to hear the matter [*CCP § 170.3(a)(2), (c)(6)*].

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**22.25 Disqualified Judge Has Very Limited Powers to Rule in Case.**

**22.25[1] Judge's Power to Rule Is Restricted After Disqualification or After Statement of Disqualification Is Filed Until Determination Is Made.** In general, a disqualified judge has no power to act in any proceeding after the filing of a statement of disqualification, until the question of disqualification has been determined. A judge who has been disqualified has no power to take further action in the proceeding [*CCP § 170.4(d)*]. Any order made by a judge after disqualification or after a statement of disqualification has been filed are null and void [ *Noorthoek v. Superior Court* (1969) 269 CA2d 600, 607, 75 CR 61 (judge had disqualified himself)].

**22.25[2] Judge Retains Enumerated Powers.** A disqualified judge may do any of the following [*CCP § 170.4(a)*]:

- Take any action or issue any order necessary to maintain the jurisdiction of the court pending the assignment of a judge not disqualified.
- Request any other judge agreed on by the parties to sit and act in his or her place.
- Hear and determine purely default matters.
- Issue an order for possession prior to judgment in eminent domain proceedings.
- Set proceedings for trial or hearing.
- Conduct settlement conferences.

A judge may also order a statement of disqualification stricken if it is untimely or on its face discloses no legal grounds for disqualification [*CCP § 170.4(b)*].



**Cross Reference:**

Discussion of striking statement of disqualification, see 22.23[4][a].

**22.25[3] Trial Judge's Powers If Statement of Disqualification Filed After Trial or Hearing Begins.** If a party files a statement of disqualification after 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, the judge may order the trial or hearing to continue notwithstanding the statement of disqualification [*CCP § 170.4(c)(1)*]. In at least one case, a court has held that a trial commences for purposes of *CCP § 170.4(c)(1)* when the judge has heard and ruled on motions in limine [ *Eckert v. Superior Court* (1999) 69 CA4th 262, 266, 81 CR2d 467 ].

In the meantime, the issue of disqualification must be referred to another judge for decision [*CCP § 170.4(c)(1)*].

If the judge alleged to be disqualified is determined to be disqualified, all orders and rulings of the judge found to be disqualified made after the filing of the statement will be vacated [*CCP § 170.4(c)(1)*].

#### **Judge's Perspective:**

In almost all instances where a challenge for cause is filed during trial the court proceeds with the trial and does not issue any stay. To do otherwise would be tantamount to the granting of a continuance where none could otherwise be obtained on a valid basis.



#### **Strategic Point:**

Have a clear and substantial ground for seeking disqualification during trial. If you challenge, you must win. In addition to the potential for sanctions, you may encounter subtle forms of retribution (although should that occur, it might help build the case for reversal on appeal based on bias).



#### **Cross Reference:**

Procedure for disqualification determination by another judge, see 22.24.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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**22.26 Effect of Disqualification on Rulings Made Prior to Disqualification.**

**22.26[1] If Judge Has Not Completed Action.** If the grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding but before the judge has completed his or her action in the proceeding, the rulings made up until that time are not to be set aside absent good cause [*CCP § 170.3(b)(4)*; *Hernandez v. Vitamin Shoppe Industries Inc. (2009) 174 CA4th 1441, 1450-1451, 95 CR3d 734*].

**Distinguish:**

By its terms, *CCP § 170.3(b)(4)* applies only to rulings made prior to the time the grounds for disqualification are first learned of or arise--not rulings made prior to the time the judge became aware of controlling law [ *Rossco Holdings, Inc. v. Bank of America (2007) 149 CA4th 1353, 1363-1364, 58 CR3d 141* (order compelling contractual arbitration was void)].

**22.26[2] If Judge Has Completed Action.** The disqualification statutes do not address a situation where a party discovers disqualifying facts after the judge has completed the action. When disqualifying facts are learned after the judgment has been entered but before judgment was final, the judgment is voidable [ *Urias v. Harris Farms, Inc. (1991) 234 CA3d 415, 422-423, 285 CR 659* (discussing earlier California Supreme Court cases that suggest judgment is void)].

**Distinguish:**

Disqualification occurs when the facts creating disqualification arise--not when disqualification is established. Relief is available to a party who, with due diligence, discovers the grounds for disqualification only after judgment is entered or appeal is filed [ *Christie v. City of El Centro (2006) 135 CA4th 767, 776, 37 CR3d 718* ].

**22.26[3] Arbitration Ordered by Disqualified Judge Is Not Necessarily Tainted.** While an order compelling contractual arbitration by a judge whose disqualification is subsequently determined to have existed at the time the order was issued is void, an award resulting from completed arbitration between the parties as a result of the void order is not necessarily tainted. Only if the arbitration itself is tainted, or the order itself was unjustified, is the award itself properly vacated [ *Rossco Holdings, Inc. v. Bank of America (2007) 149 CA4th 1353, 1364-1365, 58 CR3d 141* (subsequent judge's vacating of arbitration award without consideration of taint was premature)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**22.27 CHECKLIST: Waiving Disqualification for Cause.**

☐ Verify the ground for disqualification is waivable. One may not waive the following grounds:

- ☐ Judge has personal bias or prejudice concerning a party.
- ☐ Judge has served as an attorney in the matter.
- ☐ Judge has been a material witness in the matter.

**Authority:**

*CCP § 170.3(b)(2)*

**Discussion:**

See 22.29

☐ Determine whether disqualification has been waived by delay in filing disqualification statement.

**Authority:**

*CCP § 170.3(c)(1)*

**Discussion:**

See 22.23[1], 22.30

☐ Decide whether the ground for disqualification should be affirmatively waived.

**Authority:**

*CCP § 170.3(b)*

**Discussion:**

See 22.28

☐ Assist judge in executing waiver of disqualification on the record:

- ☐ Judge must disclose basis for disqualification on the record;
- ☐ Judge must ask the parties on the record if they wish to waive the basis for disqualification;
- ☐ Prepare written waiver reciting the basis for disqualification to be signed by all parties and their attorneys.

**Authority:**

*CCP § 170.3(b)(1)*

**Discussion:**

See 22.31

**Form:**

See 22.39 (stipulation waiving disqualification)



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**22.28 Disqualification May Be Waived Affirmatively or by Failure to Timely Request Disqualification.**

A judge who determines himself or herself to be disqualified may, after disclosing the basis for disqualification, ask the parties if they wish to waive the disqualification [CCP § 170.3(b)(1)].

A party may also waive a ground for disqualification if the party fails to present the statement of disqualification at the "earliest practicable opportunity" [CCP § 170.3(c)(1)]. See 22.23[1], 22.30.

**Exception:**

Certain grounds for disqualification may not be waived [CCP § 170.3(b)(2); discussion, see 22.29].

**Judge's Perspective:**

This situation usually arises when the judge is aware of something that rises to the level of disclosure but not for disqualification. In that instance, the judge and counsel work out a stipulation that permits the judge to continue with the matter without having to worry that the disclosure will come back to haunt the bench officer. The disclosure and discussion should be on the record in open court. Usually counsel then draft the stipulation and submit to the court later.

**➡ Cross Reference:**

Discussion of requirements for execution of waiver, see 22.31.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**22.29 Some Grounds for Disqualification Cannot Be Waived.**

**22.29[1] Judge Has Personal Bias or Prejudice Concerning a Party.** The parties cannot waive disqualification if the basis for disqualification is that the judge has a personal bias or prejudice concerning a party [*CCP* § 170.3(b)(2)(A)].

► **Cross Reference:**

Discussion of personal bias or prejudice concerning a party ground, see 22.18[7].

**22.29[2] Judge Has Served as an Attorney in the Matter.** The parties cannot waive disqualification if the basis for disqualification is that the judge has served as an attorney in the matter in controversy [*CCP* § 170.3(b)(2)(B)].

► **Cross Reference:**

Discussion of having served as a lawyer in the proceeding ground, see 22.18[3].

**22.29[3] Judge Has Been a Material Witness in the Matter.** The parties cannot waive disqualification if the basis for disqualification is that the judge has been a material witness concerning the matter [*CCP* § 170.3(b)(2)(B)].

► **Cross Reference:**

Discussion of having been a material witness ground, see 22.18[2].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaivers





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**22.30 Party May Waive Disqualification by Delay in Disclosing Grounds.**

A party may waive a ground for disqualification by failing to present a statement of disqualification at the earliest practicable opportunity after discovery of facts constituting the ground of disqualification [CCP § 170.3(c)(1)].

➡ **Cross Reference:**

Discussion of earliest practicable opportunity test, see 22.23[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.31*

**22.31 Waiver Must Be Written and on Record.**

To waive of grounds for disqualification [*CCP* § 170.3(b)(1)]:

- The judge must state the ground for disqualification on the record, and
- The waiver of disqualification must recite the basis for disqualification, be signed by all parties and their attorneys, and be filed in the record.

**Strategic Point:**



Before agreeing to waive any ground for disqualification, ask the judge for full disclosure. Consider asking for time to consider whether or not to waive a disqualifying factor in order to consult with your client or to do further research to determine whether the court has made full disclosure.



**Cross Reference:**

Form, see 22.39.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaivers



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Chapter 22 Disqualification of Judge  
IV. WAIVING DISQUALIFICATION FOR CAUSE

*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.32*

**22.32 Judge's Prohibited Activities Pertaining to Waiver.**

**22.32[1] Judge May Not Seek to Induce Waiver.** A judge may not seek to induce a waiver [*CCP* § 170.3(b)(3)].

**22.32[2] Judge Must Avoid Effort to Discover If Parties Favor or Oppose Waiver.** A judge shall avoid any effort to discover which lawyers or parties favor or oppose a waiver of disqualification [*CCP* § 170.3(b)(4)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaivers



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Chapter 22 Disqualification of Judge  
V. OBTAINING REVIEW OF DISQUALIFICATION ORDERS

*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.33*

**22.33 CHECKLIST: Obtaining Review of Disqualification Orders.**

- ☐ Consider whether there are grounds for reconsideration of the disqualification.

**Authority:**

*CCP § 1008*

**Discussion:**

See 22.36A

 **Cross Reference:**

See Ch. 29, Motions to Reconsider and Renewed Motions

- ☐ Consider whether to seek review of disqualification for cause or peremptory challenge order.

**Authority:**

*CCP § 170.3(d)*

**Discussion:**

See 22.34

- ☐ If review is desired, file and serve a petition for writ of mandate.

 **Timing:**

The petition for writ of mandate must be filed and served within 10 days of the date of service of the notice of entry of decision on disqualification, unless that time is extended for service by mail under *CCP § 1013*.

**Authority:**

*CCP § 170.3(d)*

**Discussion:**

See 22.35[3]

☐ If an appellate challenge based on due process might be considered at a later date, follow statutory procedure and seek a writ of mandate first.

**Authority:**

*CCP § 170.3(d); People v. Hull (1991) 1 C4th 266, 276, 2 CR2d 526, 820 P2d 1036*

**Discussion:**

See 22.35[1]



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V. OBTAINING REVIEW OF DISQUALIFICATION ORDERS

*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.34*

**22.34 Options and Strategy for Review of Orders.**

Unless the likelihood of success on appellate review is very high, do not seek review. If appellate review is not successful, you will be back before the same judge with a heightened level of tension and alienation.

Also consider that even if the denial of disqualification is overturned on review, the case may end up being assigned to a close colleague, and possibly friend, of the challenged judge.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral Overview



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V. OBTAINING REVIEW OF DISQUALIFICATION ORDERS

2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.35

**22.35 Review of Orders Pertaining to Disqualification for Cause.**

**22.35[1] Disqualification Order Is Not Appealable.** A determination of a judge's disqualification is not an appealable order [CCP § 170.3(d)]. Section 170.3(d) also bars review of the issue on appeal after the final judgment [ *People v. Williams* (1997) 16 C4th 635, 652, 66 CR2d 573, 941 P2d 752 (CCP § 170.1 disqualification claim was not properly raised on appeal because of defendant's failure to pursue CCP § 170.3(d) writ of mandate procedure); *Fink v. Shemtov* (2010) 180 CA4th 1160, 1176, 103 CR3d 509 (denying appeal of disqualification order in appeal on other grounds); but see *Christie v. City of El Centro* (2006) 135 CA4th 767, 775, 37 CR3d 718 (appeal of dismissal voidable because it was made by judge disqualified at time of order of dismissal and did not constitute appeal of disqualification of judge)].

**Exception:**

Courts have held that CCP § 170.3(d) does not preclude an appellate challenge, after the final judgment, to a disqualification order based on a constitutional due process claim that the judge was biased [ *People v. Freeman* (2010) 47 C4th 993, 999-1000, 103 CR3d 723, 222 P3d 177 (denying consideration of relief under CCP § 170.3(d) on appeal, while considering but denying relief on the merits of claim of due process violation); *People v. Williams* (1997) 16 C4th 635, 652 n5, 66 CR2d 573, 941 P2d 752 ; *People v. Brown* (1993) 6 C4th 322, 336, 24 CR2d 710, 862 P2d 710 ]. However, a party can forfeit the later constitutional due process claim by failing to follow the statutory procedure for challenging disqualification orders [ *Roth v. Parker* (1997) 57 CA4th 542, 549, 67 CR2d 250 ].

 **Cross Reference:**

Discussion of due process claims arising from judicial bias, see California Forms of Pleading and Practice, Ch. 317, *Judges* (Matthew Bender(R)).

**22.35[2] Disqualification Order May Be Reviewed by Writ of Mandate.** A determination of a judge's disqualification may be reviewed by writ of mandate from the appropriate court of appeal [CCP § 170.3(d); *People v. Freeman* (2010) 47 C4th 993, 1000, 103 CR3d 723, 222 P3d 177 (writ is exclusive avenue for review)].



**Warning:**

Defendant's failure to seek writ review pursuant to *CCP* § 170.3(d), of the denial of his or her statutory disqualification motions forfeits the potential statutory claims that the trial judge should have been disqualified for cause and, having once recused himself, was statutorily precluded from subsequently accepting reassignment of the case [ *People v. Freeman* (2010) 47 C4th 993, 999-1000, 103 CR3d 723, 222 P3d 177] .



#### **Cross Reference:**

Discussion of mandate in general, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender).

#### **22.35[3] Writ Petition Generally Must Be Filed and Served Within 10 Days of Service of Notice of Decision.**

The petition for writ of mandate must be filed and served within 10 days of the date of service of the notice of entry of decision on disqualification, unless that time is extended for service by mail under *CCP* § 1013 [*CCP* § 170.3(d)].

#### **Example:**

A notice of unavailability was not a proper document under the California Rules of Court and did not extend either the time for the trial court to respond to a statement of disqualification or the time for filing a petition for writ of mandate under *CCP* § 170.3(d), so petition for writ filed two months after statement was struck was untimely [ *Carl v. Superior Court* (2007) 157 CA4th 73, 77, 68 CR3d 566 ].

**22.35[4] Writ May Only Be Sought by Parties to the Proceeding.** The writ of mandate may only be sought by the parties to the proceeding [*CCP* § 170.3(d)].

A disqualified judge is not a "party to the proceeding" and may not seek a writ of mandate challenging a disqualification order [ *Curle v. Superior Court* (2001) 24 C4th 1057, 1062-1066, 103 CR2d 751 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral Overview





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Chapter 22 Disqualification of Judge  
V. OBTAINING REVIEW OF DISQUALIFICATION ORDERS

*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.36*

**22.36 Review of Orders Pertaining to Peremptory Challenge.**

An order on a peremptory challenge to a judge is not appealable and may be reviewed only by writ of mandate filed and served within 10 days of the date of service of the notice of entry of decision on disqualification, unless that time is extended for service by mail under *CCP § 1013* [*CCP § 170.3(d)*].

*CCP § 170.3(d)* applies to peremptory challenges as well as challenges for cause [ *People v. Hull* (1991) 1 C4th 266, 276, 2 CR2d 526, 820 P2d 1036 ; *Guedalia v. Superior Court* (1989) 211 CA3d 1156, 1160-1163, 260 CR 99 ].

**Exception:**

The appellate court has the discretion to treat an appeal of a decision on a peremptory challenge as a petition for writ of mandate under extraordinary circumstances. Relief will not be granted where the appealing party has not asked the appellate court to do so, the opposing party contests whether writ relief is appropriate, the appealing party's obligation to instead seek writ relief is clear, and as a result of the appealing party's failure to seek writ relief, further proceedings were held and a final resolution was long-delayed, thereby defeating the policy of judicial economy [ *Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 CA4th 1342, 1349 , 32 CR3d 717 ].

► **Cross References:**

Discussion of *CCP § 170.3(d)*, see 22.35.

Form of writ of mandate after denial of peremptory challenge, see California Forms of Pleading and Practice, Ch. 317, Judges (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral Overview



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V. OBTAINING REVIEW OF DISQUALIFICATION ORDERS

*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.36A*

**22.36A Disqualification Orders May Be Reconsidered by the Assigned Judge.**

A judge's order disqualifying himself or herself may be reconsidered under *CCP § 1008*. Given that the disqualified judge has no authority to act on substantive matters, the new judge assigned to the case hears the motion for reconsideration on the basis that the disqualified judge is "unavailable." If the new judge finds the disqualification is erroneous, the disqualified judge's authority to rule on the matter is reinstated [ *Geddes v. Superior Court (2005) 126 CA4th 417, 425-426 , 23 CR3d 857* (peremptory challenge)].



**Cross Reference:**

See Ch. 29, Motions to Reconsider and Renewed Motions

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral Overview



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Chapter 22 Disqualification of Judge

VI. FORMS.

A. Disqualification for Cause

*2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.37*

**22.37 Written Statement of Disqualification--General Form.**

Written Statement of Disqualification--General Form

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name], )  
Petitioner, )  
vs. )  
\_\_\_\_\_[name], )  
Defendant. )  
)  
)

NO. \_\_\_\_\_  
STATEMENT OF DISQUALIFICATION OF  
JUDGE

\_\_\_\_\_

1. I, \_\_\_\_\_[name], declare:

2. I am an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for the \_\_\_\_\_[party, e.g., Plaintiff John Smith]. In opposition to the selection of the Honorable \_\_\_\_\_[name of judge], I state and allege that:

3. The Honorable \_\_\_\_\_[name] is disqualified from hearing the above-entitled matter because \_\_\_\_\_[state facts constituting the ground(s) for disqualification for cause under the appropriate subdivision(s) of CCP § 170.1 ].

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [party's status and name]

## VERIFICATION

I, \_\_\_\_\_ [name], am the attorney for the \_\_\_\_\_ [Party, e.g., Plaintiff John Smith] in the above-entitled matter. I have read the foregoing written statement for the disqualification for cause of the Honorable \_\_\_\_\_ [name] as judge in this matter and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

## NOTES.

### Authority:

CCP § 170.3(c)(1)

### Drafting Statement:

See 22.23[2]

### Grounds:

See 22.18



### Timing:

See 22.23[1]

### Service:

See 22.23[3]

### Forms

of allegation of specific grounds for disqualification, see California Forms of Pleading and Practice, Ch. 317, Judges (Matthew Bender)



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Chapter 22 Disqualification of Judge

VI. FORMS.

A. Disqualification for Cause

2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.38

**22.38 Stipulation by Parties Agreeing on Judge to Hear Question of Disqualification.**

Stipulation by Parties Agreeing on Judge to Hear Question of Disqualification

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)  
)  
)  
)  
)  
)  
)

NO. \_\_\_\_\_

STIPULATION BY PARTIES ON JUDGE TO  
HEAR QUESTION OF DISQUALIFICATION

The parties to the above-entitled matter hereby stipulate and agree through their respective counsel that the question of the disqualification of the Honorable \_\_\_\_\_ [name], a Judge of the above-entitled court, who has denied his/her disqualification as judge to hear the above-entitled matter, may be heard and determined at a time and place set by the Honorable \_\_\_\_\_ [name], a Judge of the above-entitled court.

This stipulation and agreement is made pursuant to subparagraph (c)(5) of *Section 170.3 of the Code of Civil Procedure*.

Dated: \_\_\_\_\_.

\_\_\_\_\_, [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Plaintiff

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant

NOTES.

**Authority:**

CCP § 170.3(c)(5)



**Timing:**

See 22.24[1]

**Drafting Stipulation By Parties Agreeing on Judge to Hear Question of Disqualification:**

See 22.24[1]



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Chapter 22 Disqualification of Judge  
VI. FORMS.  
B. Waiver of Disqualification for Cause.

2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.39

### 22.39 Stipulation by Parties Waiving Disqualification of Judge.

Stipulation by Parties Waiving Disqualification of Judge  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                   |   |                                     |
|-------------------|---|-------------------------------------|
| _____ [name],     | ) |                                     |
| Plaintiff,        | ) | NO. _____                           |
| vs. _____ [name], | ) | STIPULATION BY PARTIES WAIVING DIS- |
| Defendant.        | ) | QUALIFICATION                       |
|                   | ) |                                     |
|                   | ) |                                     |

The parties to the above-entitled matter hereby stipulate in writing that the above-entitled matter may be heard by the Honorable \_\_\_\_\_ [name of judge], a judge of the above-entitled court. The disqualification for cause that is being waived by this written stipulation is a disqualification of that judge under \_\_\_\_\_ [specify subsection, e.g., (a)(1)] of Section 170.1 of the Code of Civil Procedure [set forth basis of disqualification, e.g., because the judge's daughter-in-law is likely to be a material witness in this proceeding].

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Plaintiff

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Plaintiff

\_\_\_\_\_ [signature]

Defendant \_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant

NOTES.

**Authority:**

CCP § 170.3(b)(1), (2)

**Grounds That May Not Be Waived:**

See 22.29



**Timing:**

See 22.31

**Drafting Stipulation by Parties Waiving Disqualification of Judge:**

See 22.31





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Chapter 22 Disqualification of Judge

VI. FORMS.

C. Peremptory Challenge to Judge

2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.40

**22.40 Proceedings to Obtain Peremptory Disqualification of Judge, Court Commissioner, or Referee--Written Notice.**

Proceedings to Obtain Peremptory Disqualification of Judge, Court Commissioner, or Referee--Written Notice  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                     |
|---------------|---|-------------------------------------|
| _____ [name], | ) |                                     |
| Plaintiff,    | ) |                                     |
| vs.           | ) | NO. _____                           |
| _____ [name], | ) | MOTION FOR PEREMPTORY DISQUALIFICA- |
| Defendant.    | ) | TION AND _____ [AFFIDAVIT or        |
|               | ) | DECLARATION] IN SUPPORT OF MOTION   |
|               | ) |                                     |

TO THE HONORABLE \_\_\_\_\_ [name], \_\_\_\_\_ [e.g., PRESIDING JUDGE OF THE  
ABOVE-ENTITLED COURT or THE JUDGE OF THE MASTER CALENDAR DEPARTMENT OF THE CIVIL  
DIVISION OF THE ABOVE-ENTITLED COURT or other appropriate statement]:

The attorney for the \_\_\_\_\_ [plaintiff or defendant] in the above-entitled matter hereby moves that  
\_\_\_\_\_ [specify matter to be heard, e.g., trial of the this matter or other appropriate statement], which  
involves a contested issue of law or fact, and which has been assigned to the Honorable \_\_\_\_\_ [name],  
\_\_\_\_\_ [Judge or Court Commissioner or Referee] of the above-entitled Court, be reassigned from that  
\_\_\_\_\_ [Judge or Court Commissioner or Referee], and that no matters hereinafter arising in this cause  
be heard by or assigned to the Honorable \_\_\_\_\_ [name], on the ground that the \_\_\_\_\_  
[Judge or Court Commissioner or Referee] is prejudiced against the \_\_\_\_\_ [plaintiff or defendant or  
attorney for the plaintiff or attorney for the defendant or interest of the \_\_\_\_\_ (specify, e.g., plaintiff or

defendant *or* attorney for the plaintiff *or* attorney for the defendant)] in this action.

This motion is based on the matters contained herein, on *Code of Civil Procedure Section 170.6*, and on the supporting \_\_\_\_\_ [Affidavit *or* Declaration Under Penalty of Perjury] of \_\_\_\_\_ [name] attached hereto and filed herewith.

WHEREFORE, \_\_\_\_\_ [plaintiff *or* defendant] prays that the relief herein requested be granted.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [party's status]

NOTES.

**Authority:**

CCP § 170.6(a)(2)



**Timing:**

See 22.09

**Drafting Written Notice:**

See 22.08[1]

**Related Form of Affidavit:**

See 22.41

**Related Form of Declaration:**

See 22.42



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Chapter 22 Disqualification of Judge

VI. FORMS.

C. Peremptory Challenge to Judge

2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.41

**22.41 Affidavit in Support of Written or Oral Motion--Statutory Form.**

Affidavit in Support of Written or Oral Motion--Statutory Form

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF \_\_\_\_\_

|               |   |                                    |
|---------------|---|------------------------------------|
| _____ [name], | ) |                                    |
| Plaintiff,    | ) |                                    |
| vs.           | ) | NO. _____                          |
| _____ [name], | ) | AFFIDAVIT IN SUPPORT OF PEREMPTORY |
| Defendant.    | ) | CHALLENGE                          |
|               | ) |                                    |
|               | ) |                                    |

\_\_\_\_\_

\_\_\_\_\_ [name], being first duly sworn, deposes and says:

That he/she is \_\_\_\_\_ [a party or an attorney for a party] to the within \_\_\_\_\_ [action or special proceeding]. That \_\_\_\_\_ [name] the \_\_\_\_\_ [judge or court commissioner or referee] \_\_\_\_\_ [before or to] whom \_\_\_\_\_ [the trial of or a hearing in] the above-mentioned \_\_\_\_\_ [action or special proceeding] \_\_\_\_\_ [is pending or has been assigned], is prejudiced against the \_\_\_\_\_ [party or party's attorney or interest of the \_\_\_\_\_ (party or party's attorney)] so that affiant cannot or believes that he/she cannot have a fair and impartial trial or hearing before the \_\_\_\_\_ [judge or court commissioner or referee].

\_\_\_\_\_ [signature]

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_.

\_\_\_\_\_ [signature]

[Clerk or Notary Public or other officer administering oath]

NOTES.

**Authority:**

CCP §§ 170.6(a)(5), 170.6(a)(2)

**Drafting Affidavit:**

See 22.08[2]

**Related Form of Written Notice for Motion:**

See 22.40

**Alternative Form of Declaration:**

See 22.42



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Chapter 22 Disqualification of Judge

VI. FORMS.

C. Peremptory Challenge to Judge

2-22 MB Practice Guide: CA Pretrial Civil Procedure 22.42

## 22.42 Declaration in Support of Written or Oral Motion.

Declaration in Support of Written or Oral Motion

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)

)

)

)

)

)

)

NO. \_\_\_\_\_

DECLARATION IN SUPPORT OF MOTION FOR  
PEREMPTORY CHALLENGE

I, \_\_\_\_\_ [name], declare that:

I am the \_\_\_\_\_ [specify, e.g., attorney for the plaintiff or attorney for the defendant or plaintiff or defendant] in the above-entitled matter.

The Honorable \_\_\_\_\_ [name], \_\_\_\_\_ [Judge or Court Commissioner or Referee]  
\_\_\_\_\_ [before or to] whom \_\_\_\_\_ [the trial of or a hearing in] the above-entitled  
matter \_\_\_\_\_ [is pending or has been assigned], is prejudiced against the \_\_\_\_\_  
[specify, e.g., plaintiff or defendant or attorney for the plaintiff or attorney for the defendant or interest of the  
\_\_\_\_\_ (specify, e.g., plaintiff or defendant or attorney for the plaintiff or attorney for the defendant)]  
so that declarant cannot or believes that he/she cannot have a fair and impartial \_\_\_\_\_ [trial or  
hearing] before the \_\_\_\_\_ [judge or court commissioner or referee].

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]

NOTES.

**Authority:**

CCP §§ 170.6(a)(2), 170.6(a)(5), 170.6(a)(6)

**Drafting Declaration:**

See 22.08[2]

**Related Form of Written Notice for Motion:**

See 22.40

**Alternative Form of Affidavit:**

See 22.41



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Chapter 23 Case Management

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.syn*

**§ 23.syn Synopsis to Chapter 23: Case Management**

23.01 Scope.

23.02 Objective and Strategy.

23.03 CHECKLIST: Determining Assignment to Differential Case Management Program.

23.04 General Civil Cases Are Evaluated for One of Three Options: Assignment to Case Management Program, Exemption From Time Goals, or Assignment to Expedited Plan.

23.04[1] Evaluation of Case Occurs at Time of Filing or Shortly Thereafter.

23.04[1][a] Each Case Must Be Evaluated on Its Own Merits to Determine Which Option Applies.

23.04[1][b] Probate, Family Law, Juvenile Court, Unlawful Detainer, and Small Claims and "Other Civil Petitions" Are Not General Civil Cases.

23.04[1][c] Cases Assigned to Case Management Program Have Different Time Disposition Goals Based on Unlimited or Limited Civil Case Status.

23.04[1][d] Courts May Establish Additional Plan for Faster Disposition of Uncomplicated Cases.

23.04[1][e] Short Cause Cases Assigned to Case Management Program May Be Exempted From Case Review.

23.04[1][f] Complex Cases and Others May Be Exempt Based on Exceptional Circumstances.

23.04[1][g] If Coordination Petition Is Granted, Coordination Judge Assigns or Exempts Case.

23.04[1][h] Delayed Application of Case Management Rules to Cases Designated As Uninsured Motorist.

23.04[1][i] Certain Collections Cases Exempt If Defendant Does Not File Responsive Pleading.

23.04[2] Cases Removed From Court's Control Excluded From Computation of Time Goals.

23.04[3] Judicial Council Form of Case Cover Sheet Provides Information to Assist in Classification.

23.04[4] Presiding Judge May Assign Judge for All Purposes or Limited Purposes.

23.05 Court Considers Specific Factors in Evaluating Assignment to Case Management Program, Exemption From Time Goals, or Assignment to Expedited Plan.

23.06 CHECKLIST: Participating in Case Management Conferences.

23.07 Options and Strategies for Parties in Case Management Conference.

23.08 Court Evaluates Nonexempt General Civil Cases at Case Management Conference.

23.08[1] Conference Is Held Within 180 Days After Complaint Filed.

23.08[2] Notice of Case Management Conference Must Be Given No Later Than 45 Days Before Conference Date.

23.08[3] Each Party Must File a Case Management Statement No Later Than 15 Days Before Conference.

23.08[3][a] Use of Judicial Council Form CM-110 Is Mandatory.

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23.58 Judicial Council Form CM-110 Case Management Statement.

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23.61 Order to Amend Case Management Conference Order.

23.62 Notice of Time Set for Trial.

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23.66 Notice of Motion and Supporting Declaration to Establish Precedence or Preference of Case for Case Management Conference or Trial.

23.67 Order Establishing Precedence or Preference of Case for Case Management Conference or Trial.

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23.70 Demand for Jury Trial (If No Local Form Exists).

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Chapter 23 Case Management  
I. STRATEGY

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.01*

**23.01 Scope.**

This chapter covers:

- Objectives and strategy for case management [see 23.02].
- Evaluation of general civil cases and assignment to a differential time goal or exemption from assignment [see 23.03 -23.05].
- Participation in case management conferences, including preparation of case management statements and participation in meet-and-confer meetings [see 23.06 -23.10; Forms: see 23.58 -23.62].
- Trial setting process for exempt cases [see 23.11].
- Special case management rules for complex cases [see 23.12].
- Possible imposition of sanctions for violations of the Trial Court Delay Reduction Act or local rules [see 23.13].
- Participation in settlement conference [see 23.14, 23.16, 23.18; Form: see 23.63].
- Making and considering offers to compromise [see 23.15, 23.18].
- Seeking and resisting bifurcated trials for special defenses and issues [see 23.20 -23.24; Forms: see 23.64, 23.65].
- Making and opposing motions for precedence and preference [see 23.25, 23.27 -23.35; Forms: see 23.66, 23.67].
- Making and opposing motions to advance, reset, or specially set trial [see 23.26, 23.27, 23.36; Forms: see 23.68, 23.69].

- Making and opposing demands for trials by jury [*see* 23.37 -23.44; Forms: *see* 23.70, 23.71].
- Paying jury fees and mileage sums [*see* 23.45 -23.47].
- Waiver of a trial by jury [*see* 23.48; Form: *see* 23.71].
- Pretrial conferences [*see* 23.50, 23.52].
- Making and opposing motions in limine [*see* 23.51 -23.57].



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Chapter 23 Case Management  
I. STRATEGY

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**23.02 Objective and Strategy.**

The Trial Court Delay Reduction Act [*Gov Code §§ 68600-68620*], along with 2002 changes to the California Rules of Court, has made significant changes to the way that a case moves through the judicial system. Previously, attorneys for civil litigants set the pace at which the case moved through the system. Under the Trial Court Delay Reduction Act, the court uses a system of case management to determine the pace at which each case moves through the judicial system. Pretrial procedure is governed by *CCP §§ 575.1, 575.2, Gov Code §§ 68612, 68616, and Cal Rules Ct, Rules 2.1 et seq., 3.1 et seq.*



**Warning:**

The case management process is not uniform statewide. Consequently, it is very important for counsel to check and comply with the local rules on the subject, which vary significantly.



**Strategic Point--Plaintiff:**

When drafting a complaint, counsel should present claims in a way that will aid in having the case assigned to the time plan that counsel finds most desirable. This should be remembered when completing mandatory California Judicial Council Form CM-010 Civil Case Cover Sheet because the information on this form will be used by the court in classifying the case and assigning it to a differential time goal.

**Judge's Perspective:**

Counsel who participate in the conference should be well versed as to the case in question. Decisions are made at these conferences that effect the overall structure and phasing of the case. These conferences should not be considered an appearance that is simply to be covered.

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 322, Juries and Jury Selection; Ch. 373, Motions In Limine; Ch. 425, Pretrial Proceedings (Matthew Bender).

California Points and Authorities, Ch. 180, Pretrial Proceedings (Matthew Bender).



► **Cross References:**

Discussion of jury selection and handling during trial, see, respectively, Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, Jury Selection; Ch. 16, Jury Instructions; Ch. 17, Dealing With the Jury.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.



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Chapter 23 Case Management

## II. DETERMINING ASSIGNMENT TO DIFFERENTIAL CASE MANAGEMENT PROGRAM

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.03*

### 23.03 CHECKLIST: Determining Assignment to Differential Case Management Program.

- ☐ File initial complaint and mandatory California Judicial Council Form CM-010 Civil Case Cover Sheet.

**Discussion:**

See Ch. 7, Complaints

- ☐ Determine if case is a "general" civil case:
- ☐ Civil cases are classified as "general" unless they are specific type excluded by Rule 1.6(4) (e.g., unlawful detainer proceedings).
  - ☐ General civil cases are subject to case management review and will be classified into one of three time goals depending on whether it is an unlimited or limited civil case.
  - ☐ Case that is not general civil case will be exempt from this case management review.

**Authority:**

*Cal Rules Ct, Rules 3.712, 3.714(b), 3.720, 3.734*

**Discussion:**

See 23.04[1]

- ☐ Determine if case is a "collections case" under *Cal Rules Ct, Rule 3.740(a)*.
- ☐ Collections case must seek recovery of not more than \$25,000 arising from a credit transaction for

property, services, or money and must not seek other specified relief.

- ☐ Collections case in which defendant has not filed responsive pleading is exempt from differential case management rules.

**Authority:**

*Cal Rules Ct, Rules 3.712(a), (d), 3.740(a), (c)(1)*

**Discussion:**

23.04[1][i]

- ☐ Calendar any case management conference or status conference date assigned by the court. Many courts have the clerk assign the date and stamp it on the filed complaint and require the plaintiff to notify all parties of the date.

**Authority:**

See, e.g., Los Angeles Super Ct Rules, Rule 7.3(c) (status conference date); San Francisco Super Ct Rules, Rule 3.4(A) (case management conference date)

- ☐ Unless the case is exempt from case management review, calendar the date that is 180 days from the date that the complaint was filed. The court will review the case and assign it to a time goal within those 180 days.

**Authority:**

*Cal Rules Ct, Rule 3.721*

**Discussion:**

See 23.04

- ☐ Decide whether to file a noticed motion to have the case assigned to one judge for all purposes or for limited purposes.

**Authority:**

*Cal Rules Ct, Rule 3.734*

**Discussion:**

See 23.04[4]



**Warning:**

Check the local court rules. Although some courts automatically assign some cases to a single judge, others proscribe limited periods within which to request assignment to a single judge.

- ☐ If case is exempt from case management review, determine whether other case management requirements apply, such as local rules for uncomplicated cases and case progression goals for complex cases.

**Discussion:**

See 23.04[1][d]-[i]



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Chapter 23 Case Management  
II. DETERMINING ASSIGNMENT TO DIFFERENTIAL CASE MANAGEMENT PROGRAM

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.04*

**23.04 General Civil Cases Are Evaluated for One of Three Options: Assignment to Case Management Program, Exemption From Time Goals, or Assignment to Expedited Plan.**

**23.04[1] Evaluation of Case Occurs at Time of Filing or Shortly Thereafter.**

**23.04[1][a] Each Case Must Be Evaluated on Its Own Merits to Determine Which Option Applies.** Each court must adopt a case management and calendar system for general civil cases [*Cal Rules Ct, Rule 3.712(a), 3.720, 10.900*]. Civil cases that are not *general* civil cases are exempt from differential case management [*Cal Rules Ct, Rules 1.6(4), 3.712(a)*].

 **Cross Reference:**

Discussion of cases that are not general civil cases, see *23.04[1][b]*.

The court must evaluate each general civil case on its own merits and, using the case evaluation factors of *Cal Rules Ct, Rule 3.715*, must decide whether to [*Cal Rules Ct, Rule 3.714(a)*]:

- Assign the case to the case management program, which results in a review of the case under *Cal Rules Ct, Rule 3.720 et seq.* (case management conference) within 180 days of the date of filing to determine how the case will be managed to meet disposition time goals;
- Exempt the case from the case disposition time goals because it is an exceptional case under *Cal Rules Ct, Rule 3.714(c)*, and monitor it with the goal of disposing of it within three years; or
- Assign the case to a local rule case management plan for expedited case disposition within six to nine months after filing, if the court has adopted such local rules.

 **Timing:**

Typically, the court will evaluate a case at the time of filing or shortly thereafter. Check local rules to determine when this evaluation takes place, how the court notifies the party of the assignment or exemption, and whether there are local rules for expedited case disposition.

► **Cross References:**

Discussion of time goals under case management program, see 23.04[1][c]; discussion of expedited case disposition and short cause cases, see 23.04[1][d], [e]; discussion of exempt civil cases, see 23.04[1][f]. Discussion of case evaluation factors, see 23.05.

**23.04[1][b] Probate, Family Law, Juvenile Court, Unlawful Detainer, and Small Claims and "Other Civil Petitions" Are Not General Civil Cases.** A "general civil case" includes all civil cases except the following [*Cal Rules Ct, Rule 1.6(4)*]:

- Probate;
- Guardianship;
- Conservatorship;
- Family law, including:
  - ☐ Proceedings under the Family Law Act, Uniform Parentage Act, and Uniform Child Custody Jurisdiction Act;
  - ☐ Freedom from parental custody and control proceedings;
  - ☐ Adoption proceedings;
- Juvenile court proceedings;
- Small claims proceedings;
- Unlawful detainer proceedings; and
- "Other civil petitions" [*see Cal Rules Ct, Rule 1.6(5)* (definition of "civil petitions")].

► **Cross References:**

Discussion concerning cases that are not considered to be "general civil cases" see:

- Matthew Bender(R) Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer.
- California Forms of Pleading and Practice, Chs. 258-260, Family Law Enforcement chapters; Chs. 327-329, Juvenile Courts chapters; Ch. 333, Landlord and Tenant: Eviction Actions; Ch. 440, Probate; Ch. 526, Small Claims (Matthew Bender).

**23.04[1][c] Cases Assigned to Case Management Program Have Different Time Disposition Goals Based on Unlimited or Limited Civil Case Status.** If a general civil case is assigned to the case management program for review under *Cal Rules Ct, Rule 3.720 et seq.*, these cases are managed to achieve the following time goals from the date of filing [*Cal Rules Ct, Rule 3.714(b)(1), (2)*]:

- Unlimited civil cases:

- ☐ 75% disposed of within 12 months.
- ☐ 85% disposed of within 18 months.
- ☐ 100% disposed of within 24 months.

- Limited civil cases:

- ☐ 90% disposed of within 12 months.
- ☐ 98% disposed of within 18 months.
- ☐ 100% disposed of within 24 months.

These goals are the guidelines for all unlimited and limited civil cases filed in that court. In managing *individual* cases, the court must consider each case on its merits; and, to enable the fair and efficient resolution of civil cases, each case should be set for trial as soon as appropriate for that individual case consistent with *Cal Rules Ct, Rule 3.720 et seq.* [*Cal Rules Ct, Rule 3.714(b)(3)*].



#### Cross Reference:

Discussion of factors for setting trial date, see 23.11[1].

The classification is almost always accomplished before or during the case management conference [*see* 23.06-23.09].



#### Timing:

Classification of a case may affect the court's willingness to grant continuances or extend pretrial deadlines. If you are assigned to the fastest time goal, you must be very diligent in moving discovery along and leaving enough time to file any pretrial motions that may assist your case. For example, keep in mind that a summary judgment motion generally must be served at least 105 days before the scheduled trial date [*CCP § 437c(a)*].

**23.04[1][d] Courts May Establish Additional Plan for Faster Disposition of Uncomplicated Cases.** Under the Trial Court Delay Reduction Act court rules, a court may adopt a case management plan for disposing of uncomplicated cases within six to nine months after filing [*Cal Rules Ct, Rule 3.714(d)(1)*]. The court, by local rule, must establish a procedure for designating cases as uncomplicated or simple [*Cal Rules Ct, Rule 3.714(d)(1)*]. The plan can be used only for uncomplicated cases that do not need a case management conference because no case management conference is held to guide these cases to resolution [*Cal Rules Ct, Rule 3.714(d)(2)*].

**23.04[1][e] Short Cause Cases Assigned to Case Management Program May Be Exempted From Case Review.** A short cause case is a civil case in which the time estimated for trial by all parties or the court is five hours or less [*Cal Rules Ct, Rule 3.735(a)*].

After a general civil case is assigned to the case management program, on the stipulation of all parties or on the court's own motion, the court may order that a case is a short cause case exempted from the requirements of case management review. The court will set the short cause case for trial within six to nine months [*Cal Rules Ct, Rule 3.735(b)*]. Short

cause cases are managed without conferences.



**Warning:**

If a short cause case is not completely tried within five hours, the judge may declare a mistrial or, in the judge's discretion, may complete the trial. In the event of a mistrial, the case will be treated as a long cause case and must promptly be set either for a new trial or for a case management conference [*Cal Rules Ct, Rule 3.735(c)*]. Thus, plaintiff's counsel may want to consider trying to limit the issues or the evidence presented in order to avoid the expense of further litigation.



**Cross Reference:**

Discussion of moving for mistrial, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 22, Mistrial.

**23.04[1][f] Complex Cases and Others May Be Exempt Based on Exceptional Circumstances.** In the interest of justice, the court may exempt a general civil case from the case disposition time goals if it finds that the case involves exceptional circumstances that will prevent the court and the parties from meeting the goals and deadlines imposed by the case disposition program. In making the determination, the court is guided by the case evaluation factors and definitions in *Cal Rules Ct, Rule 3.715* (case evaluation factors) and in *Cal Rules Ct, Rule 3.400 et seq.* (definition and provisional designation of complex cases). If a case is exempted from the case disposition time goals, the court will establish a case progression plan and monitor the case to ensure timely disposition, with the goal of disposing the case within three years [*Cal Rules Ct, Rule 3.714(d)*].

**Example:**

Court may exempt general civil case from time disposition goals and continue trial date to provide late added party with sufficient time to bring summary judgment motion; fast track rules must give way to statutory right to bring summary judgment motion [ *Polibrid Coatings, Inc. v. Superior Court (2003) 112 CA4th 920, 923-924* ].

A complex case under *Cal Rules Ct, Rule 3.400* must be assigned to a single judge for all purposes or, if not possible for law and motion and discovery matters [*Cal Rules Ct, Stds Jud Admin, Std 3.10(b)*].

If your case is complex you should ask for that designation on the Civil Case Cover Sheet, California Judicial Council Form CM-010 [*Cal Rules Ct, Rule 3.402*].



**Cross References:**

Discussion of requesting assignment to a single judge, see 23.04[4].

Discussion of complex case management rules, see 23.12.

Discussion on the use of California Judicial Council Form CM-010, see *Ch. 7, Complaints, 7.20*.

Discussion of complex case management, see Judicial Council of California Deskbook on The Management of Complex Civil Litigation.

**23.04[1][g] If Coordination Petition Is Granted, Coordination Judge Assigns or Exempts Case.** Coordination involves the assignment of civil actions sharing common questions of law or fact that have been filed in different counties to a single judge for trial [*see CCP §§ 404-404.9*]. The judge then coordinates pretrial procedures and may try the cases in one or more courts. If a petition for coordination is granted, the coordination judge then assigns the case to one of the time goals or exempts the case from the case management program.

 **Cross Reference:**

Discussion of case management of coordinated complex cases, see *Ch. 32, Notice of Related Cases, Consolidation, Coordination, and Severance of Actions*, 32.22.

Discussion of coordination of actions, see *Ch. 32, Notice of Related Cases, Consolidation, Coordination, and Severance of Actions*, 32.15.

**23.04[1][h] Delayed Application of Case Management Rules to Cases Designated As Uninsured Motorist.** To allow for arbitration of the plaintiff's claim, case management rules do not apply to a case designated by the court as "uninsured motorist" until 180 days after that designation [*Cal Rules Ct, Rule 3.712(b)*].

**23.04[1][i] Certain Collections Cases Exempt If Defendant Does Not File Responsive Pleading.** Collections cases, as defined in *Cal Rules Ct, Rule 3.740(a)*, and in which the defendant does not file a responsive pleading, are exempt from differential case management rules [*Cal Rules Ct, Rules 3.712(d), 3.740(c)(1)*].

**Distinguish:**

A "collections case" is an action for recovery of not more than \$25,000, exclusive of interest and attorney fees, arising from a credit transaction for property, services, or money. The action may not seek [*Cal Rules Ct, Rule 3.740(a)*]:

- Tort damages.
- Punitive damages.
- Recovery of real property.
- Recovery of personal property.
- Prejudgment writ of attachment.

 **Cross Reference:**

Exemption of "collections case" from 60-day service of summons requirement, see 7.29.

**23.04[2] Cases Removed From Court's Control Excluded From Computation of Time Goals.** If a case is removed from the court's control, the period of time until the case is restored to court control is excluded from the case disposition time standards; and includes such events as [*Cal Rules Ct, Stds Jud Admin, Std 2.2(n)*]:

- The filing of a notice of conditional settlement under *Cal Rules Ct, Rule 3.1385*.
- An automatic stay resulting from the filing of an action in a federal bankruptcy court.
- The removal of the case to federal court.
- An order of a federal court or higher state court staying the case.
- An order staying the case based on proceedings in a court of equal standing in another jurisdiction.
- The pendency of contractual arbitration under *CCP § 1281.4*.



- The pendency of attorney fee arbitration under *B&P Code § 6201*.
- A stay by the reporting court for active military duty or incarceration.
- For 180 days, the exemption for uninsured motorist cases under *Cal Rules Ct, Rule 3.712(b)*.

#### **Cross Reference:**

Discussion of duty to notify court of contractual arbitration stay, see *Ch. 6, Determining Forum, 6.17[2]*.

Discussion of removal to federal court, see *Ch. 17, Removal to Federal Court*.

Discussion of duty to notify court of stay, see *Ch. 32, Notice of Related Cases, Consolidation, Coordination, and Severance of Actions, 32.06A*.

Discussion of duty to notify court of conditional settlement, see *Ch. 37, Settlement and Release, 37.26*.

#### **23.04[3] Judicial Council Form of Case Cover Sheet Provides Information to Assist in Classification.**

California Judicial Council Form CM-010 consists of a Civil Case Cover Sheet, which provides information for the court's use in classifying the case. The information required in the case cover sheet includes the type of case, whether the case is limited or unlimited, whether the case is complex, the types of remedies sought, the number of causes of action, and whether the case is a class action.



#### **Warning--Plaintiff:**

Use of California Judicial Council Form CM-010 is mandatory in most civil actions [*Cal Rules Ct, Rule 3.220(b)*]. Failure to use Form CM-010 may result in the imposition of sanctions under *Cal Rules Ct, Rule 2.30* [*Cal Rules Ct, Rule 3.220(c)*].

#### **Cross Reference:**

Discussion on the use of California Judicial Council Form CM-010, see *Ch. 7, Complaints, 7.20*.

**23.04[4] Presiding Judge May Assign Judge for All Purposes or Limited Purposes.** On the noticed motion of a party or on the court's own motion, the presiding judge may order the assignment of any case to one judge for all or such limited purposes as will promote the efficient administration of justice [*Cal Rules Ct, Rule 3.734*]. Some courts automatically assign a pro rata share of all cases to a single judge [see, e.g., Los Angeles Super Ct Rules, Rule 7.3(a), (i)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersGeneral Overview



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II. DETERMINING ASSIGNMENT TO DIFFERENTIAL CASE MANAGEMENT PROGRAM

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.05*

**23.05 Court Considers Specific Factors in Evaluating Assignment to Case Management Program, Exemption From Time Goals, or Assignment to Expedited Plan.**

When deciding whether to assign a case to the case management program, declare it exempt, or assign it to an expedited plan, the court will estimate the maximum time that will reasonably be required to dispose of each case in a just and effective manner [*Cal Rules Ct, Rule 3.715(a)*]. The court will consider the following factors and any other information it deems relevant, understanding that no one factor or set of factors is controlling and that cases may have unique characteristics incapable of precise definition [*Cal Rules Ct, Rule 3.715(a)(1)-(18)*]:

- Type and subject matter of the action;
- Number of causes of action or affirmative defenses alleged;
- Number of parties with separate interests;
- Number of cross-complaints and the subject matter;
- Complexity of issues, including issues of first impression;
- Difficulty in identifying, locating, and serving parties;
- Nature and extent of discovery anticipated;
- Number and location of percipient and expert witnesses;
- Estimated length of trial;
- Whether some or all issues can be arbitrated or resolved through other dispute resolution methods;
- Statutory priority for the issues;
- Likelihood of review by writ or appeal;

- Amount in controversy and the type of remedy sought, including measures of damages;
- Pendency of other actions or proceedings that may affect the case;
- Nature and extent of law and motion proceedings anticipated;
- Nature and extent of the injuries and damages;
- Pendency of underinsured claims; and
- Any other factor that would affect the time for disposition of the case.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersGeneral Overview



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**23.06 CHECKLIST: Participating in Case Management Conferences.**

- ☐ Calendar date set by court for case management conference, which may be stamped on face of complaint by clerk.



**Timing:**

Court will give notice of case management conference at least 45 days before conference is scheduled to occur.

**Authority:**

*Cal Rules Ct, Rule 3.722(b)*

**Discussion:**

See 23.08[2]

- ☐ Meet and confer with other parties to determine the issues to be discussed at case management conference.



**Timing:**

Meet and confer must occur at least 30 days prior to the date set for the case management conference.

**Authority:**

*Cal Rules Ct, Rule 3.724*

**Discussion:**

See 23.08[4]

- ☐ File and serve on all other parties a case management statement in the form of mandatory

California Judicial Council Form CM-110 or file joint case management statement if possible.



**Timing:**

Case management statement must be filed and served at least 15 days before the date set for the case management conference.

**Authority:**

*Cal Rules Ct, Rule 3.725*

**Discussion:**

See 23.08[3]

**Form:**

See 23.58

- ☐ Consider appearance at case management conference.
- ☐ Determine whether court will be requiring appearance.
- ☐ If appearance required, consider appearing by telephone, if court has not required appearance in person and if client has:
- ☐ Made a good faith effort to meet and confer and
- ☐ Timely served and filed a case management statement before the conference date.
- ☐ If appearing by telephone, provide proper notice of intention to do so.

**Authority:**

*Cal Rules Ct, Rules 3.722(c)-(e), 3.670(c), (e)(2), (g)*

**Discussion:**

See 23.08[5], [6]



**Cross Reference:**

See *Ch. 26, Law and Motion Procedure*, 26.18 et seq. (appearance by telephone)

- ☐ Review case management order and calendar the deadlines and other important dates set forth therein.

**Discussion:**

See 23.10, 23.11

- ☐ If strategically important and in the furtherance of justice, and the opposing party will not stipulate to amendment, make motion to amend case management order.



**Timing:**

No time constraints on motion to amend, and motion can be made orally at trial.

**Discussion:**

See 23.10[3]

**Forms:**

See 23.60 (notice of motion and supporting declaration), 23.61 (order)

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39



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**23.07 Options and Strategies for Parties in Case Management Conference.**

Counsel should answer fully and completely all questions in the case management statement, using the mandatory California Judicial Council Form CM-110. Counsel should analyze the case thoroughly before committing to positions on the case management statement because the case management order will control subsequent conduct of the case unless modified [*Cal Rules Ct, Rule 3.730*] and the parties may be held to positions taken at the conference. Counsel should use the meet and confer process to discuss and resolve as many issues as possible so that the parties can pinpoint disputed issues and propose solutions during the case management conference.

**Judge's Perspective:**

Once decisions have been made at the conference, it is not easy to change the overall posture of the case at a later conference. The degree of difficulty or success will depend on whether or not the issue is one that was not anticipated and/or one that both counsel agree no longer are in issue or can be handled in another manner.

**Consider--Developing Strengths and Weaknesses of Case:**

It is important when attempting to complete the case management statement that all parties work together in an attempt to provide the court with the most accurate information possible. Preparing the case management order provides counsel with an opportunity to begin discussing the relative strengths and weaknesses of the client's legal position as well as beginning the development of a professional relationship that will continue throughout the litigation of the action.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersConferencesCase Management



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**23.08 Court Evaluates Nonexempt General Civil Cases at Case Management Conference.**

**23.08[1] Conference Is Held Within 180 Days After Complaint Filed.** For nonexempt general cases, the court will set a case management conference within 180 days after the complaint is filed [*Cal Rules Ct, Rule 3.721*]. Case management conferences are governed by *CCP* §§ 575-576, *Cal Rules Ct, Rule 3.720 et seq.* and by local rules [*Cal Rules Ct, Rule 3.728*].



**Warning:**

Penalties may be imposed for failure to comply with local rules [*CCP* § 575.2].



**Cross Reference:**

Initial evaluation and assignment of cases, see 23.04, 23.05.

**23.08[2] Notice of Case Management Conference Must Be Given No Later Than 45 Days Before Conference Date.** For each general case, the court will give notice of the case management conference no later than 45 days before the date on which the conference is scheduled [*Cal Rules Ct, Rule 3.722(b)*]. The court may provide by local rule the time and manner of giving notice to the parties [*Cal Rules Ct, Rule 3.722(b)*].



**Cross Reference:**

Discussion of additional case management conference after initial conference, see 23.08[8].

**23.08[3] Each Party Must File a Case Management Statement No Later Than 15 Days Before Conference.**

**23.08[3][a] Use of Judicial Council Form CM-110 Is Mandatory.** Each party must file and serve on all other parties a case management statement no later than 15 days prior to the date set for the case management conference [*Cal Rules Ct, Rule 3.725(a)*]. The case management statement must be in the form of California Judicial Council Form CM-110 [*Cal Rules Ct, Rule 3.725(c)*]. All applicable items on the form must be completed [*Cal Rules Ct, Rule 3.725(c)*].

Two or more parties may file a joint statement [*Cal Rules Ct, Rule 3.725(b)*].



**Judge's Perspective:**

In the complex litigation program for the Los Angeles Superior Court, counsel are ordered to file a joint initial status conference statement. The joint statement is most helpful and even if counsel are unable to agree as to certain issues at least those issues are framed in one document.

**Consider--Filing Joint Statement:**

Depending upon the complexity of the litigation and the parties working relationship, it could send a very powerful message to the court if the parties were able to file a joint case management statement.

 **Cross Reference:**

Form, see 23.58.

**23.08[3][b] [Reserved]**

**23.08[3][c] Signature of Attorney and/or Party Is Required.** The signature of the attorney or a party on a case management statement is required and represents that counsel or the party is familiar with the case and fully prepared to discuss the status of discovery, pretrial alternative dispute resolution, and any other issues raised by the statement. The signatures also represent that the signator possesses the authority to enter into written stipulations on the issues raised by the statement [see California Judicial Council Form CM-110].

**23.08[3][d] Statement Must Contain Representation That Parties Have Met and Conferred.** The case management statement must include a representation that the parties have met and conferred as required by *Cal Rules Ct, Rule 3.724* or a statement explaining why the meet and confer has not yet taken place [see California Judicial Council Form CM-110, Item 20].

**23.08[4] Parties Must Meet Not Later Than 30 Days Before Conference.** Not later than 30 days prior to the date set for the case management conference, the parties must meet and confer to determine the issues to be discussed at the case management conference [see *Cal Rules Ct, Rule 3.727*; for discussion, see § 23.09], as well as the following issues [*Cal Rules Ct, Rule 3.724*]:

- Resolution of discovery disputes and the setting of a discovery timetable.
- Identification and possible resolution of anticipated motions.
- Identification of uncontested facts and issues.
- Identifying facts and issues that are in dispute.
- Determination of whether any issues can be narrowed.
- The possibility of settlement.
- Identify availability of parties and counsel for trial, including reasons for unavailability.
- Any issues relating to discovery of electronically stored information.
- Any other relevant matters.

 **Cross Reference:**

Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

**23.08[5] Parties Are Generally Permitted to Appear by Telephone.** Upon proper notice, a party to an action may appear by telephone at case management conferences, provided the party has made a good faith effort to meet and confer and has timely served and filed a case management statement before the conference date [*Cal Rules Ct, Rule 3.670(c)(1)*; see *Cal Rules Ct, Rule 3.722(c)*].

**Exception:**

The trial court may order a personal appearance if it determines that appearance in person would materially assist in the effective management of the particular case [*Cal Rules Ct, Rule 3.670(e)(2)*].

 **Cross Reference:**

Discussion of appearance by telephone, including notice of intent to appear by telephone, see *Ch. 26, Law and Motion Procedure, 26.18 et seq.*

**23.08[6] Court May Determine That Appearance Is Not Necessary.** If the court determines that appearances at the case management conference are not necessary, it may issue a case management order and notify the parties that no appearance is required [*Cal Rules Ct, Rule 3.670(d)*]. Similarly, a court may provide by local rule that parties need not attend a case management conference in limited civil cases, unless ordered to do so by the court [*Cal Rules Ct, Rule 3.670(e)*].

**23.08[7] Counsel Must Be Familiar With Case and Prepared to Commit to the Party's Position on the Issues Presented at the Conference.** At the case management conference, counsel must be familiar with the case and be prepared to discuss and commit to the party's position on the issues listed in *Cal Rules Ct, Rules 3.724, 3.727* [*Cal Rules Ct, Rule 3.722(c)*].

 **Cross References:**

Issues listed in Rule 3.727, see 23.09. Issues listed in Rule 3.724, see 23.08[4].

**23.08[8] Additional Case Management Conference May Be Held at Any Time.** The court on its own motion, or the parties may request that an additional case management conference be held at any time; and in determining whether to hold an additional conference, the court must consider each case individually on its own merits [*Cal Rules Ct, Rule 3.723*].

A party is required to appear at the additional conference only if an appearance is necessary for the effective management of the case [*Cal Rules Ct, Rule 3.723*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**23.09 Court and Parties Must Address Specific Issues During Case Management Conference.**

The initial case management conference is generally the first case management event conducted by court order in each case, except for orders to show cause [*Cal Rules Ct, Rule 3.722(a)*]. At the case management conference, the court must review the case comprehensively and [*Cal Rules Ct, Rule 3.722(a)*]:

- Decide whether to assign the case to an alternative dispute resolution process.
- Decide whether to set the case for trial.
- Review the requirements of *Cal Rules Ct, Rules 3.727, 3.728*.

At the Case Management Conference, the parties must address, and the court will take appropriate action on, the following issues applicable to the case [*Cal Rules Ct, Rule 3.727*]:

- The existence of related cases.
- Whether all named parties have been served, have appeared, or have been dismissed.
- Whether additional parties will be added or the pleadings amended.
- In a limited civil case, whether the economic litigation procedures of *CCP §§ 90-100* will apply to the case.
- Whether there are any other matters, such as bankruptcy of a party that might affect the court's jurisdiction.
- Whether the case should be referred to any form of alternate dispute resolution.
- Whether an early settlement conference should be scheduled [*see 23.14 -23.17*].
- The status of discovery and the potential for discovery disputes.

- Whether any portion of the case should be bifurcated or a hearing should be set for a motion to bifurcate under *CCP* § 598 [*see* 23.20 -23.24].
- Whether there are any cross-complaints that should be severed because they are not ready for trial.
- Whether the case is entitled to any statutory preference [*see* 23.25 -23.36].
- Whether any party has requested a jury trial [*see* 23.37 -23.49].
- Setting of a trial date, if not previously set.
- The estimated length of trial.
- The nature of the injuries, the amount of damages and any additional relief being sought.
- Insurance coverage issues.
- Any other matters the court feels should be addressed in its case management order.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**23.10 Court Issues Case Management Order.**

**23.10[1] Case Management Order Governs Conduct of Case.** The court issues a case management order after it conducts its case review, either at or after the case management conference, or if no case management conference is held, before the date the conference would have been held. Unless modified by a subsequent order, the case management order controls all later action in the case [*Cal Rules Ct, Rule 3.730*].

**23.10[2] Case Management Order Sets Pretrial Deadlines and Trial Date.** The case management order addresses the following issues [*Cal Rules Ct, Rule 3.728*]:

- Referral to and, if referred, a date for completion of alternate dispute resolution.
- The trial date, its estimated length, the identity of trial counsel and whether a jury trial has been demanded.

➤ **Cross Reference:**

Discussion of providing required notice of upcoming trial, see Matthew Bender(R)  
Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 3, Notice of Trial.

- The date, time and place for any mandatory settlement conferences under *Cal Rules Ct, Rule 3.1380*, and any further or final case management conference if required by the court.
- Whether all necessary parties have been served or have appeared and whether any unserved defendants should be dismissed or severed.
- Any additional orders that may be appropriate, including orders regarding any of the matters listed in *Cal Rules Ct, Rule 3.727, 3.728* (subjects considered at case management conference and parties meet-and-confer discussions) such as discovery issues and pretrial motions.

➤ **Cross References:**

Matters listed in Rule 3.727, see 23.09. Issues listed in Rule 3.728, see 23.08[4].

**23.10[3] Case Management Order May Be Modified.** To prevent injustice, the court has the discretion to modify a case management order on any party's oral motion, or without a motion, provided that the adverse party is not prejudiced by the modification [ *Robinson v. Thornton* (1969) 271 CA2d 605, 615, 76 CR 835 ; *Fresno Air Serv. v. Wood* (1965) 232 CA2d 801, 804, 43 CR 276 (both decided under former Rule 216 concerning pretrial conference orders)].



**Cross References:**

Forms, see 23.60, 23.61.

Memoranda in support of and opposition to motion to amend, see *California Points and Authorities, Ch. 180, Pretrial Proceedings, §§ 180.10, 180.20* (Matthew Bender).

**Consider--Agreement:**

The degree of success concerning modification of the case management conference is directly dependent on the facts and circumstances that give rise to the modification. Naturally, it is helpful if both counsel concur with respect to the modification.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**23.11 Trial Setting Process Differs Depending on Whether Case Is a General Civil Case.**

**23.11[1] Exempt and Non-Exempt Cases May Be Set for Trial at Case Management Conference Using Various Criteria.** Both exempt and non-exempt civil cases may be set for trial at the case management conference [*Cal Rules Ct, Rule 3.722(a)*].

In setting a case for trial, the court must consider [*Cal Rules Ct, Rule 3.722(a)*]:

- Type and subject matter of the action to be tried.
- Whether the case has statutory priority.
- Number of causes of action, cross-actions, and affirmative defenses that will be tried.
- Whether any significant amendments to the pleadings have been made recently or are likely to be made before trial.
- Whether the plaintiff intends to bring a motion to amend the complaint to seek punitive damages under *CCP* § 425.13.
- Number of parties with separate interests who will be involved in the trial.
- The complexity of the issues to be tried, including issues of first impression.
- Any difficulties in identifying, locating, or serving parties.
- Whether all parties have been served and, if so, the date by which they were served.
- Whether all parties have appeared in the action and, if so, the date by which they appeared.

- How long the attorneys who will try the case have been involved in the action.
- The trial date or dates proposed by the parties and their attorneys.
- The professional and personal schedules of the parties and their attorneys, including any conflicts with previously assigned trial dates or other significant events.
- The amount of discovery, if any, that remains to be conducted in the case.
- The nature and extent of law and motion proceedings anticipated, including whether any motions for summary judgment will be filed.
- Whether any other actions or proceedings that are pending may affect the case.
- The amount in controversy and the type of remedy sought.
- The nature and extent of the injuries or damages, including whether these are ready for determination.
- The court's trial calendar, including the pendency of other trial dates.
- Whether the trial will be a jury or a nonjury trial.
- The anticipated length of trial.
- The number, availability, and locations of witnesses, including witnesses who reside outside the county, state, or country.
- Whether there have been any previous continuances of the trial or delays in setting the case for trial.
- The achievement of a fair, timely, and efficient disposition of the case.
- Any other factor that would significantly affect the determination of the appropriate date of trial.



**Warning:**

Local rules usually provide the specific procedures for setting a case for trial [*Cal Rules Ct, Rule 3.20*] and must be consulted [*see, e.g., San Francisco Super Ct Rules, Rule 6.1*].



**Cross References:**

Classification of cases as exempt and non-exempt, see 23.04.

Discussion of providing required notice of upcoming trial, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 3, Notice of Trial.

**23.11[2] Short Cause and Simple Cases May Be Set for Trial on the Court's Own Initiative.** The court may elect to exempt a short cause case from case management review and set it for trial based on its review of the civil case cover sheet or case management conference statement [*Cal Rules Ct, Rule 3.735(b)*]. The procedure for setting short cause and simple cases for trial varies from jurisdiction to jurisdiction.



 **Cross References:**

Discussion of short cause cases, see 23.04[1][e].

Discussion of providing required notice of upcoming trial, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 3, Notice of Trial.

**23.11[3] Complex Cases May Be Set for Trial by Case Management Judge or a Presiding Judge.** Complex cases may be set for trial by a case management judge or by the presiding judge. The procedure varies from jurisdiction to jurisdiction.

 **Cross References:**

Discussion of complex cases, see 23.12; form, see 23.62 (notice of time set for trial).

Discussion of providing required notice of upcoming trial, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 3, Notice of Trial.

**23.11[4] In Counties With a Master Calendar, Each Case Must Be Tried, Ordered Off Calendar, Dismissed, or Reassigned.** In any county that uses a master calendar, each case that is transferred to a courtroom for trial must be tried, ordered off the calendar, or dismissed, unless good cause arises after the commencement of trial for the court to continue the case, or with the consent of the judge supervising the master calendar, the court reassigns the case to the master calendar judge for further disposition [*Cal Rules Ct, Rule 10.910(a)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**23.12 Special Rules Apply For Complex Cases.**

**23.12[1] Party or Court May Designate a Case As Complex.** A plaintiff may designate a case as complex on the mandatory civil case cover sheet form [California Judicial Council Form CM-010] filed with the initial complaint [*Cal Rules Ct, Rule 3.401*]. The court will then decide as soon as is reasonably practicable whether the action is a complex case [*Cal Rules Ct, Rule 3.403(a)*]. The court may also decide on its own motion or on that of a party that an action is a complex case or that an action previously designated as a complex case is not a complex case [*Cal Rules Ct, Rule 3.403(b)*].

Factors considered by the court in deciding whether a case is complex and the types of cases provisionally designated as complex are listed in *Cal Rules Ct, Rule 3.400*.

► **Cross References:**

Discussion of characterization of case as "complex," see *California Forms of Pleading and Practice, Ch. 425, Pretrial Proceedings, § 425.52* (Matthew Bender).

Discussion of complex case management, see Judicial Council of California Deskbook on The Management of Complex Civil Litigation.

❓ **Decision Point--Defendant:**

A defendant may join the plaintiff in designating the action as a complex case [*Cal Rules Ct, Rule 3.402(c)*] or may file and serve no later than its first appearance a counter civil case cover sheet counterdesignating the action as not complex. The court then has 30 days after the counterdesignation is filed to determine whether the case is complex [*Cal Rules Ct, Rule 3.402(a)*]. Similarly, if the plaintiff has not designated the case as complex, the defendant may do so on the counter civil case cover sheet [*Cal Rules Ct, Rule 3.402(b)*].

**23.12[2] Complex Cases Should Be Assigned to One Judge.** Complex cases should be assigned to one judge for all purposes. If such an assignment is not possible, a single judge should be assigned to hear law and motion matters and discovery matters [*Cal Rules Ct, Stds Jud Admin, Std 3.10(b)*]. No phase of complex litigation should be assigned to a

commissioner, except under the judge's direct supervision to assist in the management of the case [Cal Rules Ct, Stds Jud Admin, Std 3.10(c); *Lu v. Superior Court* (1997) 55 CA4th 1264, 1267, 1269-1271, 64 CR2d 561 ].

### **23.12[2A] Initial Case Management Conference.**

**23.12[2A][a] Initial Case Management Conference in Complex Cases Should Be Held at Earliest Practical Date to Expose Essential Issues.** The principal objects of the initial case management conference in complex cases are [Cal Rules Ct, Rule 3.750(c)]:

- Exposing at an early date the essential issues in the litigation, and
- Avoiding unnecessary and burdensome discovery in the course of preparing for trial of those issues.



#### **Timing:**

In a complex case, the court should hold an initial case management conference with all parties represented at the earliest practical date [Cal Rules Ct, Rule 3.750(a)].



#### **Cross Reference:**

Discussion of discovery procedures, see Matthew Bender(R) Practice Guide: California Civil Discovery.

**23.12[2A][b] Initial Case Management Conference Must Consider Required Subjects.** The initial case management conference in a complex case should consider the following subjects [Cal Rules Ct, Rule 3.750(a)]:

- Whether all parties named in the complaint or cross-complaint have been served, have appeared, or have been dismissed;
- Whether any additional parties may be added or the pleadings may be amended;
- The deadline for the filing of remaining pleadings and service of additional parties;
- Whether severance, consolidation, or coordination with other actions is desirable;
- The schedule for discovery proceedings to avoid duplication and whether discovery should be stayed until all parties have been brought into the case;
- The schedule for settlement conferences or alternative dispute resolution;
- Whether to appoint liaison or lead counsel;
- The date for the filing of any dispositive motions;
- The creation of preliminary and updated lists of the persons to be deposed and the subjects to be addressed in each deposition;
- The exchange of documents and whether to establish an electronic document depository [see Cal Rules Ct, Rule 3.751];
- Whether a special master should be appointed and the purposes for such appointment;
- Whether to establish a case-based Web site and other means to provide a current master list of

addresses and telephone numbers of counsel; and

- The schedule for further conferences.

#### **Cross References:**

Participating in settlement conferences, see 23.14 et seq.

Participating in alternative dispute resolution, see Ch. 24, Pretrial ADR.

Consolidation, coordination, or severance of complex actions, see Ch. 32, Notice of Related Cases, Consolidation, Coordination, and Severance of Actions.

Discovery procedures, see Matthew Bender(R) Practice Guide: California Civil Discovery.

#### **23.12[2A][c] Court May Order Counsel to Meet and Confer Before Initial Case Management Conference.**

The court may order counsel to meet privately before the initial case management conference to discuss the items to be considered in the initial case management conference and to prepare [*Cal Rules Ct, Rule 3.750(d)*]:

- A joint statement of matters agreed upon and matters on which the court must rule at the conference, and
- A description of the major legal and factual issues involved in the litigation.



#### **Strategic Point--Electronically Stored Information:**

Counsel should schedule early in the litigation process a meet and confer for the purpose of preserving electronically stored information (ESI). The Judicial Council is currently considering whether to require this meet and confer for ESI, and the matter has already been addressed at the federal level [*see Fed R Civ P, Rule 26(f)(3)*]. If there is no discussion between the parties regarding ESI, a requesting party may not obtain certain ESI that is destroyed by routine computer systems operations. Sanctions also may occur for failing to put a litigation hold in place. If the parties meet and confer on these issues early on, the scope of the litigation may be agreed upon by the parties and ESI can be preserved in the agreed form. For example, the parties could agree on key witnesses in order to preserve specific email accounts.

**23.12[3] Complex Cases Are Frequently Exempted From Time Standards Under Trial Court Delay Reduction Act But Are Subject to a Case Progression Plan.** Complex cases are often exempted from the time standards imposed by the Trial Court Delay Reduction Act [ *Lu v. Superior Court (1997) 55 CA4th 1264, 1268, 64 CR2d 561* ]. When a complex case is exempted, the court will establish a case progression plan and monitor the case with a goal of disposition of three years [*Cal Rules Ct, Rule 3.714(c)(2)*]. A detailed case management order may satisfy the requirement for a case progression plan [ *Lu v. Superior Court (1997) 55 CA4th 1264, 1268-1269, 64 CR2d 561* (listing items typically covered in a complex case management order)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**23.13 Sanctions May Be Imposed For Failure to Comply With Trial Court Delay Reduction Act and Local Rules.**

Attorneys and parties may be sanctioned for failing to comply with local rules. The sanctions may be authorized by local rule [*CCP* § 575.2(a)], under the Trial Court Delay Reduction Act by *Gov Code* § 68608(b), or under *Cal Rules Ct, Rule 2.30* for unlawful interference with the proceedings of the court.

► **Cross Reference:**

Discussion of sanctions for failure to comply with local rules, see *Ch. 35, Sanctions, 35.07*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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IV. PARTICIPATING IN SETTLEMENT CONFERENCES AND OFFERS TO COMPROMISE

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.14*

**23.14 CHECKLIST: Participating in Settlement Conferences.**

- ☐ Decide whether to request any mandatory settlement conferences, or calendar the dates for conferences set by court on its own motion.



**Timing:**

Make your request at or prior to case management conference because dates for mandatory settlement conference will be set in case management order [*Cal Rules Ct, Rule 3.728(10)*]. The request can be made on the case management statement form [California Judicial Council Form CM-110, Item 11].

**Authority:**

*Cal Rules Ct, Rule 3.1380(a)*

**Discussion:**

See 23.17

**Form:**

See 23.58

- ☐ File and serve on each party a settlement conference statement.



**Timing:**

A settlement conference statement must be filed at least five days prior to the date set for the initial settlement conference [*Cal Rules Ct, Rule 3.1380(c)*].

**Authority:**

*Cal Rules Ct, Rule 3.1380(c)*

**Discussion:**

See 23.17[1]

**Form:**

See 23.63

☐ Attend the conference personally. Attendees will include trial counsel, parties, and persons with full authority to settle.

**Authority:**

*Cal Rules Ct, Rule 3.1380(b)*

**Discussion:**

See 23.17[2]



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.15*

**23.15 CHECKLIST: Making Offer to Compromise.**

☐ Decide whether to make an offer to compromise.



**Timing:**

Offers to compromise must be made at least 10 days before the trial is scheduled to begin [CCP § 998(b)].

**Authority:**

CCP § 998(b)

**Discussion:**

See 23.18[1], [2]

☐ Decide whether to accept or reject an offer to compromise keeping in mind cost shifting provisions.  
Make sure offer and cost shifting provisions are fully explained to client.



**Timing:**

Offers to compromise are deemed withdrawn if not accepted prior to trial or arbitration or within 30 days of being made [CCP § 998(b)(2)].

**Authority:**

CCP § 998(b)

**Discussion:**

See 23.18[1]





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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.16*

##### **23.16 Options and Strategies for Parties in Settlement Conferences.**

Settlement conferences are governed by *Cal Rules Ct, Rules 2.30, 3.1380, 3.1385* and by local court rules [see, e.g., Los Angeles Super Ct Rules, Rule 7.9(d), (e)].

##### **Strategic Point:**



Even if a mandatory settlement conference is not set in the case management order, counsel may want to consider requesting an early settlement conference. Settlement conferences often act as a "mini trial," allowing counsel to:

- Obtain an idea of the strengths and weaknesses of the opponent's case in a confidential atmosphere;
- Demonstrate the strength of his or her own client's case to the opposing party; and
- Gauge a judge's reaction to each side of the case.

##### **Judge's Perspective:**

Timing as to when the case is ready for settlement is the key to success in most instances. The trial judge should discuss settlement with counsel when it is felt that it would be productive. Each case is different. Some cases are ripe for settlement before discovery some can't even come close to settlement until all discovery is completed. Moreover, some judges like settlement, other judges believe that counsel should handle that aspect on their own. It must be remembered that in Fast Track most judges do not have the time to handle their own settlements. In complex litigation it is just the opposite. Virtually all complex litigation judges handle their own settlements.

##### **Consider--ADR:**

Counsel will generally be asked, at the initial status conference, whether the parties are willing to enter into a settlement conference or other type of alternative dispute resolution. At the time of the initial status conference counsel should be prepared to consider whether the matter would be appropriate for the court's alternative dispute resolution program or, in the appropriate case, a stipulation reached between

the parties to have the matter placed in private mediation. Counsel must be prepared to discuss issues of alternative dispute resolution and should explore them with opposing counsel before the initial status conference.

**Cross Reference:**

Discussion of settlement conferences and settlement issues, see Ch. 37, Settlement and Release.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral Overview



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.17*

**23.17 Court May Set Mandatory Settlement Conferences.**

**23.17[1] Each Party Must Submit a Settlement Conference Statement No Later Than Five Days Before Date Set for Initial Settlement Conference.** On the court's own motion or at the request of any party, the court may set mandatory settlement conferences [*Cal Rules Ct, Rule 3.1380(a)*]. If mandatory case conferences are scheduled, the court will assign the dates in the case management order [*Cal Rules Ct, Rule 3.728(10)*].

No later than five court days before the date set for the initial settlement conference, each party must submit to the court and serve on each party a settlement conference statement containing a good faith settlement demand and an itemization of economic and noneconomic damages by each plaintiff and a good faith offer of settlement by each defendant. The statement must identify and discuss in detail all facts and law pertinent to the issues of liability and damages involved in the case as to that party and comply with any additional requirements imposed by local rule [*Cal Rules Ct, Rule 3.1380(c)*].

➡ **Cross Reference:**

Form, see 23.63.

The court may not [*Cal Rules Ct, Rule 3.1380(d)*]:

- Appoint a person to conduct a settlement conference under *Cal Rules Ct, Rule 3.1380* at the same time as that person is serving as a mediator in the same action, or
- Appoint a person to conduct a mediation under *Cal Rules Ct, Rule 3.1380*.

This rules does not prevent the court from appointing a person who has previously served as a mediator in a case to conduct a settlement conference in that case following the conclusion of the mediation [*Cal Rules Ct, Rule 3.1380, Advisory Committee Comment*].

**23.17[2] Counsel, Parties, and Persons With Full Authority to Settle Must Attend Conference.** Trial counsel, parties, and persons with full authority to settle the case must personally attend the conference, unless excused by the

court for good cause. If any consent to settle is required for any reason, the party with that consensual authority must be personally present at the conference [*Cal Rules Ct, Rule 3.1380(b)*]. The court may by local rule provide more specific requirements concerning the presence of others at the settlement conference [*see, e.g., Los Angeles Super Ct Rules, Rule 7.9(d)*].

**23.17[3] Sanctions May Be Imposed for Failure to Comply With California Rules of Court Concerning Settlement Conferences.** Although the court cannot mandate that the parties settle the matter, it may impose sanctions for failure to comply with *Cal Rules Ct, Rule 3.1380* [*see Cal Rules Ct, Rule 2.30*].

**23.17[4] Plaintiff Must File Written Notice of Any Settlement.** If an entire case is settled or otherwise disposed of, the plaintiff or other party seeking affirmative relief must immediately file written notice of the settlement or other disposition with the court and serve the notice on any arbitrator or other court-connected alternative dispute resolution neutral involved in the case. The plaintiff or other party seeking affirmative relief must also immediately give oral notice to all of the above if a hearing, conference, or trial is scheduled to take place within 10 days [*Cal Rules Ct, Rule 3.1385(a)*].



**Cross Reference:**

Form of written notice, see *Ch. 37, Settlement and Release, 37.65*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesSanctions



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**23.18 Not Less Than 10 Days Before Trial, Any Party May Make a Written Offer to Compromise.**

**23.18[1] Offer to Compromise Deemed Withdrawn If Not Accepted Within 30 Days or at Start of Trial, Whichever Occurs First.** Not less than 10 days before trial, any party may serve on any other party a written offer to compromise [CCP § 998(b)]. The offer, if accepted, allows judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time [CCP § 998(b)]. If the offer is not accepted prior to trial or arbitration or within 30 days after it is made, whichever occurs first, the offer is considered to have been withdrawn [CCP § 998(b)(2)].



**Warning:**

The party making the offer to compromise should cite to CCP § 998 within the offer so as to place the opposing party on notice that it may be subjected to a statutory cost award if the offer is not accepted. Failure to do so may cause the court to refuse to award costs to the offering party to which costs would otherwise be entitled under CCP § 998 [ *Stell v. Jay Hales Dev. Co. (1992) 11 CA4th 1214, 1231-1232, 15 CR2d 220* (settlement proposal making no reference to CCP § 998 and requiring an immediate response not a statutory CCP § 998 offer entitling party to expert witness fees as costs)].

**Exceptions:**

CCP § 998 does not apply to:

- Offers made by plaintiffs in eminent domain actions [CCP § 998(g)(1)].
- Offers made in any enforcement actions brought by a public prosecutor in the name of the people of the State of California [CCP § 998(g)(2)].
- Offers in labor arbitrations filed pursuant to memoranda of understanding under the Ralph C. Dills Act (*Gov Code §§ 3512-3524*) [CCP § 998(i)].



**Cross Reference:**

Detailed coverage of *CCP § 998*, see *Ch. 37, Settlement and Release, 37.03*.

**23.18[2] When Not Accepted, Offers to Compromise Result in the Shifting of Costs.** If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award [*CCP § 998(c), (e)*]:

- The plaintiff cannot recover his or her post offer costs.
- The plaintiff must pay the defendant's costs from the time of the offer.
- Except in eminent domain actions, the court may require the plaintiff to pay the fees of experts used by the defendant.
- The defendant's *CCP § 998* costs will be deducted from any damages awarded to the plaintiff.
- If the costs awarded exceed the amount of the damages awarded to the plaintiff, the net amount will be awarded to the defendant and judgment or award will be entered accordingly.

If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court may require the defendant to pay the plaintiff's costs, including the postoffer fees of experts prepared for and/or used in trial or arbitration [*CCP § 998(d)*].



**Warning:**

Counsel should always communicate a *CCP § 998* offer to the client immediately with a letter explaining the cost-shifting implications, which can be substantial. Failure to do so may result in malpractice exposure if your client is hit with a large cost bill from the opposing party.



**Cross Reference:**

Detailed coverage of *CCP § 998*, see *Ch. 37, Settlement and Release, 37.03*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Offers of Judgment Rejections Civil Procedure Settlements Offers of Judgment Time Limitations



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**23.19 Parties May Settle Case by Stipulation.**

The parties may stipulate in writing or orally before the court for the settlement of the case or part thereof [*CCP* § 664.6]. The five-year period for bringing a case to trial under *CCP* § 583.310 is tolled during the time which the settlement agreement is in effect [ *Canal Street, Ltd. v. Sorich* (2000) 77 CA4th 602, 608, 91 CR2d 811 ].



**Strategic Point:**

A *CCP* § 664.6 stipulated settlement is advantageous because its terms can be enforced by noticed motion and the court may retain jurisdiction to enforce the settlement if the parties request [*CCP* § 664.6].



**Cross Reference:**

Discussion of stipulated settlement, see *Ch. 37, Settlement and Release, 37.47*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSettlementsSettlement AgreementsGeneral Overview



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V. SEEKING AND RESISTING BIFURCATION OF TRIAL

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.20*

## 23.20 CHECKLIST: Moving for Bifurcation of Trial.

### 23.20[1] Moving Party's Checklist.

- ☐ Determine whether bifurcated trial of special defenses or issues is appropriate:
  - ☐ For a bifurcated trial of special defenses, the answer to the complaint or cross-complaint must do one of the following:
    - ☐ State that the action is barred by the statute of limitations or a prior judgment.
    - ☐ State that another action is pending on the same cause.
    - ☐ Set up a defense not involving the merits of the case but constituting a bar to prosecution.
  - ☐ For a bifurcated trial of certain issues, the convenience of the witnesses, the ends of justice, or the economy and efficiency of handling the litigation must be promoted by the bifurcation.



### Timing:

The determination as to whether bifurcated trial of special defenses or issues is appropriate should be made before meeting and conferring with the opposing counsel regarding the case management conference.

### Authority:

*CCP §§ 597, 597.5, 598, 1048*

### Discussion:



See 23.23[2], 23.24[1]

- ☐ Meet and confer regarding possible bifurcation as part of case management conference process.



**Timing:**

The parties must meet and confer at least 30 days before conference.

**Authority:**

*Cal Rules Ct, Rule 3.724; California Judicial Council Form CM-110, Item 20*

**Discussion:**

See 23.08[4]

- ☐ Indicate intent to request bifurcation of special defenses or issues in case management statement.



**Timing:**

Case management statement must be filed and served at least 15 days before conference.

**Authority:**

*Cal Rules Ct, Rule 3.725; California Judicial Council Form CM-110, Item 15*

**Discussion:**

See 23.22

- ☐ If court does not order bifurcation at case management conference, file motion requesting bifurcation of special defenses or issues. Moving papers should include:

- ☐ Notice of motion.
- ☐ Supporting declaration.
- ☐ Supporting memorandum.
- ☐ Proposed order.
- ☐ Proof of service.

**Content Note:**

Declaration supporting motion for bifurcation of issues must contain facts showing why the convenience of the witnesses, the ends of justice, or the economy and efficiency of handling the litigation will be promoted by the bifurcation.



**Timing:**

A motion for a separate trial of defenses may be brought at any time or as a motion in limine at trial. A

motion for a separate trial of issues must be heard no later than the pretrial conference (or its equivalent under the court's local rules), or no later than 30 days before trial in cases where no pretrial conference is held [CCP § 598].

**Authority:**

CCP §§ 597, 597.5, 598, 1048

**Discussion:**

See 23.23[3], 23.24[1]

**Form:**

See 23.64 (notice of motion and declaration for separate trial of issues); 23.65 (order)

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**23.20[2] Opposing Party's Checklist.**

☐ Review moving party's motion papers and determine whether opposition is appropriate or desirable.

☐ For a bifurcated trial of a special defense, the answer to the complaint or cross-complaint must do one of the following:

☐ State that the action is barred by the statute of limitations or a prior judgment.

☐ State that another action is pending on the same cause.

☐ Set up a defense not involving the merits of the case but constituting a bar to prosecution.

☐ For a bifurcated trial of certain issues, the convenience of the witnesses, the ends of justice, or the economy and efficiency of handling the litigation must be promoted by the bifurcation.

**Authority:**

CCP §§ 597, 597.5, 598, 1048

**Discussion:**

See 23.23[3], 23.24[1]

☐ Prepare and file papers in opposition to the motion, including a memorandum.

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.46



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**23.21 Options and Strategies Relating to Bifurcation of Trial.**

Counsel may wish to move for a bifurcated trial to present evidence in an expeditious and simplified manner, particularly:

- When the court believes a separate trial on liability prior to a trial on damages may obviate the need for a trial on damages because it will lead to a judgment or settlement [ *Foreman & Clark Corp. v. Fallon* (1971) 3 C3d 875, 888 & n.8];
- To protect the defendant from a needless trial when he or she has a special defense [ *People v. Rath Packing Co.* (1978) 85 CA3d 308, 337, 149 CR 431 ]; or
- To avoid prejudice to the defendant in a case involving a claim for punitive damages [CC § 3295(d); *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 CA3d 1220, 1241, 1 CR2d 301 ].



**Decision Point:**

In deciding whether to move for a bifurcated trial, counsel should consider not only the efficiency that results from separate trials, but also the effect of bifurcation on the introduction of evidence before a particular audience. For example, in a personal injury case involving a particularly gruesome injury, bifurcation of the liability issue may allow defense counsel to exclude testimony regarding the plaintiff's pain and suffering, which though only relevant to a damage award, would likely be viewed sympathetically by the jury.



**Strategic Point--Plaintiff:**

It is very rare for a plaintiff to seek to bifurcate a trial. Typically the defendants want to bifurcate liability from damages in order to avoid the jury from being "swayed" by the significant injuries the plaintiff may have suffered. Occasionally a plaintiff may, where the medical testimony is extensive, and liability is truly the only issue in dispute, agree to bifurcation as a way of avoiding the costs of a damages presentation at trial. However, this tactic should be used with extreme caution.

**Judge's Perspective:**

Generally, the decision to bifurcate is based on the potential of early case disposition. But trial judges generally speaking have no predisposition as to particular cases that call out for bifurcation.

 **Cross Reference:**

Discussion of jury verdicts, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, Jury Verdicts.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersSeparate Trials



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**23.22 Case Management Statement Must Indicate Intent to Bifurcate.**

The case management rules require a party to state whether he or she intends to file a motion for an order bifurcating, severing, or coordinating issues or causes of action [*Cal Rules Ct, Rule 3.725(c)*; see California Judicial Council Form CM-10] so counsel must consider early in the case whether bifurcation is desirable.

► **Cross References:**

Discussion of case management conference procedures, see 23.08, 23.09; Form, see 23.59.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersSeparate Trials



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**23.23 Court Has Discretion to Order Separate Trial of a Special Defense.**

**23.23[1] Party May Move for Separate Trial of a Special Defense or It May Be Ordered Sua Sponte.** On motion of a party or on its own motion, the court may try any special defenses separately, before other issues in the case are tried [CCP § 597]. The primary purpose for doing so is to protect a defendant from a needless trial when he or she has a special defense [ *People v. Rath Packing Co. (1978) 85 CA3d 308, 337, 149 CR 431* ].

**23.23[2] Separate Defenses Include Statute of Limitations, Prior Judgment, or Other Pending Actions.** If the answer to a complaint or cross-complaint pleads that the action is barred by the statute of limitations or a prior judgment, or that another action is pending on the same cause, or sets up any other defense not involving the merits of the case but constituting a bar to prosecution, the court may proceed to trial on the defense before trying any other issue in the case [CCP § 597].

There is no right to a jury trial on affirmative defenses that can be separately tried. Any factual issues relating to those defenses are tried to the court [ *Windsor Square Homeowners Assn. v. Citation Homes (1997) 54 CA4th 547, 558, 62 CR2d 818* (res judicata defense tried to court)].



**Strategic Point:**

Even when the court denies a motion to bifurcate the trial of a defense because the criteria of CCP § 597 are not met, the party may secure a separate trial of the defense under the court's authority to order the separate trial of issues under CCP § 1048(b) or in accordance with the court's authority under Evid Code § 320 to regulate the order of proof [ *Finley v. Superior Court (2000) 80 CA4th 1152, 1162, 96 CR2d 128* ].

**Distinguish:**

The court's authority under CCP §§ 597, 1048(b) and Evid Code § 320 is discretionary. In contrast, in a medical malpractice action, the court will order a prior, separate trial on a statute of limitations defense raised by a defendant if requested to do so [CCP § 597.5].

**Decision Point:**

Bifurcation may be advantageous when your client has a strong chance of prevailing on a procedural defense, such as the statute of limitations, or on a substantive defense that requires minimal fact finding, such as agency or duty. These same types of issues lend themselves to resolution by summary judgment or adjudication, which should be considered.

**Cross Reference:**

Detailed coverage of summary judgment, see Ch. 38, Summary Judgment.

**23.23[3] How Motion Can Be Made.** *CCP* § 597 does not provide a particular procedure for making a motion for a separate trial on defenses that do not relate to the merits of the action. Three different practices can be utilized:

- Make a motion on written notice before trial.
- Make a motion in limine before the trial judge [*see* 23.51 et seq.].
- The court, on its own motion, may order a separate trial in accordance with its discretionary authority to regulate the order of proof under *Evid Code* § 320 [ *Meyer Koulisch Co. v. Cannon* (1963) 213 CA2d 419, 429-430, 28 CR 757 ] or pursuant to its power to order a separate trial of the issues under *CCP* § 598.

**Cross References:**

Motion forms for separate trial of special defense under *CCP* § 597, see California Forms of Pleading and Practice, Ch. 3, Abatement of Actions, § 3.110 et seq. (Matthew Bender).

Memoranda supporting and opposing motion, see *California Points and Authorities, Ch. 10, Abatement and Survival of Actions, § 10.30 et seq.* (Matthew Bender).

**23.23[4] Sustaining of Special Defense May End the Action.** When the defense that is separately tried is that another action is pending on the same cause [*CCP* § 430.10(c)], and only that special defense is sustained, the court enters an interlocutory judgment suspending the trial of all other issues in the case until judgment is entered in the pending action [*CCP* § 597].

In all other bifurcated cases involving special defenses, a decision in favor of the defendant on the special defense ends the action by the entering of a judgment in the defendant's favor [*CCP* § 597].

If the decision on the special defense is in the plaintiff's favor, the case will proceed to trial [*CCP* § 597; *see also CCP* § 597.5 (in professional negligence action against health care provider, remaining issues will be tried if plaintiff prevails on statute of limitations defense)]. Any judgment at the trial on the merits of the action is entered as though all issues had been tried at the same time [*CCP* § 597].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersSeparate Trials



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### 23.24 Court Has Discretion to Order Separate Trial of Issues.

**23.24[1] Party May Move for Separate Trial of Issues or It May Be Ordered Sua Sponte.** Under *CCP* § 598, the court, on the motion of a party or on its own motion, may also allow a bifurcated trial of any issues when the convenience of witnesses, the ends of justice, or the economy of and efficiency of handling the litigation would be promoted thereby. The court is also authorized by *CCP* § 1048(b) to order the separate trials of issues or causes of action when doing so promotes convenience, avoids prejudice, or is conducive to expedition and economy [ *Finley v. Superior Court* (2000) 80 CA4th 1152, 1162, 96 CR2d 128 ]. Finally, the court has the discretion to bifurcate issues on its own motion based on its authority under *Evid Code* § 320 to regulate the order of proof at trial [ *Grappo v. Coventry Fin. Corp.* (1991) 235 CA3d 496, 504, 286 CR 714 ].



#### Timing:

A motion for bifurcation of issues must be heard no later than the pretrial conference in cases in which a pretrial conference is held, or, in other cases, no later than 30 days before trial [*CCP* § 598]. The court, acting on its own motion, may make the order at any time [*CCP* § 598].



#### Cross Reference:

*CCP* § 598 notice of motion and order for obtaining separate trial of issues, see 23.64, 23.65.



#### Warning:

Because very few, if any, local rules currently refer to the final conference before trial as a "pretrial conference," counsel should file and serve a bifurcation of issues motion in time to be heard on statutory notice at the conference designated in the local rules as the final conference before trial. If the local rules do not provide for any such conference, counsel should comply with the 30-days-before-trial deadline.



#### Cross Reference:

Discussion of separate trials of child support and child custody issues [*Fam Code* §§ 3023, 4003], see California Forms of Pleading and Practice, Ch. 221, Dissolution of Marriage: Procedure (Matthew Bender).



**23.24[2] In Inverse Condemnation Action, Party Has Right to Bifurcated Trial of Liability and Damages.** In an inverse condemnation action where the issue is whether private property has been taken or damaged for public use without just compensation [*Cal Const, art I, § 19*], either party has the right to have the issue of liability bifurcated from the issue of just compensation [ *Marshall v. Department of Water & Power* (1990) 219 CA3d 1124, 1139-1141, 268 CR 559 ]. In a bifurcated inverse condemnation trial, the issue of liability is tried to the court and a jury determines the amount of damages to be awarded if the plaintiff prevails on liability [ *Marshall v. Department of Water & Power* (1990) 219 CA3d 1124, 1139-1141, 268 CR 559 ]. Factual liability issues may be submitted to a jury if the parties and the court agree to do so [ *Marshall v. Department of Water & Power* (1990) 219 CA3d 1124, 1141, 268 CR 559 ].

**23.24[3] Decision That No Liability Exists Ends Action.** When the issue of liability is tried separately and the issue is decided in favor of the defendant, a judgment is entered in favor of the defendant and the action is finished [CCP § 598].

If the decision on the liability issue is rendered in favor of the plaintiff, trial on the other issues is then held before the same or another jury. Judgment is thereafter entered as though the issues had been tried together [CCP § 598].

**23.24[4] In Punitive Damage Cases, Trial on Evidence of Net Worth of Defendant Is Bifurcated.** When a defendant against whom punitive damages are sought moves to preclude evidence of its net worth or financial condition, the court will bifurcate the trial so that a trial occurs first on the issues of liability, plaintiff's actual damages, and whether the defendant acted with oppression, malice, or fraud [CC § 3295(d)].

If the jury finds for the plaintiff and the plaintiff proves oppression, malice or, fraud by clear and convincing evidence, a trial will then be held to the same jury to determine the amount of punitive damages to be awarded to the plaintiff, and evidence of the defendant's net worth or financial condition may then be considered by the jury [CC § 3295(d); *El Monte v. Superior Court* (1994) 29 CA4th 272, 276, 34 CR2d 490 (same jury required unless defendant agrees otherwise); *Westrec Marina Management v. Jardine Ins. Brokers Orange County* (2000) 85 CA4th 1042, 1049, 102 CR2d 673 (clear and convincing evidence required)].

**Distinguish:**

In the liability portion of a non-punitive damage trial, most or all evidence relating to damages would be excluded. In the case of a punitive damages trial, the only evidence excluded relates to the financial condition of the defendant [CC § 3295(d)].

 **Cross Reference:**

Detailed coverage of punitive damages, see California Forms of Pleading and Practice, Ch. 177, Damages, § 177.40 et seq. (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersSeparate Trials



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Chapter 23 Case Management  
VI. MOTIONS FOR PRECEDENCE OR PREFERENCE AND MOTIONS TO ADVANCE, RESET, OR  
SPECIALLY SET

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.25*

**23.25 CHECKLIST: Moving for Precedence or Preference.**

**23.25[1] Moving Party's Checklist.**

- ☐ Determine whether any statute grants precedence for the type of action involved.

**Discussion:**

See 23.28



**Timing:**

Counsel should make this determination prior to filing the case management statement because information regarding precedence must be included therein.

- ☐ Determine whether any grounds exist for preference. Grounds include:
- ☐ Party 70 years of age or older and in poor health.
  - ☐ Party under age 14 in wrongful death or personal injury action.
  - ☐ Party terminally ill or injured.
  - ☐ Preference warranted by the interests of justice.
  - ☐ Plaintiff is victim of felony crime seeking damages from a defendant who has been convicted of perpetrating that crime.

**Timing:**

Counsel should make this determination prior to filing the case management statement because information regarding preference must be included therein.

**Authority:**

*CCP §§ 36, 37*

**Discussion:**

See 23.29 -23.33

- ☐ If basis for preference exists, request preference on case management statement. Be prepared to submit supporting declaration or medical documentation at case management conference if opposing party will not stipulate to preference.

**Authority:**

California Judicial Council Form CM-110

**Discussion:**

See 23.34

**Form:**

See 23.58

- ☐ Prepare motion for preference. Moving papers should include:

- ☐ Notice of motion.
- ☐ Supporting declaration.
- ☐ Supporting memorandum.
- ☐ Proposed order.
- ☐ Proof of service.

- ☐ File and serve motion and supporting papers.

**Timing:**

Serve and file a motion for preference at least 16 court days before the first status conference or case management conference that is required under local rules or the date of other hearing on the motion. If party turns 70 years of age during pendency, serve and file motion at any time.

**Authority:**

*CCP §§ 36(c), 1005(a)(13), (b)*

**Forms:**

See 23.66, 23.67

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**Content Note:**

Supporting declaration of counsel regarding poor health of party is sufficient for *CCP* § 36(a) motion if party is over 70 years of age.

**Authority:**

*CCP* § 36.5

- ☐ File proposed order if required by local rules or practice.

**23.25[2] Opposing Party's Checklist.**

- ☐ Review moving party's motion papers and determine whether opposition is appropriate or desirable.

☐ A statute must grant precedence for the particular type of action involved; or

☐ Grounds must exist for preference, such as a party being age 70 or older, or a party being age 14 or younger in a wrongful death or personal injury action, or a party is terminally ill or seriously injured, or the plaintiff is a crime victim. Grounds for preference also exist where granting preference would be in the interests of justice.

**Authority:**

*CCP* §§ 36, 37

**Discussion:**

See 23.29 -23.33

- ☐ Prepare and file papers in opposition to the motion, including a memorandum.

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.46



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VI. MOTIONS FOR PRECEDENCE OR PREFERENCE AND MOTIONS TO ADVANCE, RESET, OR  
SPECIALLY SET

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.26*

**23.26 CHECKLIST: Moving to Advance, Reset, or Specially Set Trial.**

**23.26[1] Moving Party's Checklist.**

- ☐ Determine whether circumstances exist to warrant advancing, resetting, or specially setting trial.
- ☐ Grounds are:
  - ☐ Case is entitled to statutory precedence; or
  - ☐ Five-year period for mandatory dismissal is about to expire and there is excusable delay or good cause.

**Authority:**

*Cal Rules Ct, Rule 3.1335(b); CCP §§ 583.310, 583.360*

**Discussion:**

See 23.36

- ☐ Prepare moving papers, including:
  - ☐ Notice of motion or ex parte application.
  - ☐ Supporting declaration.
  - ☐ Supporting memorandum.

☐ Proposed order.

☐ Proof of service.

**Forms:**

See 23.68, 23.69

**Content Note:**

Supporting declaration must set forth facts showing good cause for changing the trial date.

☐ File motion or ex parte application and supporting papers.

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**23.26[2] Opposing Party's Checklist.**

☐ Review moving party's motion papers and determine whether opposition is appropriate or desirable.

☐ Motions to advance, reset, or specially set a case for trial are granted only upon the filing of a declaration showing good cause and the appearance of the moving party at the motion or ex parte application hearing.

**Authority:**

*Cal Rules Ct, Rule 3.1335(a); CCP §§ 583.310, 583.360*

☐ Prepare and file papers in opposition to the motion, including a memorandum.

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.46



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## VI. MOTIONS FOR PRECEDENCE OR PREFERENCE AND MOTIONS TO ADVANCE, RESET, OR SPECIALLY SET

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.27*

### 23.27 Options and Strategies Relating to Setting Trial Date.

Counsel should determine early on whether the action involved is entitled to precedence or preference, and whether an earlier trial date is advantageous, considering the effect that such precedence or preference will have on the timing of each aspect of the case. If a case is entitled to preference and counsel wants an early trial date, indicate the request and basis for preference on the case management statement [California Judicial Council Form CM-110, Item 9]. In counties that still use at-issue memoranda or memoranda to set, a motion for preference must be served with those filings, unless the court otherwise allows [CCP § 36(c)].

Even if entitled to preference or precedence, a party may not wish to have an early trial date set because it might not leave time for all the discovery counsel wishes to undertake and might not leave time for pretrial motions such as a summary judgment motion, which must be served 105 days before the trial date [CCP § 437c(a)].



#### Strategic Point--Plaintiff:

Where damages have not yet fully developed counsel may not wish to go to trial until the full nature and extent of the injury suffered by plaintiff is understood. However, typically, the sooner you get trial the better and, therefore, motions for preference should be considered.

Counsel should be ready to try the case at the time set for trial in the case management order because trial dates are firm and all parties and counsel must regard the trial date as certain [Cal Rules Ct, Rule 3.1332(a)].



#### Cross Reference:

Detailed coverage of continuances, see Ch. 30, Continuances.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersGeneral Overview



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## VI. MOTIONS FOR PRECEDENCE OR PREFERENCE AND MOTIONS TO ADVANCE, RESET, OR SPECIALLY SET

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.28*

### **23.28 Statutory Precedence Is Granted for Certain Actions.**

Various statutes give precedence to specific actions and proceedings. Because cases entitled to precedence as a matter of law are covered by the specific statutes, counsel should check the statutes that govern the particular action being filed to determine if a statutory precedence applies. Some examples include:

- *B&P Code § 2337* (decision revoking, suspending, or restricting a license to practice medicine).
- *CCP § 35* (cases involving voter registration and elections).
- *CCP § 527(e)* (cases in which preliminary injunction granted (and possibly even when motion is denied)).
- *CCP § 1062.3(a)* (actions solely for declaratory relief).
- *CCP § 1179a* (unlawful detainer, forcible entry or detainer actions).
- *CCP § 1260.010* (eminent domain proceedings).
- *CCP §§ 1141.20(b), 1775.9(b)* (after judicial arbitration or an unsuccessful mediation, trial receives same place on active list that it would have occupied but for the arbitration or mediation).
- *Gov Code § 66499.37* (actions to review decision of agency or legislative body under the Subdivision Map Act).
- *R&T Code § 5149* (actions for refund of property taxes or assessments).



#### **Cross References:**

Discussion of unlawful detainer, see Matthew Bender(R) Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer.



Examples of statutory precedence, see *California Forms of Pleading and Practice*, Ch. 425, *Pretrial Proceedings*, § 425.72 (*Matthew Bender*).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial MattersGeneral Overview



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SPECIALLY SET

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.29*

**23.29 Preference May Be Granted When Party Is Over 70.**

A civil action is entitled to preference on the petition of a party who is over the age of 70 when that party has a substantial interest in the action as a whole and the health of that party is such that preference is necessary to prevent prejudicing the party's interest in the litigation [CCP § 36(a)]. When the court finds that those conditions are met, it must give preference to the case [ *Miller v. Superior Court* (1990) 221 CA3d 1200, 1204, 270 CR 766 ]. CCP § 36(a) preference is mandatory when its conditions are met [ *Swaithes v. Superior Court* (1989) 212 CA3d 1082, 1086, 261 CR 41 ].

The preference granted by CCP § 36(a) controls over CCP § 1141.11(a), which mandates arbitration in civil actions involving \$50,000 or less. Thus, a matter will not be referred to judicial arbitration if a CCP § 36(a) motion is granted [ *Vinokur v. Superior Court* (1988) 198 CA3d 500, 503, 243 CR 683 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersGeneral Overview



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.30*

**23.30 Preference May Be Granted for Wrongful Death or Personal Injury Cases When Party Is Under 14.**

A civil action to recover damages for wrongful death or personal injury is entitled to preference on the motion of a party who is under the age of 14 unless the court finds that the party does not have a substantial interest in the case as a whole [CCP § 36(b)]. CCP § 36(b) preference is mandatory when its conditions are met [ *Peters v. Superior Court* (1989) 212 CA3d 218, 224-226, 260 CR 426 ].



**Warning--Plaintiff:**

Counsel cannot let a case languish for years and then expect to obtain trial preference by filing a CCP § 36(b) motion. CCP § 36(b) does not affect the court's discretion to dismiss an action for a delay in prosecution under CCP §§ 583.410, 583.420(a)(2) when the plaintiff has been dilatory in moving the case to trial [ *Landry v. Berryessa Union Sch. Dist.* (1995) 39 CA4th 691, 695-697, 46 CR2d 119 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**23.31 Preference May Be Granted When Party Is Terminally Ill or Injured.**

The court may grant a motion for preference that is accompanied by clear and convincing medical documentation concluding that one of the parties suffers from an illness or condition that raises substantial medical doubt of that party surviving beyond six months, and that satisfies the court that the interests of justice will be served by granting the preference [CCP § 36(d)].

A party may move for preference based on the ill health of another party [ *Heda v. Superior Court* (1990) 225 CA3d 525, 527-528, 275 CR 136 ].

**Distinguish:**

A declaration from the moving party's counsel based on his or her information and belief as to the medical diagnosis and prognosis of a party over the age of 70 is sufficient for a CCP § 36(a) preference motion [CCP § 36.5]. However, a CCP § 36(d) motion should be supported by a physician's declaration explaining the party's terminal medical condition and authenticating the supporting medical documentation.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**23.32 Preference May Be Granted When Plaintiff Is Victim of Felony Offense and Is Seeking Damages From Convicted Felon.**

A civil action is entitled to preference if the plaintiff is seeking damages that were alleged to have been caused by the defendant during the commission of a felony offense for which the defendant has been criminally convicted [*CCP* § 37(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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SPECIALLY SET

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.33*

**23.33 Court May Give Preference for Cases in Which It Determines That Doing So Is in Interest of Justice.**

Notwithstanding any other provision of law, the court may grant a motion for preference that is supported by a showing of cause that satisfies the court that the interests of justice will be served by granting the preference [CCP § 36(e)].



**Warning--Plaintiff:**

"Cause" justifying a grant of preference under CCP § 36(e) is not established simply by the fact that the preference is necessary to avoid mandatory dismissal, particularly for failure to bring the action to trial within five years of its commencement [ *Howard v. Thrifty Drug & Discount Stores* (1995) 10 C4th 424, 440, 41 CR2d 362, 895 P2d 469 ]. The trial court will consider all of the circumstances, including the condition of the court calendar, dilatory conduct by plaintiff, prejudice to defendant of an accelerated trial date, and the likelihood of eventual mandatory dismissal if an early trial date is not granted [ *Howard v. Thrifty Drug & Discount Stores* (1995) 10 C4th 424, 441, 41 CR2d 362, 895 P2d 469 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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## VI. MOTIONS FOR PRECEDENCE OR PREFERENCE AND MOTIONS TO ADVANCE, RESET, OR SPECIALLY SET

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.34*

### **23.34 Motion for Preference Must Be Served With Declaration.**

Unless the court otherwise orders, a party may file and serve a motion for preference supported by a declaration of the moving party that all essential parties have been served with process or have appeared [CCP § 36(c)]. When supporting documentation regarding a party's medical condition is required [see CCP §§ 36(d), 36.5], counsel must make sure the necessary evidence is before the court by submitting with the notice of motion at least one supporting affidavit or declaration from a physician.



#### **Timing:**

Counsel should serve and file a motion for preference in time for it to be heard at the first status conference or case management conference that is required under local rules [see *Cal Rules Ct, Rule 3.725*], in addition to requesting preference on the mandatory case management statement form [see California Judicial Council Form CM-110, Item 9]. Doing so will help to avoid the possible loss of trial preference. The motion and supporting papers must be filed at least 16 court days before the hearing on the motion [CCP § 1005(a)(13), (b)].

#### **Exception:**

A motion for preference under CCP § 36(a) may be filed and served at any time by a party who reaches the age of 70 during the pendency of the action [CCP § 36(c)].



#### **Cross Reference:**

Making and opposing motions for precedence or preference and motions to advance, reset, or specially set, see *California Points and Authorities, Ch. 180, Pretrial Proceedings, §§ 180.50 -180.81* (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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## VI. MOTIONS FOR PRECEDENCE OR PREFERENCE AND MOTIONS TO ADVANCE, RESET, OR SPECIALLY SET

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.35*

### **23.35 If Motion for Preference Is Granted, Trial Must Start Within 120 Days.**

When a motion for preference is granted, the court must set the matter for trial not more than 120 days from the date that the motion is granted [CCP § 36(f)]. Continuances may be granted only for physical disability of a party or a party's attorney or for good cause. No continuance may exceed 15 days, and only one continuance for disability will be granted to any party [CCP § 36(f)]. These time limits are compulsory [ *Sprowl v. Superior Court* (1990) 219 CA3d 777, 781, 268 CR 592 ].

The grant of trial preference may make it impossible for a party to comply with time limits set in other statutes. A court will balance the competing goals of the applicable preference statute and any other statute specifying time limits, so as to give recognition to both while achieving a just result [ *Looney v. Superior Court* (1993) 16 CA4th 521, 535-536, 20 CR2d 182 ].

#### **Example:**

A summary judgment motion must be filed 105 days before the trial date [CCP § 437c(a)]. Counsel will not have time to procure discovery for the motion if preference is granted and the case is set for trial within 120 days pursuant to CCP § 36(f).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.36*

**23.36 Court May Advance, Reset, or Specially Set Cases When Case Is Entitled to Statutory Precedence or Five-Year Period for Mandatory Dismissal Is About to Expire.**

The court may advance, reset, or specially set cases when a case is entitled to statutory precedence [*see* 23.28].

In addition, the court may advance, reset, or specially set a case when the five-year statutory period for mandatory dismissal under *CCP* §§ 583.310, 583.360 is close to expiring. A motion to specially set a case to avoid the bar or the five-year statute requires a showing of good cause, diligence and excusable delay [*Cal Rules Ct, Rules 3.1335(b), 3.1342(e); Howard v. Thrifty Drug & Discount Stores (1995) 10 C4th 424, 441, 41 CR2d 362, 895 P2d 469* ].



**Cross Reference:**

Memoranda supporting and opposing motions for precedence or preference and motions to advance, reset, or specially set, see *California Points and Authorities, Ch. 180, Pretrial Proceedings, §§ 180.50-180.81* (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersGeneral Overview



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Chapter 23 Case Management  
VII. JURY TRIAL DEMANDS

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.37*

**23.37 CHECKLIST: Demanding Jury Trial.**

**23.37[1] Demanding Party's Checklist.**

- ☐ Determine whether right to a trial by jury exists for the action involved.
- ☐ Right to trial by jury exists for:
  - ☐ Actions for which a trial by jury is granted by statute, e.g., actions for the recovery of property and breach of contract actions.
  - ☐ Actions for which a trial by jury existed when the California Constitution was adopted in 1850.
  - ☐ Actions for which a trial by jury did not exist in 1850, if the "gist of the action" is one that would have been triable at law if it had existed in 1850.
- ☐ No right to trial by jury exists for equitable actions and some "special proceedings," such as probate and guardianship proceedings.

**Authority:**

*Cal Const, art I, § 16; CCP § 592*

**Discussion:**

See 23.38 -23.42

- ☐ Make demand in case management statement.

**Authority:**

*Cal Rules Ct, Rule 3.725(c)*

**Form:**

See 23.58

- ☐ Check local rules to determine whether they contain additional requirements for making a jury trial demand.

**Authority:**

*CCP § 575.1(a)*

- ☐ Demand for jury trial will be granted or denied in case management order.

**Authority:**

*Cal Rules Ct, Rule 3.728(4)*

**Discussion:**

See 23.43

- ☐ When party has right to jury trial but does not request it in case management statement, it can file and serve a demand for jury trial if trial date not yet set.

**Timing:**

Demand must be filed at the time the case is set for trial, or within five days if case was set without notice or stipulation.

**Authority:**

*CCP § 631(d)(4)*

**Discussion:**

See 23.43

- ☐ Party seeking jury trial for entire action or certain factual issues in type of action where jury trial not guaranteed, should file motion demanding jury trial. Moving papers should include:

- ☐ Notice of motion.
- ☐ Supporting declaration.
- ☐ Memorandum of points and authorities.
- ☐ Proposed order.
- ☐ Proof of service.

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**23.37[2] Opposing Party's Checklist.**

- ☐ Determine whether a jury trial is authorized by statute or by the California Constitution.

**Authority:**

*Cal Const, art I, § 16; CCP § 592*

**Discussion:**

See 23.38 -23.42

- ☐ Determine whether the moving party has waived a trial by jury by:

- ☐ Contract;
- ☐ Written consent with the clerk or trial judge;
- ☐ Oral consent, in open court, entered into the minutes;
- ☐ Violating local rules for making jury demands.

**Authority:**

*CCP §§ 575.1(a), 631(d)*

**Discussion:**

See 23.48, 23.49

- ☐ If the opposing party feels that a trial by jury is not clearly authorized or that the party has made a waiver, the opposing party should include this in his or her case management statement and be thoroughly prepared to discuss the issue at the case management conference.

**Authority:**

*Cal Rules Ct, Rules 3.725(c), 3.727(13)*

- ☐ If demand for trial by jury is granted, be aware that the demanding party can later waive trial by jury by:

- ☐ Failing to appear at trial;
- ☐ Filing waiver with court;
- ☐ Failing to deposit advance jury fees; or
- ☐ Failing to deposit continuing jury fees and mileage sums.

**Authority:***CCP § 631(d)***Form:***See 23.71***Discussion:***See 23.48[2]*

☐ If jury trial granted without notice in case where jury trial not guaranteed, file motion to vacate setting for jury trial. Motion papers should include:

- ☐ Notice of motion.
- ☐ Supporting declaration.
- ☐ Supporting memorandum.
- ☐ Proposed order.
- ☐ Proof of service.

**Standard Procedure Checklist:***See Ch. 26, Law and Motion Procedure, 26.39*



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VII. JURY TRIAL DEMANDS

2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.38

### 23.38 California Constitution Guarantees Right to Trial by Jury When Right Existed at Common Law.

**23.38[1] Common Law Right Is Measured at Time California Constitution Was Adopted.** The California Constitution guarantees the right to trial by jury when one existed at common law at the time when the California Constitution was adopted in 1850 [*Cal Const*, art I, § 16; *Cornette v. Department of Trans.* (2001) 26 C4th 63, 75-76, 109 CR2d 1, 26 P3d 332 ]. Whether the common law in 1850 entitled a certain action to a jury trial is a historical question that is to be determined like any other social, political, or legal fact [ *People v. One 1941 Chevrolet Coupe* (1951) 37 C2d 283, 286-287 ; *County of Sutter v. Davis* (1991) 234 CA3d 319, 322-323, 285 CR 736 ].

**23.38[2] Right Exists Only for Legal, Not Equitable, Actions.** If the "gist of an action," as determined from the pleadings, raises issues that would have been triable at law in 1850, a trial by jury is a matter of right [ *Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 CA4th 1546, 1551, 73 CR2d 462 ; *Ripling v. Superior Court* (1952) 112 CA2d 399, 402, 247 P2d 117 ]. A cause of action seeking damages is usually legal, allowing a jury trial [ *Raedeke v. Gibraltar Sav. & Loan Ass'n* (1974) 10 C3d 665, 671, 111 CR 693, 517 P2d 1157 ]. However, a party is not entitled to a jury trial in an equitable action [ *Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 CA4th 1546, 1551, 73 CR2d 462 (breach of fiduciary duty by controlling shareholder); *C & K Eng'g Contractors v. Amber Steel Co.* (1978) 23 C3d 1, 9, 151 CR 323, 587 P2d 1136 (promissory estoppel)]. The "gist of the action" refers to the nature of the rights involved and the facts of the particular case [ *C & K Eng'g Contractors v. Amber Steel Co.* (1978) 23 C3d 1, 9, 151 CR 323, 587 P2d 1136 ].

When the action presents a mix of legal and equitable issues, the parties are usually entitled to a jury trial on the legal issues [ *Arciero Ranches v. Meza* (1993) 17 CA4th 114, 124, 21 CR2d 127 ]. The court may elect to try the equitable issues first, without a jury. This is especially true when the equitable issue may dispose of the legal issues [ *Raedeke v. Gibraltar Sav. & Loan Ass'n* (1974) 10 C3d 665, 671, 111 CR 693, 517 P2d 1157 ].

#### ➡ Cross Reference:

Discussion of the right to a trial by jury in actions presenting mixed issues of law and equity, see *California Forms of Pleading and Practice*, Ch. 322, *Juries and Jury Selection*, § 322.13[1][d] (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury TrialsRight to Jury Trial



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### **23.39 Options and Strategies for Jury Trial Demands.**

For cases in which the right to trial by jury is guaranteed by statute or by the California Constitution, counsel may elect to demand a jury trial or have the action heard by the court. In deciding whether to demand a jury trial, counsel should balance the expenses of a jury trial, including jury fees, as well as the extra time needed for a jury trial, with the potential benefits of having the action heard and decided by a jury.



#### **Decision Point:**

The decision as to whether a jury trial will be demanded must be made fairly early on in the process, as the court will decide whether a jury trial will be allowed when it issues the case management order. The extra costs of a jury trial include the time drafting jury instructions and battling with opposing counsel as to which instructions will be read to the jury, drafting motions in limine to exclude prejudicial evidence, preparing verdict forms, and conducting voir dire of potential jurors.

#### **Judge's Perspective:**

The issue of whether or not to proceed with a jury depends in large part on the attorney's comfort level with the trial judge and the type of case. Generally, in complex business cases the trend is to waive jury and proceed with a bench trial.



#### **Cross Reference:**

Discussion of deciding whether to request jury or non-jury trial, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 5.03 et seq.

Discussion of conducting non-jury trial, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 5.19 et seq.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Trials Jury Trials Jury Demands





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**23.40 Right to Trial by Jury in Actions Concerning Breach of Contract, Recovery of Personal or Real Property, or Damages for Injuries Is Guaranteed by Statute.**

Unless a jury is waived or the matter ordered to a referee, an issue of fact must be tried by jury in the following actions [CCP § 592]:

- Recovery of specific real property, with or without damages.
- Money claimed as due on contract or as damages for breach of contract.
- Money claimed as damages for injuries.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureTrialsJury TrialsRight to Jury Trial



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**23.41 Right to Trial by Jury Is Limited in Inverse Condemnation Actions.**

The right to a jury trial in inverse condemnation actions under *Cal Const, art I, § 19* is limited solely to the issue of damages. The question of whether the public entity is liable for a taking is decided by the court unless the parties and the court agree otherwise [ *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 C4th 893, 951, 55 CR2d 724, 920 P2d 669 ; *Hensler v. City of Glendale* (1994) 8 C4th 1, 15, 32 CR2d 244, 876 P2d 1043 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureTrialsJury TrialsRight to Jury Trial



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.42*

### **23.42 No Right to Jury Trial Exists for Special Proceedings.**

Special proceedings are neither actions at law nor suits at equity and are typically established by statute [CCP § 23; *People v. Superior Court* (2001) 25 C4th 703, 725, 107 CR2d 323, 23 P3d 563 ; *Tide Water Assoc. Oil Co. v. Superior Court* (1955) 43 C2d 815, 822, 279 P2d 35 ]. Special proceedings are typically initiated by petition or motion to obtain special relief [ *People v. Superior Court* (2001) 94 CA4th 980, 988, 114 CR2d 760 ; *Oak Grove Sch. Dist. v. City Title Ins. Co.* (1963) 217 CA2d 678, 710, 32 CR 288 ]. There is no right to a jury trial in special proceedings unless the right is granted by statute [ *Cornette v. Department of Transp.* (2001) 26 C4th 63, 76, 109 CR2d 1, 26 P3d 332 ].

Special proceedings with no right to a jury trial include probate proceedings and guardianship and conservatorship proceedings [*Prob Code* §§ 825, 1452].

#### **Exceptions:**

Special proceedings in which the right to trial by jury is guaranteed by statute include forcible entry and detainer proceedings [CCP § 1171] and prescriptive easement issues in quiet title actions [CCP § 592].

#### **➤ Cross Reference:**

Discussion of the right to a trial by jury in other special proceedings, such as applications for extraordinary writs and administrative proceedings, see *California Forms of Pleading and Practice*, Ch. 322, *Juries and Jury Selection*, § 322.15[2][e], [f] (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Trials Jury Trials Right to Jury Trial



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#### **23.43 Jury Demand Should Be Made In Case Management Statement.**

A demand for a jury trial should be made in the case management statement [*Cal Rules Ct, Rule 3.725(c)*]. The demand is one of the issues that the court will consider during the case management conference [*Cal Rules Ct, Rule 3.727(13)*]. The court's determination concerning the demand should be stated in the case management order [*Cal Rules Ct, Rule 3.728(4)*].

If a party has a right to a jury trial but fails to request a jury trial in its case management statement, it should file a demand for jury trial at the at the time the case is first set for trial, if it is set by notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation [*CCP § 631(d)(4)*].



#### **Cross Reference:**

Form, 23.70 (jury trial demand).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureTrialsJury TrialsJury Demands



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.44*

#### **23.44 Party May Move for Advisory Jury.**

In a case in which the right to jury trial is not guaranteed by law (e.g., an equitable action), a party desiring a jury trial may request, and the court in its discretion may approve, the use of an advisory jury [see Advisory Committee Comment (2003) to repealed Cal Rules Ct, Rule 377; *Saks v. Charity Mission Baptist Church* (2001) 90 CA4th 1116, 1147, 110 CR2d 45 ].

##### **Judge's Perspective:**

The use of an advisory jury is rare and its implementation is, for the most part, invoked by the court on its own motion. However, if counsel wish to address that issue it is best to bring it to the court's attention as soon as possible so the trial judge can continually evaluate its use as the issues of the case develop.

##### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureTrialsJury TrialsJury Demands



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**23.45 Advance Jury Fee Must Be Paid 25 Days Prior to Date Set for Trial.**

The party who demands a jury trial must deposit with the court an advance jury fee 25 days prior to the date set for trial. The fee may not exceed a total of \$150 for each party [*CCP* § 631(b)].

**Distinguish:**

In an eminent domain case, the party seeking condemnation must deposit the jury fees and mileage regardless of which party demanded a jury trial [*CCP* § 631.5].



**Warning:**

A party's failure to deposit the sum required by *CCP* § 631(b) is deemed a waiver of a jury trial [*CCP* § 631(d)(5)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureTrialsJury TrialsJury Demands



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.46*

**23.46 Party Demanding a Trial by Jury Must Deposit Other Jury Fees and Expenses.**

Any party requesting a jury trial must deposit with the court, at the beginning of the second and each succeeding day's session, a sum equal to that day's jury fees and mileage, including the fees and mileage for the jury panel if the trial jury has not yet been selected and sworn. If more than one party has demanded a jury trial, the respective amount to be paid daily by each party demanding a jury will be determined by stipulation of the parties or by order of the court [*CCP* § 631(c)].

Except for government workers receiving their normal compensation during jury duty, who therefore are not entitled to a jury fee [*CCP* § 215(b)], juror fees are \$15 a day for each day's attendance as a juror after the first day [*CCP* § 215(a)]. Mileage reimbursement is \$0.34 per mile actually traveled in going to court as a juror after the first day [*CCP* § 215(c)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureTrialsJury TrialsJury Demands



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.47*

**23.47 Juror Fees Are Recoverable by Prevailing Party.**

Juror fees and mileage costs are recoverable by the prevailing party as costs [*CCP* §§ 1032, 1033.5(a)(1)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureTrialsJury TrialsJury Demands





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2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.48

### **23.48 Right to Trial by Jury May Be Waived.**

**23.48[1] Waiver of Jury Trial May Be Contractual.** A waiver of a trial by jury may occur prior to litigation via contract [ *Powers v. Dickson, Carlson & Campillo* (1997) 54 CA4th 1102, 1109, 63 CR2d 261 ; *Madden v. Kaiser Found. Hosps.* (1976) 17 C3d 699, 712-713, 131 CR 882, 552 P2d 1178 ]. The waiver must be clearly apparent in the contract and in unambiguous and unequivocal language.

#### **Cross Reference:**

Discussion of requesting non-jury trial and waiver of right to jury trial, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 5.12 et seq.

**23.48[2] Trial by Jury May Be Waived on Statutory Grounds.** A party waives the right to a trial by jury [CCP § 631(d)]:

- By failing to appear at the trial.
- By written consent filed with the clerk or judge.
- By oral consent, in open court, entered in the minutes.
- By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set on notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation.
- By failing to deposit with the clerk, or judge, advance jury fees as provided in CCP § 631(b) [see 23.45].
- By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the sum provided in CCP § 631(c) [see 23.46].

#### **Cross References:**

Form of written consent to waiver, see 23.71.

Discussion of requesting non-jury trial and waiver of right to jury trial, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 5.12 *et seq.*

**23.48[3] Waiver May Survive Reversal on Appeal.** If a judgment is reversed for a trial de novo, a party is not bound by its waiver of a jury at the first trial [ *Frankel v. Four Star Int'l, Inc.* (1980) 104 CA3d 897, 904, 163 CR 902 ]. However, if the cause is remanded on appeal for further proceedings and determination of issues that could have been decided originally, a waiver of jury trial is binding as to the proceedings on remand [ *Frankel v. Four Star Int'l, Inc.* (1980) 104 CA3d 897, 904, 163 CR 902 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureTrialsJury TrialsRight to Jury Trial



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.49*

#### **23.49 Court Has Discretion to Allow Trial by Jury in Spite of a Waiver.**

The court may, in its discretion, on just terms, allow a trial by jury although there may have been a waiver of a trial by jury [CCP § 631(e)]. In deciding whether to allow a trial by jury after a waiver, the court may consider the following factors [ *Day v. Rosenthal* (1985) 170 CA3d 1125, 1176, 217 CR 89 ]:

- Delay in rescheduling the trial for jury.
- Lack of funds.
- Timeliness of the request.
- Prejudice to the litigants.
- Prejudice to the court or its calendar.
- Reason for the request.
- Whether the other parties desire a jury trial.

When there is doubt as to whether there has been a waiver of the right to a jury trial and doubt as to whether relief from the waiver should be granted, the matter should be resolved in favor of the party who requested a jury trial [ *Massie v. AAR W. Skyways, Inc.* (1992) 4 CA4th 405, 411, 5 CR2d 654 ; *Oakes v. McCarthy Co.* (1968) 267 CA2d 231, 264-265, 73 CR 127 ]. Because public policy favors trials by jury, the trial court should grant relief from a jury waiver, except when to do so would work serious hardship to the objecting party [ *Boal v. Price Waterhouse & Co.* (1985) 165 CA3d 806, 809, 212 CR 42 ; *Wharton v. Superior Court* (1991) 231 CA3d 100, 103, 282 CR 349 ]. The objecting party must show some prejudice other than that which may result because of the actual jury trial [ *Massie v. AAR W. Skyways, Inc.* (1992) 4 CA4th 405, 411, 5 CR2d 654 ].

#### **➡ Cross Reference:**

Additional discussion of court's discretion to grant jury trial if party revokes prior waiver of jury trial right, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 5.18.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsRight to Jury Trial



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.50*

**23.50 CHECKLIST: Pretrial Conference Preparation.**

- ☐ Review local rules to determine whether court holds a pretrial conference, final status conference, final case management conference, or trial readiness conference.

**Discussion:**

See 23.52

- ☐ Calendar date of or deadline for conference and determine when materials for conference need to be served on other parties and filed or lodged with court.

**Discussion:**

See 23.52

- ☐ Prepare materials for conference which may include:

- ☐ Motions in limine.
- ☐ Jury instructions.
- ☐ Witness list.
- ☐ Exhibit list.
- ☐ Statement of the case.

**Prerequisite:**

Many courts require submission of joint exhibit lists and jury instructions so counsel must leave time for meeting and conferring on these issues prior to their submittal to the court.

**Timing:**

Some courts require all motions, including motions in limine to be heard on *CCP* § 1005(b) 16-court-day notice before the pretrial conference, so counsel must have desired motions prepared in time [see Los Angeles Super Ct Rules, Rule 7.9(h)].

**Discussion:**

See 23.52



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.51*

**23.51 CHECKLIST: Making and Opposing Motions in Limine.**

**23.51[1] Moving Party's Checklist.**

☐ Determine whether any evidence is potentially inadmissible, and if so, whether it is prejudicial to moving party's case.

**Discussion:**

See 23.53

☐ Determine scope of motion in limine.

☐ Motions in limine may be used to:

☐ Preclude the admission of specific evidence.

☐ Preclude reference by counsel or witnesses to certain matters that may be prejudicial.

☐ Obtain favorable rulings in advance on the admissibility of certain evidence; or

☐ Dismiss all or part of the action based on the exclusion of evidence necessary to support the opposing party's case.

**Authority:**

*CCP § 128(a)(3), (8); Evid Code §§ 350, 352, 402(b)*

**Discussion:**

See 23.53, 23.54

☐ Review local rules to determine when motion may be made.

☐ Motions in limine are usually heard and ruled on:

☐ At the final conference before trial; or

☐ On the day trial is scheduled to begin, before the jury is selected.

**Discussion:**

See 23.54



**Timing:**

Some courts require motions in limine to be heard on *CCP § 1005(b)* 16-court-day notice before the final status conference for cases assigned to judges on an individual or all purpose calendar, or 5-days' notice before the final status conference for cases assigned to judges who handle cases on assignment from a Master calendar court [see, e.g., Los Angeles Super Ct Rules, Rule 7.9(h)].

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

☐ If local rules do not specify particular method, decide whether to make the motion in limine orally or with advance written notice.

**Discussion:**

See 23.54

☐ Make the motion on the record, with all counsel present.

**Discussion:**

See 23.54

**23.51[2] Opposing Party's Checklist.**

☐ If motion in limine is written:

☐ Review moving party's motion papers and determine whether opposition is appropriate or desirable.

☐ Prepare and file papers in opposition to the motion, including an opposing memorandum.

**Standard Procedure Checklist:**



See *Ch. 26, Law and Motion Procedure*, 26.46

☐ If motion in limine is oral:

- ☐ Indicate opposition and make argument supporting opposing viewpoints.
- ☐ If it seems that court will grant the motion, suggest that the court only grant it subject to an offer of proof at trial.

**Discussion:**

See 23.55



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.52*

**23.52 Courts May Hold Pretrial Conferences.**

Local rules typically require counsel to attend a final pretrial or status conference on a date between 30 days and five court days before trial. The conference has different names in different counties. The purpose of the conference is to resolve outstanding issues so the parties are ready to proceed to trial on the scheduled trial date. Among the issues that may be addressed are jury instructions, special verdict forms, witness and exhibit lists, motions in limine and major evidentiary issues that may arise, and the expected length of the trial.

**Example:**

In Los Angeles County Superior Court, counsel attend a final status conference no more than 10 days prior to the trial date. At least five days before the conference, the parties exchange and file lists of prenumbered trial exhibits, witness lists, jury instruction requests and a short statement of the case to be read to the jury. In addition, motions in limine, bifurcation motions and any other trial preparation or dispositive motions, other than summary judgment motions, will be heard at the conference. If the case has been assigned to a single judge ("I/C cases"), all motions, including motions in limine, must be filed and served with statutory notice; i.e., 16 court days before the conference (adding the appropriate number of days if not personally served). In cases not yet assigned to a judge ("M/C cases"), the motions must be filed and served 5 court days before the conference and will be set for hearing on the first day of trial [CCP § 1005(b); Los Angeles Super Ct Rules, Rule 7.9(h)].



**Warning:**

The court may refuse to consider late-filed motions, which may be critical to the case, if, for example, prejudicial evidence is admitted that could have been excluded by a motion in limine.



**Cross Reference:**

Discussion of motions in limine, see 23.53, 23.54.

Discussion of final pretrial conferences, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 4, Final Pretrial Conference.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersConferencesPretrial Conferences



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.53*

**23.53 Motions in Limine May Be Used to Exclude Inadmissible or Prejudicial Evidence.**

Motions in limine are typically used to exclude certain evidence from introduction before a jury. A motion in limine may be used to exclude evidence either because it is irrelevant or because it is unduly prejudicial [ *Pellegrini v. Weiss* (2008) 165 CA4th 515, 530, 81 CR3d 387 ; *Schweitzer v. Westminster Investments, Inc.* (2007) 157 CA4th 1195, 1214, 69 CR3d 472 ; *Lucas v. County of Los Angeles* (1996) 47 CA4th 277, 284-285, 54 CR2d 655 ]. A typical order granting a motion in limine excludes the evidence and forbids counsel, the parties and witnesses from mentioning it in the presence of the jury [ *People v. Morris* (1991) 53 C3d 152, 188, 279 CR 720, 807 P2d 949 ].

Motions in limine may also be used to request favorable pretrial rulings on the admissibility of certain evidence, which is useful to a party desiring to introduce a voluminous amount of documentary evidence.

Finally, motions in limine may be used to dismiss the entire action when the effect of granting the motion in limine results in the exclusion of all or the most critical pieces of evidence so that the plaintiff fails to state a cause of action. No separate motion for a judgment on the pleadings is necessary in such a situation [ *Coshov v. City of Escondido* (2005) 132 CA4th 687, 701-702 ; *Clemens v. American Warranty Corp.* (1987) 193 CA3d 444, 451, 238 CR 339 ].

**Strategic Point:**



Although appellate courts have expressed concern about the use of a motion in limine as a substitute for a motion for summary adjudication [ *Amtower v. Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1592-1597, 71 CR3d 361 ], such use may be appropriate and strategically desirable. Motions for summary adjudication are usually expensive to prepare and are frequently denied due to caution by the trial court and concern about the risk of reversal on appeal. Because the summary adjudication process occurs in written form with an extended notice period that involves written oppositions supported by lawyer-prepared factual declarations, the procedure is far less likely to elicit spontaneous, honest admissions than might occur in a outside-the-presence of the jury hearing under *Evid Code* § 402. Although the Court of Appeal in *Amtower* criticized the use of motions in limine to dispose of a claim, it also stated that "trial courts do have the inherent power to use them in this way." In fact, while the Court of Appeal criticized the procedure it found that any procedural irregularity was harmless because of a concession that the plaintiff made during the pretrial "mini-trial" proceeding [ *Amtower v. Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1592-1597, 71 CR3d 361 ]. In contrast to the successful use of

the concession in *Amtower*, the Court of Appeal in *Scalf v. D.B. Log Homes, Inc. (2005) 128 CA4th 1510, 1522, 27 CR3d 826* reversed a summary judgment on the ground that a concession that was made in a deposition answer was "simply evidence" and not a "judicial admission" entitled to "conclusive effect to the truth of the matter asserted." Trial testimony is likely to be treated as more conclusive than deposition testimony precisely because the courts assume that by the time of trial the parties and witnesses are prepared for trial and have a reasonably good understanding of the issues.

**Example:**

The fact that a motion in limine filed after the denial of motion for judgment on the pleadings has the effect of a motion for judgment on the pleadings, in that it has the cumulative effect of an objection to all evidence on the ground that the plaintiff failed to state any cause of action, does not require the defendant to file a renewed motion for judgment on the pleadings under *CCP § 1008* [ *Coshow v. City of Escondido (2005) 132 CA4th 687, 701-702* ].



**Cross References:**

Discussion of grounds for motion in limine, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 4.22.

Detailed coverage of motions in limine, see *California Forms of Pleading and Practice*, Ch. 373, *Motions In Limine* (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Civil ProcedurePretrial MattersMotions in LimineGeneral Overview



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**23.54 Local Rules Usually Govern Motion in Limine Procedure.**

California law does not specify any procedure for making a motion in limine. Local rules usually specify a procedure. Depending on the applicable local rules, motions in limine may be made orally or must be in writing. The notice required for written motions also varies from county to county. In some jurisdictions, a party may make a motion in limine on the day that trial is scheduled to begin, while in others, longer notice is required. Motions in limine are never made before the jury.

**Examples:**

Los Angeles County requires 16 court days' notice before the final status conference for motions in limine when the case is assigned to a judge on an individual or all purpose calendar, or 5-days' notice before the final status conference for a case assigned to judges who handle cases on assignment from a Master calendar court [Los Angeles Super Ct Rules, Rule 7.9(h); *see also* CCP § 1005(b)]. San Francisco County requires that motions in limine be personally served five days before the trial date (or ten days if served by mail) [San Francisco Super Ct Rules, Rule 6.2]. Orange County requires the parties to exchange motions in limine at an "issue conference," which must be held at least ten days before trial [Orange Super Ct Rules, Rule 450].

**➡ Cross Reference:**

Discussion of exemption of motions in limine from prohibition against local rules on motions, timing of the motions, and filing requirements, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 4.23 *et seq.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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Chapter 23 Case Management  
VIII. PRETRIAL CONFERENCES

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.55*

**23.55 Motions in Limine May Be Granted Subject to Offer of Proof.**

A court may conditionally grant a motion in limine to prevent mention of prejudicial evidence subject to offers of proof at trial. If the probative value of the evidence offered at trial outweighs its prejudicial effect, the trial court may reconsider its prior decision to grant the motion in limine [see *Lemer v. Boise Cascade, Inc. (1980) 107 CA3d 1, 9-12, 165 CR 555* ].



**Cross Reference:**

Additional discussion of trial court's discretion in ruling on motions in limine, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 4.29*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersMotions in LimineExclusion of Evidence



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.56*

### **23.56 Violation of Order Granting Motion in Limine May Result in Contempt Citation.**

If an attorney violates an order granting a motion in limine by referring to the excluded evidence in front of the jury, the attorney may be cited for contempt [*CCP § 1209(a)(5)*; see *Charbonneau v. Superior Court* (1974) 42 CA3d 505, 507, 116 CR 153 ].



#### **Warning:**

The court may grant a motion for a new trial or a declare a mistrial if the violation of the order causes serious prejudice to the opposing party's claims or defenses [*CCP § 616*; *Grimshaw v. Ford Motor Co.* (1981) 119 CA3d 757, 793-795, 174 CR 348 ].

#### **Distinguish:**

A trial court may not award attorney fees under *CCP §§ 128(a)(4), 128.5, 128.7, or 187* for repeated violations of an order in limine [ *Clark v. Optical Coating Laboratory, Inc.* (2008) 165 CA4th 150, 164-165, 80 CR3d 812 ].



#### **Cross References:**

Additional discussion of order of contempt for violation of ruling on motions in limine, as well as other possible sanctions, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 4.31.

Discussion of direct contempt generally, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 23.09 *et seq.*

Discussion of moving for mistrial, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 22, Mistrial.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersMotions in LimineGeneral Overview





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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.57*

**23.57 Orders Granting or Denying Motions in Limine Are Not Subject to Interlocutory Appeal.**

An order granting or denying a motion in limine is not appealable and review of the order via extraordinary writ is not usually possible [*CCP* §§ 904.1, 904.2].



**Cross Reference:**

Discussion concerning the appeal after judgment of an order granting or denying a motion in limine, see *California Forms of Pleading and Practice*, Ch. 373, *Motions In Limine*, § 373.18[2] (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersMotions in LimineAppeals



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.58*

**23.58 Judicial Council Form CM-110 Case Management Statement.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.725(c)*; California Judicial Council Form CM-110 has been adopted for mandatory use [*Cal Rules Ct, Rule 1.31*]



**Timing:**

See 23.08[3]



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2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.59

**23.59 Case Management Conference Order.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |                                  |
|----------------------------------|---|----------------------------------|
| _____ [name, e.g., John Smith]   | ) |                                  |
| Plaintiff vs. _____ [name, e.g., | ) | NO. _____                        |
| Mary Jones]                      | ) | CASE MANAGEMENT CONFERENCE ORDER |
| Defendant                        | ) |                                  |
|                                  | ) |                                  |

\_\_\_\_\_

A case management conference in this case was held in Department \_\_\_\_\_ of this Court on \_\_\_\_\_ [date]. \_\_\_\_\_ [Specify name of each attorney appearing and party represented and name of each party appearing in person, e.g.: Tom Doe appeared as counsel for plaintiff and Jane Lee appeared as counsel for defendant]. This shall constitute the case management order for this action unless superseded or amended.

[SET FORTH nature of case and matters resolved at conference, e.g.:]

1. Nature of Case. This is \_\_\_\_\_ [an action or a special proceeding] for \_\_\_\_\_ [set forth concise and descriptive statement of case].
2. Matters Agreed on or Admitted. The following matters have been agreed on or admitted by the parties: \_\_\_\_\_ [specify, setting forth each matter in a separately lettered subparagraph].
3. Exhibits. The following is a list of exhibits marked in evidence or for identification or as authenticated by consent of

the parties: \_\_\_\_\_ [*specify, describing each exhibit in a separately lettered subparagraph*].

4. Witnesses. The parties stipulated that \_\_\_\_\_ [*number*] persons would be called as witnesses.

5. Disputed Issues and Contentions. The following are the issues remaining in dispute and the factual and legal contentions made by each party with respect to them: \_\_\_\_\_ [*list each disputed issue in a separately lettered subparagraph followed by factual and legal contentions of each party with respect to each issue*].

6. Rulings and Orders. The following rulings and orders were made at the case management conference: \_\_\_\_\_ [*specify, setting forth concise and descriptive statement of each ruling or order in a separately lettered subparagraph*].

7. No further case management conference or review is required.

[*EITHER*]

8. Neither plaintiff nor defendant has demanded a jury trial.

[*OR*]

8. \_\_\_\_\_ [*Identify party, e.g., Defendant Mary Jones*] has demanded a jury trial.

[*CONTINUE*]

9. All parties necessary to the disposition of this case have been served or have appeared.

[10. The following \_\_\_\_\_ (unserved *or* not appearing *or* unserved and not appearing) \_\_\_\_\_ (fictitious *or* named *or* fictitious and named) defendant(s) are to be \_\_\_\_\_ (dismissed *or* severed *or* dismissed and severed) from the action (as follows: \_\_\_\_\_ [*specify*]).]

11. The names and addresses of counsel who will try this case are: Tom Doe for plaintiff and Jane Lee for defendant.

[12. This case is set for a settlement conference pursuant to *Rule 3.1380 of the California Rules of Court* on \_\_\_\_\_ (date) at \_\_\_\_\_ (time).]

13. This case is set for trial on \_\_\_\_\_ (date).

14. The time estimated for trial is \_\_\_\_\_ days.

[*CONTINUE, setting forth any additional matters required by local court rule*]

15. Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.728*



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2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.60

**23.60 Notice of Motion and Supporting Declaration to Amend Case Management Conference Order.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |                                    |
|----------------------------------|---|------------------------------------|
| _____                            | ) |                                    |
|                                  | ) | NO. _____                          |
|                                  | ) | NOTICE OF MOTION AND MOTION ORDER  |
| _____ [name, e.g., John Smith]   | ) | FOR AMENDING CASE MANAGEMENT CON-  |
| Plaintiff vs. _____ [name, e.g., | ) | FERENCE ORDER, SUPPORTING DECLARA- |
| Mary Jones]                      | ) | TION OF _____ [name] AND SUP-      |
| Defendant                        | ) | PORTING MEMORANDUM                 |
|                                  | ) | Date: _____                        |
|                                  | ) | Time: _____                        |
|                                  | ) | Location: _____                    |
|                                  | ) | Judge: _____                       |
|                                  |   | Date Action Filed: _____           |
|                                  |   | Trial Date: _____                  |

To \_\_\_\_\_ [identify party, e.g., defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [specify party, e.g., plaintiff] will, and hereby does, move the court for an order amending the case management conference order in this case as follows: \_\_\_\_\_ [specify]. The motion will be brought pursuant to

\_\_\_\_\_ [cite statutory authority here] and will be made on the ground that the requested amendment is necessary in the furtherance of justice.

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)] [if applicable, add: \_\_\_\_\_ (plaintiff's or defendant's) request for judicial notice], and the supporting memorandum served and filed herewith, and on such further and additional evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature, e.g., Tom Doe]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[Plaintiff or Defendant]

SUPPORTING DECLARATION OF \_\_\_\_\_ [name, e.g., Tom Doe]

I, \_\_\_\_\_ [name, e.g., Tom Doe], declare:

1. I am the \_\_\_\_\_ [identify declarant, e.g., attorney of record for plaintiff herein] and make this declaration in support of \_\_\_\_\_ [identify party, e.g., plaintiff's] motion for an order \_\_\_\_\_ [amending or modifying] the case management conference order in this case. I have personal knowledge of the facts set forth herein, and if called to testify, would and could testify competently thereto.

2. \_\_\_\_\_ [Set forth probative facts within declarant's personal knowledge establishing that granting motion would be in furtherance of justice or would prevent manifest injustice].

3. I hereby request \_\_\_\_\_ [state the relief requested from the court, i.e., that plaintiff's motion for an order \_\_\_\_\_ (amending or modifying) the case management conference order in this case be granted as follows: \_\_\_\_\_ (specify)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

SUPPORTING MEMORANDUM

[Add memorandum supporting motion]

NOTES.

**Authority:**

*CCP* § 576

**Related Form of Order:**

See 23.61

**Related Form of Memoranda:**

See *California Points and Authorities, Ch. 180, Pretrial Proceedings, § 180.10* (Matthew Bender)





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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.61*

**23.61 Order to Amend Case Management Conference Order.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |           |
|----------------------------------|---|-----------|
| _____ [name, e.g., John Smith]   | ) |           |
| Plaintiff vs. _____ [name, e.g., | ) | NO. _____ |
| Mary Jones]                      | ) | ORDER     |
| Defendant                        | ) |           |
|                                  | ) |           |

\_\_\_\_\_

The motion of \_\_\_\_\_ [identify party, e.g., plaintiff] for an order amending the case management conference order in this case came on regularly for hearing by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

The matter having been argued and submitted, and it appearing to the satisfaction of the court that the amendment is necessary in the furtherance of justice,

IT IS ORDERED that the motion be and is granted and that the case management conference order herein be and is amended as follows: \_\_\_\_\_ [specify].

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*CCP § 576*

**Related Form of Motion:**

*See 23.60*



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*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.62*

### 23.62 Notice of Time Set for Trial.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |                              |
|----------------------------------|---|------------------------------|
| _____ [name, e.g., John Smith]   | ) |                              |
| Plaintiff vs. _____ [name, e.g., | ) | NO. _____                    |
| Mary Jones]                      | ) | NOTICE OF TIME SET FOR TRIAL |
| Defendant                        | ) |                              |
|                                  | ) |                              |

\_\_\_\_\_

To \_\_\_\_\_ [identify party, e.g., plaintiff] John Smith and to her attorney of record:

NOTICE IS HEREBY GIVEN that this action has been set for trial on \_\_\_\_\_ [date] at  
\_\_\_\_\_ [time] in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this  
court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city].

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Attorney for \_\_\_\_\_ [party's

status and name, e.g., defendant Mary Jones]

NOTES.

**Authority:**

*CCP § 594(b)*



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IX. FORMS

B. Settlement Conferences and Offers to Compromise

2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.63

### 23.63 Settlement Conference Statement.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |                                 |
|----------------------------------|---|---------------------------------|
| _____ [name, e.g., John Smith]   | ) |                                 |
| Plaintiff vs. _____ [name, e.g., | ) | NO. _____                       |
| Mary Jones]                      | ) | SETTLEMENT CONFERENCE STATEMENT |
| Defendant                        | ) |                                 |
|                                  | ) |                                 |

\_\_\_\_\_

\_\_\_\_\_ [Plaintiff or Cross-Complainant] John Smith represents:

1. Nature of case. This is an action for \_\_\_\_\_ [specify, e.g., damages for personal injuries and property damage sustained by plaintiff in an automobile accident].
2. Facts. The material facts of the case are as follows: \_\_\_\_\_ [set forth concise statement of material facts].
3. Parties. The parties and their capacities in this action are as follows: \_\_\_\_\_ [specify].
4. Agreed or Admitted Matters. The parties agree or admit that the following matters are true:  
\_\_\_\_\_ [specify, including matters admitted by pleadings, answers to interrogatories, or requests for admission].
5. Contentions. The factual and legal contentions in dispute are as follows: \_\_\_\_\_ [concisely state,

identifying first the party making the contention(s), then the contention(s), and lastly the party disputing the contention(s)].

6. Legal Propositions and Authorities. \_\_\_\_\_ [Specify each legal proposition important to resolution of the case and cite appropriate authority that supports it].

[ADD, if statement is filed by party claiming damages]

7. Damages. [As of this date,] \_\_\_\_\_ plaintiff John Smith has sustained damages in the total amount of \$ \_\_\_\_\_. These damages consist of special and general damages as follows: \_\_\_\_\_ [itemize special damages by category and then general damages].

8. Punitive Damages. The amount claimed as punitive damages is \$ \_\_\_\_\_.

9. Settlement Demand. Plaintiff John Smith demands the sum of \$ \_\_\_\_\_ to settle this case without trial.

10. Settlement Offers in Place. Plaintiff John Smith has received [no settlement offers or the following settlement offers: \_\_\_\_\_ (specify)].

[OR, if statement is filed by defendant]

7. Settlement Offer. Defendant Mary Jones offers the sum of \$ \_\_\_\_\_ to settle this case without trial.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1380(c); Los Angeles Super Ct Rules, Rule 7.9(e)(5)*



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C. Bifurcation of Trial

2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.64

**23.64 Notice of Motion and Declaration for Separate Trial of Issue or Part of Issue Before Trial of Other Issues or Part of Issue in Case.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |                                        |
|----------------------------------|---|----------------------------------------|
|                                  | ) |                                        |
|                                  | ) | NO. _____                              |
|                                  | ) | NOTICE OF MOTION FOR ORDER GRANTING    |
| _____ [name, e.g., John Smith]   | ) | PRIOR SEPARATE TRIAL OF ISSUE OF       |
| Plaintiff vs. _____ [name, e.g., | ) | _____ [specify, e.g., liability], SUP- |
| Mary Jones]                      | ) | PORTING DECLARATION _____              |
| Defendant                        | ) | [name], AND SUPPORTING MEMORANDUM      |
|                                  | ) | Date: _____                            |
|                                  | ) | Time: _____                            |
|                                  | ) | Location: _____                        |
|                                  | ) | Judge: _____                           |
|                                  |   | Date Action Filed: _____               |
|                                  |   | [Trial Date: _____]                    |

To \_\_\_\_\_ [identify party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date] at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [specify party, e.g., Defendant] will, and hereby does, move for an order that the issue of \_\_\_\_\_ [

*specify, e.g., defendant's liability*] be tried before the issue of \_\_\_\_\_ [*specify, e.g., plaintiff's damages*] in this case. The motion will be brought pursuant to \_\_\_\_\_ [*cite statutory authority*] and will be made on the ground that the \_\_\_\_\_ [*convenience of the witnesses or the ends of justice or the economy and efficiency of handling the litigation or any combination of these*] will be promoted thereby.

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [*name(s)*], [*if applicable, add: \_\_\_\_\_ (plaintiff's or defendant's) request for judicial notice*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such further and additional evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

[*party's status and name*]

SUPPORTING DECLARATION OF \_\_\_\_\_ [*name*]

I, \_\_\_\_\_ [*name*], declare:

1. I am \_\_\_\_\_ [*identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for \_\_\_\_\_ (moving party) or other statement as appropriate*]. I have personal knowledge of the facts set forth herein, and if called to testify, would and could testify competently thereto.

[*SET FORTH, in successively numbered paragraphs, facts within declarant's personal knowledge establishing that granting the motion would promote the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation, or any combination of these, e.g.:*]

2. Plaintiff's complaint prays judgment against defendant in the sum of \$\_\_\_\_\_ for \_\_\_\_\_ [*specify, e.g., personal injuries therein alleged to have been sustained by plaintiff as the proximate result of defendant's negligence*].

3. Defendant has filed an answer in which he/she has \_\_\_\_\_ [*specify, e.g., denied he/she was negligent, denied his/her alleged actions were the proximate cause of plaintiff's alleged injuries, alleged plaintiff was negligent and that such negligence was the proximate cause of plaintiff's injuries, and denied that plaintiff's alleged injuries are of the nature and extent alleged in the complaint*].

4. \_\_\_\_\_ [Plaintiff or Defendant] has demanded a jury trial.

5. The cause is now at issue and ready for \_\_\_\_\_ [pretrial conference or trial], and \_\_\_\_\_ [*e.g., two*] major issues of fact remain to be tried as follows: \_\_\_\_\_ [*specify,*



*e.g.*, (a) whether defendant is liable for plaintiff's alleged injuries, and (b) if defendant is liable, the amount of damages recoverable by plaintiff].

6. The \_\_\_\_\_ [*specify ground of motion, e.g., convenience of the witnesses*] will be promoted by trying the issue of \_\_\_\_\_ [*e.g., liability*] before the issue of \_\_\_\_\_ [*e.g., damages*] for these reasons:

[*SPECIFY, e.g.*]

a. I estimate the trial of this action will take approximately \_\_\_\_\_ days.

b. I estimate trial of the issue of \_\_\_\_\_ [*e.g., liability*] will take approximately \_\_\_\_\_ days.

c. I estimate trial of the issue of \_\_\_\_\_ [*e.g., damages*] will take approximately \_\_\_\_\_ days.

d. I know of no witnesses who are competent to testify as to \_\_\_\_\_ [*specify, e.g., defendant's alleged negligence or plaintiff's negligence*] who are also competent to testify as to \_\_\_\_\_ [*specify, e.g., the nature or extent of plaintiff's alleged injuries*].

e. I anticipate that \_\_\_\_\_ [*number*] witnesses will be called to testify as to the issue of \_\_\_\_\_ [*specify, e.g., the nature and extent of plaintiff's alleged injuries*], none of whom is competent to testify as to \_\_\_\_\_ [*specify, e.g., defendant's alleged negligence or plaintiff's negligence*].

f. I know of no special defense herein that is entitled to be tried pursuant to \_\_\_\_\_ [*Code of Civil Procedure Section 597 or Code of Civil Procedure Section 597.5*] before trial of the issue of \_\_\_\_\_ [*e.g., liability*] herein.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [*date*]

\_\_\_\_\_ [*signature*]

#### SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

NOTES.

#### Authority:

CCP § 598

**Related Form of Order:**

See 23.65



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**23.65 Order Granting Motion for Separate Trial of Issue or Part of Issue Before Trial of Other Issues or Part of Issue in Case.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |           |
|----------------------------------|---|-----------|
| _____ [name, e.g., John Smith]   | ) |           |
| Plaintiff vs. _____ [name, e.g., | ) | NO. _____ |
| Mary Jones]                      | ) | ORDER     |
| Defendant                        | ) |           |
|                                  | ) |           |

\_\_\_\_\_

The motion of \_\_\_\_\_ [identify party, e.g., defendant] for an order requiring trial of the issue of \_\_\_\_\_ [specify, e.g., liability] before trial of the issue of \_\_\_\_\_ [specify, e.g., damages] in this case came on regularly for hearing by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

On proof made to the satisfaction of the court that the \_\_\_\_\_ [convenience of the witnesses or ends of justice or economy and efficiency of handling the litigation or any combination of these] will be promoted thereby and that the motion ought to be granted,

IT IS ORDERED that the motion be, and it is hereby, granted and that the issue of \_\_\_\_\_ [e.g., liability] shall be tried separately [\_\_\_\_\_ (by the Court or before a duly impaneled and sworn jury)] before trial of the issue of \_\_\_\_\_ [e.g., damages] in this case.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*CCP § 598*

**Related Form of Motion:**

*See 23.64*



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IX. FORMS

D. Motions for Precedence or Preference and Motions to Continue, Advance, Reset, or Specially Set

2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.66

**23.66 Notice of Motion and Supporting Declaration to Establish Precedence or Preference of Case for Case Management Conference or Trial.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |                                       |
|----------------------------------|---|---------------------------------------|
|                                  | ) |                                       |
|                                  | ) | NO. _____                             |
|                                  | ) | NOTICE OF MOTION AND MOTION FOR OR-   |
| _____ [name, e.g., John Smith]   | ) | DER [ESTABLISHING PRECEDENCE OR       |
| Plaintiff vs. _____ [name, e.g., | ) | GRANTING PREFERENCE] AND SETTING CASE |
| Mary Jones]                      | ) | FOR [CASE MANAGEMENT CONFERENCE OR    |
| Defendant                        | ) | TRIAL], SUPPORTING DECLARATION OF     |
|                                  | ) | [NAME], AND SUPPORTING MEMORANDUM     |
|                                  | ) | Date: _____                           |
|                                  | ) | Time: _____                           |
|                                  | ) | Locations: _____                      |
|                                  | ) | Judge: _____                          |
|                                  | ) | Date Action Filed: _____              |
|                                  | ) | Trial Date: _____                     |

To \_\_\_\_\_ [identify party, e.g., defendant] \_\_\_\_\_ [name] and to his/her attorney of record:

[EITHER, if seeking preference based on CCP § 36(a) ]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], California, \_\_\_\_\_ [specify party, e.g., plaintiff] will, and hereby does, move the court for an order granting this case a preference and setting it for \_\_\_\_\_ [a case management conference or trial] at the earliest possible date. The motion will be brought pursuant to *Code of Civil Procedure Section 36(a)* and will be made on the ground(s) that \_\_\_\_\_ [identify party, e.g., plaintiff] is \_\_\_\_\_ [70 or specify number more than 70] years of age.

[OR, if seeking preference based on CCP § 36(b) ]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], California, \_\_\_\_\_ [specify party, e.g., plaintiff] will move the court for an order granting this case a preference and setting it for \_\_\_\_\_ [a case management conference or trial] at the earliest possible date. The motion will be brought pursuant to *Code of Civil Procedure Section 36(b)* and will be made on the ground(s) that this is an action to recover damages for \_\_\_\_\_ [wrongful death or personal injury] and \_\_\_\_\_ [identify moving party, e.g., plaintiff] is \_\_\_\_\_ [specify number under 14] years of age.

[OR, if seeking preference based on CCP § 36(d) ]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], California, \_\_\_\_\_ [specify party, e.g., plaintiff] will move the court for an order granting this case a preference and setting it for \_\_\_\_\_ [a case management conference or trial] at the earliest possible date. The motion will be brought pursuant to *Code of Civil Procedure Section 36(d)* and will be made on the ground(s) that \_\_\_\_\_ [identify party, e.g., plaintiff] \_\_\_\_\_ suffers from an \_\_\_\_\_ [illness or condition] raising substantial medical doubt that he/she will survive beyond six months from now and the interests of justice will be served by the granting of the preference.

[OR, if seeking preference based on CCP § 36(e) ]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], California, \_\_\_\_\_ [specify party, e.g., plaintiff] will move the court for an order granting this case a preference and setting it for \_\_\_\_\_ [a case management conference or trial] at the earliest possible date. The motion will be brought pursuant to *Code of Civil Procedure Section 36(e)* and will be made on the ground(s) that the interests of justice will be served by the granting of the preference.

[OR, if seeking preference based on CCP § 37 ]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], California, \_\_\_\_\_ [specify party, e.g., plaintiff] will move the court for an order granting this case a preference and setting it for \_\_\_\_\_ [a case management conference or trial] at the earliest possible date. The motion will be brought pursuant to *Code of Civil Procedure Section 37* and will be made on the ground(s) that this is an action in which plaintiff is seeking damages for personal injuries caused by defendant during the commission of a felony offense for which defendant has been criminally convicted.

[OR, if seeking precedence under CCP § 1062.3(b) for action that seeks both declaratory and other relief]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], California, \_\_\_\_\_ [specify party, e.g., plaintiff] will move the court for an order establishing that this case has precedence and setting it for \_\_\_\_\_ [a case management conference or trial] at the earliest possible date. The motion will be brought pursuant to *Code of Civil Procedure Section 1062.3(b)* and will be made on the ground(s) that this case is an action for declaratory relief and, although judicial relief in addition to declaratory relief is sought, the action requires a speedy trial.

[OR, to establish other statutory precedence]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], California, \_\_\_\_\_ [specify party, e.g., plaintiff] will move the court for an order establishing that this case has precedence and setting it for \_\_\_\_\_ [a case management conference or trial] at the earliest possible date. The motion will be brought pursuant to \_\_\_\_\_ [cite statutory authority] and will be made on the ground(s) that this case is \_\_\_\_\_ [an action or a proceeding] \_\_\_\_\_ [specify, e.g., by a taxpayer seeking a refund of property taxes] and is entitled to precedence in setting for trial pursuant to \_\_\_\_\_ [specify code section, e.g., Revenue and Tax Code Section 5149].

[CONTINUE]

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)] [if applicable, add: \_\_\_\_\_ (plaintiff's or defendant's) request for judicial notice], and the supporting memorandum served and filed herewith, and on such further and additional evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

SUPPORTING DECLARATION OF \_\_\_\_\_ [name]

I, \_\_\_\_\_ [name], declare:

1. I am the \_\_\_\_\_ [identify declarant, e.g., the attorney of record for plaintiff] herein and make this declaration in support of \_\_\_\_\_ [identify party, e.g., plaintiff's] motion for an order that this case \_\_\_\_\_ [is entitled to precedence or be granted preference] and setting it for \_\_\_\_\_ [a case management conference or trial]. I have personal knowledge of the facts set forth herein, and if called to testify, would and could testify competently thereto.

[EITHER, if seeking preference based on CCP § 36(a) ]

2. As shown by the certified copy of the birth certificate attached as Exhibit A and made a part hereof, \_\_\_\_\_ [identify party, e.g., plaintiff \_\_\_\_\_ (name)] was born on \_\_\_\_\_ [date] and is \_\_\_\_\_ [70 or more] years of age.

3. \_\_\_\_\_ [Identify party, e.g., Plaintiff \_\_\_\_\_ (name)] has a substantial interest in the case in that \_\_\_\_\_ [specify].

4. In addition to advanced age, [I am informed and believe and thereon allege that] \_\_\_\_\_ [identify party, e.g., plaintiff \_\_\_\_\_ (name)] suffers \_\_\_\_\_ [describe state of health that requires preference to prevent prejudicing party's interest in the litigation].

[OR, if seeking preference based on CCP § 36(b) ]

2. As shown by the complaint herein, this is an action to recover damages for \_\_\_\_\_ [wrongful death or personal injury], and, in addition, as shown by the certified copy of the birth certificate attached as Exhibit A and made a part hereof, \_\_\_\_\_ [identify party, e.g., plaintiff] was born on \_\_\_\_\_ [date] and is \_\_\_\_\_ [specify number under 14] years of age.

3. \_\_\_\_\_ [Identify party, e.g., Plaintiff \_\_\_\_\_ (name)] has a substantial interest in the case in that \_\_\_\_\_ [specify].

[OR, if seeking preference based on CCP § 37 ]

2. As shown by the complaint herein, this is an action in which plaintiff is seeking to recover damages sustained on \_\_\_\_\_ [date] as a result of \_\_\_\_\_ [specify, e.g., being shot by defendant while he/she was in the course of committing an armed robbery].

3. As shown by the Clerk's Certificate attached hereto as Exhibit A and made a part hereof, defendant was convicted of the felony of \_\_\_\_\_ [specify] on \_\_\_\_\_ [date], in the Superior Court of the State of



California, County of \_\_\_\_\_, in the case of People vs. \_\_\_\_\_[*name*], number \_\_\_\_\_ . The court is hereby requested to take judicial notice of this criminal conviction.

[OR, if seeking precedence under CCP § 1062.3(b) for action that seeks both declaratory and other relief]

2. As shown by the complaint herein, this is an action for declaratory relief in which plaintiff(s) also seeks/seek \_\_\_\_\_[*specify additional relief sought*]. A speedy trial of this action is required for the following reason(s): \_\_\_\_\_[*set forth probative facts within declarant's personal knowledge*].

[OR, in other cases]

2. \_\_\_\_\_[*Set forth facts establishing ground for granting motion*].

[CONTINUE]

3. I hereby request \_\_\_\_\_[*state the relief requested from the court, e.g., that the trial date be advanced or a preference to be granted for this action*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

#### SUPPORTING MEMORANDUM

[Add memorandum supporting motion]

NOTES.

**Authority:**

CCP §§ 36, 37

**Related Form of Order:**

See 23.67

**Related Form of Memoranda:**

See *California Points and Authorities, Ch. 180, Pretrial Proceedings, § 180.50* (Matthew Bender)



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Chapter 23 Case Management

IX. FORMS

D. Motions for Precedence or Preference and Motions to Continue, Advance, Reset, or Specially Set

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.67*

**23.67 Order Establishing Precedence or Preference of Case for Case Management Conference or Trial.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |           |
|----------------------------------|---|-----------|
| _____ [name, e.g., John Smith]   | ) |           |
| Plaintiff vs. _____ [name, e.g., | ) | NO. _____ |
| Mary Jones]                      | ) | ORDER     |
| Defendant                        | ) |           |
|                                  | ) |           |

\_\_\_\_\_

The motion of \_\_\_\_\_ [identify party, e.g., plaintiff] for an order \_\_\_\_\_ [establishing that this case is entitled to precedence *or* granting this case a preference] and setting it for \_\_\_\_\_ [a case management conference *or* trial] came on regularly for hearing by the court on \_\_\_\_\_ [date].  
Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

[*EITHER, without findings*]

On proof made to the satisfaction of the court that the motion ought to be granted,

[*OR, with findings (see Code Civ. Proc. § 36(a))*]

The Court, having considered the \_\_\_\_\_ [affidavit(s) *or* declaration(s)] and other documents in support

of and in opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, finds as follows:

[SET OUT specific findings in as many paragraphs as appropriate, e.g.:]

1. \_\_\_\_\_ (Identify party, e.g., Plaintiff) has a substantial interest in this action as a whole; and
2. \_\_\_\_\_'s (Identify party, e.g., Plaintiff's) health is such that a preference is necessary to prevent prejudicing his/her interest in this litigation.

Therefore,

[CONTINUE]

IT IS ORDERED that the motion be and is granted and that this case is \_\_\_\_\_ [entitled to precedence or granted a preference] in setting.

IT IS FURTHER ORDERED that the case be and is set for \_\_\_\_\_ [a case management conference or trial] on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], California.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

CCP §§ 36, 37

**Related Form of Motion:**

See 23.66



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Chapter 23 Case Management

IX. FORMS

D. Motions for Precedence or Preference and Motions to Continue, Advance, Reset, or Specially Set

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.68*

**23.68 Notice of Motion and Supporting Declaration to Advance, Reset, or Specially Set Case for Trial Setting Conference or Trial.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |                                       |
|----------------------------------|---|---------------------------------------|
|                                  | ) |                                       |
|                                  | ) | NO. _____                             |
|                                  | ) | NOTICE OF MOTION AND MOTION FOR OR-   |
| _____ [name, e.g., John Smith]   | ) | DER [ADVANCING or RESETTING or SPE-   |
| Plaintiff vs. _____ [name, e.g., | ) | CIALLY SETTING] CASE FOR AND SETTING  |
| Mary Jones]                      | ) | CASE FOR [TRIAL SETTING CONFERENCE OR |
| Defendant                        | ) | TRIAL], SUPPORTING DECLARATION OF     |
|                                  | ) | [NAME], AND SUPPORTING MEMORANDUM     |
|                                  | ) | Date: _____                           |
|                                  | ) | Time: _____                           |
|                                  | ) | Locations: _____                      |
|                                  | ) | Judge: _____                          |
|                                  | ) | Date Action Filed: _____              |
|                                  | ) | Trial Date: _____                     |

To \_\_\_\_\_ [identify party, e.g., defendant] \_\_\_\_\_ [name] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date] at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of]

this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_  
 [specify party, e.g., plaintiff] will, and hereby does, move the court for an order \_\_\_\_\_ [advancing or  
 resetting or specially setting] this case for \_\_\_\_\_ [a trial setting conference or trial]  
 \_\_\_\_\_ [from \_\_\_\_\_ (date) at \_\_\_\_\_ (time) to  
 \_\_\_\_\_ (date) at \_\_\_\_\_ (time) or on \_\_\_\_\_ (date) at  
 \_\_\_\_\_ (time)]. The motion will be made on the ground that \_\_\_\_\_ [specify, e.g., this  
 case is entitled to precedence in setting pursuant to \_\_\_\_\_ (specify code section) or this case must be  
 brought to trial on or before \_\_\_\_\_ (date) to avoid mandatory dismissal under the provisions of Code  
 of Civil Procedure Sections 583.310 and 583.360].

The motion will be based on this notice of motion, on the [declaration(s) of \_\_\_\_\_ (name(s)) and]  
 supporting memorandum served and filed herewith, on the records and file herein, and on such further and additional  
 evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

SUPPORTING DECLARATION OF \_\_\_\_\_ [name]

I, \_\_\_\_\_ [name], declare:

1. I am the \_\_\_\_\_ [identify declarant, e.g., attorney of record for \_\_\_\_\_ (specify  
 moving party, e.g., plaintiff)] herein and make this declaration in support of \_\_\_\_\_ [specify party, e.g.,  
 plaintiff's] motion to \_\_\_\_\_ [advance or reset or specially set] this case for \_\_\_\_\_ [a  
 trial setting conference or trial]. I have personal knowledge of the facts set forth herein, and if called to testify, would  
 and could testify competently thereto.

2. This is an action for \_\_\_\_\_ [briefly describe the action in two or three sentences, including the  
 parties, the basic facts and the issues pertinent to the motion].

3. It is necessary that this case be \_\_\_\_\_ [advanced or reset or specially set] because  
 \_\_\_\_\_ [specify probative facts within declarant's personal knowledge].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

SUPPORTING MEMORANDUM

[Add memorandum supporting motion]

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1335*

**Related Form of Order:**

See 23.69

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 180, Pretrial Proceedings*, §§ 180.55-180.57 (Matthew Bender)



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IX. FORMS

D. Motions for Precedence or Preference and Motions to Continue, Advance, Reset, or Specially Set

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.69*

**23.69 Order to Advance, Reset, or Specially Set Case for Trial Setting Conference or Trial.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |           |
|----------------------------------|---|-----------|
| _____ [name, e.g., John Smith]   | ) |           |
| Plaintiff vs. _____ [name, e.g., | ) | NO. _____ |
| Mary Jones]                      | ) | ORDER     |
| Defendant                        | ) |           |
|                                  | ) |           |

\_\_\_\_\_

The motion of \_\_\_\_\_ [identify party, e.g., plaintiff] for an order \_\_\_\_\_ [advancing or resetting or specially setting] this case for \_\_\_\_\_ [a trial setting conference or trial] came on regularly for hearing by the court on \_\_\_\_\_ [date] in Department \_\_\_\_\_ of this Court. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be and is hereby granted and the \_\_\_\_\_ [trial setting conference or trial] is \_\_\_\_\_ [advanced or reset or set] \_\_\_\_\_ [from \_\_\_\_\_ (date) at \_\_\_\_\_ (time) to \_\_\_\_\_ (date) at \_\_\_\_\_ (time) or on \_\_\_\_\_ (date) at \_\_\_\_\_ (time)].

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1335*

**Related Form of Motion:**

See 23.68





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Chapter 23 Case Management

IX. FORMS

E. Jury Trial Demands

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.70*

**23.70 Demand for Jury Trial (If No Local Form Exists).**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |                       |
|----------------------------------|---|-----------------------|
| _____ [name, e.g., John Smith]   | ) |                       |
| Plaintiff vs. _____ [name, e.g., | ) | NO. _____             |
| Mary Jones]                      | ) | DEMAND FOR JURY TRIAL |
| Defendant                        | ) |                       |
|                                  | ) |                       |

\_\_\_\_\_

To the clerk of the above-entitled court, to each plaintiff/defendant, and to \_\_\_\_\_ [name],  
his/her/its/their attorney(s) of record:

NOTICE IS HEREBY GIVEN that \_\_\_\_\_ [plaintiff or defendant] demands a jury trial in the  
above-captioned action [and herewith deposits the sum of \$ \_\_\_\_\_ as advance jury fees].

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[*party's status and name*]

NOTES.

**Authority:**

*Cal Const, art I, § 16; CCP § 592*



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Chapter 23 Case Management  
IX. FORMS  
E. Jury Trial Demands

*2-23 MB Practice Guide: CA Pretrial Civil Procedure 23.71*

**23.71 Waiver of Jury Trial (If No Local Form Exists).**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                  |   |                      |
|----------------------------------|---|----------------------|
| _____ [name, e.g., John Smith]   | ) |                      |
| Plaintiff vs. _____ [name, e.g., | ) | NO. _____            |
| Mary Jones]                      | ) | WAIVER OF JURY TRIAL |
| Defendant                        | ) |                      |
|                                  | ) |                      |

\_\_\_\_\_

To the clerk of the above-entitled court, to each plaintiff/defendant and to \_\_\_\_\_ [name]  
his/her/its/their attorney(s) of record:

NOTICE IS HEREBY GIVEN that plaintiff/ defendant waives trial by jury in the above-captioned action.

[This waiver supersedes plaintiff's/defendant's demand for jury trial in the above-captioned action made and filed on  
\_\_\_\_\_ (date).]

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

*[party's status and name]*

NOTES.

**Authority:**

*CCP § 631(d)*



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Chapter 24 Pretrial ADR

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.syn*

**§ 24.syn Synopsis to Chapter 24: Pretrial ADR**

24.01 Scope.

24.02 Objective and Strategy.

24.02[1] Basic Objective Is to Ease Court's Case Load by Providing Prompt, Equitable Resolution of Civil Cases.

24.02[2] Judicial Arbitration Is Distinct From Contractual Arbitration.

24.02[3] Parties May Stipulate to Binding Judicial Arbitration.

24.02[4] Judicial Arbitration and Court Mediation Program Are Mutually Exclusive Alternatives.

24.03 CHECKLIST: Determining When Actions Are Subject to Judicial Arbitration.

24.03[1] Plaintiff's Checklist.

24.03[2] Defendant's Checklist.

24.04 Mandatory Judicial Arbitration.

24.04[1] Unlimited Civil Cases.

24.04[1][a] Judicial Arbitration Is Required When Amount in Controversy Does Not Exceed \$50,000.

24.04[1][b] Judge Determines Amount in Controversy.

24.04[1][c] Suitability of Case for Judicial Arbitration Is Determined at Case Management Conference or on the Written Submissions of the Parties.

24.04[1][d] Judge's Determination of Amount in Controversy Does Not Prevent Arbitrator From Awarding More

Than \$50,000.

24.04[2] Limited Civil Cases.

24.04[2][a] Local Rules May Provide for Submission to Judicial Arbitration.

24.04[2][b] Certain Motor Vehicle Accident Cases Must Be Submitted to Judicial Arbitration.

24.05 Voluntary Judicial Arbitration.

24.05[1] Parties May Stipulate to Judicial Arbitration of Civil Case Involving Any Amount.

24.05[2] On Plaintiff's Election.

24.05[2][a] Plaintiff May File Election for Judicial Arbitration.

24.05[2][b] Defendant May Move to Delay Arbitration Hearing for Good Cause.

24.05[2][c] Cross-Complainant May Move for Determination of Amount in Controversy and Removal of Case From Arbitration Hearing List.

24.06 Certain Actions Are Exempt From Judicial Arbitration.

24.07 CHECKLIST: Obtaining Assignment of Arbitrator.

24.08 Method of Assignment.

24.08[1] Parties May Designate Arbitrator by Stipulation.

24.08[2] Assigning Arbitrator From Panel.

24.08[2][a] Each Court Must Have Panel of Available Arbitrators.

24.08[2][b] Selection Procedure Is Governed by Strict Time Limits.

24.08[2][c] Selection Procedure in Multi-Party Case Requires Determining Number of Adverse Sides.

24.08[2][d] Case Must Be Assigned to Appointed Arbitrator.

24.08[2][e] Local Procedures May Replace Regular Assignment Procedures.

24.09 Appointing New Arbitrator.

24.09[1] Required When Arbitrator Declines to Serve or Fails to Hold Timely Hearing.

24.09[2] Administrator May Certify Case to Court Upon Return From First Assignment; Must Certify Case Upon Second Return.

24.10 Disqualifying Arbitrator.

24.10[1] Arbitrator May Be Disqualified for Cause.

24.10[1][a] Grounds for Disqualification Are Set Forth in Statute.

24.10[1][b] Arbitrator Must Disqualify Himself If Any Ground for Disqualification Exists.

24.10[1][c] If Arbitrator Does Not Disqualify Himself, Party May Move to Vacate Appointment.

24.10[2] Party May Peremptorily Challenge Arbitrator.

24.10[3] Arbitrator Must Make Certain Disclosures.

24.11 CHECKLIST: Preparing for Arbitration Hearing.

24.12 Hearing Must Occur Within Specific Timeframe.

24.13 Arbitrator Provides Notice of Arbitration Hearing.

24.14 Obtaining Continuance of Hearing.

24.14[1] Parties May Stipulate to Continuance With Arbitrator's Consent.

24.14[2] Absent Arbitrator's Consent, Continuance May Be Granted by Court.

24.15 Limitations on Discovery.

24.15[1] Discovery Is Allowed Up to 15 Days Before Hearing.

24.15[2] No Discovery of Defendant's Financial Condition When Punitive Damages Are Sought Unless Court So Orders.

24.16 Prohibited Communications With Arbitrator.

24.16[1] Ex Parte Communications Are Not Allowed.

24.16[2] Disclosure of Settlement Offers Is Not Allowed.

24.17 Plaintiff Must Provide Notice If Case Is Settled Before Hearing.

24.18 Party May Waive Right to Be Represented by Counsel at Hearing.

24.19 Hearing May Proceed in Party's Absence.

24.20 Presenting Evidence at Hearing.

24.20[1] General Rules of Evidence Apply.

24.20[2] Documentary Evidence.

24.20[2][a] Documentary Evidence Is Admissible.

24.20[2][b] To Be Admitted, Copies Must Be Delivered to Opposing Party.

24.20[2][c] Author or Custodian of Document May Be Subpoenaed.

24.20[3] Witness Statements.

24.20[3][a] Witness Statements Are Admissible If Certain Requirements Are Met.

24.20[3][b] Arbitrator Must Disregard Inadmissible Matter.

24.20[4] Depositions.

24.20[4][a] Witnesses' Depositions Are Admissible If Certain Requirements Are Met.

24.20[4][b] Proponent Must Notify Opposing Parties of Intention to Offer Deposition.

24.20[4][c] Opposing Party May Subpoena Deponent.

24.20[5] Compelling Attendance of Witnesses.

24.20[5][a] Witnesses May Be Subpoenaed to Appear at Hearing.

24.20[5][b] If Subpoenaed Witness Fails to Appear, Arbitrator May Adjourn or Continue Hearing.

24.21 Arbitrator's Powers at Hearing

24.21[1] Arbitrator Given Specific Powers to Conduct Hearing.

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24.39 Dismissing or Withdrawing Request.

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24.40 Setting Case for Trial de Novo.

24.40[1] Trial Must Be Set for Earliest Possible Date.

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24.42 Judgment After Trial.

24.42[1] Judgment Must Be Based on Judge's Own Findings.

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24.42[2][a] Party Who Fails to Obtain More Favorable Judgment Must Pay Costs.

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24.43 CHECKLIST: Mediating Under Civil Action Mediation Act.

24.44 Civil Action Mediation Act Applies in Los Angeles, but Any Other County May Elect to Apply the Program.

24.45 Court Must Have Case Management Conference to Determine Suitability for ADR.

24.46 Parties Must Meet and Confer at Least 30 Days Prior to Conference.

24.47 Mediation Is Option in Any Civil Case Which May Be Referred to Arbitration.

24.48 Court May Not Order Case Exceeding \$50,000 Into Mediation.

24.49 Actions Which Seek Equitable Relief May Be Mediated.

24.50 Public Entities May Utilize Mediation.

24.51 Determination on Whether to Send Case to Mediation Is Done After Considering Views of Parties on a Case-by-Case Basis.

24.52 Stipulation to Mediate.

24.52[1] Any Action May Be Referred to Mediation Upon Stipulation by Parties.

24.52[2] Stipulation Must Be Filed No Later Than 90 Days Before Trial.

24.53 Mediator Must Be Selected Within 30 Days of Submission to Mediation.

24.54 Court-Appointed Mediators Are Paid \$150 per Case or per Day.

24.55 Administrative Costs Are Paid As for Arbitration.

24.56 Mediation Hearing.

24.56[1] Attendance by Parties and Counsel of Record, and Participant Lists.

24.56[1][a] Parties and Counsel of Record Are Required to Attend Mediation Sessions, Unless Excused.

24.56[1][b] Attendance by Parties, Counsel, and Representatives Must Be In Person, Unless Mediator Permits Attendance by Telephone.

24.56[1][c] Each Party Must Serve List of Participants At Least Court Five Days Before First Mediation Session, and Whenever Supplements Is Needed Thereafter.

24.56[2] Attorney May Not Be Excluded From Mediation.

24.56[3] Statements Made in Mediation Are Generally Excluded From Evidence.

24.56[4] Writings in Mediation.

24.56[4][a] Mediator May Request Statement of Mediation Issues.

24.56[4][b] Writings Prepared for Mediation Are Inadmissible.

24.56[5] Disclosure of Mediation Evidence Permitted in Limited Circumstances.

24.57 Unlike with Arbitration, Discovery Is Not Cut Off.

24.58 Mediation Must Be Completed Within 60 Days, Extendable for Another 30 Days for Good Cause.

24.59 Mediator Must File Statement Advising Court of Agreement or Nonagreement.

24.60 When Statement of Nonagreement Is Filed, Matter Is Placed on Active Trial Calendar.

24.61 Submission to Mediation Does Not Suspend Running of Time Period for Dismissal for Delay in Prosecution.

24.62 Mediation Does Not Affect Time Periods Under Trial Delay Reduction Act.

24.63 Costs of Mediation May Be Awarded by Court.

24.64 Stipulation for Judicial Arbitration or Mediation.

24.65 Notice of Motion and Motion for Order to Determine Amount in Controversy on Cross-Complaint and Remove Case From Arbitration Hearing List With Supporting Declaration.

24.66 Order on Motion to Determine Amount in Controversy on Cross-Complaint and Remove Case From Arbitration Hearing List.

24.67 Rejection of Arbitrator.

24.68 Request for Disqualification of Arbitrator.

24.69 Notice of Intent to Offer Records, Statements, and Depositions in Evidence.

24.70 Demand That Witness Be Produced in Person to Testify at Hearing.

24.71 Notice of Motion and Motion for Order to Vacate Judgment With Supporting Declaration.

24.72 Order on Motion to Vacate Judgment.

24.73 Judicial Council Form ADR-102 Request for Trial de Novo After Judicial Arbitration.

24.74 Notice of Motion and Motion for Order Finding Imposition of Costs and Fees to Create Substantial Economic Hardship.

24.75 Order Finding Imposition of Costs and Fees to Create Substantial Economic Hardship.

24.76 Judicial Council Form ADR-100 Statement of Agreement or Nonagreement.



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Chapter 24 Pretrial ADR  
I. STRATEGY

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.01*

**24.01 Scope.**

This chapter covers:

- Objectives and strategy for judicial arbitration [see 24.02].
- Submission of cases to mandatory judicial arbitration [see 24.03-24.04, 24.06].
- Voluntary judicial arbitration on the plaintiff's election or the parties' stipulation [see 24.03, 24.05-24.06; Form: see 24.64-24.66].
- Selecting and objecting to the arbitrator [see 24.07-24.10; Forms: see 24.67, 24.68].
- Preparing for and participating in the arbitration hearing [see 24.11-24.23; Forms: see 24.69, 24.70].
- Entry of judgment on the arbitration award [see 24.25-24.32; Forms: see 24.71, 24.72].
- Requesting a trial de novo [see 24.33-24.42; Forms: see 24.73-24.75].
- Mediating claims under the Civil Action Mediation Act [see 24.43-24.63; Form: see 24.76].

**Core Statutes:**

Judicial Arbitration: *CCP* §§ 1141.10-1141.31;

Judicial Mediation: *CCP* §§ 1775-1775.15

**Core Rules:**

Judicial Arbitration: *Cal Rules Ct*, Rules 3.810-3.829;

Judicial Mediation: *Cal Rules Ct*, Rules 3.870-3.877.



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Chapter 24 Pretrial ADR  
I. STRATEGY

2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.02

## 24.02 Objective and Strategy.

**24.02[1] Basic Objective Is to Ease Court's Case Load by Providing Prompt, Equitable Resolution of Civil Cases.** Judicial arbitration is a mandatory step in pretrial procedure for many cases valued at \$50,000 or less. The objective is to use a court-appointed arbitrator in a simplified and economical procedure to obtain prompt and equitable resolution of civil cases, while lightening the court's caseload [see *CCP* §§ 1141.10, 1141.11(a); *Zatkin v. Cesare* (1988) 199 CA3d 756, 761, 245 CR 222 ]. Judicial arbitration is nonbinding, but to encourage acceptance, a party who elects trial de novo after arbitration is open to liability for costs and fees if he or she does not obtain a more favorable result after trial [*CCP* § 1141.20].

**24.02[2] Judicial Arbitration Is Distinct From Contractual Arbitration.** Judicial arbitration and contractual arbitration are completely different. Significant differences are:

- Contractual arbitration is binding, while a party dissatisfied with a judicial arbitration award may request a trial de novo [ *Heenan v. Sobati* (2002) 96 CA4th 995, 1000-1001, 117 CR2d 532 ].
- Contractual arbitration takes place outside of court, with judicial involvement limited to enforcement of the award [ *Heenan v. Sobati* (2002) 96 CA4th 995, 1001, 117 CR2d 532 ].
- *CCP* §§ 1280-1294.2, governing contractual arbitration, do not apply to judicial arbitration [*CCP* § 1141.30; *Heenan v. Sobati* (2002) 96 CA4th 995, 1000, 117 CR2d 532 ].

**24.02[3] Parties May Stipulate to Binding Judicial Arbitration.** The parties may stipulate to *binding* judicial arbitration, as an even more inexpensive and efficient method of resolving their dispute [see *Blanton v. Womancare, Inc.* (1985) 38 C3d 396, 402 ]. The judicial arbitration statutes and rules will apply, except that the parties will not have the right to request a trial de novo [see *Porreco v. Red Top RV Center* (1989) 216 CA3d 113, 119, 264 CR 609 ; see also *Pratt v. Gursey, Schneider & Co.* (2000) 80 CA4th 1105, 1110, 95 CR2d 695 (parties may waive right to appeal arbitrator's decision, making arbitration completely binding)].



### Warning:

The client must consent to the agreement [ *Blanton v. Womancare, Inc.* (1985) 38 C3d 396, 402-408 ]. Thus, the attorney should obtain the client's signature on the stipulation and confirm that the opposing party, not just opposing counsel, has also signed the stipulation [ *Sanker v. Brown* (1985) 167 CA3d 1144, 1146-1147, 213 CR 768 (adding party's signature line to stipulation is "an obvious preventive measure")].

A binding judicial arbitration is merely a bench trial in which the parties waive their right to a court reporter and to appeal, and the judge acts as a judicial officer [ *Heenan v. Sobati* (2002) 96 CA4th 995, 1003, 117 CR2d 532 ]. Any post-trial proceedings, including the entry of judgment and the determination of any award of costs and attorney's fees, must be conducted by the judge who conducted the arbitration, and may not be assigned to another judge for confirmation of the arbitration award [ *Heenan v. Sobati* (2002) 96 CA4th 995, 1004-1006, 117 CR2d 532 ].



#### **Warning:**

If the parties attempt to stipulate to binding judicial arbitration subject to confirmation under the California Arbitration Act [CCP §§ 1280-1294.2], a sitting superior court judge cannot properly conduct the arbitration [ *Heenan v. Sobati* (2002) 96 CA4th 995, 997, 1000, 117 CR2d 532 ].



#### **Cross Reference:**

Form of stipulation, see 24.64.

#### **24.02[4] Judicial Arbitration and Court Mediation Program Are Mutually Exclusive Alternatives.**

"Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement [CCP § 1775.1(a)]. It is available as an alternative to judicially mandated arbitration in Los Angeles County as well as other counties that have adopted the mediation program established under CCP §§ 1775-1775.15. Cases referred to mediation cannot later be ordered into judicial arbitration, and cases previously referred to judicial arbitration cannot be ordered into mediation [CCP § 1775.4].

#### **Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 36, Judicial Arbitration; and Ch. 37, Judicially Mandated Civil Action Mediation (Matthew Bender).

California Points and Authorities, Ch. 131A, Judicial Arbitration (Matthew Bender).



#### **Cross Reference:**

For tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure  
Alternative Dispute Resolution  
Mandatory ADR  
Civil Procedure  
Alternative Dispute Resolution  
Mediations



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Chapter 24 Pretrial ADR

## II. DETERMINING WHEN ACTIONS ARE SUBJECT TO JUDICIAL ARBITRATION

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.03*

### 24.03 CHECKLIST: Determining When Actions Are Subject to Judicial Arbitration.

#### 24.03[1] Plaintiff's Checklist.

- ☐ Determine if action is subject to mandatory judicial arbitration:
- ☐ Is amount in controversy likely to be \$50,000 or less for each plaintiff?
  - ☐ If case is a limited civil case, is judicial arbitration required by local rule?
  - ☐ Is action exempt from arbitration?

#### **Authority:**

*CCP § 1141.11; Cal Rules Ct, Rule 3.811(a)(1)-(3)*

#### **Discussion:**

*See 24.04, 24.06*

- ☐ Consider submitting case to judicial arbitration to obtain inexpensive and expeditious determination of claim:
- ☐ If plaintiff agrees to limit any recovery to \$50,000:
    - ☐ Prepare, file, and serve plaintiff's election to arbitrate.
  - ☐ If plaintiff does not agree to limit any recovery to \$50,000:



- ☐ Attempt to secure defendant's stipulation to submit case to arbitration.

**Authority:**

*CCP § 1141.11(a), (b); Cal Rules Ct, Rules 3.811(a)(4), (5), 3.812(a)*

**Discussion:**

See 24.05[1], [2][a]

**Form:**

See 24.64 (stipulation)

- ☐ Prepare for case management conference at which court will determine if action is subject to mandatory judicial arbitration:

- ☐ To postpone conference:

- ☐ File and serve motion for postponement.

- ☐ If arbitration not desired, be prepared to make offer of proof of damages exceeding \$50,000 at conference.

- ☐ If all plaintiffs agree to submit case to arbitration:

- ☐ Consider filing election to arbitrate before conference.

- ☐ If election is not filed:

- ☐ At least 30 days before conference, meet and confer with defendant to consider, among other things, whether defendant will stipulate to judicial arbitration or some other form of alternative dispute resolution.

- ☐ If defendant will not stipulate to judicial arbitration, reconsider election waiving damages in excess of \$50,000.

- ☐ File and serve mandatory case management statement at least 15 days prior to case management conference.

**Authority:**

*CCP §§ 1141.11(a), (b), 1141.16; Cal Rules Ct, Rules 3.724, 3.725, 3.727(6), 3.811(a)(1)-(3)*

**Discussion:**

See 24.04[1][b], [c]

**24.03[2] Defendant's Checklist.**

☐ Determine if action is subject to mandatory judicial arbitration:

- ☐ Is amount in controversy likely to be \$50,000 or less for each plaintiff?
- ☐ If case is a limited civil case, is judicial arbitration of case required by local rule?
- ☐ Is action exempt from arbitration?

**Authority:**

*CCP § 1141.11; Cal Rules Ct, Rule 3.811(a)(1)-(3)*

**Discussion:**

See 24.04, 24.06

☐ Prepare for case management conference at which court will determine if action is subject to mandatory judicial arbitration:

- ☐ To postpone conference:
  - ☐ File and serve motion for postponement.
- ☐ If plaintiff has filed election to arbitrate before conference, to postpone arbitration hearing, e.g., to allow time to complete discovery, file and serve motion to delay hearing:
  - ☐ Follow standard noticed motion procedure.
- ☐ If plaintiff has not filed election and arbitration is desired:
  - ☐ At least 30 days before conference, meet and confer with plaintiff to consider, among other things, whether plaintiff will stipulate to judicial arbitration or some other form of alternative dispute resolution.
- ☐ If plaintiff will not stipulate to judicial arbitration and arbitration is desired:
  - ☐ Prepare to show at conference damages are less than \$50,000.
- ☐ File and serve mandatory case management statement at least 15 days prior to case management conference.

**Authority:**

*CCP §§ 1141.11(a), (b), 1141.12(a), (b)(i), 1141.16(c); Cal Rules Ct, Rules 3.724, 3.725, 3.727(6), 3.811(a)(4), 3.812(a), (b), (d)*

**Discussion:**

See 24.04[1][b], [c], 24.05[1], [2][b]

**Form:**

See 24.64 (stipulation)

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

- ☐ If defendant has filed cross-complaint:
- ☐ And plaintiff has filed election to arbitrate,
  - ☐ And amount in controversy on cross-complaint is more than \$50,000,
  - ☐ File and serve motion to remove case from judicial arbitration.
- ☐ Follow standard noticed motion procedure.

**Authority:**

*Cal Rules Ct, Rules 3.811(b)(8), 3.812(c)*

**Discussion:**

See 24.05[2][c]

**Forms:**

See 24.65 and 24.66 (motion and order to remove case from hearing list)

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39



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Chapter 24 Pretrial ADR

## II. DETERMINING WHEN ACTIONS ARE SUBJECT TO JUDICIAL ARBITRATION

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.04*

### **24.04 Mandatory Judicial Arbitration.**

#### **24.04[1] Unlimited Civil Cases.**

**24.04[1][a] Judicial Arbitration Is Required When Amount in Controversy Does Not Exceed \$50,000.** In a superior court with 18 or more judges, all nonexempt unlimited civil cases in which the amount in controversy does not exceed \$50,000 for each plaintiff must be assigned to judicial arbitration [*CCP § 1141.11(a)*; *Cal Rules Ct, Rule 3.811(a)(1)*]. Superior courts with fewer than 18 judges may provide for mandatory judicial arbitration in these cases by local rule [*CCP § 1141.11(b)*; *Cal Rules Ct, Rule 3.811(a)(2)*].

#### **Exceptions:**

Certain types of actions are exempt from judicial arbitration [*see 24.06*].

**24.04[1][b] Judge Determines Amount in Controversy.** A judge determines whether the amount in controversy is \$50,000 or less for each plaintiff. The determination of the amount in controversy must be made at a case management conference or based upon review of the written submissions of the parties [*CCP § 1141.16(a)*]. This determination, and whether any prayer for equitable relief is frivolous or insubstantial is not appealable [*CCP § 1141.16(a)*].

In determining the amount in controversy, the judge:

- Must base the determination on the total amount of damages, without considering questions of liability or comparative negligence or other defenses [*CCP § 1141.16(a)*].
- Is not required to accept the plaintiff's demand for damages as the measure of the amount in controversy [ *Sharples v. Chole (1994) 29 CA4th 1213, 1218, 35 CR2d 208* ].
- Has the discretion to make a practical assessment of the maximum damages recoverable at trial, presuming liability and disregarding defenses.

Before assigning a case to judicial arbitration, a judge must have some factual basis for determining that the damages

the plaintiff claims are significantly inflated and can be discounted below the \$50,000 level. If the parties dispute the amount in controversy, they are entitled to the opportunity to make an offer of proof of damages [see *Sharples v. Chole* (1994) 29 CA4th 1213, 1220, 35 CR2d 208 ].

**24.04[1][c] Suitability of Case for Judicial Arbitration Is Determined at Case Management Conference or on the Written Submissions of the Parties.** The determination whether a case is suitable for arbitration must be made at the initial case management conference or after all of the parties have appeared or defaulted [CCP § 1141.16(a); *Cal Rules Ct, Rules 3.727(6), 3.811(d)*].

At least 30 days before the conference, the parties must meet and confer, in person or by phone, to consider, among other things, whether the parties wish to stipulate to, or the case should be referred to, judicial arbitration [*Cal Rules Ct, Rule 3.724*]. If the parties agree to judicial arbitration, they must jointly complete an ADR stipulation and file it with the court [*Cal Rules Ct, Rules 3.221, 3.726*].

The court's case management order must include any order referring the case to judicial arbitration and the date for completion of the arbitration process [*Cal Rules Ct, Rule 3.728(1), (2)*].

#### **Cross References:**

Discussion of election to arbitrate, see 24.05[2]. Form of stipulation, see 24.64.

Forms to postpone conference or arbitration hearing, see *California Forms of Pleading and Practice, Ch. 36, Judicial Arbitration*, §§ 36.72, 36.73 (Matthew Bender).

**24.04[1][d] Judge's Determination of Amount in Controversy Does Not Prevent Arbitrator From Awarding More Than \$50,000.** A judge's determination that the amount in controversy does not exceed \$50,000 does not preclude the arbitrator from awarding more than \$50,000 [CCP § 1141.16(b)]. This determination is not admissible in any trial de novo following arbitration [CCP § 1141.16(b)].

#### **Cross References:**

Discussion of amount of arbitrator's award, see 24.27. Discussion of what is inadmissible at trial de novo, see 24.41.

### **24.04[2] Limited Civil Cases.**

**24.04[2][a] Local Rules May Provide for Submission to Judicial Arbitration.** Courts may provide by local rule that all nonexempt limited civil cases must be submitted to mandatory judicial arbitration [CCP § 1141.11(c); *Cal Rules Ct, Rule 3.810(e)*; see CCP § 85 et seq. (defining "limited civil case")].

#### **Exceptions:**

Local rules requiring mandatory judicial arbitration in limited civil cases may not be applied to small claims court actions, unlawful detainer actions, and actions under the Consumers Legal Remedies Act (CC §§ 1750-1784) [CCP § 1141.11(c)]. Other types of actions are also exempt from judicial arbitration [see 24.06].

**24.04[2][b] Certain Motor Vehicle Accident Cases Must Be Submitted to Judicial Arbitration.** In those courts that have adopted judicial arbitration for limited civil cases, all such cases that involve a claim for money damages against a single defendant resulting from a motor vehicle collision, except those heard in the small claims division, must be submitted to judicial arbitration [CCP § 1141.11(d)(1)].

The term "single defendant" means [CCP § 1141.11(d)(3)]:

- An individual or an entity,
- Two or more persons covered by the same insurance policy, or
- Two or more persons residing in the same household who are uninsured.

**Exception:**

Mandatory arbitration does not apply if the defendant cross-complains against a third party [*CCP* § 1141.11(d)(4)].

**Timing:**

Motor vehicle accident cases against a single defendant must be submitted to arbitration within 120 days after the defendant files an answer to the complaint. The court may extend this time period for good cause [*CCP* § 1141.11(d)(1)].

A court may provide by local rule for the voluntary or mandatory use of case questionnaires in single-defendant, motor vehicle cases. In this event, the parties must exchange the questionnaires when the defendant answers, and must complete and return them within 60 days [*CCP* §§ 93, 1141.11(d)(2)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMandatory ADR



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Chapter 24 Pretrial ADR

## II. DETERMINING WHEN ACTIONS ARE SUBJECT TO JUDICIAL ARBITRATION

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.05*

### 24.05 Voluntary Judicial Arbitration.

**24.05[1] Parties May Stipulate to Judicial Arbitration of Civil Case Involving Any Amount.** Any civil case may be submitted to judicial arbitration on the parties' stipulation, regardless of the amount in controversy [CCP § 1141.12(a); *Cal Rules Ct, Rule 3.811(a)(4)*]; although the court may only order a case to judicial arbitration in which the amount in controversy is \$50,000 or less [CCP § 1141.11(a); *Cal Rules Ct, Rule 3.811(a)*].

The parties may also stipulate to binding arbitration [see *Blanton v. Womancare, Inc. (1985) 38 C3d 396, 402*] and to the person who will act as the arbitrator [CCP § 1141.18(a); *Cal Rules Ct, Rule 3.812*]. The parties to a stipulated arbitration must pay the arbitrator's fee, unlike court-ordered arbitration in which the court pays the fee [CCP § 1141.28]. The limits on post-arbitration discovery that apply to court-ordered arbitration do not apply to arbitration on the parties' stipulation [CCP § 1141.24].



#### Timing:

The stipulation must be filed no later than the time the initial case management statement is filed, unless a judge orders otherwise, and the case must be set for arbitration forthwith [*Cal Rules Ct, Rule 3.812(a)*].



#### Cross References:

Form of stipulation, see 24.64; discussion of binding arbitration, see 24.02[3]; stipulating to arbitrator, see 24.08[1]; payment of arbitrator's fee, see 24.23[3]; post-arbitration discovery, see 24.32.

### 24.05[2] On Plaintiff's Election.

**24.05[2][a] Plaintiff May File Election for Judicial Arbitration.** Any civil case may be submitted to judicial arbitration if the plaintiff files an election to arbitrate and agrees that the arbitration award may not exceed \$50,000 [see CCP § 1141.12(b); *Cal Rules Ct, Rule 3.812(b)*].



#### Timing:

The plaintiff must file the request no later than the time the initial case management statement is filed,

unless a judge orders otherwise [*Cal Rules Ct, Rule 3.812(b)*].



**Warning:**

One appellate court has held that a plaintiff who receives the maximum allowable arbitration award of \$50,000 is not entitled to request a trial de novo even if the plaintiff concludes that the case is worth more than \$50,000 [*see Robinson v. Superior Court (1984) 158 CA3d 98, 102-108, 204 CR 366*]. Therefore, counsel for the plaintiff should evaluate the case fully before making the decision to limit the amount of the plaintiff's recovery to \$50,000. After filing the election to arbitrate, if counsel realizes that the plaintiff's damages may exceed \$50,000, a motion to withdraw from arbitration should immediately be filed [ *Robinson v. Superior Court (1984) 158 CA3d 98, 106 n12, 108, 204 CR 366* ; *see Invicta Plastics, U.S.A., Ltd. v. Superior Court (1981) 120 CA3d 190, 192, n195, 174 CR 476* (withdrawal from arbitration on amendment of complaint to increase amount of damages)].



**Cross Reference:**

Form of election, see *California Forms of Pleading and Practice, Ch. 36, Judicial Arbitration, § 36.71* (Matthew Bender).

**24.05[2][b] Defendant May Move to Delay Arbitration Hearing for Good Cause.** On the plaintiff's timely filing of an election to arbitrate, the court must set the case for arbitration forthwith, unless the defendant files a motion to delay the arbitration hearing for good cause [*CCP § 1141.16(c)*; *Cal Rules Ct, Rule 3.812(b)*].



**Cross Reference:**

Form of motion and order to delay arbitration hearing, see *California Forms of Pleading and Practice, Ch. 36, Judicial Arbitration, § 36.73* (Matthew Bender).

**24.05[2][c] Cross-Complainant May Move for Determination of Amount in Controversy and Removal of Case From Arbitration Hearing List.** A cross-complainant may file a motion within 15 days after notice of the plaintiff's election to arbitrate requesting a judicial determination that the amount in controversy relating to the cross-complaint exceeds \$50,000; and, on a determination that the cross-complaint *does* exceed \$50,000, the case must be removed from the list of cases assigned to arbitration [*Cal Rules Ct, Rule 3.812(c)*; *see Cal Rules Ct, Rule 3.811(b)(8)*].



**Cross References:**

Forms of motion and order to determine amount in controversy on cross-complaint and remove case from arbitration list, see 24.65 and 24.66.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMandatory ADR





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Chapter 24 Pretrial ADR

## II. DETERMINING WHEN ACTIONS ARE SUBJECT TO JUDICIAL ARBITRATION

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.06*

### **24.06 Certain Actions Are Exempt From Judicial Arbitration.**

A number of actions are exempt from judicial arbitration. They are:

- Actions in which the court determines that the amount in controversy exceeds \$50,000 [*CCP* § 1141.11(a), (b); *Cal Rules Ct, Rule 3.811(a)(1), (2)*].
- Actions in which the parties stipulate that the amount in controversy exceeds \$50,000 [*CCP* § 1141.16(a)]. Although the court may not order such a case to judicial arbitration, the parties may stipulate to arbitrate the case [*CCP* § 1141.12(a), (b)].
- Actions that include a prayer for equitable relief that is not frivolous or insubstantial [*CCP* § 1141.13; *Cal Rules Ct, Rule 3.811(b)(1)*]. A judge must determine whether the prayer is frivolous or insubstantial at the initial case management conference, and this determination is not appealable [*CCP* § 1141.16(a)].
- Class actions [*Cal Rules Ct, Rule 3.811(b)(2)*].
- Small claims actions or trials de novo on appeal from the small claims court [*Cal Rules Ct, Rule 3.811(b)(3)*].
- Unlawful detainer proceedings [*Cal Rules Ct, Rule 3.811(b)(4)*].
- Family Law Act proceedings [*Cal Rules Ct, Rule 3.811(b)(5)*].
- Any action otherwise subject to arbitration that the court finds is not amenable to arbitration because arbitration would not reduce the probable time and expense necessary to resolve the litigation [*Cal Rules Ct, Rule 3.811(b)(6)*].
- Any category of actions otherwise subject to arbitration that is excluded by local rule as not amenable to arbitration because, under circumstances relating to the particular court, arbitration of these actions would not reduce the probable time and expense necessary to resolve the litigation [*Cal Rules Ct,*

*Rule 3.811(b)(7)*].

- Actions involving multiple causes of action or a cross-complaint if a judge determines that the amount in controversy as to any cause of action or cross-complaint exceeds \$50,000 [*Cal Rules Ct, Rule 3.811(b)(8)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMandatory ADR



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III. OBTAINING ASSIGNMENT OF ARBITRATOR

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.07*

**24.07 CHECKLIST: Obtaining Assignment of Arbitrator.**

- ☐ Obtain assignment of arbitrator by:
- ☐ Obtaining other party's stipulation to arbitrator and arbitrator's consent; or
  - ☐ Accepting assignment of arbitrator from court's panel of arbitrators.
  - ☐ To reject any individual, file and serve notice of rejection.

**Authority:**

*CCP § 1141.18(a); Cal Rules Ct, Rules 3.814, 3.815(a)*

**Discussion:**

*See 24.08*

**Forms:**

*See 24.64 (stipulation); 24.67 (rejection)*

- ☐ If arbitrator declines to serve, request ADR administrator to appoint new arbitrator.

**Authority:**

*Cal Rules Ct, Rule 3.815(d)*

**Discussion:**

*See 24.09*

- ☐ If grounds exist for disqualification of arbitrator for cause:

- ☐ Demand arbitrator's disqualification.
- ☐ File and serve motion for disqualification if arbitrator refuses to be disqualified.
- ☐ Follow standard noticed motion procedure.

**Authority:**

*CCP §§ 170.1, 1141.18(d); Cal Rules Ct, Rule 3.816(a)*

**Discussion:**

See 24.10[1]

**Form:**

See 24.68 (request for disqualification)

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

- ☐ Determine whether to exercise peremptory challenge against arbitrator.

**Authority:**

*CCP §§ 170.6, 1141.18(d)*

**Discussion:**

See 24.10[2]

**Form:**

See 24.68 (request for disqualification)



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*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.08*

**24.08 Method of Assignment.**

**24.08[1] Parties May Designate Arbitrator by Stipulation.** The parties may designate, by stipulation, any person to serve as the arbitrator, including a non-attorney [*CCP § 1141.18(a)*; *Cal Rules Ct, Rule 3.812*]. The stipulation may specify the maximum amount of the arbitrator's award [*Cal Rules Ct, Rule 3.815(a)*].

If the parties select a person who is not on the court's arbitration panel, the stipulation will be effective only if the selected person completes a written consent to serve and the oath required of panel arbitrators, and both the consent and the oath are attached to the stipulation [*Cal Rules Ct, Rule 3.815(a)*].

A stipulation may specify the maximum amount of the arbitrator's award [*Cal Rules Ct, Rule 3.815(a)*].



**Timing:**

The stipulation must be filed immediately and oral notice of it given no later than 10 days before the case has been set for arbitration [*Cal Rules Ct, Rule 3.1385(a)(1)*].



**Cross Reference:**

Form of stipulation, see 24.64.

**24.08[2] Assigning Arbitrator From Panel.**

**24.08[2][a] Each Court Must Have Panel of Available Arbitrators.** Each court is required to have a panel of arbitrators who are available to hear cases that have been assigned to judicial arbitration. These arbitrators must be active or inactive members of the State Bar, retired judges, or retired court commissioners [*see CCP § 1141.18(a)*; *Cal Rules Ct, Rule 3.814*].



**Finding and Investigating Arbitrators Using Online Resources:**

Many resources are available online for finding and investigating potential arbitrators. These resources can help in selecting your preferred arbitrator and in assessing the strengths and weaknesses of the opponent's suggested arbitrator. For example, helpful resources at *lexis.com* include:

- Legal tab > Reference > Biographies > Biographies.

☐ Sample Search: To find biographical information about an arbitrator, try this NAME segment search of the Biographies file: *name (last name /3 first name)*.

- Legal tab > Area of Law--By Topic > Alternative Dispute Resolution > Access Directories > Martindale-Hubbell(R) Dispute Resolution Directory.

☐ Sample Search: To find basic professional information about dispute resolution practitioners in a particular county, do COUNTY segment search of the Martindale-Hubbell Dispute Resolution Directory in this format: *name (last name /3 first name) and geo-scope (ca)*.

- Legal tab > States Legal--U.S. > California > Search News > General News > California News Publications.

☐ Sample Search: To find news articles about a California arbitrator, search the California News Publications file using this format: *first name /3 last name*.

- To find articles about or written by an arbitrator, search the law reviews and other periodical articles in Legal tab > Secondary Legal > Law Reviews, CLE, Legal Journals & Periodicals, Combined.

☐ Sample search: For legal articles written by a particular arbitrator, try a simple search: *first name /3 last name*.

**24.08[2][b] Selection Procedure Is Governed by Strict Time Limits.** Within 15 days after the case is set for arbitration, the ADR administrator determines the number of clearly adverse sides and selects a random number of names equal to the number of sides, plus one. Each party (or side) has 10 days to reject, in writing, an equal number of names, so that if each party (or side) rejects the maximum number of names permitted, a single name will remain and that arbitrator will be appointed to hear the case. If at the end of 10 days two or more names have not been rejected, the arbitration administrator must appoint one of these persons as the arbitrator [*Cal Rules Ct, Rule 3.815(b)*]. Cases submitted to arbitration by stipulation or election must be assigned an arbitrator within 30 days of the time of the submission [*CCP § 1141.16(c)*].



#### **Cross Reference:**

Form for rejection, see 24.67.

**24.08[2][c] Selection Procedure in Multi-Party Case Requires Determining Number of Adverse Sides.** In a multi-party case, the ADR administrator must determine the number of clearly adverse sides. The ADR administrator may assume there are two sides, unless there is a cross-complaint that brings in a new party. The presiding judge must decide any dispute as to the number or identity of sides in the same manner as a judge determines the number of sides entitled to peremptory challenges of prospective jurors [*Cal Rules Ct, Rule 3.815(b)(1)*]. The ADR administrator must select a number of names of potential arbitrators equal to the number of sides, plus one, and must mail a list of these names to counsel for the parties. Counsel have 10 days from the date of mailing to file a written rejection of one name on the list [*Cal Rules Ct, Rule 3.815(b)(2), (3)*]. If there are two or more parties on a side, they must join in the rejection [*Cal Rules Ct, Rule 3.815(b)(3)*]. On expiration of the 10 day period, the ADR administrator must appoint one of the

persons on the list whose name was not rejected [*Cal Rules Ct, Rule 3.815(b)(4)*].



**Cross Reference:**

Form for rejection, see 24.67.

**24.08[2][d] Case Must Be Assigned to Appointed Arbitrator.** The ADR administrator must assign the case to the appointed arbitrator, and give notice of the appointment to the arbitrator and all parties [*Cal Rules Ct, Rule 3.815(b)(5)*].

**24.08[2][e] Local Procedures May Replace Regular Assignment Procedures.** Instead of using the procedure set out in *Cal Rules Ct, Rule 3.815*, a court may adopt its own procedure for assigning a case to an arbitrator [*Cal Rules Ct, Rule 3.815(c)*].



**Strategic Point:**

It is not uncommon for the parties to select a mutually agreeable, more experienced arbitrator than one of the court appointed arbitrators. A more experienced and well-known arbitrator will almost always charge much higher fees, which must be paid by the parties, than a court appointed office.



**Cross Reference:**

Discussion of arbitrator compensation, 24.23.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADR



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**24.09 Appointing New Arbitrator.**

**24.09[1] Required When Arbitrator Declines to Serve or Fails to Hold Timely Hearing.** If the arbitrator declines to serve, the ADR administrator must either return the case to the top of the arbitration hearing list and appoint a new arbitrator or certify the case to court [*Cal Rules Ct, Rule 3.815(d)*].

**24.09[2] Administrator May Certify Case to Court Upon Return From First Assignment; Must Certify Case Upon Second Return.** If the second arbitrator selected declines to serve or if the arbitrator does not complete the hearing within 90 days after being assigned the case, including any time for continuances granted under *Cal Rules Ct, Rule 3.818*, the ADR administrator must certify the case to court [*Cal Rules Ct, Rule 3.815(e)*]. If the inability to hold a hearing was due to the neglect or lack of cooperation of a party who elected or stipulated to arbitration, the case may set the case for trial and make other appropriate orders. Other cases may be ordered reassigned for arbitration, or the court may make other appropriate orders to expedite resolution of the case [*Cal Rules Ct, Rule 3.815(f)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**24.10 Disqualifying Arbitrator.**

**24.10[1] Arbitrator May Be Disqualified for Cause.**

**24.10[1][a] Grounds for Disqualification Are Set Forth in Statute.** Any party may request the disqualification of the arbitrator for cause on the grounds and by the procedures specified in *CCP § 170.1* for disqualification of a judge for cause [*CCP § 1141.18(d)*].

The arbitrator is disqualified if any member of the arbitrator's law firm would be disqualified under *CCP § 170.1(a)(4)*, which applies when the member or the member's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person, is a party to the proceeding or an officer, director, or trustee of a party [*Cal Rules Ct, Rule 3.816(a)*].

**Distinguish:**

The arbitrator's failure to hold the arbitration hearing within 90 days from time of appointment under former *Cal Rules Ct, Rule 3.815(b)* [see now *Cal Rules Ct, Rule 3.815(e)* (90 days from appointment of second arbitrator)] is not a ground for disqualification of the arbitrator or a basis for vacating the judgment entered on the arbitration award. The parties' remedy is to request the ADR administrator to appoint a new arbitrator [ *Cabrera v. Plager* (1987) 195 CA3d 606, 612, 241 CR 731 ].

**➡ Cross Reference:**

Related discussion pertaining to judges, see Ch. 22, Disqualification of Judge.

**24.10[1][b] Arbitrator Must Disqualify Himself If Any Ground for Disqualification Exists.** An arbitrator must disqualify himself or herself on the demand of any party made before the conclusion of the arbitration proceedings on any of the grounds specified in *CCP § 170.1* [*CCP § 1141.18(d)*]. An arbitrator has a duty to determine whether any of these grounds for disqualification exists. The arbitrator must promptly notify the ADR administrator of any known ground for disqualification and another arbitrator must be appointed, unless the parties waive the disqualification in writing [*Cal Rules Ct, Rule 3.816(a)*].

An arbitrator's failure to disclose a potential cause for disqualification is grounds for vacating the arbitration award [

*Kaiser Foundation Hospitals v. Superior Court* (1993) 19 CA4th 513, 517, 23 CR2d 431 ].

**24.10[1][c] If Arbitrator Does Not Disqualify Himself, Party May Move to Vacate Appointment.** On motion of any party, made as promptly as possible before the conclusion of the arbitration proceedings, the court must vacate the arbitrator's appointment if the court finds that the moving party demanded the arbitrator's disqualification, the arbitrator failed to disqualify himself or herself, and any of the grounds for disqualification specified in *CCP* § 170.1 exists. If the appointment is vacated, the ADR administrator must return the case to the top of the arbitration hearing list and appoint a new arbitrator. The court may also order review of the circumstances of the disqualification by the administrative committee, or the presiding judge for appropriate action [*Cal Rules Ct, Rule 3.816(d)*].



**Cross References:**

Form for request for disqualification, 24.68.

Forms for noticed motion to vacate appointment, see *California Forms of Pleading and Practice, Ch. 36, Judicial Arbitration, § 36.77* (Matthew Bender).

**24.10[2] Party May Peremptorily Challenge Arbitrator.** A party may peremptorily challenge an arbitrator in the same manner as a party may peremptorily challenge a judge under *CCP* § 170.6 [*CCP* § 1141.18(d)].



**Timing:**

Any peremptory challenge must be made within five days after the arbitrator is named [*CCP* § 1141.18(d)].



**Warning:**

A party is only entitled to one peremptory challenge per case. A party who exercises this challenge against the arbitrator may not subsequently exercise a peremptory challenge against the judge assigned to hear the trial de novo [ *Kelley v. Bredelis* (1996) 45 CA4th 1819, 1827, 53 CR2d 536 ].



**Cross Reference:**

Related discussion pertaining to judges, see Ch. 22, Disqualification of Judge.

**24.10[3] Arbitrator Must Make Certain Disclosures.** In addition to any other disclosures required by law, an arbitrator must disclose to the parties:

- Any information the arbitrator believes the parties might consider relevant to the question of disqualification, even if the arbitrator believes there is no actual basis for disqualification [*see Cal Rules Ct, Rule 3.816(b)(1)*; Cal Rules Ct, Code Jud Ethics, Canon 6(D)(5)(a); *Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 CA4th 716, 723, 73 CR2d 85 (arbitrator must use objective standard in deciding whether person aware of facts might doubt his or her impartiality)].
- His or her membership in any organization that practices discrimination [*see Cal Rules Ct, Rule 3.816(b)(1)*; Cal Rules Ct, Code Jud Ethics, Canon 6(D)(5)(b)].
- Any significant personal or professional relationship he or she has or has had with a party, attorney, or law firm in the case, including the number and nature of any other proceedings in the past 24 months in which the arbitrator has been compensated privately by a party, attorney, law firm, or insurance company in the case for any services, including, but not limited to, service as an attorney, expert witness, or consultant, or as a judge, referee, arbitrator, mediator, settlement facilitator, or other alternative dispute resolution neutral [*see Cal Rules Ct, Rule 3.816(b)(2)*; *Ceriale v. AMCO Ins. Co.* (1996) 48

*CA4th 500, 505-506, 55 CR2d 685* (arbitrator must disclose fact that he or she has case assigned for arbitration before attorney involved in case arbitrator is to decide)].

**Timing:**

The arbitrator must make these disclosures no later than five days before the deadline for the parties to exercise a peremptory challenge against the arbitrator or, if the arbitrator is unaware of his or her appointment or of a matter subject to disclosure at that time, as soon as practicable thereafter [*Cal Rules Ct, Rule 3.816(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewCivil  
ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute  
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*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.11*

**24.11 CHECKLIST: Preparing for Arbitration Hearing.**

- ☐ If continuance of arbitration hearing is sought:
- ☐ Obtain other party's stipulation, and arbitrator's consent, to continuance; or
  - ☐ File and serve motion for continuance.
  - ☐ Follow standard noticed motion procedure.

**Authority:**

*Cal Rules Ct, Rule 3.818*

**Discussion:**

*See 24.14*

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.39*

- ☐ Schedule discovery:
- ☐ To ensure that all discovery is completed at least 15 days before hearing.
  - ☐ If more time is needed, apply to court for extension of time for good cause.

**Authority:**

*Cal Rules Ct, Rule 3.822*

**Discussion:**

See 24.15[1]

☐ If the entire case is settled before hearing:

- ☐ File notice of settlement with court;
- ☐ Serve notice on arbitrator; and
- ☐ Give arbitrator oral notice if hearing is scheduled to take place within 10 days.

**Authority:**

*Cal Rules Ct, Rule 3.1385(a)(1)*

**Discussion:**

See 24.17

☐ Determine documents, witness statements, and depositions to be offered in evidence at hearing:

☐ Serve opposing party with copies of these documents and witness statements, and with notice of intention to offer these depositions:

- ☐ By personal delivery at least 20 days before hearing; or
- ☐ By mail at least 25 days before hearing.

**Authority:**

*Cal Rules Ct, Rule 3.823(b), (d)*

**Discussion:**

See 24.20[2][a], [b], [3][a], [4][a], [b]

**Form:**

See 24.69 (notice of intention to offer records, statements, and depositions)

☐ Review documents, witness statements, and depositions opposing party intends to offer in evidence at hearing:

- ☐ Prepare and serve subpoenas on any of opposing party's witnesses who are authors or custodians of records opposing party intends to offer in evidence, if their appearance at hearing is desired for purposes of cross-examination.
- ☐ At least 10 days before hearing, serve opposing party with demand that it produce at the hearing its witnesses whose statements it intends to offer in evidence, if their appearance at hearing is desired for purposes of cross-examination.

- ☐ Prepare and serve subpoenas on any witnesses whose deposition opposing party intends to offer in evidence, if their appearance at hearing is desired for purposes of cross-examination.
- ☐ Prepare and serve subpoenas on any other witnesses whose appearance at hearing is desired.

**Authority:**

*Cal Rules Ct, Rule 3.823(b), (c)*

**Discussion:**

See 24.20[2][c], [3][a], [4][c], [5][a]

**Forms:**

See 24.70 (demand that witness be produced to testify at hearing); Judicial Council Form SUBP-001 Civil Subpoena for Personal Appearance at Trial or Hearing



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**24.12 Hearing Must Occur Within Specific Timeframe.**

The arbitration hearing may not be held until 210 days after the filing of the complaint, or 240 days if the parties stipulated to a one time 30 day continuance [CCP § 1141.16(c)].

**Exception:**

An arbitration hearing may be held earlier upon any of the following [CCP § 1141.16(c)]:

- The parties stipulate to an earlier date.
- The written consent of all plaintiffs, subject to a motion by a defendant to delay the earlier date for good cause.
- An order of the court if the parties have stipulated, or the court has ordered under CCP § 1141.24, that discovery will be permitted after the arbitration award is rendered.

The hearing must be scheduled to be completed within 90 days from the date the case was assigned to the arbitrator [Cal Rules Ct, Rule 3.817(c)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.13*

**24.13 Arbitrator Provides Notice of Arbitration Hearing.**

The arbitrator must notify each party and the ADR administrator, in writing, of the date, time, and place of the hearing, and must do so within 15 days after appointment [*Cal Rules Ct, Rule 3.817(a)*].

The arbitrator cannot set the hearing for a Saturday, Sunday, or legal holiday, except on the agreement of all parties and the arbitrator; and at least 30 days notice must be given to all parties of the hearing date [*Cal Rules Ct, Rule 3.817(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**24.14 Obtaining Continuance of Hearing.**

**24.14[1] Parties May Stipulate to Continuance With Arbitrator's Consent.** The parties may stipulate to a continuance of the arbitration hearing with the arbitrator's consent, which must be granted on a showing of good cause. Notice of the continuance must be given to the ADR administrator [*Cal Rules Ct, Rule 3.818(a)*].

**24.14[2] Absent Arbitrator's Consent, Continuance May Be Granted by Court.** If the arbitrator does not consent, the court may grant a continuance on a party's motion, for good cause shown [*Cal Rules Ct, Rule 3.818(b)*]. If the court grants the motion, the moving party must notify the arbitrator, and the arbitrator must reschedule the hearing, giving notice to all parties [*Cal Rules Ct, Rule 3.818(b)*].

An arbitration hearing may not be continued to a date more than 90 days after assignment of the case to the arbitrator, except by court order on a party's motion [*Cal Rules Ct, Rule 3.818(c)*].



**Cross Reference:**

Form for noticed motion for continuance, see *California Forms of Pleading and Practice*, Ch. 36, *Judicial Arbitration*, § 36.78 (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**24.15 Limitations on Discovery.**

**24.15[1] Discovery Is Allowed Up to 15 Days Before Hearing.** The parties have a right to conduct discovery up to 15 days before the date of the arbitration hearing. The court may grant an extension of this time on a showing of good cause [*Cal Rules Ct, Rule 3.822*].

If the hearing date is continued, the parties have a right to conduct discovery up to 15 days before the new hearing date [*see Zinn v. Superior Court (1980) 108 CA3d 583, 588, 166 CR 640* ].



**Cross Reference:**

Discussion of the right to conduct discovery after an arbitration award is made, see 24.32.

**24.15[2] No Discovery of Defendant's Financial Condition When Punitive Damages Are Sought Unless Court So Orders.** At the arbitration hearing, the plaintiff may not compel the defendant to produce evidence of the defendant's financial condition or the profits the defendant has gained by the alleged wrongful conduct, unless the court has entered an order permitting pretrial discovery of this evidence [*CCP § 1141.19.5*].



**Strategic Point:**

After judicial arbitration, all discovery is cut off with the exception of expert discover [*see 24.32*]. This is an important consideration when determining whether to agree to arbitration or mediation. Because mediation does not eliminate the ability to do post-mediation discovery, and post-arbitration discovery is restricted, this factor may make judicial arbitration a less attractive alternative.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADR



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*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.16*

**24.16 Prohibited Communications With Arbitrator.**

**24.16[1] Ex Parte Communications Are Not Allowed.** Ex parte communications by counsel or the parties with the arbitrator or a potential arbitrator are prohibited, except to set the time and place of the hearing or make other arrangements to conduct the proceedings, as long as the arbitrator reasonably believes that communication will not result in procedural or tactical advantage for any party [*Cal Rules Ct, Rule 3.820(b)(1)*]. An arbitrator may initiate or consider an ex parte communication when expressly authorized by law to do so [*Cal Rules Ct, Rule 3.820(b)(2)*].

**24.16[2] Disclosure of Settlement Offers Is Not Allowed.** Disclosures to the arbitrator of any settlement offers are prohibited before the filing of the award [*Cal Rules Ct, Rule 3.820(a)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**24.17 Plaintiff Must Provide Notice If Case Is Settled Before Hearing.**

If the entire case is settled or otherwise resolved, the plaintiff or other party seeking affirmative relief must immediately file written notice of the settlement or resolution with court and serve notice on all parties and the arbitrator. The plaintiff or other party seeking affirmative relief also must give oral notice if the hearing is scheduled to take place within 10 days [*Cal Rules Ct, Rule 3.1385(a)(1)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**24.18 Party May Waive Right to Be Represented by Counsel at Hearing.**

A party has the right to be represented by counsel at the arbitration hearing, but may waive this right. Any waiver may be revoked, but if revoked, the opposing party is entitled to a reasonable continuance to also obtain counsel [*Cal Rules Ct, Rule 3.821(a)*].

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**24.19 Hearing May Proceed in Party's Absence.**

An arbitration hearing may proceed in the absence of any party who, after due notice, fails to appear or to obtain a continuance. An arbitrator's award may not be based solely on a party's absence, however. If the defendant defaults, the arbitrator must require the plaintiff to submit evidence to support the award [*Cal Rules Ct, Rule 3.821(b)*].

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**24.20 Presenting Evidence at Hearing.**

**24.20[1] General Rules of Evidence Apply.** The rules of evidence governing civil actions apply to an arbitration hearing, except as discussed below [*Cal Rules Ct, Rule 3.823(b)*].

**24.20[2] Documentary Evidence.**

**24.20[2][a] Documentary Evidence Is Admissible.** A wide range of documentary evidence is admissible at the arbitration hearing. Any party may offer the following documentary evidence [*Cal Rules Ct, Rule 3.823(b)(1)*]:

- Written reports of expert witnesses.
- Medical records and bills.
- Documentary evidence of loss of income.
- Property damage repair bills or estimates. Repair estimates must be accompanied (1) by a statement indicating whether the property was repaired and, if so, whether the estimated repairs were in full or in part, and (2) by a copy of the receipted bill showing the items of repair made and the amount paid.
- Police reports about the accident giving rise to the case. The arbitrator may not, however, consider any opinion as to ultimate fault expressed in these reports.
- Other bills and invoices, purchase orders, checks, written contracts, and similar documents prepared and maintained in the ordinary course of business.

**24.20[2][b] To Be Admitted, Copies Must Be Delivered to Opposing Party.** The arbitrator must receive these documents in evidence if copies have been personally delivered to all opposing parties at least 20 days before the hearing, or if copies have been mailed to all opposing parties at least 25 days before the hearing [*Cal Rules Ct, Rule 3.823(b)(1), (d)*].

**24.20[2][c] Author or Custodian of Document May Be Subpoenaed.** Any other party may subpoena the author or the custodian of the document as a witness, and may examine the witness as if under cross-examination [*Cal Rules Ct, Rule 3.823(b)(1)*].

 **Cross Reference:**

Discussion of issuing subpoena, see 24.20[5][a].

**24.20[3] Witness Statements.**

**24.20[3][a] Witness Statements Are Admissible If Certain Requirements Are Met.** Written witness statements may be received in evidence at the arbitration hearing if certain requirements are met. The statements are admissible if [*Cal Rules Ct, Rule 3.823(b)(2)*]:

- They are made by affidavit or declaration under penalty of perjury.
- Copies have been personally delivered to all opposing parties at least 20 days before the hearing, or mailed to all opposing parties at least 25 days before the hearing [*Cal Rules Ct, Rule 3.823(d)*].
- No opposing party has, at least 10 days before the hearing, delivered to the proponent of the evidence a written demand that the witness be produced in person to testify at the hearing.

 **Cross Reference:**

Form of demand, see 24.70.

**24.20[3][b] Arbitrator Must Disregard Inadmissible Matter.** The arbitrator must disregard any portion of a witness's statement that would be inadmissible if the witness were testifying in person. The inclusion of inadmissible matter does not, however, make the entire statement inadmissible [*Cal Rules Ct, Rule 3.823(b)(2)*].

**24.20[4] Depositions.**

**24.20[4][a] Witnesses' Depositions Are Admissible If Certain Requirements Are Met.** The deposition of a witness may be offered by any party and must be received in evidence at the arbitration hearing, subject to the objections available under *CCP § 2025.410*, even if the witness is not unavailable as a witness and no exceptional circumstances exist, if the deposition was taken by stipulation of the parties or in the manner provided for by law, and within the time limits for discovery in an arbitration proceeding [*Cal Rules Ct, Rule 3.823(b)(3)*].

 **Cross Reference:**

Discussion of time limits for discovery, see 24.15[1].

**24.20[4][b] Proponent Must Notify Opposing Parties of Intention to Offer Deposition.** The proponent of the deposition must personally deliver to all opposing parties notice of intention to offer the deposition in evidence at least 20 days before the hearing, or give the opposing parties such notice by mail at least 25 days before the hearing [*Cal Rules Ct, Rule 3.823(d)*; see 24.69 (form of notice of intention)].

**24.20[4][c] Opposing Party May Subpoena Deponent.** On receiving notice, the opposing party may subpoena the deponent. Unless the deposition is admissible under *CCP § 2025.620*, the arbitrator has the discretion to exclude the deposition from evidence or to admit it subject to further cross-examination of the deponent by the subpoenaing party [*Cal Rules Ct, Rule 3.823(b)(3)*].

 **Cross Reference:**



Discussion of issuing subpoena, see 24.20[5][a].

#### **24.20[5] Compelling Attendance of Witnesses.**

**24.20[5][a] Witnesses May Be Subpoenaed to Appear at Hearing.** Subpoenas may be issued for the attendance of witnesses at the arbitration hearing. The party must modify the subpoena to show that the appearance is before an arbitrator, and must give the time and place of the arbitration hearing [*Cal Rules Ct, Rule 3.823(c)*]. Judicial Council Form SUBP-001 may be used.

**24.20[5][b] If Subpoenaed Witness Fails to Appear, Arbitrator May Adjourn or Continue Hearing.** The arbitrator has the discretion to adjourn or continue the arbitration hearing on the nonappearance of a properly subpoenaed witness. If a subpoenaed witness refuses to appear, to be sworn or to answer, proceedings to compel compliance with the subpoena on penalty of contempt may be brought in the superior court under *CCP § 1991* [*Cal Rules Ct, Rule 3.823(c)*].

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## 24.21 Arbitrator's Powers at Hearing

**24.21[1] Arbitrator Given Specific Powers to Conduct Hearing.** In conducting the arbitration hearing, the arbitrator has specific powers that he or she may exercise. These are [*Cal Rules Ct, Rule 3.824(a)*]:

- Administer oaths or affirmation to witnesses.
- Take adjournments on a party's request or on the arbitrator's own initiative when deemed necessary.
- Rule on the admissibility and relevance of offered evidence.
- Examine any site or object relevant to the case.
- Invite the parties, on reasonable notice, to submit trial briefs.
- Decide the law and facts of the case, and make an award accordingly.
- Award costs not exceeding the statutory costs of suit.

All other questions arising out of the case are reserved to the court [*Cal Rules Ct, Rule 3.824(a)*].

### Example:

An arbitrator does not have the authority to award a plaintiff prejudgment interest under *CC § 3291* and *CCP § 998*; this is a matter for the court to determine [ *Wagy v. Brown (1994) 24 CA4th 1, 8-10, 29 CR2d 48* ].



### Strategic Point--Challenging Arbitrator's Award of Costs:

A party may challenge an arbitrator's award of costs only by filing a request for a trial de novo [see *Wagy v. Brown (1994) 24 CA4th 1, 6-8, 29 CR2d 48* ]. A party has no right to appeal this award; review

by appeal is only available with respect to the court's judgment on the trial de novo [ *Dickens v. Lee* (1991) 230 CA3d 985, 987-988, 281 CR 783 ].

 **Cross References:**

Discussion of subsequent court orders, see 24.30. Discussion of trial de novo, see 24.34-24.37.

Discussion of requesting court to order fees if award is silent, see 24.30[2].

**24.21[2] Arbitrator May Award Contractual Attorney's Fees.** The arbitrator may award attorney's fees under CC § 1717 to a party prevailing in an arbitration proceeding on a contract that provides for attorney's fees. The arbitrator's award of fees or determination of the amount of fees is not appealable, but may be challenged by a request for a trial de novo [ *Kelley v. Bredelis* (1996) 45 CA4th 1819, 1823-1824, 53 CR2d 536 ].

 **Cross References:**

Discussion of subsequent court orders, see 24.30. Discussion of trial de novo, see 24.34-24.37.

Discussion of requesting court to order fees if award is silent, see 24.30[2].

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**24.22 Arbitrator May Make Record of Hearing.**

An arbitrator may, but is not required to, make a record of the hearing. Any records of the hearing are deemed the arbitrator's personal notes and are not subject to discovery. The arbitrator need not deliver the records to any party or to any other person, except to an employee using the records under the arbitrator's supervision or pursuant to a subpoena issued in a criminal investigation or prosecution for perjury. No other record may be made. The arbitrator may not permit the presence of a stenographer or court reporter or the use of any recording device at the hearing [*Cal Rules Ct, Rule 3.824(b)*].

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**24.23 Arbitrator's Compensation.**

**24.23[1] Arbitrator Must Submit Fee Statement to Arbitration Administrator.** The arbitrator must submit a fee statement to the arbitration administrator promptly on the completion of his or her duties, setting forth the title and number of the case, the date of the arbitration hearing, and the date the arbitration award or notice of settlement was filed with the court [*Cal Rules of Ct, Rule 3.819*].

An arbitrator may waive compensation in whole or part. If compensation is sought, no compensation may be paid before the arbitrator files the award or before the parties settle the case [*CCP § 1141.18(b)*].

**24.23[2] Payment Is by Case or by Day, Whichever Is Greater.** Arbitrators are paid \$150 per case or \$150 per day, whichever is greater, unless compensation is waived in whole or in part, or unless a higher level of compensation is set by the county board of supervisors [*CCP § 1141.18(b)*].

**24.23[3] Responsibility for Paying Compensation.**

**24.23[3][a] Mandatory Arbitration Costs Are Paid by Court.** In cases subject to mandatory judicial arbitration, all administrative costs of the arbitration, including the arbitrator's compensation, must be paid by the court [*CCP § 1141.28(a)*].



**Strategic Point:**

Despite the provisions of *CCP § 1141.28(a)*, in almost all jurisdictions, the courts are no longer paying arbitrators because of budgetary constraints. Typically, the arbitrator agrees to provide up to three hours of hearing time at no charge. Should the hearing go beyond 3 hours, arbitrators request the parties pay for the arbitrator's time, although the parties are not required to agree to do so.

**24.23[3][b] Arbitration Costs on Parties' Stipulation Are Shared Equally.** In cases referred to judicial arbitration on the parties' stipulation that are not subject to mandatory arbitration, the arbitrator's compensation must be paid in equal shares by the parties [*CCP § 1141.28(b)*].

**Exception:**

If the arbitrator determines that imposition of the costs of the arbitration, including the arbitrator's compensation, would create a substantial hardship for a party, then that party's share of the arbitrator's compensation must be paid by the court. The court may review the arbitrator's determination of substantial hardship [*CCP* § 1141.28(b)].

**24.23[4] Payment Is Made Upon Filing Arbitration Award or Settlement Notice.** No compensation may be paid to the arbitrator before the timely filing of the arbitration award or notice of settlement of the case [*CCP* § 1141.18(b); *Cal Rules Ct, Rule 3.819(a)*].

**Exceptions:**

On the arbitrator's verified ex parte application, the court may, for good cause, authorize payment of compensation when the arbitrator has devoted a substantial amount of time to a case that settled without a hearing or when the award was not timely filed [*Cal Rules Ct, Rule 3.819(b)*].

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**24.24 Arbitrator May Not Testify in Subsequent Civil Proceedings.**

An arbitrator is not competent to testify in any subsequent civil proceedings regarding any statement, conduct, decision, or ruling occurring at or in conjunction with the arbitration proceedings [*Evid Code* § 703.5]. Thus, the arbitrator may not testify about the arbitration proceedings in any subsequent trial de novo.

**Exceptions:**

The arbitrator is competent to testify about statements or conduct that could give rise to civil or criminal contempt, constitute a crime, be the subject of an investigation by the State Bar or Commission on Judicial Performance, or give rise to a disqualification proceeding under *CCP* § 170.1(a)(6) [*Evid Code* § 703.5].

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**24.25 CHECKLIST: Reviewing Arbitration Award and Judgment on Award.**

☐ Review arbitration award. Confirm that it:

- ☐ Determines all issues, including determination of any damages.
- ☐ Includes an award of costs, if appropriate.
- ☐ Includes an award of attorney's fees, if appropriate.
- ☐ Is signed by the arbitrator.
- ☐ Is filed and served within 10 days after conclusion of hearing.

**Authority:**

*CCP § 1141.23; Cal Rules Ct, Rule 3.825(a), (b)*

**Discussion:**

See 24.26-24.28

☐ Request the court to award the following, as appropriate:

- ☐ Prejudgment interest on the award.
- ☐ Costs, if not awarded by arbitrator.



- ☐ Attorney's fees, if not awarded by arbitrator.
- ☐ Sanctions against opposing party for abuse of arbitration process.

**Discussion:**

See 24.30

- ☐ Determine if any grounds exist to vacate judgment on award.

- ☐ If so, file and serve motion to vacate within six months after entry of judgment.

**Authority:**

*Cal Rules Ct, Rule 3.825(d)*

**Discussion:**

See 24.31

**Forms:**

See 24.71 and 24.72 (motion to vacate and order)



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**24.26 Award Must Be in Writing, Signed, and Determine All Issues.**

The arbitration award must be in writing and signed by the arbitrator, and must contain a determination of all issues properly raised by the pleadings, including a determination of any damages and an award of costs if appropriate [*CCP* § 1141.23; *Cal Rules Ct, Rule 3.825(a)*; see *Espinoza v. Machonga* (1992) 9 *CA4th* 268, 270, 11 *CR2d* 498 (parties may not reserve any issue for decision by court)].

The arbitrator may also award contractual attorney's fees to the prevailing party in an action on a contract that provides for such an award [ *Kelley v. Bredelis* (1996) 45 *CA4th* 1819, 1823-1824, 53 *CR2d* 536 ], but may not award prejudgment interest; this is a matter for the court [ *Wagy v. Brown* (1994) 24 *CA4th* 1, 8-10, 29 *CR2d* 48 ].

The arbitrator is not required to issue findings of fact and conclusions of law [*Cal Rules Ct, Rule 3.825(a)*].

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**24.27 Award May Exceed Judicially Determined Amount in Controversy.**

An arbitrator's award may exceed the "amount in controversy" as determined by the court in referring the case to judicial arbitration [*CCP* § 1141.16].



**Cross Reference:**

Discussion of judge's determination of amount in controversy, see 24.04[1][b].

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**24.28 Award Must Be Filed and Served Within 10 Days of Hearing's Conclusion.**

The arbitrator must file the award with the clerk of the court, with proof of service on each party, within 10 days after the conclusion of the arbitration hearing [CCP § 1141.23; *Cal Rules Ct, Rule 3.825(b)*]. The court may allow 20 additional days for the arbitrator to file and serve the award in cases of unusual length or complexity. The arbitrator may file and serve an amended award within the time for filing the award [*Cal Rules Ct, Rule 3.825(b)*].

**Consider:**

The 10-day filing rule is directory only, not jurisdictional and, as a result, the arbitrator does not lose jurisdiction to file the award after the 10-day period [ *Koll Hancock Torrey Pines v. Biophysica Foundation, Inc. (1989) 215 CA3d 883, 885-886, 264 CR 36* (arbitration award filed five days late was not invalid); see *Lopes v. Millsap (1992) 6 CA4th 1679, 1685-1687, 8 CR2d 814* (same rule applied to amended award filed after 10-day period)].

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**24.29 Entering Award As Judgment.**

**24.29[1] Absent Timely Request for Trial De Novo, Clerk Must Enter Award As Judgment.** If a request for a trial de novo is not filed and served within 30 days after the award is filed, the clerk of the court must enter the award as a judgment and mail notice of entry of judgment to all parties who have appeared in the case [*CCP* § 1141.23; *Cal Rules Ct*, Rule 3.827(a), (b)].

► **Cross Reference:**

Discussion of time for requesting trial de novo, see 24.37.

**24.29[2] Judgment May Be Enforced As If Rendered by Court.** A judgment on an arbitration award may be enforced as if it had been rendered by the court in which it is entered [*Cal Rules Ct*, Rule 3.827(c)].

**24.29[3] Parties Have No Right to Appeal.** The parties do not have a right to appeal from a judgment entered on a judicial arbitration award [*CCP* § 1141.23; *Cal Rules Ct*, Rule 3.827(c)].

**Exceptions:**

The parties may appeal from certain postjudgment orders, such as an order striking a request for a trial de novo as untimely [ *Mentzer v. Hardoin* (1994) 28 CA4th 1365, 1368 n2, 34 CR2d 214 ] and an order denying a motion to vacate or set aside the judgment [ *Hughey v. City of Hayward* (1994) 24 CA4th 206, 208, 30 CR2d 678 ]. The parties may also appeal from pre-arbitration judicial rulings on claims not submitted to arbitration [see *Jennings v. Marralle* (1994) 8 C4th 121, 129, 32 CR2d 275, 876 P2d 1074 (appeal from judge's order denying leave to amend complaint to assert additional cause of action)].

► **Cross References:**

Discussion of appeal from denial of request for trial de novo as untimely, see 24.38[2]. Discussion of appeal from denial of motion to vacate, see 24.31[3].

**24.29[4] Award Is Res Judicata in Subsequent Proceeding.** A final judicial arbitration award, if clear and unambiguous, is res judicata in any subsequent proceeding on the same cause of action [ *Flynn v. Gorton* (1989) 207 CA3d 1550, 1555, 255 CR 768 ].

**24.29[5] Collateral Estoppel Effect of Award Is Not Clear.** It is not clear whether collateral estoppel effect may be given to a judgment based on a judicial arbitration award [*see Flynn v. Gorton (1989) 207 CA3d 1550, 1555-1556, 255 CR 768* (collateral estoppel effect should *not* be given; no record is made of arbitration, and findings of fact and conclusions of law are not required, so that it is difficult to determine what issues were actually determined); *see also Vandenberg v. Superior Court (1999) 21 C4th 815, 824 n2, 88 CR2d 366, 982 P2d 229* (holding contractual arbitration award not to have collateral estoppel effect absent agreement, but declining to address effect of judicial arbitration award); *but see State Farm Mut. Auto. Ins. Co. v. Superior Court (1989) 211 CA3d 5, 12-15* (collateral estoppel effect may be given in an appropriate case)].

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### 24.30 Subsequent Orders by Court.

**24.30[1] Prejudgment Interest May Be Awarded.** Prejudgment interest under *CC* § 3291 and *CCP* § 998 is recoverable in a judicial arbitration proceeding, but may be awarded only by the court after entry of judgment on the arbitration award [ *Wagy v. Brown* (1994) 24 CA4th 1, 8-10, 29 CR2d 48 ; see *Joyce v. Black* (1990) 217 CA3d 318, 320 ].

**24.30[2] Costs May Be Awarded If Award Silent.** Following entry of judgment on an arbitration award, the court may award costs to the prevailing party if the arbitration award is silent as to costs. A prevailing party has a right to recover costs under *CCP* § 1032(b), and may do so by filing with the court a memorandum of costs under *Cal Rules Ct, Rule 3.1700* [ *Guevara v. Brand* (1992) 8 CA4th 995, 997-998, 10 CR2d 780 ]. A party may appeal a judge's order awarding costs, but a party may not appeal an arbitrator's award of costs [see *Dickens v. Lee* (1991) 230 CA3d 985, 989, 281 CR 783 ].

**24.30[3] Attorney's Fees May Be Awarded.** A court may award attorney's fees under *CC* § 1717 to a party prevailing in the arbitration proceeding based on a contract provision for attorney's fees [ *Kelley v. Bredelis* (1996) 45 CA4th 1819, 1823-1824, 1831-1834, 53 CR2d 536 ]. If the arbitration award provides that the prevailing party is entitled to recover attorney's fees but does not specify the amount of those fees, a judge may determine the amount on the prevailing party's motion for attorney's fees and entry of judgment on the award. This determination is appealable [ *Kelley v. Bredelis* (1996) 45 CA4th 1819, 1823-1824, 53 CR2d 536 ].



#### Cross Reference:

Discussion of recovery of attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 25, Attorney's Fees.

**24.30[4] Sanctions May Be Imposed.** A court may order a party or a party's attorney to pay monetary sanctions to the opposing party for a failure to participate in judicial arbitration or for an abuse of the arbitration process [see *Rietveld v. Rosebud Storage Partners, L.P.* (2004) 121 CA4th 250, 255 (violation of local rule); *Lyons v. Wickhorst* (1986) 42 C3d 911, 918-919, 231 CR 738, 727 P2d 1019 ; *Zatkin v. Cesare* (1988) 199 CA3d 756, 759, 245 CR 222 ].

#### Exceptions:

A court may not dismiss the action as a sanction for the plaintiff's misuse of the arbitration process [see *Zatkin v. Cesare* (1988) 199 CA3d 756, 758, 760-761, 245 CR 222 (rule applies even if plaintiff elects arbitration)], or deny a party's request for a trial de novo for that party's failure to participate in the arbitration process [ *Lyons v. Wickhorst* (1986) 42 C3d 911, 915, 231 CR 738, 727 P2d 1019 ].

**24.30[5] Setoff Is Not Allowed.** A court does not have jurisdiction to modify an arbitration award in the plaintiff's favor by granting a setoff against it [see *Schumacher v. Ayerve* (1992) 9 CA4th 1860, 1863-1865, 12 CR2d 417 ; *Pierson v. Honda* (1987) 194 CA3d 1411, 1414, 240 CR 148 ].

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**24.31 Motion to Vacate Judgment Entered on Award.**

**24.31[1] Grounds for Motion Are Set Out in Statute.** A party against whom a judgment is entered on an arbitration award may file a motion to vacate the judgment. The motion may be made on the following grounds [*Cal Rules Ct, Rule 3.828(a)*]:

- The arbitrator was subject to a disqualification not disclosed before the hearing and of which the arbitrator was then aware [*see Kaiser Foundation Hospitals v. Superior Court (1993) 19 CA4th 513, 517, 23 CR2d 431 ; compare Cabrera v. Plager (1987) 195 CA3d 606, 612, 241 CR 731 (arbitrator's failure to hold hearing within 90 days of appointment does not subject arbitrator to "disqualification" and is not basis for vacating judgment)*].
- The judgment was a result of mistake, inadvertence, surprise, or excusable neglect [*see CCP §§ 473(b), 1141.23; Yeap v. Leake (1997) 60 CA4th 591, 601-602, 70 CR2d 680 (plaintiff entitled to mandatory relief from judgment based on failure of plaintiff's attorney to appear at arbitration hearing and to file and serve timely request for trial de novo); Mentzer v. Hardoin (1994) 28 CA4th 1365, 1369-1372, 34 CR2d 214 (motion based on confusion about deadline for requesting trial de novo resulting from court's procedure of not immediately filing arbitration awards). Relief on this ground is almost invariably sought after the court has rejected a request for a trial de novo as untimely.*]
- The award was procured by corruption, fraud, or other undue means [*see CCP § 1286.2(a)(1)*].
- The arbitrator was corrupt [*see CCP § 1286.2(a)(2)*].
- The party's rights were substantially prejudiced by the arbitrator's misconduct [*see CCP § 1286.2(a)(3)*].
- The arbitrator making the award failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware [*CCP § 1286.2(a)(6); Luce, Forward, Hamilton & Scripps, LLP v. Koch (2008) 162 CA4th 720, 735-736, 75 CR3d 869 (disqualification not*

required where disclosure not required); *Casden Park La Brea Retail LLC v. Ross Dress for Less, Inc.* (2008) 162 CA4th 468, 478, 75 CR3d 763 (disqualification not required where disclosure not required); *Fininen v. Barlow* (2006) 142 CA4th 185, 190, 47 CR3d 687 ].

#### **Exception:**

A party to an arbitration agreement may waive the right to have a court vacate an arbitration award on particular grounds otherwise authorized by statute [see *Fininen v. Barlow* (2006) 142 CA4th 185, 190, 47 CR3d 687 (finding of waiver of right under CCP § 1286.2(a)(6) affirmed)].

These are the only grounds on which the judgment may be vacated [*Cal Rules Ct, Rule 3.828(a)*]; see, e.g., *Koll Hancock Torrey Pines v. Biophysica Foundation, Inc.* (1989) 215 CA3d 883, 885-888, 264 CR 36 (arbitrator's failure to file award within 10 days after hearing is not grounds for vacating judgment)].



#### **Cross References:**

Form of motion to vacate and order, see 24.71 and 24.72. Discussion of grounds for disqualifying arbitrator for cause, see 24.10[1].

Discussion of relief from judgments and orders under CCP § 473(b) and related equitable relief, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 29.10 et seq.

**24.31[2] Motion Must Be Made Within Six Months After Judgment Entered.** Any motion to vacate must be filed and served on the adverse parties and the arbitrator within six months after the entry of judgment [*Cal Rules Ct, Rule 3.828(a)*]. A court lacks jurisdiction to hear a motion filed after this six-month period [ *Pierson v. Honda* (1987) 194 CA3d 1411, 1415-1416, 240 CR 148 ].

**24.31[3] Ruling Is Made by the Court.** The motion must be heard and determined by the court, not the arbitrator [ *Merritt v. Marks* (1985) 175 CA3d 825, 828, 221 CR 88 ].

The court may grant the motion only on clear and convincing evidence that the alleged grounds are true and that the motion was made as soon as practicable after the moving party learned of the existence of the grounds [*Cal Rules Ct, Rule 3.828(b)*].

An order denying the motion is appealable [ *Hughey v. City of Hayward* (1994) 24 CA4th 206, 208, 30 CR2d 678 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionValidity of ADR Methods



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**24.32 Discovery Is Generally Not Permitted After Award.**

In cases ordered to arbitration after the court has determined that the amount in controversy will not exceed \$50,000, discovery is generally not permitted after an arbitration award, other than expert witness discovery under *CCP* §§ 2034.010-2034.730 [see *CCP* § 1141.24].

**Exceptions:**

Discovery is permitted on the parties' stipulation, on a court's order for good cause shown [*CCP* § 1141.24; see *Regan v. Lanet* (1987) 197 CA3d 353, 359-361, 243 CR 20 (factors to be considered in determining good cause for discovery); *McCormick v. Sentinel Life Ins. Co.* (1984) 153 CA3d 1030, 1051-1052, 200 CR 732 (insufficient showing of good cause)]. The limitation on post-award discovery does not apply if the case was submitted to arbitration on the plaintiff's election [ *McMillan v. Superior Court* (1983) 146 CA3d 1014, 1016-1018, 194 CR 670 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADR



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Chapter 24 Pretrial ADR  
VI. REQUESTING TRIAL DE NOVO

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**24.33 CHECKLIST: Requesting Trial de Novo.**

- ☐ If dissatisfied with any provision of arbitration award, file and serve request for trial de novo.

**Authority:**

*CCP § 1141.20; Cal Rules Ct, Rule 3.826(a)*

**Discussion:**

*See 24.34-24.36*

**Form:**

*See 24.73*



**Timing:**

Must be filed and served within 30 days after the date the arbitrator filed the award with the court.

- ☐ If 30-day period has expired, file and serve *CCP § 473(b)* motion for relief from judgment.

**Authority:**

*CCP § 1141.23; Cal Rules Ct, Rule 3.828(a)*

**Discussion:**

*See 24.38[1]*



**Timing:**

Must be filed within a reasonable time, but no later than 6 months after entry of judgment.

**Authority:**

*CCP § 473(b); Cal Rules Ct, Rule 3.828(a)*

- ☐ If plaintiff, ensure that case is set for trial before expiration of five-year period.

**Authority:**

*CCP § 1141.17*

**Discussion:**

See 24.40[1]

- ☐ To avoid imposition of costs and fees for failure to obtain a judgment in the trial de novo that is more favorable than the arbitration award, file and serve motion for relief from costs and fees based on substantial economic hardship.

- ☐ Follow standard noticed motion procedure.

**Authority:**

*CCP § 1141.21(a); Cal Rules Ct, Rule 3.826(d)*

**Discussion:**

See 24.42[2][c]

**Forms:**

See 24.74 and 24.75 (motion and order)

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39



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**24.34 Make Request to Challenge Award.**

**24.34[1] Absent Request for Trial De Novo, Award Is Final.** An arbitration award is final unless a party files a request for a trial de novo with the clerk of the court [*CCP* § 1141.20(a); *Cal Rules Ct, Rule 3.826(a)*].



**Warning:**

Filing the request with the arbitration administrator is not sufficient [ *Usher v. Soltz* (1981) 123 CA3d 692, 176 CR 746 ].

**Drawback:**

The Legislature, seeking to encourage the finality of judicial arbitration awards, has enacted disincentives to requesting a trial de novo, e.g., a party requesting a trial de novo who does not obtain a more favorable judgment is liable for significant costs and fees [*CCP* § 1141.21(a); *see also Bhullar v. Tayyab* (1996) 46 CA4th 582, 589, 54 CR2d 17 (discouraging trial de novo is essential to proper functioning of judicial arbitration system, which is intended to ease court case loads as well as to provide means of resolving small claims efficiently and affordably)].



**Cross Reference:**

Discussion of post-trial liability for costs and attorney's fees, see 24.42[2], [3].

**24.34[2] Request Is Only Way to Challenge Orders Included in Award.** A request for a trial de novo is the sole method for challenging *any* order included in an arbitration award. A party waives a challenge to any portion of the award by failing to request a trial de novo [ *Wagy v. Brown* (1994) 24 CA4th 1, 6-8, 29 CR2d 48 (party waives right to challenge arbitrator's cost order by failing to request trial de novo and may not challenge order by appeal from judgment on arbitration award)].

**24.34[3] Request Cannot Be Denied for Failure to Participate in Arbitration Proceedings.** A court does not have authority under the arbitration statutes or rules, or inherent authority, to deny a party's request for a trial de novo as a sanction for the party's failure to participate in the arbitration proceedings [ *Lyons v. Wickhorst* (1986) 42 C3d 911, 915, 231 CR 738, 727 P2d 1019 ; *Salowitz Organization, Inc. v. Traditional Industries, Inc.* (1990) 219 CA3d 797,

802-806, 268 CR 493 ]. The right to a trial de novo is unconditional [ *Hebert v. Harn* (1982) 133 CA3d 465, 467-470, 184 CR 83 (court cannot impose "good cause" requirement)]. The court may, however, order a party or a party's attorney to pay monetary sanctions to the opposing party for a failure to participate in the arbitration proceeding [see *Lyons v. Wickhorst* (1986) 42 C3d 911, 918-919, 231 CR 738, 727 P2d 1019 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**24.35 No Prescribed Form Is Required to Make Request.**

The judicial arbitration statutes and rules do not prescribe any particular form for a request for a trial de novo. Parties may use Judicial Council Form ADR-102 to request a trial de novo.

The request must be accompanied by proof of service of the request on all other parties appearing in the case [*CCP* § 1141.20(a); *Cal Rules Ct, Rule 3.826(a)*].

In cases decided before the Judicial Council adopted Form ADR-102, the courts held that any form of notice that, in substance, informs both the court and the opposing party of the intent to request a trial de novo is sufficient, and that if the clerk refuses to file such a notice and enters judgment on the arbitration award, the party attempting to file the notice is entitled to relief from the judgment under *CCP* § 473(b) [*see Hanf v. Sunnyview Development, Inc. (1982) 128 CA3d 909, 916, 180 CR 718* (form entitled "Rejection of Arbitrator's Award" was sufficient request); *see also Fox Industrial Realty v. Dio Dix, Inc. (1982) 136 CA3d 787, 792, 186 CR 449* (filing at-issue memorandum was sufficient request)].

► **Cross References:**

Form for request for trial de novo (Judicial Council Form ADR-102), *see* 24.73.

Additional discussion of relief from judgments and orders under *CCP* § 473(b), *see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 29.10 et seq.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**24.36 Scope and Effect of Request.**

**24.36[1] Award Is Vacated As to All Issues.** A party may request a court or jury trial, both as to law and facts [CCP § 1141.20(b)]. However, a party may not request a trial de novo on some issues and accept the arbitration award on other issues. A request for a trial de novo vacates the arbitration award in its entirety and puts the case at issue as though the arbitration proceedings had not occurred [ *Wagy v. Brown* (1994) 24 CA4th 1, 7, 29 CR2d 48 ].

**24.36[2] Award Is Vacated As to All Plaintiffs.** A request for a trial de novo ordinarily vacates the award as to all parties and requires trial of the entire case. One plaintiff's request for a trial de novo precludes the court from entering judgment in favor of another plaintiff who has not joined in the request, when both plaintiffs' claims arise from the same set of circumstances and involve common issues of liability. The only cases excepted from this general rule are those in which the plaintiffs' claims are based on facts and law entirely independent of each other [ *Lewco Iron Metals, Inc. v. Superior Court* (1999) 76 CA4th 837, 841-845, 90 CR2d 671 ; *Demirgian v. Superior Court* (1986) 187 CA3d 372, 374-378, 231 CR 698 ].

**24.36[3] Award Is Vacated As to All Defendants.** A plaintiff's request for a partial trial de novo against one of two defendants is ineffective if the plaintiff's claims against the defendants arise from a single set of facts. In such a case, the plaintiff's request vacates the arbitration award in its entirety. A partial trial de novo against one defendant is permitted only when the plaintiff's claims against the defendants are totally unrelated, both legally and factually [ *Muega v. Menocal* (1996) 50 CA4th 868, 876-877, 57 CR2d 697 ].

**24.36[4] Award Is Vacated As to Cross-Complaint.** When a party files a request for a trial de novo, the arbitration award is vacated as to any factually and legally related cross-complaint [ *Southern Pacific Transportation Co. v. Mendez Trucking, Inc.* (1998) 66 CA4th 691, 694-696, 78 CR2d 236 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**24.37 Time for Filing and Serving Request.**

**24.37[1] File and Serve Request Within 30 Days After Award Is Filed.** Any request for a trial de novo must be filed with the court and served on all other parties within 30 days after the date the arbitrator files the award with the clerk of the court [CCP § 1141.20(a); *Cal Rules Ct, Rule 3.826(a)*]. A request filed after the parties have been served with a copy of the arbitration award, but before the award is filed with the clerk, is deemed valid and timely filed [*Cal Rules Ct, Rule 3.826(a)*].

**24.37[2] 30-Day Period May Not Be Extended or Shortened.** The 30-day period within which to file a request for a trial de novo may not be extended [*Cal Rules Ct, Rule 3.826(a)*].

A court may not shorten the time for filing a request for a trial de novo to less than the 30-day period provided by CCP § 1141.20(a) [ *Karamzai v. Digitcom* (1996) 51 CA4th 547, 550-551, 59 CR2d 139 ].

**24.37[3] 30-Day Period Runs From Date Award Is Filed, Not From Date Parties Receive Copy of Award.** The 30-day period runs from the date the arbitrator's award is *filed*, not from the date the parties receive a copy of the award. The time for filing the request is not extended by five days under CCP § 1013(a) when the arbitrator serves the award by mail [ *Hanf v. Sunnyview Development, Inc.* (1982) 128 CA3d 909, 913 n5, 180 CR 718 ]. However, if the arbitrator fails to serve a party with a copy of the award properly, that party's 30-day time limit for requesting a trial de novo does not begin to run until the party receives actual notice of the award [ *Domingo v. Los Angeles County Metro. Transportation Auth.* (1999) 74 CA4th 550, 553-556, 88 CR2d 224 ].

**24.37[4] Judgment Should Not Be Entered Prior to Expiration of 30-Day Period.** When the clerk erroneously enters judgment on an arbitration award before the expiration of the 30-day period, a party seeking a trial de novo is entitled to relief from the judgment under CCP § 473(b) on the ground of "surprise" [see *Oats v. Oats* (1983) 148 CA3d 416, 421, 196 CR 20 ].

➡ **Cross Reference:**

Discussion of relief from judgments and orders under CCP § 473(b) and related equitable relief, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 29.10 et seq.*

**24.37[5] Judgment Should Not Be Entered After Timely Request Is Filed.** When the clerk erroneously enters judgment on the arbitration award after a party has timely filed a request for a trial de novo, the party is entitled to relief from the judgment and an order restoring the case to the trial list [see *Fox Industrial Realty v. Dio Dix, Inc. (1982) 136 CA3d 787, 790-792, 186 CR 449* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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## 24.38 Obtaining Relief From Late Filing of Request.

**24.38[1] File CCP § 473(b) Motion.** A party desiring a trial de novo who fails to file and serve a timely request may seek relief by filing a motion under *CCP* § 473(b) to vacate the judgment, based on mistake, inadvertence, surprise, or excusable neglect [see *CCP* § 1141.23; *Cal Rules Ct, Rule 3.828(a)*].



### Timing:

The motion must be filed within a reasonable time, but no later than six months after entry of the judgment [*CCP* § 473(b); *Cal Rules Ct, Rule 3.828(a)*].

### Consider--Discretionary or Mandatory Relief:

When the requesting party has appeared at the arbitration hearing (in person or through his or her attorney), this party has had his or her "day in court" and thus is only entitled to discretionary, not mandatory, relief under *CCP* § 473(b) from the failure of the party's attorney to timely file a request for a trial de novo [ *Brown v. Williams* (2000) 78 CA4th 182, 188-189, 92 CR2d 634 (analogizing party's right to relief in this situation to plaintiff's right to relief from judgment of dismissal following hearing on defendant's motion to dismiss)]. When the party's attorney failed to appear at the hearing and also failed to file a timely request for a trial de novo, the party is entitled to mandatory relief [ *Yeap v. Leake* (1997) 60 CA4th 591, 598-602, 70 CR2d 680 ]. Mandatory relief will only be granted, however, when the attorney's declaration explains why a timely request for a trial de novo was not filed [ *Ayala v. Southwest Leasing & Rental, Inc.* (1992) 7 CA4th 40, 44-45, 8 CR2d 637 ].



### Cross References:

Discussion of motion to vacate the judgment, see 24.31.

Discussion of relief from judgments and orders under *CCP* § 473(b) and related equitable relief, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 29.10 *et seq.*

**24.38[2] Appeal From Final Judgment.** An order striking a party's request for a trial de novo on the ground that it is untimely may also be reviewed on appeal from the final judgment [ *Mentzer v. Hardoin* (1994) 28 CA4th 1365,

*1368 n2, 34 CR2d 214 ].*

**Legal Topics:**

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**24.39 Dismissing or Withdrawing Request.**

**24.39[1] Party May Dismiss or Withdraw Request.** A party may dismiss or withdraw a request for a trial de novo *before* the 30-day period has run, as long as the opposing party's rights are not prejudiced. The parties are restored to their previous positions, and the arbitration award is reinstated [see *Miller v. Foremost Motors, Inc. (1993) 16 CA4th 1271, 1275, 20 CR2d 503* ].

When a party dismisses or withdraws a request for a trial de novo *after* the 30-day period has run, the court may reinstate the arbitration award or, on a showing of prejudice to the opposing party, vacate the dismissal of the request and require the parties to proceed with a trial de novo [ *Calderon v. Kane (1995) 36 CA4th 1663, 1668, 43 CR2d 480* ].

**24.39[2] Best Practice Is to Make Motion.** Although the judicial arbitration statutes and rules do not prescribe any particular procedure for dismissal of a request for a trial de novo, the preferable procedure is to require a party to seek dismissal by a noticed motion since a dismissal affects the opposing party's rights. The judge should grant the motion if it is unopposed and enter judgment on the arbitration award. The judge should deny the motion if the opposing party demonstrates prejudice by having justifiably relied on the other party's request for a trial de novo [ *Calderon v. Kane (1995) 36 CA4th 1663, 1668, 43 CR2d 480* ].

**24.39[3] Liability for Fee Award Cannot Be Avoided by Dismissal.** A plaintiff may not avoid liability for an award of attorney's fees and costs to the defendant as the prevailing party in the arbitration proceeding by dismissing the action. A request for dismissal, with or without prejudice, reinstates the arbitration award, and also repudiates any request by the plaintiff for a trial de novo [ *Kelley v. Bredelis (1996) 45 CA4th 1819, 1824-1832, 53 CR2d 536* ; *Harris v. Billings (1993) 16 CA4th 1396, 1402, 20 CR2d 718* ].

**Legal Topics:**

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## 24.40 Setting Case for Trial de Novo.

**24.40[1] Trial Must Be Set for Earliest Possible Date.** If a party makes a timely request for a trial after arbitration, the case must proceed as provided under an applicable case management order. If no pending order provides for the prosecution of the case after a request for trial after arbitration, the court must promptly schedule a case management conference [*Cal Rules Ct, Rule 3.826[b]*; see *CCP § 1141.20(b)*].



### Warning--Running of Five-Year Statute:

The plaintiff should ensure the case is set for trial before the expiration of the five-year period for bringing the case to trial under *CCP § 583.110*, because submission of the case to judicial arbitration does not ordinarily toll this five-year period [*CCP § 1141.17(a)*]. The plaintiff is responsible for informing the court of the date on which the five-year period will expire and requesting a trial date before this date [ *Howard v. Thrifty Drug & Discount Stores (1995) 10 C4th 424, 436, 41 CR2d 362, 895 P2d 469* ]. The five-year statute stops running automatically for arbitrations beginning or continuing into the last six months of the five-year period, until the date on which a trial de novo is requested [*CCP § 1141.17(b)*; see *Jackson v. Garmon (1990) 217 CA3d 860, 862-866, 266 CR 201* (this tolling provision applies to both voluntary and mandatory judicial arbitration)].

**24.40[2] Court May Dismiss Case for Lack Prosecution.** Because a case that is submitted to judicial arbitration "is only on a sabbatical from the courthouse," the court retains jurisdiction to dismiss the case for lack of diligent prosecution before, during, and after the arbitration [ *Nanfito v. Superior Court (1991) 2 CA4th 315, 319, 2 CR2d 876* ].



### Cross Reference:

Discussion of dismissal for lack of prosecution, see Ch. 40, Dismissal For Delay in Bringing to Trial.

### Legal Topics:

For related research and practice materials, see the following legal topics:  
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**24.41 Case Tried As If No Arbitration Occurred; Any Reference to Arbitration Is Forbidden.**

The case must be tried as if no arbitration proceeding had occurred. No reference may be made during trial to the fact that an arbitration proceeding has been held, to the evidence presented at the arbitration hearing, to the arbitration award, or to any other aspect of the arbitration. None of these matters may be used as affirmative evidence, for purposes of impeachment, or for any other purpose at trial [*Cal Rules Ct, Rule 3.826(c)*; see *Jimena v. Alesso* (1995) 36 CA4th 1028, 1030-1031, 43 CR2d 18 (witness's testimony in judicial arbitration hearing is not admissible to impeach witness's testimony at trial)].



**Warning:**

Any reference to the arbitration proceeding or award during trial is an irregularity in the proceedings of the trial under *CCP* § 657 for the purposes of vacating the judgment entered after trial or for granting a new trial [*CCP* § 1141.25].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**24.42 Judgment After Trial.**

**24.42[1] Judgment Must Be Based on Judge's Own Findings.** The judge presiding over a trial de novo must make his or her own findings of fact and may not merely adopt the arbitrator's findings. For the judgment to be upheld, the judge's independent decision must be clearly shown by the record [ *Weber v. Kessler (1981) 126 CA3d 1033, 1036-1037, 179 CR 299* ].

**24.42[2] Award of Costs.**

**24.42[2][a] Party Who Fails to Obtain More Favorable Judgment Must Pay Costs.** If the judgment on the trial de novo is not more favorable than the arbitration award in either the amount of damages awarded or the type of relief granted to the party requesting the trial, the court must order that party to pay to the court the compensation it paid to the arbitrator, and to pay to the opposing parties (1) their allowable costs as specified in *CCP* § 1033.5, (2) their reasonable costs of expert witnesses (who are not regularly employees of any party) actually incurred or reasonably necessary in the preparation or trial of the case, and (3) any compensation they paid to the arbitrator. These costs are limited to those incurred from the time of the request of the trial de novo, except for the arbitrator's compensation [*CCP* § 1141.21(a)].

The purpose of this statute is to encourage litigants to accept the arbitrator's decision and to discourage requests for a trial de novo [ *Suman v. BMW of North Am., Inc. (1994) 23 CA4th 1, 13, 28 CR2d 133* ].

**Exception--Judgment That Exceeds Amount in Controversy:**

A party who requests a trial de novo after an arbitration award that exceeds the "amount in controversy" as determined by the court in referring the case to judicial arbitration is not subject to the imposition of these costs if the judgment on the trial de novo also exceeds the amount in controversy [*CCP* § 1141.26].

➤ **Cross Reference:**

Discussion of recovery of costs, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 24, Costs.

**24.42[2][b] Unsuccessful Multiple Parties Are Each Liable for Costs.** When two or more parties have requested

a trial de novo, each is liable for these costs if unsuccessful in the trial de novo [ *Boyd v. Oscar Fisher Co. (1989) 210 CA3d 368, 382, 258 CR 473* ].

**Distinguish:**

A plaintiff who requests a trial de novo as to only one of two defendants may be ordered to pay the costs of the other defendant who also requests a trial de novo and prevails at trial [see *Muega v. Menocal (1996) 50 CA4th 868, 875, 57 CR2d 697* (fact that plaintiff did not seek trial de novo against this defendant does not preclude liability)].

**24.42[2][c] Costs May Not Be Imposed If Results in Substantial Economic Hardship.** The court may refuse to impose costs if finding that doing so would create such a substantial economic hardship for the unsuccessful party as not to be in the interest of justice [*CCP § 1141.21(a)(1)*; see *Cal Rules Ct, Rule 3.826(d)*].

 **Cross Reference:**

Forms of motion and order that imposing costs will cause substantial economic hardship, see 24.74 and 24.75.

**24.42[2][d] Costs May Be Imposed Against Party Proceeding in Forma Pauperis Only As Offset Against Award.** If the party requesting the trial de novo has proceeded in forma pauperis, the opposing party's costs under *CCP § 1033.5* and costs of expert witnesses may be imposed only as an offset against any damages awarded in the requesting party's favor [*CCP § 1141.21(b)*]. The party may be required to pay to the court the compensation it paid to the arbitrator only to the extent there remains a sufficient amount in the judgment after the amounts offset for the opposing party's costs have been deducted from the judgment [*CCP § 1141.21(c)*].

**24.42[3] Unsuccessful Party Liable for Authorized Attorney's Fees.** Under *CCP § 1141.21*, the court must award costs, including attorney's fees if authorized by contract, statute, or law, when the party requesting the trial de novo does not obtain a judgment that is more favorable than the arbitration award [ *Bhullar v. Tayyab (1996) 46 CA4th 582, 587-591, 54 CR2d 17* (such fees are recoverable as costs under *CCP § 1033.5(a)(10)*)].

 **Cross Reference:**

Discussion of recovery of attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 25, Attorney's Fees.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionJudicial Review



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**24.43 CHECKLIST: Mediating Under Civil Action Mediation Act.**

☐ Determine if case is in county which utilizes Civil Action Mediation Act.

**Authority:**

*CCP §§ 1775(e), 1775.2*

**Discussion:**

*See 24.44*

☐ Prepare for case management conference, at which the court will determine if the case will be sent to any form of ADR.

☐ Meet and confer with other parties to consider mediation and other issues.

☐ At least 30 days prior to case management conference.

☐ File and serve mandatory case management statement at least 15 calendar days prior to case management conference.

☐ If parties agree to mediation.

☐ Complete ADR stipulation jointly.

☐ File stipulation no later than 90 days before trial.

**Authority:**

*Cal Rules Ct, Rules 3.221, 3.724-3.726, 3.871(a)(2)*

**Discussion:**

See 24.46, 24.52

**Form:**

See 24.64

☐ Select mediator within 30 days of submission to mediation.

☐ Must stipulate to mediator in 15 days.

☐ If unable to agree, court may appoint mediator.

**Authority:**

*CCP § 1775.6; Cal Rules Ct, Rule 3.873*

**Discussion:**

See 24.53

☐ Serve initial participant at least 5 court days before first mediation session, and serve supplemental list thereafter whenever other persons will attend with or on behalf of the client.

**Authority:**

*Cal Rules Ct, Rules 3.874(b)(1)*

**Discussion:**

See 24.56[1][c]

☐ Submit short mediation statement when requested by mediator, stating:

☐ Issues in dispute.

☐ Possible resolutions of issues in dispute.

☐ Other information or documents that mediator requests and that may appear helpful to resolve the dispute.

**Authority:**

*Cal Rules Ct, Rules 3.874(b)(2)*

**Discussion:**

See 24.56[3][a]

☐ Appear at mediation.

☐ Parties and counsel of record must personally appear, unless excused or permitted to appear by

telephone.

- ☐ If party is not a natural person, representative with authority to resolve the dispute must appear.
- ☐ If it is a governmental entity that requires an agreement to be approved by an elected official or legislative body, a representative with authority to recommend agreement must attend.

**Authority:**

Cal Rules Ct, Rule 3.874

**Discussion:**

See 24.56[1]

- ☐ Complete mediation in sixty days.

- ☐ May be extended 30 days upon showing of good cause.

**Authority:**

Cal Rules Ct, Rule 3.876(b)

**Discussion:**

See 24.58

- ☐ Mediator must file a statement on Judicial Council form ADR-100, advising the court whether the mediation ended in full agreement or nonagreement as to the entire case or as to particular parties in the case.

- ☐ Must be filed within 10 days of conclusion of mediation.

**Authority:**

Cal Rules Ct, Rule 3.875

**Discussion:**

See 24.59

**Form:**

See 24.76



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**24.44 Civil Action Mediation Act Applies in Los Angeles, but Any Other County May Elect to Apply the Program.**

The Civil Action Mediation Act establishes a procedure in Los Angeles County, under which the court may refer cases to appropriate dispute resolution processes such as judicial arbitration and mediation as an alternative to trial, consistent with the parties' right to obtain a trial if a dispute is not resolved through an alternative process [*CCP* §§ 1775(e), 1775.2]. Any other county may elect to apply the program [*CCP* §§ 1775(e), 1775.2(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMediations



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#### **24.45 Court Must Have Case Management Conference to Determine Suitability for ADR.**

All general civil cases, unless excepted by local rule, must have a case management conference at which the court must determine whether the case should be referred to an alternative dispute resolution process and, if so, the date by which the process is to be completed [*Cal Rules Ct, Rules 3.721, 3.722(a), 3.727(6)*].



#### **Strategic Point:**

Although trial courts may try to cajole the parties in complex actions into stipulating to private mediation, a trial court does not have the inherent authority under *CCP §§ 128(a)(3), 187* to order parties in a complex civil action to attend and pay for private mediation because the Civil Action Mediation Program, *CCP § 1775 et seq.* emphasizes the voluntary nature of mediation and *Cal Rules Ct, Rule 3.853(2)* allows a party to withdraw from mediation at any time [ *Jeld-Wen, Inc. v. Superior Court* (2007) 146 CA4th 536, 540-543, 53 CR3d 115 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedurePretrial MattersConferencesCase Management



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**24.46 Parties Must Meet and Confer at Least 30 Days Prior to Conference.**

No later than 30 calendar days before the date set for the case management conference, the parties must meet and confer, in person or by phone, to consider, among other things [*Cal Rules Ct, Rule 3.724*]:

- Whether the parties wish to stipulate to or the case should be referred to mediation or any other form of alternative dispute resolution,
- The date by which the ADR must be completed, and
- Settlement.

The parties must file and serve a mandatory case management statement 15 calendar days before the date set for the case management conference [*Cal Rules Ct, Rule 3.725(a)*]. If all the parties agree to an ADR process, they must also jointly complete the ADR stipulation served with the complaint [*Cal Rules Ct, Rule 3.726*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMandatory ADR





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**24.47 Mediation Is Option in Any Civil Case Which May Be Referred to Arbitration.**

Any civil action in which arbitration is required may be submitted to mediation by the presiding judge as an alternative to judicial arbitration, regardless of whether the action includes a prayer for equitable relief [*CCP* § 1775.3(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute  
ResolutionMediations



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**24.48 Court May Not Order Case Exceeding \$50,000 Into Mediation.**

The court may not order a case into mediation if the amount in controversy exceeds \$50,000 [*CCP* § 1775.5; *Cal Rules Ct, Rule 3.871(a)(1)*], even under a mediation program adopted by local court rules [ *Jeld-Wen, Inc. v. Superior Court* (2007) 146 CA4th 536, 543, 53 CR3d 115 (*San Diego County Superior Court had no authority to order mediation or sanction party for failing to mediate in complex case*) ]. However, the parties may stipulate to mediation [*Cal Rules Ct, Rule 3.871(a)(2)*].

► **Cross Reference:**

Discussion of amount in controversy, see 24.04[1][b].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMediations



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**24.49 Actions Which Seek Equitable Relief May Be Mediated.**

Mediation is available for actions which include a prayer for equitable relief, unlike mandatory judicial arbitration [compare CCP § 1775.3(a) and CCP § 1141.13; Cal Rules Ct, Rule 3.811(b)(1)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMediations



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**24.50 Public Entities May Utilize Mediation.**

The presence of a public agency or public entity as a party does not preclude submission to mediation [*CCP* § 1775.3(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**24.51 Determination on Whether to Send Case to Mediation Is Done After Considering Views of Parties on a Case-by-Case Basis.**

The amenability of a particular action for mediation is to be determined on a case-by-case basis [*Cal Rules Ct, Rule 3.871(b)*]. The determination to send a case to mediation is made by the court after considering the parties' expressed views.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMediations



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#### **24.52 Stipulation to Mediate.**

**24.52[1] Any Action May Be Referred to Mediation Upon Stipulation by Parties.** Any action, regardless of the amount in controversy, may be submitted to mediation under the project if the parties stipulate [*Cal Rules Ct, Rule 3.871(a)(2)*].

**24.52[2] Stipulation Must Be Filed No Later Than 90 Days Before Trial.** The stipulation must be filed not later than 90 days before trial unless the court permits it to be filed later [*Cal Rules Ct, Rules 3.221, 3.871(a)(2)*].



#### **Cross Reference:**

Form of Stipulation, see 24.64.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**24.53 Mediator Must Be Selected Within 30 Days of Submission to Mediation.**

A mediator must be selected for the action within 30 days of its submission to mediation [CCP § 1775.6]. The parties determine the method of selection and qualifications of the mediator [CCP § 1775.6]. The parties have 15 days from the date the action is submitted to mediation to stipulate to a mediator [Cal Rules Ct, Rule 3.873]. If the parties are unable to agree on a mediator within the 15-day period, the court may select a mediator [CCP § 1775.6; Cal Rules Ct, Rule 3.873].

The court may not [Cal Rules Ct, Rule 3.1380(d)]:

- Appoint a person to conduct a mandatory settlement conference under *Cal Rules Ct, Rule 3.1380* at the same time as that person is serving as a mediator in the same action, or
- Appoint a person to conduct a mediation under *Cal Rules Ct, Rule 3.1380*.



**Strategic Point:**

The Advisory Committee Comment to *Cal Rules Ct, Rule 3.1380* explains that subdivision (d) is not intended to discourage settlement conferences or mediations. However, problems have arisen in several cases, such as *Jeld-Wen, Inc. v. Superior Court* (2007) 146 CA4th 536, 53 CR3d 115, when distinctions between different ADR processes have been blurred. To prevent confusion about the confidentiality of the proceedings, it is important to clearly distinguish between settlement conferences held under this rule and mediations. The special confidentiality requirements for mediations established by *Evid Code §§ 1115-1128* expressly do not apply to settlement conferences under this rule. This provision is not intended to prohibit a court from appointing a person who has previously served as a mediator in a case to conduct a settlement conference in that case following the conclusion of the mediation.

Under Cal Rules Ct effective January 1, 2011, courts that supply lists of mediators to parties or that recommend, select, appoint, or compensate mediators to mediate general civil cases pending in the court must establish minimum qualifications for those mediators [Cal Rules Ct, Rule 10.781, as amended effective January 1, 2011].

**Cross Reference:**

Discussion of resources for finding mediators, see *Ch. 6, Determining Forum*, 6.05[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionMediations





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**24.54 Court-Appointed Mediators Are Paid \$150 per Case or per Day.**

Court-appointed mediators are paid \$150 per case or per day, whichever is greater, except that no compensation shall be paid before the mediator files a statement of nonagreement or the parties settle the action [CCP § 1775.8(a)]. Higher rates may be set in a county or city and county by the board of supervisors [CCP § 1775.8(a)]. Volunteers may also be available who will serve without compensation.



**Strategic Point:**

It is quite common for the parties to select a mutually agreeable and more experienced mediator than the one who would be appointed by the court. Mediation is an art form and having an appropriate mediator is essential to the potential resolution of a case. A more well-known mediator will typically charge a much higher fee than the \$150 paid to court-appointed mediators.

Under Cal Rules Ct effective January 1, 2011, courts that supply lists of mediators to parties or that recommend, select, appoint, or compensate mediators to mediate general civil cases pending in the court must establish minimum qualifications for those mediators [Cal Rules Ct, Rule 10.781, as amended effective January 1, 2011].

**Legal Topics:**

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**24.55 Administrative Costs Are Paid As for Arbitration.**

Administrative costs of mediation, including compensation of mediators, are to be paid in the same manner as for arbitration [*CCP* § 1775.8(b)].

➡ **Cross Reference:**

Discussion of payment of arbitrators, see 24.32.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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## **24.56 Mediation Hearing.**

### **24.56[1] Attendance by Parties and Counsel of Record, and Participant Lists.**

**24.56[1][a] Parties and Counsel of Record Are Required to Attend Mediation Sessions, Unless Excused.** All parties who are natural persons and their counsel of record, and the representative of a party that is not a natural person, must attend all mediation sessions, unless excused. The representative of a party that is not a natural person must have authority to resolve the dispute or, if the party is a governmental entity that requires an agreement to be approved by an elected official or legislative body, authority to recommend such an agreement [Cal Rules Ct, Rule 3.874(a)(1); *see also* Cal Rules Ct, Rule 3.874(a)(2) (attendance by representatives of insurers)].

#### **Exception:**

The mediator may excuse a party, counsel of record, or representative of a party from attending a mediation session. The excused person must promptly send a letter or electronic communication to the mediator and all parties confirming the excused absence [Cal Rules Ct, Rule 3.874(a)(3)].

**24.56[1][b] Attendance by Parties, Counsel, and Representatives Must Be In Person, Unless Mediator Permits Attendance by Telephone.** The mandatory attendance of parties and counsel and representatives of parties at mediation sessions must be in person [Cal Rules Ct, Rule 3.874(a)(1)].

#### **Exception:**

Parties and counsel and representatives of parties may attend by telephone if permitted to do so [Cal Rules Ct, Rule 3.874(a)(1)]. The mediator may allow a party, counsel of record, or representative of a party to attend a mediation session by telephone. The person allowed to attend by telephone must promptly send a letter or electronic communication to the mediator and all parties confirming permission to attend by telephone [Cal Rules Ct, Rule 3.874(a)(3)].

**24.56[1][c] Each Party Must Serve List of Participants At Least Court Five Days Before First Mediation Session, and Whenever Supplements Is Needed Thereafter.** Each party must serve a list of its mediation participants on the mediator and all other parties. The list must include the names of all [Cal Rules Ct, Rule 3.874(b)(1)]:

- Parties to the action;
- Attorneys of record;
- Representatives of parties not natural persons;
- Insurance representatives; and
- Other persons who will attend mediation with or on behalf of the party.



#### **Timing:**

Each party must serve [Cal Rules Ct, Rule 3.874(b)(1)]:

- An initial list of its participants at least five court days before the first mediation session, and
- A supplemental list promptly after whenever the party subsequently determines that other persons will attend the mediation with or on behalf of the party.

**24.56[2] Attorney May Not Be Excluded From Mediation.** Some mediators attempt to require the parties to participate in mediation sessions without their counsel present; however, each party is entitled to have counsel present at all mediation sessions that concern it [Cal Rules Ct, Rule 3.874(a)(4)].

**24.56[3] Statements Made in Mediation Are Generally Excluded From Evidence.** All statements made by the parties during the mediation are subject to *Evid Code* §§ 703.5, 1115-1128, and 1152, which limit the admission in evidence of offers to compromise and generally exclude from evidence statements and admissions made in mediation [CCP § 1775.10; *Simmons v. Ghaderi* (2008) 44 C4th 570, 588-589, 80 CR3d 83, 187 P3d 934 (evidence of unrecorded oral agreement to settle inadmissible); *Travelers Casualty & Surety Co. v. Superior Court* (2005) 126 CA4th 1131, 1145, 24 CR3d 751 (applying CCP § 1119(a))].

Any reference to the mediation or the statement during any subsequent trial shall constitute an irregularity in the proceedings of the trial for the purposes of granting a new trial [CCP § 1775.12; *Travelers Casualty & Surety Co. v. Superior Court* (2005) 126 CA4th 1131, 1145, 24 CR3d 751 (applying CCP § 1119(a))].

#### **24.56[4] Writings in Mediation.**

**24.56[4][a] Mediator May Request Statement of Mediation Issues.** A mediator may request each party to submit a short mediation statement. The statement must provide requested information about [Cal Rules Ct, Rule 3.874(a)(1)]:

- The issues in dispute;
- Possible resolutions of the issues in dispute; and
- Other information or documents that may appear helpful to resolve the dispute.

**24.56[4][b] Writings Prepared for Mediation Are Inadmissible.** A writing prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is inadmissible and not subject to discovery. The disclosure of the writing cannot be compelled in an arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which testimony can be compelled to be given [*Evid Code* § 1119(b); *Rojas v. Superior*

*Court (2004) 33 C4th 407, 418, 15 CR3d 643, 93 P3d 260, 93 P3d 260* ]. For these purposes, a "writing" includes 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 [*Evid Code §§ 250, 1119(b)*].

### Examples:

- A settlement agreement arising from mediation that was not effective unless all parties signed was inadmissible because one party was not present to sign and had not signed it [ *Rael v. Davis (2008) 166 Cal. App. 4th 1608, 1621, 83 Cal. Rptr. 3d 745* ] .
- Mediation briefs and emails between counsel and the party discussing the mediation briefs prior to the mediation are writings that may not be disclosed; however, the party seeking to assert mediation confidentiality has the burden of showing that communications and writings are materially related to, and foster, the mediation [ *Wimsatt v. Superior Court (2007) 152 CA4th 137, 159, 61 CR3d 200* (protective order granted)].
- Photographs, videotapes, written witness statements, and the reports on analysis of physical samples qualify as writings so long as they are prepared for the purpose of, in the course of, or pursuant to, a mediation, while actual physical samples collected at a site, either from the air or from destructive testing, are not writings [ *Rojas v. Superior Court (2004) 33 C4th 407, 422-423, 15 CR3d 643, 93 P3d 260* ].
- Valuation order prepared by mediator in an attempt to value various sexual abuse claims, where a potentially liable party refused to waive the confidentiality privilege is a writing [ *Travelers Casualty & Surety Co. v. Superior Court (2005) 126 CA4th 1131, 1145, 24 CR3d 751* ].

### Distinguish:

Evidence otherwise admissible or subject to discovery outside of a mediation does not become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation [*Evid Code § 1120(a)*]. Thus, the facts conveyed by statements, to the extent that they can be evidenced by other means, are subject to admission into evidence [ *Rojas v. Superior Court (2004) 33 C4th 407, 423 n.8, 424, 15 CR3d 643, 93 P3d 260, 93 P3d 260* ]. Also, a mediation settlement agreement containing a confidentiality waiver is admissible as evidence of a settlement [ *Stewart v. Preston Pipeline Inc. (2005) 134 CA4th 1565* ].

### Example:

A statement iterating a reduced settlement offer given the evening before mediation session may be disclosed if there is no showing that the statement was made for the purpose of, or pursuant to, the mediation [ *Wimsatt v. Superior Court (2007) 152 CA4th 137, 160-161, 61 CR3d 200* (protective order denied)].

### Judge's Perspective:

In light of *Rojas*, it is important for the parties and the judge chosen or assigned to handle settlement to understand the ground rules that will pertain to dispute resolution. Specifically, is the settlement conference to be conducted pursuant to *Cal Rules Ct, Rule 3.1380*? In other words, will the assigned judge be conducting a settlement conference or mediation? Because of the strong public policy toward confidentiality as set forth in *Rojas* it is important for the settling judge to be aware of the limitations the

mediation privilege can bring if one of the parties or a party's insuring carrier refuses to participate in the actual resolution process itself. Does the mediation privilege apply to a party's insuring carrier who refuses to participate in the actual process itself notwithstanding participation by the insured party? Can this refusal become transparent for later use by the insured? While the purpose and intent behind the confidentiality aspects of the mediation privilege may be laudable, the practicality of the situation may be that the protection accorded is too great thereby defeating the use of the privilege in the first place. Judge's may opt for simple settlement powers as set forth in *Cal Rules Ct, Rule 3.1380*.

#### Strategic Point:



Although the mediation privilege has been construed broadly, *Foxgate Homeowners Assn. v. Bramalea California, Inc.* (2001) 26 C4th 1, 14, 108 CR2d 642, 25 P3d 1117 recognizes that the mediation privilege should not be enforced in a manner that "would lead to absurd results, thereby violating the presumed intent of the Legislature." Written settlement agreements prepared in the course of mediation generally are not made inadmissible by the mediation privilege [*Evid Code* § 1123; *Simmons v. Ghaderi* (2008) 44 C4th 570, 588-589, 80 CR3d 83, 187 P3d 934 (evidence of unsigned draft written settlement inadmissible)]. However, because settlement agreements that are signed at the end of a long mediation session often are somewhat sketchy agreements that cover only the essential terms of the deal, extrinsic evidence may be necessary to provide meaning and to allow enforcement of the agreement. Although the Legislature obviously intended that the mediation privilege would encourage mediation and enforceable settlement agreements, it is not clear that such extrinsic evidence would be admissible even though such evidence might be necessary to enforce the settlement agreement. As a result, it is important that settlement agreements entered into during a mediation be as clear and as complete as possible.

#### Strategic Point--Stipulation:



When stipulating to a protective order for mediation, clarify that evidence that is discoverable is not being made *undiscoverable* by submission to mediation. For example, charts made in preparation of mediation will not be discoverable, however the raw data that produced the charts are still discoverable after the mediation. Sample language to include in the stipulation may include: "Any information (including electronic information and documents) which has been or will be prepared by the parties for the purpose of, or in the course of, mediation and/or settlement discussions shall be maintained as confidential by the parties and their agents, and shall not be used for any purpose whatsoever other than for confidential evaluation and discussion of settlement of the Lawsuit. This does not apply to information obtained through discovery in the Lawsuit, and the potential confidentiality of any information obtained through discovery in the Lawsuit shall be handled by separate agreement or order of the Court."

**24.56[5] Disclosure of Mediation Evidence Permitted in Limited Circumstances.** All persons conducting and participating in the mediation may agree to disclose a communication, document, or writing subject to the nondisclosure rules [*Evid Code* § 1122(a)(1)]. Disclosure of protected communications and writings that were "prepared by or on behalf of fewer than all the mediation participants" is permissible if the participants expressly agree to disclosure and if disclosure would not reveal "anything said or done or any admission made in the course of the mediation" [*Evid Code* § 1122(a)(2); *Rojas v. Superior Court* (2004) 33 C4th 407, 423, 15 CR3d 643, 93 P3d 260, 93 P3d 260 ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMediations



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Chapter 24 Pretrial ADR  
VII. MEDIATING CLAIMS UNDER CIVIL ACTION MEDIATION ACT

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.57*

**24.57 Unlike with Arbitration, Discovery Is Not Cut Off.**

Any party who participates in mediation pursuant to *CCP* § 1775.3 retains the right to obtain discovery [*CCP* § 1775.11].



**Strategic Point:**

Cal Rules Ct, Rule 3.876(b) urges parties to exercise restraint in discovery while a case is in mediation. A protective order may be issued to accommodate the objective [Cal Rules Ct, Rule 3.876(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMediations



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**24.58 Mediation Must Be Completed Within 60 Days, Extendable for Another 30 Days for Good Cause.**

The maximum time for mediation is 60 days after reference to a mediator. The court may extend that period by up to 30 days on a showing of good cause [Cal Rules Ct, Rule 3.876(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMediations





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VII. MEDIATING CLAIMS UNDER CIVIL ACTION MEDIATION ACT

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.59*

**24.59 Mediator Must File Statement Advising Court of Agreement or Nonagreement.**

Within 10 days of the conclusion of mediation, the mediator must file a statement on Judicial Council form ADR-100, advising the court whether the mediation ended in full agreement or nonagreement as to the entire case or as to particular parties in the case [Cal Rules Ct, Rule 3.875]. If the parties to mediation are unable to reach a mutually acceptable agreement and any party to the mediation wishes to terminate the mediation, the mediator must file a statement of nonagreement [CCP § 1775.9(a)].



**Cross Reference:**

Form for Statement Advising of Agreement of Nonagreement, see 24.76.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMediations



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VII. MEDIATING CLAIMS UNDER CIVIL ACTION MEDIATION ACT

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.60*

**24.60 When Statement of Nonagreement Is Filed, Matter Is Placed on Active Trial Calendar.**

When a statement of nonagreement is filed, the matter must be calendared for trial, so that it is given the same place on the active list as it had prior to mediation, or given civil priority on the next setting calendar [*CCP* § 1775.9(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMediations



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Chapter 24 Pretrial ADR  
VII. MEDIATING CLAIMS UNDER CIVIL ACTION MEDIATION ACT

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.61*

#### **24.61 Submission to Mediation Does Not Suspend Running of Time Period for Dismissal for Delay in Prosecution.**

Submission of an action to mediation does not suspend the running of the *CCP* § 583.110 *et seq.* time periods relating to dismissal for delay in prosecution [*CCP* § 1775.7(a)]. However, if an action is or remains submitted to mediation more than four years and six months after the plaintiff has filed the action, then the time beginning on the date four years and six months after the action was filed and ending on the date on which a statement of nonagreement is filed is excluded in computing the *CCP* § 583.310 five-year period for bringing the case to trial [*CCP* § 1775.7(b); *Gonzalez v. County of Los Angeles* (2004) 122 CA4th 1124, 1129 ].

#### **➤ Cross References:**

Discussion of Statement of Nonagreement, see 24.59. Form of Statement of Nonagreement, see 24.76.  
Discussion of dismissal for failure to bring case to trial, see Ch. 40, Dismissal for Delay in Bringing to Trial.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureAlternative Dispute ResolutionMediations



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Chapter 24 Pretrial ADR  
VII. MEDIATING CLAIMS UNDER CIVIL ACTION MEDIATION ACT

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.62*

**24.62 Mediation Does Not Affect Time Periods Under Trial Delay Reduction Act.**

Submission of an action to mediation does not to affect the time periods specified in the Trial Court Delay Reduction Act, except on the parties' written stipulation, there will be an extension of up to 90 days to the delay reduction time standards to permit mediation [Cal Rules Ct, Rule 3.876(a), (b); *see Gov Code § 68600 et seq.*]. The stipulation must be filed with the court [Cal Rules Ct, Rule 3.876(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMediations



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*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.63*

**24.63 Costs of Mediation May Be Awarded by Court.**

The award of mediation expenses as costs is neither provided for nor proscribed by statute [ *Gibson v. Bobroff* (1996) 49 CA 4th 1202, 1207, 57 CR2d 235 ]. When an unsuccessful mediation has been court-ordered, reasonably necessary expenses incident to the mediation may, in the sound discretion of the trial court, be awarded after trial to the prevailing party [ *Gibson v. Bobroff* (1996) 49 CA4th 1202, 1209, 57 CR2d 235 ]. The basis for the award is the discretionary authority of a court under CCP § 1033.5(c)(4) to award costs reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation [ *Gibson v. Bobroff* (1996) 49 CA4th 1202, 1207, 1209, 57 CR2d 235 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureAlternative Dispute ResolutionMediations



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Chapter 24 Pretrial ADR

VIII. FORMS

A. Determining When Actions Are Subject to Judicial Arbitration

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.64*

#### **24.64 Stipulation for Judicial Arbitration or Mediation.**

[Click here to view image.](#)

NOTES.

**Authority:**

*CCP §§ 1141.12, 1141.18(a); Cal Rules Ct, Rules 3.221, 3.726, 3.810, 3.811, 3.812, 3.871, (a)(2);* Santa Clara County Superior Court Form CV-5008 is a sample form of stipulation to alternative dispute resolution



**Timing:**

See 24.05[1], 24.52[2]

**Drafting Stipulation:**

See 24.02[3], 24.05[1], 24.08[1]



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Chapter 24 Pretrial ADR

VIII. FORMS

A. Determining When Actions Are Subject to Judicial Arbitration

2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.65

**24.65 Notice of Motion and Motion for Order to Determine Amount in Controversy on Cross-Complaint and Remove Case From Arbitration Hearing List With Supporting Declaration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NOTICE OF MOTION AND MOTION FOR OR-  
) DER TO DETERMINE AMOUNT IN CONTRO-  
) VERSY ON CROSS-COMPLAINT AND REMOVE  
) CASE FROM ARBITRATION HEARING LIST,  
) SUPPORTING DECLARATION OF  
) \_\_\_\_\_ [name], AND SUPPORTING  
) MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Arbitration Hearing Date: \_\_\_\_\_

To Plaintiff \_\_\_\_\_ [name] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon  
thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of]]  
this court, located at \_\_\_\_\_ [street address], Defendant and Cross-Complainant

\_\_\_\_\_ [name] will, and hereby does, move for an order that this case should be removed from the arbitration hearing list under *California Rules of Court, Rule 3.812(c)*. The motion will be made on the ground that the amount in controversy relating to the cross-complaint exceeds fifty thousand dollars (\$50,000).

The motion will be based on this notice of motion, on the declaration of \_\_\_\_\_ [name] and the supporting memorandum set forth below, on the records and file in this case, and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant \_\_\_\_\_ [name]

#### SUPPORTING DECLARATION OF \_\_\_\_\_

I, \_\_\_\_\_, declare:

1. I am \_\_\_\_\_ [declarant, e.g., Jane Lee, an attorney at law duly admitted to practice before all of the courts of the State of California and the attorney of record in this case for Defendant Mary Jones].

2. \_\_\_\_\_ [Set forth facts showing that amount in controversy based on cross-complaint alone, excluding questions of liability or comparative negligence or other defenses, exceeds \$50,000].

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]

#### SUPPORTING MEMORANDUM

[Set out memorandum here]

NOTES.

#### Authority:

*Cal Rules Ct, Rule 3.812(c)*



Timing:



See 24.05[2][c]

**Drafting Motion:**

See 24.05[2][c]

**Related Form of Order:**

See 24.66

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 131A, Judicial Arbitration, § 131A.10* (Matthew Bender)



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Chapter 24 Pretrial ADR

VIII. FORMS

A. Determining When Actions Are Subject to Judicial Arbitration

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.66*

**24.66 Order on Motion to Determine Amount in Controversy on Cross-Complaint and Remove Case From Arbitration Hearing List.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |       |
|---------------|---|-------|
| _____ [name], | ) |       |
| Plaintiff,    | ) |       |
| vs.           | ) | ORDER |
| _____ [name], | ) |       |
| Defendant.    | ) |       |
|               | ) |       |
|               | ) |       |

The motion of Defendant and Cross-Complainant \_\_\_\_\_ [name] for an order to remove this case from the arbitration hearing list on the ground that the amount in controversy relating to the cross-complaint exceeds fifty thousand dollars (\$50,000), came on regularly for hearing by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]. Defendant and Cross-Complainant appeared by counsel \_\_\_\_\_ [name].

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and the amount in controversy relating to the cross-complaint is determined to exceed fifty thousand dollars (\$50,000).

IT IS FURTHER ORDERED that this case be removed from the arbitration hearing list.

Date: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.812(c)*

**Related Form of Motion:**

See 24.65



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Chapter 24 Pretrial ADR  
VIII. FORMS  
B. Rejecting or Disqualifying Arbitrator

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.67*

### 24.67 Rejection of Arbitrator.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                         |
|---------------|---|-------------------------|
| _____ [name], | ) |                         |
| Plaintiff,    | ) |                         |
| vs.           | ) | REJECTION OF ARBITRATOR |
| _____ [name], | ) |                         |
| Defendant.    | ) |                         |
|               | ) |                         |
|               | ) |                         |

\_\_\_\_\_

\_\_\_\_\_ [Party, e.g., Plaintiff John Smith] rejects \_\_\_\_\_ [name] as an arbitrator in this case under *California Rules of Court, Rule 3.815(a)*.

Date: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.815(b)*



**Timing:**

See 24.08[2][b], [c]

**Drafting Rejection:**

See 24.08[2][b], [c]



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Chapter 24 Pretrial ADR  
VIII. FORMS  
B. Rejecting or Disqualifying Arbitrator

2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.68

**24.68 Request for Disqualification of Arbitrator.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_ [name],

Plaintiff,

vs.

\_\_\_\_\_ [name],

Defendant.

)  
)  
)  
)  
)  
)  
)

REQUEST FOR DISQUALIFICATION OF ARBITRATOR

\_\_\_\_\_ [Party, e.g., Plaintiff John Smith] objects to the appointment of \_\_\_\_\_ [name] as arbitrator in this case under *Code of Civil Procedure Section 1141.18* and *California Rules of Court, Rule 3.816*, for the reason that he/she is disqualified on the ground that \_\_\_\_\_ [specify ground(s) in CCP §§ 170.1 or 170.6 with appropriate statutory citation].

Date: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

NOTES.

**Authority:**

*CCP § 1141.18(d); Cal Rules Ct, Rule 3.816*



**Timing:**

See 24.10[2]

**Drafting Request:**

See 24.10



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Chapter 24 Pretrial ADR  
VIII. FORMS  
C. Conducting Arbitration Hearing

2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.69

**24.69 Notice of Intent to Offer Records, Statements, and Depositions in Evidence.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                           |
|---------------|---|-------------------------------------------|
| _____ [name], | ) |                                           |
| Plaintiff,    | ) |                                           |
| vs.           | ) | NOTICE OF INTENTION TO OFFER              |
| _____ [name], | ) | _____ [RECORDS or WRITTEN                 |
| Defendant.    | ) | STATEMENTS or DEPOSITIONS or any combina- |
|               | ) | tion thereof] IN EVIDENCE AT ARBITRATION  |
|               | ) | HEARING                                   |

\_\_\_\_\_

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that \_\_\_\_\_ [party, e.g., Defendant Mary Jones] intends to introduce the attached \_\_\_\_\_ [records and/or written statements and/or depositions] in evidence at the arbitration hearing in this case.

This notice is given under *California Rules of Court, Rule 3.823(b)*.

Date: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]



\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.823(b), (d)*



**Timing:**

See 24.20

**Drafting Notice:**

See 24.20



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VIII. FORMS  
C. Conducting Arbitration Hearing

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.70*

**24.70 Demand That Witness Be Produced in Person to Testify at Hearing.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                    |
|---------------|---|------------------------------------|
| _____ [name], | ) |                                    |
| Plaintiff,    | ) |                                    |
| vs.           | ) | DEMAND THAT WITNESS BE PRODUCED IN |
| _____ [name], | ) | PERSON TO TESTIFY AT HEARING       |
| Defendant.    | ) |                                    |
|               | ) |                                    |
|               | ) |                                    |

\_\_\_\_\_

To \_\_\_\_\_ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

\_\_\_\_\_ [Party, e.g., Plaintiff John Smith] hereby demands, under *California Rules of Court, Rule 3.823(b)(2)* that \_\_\_\_\_ [name(s)] be produced in person to testify at the arbitration hearing in this case scheduled for \_\_\_\_\_ [date].

Date: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.823(b)(2)*



**Timing:**

See 24.20[3][a]

**Drafting Demand:**

See 24.20[3][a]



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Chapter 24 Pretrial ADR

VIII. FORMS

D. Vacating Judgment Entered on Arbitration Award

2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.71

**24.71 Notice of Motion and Motion for Order to Vacate Judgment With Supporting Declaration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NOTICE OF MOTION AND MOTION FOR OR-  
) DER TO VACATE JUDGMENT, SUPPORTING  
) DECLARATION OF \_\_\_\_\_ [name],  
) AND SUPPORTING MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
Date Action Filed: \_\_\_\_\_  
Trial Date: None Set

To \_\_\_\_\_ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order to vacate judgment on the arbitration award in this case entered against \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith], under *California Rules of Court, Rule 3.828*. The motion will be made on the ground that \_\_\_\_\_ [specify grounds, e.g., the arbitrator was subject to disqualification, which he/she did not disclose before the arbitration hearing and of which he/she was then aware].

The motion will be based on this notice of motion, on the declaration of \_\_\_\_\_ [name] and the supporting memorandum set forth below, on the records and file in this case, and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

SUPPORTING DECLARATION OF \_\_\_\_\_ [name]

I, \_\_\_\_\_, declare:

1. I am \_\_\_\_\_ [declarant, e.g., Tom Doe, an attorney at law duly admitted to practice before all of the courts of the State of California and the attorney of record in this case for Plaintiff John Smith].

2. \_\_\_\_\_ [Set forth facts establishing discovery and existence of grounds for vacating judgment, e.g., grounds for disqualification of arbitrator and arbitrator's awareness of them].

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]

SUPPORTING MEMORANDUM

[Set out memorandum here]

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.828*



**Timing:**

See 24.31[2]

**Drafting Motion:**

See 24.31[1]

**Related Form of Order:**

See 24.72

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 131A, Judicial Arbitration, §§ 131A.100, 131A.101* (Matthew Bender)



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Chapter 24 Pretrial ADR

VIII. FORMS

D. Vacating Judgment Entered on Arbitration Award

2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.72

**24.72 Order on Motion to Vacate Judgment.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |       |
|---------------|---|-------|
| _____ [name], | ) |       |
| Plaintiff,    | ) |       |
| vs.           | ) | ORDER |
| _____ [name], | ) |       |
| Defendant.    | ) |       |
|               | ) |       |
|               | ) |       |

The motion of \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] for an order vacating the judgment on the arbitration award in this case entered against \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] came on regularly for hearing by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]. Defendant appeared by counsel \_\_\_\_\_ [name].

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and the judgment entered against \_\_\_\_\_  
[*moving party, e.g., Plaintiff John Smith*] is vacated.

Date: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.828*

**Related Form of Motion:**

*See 24.71*





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Chapter 24 Pretrial ADR  
VIII. FORMS  
E. Requesting Trial de Novo

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.73*

**24.73 Judicial Council Form ADR-102 Request for Trial de Novo After Judicial Arbitration.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*CCP § 1141.20; Cal Rules Ct, Rule 3.826(a)*; California Judicial Council Form ADR-102 has been approved for optional use [*Cal Rules Ct, Rule 3.826(a)*]



**Timing:**

See 24.37

**Drafting Request:**

See 24.34-24.36



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Chapter 24 Pretrial ADR  
VIII. FORMS  
E. Requesting Trial de Novo

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.74*

**24.74 Notice of Motion and Motion for Order Finding Imposition of Costs and Fees to Create Substantial Economic Hardship.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NOTICE OF MOTION AND MOTION FOR OR-  
) DER FINDING IMPOSITION OF COSTS AND  
) FEES TO CREATE SUBSTANTIAL ECONOMIC  
) HARDSHIP, SUPPORTING DECLARATION OF  
) \_\_\_\_\_ [name], AND SUPPORTING  
) MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order that \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith]

not be required to pay costs and fees after obtaining a less favorable judgment in the trial de novo than was obtained in arbitration, on the ground that the imposition of costs and fees would create such a substantial economic hardship as not to be in the interest of justice, under *Code of Civil Procedure Section 1141.21* and *California Rules of Court, Rule 3.826(d)*.

The motion will be based on this notice of motion, on the declaration of \_\_\_\_\_[*name*] and the supporting memorandum set forth below, on the records and file in this case, and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_

\_\_\_\_\_ [*firm name*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

SUPPORTING DECLARATION OF \_\_\_\_\_ [*name*]

[*Set out declaration here*]

SUPPORTING MEMORANDUM

[*Set out memorandum here*]

NOTES.

**Authority:**

*CCP § 1141.21; Cal Rules Ct, Rule 3.826(d)*

**Drafting Notice and Motion:**

*See 24.42[2][c]*

**Related Form of Order:**

*See 24.75*



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Chapter 24 Pretrial ADR  
VIII. FORMS  
E. Requesting Trial de Novo

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.75*

**24.75 Order Finding Imposition of Costs and Fees to Create Substantial Economic Hardship.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |       |
|---------------|---|-------|
| _____ [name], | ) |       |
| Plaintiff,    | ) |       |
| vs.           | ) | ORDER |
| _____ [name], | ) |       |
| Defendant.    | ) |       |
|               | ) |       |
|               | ) |       |

The motion of \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] for an order that \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] not be required to pay costs and fees after obtaining a less favorable judgment in the trial de novo than was obtained in arbitration, on the ground that the imposition of costs and fees would create such a substantial economic hardship as not to be in the interest of justice, came on regularly for hearing by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]. Defendant appeared by counsel \_\_\_\_\_ [name].

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On proof made to the satisfaction of the court that the imposition of the costs and fees specified in *Code of Civil Procedure Section 1141.21* against the \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] would create such a substantial economic hardship as not to be in the interest of justice,

IT IS ORDERED that the motion be, and it hereby is, granted and that \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] is not required to pay costs and fees under *Code of Civil Procedure Section 1141.21* in this matter.

Date: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 1141.21; Cal Rules Ct, Rule 3.826(d)*

**Related Form of Motion:**

See 24.74



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Chapter 24 Pretrial ADR

VIII. FORMS

F. Mediation of Claims Under Civil Action Mediation Act

*2-24 MB Practice Guide: CA Pretrial Civil Procedure 24.76*

**24.76 Judicial Council Form ADR-100 Statement of Agreement or Nonagreement.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*CCP § 1775.9*; Judicial Council Form ADR-100 is mandatory [*CCP § 1775.9*]



**Timing:**

See 24.59



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Chapter 25 Reference

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.syn*

**§ 25.syn Synopsis to Chapter 25: Reference**

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25.24 [Reserved]

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Chapter 25 Reference  
I. STRATEGY

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.01*

**25.01 Scope.**

This chapter covers:

- Objectives and strategy for obtaining the appointment of a referee in an action or proceeding [see 25.02].
- Obtaining appointment of a referee pursuant to an agreement of the parties under *CCP* § 638 [see 25.04[1]], including the procedure and requirements for an order appointing a referee under that section [see 25.05; Forms: see 25.23 -25.27].
- Obtaining appointment of a referee on motion pursuant to *CCP* § 639, when the parties have not agreed to reference [see 25.06[1], [2]] including the procedure and requirements for the order [see 25.06[3][4]; Forms: see 25.23 -25.26].
- Procedures for selection of the individual to serve as referee [see 25.07].
- Choosing the location of the hearing before the referee [see 25.08].
- The matters the referee must disclose, including the timing of the disclosures [see 25.09].
- The procedural requirements for conduct of a hearing before the referee [see 25.10[1], [2]], and the scope of authority of a discovery referee [see 25.10[3]].
- The post-hearing procedural requirements, including the statement of decision to be rendered by a referee [see 25.11[1]], and the referee's duties regarding the exhibits from the hearing [see 25.11[2]].
- The effect of the referee's decision, including moving to confirm or adopt the referee's report [see 25.12; Form: see 25.27].
- The manner of payment of the referee's fees [see 25.13].

- Circumstances requiring return of a case to the trial court calendar [see 25.16; Form: see 25.28].
- Opposing appointment of a referee [see 25.17; Form: see 25.29], including peremptory challenges [see 25.17[2]] and specific grounds for objection to the appointment of a particular referee [see 25.17[3]].
- Objecting to a referee's report or recommendations [see 25.20 -25.22], including moving for a new trial after a general reference [see 25.20; Form: see 25.32] and making objections and moving to set aside a referee's report after a special reference [see 25.21, 25.22; Forms: see 25.30 -25.31].

**Core Statutes:**

*CCP §§ 638, 639*



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Chapter 25 Reference  
I. STRATEGY

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.02*

**25.02 Objective and Strategy.**

**25.02[1] Types of Reference.** Reference is the procedure by which a referee is appointed in a civil case to hear issues of fact and law and report to the court [see *CCP* §§ 638-645.2]. It may be either "general" (voluntary only) or "special" (voluntary or involuntary) [see *CCP* §§ 638(a), (b), 639].

**25.02[2] General Reference.** As a consensual proceeding, in a general reference the referee can finally decide any or all issues of fact and law [ *Ellsworth v. Ellsworth* (1954) 42 C2d 719, 722, 269 P2d 3 ; see *Murphy v. Padilla* (1996) 42 CA4th 707, 713, 49 CR2d 722 ], and the referee's decision stands as the decision of the court [*CCP* 644(a)]. Thus, an agreement for reference may provide an expeditious disposition of all issues.

**25.02[3] Special Reference.** A special reference can be used to resolve disputes that are complex or require special expertise, and may be used in a manner somewhat similar to an agreement to arbitrate. But in a reference, the decisions are subject to review in a manner that is not available in an arbitration where errors of law or of fact are generally not reviewable. Reference may be particularly appropriate in cases where there are complex or technical issues, but there is one or more key unresolved issues of law for which the parties wish to retain the right to access to the appellate courts.

A "special" reference, in which the referee is appointed only for a specific, limited purpose may be ordered with or without the parties' consent [see *CCP* §§ 638, 639]. A special reference may be ordered pursuant to:

- The agreement of the parties [*CCP* § 638];
- A motion filed by one of the parties [*CCP* § 639(a)]; or
- The court's own motion [*CCP* § 639(a)].

A special reference ordered pursuant to a motion may only discharge the purposes specified by statute [see *CCP* § 639(a) (instances authorizing appointment of referee)]. The report of the referee in a special reference is considered advisory only and may be adopted or disregarded by the court [*CCP* § 644(b)]. Thus, a special reference may be desirable to narrow or focus issues for trial.

**25.02[4] Discovery Referees.** Often the decision to request a discovery referee, a special reference, requires consideration of the manner in which discovery would be handled without a discovery referee (*e.g.*, by a specially assigned judge who also will preside over trial or by a discovery commissioner who may be unable to devote much attention to the case), the difficulty and complexity of the discovery likely to be involved, and the expense of a discovery referee in relation to the amount in dispute. Often one side of a dispute has relatively little access to the key facts (*e.g.*, the plaintiff in a fraud case) and will be the party propounding discovery, while the other side's goal is to resist discovery. Although there can be significant expense associated with having a private judge serve as a discovery referee, often the appointment and availability of a discovery referee will help cause a recalcitrant party to be more cooperative. Discovery referees, for example, often will make themselves available by telephone to resolve disputes that may arise during the course of a deposition. In contrast, few judges or commissioners are willing to become involved in such telephone conferences.

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 38, Reference (Matthew Bender).

California Points and Authorities, Ch. 201, Reference and Referees (Matthew Bender).

 **Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudicial OfficersReferences





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Chapter 25 Reference  
II. OBTAINING APPOINTMENT OF A REFEREE

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.03*

**25.03 CHECKLIST: Obtaining Appointment of a Referee.**

☐ Determine purpose and scope of reference sought:

☐ General reference, only with consent of parties, in which referee will hear and determine all issues of law and fact; or

☐ Special reference, with or without consent of parties, in which referee will be appointed for specific limited purpose.

**Authority:**  
*CCP §§ 638, 639*

**Discussion:**  
*See 25.02*

☐ Determine whether parties have agreed, or will agree, to appointment of referee for purpose(s) and scope sought:

☐ In written contract or lease providing that controversy arising from contract or lease must be heard by referee; or

☐ By stipulation for reference to be filed with court or entered in the minutes.

**Authority:**  
*CCP § 638*

**Discussion:**  
*See 25.04*

☐ If parties agree to reference, determine whether parties also agree on whom court should appoint as referee. If so, prepare referee's certification and disclosure, and obtain referee's signature.

**Authority:**

*Cal Rules Ct, Rule 3.904*

**Discussion:**

*See 25.05[2][b]*

☐ If written contract or lease provides for reference:

☐ Prepare notice of motion and motion for appointment of referee pursuant to agreement of parties, with:

☐ Supporting declaration.

☐ Supporting memorandum.

☐ Written contract or lease.

☐ Proposed order appointing referee.

☐ Certificate of referee, if parties agree as to individual(s) to be appointed.

☐ Serve and file motion according to standard motion procedure.

**Authority:**

*CCP § 638; Cal Rules Ct, Rules 3.901, 3.902*

**Discussion:**

*See 25.05*

**Forms:**

*See 25.22 (notice of motion and motion for appointment of referee), 25.23 (stipulation or motion for order appointing referee), 25.26 (certificate of referee)*

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.39*

☐ If parties will stipulate to appointment of referee:

☐ Prepare stipulation with:

☐ Proposed order appointing referee.

☐ Certificate and disclosure of referee, if parties agree on individual(s) to be appointed.

☐ Cover letter to clerk requesting that stipulation and proposed order be presented to judge for signature.

☐ Mail or deliver stipulation and proposed order to court.

**Authority:**

*CCP § 638; Cal Rules Ct, Rule 3.901, 3.902*

**Discussion:**

*See 25.05*

**Forms:**

*See 25.23 (stipulation or motion for order appointing referee), 25.25 (order appointing referee)*

☐ If privately compensated referee is appointed pursuant to parties' agreement, determine whether to move to seal records:

☐ Prepare notice of motion and motion to seal records with:

☐ Supporting declaration.

☐ Supporting memorandum.

☐ Serve the motion on all parties who have appeared in the case and the referee.

☐ File the motion for hearing by the assigned judge, or, if the case is not assigned, presiding judge, or his or her designee.

**Authority:**

*Cal Rules Ct, Rule 3.932(a)*

**Discussion:**

*See 25.05[3]*

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.39*

☐ If parties cannot agree to reference, determine whether grounds exist for motion for appointment of referee:

☐ Trial of an issue of fact requires the examination of a long account.

- ☐ Taking of an account is necessary for the information of the court before judgment, or for effecting a judgment or order.
- ☐ Question of fact, other than upon the pleadings, has arisen on motion or otherwise, in any stage of the action.
- ☐ Necessary for the information of the court in a special proceeding.
- ☐ Court determines it is necessary to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery and to report findings and make a recommendation to the court.

**Authority:**

*CCP § 639(a); Cal Rules Ct, Rule 3.922(c)*

**Discussion:**

*See 25.06[2]*

☐ If grounds for motion for appointment of referee exist:

- ☐ Prepare notice of motion and motion for appointment of referee, with:
  - ☐ Supporting declaration.
  - ☐ Supporting memorandum.
  - ☐ Proposed order appointing referee.
  - ☐ Certificate of referee, if the motion requests appointment of a particular person as referee.
- ☐ Serve and file motion according to standard motion procedure.

**Authority:**

*CCP § 639(a); Cal Rules Ct, Rules 3.921, 3.922, 3.924(a), (c)*

**Discussion:**

*See 25.06*

**Forms:**

*See 25.23 (stipulation or motion for order appointing referee), 25.25 (order appointing referee), 25.26 (certificate of referee)*

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.39*



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Chapter 25 Reference  
II. OBTAINING APPOINTMENT OF A REFEREE

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.04*

**25.04 Options and Strategies for Party Seeking Appointment of Referee.**

**25.04[1] Referee May Be Appointed Under CCP § 638 Pursuant to Agreement of Parties.**

**25.04[1][a] Consent for Reference May Be by Stipulation or Provision of Written Contract or Lease.** The parties to an action or proceeding may stipulate, either in writing or by agreement in open court, to the appointment of a referee. A referee may be appointed [*CCP § 638*]:

- Pursuant to an agreement of the parties filed with the clerk or judge, or entered in the minutes; or
- On motion of a party to a written contract or lease that provides that any controversy arising from the contract or lease must be heard by a referee.

The "may" in the statute authorizing appointment of referees pursuant to a reference agreement makes the appointment discretionary, not mandatory [*Tarrant Bell Property, LLC v. Superior Court* (2009) 179 CA4th 1283, 1290, 102 CR3d 235].

**Distinguish--Agreement for Outside Expert Opinion:**

A stipulation that the court may appoint an expert to render an opinion is not a reference if it fails to allow the expert to hear witnesses and make findings of fact [ *Petroleum Midway Co. v. Zahn* (1944) 62 CA2d 645, 650, 145 P2d 371 ].

**Distinguish--Consent to Reference/Consent to Particular Referee:**

An agreement for an order appointing a referee does not constitute a waiver of grounds for objection to the appointment of a particular person as the referee [*Cal Rules Ct, Rule 3.905*].

➤ **Cross References:**

Discussion of objections to appointment of particular person as referee, see 25.17. Discussion of selection procedure when parties agree to reference but not to appointment of particular referee, see 25.07[2].

**25.04[1][b] Parties May Agree to General or Specific Reference.** The court may appoint a referee, pursuant to the agreement between the parties [CCP § 638]:

- To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision; and/or
- To ascertain a fact necessary to enable the court to determine an action or proceeding.



**Warning:**

To have a valid general reference, the parties must consent, and the order of the court must specify that the referee is authorized to decide all issues [ *Murphy v. Padilla* (1996) 42 CA4th 707, 713-714, 49 CR2d 722 ].

**Example--Requirements for General Reference Not Met:**

The parties did not stipulate to reference. The court appointed a special referee pursuant to CCP § 639 to hear all law and motion and summary judgment matters. The plaintiff moved for partial summary judgment, and the referee heard the motion and submitted a report to the court. The court treated the referee's findings and conclusions as binding and determinative and entered partial summary judgment for the plaintiff. The appellate court ordered vacatur of the partial summary judgment because the special referee had no authority to make a binding determination of liability without the parties' consent [ *Aetna Life Ins. Co. v. Superior Court* (1986) 182 CA3d 431, 435-436, 227 CR 460 ].



**Cross Reference:**

Discussion of requirements for reference under CCP § 638, see 25.05.

**25.04[2] Reference May Be Ordered on Motion Under CCP § 639.** When the parties do not consent to the appointment of a referee, the court may, on the written motion of any party, or on its own motion, appoint a referee in specified circumstances [see CCP § 639(a)].

**Distinguish--Appointment of Mediator:**

A court cannot use the reference procedure under CCP § 639 to appoint a person to conduct a mediation [Cal Rules Ct, Rule 3.920(b)]. However, this rule does not limit the power of a court to appoint a referee to conduct a mandatory settlement conference in a complex case, or prevent a court, after the termination of a reference, from appointing a person who previously served as a referee to conduct a mediation [Cal Rules Ct, Rule 3.920, Advisory Committee Comment].



**Cross References:**

Discussion of procedure for reference under CCP § 639, see 25.06. Discussion of grounds for appointment of referee without consent of parties, see 25.06[2].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferences



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II. OBTAINING APPOINTMENT OF A REFEREE

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.05*

**25.05 Reference by Agreement Governed by Procedure Under CCP § 638.**

**25.05[1] Written Stipulation or Motion Must Be Presented to Court With Proposed Order.** A written stipulation or motion for an order appointing a referee pursuant to *CCP § 638* must be presented [*Cal Rules Ct, Rule 3.901(a)*]:

- To the judge to whom the case is assigned; or
- To the presiding judge or law and motion department if the case has not been assigned.

The motion must be based on a written contract or lease that provides that any controversy arising therefrom is to be heard by a referee if the court finds a reference agreement exists between the parties [*CCP § 638*].

In either case, the stipulation or motion for appointment of a referee must [*Cal Rules Ct, Rule 3.901(b)*]:

- Clearly state whether the scope of the requested reference includes all issues or is limited to specified issues;
- State whether the referee will be privately compensated;
- If authorization to use court facilities or court personnel is requested, describe the use requested and state the reasons that the use would further the interests of justice;
- If the applicant is requesting or the parties have stipulated to the appointment of a particular person as referee, be accompanied by the proposed referee's certification as required by *Cal Rules Ct, Rule 3.904(a)* [*see 25.05[4]*]; and
- Be accompanied by a proposed order that includes the matters specified in *Cal Rules Ct, Rule 3.902* [*see 25.05[2]*].

### ► Cross References:

Forms, see 25.23 (California Judicial Council Form ADR-109 Stipulation or Motion for Order Appointing Referee (Alternative Dispute Resolution)), 25.25 (California Judicial Council Form ADR-110 Order appoint Referee (Alternative Dispute Resolution)).

### 25.05[2] Contents of Order.

**25.05[2][a] Order Must Identify Proposed Referee.** If the applicant is requesting or the parties have stipulated to the appointment of a particular person as referee, the proposed order must state [*Cal Rules Ct, Rules 3.901(b)(4), 3.902(1)*]:

- The name, business address, and telephone number of the proposed referee; and
- The proposed referee's State Bar number if he or she is a member of the State Bar.

If the proposed referee is a former California judicial officer, he or she must be an active or inactive member of the State Bar [*Cal Rules Ct, Rule 3.903*].

The court's order of appointment of a referee by agreement of the parties must state the aforementioned information concerning the person ultimately appointed as the referee in the case [*Cal Rules Ct, Rule 3.902(1)*].

### ► Investigating Referees Using Online Resources:

Many resources are available online for investigating referees. These resources can aid you in assessing referee or potential referee in your case. For example, helpful resources at *lexis.com* include:

- To find biographical information on a referee in California, search Legal tab > Reference > Biographies > Biographies.

○ Sample Search: To find information about a specific referee, try a NAME segment search such as: *name (first name /3 last name) and state (ca)*

- To find news articles that have mentioned a specific referee, search Legal tab > States Legal--U.S. > California > General News & Information > California news publications.

○ Sample Search: To find news items about the referee, try a simple search in this format: *first name /3 last name*

### ► Cross Reference:

Discussion of selection procedure when parties agree to reference but not to appointment of particular referee, see 25.07[2].

**25.05[2][b] Order Must State Whether Referee Is To Be Privately Compensated.** The proposed order filed with the application for appointment of referee by agreement of the parties must state whether the referee will be privately compensated [*Cal Rules Ct, Rules 3.901(b)(5), 3.902(3)*].

The order of appointment of a referee by agreement of the parties issued by the court must state whether the referee will be privately compensated [*Cal Rules Ct, Rule 3.902(3)*].



**25.05[2][c] Order Must Specify Scope of Reference.** The proposed order and the final order must clearly state whether the scope of the reference covers all issues or is limited to specified issues [*Cal Rules Ct, Rules 3.901(b)(5), 3.902(2)*].

 **Cross Reference:**

Discussion of effect of referee's decision, see 25.12.

**25.05[2][d] Order Must State Whether Use of Court Facilities and Personnel Is Authorized.** The proposed order and the final order for appointment of referee by agreement of the parties must state whether the use of court facilities and court personnel is authorized [*Cal Rules Ct, Rules 3.901(b)(5), 3.902(4)*].

 **Cross Reference:**

Discussion of use of court facilities and personnel in reference under *CCP* § 638, see 25.08[1].

**25.05[3] Party May Move to Seal Records.** A party's motion to seal records in a cause before a referee must be filed with and heard by the judge to whom the case is assigned, or the presiding judge or his or her designee. The motion must be served on the referee and all parties who have appeared in the case. *Cal Rules Ct, Rules 2.550 and 2.551*, applicable to motions to seal court records, apply to the motion [*Cal Rules Ct, Rule 3.932(a)*].

 **Cross Reference:**

Discussion of request for appropriate hearing site, see 25.08[1][c].

Discussion and form of motion to seal court records under *Cal Rules Ct, Rules 2.550 and 2.551*, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, § 2.11 *et seq.*

**25.05[4] Appointed Referee Must File Certification Before Serving.** Before beginning to serve, a referee appointed by agreement must [*Cal Rules Ct, Rule 3.904(a)*]:

- Certify in writing that he or she consents to serve as provided in the order of appointment and is aware of and will comply with applicable provisions of *Cal Rules of Ct*, *Code Jud Ethics*, *Canon 6*, and the *California Rules of Court*; and
- File the certification with the court.

 **Cross Reference:**

Form of referee's certification, see 25.26.

**25.05[5] Referee Must File Statement of Contact Information.** In each case in which he or she is appointed referee, a referee must file a statement that provides the name, telephone number, and mailing address of a person who may be contacted to obtain information about the date, time, location, and general nature of all hearings scheduled in matters pending before the referee that would be open to the public if held before a judge [*Cal Rules Ct, Rule 3.931(b)(1)*]. The referee may also provide the address of a website containing the information [*Cal Rules Ct, Rule 3.931(b)(2)*].



**Timing:**

The referee must file his or her statement of contact information at the same time that he or she files the certification under *Cal Rules Ct, Rule 3.904(a)* or *3.924(a)* [*see* § 25.05[4]] that is required of referees [*Cal Rules Ct, Rule 3.931(b)(1)*].

If the referee's contact information changes during the pendency of a case, the referee must promptly file a revised statement with the court in the case [*Cal Rules Ct, Rule 3.931(b)(1)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferences



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*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.06*

**25.06 Procedure to Obtain Order Appointing Referee Governed by CCP § 639 When Parties Do Not Agree.**

**25.06[1] Court May Appoint Referee on Motion by Party or on Own Motion.** If the parties have not agreed to the appointment of a referee, the court may, under specified circumstances, appoint a referee [*CCP § 639(a)*]:

- On the written motion of any party; or
- On its own motion.

➡ **Cross References:**

Forms, see 25.23 (California Judicial Council Form ADR-109 Stipulation or Motion for Order Appointing Referee (Alternative Dispute Resolution)), 25.25 (California Judicial Council Form ADR-110 Order appoint Referee (Alternative Dispute Resolution)).

**25.06[2] Grounds for Appointment of Referee.** The court may appoint a referee, without the agreement of the parties, only in the following cases [*Cal Rules Ct, Rule 3.920(a)*]:

- When the trial of an issue of fact requires the examination of a long account on either side; the referee may be directed to hear and decide the whole issue, or report on any specific question of fact involved;
- When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;
- When a question of fact, other than upon the pleadings, arises on motion or otherwise, in any stage of the action;
- When it is necessary for the information of the court in a special proceeding; or
- When the court in any pending action determines that it is necessary for the court to appoint a referee

to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation to the court.



**Warning:**

A discovery referee cannot be appointed pursuant to *CCP* § 639(a)(5) unless the exceptional circumstances of the case require it [*Cal Rules Ct, Rule 3.920*].

**25.06[3] Hearing on Motion.** A motion by a party for the appointment of a referee pursuant to *CCP* § 639 must be served and filed [*Cal Rules Ct, Rule 3.921(a)*].

The motion must be heard [*Cal Rules Ct, Rule 3.921(b)*]:

- By the judge to which the case is assigned; or
- If the case has not been assigned, by the presiding judge or law and motion judge.

The motion must specify the matter or matters to be included in the requested reference [*Cal Rules Ct, Rule 3.921(a)*].

**25.06[4] Court Must Make Written Order.**

**25.06[4][a] Reason for Appointment Must Be Stated.** When a referee is appointed under *CCP* § 639(a), the order must state the reason for appointment of a referee [*CCP* § 639(d)(1); *Cal Rules Ct, Rule 3.922(c)(1)*].

**25.06[4][b] Order Must Specify Scope and Circumstances for Appointment of Referee in Discovery Disputes.** When a referee is appointed to hear discovery matters, the order must indicate whether the referee is being appointed for all discovery purposes in the action or only for limited purposes [*CCP* § 639(c); *Cal Rules Ct, Rule 3.922(d)(2)*].

The order appointing a referee for discovery matters must also state the exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case [*CCP* § 639(d)(2); *Cal Rules Ct, Rule 3.922(c)(2)*].

**25.06[4][c] Subject Matter Included in Reference Must Be Stated.** The order must state the subject matter or matters included in the reference [*CCP* § 639(d)(3); *Cal Rules Ct, Rule 3.922(d)(1)*].

**25.06[4][d] Referee Must Be Identified.** The order must include the name, business address, and telephone number of the referee [*CCP* § 639(d)(4); *Cal Rules Ct, Rule 3.922(b)*].

If the referee is a member of the State Bar, the order must include the referee's State Bar number [*Cal Rules Ct, Rule 3.922(b)*].

If the proposed referee is a former California judicial officer, he or she must be an active or inactive member of the State Bar [*Cal Rules Ct, Rule 3.923*].

**25.06[4][e] Certification Signed by Requested Referee Must Be Attached.** If the motion requests the appointment of a particular person as referee, the requested person's certification that he or she is aware of and will comply with applicable provisions of the Code of Judicial Ethics, Canon 6, and the California Rules of Court must be attached to the order [*Cal Rules Ct, Rule 3.921(a)*].



**Cross Reference:**

Form, see 25.26 (certificate of referee).

**25.06[4][f] Maximum Hourly Rate Must Be Stated.** The order must state the maximum hourly rate the referee may charge [CCP § 639(d)(5); *Cal Rules Ct, Rule 3.922(f)(1)*].

**25.06[4][g] Maximum Number of Hours May Be Stated.** At the request of any party, the order must include the maximum number of hours for which the referee may charge [CCP § 639(d)(5); *Cal Rules Ct, Rule 3.922(f)(1)*].

Upon the written application of any party or the referee, the court may, for good cause shown, modify the maximum number of hours for which the referee may charge [CCP § 639(d)(5)].

Any modification of the maximum hours is subject to any findings made concerning the parties' economic ability to pay [CCP § 639(d)(5), (6)].

#### **Cross Reference:**

Discussion of finding concerning economic ability to pay, see 25.06[4][h].

**25.06[4][h] Finding Concerning Economic Ability to Pay Must Be Made.** An order appointing a referee must include either [CCP § 639(d)(6)(A); *Cal Rules Ct, Rule 3.922(f)(2)*]:

- A finding that no party has established an economic inability to pay a pro rata share of the referee's fee; or
- A finding that one or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that additional share of the referee's fee.

#### **Warning:**

The party drafting a proposed order must include one of these two findings. A court cannot appoint a referee at a cost to the parties if neither of these findings is made [CCP § 639(d)(6)(A); *Cal Rules Ct, Rule 3.922(f)(2)*].

When the issue of economic hardship is raised before the commencement of the referee's services, the court must determine a fair and reasonable apportionment of the reference costs [*Cal Rules Ct, Rule 3.922(f)(3)*].

The court may modify its order as to the apportionment and may consider a recommendation by the referee as a factor in determining any modification [*Cal Rules Ct, Rule 3.922(f)(3)*].



#### **Strategic Points--Finding of Economic Inability to Pay:**

A party seeking a finding of economic inability to pay should be aware of the following [CCP § 639(d)(6)(B)]:

- In determining whether a party has established an inability to pay the referee's fees, the court can consider only the ability of the party, not the party's counsel, to pay these fees.
- If a party is proceeding in forma pauperis, the party is deemed by the court to have an economic inability to pay the referee's fees.

- A determination of economic inability to pay the fees is not limited to parties who proceed in forma pauperis.

- In determining whether a party has established an inability to pay the fees (for parties not proceeding in forma pauperis), the court must consider, among other things, the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation.

**25.06[4][i] Order Must State Authority of Discovery Referee.** An order appointing a referee under *CCP* § 639(a)(5) to hear and determine discovery motions and disputes relevant to discovery must state that the referee is authorized to set the date, time, and place for all hearings determined by the referee to be necessary; direct the issuance of subpoenas; preside over hearings; take evidence; and rule on objections, motions, and other requests made during the course of the hearing [*Cal Rules Ct, Rule 3.922(e)*].

**25.06[4][j] Order Must State Whether Use of Court Facilities and Personnel Is Authorized.** The order for appointment of referee under *CCP* § 639 must state the extent, if any, that the use of court facilities and court personnel in the reference is authorized [*Cal Rules Ct, Rule 3.922(g)*].

 **Cross Reference:**

Discussion of use of court facilities and personnel in reference under *CCP* § 639, see 25.08[2].

**25.06[5] Appointed Referee Must File Certification Before Serving.** Before beginning to serve, a referee appointed by agreement must [*Cal Rules Ct, Rule 3.924(a)*]:

- Certify in writing that he or she consents to serve as provided in the order of appointment and is aware of and will comply with applicable provisions of Code of Judicial Ethics, Canon 6, and the California Rules of Court; and

- File the certification with the court.

 **Cross Reference:**

Form of referee's certification, see 25.26.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**25.07 Procedure for Selection of Referee Varies Depending on Whether Agreement Controls.**

**25.07[1] Court Must Appoint Individual(s) Agreed to by Parties.** When the parties have agreed on the selection of a referee, the court must appoint the person or persons selected by the parties [CCP § 640(a)]. Up to three persons may be appointed as referees [CCP § 640(a)].

When there are three referees, all must meet, but two of them (a quorum) may do any act which might be done by all [CCP § 1053].

**25.07[2] Court Uses Selection Procedure When Parties Do Not Agree.**

**25.07[2][a] Parties Shall Submit Nominees.** If the parties do not agree on the selection of the referee or referees, each party shall submit to the court up to three nominees for appointment as referee [CCP § 640(b)]. The court must appoint one or more referees, not exceeding three, from among the nominees against whom there is no legal objection [CCP § 640(b)].

**25.07[2][b] If Parties Fail to Submit Nominees.** If no nominations are received from any of the parties, the court shall appoint one or more referees, not exceeding three, against whom there is no legal objection [CCP § 640(b)]. Alternatively, the court may appoint a court commissioner of the county where the cause is pending as referee [CCP § 640(b)].

**25.07[3] Participation in Selection Procedure Does Not Constitute Waiver of Objections.** Participation in the referee selection procedure does not constitute a waiver of grounds for objection to the appointment of a referee [CCP § 640(c)].



**Cross Reference:**

Discussion of objection to appointment of referee, see 25.17.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.08*

**25.08 Choosing Hearing Site for Proceeding Before Referee.**

**25.08[1] Reference Pursuant to Parties' Agreement to Use Privately Compensated Referee.**

**25.08[1][a] Parties Are Deemed to Have Elected to Proceed Outside Courthouse.** A party who has elected to use the services of a privately compensated referee pursuant to *CCP* § 638 is deemed to have elected to proceed outside the courthouse [*Cal Rules Ct, Rule 3.909(a)*].

Court facilities, court personnel, and summoned jurors cannot be used, except on a finding by the presiding judge or his or her designee that the use would further the interests of justice [*Cal Rules Ct, Rule 3.907*].

**25.08[1][b] Clerk Must Post Contact Information.** For a matter pending before a referee, the court clerk must post in the court facility the contact information set forth in the referee's statement of contact information [*Cal Rules Ct, Rule 3.931(c)(3)*].



**Cross Reference:**

Referee's statement of contact information, see § 25.05[5].

**25.08[1][c] Judge May Order Appropriate Hearing Site.** On the request of any person or on the judge's own motion, the presiding judge or his or her designee may order that a case before a referee must be heard at a site [*Cal Rules Ct, Rule 3.931(c)(1)*]:

- Easily accessible to the public; and
- Appropriate for seating those who have made known their plan to attend hearings.

A request for an appropriate hearing site must state the good cause for the request [*Cal Rules Ct, Rule 3.931(c)(1)*]. The request must be filed with the court and served on [*Cal Rules Ct, Rule 3.931(c)(1)*]:

- Each party, and

- The referee.

The proceedings are not stayed while the application is pending unless the presiding judge or his or her designee orders that they be stayed [*Cal Rules Ct, Rule 3.931(c)(1)*].

**Distinguish:**

An order for an appropriate hearing site is not grounds for withdrawal of a stipulation [*Cal Rules Ct, Rules 3.906(a)(2), 3.931(c)(1)*].

 **Cross Reference:**

Discussion of withdrawal of stipulation, see 25.16[1].

If a court staff mediator or evaluator is required to attend a hearing before a referee, unless otherwise ordered by the presiding judge or his or her designee, the location selected for the hearing must be no more than fifteen minutes' travel time from the mediator's or evaluator's work site [*Cal Rules Ct, Rule 3.931(c)(2)*].

All proceedings before a referee that would be open to the public if held before a judge must be open to the public [*Cal Rules Ct, Rule 3.931(a)*].

 **Cross Reference:**

Contact information for information about proceedings, see §§ 25.05[5], 25.08[1][b].

**25.08[2] Reference Ordered by Court Pursuant to CCP § 639.**

**25.08[2][a] Parties Are Entitled to Use Court Facilities.** A reference ordered on motion pursuant to *CCP* § 639 entitles the parties to the use of court facilities and court personnel to the extent provided in the order of reference [*Cal Rules Ct, Rule 3.926*].

**25.08[2][b] Proceedings May Be Held in Private Facility.** A reference ordered on motion pursuant to *CCP* § 639 may also be held in a private facility [*Cal Rules Ct, Rule 3.926*]. However, if the proceedings are in a private facility, that facility must be open to the public [*Cal Rules Ct, Rule 3.926*]. Specifically, all proceedings before a referee that would be open to the public if held before a judge must be open to the public [*Cal Rules Ct, Rule 3.931(a)*].

 **Cross Reference:**

Contact information for information about proceedings, see §§ 25.05[5], 25.08[1][b].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**25.09 Referee Must Make Disclosures.**

**25.09[1] Matters That Must Be Disclosed.**

**25.09[1][a] Matters Subject to Rules of Code of Judicial Ethics.** In addition to any other disclosure required by law, a referee must disclose to the parties any matter subject to disclosure:

- In a case of reference by agreement under *CCP* § 638, under Cal Rules Ct, Code Jud Ethics, Canon 6D(5)(a), (b) [*Cal Rules Ct, Rule 3.904(b)(1)*], or
- In a case of judicial appointment of referee under *CCP* § 639, under Cal Rules Ct, Code Jud Ethics, Canon 6D(2)(f), (g) [*Cal Rules Ct, Rule 3.924(b)(1)*].

**25.09[1][b] Personal Conflicts of Interest.** A referee must also disclose any significant personal or professional relationship the referee has or has had with a party, attorney, or law firm in the instant case [*Cal Rules Ct, Rules 3.904(b)(2), 3.924(b)(2)*]. The disclosure of any relationships must include the number and nature of any other proceedings in the past 24 months in which the referee has been privately compensated by a party, attorney, law firm, or insurance company in the instant case for any services, including, but not limited to [*Cal Rules Ct, Rules 3.904(b)(2), 3.924(b)(2)*]:

- Service as an attorney, expert witness, or consultant; or
- Service as a judge, referee, arbitrator, mediator, settlement facilitator, or other alternative dispute resolution neutral.

**25.09[2] Time Within Which Disclosure Must Be Made.** A referee must make disclosures no later than five days prior to the deadline for parties to file a motion for disqualification of the referee under *CCP* § 170.6 [*Cal Rules Ct, Rules 3.904(b), 3.924(b)*].

**Exception:**

If the referee is not aware of his or her appointment or of a matter subject to disclosure at that time, the

referee must make the disclosure as soon as practicable thereafter [*Cal Rules Ct, Rules 3.904(b), 3.024(b)*].

**Cross Reference:**

Discussion of disqualification pursuant to *CCP* § 170.6, see 25.17[2].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**25.10 Hearing Must Follow Statutory Procedural Requirements.**

**25.10[1] Statement Regarding Contact for Filing of and Access to Documents and Exhibits.** Temporary judges and referees must file a statement in each case in which they are appointed that provides the name, telephone number, and mailing address of a person who may be contacted to obtain access to any documents or exhibits submitted to the temporary judge or referee that would be open to the public if filed or lodged with the court. The statement must be filed at the same time as the temporary judge's or referee's certification under rule 2.831(b), 3.904(a), or 3.924(a). If there is any change in this contact information, the temporary judge or referee must promptly file a revised statement with the court [*Cal Rules Ct, Rules 2.400(d)(2)*].

**25.10[2] Filing Party Must Provide Documents to Referee and Court.**

**25.10[2][a] File Documents and Pay Fee to Court Clerk.** In a case pending before a referee, all original documents are to be filed with the clerk in the same manner as would be required if the case were being heard by a judge, including paying any required fees [*Cal Rules Ct, Rule 2.400(b)(1)*].



**Timing:**

All documents to be submitted to a temporary judge or referee must be filed within time limits specified by law [*Cal Rules Ct, Rule 2.400(b)(1)*].

**Exception:**

If a document would ordinarily be filed with the court after it is submitted to a judge or if a party submits an ex parte application, the party that submits the document or application to a temporary judge or referee must file the original with the court after the document or application has been submitted to the temporary judge or referee [*Cal Rules Ct, Rule 2.400(b)(3)*].



**Timing:**

An original document or application to be filed with the court *after* it is submitted to a temporary judge or referee must be filed with the court no later than the next court day after the document or application has been submitted to the temporary judge or referee [*Cal Rules Ct, Rule 2.400(b)(3)*].

**25.10[2][b] Provide Proper Copies of Documents to Referee.** The filing party must provide to the referee a file-stamped copy of each document relevant to the issues before the referee [*Cal Rules Ct, Rule 2.400(b)(1)*]. If a document would ordinarily be filed with the court after it is submitted to a judge or if a party submits an ex parte application, after submitting the document or application to the temporary judge or referee and filing the original with the court [see § 25.10[2][a]], the party must promptly provide a filed-stamped copy of the document or application to the temporary judge or referee [*Cal Rules Ct, Rule 2.400(b)(3)*].



**Warning:**

If a document must be filed with the court before it is considered by a judge, the temporary judge or referee must not accept or consider any copy of that document unless the document has the clerk's file stamp or is accompanied by a declaration stating that the original document has been submitted to the court for filing [*Cal Rules Ct, Rule 2.400(b)(2)*].

**25.10[2][c] Provide Referee Notice of Cancellation or Court Rejection of Filing.** A party who has submitted a document to a temporary judge or referee must immediately notify the temporary judge or referee if the document is not accepted for filing by the court or if the filing is subsequently canceled [*Cal Rules Ct, Rule 2.400(b)(4)*].

**25.10[3] Hearing Is Conducted in Same Manner As Trial Before Court.** A hearing before a referee is conducted in the same manner as a trial held before a court [ *In re McNamee (1933) 131 CA 30, 31, 20 P2d 722* ]. The Evidence Code applies in proceedings conducted by a referee [*Evid Code § 300*].

**Exception:**

A special reference for an accounting does not contemplate hearings or the taking of evidence; the parties are simply required to deliver to the referee all books, accountings, bank records, or other documentation requested by the referee [ *Jones v. Wagner (2001) 90 CA4th 466, 475, 108 CR2d 669* ].



**Warning:**

A referee or party may be subject to criminal penalties for engaging in unlawful communications about a pending cause or action outside the regular course of the proceedings [see *Pen Code §§ 95, 96*].



**Cross Reference:**

Contact information for information about proceedings, see §§ 25.05[5], 25.08[1][b].

**25.10[4] Scope of Authority of Discovery Referee.** When a referee is appointed under *CCP § 639(a)(5)* to assist in the resolution of a discovery dispute, the referee is authorized to [*Cal Rules Ct, Rule 3.922(e)*]:

- Set the date, time, and place for all hearings determined by the referee to be necessary;
- Direct the issuance of subpoenas;
- Preside over hearings;
- Take evidence; and
- Rule on objections, motions, and other requests made during the course of the hearing.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferences



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*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.11*

**25.11 Post-Hearing Procedural Requirements.**

**25.11[1] Statement of Decision.**

**25.11[1][a] Time for Filing Report Is Generally 20 Days After Hearing.** Unless otherwise directed by the court, a referee must report the statement of a decision in writing to the court within 20 days after the hearing, if any, has been concluded and the matter has been submitted [*CCP* § 643(a)].

The California Judicial Council has approved Form ADR-111, Report of Referee (Alternative Dispute Resolution), for the referee's optional use in reporting [*see Cal Rules Ct, Rule 1.35*].

**25.11[1][b] Referee Appointed Pursuant to Agreement of Parties Must Report in Accordance With Agreement.** A referee appointed under *CCP* § 638 pursuant to an agreement of the parties must report as agreed by the parties and approved by the court [*CCP* § 643(b)].

**25.11[1][c] Referee Appointed Without Agreement of Parties Must Address Specific Items and Serve Report on Parties.** A referee appointed on motion pursuant to *CCP* § 639 must file a report with the court that includes [*CCP* § 643(c)]:

- A recommendation on the merits of any disputed issue;
- A statement of the total hours spent and the total fees charged by the referee; and
- The referee's recommended allocation of payment.

The referee must serve the report on all parties [*CCP* § 643(c)].

➡ **Cross Reference:**

Discussion of objections to referee's report or recommendations, see 25.21.

**25.11[2] Rule of Court Governs Delivery of and Access to Exhibits.**

**25.11[2][a] Referee Must Deliver Exhibits to Clerk at Conclusion.** If proceedings are conducted by a referee outside of court facilities, the referee must keep all exhibits and deliver them, properly marked, to the clerk at the conclusion of the proceeding [*Cal Rules Ct, Rule 2.400(c)(2)*].

**Exception:**

The parties may file a written stipulation for alternative disposition of the exhibits, subject to court approval [*Cal Rules Ct, Rule 2.400(c)(2)*].

**Distinguish:**

For these purposes, a "court facility" consists of those areas within a building required or used for court functions [*Cal Rules Ct, Rule 2.400(e)*].

**25.11[2][b] Referee Cannot Release Exhibits in His/Her Possession Other Than to Clerk.** On request of the referee, the clerk must deliver exhibits to the possession to the referee, who cannot release them to any person other than the clerk [*Cal Rules Ct, Rule 2.400(c)(2)*].

**25.11[2][c] Referee Must Make Exhibits Available Upon Request.** Documents and exhibits in the possession of a temporary judge or referee that would be open to the public if filed or lodged with the court must be made available during business hours for inspection by any person within a reasonable time after request and under reasonable conditions [*Cal Rules Ct, Rule 2.400(d)(1)*].

 **Cross Reference:**

Referee notification of contact information, see § 25.10[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudicial OfficersReferences





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II. OBTAINING APPOINTMENT OF A REFEREE

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.12*

**25.12 Effect of Referee's Decision.**

**25.12[1] Decision Stands As Decision of Court If Consensual General Reference Under CCP § 638.** In the case of a consensual general reference pursuant to *CCP* § 638(a), the decision of the referee on the whole issue must stand as the decision of the court. When the statement of decision is filed with the clerk of court, or with the judge if there is no clerk, judgment may be entered in the same manner as if the action had been tried by the court [*CCP* § 644(a)].

➡ **Cross Reference:**

Discussion of motion for new trial after consensual general reference, see 25.20.

**25.12[2] In Special References, Decision Is Advisory.** In the case of all references other than general consensual references pursuant to *CCP* § 638, the decision of the referee is only advisory. The court may adopt the referee's recommendations in whole or in part after independently considering the referee's findings and any objections and responses thereto filed with the court [*CCP* § 644(b)].

➡ **Cross Reference:**

Discussion of objections to referee's report or recommendations, see 25.21.

**25.12[3] Party May Move Court to Confirm or Adopt Referee's Report in Special Reference.** In a special reference, the report of the referee does not become the decision of the court without further action by the trial judge. Until adoption of the report and the filing of the findings of fact and conclusions of law of the trial court, the report may be set aside without the necessity of granting a new trial [ *Ellsworth v. Ellsworth* (1954) 42 C2d 719, 723, 269 P2d 3 ].



**Strategic Point--Party in Agreement With Referee's Recommendations:**

A party in agreement with the recommendations of the referee should move to confirm or adopt the referee's report as soon as possible after the report is filed to indicate that party's position with respect to the report for the court's consideration.



**Cross Reference:**

Form, see 25.27 (notice of motion and motion to confirm or adopt referee's report).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudicial OfficersReferences



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2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.13

### 25.13 Payment of Referee's Fees.

**25.13[1] If Referee Is Appointed Pursuant to CCP § 638, Payment Must Be Made in Accordance With Parties' Agreement.** When a referee is appointed pursuant to *CCP* § 638, the referee's fees must be paid as agreed by the parties. If the parties do not agree on the payment of fees, and request the matter to be resolved by the court, the court may order the parties to pay the referee's fees, in the same manner as referees appointed pursuant to *CCP* § 639 [*CCP* § 645.1(a)].

#### Example:

The trial court erred in refusing to enforce a provision in a stipulation calling for a 50-50 split in payment of fees of referee appointed under *CCP* § 638 [ *Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 CA4th 25, 29-31, 82 CR3d 135 (citing *CCP* § 645.1)].

#### ➡ Cross Reference:

Discussion of orders for payment of fees to referee's fees appointed pursuant to *CCP* § 639, see 25.13[2].

**25.13[2] If Referee Is Appointed Pursuant to CCP § 639, Court Specifies Manner of Payment.** When a referee is appointed pursuant to *CCP* § 639, the court may order the parties to pay the fees of a referee who is not an employee or officer of the court at the time of appointment [*CCP* § 645.1(b); see *CCP* § 1023 (referee's fees as costs)]. The order for payment of fees may be made at any time after a determination of ability to pay is made [*CCP* § 645.1(b)].

The court may order payment of the referee's fees in any manner that is fair and reasonable, including an apportionment of the fees among the parties. The term "parties" does not include parties' counsel [*CCP* § 645.1(b)].

#### Examples--"Fair and Reasonable" Apportionment:

- Order requiring objecting party to pay entire cost of reference simply because the other party was indigent was not fair and reasonable [ *Taggares v. Superior Court* (1998) 62 CA4th 94, 105-106, 72 CR2d 387 ].

■ Order requiring parties to share referee fees equally was not fair and reasonable because court failed to consider one party's claim that having to pay referee fees would impact her ability to pursue the litigation [ *McDonald v. Superior Court* (1994) 22 CA4th 364, 369-370, 27 CR2d 310 ].



**Cross Reference:**

Discussion of required finding concerning economic ability to pay in order appointing referee, see 25.06[4][h].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudicial OfficersReferences



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III. OPPOSING APPOINTMENT OF A REFEREE

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.14*

**25.14 CHECKLIST: Opposing Appointment of a Referee.**

☐ If opposing party has filed a motion for reference based on written contract or lease providing for appointment of referee, prepare and serve opposition to motion, if any, in accordance with standard motion procedure.

**Authority:**

*CCP § 638*

**Discussion:**

*See 25.15*

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.46*

☐ If opposing party has presented a stipulation for reference to court, determine whether grounds exist for motion to withdraw stipulation for appointment of referee.

☐ If grounds exist, prepare:

☐ Notice of motion and motion to withdraw stipulation;

☐ Supporting declaration; and

☐ Supporting memorandum.

☐ Serve and file motion according to standard motion procedure.

**Authority:**

*CCP § 638; Cal Rules Ct, Rule 3.906*

**Discussion:**

*See 25.16[1]*

**Form:**

*See 25.28 (notice of motion and motion to withdraw stipulation)*

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.39*

☐ If opposing party has filed a motion for appointment of referee pursuant to *CCP § 639(a)*:

☐ Determine response to motion including:

☐ Objections to grounds stated in motion for appointment of referee;

☐ Own nominees for referee, if motion is granted; and/or

☐ Own economic ability to pay referee's fees.

☐ Serve and file opposition according to standard motion procedure.

**Authority:**

*CCP §§ 639, 640(c)*

**Discussion:**

*See 25.06, 25.17[1]*

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.46*

☐ If an individual has been nominated as referee, determine whether grounds exist for objecting to the appointment.

If grounds exist:

☐ File objections with court with reasonable diligence;

☐ Serve objections on all parties and proposed referee; and

☐ Present objections at hearing for appointment.

**Authority:**

*CCP §§ 641-643; Cal Rules Ct, Rules 3.905, 3.925*

**Discussion:**

See 25.17[3]

☐ If an individual has been appointed as referee:

☐ Determine whether to file peremptory challenge.

☐ If referee is appointed for all discovery purposes, make peremptory challenge:

☐ Within 10 days after notice of the appointment, if party has appeared; or

☐ Within 10 days after appearance.

☐ If referee is appointed for limited discovery purposes, make peremptory challenge at least 5 days before date set for hearing, if referee is known at least 10 days before date set for hearing.

**Authority:**

*CCP §§ 170.6, 639(b)*

**Discussion:**

See 25.17[2]

☐ Determine whether to file motion to vacate appointment, based on specific grounds for objection to appointment, not previously heard and disposed of by court during selection process.

☐ If grounds exist, prepare:

☐ Notice of motion and motion to vacate appointment of referee;

☐ Supporting declaration; and

☐ Supporting memorandum.

☐ Serve and file according to standard motion procedure.

**Authority:**

*CCP §§ 641, 641.2*

**Discussion:**

See 25.17[3]

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**Form:**

See 25.29 (notice of motion and motion to vacate appointment of referee)



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*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.15*

**25.15 Options and Strategy.**

**25.15[1] Options for Opposing Reference.** A party who wishes to completely oppose the appointment of a referee, can either file an opposition to a motion for appointment under *CCP* §§ 641, 641.2, or file a motion to withdraw a stipulation for reference under *Cal Rules Ct, Rule 3.906*.

A party seeking to oppose the appointment of a particular individual as referee, may:

- File an objection to the individual before the appointment [*Cal Rules Ct, Rules 3.905, 3.925*]; or
- File a peremptory challenge against an individual who has been appointed [*CCP 170.6*]; or
- File a motion to vacate the appointment, based on one or more of the grounds for disqualification [*CCP* § 641].

**25.15[2] Strategies for Party Opposing Reference.**

**25.15[2][a] Intervention by Nonparty.** An agreement for reference only applies as to the original parties to the agreement. If a nonparty is granted leave to intervene in an action before a privately compensated referee, the case must be returned to the trial docket unless all of the parties stipulate to have the matter heard by the referee [*Cal Rules Ct, Rule 3.932(b)*].

**25.15[2][b] Challenge to Method in Which Stipulation Was Obtained.** If a party has stipulated to reference and later determines that he or she wants the matter heard by the court, good cause to withdraw the stipulation must be shown [*Cal Rules Ct, Rule 3.906(a)*].



**Strategic Point:**

To establish good cause, counsel should consider matters such as the circumstances under which the stipulation was obtained and facts or issues that have been discovered since the stipulation.



**25.15[2][c] Challenge to Enforceability of Underlying Agreement.** If an opposing party moves to have a referee appointed pursuant to a written contract or lease between the parties providing for the appointment of a referee, the agreement itself should be carefully reviewed for issues as to its enforceability [see *Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 CA4th 723, 731-736, 132 CR2d 35 ; *Pardee Constr. Co. v. Superior Court* (2002) 100 CA4th 1081, 1086-1092, 123 CR2d 288 ].

**Example--Reference Provision Unenforceable:**

Property owners filed class action suit against construction company. The provision of the purchase agreement requiring the appointment of a referee to resolve the controversy was not enforceable because the agreements were found to be adhesive and unconscionable [ *Pardee Constr. Co. v. Superior Court* (2002) 100 CA4th 1081, 1086-1087, 123 CR2d 288 ].

**Example--Reference Provision Enforceable:**

Home buyers filed suit against developer. The purchase contracts contained provisions requiring binding judicial reference. Scrutinizing the provisions and distinguishing them from the contracts at issue in *Pardee Constr. Co. v. Superior Court* (2002) 100 CA4th 1081, 123 CR2d 288 , the court determined that the provisions were enforceable because the contracts did not contain the procedurally unconscionable elements present in the prior case [ *Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 CA4th 723, 728-730, 132 CR2d 35 ].

**25.15[2][d] Challenge of Particular Individual As Referee.** If a party objects to the appointment of a particular individual as referee, the objection must be made with reasonable diligence [*Cal Rules Ct, Rules* 3.905, 3.925]. The objection should therefore be made, if possible, before appointment during the selection process.

**Drawback--Only One Peremptory Challenge:**

Although a referee is subject to peremptory challenge [*CCP § 170.6*], the parties are limited to one peremptory challenge each [*CCP § 170.6(a)(3)*]. Therefore, if possible, a referee should be challenged for cause [see *CCP § 641*], to avoid unnecessarily using the peremptory challenge.

 **Cross References:**

Discussion of circumstances requiring return of case to trial calendar, see 25.16. Discussion of peremptory challenge of referee, see 25.17[2]. Discussion of grounds for disqualification of referee, see 25.17[3].

**25.15[2][e] Judicial Economy Supports Denial of Reference.** A trial court may refuse to enforce a reference agreement where there is a possibility of conflicting rulings on a common issue of law or fact or other circumstances related to considerations of judicial economy, consistent with the purposes and policies of *CCP § 638* [*Tarrant Bell Property, LLC v. Superior Court* (2009) 179 CA4th 1283, 1295, 102 CR3d 235].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferences



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2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.16

**25.16 Circumstances Requiring Return of Case to Trial Court Docket.**

**25.16[1] Motion to Withdraw Stipulation for Appointment of Referee.** A party who previously stipulated to the appointment of a referee may move to withdraw the stipulation [*see Cal Rules Ct, Rule 3.906*]. The notice of the motion must be served on all parties and the referee, and filed with the court [*Cal Rules Ct, Rule 3.906(b)*].

A motion to withdraw a stipulation for the appointment of a referee must be [*Cal Rules Ct, Rule 3.906*]:

- Supported by a declaration of facts establishing good cause for permitting the party to withdraw the stipulation; and
- Heard by the judge to whom the case is assigned, or the presiding judge or law and motion judge.

If the motion is granted, the case must be transferred to the trial court calendar [*Cal Rules Ct, Rule 3.906(b)*].



**Warning--Party Seeking to Withdraw Stipulation:**

The following do not constitute good cause for withdrawal of a stipulation for appointment of referee:

- A declaration that a ruling is based on an error of fact or law [*Cal Rules Ct, Rule 3.906(a)(1)*].
- An order for an appropriate hearing site accessible to the public [*Cal Rules Ct, Rule 3.906(a)(2)*].



**Cross References:**

Form, see 25.28 (notice of motion and motion to withdraw stipulation for appointment of referee).  
Discussion of order for appropriate hearing site, see 25.08[1][c].

**25.16[2] Motion for Leave to File Complaint in Intervention.** If a nonparty seeks to intervene in a case before a privately compensated referee, the motion for leave to file a complaint in intervention must be [*Cal Rules Ct, Rule 3.908*]:

- Served on the referee and all parties who have appeared in the case, and filed with the court; and
- Heard by the assigned judge or, if the case is not assigned, by the presiding judge or his or her designee.

If intervention is allowed, the case must be returned to the trial court calendar unless all parties stipulate to proceed before the referee [*Cal Rules Ct, Rule 3.932(b)*].

**Cross Reference:**

Discussion and form of motion for leave to intervene, see Ch. 31, Intervention.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudicial OfficersRefereesAppointments



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*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.17*

**25.17 Objections to Reference or Referee.**

**25.17[1] Manner of Making Objections.**

**25.17[1][a] Objections Must Be in Writing, Heard by Court.** Any objections to a reference or to the referee or referees appointed by the court must be made in writing and must be heard and disposed of by the court, not by the referee [*CCP* § 642].

Any objection to the appointment of a person as referee must be in writing and must be [*Cal Rules Ct, Rules 3.905, 3.925*]:

- Made with reasonable diligence; and
- Filed and served upon all parties and the referee.

**25.17[1][b] Agreeing to Reference Does Not Constitute Waiver of Objections to Referee.** A stipulation or agreement for an order appointing a referee does not constitute a waiver of grounds for objection to the appointment of a particular person as referee [*Cal Rules Ct, Rule 3.905*].

**25.17[1][c] Participation in Selection Process Does Not Constitute Waiver of Objections to Referee or Compensation.** Participation in the selection procedure, used by the court when the parties do not agree on the person to be appointed as referee, does not constitute a waiver of grounds for objection to [*CCP* § 640(c); see *Cal Rules Ct, Rule 3.925*]:

- The appointment of a particular person as referee; or
- The rate or apportionment of compensation of the referee.



**Cross Reference:**

Discussion of selection procedure, see 25.07[2].

### 25.17[2] Peremptory Challenge of Referee.

**25.17[2][a] Referee May Be Disqualified by Peremptory Challenge Pursuant to CCP § 170.6.** A referee may be disqualified by peremptory challenge, in the same manner a judge may be disqualified, on the ground that the referee is prejudiced against [CCP § 170.6(a)(2)]:

- A party or attorney; or
- The interest of any party or attorney appearing in the action.



#### Strategic Point--Only One Peremptory Challenge:

A party is limited to one peremptory challenge [CCP § 170.6(a)(3)]. Therefore, a party should consider whether grounds exist for a challenge for cause against a particular referee before exhausting the peremptory challenge [see CCP § 641 (grounds for disqualification); [ *Baugh v. Garl* (2006) 137 CA4th 737, 746, 40 CR3d 539 ] (peremptory challenge to discovery referee was denied because party with unity of interest previously exercised peremptory challenge against judge in the case)].



#### Cross References:

Discussion of grounds for challenge for cause, see 25.17[3][a].

Discussion of procedure for peremptory challenge, see Ch. 22, *Disqualification of Judge*, 22.03 et seq.

**25.17[2][b] Peremptory Challenge Against Discovery Referee Must Be Made Within Specified Time.** If a referee has been appointed for all discovery purposes, a party must make a peremptory challenge pursuant to CCP § 170.6 against the referee either [CCP § 639(b)]:

- Within 10 days after notice of the appointment, if the party has appeared in the action; or
- Within 10 days after the appearance.

If a referee has been appointed for limited discovery purposes, a party must make a peremptory challenge against the referee at least five days before the date set for hearing, if the referee assigned is known at least 10 days before the date set for hearing [CCP § 639(b)].

### 25.17[3] Challenges for Cause.

**25.17[3][a] Party May Object to Appointment of Referee on Specified Grounds.** A party may object to the appointment of any person as referee, on one or more of the following grounds [CCP § 641]:

- A want of any of the qualifications prescribed by statute to render a person competent as a juror, except a requirement of residence within a particular county in the state.
- Consanguinity or affinity, within the third degree, to either party, or to an officer of a corporation which is a party, or to any judge of the court in which the appointment is made.
- Standing in the relation of guardian and ward, conservator and conservatee, master and servant, employer and clerk, or principal and agent, to either party.
- Being a member of the family of either party.

- Being a partner in business with either party.
- Being security on any bond or obligation for either party.
- Having served as a juror or been a witness on any trial between the same parties.
- Interest on the part of the person in the event of the action, or in the main question involved in the action.
- Having formed or expressed an unqualified opinion or belief as to the merits of the action.
- The existence of a state of mind in the potential referee evincing enmity against or bias toward either party.

**Strategic Point:**



To satisfy the requirement of making an objection "with reasonable diligence," a party should object to the appointment of a particular referee as soon as the grounds for objection are known [*see Cal Rules Ct, Rules 3.905, 3.925*]. If grounds for an objection are not known until after the referee is appointed, the objecting party must file a motion to vacate the appointment.



**Cross Reference:**

Discussion of motion to vacate appointment, see 25.17[3][c].

**25.17[3][b] Technical Qualifications Required in Environmental Pollution Actions.** In environmental actions brought under *Gov Code § 12600 et seq.*, a party may object to the appointment of any person as referee on the ground that he or she is not technically qualified with respect to the particular subject matter of the proceeding [*CCP § 641.2*].

**25.17[3][c] Party May Move to Vacate Appointment of Referee.** If the grounds for disqualification of a particular referee become known after the referee is appointed, the objecting party may file a motion to vacate the appointment to be heard by the court [*see CCP §§ 641, 642*].



**Cross Reference:**

Form, see 25.29 (notice of motion and motion to vacate appointment of referee).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersRefereesRemovals



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Chapter 25 Reference

#### IV. OBJECTING TO REFEREE'S REPORT OR RECOMMENDATIONS

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.18*

#### **25.18 CHECKLIST: Objecting to Referee's Report or Recommendations.**

- ☐ If referee has rendered report in general consensual reference pursuant to *CCP* § 638, review report and determine whether grounds exist to move for new trial.

**Authority:**

*CCP* §§ 645, 657

**Discussion:**

See 25.19

**Form:**

See 25.32 (notice of intention to move for new trial)

- ☐ If referee has rendered report in special reference:
- ☐ Determine what objections, if any, to raise to referee's report;
  - ☐ File objections within 10 days after referee serves and files report, or within time directed by court; and
  - ☐ Serve objections on:
    - ☐ The referee;
    - ☐ All other parties.
  - ☐ If opposing party has filed motion to confirm or adopt report, incorporate objections into response

to motion;

☐ If opposing party has not moved to confirm or adopt report, determine whether to file motion to set aside referee's report:

☐ Prepare notice of motion and motion to set aside referee's report with:

☐ Supporting declaration showing good cause for motion;

☐ Supporting memorandum.

☐ Serve and file motion according to standard motion procedure.

**Authority:**

*CCP § 643(c)*

**Discussion:**

*See 25.21, 25.22*

**Forms:**

*See 25.30 (objections to report of referee), 25.31 (notice of motion and motion to set aside referee's report)*

**Standard Procedure Checklist:**

*See Ch. 26, Motions and Orders, 26.39*





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Chapter 25 Reference

#### IV. OBJECTING TO REFEREE'S REPORT OR RECOMMENDATIONS

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.19*

#### 25.19 Options and Strategy.

**25.19[1] Options If Reference Is General Reference--CCP § 638.** If the report is rendered pursuant to a general consensual reference, the referee's decision becomes the decision of the court [CCP § 644(a)]. Therefore a motion for a new trial must be filed to have the report, and judgment thereon, set aside [see CCP § 657 (grounds for new trial)].

**25.19[2] Options If Reference Is Special Reference--CCP § 639.** If the report is rendered pursuant to a special reference, the referee's decision is advisory only and may be adopted, in whole or in part, or disregarded by the court [CCP § 644(b)]. Objections to the report should be filed with the court within 10 days of service of the report [CCP § 643(c)].

If an opposing party has filed a motion to confirm the report, the objections may be incorporated into the response to the motion to confirm. If the objecting party seeks to have the court disregard the report in its entirety, the objections can be incorporated into a motion to set aside the report.



#### **Strategic Point--Party Objecting to Referee's Report:**

When a referee has been appointed in a special reference, the court is required to treat the report as advisory only and independently consider the referee's findings [see CCP § 644(b)]. The court's failure to do so may render a judgment entered on the report subject to vacatur [see *Aetna Life Ins. Co. v. Superior Court* (1986) 182 CA3d 431, 436, 227 CR 460 ].

#### **Example:**

The court appointed a special referee pursuant to CCP § 639. The plaintiff moved for partial summary judgment, and the referee heard the motion and submitted a report to the court. The court treated the referee's findings and conclusions as binding and determinative and entered partial summary judgment for the plaintiff. The appellate court ordered vacatur of the partial summary judgment because the referee had no authority to make a binding determination of liability without the parties' consent, and the court had not independently considered the summary judgment matter [ *Aetna Life Ins. Co. v. Superior Court* (1986) 182 CA3d 431, 436, 227 CR 460 ].



**Cross References:**

Discussion of motion for new trial after general consensual reference, see 25.20. Discussion of requirements for filing objections to report in special references, see 25.21. Discussion of motion to set aside referee's report in special reference, see 25.22.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersReferences



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Chapter 25 Reference

#### IV. OBJECTING TO REFEREE'S REPORT OR RECOMMENDATIONS

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.20*

#### **25.20 Party May Move for New Trial After General Reference Under CCP § 638.**

**25.20[1] Decision Is Treated As Decision of Court.** In a general consensual reference pursuant under *CCP* § 638, the referee's decision becomes the decision of the court; it is subject to the same exceptions and manner of review as if made by the court [*CCP* §§ 644(a), 645]. Therefore, a party may object to the decision by moving for a new trial [see *CCP* § 657].

In general, the objections must be raised in the trial court before they will be reviewed on appeal; however, a motion for a new trial is not a prerequisite to an appeal based on insufficiency of the evidence [ *Estate of Raphael (1953) 115 CA2d 525, 528-529, 252 P2d 979* ].

**25.20[2] Grounds for New Trial.** After a general reference, a new trial may be granted, in whole or in part, on any of the following grounds:

- Irregularity in the proceedings of the court or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial [*CCP* § 657(1)];
- Accident or surprise, which ordinary prudence could not have guarded against [*CCP* § 657(3)];
- Newly discovered evidence, material for the party making the application, that the party could not, with reasonable diligence, have discovered and produced at the trial [*CCP* § 657(4)];
- Excessive or inadequate damages [*CCP* § 657(5)];
- Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law [*CCP* § 657(6)]; or
- Error in law occurring at the trial and excepted to by the party making the application [*CCP* § 657(7)].



**Cross References:**

Form, see 25.32.

For detailed discussion, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial, § 371.60 et seq. (Matthew Bender).

**25.20[3] Motion May Be Heard by Referee.** The motion for a new trial may be heard by the referee, unless the parties' stipulation and the order of reference indicate that the referee's powers expire once the decision is rendered [ *Clark v. Rancho Santa Fe Assn. (1989) 216 CA3d 606, 625-626, 265 CR 41* ].

**Example:**

A referee properly heard a motion for a new trial because the order for reference stated that the referee was to make "a complete and final adjudication" [ *Clark v. Rancho Santa Fe Assn. (1989) 216 CA3d 606, 625-626, 265 CR 41* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudicial OfficersReferences



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Chapter 25 Reference

#### IV. OBJECTING TO REFEREE'S REPORT OR RECOMMENDATIONS

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.21*

### 25.21 Objections to Referee's Report in Special Reference Proceeding.

**25.21[1] Objections Must Be Filed Within 10 Days.** Any party may file an objection to the referee's report or recommendations within 10 days after the referee serves and files the report [CCP § 643(c)].

**Exception:**

The court may direct a different time within which objections must be filed [CCP § 643(c)].



**Warning:**

A party's failure to promptly file written objections to a referee's report or to move to set aside the report may be deemed a waiver of those objections [ *Martino v. Denevi* (1986) 182 CA3d 553, 557-558, 227 CR 354 ].



**Cross References:**

Form, see 25.30 (objections to report of referee). Discussion of motion to set aside referee's report, see 25.22.

**25.21[2] Responses to Objections Must Be Filed Within 10 Days.** Responses to the objections to a referee's report or recommendations must be filed within 10 days after the objection is served [CCP § 643(c)].

**25.21[3] Objections Must Be Served on All Parties and Referee.** Objections and responses to objections to a referee's report or recommendations must be served on [CCP § 643(c)]:

- The referee; and
- All other parties.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersReferences



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Chapter 25 Reference

#### IV. OBJECTING TO REFEREE'S REPORT OR RECOMMENDATIONS

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.22*

##### **25.22 Party May Move to Set Aside Referee's Report in Special References.**

The court must review any objections to the referee's report and any responses to those objections [CCP § 643(c)].

The court shall then enter appropriate orders [CCP § 643(c)].

However, the court also has the power to change the terms of the referee's appointment or to modify or disregard the referee's recommendations [CCP § 643(c)]. This overriding power may be exercised at any time, either on [CCP § 643(c)]:

- The motion of any party for good cause shown; or
- The court's own motion.



##### **Strategic Point--Party Objecting to Report:**

Although the court has the power to disregard the referee's report "at any time," a party opposing the report should raise objections, if any, at the earliest possible opportunity, or move to set aside the entire report if appropriate under the circumstances, to avoid waiver of those objections [see *Martino v. Denevi* (1986) 182 CA3d 553, 556-558, 227 CR 354 ].



##### **Cross References:**

Form, see 25.31 (notice of motion and motion to set aside referee's report). Discussion of making written objections to referee's report, see 25.21.

##### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersRefereesJudicial ReviewCivil ProcedureJudicial OfficersReferences



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Chapter 25 Reference  
V. FORMS  
A. Obtaining Appointment of a Referee

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.23*

**25.23 Judicial Council Form ADR-109 Stipulation or Motion for Order for Appointing Referee (Alternative Dispute Resolution)**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*CCP § 638; California Judicial Council Form ADR-109 is approved for optional use [see Cal Rules of Ct, Rule 1.35]*

**Appointment of Referee Under CCP § 638:**

*See 25.04[1]*

**Contents of Order:**

*See 25.05[2]*

**Grounds for Reference Under CCP § 639:**

*See 25.06[2]*

**Related Form of Order:**

*See 25.25*

**Related Form of Certificate of Referee:**

*See 25.26*

**Related Forms of Memoranda:**



See *California Points and Authorities, Ch. 201, Reference and Referees, 201.10* (Matthew Bender)



**Cross Reference:**

For a fillable version of this form in electronic format, see *LexisNexisJ Automated California Judicial Council Forms*, which may be accessed at [www.lexis.com/forms](http://www.lexis.com/forms)



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Chapter 25 Reference

V. FORMS

A. Obtaining Appointment of a Referee

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.24*

**[Reserved]**

25.24[Reserved]



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Chapter 25 Reference  
V. FORMS  
A. Obtaining Appointment of a Referee

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.25*

**25.25 Judicial Council Form ADR-110 Order Appointing Referee (Alternative Dispute Resolution).**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*Cal Rules Ct, Rules 3.902, 3.922*; California Judicial Council Form ADR-110 has been approved by the California Judicial Council for optional use [see *Cal Rules of Ct, Rule 1.35*]

**Contents of Order for Reference Under CCP § 638:**

See 25.05[2]

**Contents of Order for Reference Under CCP § 639:**

See 25.06[4]

**Selection Procedure When Parties Do Not Agree on Referee:**

See 25.07[2]

**Related Form of Stipulation or Motion for Order:**

25.23

**Related Form of Certificate of Referee:**

See 25.26

**➤ Cross Reference:**

For a fillable version of this form in electronic format, see *LexisNexis(R) Automated California Judicial*

*Council Forms*, which may be accessed at [www.lexis.com/forms](http://www.lexis.com/forms)



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Chapter 25 Reference  
V. FORMS  
A. Obtaining Appointment of a Referee

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.26*

**25.26 Certificate of Referee.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |
|---------------|---|
| _____ [name], | ) |
| Plaintiff,    | ) |
| vs.           | ) |
| _____ [name], | ) |
| Defendant.    | ) |
|               | ) |
|               | ) |

\_\_\_\_\_

**CERTIFICATE OF [PROPOSED] REFEREE**

I, the undersigned, certify that I am aware of the provisions of the California Rules of Court pertaining to references and of canon 6 of the Code of Judicial Ethics. If and when I am appointed to serve as referee in this matter, I will comply with those provisions and rules.

Date: \_\_\_\_\_.

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name of referee]

---

[*business address, telephone number, and state bar number, if member of state bar*]

NOTES.

**Authority:**

*Cal Rules Ct, Rules 3.904(a), 3.924(a)*

**Certification Requirement:**

*See 25.05[2][c], 25.06[4][e]*

**Related Form of Order Appointing Referee:**

*See 25.25*



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Chapter 25 Reference

V. FORMS

A. Obtaining Appointment of a Referee

2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.27

**25.27 Notice of Motion and Motion to Confirm or Adopt Referee's Report.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
)  
) NOTICE OF MOTION AND MOTION TO  
) \_\_\_\_\_ [CONFIRM or ADOPT]  
) REFEREE'S REPORT AND TO ENTER JUDG-  
) MENT AND SUPPORTING MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_  
) Referee: \_\_\_\_\_

To \_\_\_\_\_ [opposing party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for an order to \_\_\_\_\_ [confirm or adopt] the referee's report filed in this matter on \_\_\_\_\_ [date] and to enter judgment in accordance with the findings set forth in the report. The motion will be made on the grounds that the report is supported

by the evidence.

The motion will be based on this notice of motion and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

#### SUPPORTING MEMORANDUM

[Set out memorandum here]

NOTES.

**Authority:**

*CCP § 644(b)*

**Motion to Confirm or Adopt Referee's Report in Special Reference:**

*See 25.12[3]*

**Related Form of Memoranda:**

*See California Points and Authorities, Ch. 201 Reference and Referees, § 201.70 (Matthew Bender)*





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Chapter 25 Reference  
V. FORMS  
B. Opposing Appointment of Referee

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.28*

**25.28 Notice of Motion and Motion to Withdraw Stipulation for Appointment of Referee.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NOTICE OF MOTION AND MOTION TO WITH-  
) DRAW STIPULATION FOR APPOINTMENT OF  
) REFEREE, SUPPORTING DECLARATION OF  
) \_\_\_\_\_ [name], AND SUPPORTING  
) MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_  
) Referee: \_\_\_\_\_

To \_\_\_\_\_ [opposing party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order to withdraw his/her stipulation for the appointment of a referee. The motion will be made on the grounds that good cause exists for permitting

\_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] to withdraw the stipulation.

The motion will be based on this notice of motion, on the declaration of \_\_\_\_\_ [name], on the supporting memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

#### SUPPORTING DECLARATION OF \_\_\_\_\_

I, \_\_\_\_\_, declare:

1. I am \_\_\_\_\_ [declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above].

2. Good cause exists for allowing \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] to withdraw the stipulation because \_\_\_\_\_ [specify, e.g., he was unrepresented by counsel and under extreme duress when the stipulation was signed].

3. \_\_\_\_\_ [Set forth, in consecutively numbered paragraphs, additional facts showing good cause for order(s) sought].

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]

#### SUPPORTING MEMORANDUM

[Set out memorandum here]

NOTES.

#### Authority:

Cal Rules Ct, Rule 3.906

**Return of Case to Trial Court Docket if Motion to Withdraw Stipulation Is Granted:**

See 25.16[1]



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Chapter 25 Reference  
V. FORMS  
B. Opposing Appointment of Referee

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.29*

**25.29 Notice of Motion and Motion to Vacate Appointment of Referee.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NOTICE OF MOTION AND MOTION TO VA-  
) CATE APPOINTMENT OF REFEREE AND AP-  
) POINT NEW REFEREE, SUPPORTING DECLAR-  
) ATION OF \_\_\_\_\_ [name], AND  
) SUPPORTING MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_  
) Referee: \_\_\_\_\_

To \_\_\_\_\_ [opposing party, e.g., Defendant Jones & Co.] and to his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon  
thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of]  
this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_  
[moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order vacating the appointment of  
\_\_\_\_\_ [name] as referee and appointing a new referee to hear, try, and determine

\_\_\_\_\_[*specify issues within scope of reference*]. The motion will be made on the grounds that \_\_\_\_\_ [*specify ground(s) under CCP § 641 or 641.2 for disqualification, e.g., he has expressed an unqualified opinion as to the merits of the action*].

The motion will be based on this notice of motion, on the declaration of \_\_\_\_\_ [*name*] on the supporting memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [*firm name*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

#### SUPPORTING DECLARATION OF \_\_\_\_\_

I, \_\_\_\_\_, declare:

1. I am \_\_\_\_\_ [*declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above*].

[*EITHER, if grounds for disqualification exist under CCP § 641(a)* ]

2. \_\_\_\_\_ [*Name of referee*] lacks the qualifications prescribed by *Code of Civil Procedure section 203*, other than the requirement of residence in a particular county, to render him/her competent to serve as a juror in that \_\_\_\_\_ [*specify, e.g., she is no longer a domiciliary of the State of California*].

[*AND/OR, if grounds for disqualification exist under CCP § 641(b)* ]

2. \_\_\_\_\_ [*Name of referee*] is \_\_\_\_\_ [*specify nature of disqualifying relationship under CCP § 641(b), e.g., he is the brother-in-law of a vice president of Jones & Co., a defendant in this action*].

[*AND/OR, if grounds for disqualification exist under CCP § 641(c)* ]

2. \_\_\_\_\_ [*Name of referee*] is \_\_\_\_\_ [*specify nature of disqualifying relationship under CCP § 641(c), e.g., he is an agent of Jones & Co., a defendant in this action*].

[*AND/OR, if grounds for disqualification exist under CCP § 641(d)* ]

2. \_\_\_\_\_ [*Name of referee*] \_\_\_\_\_ [*served as a juror or was a witness*] in the trial held

in \_\_\_\_\_ [title of case], Case Number \_\_\_\_\_, in \_\_\_\_\_ [specify court], which was an action between the same parties as in this action.

[AND/OR, if grounds for disqualification exist under CCP § 641(e) ]

2. \_\_\_\_\_ [Name of referee] has an interest in \_\_\_\_\_ [the event of this action or the main question involved in this action] in that \_\_\_\_\_ [specify].

[AND/OR, if grounds for disqualification exist under CCP § 641(f) ]

2. \_\_\_\_\_ [Name of referee] has \_\_\_\_\_ [formed and/or expressed] an unqualified opinion or belief as to the merits of this action in that \_\_\_\_\_ [specify, e.g., she is a lobbyist for a tort reform group that seeks to prohibit damage claims such as the claim made by plaintiff in the present case].

[AND/OR, if grounds for disqualification exist under CCP § 641(g) ]

2. There exists a state of mind in \_\_\_\_\_ [name of referee] harboring \_\_\_\_\_ enmity against or bias toward] \_\_\_\_\_ [party, e.g., Plaintiff John Smith] in that \_\_\_\_\_ [specify].

[AND/OR, if grounds for disqualification exist under CCP § 641.2 ]

2. This is an action brought under the provisions of *Government Code sections 12600-12612*. \_\_\_\_\_ [Name of referee] is not technically qualified with the particular subject matter of the proceeding in that \_\_\_\_\_ [specify facts in referee's education and professional experience indicating lack of expertise in environmental pollution issues].

[CONTINUE]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: \_\_\_\_\_.

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

#### SUPPORTING MEMORANDUM

[Set out memorandum here]

NOTES.

**Authority:**

*CCP §§ 641, 641.2*

**Grounds for Disqualification of Referee:**

*See 25.17[3]*

**Related Forms of Memoranda:**

*See California Points and Authorities, Ch. 201, Reference and Referees, §§ 201.50-201.58 (Matthew Bender)*



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Chapter 25 Reference  
V. FORMS  
C. Objecting to Referee's Report

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.30*

### 25.30 Objections to Report of Referee.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                 |
|---------------|---|---------------------------------|
| _____ [name], | ) |                                 |
| Plaintiff,    | ) |                                 |
| vs.           | ) | OBJECTIONS TO REPORT OF REFEREE |
| _____ [name], | ) |                                 |
| Defendant.    | ) |                                 |
|               | ) |                                 |
|               | ) |                                 |

\_\_\_\_\_

\_\_\_\_\_ [Objecting party, e.g., Defendant Mary Jones] objects to the report of the referee made pursuant to a special reference under \_\_\_\_\_ [Code of Civil Procedure section 638 or Code of Civil Procedure section 639] and filed on \_\_\_\_\_ [date], on the following grounds:

#### Summary Statement

The present \_\_\_\_\_ [action or proceeding] was commenced by \_\_\_\_\_ [party, e.g., Plaintiff John Smith] to \_\_\_\_\_ [specify nature of action]. An order of reference under \_\_\_\_\_ [Code of Civil Procedure section 638 or Code of Civil Procedure section 639] was made on the \_\_\_\_\_ [agreement of the parties or motion of the plaintiff or motion of the defendant or court's own motion] and entered in this action on \_\_\_\_\_ [date], appointing \_\_\_\_\_ [name of referee] to \_\_\_\_\_ [specify duties] and to report his/her decision to the court as to



\_\_\_\_\_[*specify facts to be determined*]. A hearing was held on \_\_\_\_\_[*date*] by the referee at which \_\_\_\_\_[*parties and counsel who appeared, e.g., Plaintiff John Smith and his attorney, Jane Lee, and Defendant Mary Jones and her attorney, Tom Doe*] appeared, and at which evidence in the form of \_\_\_\_\_[*specify, e.g., the parties' testimony*] was admitted. The hearing was concluded and the matter submitted to the referee whose report was filed on \_\_\_\_\_[*date*].

1. The evidence does not support the decision of the referee.

[*Set forth, in consecutively numbered paragraphs, other grounds as appropriate.*]

[OR]

1. The Evidence Does Not Support the Decision of the Referee.

The referee decided that \_\_\_\_\_[*set forth portion of decision to which exception is taken*]. The only evidence before the referee on that issue was \_\_\_\_\_[*specify*], which showed only \_\_\_\_\_[*specify nature of evidence*]. There was no other evidence presented to rebut or contradict this evidence and no other evidence to support the referee's decision.

\_\_\_\_\_[*Set forth additional grounds, as appropriate, with headings and paragraphs summarizing the objection.*]

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

NOTES.

**Authority:**

CCP §§ 643(c), 644(b)

**Timing of Objections to Referee's Report:**

See 25.21

**Related Form of Motion to Set Aside Report:**

See 25.31



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Chapter 25 Reference  
V. FORMS  
C. Objecting to Referee's Report

*2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.31*

**25.31 Notice of Motion and Motion to Set Aside Referee's Report.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NOTICE OF MOTION AND MOTION TO SET  
) ASIDE REFEREE'S REPORT, SUPPORTING DE-  
) CLARATION OF \_\_\_\_\_ [name],  
) AND SUPPORTING MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_  
) Referee: \_\_\_\_\_

To \_\_\_\_\_ [opposing party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for an order to set aside the report of the referee, issued pursuant to a special reference under \_\_\_\_\_ [Code of Civil Procedure section 638 or Code of Civil Procedure section 639] ordered by this court on \_\_\_\_\_ [date of order for reference] and

filed with this court on \_\_\_\_\_ [date]. The motion will be made on the ground(s) set forth in the objections of \_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] filed \_\_\_\_\_ [herewith or specify date previously filed], a copy of which is attached hereto.

The motion will be based on this notice of motion, on the declaration of \_\_\_\_\_ [name] and the supporting memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

#### SUPPORTING DECLARATION OF \_\_\_\_\_

I, \_\_\_\_\_, declare:

1. I am \_\_\_\_\_ [declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. \_\_\_\_\_ [Set forth facts, in consecutively numbered paragraphs, establishing grounds for setting aside referee's report, e.g., The referee refused to consider additional documentation submitted by Defendant Mary Smith, concerning the parties' respective interests in their partnership, which she was not able to provide at the initial hearing before the referee, but which she subsequently obtained from a storage facility and forwarded to the referee].

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]

#### SUPPORTING MEMORANDUM

[Set out memorandum here]

NOTES.

**Authority:**

CCP §§ 644(b), 645

**Moving to Set Aside Referee's Report:**

See 25.22

**Related Form of Objections to Referee's Report:**

See 25.30

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 201, Reference and Referees, §§ 201.80-201.85* (Matthew Bender)



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Chapter 25 Reference  
V. FORMS  
C. Objecting to Referee's Report

2-25 MB Practice Guide: CA Pretrial Civil Procedure 25.32

**25.32 Notice of Intention to Move for New Trial.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_ [name],

Plaintiff,

vs.

\_\_\_\_\_ [name],

Defendant.

)  
)  
)  
)  
)  
)  
)

NOTICE OF INTENTION TO MOVE FOR NEW  
TRIAL [AND SUPPORTING MEMORANDUM]  
Referee: \_\_\_\_\_

\_\_\_\_\_

To \_\_\_\_\_ [opposing party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that \_\_\_\_\_ [party intending to move for new trial, e.g., Plaintiff John Smith] intends to move this court, at a time to be set by the court, to vacate and set aside the report of the referee issued pursuant to a general reference under *Code of Civil Procedure* section 638(a) in favor of \_\_\_\_\_ [party, e.g., Defendant Mary Jones] and against \_\_\_\_\_ [party, e.g., Plaintiff John Smith] on \_\_\_\_\_ [date], [and the judgment entered thereon,] and grant \_\_\_\_\_ [moving party, e.g., Plaintiff John Smith] a new trial on \_\_\_\_\_ [all issues or specify issues]. This motion will be made on the following grounds:

[EITHER]

1. \_\_\_\_\_ [*Moving party, e.g., Plaintiff John Smith*] was prevented from having a fair trial because of \_\_\_\_\_ [*specify irregularity in proceedings, order, or abuse of discretion*].

[AND/OR]

2. An \_\_\_\_\_ [accident or surprise] occurred, which ordinary prudence could not have guarded against, in that \_\_\_\_\_ [*specify*].

[AND/OR]

2. There is newly discovered evidence, material for \_\_\_\_\_ [*moving party, e.g., Plaintiff John Smith*], which could not, with reasonable diligence, have been discovered and produced at trial, consisting of \_\_\_\_\_ [*specify*].

[AND/OR]

2. The damages are \_\_\_\_\_ [excessive or inadequate] in that \_\_\_\_\_ [*specify*].

[AND/OR]

2. The evidence is insufficient to justify the referee's decision in that \_\_\_\_\_ [*specify*].

[AND/OR]

2. The referee's decision is contrary to law in that \_\_\_\_\_ [*specify*].

[AND/OR]

2. An error in law occurred at trial, which was excepted to by \_\_\_\_\_ [*moving party, e.g., Plaintiff John Smith*] in that \_\_\_\_\_ [*specify*].

[CONTINUE with EITHER]

With respect to the grounds specified in Paragraph(s) \_\_\_\_\_ [*specify number(s)*], above, this motion will be made on \_\_\_\_\_ [affidavits or declarations].

[AND/OR]

With respect to the grounds specified in Paragraph(s) \_\_\_\_\_ [*specify number(s)*], above, this motion will be made on the minutes of the referee and the court.

[CONTINUE]

This motion is also based on the supporting memorandum \_\_\_\_\_ [served and filed herewith *or* to be served and filed hereafter].

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

NOTES.

**Authority:**

*CCP §§ 644(a), 645, 657*

**Moving for New Trial After General Consensual Reference:**

*See 25.20*

**Related Forms of Memoranda:**

*See California Points and Authorities, Ch. 201, Reference and Referees, §§ 201.90, 201.100 (Matthew Bender)*



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Chapter 26 Law and Motion Procedure

*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.syn*

**§ 26.syn Synopsis to Chapter 26: Law and Motion Procedure**

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26.02 Objective and Strategy.

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- 26.58 Court May Render Decision on Motion Without Hearing.
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- 26.63[2] Show Cause Proceeding Also Used to Secure Order Against Party Who Has Not Yet Appeared in Action.
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26.77 Order Granting or Denying Motion--Without Findings.

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Chapter 26 Law and Motion Procedure  
I. STRATEGY

*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.01*

**26.01 Scope.**

This chapter covers:

- Objective and strategy for making motions [*see* 26.02].
- Determining the type of motion to bring and the basic procedural requirements for motions [*see* 26.03-26.11].
- Providing evidentiary support for motions [*see* 26.12-26.17, Forms: *see* 26.66, 26.68, 26.71-26.73].
- Making a telephone appearance [*see* 26.18-26.22; Form: *see* 26.69].
- Making ex parte applications [*see* 26.23-26.34; Forms: *see* 26.75, 26.76].
- Responding to ex parte applications [*see* 26.35-26.38].
- Making noticed motions [*see* 26.39-26.45; Forms: *see* 26.65-26.73].
- Responding to noticed motions [*see* 26.46-26.51; Form: *see* 26.74].
- Checking tentative ruling procedures [*see* 26.52-26.55].
- Hearings on motions [*see* 26.56-26.59].
- Rulings on motions and entry of orders [*see* 26.60-26.64; Forms 26.77-26.82].
- Orders to Show Cause [*see* 26.63; Form: *see* 26.82].

**Core Statutes:**

*CCP §§ 1003-1008, 1010-1020, 1064; Evid Code §§ 450-460; Cal Rules Ct, Rules 3.20, 3.670, 3.1103, 3.1110, 3.1112, 3.1113, 3.1200 et seq., 3.1300, 3.1304, 3.1306, 3.1350*



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Chapter 26 Law and Motion Procedure  
I. STRATEGY

*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.02*

**26.02 Objective and Strategy.**

An order is a direction of a court or judge, made or entered in writing and not included in a judgment. A motion is an application for an order [see *CCP* § 1003; *Reifler v. Superior Court* (1974) 39 CA3d 479, 483, 114 CR 356 ]. A motion is not an independent right or remedy, and is confined to incidental matters in the progress of a cause. It is not proper to raise matters by motions that are wholly distinct and independent and subject to a formal petition or complaint [ *Hospital Sys., Inc. v. Office of Statewide Health Planning & Dev.* (1994) 25 CA4th 1686, 1691, 30 CR2d 922 ].

Although motions are incidental to an action, they may be made throughout the pendency of such action, including pre-trial [e.g., motion for summary judgment, *CCP* § 437c], during trial [e.g., motion for nonsuit, *CCP* § 581], post-trial [e.g., motion for directed verdict or for judgment notwithstanding the verdict, *CCP* § 629], post judgment [e.g., motion to set aside or vacate judgment, *CCP* §§ 473(b), (d), 473.5, and 663], and during an appeal [e.g., motion to strike pursuant to *Cal Rules Ct, Rule 8.204(e)(2)(B)*].

All motions should be direct, clear, and concise. The specific relief requested should be clearly described. If exhibits are necessary, they should highlight the pertinent parts and be referenced in the body of the motion. Counsel should not assume that the court would attempt to determine on its own why an exhibit is significant. Opposing papers also need to be clear and concise, with a short direct statement of why the relief requested is inappropriate. Both moving and opposing papers should support the party's position with facts and legal authority rather than hyperbole or *ad hominem* argument.

There are three basic types of law and motion procedures that may be brought: oral motions, ex parte applications, and noticed motions. Choosing which one will depend on the circumstances. The predominant motions are noticed motions because they provide the court and opposing parties with sufficient notice to thoroughly prepare the arguments and identify the substantive and procedural issues. Oral motions are generally limited to open court proceedings in the presence of adverse counsel and are often made when an unexpected issue arises. Ex parte relief is obtained by making an application to the court. Prior commentary and decisions often refer to these applications as ex parte motions; however, with the amendments to *Cal Rules Ct, Rule 3.1200 et seq.*, this procedure is now referred to as ex parte applications.

**Distinguish--Terminology:**

In describing a written motion, counsel should use the appropriate terminology ("motion" or



"application" or "petition") of the statute governing the particular motion unless a written form employing other terminology is provided by the court. Do not confuse the use of the word "petition" in probate proceedings that substitute for the term "written motion" [*see, e.g., Prob Code § 1201*] from the word "petition" used to describe the pleading that initiates a special proceeding such as a prerogative writ [*see, e.g., CCP §§ 1086, 1103* (writs of mandate and prohibition)].

#### **Judge's Perspective:**

The court's law and motion docket, for the most part, is made up of summary judgment/adjudication motions, demurrers, and discovery disputes. Clearly, there are a myriad of other motions that are and can be brought before the fast track court but those listed above seem to be the most frequent. Be mindful that it is always best to keep your motion very succinct and credible. Avoid attaching correspondence that contains vituperative exchanges and avoid ex parte applications that seek to shorten time on noticed motions that can't wait.

#### **Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 372, Motions and Orders (Matthew Bender).

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender).

#### **Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Motion Practice General Overview



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Chapter 26 Law and Motion Procedure  
II. DETERMINING TYPE OF MOTION OR APPLICATION AND PROCEDURE

*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.03*

**26.03 CHECKLIST: Determining Type of Motion or Application and Procedure.**

☐ Determine which procedures matches the circumstances:

- ☐ Oral motions usually made during hearing or trial in open court or in chambers with adverse counsel present.
- ☐ Ex parte application made in urgent situations and must be in writing.
- ☐ Noticed motions must be made in writing and served on parties appearing in an action or proceedings and filed prior to hearing.

**Authority:**

*CCP §§ 631.8, 1005.5, 1010, 1014; Cal Rules Ct, Rules 3.1201, 3.1203, 3.1112*

**Discussion:**

See 26.05

**Forms:**

See 26.65, 26.75

☐ Determine who may make motion or application:

- ☐ Party to a pending action or proceeding may make a motion or application.
- ☐ Nonparty may make a motion to vacate a void judgment or order if the person has a right or interest affected by enforcement of the judgment.

- ☐ Media may motion the court to cover a trial.

**Authority:**

*Difani v. Riverside County Oil Co. (1927) 201 C 210, 214, 256 P 210 ; Plaza Hollister Ltd. P'ship v. County of San Benito (1999) 72 CA4th 1, 16-20, 84 CR2d 715 ; Chase v. Superior Court (1962) 210 CA2d 872, 876, 27 CR 383 ; see also CCP § 387; Sorell v. Superior Court of San Francisco (1967) 248 CA2d 157, 159-160, 56 CR 222*

**Discussion:**

See 26.06

- ☐ Determine timing and place for making motion:

- ☐ Generally make motion at any time during pendency of action in court in which action is pending.

☐ An action is deemed pending from the time of its commencement until its final determination on appeal or when the time for appeal has expired, unless the judgment is sooner satisfied.

**Exceptions:**

Statutes relating to specific motions may impose time limitations on when motion can be made [see, e.g., CCP § 435, regarding motions to strike all or part of pleadings].

The Code of Civil Procedure and other statutes may permit motions to be made in other courts.

**Authority:**

*CCP §§ 435, 708.110-708.205, 1004, 1005, 1049; Cal Rules Ct, Rule 1.150*

**Discussion:**

See 26.07-26.08

- ☐ Determine whether notice of motion is required.

- ☐ Majority of motions are "noticed motions" made on written notice to the adverse party.
- ☐ There is no express statutory provision requiring that notice of all motions be provided.
- ☐ Where statute is silent, court will determine whether written notice to adverse party is required.
- ☐ If order granting motion affects adverse party's rights, written notice is generally required.
- ☐ Written notice is not required if there is immediate need to avoid irreparable harm, or if adverse party has no right to be heard.

**Authority:**

CCP §§ 464, 473, 1005; *Cal Rules Ct, Rule 3.1200 et seq.*; *Arata v. Tellurium Gold & Silver Mining Co. (1884) 65 C 340, 342, 4 P 195*; *McDonald v. Severy (1936) 6 C2d 629, 631, 59 P2d 98*; *US Const, amend XIV*; *Cal Const, art I, § 7(a)*

**Discussion:**

See 26.09

**Forms:**

See 26.65, 26.75

- ☐ Determine who must be served with notice and procedure for notice.
- ☐ Serve notice and other papers on adverse party or attorney in manner prescribed by statute.
- ☐ Serve notice and/or papers on attorney of party residing out of state.
- ☐ Serve notice and/or papers on court clerk or judge if party not represented by counsel and resides out of state.
- ☐ Need not serve papers or notice on defaulting or nonappearing party.

**Authority:**

CCP §§ 1010-1020

**Discussion:**

See 26.10

- ☐ Before filing, evaluate motion in light of potential for sanctions.

**Authority:**

CCP §§ 128.7, 2016.010 et seq.

**Discussion:**

See 26.11



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Chapter 26 Law and Motion Procedure  
II. DETERMINING TYPE OF MOTION OR APPLICATION AND PROCEDURE

*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.04*

**26.04 Options and Strategies.**

A court's law and motion calendar exists to manage the various requests for orders that occur before trial. The variety of motions and applications that may be sought are extremely varied, such as motions to quash, demurrers, motions to strike, discovery motions, and motions for summary judgment, just to name a few. In general, the various procedures and orders sought can be classified into three categories: oral motions, applications for ex parte relief, and noticed motions. The most commonly used procedure is the written, noticed motion. Oral motions are limited to in court situations, and ex parte applications are requests for orders usually when there is an urgent situation. In all cases, counsel should ensure that the court has the power to grant the relief requested.

The preliminary step is to review the applicable statute for the contemplated motion. The requirements between motions are often quite different and the statute governing the desired procedure will have requirements specific to that procedure. For example, the evidentiary requirements for summary judgment motions are much more extensive than a motion to quash service of summons. However, there are common requirements for most all motions, and this chapter addresses these basic requirements.

**Judge's Perspective:**

Counsel should make sure that the relief being sought by the motion is the proper vehicle to accomplish the result. All too often, counsel interpose motions for judgment on the pleadings, or demurrers, when the proper vehicle to approach an issue that is outside the pleading is a motion for summary judgment or adjudication.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### **26.05 Three Basic Types of Law and Motion Procedure Are Oral Motions, Ex Parte Applications, and Noticed Motions.**

**26.05[1] Oral Motions May Be Made During Hearing or Trial in Open Court or in Chambers.** Oral motions are usually made in the presence of adverse counsel and include motions to strike testimony, motion for nonsuit [*CCP* § 581c], or judgment [*CCP* § 631.8], motions for directed verdict, and motions for mistrial.

**26.05[2] Ex Parte Applications Must Be in Writing and May Be Made in Urgent Situations.** Ex parte applications (formerly referred to as ex parte motions) must be in writing, are presented along with a proposed order to a judge or commissioner in chambers, and are permitted only when there is a showing of irreparable harm, immediate danger, or based on statute granting ex parte relief [*Cal Rules Ct, Rules 3.1201, 3.1202(c)*].

#### **Cross Reference:**

Discussion of ex parte applications, see 26.23 et seq.

**26.05[3] Noticed Motions Must Be In Writing and Served and Filed Prior to Hearing.** Noticed motions involve serving and filing a notice of motion with its supporting papers followed by a hearing on the motion and the ruling of the judge granting or denying the motion [*CCP* §§ 1005, 1005.5; *Cal Rules Ct, Rules 3.1112, 3.1113, 3.1300*]. The majority of pretrial motions are made by noticed motion.

#### **Cross Reference:**

Discussion of noticed motions, see 26.39 et seq.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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## **26.06 Who May Make Motions and Applications.**

**26.06[1] Party to Pending Action or Proceeding May Make Motion.** Ordinarily, only a person who is a party to a pending action or proceeding may make a motion [ *Difani v. Riverside County Oil Co. (1927) 201 C 210, 213-214, 256 P 210* (creditor of defendant was not allowed to bring motion to vacate default judgment and attachment); *Chase v. Superior Court (1962) 210 CA2d 872, 876, 27 CR 383* (attorneys who filed complaint were not allowed to bring motion to reconsider order that had dismissed complaint on ground it was filed without plaintiff's authorization)].

### **Example:**

When a worker's compensation insurer voluntarily dismissed its action against a third party whose negligence allegedly caused a worker's injury, the worker was not allowed to bring a *CCP § 473* motion to set aside the dismissal. Although the worker had a right to intervene in the action, the worker never did so, and after the dismissal there was no action in which he could intervene [ *Roski v. Superior Court (1971) 17 CA3d 841, 846, 95 CR 312* ].

**26.06[2] Nonparty May Make Motion to Vacate Void Judgment or Order.** A nonparty may move to vacate a void judgment or order if he or she has a right or interest that would be affected by enforcement of the judgment or order [ *People v. Silva (1981) 114 CA3d 538, 547-548, 170 CR 713* ].

**26.06[3] Attorney May Move for Enforcement of Fee Award.** An attorney who has been awarded fees, although not a party to the action, may move the court for enforcement of the award [ *Sorell v. Superior Court of San Francisco (1967) 248 CA2d 157, 159, 56 CR 222* ].

**26.06[4] Media May Apply to Cover Trial.** News media may apply for authorization for media coverage (i.e., photographic, recording, broadcast) of court proceedings [ *Cal Rules Ct, Rule 1.150* ].

### **Legal Topics:**

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### **26.07 Motions and Applications Generally Must Be Made While Action Is Pending.**

Except as limited by statute, a motion may normally be made at any time when the relief sought would be appropriate in a pending action [see *CCP § 1004* (motion made in court where action is pending)]. An action is deemed pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied [*CCP § 1049*].



#### **Warning:**

Statutes relating to specific motions may impose time limitations for when a motion may be made [see, e.g., *CCP § 435* (motion to strike all or part of a pleading); *CCP § 437c* (motion for summary judgment)].



#### **Cross Reference:**

See the chapters in this publication covering specific motions for discussion of timing.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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## 26.08 Where Motions and Applications May Be Made.

**26.08[1] Motions Generally Must Be Made in Court in Which Action Is Pending.** Except as provided in *CCP* § 166 (power of trial judges to act in chambers and powers of judges versus the power of the court), motions must be made in the court in which the action is pending [*CCP* § 1004].

**26.08[2] Motions May Be Made in Court Other Than One in Which Action Is Pending When Authorized by Statute.** Some statutes may authorize the making of a motion in a court other than the one in which the action is pending [see, e.g., *CCP* §§ 708.110-708.205 (third-party examination in aid of enforcement of judgment)].

**26.08[3] Payment of Filing Fee Is Required.** A uniform fee for filing any notice of motion or any other paper requiring a hearing after the first paper will be imposed [*Gov Code* § 70617].

### Exceptions:

A special uniform filing fee for a motion for summary judgment or adjudication will be imposed [*Gov Code* § 70617(d)]. There is no filing fee for an amended notice of motion [*Gov Code* § 70617(b)(2)] or other papers as set forth in *Gov Code* § 70617(b)(3)-(13).



### Cross Reference:

Waiver of fees and costs due to indigency, and proceeding *in forma pauperis*, see *Ch. 7, Complaints*, 7.26[4].

### Legal Topics:

For related research and practice materials, see the following legal topics:  
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**26.09 Moving Party Must Determine Whether Written Notice Is Required.**

**26.09[1] Notice Generally Required by Statute.** Although there is no express statutory provision requiring that notice of *all* motions be given, the vast majority of motions require written notice [*see, e.g., CCP § 1005(a)* (list of motions requiring written notice); *CCP § 437c(a)* (motion for summary judgment); *CCP § 473(d)* (motion to set aside void judgment or order)].

**26.09[2] Court Will Determine Whether Written Notice of Motion Is Required Where Statute Is Silent.** When there is no statutory provision requiring written notice of a motion to an adverse party or the applicable statute is silent regarding the requirement of written notice [*see, e.g., CCP §§ 464, 473(a), (b)*], the court must determine whether such notice is required [ *Arata v. Tellurium Gold & Silver Mining Co. (1884) 65 C 340, 342, 4 P 195* ].

**26.09[3] Written Notice Is Required If Order Granting Proposed Motion Would Affect Rights of Adverse Party.** To satisfy procedural due process requirements of the federal and state constitutions, when an order granting a motion will affect the rights of the adverse party, the motion must be made on notice to such party [ *McDonald v. Severy (1936) 6 C2d 629, 631, 59 P2d 98* ; *Bohn v. Bohn (1913) 164 C 532, 536-537, 129 P 981* ; *Miller v. Foremost Motors, Inc. (1993) 16 CA4th 1271, 1276, 20 CR2d 503* ].

**Exception:**

In cases requiring urgency, a court order may be sought by ex parte application, without the full notice procedure required by *CCP § 1005* [*see Cal Rules Ct, Rule 3.1200 et seq.*]. Even this ex parte procedure, however, generally requires a short period of notice or attempted notice in advance of the moving party's ex parte appearance [*Cal Rules Ct, Rule 3.1203*].



**Cross Reference:**

Discussion of ex parte applications, see 26.23 et seq.

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## **26.10 Service of Notice and Other Papers.**

**26.10[1] Service May Be Made on Adverse Party or Attorney Pursuant to Statute.** Notices and other papers may be served on a party or the party's counsel in the manner prescribed in *CCP §§ 1010-1020* when not otherwise provided by the Code of Civil Procedure [*CCP § 1010*].

### **Cross Reference:**

Discussion of service of motions and extensions of time based on manner of service, see Ch. 27, Service of Papers.

**26.10[2] No Service Required on Defaulting or Nonappearing Party.** A notice of motion need not be served on any party whose default has been duly entered or who has not appeared in the action or proceeding [*CCP § 1010*; see also *CCP § 1014* (enumerating acts constituting an appearance and stating that service of notice or papers need not be made on a nonappearing defendant)].

**26.10[3] "Serve and File" in Court Rules Means Serve on Each Party or His or Her Attorney Identified As Such in Proof of Service.** Unless a statute or rule provides otherwise, the requirement that a party "serve and file" documents means that the party must serve a copy of the documents on each unrepresented, the attorney of each represented party, and any other person as required by statute, rule, or court order. It also requires the filing of the document and a proof of service with the court [*Cal Rules Ct, Rule 1.21(b)*].

### **Exception:**

In the case of an action in which a party's attorney has given notice of limited scope representation, all papers must be served on both the attorney and the party, until either a substitution of attorneys or an order to be relieved as attorney has been served and filed [*Cal Rules Ct, Rule 3.36(b)*].

### **Cross References:**

Establishing limited scope representation, see Ch. 3, *Beginning and Terminating Attorney-Client Relationship*, 3.13[2].

Substitution of attorneys, see *Ch. 3, Beginning and Terminating Attorney-Client Relationship*, 3.34.

Grounds for obtaining order to be relieved as attorney in noticed representation of limited scope, see *Ch. 3, Beginning and Terminating Attorney-Client Relationship*, 3.29[7].

For these purposes, "proof of service" consists of a declaration stating that service has been made in the aforementioned manner. The proof of service must state which party or parties in an action involving multiple attorneys is represented by each served attorney [*Cal Rules Ct, Rule 1.21(c)*].

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### **26.11 Court May Impose Sanctions on Party Making Frivolous Motions and in Relation to Discovery.**

The attorney of record, if any, must sign every written notice of motion or other similar paper, and presentation of the paper to the court certifies that the motion or other paper is not frivolous [*CCP* § 128.7]. Sanctions may be imposed for violation of this provision of the Code of Civil Procedure [*CCP* § 128.7(c)].

#### **Cross References:**

Discussion of sanctions, see Ch. 35, Sanctions.

Discussion of sanctions involving discovery, see Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 3, Sanctions.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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**26.12 CHECKLIST: Providing Evidentiary Support for Motions and Applications.**

☐ Assemble evidentiary support for motion.

☐ Provide evidence for motion or application by affidavit or declaration, and by request for judicial notice.

☐ Present oral evidence at motion hearing if permitted.

☐ Prior to introducing oral evidence, must file a written statement setting forth the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing.

☐ Introduction of oral evidence or evidence by affidavit or declaration may be restricted for certain motions.

**Authority:**

*CCP §§ 2009, 2015.5; Cal Rules Ct, Rule 3.1306(a), (b); Smith, Smith & Kring v. Superior Court (1997) 60 CA4th 573, 577-578, 70 CR2d 507 ; Flood v. Simpson (1975) 45 CA3d 644, 649-650, 119 CR 675 ; Reifler v. Superior Court (1974) 39 CA3d 479, 485, 114 CR 356 ; McLellan v. McLellan (1972) 23 CA3d 343, 359-360, 100 CR 258 ; Ascherman v. Superior Court (1967) 254 CA2d 506, 511-512, 62 CR 547*

**Discussion:**

See 26.14-26.16

**Forms:**

See 26.66, 26.68

- ☐ Determine whether to request that court take judicial notice of evidence.
  - ☐ Determine whether judicial notice will be permissive or mandatory.
  - ☐ Submit request for judicial notice.
    - ☐ Establish relevancy of evidence.
    - ☐ Provide material for which judicial notice is requested.
  - ☐ Arrange for court file to be present in courtroom at time of hearing if requesting judicial notice of a court file.
- ☐ Object to improper requests for judicial notice.

**Authority:**

*CCP § 430.70; Evid Code §§ 350, 352, 450-460; Cal Rules Ct, Rules 3.1113(l), 3.1306(c); People v. Peevy (1998) 17 C4th 1184, 1208 n4, 73 CR2d 865, 953 P2d 1212 ; Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 C4th 1057, 1063-1065, 31 CR2d 358, 875 P2d 73 ; Del Mar Terrace Conservancy, Inc. v. City Council (1992) 10 CA4th 712, 744, 12 CR2d 785 ; Osborn v. Irwin Mem'l Blood Bank (1992) 5 CA4th 234, 261 n5, 7 CR2d 101 ; Mozzetti v. City of Brisbane (1977) 67 CA3d 565, 577-579, 136 CR 751 ; Cal. L. Revision Comm'n Comment to Evid Code § 453*

**Discussion:**

See 26.17

**Forms:**

See 26.71-26.74



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### **26.13 Options and Strategies.**

Carefully and accurately presented evidence is the cornerstone of a successful motion or application. The evidence needs to support the motion and must be tailored to specific issue before the court. Extraneous evidence only tends to confuse the situation and opens up avenues of attack in later proceedings. Stick to evidence based on personal information, avoid hearsay statements, and get to the point quickly.

Judicial notice is an effective tool for supporting your motion or application. However, be wary of requests for judicial notice that attempt to bring in evidence that is objectionable. One common trap is a request for judicial notice of court files. Many practitioners attempt to build arguments on filed court documents containing hearsay statements. Just because the document is filed does not mean the hearsay is suddenly converted to judicially noticed material.

All the content of a court-filed document may not be admissible. The fact of its filing is subject to judicial notice. Taking judicial notice of facts within an appellate court opinion is proper [ *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 CA3d 39, 45, 170 CR 533 ].

#### **Judge's Perspective:**

Counsel request judicial notice in far too many instances, thinking that it is a panacea for evidentiary problems. Try to avoid this problem by limiting judicial notice to that which is absolutely needed and make sure that evidentiary foundation exists for the information contained in the judicial notice request.



#### **Cross Reference:**

Discussion of judicial notice of court records, see 26.17[5].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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#### **26.14 Evidence at Hearing May Be Presented by Affidavit or Declaration, and by Request for Judicial Notice.**

Evidence presented by affidavit or declaration or by request for judicial notice is received without testimony or cross-examination except in the court's discretion for good cause shown [*Cal Rules Ct, Rule 3.1306(a)*; see also *Smith, Smith & Kring v. Superior Court* (1997) 60 CA4th 573, 578, 70 CR2d 507 (only evidence trial court should have considered is that contained in declarations filed in support of and in opposition to motion)]. Therefore, attendance of the moving party is not required for purpose of testimony or cross-examination [ *McLellan v. McLellan* (1972) 23 CA3d 343, 359, 100 CR 258 ].

Any person is qualified to make an affidavit or declaration in support of a motion, which will be considered competent evidence absent an objection that the affiant or declaration lacked personal knowledge of the matters stated [ *McLellan v. McLellan* (1972) 23 CA3d 343, 359-360, 100 CR 258 ].



#### **Warning:**

Although hearsay or other incompetent evidence in an affidavit received without a proper objection or motion to strike is regarded as competent evidence in support of the subsequent order [ *Flood v. Simpson* (1975) 45 CA3d 644, 649, 119 CR 675 ], facts contained in an unverified statement are not evidence and cannot provide the basis for granting the motion [ *Smith, Smith & Kring v. Superior Court* (1997) 60 CA4th 573, 578, 70 CR2d 507 ].



#### **Cross Reference:**

Discussion of hearsay in affidavits or declarations and objections to it, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 11.94 et seq.*

#### **Distinguish:**

Evidence other than affidavits and declarations is admissible when an issue of fact is to be determined at the hearing on the motion [ *Ascherman v. Superior Court* (1967) 254 CA2d 506, 510, 62 CR 547 ].

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### **26.15 Oral Evidence May Be Presented at Motion Hearing.**

Although a trial court is empowered to exclude oral testimony, it has the discretion to receive such testimony, and refusal to exercise such discretion to receive such testimony may result in reversal of the court's order [*see Reifler v. Superior Court* (1974) 39 CA3d 479, 485, 114 CR 356 ].

#### **Prerequisite:**

A written statement setting forth the nature and extent of the evidence sought to be introduced and a reasonable time estimate for presentation of such evidence at the hearing must be filed at least three court days prior to the hearing [*Cal Rules Ct, Rule 3.1306(b)*]. If the statement is filed less than five court days before the hearing, the filing party must serve a copy on the other parties in a manner that assures delivery at least two days prior to the hearing [*Cal Rules Ct, Rule 3.1306(b)*].

#### **Exception:**

The requirement of a written statement is inapplicable to oral evidence presented in rebuttal to oral evidence presented by the other party.



#### **Warning:**

Presentation of oral evidence at a law and motion hearing is highly unusual and would only be allowed by the court in extraordinary circumstances. The courts have limited time for law and motion proceedings and are averse to citing the motions based on anything other than the papers that have been filed.



#### **Cross References:**

Discussion of preparation of witnesses for examination, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 7.21 *et seq.*

Discussion of questioning witnesses and objections, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 11, Questioning Witnesses and Objections.

Discussion of obtaining and using interpreters for questioning witnesses at hearings, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 8, Interpreters.

**Legal Topics:**

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#### **26.16 Affidavit Evidence or Oral Testimony May Be Restricted on Particular Motions.**

Where courts are limited to examining the face of a challenged pleading [*see, e.g., CCP § 435 et seq.*, (motion to strike a pleading or matter from a pleading)] and other matters appearing from the court's records, use of affidavit evidence and oral testimony is restricted.

Litigants do not have a right to present oral testimony at a hearing on a motion for summary judgment [*Cal Rules Ct, Rule 3.1306(a); Mediterranean Constr. Co. v. State Farm Fire & Cas. Co. (1998) 66 CA4th 257, 263, 265, 77 CR2d 781* ].



#### **Cross Reference:**

Discussion of motions for summary judgment, see Ch. 38, Summary Judgment.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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### **26.17 Moving Party May Request Court Take Judicial Notice of Evidence.**

**26.17[1] Judicial Notice May Be Permissive or Mandatory.** The court is *required* to take judicial notice of matters specified in *Evid Code* § 451, and *may take* judicial notice of matters set forth in *Evid Code* § 452. However, the court is required to take judicial notice of matters set forth in *Evid Code* § 452 if a party requests that judicial notice be taken, gives each adverse party notice of the request, and furnishes the court with sufficient information to enable it to take judicial notice of the matter [*Evid Code* § 453].

#### **Exception:**

Judicial notice may not be taken of any matter unless authorized or required by law [*Evid Code* § 450].

#### **Prerequisite:**

During a hearing on a motion, a request to take judicial notice of a matter must be made by separate document listing the specific items for which notice is requested [*Cal Rules Ct, Rule 3.1113(l)*; *but see CCP* § 430.70 (matter of which court is requested to take judicial notice in ruling on a demurrer must be specified in the demurrer or supporting points and authorities except as court may otherwise permit)].

#### **➡ Cross Reference:**

Discussion of subjects of judicial notice, see California Forms of Pleading and Practice, Ch. 321, *Judicial Notice* (Matthew Bender).

**26.17[2] Moving Party Must Provide Material for Which Judicial Notice Is Requested to Court and Other Parties.** Party requesting judicial notice of material must provide such material to the court and each party. If the material is part of the court file, the party must specify in writing the portion of the file to be judicially noticed, and make sure the file is in the courtroom for the hearing [*Cal Rules Ct, Rule 3.1306(c)*].



#### **Trap:**

It is important to make the arrangements to have the file in the courtroom in advance. This requirements is often ignored, and it can be a trap for the unwary.

**Warning--Local Rules May Impose Additional Requirements:**

For example, in Los Angeles County Superior Court, and San Francisco Superior Court, at least five days before the hearing, the party requesting judicial notice of a court file must file a separate document with the clerk of the department in which the motion is to be heard requesting the clerk to order delivery of the file to the department for the hearing. Moreover, the file must be delivered to the department at least two court days before the hearing to give the judge an opportunity to review the file in preparation for the hearing [Los Angeles Co Super Ct Rules, Rule 9.2; San Francisco Super Ct Rules, Rule 8.9B]. It is always wise to check the appropriate county's local rules for further judicial notice requirements.

**26.17[3] Oral Motion Should Be Made When Invoking Judicial Notice Regarding Evidence Presented at Trial.** If judicial notice is invoked at trial based upon evidence produced at trial, an oral motion to the court to take judicial notice is proper [*Evid Code* §§ 453, 455]. If a party knows before trial that he or she intends to invoke judicial notice at trial, a written request for judicial notice may be filed at a pretrial conference [see *Evid Code* § 453(a); see also, e.g., *Estate of Muller* (1969) 2 CA3d 259, 270, 82 CR 531 ].

**Cross Reference:**

For list of matters subject to Judicial Notice under *Evid Code* §§ 451, 452, see California Forms of Pleading and Practice, Ch. 321, Judicial Notice (Matthew Bender).

**26.17[4] Trial Court Must Give Parties Reasonable Opportunity to Be Heard on Issue of Judicial Notice.** Regarding any matters specified in *Evid Code* § 451(f) or 452 that are of substantial consequence to the determination of the action, the court must afford each party a reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to be heard on the propriety of taking judicial notice of the matter and the tenor of the matter to be noticed [*Evid Code* § 455(a)].

**26.17[5] Judicial Notice May Be Denied If Matter Sought to Be Noticed Is Not Relevant or Because of Potential Prejudice or Undue Consumption of Time or Where Material Is Hearsay.** To be given judicial notice the matter must be relevant to the pending case [ *Western States Petroleum Assn. v. Superior Court* (1995) 9 C4th 559, 574-576, 38 CR2d 139, 888 P2d 1268 (only relevant evidence is subject to judicial notice); *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 C4th 1057, 1063-1065, 31 CR2d 358, 875 P2d 73 ; see also *Evid Code* § 350 (relevancy requirement)].

**Warning:**

The general rule is that the truthfulness and interpretation of a document's contents are disputable, and the California Courts of Appeal have utilized three different approaches at the demurrer stage as to accepting the accuracy of the contents of judicially noticed documents [ *C.R. v. Tenet Healthcare Corp* (2009) 169 CA4th 1094, 1103, 87 CR3d 424 ] :

- The truth of a document's contents will not be considered unless it is a judgment, statement of decision, or order.
- The truth of statements may be accepted when made by a party but not those of third parties or an opponent
- The contents of a document may only be accepted where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed.

**Exception:**

Under *Evid Code* § 352 judicial notice of relevant matters may be denied if the trial court determines that the probative value of the evidence is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury, or will require an undue consumption of time [ *Mozzetti v. City of Brisbane* (1977) 67 CA3d 565, 577-579, 136 CR 751 ].

Where matter sought to be noticed is hearsay and not subject to any exception to the hearsay rule, judicial notice of the matter may be denied [see *Osborn v. Irwin Mem'l Blood Bank* (1992) 5 CA4th 234, 261 n5, 7 CR2d 101 ].



#### **Warning--Court Records:**

A request for judicial notice of court records does not mean the court judicially notices the existence of facts asserted in *every document* of a court file. A court *cannot* take judicial notice of *hearsay allegations* as being true, just because they are part of a court record or file. A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments [ *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 CA4th 471, 484, 104 CR3d 545 ; *Kilroy v. State of California* (2004) 119 CA4th 140, 145 ; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 CA4th 875, 882, 110 CR2d 877 ; *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 CA3d 39, 45-47, 170 CR 533 ].

**26.17[6] Reviewing Court Must Generally Take Judicial Notice of Matters Trial Court Noticed or Was Required to Notice.** A reviewing court generally must take judicial notice of matters properly noticed by the trial court or that the trial court was required to notice [*Evid Code* § 459].



#### **Warning:**

Although a reviewing court has the same discretionary power as the trial court to take judicial notice of matters [*Evid Code* § 459], it will generally not take judicial notice of matters that were before the trial court [see, e.g., *People v. Peevy* (1998) 17 C4th 1184, 1208 n4, 73 CR2d 865, 953 P2d 1212 (requests for judicial notice of exhibit was denied because the issue upon which the exhibits were offered was not raised in the trial court); see also *Brosterhous v. State Bar of Cal.* (1995) 12 C4th 315, 325, 48 CR2d 87, 906 P2d 1242 ].

**26.17[7] Reviewing Court Will Generally Uphold Trial Court's Decision on Judicial Notice.** The trial court's determination to take judicial notice of a matter specified in *Evid Code* § 452 will be upheld on appeal if the matter was properly noticed. A reviewing court may use any information, whether or not available to the trial court to sustain the proper taking of judicial notice [*Evid Code* § 459(b), (d); see also Cal. L. Revision Comm'n Comment to *Evid Code* § 453].

Similarly, a decision of the trial court judge denying a request for judicial notice will be upheld on appeal unless the reviewing court determines that no reasonable judge would refuse to take judicial notice of the matter [see Cal. L. Revision Comm'n Comment to *Evid Code* § 453].

Although judicial notice of matters set forth in *Evid Code* § 451 is mandatory, a trial court's failure to take judicial notice of such matters may not be reversible error on appeal depending on the circumstances. For instance, an appellate court may hold that the error was "invited" or that points not urged in the trial court may not be advanced on appeal, without abrogating the provisions of *Evid Code* § 451.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

[Civil Procedure](#)[Pleading & Practice](#)[Motion Practice](#)[General Overview](#)[Evidence](#)[Judicial Notice](#)[General Overview](#)





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*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.18*

**26.18 CHECKLIST: Making a Telephone Appearance.**

☐ Determine whether to appear at hearing by telephone.

☐ Telephone appearance is permitted in most proceedings in civil cases and other special proceedings.

☐ Consider requesting appearance by telephone where appropriate even though appearance in person is required because:

☐ Hearing, conference, or proceeding is one in which personal appearance is generally required.

☐ Client is one of whom personal appearance is generally required in the pertinent type of hearing or proceeding.

☐ Local Rules of Court govern procedure for telephone appearance.

☐ When appearing by telephone, provide notice of such appearance to other parties.

☐ Notify court of intent to appear by telephone, either by:

☐ Indicating "Telephone Appearance" below title of moving, opposition, or reply papers; or

☐ Notifying court and all parties of intent to appear by telephone at least 3 court days before the appearance.

☐ Oral notice must be personal or by telephone.

☐ Written notice must be served by personal delivery, facsimile transmission, express mail or other means ensuring delivery no later than close of next business day.

☐ Where party first notices an intent to appear by telephone and later decides to appear in person, that party must notify the court and the other parties, orally or in writing, at least 2 days prior to the hearing, of such change.

☐ If another party has given notice of appearance by telephone, give notice of appearance by telephone no later than noon on the court day before the appearance.

☐ If notice has not been given in timely manner, consider whether good cause permits appearance by telephone without required notice.

**Authority:**

*Cal Rules Ct, Rules 1.6(4), 3.670; Cal Rules Ct, Stnds Jud Admin, Stnd 3.1; CCP § 367.5*

**Discussion:**

*See 26.20-26.22*

**Forms:**

*See 26.65, 26.69*



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**26.19 Options and Strategies.**

Appearance by telephone is a useful procedure to manage one's calendar, permitting multiple appearances in different courtrooms in the same day, often in different counties. Whether to use this procedure depends primarily on the type of evidence in support of the motion and the motion's complexity. If there is a possibility that oral testimony is needed or if the motion is very crucial to the case, do not opt for a telephone appearance. Physical presence in the courtroom provides the ability to read the reactions of the court and opposing counsel, which strengthens argument presentation and allows greater flexibility for responding to last minute changes in circumstances. Being present at the courtroom before the hearing can give you a better understanding of the calendar and how the court is handling the docket. However, telephone appearances are very useful for routine motions and motions where there is little need for argument.

Appearance by telephone could affect an award of attorney fees, because a court should consider whether an attorney is claiming fees for appearing in person in a proceeding in which that attorney could have appeared by telephone [Cal Rules Ct, Stnds Jud Admin, Standard 3.1].

**Judge's Perspective:**

Telephonic appearances are useful, but keep in mind that when the court addresses case management and issue phasing, it is best for all counsel to be physically present. There may be instances where the court will want counsel to meet and confer in the courtroom to work out differences or issues that do not require court involvement at that time.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.20 Determining Whether Appearance by Telephone Is Permitted.**

**26.20[1] Court Rules Authorize Appearance by Telephone.** The Legislature has given the Judicial Council authority to make rules for appearance by telephone after notice in accordance with *CCP* § 367.5, as well as for other situations [*CCP* § 367.5(d)]. The limitations of the statutory authorization do not apply to rules made concerning appearance by telephone in instances not enumerated in *CCP* § 367.5(b) [*CCP* § 367.5(e)]. Court rules permitting appearance of parties by telephone apply in all general civil cases as defined in *Cal Rules Ct*, *Rule 1.6* and to unlawful detainer and probate proceedings [*Cal Rules Ct*, *Rule 3.670(b)*; *see also CCP* § 367.5(b)].



**Strategic Point:**

To improve access to the courts and reduce litigation costs, courts should, to the extent feasible, permit parties to appear by telephone at appropriate conferences, hearings, and proceedings in civil cases [*CCP* § 367.5(a); *Cal Rules Ct*, *Rule 3.670(a)*].

**26.20[2] Appearance by Telephone Is Generally Permitted in Certain Types of Conferences, Hearings, and Proceedings.** Appearance by telephone is generally permitted upon proper notice in [*CCP* § 367.5(b); *Cal Rules Ct*, *Rule 3.670(c)*; *see also Cal Rules Ct*, *Rule 3.722(c)*]:

- Case management conferences, provided the party has made a good faith effort to meet and confer and has timely served and filed a case management statement before the conference date.
- Trial setting conferences.
- Hearings on law and motion, except motions in limine.
- Hearings on discovery motions.
- Status conferences, including conferences to review the status of an arbitration or a mediation.

- Hearings to review the dismissal of an action.

**Exception:**

The court may require a party to appear in person at a hearing, conference, or proceeding listed above if the court determines on a hearing-by-hearing basis that a personal appearance would materially assist in the determination of the proceedings or in the effective management or resolution of the particular case [CCP § 367.5(c); *Cal Rules Ct, Rule 3.670(e)(2)*]. In exercising its discretion in that regard, the court is to consider the general policy favoring telephone appearances in civil cases [*Cal Rules Ct, Rule 3.670(e)(1)*]. In ordering the party to appear in person after notice of appearance by telephone, the court may continue the hearing, conference, or proceeding and must provide for notice to all parties [*Cal Rules Ct, Rule 3.670(h)*; see 26.22[3]].

 **Cross Reference:**

Notice of appearance by telephone, see 26.22.

**26.20[3] Personal Appearance Is Generally Required in Other Types of Conferences, Hearings, and Proceedings.** Personal appearance is generally required in conferences, hearings, and proceedings not listed in 26.20[2], including [*Cal Rules Ct, Rule 3.670(d)*]:

- Trials and hearings at which witnesses are expected to testify.
- Hearings on temporary restraining orders.
- Settlement conferences.
- Trial management conferences.
- Hearings on motions in limine.
- Hearings on petitions to confirm the sale of property under the Probate Code.

**Exception:**

The court may permit a party to appear by telephone at a hearing, conference, or proceeding listed above if the court determines that a telephone appearance is appropriate [*Cal Rules Ct, Rule 3.670(e)(3)*]. In exercising its discretion in that regard, the court is to consider the general policy favoring telephone appearances in civil cases [*Cal Rules Ct, Rule 3.670(e)(1)*].

**26.20[4] Personal Appearance Is Generally Required of Certain Types of Parties.** Personal appearance is generally required in all conferences, hearings, and proceedings by persons [*Cal Rules Ct, Rule 3.670(d)*; see also *Cal Rules Ct, Rule 3.1207*]:

- Seeking an ex parte order, except when the applicant is seeking an order:
  - ☐ For permission to file a memorandum in excess of the applicable page limits;
  - ☐ For an extension of time to serve pleadings;
  - ☐ To set hearing dates on alternative writs and orders to show cause; or

- ☐ By stipulation of the parties;
- Ordered to appear:
  - ☐ To show cause why sanctions should not be imposed for violation of a court order or a rule; or
  - ☐ In an order or citation issued under the Probate Code.

**Exception:**

The court may permit a party listed above to appear by telephone at the pertinent hearing or proceeding if the court determines that a telephone appearance is appropriate [*Cal Rules Ct, Rule 3.670(e)(3)*]. In exercising its discretion in that regard, the court is to consider the general policy favoring telephone appearances in civil cases [*Cal Rules Ct, Rule 3.670(e)(1)*].

At these proceedings, other parties who are not required to appear in person may appear by telephone [*Cal Rules Ct, Rule 3.670(d)*].

**26.20[5] Court May Continue Hearing, Conference, or Proceeding in Progress Upon Ordering Personal Appearance.** At any time during a hearing, conference, or proceeding conducted by telephone, the court may determine that a personal appearance by a party appearing by telephone is necessary, order a personal appearance of that party, and continue the matter [*Cal Rules Ct, Rules 3.670(f)*].



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**26.21 Local Court Rules Must Provide Court's Specific Telephone Appearance Information.**

Each court must publish notice providing parties with the specific requirements for appearance by telephone at conferences, hearings, and proceedings in that court [*Cal Rules Ct, Rule 3.670(m)*]. A reasonable fee may be charged a party appearing by telephone [*Cal Rules Ct, Rule 3.670(i)*; *see also Cal Rules Ct, Rule 3.670(l)* (a court may designate by local rule the conference call vendor to be used for telephone appearances)].

Each court's local rules should specify who initiates the call, whether there is a time limit, how the parties are notified, and the effects of a tentative ruling system [*Cal Rules Ct, Stnds Jud Admin, Stnd 3.1*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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## **26.22 Notifying Court and Other Parties of Telephone Appearance or Cancellation Thereof.**

### **26.22[1] Notification When No Other Party Has Notified of Telephone Appearance.**

**26.22[1][a] Party Must Provide Notice of Appearance by Telephone in Pleading or Separate Notice.** A party choosing to appear by telephone must either [*Cal Rules Ct, Rule 3.670(g)(1)*]:

- Set forth that intention by placing the phrase "Telephone Appearance" below the title of the party's moving, opposing, or reply papers, or
- Provide oral or written notification to the court and all parties at least 3 court days before the telephone appearance.

#### **Exception:**

The trial court, on a showing of good cause, may permit a party to appear by telephone even if the party has not given notice by either of these methods [*Cal Rules Ct, Rule 3.670(g)(4)*].

Under the second option, a party providing oral notification must do so either in person or by telephone. A party providing written notification under that option must [*Cal Rules Ct, Rule 3.670(g)(1)(B)*]:

- File a "Notice of Intent to Appear by Telephone" with the court at least three court days before the appearance, and
- Serve the notice at the same time on all other parties by personal delivery, fax transmission, express mail, or other means reasonably calculated to ensure delivery to the parties no later than the close of the next business day.

#### **➡ Cross References:**

Form of notice of motion with "Telephone Appearance" below the title, see 26.65. Form of "Notice of Intent to Appear by Telephone," see 26.69.



**26.22[1][b] Cancellation of Notification Made When No Other Party Has Notified of Telephone Appearance.**

A party that has given notice of telephone appearance in its pleadings or separate notice under *Cal Rules Ct, Rule 3.670(g)(1)* may cancel the telephone appearance and appear in person by notifying the court and the other parties at least 2 court days before the appearance [*Cal Rules Ct, Rule 3.670(g)(3)*].

**Exception:**

The trial court, on a showing of good cause, may permit a party to appear in person after giving notice of telephone appearance under *Cal Rules Ct, Rule 3.670(g)(1)* even if the party has not given notice of cancellation of appearance by telephone [*Cal Rules Ct, Rule 3.670(g)(4)*].

**26.22[2] Notification of Telephone Appearance by Party Notified of Other Party's Telephone Appearance.**

A party that has not given notice that decides to appear by telephone after receiving notice of telephone appearance from another party must notify the court and all other parties that have appeared in the action of its intent to appear by telephone by no later than noon on the court day before the appearance [*Cal Rules Ct, Rule 3.670(g)(2)*].

**Exception:**

The trial court, on a showing of good cause, may permit a party to appear by telephone after receiving notice of telephone appearance from another party even if the party showing good cause has not given notice of telephone appearance after receiving notice of telephone appearance from the other party [*Cal Rules Ct, Rule 3.670(g)(4)*].

**26.22[3] Notification By Court Ordering Personal Appearance.** A trial court ordering a party to appear in person after receiving that party's notice of telephone appearance must reasonably notify all parties of its order. The court may direct the court clerk, a court-appointed vendor, a party, or an attorney to provide the notification [*Cal Rules Ct, Rule 3.670(h)*].

**Exception:**

In courts using a telephonic tentative ruling system for law and motion matters, the court may give notice that the party must appear in person as part of the court's tentative ruling on a specific law and motion matter if that notification is given one court day before the hearing [*Cal Rules Ct, Rule 3.670(h)*].

**Strategic Point:**

The trial court ordering personal appearance may continue the hearing if necessary to accommodate the personal appearance [*Cal Rules Ct, Rule 3.670(h)*].



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**26.23 CHECKLIST: Making Ex Parte Applications.**

☐ Determine if grounds for ex parte relief exist:

- ☐ Irreparable harm.
- ☐ Immediate danger.
- ☐ Any other statutory basis for granting ex parte relief.

**Authority:**

*Cal Rules Ct, Rule 3.1202(c)*

**Discussion:**

See 26.25

☐ Preparing and filing ex parte application.

- ☐ Prepare application with case caption and stating relief requested.
- ☐ Include party's and attorney's names, addresses and telephone in application.
- ☐ Include affidavit or declaration showing notice or attempted notice to opposing party, or that no notice should be required.
- ☐ Include declaration in support of application based on personal knowledge.

- ☐ Include supporting memorandum.
- ☐ Include request for judicial notice, if needed.
- ☐ If an ex parte application of the same character or type of relief has been previously made in the action and was refused in whole or in part, include a full disclosure of any previous applications and the court's actions.
- ☐ Include proposed order.
- ☐ If shortening time on a motion, include motion or specify in the order the timing for filing and service of the motion.
- ☐ Exclude or redact social security and financial account numbers and consider filing optional confidential identifier reference list.

☐ File before judge or court commissioner.

- ☐ Depends on local rules.

**Authority:**

*Cal Rules Ct, Rule 3.1200 et seq.; CCP §§ 166(a)(1), 259(a), 1003; Gov Code § 72190*

**Discussion:**

See 26.26-26.30

**Forms:**

See 26.67, 26.71, 26.75, 26.76

☐ Provide notice of ex parte application to opposing party at first reasonable opportunity and file proof of notice.

☐ Serve parties appearing at ex parte hearing with ex parte application and any written opposition.

**Authority:**

*Cal Rules Ct, Rules 3.1203, 3.1204, 3.1206*

**Discussion:**

See 26.26, 26.30

☐ Personally appear in court to present ex parte application.

- ☐ Court will not consider ex parte application unless moving party personally appears, unless:

☐ Application requests filing memorandum in excess of applicable page limit.

☐ Application requests extensions of time in which to serve pleadings.

☐ Application requests setting of hearing dates on alternative writs and orders to show cause.

☐ Application involves stipulation by the parties or other orders of the court.

**Authority:**

*Cal Rules Ct, Rule 3.1207*

**Discussion:**

*See 26.31*

☐ Prevailing party must provide notice of court's decision or order to other parties unless notice is waived, and serve copy of motion and order on parties or their counsel.

☐ Service may be by mail or as otherwise provided by statute or the court.

**Authority:**

*CCP § 1019.5(a); see also CCP §§ 1010-1020*

**Discussion:**

*See 26.32-26.34*

**Form:**

*See 29.79-26.81*



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*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.24*

**26.24 Options and Strategies.**

Ex parte applications (formerly referred to as ex parte motions) are a procedure to obtain immediate relief to avoid irreparable harm or immediate danger. Ex parte applications are commonly understood to mean only one party presents its case to the court; however, *Cal Rules Ct, Rules 3.1200 et seq.* requires the applicant to undertake considerable efforts to timely notify the adverse party of the application unless the applicant can justify why the adverse party should not be notified.

Courts will closely scrutinize an ex parte application because fundamentals of due process require notice and an opportunity to be heard. A declaration stating why notice should not be required must be very specific and fact oriented, avoid vague statements or rote recitations of harm or injury, and be based on competent testimony based on personal knowledge. There are many published opinions where counsel have been sanctioned for bringing improper ex parte applications based on less than forthcoming declarations, often made for the purpose of gaining a tactical advantage.

**Judge's Perspective:**

Make sure that the relief that is sought on an ex parte basis is relief that the court can, in fact, provide.  
Many counsel request relief that the court can only give by way of a noticed motion. Hence, the request should be for an order shortening time and not the relief called for in the motion itself.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.25*

**26.25 Ex Parte Motions or Applications Are Proper to Avoid Irreparable Harm, Immediate Danger, or When Other Statutory Basis Exists for Relief Ex Parte.**

Ex parte motions are permitted when there is a pressing need for immediate relief, to avoid irreparable harm, an immediate danger exists, or there exists any other statutory basis for granting relief ex parte [*Cal Rules Ct, Rule 3.1202(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.26 Applicant Must Provide Notice of Ex Parte Application to Opposing Party One Day Before Ex Parte Appearance.**

Absent a showing of exceptional circumstances warranting a shorter notice period [*Cal Rules Ct, Rule 3.1204(c)*], a party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance [*Cal Rules Ct, Rule 3.1203*; see also *Datig v. Dove Books, Inc. (1999) 73 CA4th 964, 976-979, 87 CR2d 719* (order granting ex parte application reversed because obtained without any notice or any excuse for lack of notice)]. The notice must specifically state the nature of the relief requested and the date, time, and place for the presentation of the application [*Cal Rules Ct, Rule 3.1204(b)(1)*].



**Warning:**

Absent exceptional circumstances, no hearing on the application may be conducted unless service has been made to the adverse party [*Cal Rules Ct, Rule 3.1206*].

**Distinguish:**

A party seeking an ex parte order in an unlawful detainer proceeding may provide shorter notice provided that the notice given is reasonable [*Cal Rules Ct, Rule 3.1204(c)(2)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.27 Application May Be Made Without Notice When Adverse Party Has No Right to Be Heard.**

An ex parte application may be made without notice to the adverse party if the applicant can show by declaration why notice should not be required [*Cal Rules Ct, Rule 3.1204(b)(3), (e)(2)(B)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.28 Judge or Court Commissioner May Grant Ex Parte Motion.**

Ex parte motions may be granted by a judge in chambers [*CCP* § 166(a)(1); *see also CCP* § 1003]. Court commissioners may also grant ex parte motions [*CCP* § 259(a) and *Gov Code* § 72190].

Practice varies among the courts about the judge or department to which an ex parte motion or application must be presented. Therefore, counsel should consult local court rules, practices, and procedures concerning special requirements for the time such motions are heard, service of papers, and notification of court and counsel of ex parte application. However, the local rules relating to ex parte applications and the form and format of papers may be preempted by *Cal Rules Ct, Rule 3.20*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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## 26.29 Preparing Ex Parte Applications.

**26.29[1] Ex Parte Application Must Be in Writing.** The ex parte application must be in writing and must contain the case caption, a statement of the relief requested, and the name, address and telephone number of any attorney known to the applicant to represent any party to the pending action [*Cal Rules Ct, Rule 3.1201, 3.1202(a)*]. If there is no known attorney, the name, address, and telephone number of the known party must be stated in the application [*Cal Rules Ct, Rule 3.1202(a)*].

If the court in which the action is pending provides a printed form for use in making the particular ex parte motion, that form must be used.



### Warning:

If an ex parte application for an order has previously been made to the court and refused, in whole or in part, any subsequent application of the same character or seeking the same relief, although based upon an alleged different set of facts, must include full disclosure of the previous application and the court's action [*Cal Rules Ct, Rule 3.1202(b)*].



### Cross References:

Format of citations to legal sources, see 26.43[5][c]. Exclusion or redaction of social security and financial account numbers from documents filed in the court's public file, see *Ch. 7, Complaints, 7.06[10]*.

**26.29[2] Attach Affidavit or Declaration Showing Notice or Attempted Notice to Opposing Party or That No Notice Should Be Required.** An ex parte application for an order must be accompanied by a declaration showing that notice of the ex parte application was provided within the applicable time period, or that a good faith attempt at notice was made, or that for specified reasons notice should not be required [*Cal Rules Ct, 3.1204(b)*]. The declaration must also state whether there was any response to the notice given, and whether opposition is expected [*Cal Rules Ct, Rule 3.1204(b)(1); see also CCP §§ 2009, 2015.5*].

If notice was provided later than 10:00 a.m. the court day before the ex parte appearance, the notice declaration must

explain the exceptional circumstances that justify the shorter notice; however, if involving unlawful detainer proceedings, the declaration may explain why the notice given is reasonable [*Cal Rules Ct, Rule 3.1204(c)*].

**26.29[3] Attach Supporting Declaration That Demonstrates Basis for Proceeding Ex Parte Based Upon Personal Knowledge.** The declaration must amount to an affirmative factual showing, containing competent testimony based upon personal knowledge of irreparable harm, immediate danger, or other statutory basis for granting ex parte relief [*Cal Rules Ct, Rule 3.1202(c)*; see also *CCP § 2015.5*].

**26.29[4] Include Memorandum.** The ex parte application must be supported by a memorandum [*Cal Rules Ct, Rule 3.1201*].

**Exception:**

In very limited circumstances, ex parte applications do not need supporting memoranda or points and authorities if the application is filed on Judicial Council forms. These instances include [*Cal Rules Ct, Rule 3.1114(a)*]:

- An application for appointment of guardian ad litem in a civil case.
- Application for an order extending time to serve pleadings.

In these instances, a party may still submit, or the court may order submission of, a memorandum in support of the application if it would further the interests of justice; and the memorandum must comply with *Cal Rules Ct, Rule 3.1113* [*Cal Rules Ct, Rule 3.1114(b)*].

 **Cross References:**

Discussion of when memorandum required, see 26.43[5]. Format of citations to legal sources, see 26.43[5][c]. Exclusion or redaction of social security and financial account numbers from documents filed in the court's public file, see *Ch. 7, Complaints, 7.06[10]*.

**26.29[5] Include Request for Judicial Notice.** Although *Cal Rules Ct, Rule 3.1200 et seq.* does not mention requests for judicial notice, an applicant may need to reference a piece of evidence subject to judicial notice to support the application. Prudent practice would be to follow the procedure for judicial notice as though the application was a noticed motion.

 **Cross Reference:**

Discussion of judicial notice, see 26.17.

**26.29[6] Include Proposed Order.** A proposed order must be included in the ex parte application [*Cal Rules Ct, Rule 3.1201(5)*; see also 26.60 and 26.61 for proposed samples of proposed orders].



**Trap:**

The court may deny a motion for the sole reason that an order was not provided.

 **Cross Reference:**

Discussion of orders, see 26.60 et seq.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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### **26.30 Filing and Serving Papers.**

**26.30[1] Clerk Cannot Reject Filing Application That Lacks Notice Requirement.** The court clerk cannot reject an ex parte application for noncompliance with notice requirements of *Cal Rules Ct, Rule 3.1203*, and must promptly present the application to the appropriate judicial officer for consideration [*Cal Rules Ct, Rule 3.1205*].

**26.30[2] Service of Application and Any Opposition Made at First Reasonable Opportunity.** The applicant must serve the ex parte application or any written opposition on all other parties appearing at the hearing at the first reasonable opportunity; and absent exceptional circumstances, no hearing may be conducted unless such service has been made [*Cal Rules Ct, Rule 3.1206*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.31 Applicant's Personal Appearance Required at Hearing Except in Limited Circumstances.**

The court will not consider an ex parte application unless the applicant personally appears [*Cal Rules Ct, Rule 3.1207*]. Personal appearance is not required in the case of ex parte applications to file a memorandum in excess of the applicable page limit, to extend time to serve pleadings, to set hearing dates on alternative writs and orders to show cause, and for stipulations by the parties or other orders of the court [*Cal Rules Ct, Rule 3.1207*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.32 No Hearing May Be Held Unless Applicant Serves Parties Appearing at Ex Parte Hearing With Ex Parte Application and Any Written Opposition.**

Absent exceptional circumstances, no hearing may be conducted unless the applicant has served the application or any written opposition on all other appearing parties at the first reasonable opportunity [*Cal Rules Ct, Rule 3.1206*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.33 Prevailing Party in Master Calendar Courthouse Files Signed Ex Parte Order Granting Request in Clerk's Office and Provides Notice of Court's Decision or Order to Other Parties Unless Notice Waived.**

Once the original of the ex parte order granting the application is signed by the judge or commissioner, counsel for the moving party must have the copies conformed by the clerk and the originals of the motion, if written, and the order filed in the clerk's office. When motion is granted or denied, absent other order from the court, the prevailing party must provide notice of the court's decision or order to all other parties or their attorneys in the manner provided in *CCP* §§ 1010-1020, unless notice has been waived by all parties in open court and entered in the minutes [*CCP* § 1019.5(a)].

**Distinguish:**

In a direct calendaring system, the clerk of the judge in question files the order.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.34 Prevailing Party Serves Copy of Order and Any Written Ex Parte Motion on Other Parties or Their Counsel.**

Counsel for the prevailing party should serve or caused to be served a conformed copy of the order and the written ex parte motion, if any, on opposing counsel, or on the opposing party if not represented by counsel [*see CCP § 1015*]. Such service can generally be made by mail pursuant to *CCP §§ 1012, 1013* [*but see Cal Rules Ct, Rule 3.1300 and CCP §§ 1011, 1015* (personal service required)].

However service is effected, although not required, it is recommended that counsel prepare and file a proof of service setting forth the exact titles of the papers served [*see CCP § 1013a*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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VI. RESPONDING TO EX PARTE APPLICATIONS

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**26.35 CHECKLIST: Responding to Ex Parte Applications**

☐ Review application and determine if proper grounds exist for ex parte relief:

- ☐ Irreparable harm.
- ☐ Immediate danger.
- ☐ Any other statutory basis for granting ex parte relief.

**Authority:**

*Cal Rules Ct, Rule 3.1202(c)*

**Discussion:**

See 26.38

☐ Review application and determine if there is a defect in notice and service or if all required elements are included:

- ☐ Notice must be made no later than 10:00 a.m. the court day before the ex parte application, absent exceptional circumstances.

**Authority:**

*Cal Rules Ct, Rule 3.1203*

**Discussion:**

See 26.37

☐ Personally appear in court to oppose ex parte application and submit written opposition if time permits.



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### **26.36 Options and Strategies.**

A party adversely affected by an ex parte application will either be noticed before the hearing, or will learn about the application's order after it is imposed if the court rules that notice was not required. In the former situation, draft opposition papers and attend the hearing. Courts require strict adherence to the rules of court requirements, and a procedural attack on the application has a good chance of succeeding. Substantive attacks focus on the declaration asserting irreparable harm, immediate danger, or other statutory grounds for ex parte relief. In the latter situation where the adverse party was not notified, consider filing a *CCP* § 473 motion for relief from the court's order.



#### **Cross Reference:**

Discussion of relief from orders, see California Forms of Pleading and Practice, Ch. 489, Relief From Judgments and Orders (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### **26.37 Objecting to Notice.**

*Cal Rules Ct, Rule 3.1200 et seq.* has multiple procedural safeguards to require notice to the adverse party, and courts require strict compliance with this rule. If notice is defective, attend the hearing on the application and make a limited appearance only for the purpose of objecting to notice to avoid waiving the notice defects; however, be prepared to oppose the application substantively in case the court finds notice is proper.



#### **Cross Reference:**

Discussion of limited appearance to assert defects in service and waiver of defects, see 26.48.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### **26.38 Objecting to Ex Parte Relief.**

The party opposing ex parte relief should focus on the central issue of the application, i.e., the applicant's assertion of irreparable harm, immediate danger, or any other statutory basis for ex parte relief [see *Cal Rules Ct, Rule 3.1202(c)*]. The declaration supporting these contentions may be attacked for not being competent or based on personal knowledge [see *Cal Rules Ct, Rule 3.1202(c)*].



#### **Strategic Point:**

A counter declaration may be used to contravene the assertions of the applicant's declaration. Support the counter declaration with a memorandum.



#### **Warning:**

As is the case with the applicant, opposing counsel should review local rules of court to determine any requirements or limitations imposed on the manner in which objections may be made.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.39 CHECKLIST: Making Noticed Motions.**

☐ Seek stipulation as alternative to noticed motion. If stipulation cannot be obtained, seek noticed motion.

☐ Identify papers to be prepared:

☐ Notice of motion.

☐ Motion.

☐ Supporting memorandum.

☐ Other supporting papers: declarations, exhibits, appendices, other documents.

**Authority:**

*CCP § 1010; Cal Rules Ct, Rule 3.1112*

**Discussion:**

*See 26.41, 26.42, 26.43[1], [2]*

**Forms:**

*See 26.65, 26.67*

☐ Prepare evidence to support motion:

☐ Declarations.

- ☐ Affidavits.
- ☐ Request for judicial notice.
- ☐ Request to present oral testimony.

**Authority:**

*CCP § 1010; Cal Rules Ct, Rules 3.1112, 3.1306(a)*

**Discussion:**

*See 26.43[3]-[4], [6]*

**Forms:**

*See 26.66, 26.68, 26.71*

- ☐ Prepare memorandum in support of motion.
  - ☐ Comply with format requirements of California Rules of Court.
    - ☐ Contents must include:
      - ☐ Statement of facts.
      - ☐ Concise statement of the law.
      - ☐ Evidence and arguments upon which memorandum relies.
      - ☐ A discussion of the statute, cases and textbooks cited in support of the position advanced.
  - ☐ Adhere to 15-page limitation or seek permission to file longer memorandum.
  - ☐ Exclude or redact social security and financial account numbers and consider filing optional confidential identifier reference list.
  - ☐ Include a copy of supporting evidence referenced in memorandum.
  - ☐ Prepare same number of copies as notice of motion.
  - ☐ Prepare memorandum for service and filing with notice of motion papers.

**Warning:**

Failure to file requisite memorandum may be construed as an admission that the motion lacks merit and may result in denial.

**Authority:**

*Cal Rules Ct, Rules 1.20(b), 1.200, 3.1113*

**Discussion:**

See 26.43[5], 7.06[10]

**Form:**

See 26.67

☐ Prepare documents affecting appearance, if applicable:

☐ Notice of nonappearance.

☐ Notice of intent to appear by telephone.

**Authority:**

*Cal Rules Ct, Rules 1.6(4), 3.670(a), (c), (g), 3.1304(c); see also CCP § 367.5*

**Discussion:**

See 26.43[7], [8]

**Forms:**

See 26.69, 26.70

☐ Prepare proof of service.

☐ Sign the notice of motion.

☐ Sign memorandum.

☐ Have declaration executed by person making it or have affidavit subscribed and sworn to.

☐ Attach an unsigned copy of proof of service to the papers to be served.

☐ If service by mail, overnight service, or facsimile note the date and place of mailing, deposit or transmission on the papers served.

**Authority:**

*CCP §§ 128.7(a), (i), 1013(b), (d), (f), 1013a*

☐ For *CCP § 1005* motions, serve notice of motion and supporting papers on adverse party's counsel or adverse party at least 16 court days before hearing.



- ☐ Notice period is extended if notice is not delivered by personal service.
- ☐ Notice period for motions other than *CCP* § 1005 motions may be extended or limited by statutes governing particular motions.
- ☐ Court may prescribe shorter notice period on its own motion or on application for order shortening time.

**Authority:**

*CCP* § 1005(a), (b), 1010, 1010.6(a)(6), 1011, 1013, 1015

**Discussion:**

See 26.44

- ☐ Prepare certificate, affidavit or declaration of service.

- ☐ State exact titles of papers served.
- ☐ Have document executed by person making service.
- ☐ Attach original certificate, affidavit or declaration to original of papers served.

**Authority:**

*CCP* § 1013

**Discussion:**

See 26.44

- ☐ For *CCP* § 1005 motions, file motion, supporting papers, and proof of service with court clerk at least 16 court days prior to hearing.

- ☐ Pay filing fee.
- ☐ Request clerk fill in date and time of filing.
- ☐ If file by mail enclose self-address stamped envelope for return of file stamped copy.
- ☐ Request clerk place motion on calendar.
- ☐ File proof of service at least 5 court days before hearing.

- ☐ Motion deemed made on service and filing.

**Authority:**

*CCP §§ 1005(b), 1005.5, 1010; Gov Code § 70617; Cal Rules Ct, Rules 1.21, 1.5(b), 3.1100, 3.1300(a), (c)*

**Discussion:**

See 26.44

☐ File Reply Memorandum, with proof of service, if opposing memorandum raises issues not sufficiently addressed in supporting memorandum.

☐ Consider using reply papers as notification of telephone appearance.



**Timing:**

File reply memorandum at least 5 court days before hearing.

**Authority:**

*CCP §§ 1005(b), (c), 1010.6(a)(6); Cal Rules Ct, Rules 3.1300(a), 3.607(g)(1)(A)*

**Discussion:**

See 26.45



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#### **26.40 Options and Strategies.**

Noticed motions are the most common form of law and motion practice. The name of the motion may change depending on the procedure being used (*e.g.*, demurrer, motion to quash, motion to strike, motion for summary judgment, claim of exemption), but the procedures share the common element of requesting the court to issue an order affecting the action before trial.

The majority of motions are enumerated in *CCP* § 1005, and the requirements of *CCP* § 1005 apply to any other proceeding under the code in which notice is required and no other time or method is prescribed by law or by court or judge [*CCP* § 1005(a)(13)].

If pressed for time and the period of notice causes problems, consider filing a concurrent motion to shorten time.

Be sure to completely and thoroughly support the motion with the required evidence, to facilitate the court's determination of the precise relief being sought and the merit of the request. Law and motion papers should never be used to burden an opponent. Resist the urge to sandbag the opposition by saving crucial evidence for the reply papers or the hearing. The court may deem the evidence waived because it was not provided in the moving papers. Evidence varies from motion to motion, and the amount required depends on the procedure. Motions for summary judgment have extensive evidence requirements and should be fully supported or risk denial of valid motion.



#### **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.41 Notice of Motion Is Required and Must Be in Writing.**

During a pending action or proceeding, the moving party must provide the opposing party with notice of any motion it intends to bring [CCP §§ 1005(b), 1010]. Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which the motion will be made, the papers, if any, upon which it is to be based [CCP § 1010; see also CCP § 1005 (instances in which written notice is required)], the party bringing the motion, the names of the parties to whom it is addressed, and if a pleading is challenged, the specific portion challenged [Cal Rules Ct, Rule 3.1112(d)].



**Warning:**

The fact that an opposing party has actual knowledge of a proceeding will not waive the statutory written notice requirement [ *County of Santa Clara v. Perry* (1998) 18 C4th 435, 442, 75 CR2d 738, 956 P2d 1191 ]. However, failure to provide written notice may be excused if the motion is made orally in open court in adverse counsel's presence [ *Thieme v. Commercial Lighting & Maint. Co.* (1960) 177 CA2d 575, 576, 2 CR 382 ].

**Exception:**

The notice requirement or objection to defects in notice may be waived by opposing party's appearance at the hearing of the motion and opposition to it on its merits [ *Mann v. Cracchiolo* (1985) 38 C3d 18, 27, 210 CR 762, 694 P2d 1134 ; *Vlahovich v. Cruz* (1989) 213 CA3d 317, 320, 261 CR 565 ], unless the appearance is solely for the purpose of objecting to the motion on grounds of inadequate notice [ *Bohn v. Bohn* (1913) 164 C 532, 538-539, 129 P 981 ].



**Cross Reference:**

Discussion of limited appearance to assert defects in service and waiver of defects, see Ch. 27, *Service of Papers*, 27.40 et seq.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.42 Noticed Motion Composed of Three Required Parts: Notice of Motion, Motion Itself, and Supporting Papers.**

The papers filed in support of a motion or demurrer must include the following papers [*Cal Rules Ct, Rule 3.1112(a)*]:

- The motion or demurrer itself;
- The notice of hearing on the motion or demurrer; and
- A memorandum in support of the motion or demurrer.

These papers may be filed as separate documents or may be combined in one or more documents if the party filing a combined pleading specifies these items separately in the caption of the combined pleading [*Cal Rules Ct, Rule 3.1112(c)*].

Other papers may be filed in support of a motion, such as [*Cal Rules Ct, Rule 3.1112(b)*]:

- Declarations.
- Exhibits.
- Appendices.
- Other documents or pleadings.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### 26.43 Preparing Motion Papers.

**26.43[1] Notice of Motion Must State Nature of Order Sought and Grounds.** The notice of motion must state in the opening paragraph the nature of the order being sought and the grounds for issuance of the order [*Cal Rules Ct, Rule 3.1110(a)*].

**26.43[2] Motion Must Have Required Elements.** The motion itself must [*Cal Rules Ct, Rule 3.1112(d)*]:

- Identify the party or parties bringing the motion;
- Name the parties to whom it is addressed;
- Briefly state the basis for the motion and the relief sought; and
- If a pleading is challenged, state the specific portion challenged.

#### ➤ **Cross References:**

Format of citations to legal sources, see 26.43[5][c]. Exclusion or redaction of social security and financial account numbers from documents filed in the court's public file, see *Ch. 7, Complaints, 7.06[10]*.

**26.43[3] Provide Affidavits and Declarations Setting Forth Evidentiary Facts.** Unless the motion is not subject to support by extrinsic evidence, one or more affidavits or declarations, made under penalty of perjury, and setting forth the evidentiary facts required to establish the grounds of the motion are necessary [*Cal Rules Ct, Rule 3.1306(a)*]. Other evidentiary documents on which the motion is based, such as contracts, deeds of trust, or matters of which judicial notice may be taken, may be attached as exhibits to the declarations that authenticate them [*see, e.g., Coulston v. Cooper (1966) 245 CA2d 866, 869, 54 CR 302* (auto rental contract attached as exhibit to declaration supporting motion to quash)].

#### ➤ **Cross Reference:**

Discussion of evidentiary support for motions, see 26.12 et seq.

**26.43[4] Provide Written Statement Setting Forth Nature and Extent of Oral Evidence Which Seek to Introduce and Time Estimate for Hearing.** A written statement setting forth the nature and extent of the evidence sought to be introduced and a reasonable time estimate for presentation of such evidence at the hearing must be filed at least three days prior to the hearing [*Cal Rules Ct, Rule 3.1306(b)*].



**Cross Reference:**

Discussion of evidentiary support for motions, see 26.12 et seq.



**Warning:**

Likelihood of oral testimony at a law and motion proceeding is extraordinarily limited.

**26.43[5] Provide Supporting Memorandum.**

**26.43[5][a] Supporting Memorandum Must Be Served and Filed With Motion.** Unless specifically exempt by *Cal Rules Ct, Rule 3.1114*, a supporting memorandum must be served and filed with a motion [*Cal Rules Ct, Rule 3.1113(a)*].



**Warning:**

Failure to file the requisite memorandum may be construed as an admission that motion lacks merit, may result in denial of the motion, and may waive of all grounds not supported [*Cal Rules Ct, Rule 3.1113(a)*].

**Exception.**

In limited circumstances, a supporting memorandum is not required if the civil motion, application, or petition is filed on one of the following Judicial Council forms [*Cal Rules Ct, Rule 3.1114(a)*]:

- Application for appointment of guardian ad litem in a civil case.
- Application for an order extending time to serve pleadings.
- Motion to be relieved of counsel.
- Motion filed in small claims case.
- Petition for change of name or gender.
- Petition for declaration of emancipation of minor.
- Petition for injunction prohibiting harassment.
- Petition for protective order to prevent elder or dependent adult abuse.
- Petition of employer for injunction prohibiting workplace violence.
- Petition for order prohibiting abuse (transitional housing).

- Petition to approve compromise of claim of a minor or person with a disability.
- Petition for withdrawal of funds from blocked account.

In these instances, a party may still submit, or the court may order submission of, a memorandum in support of the motion, application, or petition if it would further the interests of justice; and the memorandum must comply with *Cal Rules Ct, Rule 3.1113* [*Cal Rules Ct, Rule 3.1114(b)*].

#### **Cross Reference:**

Discussion of when memorandum required, see 26.43[5].

**26.43[5][b] Memorandum Must Comply With California Rules of Court.** The form and content of memoranda are governed by *Cal Rules Ct, Rule 3.1113*, and more generally by *Cal Rules Ct, Rules 3.1100, 3.1103, 3.1110, 3.1112, 3.1113, 3.1150, 3.1200 et seq., 3.1350*. Memoranda are also subject to general rules governing papers served and filed with the court [*see Cal Rules Ct, Rules 1.20(b), 1.200, 2.100 et seq.*].

#### **Warning:**

The rules of court adopted by the Judicial Council preempt local court rules dealing with the form and format of papers, as well as local court rules relating to, inter alia, motions [*Cal Rules Ct, Rule 3.20*].

#### **Cross Reference:**

Exclusion or redaction of social security and financial account numbers from documents filed in the court's public file, see *Ch. 7, Complaints, 7.06[10]*.

**26.43[5][c] Contents of Memorandum and Style.** A memorandum filed in support of a motion must contain: 1) a statement of facts; 2) a concise statement of the law; 3) evidence and arguments upon which the memorandum relies; and 4) a discussion of the statutes, cases and textbooks cited in support of the position advanced. The rules do not prohibit the organization of the points and authorities in the memorandum "on some other basis than plodding down the line with each cause of action, seriatim" [ *Hope Internat. Univ. v. Superior Court (2004) 119 CA4th 719, 732* ].

A memoranda that exceeds 10 pages must include a table of contents and a table of authorities [*Cal Rules Ct, Rule 3.1113(d)*]. A memorandum that exceeds 15 pages must also include an opening summary of argument [*Cal Rules Ct, Rule 3.1113(d)*].

As with all documents filed with the court, the style used in a memorandum must comport with the *California Style Manual* or *The Bluebook: Uniform System of Citation*, at the option of the party filing the document, and must be used consistently throughout the memorandum [*Cal Rules Ct, Rule 1.200*].

#### **Warning:**

*Cal Rules Ct, Rule 2.100 et seq.* sets forth statewide standards for the size, color, and type of paper; font style and color; line spacing and numbering; and other formatting requirements for papers filed with trial courts. Violation of these requirements may cause the court to reject the motion.

**26.43[5][d] Page Length Is Limited and Permission Required for Longer Memorandum.** Except for memoranda accompanying summary judgment motions, supporting memoranda may not exceed 15 pages, and reply memoranda are limited to ten pages. The page limits do not include exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service [*Cal Rules Ct, Rule 3.1113(d)*].

#### **Warning:**



Court has discretion to refuse to consider a memorandum that is filed in excess of page limit without permission [*Cal Rules Ct, Rule 3.1113(d)*].

**Judge's Perspective:**

Counsel should be admonished not to try and extend the page limitations through the use of footnotes, declarations that contain further points and authorities, and clever margin and font changes. These tactics can be readily spotted and serve no useful purpose. These tactics jeopardize counsel's credibility prior to the hearing on the motion.

**Distinguish--Multiple Parties:**

The page limits of Cal Rules Ct, Rule 3.113(d) apply to all plaintiffs or all defendants on each side of a motion, rather than as separate page limitations as to each plaintiff or defendant (e.g., three co-plaintiffs opposing a single summary judgment motion are limited to a single memorandum of 20 pages instead of an aggregated 60 pages). Should multiple plaintiffs or multiple defendants want to increase the page limit of a memorandum, they must use the application process to file a longer memorandum under Cal Rules Ct, Rule 3.113(e) [ *Collins v. Hertz Corp (2006) 144 CA4th 64, 71, 50 CR3d 149* ].



**Warning:**

File ex parte application with the court at least 24 hours before the memorandum is due requesting permission to file a longer memorandum, and advise the other parties of the request by written notice [*Cal Rules Ct, Rule 3.1113(d)*]. It is advisable to seek permission to file a longer memorandum well in advance of the 24-hour deadline in case your application for extension is denied.

**26.43[5][e] Attach Evidence Referenced In Memorandum for Service and Filing.** If the memorandum refers to evidence that is not before the court, a copy of such evidence must accompany the memorandum [*see CCP § 1010; see also CCP § 1005(b)*]. Also, authority other than California law, or California case law published in the Advance Sheets of the Official Reports must be lodged with the papers and tabbed as exhibits as required by *Cal Rules Ct, Rule 3.1110(f)* [*Cal Rules Ct, Rule 3.1113(j)*].



**Strategic Point:**

Some judges request that copies of California opinions also be provided with the "Judge's Copy" of the memorandum. It also may be useful to bracket the portions of opinions that are provided to assist the trial judge in focusing quickly on the points for which the opinion was cited. A "Judge's Copy" is sometimes required by local rule [*see, e.g., San Francisco Super Ct Rules, Rule 8.5*]. If the moving party needs to obtain a hearing and ruling or order promptly, it may be advisable to provide "Judge's Copies" of both your own and your adversary's papers to avoid a possible continuance of the hearing. Some judges have encouraged the submission of a well-organized three-ring binder of all papers that have been filed or lodged in connection with the particular hearing.

Evidence not before the court is usually in the form of affidavit or declaration, but may also include documentary evidence, presented as exhibits that are authenticated by affidavits or declarations attached to the exhibits, or discovery products such as deposition testimony and interrogatories, which also require authentication. Evidentiary facts may also be matters subject to judicial notice.

**Distinguish:**

- For all practical purposes, declarations under penalty of perjury have replaced affidavits as the mode

of presenting the evidence of a witness on motion.

- Some motions may not be supported by extrinsic evidence [*see, e.g., CCP § 438* (motion for judgment on the pleadings)]; therefore, the supporting or opposing memorandum will rely on pleadings or judicially noticed matters. In addition, when submitting evidence discussed in a memorandum counsel must be aware of the foundational requirements for the court to consider the evidence, as well as the limitations on the court's consideration of particular forms of evidence.



#### Strategic Point:

Prior to presenting a legal argument, counsel should ensure that the evidence supports counsel's position. To the extent the support is contained in counsel's own declaration, counsel must scrupulously confine statements to matters of counsel's own knowledge or to matters shown by other documents that counsel can authenticate.

**26.43[6] Provide Request for Judicial Notice.** The court is required to take judicial notice of matters set forth *Evid Code § 452* if a party requests that judicial notice be taken, gives each adverse party notice of the request, and furnishes the court with sufficient information to enable it to take judicial notice of the matter [*Evid Code § 453*].



#### Cross Reference:

Discussion of judicial notice for motions, see 26.17.

**26.43[7] Provide Notice of Nonappearance If Party Does Not Intend to Appear at Hearing on Motion.** A party may give notice that he or she will not appear at a hearing and submit the matter without an appearance unless the court requires such appearance [*Cal Rules Ct, Rule 3.1304(c)*]. In such event, the court must rule on the motion as if the party had appeared [*Cal Rules Ct, Rule 3.1304(c)*].

**26.43[8] Provide Notice of Intent to Appear by Telephone If Desired and Permitted.** If a party chooses to appear by telephone, that party generally must either set forth such intention by placing the phrase "Telephone Appearance" below the title of the moving papers, or notify the court and all parties at least three court days before the appearance, either orally or in writing, of such intention [*Cal Rules Ct, Rule 3.670(g)(1)*]. If the party subsequently decides to appear in person, notice must also be provided to the court and the other parties [*Cal Rules Ct, Rule 3.670(g)(3)*].



#### Cross Reference:

Discussion of appearing by telephone, see 26.18 et seq.

**26.43[9] Other Documents May Accompany Motion.** Requests to introduce oral evidence at the motion hearing pursuant to *Cal Rules Ct, Rule 3.1306(a)*, and written objections to evidence submitted in opponent's papers may also accompany the memorandum.

#### Prerequisite:

A written statement setting forth the nature and extent of the evidence sought to be introduced and a reasonable time estimate for presentation of such evidence at the hearing must be filed at least three days prior to the hearing [*Cal Rules Ct, Rule 3.1306(b)*].



#### Cross Reference:

Discussion of oral testimony and restrictions, see 26.15, 26.16.

**26.43[10] Signing Notice of Motion and Sanctions.** If the party is represented by an attorney of record, at least

one attorney of record must sign the notice of motion in the attorney's name; or if the party is not represented by counsel, the party must sign the notice of motion [CCP § 128.7(a), (i)]. An unsigned paper will be stricken unless the omission is corrected promptly after being called to the attention of the attorney of party [CCP § 128.7(a)]. Presenting the motion to the court, whether by signing, filing, submitting, or later advocating it constitutes a certification that the motion is not filed for an improper purpose or frivolous [CCP § 128.7(b)].

**Cross Reference:**

Discussion of sanctions, see Ch. 35, Sanctions.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Motion Practice Content & Form Civil Procedure Pleading & Practice Motion Practice Supporting Memoranda



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#### 26.44 Service and Filing of Papers.

**26.44[1] For CCP 1005 Motions, Serve and File Notice of Motion, Motion, and Supporting Papers at Least 16 Court Days Prior to Hearing.** For the majority of motions, the notice of motion, motion, and supporting papers must be served on the opposing parties at least 16 court days before a hearing on the motion [*CCP §§ 1005(b), 1010; Cal Rules Ct, Rule 3.1300(a); Gov Code § 70617*]. Papers served on the parties must be a copy of papers filed or to be filed with the court [*CCP § 1005(b)*].



#### Trap:

Not all motions require 16 court days' notice. Motions for summary judgment require notice 75 days before hearing [*CCP § 437c(a)*]. Motions to dismiss for failure to prosecute require 45 days' notice [*Cal Rules Ct, Rule 3.1342*]. Completely read the appropriate statute, and if there are no specific time requirements then review the statutes governing time and method when not otherwise prescribed by law or by court or judge [*see CCP § 1005(a)(13), (b)*].



#### Cross Reference:

Discussion of determining time requirements for service, see *Ch. 27, Service of Papers, 27.03 et seq.*

Local rules may provide that notice and motion papers be filed in a place other than the clerk's office.

Courts must provide a drop box for filing when the clerk's office filing counter is closed between 8:30 a.m. and 4:00 p.m. A court may provide a drop box for use at other times [*Cal Rules Ct, Rule 2.210(a)*]. A document deposited in a court's drop box up to and including 4:00 p.m. on a court day is deemed to have been deposited for filing on that day. A court may provide for same-day filing of a document deposited in its drop box after 4:00 p.m. on a court day. If so, the court must give notice of the deadline for same-day filing of a document deposited in its drop box [*Cal Rules Ct, Rule 2.210(b)*]. A court must have a means of determining whether a document was deposited in the drop box by 4:00 p.m., or after the deadline for same-day filing if a court provides for a later time, on a court day [*Cal Rules Ct, Rule 2.210(d)*].



#### Warning:

A paper is late if not submitted before the close of the clerk's office on the day the paper is due [*Cal Rules Ct, Rule 3.1300(e)*]. However, no paper may be rejected for filing on the ground that it was submitted after the time set for filing [*Cal Rules Ct, Rule 3.1300(d)*]. Nonetheless, if a clerk refuses to accept late-filed papers, counsel may be required to engage in the time-consuming task of submitting an ex parte application to file a late brief. Although late filing may be waived by the court, late service on opposing counsel must be waived by the opposing party.

**26.44[2] Notice Period May Be Extended or Limited Depending Upon Type of Service.** For non-personal service, the 16-court-day period is increased by:

■ Mail:

- ☐ 5 calendar days if place of mailing and place of address are within California.
- ☐ 10 calendar days if either place of mailing or place of address is outside California, but within United States.
- ☐ 15 calendar days if place of mailing or place of address is outside United States.

■ Facsimile transmission, express mail, or overnight delivery:

- ☐ 2 calendar days.

➡ **Cross Reference:**

Discussion of determining time requirements for service and extensions, see *Ch. 27, Service of Papers*, 27.03 et seq.

**26.44[3] Court May Prescribe Shorter Notice Period on Its Own Motion or Upon Application for Order Shortening Time.** Notwithstanding the notice period set forth in *CCP § 1005(b)*, on its own motion or on application for an order shortening time, supported by a declaration showing good cause, the court may prescribe a shorter time for filing and service of papers [*Cal Rules Ct, Rule 3.1300(b)*].



**Warning:**

For summary judgment motions, the court may not order the shortening of the 75-day notice period [ *McMahon v. Superior Court (2003) 106 CA4th 112, 118, 130 CR 2d 407* ; see also *CCP § 437c(a)* (notice period)].



**Cross Reference:**

Discussion of shortening time, see *Ch. 27, Service of Papers*, 27.08 et seq.

**26.44[4] File Proof of Service With Court Clerk.** Proof of service on the other parties in the action may be filed with the noticed motions and supporting papers, but no later than five (5) court days before the motion hearing. The motion is deemed made upon service and filing [*Cal Rules Ct, Rule 3.1300(c)*].



**Cross Reference:**

Forms of proof of service, see *Ch. 27, Service of Papers*, 27.48 et seq.

**26.44[5] Motion Deemed Made on Service and Filing.** A motion on all the grounds stated in the written notice of motion is deemed to have been made and to be pending before the court, for all purposes, upon service and filing of the notice of motion [*CCP* § 1005.5].

Parties are still entitled to a hearing of the motion to which they are otherwise entitled [*CCP* § 1005.5].

**Distinguish:**

Enactment of *CCP* § 1005.5 did not convert an oral motion to a written motion or affect the contents of the notice of motion; it merely stopped the running of any time period on the motion and dispensed with the necessity of making the motion orally at the hearing by providing that the motion is deemed made on service and filing of the notice of motion.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime Limitations



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**26.45 File Reply Memorandum 5 Court Days Before Hearing If Opposing Memorandum Raises Issues Not Sufficiently Addressed in Supporting Memorandum.**

A reply memorandum should only be filed if an opposing memorandum raises issues or evidence that were not sufficiently addressed in the supporting memorandum [see *Bergman v. Rifkind & Sterling, Inc.* (1991) 227 CA3d 1380, 1386-1387, 278 CR 583 ].



**Timing:**

Reply papers must be filed, and a copy served on each party at least 5 court days before the hearing [CCP § 1005(b), (c); see also CCP § 437c(b)(4) (reply in summary judgment proceeding must be served and filed not less than five days preceding the hearing)].



**Warning:**

CCP § 1013, which extends the time within which a right may be exercised or an act may be done based on type of service, does not apply to CCP § 1005 notices of motion, papers opposing a motion, or reply papers [CCP § 1005(b)].



**Cross Reference:**

Discussion of time extensions based on type of service, see *Ch. 27, Service of Papers*, 27.07.



**Strategic Points:**

- Depending on local practice, may want to file reply memorandum directly with the clerk of the law and motion department or division rather than in the office of the court clerk, so that the court will have sufficient time to consider the reply memorandum prior to the hearing on the motion. Counsel should also review local requirements to determine whether filing in the department is optional or mandatory.
- Reply papers offer the opportunity to provide a succinct response to the issues opposing counsel has

raised. The motion papers generally cover multiple issues in a fairly limited fashion, whereas the opposing papers may raise a singly point that can be thoroughly addressed in the reply.

■ If no party has yet to give notice of telephone appearance, the replying party may use its reply papers to notify the court and the parties of its intention to do so [*Cal Rules Ct, Rule 3.670(g)(1)(A)*].



**Cross Reference:**

Discussion of appearing by telephone, see 26.18 et seq.



**Warning:**

A reply memorandum should not attempt to raise issues not previously raised in either the supporting or opposing memoranda.

**Judge's Perspective:**

The court always welcomes reply briefs when, in fact, they function as a reply and not a vehicle for the presentation of new material. The reply brief needs to be succinct and address only those points raised in opposition. It is a good opportunity to frame your strongest point and have the last word. Keep the brief very short.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime Limitations





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**26.46 CHECKLIST: Responding to Noticed Motions.**

☐ Determine whether to oppose motion.

☐ Seek stipulation as an alternative.

☐ Assess whether opposition may subject party to sanctions.

☐ Review motion and supporting papers to determine whether there is a substantive basis for challenge to the motion and/or the supporting papers accompanying the motion.



**Warning:**

Failure to oppose a motion results in a waiver on appeal of any objection to the resulting order.

**Discussion:**

See 26.47

☐ Determine whether the notice of motion has been timely given.

☐ Challenge defective notice.

☐ Appear at hearing without filing a response to request a continuance.

☐ File opposition to noticed motion based upon defective service or inadequate notice and appear at hearing to object to hearing based upon defective or inadequate notice.

**Authority:**

*Bohn v. Bohn* (1913) 164 C 532, 538-539, 129 P 981 ; *Carlton v. Quint* (2000) 77 CA4th 690, 697-698, 91 CR2d 844

**Discussion:**

See 26.48

- ☐ Prepare memorandum in opposition to the motion if determine that valid basis for opposition exists.
  - ☐ Identify the moving party and the motion being opposed when filing an opposition to a motion in a multiple-party case [*Cal Rules Ct, Rule 2.111(6)*].
  - ☐ Prepare affidavit or declaration setting forth the evidence in opposition to motion.
  - ☐ Prepare a written statement setting forth the nature and extent of any oral evidence sought to be introduced, and a reasonable time estimate for the hearing.
  - ☐ Have memorandum executed by counsel, and declarant or have affiant subscribe or swear to its contents.
  - ☐ Serve and file the memorandum and any affidavits, declaration, and/or statement relating to oral evidence.
- ☐ Service and filing is generally in same manner as required for moving party.



**Timing:**

All papers opposing a noticed motion must be filed and served at least 9 court days before the hearing. The statement relating to oral evidence must be filed no later than three court days before the hearing, and if it is filed less than five court days before the hearing, counsel must serve a copy on the moving party in a manner to assure delivery to the moving party no later than two days before the hearing.

**Authority:**

*Bell v. Am. Title Ins. Co.* (1991) 226 CA3d 1589, 1602, 277 CR 583 (party neither filed opposition nor objected at hearing); *CCP §§ 1005(b), 1010.6(a)(6)*; *Cal Rules Ct, Rules 2.111(6), 3.1300(a)*.

**Discussion:**

See 26.49

- ☐ File objection to request for judicial notice.
  - ☐ Objection may be to written request by moving party or to the court's proposal to take judicial notice of a matter.
  - ☐ State grounds for objection.

☐ Append a memorandum supporting each ground of objection to request for judicial notice.

☐ File objections to other evidence supporting motion.

☐ Object to inadmissible evidence in declarations or attached exhibits on such grounds as:

☐ Relevance.

☐ Competency.

☐ Improper opinion.

☐ Privilege.

☐ Hearsay.

☐ Authentication.

**Authority:**

*Evid Code §§ 450-460, 700-1605*

**Discussion:**

*See 26.50*

**Form:**

*See 26.74*

☐ File notice of nonappearance if counsel does not intend to appear at hearing.

☐ File notice of appearance by telephone if desired and permitted.

**Authority:**

*Cal Rules Ct, Rules 3.670(a), (g), 3.1304(c).*

**Discussion:**

*See 26.51*



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#### **26.47 Options and Strategies.**

Opposition to noticed motions involves the two-prong attack of asserting procedural defects and lack of substantive law or evidence in support of the motion. A very common procedural opposition is challenging defective notice, which involves the issue of making a limited appearance at the hearing. Courts do not want their orders subject to collateral attack, and defects in notice and service are a quick way of taking motions off calendar or obtaining a denial.

Substantive attacks are as varied as the motions themselves. Each motion has a central element (*e.g.*, no issue of material fact for summary judgment, insufficient minimum contacts to support jurisdiction for a motion to quash service of summons). Papers should be clear and concise and, if appropriate, provide an alternative to the relief sought in the papers. Craft arguments that consistently focus on the lack of central elements of the motion. Successful oppositions to motions often have a central theory that is supported by each successive point. However, do not be afraid to argue in the disjunctive to avoid waiver of a point that may well deny the motion.

If the motion is meritorious, consider a stipulation to the order sought because this gives your party a better chance at fashioning an agreement that better suits the situation. Also, be mindful that opposing a clearly valid motion on very weak grounds may subject counsel to sanctions for frivolous activity.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.48 Challenging Defective Notice.**

Defects and irregularities in a notice of motion, or failure to provide notice at all to the adverse party may be challenged without waiving the defects or irregularities by an appearance in opposition to the motion for the limited purpose of objecting to a consideration of the motion by the court on the ground of insufficiency of the notice [ *Bohn v. Bohn* (1913) 164 C 532, 538-539, 129 P 981 ].



**Trap:**

Defects and irregularities in a notice of motion, and failure to give notice at all, are normally waived by the adverse party's appearance at the hearing on the motion and opposition to it on its merits [ *Carlton v. Quint* (2000) 77 CA4th 690, 697-698, 91 CR2d 844 ; *Vlahovich v. Cruz* (1989) 213 CA3d 317, 320, 261 CR 565 ; *Tate v. Superior Court* (1975) 45 CA3d 925, 929-930, 119 CR 835 ].

In challenging the absence of notice or defective notice counsel or the adverse party may also appear at the hearing and request a continuance for the purpose of preparing a proper response, making a complete record regarding the notice for appellate purposes in the event the continuance is denied. Alternately, counsel may file an opposition to the motion based on the notice irregularities and the merits, and appear at the hearing to object to the hearing proceeding based upon defective and/or inadequate notice, and requesting a continuance.



**Strategic Point:**

Counsel should only stand on the notice requirements when doing so affirmatively benefits the client (e.g., improper notice of a summary judgment motion causes the court to deny the ability of a party to have a summary judgment motion heard). If, however, adherence to a notice requirement is an exercise of form over substance, little other than extra expense is to be gained for the client and the court will not appreciate the fact that counsel has asserted notice requirements with vigor, on principle, only to have counsel back once proper notice has been given.



**Warning:**

Counsel should be prepared to argue the motion on the merits if the court rejects the request for

continuance.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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#### **26.49 File Opposing Memorandum and Other Papers 9 Court Days Before Hearing.**

Although not expressly authorized by statute or the California Rules of Court, practice permits counsel for the adverse party to oppose the noticed motion by filing a memorandum in opposition to the motion. Counsel also may consider filing counter declarations, requests for judicial notice, and any of the other types of supporting documents used to bring a noticed motion.



#### **Warnings:**

- Failure to oppose a motion results in a waiver on appeal of any objection to the resulting order [ *Bell v. Am. Title Ins. Co.* (1991) 226 CA3d 1589, 1602, 277 CR 583 (party neither filed opposition nor objected at hearing)].
- *CCP § 1013*, which extends the time within which a right may be exercised or an act may be done based on type of service, does not apply to *CCP § 1005* notices of motion, papers opposing a motion, or reply papers [*CCP § 1005(b)*].



#### **Cross Reference:**

Discussion of memorandum format, requirements, and limitations, see 26.43[5].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime Limitations



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### **26.50 Object to Improper Evidence and Requests for Judicial Notice.**

Although the adverse party may choose not to oppose the noticed motion, he or she may object to a request for judicial notice by the moving party or on the court's own motion [*Evid Code* §§ 450, 451, 453; *see also* 26.54 (form)]. Grounds for such objection include: failure of the party requesting judicial notice to give adequate notice of and information about the request [*see Evid Code* § 453], the matter for which judicial notice is requested is not subject to judicial notice [*Evid Code* §§ 451, 452], or that the matter sought to be judicially noticed is irrelevant, prejudicial, or hearsay [*see Evid Code* § 450].



#### **Strategic Point:**

Where a written objection to the request for judicial notice is made counsel should append or attach to the objection a memorandum supporting each ground of objection.

Counsel also may object to the movant's other evidence using the range of objections available in the Evidence Code. A common objection is that the supporting declarations are not based on personal knowledge or include inadmissible hearsay. Review the evidence in support of the motion as if at trial, make the objection in the memorandum, and support the objections with appropriate statutes and case law. Evidence objections include relevance, competency, improper opinion, privilege, hearsay, and authentication.



#### **Cross References:**

Discussion of evidence in support of motion, *see* 26.12 et seq.

Discussion of objecting to evidence, *see* Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections.

#### **Legal Topics:**

For related research and practice materials, *see* the following legal topics:  
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**26.51 Prepare and File Notice of Nonappearance or Notice of Appearance by Telephone.**

If the opposing party or counsel does not intend to appear at the hearing on the motion and opposition to the motion, a notice of nonappearance must be filed [*Cal Rules Ct, Rule 3.1304(c)*]. Alternately, opposing counsel may opt to appear by telephone absent court order to the contrary, and may do so upon filing a notice of appearance by telephone with the court and the other parties [*Cal Rules Ct, Rule 3.670(a), (g)*].



**Cross References:**

Discussion of appearing by telephone, see 26.18 et seq.; discussion of notice of nonappearance, see 26.43[7].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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IX. CHECKING TENTATIVE RULING PROCEDURES

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**26.52 CHECKLIST: Checking Tentative Ruling Procedure.**

- ☐ Review local rules of court for tentative ruling procedure.
  - ☐ Determine if procedure requires party to notice all other parties of intent to appear at hearing if court has not directed oral argument.
- ☐ Check tentative ruling day before scheduled hearing.
  - ☐ If notice required to opt for oral argument, notice all parties by telephone before 4:00 p.m. the day before the scheduled hearing.
  - ☐ Identify issues.

**Authority:**

*Cal Rules Court, Rules 3.1308(a), (c)*

**Discussion:**

See 26.54, 26.55



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**26.53 Options and Strategies.**

Tentative ruling procedures enable the court to shorten the time for a hearing on the motion by focusing the oral discussion, and in some cases to eliminate the need for parties to appear. The tentative ruling should be checked early in the day before the scheduled hearing in case notice is required to opt for oral argument. Use the ruling to focus on the issues the court believes are central to motion and to better prepare for oral argument.



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**26.54 Court Must State Tentative Ruling Procedure in Local Rules.**

A court adopting a tentative ruling procedure must include the procedure in its local rules of court describing the procedure and set forth the telephone number and time for obtaining the ruling. If a court or a branch of a court adopts a tentative ruling procedure, then all judges in the court or branch must use that procedure for issuing tentative rulings. However, no judge is required to issue a tentative ruling [*Cal Rules Ct, Rule 3.1308(c)-(e)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**26.55 Court May Adopt One of Two Procedures.**

Rules of court offer two tentative ruling procedures for a court to adopt:

- Make ruling available by telephone, and by any other method the court designates, by 3:00 p.m. on the court day before the scheduled hearing. The court must designate if oral argument is required, and may note any issues on which the court wishes the parties to provide further argument. If the court has not requested oral argument, it is permitted only upon telephonic or personal notice to the court and the other parties of a party's intent to appear by 4:00 on the court day prior to the hearing. Under this procedure, the tentative ruling becomes the court's ruling if the court has not directed oral argument and notice of intent to appear has not been given [*Cal Rules Ct, Rule 3.1308(a)(1)*].
- The court makes the tentative ruling available by telephone and any other method it designates, by a specified time prior to the hearing, noting any issues on which the court wishes the parties to provide further argument at the hearing. The parties are not required to provide notice of intent to appear, and the tentative ruling does not automatically become the court's ruling if no notice is given. Rather, the court's final ruling is not tendered until after the hearing [*Cal Rules Ct, Rule 3.1308(a)(2)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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X. HEARINGS ON MOTIONS

2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.56

**26.56 CHECKLIST: Hearings on Motions.**

☐ Court may, in some instances, render decision without hearing.

**Authority:**

*Brannon v. Superior Court* (2004) 114 CA4th 1203, 1211, 8 CR3d 491 (oral argument may not be required on every motion brought in superior court, but error to deny hearing on motion for summary judgment); see *Sweat v. Hollister* (1995) 37 CA4th 603, 613

**Discussion:**

See 26.58

☐ Clerk of court will post hearing schedule.

☐ Decide whether to submit matter without appearance.

☐ Decide whether to appear by telephone, or notice intent to appear in person if previously indicated a telephone appearance.

**Authority:**

*Cal Rules Ct, Rules 3.670(g), 3.1304(a), (d)*

**Discussion:**

See 26.59[1], [2]

**Form:**

See 26.69

☐ Moving and opposing counsel present oral arguments and rebuttal in support of their position.

☐ Present evidence by declaration, affidavit, and request for judicial notice, unless otherwise ordered or permitted by the court.

**Authority:**

*Cal Rules Ct, Rule 3.1306*

**Discussion:**

See 26.59[3]



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Chapter 26 Law and Motion Procedure  
X. HEARINGS ON MOTIONS

*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.57*

### **26.57 Options and Strategies.**

If presenting oral testimony, be sure all witnesses are in attendance and consider having them under subpoena. Be prepared to assert the grounds for permissive judicial notice and to rebut objections to evidence.

When arguing the case, do not merely recite the arguments in the moving and supporting papers. The court has already read your papers and wants clarification of difficult issues or questionable precedents.

#### **Judge's Perspective:**

Oral argument at a law and motion hearing is very difficult. You have to avoid repeating matters in your papers and you likewise have to make sure that your points have been emphasized. The best approach is to highlight those issues raised in your points and authorities and ask if the court has any questions or concerns with respect to a particular argument.

#### **► Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.





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X. HEARINGS ON MOTIONS

*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.58*

**26.58 Court May Render Decision on Motion Without Hearing.**

An oral argument may not be required on every motion brought in superior court [ *Brannon v. Superior Court* (2004) 114 CA4th 1203, 1211, 8 CR3d 491 ; see *Sweat v. Hollister* (1995) 37 CA4th 603, 613, 43 CR2d 399 ]; however, a trial court may not deny a hearing on a motion for summary judgment [ *Brannon v. Superior Court* (2004) 114 CA4th 1203, 1211 , 8 CR3d 491 ; *Mediterranean Constr. Co. v. State Farm Fire & Cas. Co.* (1998) 66 CA4th 257, 262-265, 77 CR2d 781 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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Chapter 26 Law and Motion Procedure  
X. HEARINGS ON MOTIONS

*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.59*

### **26.59 Hearing on Noticed Motion.**

**26.59[1] Clerk of Court Posts Schedule of Hearings.** The clerk of the court is required to post a general schedule showing the days and departments for holding law and motion hearings [*Cal Rules Ct, Rule 3.1304(a)*].



#### **Warning:**

If a matter will not be heard on the date scheduled, the moving party must immediately notify the court [*Cal Rules Ct, Rule 3.1304(b)*].

**26.59[2] Moving Party Must Decide Whether to Submit Matter Without Appearance or Whether to Appear By Telephone.** After the moving party provides notice to the other party, unless the court requires his or her appearance at the hearing on the noticed motion, upon filing a notice of nonappearance, the moving party may choose to submit the matter without appearance [*Cal Rules Ct, Rule 3.1304(c)*]. The party also may choose to appear by telephone even if the phrase "Telephone Appearance" was not indicated on the moving papers. To do so, the party must notify the court and all parties by oral or written notice at least 3 court days before the appearance [*Cal Rules Ct, Rule 3.670(d)(1)(B)*]. If another party has given notice of telephone appearance, other parties may notify the court and all other parties that have appeared in the action until noon on the court day before the appearance of their intent to appear by telephone [*Cal Rules Ct, Rule 3.670(g)(2)*].



#### **Warning:**

If a party fails to appear at the hearing without providing a notice of nonappearance, the court may take the matter off the calendar, to be reset only on motion, or the court may rule on the matter [*Cal Rules Ct, Rule 3.1304(d)*].



#### **Cross Reference:**

Discussion of appearance by telephone, see 26.18 et seq.

**26.59[3] If Moving Party Appears Court Will Consider Evidence and Arguments of Both Sides.** Unless counsel for the moving party has given a notice or nonappearance [*Cal Rules Ct, Rule 3.1304(c)*], or the court does not

direct oral argument in its tentative ruling and neither party has noticed an appearance, moving counsel will appear and present oral argument in support of the motion, and in opposition to any affidavit or declaration or memorandum served and filed by the opposing party. Opposing counsel may then present oral argument as to why the motion should not be granted or why it should be granted in a limited or conditional manner. Counsel for the moving party may rebut the opposing counsel's argument and submit matter to the court.

At the hearing, the court will consider evidence that has been submitted as part of the papers filed with the motion, including declarations, affidavits, and requests for judicial notice, without testimony or cross examination, except as allowed in the court's discretion for good cause shown [*Cal Rules Ct, Rule 3.1306(a)*]. The court may also consider oral evidence, if the party presenting the evidence has timely complied with the requirements for presenting oral testimony [*Cal Rules Ct, Rule 3.1306(b)*; see 26.15].

**Cross Reference:**

Discussion of admitting and objecting to evidence, including hearsay in affidavits or declarations and objections to it, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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Chapter 26 Law and Motion Procedure  
XI. RULINGS, ORDERS & POST HEARING REQUIREMENTS

*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.60*

**26.60 CHECKLIST: Rulings and Orders.**

- ☐ Court will ordinarily rule on motion at hearing.
  - ☐ Specific findings generally not required.
  - ☐ Prepare formal order if motion granted.
  - ☐ Obtain court's signature and file formal order with clerk for entry of order.
  - ☐ Some courts will require approval of adverse party to form of order.
- ☐ Entry of order occurs by minute order or formal order of court.

**Authority:**

*CCP § 1015*

**Discussion:**

*See 26.62[1], [2]*

**Forms:**

*See 26.77, 26.78*

- ☐ Clerk notifies parties of court's ruling when court takes matter under submission.



**Warning:**

Failure of the clerk to give the requisite notice does not extend the time provided by law for performing any act, except as regards appeals as provided in the California Rules of Court.

**Authority:**

*CCP § 664.5; Cal Rules Ct, Rule 3.1109*

**Discussion:**

See 26.62[3]

☐ Prevailing party must provide notice of entry of order if represented by counsel.

☐ If not represented by counsel the clerk of the court provides notice.

**Warning:**

Whether the clerk is required to give notice and whether or not the order is in written or appealable, counsel for the prevailing party must give notice of the court's decision to all parties or their counsel in the manner provided by statute, unless such notice is waived in open court and recorded in the minutes.

**Authority:**

*CCP §§ 664.5(a), (b), 1010 et seq.*

**Discussion:**

See 26.62[4]

**Forms:**

See 26.79, 26.80

☐ Court provides notice of order when motion granted or denied on court's own motion.

**Authority:**

*CCP §§ 1010 et seq., 1019.5(b)*

**Discussion:**

See 26.62[5]

☐ Order to show cause is sought when want to require party to appear to show cause why relief requested should not be granted, or to secure order against a party who has not yet appeared in action, although subject to the court's jurisdiction.

☐ Order to show cause acts as both a notice of motion for an order and a citation to a party to appear.

☐ File ex parte application seeking an order to show cause.

☐ Application should set forth evidentiary facts justifying order.

☐ May need or be required to file a memorandum.

☐ Use same procedure to obtain show cause order as use to obtain an order on ex parte application.

☐ Hearing conducted in same manner as hearing on noticed motion.

☐ Court may admit or reject oral testimony.

**Authority:**

*Green v. Gordon* (1952) 39 C2d 230, 232, 246 P2d 38 ; *Difani v. Riverside County Oil Co.* (1927) 201 C 210, 213-214, 256 P 210 ; see also CCP §§ 527, 1010, 1014; Cal Rules Ct, Rules, 3.1100, 3.1113(a), 3.1306(a), 3.1352, 3.1354; *Sarracino v. Superior Court* (1974) 13 C3d 1, 8 n6, 118 CR 21, 529 P2d 53 ; *Kenney v. Kelleher* (1883) 63 C 442, 444 ; *Donald J. v. Evna M.* (1978) 81 CA3d 929, 933, 147 CR 15 ; *Reifler v. Superior Court* (1974) 39 CA3d 479, 483, 114 CR 356 ; *Marshank v. Superior Court* (1960) 180 CA2d 602, 605, 4 CR 593

**Discussion:**

See 26.63

**Form:**

See 26.66

☐ Monetary sanctions may be imposed for violation of court order absent good cause or substantial justification.

☐ Maximum sanction is \$1500.

**Authority:**

CCP § 177.5

**Discussion:**

See 26.64



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### **26.61 Options and Strategies.**

If a proposed order has not been submitted with the moving papers, draft a proposed order and have it present during the hearing. If your motion is successful, the judge can sign the order immediately, which is especially important if immediate relief is needed.

Consider bringing a laptop computer to court with an electronic copy of the order. The order can be conformed to the court's ruling just after the hearing. Although many courts do not have the facilities to provide a printer, if a printer is available, the order can be signed a short time after the judge has ruled.

#### **Judge's Perspective:**

Proposed orders for the most part are very general in nature, because counsel do not necessarily know what points or basis the court will cite for the relief granted. Hence, trial judges generally assign the task of preparing the order to counsel that has prevailed.

#### **➡ Cross Reference:**

Discussion of writ of mandate compelling decision by court, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 19.17.*

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.62*

## **26.62 Ruling on Motions and Entry of Orders.**

### **26.62[1] Court Will Ordinarily Rule on Motion at Hearing.**

**26.62[1][a] Court Is Ordinarily Not Required to Make Specific Findings.** Absent case or statutory law to the contrary, the general rule is that specific findings of fact as a basis for a particular order are to be made only upon issues joined by the pleadings under *CCP* § 590, where the decision of the court following the findings is a judgment, and otherwise, in fact, have no place in the court's ruling on a motion [ *Waller v. Weston* (1899) 125 C 201, 204, 57 P 892 ; see *Allstate Ins. Co. v. Orlando* (1968) 262 CA2d 858, 867, 69 CR 702 ; *Skouland v. Skouland* (1962) 201 CA2d 677, 679, 20 CR 185 ].

#### **Exceptions:**

Failure of the court to specify the matters set forth in *CCP* § 437c may provide a basis for writ relief (if the motion is denied) or appeal (if the motion is granted) from the order [*CCP* § 437c (summary judgment), *CCP* § 473.5 (default)].

**26.62[1][b] If Motion Granted Moving Party Prepares Formal Order.** If the motion is granted a formal order is usually required. If the order is prepared prior to hearing, it may be provided to the clerk for signature by the judge and for conforming the copies. If moving counsel prepares the order after the hearing, counsel should secure opposing counsel's approval as to form, and submit it to the judge for signature. Moving counsel will then have the copies conformed and served on the adverse party or his attorney [see *CCP* § 1015].

#### **Distinguish:**

Some courts may require counsel preparing the order to submit it to opposing counsel for approval as to form before the order is presented to the court for signature. In such case, the notation "Approved as to form" appears at the bottom of the order, and is sent to opposing counsel for his signature.

If the motion is denied, a formal order is not normally prepared. However, if the court requires a formal written order, opposing counsel will ordinarily prepare the order for signature.



#### **Warning:**



While a trial court may shift to counsel the burden of preparing a formal order on a motion for summary judgment under *CCP* § 437c(g), the total abdication of judicial responsibility is error. Thus, granting a summary judgment motion without any specification of the reasons for doing so, then directing counsel for the prevailing party to prepare an order including findings necessary to support the order, without telling the prevailing party what any of those findings should be, is not permitted [ *Carnes v. Superior Court* (2005) 126 CA4th 688, 692, 23 CR3d 915 ].

**26.62[2] Entry of Order on Motion Is by Minute Order or by Filing Formal Order With Clerk.** An entry of order on the motion occurs by either the court's order to the clerk to enter a minute order, which when entered in the minutes is a written order of the court, or the court may make a formal order, the entry of which consists of filing the signed order with the clerk [ *Eldridge v. Superior Court* (1989) 208 CA3d 1350, 1354, 256 CR 724 ].

**26.62[3] When Court Takes Matter Under Submission Clerk Notifies Parties of Court's Ruling.** If the court takes matter under submission rather than ruling on the motion at the hearing, the court clerk is required to notify the parties of the court's ruling or order. The notification must specifically identify the matter ruled upon, and may be made by mail. Where there are multiple parties, the notification must identify the moving party, the party against whom relief was requested, and must specifically identify the particular motion ruled on [ *Cal Rules Ct, Rule 3.1109*; see also *CCP* § 664.5 ].



**Warning:**

Failure of the clerk to give the requisite notice does not extend the time provided by law for performing any act, except as provided in *Cal Rules Ct, Rules 8.104(a), 8.751(a)*, respectively relating to notice of appeal. However, although notice by the clerk is not required by *CCP* § 664.5, notice by the court clerk may constitute notice that will commence the running of certain periods [see, e.g., notice given by the clerk of the court's order denying a motion for summary adjudication of issues begins the running of the period within which a party must petition for review by writ under *CCP* § 437c(m)].

**26.62[4] Prevailing Party Must Provide Notice of Entry of Order.** A prevailing party represented by counsel, and submitting an order or judgment for entry, must prepare and mail a copy of the notice of entry of order or judgment to all parties who have appeared in the action or proceeding and file with the court the original notice of entry of judgment together with the proof of service by mail [ *CCP* § 664.5(a) ].

If the prevailing party is not represented by counsel, the clerk of the court is required to mail notice of entry of judgment to parties appearing in the action or proceeding, and execute a certificate of mailing that is placed in the court file [ *CCP* § 664.5(b) ].

Whether or not the order is one of which the clerk is required to give notice pursuant to *CCP* § 664.5, and whether or not the order is written or appealable, counsel for the prevailing party must give notice of the court's decision regarding a motion to all other parties or their attorneys, in the manner provided in *CCP* §§ 1010-1020 unless notice is waived by all parties in open court and entered in the minutes [ *CCP* §§ 1010-1020 ].



**Strategic Point:**

The ten-day deadline for filing a motion for reconsideration begins at the prevailing party's service of notice of the ruling, not the clerk's sending of notice [ *Forrest v. Department of Corporations* (2007) 150 CA4th 183, 203, 58 CR3d 466 (motion made more than ten days after clerk's mailing but less than ten days after prevailing party's service of notice was timely) ]. Accordingly, counsel for the prevailing party should consider serving notice of the ruling on a motion on the other party as soon as possible after the ruling in order to minimize the time for the other party to consider making a motion for

reconsideration of the ruling on the motion.



**Strategic Point:**

Although a proposed order is not always required, the prevailing party should consider submitting a proposed order with the moving papers [*see Cal Rules Ct, Rule 3.1113(m)*] to avoid the five day approval period provided in *Cal Rules Ct, Rule 3.1312(a)*. If notice was not waived, but a minute order was entered, a notice of ruling can be used as an alternative to a more formal order. A notice of ruling will avoid the delays inherent in the use of a more formal order that must be approved as to form by opposing counsel.

**26.62[5] Court Provides Notice of Order When Motion Granted or Denied On Its Own Motion.** When a court grants or denies a motion on its own motion, the court is responsible for providing notice of its order in the manner provided in *CCP §§ 1010-1020*, unless notice is waived by all parties in open court and is entered in the minutes [*CCP § 1019.5(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.63*

## **26.63 Order to Show Cause.**

**26.63[1] Order to Show Cause Is Used as Both Notice of Motion and Citation Requiring Party to Appear to Show Cause Why Requested Relief Should Not Be Granted.** An order to show cause is in the nature of a citation to a party to appear at a stated time and place to show cause why the relief sought by the moving party should not be granted [ *Green v. Gordon* (1952) 39 C2d 230, 232, 246 P2d 38 ], and substitutes for a notice of motion [ *Donald J. v. Evna M.* (1978) 81 CA3d 929, 933, 147 CR 15 ; *Marshank v. Superior Court* (1960) 180 CA2d 602, 605, 4 CR 593 ], thereby operating as both a notice of motion for an order and a citation to a party to appear [ *Difani v. Riverside County Oil Co.* (1927) 201 C 210, 213-214, 256 P 210 ; *see also Sarracino v. Superior Court* (1974) 13 C3d 1, 8 n6, 118 CR 21, 529 P2d 53 ; *Reifler v. Superior Court* (1974) 39 CA3d 479, 483-484, 114 CR 356 ].

**26.63[2] Show Cause Proceeding Also Used to Secure Order Against Party Who Has Not Yet Appeared in Action.** The order to show cause proceeding may attempt to secure an order against a party who has not appeared in the action or proceeding [ *see CCP §§ 1010, 1014* ], although jurisdiction has been obtained over the party by service of summons, or will be obtained by such service concurrently with the service of the show cause order.

**26.63[3] Order to Show Cause Is Made by Ex Parte Application.** An order to show cause is made by the court or judge on ex parte application [ *Kenney v. Kelleher* (1883) 63 C 442, 444 ]. The application, like the affidavit or declaration submitted in support of a noticed motion [ *Cal Rules Ct, Rule 3.1306(a)* ], must set forth evidentiary facts that would justify issuance of the order.

A memorandum may be necessary and is sometimes required by a party requesting an order to show cause [ *see Cal Rules Ct, Rules 3.1100, 3.1113(a)* ; *see also CCP § 527* (order to show cause in injunction), and *Cal Rules Ct, Rule 3.1176* (order to show cause why ex parte appointment of receiver should not be confirmed) ].

The procedure for obtaining a show cause order is the same as for obtaining an order on ex parte application, and the hearing on the show cause order is conducted in substantially the same manner as a hearing on a noticed motion, with the court having the discretion to admit or reject oral testimony [ *Reifler v. Superior Court* (1974) 39 CA3d 479, 485-486, 114 CR 356 ].

## **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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**26.64 Sanctions May Be Imposed for Violation of Court Order.**

A judicial officer may impose reasonable money sanctions, not exceeding \$1500, for violation of a lawful court order without good cause or substantial justification, by a witness, a party, his or her counsel, or both. This power does not apply to advocacy of counsel before the court [*CCP* § 177.5].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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Chapter 26 Law and Motion Procedure

XII. FORMS

A. Making Noticed or Written Motions

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### 26.65 Notice of Motion.

Notice of Motion

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)  
) [Referee: \_\_\_\_\_]  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR OR-  
) DER  
) \_\_\_\_\_ [specify order  
) sought, e.g., QUASHING SERVICE OF SUMMONS  
) AND/OR STAYING OR DISMISSING THE AC-  
) TION] SUPPORTING \_\_\_\_\_  
) (AFFIDAVIT or  
) DECLARATION) OF  
) \_\_\_\_\_ (name), AND MEMOR-  
) ANDUM SUPPORTING [LIMITED CIVIL CASE]  
) [Telephone Appearance]  
)  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

[EITHER]

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

[OR]

To each \_\_\_\_\_ [party, e.g., Plaintiff] named above, and to the attorney of record for each such party:

[CONTINUE]

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., Defendant Mary Jones] will, and hereby does, move for an order \_\_\_\_\_ [specify, e.g., quashing service of summons on Defendant Mary Jones and/or staying or dismissing the action]. The motion will be made on the grounds that \_\_\_\_\_ [specify legal grounds, e.g., the court lacks jurisdiction over the person of this defendant and/or California is an inconvenient forum and this action, in the interest of substantial justice, should be heard in a forum outside this state].

The motion will be based on this notice of motion, on the \_\_\_\_\_ [affidavit(s) or declaration(s)] of \_\_\_\_\_ [name(s)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [moving party]

NOTES.

**Authority:**

CCP § 1010; Cal Rules Ct, Rules 3.1110, 3.670(g)(1)(A)

**Discussion:**

See 26.39 et seq.

**Related Declaration in Support of Motion:**

See 26.66

**Related Memorandum:**

See 26.67



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### 26.66 Declaration in Support of Motion.

Declaration in Support of Motion  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) DECLARATION OF \_\_\_\_\_ [name,  
) e.g., MARY JONES] IN SUPPORT OF  
) \_\_\_\_\_ [party, e.g., DEFEND-  
) ANT'S] MOTION FOR \_\_\_\_\_ [spe-  
) cify, e.g., QUASHING SERVICE OF SUMMONS  
) AND/OR STAYING OR DISMISSING THE AC-  
) TION]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) [Hearing Judge: \_\_\_\_\_]  
) Date Action Filed: \_\_\_\_\_  
) [Trial Date: \_\_\_\_\_]

I, \_\_\_\_\_ [name, e.g., Mary Jones], declare:

1. I am \_\_\_\_\_ [declarant or other statement as appropriate] and hereby make this declaration in support of \_\_\_\_\_'s [moving party, e.g., Defendant Mary Jones] motion for \_\_\_\_\_ [specify].



2. \_\_\_\_\_[Here, and in subsequent paragraphs, set forth applicable facts to which declarant is competent to testify, or of which court must take judicial notice, or of which court may take judicial notice with request that it do so. If additional facts not within declarant's personal knowledge and not subject to judicial notice are required, secure from persons competent to testify to those facts additional declarations setting forth those facts, and attach those declarations to 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]

NOTES.

**Authority:**

CCP §§ 1010, 2003, 2009, 2015.5; Evid Code §§ 452, 453; Cal Rules Ct, Rules 3.1110, 3.1113(l), 3.1115, 3.1306

**Discussion:**

See 26.14

**Related Notice of Motion:**

See 26.65

**Related Memorandum of Points and Authorities:**

See 26.67



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### 26.67 Memorandum--Skeletal Form.

Memorandum--Skeletal Form  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [names],  
Defendant.

)  
) NO. \_\_\_\_\_  
) MEMORANDUM \_\_\_\_\_ [specify,  
) e.g., IN SUPPORT OF MOTION FOR JUDGMENT  
) ON THE PLEADINGS]  
) [LIMITED CIVIL CASE]  
) [TELEPHONE APPEARANCE]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) [Hearing Judge: \_\_\_\_\_]  
) Date Action Filed: \_\_\_\_\_  
) [Trial Date: \_\_\_\_\_]

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[INCLUDE opening summary if memorandum exceeds 15 pages]

## I. SUMMARY OF ARGUMENT

[SUMMARIZE the arguments set forth in the memorandum]

## II. STATEMENT OF FACTS

\_\_\_\_\_ [State facts relevant to the determination of the motion, e.g., Plaintiff seeks recovery of damages for personal injuries sustained in an automobile accident that occurred on \_\_\_\_\_ (date). As shown by the records of this court, the complaint was filed on \_\_\_\_\_ (date)].

[SET FORTH each point of law supporting your position, anticipating and, if desired, defusing the major arguments that the opposition will raise. The following points and authorities set forth as an example illustrate the manner in which points and authorities in support of a motion for judgment on the pleadings on the ground the action is barred by the statute of limitations might be set forth. Counsel should also insert argument between paragraphs when appropriate, showing the relationship between the facts of the present case and the point of law stated. If appropriate, the letter and introductory phrase or paragraph heading of each point should be included in the table of contents if one is required.]

## III. A MOTION FOR JUDGMENT ON THE PLEADINGS IS PROPER TO RAISE THE BAR OF THE STATUTE OF LIMITATIONS AND MAY BE MADE AT ANY TIME BEFORE FINAL JUDGMENT IS ENTERED.

**A. Nature of Motion.** A motion for judgment on the pleadings is made on the same grounds and decided on the same basis as a general demurrer, and judgment on the pleadings for defendant is proper when the complaint on its face fails to state a cause of action ( *Pierson v. Sharp Mem'l Hosp., Inc.* (1989) 216 CA3d 340, 342, 264 CR 673 ).

**B. Failure of Complaint to State Cause of Action.** A complaint that shows on its face that the cause of action is barred by the statute of limitations does not state facts sufficient to constitute a cause of action and is subject to a general demurrer (*Code Civ. Proc. § 430.10(e)*), but the defect (bar of the statute) must be alleged (see *Jessica H. v. Allstate Ins. Co.* (1984) 155 CA3d 590, 592, 202 CR 239 (involving a demurrer)).

**C. When Motion Can Be Made.** A motion for judgment on the pleadings can be made at any time before final judgment is rendered ( *Shabrick v. Moore* (1961) 195 CA2d 56, 59, 15 CR 310 ).

## IV. THE COMPLAINT SHOWS ON ITS FACT THAT THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

**A. When Cause of Action Accrues.** A cause of action accrues when there is a remedy available ( *Heyer v. Flaig* (1969) 70 C2d 223, 230, 74 CR 225, 449 P2d 161 , overruled on other grounds, *Laird v. Blacker* (1992) 2 C4th 606, 7 CR2d 550, 828 P2d 691 ).

**B. When Period of Limitation Starts.** The period of limitation begins to run when a suit may be maintained ( *Osborn v. Hopkins* (1911) 160 C 501, 506, 117 P 519 ). In this action, the period of limitation began to run on \_\_\_\_\_[date], the date on which the automobile accident occurred.

**C. Limitation on When Action Can Be Commenced.** With exceptions not here applicable, civil actions can only be commenced within the periods prescribed in *Code of Civil Procedure sections 312-365* (*Code Civ. Proc. § 312*).

**D. Period of Limitation on Personal Injury Action.** The period prescribed for the commencement of an action for injury to one caused by the wrongful act or neglect of another is two years (*Code Civ. Proc.* §§ 335, 335.1). Thus, to be timely in this case, the action would need to have been commenced before \_\_\_\_\_ [date].

**E. When Is Action Commenced.** An action is commenced, within the meaning of *Code of Civil Procedure* section 312 *et seq.*, when the complaint is filed (*Code Civ. Proc.* § 350). Here, the complaint was filed on \_\_\_\_\_ [date], \_\_\_\_\_ [specify number of days] after the limitation period expired.

[CONCLUSION *if desired*]

Based on the foregoing authorities, defendant respectfully requests an order granting his/her motion for judgment on the pleadings and dismissing the action.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [moving party]

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1113*

**Discussion:**

*See 26.43[5]*

**Related Notice of Motion:**

*See 26.65*

**Related Ex Parte Application to File Memorandum in Excess of Page Limits:**

*See 26.76*



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Chapter 26 Law and Motion Procedure  
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A. Making Noticed or Written Motions

2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.68

### 26.68 Written Statement of Oral Evidence to Be Introduced at Law and Motion Hearing.

Written Statement of Oral Evidence to Be Introduced at Law and Motion Hearing  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) STATEMENT OF EVIDENCE TO BE INTRO-  
) DUCED IN \_\_\_\_\_ [SUPPORT OF  
) or OPPOSITION TO] \_\_\_\_\_ [party,  
) e.g., DEFENDANT'S MOTION FOR  
) \_\_\_\_\_ [specify, e.g., MOTION TO  
) QUASH SERVICE OF SUMMONS AND/OR STAY  
) OR DISMISS ACTION]  
) [LIMITED CIVIL CASE]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) [Judge: \_\_\_\_\_]  
) Date Action Filed: \_\_\_\_\_  
) [Trial Date: \_\_\_\_\_]

Pursuant to Rule 3.1306(b) of the California Rules of Court, \_\_\_\_\_ [party seeking to introduce oral evidence, e.g., Defendant Mary Jones] requests permission to introduce oral evidence and submits the following written statement of the nature and extent of the oral evidence to be introduced at the hearing:

**NATURE OF THE EVIDENCE:**

The evidence to be introduced at the law and motion hearing is \_\_\_\_\_ [*specify nature of evidence, e.g., the testimony of the Defendant Mary Jones and her contacts with California*].

**EXTENT OF THE EVIDENCE:**

The evidence to be introduced at the law and motion hearing is \_\_\_\_\_ [*set forth extent of evidence, e.g., the defendant's places of residence for the past 30 years, her contacts with California, and the extent of her business dealings with the state*].

The hearing shall take approximately \_\_\_\_\_ [*specify a reasonable time estimate for the hearing, e.g., one hour*].

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_ [*party*]

**NOTES.****Authority:**

*Cal Rules Ct, Rule 3.1306*

**Discussion:**

*See 26.15, 26.16*

**Related Notice of Motion:**

*See 26.65*



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#### **26.69 Judicial Council Form CIV-020 Notice of Intent to Appear by Telephone**

Notice of Intent to Appear by Telephone at Hearing on Motion

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*CCP § 367.5; Cal Rules Ct, Rule 3.670; California Judicial Council Form CIV-020, pictured above, is approved for optional use [Cal Rules Ct, Rule 1.35]*

**Timing:**

*See 26.18, 26.22[1][a]*

**Discussion:**

*See 26.18 -26.22*





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### 26.70 Notice of Nonappearance.

Notice of Nonappearance

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)

)

NO. \_\_\_\_\_

)

NOTICE OF NONAPPEARANCE ON

)

\_\_\_\_\_ [specify, e.g., MOTION TO

)

SET ASIDE DEFAULT]

)

[LIMITED CIVIL CASE]

)

Date: \_\_\_\_\_

)

Time: \_\_\_\_\_

)

Location: \_\_\_\_\_

)

[Judge: \_\_\_\_\_]

)

Date Action Filed: \_\_\_\_\_

[Trial Date: \_\_\_\_\_]

To \_\_\_\_\_ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that counsel for \_\_\_\_\_ [party giving notice, e.g., Defendant Mary Jones] does not intend to appear on the \_\_\_\_\_ [specify matter to be heard, e.g., motion to set aside the default of the Defendant] on \_\_\_\_\_ [date], in \_\_\_\_\_ (Department or Division) \_\_\_\_\_ of this court, and submits the matter to the court on the moving and supporting papers filed with the notice of motion.

\_\_\_\_\_ [date]

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [party giving notice]

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1304(c)*

**Discussion:**

*See 26.43[7]*



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2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.71

### 26.71 Request for Judicial Notice.

Request for Judicial Notice

SUPERIOR COURT OF CALIFORNIA

COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)

)

NO. \_\_\_\_\_

)

REQUEST FOR JUDICIAL NOTICE

)

[LIMITED CIVIL CASE]

)

Date: \_\_\_\_\_

)

Time: \_\_\_\_\_

)

Location: \_\_\_\_\_

)

[Judge: \_\_\_\_\_]

)

Date Action Filed: \_\_\_\_\_

)

[Trial Date: \_\_\_\_\_]

)

TO THE [HONORABLE \_\_\_\_\_ (name), JUDGE OF THE] ABOVE ENTITLED COURT:

\_\_\_\_\_, [Party, e.g., Plaintiff John Smith], under the provisions of *Evidence Code* sections 452, subdivision \_\_\_\_\_, and 453, requests that the court take judicial notice of

\_\_\_\_\_, [specify matter of which notice is requested to be taken, together with sufficient information to enable the court to take notice]

[FOR EXAMPLE, statute of a sister state]

Ohio Revised Code Annotated §§ 4511.29 and 4511.30, which regulate driving left of the center of a road and were in effect at all times mentioned in the complaint on file herein.

[OR, *court record*]

the attached certified copies of the complaint and answer filed in the \_\_\_\_\_ [*specify court, e.g., Superior Court of California, County of \_\_\_\_\_,*] in a prior action by plaintiff against this defendant on the same claim as alleged in the complaint on file herein, and the certified copy of the judgment entered in that case on \_\_\_\_\_ [*date*], after a full trial on the merits, adjudicating that plaintiff take nothing by his/her complaint.

[OR, *fact of common local knowledge*]

the fact that this city was severely damaged by an earthquake that struck without warning in the early morning hours of \_\_\_\_\_ [*date*], resulting in \_\_\_\_\_ [*specify, e.g., a portion of the city's moving some 5 feet to the north*], on the ground that the earthquake and its results are facts of such common knowledge within the territorial jurisdiction of this court that they cannot reasonably be the subject of dispute.

[OR *set forth other matter and CONTINUE*]

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_ [*party's status and name*]

NOTES.

**Authority:**

*Evid Code §§ 452, 453, 455; Cal Rules Ct, Rules 3.1113(l), 3.1306(b), 3.1350(c), (e)*

**Discussion:**

*See 26.17*

**Related Notice of Request for Judicial Notice:**

*See 26.72*

**Related Form of Request in Notice of Motion:**

*See 26.73*



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### 26.72 Notice of Request for Judicial Notice.

Notice of Request for Judicial Notice  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) NOTICE OF REQUEST THAT COURT TAKE JU-  
) DICIAL NOTICE  
) [LIMITED CIVIL CASE]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

TO \_\_\_\_\_ [name of adverse party] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], \_\_\_\_\_ [identify party] will file with the court the attached request that the court take judicial notice of the matter therein stated [and appoint a person learned in the matter to advise the court], together with a memorandum [and \_\_\_\_\_ (specify any written material attached to the request of which judicial notice is requested)].

You will please take further notice that at the above-mentioned time and place \_\_\_\_\_ [party, e.g., Defendant Mary Jones] will submit to the court information to enable the court to take judicial notice of said matter, as

follows: \_\_\_\_\_[attach copy of information relied on to support the request].

[If applicable, add:]

This request will be based on this notice of request, the attached information to enable the court to grant the request, the attached memorandum, such supplemental information as may be filed subsequently herein, such supplemental memoranda as may be filed subsequently herein, and oral and documentary evidence to be presented on the hearing of said request.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [party's status and name]

NOTES.

**Authority:**

*Evid Code §§ 452, 453, 455; Cal Rules Ct, Rules 3.1113(l), 3.1306(b), 3.1350(c), (e)*

**Discussion:**

*See 26.17*

**Related Request for Judicial Notice:**

*See 26.71*

**Related Request for Judicial Notice--In Noticed Motion:**

*See 26.73*



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*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.73*

**26.73 Request for Judicial Notice--In Noticed Motion.**

Request for Judicial Notice--In Noticed Motion

*[EITHER, for example]*

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ *[name(s)]*, the request for judicial notice, and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

*[OR]*

The motion will be based on this notice of motion, on the \_\_\_\_\_ *[specify document or publication of which judicial notice is requested to be taken, e.g., complaint filed on \_\_\_\_\_ (date) in the \_\_\_\_\_ Court of \_\_\_\_\_ in an action entitled \_\_\_\_\_ (name), Plaintiff, vs. \_\_\_\_\_ (name), Defendant, No. \_\_\_\_\_, (a certified copy of which is attached hereto as Exhibit \_\_\_\_\_, and)]* of which this court is hereby requested to take judicial notice pursuant to the provisions of *Evidence Code Section 452, subdivision \_\_\_\_\_*, and Section 453, on the declaration(s) of \_\_\_\_\_ *[name(s)]* and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

*[OR]*

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ *[name(s)]* and the memorandum served and filed herewith, on the records and file herein, on such evidence as may be presented at the hearing of the motion, and on the fact that \_\_\_\_\_ *[specify fact of which notice is requested to be taken,*

*e.g.*, Beverly Hills is in Los Angeles County], of which the court is hereby requested to take judicial notice pursuant to *Evidence Code Section 452, subdivision \_\_\_\_\_*, and *Section 453*.

NOTES.

**Authority:**

*Evid Code §§ 452, 453, 455; Cal Rules Ct, Rules 3.1306(b), 3.1350(c), (e)*

**Discussion:**

*See 26.17*

**Related Request for Judicial Notice:**

*See 26.71*

**Related Notice of Request for Judicial Notice:**

*See 26.72*

**Notice of Motion:**

*See 26.65*

**Memorandum--Skeletal Form.**

*See 26.67*





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*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.74*

### 26.74 Objections to Request for Judicial Notice.

Objections to Request for Judicial Notice  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) OBJECTIONS TO REQUEST FOR JUDICIAL NO-  
) TICE  
) [LIMITED CIVIL CASE]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

TO THE [HONORABLE \_\_\_\_\_ (name), JUDGE OF THE] ABOVE-ENTITLED COURT:

\_\_\_\_\_, [Party, e.g., Plaintiff John Smith], objects to the request of \_\_\_\_\_ [party, e.g., Defendant Mary Jones] that the court take judicial notice of the matter specified in the request on the following grounds: \_\_\_\_\_

[LIST grounds, for example, EITHER]

1. It is not clear from the Request what the court is asked to take judicial notice of, and, consequently, \_\_\_\_\_ [objecting party] is unable to prepare to meet the request.

[AND/OR]

2. The \_\_\_\_\_ [requesting party, e.g., Plaintiff John Smith] has failed to attach to the request copies of the matter to be judicially noticed, and, consequently, \_\_\_\_\_ [objecting party, e.g., Defendant Mary Jones] is unable to prepare to meet the request.

[AND/OR]

3. The copies of the matter of which the court is requested to take judicial notice attached to the request are not certified or otherwise authenticated[, and \_\_\_\_\_ (objecting party) has been unable to verify their accuracy].

[AND/OR]

4. Judicial notice is neither required by *Evidence Code Section 451* nor authorized by *Evidence Code Section 452*.

[AND/OR]

5. The matter of which judicial notice is sought is irrelevant to this case.

[AND/OR]

6. The matter of which judicial notice is sought, although relevant, should be excluded under the provisions of *Evidence Code Section 352* on the ground its probative value is substantially outweighed by the probability that its admission will \_\_\_\_\_ [necessitate an undue consumption of time and/or create substantial danger of \_\_\_\_\_ (undue prejudice and/or confusing the issues and/or misleading the jury)], in that \_\_\_\_\_ [specify].

[AND/OR]

7. The matter of which judicial notice is sought is hearsay and not subject to judicial notice.

[AND/OR]

8. The matter of which judicial notice is sought contains hearsay, and it is clear from the tenor of the request that \_\_\_\_\_ [requesting party] wants this court to take judicial notice of the truth of those hearsay statements.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [party's status and name]

#### MEMORANDUM

[ADD memorandum here]

NOTES.

**Authority:**

*Evid Code §§ 450-460; Cal Rules Ct, Rules 3.1306(b), 3.1350(c), (e)*

**Discussion:**

*See 26.17*

**Related Request for Judicial Notice:**

*See 26.71*

**Related Notice of Request for Judicial Notice:**

*See 26.72*

**Memorandum--Skeletal Form:**

*See 26.67*



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B. Making Ex Parte Applications

2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.75

### 26.75 Ex Parte Motion or Application for Order--Skeletal Form.

Ex Parte Motion or Application for Order--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)

)

)

)

)

)

)

)

)

)

)

)

)

NO. \_\_\_\_\_

EX PARTE APPLICATION

FOR ORDER \_\_\_\_\_

[specify order sought, e.g., TO SHORTEN TIME

FOR NOTICE OF MOTION TO EXPUNGE LIS

PENDENS]

[LIMITED CIVIL CASE]

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Location: \_\_\_\_\_

[Judge: \_\_\_\_\_]

Date Action Filed: \_\_\_\_\_

[Trial Date: \_\_\_\_\_]

[EITHER]

\_\_\_\_\_, [Party, e.g., Defendant Mary Jones] hereby \_\_\_\_\_ [moves or applies] for an  
order \_\_\_\_\_ [specify order sought, e.g., to shorten time for notice of motion to expunge lis pendens].  
This \_\_\_\_\_ [motion or application] is made on the ground that \_\_\_\_\_ [specify, e.g.,

Sale of the subject property, 1 Main Street, Farallon City, California, is to take place in 15 days to meet contractual sales terms and to avoid forfeit of deposit. Existing lis pendens will materially affect the sale price of the property]. [A prior application was made on \_\_\_\_\_ (date) for an ex parte order \_\_\_\_\_ (describe prior application). The court refused that application \_\_\_\_\_ (in whole or in part). This application \_\_\_\_\_ (state why this application is being made, e.g., a different state of facts).] In support of this \_\_\_\_\_ [motion or application], I, the undersigned, declare:

[OR]

\_\_\_\_\_ [Party, e.g., Defendant Mary Jones] hereby \_\_\_\_\_ [moves or applies] for an order \_\_\_\_\_ [specify order sought]. This \_\_\_\_\_ [motion or application] is made on the ground that \_\_\_\_\_ [specify]. [A prior application was made on \_\_\_\_\_ (date) for an ex parte order \_\_\_\_\_ (describe prior application). The court refused that application \_\_\_\_\_ (in whole or in part). This application \_\_\_\_\_ (state why this application is being made, e.g., a different state of facts).]

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [party's status and name]

#### DECLARATION

I, \_\_\_\_\_ [name], declare:

[IN EITHER CASE CONTINUE]

1. I am the \_\_\_\_\_ [attorney of record herein for \_\_\_\_\_ (moving party) or \_\_\_\_\_ moving party].

2. The name, address and telephone number of the \_\_\_\_\_ [attorney for the opposing party or opposing party], as known to me, is \_\_\_\_\_ [set out name, address, and telephone number].

[EITHER]

3. On \_\_\_\_\_ [date], at \_\_\_\_\_ [time], I informed \_\_\_\_\_ [name], \_\_\_\_\_ [name of opposing party or attorney person to whom notice was given], the opposing \_\_\_\_\_ [party or party's attorney], of the date, time and place that the above application for an order \_\_\_\_\_ [specify relief sought] would be made.

4. \_\_\_\_\_ [name of opposing party or attorney person to whom notice was given] informed me that  
 \_\_\_\_\_ [describe response to notice, including whether or not opposition is expected].

[OR]

3. I attempted, in good faith, to inform \_\_\_\_\_ [name], the opposing \_\_\_\_\_ [party or party's attorney], of the time and place that the above application for an order \_\_\_\_\_ [specify order sought] would be made. I was unable to do so even though \_\_\_\_\_ [describe efforts made].

[OR]

3. Notice to the \_\_\_\_\_ [name], the opposing \_\_\_\_\_ [party or party's attorney], of the above application for an order \_\_\_\_\_ [specify order sought] should not be required because  
 \_\_\_\_\_ [specify reason].

[CONTINUE]

5. \_\_\_\_\_ [Set forth, in as many separately numbered paragraphs as necessary, facts within personal knowledge of applicant establishing irreparable harm, immediate danger, or any other statutory basis for granting ex parte relief rather than setting the matter for hearing on noticed motion] .

6. \_\_\_\_\_ [Set forth, in as many separately numbered paragraphs as necessary, facts within personal knowledge of applicant establishing right to order sought; if facts are not within applicant's personal knowledge, have person with knowledge make an affidavit or execute a declaration under penalty of perjury, attach affidavit or declaration to this application, and incorporate it by reference. Attach as many affidavits or declarations as are necessary to establish the required facts.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1200 et seq.*

**Discussion:**

See 26.23-26.34

**Related Ex Parte Application to File Memorandum in Excess of Page Limits:**

See 26.76

**Declaration in Support of Motion:**

See 26.66

**Related Order:**

See *26.81*



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Chapter 26 Law and Motion Procedure

XII. FORMS

B. Making Ex Parte Applications

2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.76

**26.76 Ex Parte Application for Leave to File Memorandum in Excess of Page Limit.**

Ex Parte Application for Leave to File Memorandum in Excess of Page Limit

SUPERIOR COURT OF CALIFORNIA

COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)

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NO. \_\_\_\_\_

EX PARTE APPLICATION FOR LEAVE TO FILE

MEMORANDUM IN EXCESS PAGE LIMITA-

TION, SUPPORTING DECLARATION(S) of

\_\_\_\_\_

\_\_\_\_\_, [name(s)],

SUPPORTING MEMORANDUM, AND PRO-

POSED ORDER

[LIMITED CIVIL CASE]

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Location: \_\_\_\_\_

[Hearing Judge: \_\_\_\_\_]

Date Action Filed: \_\_\_\_\_

[Trial Date: \_\_\_\_\_]

APPLICATION

\_\_\_\_\_ [Party, e.g., Defendant Mary Jones] hereby applies for an order, pursuant to *California Rules*



of Court, Rule 3.1113(d), granting leave to file a memorandum in \_\_\_\_\_ [purpose of points and authorities, e.g., support of motion to dismiss for lack of jurisdiction] that is in excess of \_\_\_\_\_ [page limitation, e.g., 15] pages in length.

[EITHER, if proposed memorandum is attached]

The memorandum that \_\_\_\_\_ [party, e.g., Defendant Mary Jones] seeks leave to file consists of \_\_\_\_\_ [number, e.g., 22] pages, and is attached as an exhibit to the declaration of \_\_\_\_\_ [name of declarant attorney] in support of and attached with this application.

[OR, if proposed memorandum is unavailable to present for evaluation]

\_\_\_\_\_ [Party, e.g., Defendant Mary Jones] seeks leave to file a memorandum not exceeding \_\_\_\_\_ [number of pages anticipated, e.g., 22] pages in length.

[CONTINUE]

This application is made on the grounds that good cause exists to permit a longer memorandum, and is based on the attached declaration of \_\_\_\_\_ [name of declarant attorney].

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Attorney for \_\_\_\_\_ [moving party]

SUPPORTING DECLARATION OF \_\_\_\_\_ [name]

I, \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for \_\_\_\_\_ (moving party) or other statement as appropriate].

2. \_\_\_\_\_ [State facts showing reasons why the argument cannot be made within the page limit, e.g., The argument in support of defendant's motion to dismiss for lack of jurisdiction is an issue of first impression in this jurisdiction. An adequate analysis of this issue requires discussion of numerous authorities both inside and outside California. Unless the court grants leave to file a memorandum in support of this motion that exceeds 15 pages, defendant will be denied the opportunity to present to the court a complete analysis of an issue central to the entire action.

[3. A copy of the drafted memorandum is attached hereto and made a part hereof.]

4. On \_\_\_\_\_ [date], at \_\_\_\_\_ [time], I provided written notice to \_\_\_\_\_ [name], attorney for \_\_\_\_\_ [party, e.g., Plaintiff John Smith] of \_\_\_\_\_'s [applicant's party, e.g., Defendant Mary Jones] intention to make this application for leave to

file the memorandum specified above in excess of the applicable page limit, that the notice provided the date, time, and manner of the application as noted above, \_\_\_\_\_ [*specify facts demonstrating means of written notice, e.g., as set forth in the attached proof of personal service*].

5. I \_\_\_\_\_ [have or have not] received a response to this application, and I \_\_\_\_\_ [do or do not] expect opposition to this application.

6. *California Rules of Court, Rule 3.1113(d)* provides the basis for granting ex parte relief as requested in this application, rather than setting this matter for hearing on notice motion.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

\_\_\_\_\_ [name of declarant]

#### SUPPORTING MEMORANDUM

I. AN EX PARTE APPLICATION TO FILE A MEMORANDUM IN EXCESS OF THE APPLICABLE PAGE LIMITATION IS PROPER AND SHOULD BE GRANTED WHEN SUPPORTED BY REASONS WHY THE ARGUMENT CANNOT BE MADE WITHIN THE STATED LIMIT.

**A. Ex Parte Relief.** A party may apply to the court ex parte for permission to file a memorandum in excess of the applicable page limits when written notice of the application is given to other parties at least 24 hours before the memorandum is due [*Cal Rules of Ct., Rule 3.1113(d)*]. Written notice of this ex parte application was given to \_\_\_\_\_ [name], attorney for \_\_\_\_\_ [party] on \_\_\_\_\_ [date] and this application is presented on \_\_\_\_\_ [date].

**B. Reasons to Exceed Page Limits.** An application to file a memorandum in excess of the applicable page limits must state the reasons why the argument cannot be made within the stated limit [*Cal Rules of Ct., Rule 3.1113(d)*]. The supporting declaration incorporated in this application provides sufficient reasons to exceed the page limit so the court is properly informed of the issues before it.

#### PROPOSED ORDER

[*EITHER, if proposed memorandum is attached*] Good cause appearing, IT IS HEREBY ORDERED that:

The application of \_\_\_\_\_ [party, e.g., Defendant Mary Jones] for leave to file the memorandum attached to the declaration of \_\_\_\_\_ [name of declarant attorney] in support of this application is GRANTED.

[*OR, if the proposed memorandum is unavailable for the court's evaluation*]

Good cause appearing, IT IS HEREBY ORDERED that:

The application of \_\_\_\_\_ [party, e.g., Defendant Mary Jones] for leave to file a memorandum in \_\_\_\_\_ [specify purpose of memorandum, e.g., support of motion to dismiss for lack of jurisdiction] that is in excess of \_\_\_\_\_ [number, e.g., 15] pages is GRANTED; and

The memorandum may not exceed \_\_\_\_\_ [leave blank for court to fill in or specify number of pages anticipated, e.g., 22] pages in length.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*Cal Rules of Ct, Rules 3.1113(d), 3.1200 et seq.*

**Discussion:**

*See 26.43[5][d]*

**Memorandum--Skeletal Form:**

*See 26.67*

**Related Order:**

*See 26.81*



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2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.77

### 26.77 Order Granting or Denying Motion--Without Findings.

Order Granting or Denying Motion--Without Findings  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                      |
|---------------|---|--------------------------------------|
| _____ [name], | ) |                                      |
| Plaintiff,    | ) | NO. _____                            |
| vs.           | ) | ORDER _____                          |
| _____ [name], | ) | [specify subject of order, e.g.,     |
| Defendant.    | ) | SHORTENING TIME FOR NOTICE OF MOTION |
|               | ) | TO EXPUNGE LIS PENDENS]              |
|               | ) |                                      |

The motion of \_\_\_\_\_ [party, e.g., Defendant Mary Jones] for an order \_\_\_\_\_ [specify nature] came on regularly for hearing by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; Defendant appeared by counsel \_\_\_\_\_ [name].

On proof made to the satisfaction of the court that the motion ought to be \_\_\_\_\_ [granted or denied],

[EITHER]

IT IS ORDERED that the motion be, and hereby is, granted and \_\_\_\_\_ [set out the particular order sought].

[OR]

IT IS ORDERED that the motion be, and hereby is, denied.

Dated: \_\_\_\_\_

\_\_\_\_\_[signature]  
Judge of the Superior Court

NOTES.

**Authority:**

*CCP §§ 1003, 1064*

**Discussion:**

*See 26.62*

**Related Form of Order With Findings:**

*See 26.78*



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2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.78

**26.78 Order Granting or Denying Motion--Order With Findings.**

Order Granting or Denying Motion--Order With Findings  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                                  |
|---------------|---|--------------------------------------------------|
| _____ [name], | ) |                                                  |
| Plaintiff,    | ) | NO. _____                                        |
| vs.           | ) | ORDER _____                                      |
| _____ [name], | ) | [specify subject of order, e.g., SHORTENING TIME |
| Defendant.    | ) | FOR NOTICE OF MOTION TO EXPUNGE LIS              |
|               | ) | PENDENS]                                         |
|               | ) |                                                  |

The motion of \_\_\_\_\_ [party, e.g., Defendant Mary Jones] for an order \_\_\_\_\_  
[specify, e.g., shortening time for notice of motion to expunge lis pendens] came on regularly for hearing by the court on  
\_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by  
counsel \_\_\_\_\_ [name].

The Court, having considered the \_\_\_\_\_ [affidavit or declaration] and other documents in support of  
and in opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, finds as  
follows: \_\_\_\_\_ [set out specific finding or findings required].

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that \_\_\_\_\_ [set out  
particular order sought].

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*CCP §§ 1003, 1064*

**Discussion:**

*See 26.62*

**Related Form of Order Without Findings:**

*See 26.77*



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*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.79*

### 26.79 Notice of Entry of Order.

Notice of Entry of Order  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) NOTICE OF ENTRY OF ORDER  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_  
)

To the above-named \_\_\_\_\_ [party, e.g., Defendant Mary Jones] and to \_\_\_\_\_ [name],  
his/her/its attorney:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], the above-entitled court duly entered an order  
\_\_\_\_\_ [granting or denying] the motion of \_\_\_\_\_ [party] for an order  
\_\_\_\_\_ [specify nature].

Dated: \_\_\_\_\_



\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [party's status and name]

NOTES.

**Authority:**

*CCP § 664.5; Cal Rules Ct, Rule 3.1109*

**Discussion:**

*See 26.62[4]*



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*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.80*

**26.80 Notice of Court's Decision or Order Granting or Denying Motion.**

Notice of Court's Decision or Order Granting or Denying Motion

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)

)

NO. \_\_\_\_\_

)

NOTICE OF \_\_\_\_\_

)

DECISION *or* ORDER]

)

Date: \_\_\_\_\_

)

Time: \_\_\_\_\_

)

Location: \_\_\_\_\_

)

Judge: \_\_\_\_\_

)

Date Action Filed: \_\_\_\_\_

)

Trial Date: \_\_\_\_\_

)

To the above-named \_\_\_\_\_ [nonprevailing party, e.g., Defendant Mary Jones] and to  
\_\_\_\_\_, [name], his/her/its attorney:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], the above-entitled court duly entered  
\_\_\_\_\_ [an order or a decision] \_\_\_\_\_ [granting or denying] the motion of  
\_\_\_\_\_ [party] for \_\_\_\_\_ [specify nature of requested decision or order].

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_ [*party's status and name*]

NOTES.

**Authority:**

*CCP §§ 1010, 1019.5(a)*

**Discussion:**

*See 26.62[5]*



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XII. FORMS  
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*2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.81*

**26.81 Order Granting Ex Parte Application.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)  
)  
)  
)  
)  
)  
)

NO. \_\_\_\_\_

ORDER \_\_\_\_\_ [specify]

Application having been made \_\_\_\_\_ [by or on behalf of] \_\_\_\_\_ [moving party], and  
good cause appearing therefor,

IT IS ORDERED that \_\_\_\_\_ [specify, including any limitations on order, conditions, or terms].

Dated: \_\_\_\_\_

\_\_\_\_\_, [signature]  
Judge of the Superior Court

NOTES.

**Authority:**

*CCP §§ 166(a)(1), 1003*

**Related Applications for Ex Parte Relief:**

See 26.75, 26.76



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Chapter 26 Law and Motion Procedure  
XII. FORMS  
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2-26 MB Practice Guide: CA Pretrial Civil Procedure 26.82

### 26.82 Order to Show Cause--Skeletal Form.

Order to Show Cause--Skeletal Form  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                     |
|---------------|---|---------------------|
| _____ [name], | ) |                     |
| Plaintiff,    | ) |                     |
| vs.           | ) | NO. _____           |
| _____ [name], | ) | ORDER TO SHOW CAUSE |
| Defendant.    | ) |                     |
|               | ) |                     |
|               | ) |                     |

To \_\_\_\_\_ [party, e.g., Defendant Mary Jones]: The ex parte application for an order  
\_\_\_\_\_ [specify, e.g., appointing a receiver] being before this court, and good cause appearing therefor,  
[and \_\_\_\_\_ (specify, e.g., Plaintiff John Smith) having on \_\_\_\_\_ [date], filed an  
undertaking in the amount of \$ \_\_\_\_\_ as provided by *Section 566 of the Code of Civil Procedure*, and  
this court having appointed \_\_\_\_\_ (name) of \_\_\_\_\_ (city), California, a receiver for  
the following described property: \_\_\_\_\_ (describe)],

IT IS HEREBY ORDERED that \_\_\_\_\_ [party, e.g., Defendant Mary Jones] appear on  
\_\_\_\_\_ [date], at \_\_\_\_\_ [time] in [ \_\_\_\_\_ (Department or Division)  
\_\_\_\_\_ of] this court, located at \_\_\_\_\_ [address and room number, if any],  
\_\_\_\_\_ [city], then and there to show cause, if any he/she/it has, why the \_\_\_\_\_  
[appointment of the receiver should not be confirmed or order(s) sought by the attached application should not be  
granted].

[This order shall be served on \_\_\_\_\_ (*party, e.g., Defendant Mary Jones*) by delivering a copy of it, together with a copy of the application attached, at least \_\_\_\_\_ days prior to \_\_\_\_\_ (*date of hearing*)].

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*CCP §§ 1010, 1014; Cal Rules Ct, Rules 3.1100, 3.1113(a); Green v. Gordon (1952) 39 C2d 230, 232, 246 P2d 38*

**Discussion:**

See 26.63



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Chapter 27 Service of Papers

*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.syn*

**§ 27.syn Synopsis to Chapter 27: Service of Papers**

27.01 Scope.

27.02 Objective and Strategy.

27.03 CHECKLIST: Determining Time for Service.

27.04 Options and Strategies.

27.04[1] Type of Procedure Determines Time Requirements.

27.04[2] Non-Personal Service Extends Time Requirements.

27.04[3] Court Orders and Local Court Rules May Change Time Requirements.

27.04[4] Party May Request Time Requirements Be Shortened or Extended.

27.05 Copies and Originals Subject to Same Time Requirements.

27.06 Computing Time Within Which an Act Must Be Done.

27.06[1] Exclude First Day and Include Last Unless Last Is Holiday.

27.06[2] Holidays Are Enumerated in Statute and Include Weekends.

27.06[3] Distinguishing Between Calendar Days and Court Days.

27.07 Computing Time Extensions Based on Procedure and Type of Service.

27.07[1] Notice for CCP § 1005 Motions Is Extended 2 to 20 Days Depending on Method of Nonpersonal Service.

27.07[2] CCP § 1005 Motions Not Affected by CCP § 1013 Extension of Time for Right or Duty to Act After Notice.



27.07[3] Nonpersonal Service of Notice Extends Right or Duty to Act or Respond Under CCP § 1013.

27.07[4] CCP § 1013 Extensions Do Not Apply to Jurisdictional Deadlines.

27.07[5] CCP § 1013 Extensions Only Apply If Service Required.

27.08 CHECKLIST: Shortening Time.

27.09 Options and Strategies.

27.09[1] Consider Necessity of Shortening Time.

27.09[2] Consider Whether to Use Ex Parte Application, or Stipulation.

27.09[3] Consider Provisions That Shorten Time for Discovery.

27.10 Shortening Time by Noticed Motion Uncommon.

27.11 Shortening Time by Ex Parte Application Is Common Method.

27.11[1] Ex Parte Application Is Made As a Necessity.

27.11[2] Shortening Time for Filing and Serving Motion Papers Requires Good Cause.

27.11[3] Follow Standard Ex Parte Application Procedure.

27.11[4] Personal Appearance Required at Hearing With Some Exceptions.

27.12 Shortening Time by Stipulation Available.

27.13 Objecting to Request to Shorten Time.

27.13[1] Attend Ex Parte Hearing to Shorten Time and Assert Defects.

27.13[2] Seek Relief Under CCP § 473 If Ex Parte Application Granted.

27.13[3] Attend the Noticed Hearing but Assert Only Defects in the Notice to Avoid Waiver.

27.14 CHECKLIST: Extending Time.

27.15 Options and Strategies.

27.15[1] Consider Necessity of Extending Time.

27.15[2] Consider Whether to Use Ex Parte Application or Stipulation.

27.15[3] Consider Statutes Expressly Denying or Permitting Extensions of Time Based on Procedure Sought.

27.15[4] State Legislators Given Special Time Extensions.

27.16 Broad Range of Acts May Have Time Extended.

- 27.17 Extensions Must Be Requested During Period in Which Act Must Be Done.
- 27.18 Good Cause Showing Required for Extension.
- 27.19 Extension Limited to 30 Days Unless Adverse Party Consents to Longer Time.
- 27.20 Extending Time by Noticed Motion Uncommon.
- 27.21 Extending Time by Ex Parte Application.
  - 27.21[1] Establish Necessity of Application.
  - 27.21[2] Follow Standard Ex Parte Procedure.
  - 27.21[3] Application Must Be Made to Judge Before Whom Matter Pending.
  - 27.21[4] Previous Time Extensions Must Be Disclosed.
  - 27.21[5] Personal Appearance Required at Hearing With Some Exceptions.
- 27.22 Extending Time by Stipulation.
  - 27.22[1] Parties May Stipulate to Extend Time but Delay Reduction Act May Restrict Length of Extension.
  - 27.22[2] Previous Stipulation to Extend Time Not Used to Compute 30-Day Limit.
  - 27.22[3] Stipulating to Extend Time to Plead Not Normally a General Appearance.
- 27.23 Orders Extending Time Must Be Served Immediately.
- 27.24 Objecting to a Request to Extend Time.
- 27.25 CHECKLIST: Identifying Persons to Be Served and Addresses.
- 27.26 Parties Must Provide Information for Service.
- 27.27 Service Required on Attorney of Record If Party Represented by Counsel.
  - 27.27[1] Service on Attorney Instead of Party.
  - 27.27[2] Exceptions to Service on Attorney of Record.
    - 27.27[2][a] Serve Party With Subpoenas, Writs, and Contempt Documents.
    - 27.27[2][b] Serve Party If Attorney Removed or Suspended From Practice of Law.
  - 27.27[3] Attorney's Address for Service.
    - 27.27[3][a] Serve at Office or Address Provided by Attorney.
    - 27.27[3][b] May Serve at Court If No Address Provided.

27.28 Service Required on Party If Not Represented by Counsel.

27.28[1] Service on Party When Unrepresented.

27.28[2] Party's Address for Service.

27.28[2][a] Serve at Party's Residence.

27.28[2][b] Serve at Court If Residence Unknown.

27.28[2][c] May Serve at Court for Out of State Party.

27.29 CHECKLIST: Choosing Method of Service and Proof of Service of Notices.

27.30 Options and Strategies.

27.31 Personal Service or Leaving Papers With Designated Person.

27.31[1] Serving Attorney of Record.

27.31[2] Serving Party.

27.31[3] Proof of Service.

27.31[3][a] Absence of Method in CCP § 1011.

27.31[3][b] Proof by Affidavit or Declaration.

27.31[3][c] Certificate of Attorney.

27.32 Service by Mail.

27.32[1] Strict Compliance Required for Party and Court Clerk.

27.32[2] Mail to Residence or Office.

27.32[3] Provide Required Notation on Papers or Include Unsigned Affidavit or Certificate.

27.32[4] Service Complete at Time of Deposit but Time Requirements Extended 5 to 20 Calendar Days Depending on Addresses.

27.32[5] Proof of Service.

27.32[5][a] Affidavit of Non-Attorney.

27.32[5][b] Certificate of Attorney.

27.32[5][c] Proof of Service by Court Clerk.

27.33 Service by Express Mail or Overnight Delivery.

27.33[1] Mail or Have Delivered to Office or Residence.

27.33[2] Provide Required Notation on Papers or Include Unsigned Affidavit or Certificate.

27.33[3] Service Complete at Time of Deposit But Time Requirements Extended Two Court Days.

27.33[4] Proof of Deposit.

27.34 Service by Facsimile Transmission.

27.34[1] Specific Definitions for This Method of Service.

27.34[2] Standards.

27.34[2][a] Fax Machine Must Have Minimum Baud Rate.

27.34[2][b] Fax Form and Format Must Conform to State and Local Rules of Court.

27.34[2][c] First-Named Plaintiff Must Maintain Fax Service List.

27.34[2][d] Parties Must Participate in Fax Service List and Serve It on New Parties.

27.34[3] Court May Notice Parties by Fax.

27.34[4] Signed Documents.

27.34[4][a] Signature on Fax Indicates Possession or Control of Original Document.

27.34[4][b] Party May Demand Production of Original Signed Document.

27.34[5] Filing Documents With Court.

27.34[5][a] Different Rules Govern Different Court Departments.

27.34[5][b] Specific Papers Excluded From Facsimile Filing or Issuance by Court.

27.34[5][c] Party May Directly File Documents With Court.

27.34[5][d] Party May Use Fax Filing Agency.

27.34[6] Service Between Parties.

27.34[6][a] Written Consent Required.

27.34[6][b] Fax Machine Must Be Available During Specific Times.

27.34[6][c] Notice Must Include Adequate Notations or Copy of Affidavit or Certificate of Transmission.

27.34[6][d] Service Complete at Time of Transmission but Time Requirements Extended Two Court Days.

27.34[6][e] Proof of Transmission.

27.35 Electronic Service.

27.35[1] Specific Definitions for This Method of Service.

27.35[2] Standards.

27.35[2][a] Court Must Maintain Internet-Accessible System and Publish Requirements and Problems.

27.35[2][b] Electronic Filer Must Have System That Is Compatible With and Does Not Harm Court's Electronic System.

27.35[3] Electronic Filing With Court.

27.35[3][a] Electronic Filing With Court Permitted in Any Action or Proceeding If Local Rules Adopted.

27.35[3][b] Wide Range of Documents May Be Filed.

27.35[3][c] Filed Electronic Document Has Same Legal Effect As Paper Document.

27.35[3][d] Electronic Filing Does Not Alter Filing Deadline.

27.35[3][e] Electronic Filer Must Provide Court With Latest Electronic Address.

27.35[3][f] Signatures Required Under Penalty of Perjury Must Be Signed Before Filing and May Have to Be Produced.

27.35[3][g] Signatures Not Required Under Penalty of Perjury Are Deemed Signed When Filed.

27.35[3][h] Documents Requiring Signatures of Opposing Parties Must Be Completed Before Filing.

27.35[3][i] Digital Signatures Not Required.

27.35[3][j] Court May Permit Electronic Payment of Filing Fees.

27.35[3][k] Court May Contract With Electronic Service Providers.

27.35[3][l] Court Must Send Confirmation of Electronic Filing or Reason Why Rejected.

27.35[3][m] Document Filed After Close of Business Is Filed Next Court Day.

27.35[3][n] Party May Challenge Filing Delay Caused by Court's System.

27.35[3][o] Court Endorsement Will Indicate Electronic Filing.

27.35[3][p] Court May Transmit Electronic Summons.

27.35[4] Electronic Service by Court and Between Parties.

- 27.35[4][a] Electronic Service Permitted When Other Nonpersonal Service Permitted.
- 27.35[4][b] Court May Electronically Serve Notices and Other Court Documents.
- 27.35[4][b1] Judge or Judicial Officer May Sign Electronically Served Document in Any Legal Manner.
- 27.35[4][c] Party Subject to Electronic Service by Notice to Accept Electronic Service or by Electronically Filing Any Document.
- 27.35[4][d] Party Must Update Any Change of Electronic Address.
- 27.35[4][d1] Court Must Provide Electronic Service List, But Serving Party Must Ensure Service.
- 27.35[4][e] Service Complete at Time of Transmission but Time Requirements Extended Two Court Days.
- 27.35[4][f] Service After Close of Business Considered Served on Following Court Day.
- 27.35[4][g] Proof of Transmission.
- 27.35[5] Court May Order Electronic Filing and/or Service in Special Cases.
- 27.36 Service to Court When Party's Residence Address Unknown.
- 27.37 Writ or Order Via Telegraph.
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- 27.39 Service in Foreign Country Served in Same Manner As Summons.
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- 27.42 Avoid Waiver by Limited Appearance at Hearing Objecting Only to Notice.
- 27.43 Application and Declaration for Ex Parte Order Shortening Time for Service of Notice of Motion and Accompanying Papers Under CCP § 1005(b).
- 27.44 Ex Parte Order Shortening Time for Service of Notice of Motion and Accompanying Papers.
- 27.45 Stipulation Extending Time to Perform Act to Date Certain.
- 27.46 Ex Parte Application for Order Extending Time.
- 27.47 Ex Parte Order Extending Time.
- 27.47A Judicial Council Form CM-020 Ex Parte Application for Extension of Time to Serve Pleading and Orders
- 27.48 Judicial Council Form POS-020 Proof of Personal Service--Civil, Judicial Council Form POS-020(D) Attachment (Documents Served), Judicial Council Form POS-020(P) Attachment (Persons Served).
- 27.49 Proof of Personal Service: Certificate of Attorney.

27.50 Judicial Council Form POS-030 Proof of Service by First-Class Mail--Civil, Judicial Council Form POS-030(D) Attachment (Documents Served), Judicial Council Form POS-030(P) Attachment (Persons Served).

27.51 Judicial Council Form POS-040 Proof of Service--Civil (Personal Service, Mail, Overnight Delivery, Messenger Service, Facsimile, E-Mail/Electronic Transmission), Judicial Council Form POS-040(D) Attachment (Documents Served), Judicial Council Form POS-040(P) Attachment (Persons Served).

27.52 Judicial Council Form MC-005 Facsimile Transmission Cover Sheet (Fax Filing).

27.53 Judicial Council Form EFS-005 Consent to Electronic Service and Notice of Electronic Notification Address (Electronic Filing and Service).

27.54 Judicial Council Form EFS-010 Notice of Change of Electronic Notification Address (Electronic Filing and Service).

27.55 Judicial Council Form POS-050/EFS-050 Proof of Electronic Service (Proof of Service/Electronic Filing and Service).



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Chapter 27 Service of Papers  
I. STRATEGY

*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.01*

**27.01 Scope.**

This chapter covers:

- Objectives and strategies for service of papers [see 27.02].
- Determining time for service [see 27.03-27.07].
- Shortening time [see 27.08-27.13; Form: see 27.43, 27.44].
- Extending time [see 27.14-27.24; Forms: see 27.45, 27.46, 27.47A].
- Identifying persons to be served [see 27.25-27.28].
- Choosing method of service and proof of service [see 27.29-27.39; Forms: see 27.48-27.57].
- Asserting defects in service [see 27.40-27.42].

**Core Statutes:**

*CCP §§ 1010.5, 1010.6, 1011-1020*





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Chapter 27 Service of Papers  
I. STRATEGY

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**27.02 Objective and Strategy.**

There are specific, mandatory rules governing service of papers. [*see, e.g., CCP § 1013* (method of service)]. Service must be effected properly [*see, e.g., Lee v. Placer Title Co. (1994) 28 CA4th 503, 511, 33 CR2d 572* (failure to comply with statutory requirements for service by mail deprives a court of jurisdiction to act)]. Rules for service of papers are primarily set forth in *CCP §§ 1005, 1010-1020* and *Cal Rules Ct, Rule 2.300 et seq.*



**Warning--Mistakes Are Costly:**

Compliance with notice provisions is the most important aspect of an attorney's practice. Ensuring strict compliance should not be left to others, as a client's rights can be irretrievably lost, subjecting an attorney to a malpractice action or sanctions. Some sanctions are mandatory; other sanctions may be imposed by the court. In addition, the client whose case is compromised by attorney mistakes will want an explanation of the error and appropriate remedies. Moreover, proper notice and service are fundamental element of due process, and failure to abide by the statutes and rules will often render any judgment or order void or subject to collateral attack.

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 518, Service of Summons and Papers (Matthew Bender).



**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.



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Chapter 27 Service of Papers  
II. DETERMINING TIME FOR SERVICE

*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.03*

**27.03 CHECKLIST: Determining Time for Service.**

☐ Compute time within which act must be done:

- ☐ Exclude first day and include last unless last it is a holiday.
- ☐ Saturdays and Sundays are treated as holidays.
- ☐ Review statutory list of court holidays.

**Exception:**

If statute calls for filing on or before a date and that date falls on a weekend or holiday, court may rule that filing may not be done on the next court day [ *Steele v. Bartlett* (1941) 18 C2d 573, 573, 116 P2d 780 ].

**Authority:**

*CCP §§ 10, 12a, 135*

**Discussion:**

*See 27.06*

☐ Compute extensions to 16-court-day notice period for *CCP § 1005* motions:

☐ Notice of motion:

☐ Mail:

☐ 5 calendar days if place of mailing and place of address are within California.

☐ 10 calendar days if either place of mailing or place of address is outside California, but within United States.

☐ 20 calendar days if place of mailing or place of address is outside United States.

☐ Facsimile transmission, express mail, or overnight delivery:

☐ 2 calendar days.



**Warning:**

Fax transmissions are only available if counsel agrees in writing [CCP § 1013(e)].

☐ CCP § 1005 opposition and reply papers:

☐ No additional extensions are available under CCP § 1013.

☐ Opposition papers served and filed 9 court days before hearing.

☐ Reply papers served and filed 5 court days before hearing.

☐ Opposition and reply papers must be served in a manner reasonably calculated to ensure delivery no later than next business day [CCP § 1005(c)].

**Authority:**

CCP § 1005

**Discussion:**

See 27.07[1], [2]

☐ Compute CCP § 1013 time extensions to act or respond based on type of notice received:

☐ No extension for personal service.

☐ Noticed by mail:

☐ 5 calendar days if place of mailing and place of address are within California.

☐ 10 calendar days if either place of mailing or place of address is outside California, but within United States.

☐ 20 calendar days if place of mailing or place of address is outside United States.

☐ Noticed by facsimile transmission, express mail, overnight delivery, or electronic service:

☐ 2 court days.

**Exception:**

Time extensions do not apply to:

- Filing notice of intention to move for new trial.
- Filing notice of intention to move to vacate judgment.
- Filing notice of appeal.

**Authority:**

*CCP §§ 1013, 1010.6(a)(6); Cal Rules Ct, Rule 2.260(e)(2)*

**Discussion:**

See 27.07[3]-[5]



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II. DETERMINING TIME FOR SERVICE

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**27.04 Options and Strategies.**

**27.04[1] Type of Procedure Determines Time Requirements.** Time requirements vary based on the procedure involved. Review the statute governing the procedure involved and determine the precise time requirements. Be sure to check the exact statute for the procedure, and do not allow a general understanding of the subject area to misdirect you to the wrong statute.

**Example--Not All Motions Have the Same Time Requirements:**

Motions are an example of a procedure where practitioners can make mistakes. Most motions must be served and filed at least 16 court days before the hearing [*see CCP § 1005(a), (b)*]. However, motions for summary judgment require notice 75 days before hearing [*CCP § 437c(a)*]. Motions for failure to dismiss requires notice 45 days before hearing [*Cal Rules Ct, Rule 3.1342*]. Completely read the appropriate statute, and if there are no specific time requirements then review the statutes governing time and method when not otherwise prescribed by law or by court or judge [*see CCP § 1005(a)(13), (b)*].

**Distinguish--Service of Summons:**

Service of summons, which notifies a defendant of the complaint and brings that person under the jurisdiction of the court, is distinct from service of papers and has its own time requirements, proof of service, and extensions of time. Do not confuse the two terms when reviewing statutes and opinions.



**Strategic Point:**

Before undertaking the contemplated procedure, review these factors and consider whether time constraints will affect the specific procedure and the overall litigation relative to:

- The stage of the proceedings.
- The overall strategy of the case.

- How much discovery is needed or already provided.
- Costs.
- Subsequent procedures available.
- Procedures no longer available.

**Cross References:**

See chapter on specific procedure for time requirements.

Discussion of noticed motions, see Ch. 26, Law and Motion Procedure.

Discussion of service of summons, see Ch. 8, Service of Summons.

**27.04[2] Non-Personal Service Extends Time Requirements.** Personal service is complete on the day made, but the following non-personal methods of service extend the statutory notice time, as well as the time for a right or duty to do any act or make a response after the notice [*see CCP §§ 1005, 1010.6, 1101, 1013*]:

- Mail.
- Express mail or overnight delivery.
- Facsimile transmission.
- Electronic.

**Warning:**

Fax transmissions may only be utilized if counsel agrees in writing [*CCP § 1013(e)*]. Electronic service may only be used if the party indicates that he or she will accept electronic service by filing and serving a notice of agreement to accept electronic services or by electronically filing any document with the court [*Cal Rules Ct, Rule 2.260(a)(2)*].

**Cross References:**

Discussion of time extensions based on type of procedure and method of service, see 27.07.

Discussion of noticed motion, see Ch. 26, Law and Motion Procedure.

**27.04[3] Court Orders and Local Court Rules May Change Time Requirements.** Always review the court file and your own file for court orders extending or shortening time [*see, e.g., CCP § 1005(b)* (court may prescribe a shorter time for notice of motion, filing of opposition and reply papers)].

Always consult local court rules for additional requirements relating to service of papers [*see, e.g., Sacramento Co. Rules Ct, Rule 3.03(B), (C)* (opposition and reply papers to be served by means to ensure receipt within 24 hours of filing on penalty of sanctions or court's discretion not to consider document)].

**27.04[4] Party May Request Time Requirements Be Shortened or Extended.** A party may request the court to shorten the time in which to do an act [*see, e.g., CCP § 1005(b)* (court may prescribe a time shorter than the 16 court days required for notice motion)], or request the court to extend the time in which to do an act or seek a stipulation to

extend time [*see CCP § 1054*].

**Cross References:**

Discussion of shortening time, see 27.08 et seq.

Discussion of extending time, see 27.14 et seq.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsComputation



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**27.05 Copies and Originals Subject to Same Time Requirements.**

The time for serving copies of papers generally is the same as the time for filing the originals [*see, e.g., CCP § 1005(b)* (unless otherwise ordered or specifically provided, all moving and supporting papers must be served and filed at least 16 court days before the hearing)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview





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*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.06*

**27.06 Computing Time Within Which an Act Must Be Done.**

**27.06[1] Exclude First Day and Include Last Unless Last Is Holiday.** Generally, the time for determining when an act must be done is computed by excluding the first day and including the last, unless the last day is considered a holiday. If the last day of the period within which an act is to be done is a holiday, the period is extended to the next day that is not a holiday [see CCP § 12a].



**Warning:**

If statute calls for filing on or before a date and that date falls on a weekend or holiday, court may rule that filing may not be done on the next court day [ *Steele v. Bartlett (1941) 18 C2d 573, 573, 116 P2d 780* ].

**27.06[2] Holidays Are Enumerated in Statute and Include Weekends.** The following constitute judicial holidays [see CCP § 12a]:

- Every Saturday and Sunday [CCP §§ 10, 12a, 135].
- All days specified in CCP §§ 10, 12a [referencing CCP § 135; Gov Code § 6700]:
  - ☐ New Year's Day (January 1).
  - ☐ Dr. Martin Luther King, Jr. Day (3rd Monday in January).
  - ☐ Lincoln Day (February 12th).
  - ☐ Presidents' Day (3rd Monday in February).
  - ☐ Cesar Chavez Day (March 31).

- ☐ Good Friday from 12 noon to 3 p.m.
- ☐ Memorial Day (last Monday in May).
- ☐ Independence Day (July 4).
- ☐ Labor Day (first Monday in September).
- ☐ Admission Day (September 9).
- ☐ Columbus Day (second Monday in October).
- ☐ Veterans Day (November 11).
- ☐ Thanksgiving Day.
- ☐ Day after Thanksgiving Day.
- ☐ Christmas Day (December 25).
- ☐ Every day appointed by the President or Governor for a public fast, thanksgiving, or holiday.

■ "Admission Day" on September 9 is listed in *Gov Code § 6700* although not specified in *CCP §§ 10, 12a*.

■ When any city, county, state, or public office, other than a branch office, is closed for the whole day, the day is considered a holiday [*CCP § 12b*].

■ If January 1st, February 12th, March 31st, July 4th, September 9th, November 11th, or December 25th falls upon a Sunday, the Monday following is a holiday. If November 11th falls upon a Saturday, the preceding Friday is a holiday [*Gov Code § 6701*]. If any holiday designated in *Gov Code § 6700* falls on a Saturday, the board of supervisors of any county may by ordinance or resolution provide that an alternate day must be a holiday for the employees of the county, except those employees of the county working as court attaches [*Gov Code § 6701*].

**27.06[3] Distinguishing Between Calendar Days and Court Days.** Depending on the statute or rule of court, service may be based on either calendar days or court days. Calendar days are determined using a standard calendar, and the time in which an act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded [*CCP § 12*].

A "court day" may be defined as any day in which the court is not closed due to a judicial holiday [*see CCP §§ 133, 134*]. While courts of justice may be held and business transacted on any day, [*CCP § 133*], courts must be closed for the transaction of judicial business on judicial holidays, for all but the following purposes [*CCP § 134(a), (b)*]:

- To give, upon request, instructions to a deliberating jury.
- To receive a verdict or discharge a jury.
- For arraignments in criminal actions.
- For Saturday Small Claims court sessions.
- For injunctions and writs of prohibition, which may be issued and served on any day.

The fact that a court is open on a judicial holiday cannot make that day a non holiday for purposes of computing the time required for the conduct of any proceeding nor for the performance of any act [*CCP* § 134(d)].

If a day appointed for the holding or sitting of a court, or to which it is adjourned, falls on a judicial holiday, it is deemed appointed for or adjourned to the next day [*CCP* § 134(d)].

A court may designate one or more departments to remain open on a judicial holiday or at any hours of the day or night [*CCP* § 134(c)], however these courts are still judicial holidays for purposes of computing the time required for the conduct of any proceeding or for the performance of any act [*CCP* § 134(d)]; and any paper lodged with the court during that time must be filed by the court on the next day that is a non-judicial holiday if the document meets the filing criteria [*CCP* § 134(d)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsTime LimitationsComputation



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II. DETERMINING TIME FOR SERVICE

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**27.07 Computing Time Extensions Based on Procedure and Type of Service.**

**27.07[1] Notice for CCP § 1005 Motions Is Extended 2 to 20 Days Depending on Method of Nonpersonal Service.** *CCP § 1005* motions require notice be served and filed at least 16 court days before the hearing [*CCP § 1005(b)*]. For non-personal service, the 16-day period is increased by:

● Mail:

- ☐ 5 calendar days if place of mailing and place of address are within California.
- ☐ 10 calendar days if either place of mailing or place of address is outside California, but within United States.
- ☐ 20 calendar days if place of mailing or place of address is outside United States.

● Facsimile transmission, express mail, or overnight delivery:

- ☐ 2 calendar days.

**27.07[2] CCP § 1005 Motions Not Affected by CCP § 1013 Extension of Time for Right or Duty to Act After Notice.** *CCP § 1013*, which extends the time within which a right may be exercised or an act may be done, does not apply to *CCP § 1005* notices of motion, papers opposing a motion, or reply papers [*CCP § 1005(b)*]. *CCP § 1005* includes extensions within its terms.



**Timing:**

All papers opposing a *CCP § 1005* noticed motion must be filed with court and a copy served on each party at least nine court days before the hearing and all reply papers at least five court days before the hearing [*CCP § 1005(b)*].

 **Cross Reference:**

Motion practice, see Ch. 26, Law and Motion Procedure.

**27.07[3] Nonpersonal Service of Notice Extends Right or Duty to Act or Respond Under CCP § 1013.** When not otherwise provided by the Code of Civil Procedure, notices and other papers are served as prescribed by *CCP* §§ 1010-1020 [*CCP* § 1010]. Any notice period and any right or duty to act or respond within a certain time after service of the document is increased by:

■ Mail [*CCP* § 1013(a)]:

- ☐ 5 calendar days if place of mailing and place of address are within California.
- ☐ 10 calendar days if either place of mailing or place of address is outside California, but within United States.
- ☐ 20 calendar days if place of mailing or place of address is outside United States.

■ Facsimile transmission [*CCP* § 1013(e)]:

- ☐ 2 court days.

■ Express mail or overnight delivery [*CCP* § 1013(c)]:

- ☐ 2 court days.

■ Electronic service [*CCP* § 1010.6(a)(6); *Cal Rules Ct*, *Rule 2.260(e)(2)*]:

- ☐ 2 court days.

**Example:**

Ten-day period to file *CCP* § 170.6 peremptory challenge to judge's assignment is extended 5 days if the clerk mails the notice of the judge's all purpose assignment to party's California address [ *California Bus. Council for Equal Opportunity v. Superior Court* (1997) 52 CA4th 1100, 1103, 62 CR2d 7 ].



**Trap--CCP § 1005 Motions:**

These time extensions do not apply to *CCP* § 1005 notices of motion, opposition papers, or reply papers [*CCP* § 1005(b)]. *CCP* § 1005 includes extensions within its terms.

**Exception:**

The extensions of time do not apply to [*CCP* §§ 1013(a), 1010.6(a)(6); *Cal Rules Ct*, *Rule 2.260(e)(3)*]:

- Filing notice of intention to move for new trial.
- Filing notice of intention to move to vacate judgment.
- Filing notice of appeal.

**Consider:**

Notice by facsimile, express mail, overnight delivery, or electronic service is increased two "court" days instead of two "calendar" days.

**27.07[4] CCP § 1013 Extensions Do Not Apply to Jurisdictional Deadlines.** *CCP § 1013* extensions do not apply to jurisdictional deadlines [ *Department of Indus. Relations, Div. of Labor Standards Enforcement v. Atlantic Baking Co., Inc.* (2001) 89 CA4th 891, 895, 108 CR2d 44 ; *Cal Rules Ct, Rule 2.260(e)(2)* (*CCP § 1013* does not apply to petition for writ of mandate from Order issued by Labor Commissioner)].

**27.07[5] CCP § 1013 Extensions Only Apply If Service Required.** *CCP § 1013* time extensions apply only when the relevant time limit begins to run from the service of a document to which a response is directed [ *Citicorp N. Am., Inc. v. Superior Court* (1989) 213 CA3d 563, 568, 261 CR 668 ]. When the time period is commenced by an act other than service, there is no extension of time [ *Camper v. Workers' Comp. Appeals Bd., J.C. Penney Co., Inc.* (1992) 3 C4th 679, 684, 12 CR2d 101, 836 P2d 888 ; *Department of Indus. Relations, Div. of Labor Standards Enforcement v. Atlantic Baking Co.* (2001) 89 CA4th 891, 895, 108 CR2d 44 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions



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III. SHORTENING TIME

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**27.08 CHECKLIST: Shortening Time.**

- ☐ Determine necessity of shortening time.
  - ☐ Compute time required to act based on procedure sought.
  - ☐ Review specific statute and rules for procedure.
  - ☐ Review general statutes and rules governing procedure.
- ☐ Add applicable time extensions based on type of notice.
- ☐ Review local rules restricting shortening of time.

**Discussion:**

See 27.09

- ☐ Seek stipulation from all opposing parties to shorten time.
  - ☐ Obtain agreements by all opposing counsel to stipulate to shortening of time.
  - ☐ Draft stipulation.
  - ☐ Have stipulation executed by all opposing counsel.
  - ☐ Prepare proof of service.

- ☐ Serve copies of stipulation and proof of service.
- ☐ File original stipulation with court where action pending.

**Authority:**

*CCP § 283(1)*

**Discussion:**

See 27.12

- ☐ File noticed motion to shorten time.

- ☐ Procedure generally not favored due to time constraints.

**Authority:**

*CCP § 1005*

**Discussion:**

See 27.10

- ☐ File ex parte application to shorten time.

- ☐ Demonstrate adequate reason why matter cannot be heard on regular notice.

- ☐ Showing of good cause:

- ☐ Required for *CCP § 1005* notices of motion.

- ☐ Court will generally require good cause for all other applications.

- ☐ Prepare components of application:

- ☐ Ex parte application.

- ☐ Declaration in support of application.

- ☐ Declaration of notice to opposing parties.

- ☐ Statement whether shortening time has been previously applied for and/or granted.

- ☐ Memorandum of points and authorities.



☐ Proposed order.

☐ Other necessary documents, such as a proposed notice of motion.

☐ If moving party is attempting to shorten time on a notice of motion, the motion itself should be served with ex parte application or a statement should be given as to why it is not and the order should specify a time for filing and service.

☐ Notice opposing parties of application no later than 10:00 a.m. the day before hearing.

☐ Attend hearing.

☐ File the order promptly.

☐ Serve order on all parties.

**Authority:**

*Cal Rules Ct, Rule 3.1200 et seq.*

**Discussion:**

See 27.11

**Forms:**

See 27.43, 27.44

☐ Objecting to request to shorten time.

☐ Noticed motion:

☐ File opposition papers.

☐ Establish good cause not met.

☐ Ex parte application:

☐ Properly noticed application:

☐ Draft opposition papers including written objections, as court sometimes will consider only written papers when ruling on an ex parte application.

☐ Attend hearing and dispute grounds for shortening time.

☐ Improperly noticed application:

☐ Appear at hearing asserting only defective notice.

☐ Be prepared to dispute grounds for shortening time if court does not grant continuance.

☐ After application:

☐ Consider *CCP* § 473 motion for relief from order shortening time.

**Authority:**

*CCP* § 1005; *Cal Rules Ct*, Rule 3.1200 et seq.

**Discussion:**

See 27.13



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**27.09 Options and Strategies.**

**27.09[1] Consider Necessity of Shortening Time.** The strategies underlying a request to shorten time are determined by the context in which the request is being made. Other chapters in this publication addressing specific procedures discuss the strategic use of a request to shorten time in context. Factors to be considered in shortening time include:

- Whether procedure sought may be noticed using statutory time requirements.
- Urgency of obtaining relief.
- Stage of the proceedings.
- Time lines set by statute and the court.
- Statutes and local rules restricting shortening of time.
- Time extensions depending on manner of service.
- Court's calendar and assigned judge's availability.
- Availability of witnesses.
- Need to coordinate hearing on related motions.
- Opposing party's willingness to stipulate to shorten time.

**27.09[2] Consider Whether to Use Ex Parte Application, or Stipulation.** Because of the nature of an order shortening time, giving the standard 16-day notice of motion [*see CCP § 1005(b)*] would defeat the purpose of the motion, so the order is commonly sought ex parte. Another alternative to shortening time is to seek the stipulation of all opposing parties to shorten time.

**Warning:**

For motions for summary judgment, the court may not order the shortening of the 75-day-notice period; however, the parties can stipulate to it [ *McMahon v. Superior Court* (2003) 106 CA4th 112, 118, 130 CR2d 407 ].

**Cross References:**

Discussion of noticed and ex parte motions in general, see Ch. 26, Law and Motion Procedure.

Discussion of stipulations in general, see Ch. 28, Stipulations.

**27.09[3] Consider Provisions That Shorten Time for Discovery.** Several statutes for shortening time periods relating to various discovery procedures should be considered.

To shorten time periods related to various discovery procedures under the Discovery Act, see *CCP § 2016.010 et seq.* operative July 1, 2005].

- For shortening notice required before a deposition [see *CCP § 2025.270(d)*].
- To shorten time before plaintiff's propounding of interrogatories [see *CCP § 2030.020(d)*].
- To shorten time for responding to interrogatories [see *CCP § 2030.260(a), (b)*].
- To shorten time before plaintiff's demand for inspection, copying, testing, or sampling [see *CCP § 2031.020(d)*].
- To shorten time for responding to requests for production or entry [see *CCP § 2031.260*].
- To shorten time before plaintiff's request for admissions [see *CCP § 2033.020(d)*].
- To shorten time for responding to requests for admissions [see *CCP § 2033.250*].
- To shorten time for periods for service of documents related to the subpoenaing of personal records of a consumer, or their employment record [see *CCP §§ 1985.3(h), 1985.6(g)*].

**Cross Reference:**

Discussion of discovery, see Matthew Bender(R) Practice Guide: California Civil Discovery.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview



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#### **27.10 Shortening Time by Noticed Motion Uncommon.**

The very nature of shortening time usually precludes the use of a noticed motion since time is of the essence. However, if a party is aware that a motion or other procedure is going to occur in the future and that certain litigation time constraints may affect the motion, the party may file a noticed motion to shorten time for service.



#### **Warning:**

For motions for summary judgment, the court may not order the shortening of the 75-day-notice period; however, the parties can stipulate to it [ *McMahon v. Superior Court (2003) 106 CA4th 112, 118, 130 CR2d 407* ].



#### **Cross Reference:**

Discussion of noticed motions, see *Ch. 26, Law and Motion Procedure*, 26.39 et seq.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Time Limitations General Overview



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**27.11 Shortening Time by Ex Parte Application Is Common Method.**

**27.11[1] Ex Parte Application Is Made As a Necessity.** Ex parte applications are permitted when there is a showing of irreparable harm, immediate danger, or any other statutory basis for granting ex parte relief [*Cal Rules Ct, Rule 3.1202(c)*]. The very nature of shortening time dictates that there is insufficient time to follow the statutory time requirements; therefore, of necessity, an order shortening time is usually obtained ex parte.

**27.11[2] Shortening Time for Filing and Serving Motion Papers Requires Good Cause.** An ex parte application for an order shortening the time requirements of *CCP § 1005* for filing and service of motion papers must be supported with a declaration showing good cause for the order [*Cal Rules of Ct, Rule 3.1300(b)*].

**27.11[3] Follow Standard Ex Parte Application Procedure.** Ex parte applications require [*Cal Rules Ct, Rule 3.1200 et seq.*]:

- Notice to all parties no later than 10:00 a.m. the court day before the ex parte appearance unless exceptional circumstances justify a shorter time [*Cal Rules Ct, Rule 3.1203*].
- The notice to the opposing party to state the specific nature of the relief requested, the date, time, and place for the presentation of the application, and whether the application will be opposed [*Cal Rules Ct, Rule 3.1204(a)*].
- A declaration that notice was given to the opposing party as required, that the applicant tried in good faith but was unable to inform the opposing party of the application, or that the applicant, for reasons specified, should not be required to inform the opposing party [*Cal Rules Ct, Rule 3.1204(b)*].
- The application to state the contact information for all parties' attorneys and whether a similar ex parte application has been previously made and the court's rulings [*Cal Rules Ct, Rule 3.1202(a), (b)*].
- The application be in writing and include [*Cal Rules Ct, Rule 3.1201, 3.1202(c)*]:

- Case caption and relief requested.

- ☐ Declaration in support of application containing affirmative factual showing containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for relief.
- ☐ Declaration that notice given.
- ☐ Memorandum.
- ☐ Proposed order.

**Cross References:**

Forms, see 27.43, 27.44.

Discussion of ex parte applications and motions, see *Ch. 26, Law and Motion Procedure*, 26.23 et seq.

**Strategic Points--Applicant:**

Provide compelling reasons for shortening time in the supporting declaration. While good cause is expressly required for shortening time of a *CCP § 1005* motion, it is highly unlikely the court will shorten other notice periods without a similar showing of good cause.

If the ex parte application is to shorten time on a motion, include a copy of the motion with the ex parte application or provide an explanation for not doing so. If the motion is not attached, include a time and date for service of the motion in the ex parte order.

**Warning:**

Counsel should check local rules for ex parte applications including procedures for paying filing fees and obtaining the case file, the time for presenting ex parte applications to the judge, and special service requirements.

**27.11[4] Personal Appearance Required at Hearing With Some Exceptions.** Personal appearance of the applicant is required at the hearing except if the application is to file a memorandum in excess of the applicable page limit, to extend time to serve pleadings, to set hearing dates on alternative writs and orders to show cause, or for stipulations by the parties or other orders of the court [*Cal Rules Ct, Rule 3.1207*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Civil Procedure Pleading & Practice Motion Practice Time Limitations



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**27.12 Shortening Time by Stipulation Available.**

A stipulation is effective at any stage of an action or proceeding when filed with the clerk, or entered on the minutes of the court [CCP § 283(1)]. When there is an attorney of record, the attorney's signature or assent is required on the stipulation before the conduct or disposal of an action can be entertained by the court [ *Wells Fargo & Co. v. City & County of San Francisco* (1944) 25 C2d 37, 42-43, 152 P2d 625 ].



**Warning:**

Be sure to have all parties affected by the shortening of time sign the stipulation.



**Strategic Point--Written Stipulation:**

Stipulations may be in writing or orally entered into the minutes of the court. Because notice is an essential element of due process, execute a written stipulation shortening time, even if there is an oral agreement, to guard against any confusion about the extent of the stipulation and to avoid collateral attack of the motion or procedure sought.



**Strategic Point--Ex Parte Motions:**

If there is any question whether a stipulation to shorten time will be accepted by the court, submit the stipulation as part of an ex parte application to shorten time.

**Consider:**

Trial Court Delay Reduction rules affect the shortening and extension of time. While the court may be in favor of shortening time to speed up the litigation, be sure to check local rules of court to see whether notice periods for certain motions and procedures can or cannot be shortened.



**Cross Reference:**

Discussion of stipulations, see Ch. 28, Stipulations.



**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview



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**27.13 Objecting to Request to Shorten Time.**

**27.13[1] Attend Ex Parte Hearing to Shorten Time and Assert Defects.** Appear at the ex parte hearing to shorten time and assert defects in the notice of the application and/or the declaration in support of the motion. Establish that good cause does not exist to grant the application.

**27.13[2] Seek Relief Under CCP § 473 If Ex Parte Application Granted.** A party may seek relief from an order against the party for mistake, inadvertence, surprise, or excusable neglect [CCP § 473(b)]. The court may grant the application without the opposing party's appearance at the hearing, especially if the court finds that notice of the application was not required. In this event, file a CCP 473 motion ex parte asserting defects in the application and no good cause to shorten time. Do this immediately after receiving notice of the order shortening time.

 **Cross Reference:**

Discussion of relief from orders under CCP § 473(b) and related equitable relief, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 29.10 et seq.

**27.13[3] Attend the Noticed Hearing but Assert Only Defects in the Notice to Avoid Waiver.** Defects and irregularities in a notice of motion, or failure to provide notice at all to the adverse party may be challenged without waiving the defects or irregularities by an appearance in opposition to the motion for the limited purpose of objecting to a consideration of the motion by the court on the ground of insufficiency of the notice [ *Bohn v. Bohn* (1913) 164 C 532, 538-539, 129 P 981 ].

**Consider:**

Counsel should not insist on asserting the notice requirements unless there is a valid reason for doing so. Otherwise, the court may feel that counsel is engaging in gamesmanship to avoid addressing the merits of an issue.

 **Trap--Avoid Waiver of Issue:**

Defects and irregularities in a notice of motion, and failure to give notice at all, are normally waived by the adverse party's appearance at the hearing on the motion and opposing to it on its merits [ *Carlton v.*

*Quint (2000) 77 CA4th 690, 697-698, 91 CR2d 844 ; Vlahovich v. Cruz (1989) 213 CA3d 317, 320, 261 CR 565 ; Tate v. Superior Court (1975) 45 CA3d 925, 930, 119 CR 835 ].*

In challenging the absence of notice or defective notice counsel or the adverse party may also appear at the hearing and request a continuance for the purpose of preparing a proper response, making a complete record regarding the notice for appellate purposes in the event the continuance is denied. Alternately, counsel may file an opposition to the motion based on the notice irregularities and the merits, and appear at the hearing to object to the hearing proceeding based upon defective and/or inadequate notice, and requesting a continuance.



**Warning:**

Counsel may request a continuance at the hearing to prepare a proper response and complete record, or file opposition to the hearing based on defective and/or inadequate notice. Counsel should be prepared to argue the motion on the merits if the court rejects the request for continuance.



**Cross Reference:**

Discussion of opposing defective noticed motions, see *Ch. 26, Law and Motion Procedure, 26.48.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**27.14 CHECKLIST: Extending Time.**

- ☐ Determine necessity of extending time.
  - ☐ Compute time required to act based on procedure sought.
  - ☐ Review specific statute and rules for procedure.
  - ☐ Review general statutes and rules governing procedure.
- ☐ Add applicable time extensions based on type of notice.
- ☐ Review local rules restricting extension of time.
- ☐ Determine if party or witness is state legislator requiring extension of time.
- ☐ Limited to 30 days unless opposing party consents to longer time.

**Authority:**

*CCP §§ 1054, 1054.1*

**Discussion:**

*See 27.15, 27.19*

- ☐ Seek stipulation from all opposing parties to extend time.
  - ☐ Obtain agreements by all opposing counsel to stipulate to extending of time.

- ☐ Draft stipulation.
- ☐ Have stipulation executed by all opposing counsel.
- ☐ Prepare proof of service.
- ☐ Serve copies of stipulation and proof of service.
- ☐ File original stipulation with court where action pending.

**Authority:**

*CCP §§ 283, 1054*

**Discussion:**

See 27.22

**Form:**

See 27.45

- ☐ File noticed motion to extend time.

- ☐ Procedure generally not favored.

**Discussion:**

See 27.20

**Authority:**

*CCP § 1005*

- ☐ File ex parte application to extend time.

- ☐ Prepare components of application:

- ☐ Ex parte application.
- ☐ Declaration in support of application showing good cause for extension.
- ☐ Declaration of notice to opposing parties.
- ☐ Statement whether extending time has been previously applied for and/or granted.
- ☐ Memorandum.

- ☐ Proposed order.
- ☐ Other necessary documents, such as a proposed notice of motion.
- ☐ Notice opposing parties of application no later than 10:00 a.m. the day before hearing.
- ☐ Attend hearing.
- ☐ File the order promptly.
- ☐ Serve order on all parties.

**Authority:**

*CCP § 1054; Cal Rules Ct, Rule 3.1200 et seq.*

**Discussion:**

See 27.21

**Forms:**

See 27.46, 27.47, 27.47A

- ☐ Objecting to request to extend time.
  - ☐ Noticed motion:
    - ☐ File opposition papers.
    - ☐ Establish good cause not met.
  - ☐ Ex parte application:
    - ☐ Properly noticed application:
      - ☐ Attend hearing and dispute grounds for extending time.
- ☐ Improperly noticed application:
  - ☐ Appear at hearing asserting only defective notice.
  - ☐ Be prepared to dispute grounds for extending time if court does not grant continuance.
- ☐ After application:

- ☐ Consider *CCP* § 473 motion for relief from order extending time.

**Authority:**

*CCP* § 1005; *Cal Rules Ct*, *Rule 3.1200 et seq.*

**Discussion:**

See 27.24



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## 27.15 Options and Strategies.

**27.15[1] Consider Necessity of Extending Time.** The strategies underlying a request to extend time are determined by the context in which the request is being made. Other chapters in this publication addressing specific procedures discuss the strategic use of a request to extend time in context. The factors considered for extending time are often the same as those for shortening time.

### ➡ Cross Reference:

Discussion of factors for shortening time, see 27.09[1].

**27.15[2] Consider Whether to Use Ex Parte Application or Stipulation.** Because of the nature of an order extending time, giving the standard 16-court-day notice of motion [see CCP § 1005(b)] would defeat the purpose of the motion, so it is commonly done ex parte or pursuant to an ex parte application for an order shortening time. Another alternative to extending time is to seek the stipulation of all opposing parties to extend time.

**27.15[3] Consider Statutes Expressly Denying or Permitting Extensions of Time Based on Procedure Sought.** Specific statutes prohibit time extensions and the computation of time within which to act:

- CCP § 1013 as not extending notice of trial requirements for unlawful detainer actions [CCP § 594].
- CCP § 1013 as not extending time to move to vacate or set aside judgment [CCP § 594].
- No extension of time to file notice of intention to move for new trial [CCP § 659].
- Notice of appeal may not be extended [Cal Rules Ct, Rule 8.752].

Specific statutes permit extensions of time based on procedure sought:

- Extensions following CCP § 418.10 motion to quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution [CCP § 418.10(b), (c)].



- Extension by filing motion to strike [*CCP* § 435].
- Court extending time for answer or demurrer [*CCP* § 473(a)]; stipulated extension of 15 days, or extension as permitted by local rules, for responsive pleading [*Gov Code* § 68616(b)].
- Court extending period of attachment [*CCP* § 488.510].
- Court postponing trial due to amendment [*CCP* § 594a].
- Postponement of trial or demurrer for not more than 30 days on written stipulation of parties [*CCP* § 595.2].
- Extension to serve and file affidavits (as opposed to the notice) for new trial motion [*CCP* § 659a].
- Extensions related to bond or undertaking [*CCP* § 995.050].
- Extensions in unlawful detainer actions not to exceed 10 days [*CCP* § 1167.5].

**27.15[4] State Legislators Given Special Time Extensions.** When a party whose attorney is a member of the state legislature seeks an extension for acts to be done in any action or proceeding in a state court or before a state administrative agency the time allowed for the act must be extended to a date certain. The extension is available for acts that relate to the pleadings, the preparation of bills of exceptions, or their amendments, or the services of notices [*see CCP* § 1054.1]. When a member of the State Legislature is a party, the attorney of record, or the principal witness, the trial of any civil action/proceeding in state court, or any administrative hearing, or the hearing of any motion, demurrer, or other proceeding must be postponed to a date certain, similar to the circumstances and conditions in *CCP* § 1054.1 [*see CCP* § 595].

**Prerequisite:**

To qualify for the extension, the Legislature must be in session, or in recess for less than 41 days, or the attorney must a member of a legislative committee that is meeting or supposed to meet [*see CCP* § 1054.1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensions



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#### **27.16 Broad Range of Acts May Have Time Extended.**

*CCP § 1054* authorizes extension of time for:

- Any act that relates to the pleadings in an action.
- Notices of motion.
- Any act that relates to bonds [*see CCP § 995.010 et seq.*].
- Any act that relates to the preparation of bills of exception and their amendments.

**Exception:**

Services of notice of the following acts cannot have their time extended [*see CCP §§ 659, 1054*]:

- Notice of appeal.
- Notice of intention to move for a new trial.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensions



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### **27.17 Extensions Must Be Requested During Period in Which Act Must Be Done.**

The court may only grant an extension during the period of time within which the act must be done; therefore an order extending time after a deadline to act has passed will be void [*see Coast Elec. Serv., Inc. v. Jensen (1931) 111 CA 124, 126, 295 P 346*].

#### **Exception:**

If the time for performance is not jurisdictional, relief may be granted for filing late under *CCP* § 473(b), based on mistake, inadvertence, surprise, or excusable neglect [*see Lee v. Wells Fargo Bank, N.A. (2001) 88 CA4th 1187, 1190-1191, 1193, 106 CR2d 726* (relief under *CCP* § 473 from late filing of memorandum of costs); *Cornell Univ. Med. Coll. v. Superior Court (1974) 38 CA3d 311, 314-315, 113 CR 291* (relief for excusable inadvertence granted when petition for writ of mandate was misdirected by messenger; extension could have been granted under *CCP* § 418.10(c))].

#### **► Cross References:**

Computing time within which an act must be done, see 27.06.

Computing time extensions based on procedure and type of service, see 27.07.

Relief under *CCP* § 473(b), see *Ch. 36, Defaults and Motions for Relief*, 36.65 et seq.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**27.18 Good Cause Showing Required for Extension.**

"Good cause" for the extension must be shown [*CCP* § 1054].

**Distinguish:**

*CCP* § 473 extension for responsive pleading does not require "good cause" but does require extension order to be in furtherance of justice.

**Consider--No Precise Definition of What Constitutes Good Cause:**

Generally "good cause" has been defined as requesting a "factual exposition of a reasonable ground for the sought order. The good cause may be equated to a good reason for a party's failure to perform that specific requirement from which he seeks to be excused" [see *Waters v. Superior Court* (1962) 58 C2d 885, 893, 27 CR 153, 377 P2d 265 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**27.19 Extension Limited to 30 Days Unless Adverse Party Consents to Longer Time.**

An extension of time cannot exceed 30 days unless the adverse party consents [*CCP* § 1054(a)]. An order granting an extension beyond 30 days without the adverse party's consent is void [see *Kennedy v. Mulligan* (1902) 136 C 556, 557, 69 P 291 ].

**Distinguish:**

Previous extensions of time by stipulation of all parties are not included in the computation of the 30-day time limitation [*CCP* § 1054(b)].



**Warning:**

Although technically no limit exists for the extension of time to answer or demur under *CCP* § 473(a), other sections of the Code of Civil Procedure without specified limits have been interpreted to be subject to the 30-day limitation that exists under *CCP* § 1054 [see *Lewith v. Rehmke* (1933) 217 C 563, 565, 20 P2d 687 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensions



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**27.20 Extending Time by Noticed Motion Uncommon.**

The very nature of extending time usually precludes the use of a noticed motion since time is of the essence. However, if a party is aware that a motion or other procedure is going to occur in the future and that certain litigation time constraints may affect the motion, the party may file a noticed motion to extend time for service.

**Legal Topics:**

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### **27.21 Extending Time by Ex Parte Application.**

**27.21[1] Establish Necessity of Application.** Ex parte applications are permitted when there is a showing of irreparable harm, immediate danger, or an other statutory basis for granting ex parte relief [*Cal Rules Ct, Rule 3.1202(c)*].

**27.21[2] Follow Standard Ex Parte Procedure.** Ex parte applications require [*Cal Rules Ct, Rule 3.1200 et seq.*]:

- Notice to all parties no later than 10:00 a.m. the court day before the ex parte appearance unless exceptional circumstances justify a longer time [*Cal Rules Ct, Rule 3.1203*].
- The notice to the opposing party state the specific nature of the relief requested, the date, time, and place for the presentation of the application, and whether the application will be opposed [*Cal Rules Ct, Rule 3.1204(a)*].
- A declaration that notice was given to the opposing party as required, that the applicant tried in good faith but was unable to inform the opposing party of the application, or that the applicant should not be required to inform the opposing party [*Cal Rules Ct, Rule 3.1204(b)*].
- The application state the contact information for all parties' attorneys and whether a similar ex parte application has been previously made and the court's rulings [*Cal Rules Ct, Rules 3.1202(a), (b), 2.20(b)*].
- The application be in writing and include [*Cal Rules Ct, Rule 3.1201*]:
  - ☐ Case caption and relief requested.
  - ☐ Declaration in support of application containing affirmative factual showing containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for relief.

- ☐ Declaration that notice given.
- ☐ Memorandum.
- ☐ Proposed order.

**Exception:**

If filing an ex parte application for extension of time to serve pleadings on Judicial Council Form CM-020, a supporting memorandum is not required, but one may be submitted if it would further the interests of justice [*Cal Rules Ct, Rule 3.1114(a)(2), (b)*].

**Cross References:**

Forms, see 27.46, 27.47, 27.47A.

Discussion of ex parte applications and motions, see *Ch. 26, Law and Motion Procedure*, 26.23 et seq.

**27.21[3] Application Must Be Made to Judge Before Whom Matter Pending.** Applications for orders extending time must be heard and determined by the judge before whom the matter is pending; however, another judge of the same court may hear the application if the first judge is unable to hear the application due to inability, death, or absence [*Cal Rules Ct, Rule 2.20(a)*].

**27.21[4] Previous Time Extensions Must Be Disclosed.** Applications for orders extending time must disclose in writing the nature of the case and what extensions, if any, have previously been granted by court order or stipulation [*Cal Rules Ct, Rule 2.20(b)*].

**27.21[5] Personal Appearance Required at Hearing With Some Exceptions.** Personal appearance of the applicant is required at the hearing except if the application is to file a memorandum in excess of the applicable page limit, to extend time to serve pleadings, to set hearing dates on alternative writs and orders to show cause, or for stipulations by the parties or other orders of the court [*Cal Rules Ct, Rule 3.1207*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensions





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## 27.22 Extending Time by Stipulation.

### **27.22[1] Parties May Stipulate to Extend Time but Delay Reduction Act May Restrict Length of Extension.**

Upon a showing of good cause, the court must grant an extension of time when all attorneys of record of the parties stipulate to extend time [CCP § 1054(a), (b)].



#### **Cross Reference:**

Form, see 27.45.



#### **Warning--Trial Court Delay Reduction Act:**

The Trial Court Delay Reduction Act can in some aspects limit time extensions by stipulation. The act specifically allows for:

- Stipulations to extend time to serve responsive pleadings by 15 days after service of complaint [see *Gov Code § 68616(b)*].
- Stipulations that allow for a single continuance not to exceed 30 days, provided the stipulation is made within 30 days of service of the responsive pleadings [see *Gov Code § 68616(d)*].



#### **Warning--Local Rules:**

Local rules may have specific provisions that govern the manner and procedure by which parties can stipulate to extend time.

**27.22[2] Previous Stipulation to Extend Time Not Used to Compute 30-Day Limit.** Previous extensions of time by stipulation of all parties are not included in the computation of the 30-day time limitation [CCP § 1054(b)].

**27.22[3] Stipulating to Extend Time to Plead Not Normally a General Appearance.** Applying to the court for, or stipulating to, an extension of time to plead is not a general appearance for a defendant [see CCP § 418.10(d)].

However, a stipulation that extends the time "within which to appear" may be held to be a general appearance [see *RCA Corp. v. Superior Court* (1975) 47 CA3d 1007, 1009-1010, 121 CR 441 , but see CCP § 418.10]; and stipulations that also accept service of the summons and complaint are held to be general appearances [see *General Ins. Co. v. Superior Court* (1975) 15 C3d 449, 452-453, 124 CR 745, 541 P2d 289 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensions



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Chapter 27 Service of Papers  
IV. EXTENDING TIME

*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.23*

**27.23 Orders Extending Time Must Be Served Immediately.**

Orders extending time must be filed forthwith and copies served within 24 hours after the order is made, or within such other time fixed by the court [*Cal Rules Ct, Rule 2.20(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensions



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Chapter 27 Service of Papers  
IV. EXTENDING TIME

*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.24*

#### **27.24 Objecting to a Request to Extend Time.**

A party need not stipulate to a request to extend time. If a properly noticed ex parte application is made, attend the hearing and assert lack of good cause for the extension and to argue against the application. If notice was improper, make a limited appearance at the hearing to assert defective notice only to avoid waiver of improper notice.

##### **Consider:**

Counsel should act to protect their client; however, this should be tempered with professional courtesy. Objections to extending time should only be used to obtain a *quid pro quo* or to protect the ultimate rights of the client. Avoid leaving the court with the impression that you are "playing games."



##### **Cross Reference:**

Discussion of waiver of improperly noticed motions, see 27.13[3].

##### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensions



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Chapter 27 Service of Papers  
V. IDENTIFYING PERSONS TO BE SERVED AND ADDRESSES

*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.25*

**27.25 CHECKLIST: Identifying Persons to Be Served and Addresses.**

☐ Review list of parties and addresses for service furnished by first-named plaintiff.

- ☐ If list not furnished, contact first-named plaintiff for list.
- ☐ Review court file or electronic docket for recent new parties.
- ☐ Identify parties and attorneys of record to be served and addresses.

**Authority:**

*Cal Rules Ct, Rule 3.254(a)*

**Discussion:**

See 27.26

☐ Serve attorney of record when party represented.

- ☐ Confirm that attorney license is active if you have reason to believe it is not.
- ☐ Confirm address for service.
- ☐ Serve court if no address provided.

**Exception:**

Serve party with subpoena, certain writs, and other process or contempt papers.

**Authority:**

*CCP §§ 1015, 1016; Cal Rules Ct, Rules 1.6(19), 1.21(a)*

**Discussion:**

See 27.27

- ☐ Serve party when unrepresented.
- ☐ Identify party's residence.
- ☐ Serve at court if party's residence unknown.
- ☐ May serve at court for out-of-state party.

**Authority:**

*CCP §§ 1011, 1015*

**Discussion:**

See 27.28



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V. IDENTIFYING PERSONS TO BE SERVED AND ADDRESSES

*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.26*

**27.26 Parties Must Provide Information for Service.**

Each party must [*Cal Rules Ct, Rule 3.254*]:

- Furnish the first-named plaintiff with its current address for service of notice when it first appears in the action;
- Furnish the first-named plaintiff with any changes in its address for service of notice; and
- If it serves an order, notice, or pleading on a party who has not yet appeared in the action, serve a copy of the list at the same time as the order, notice, or pleading is served.

If more than two parties have appeared in a case and are represented by different counsel, the plaintiff named first in the complaint must [*Cal Rules Ct, Rule 3.254(a)*]:

- Maintain a current list of the parties and the address for service of notice on each party; and,
- Furnish a copy of the list on request to any party or the court.

**Consider:**

Whether a party is represented by counsel or acting in pro per can change throughout litigation, and substitution of counsel is common. Be sure to track the status of the adverse party's representation to avoid improper service and/or improper contact with a party represented by counsel. Diligent counsel should monitor all pleadings, petitions, written notices of motion, or other similar papers because they must be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by counsel, the documents must be signed by the party [*see CCP § 128.7*].

In addition, if an attorney or pro per litigant has only provided a P.O. box, request a physical address either by agreement or court order. Otherwise, service cannot be made personally or by express mail or overnight delivery.

**Record Keeping:**

Monitor the address of the opposing party's last document filed and served on your client because that is

the address used for service by mail [*CCP* § 1013(a), (c)]; the fax number on the last document filed and served is the fax number for service by facsimile [*CCP* § 1013(e)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**27.27 Service Required on Attorney of Record If Party Represented by Counsel.**

**27.27[1] Service on Attorney Instead of Party.** In all cases where a party has an attorney in the action or proceeding, service must be on the attorney and not the party, except when service involves subpoenas, writs, and other process issued in the suit, and papers for contempt [*CCP § 1015*; Cal Rules Prof C, Rule 2-100].

"Service," as defined by the Rules of Court, means service in the manner provided by statute or rule [*Cal Rules Ct, Rule 1.6(19)*]. The rules provide further that a notice or other paper required to be served on or given to a party must be served on the party's attorney if there is one [*Cal Rules Ct, Rule 1.21(a)*].



**Warning:**

If a substitution of counsel has occurred, the former attorney is still recognized as attorney of record until written notice of the substitution is given to the adverse party [*see CCP § 285*]. For discussion of substitution of counsel, see Ch. 3, Beginning and Terminating the Attorney-Client Relationship, 3.34.

**27.27[2] Exceptions to Service on Attorney of Record.**

**27.27[2][a] Serve Party With Subpoenas, Writs, and Contempt Documents.** Subpoenas, certain writs, and other process issued in the suit, and papers to bring the party into contempt must be served on the party, not the attorney [*CCP §§ 1015, 1016*].



**Cross Reference:**

Discussion of contempt of court, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 23, Contempt.

**27.27[2][b] Serve Party If Attorney Removed or Suspended From Practice of Law.** If the sole attorney for a party has been removed or suspended from practice, the party has no attorney for purposes of service of papers, and service may be made on the party [*see CCP § 1015*].

**27.27[3] Attorney's Address for Service.**

**27.27[3][a] Serve at Office or Address Provided by Attorney.** Service on an attorney is made at the attorney's office [*CCP* § 1011(a)]. If the party's sole attorney has no known office in the state, but has filed an address where notices and papers may be served on him or her, service may be made at that address [*CCP* § 1015].

**27.27[3][b] May Serve at Court If No Address Provided.** If the party's sole attorney has no known office in the state, notices and papers may be served by leaving a copy of each of the notices and papers with the court clerk [*CCP* § 1015].



**Cross Reference:**

Discussion of service by delivery to clerk of court when address unknown, see 27.36.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**27.28 Service Required on Party If Not Represented by Counsel.**

**27.28[1] Service on Party When Unrepresented.** Service is made on the party if there is no attorney of record [see CCP §§ 1010, 1015].

**27.28[2] Party's Address for Service.**

**27.28[2][a] Serve at Party's Residence.** Service on a party is made at the party's residence [see CCP § 1011(b)].

**27.28[2][b] Serve at Court If Residence Unknown.** If the party's residence is unknown, service may be made by delivering the notice or papers to the court's clerk [CCP § 1011(b)].

**► Cross Reference:**

Procedure for delivery to clerk of court or judge, see 27.36.

**27.28[2][c] May Serve at Court for Out of State Party.** When a party who has appeared in the action resides outside the state and is not represented by an attorney, the service may be made on the clerk [CCP § 1015].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePartiesSelf-RepresentationGeneral Overview



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Chapter 27 Service of Papers  
VI. CHOOSING METHOD OF SERVICE AND PROOF OF SERVICE

*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.29*

**27.29 CHECKLIST: Choosing Method of Service and Proof of Service of Notices.**

☐ Personal Service.

☐ Attorney of record:

☐ At the attorney's office by leaving the notice or other papers in an envelope or package clearly labeled to identify the attorney with the receptionist or person in charge; or

☐ At the attorney's office by leaving the papers between 9:00 a.m. and 5:00 p.m. in a conspicuous place in the office when there is no person in the office; or

☐ If the attorney's office is not open, by leaving the notice or other papers at the attorney's residence, with a person not less than 18 years of age, if the residence is in the same county as the office; or

☐ If the attorney's residence is not known or not in the same county as the attorney's office, or there is no person over 18 years of age to accept service, by placing the papers, enclosed in a sealed envelope, into the post office or a mailbox or other facility regularly maintained by the U.S. Government, addressed to the attorney at the attorney's office, if known, or otherwise to the attorney's residence, if known; or

☐ If neither the attorney's office nor residence is known, by delivering the papers to the address of the attorney as designated on the court papers, or by delivering the papers for the attorney to the clerk of the court, or to the judge when there is no clerk.

☐ Prepare proof of personal service.

☐ Party:

☐ By leaving the notice or other papers at the party's residence, between 8:00 a.m. and 6:00 p.m., with a person not less than 18 years of age; or

☐ By mail, if there is no person over 18 years of age to accept service between 8:00 a.m. and 6:00 p.m.; or

☐ By delivering the papers for that party to the clerk of court, or the judge if there is no clerk, if the party's residence is not known.

☐ Prepare proof of personal service.

**Authority:**  
*CCP § 1011*

**Discussion:**  
See 27.31

**Forms:**  
See 27.48, 27.49, 27.51

☐ Service by mail.

☐ Make copies of notice or papers and include notation on them of the date and place of mailing, or include an unsigned copy of the affidavit or certificate of mailing.

☐ Place in sealed envelope, with postage prepaid.

☐ Address to the person on whom you are serving the papers, at the office address last given by that person on any document filed in the cause and served on the person making service by mail; otherwise, the envelope must be addressed to the place of residence.

☐ Deposit in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service.

☐ Account for time extensions for right or duty to act or respond after mail service.

☐ 5 calendar days if place of mailing and place of address are within California.

☐ 10 calendar days if either place of mailing or place of address is outside California,

but within United States.

☐ 20 calendar days if place of mailing or place of address is outside United States.

☐ Prepare proof of mail service.

**Authority:**

*CCP §§ 1013, 1013a*

**Discussion:**

See 27.32

**Forms:**

See 27.50, 27.51

☐ Service by express mail or overnight delivery.

☐ Express Mail:

☐ Make copies of notice or papers and include notation on them of the date and place of Express Mailing, or include an unsigned copy of the affidavit or certificate of mailing.

☐ Place in a sealed envelope, with Express Mail postage paid.

☐ Address to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by Express Mail; otherwise, at that party's place of residence.

☐ Deposit in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of Express Mail.

☐ Overnight delivery:

☐ Make copies of notice or papers and include notation on them of the date and place of sending by overnight delivery, or include an unsigned copy of the affidavit or certificate of deposit.

☐ Place in an envelope or package designated by the express service carrier with delivery fees paid or provided for.

☐ Address to the person on whom it is to be served, at the office address last given by that person on any document filed in the cause and served on the party making service; otherwise at that party's place of residence.

- ☐ Deposit in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents.
- ☐ Account for time extensions for right or duty to act or respond after Express Mail or overnight delivery service.
- ☐ 2 court days.
- ☐ Prepare proof of Express Mail or overnight delivery service.

**Authority:**

*CCP §§ 1013(c), 1013a*

**Discussion:**

See 27.33

**Form:**

See 27.51

- ☐ Service and filing by facsimile transmission.
  - ☐ Service between parties by fax.
    - ☐ File and serve court and all parties with written notice of election to send and receive notice by fax and include fax telephone number.
    - ☐ Be sure to have other party's written notice of agreement to be served by fax on file before sending transmission.
    - ☐ If counsel for first-named plaintiff or petitioner:
      - ☐ Compile fax service list.
      - ☐ Provide copy of fax service list to any party requesting it.
  - ☐ If counsel for party other than first-named plaintiff or petitioner:
    - ☐ Provide fax number to first-named plaintiff or petitioner.
    - ☐ Request fax service list from first-named plaintiff or petitioner.
- ☐ Make copies of notice or papers and include notation on them of the date and place of facsimile

transmission, or include an unsigned copy of the affidavit or certificate of transmission.

☐ If serving party that has not yet appeared in the action, include copy of fax service list with other papers served on that party.

☐ Fax documents to court or party's designated fax machine.

☐ Generate transmission report showing transmission complete and without error.

☐ Account for time extensions for right or duty to act or respond after fax service:

☐ 2 court days.

☐ Prepare proof of fax transmission and attach transmission report.

☐ Filing with court.

☐ Determine if court has local rules for fax filing.

☐ Do not fax wills, codicils, bonds, or undertakings.

☐ Include notation "By fax" below title of documents.

☐ Include mandatory Facsimile Filing Cover Sheet.

☐ Arrange payment of filing and fax fees with court.

☐ Transmit to court or fax filing agency.

☐ Generate transmission report showing transmission complete and without error.

☐ Confirm payment of fees.

☐ Move to have document filed on date transmitted if court system prevented filing.

**Authority:**

*CCP §§ 1013(e), (f); Cal Rules Ct, Rule 2.304(b), (d), 2.306(b), (h)*

**Discussion:**

See 27.34

**Forms:**



See 27.51, 27.52

☐ Service and filing by electronic service.

☐ Electronic service between parties.

☐ File and serve court and all parties with written notice of election to send and receive notice by electronic service and include electronic notification address.



**Warning:**

Electronically filing any document with court is deemed acceptance of electronic service.

**Form:**

See 27.53.

☐ Be sure to have other party's written notice of agreement to be served by electronic service on file before sending transmission.

☐ Notify court and party immediately of any change in electronic notification address.

**Form:**

See 27.54.

☐ Make copies of notice or papers and include notation on them of the date and place of electronic service, or include an unsigned copy of the affidavit or certificate of transmission.

☐ Electronically send documents to court or party's designated electronic notification address.

☐ Generate transmission report showing transmission complete and without error.

☐ Account for time extensions for right or duty to act or respond after electronic service:

☐ 2 court days.

☐ Prepare proof of electronic transmission and attach transmission report.

**Form:**

See 27.55.

☐ Place original document with signature in office file for possible later inspection.

☐ Filing with court.

☐ Determine if court has local rules for electronic filing.

☐ File and serve court and all parties with written notice of election to send and receive notice by electronic service and include electronic notification address.



**Warning:**

Electronically filing any document with court is deemed acceptance of electronic service.

☐ Do not fax wills, codicils, bonds, or undertakings.

☐ Include notation "By electronic transmission" below title of documents.

☐ Arrange payment of filing fees with court.

☐ Transmit to court or electronic filing service providers.

☐ Generate transmission report showing transmission complete and without error.

☐ Check for court's electronic confirmation of receipt of documents and payment of fees.

☐ Move to have document filed on date transmitted if court system prevented filing.

**Authority:**

*CCP § 1010.6; Cal Rules Ct, Rule 2.250 et seq.*

**Discussion:**

See 27.35

**Form:**

See 27.52

☐ Service to court when address unknown.

☐ Enclose in envelope with outside label indicating:

☐ Service being per *CCP § 1011(b)* on a party whose residence address is unknown.

☐ Name of party whose residence address is unknown.

☐ Case name and number.

**Authority:**  
*CCP § 1011(b)*

**Discussion:**  
See 27.36

☐ Telegraph transmission.

☐ Used for writ or order.

**Authority:**  
*CCP § 1017*

**Discussion:**  
See 27.37

☐ Notices by registered mail.

☐ Available when service is not governed by other provisions.

☐ Returned receipt purportedly signed by addressee creates disputable presumption that notice was received.

**Consider:**

Service by registered mail is not preferred unless specifically required by statute. A party can simply not accept the registered mail, leaving the party without service. Conversely, proof of service by regular mail provides the presumption that the document was properly served.

**Authority:**  
*CCP § 1020*

**Discussion:**  
See 27.38

☐ Service in foreign country.

☐ Use same procedure for service summons in foreign country.

**Authority:**  
20 UST 361

**Discussion:**  
See 27.39



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### **27.30 Options and Strategies.**

When not otherwise provided by the Code of Civil Procedure, notices and other papers must be in writing and may be served as prescribed in Chapter 5, Part 2, Title 14 of the Code [*CCP §§ 1010-1020*].

Chapter 5 of the Code of Civil Procedure provides several methods for service:

- Personal service, or leaving with a designated person [*CCP § 1011*].
- Service by mail [*CCP §§ 1012, 1013*].
- Service by express mail or overnight delivery [*CCP §§ 1012, 1013*].
- Service by facsimile transmission [*CCP §§ 1010.5, 1013*].
- Electronic service [*CCP § 1010.6*].
- Service on court clerk when party or attorney address unknown [*CCP § 1015*].
- Transmission of papers by telegraph for service [*CCP § 1017*].
- Service by registered mail when service not governed by *CCP §§ 1010-1019*.

The statutory language of these code sections provide that service "may" be made using one of the statutory methods of service. This allows the party serving the papers to choose the manner of service.

Service by other than personal service, i.e., mail, express mail, overnight delivery, facsimile, and electronic means provide time extensions for the other party to act or respond. When choosing the method of service, consider time constraints, costs, and office capabilities. Personal service may be difficult and costly compared to other methods of service, and access to gated communities is permitted for service of process or a subpoena [*see CCP § 415.21*] but the statute does not include service of other papers in its language [*see Ch. 8, Service of Summons, 8.33*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.31*

### **27.31 Personal Service or Leaving Papers With Designated Person.**

**27.31[1] Serving Attorney of Record.** The service may be personal, by delivery to the attorney on whom the service is required to be made [*CCP § 1011(a)*].

Service also may be made on an attorney by using one of the following methods [*CCP § 1011(a)*]:

- At the attorney's office by leaving the notice or other papers in an envelope or package clearly labeled to identify the attorney with the receptionist or person in charge.
- At the attorney's office by leaving the paper between 9:00 a.m. and 5:00 p.m. in a conspicuous place in the office when there is no person in the office.
- If the attorney's office is not open, by leaving the notice or other papers at the attorney's residence, with a person not less than 18 years of age, if the residence is in the same county as the office.
- If the attorney's residence is not known or not in the same county as the attorney's office, or there is no person over 18 years of age to accept service, by placing the papers, enclosed in a sealed envelope, into the post office or a mailbox or other facility regularly maintained by the U.S. Government, addressed to the attorney at the attorney's office, if known, or otherwise to the attorney's residence, if known.
- If neither the attorney's office nor residence is known, by delivering the papers to the address of the attorney as designated on the court papers, or by delivering the papers for the attorney to the clerk of the court.

#### **Consider:**

The court may require the serving party demonstrate why service should be effectuated by delivery to the court.

#### **➡ Cross Reference:**

Procedure for delivery to clerk of court when address unknown, see 27.36.

**27.31[2] Serving Party.** If upon a party, service must be made in the manner specifically provided in particular cases [*CCP* § 1011(b)].

If no specific provision is made, service may be made on a party using one of the following methods [*CCP* § 1011(b)]:

- By leaving the notice or other papers at the party's residence, between 8:00 a.m. and 6:00 p.m., with a person not less than 18 years of age. If at the time of attempted service between those hours no person 18 years of age or older cannot be found, notice may be served by mail.
- By delivering the papers for that party to the clerk of court if the party's residence is not known.

**Consider:**

The court may require the serving party demonstrate why service should be effectuated by delivery to the court.



**Cross References:**

Procedure for delivery to clerk of court when address unknown, see 27.36.

Service by mail, see 27.32.

**27.31[3] Proof of Service.**

**27.31[3][a] Absence of Method in *CCP* § 1011.** Although personal service is authorized by *CCP* § 1011, the statute does not expressly provide the method for proof of service; moreover, the Code of Civil Procedure sections that govern service of papers [*CCP* §§ 1010-1020] do not provide an express method for proof of service when personal service is used.

**27.31[3][b] Proof by Affidavit or Declaration.** The standard practice has been to prove personal service by affidavit [*CCP* § 2009] or by declaration under penalty of perjury [*CCP* § 2015.5] of the person making the service, or by the written acknowledgment of the person served [*compare CCP* §§ 417.10(d), 417.20(d) (proof of service of summons)].



**Cross Reference:**

Forms, see 27.48, 27.51.

**27.31[3][c] Certificate of Attorney.** Proof of personal service by an attorney of record is usually made by the certificate of the attorney [*compare CCP* § 1013a(2) (proof of service by mail)].



**Cross Reference:**

Form, see 27.49.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### **27.32 Service by Mail.**

**27.32[1] Strict Compliance Required for Party and Court Clerk.** Service by mail requires strict compliance with all statutory requirements; failure to comply may deprive a court of jurisdiction to act [*see Lee v. Placer Title Co. (1994) 28 CA4th 503, 511, 33 CR2d 572*]. This requirement applies to mailings by the court clerk as well as to mailings by parties [*see Lee v. Placer Title Co. (1994) 28 CA4th 503, 508, 33 CR2d 572* (dismissal of an action void when court clerk did not mail notice of dismissal to the current address of the plaintiffs' counsel on file)].

**27.32[2] Mail to Residence or Office.** Service by mail may be made [*CCP § 1012*]:

- Where the person to be served resides.
- Where the person to be served has an office where there is delivery service by mail.
- Where the person making the service and the person to be served reside or have their offices in different places between which there is regular communication by mail.

The notice or other papers must be [*CCP § 1013(a)*]:

- In a sealed envelope, with postage prepaid.
- Addressed to the person on whom it is being served, at the office address last given by that person on any document filed in the cause and served on the person making service by mail; otherwise, the envelope must be addressed to the place of residence.
- Deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service.

**27.32[3] Provide Required Notation on Papers or Include Unsigned Affidavit or Certificate.** The copies of notice or papers served by mail must bear a notation of the date and place of mailing, or be accompanied by an unsigned copy of the affidavit or certificate of mailing [*CCP § 1013(b)*].



**27.32[4] Service Complete at Time of Deposit but Time Requirements Extended 5 to 20 Calendar Days Depending on Addresses.** Service of notice and papers by mail is complete at the time of deposit, but any notice period and any right or duty to act or respond is extended: [*CCP* § 1013(a)]:

- 5 calendar days if the place of mailing and the place of address are within California.
- 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States.
- 20 calendar days if either the place of mailing or address is outside the United States.

These extensions of time apply in the absence of a specific exception provided for by other statute or by rule of court [*CCP* § 1013(a)].

**Exceptions:**

*CCP* § 1013(a) time extensions do not apply to:

- Filing notice of intention to move for a new trial.
- Notice of intention to vacate a judgment pursuant to *CCP* § 663a.
- Notice of appeal.



**Trap--*CCP* § 1005 Motions:**

The time extensions under *CCP* § 1013 which extend the time within which a right may be exercised or an act may be done do not apply to *CCP* § 1005 notices of motion, opposition papers, or reply papers [*CCP* § 1005(b)]. *CCP* § 1005 includes extensions within its terms.



**Cross Reference:**

Motions practice, see Ch. 26, Law and Motion Procedure.

**27.32[5] Proof of Service.**

**27.32[5][a] Affidavit of Non-Attorney.** The more common way for a non-attorney to provide proof of service is by mail by affidavit setting forth the exact title of the document served and filed in the cause, and showing all of the following [*CCP* § 1013a(3)]:

- The name and residence or business address of the person making the service.
- That he or she is a resident of, or employed in, the county where the mailing occurs.
- That he or she is over the age of 18 years and not a party to the cause.
- That he or she is readily familiar with the business's practice for collection and processing of correspondence for mailing with the United States Postal Service.
- That the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

- The name and address of the person served as shown on the envelope, and the date and place of business where the correspondence was placed for deposit in the United States Postal Service.
- That the envelope was sealed and placed for collection and mailing on that date following ordinary business practices.

This proof of service, on motion of a party served, is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the affidavit [CCP § 1013a(3)].



**Cross Reference:**

Forms, see 27.50, 27.51.

A non-attorney may alternatively provide proof of service by mail by affidavit setting forth all of the following [CCP § 1013a(1)]:

- The exact title of the document served and filed in the cause.
- The name and residence or business address of the person making the service.
- A statement that the person making the service is a resident of or employed in the county where the mailing occurs.
- A statement that the person making the service is over the age of 18 years and not a party to the cause.
- The date and place of deposit in the mail.
- The name and address of the person served as shown on the envelope.
- A statement that the envelope was sealed and deposited in the mail with the postage fully prepaid.



**Cross Reference:**

Forms, see 27.50, 27.51.

**27.32[5][b] Certificate of Attorney.** Proof of service by mail may be made by an attorney by a certificate setting forth the following [CCP § 1013a(2)]:

- The exact title of the document served and filed in the cause.
- The name and business address of the person making the service.
- A statement that the person making the service is an active member of the State Bar of California and is not a party to the cause.
- The date and place of deposit in the mail.
- The name and address of the person served as shown on the envelope.

- A statement that the envelope was sealed and deposited in the mail with the postage thereon fully prepaid.

**27.32[5][c] Proof of Service by Court Clerk.** In case of service by the clerk of a court of record, the clerk must execute a certificate that provides [*CCP* § 1013a(4)]:

- The exact title of the document served and filed in the cause.
- The name of the clerk and the name of the court of which he or she is the clerk.
- That he or she is not a party to the cause.
- The date and place of deposit in the mail.
- The name and address of the person served as shown on the envelope.
- That the envelope was sealed and deposited in the mail with the postage fully prepaid.

This form of proof is sufficient for service of process in which the clerk or deputy clerk signing the certificate places the document for collection and mailing on the date shown thereon, so as to cause it to be mailed in an envelope so sealed and so addressed on that date following standard court practices [*CCP* § 1013a(4)].

Service made by the court clerk, on motion of a party served and a finding of good cause by the court, is deemed to have occurred on the date of postage cancellation or postage meter imprint as shown on the envelope, if that date is more than one day after the date of deposit for mailing contained in the certificate [*CCP* § 1013a(4)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### **27.33 Service by Express Mail or Overnight Delivery.**

**27.33[1] Mail or Have Delivered to Office or Residence.** In the case of service by Express Mail, the notice or other paper must be [CCP § 1013(c)]:

- In a sealed envelope, with Express Mail postage paid.
- Addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by Express Mail; otherwise, at that party's place of residence.
- Deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of Express Mail.

In the case of service by another method of delivery providing for overnight delivery, the notice or other paper must be [CCP § 1013(c)]:

- In an envelope or package designated by the express service carrier with delivery fees paid or provided for.
- Addressed to the person on whom it is to be served, at the office address last given by that person on any document filed in the cause and served on the party making service; otherwise at that party's place of residence.
- Deposited in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents.

**27.33[2] Provide Required Notation on Papers or Include Unsigned Affidavit or Certificate.** The copies of notice or papers served by Express Mail or other overnight delivery must bear a notation of the date and place of mailing, or be accompanied by an unsigned copy of the affidavit or certificate of deposit [CCP § 1013(d)].

**27.33[3] Service Complete at Time of Deposit But Time Requirements Extended Two Court Days.** Service is complete at time of deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document served by Express Mail or other method of delivery providing for overnight delivery is extended by two court days [*CCP § 1013(c)*].

This extension applies in the absence of a specific exception provided for by *CCP § 1013* or other statute or rule of court [*CCP § 1013(c)*].

**Exceptions:**

*CCP § 1013(c)* time extensions do not apply to:

- Filing notice of intention to move for a new trial.
- Notice of intention to vacate a judgment pursuant to *CCP § 663a*.
- Notice of appeal.



**Trap--CCP § 1005 Motions:**

The time extensions under *CCP § 1013* which extend the time within which a right may be exercised or an act may be done do not apply to *CCP § 1005* notices of motion, opposition papers, or reply papers [*CCP § 1005(b)*]. *CCP § 1005* includes extensions within its terms.



**Cross Reference:**

Motions practice, see Ch. 26, Law and Motion Procedure.

**27.33[4] Proof of Deposit.** Although not specifically authorized by statute, proof of service by express mail or overnight delivery, by implication, may also be made by either a non-attorney or an attorney [*see CCP § 1013a*].



**Cross Reference:**

Form, see 27.51.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**27.34 Service by Facsimile Transmission.**

**27.34[1] Specific Definitions for This Method of Service.** A fax transmission is the transmission of a copy of a document by a system that encodes a document into electrical signals, transmits these electrical signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end [*Cal Rules Ct, Rule 2.301(2)*].

A fax machine is a machine that can send, in regular resolution, a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT) [*Cal Rules Ct, Rule 2.301(3)*]. A "fax machine" includes, but is not limited to, a facsimile modem that is connected to a personal computer [*Cal Rules Ct, Rule 2.301(3)*].

A fax filing is the facsimile transmission of a document to a court that accepts the documents [*Cal Rules Ct, Rule 2.301(4)*].

"Service by fax" refers to the transmission of a document to a party or the attorney for a party under the fax rules [*Cal Rules Ct, Rule 2.301(5)*].

A "transmission record" is the document printed by the sending fax machine stating the telephone number of the receiving machine, the number of pages sent, and the transmission time and date, and an indication of any errors in transmission [*Cal Rules Ct, Rule 2.301(6)*].

A "fax filing agency" is an entity that receives documents by fax for processing and filing with the court [*Cal Rules Ct, Rule 2.301(7)*].

**27.34[2] Standards.**

**27.34[2][a] Fax Machine Must Have Minimum Baud Rate.** Any fax machine used to send documents to a court must send at an initial transmission speed of no less than 4800 baud and be able to generate a transmission record [*Cal Rules Ct, Rule 2.301(3)*].

**27.34[2][b] Fax Form and Format Must Conform to State and Local Rules of Court.** A document used for transmitting a fax must comply with *Cal Rules Ct, Rule 2.100 et seq.* [*Cal Rules Ct, Rule 2.302*; see *Cal Rules Ct, Rules 2.100(a), 3.20(a)* (preempting local rules concerning the form or format of papers)].

Any exhibit that exceeds 8 1/2 by 11 inches must be reduced to not more than 8 1/2 by 11 inches before it is transmitted [*Cal Rules Ct, Rule 2.302*].

**27.34[2][c] First-Named Plaintiff Must Maintain Fax Service List.** The plaintiff or petitioner named first in the complaint or petition in a case in which the parties have agreed to service by fax must [*Cal Rules Ct, Rule 2.306(b)(1)*]:

- Maintain a current list of the parties that includes their fax numbers for service of notice on each party.
- Furnish a copy of the list on request to any party or the court.

**27.34[2][d] Parties Must Participate in Fax Service List and Serve It on New Parties.** Each party in a case in which the parties have agreed to service by fax must [*Cal Rules Ct, Rule 2.306(b)(2)*]:

- Furnish the first-named plaintiff or petitioner with the party's current fax number for service of notice when the party first appears in the action.
- Include a copy of the service list maintained by the first-named plaintiff [*see 27.34[2][c]*] when serving an order, notice, or pleading on any party that has not yet appeared in the action.

**27.34[3] Court May Notice Parties by Fax.** A court may serve a notice by fax in the same manner that parties may serve papers by fax [*Cal Rules Ct, Rule 2.306(c)*]. The court may serve notices by fax on an attorney who consents to fax service [*Cal Rules Ct, Rule 2.306(a)(1)*].

**Distinguish:**

Inclusion of a fax number in the attorney identification information in the upper left corner of paper filed with a court does not constitute consent to service by fax or email unless otherwise provided by law [*Cal Rules Ct, Rule 2.111(1)*].

**27.34[4] Signed Documents.**

**27.34[4][a] Signature on Fax Indicates Possession or Control of Original Document.** A party who serves a signed document by fax represents that the original signed document is in his or her possession or control [*Cal Rules Ct, Rule 2.305(a)*].

A signature produced by fax transmission is an original, notwithstanding any provision of law to the contrary, including *Evid Code* §§ 255 and 260 (defining the terms "original" and "duplicate" for purposes of the Evidence Code) [*Cal Rules Ct, Rule 2.305(d)*].

**27.34[4][b] Party May Demand Production of Original Signed Document.** At any time after service of a signed fax document, any other party may serve a demand for production of the originally signed document. The demand must be served on all other parties but is not to be filed with the court [*Cal Rules Ct, Rule 2.305(b)*].

If a party serves a demand for production of the original signed document, the parties must arrange a meeting for examination of the original signed document [*Cal Rules Ct, Rule 2.305(c)*].

**27.34[5] Filing Documents With Court.**

**27.34[5][a] Different Rules Govern Different Court Departments.** *Cal Rules Ct, Rule 2.300 et seq.* apply to fax service in civil, probate, and family law proceedings in all trial courts, while *Cal Rules Ct, Rule 5.522* govern fax filing in juvenile proceedings [*Cal Rules Ct, Rule 2.300(a)*].

**27.34[5][b] Specific Papers Excluded From Facsimile Filing or Issuance by Court.** No will, codicil, bond, or undertaking may be filed by fax, nor can the court issue by fax any document that is intended to carry the original seal of the court [*Cal Rules Ct, Rule 2.300(b)*]. However, a court may serve any notice by fax in the same manner that litigants may serve papers by fax [*Cal Rules Ct, Rule 2.306(a), (c)*].

**Distinguish--Service of Summons:**

The fax rules do not affect the requirements for personal or substituted service of the summons and complaint or any other opening paper [see *Cal Rules Ct, Rule 2.306* (authorizing "service of papers" by fax, but not service of summons)].

**27.34[5][c] Party May Directly File Documents With Court.** A party may fax a document directly to a court that allows direct fax filing by local rule [*Cal Rules Ct, Rule 2.304(a)* (local rule providing fax telephone numbers)]. A Judicial Council Facsimile Filing Cover Sheet must be the first page transmitted, followed by any special handling instructions, then the document [*Cal Rules Ct, Rule 2.304(b)*]. The document must contain the phrase "By fax" immediately below the document's title [*Cal Rules Ct, Rule 2.304(c)*].

 **Cross Reference:**

Form of Facsimile Filing Cover Sheet, see 27.56.

The filing fee is paid by credit card or a prearranged filing fee account with the court [*Cal Rules Ct, Rule 2.304(e), (f)*].

The party's fax machine must print a transmission record of each fax filing, and if the court does not file the document due to a transmission error or failure to process the document when received by the court, the party may move for an order filing the document nunc pro tunc [*Cal Rules Ct, Rule 2.304(d)*]. The motion must include the printed transmission record and a declaration in the form specified in the rules of court stating the transmission dates and compliance with the rules of court [*Cal Rules Ct, Rule 2.304(d)*].

**27.34[5][d] Party May Use Fax Filing Agency.** A party may fax a document to a fax filing agency for filing with the court. However, the agency is an agent of the party, not an agent of the court [*Cal Rules Ct, Rule 2.303(a)*]. After receiving the fax, the agency prepares the document to comply with *Cal Rules Ct, Rules 2.100 et seq.*, physically transports the document to the court, and files the document as well as paying any filing fee [*Cal Rules Ct, Rule 2.303(b)*]. Each document filed must contain the phrase "By fax" immediately below the document's title [*Cal Rules Ct, Rule 2.303(f)*]. The agency also may file the documents by fax [*Cal Rules Ct, Rule 2.304(a)*].

An advance agreement must be made between the agency and the party for payment of filing fees and service charges [*Cal Rules Ct, Rule 2.303(c)*], the agency must keep all documents confidential [*Cal Rules Ct, Rule 2.303(d)*], and by filing the document the agency certifies it has followed the rules of court for fax filing and that the document is filed in full and unaltered [*Cal Rules Ct, Rule 2.303(e)*].

**27.34[6] Service Between Parties.**

**27.34[6][a] Written Consent Required.** Service by fax is permitted only if the parties agree and a written confirmation of that agreement is made [*CCP § 1013(e)*; *Cal Rules Ct, Rule 2.306(a)(1)*].

**Distinguish:**

Inclusion of a fax number in the attorney identification information in the upper left corner of paper filed with a court does not constitute consent to service by fax or email unless otherwise provided by law [see



*Cal Rules Ct, Rule 2.111(1)*].

**Exception:**

Where a statute specifies only that service *may* be accomplished in accordance with *CCP § 1013* [see, e.g., *CCP § 364(c)*], service may be accomplished by facsimile transmission [ *Jones v. Catholic Healthcare West* (2007) 147 CA4th 300, 309, 54 CR3d 148 ].

**27.34[6][b] Fax Machine Must Be Available During Specific Times.** A party or attorney agreeing to accept service by fax must make his or her fax machine generally available for receipt of documents between 9:00 a.m. and 5:00 p.m. on days that are not court holidays under *CCP § 136* [*Cal Rules Ct, Rule 2.306(e)*].

This provision does not prevent the attorney from sending documents by means of the fax machine or providing for normal care and maintenance of the fax machine during these hours [*Cal Rules Ct, Rule 2.306(e)*].

**27.34[6][c] Notice Must Include Adequate Notations or Copy of Affidavit or Certificate of Transmission.**

The copy of the notice or other papers served by fax must bear a notation of the date and place of transmission and the facsimile telephone number to which it was transmitted or be accompanied by an unsigned copy of the affidavit or certificate of transmission containing the telephone number to which the notice or papers were transmitted [*CCP § 1013(f)*].

**27.34[6][d] Service Complete at Time of Transmission but Time Requirements Extended Two Court Days.**

Service is complete at the time of transmission, but any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after service of the document by fax is extended by two court days [*CCP § 1013(e)*; *Cal Rules Ct, Rule 2.306(d)*].

This extension applies in the absence of a specific exception provided for by *CCP § 1013* or other statute or rule of court [*CCP § 1013(c)*].

**Exceptions:**

*CCP § 1013(c)* time extensions do not apply to [*Cal Rules Ct, Rule 2.306(e)*]:

- Filing notice of intention to move for a new trial.
- Notice of intention to vacate a judgment pursuant to *CCP § 663a*.
- Notice of appeal.



**Trap--CCP § 1005 Motions:**

The time extensions under *CCP § 1013* which extend the time within which a right may be exercised or an act may be done do not apply to *CCP § 1005* notices of motion, opposition papers, or reply papers [*CCP § 1005(b)*]. *CCP § 1005* includes extensions within its terms.

Service by fax is complete on receipt of the entire document by the receiving party's facsimile machine. Service occurring after 5:00 p.m. is deemed to have occurred on the next court day [*Cal Rules Ct, Rule 2.306(g)*].

Service is ineffective if the transmission does not fully conform to the provisions of *Cal Rules Ct, Rule 2.306* [*Cal Rules Ct, Rule 2.306(h)(5)*].



**Warning:**

Be sure entire document is transmitted before 5:00 p.m. to avoid untimely notice.

 **Cross Reference:**

Motions practice, see Ch. 26, Law and Motion Procedure.

**27.34[6][e] Proof of Transmission.** Proof of service by fax may be made by any method provided in *CCP* § 1013(a) (governing proof of service by mail) with certain exceptions [*Cal Rules Ct, Rule 2.306(h)*]:

- Time, date, and sending fax machine number used in lieu of date and place of deposit in mail.
- Name and fax machine number of person served used in lieu of name and address of person served on envelope.
- Statement that document transmitted by facsimile transmission, complete, and without error used in lieu of statement envelope was sealed and deposited in mail with postage paid.
- Copy of the transmission report *must* be attached to proof of service along with declaration that transmission report properly issued by fax machine.

Service of papers by fax is ineffective if the transmission does not fully conform to the provisions of *Cal Rules Ct, Rule 2.306* [*Cal Rules Ct, Rule 2.306(h)(5)*].

 **Cross Reference:**

Optional Judicial Council forms and attachments, see 27.54, 27.55, 27.55A.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**27.35 Electronic Service.**

**27.35[1] Specific Definitions for This Method of Service.** "Electronic filing" is the electronic transmission to a court of a document in electronic form [*Cal Rules Ct, Rule 2.250(4)*].

An "electronic filing service provider" is a person or entity that receives an electronic filing from a party for re-transmission to the court [*Cal Rules Ct, Rule 2.250(5)*]. In submission of filings the electronic filing service provider does so on behalf of the electronic filer and not as an agent of the court.

"Electronic service" is the electronic transmission of a document to a party's electronic notification address, either directly or through an electronic service provider, for purposes of effecting service [*Cal Rules Ct, Rule 2.250(6)*].

A party's "electronic notification address" is the electronic address at or through which the party has authorized electronic service [*Cal Rules Ct, Rule 2.250(8)*].

"Electronic filer" is a party filing a document in electronic form directly with the court, by an agent, or through an electronic filing service provider [*Cal Rules Ct, Rule 2.250(3)*].

"Document" means a pleading, paper, declaration, exhibit, or other filing submitted by a party or party's agent and may be in paper or electronic form [*Cal Rules Ct, Rule 2.250(2)*].

"Close of business" means 5:00 p.m. or any other time on a court day at which the court stops accepting documents for filing at its filing counter; and the court must provide notice of its close-of-business time electronically [*Cal Rules Ct, Rule 2.250(1)*].

**27.35[2] Standards.**

**27.35[2][a] Court Must Maintain Internet-Accessible System and Publish Requirements and Problems.** A trial court may adopt local rules permitting electronic filing and service [*CCP § 1010.6(a)*]. A court that permits electronic filing must allow filing over the Internet ensuring transmission security and integrity, must publish the court's electronic filing requirements in both electronic and print formats, and must promptly take reasonable steps to provide

notice of problems affecting electronic filing [*Cal Rules Ct, Rule 2.254*].

**27.35[2][b] Electronic Filer Must Have System That Is Compatible With and Does Not Harm Court's Electronic System.** An electronic filer must [*Cal Rules Ct, Rule 2.256*]:

- Comply with court requirements designed to ensure electronic system integrity and protect sensitive personal information.
- Take all reasonable steps to ensure filings do not contain computer code, including viruses, that might be harmful to the court's system and to other users of that system.
- Use software in the public domain or generally available at reasonable cost.

**27.35[3] Electronic Filing With Court.**

**27.35[3][a] Electronic Filing With Court Permitted in Any Action or Proceeding If Local Rules Adopted.** A court may permit electronic filing of a document in any action or proceeding unless rules of court or other legal authority prohibit filing [*Cal Rules Ct, Rule 2.252(a)*].

**Prerequisite:**

The court must adopt local rules first before permitting electronic filing [*see CCP § 1010.6(a)*].

**27.35[3][b] Wide Range of Documents May Be Filed.** Electronic documents that may be filed with the court include [*Cal Rules Ct, Rules 2.250(2), 2.252(a)-(d)*]:

- Pleadings, papers, declarations, exhibits, and any other filings.
- Scanned copies of an original that is later filed with the court within 10 calendar days.
- Applications for waiver of costs and fees.
- Notices, orders, minute orders, judgments, or other documents prepared by the court.

**27.35[3][c] Filed Electronic Document Has Same Legal Effect As Paper Document.** A filed electronic document has the same legal effect as a document in paper form [*Cal Rules Ct, Rule 2.252(e)(1)*].

**27.35[3][d] Electronic Filing Does Not Alter Filing Deadline.** Filing a document electronically does not alter any filing deadline [*Cal Rules Ct, Rule 2.252(e)(2)*].

**27.35[3][e] Electronic Filer Must Provide Court With Latest Electronic Address.** Electronic filers must provide the court with [*Cal Rules Ct, Rules 2.256(a)*]:

- One or more electronic notification addresses at which the filer agrees to accept service.
- Immediate notice of any change in electronic notification addresses.
- Any information the court needs for case processing.

**27.35[3][f] Signatures Required Under Penalty of Perjury Must Be Signed Before Filing and May Have to Be Produced.** A document requiring a signature under penalty of perjury must be signed in printed form before electronically filing the document; and the act of filing indicates the original is signed and available for review by the court or any party [*CCP § 1010.6(a)(2)(B)*; *Cal Rules Ct, Rule 2.257(a)(1), (2)*].

A party may serve a demand for production of the original any time after the document is filed and the party who filed the document must produce the signed original within 5 days of being served the demand [*Cal Rules Ct, Rule 2.257(a)(3), (4)*].

At any time after the document signed under penalty of perjury is filed, the court may order the filing party to produce the original signed document in court for inspection and copying by the court. The order must specify the date, time, and place for the production and must be served on all parties [*Cal Rules Ct, Rule 2.257(a)(5)*].

**27.35[3][g] Signatures Not Required Under Penalty of Perjury Are Deemed Signed When Filed.** A document not requiring a signature under penalty of perjury is deemed signed by the party when electronically filed [*CCP § 1010.6(a)(2)(A); Cal Rules Ct, Rule 2.257(b)*].

**27.35[3][h] Documents Requiring Signatures of Opposing Parties Must Be Completed Before Filing.** Documents requiring signature of opposing parties, such as stipulations, requires the party filing the document obtain all signature on an original printed document and make the original available for inspection; and filing the document indicates all parties have signed the document [*Cal Rules Ct, Rule 2.257(c)*].

The court and any other party may demand production of the original signed document in the manner discussed in *Cal Rules Ct, Rule 2.257(a)(3)-(5)* [*Cal Rules Ct, Rule 2.257(c)(2); see 27.35[3][f]*].

**27.35[3][i] Digital Signatures Not Required.** A party is not required to use a digital signature on an electronically filed document [*Cal Rules Ct, Rule 2.257(d)*].

**27.35[3][j] Court May Permit Electronic Payment of Filing Fees.** The court may permit payment of filing fees by credit card, debit card, electronic funds transfers, or debit accounts, and fees may be waived for those eligible [*Cal Rules Ct, Rule 2.258; see Cal Rules Ct, Rule 2.252(c); Gov Code § 68630 et seq.*].

**27.35[3][k] Court May Contract With Electronic Service Providers.** The court may contract with an electronic service provider wherein electronic filers file the documents with the service provider who in turn files the document with the court [*Cal Rules Ct, Rule 2.255(a)*].

**Distinguish:**

In submission of filings, the electronic filing service provider does so on behalf of the electronic filer and not as an agent of the court [*Cal Rules Ct, Rule 2.250(5)*].

**27.35[3][l] Court Must Send Confirmation of Electronic Filing or Reason Why Rejected.** After the court receives an electronic document, the court must promptly send the filer confirmation of the receipt of the document, indicating the date and time of receipt. A document is considered received at the date and time the confirmation of receipt is created [*Cal Rules Ct, Rule 2.259(a)(1)*]. The document complies with the filing requirements, the confirmation will indicate the document is filed, the transaction number, the title of the documents as filed, and the fee assessed [*CCP § 1010.6(a)(4); Cal Rules Ct, Rule 2.259(a)(2)*].

If a document received does not comply with electronic filing requirements or the fee was not paid, the court must send notice why the document was rejected for filing [*Cal Rules Ct, Rule 2.259(b)*].

**27.35[3][m] Document Filed After Close of Business Is Filed Next Court Day.** A document electronically filed with the court after 5:00 p.m., or any other time designated as close of business, is deemed filed on the next court day [*CCP § 1010.6(a)(3); Cal Rules Ct, Rules 2.250(1), 2.259(c)*].

**Consider:**

Counsel should never file a complaint electronically if there is a risk the statute of limitations may

expire, particularly if filing late in the day. The systems are too new to risk a client's rights by electronic filing.

**27.35[3][n] Party May Challenge Filing Delay Caused by Court's System.** If a party attempts to file a document during regular electronic filing hours but the court system is unavailable, the court must deem the document filed on that day if the party demonstrates that he or she attempted to file on that particular day [*Cal Rules Ct, Rule 2.259(d)*].

**Exception:**

This rule does not apply to complaints or other initial proceedings [*Cal Rules Ct, Rule 2.259(d)*].

**27.35[3][o] Court Endorsement Will Indicate Electronic Filing.** The court will endorse the documents as electronically filed and will have the same effect as a manually endorsed stamp [*Cal Rules Ct, Rule 2.259(e)*].

**27.35[3][p] Court May Transmit Electronic Summons.** If the court receives an electronic complaint, petition, or other document that must be served with summons, the court must issue at the plaintiff's request a summons to be kept in its records and may transmit a copy of the summons electronically to the electronic filer [*CCP § 1010.6(a)(5); Cal Rules Ct, Rule 2.259(f)(1)*].

**27.35[4] Electronic Service by Court and Between Parties.**

**27.35[4][a] Electronic Service Permitted When Other Nonpersonal Service Permitted.** Electronic service is permitted when notice may be served by mail, express mail, overnight delivery, or facsimile transmission [*Cal Rules Ct, Rule 2.260(a)(1)*].

**27.35[4][b] Court May Electronically Serve Notices and Other Court Documents.** The court may electronically serve any notice, order, judgment, or other documents by the court in the same manner parties serve electronic documents [*Cal Rules Ct, Rule 2.260(g)*].

**27.35[4][b1] Judge or Judicial Officer May Sign Electronically Served Document in Any Legal Manner.** If a document requires a signature by a court or a judicial officer, the document may be electronically signed in any manner permitted by law [*Cal Rules Ct, Rule 2.257(e)*].

**27.35[4][c] Party Subject to Electronic Service by Notice to Accept Electronic Service or by Electronically Filing Any Document.** A party indicates it agrees to accept electronic service by [*Cal Rules Ct, Rule 2.260(a)(2)*]:

- Filing and serving a notice accepting electronic service, and including the address for electronic service address.
- Electronically filing any document with the court.



**Warning:**

A party that has consented to electronic service by either of the aforementioned methods and has used an electronic filing service provider to file and serve documents in a case consents to service on that electronic filing service provider as the designated agent for service for the party in the case, until the party designates a different agent for service [*Cal Rules Ct, Rule 2.260(a)(3)*].



**Warning:**

An electronic notification address is presumed valid if the party files electronic documents from that address and has not filed and served notice that the address is no longer valid [*Cal Rules Ct, Rule 2.260(d)(3)*].

Judicial Council Form EFS-005 Consent to Electronic Service and Notice of Electronic Notification Address (Electronic Filing and Service) has been approved for optional use in providing notice of change of electronic notification address.

 **Cross Reference:**

Judicial Council Form EFS-005 Consent to Electronic Service and Notice of Electronic Notification Address (Electronic Filing and Service), see 27.53.

**27.35[4][d] Party Must Update Any Change of Electronic Address.** A party whose electronic notification address changes while the action is pending must promptly file a notice of change of electronic address and serve the notice on all parties [*Cal Rules Ct, Rule 2.260(d)(1)*]. A party's election to contract with an electronic filing service provider to electronically file and serve documents or to receive electronic service of documents on the party's behalf does not relieve the party of this duty [*Cal Rules Ct, Rule 2.260(d)(2)*].

 **Warning:**

An electronic notification address is presumed valid if the party files electronic documents from that address and has not filed and served notice that the address is no longer valid [*Cal Rules Ct, Rule 2.260(d)(3)*].

Judicial Council Form EFS-010 Notice of Change of Electronic Notification Address (Electronic Filing and Service) has been approved for optional use in providing notice of change of electronic notification address.

 **Cross Reference:**

Judicial Council Form EFS-010 Notice of Change of Electronic Notification Address (Electronic Filing and Service), see 27.54.

**27.35[4][d1] Court Must Provide Electronic Service List, But Serving Party Must Ensure Service.** A court that permits electronic filing in a case must maintain and make available electronically to the parties an electronic service list that contains the most recent electronic notification addresses that the parties that have filed electronically in the case have provided to the court [*Cal Rules Ct, Rule 2.260(b)*].

 **Warning:**

Although the court is required to provide the electronic service list, the serving party is responsible for electronic service on all other parties in the case. A party may serve documents electronically directly, by an agent, or through an electronic filing service provider [*Cal Rules Ct, Rule 2.260(b)*].

**27.35[4][e] Service Complete at Time of Transmission but Time Requirements Extended Two Court Days.** Service is complete at the time of transmission, but any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after service of the document by fax is extended by two court days [*CCP § 1010.6(a)(6)*; *Cal Rules Ct, Rule 2.260(e)(1), (2)*].

**Exceptions:**

This time extension does not apply to [*CCP § 1010.6(a)(6)*; *Cal Rules Ct, Rule 2.260(e)(3)*]:

- Filing notice of intention to move for a new trial.
- Notice of intention to vacate a judgment pursuant to *CCP § 663a*.

- Notice of appeal.



#### **Trap--CCP § 1005 Motions:**

The time extensions under *CCP § 1013* which extend the time within which a right may be exercised or an act may be done do not apply to *CCP § 1005* notices of motion, opposition papers, or reply papers as time has already been incorporated into § 1005. *CCP § 1005* includes extensions within its terms. *CCP § 1005* does not address electronic service.

**27.35[4][f] Service After Close of Business Considered Served on Following Court Day.** Service that occurs after the close of business is considered to have occurred on the next court day [*CCP § 1010.6(a)(3)*; *Cal Rules Ct, Rule 2.260(e)(4)*]. "Close of business" is defined as 5:00 p.m. for the court or any other time the court stops accepting documents for filing at its counter [*Cal Rules Ct, Rule 2.250(1)*].

**27.35[4][g] Proof of Transmission.** Proof of service by electronic transmission may be made by any method provided in *CCP § 1013a* (governing proof of service by mail) with certain exceptions [*Cal Rules Ct, Rule 2.260(a)(1)*, (f)(1)]:

- The electronic notification address of the person making the service used in addition to that person's residence or business address.
- The date and time of the electronic service used in lieu of the date and place of deposit in the mail.
- The name and electronic notification address of the person served used in lieu of the person's name and address as shown on the envelope.
- That the document was served electronically is used in lieu of the statement that the envelope was sealed and deposited in the mail with postage fully prepaid.

Proof of service may be in electronic form and may be filed electronically with the court [*Cal Rules Ct, Rule 2.260(f)(2)*].



#### **Timing:**

Per *Cal Rules Ct, Rule 3.1300(c)*, proof of service of the moving papers must be filed at least 5 court days before the hearing [*Cal Rules Ct, Rule 2.260(f)(3)*].

The party filing the proof of electronic service must maintain the printed form of the document bearing the declarant's original signature and must make the document available for review and copying on the request of the court or any party to the action or proceeding in which it is filed, per *Cal Rules Ct, Rule 2.257(a)* [*Cal Rules Ct, Rule 2.260(f)(4)*].

Judicial Council Form POS-050/EFS-050 Proof of Electronic Service (Proof of Service/Electronic Filing and Service) has been approved for optional use in providing proof of electronic service. The Judicial Council has also approved as add-on forms to Form POS-050/EFS-050 a form for listing multiple documents, Form POS-050(D)/EFS-050(D) Attachment to Proof of Electronic Service (Documents Served) (Proof of Service/Electronic Filing and Service), and a form for listing multiple persons served, Form POS-050(P)/EFS-050(P) Attachment to Proof of Electronic Service (Persons Served) (Proof of Service/Electronic Filing and Service).



#### **Cross Reference:**

Judicial Council Form POS-050/EFS-050 Proof of Electronic Service (Proof of Service/Electronic Filing



and Service), see 27.55.

Judicial Council Form POS-040 Proof of Service--Civil (Personal Service, Mail, Overnight Deliver, Messenger Service, Facsimile, E-Mail/Electronic Transmission), see 27.51.

**27.35[5] Court May Order Electronic Filing and/or Service in Special Cases.** A court may, on motion of any party or on its own motion, order all parties in a class action, a consolidated action, or a group of actions, a coordinated action, or an action that is deemed complex under Judicial Council rules [*see Cal Rules Ct, Rule 3.403*], after finding that such an order would not cause undue hardship or significant prejudice to any party in the action [*CCP § 1010.6(a)(8); Cal Rules Ct, Rule 2.253(a)*] to [*Cal Rules Ct, Rule 2.253(a)(1)-(3)*]:

- Serve all documents electronically, except when personal service is required by statute or rule,
- File all documents electronically, or
- Serve and file all documents electronically, except when personal service is required by statute or rule.

The court's order also may provide [*Cal Rules Ct, Rule 2.253(b)*]:

- Documents previously filed in paper form may be resubmitted in electronic form; and
- When the court sends confirmation of filing to all parties, receipt of the confirmation constitutes service of the filing if the filed document is available electronically.

When it is not feasible for a party to convert a document to electronic form by scanning, imaging, or another means, a court may allow a party to serve, file, or serve and file the document in paper form [*Cal Rules Ct, Rule 2.253(c)*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsGeneral Overview



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VI. CHOOSING METHOD OF SERVICE AND PROOF OF SERVICE

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**27.36 Service to Court When Party's Residence Address Unknown.**

When service is made by delivering the notice or papers to the clerk of the court under *CCP § 1011(b)* because a party's address is unknown, the papers must be enclosed in an envelope addressed to the party in care of the clerk [*Cal Rules Ct, Rule 3.252(a)*]. The back of the envelope must state the following [*Cal Rules Ct, Rule 3.252(b)*]:

- "Service is being made under *Code of Civil Procedure Section 1011(b)* on a party whose residence address is unknown."
- [*Name of the party whose residence address is unknown*].
- [*Case name and number*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsGeneral Overview



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### **27.37 Writ or Order Via Telegraph.**

Any writ or order in any civil suit or proceeding and all other papers requiring service may be transmitted by telegraph for service in any place, subject to the following requirements [CCP § 1017]:

- The telegraphic copy of the writ, order, or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him or her, if any return is required, in the same manner, and with the same force and effect in all respects, as the original might be if delivered to him or her.
- The officer or person serving or executing the telegraphic copy has the same authority, and is subject to the same liabilities, as if the copy were the original.
- The original, if a writ or order, must also be filed in the court from which it was issued, and a certified copy must be preserved in the telegraph office from which it was sent. In sending it, the operator may use either the original or the certified copy for that purpose.
- Whenever any document to be sent by telegraph bears a seal, either private or official, it is not necessary for the operator in sending it to telegraph a description of the seal or any words or device on it, but the seal may be expressed in the telegraphic copy by the letters "L.S." (locus sigilli, that is, place of the seal) or by the word "seal."

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**27.38 Notices Sent by Registered Mail When Service Not Governed by Service Statutes.**

Any notice required by law, other than a notice required to be given to a party to an action or to the party's attorney, the service of which is not governed by *CCP* §§ 1010-1019 and which is not otherwise specifically provided for by law, may be given by sending it by registered (or certified [*CCP* § 11]) return-receipt mail, with proper postage prepaid, addressed to the addressee's last known address [*CCP* § 1020].

The production of a returned receipt purporting to be signed by the addressee creates a disputable presumption that the notice was received by the person to whom it was required to be sent [*CCP* § 1020].

**Distinguish:**

The absence of a signed return receipt does not negate any other presumptions concerning mailed items. Under *Evid Code* § 641, a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. To rebut this presumption, evidence must be admitted to deny receipt of the mailing [ *Bear Creek Master Assn. v. Edwards* (2005) 130 CA4th 1470, 1486, 31 CR3d 337 ]. Where a statute provides for service by registered or certified mail, the addressee cannot assert failure of service when he or she wilfully disregards a notice of certified mail delivered to his or her address under circumstances where it can be reasonably inferred that the addressee was aware of the nature of the correspondence [ *Bear Creek Master Assn. v. Edwards* (2005) 130 CA4th 1470, 1487, 31 CR3d 337 ].

**Consider:**

Service by registered mail is not preferred unless specifically required by statute. A party can simply not accept the registered mail, leaving the party without service. Conversely, proof of service by regular mail provides the presumption that the document was properly served.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePleading & PracticePleadingsGeneral Overview



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**27.39 Service in Foreign Country Served in Same Manner As Summons.**

A paper may be served on a person in a foreign country in the manner a summons is served pursuant to the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" [20 U.S.T. 361].



**Cross Reference:**

Service of summons, see Ch. 8, Service of Summons.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings General Overview Civil Procedure Pleading & Practice Service of Process Methods Foreign Service



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VII. ASSERTING DEFECTS IN SERVICE

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**27.40 CHECKLIST: Asserting Defects in Service.**

- ☐ Improperly served and noticed motions and applications:
  - ☐ Appear at hearing asserting only defective notice.
  - ☐ Be prepared to dispute grounds if court does not grant continuance.
- ☐ After hearing or if hearing not attended:
  - ☐ Consider *CCP* § 473 motion for relief from order.

**Authority:**

*CCP* § 1005; *Cal Rules Ct*, Rule 3.1200 et seq.

**Discussion:**

See 27.41-27.42



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VII. ASSERTING DEFECTS IN SERVICE

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**27.41 Service Defects Must Be Raised in Trial Court.**

Any objection to the manner or proof of service or in a notice of motion must be made in the trial court and cannot normally be raised for the first time on appeal [see *Peers v. Stoll* (1939) 32 CA2d 511, 512, 90 P2d 119 (notice of motion), *disapproved on other grounds*, *Butcher v. Brouwer* (1942) 21 C2d 354, 358, 132 P2d 205 ; *Carlton v. Quint* (2000) 77 CA4th 690, 697-698, 91 CR2d 844 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**27.42 Avoid Waiver by Limited Appearance at Hearing Objecting Only to Notice.**

Defects and irregularities in a notice of motion or failure to provide notice at all to the adverse party may be challenged without waiving the defects or irregularities by making a limited appearance at the hearing on the motion for the purpose of objecting to a consideration of the motion by the court on the ground of insufficiency of the notice [ *Bohn v. Bohn* (1913) 164 C 532, 538-539, 129 P 981 ].



**Trap--Avoid Waiver of Issue:**

Defects and irregularities in a notice of motion, and failure to give notice at all, are normally waived by the adverse party's appearance at the hearing on the motion *and* opposing it on its merits [ *Carlton v. Quint* (2000) 77 CA4th 690, 697-698, 91 CR2d 844 ; *Vlahovich v. Cruz* (1989) 213 CA3d 317, 320, 261 CR 565 ; *Tate v. Superior Court* (1975) 45 CA3d 925, 930, 119 CR 835 ]. This rule applies even when no notice was given at all [ *Carlton v. Quint* (2000) 77 CA4th 690, 698, 91 CR2d 844 ].



**Decision Point--Continuance Versus Opposition:**

In challenging the absence of notice or defective notice counsel or the adverse party may appear at the hearing and request a continuance for the purpose of preparing a proper response, and making a complete record regarding the notice for appellate purposes in the event the continuance is denied. Alternately, counsel may file an opposition to the motion based on the notice irregularities and the merits, and appear at the hearing to object to the hearing proceeding based upon defective and/or inadequate notice, and requesting a continuance.



**Warning:**

Counsel should be prepared to argue the motion on the merits if the court rejects the request for continuance unless counsel wants to preserve the issue of notice for appeal; however this is not recommended.



**Strategic Point--CCP § 473 Motion:**

A party may seek relief from an order on the basis of mistake, inadvertence, surprise, or excusable



neglect by use of a *CCP* § 473 motion.



**Cross Reference:**

Discussion of opposing defective noticed motions, see *Ch. 26, Law and Motion Procedure*, 26.48.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsGeneral Overview



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*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.43*

**27.43 Application and Declaration for Ex Parte Order Shortening Time for Service of Notice of Motion and Accompanying Papers Under CCP § 1005(b).**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant,

)  
) NO. \_\_\_\_\_  
) APPLICATION AND SUPPORTING DECLARA-  
) TION OF \_\_\_\_\_ [name] FOR EX  
) PARTE ORDER SHORTENING TIME FOR SER-  
) VICE OF NOTICE OF MOTION FOR  
) \_\_\_\_\_ [specify what seeking to have  
) shortened] AND ACCOMPANYING PAPERS  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_  
) [Add, if appropriate: LIMITED CIVIL CASE]

APPLICATION

I, \_\_\_\_\_ [attorney, e.g., Defense Attorney Jane Lee], hereby apply on behalf of  
\_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] in the above-captioned matter, for an order,

pursuant to *Code of Civil Procedure Section 1005(b)*, shortening time for service of the attached notice of motion for \_\_\_\_\_ [*specify, e.g., expunging lis pendens*] and supporting papers, \_\_\_\_\_ days before the hearing.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for Plaintiff \_\_\_\_\_ [*name*]

SUPPORTING DECLARATION OF \_\_\_\_\_ [*name*]

I, \_\_\_\_\_ [*name, e.g., Defendant's Attorney Jane Lee*], declare:

1. I am \_\_\_\_\_ [*identify the declarant, e.g., the defense attorney*] for \_\_\_\_\_ [*specify moving party, e.g., Mary Jones*].

2. \_\_\_\_\_ [*State facts that show good cause for shortening time for notice of motion, e.g., Sale of the subject property, 1 Main Street, Farallon City, California, is to take place in 15 days to meet contractual sale terms and avoid forfeit of deposit. Existing lis pendens will materially affect the sale price of the property*].

3. \_\_\_\_\_ [*State that there have been no prior applications for shortening time or specify any prior applications and the court's actions*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for Defendant

DECLARATION OF NOTICE

[*Add declaration of notice given for ex parte application.*]

MEMORANDUM

[Add memorandum supporting motion.]

NOTES.

**Authority:**

*CCP § 1005(b)*

**Grounds for Motion:**

*See 27.11[1], [2]*

**Procedure:**

*See 27.11[3]*

**Related Form of Order:**

*See 27.44*

**Declaration of Notice:**

*See Ch. 26, Law and Motion Practice, § 26.29[2]*



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*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.44*

**27.44 Ex Parte Order Shortening Time for Service of Notice of Motion and Accompanying Papers.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                      |
|---------------|---|--------------------------------------|
| _____ [name], | ) |                                      |
| Plaintiff,    | ) |                                      |
| vs.           | ) | NO. _____                            |
| _____ [name], | ) | EX PARTE ORDER SHORTENING TIME FOR   |
| Defendant,    | ) | SERVICE OF NOTICE OF MOTION FOR      |
|               | ) | _____ [specify, e.g., EXPUNGING      |
|               | ) | LIS PENDENS] AND ACCOMPANYING PAPERS |

\_\_\_\_\_

Application having been made by \_\_\_\_\_ [party, e.g., Defendant Mary Jones] with proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS ORDERED that the application of \_\_\_\_\_ [party, e.g., Defendant Mary Jones], for an ex parte order shortening time for service of notice of motion for \_\_\_\_\_ [specify, e.g., expunging lis pendens] and accompanying papers is granted and the time of service of that notice of motion is shortened so that service by \_\_\_\_\_ [specify manner, e.g., overnight delivery] to the office of the attorney for \_\_\_\_\_ [party, e.g., Plaintiff John Smith], by \_\_\_\_\_ [name, e.g., Defense Attorney Jane Lee], on \_\_\_\_\_ [date], is sufficient notice of the proceeding.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 1005(b)*

**Related Form of Application:**

27.43



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**27.45 Stipulation Extending Time to Perform Act to Date Certain.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                  |
|---------------|---|----------------------------------|
| _____ [name], | ) |                                  |
| Plaintiff,    | ) |                                  |
| vs.           | ) | NO. _____                        |
| _____ [name], | ) | STIPULATION EXTENDING TIME TO    |
| Defendant,    | ) | _____ [specify, e.g., FILE THIRD |
|               | ) | AMENDED COMPLAINT]               |
|               | ) |                                  |

\_\_\_\_\_

[EITHER, if more than one party has appeared in the action]

IT IS HEREBY STIPULATED by and between the parties hereto through their respective undersigned attorneys that \_\_\_\_\_ [party, e.g., Plaintiff John Smith] shall have up to and including \_\_\_\_\_ [date], to \_\_\_\_\_ [state act to be performed, e.g., file a third amended complaint].

[OR, if only one party has appeared in the action]

IT IS HEREBY STIPULATED by the undersigned attorney of record for \_\_\_\_\_ [party, e.g., Defendant Mary Jones] that \_\_\_\_\_ [party, e.g., Plaintiff John Smith] shall have up to and including \_\_\_\_\_ [time] on \_\_\_\_\_ [date], to \_\_\_\_\_ [state act to be performed, e.g., file a third amended complaint].

[ADD date line and signature block for the attorney of record of each party who has appeared in the action]

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Plaintiff

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant

NOTES.

**Authority:**

CCP §§ 283, 1054

**Procedure:**

See 27.22





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2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.46

**27.46 Ex Parte Application for Order Extending Time.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                           |
|---------------|---|-------------------------------------------|
| _____ [name], | ) |                                           |
| Plaintiff,    | ) |                                           |
| vs.           | ) | NO. _____                                 |
| _____ [name], | ) | EX PARTE APPLICATION FOR ORDER EX-        |
| Defendant,    | ) | TENDING TIME TO _____ [spe-               |
|               | ) | cify, e.g., FILE THIRD AMENDED COMPLAINT] |
|               | ) |                                           |

\_\_\_\_\_

\_\_\_\_\_ [Party, e.g., Plaintiff John Smith] hereby applies for an order, pursuant to  
\_\_\_\_\_ [Code of Civil Procedure Section 1054 or Code of Civil Procedure Section 1054.1], extending  
the time in which he/she may \_\_\_\_\_ [specify, e.g., file a third amended complaint] from  
\_\_\_\_\_ [date], to \_\_\_\_\_ [date], and in support thereof, the undersigned declare:

1. I am \_\_\_\_\_ [declarant, e.g., attorney or record for Plaintiff John Smith].

2. This is an action for \_\_\_\_\_ [specify nature of case, e.g., replevin].

[EITHER]

3. \_\_\_\_\_ [State facts showing good cause for extension of time, e.g., Court records required for filing  
third amended complaint have been damaged by the recent fire in the clerk's office and will not be available to the

public for three weeks].

[OR, if declarant is a member of the legislature]

3. I am a duly elected member of the Legislature of the State of California I am a \_\_\_\_\_ [member of the Assembly of the Legislature from the \_\_\_\_\_ District or Senator from the \_\_\_\_\_ District or Senator from \_\_\_\_\_ County or other statement if appropriate]. \_\_\_\_\_ [The Legislature will be in \_\_\_\_\_ (regular or extraordinary) session or the \_\_\_\_\_ Committee of the Legislature, or which I am a member, is holding a hearing at \_\_\_\_\_ (city)] beginning \_\_\_\_\_ [date].

4. \_\_\_\_\_ [State that there have been no prior applications for extension of time or specify any prior applications and the court's actions].

5. In the absence of an order extending time, the \_\_\_\_\_ [specify title of pleading or other document for which extension is sought, e.g., third amended complaint] would have to be filed and served on or before \_\_\_\_\_ [date].

6. On \_\_\_\_\_ [date], I notified \_\_\_\_\_ [name, e.g., Jane Lee], attorney for \_\_\_\_\_ [party, e.g., Defendant Mary Jones], by \_\_\_\_\_ [manner of notification, e.g., overnight delivery], that this \_\_\_\_\_ [specify, e.g., ex parte application to extend time to plead] would be made and he/she refused to agree to an extension to \_\_\_\_\_ [date].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

#### DECLARATION OF NOTICE

[Add declaration of notice given for ex parte application.]

#### SUPPORTING MEMORANDUM

[Add memorandum supporting motion.]

#### NOTES.

#### Authority:

CCP §§ 1054, 1054.1

#### Grounds for Motion:

See 27.15[4], 27.21

**Related Form of Order:**

See 27.47

**Declaration of Notice:**

See *Ch. 26, Law and Motion Practice*, 26.29[2]



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*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.47*

**27.47 Ex Parte Order Extending Time.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                  |
|---------------|---|----------------------------------|
| _____ [name], | ) |                                  |
| Plaintiff,    | ) |                                  |
| vs.           | ) | NO. _____                        |
| _____ [name], | ) | EX PARTE ORDER EXTENDING TIME TO |
| Defendant,    | ) | _____ [specify, e.g., FILE THIRD |
|               | ) | AMENDED COMPLAINT]               |
|               | ) |                                  |

[EITHER, for extension under Code Civ. Proc. § 1054 ]

Application having been made by \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and good cause appearing therefore.

[OR, for extension under Code Civ. Proc. § 1054.1 ]

Application having been made by \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and proof having been made to the satisfaction of the court.

[CONTINUE]

IT IS ORDERED that \_\_\_\_\_'s [*party, e.g.*, Plaintiff John Smith] application to extend time to \_\_\_\_\_ [*specify act, e.g.*, file a third amended complaint], hereby is granted, and such time is extended to \_\_\_\_\_ [*time*] on \_\_\_\_\_ [*date*].

This order shall be served on all parties by \_\_\_\_\_ [*time*], \_\_\_\_\_ [*date*].

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court

NOTES.

**Authority:**

*CCP §§ 1054, 1054.1*

**Related Form of Application:**

*See 27.46*



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VIII. FORMS

*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.47A*

**27.47A Judicial Council Form CM-020 Ex Parte Application for Extension of Time to Serve Pleading and Orders**

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Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1200 et seq.*; California Judicial Council Form CM-020 has been adopted by the California Judicial Council for optional use [*see Cal Rules Ct, Rule 1.35*]

**Discussion:**

*See 27.21*



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VIII. FORMS

*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.48*

**27.48 Judicial Council Form POS-020 Proof of Personal Service--Civil, Judicial Council Form POS-020(D) Attachment (Documents Served), Judicial Council Form POS-020(P) Attachment (Persons Served).**

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NOTES.

**Authority:**

*CCP § 1011*; Judicial Council Form POS-020, Judicial Council Form POS-020(D), and Judicial Council Form POS-020(P) are approved for optional use [*Cal Rules Ct, Rule 1.35*]

**Proof of Personal Service By Affidavit or Declaration:**

See 27.31[3][b]

**Related Form of Attorney's Certificate of Personal Service:**

See 27.49

**Related Forms of Proof of Service by Personal Service, Mail, Overnight Delivery, Messenger Service,**

**Facsimile, E-Mail/Electronic Transmission:**

*See 27.50, 27.51*





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Chapter 27 Service of Papers  
VIII. FORMS

*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.49*

**27.49 Proof of Personal Service: Certificate of Attorney.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|              |   |                        |
|--------------|---|------------------------|
| _____ [name] | ) |                        |
| Plaintiff,   | ) | Case No. _____         |
| vs.          | ) | ATTORNEY'S CERTIFICATE |
| _____ [name] | ) | OF PERSONAL SERVICE    |
| Defendant.   | ) |                        |
|              | ) |                        |
|              | ) |                        |

\_\_\_\_\_

I, \_\_\_\_\_ [name], certify:

I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is \_\_\_\_\_ [specify address].

I served the \_\_\_\_\_ [set forth exact title of document(s) served] on \_\_\_\_\_ [date] at \_\_\_\_\_ [time] by personally delivering \_\_\_\_\_ [a copy or \_\_\_\_\_ [number] copies] of \_\_\_\_\_ [the document or each of these papers] to \_\_\_\_\_ [specify the person served] at \_\_\_\_\_ [specify address].

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

NOTES.

**Authority:**

*CCP § 1011*

**Personal Service By Affidavit, Declaration, or Certificate:**

*See 27.31[3][b], [c]*

**Related Forms of Proof of Personal Service:**

*See 27.50, 27.51*



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*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.50*

**27.50 Judicial Council Form POS-030 Proof of Service by First-Class Mail--Civil, Judicial Council Form POS-030(D) Attachment (Documents Served), Judicial Council Form POS-030(P) Attachment (Persons Served).**

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NOTES.

**Authority:**

*CCP §§ 1013, 1013a*; Judicial Council Form POS-030, Judicial Council Form POS-030(D), and Judicial Council Form POS-030(P) are approved for optional use [*Cal Rules Ct, Rule 1.35*]

**Proof of Personal Service By Affidavit or Declaration:**

See 27.31[3][b]

**Proof of Service by Mail:**

See 27.32[5]

**Related Forms of Proof of Service by Personal Service, Mail, Overnight Delivery, Messenger Service,**

**Facsimile, E-Mail/Electronic Transmission:**

*See 27.49, 27.51*



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*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.51*

**27.51 Judicial Council Form POS-040 Proof of Service--Civil (Personal Service, Mail, Overnight Delivery, Messenger Service, Facsimile, E-Mail/Electronic Transmission), Judicial Council Form POS-040(D) Attachment (Documents Served), Judicial Council Form POS-040(P) Attachment (Persons Served).**

[Click here to view image.](#)

NOTES.

**Authority:**

*CCP §§ 1011, 1013, 1013a, 2015.5*; Judicial Council Form POS-040, Judicial Council Form POS-040(D), and Judicial Council Form POS-040(P) are approved for optional use [*Cal Rules Ct, Rule 1.35*]

**Proof of Personal Service By Affidavit or Declaration:**

*See 27.31[3][b]*

**Proof of Service by Mail:**

*See 27.32[5]*

**Proof of Deposit for Express Mail or Overnight Delivery:**

*See 27.33[4]*

**Proof of Facsimile Transmission:**

*See 27.34[6][e]*

**Related Forms of Proof of Service by Personal Service or Mail:**

*See 27.48, 27.50*



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VIII. FORMS

*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.52*

**27.52 Judicial Council Form MC-005 Facsimile Transmission Cover Sheet (Fax Filing).**

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NOTES.

**Authority:**

*Cal Rules Ct, Rule 2.304(b)*; Judicial Council Form MC-005 has been adopted for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Proof of Transmission:**

See 27.34[6][e]

**Related Form of Proof of Service By Facsimile Transmission:**

See 27.51



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*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.53*

**27.53 Judicial Council Form EFS-005 Consent to Electronic Service and Notice of Electronic Notification Address (Electronic Filing and Service).**

[Click here to view image.](#)

NOTES.

**Authority:**

*Cal Rules Ct, Rule 2.260(a)(2)*; Judicial Council Form EFS-005 is approved for optional use [*Cal Rules Ct, Rule 1.35*]

**Consent to Electronic Service:**

See 27.35[4][c]

**Related Form of Notice of Change of Electronic Notification Address (Electronic Filing and Service):**

See 27.54

**Related Form of Proof of Electronic Service (Proof of Service/Electronic Filing and Service):**

See 27.55



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**27.54 Judicial Council Form EFS-010 Notice of Change of Electronic Notification Address (Electronic Filing and Service).**

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NOTES.

**Authority:**

*Cal Rules Ct, Rule 2.260(d)*; Judicial Council Form EFS-010 is approved for optional use [*Cal Rules Ct, Rule 1.35*]

**Obligation to Update Electronic Notification Address:**

*See 27.35[4][d]*

**Related Form of Consent to Electronic Service and Notice of Electronic Notification Address (Electronic Filing and Service):**

*See 27.53*

**Related Form of Proof of Electronic Service (Proof of Service/Electronic Filing and Service):**

*See 27.55*





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*2-27 MB Practice Guide: CA Pretrial Civil Procedure 27.55*

**27.55 Judicial Council Form POS-050/EFS-050 Proof of Electronic Service (Proof of Service/Electronic Filing and Service).**

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NOTES.

**Authority:**

*CCP § 1013a; Cal Rules Ct, Rule 2.260(a)(1), (f);* Judicial Council Form POS-050/EFS-050 is approved for optional use [*Cal Rules Ct, Rule 1.35*]

**Proof of Electronic Service:**

See 27.35[4][g]

**Related Form of Consent to Electronic Service and Notice of Electronic Notification Address (Electronic Filing and Service):**

See 27.53

**Related Form of Notice of Change of Electronic Notification Address (Electronic Filing and Service):**

See 27.54



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## Chapter 28 Stipulations

*2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.syn*

### **§ 28.syn Synopsis to Chapter 28: Stipulations**

28.01 Scope.

28.02 Objective and Strategy.

28.03 CHECKLIST: Entering Into Stipulations.

28.04 Attorney's Authority to Enter Into Stipulations Is Limited.

28.04[1] Attorney Has Implied Authority to Enter Into Stipulations Regarding Management of Case.

28.04[2] Attorney Must Get Express Authority to Impair Fundamental Right or Substantial Portion of Case.

28.04[3] Client May Ratify Unauthorized Stipulation.

28.05 Stipulation May Address Content or Timing of Pleadings.

28.05[1] Dismissing Claims.

28.05[2] Extending Time Limits for Pleading Requirements.

28.06 Stipulation May Address Discovery Issues.

28.07 Stipulation May Address Alternative Dispute Resolution.

28.07[1] Agreeing to Arbitration.

28.07[2] Agreeing to Mediation.

28.08 Stipulation May Address Introduction of Evidence or Alteration of Trial Procedures.

28.08[1] Narrowing Issues or Defenses.

28.08[2] Admitting Facts.

28.08[3] Waiving Evidentiary Requirements.

28.08[3][a] Admission of Otherwise Inadmissible Evidence.

28.08[3][b] Admission of Depositions.

28.08[3][c] Expert Witnesses.

28.08[3][d] Judicial Notice.

28.08[4] Modifying Trial Procedures.

28.09 Stipulation May Address Settlement of Action.

28.09[1] Stipulating to the Entry of Judgment.

28.09[2] Res Judicata and Collateral Estoppel Apply to Stipulated Judgment.

28.10 Parties Cannot Stipulate to Matters That Are Illegal or Contrary to Public Policy.

28.11 Parties Cannot Stipulate to Matters That Constitute Questions of Law.

28.12 Parties Cannot Stipulate to Matters Affecting the Subject Matter Jurisdiction of the Court.

28.13 Requirements for Stipulations.

28.13[1] Written Record Is Usually Required.

28.13[2] Exceptions to Requirement of Writing.

28.13[3] Signature or Assent by Attorney and/or Client.

28.13[4] Filing.

28.14 CHECKLIST: Requesting Relief From Stipulations.

28.14[1] Moving Party's Checklist.

28.14[2] Opposing Party's Checklist.

28.15 Requirements for Release From Stipulation.

28.15[1] Noticed Motion Is Required.

28.15[2] Grounds.

28.15[3] Mistake of Fact or Law.

28.16 Stipulation--General Form.

28.17 Stipulation of Facts.

28.18 Motion to Set Aside Stipulation and Supporting Declaration.

28.19 Order Setting Aside Stipulation.



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Chapter 28 Stipulations  
I. STRATEGY

*2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.01*

**28.01 Scope.**

This chapter covers:

- Objectives and strategy for stipulations [*see* 28.02].
- Authority to enter and requirements for stipulations [*see* 28.04, 28.13].
- Subject matter of stipulations [*see* 28.05-28.09; Forms: *see* 28.16 and 28.17].
- Preparing stipulations [*see* 28.03; Forms: *see* 28.16, 28.17].
- Stipulations that are not allowed by law [*see* 28.10-28.12].
- Obtaining relief from stipulations [*see* 28.14, 28.15; Forms: *see* 28.18, 28.19].

**Core Statute:**

*CCP § 283(1)*



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Chapter 28 Stipulations  
I. STRATEGY

*2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.02*

**28.02 Objective and Strategy.**

Stipulations are agreements entered into between counsel, relating to the business before the court. Unless it is contrary to law, court rules or policy, a stipulation is also binding on the court [see *Spindell v. State Bar* (1975) 13 C3d 253, 260-261, 118 CR 480, 530 P2d 168, 80 A.L.R.3d 1231 ; *T & O Mobile Homes, Inc. v. United Cal. Bank* (1985) 40 C3d 441, 445 n. 11, 220 CR 627, 709 P2d 430 ]. Stipulations can be made at any step of the action or proceeding [CCP § 283(1)].

**Strategic Points:**



- Parties may often reduce the cost and time associated with litigation by entering into stipulations.
- Time management of litigation becomes easier through the use of stipulations regarding deadlines.
- Alternative procedures for resolving disputes may be available by stipulation, including arbitration and mediation.
- A stipulation that impacts that court's conduct of business may not be "rubber stamped"--it is important to find out how your particular judge may react to a particular stipulation.
- A final stipulated judgment is not appealable unless consent was merely given to facilitate an appeal following adverse determination of a critical issue.



**Warning:**

The client must sign off on stipulations that affect fundamental rights as opposed to litigation tactics [see 28.04].

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 533, Stipulations (Matthew Bender).



**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureCounselGeneral Overview



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Chapter 28 Stipulations  
II. ENTERING INTO STIPULATIONS

*2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.03*

**28.03 CHECKLIST: Entering Into Stipulations.**

☐ Determine if you need authority to enter into a stipulation:

☐ Obtain the client's consent if you need it.

**Authority:**  
*CCP § 283(1)*

**Discussion:**  
*See 28.04*

☐ Determine whether you are allowed to stipulate on the subject matter:

☐ Content or timing of pleadings.

**Discussion:**  
*See 28.05*

☐ Discovery issues.

**Authority:**  
*CCP §§ 95(b), 2017.020, 2019.030(b), 2016.030, 2025.610, 2030.090, 2031.060, 2032.310, 2032.320, 2016.030*

**Discussion:**  
*See 28.06*



- ☐ Alternative dispute resolution.

**Discussion:**

See 28.07

- ☐ Introduction of evidence or alteration of trial procedures.

**Authority:**

*CCP §§ 283(1), 1048(a), 1054*

**Discussion:**

See 28.08

- ☐ Settlement of actions.

**Authority:**

*CCP § 664.6*

**Discussion:**

See 28.09

- ☐ Determine whether you are not allowed to stipulate on the subject matter:

- ☐ Matters that are illegal or contrary to public policy.

**Discussion:**

See 28.10

- ☐ Matters that constitute questions of law.

**Discussion:**

See 28.11

- ☐ Matters affecting the subject matter jurisdiction of the court.

**Discussion:**

See 28.12

- ☐ Draft the stipulation:

- ☐ Obtain all necessary attorneys' signatures and

- ☐ Obtain signatures of affected parties, if necessary.

**Discussion:**

See 28.13

**Form:**

See 28.16 (stipulation--general form)

☐ File the stipulation with the court.



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Chapter 28 Stipulations  
II. ENTERING INTO STIPULATIONS

2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.04

**28.04 Attorney's Authority to Enter Into Stipulations Is Limited.**

**28.04[1] Attorney Has Implied Authority to Enter Into Stipulations Regarding Management of Case.** An attorney has the authority to bind his or her client in any of the steps of an action [see CCP § 283(1)] and may do so without a client's prior, express authority with respect to tactical decisions or necessary or incidental matters regarding management of the suit [ *Blanton v. Womancare, Inc. (1985) 38 C3d 396, 404, 212 CR 151, 696 P2d 645, 48 A.L.R.4th 109* (plaintiff not bound by binding arbitration agreement her attorney signed: attorney acted against her express wishes and without authority, depriving plaintiff of substantial rights)].

► **Cross Reference:**

Attorney's general authority to appear and to control the litigation, see California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics (Matthew Bender).

**28.04[2] Attorney Must Get Express Authority to Impair Fundamental Right or Substantial Portion of Case.** The client's consent must be obtained before an attorney may enter into a stipulation which impairs a substantial portion of the case or involves a waiver or compromise of a fundamental right [ *Levy v. Superior Court (1995) 10 C4th 578, 584, 41 CR2d 878, 896 P2d 171* ; see *Linsk v. Linsk (1969) 70 C2d 272, 277-278, 74 CR 544, 449 P2d 760* (listing stipulations outside attorney's authority)]. These include:

- Consent to conservatorship [ *Conservatorship of John L. (2010) 48 C4th 131, 149-157, 105 CR3d 424* ].
- Settlement [ *Levy v. Superior Court (1995) 10 C4th 578, 584, 41 CR2d 878, 896 P2d 171* ].
- Agreeing to binding arbitration [ *Blanton v. Womancare, Inc. (1985) 38 C3d 396, 407-408, 212 CR 151, 696 P2d 645, 48 A.L.R.4th 109* ; *Lazarus v. Titmus (1998) 64 CA4th 1242, 1247-1249, 75 CR2d 676* ].

**28.04[3] Client May Ratify Unauthorized Stipulation.** A client may ratify an unauthorized stipulation entered into by his or her attorney [ *Blanton v. Womancare, Inc. (1985) 38 C3d 396, 407-408, 212 CR 151, 696 P2d 645, 48*

*A.L.R.4th* 109 (finding no ratification); *Fidelity & Cas. Co. v. Abraham* (1945) 70 CA2d 776, 782-783, 161 P2d 689 (party who retained benefits of oral stipulation that was not recorded in court's minutes was estopped from repudiating it)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
[Civil ProcedureCounselGeneral Overview](#)



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Chapter 28 Stipulations  
II. ENTERING INTO STIPULATIONS

2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.05

**28.05 Stipulation May Address Content or Timing of Pleadings.**

**28.05[1] Dismissing Claims.** Stipulations may provide for the dismissal or abatement of an action [see, e.g., *Reid v. Valley Restaurants, Inc.* (1957) 48 C2d 606, 609-610, 311 P2d 473 (during trial, complaint dismissed and matter of fees sought in cross-complaint submitted to court); *Cal-Vada Aircraft, Inc. v. Superior Court* (1986) 179 CA3d 435, 448, 224 CR 809 ].



**Strategic Point--Plaintiff:**

If discovery discloses one or all of your legal theories is not well-supported by the facts, consider dismissing that count or cause of action while going forward with the others so as not to taint the meritorious aspects of your case in front of the jury. If dismissal of all or part of the case is warranted, consider seeking the defendant's consent to get a waiver of malicious prosecution and attorneys' fee and cost claims.



**Cross Reference:**

Stipulating to the discharge of an interpleading party, see California Forms of Pleading and Practice, Ch. 134, Interpleader (Matthew Bender).

**28.05[2] Extending Time Limits for Pleading Requirements.** The parties may extend the time required to effectuate service of process [ *Big Bear Mun. Water Dist. v. Superior Court* (1969) 269 CA2d 919, 923, 75 CR 58 ]. Stipulations may extend the time to move, answer, or otherwise plead to the complaint [see, e.g., *Farrar, Herrick & Assocs. v. Safecare Co.* (1981) 115 CA3d 123, 127, 171 CR 191 (parties may stipulate to an open ended extension of time to respond to the complaint)].

**Exception:**

Actions subject to the Trial Court Delay Reduction rules are subject to stringent restrictions. In most instances complaints must be served within 60 days of filing [see *Gov Code* § 68616(a)]. The parties may stipulate to an additional 15 days (or more if allowed by local rule) [see *Gov Code* § 68616(b)]. Courts strongly discourage stipulations relating to time limits, and for extensions other than the

statutorily authorized 15-day extension of time to respond to a complaint, local rules may require court approval [see Los Angeles Super Ct Rules, Rule 7.10].



**Warning--Action May Still Be Dismissed for Delay in Prosecution:**

A stipulation granting an open extension of time to respond to a complaint will not preclude dismissal of an action for delay in prosecution [see *Marra v. Mission Foods Corp.* (1993) 19 CA4th 724, 728, 23 CR2d 741 (affirming dismissal); *Martin v. K & K Properties, Inc.* (1987) 188 CA3d 1559, 1566, 234 CR 161 ].



**Cross References:**

Discussion, see Ch. 40, Dismissal for Delay in Bringing to Trial, and Ch. 30, Continuances.

Stipulating to the amendment of pleadings and the filing of supplemental pleadings, see California Forms of Pleading and Practice, Ch. 21, Amended and Supplemental Pleadings (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePleading & PracticeService of ProcessTime LimitationsExtensionsCivil ProcedureDismissalsVoluntary DismissalsStipulations



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*2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.06*

**28.06 Stipulation May Address Discovery Issues.**

Stipulations are commonly used in the conduct of discovery matters. The Civil Discovery Act recognizes a number of subjects on which parties may expressly stipulate, including:

- Taking subsequent depositions of a person who has been previously deposed [CCP § 2025.610].
- Regarding the manner in which physical, mental, or blood examinations may be taken [CCP §§ 2016.030, 2032.310, 2032.320].
- For protective orders regarding interrogatories and demands for inspection, copying, testing, or sampling of documents, tangible things, places, or electronically stored information [CCP §§ 2030.090, 2031.060].
- Additional discovery in limited civil cases [CCP § 95(b)].
- Modification of deposition and other discovery procedures [CCP § 2016.030].
- Preserving and protecting the confidentiality of certain documents during litigation. The parties may stipulate to a protective order in anticipation of, or in response to, written discovery requests and then seek the court's approval [CCP §§ 2016.030, 2017.020, 2019.030(b)].
- Limiting the issues in a case [ *Title Ins. Co. v. State Bd. of Equalization* (1992) 4 C4th 715, 733, 14 CR2d 822, 842 P2d 121 ].
- Extending the time for the completion of discovery proceedings to a specified date [CCP § 2024.060].

**Exception:**

Stipulation cannot require a court to grant a continuance or postponement of trial [CCP § 2024.060].

**Strategic Point:**

Counsel may derive significant advantages through cooperative give and take on discovery issues, particularly given the often-applicable requirement that counsel make a reasonable and good faith effort at informal resolution of discovery disputes before filing a motion [see *CCP* § 2023.020 (potential sanctions even if you prevail on motion)]. Willingness to engage in discovery stipulations may:

- Make available some discovery that might otherwise be impossible to schedule on demand.
- Allow considerable savings by avoiding inevitable objections to technicalities regarding discovery.
- Favorably impress the court when you really must object to some specific request.
- Help contain any attorney fee and cost requests, both yours and those of opposing counsel.

**Cross Reference:**

Discussion of use of stipulations in discovery, see specific topics in Matthew Bender(R) Practice Guide: California Civil Discovery.

**Warning:**

A discovery stipulation may waive a party's right to insist on a formal order compelling responses as a precursor to an issuance of evidentiary, issue, or terminating sanctions; and a poor outcome is not a principled reason to set aside a stipulation by counsel [ *Mileikowsky v. Tenet Healthsystem* (2005) 128 CA4th 262, 279 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureDiscoveryMethodsStipulations





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2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.07

**28.07 Stipulation May Address Alternative Dispute Resolution.**

**28.07[1] Agreeing to Arbitration.** Any superior court action may be submitted to judicial arbitration by stipulation [see *Cal Rules Ct, Rule 3.811(a)(4)*].

A written agreement to submit an existing controversy to arbitration is valid, enforceable and irrevocable [*CCP § 1281*; see *Blanton v. Womancare, Inc. (1985) 38 C3d 396, 407-408, 212 CR 151, 696 P2d 645, 48 A.L.R.4th 109* (stipulation not enforceable because client did not agree or ratify)]. In private arbitration, parties may also stipulate to limit the scope of arbitration and place limits on the arbitrator's power [see *Moncharsh v. Heily & Blase (1992) 3 C4th 1, 9, 10 CR2d 183, 832 P2d 899*].

► **Cross References:**

Discussion of contractual arbitration, see *Ch. 6, Determining Forum, 6.06*.

Discussion of judicial arbitration, see *Ch. 24, Pretrial ADR, 24.03 et seq.*

**28.07[2] Agreeing to Mediation.** Any action regardless of the amount in controversy may be submitted to mediation under the Civil Action Mediation Act by stipulation [*Cal Rules Ct, Rule 3.871(a)(2)*; see *CCP §§ 1775-1775.15*]. The Civil Action Mediation Act applies in Los Angeles County and any other county that elect to apply it as an alternative to judicial arbitration under *CCP §§ 1141.10-1141.31* [*CCP § 1775.4*]. It does not preempt other ADR programs in trial courts [*CCP § 1775.13*], and in many instances, parties may stipulate to use other programs [see *San Francisco Super Ct Rules, Rule 4.2*].



**Timing:**

Stipulation under Civil Action Mediation Act must be filed not later than 90 days before trial unless court permits a later time [*Cal Rules Ct, Rule 3.871(a)(2)*].



**Cross References:**

Discussion/Form, see *Ch. 24, Pretrial ADR, 24.52, 24.64*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute  
ResolutionMediations



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**28.08 Stipulation May Address Introduction of Evidence or Alteration of Trial Procedures.**

**28.08[1] Narrowing Issues or Defenses.** The parties may stipulate to limit the issues or defenses to be adjudicated [ *Title Ins. Co. v. State Bd. of Equalization* (1992) 4 C4th 715, 733, 14 CR2d 822, 842 P2d 121 ].

A stipulation may also admit liability or damages [ *Gonzales v. Pacific Greyhound Lines* (1950) 34 C2d 749, 754, 214 P2d 809 ].



**Warning--Client May Have to Join Stipulation:**

Counsel does not have authority to enter a stipulation that relinquishes substantial rights of the client, e.g., to stipulate to nominal damages [see *Linsk v. Linsk* (1969) 70 C2d 272, 277-278, 74 CR 544, 449 P2d 760 (listing stipulations outside attorney's authority); see also 28.04[2]].

**Example:**

Stipulation that the only issue to be tried was whether forbearance agreement was enforceable in lieu of prior forbearance agreement squarely presented the issue of the statute of frauds to the trial court for disposition by motion and opposition, and the issue was thus not waived [Secret v. Security National Mortgage Loan Trust 2002-2 (2008) 167 CA4th 544, 552, 84 CR3d 275 ].

**28.08[2] Admitting Facts.** The parties may stipulate that certain facts are undisputed and may be treated as proved in court [see CCP § 283(1)].

Proof of facts may be dispensed with by stipulation [ *Greatorex v. Board of Admin.* (1979) 91 CA3d 54, 58, 154 CR 37 ].



**Warning--Stipulation Binding Even if Other Provisions Set Aside:**

Once a party has stipulated to a fact, that party is bound by the stipulation even if other provisions of the stipulation are later set aside [ *Rossmann v. State Bar* (1985) 39 C3d 539, 542, 216 CR 919, 703 P2d 390 ].

**28.08[3] Waiving Evidentiary Requirements.**

**28.08[3][a] Admission of Otherwise Inadmissible Evidence.** Parties may stipulate to the admission of evidence even if it is otherwise inadmissible [ *County of Alameda v. Risby* (1994) 28 CA4th 1425, 1430, 34 CR2d 333 ]. Stipulations pertaining to the admission of evidence, absent an express limitation, apply to a later trial of the same action, unless the trial court allows the stipulation to be withdrawn [ *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 C4th 375, 398, 75 CR3d 333, 181 P3d 142 (stipulation admitted after withdrawal denied)].

**Cross References:**

Form of stipulation of facts, see 28.17.

Stipulating to the submission of a controversy on an agreed statement of facts, see California Forms of Pleading and Practice, Ch. 534, Submitted Controversy (Agreed Case) (Matthew Bender).

**28.08[3][b] Admission of Depositions.** Depositions may be admitted in evidence by stipulation [see, e.g., *Los Angeles County Employees' Assn. v. Sanitation Dist. No. 2* (1979) 89 CA3d 294 ].

**28.08[3][c] Expert Witnesses.** The parties may also stipulate to the qualifications and findings of an expert witness [ *McGuire v. Baird* (1937) 9 C2d 353, 356, 70 P2d 915 ].

**28.08[3][d] Judicial Notice.** Parties may stipulate that the trial court take judicial notice of particular matters [ *Laguna Beach Taxpayers' Ass'n v. City Council* (1960) 187 CA2d 412, 416, 9 CR 775 ].

**28.08[4] Modifying Trial Procedures.** Stipulations are frequently made pertaining to procedural steps during trial. For example, stipulations may:

- Extend the time for trial or for a hearing on a motion [CCP § 1054].
- Provide that the action be tried by a temporary judge or special master [see *Cal Rules Ct, Rules* 2.816; see, e.g., *In re Horton* (1991) 54 C3d 82, 97-98, 284 CR 305, 813 P2d 1335 ].
- Provide for the consolidation of actions with court approval under CCP § 1048(a).
- Designate the content of jury instructions [see, e.g., *Cracknell v. Fisher Governor Co.* (1967) 247 CA2d 857, 862, 56 CR 64 ].
- Waive findings by the court [see, e.g., *Worcester v. Worcester* (1966) 246 CA2d 56, 62, 54 CR 436 ].
- Provide that the case be taken under submission without further hearing [see, e.g., *Jacoby v. Feldman* (1978) 81 CA3d 432, 445-446, 146 CR 334 ].
- Waive the requirement that the court provide a statement of reasons for granting a new trial when it has expressly adopted previously filed reasons [see, e.g., *Herman v. Shandor* (1970) 8 CA3d 476, 481, 87 CR 443 ].
- Provide that the court determine liability issues before deciding whether to certify the case as a class action [ *Woosley v. State* (1992) 3 C4th 758, 794, 13 CR2d 30, 838 P2d 758 , cert. denied, 508 US 940, 113 S Ct 2416, 124 L Ed2d 639 (1993) ].

An attorney has the authority to stipulate to a temporary judge to hear the action without first obtaining express

authority from the client [ *In re Horton* (1991) 54 C3d 82, 92-93, 284 CR 305, 813 P2d 1335 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial MattersGeneral Overview



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2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.09

**28.09 Stipulation May Address Settlement of Action.**

**28.09[1] Stipulating to the Entry of Judgment.** The parties to the action or proceeding may stipulate to the entry of judgment [see, e.g., *California State Auto. Ass'n Inter-Ins. Bureau v. Superior Court* (1990) 50 C3d 658, 664, 268 CR 284, 788 P2d 1156 ].

The court may enter judgment on motion of a party pursuant to the terms of a settlement agreement that has either been stipulated to orally in court or by written agreement [CCP § 664.6; *Corkland v. Boscoe* (1984) 156 CA3d 989, 994, 203 CR 356 ].



**Trap:**

In most instances a stipulated judgment is not appealable. An exception to this rule permits an appeal if consent was merely given to facilitate an appeal following adverse determination of a critical issue [ *Norgart v. Upjohn Co.* (1999) 21 C4th 383, 400, 87 CR2d 453, 981 P2d 79 ; *Villano v. Waterman Convalescent Hosp., Inc.* (2010) 181 CA4th 1189, 1198, 105 CR3d 276 ; *Harrington-Wisely v. State of California* (2007) 156 CA4th 1488, 1495, 68 CR3d 209] .

The Courts of Appeal are divided on when there has been an adverse determination of a critical issue. On the one hand, Division Seven of the Second Appellate District has ruled that the exception only applies when the stipulated judgment is final, in that it disposes of all issues between the parties [ *Harrington-Wisely v. State of California* (2007) 156 CA4th 1488, 1496, 68 CR3d 209] . On the other hand, the Fourth Appellate District's Division Two has ruled that the exception applies even if the trial court's challenged rulings were tentative and subject to reconsideration, or if an appealing plaintiff still has the possibility of recovering on his or her remaining causes of action [ *Villano v. Waterman Convalescent Hosp., Inc.* (2010) 181 CA4th 1189, 1203, 105 CR3d 276] . Interestingly, both Districts rely on the same decision by Division Two of the Fourth Appellate District for their rule [see *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 CA4th 1422, 77 CR2d 574] .

The *Villano* decision of Division Two of the Fourth Appellate District noted that *Tudor* gives appellant the burden of showing reversible error by an adequate record. One aspect of that burden requires that the

appellant develop the fullest possible evidentiary record before seeking review. Thus, an appellant must make an offer of proof in the trial court in order to claim on appeal that evidence was wrongly excluded. Similarly, if an appellant wishes to argue a point on appeal, it must first make a record by raising the point in the trial court. In addition, the appellant must show prejudice, in that it is reasonably probable a result more favorable to the appellant would have been reached absent the error [ *Villano v. Waterman Convalescent Hosp., Inc.* (2010) 181 CA4th 1189, 1200, 105 CR3d 276] .



#### **Warning--Client Must Participate:**

A stipulation under CCP § 664.6 requires the direct participation of the parties; a stipulation signed only by the attorneys is not enforceable under Section 664.6 [ *Levy v. Superior Court* (1995) 10 C4th 578, 585-586, 41 CR2d 878, 896 P2d 171 ].

If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement [CCP § 664.6].



#### **Cross Reference:**

Discussion and forms, see *Ch. 37, Settlement and Release*, 37.47, 37.66.

**28.09[2] Res Judicata and Collateral Estoppel Apply to Stipulated Judgment.** A stipulated judgment is a decision on the merits [ *Greator v. Board of Admin.* (1979) 91 CA3d 54, 58, 154 CR 37 ].

The doctrines of res judicata and collateral estoppel apply to those claims and issues embraced within a consent judgment [ *Greator v. Board of Admin.* (1979) 91 CA3d 54, 58, 154 CR 37 ].

A stipulated judgment normally determines all matters placed in issue by the pleadings but the parties can agree to restrict the scope of the judgment by expressly withdrawing an issue from it [see *In re Marriage of Buckley* (1982) 133 CA3d 927, 935, 184 CR 290 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEffects



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*2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.10*

**28.10 Parties Cannot Stipulate to Matters That Are Illegal or Contrary to Public Policy.**

A stipulation is not binding on the court if it is illegal or contrary to public policy [*see Mary R. v. B. & R. Corp.*, (1983) 149 CA3d 308, 316, 196 CR 871 (stipulated order of confidentiality is contrary to public policy); *Copley Press, Inc. v. Superior Court* (1998) 63 CA4th 367, 374, 74 CR2d 69 (sealing order in a civil case is always subject to continuing review and modification, if not termination, on changed circumstances)]. Therefore, a stipulation intended to bar a party's fraud claims does not bind the party [ *McClain v. Octagon Plaza, LLC* (2008) 159 CA4th 784, 797-798, 71 CR3d 885 ]. A stipulation cannot call for judgment that includes damages constituting a penalty unenforceable under Civ Code § 1671 [ *Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 CA4th 495, 497, 78 CR3d 24 ].





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**28.11 Parties Cannot Stipulate to Matters That Constitute Questions of Law.**

A stipulation will not bind the court on questions of law, including legal conclusions to be drawn from admitted or stipulated facts, or interpretations of the federal and California Constitutions, statutes, and ordinances [ *Fields v. Blue Shield of Cal.* (1985) 163 CA3d 570, 579, 580 n.5, 209 CR 781 (stipulation to legal conclusion that document was not adhesion contract not binding on court); *County of Inyo v. City of Los Angeles* (1984) 160 CA3d 1178, 1183, 207 CR 425 (court cannot accept stipulation that eclipses prior, final adjudication of substantial issues; remaining jurisdiction limited to implementing terms of judgment)].



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**28.12 Parties Cannot Stipulate to Matters Affecting the Subject Matter Jurisdiction of the Court.**

Jurisdiction over the subject matter of an action or proceeding generally cannot be conferred on the court, enlarged, or waived by stipulation of the parties [ *Harrington v. Superior Court* (1924) 194 C 185, 188, 228 P 15 ; *Housing Group v. United Nat'l Ins. Co.* (2001) 90 CA4th 1106, 1113, 109 CR2d 497 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral Overview



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II. ENTERING INTO STIPULATIONS

*2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.13*

**28.13 Requirements for Stipulations.**

**28.13[1] Written Record Is Usually Required.** A stipulation is effective at any stage of an action or proceeding when filed with the clerk, or entered on the minutes of the court [*see CCP § 283(1)*; *see also Lipscomb v. Krause* (1978) 87 CA3d 970, 974, 151 CR 465 ].

The extent of the agreement must be ascertainable from the record, either from the minutes, if oral, or from a writing filed with the clerk [ *Cathcart v. Gregory* (1941) 45 CA2d 179, 187, 113 P2d 894 ].

The terms of an oral stipulation entered in the minutes must be definite and certain to be valid and effective [ *Harris v. Spinali Auto Sales, Inc.* (1966) 240 CA2d 447, 452, 49 CR 610 ].

**28.13[2] Exceptions to Requirement of Writing.** Stipulations that are neither filed with the court nor entered on the minutes of the court will be recognized if they have been executed and cannot be nullified without doing an injustice to one party [*see Baker v. Ramirez* (1987) 190 CA3d 1123, 1135, 235 CR 857 ].

Despite the *CCP § 283(1)* requirement of a writing or entry in the minutes, an oral stipulation may be enforced based on the parties' conduct through either estoppel or ratification [ *Harding v. Collazo* (1986) 177 CA3d 1044, 1052, 223 CR 329 ].

If the party admits making the stipulation it will be as binding as if entered in the minutes [ *Harding v. Collazo* (1986) 177 CA3d 1044, 1052, 223 CR 329 ].

**28.13[3] Signature or Assent by Attorney and/or Client.** When there is an attorney of record, the attorney's signature or assent is required on the stipulation before the conduct or disposal of an action can be entertained by the court [ *Wells Fargo & Co. v. City and County of San Francisco* (1944) 25 C2d 37, 42-43, 152 P2d 625 ].

➤ **Cross Reference:**

Discussion regarding the scope of attorneys' authority to bind client, see 28.04.

An attorney may not enter into a stipulation impairing a substantial portion of the case or waive or compromise a client's fundamental rights without the client's express consent [ *Levy v. Superior Court* (1995) 10 C4th 578, 584, 41 CR2d 878, 896 P2d 171 ].



**Cross Reference:**

Discussion of when client's assent is required, see 28.04.

**28.13[4] Filing.** When filed, the stipulation becomes binding on the parties as of the date of its execution [ *Smith v. Whittier* (1892) 95 C 279, 290, 30 P 529 ].

There is no time limit for filing a stipulation under CCP § 283(1).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDismissalsVoluntary DismissalsStipulationsCivil ProcedureSettlementsSettlement AgreementsGeneral Overview



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III. REQUESTING RELIEF FROM STIPULATIONS

*2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.14*

**28.14 CHECKLIST: Requesting Relief From Stipulations.**

**28.14[1] Moving Party's Checklist.**

☐ Determine whether grounds exist to set aside stipulation:

- ☐ Inadvertence.
- ☐ Excusable neglect.
- ☐ Fraud.
- ☐ Mistake of fact.
- ☐ Mistake of law.
- ☐ Stipulated facts have changed.
- ☐ A change in the underlying conditions exist that could not have been anticipated.
- ☐ Special circumstances exist rendering it unjust to enforce the stipulation.

**Discussion:**

See 28.15

☐ Draft:

- ☐ Motion and notice of motion for relief from stipulation.
- ☐ Supporting declaration showing grounds for relief.
- ☐ Supporting memorandum.
- ☐ Proposed order.

☐ Serve and file motion:

- ☐ Follow standard noticed motion procedure.

☐ Calendar response and hearing dates.

**Discussion:**

See 28.15

**Authority:**

CCP § 473

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**Forms:**

See 28.18, 28.19

**28.14[2] Opposing Party's Checklist.**

☐ Calendar response and hearing dates.

☐ Determine ground for opposition:

- ☐ Party failed to exercise of ordinary care.
- ☐ Party failed to exercise due diligence.

**Discussion:**

See 28.15

☐ Prepare opposition:

- ☐ Draft declaration opposing motion.

☐ Draft opposing memorandum.

☐ Draft proposed order.

☐ Serve and file response.

☐ Follow standard noticed motion procedure.

**Discussion:**

See 28.15

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39



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2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.15

**28.15 Requirements for Release From Stipulation.**

**28.15[1] Noticed Motion Is Required.** A party may obtain a release from a stipulation only on a noticed motion to set it aside, made in the trial court and supported by an affidavit or declaration under penalty of perjury stating the grounds for relief [ *Harris v. Spinali Auto Sales, Inc.* (1966) 240 CA2d 447, 453, 49 CR 610 ].

► **Cross Reference:**

Form, see 28.18.

**28.15[2] Grounds.** A party must show good cause in order to be released from a stipulation [ *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 CA3d 856, 865, 157 CR 355 ].

A court may exercise its sound discretion and set aside the stipulation in the following situations [see *Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd.* (2010) 181 CA4th 752, 768, 104 CR3d 641 (knowingly taking the risk of unsettled law not grounds for avoiding stipulation); *In re Marriage of Jacobs* (1982) 128 CA3d 273, 283 n.3, 180 CR 234 ]:

- When a stipulation has been entered into through inadvertence, excusable neglect, fraud, mistake of fact, or mistake of law [see CCP § 473];
- When facts stipulated have changed or there has been a change in the underlying conditions that could not have been anticipated; or
- When special circumstances exist rendering it unjust to enforce the stipulation.

► **Cross Reference:**

Circumstances under which when stipulation entered into without the consent of the client may be set aside, see 12.04.

**28.15[3] Mistake of Fact or Law.** The trial court, in its discretion, may disregard a stipulation that has been



entered into through inadvertence or mistake of fact [ *County of Sacramento v. Workers' Comp. Appeals Bd. (2000)* 77 CA4th 1114, 1121, 92 CR2d 290 ].

The court may relieve a party from a stipulation that incorrectly sets forth material facts that are contradicted by undisputed evidence [ *Sinnock v. Young (1943)* 61 CA2d 130, 131, 142 P2d 85 ].

A mistake of fact must be of a material character, that will change the legal rights of the parties, as well as one that could not have been avoided by the exercise of ordinary care [ *Harris v. Spinali Auto Sales, Inc. (1966)* 240 CA2d 447, 454, 49 CR 610 ].

When there is no mistake but merely a lack of full knowledge of the facts which is due to the failure of a party to exercise due diligence to ascertain them, there is no proper ground for relief from the stipulation [ *Robinson v. Workers' Comp. Appeals Bd. (1987)* 194 CA3d 784, 791, 239 CR 841 ].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDismissalsVoluntary DismissalsStipulationsCivil ProcedureSettlementsSettlement AgreementsGeneral Overview



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Chapter 28 Stipulations  
IV. FORMS

*2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.16*

**28.16 Stipulation--General Form.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                |   |             |
|----------------|---|-------------|
| _____ [name],  | ) |             |
| Plaintiff,     | ) |             |
| vs.            | ) | STIPULATION |
| _____ [names], | ) |             |
| Defendant.     | ) |             |
|                | ) |             |
|                | ) |             |

\_\_\_\_\_

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel, that \_\_\_\_\_ [specify, in numbered paragraphs if convenient, the step or steps of the action or proceeding to which the parties agree to be bound, e.g., Philip Bartholomew, M.D. is an expert witness who is qualified to testify as to whether defendant's treatment of plaintiff's broken femur was consistent with what other physicians in the locality in question in the exercise of reasonable care might do under similar circumstances].

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Plaintiff

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant

[Add appropriate signatures(s), if client's express authorization appears necessary]

Date: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Plaintiff

Date: \_\_\_\_\_.

\_\_\_\_\_ [signature]

Defendant

NOTES.

**Authority:**

See CCP § 283(1)

**Subject Matter of Stipulations:**

See 28.05-28.12

**Requirements for Stipulations:**

See 28.13



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*2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.17*

**28.17 Stipulation of Facts.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                |   |                      |
|----------------|---|----------------------|
| _____ [name],  | ) |                      |
| Plaintiff,     | ) |                      |
| vs.            | ) | STIPULATION OF FACTS |
| _____ [names], | ) |                      |
| Defendant.     | ) |                      |
|                | ) |                      |
|                | ) |                      |

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel, that, for the purpose of trial in this action the facts listed below are undisputed and may be treated by the court as facts proved in open court.

The parties may, during the trial of this matter, call witnesses and offer evidence for the purpose of proving any additional facts as the parties may see fit.

[Add, if appropriate: In making the stipulation, the parties do not waive any legal objection to the relevancy, the materiality, or the admissibility in evidence of any of the facts set forth in this stipulation, and each party reserves the right to offer any legal objection to those facts, or any part of those facts, either by filing written objections or by stating such objections orally in open court, at any time during the trial before the objecting party concludes his/her offer of evidence and rests his/her case. An objection so made shall be considered timely.]

The undisputed facts are as follows:

1. \_\_\_\_\_ [List undisputed facts here and under following numbers].

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Plaintiff

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant

NOTES.

**Authority:**

See CCP § 283(1)

**Stipulations Addressing Introduction of Evidence or Alteration of Trial**

**Procedures:**

See 28.08



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Chapter 28 Stipulations  
IV. FORMS

*2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.18*

**28.18 Motion to Set Aside Stipulation and Supporting Declaration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],  
Plaintiff,  
vs.  
\_\_\_\_\_[names],  
Defendant.

)  
) NO. \_\_\_\_\_  
) MOTION AND NOTICE OF MOTION TO SET  
) ASIDE STIPULATION, SUPPORTING DECLARA-  
) TION OF \_\_\_\_\_ [name], AND  
) SUPPORTING MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
Date Action Filed: \_\_\_\_\_  
Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [specify party, e.g. Plaintiff John Smith] and to \_\_\_\_\_ [name], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [address], \_\_\_\_\_ [city], \_\_\_\_\_ [specify party, e.g., Defendant Mary Jones] will, and hereby does, move for an order setting aside the stipulation \_\_\_\_\_ [describe stipulation, e.g., dated August 24, 2003, regarding the testimony of James Roe on file in this action]. The motion will be made on the ground that good cause exists to set aside the stipulation in that \_\_\_\_\_ [

*specify, e.g., the stipulation was entered into through inadvertence, surprise, excusable neglect, fraud, and mistake of fact and law or the facts stipulated to have changed or there has been a change in the underlying conditions to the stipulation that could not have been anticipated or special circumstances exist rendering it unjust to enforce the stipulation or specify other ground*].

The motion will be based on this notice of motion, on the declaration of \_\_\_\_\_ [name] and the supporting memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status, e.g., Defendant]

SUPPORTING DECLARATION OF \_\_\_\_\_ [name]

I, \_\_\_\_\_ [name], declare:

I am \_\_\_\_\_ [identify declarant, e.g., Jane Lee, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for \_\_\_\_\_ (specify party, e.g., Defendant Mary Jones) or other statement as appropriate].

On or about \_\_\_\_\_ [date], I entered into a stipulation with \_\_\_\_\_ [name], attorney of record for the \_\_\_\_\_ [specify party, e.g., Plaintiff John Smith]. On behalf of our respective clients, we stipulated that \_\_\_\_\_ [specify effect of stipulation, e.g., James Roe would, if called and sworn as a witness, testify that the milk in question in this breach of contract action was grade A milk].

The stipulation should be set aside because \_\_\_\_\_ [specify, e.g., of a mistake of fact, in that the facts stipulated have changed, and special circumstances now render it unjust to enforce the stipulation in that James Roe has told me that a doubt now exists in his mind as to whether or not the milk in question in this action was grade A milk, as set forth more fully in the declaration of James Roe, also submitted in support of this motion].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: \_\_\_\_\_.

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

NOTES.

**Authority:**

See *CCP* § 473; *In re Marriage of Jacobs* (1982) 128 CA3d 273, 283 n3, 180 CR 234

**Release from Stipulation:**

See 28.15

**Related Form of Order:**

See 28.19





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Chapter 28 Stipulations  
IV. FORMS

*2-28 MB Practice Guide: CA Pretrial Civil Procedure 28.19*

**28.19 Order Setting Aside Stipulation.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_ [name],

Plaintiff,

vs.

\_\_\_\_\_ [names],

Defendant.

)  
)  
)  
)  
)  
)  
)

NO. \_\_\_\_\_  
ORDER

\_\_\_\_\_

The motion of \_\_\_\_\_ [specify moving party, e.g., Defendant Mary Jones] for an order to set aside the stipulation dated \_\_\_\_\_ [date], on file in this action came on regularly for hearing by the court this date. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

On proof made to the satisfaction of the court that the motion should be granted,

IT IS ORDERED that the motion be, and hereby is, granted and the stipulation of \_\_\_\_\_ [date], providing that \_\_\_\_\_ [specify provisions], be vacated.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

See *CCP* § 473; *In re Marriage of Jacobs* (1982) 128 CA3d 273, 283 n3, 180 CR 234

**Release from Stipulation:**

See 28.15

**Related Form of Noticed Motion:**

See 28.18



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Chapter 29 Motions to Reconsider and Renewed Motions

*2-29 MB Practice Guide: CA Pretrial Civil Procedure 29.syn*

**§ 29.syn Synopsis to Chapter 29: Motions to Reconsider and Renewed Motions**

29.01 Scope.

29.02 Objective and Strategy.

29.03 CHECKLIST: Making a Motion for Reconsideration or Renewing a Motion.

29.04 Options and Strategies for Moving Party.

29.05 Interim and Final Orders May Be Reconsidered or Renewed, but Ruling Must Come Before Judgment Is Entered.

29.05[1] CCP § 1008 Governs Both Interim and Final Orders.

29.05[2] Reconsideration Is Not Allowed After Entry of Judgment.

29.05[3] Distinction Between Orders and Judgments Is Not Always Clear.

29.06 Motions for Reconsideration and Renewed Motions Are Distinguishable.

29.06[1] Terms Often Used Interchangeably.

29.06[2] Motion to Reconsider May Be Made by Any Affected Party.

29.06[3] Renewed Motion May Be Made Only by Party Whose Original Motion Was Denied.

29.07 Any Party May Seek Reconsideration but Only Original Moving Party May Renew a Motion.

29.08 Time Limits.

29.08[1] Motion for Reconsideration Must Be Filed Within 10 Days After Service on Party of Written Notice of Entry of Order.

29.08[2] CCP § 1008 Does Not Set Time Limit on Renewal of Motion.

29.08[3] Time Limits Derived From Other Statutes May Apply.

29.09 Application to Reconsider Must Be Made to Same Judge or Court.

29.10 Court Commissioner May Hear Reconsideration Motion.

29.11 Must Show New or Different Facts, Circumstances, or Law.

29.11[1] Must Establish by Affidavit or Declaration.

29.11[2] What Constitutes New Facts Is Within Sound Discretion of Court.

29.11[3] Must Not Have Been Considered Previously by Court.

29.11[4] Must Not Be Wholly Collateral to Merits of Initial Motion.

29.11[5] Later-Enacted Statute Not Sufficient If No Retroactive Application.

29.12 Must Show Satisfactory Explanation for Failure to Produce New or Different Facts, Circumstances, or Law Before Initial Order.

29.12[1] Party Must Make Threshold Showing of Diligence.

29.12[2] Inadvertence and Time Pressure Not Sufficient Explanation.

29.12[3] Mistake Based on Ignorance of Law or Imprecision in Drafting Not Basis for Reconsideration.

29.12[4] Moving Party's Failure to Understand Relevance of Information in Party's Possession Not Satisfactory Explanation.

29.13 Draft Motion Documents to Emphasize What Is New.

29.13[1] Notice of Motion and Motion.

29.13[2] Supporting Memorandum.

29.13[3] Supporting Affidavit or Declaration.

29.14 If Unable to Meet Statutory Requirements, Party May Suggest Court Invoke Inherent Power to Reconsider Interim Rulings On Its Own Motion.

29.15 Alternative Methods of Relief May Be Available If Reconsideration Is Unavailable Under CCP § 1008.

29.15[1] Other Motions May Be Available to Accomplish Desired Result.

29.15[2] Court and Parties May Not Use Alternative Methods of Relief Merely to Circumvent CCP § 1008 Jurisdictional Limits.

- 29.16 Res Judicata Doctrine Does Not Preclude Reconsideration Motion.
- 29.17 CHECKLIST: Opposing Motion for Reconsideration or Renewed Motion.
- 29.18 Options and Strategies for Opposing Party.
- 29.19 Potential Bases for Opposing Motion for Reconsideration or Renewed Motion.
- 29.19[1] Timeliness of Motion.
- 29.19[2] Entry of Judgment.
- 29.19[3] Adequacy of Affidavit.
- 29.19[3][a] No New or Different Facts, Circumstances, or Law Shown.
- 29.19[3][b] Unsatisfactory Explanation for Failure to Produce Information Previously.
- 29.20 Seeking Sanctions for Noncompliance With CCP § 1008.
- 29.20[1] Trial Court May Punish Violation of CCP § 1008 as Contempt.
- 29.20[2] Trial Court May Impose Sanctions Under CCP § 128.7.
- 29.21 Revoking or Setting Aside Order for Failure to Comply With CCP § 1008.
- 29.21[1] Order Made Contrary to CCP § 1008 May Be Revoked.
- 29.21[2] Ex Parte Motion to Revoke or Set Aside Order Is Available for Failure to Comply With CCP § 1008(b).
- 29.22 CHECKLIST: Seeking Review of Order Granting or Denying Reconsideration.
- 29.23 Distinguishing Between Grant or Denial of Motion for Reconsideration and Grant or Denial on Merits After Reconsideration.
- 29.24 Statutory List of Appealable Orders Does Not Include Orders Granting or Denying Reconsideration.
- 29.25 Orders Granting or Denying Reconsideration of Nonappealable Orders Are Not Themselves Appealable.
- 29.26 Grant or Denial of Reconsideration of Nonappealable Order May Be Reviewed by Extraordinary Writ.
- 29.27 Courts Are Split As to Whether an Order Denying Reconsideration of Appealable Order Is Appealable.
- 29.27[1] Cases Allowing Appeal.
- 29.27[2] Cases Disallowing Appeal.
- 29.28 Determining Whether Motion Extends Time to Seek Review of Original Order.
- 29.28[1] Motion for Reconsideration Extends Time for Appeal.
- 29.28[2] Court's Sua Sponte Reconsideration or Party's Renewed Motion Under CCP § 1008(b) Does Not Extend

Time for Appeal.

29.29 Notice of Motion and Motion for Reconsideration.

29.30 Notice of Renewed Motion and Renewed Motion.

29.31 Declaration in Support of Motion for Reconsideration or Renewed Motion.

29.32 Order Granting or Denying Motion for Reconsideration.



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Chapter 29 Motions to Reconsider and Renewed Motions  
I. STRATEGY

*2-29 MB Practice Guide: CA Pretrial Civil Procedure 29.01*

**29.01 Scope.**

This chapter covers:

- Objectives and strategy for motions to reconsider and renewed motions [*see* 29.04].
- Making a motion for reconsideration or renewing a motion [*see* 29.03-29.16; Forms: *see* 29.29-29.32].
- Opposing a motion for reconsideration or a renewed motion [*see* 29.17-29.21].
- Seeking revocation or setting aside of an order made on a motion for reconsideration or renewed motion [*see* 29.21].
- Seeking sanctions for noncompliance with *CCP* § 1008 [*see* 29.20[1]-[2]].
- Seeking review of an order granting or denying reconsideration [*see* 29.22-29.28].

**Core Statute**

*CCP* § 1008



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Chapter 29 Motions to Reconsider and Renewed Motions  
I. STRATEGY

*2-29 MB Practice Guide: CA Pretrial Civil Procedure 29.02*

**29.02 Objective and Strategy.**

Motions for reconsideration and renewed motions are used to attack adverse orders at the trial court level, but only when new or different facts, circumstances, or law can be shown [see *CCP § 1008*]. Neither is appropriately used to correct an erroneous ruling.



**Strategic Point:**

The two main distinctions between the motions are:

- Motion for reconsideration [*CCP § 1008(a)*]:
  - ☐ May be brought by any party.
  - ☐ Must be brought within 10 days after receiving service of notice of entry of the original order.
- Renewed motion [*CCP § 1008(b)*]:
  - ☐ May only be brought by original moving party.
  - ☐ No 10-day limit.



**Strategic Point:**

The three main hurdles for the moving party to overcome and, hence, points of attack for the opposing party are [see *CCP § 1008*]:



- Time limits.
- The requirement to show new or different facts, circumstances, or law.
- The requirement to give a satisfactory explanation for not presenting the new or different facts, circumstances, or law at the time of the original motion.

### Judge's Perspective

Motions for reconsideration tend to be the most problematic for both counsel and the court. Counsel need to be aware that, for the trial court, the first impression regarding these motions is one of retracing old territory. Accordingly, the proponent of the motion has an immediate uphill battle in trying to justify why the ruling or order needs to be revisited. Moreover, motions for reconsideration, unlike any other, have the effect of making the court an advocate and, for the purposes of the hearing, your constructive opponent. Specifically, the opposing party can sit back and watch the proponent of the motion argue with the court. The fact that counsel forgot to cite existing substantive authority or that a new argument has surfaced is not going to save the motion from possible sanctions.



### Warning:

The Legislature has amended *CCP § 1008* several times. Take particular care when citing case law governed by versions of the statute prior to the January 1, 1993, effective date of major 1992 amendments. Before those amendments, *CCP § 1008* did not purport to be jurisdictional or exclusive [ *Kollander Construction, Inc. v. Superior Court* (2002) 98 CA4th 304, 310, 119 CR2d 614 ], in contrast to the current version of the statute [see *CCP § 1008(e)*]. The 1992 and 1998 amendments have engendered considerable controversy concerning the statute's jurisdictional effect and required showings.

### Detailed Discussion/Forms:

See California Forms of Pleading and Practice, Ch. 374, Motions to Reconsider and Renewed Motions (Matthew Bender).

California Points and Authorities, Ch. 158, Motions to Reconsider and Renewed Motions (Matthew Bender).



### Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend



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Chapter 29 Motions to Reconsider and Renewed Motions  
II. MAKING A MOTION FOR RECONSIDERATION OR RENEWED MOTION

*2-29 MB Practice Guide: CA Pretrial Civil Procedure 29.03*

**29.03 CHECKLIST: Making a Motion for Reconsideration or Renewing a Motion.**



Determine timing.



Must move for reconsideration under *CCP § 1008(a)* within 10 days after being served with written notice of entry of order.

**Exception:**

If a nonparty has standing to move for reconsideration but was not served with the order to be reconsidered, 10-day period never begins to run.



*CCP § 1008(b)* does not impose deadline for renewing a motion, but collateral deadlines may apply.

**Authority:**

*CCP § 1008(a), (b)*

**Discussion:**

See 29.07, 29.08



Determine if judgment has been entered.

**Authority:**

*Ramon v. Aerospace Corp. (1996) 50 CA4th 1233, 1236, 58 CR2d 217*

**Discussion:**

See 29.05[2]



Determine what new or different facts, circumstances, or law justifies reconsideration or renewal.

**Authority:***CCP § 1008(a), (b)***Discussion:***See 29.11*

- ☐ Draft notice of motion and motion for reconsideration or renewed motion.

**Authority:***CCP § 1008(a), (b)***Discussion:***See 29.11-29.13***Form:***See 29.29, 29.30*

- ☐ Draft supporting memorandum.

**Authority:***Cal Rules Ct, Rule 3.1113(a)***Discussion:***See 29.13[2]*

- ☐ Draft supporting affidavit or declaration.

☐ Check content; must show:

☐ What prior application was made.

☐ When prior application was made.

☐ To what judge prior application was made.

☐ What order or decisions were made.

☐ What new or different facts, circumstances, or law exist.

☐ Must not have been previously considered by court.

☐ Must not be wholly collateral to merits of initial motion.

☐ Must not be later enacted statute that is not retroactive.

☐ Must not be failure to have identified fact issues through inadvertence and time

pressure.

☐ Must not be just mistaken belief, based on ignorance of law or imprecision in drafting.

**Authority:**

*CCP §§ 1008(a), (b), 2015.5*

**Discussion:**

See 29.11, 29.12, 29.13[3]

**Form:**

See 29.31

☐ Explanation of why new or different facts, circumstances, or law were not produced before initial order.

**Authority:**

*Baldwin v. Home Savings of America (1997) 59 CA4th 1192, 1200, 1198-1200, 69 CR2d 592 (law); Kalivas v. Barry Controls Corp. (1996) 49 CA4th 1152, 1161, 57 CR2d 200 (facts)*

**Discussion:**

See 29.12-29.13

☐ Draft proposed order granting renewed motion or motion for reconsideration.

**Authority:**

*CCP § 1008(a), (b)*

**Form:**

See 29.32

☐ For motion for reconsideration, apply to same judge who heard original motion unless unavailable.

**Authority:**

*CCP § 1008(a); International Ins. Co. v. Superior Court (1998) 62 CA4th 784, 786 n2, 72 CR2d 849*

**Distinguish:**

"Same judge" rule of does not apply to renewed motions under *CCP § 1008(b)* [ *Deauville Restaurant, Inc., v. Superior Court (2001) 90 CA4th 843, 849* ].

**Discussion:**

See 29.09

☐ If unable to comply with requirements of *CCP § 1008*, consider whether to suggest to the court that it reconsider an erroneous prior interim ruling on its own motion.



**Warning:**

Do not make your own motion; rather, only suggest the court make its own motion.

**Authority:**

*Le Francois v. Goel* (2005) 35 C4th 1094, 1104

**Discussion:**

See 29.14



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Chapter 29 Motions to Reconsider and Renewed Motions  
II. MAKING A MOTION FOR RECONSIDERATION OR RENEWED MOTION

*2-29 MB Practice Guide: CA Pretrial Civil Procedure 29.04*

**29.04 Options and Strategies for Moving Party.**

Having new or different facts, circumstances, or law and a satisfactory explanation for not having presented that information at the time of the original motion is at the core of a motion for reconsideration or a renewed motion. Without this, the motion is not authorized and proceeding risks sanctions [*CCP § 1008(a), (b), (d)*].

If those prerequisites cannot be met, consider other possibilities, for example a *CCP § 473(b)* motion for relief from the order based on mistake, inadvertence, surprise, or excusable neglect.

Appellate courts are divided as to whether a trial court may reconsider its rulings when a party does not satisfy the requirements of *CCP § 1008*.



**Warning:**

Ignoring *CCP § 1008* will not make it go away. If you file a second identical motion without explicitly fulfilling the requirements of section 1008, the court will nonetheless apply the section 1008 requirements to the motion [*see Kerns v. CSE Ins. Group (2003) 106 CA4th 368, 380, 130 CR2d 754* (reversing summary judgment granted on second motion for summary judgment that did not comply with section 1008)].

**Judge's Perspective:**

Counsel are well advised to think carefully about bringing a motion for reconsideration. The court will demand strict adherence to the prerequisites of *CCP § 1008*. If there are new or different facts or case law then those matters should be addressed right up front. Do not bury the basis for the motion in the body of the memorandum. Specify and articulate the basis right in the notice portion of the motion.



**Strategic Point--Moving Party:**

Before making the motion weigh the benefit to be gained against the potential for increasing antagonism with opposing counsel, as well as the judge.



**Warning:**

A *CCP* § 1008 motion is not without risk. *CCP* § 1008(d) permits a finding of contempt and imposition of sanctions under *CCP* § 128.7 for failure to comply with the requirements of *CCP* § 1008.

**Judge's Perspective:**

Even if the moving party strongly believes that the original order or ruling of the court was in error the better course would be to seek writ review or appellate review. There is no advantage to bringing a renewed motion when the gist of what is requested is reconsideration.

 **Cross References:**

Discussion of sanctions, see 29.20.

Discussion of relief from judgments and orders under *CCP* § 473(b) and related equitable relief, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 29.10 *et seq.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil  
ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief  
From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable  
Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend



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Chapter 29 Motions to Reconsider and Renewed Motions  
II. MAKING A MOTION FOR RECONSIDERATION OR RENEWED MOTION

2-29 MB Practice Guide: CA Pretrial Civil Procedure 29.05

**29.05 Interim and Final Orders May Be Reconsidered or Renewed, but Ruling Must Come Before Judgment Is Entered.**

**29.05[1] CCP § 1008 Governs Both Interim and Final Orders.** *CCP § 1008* by its own terms, applies to motions to reconsider and to renew, whether the order deciding the previous matter or motion was interim or final. It applies to all applications for interim orders [*CCP § 1008(e), (g)*].

**29.05[2] Reconsideration Is Not Allowed After Entry of Judgment.** A trial court lacks jurisdiction to rule on a motion for reconsideration after judgment is entered [ *APRI Ins. Co. v. Superior Court* (1999) 76 CA4th 176, 181, 90 CR2d 171 (vacating order granting motion on reconsideration; entry of written order of dismissal operates as judgment under *CCP § 581d*); *Ramon v. Aerospace Corp.* (1996) 50 CA4th 1233, 1236, 58 CR2d 217 ]. This is so even if the motion was filed before entry of judgment; after entry the court cannot correct judicial error except in accordance with statutory proceedings, of which a motion for reconsideration is not one [ *APRI Ins. Co. v. Superior Court* (1999) 76 CA4th 176, 181, 90 CR2d 171 ; *Nave v. Taggart* (1995) 34 CA4th 1173, 1177, 40 CR2d 714 ].



**Warning:**

A motion for reconsideration undetermined after judgment, even if the trial court erroneously takes it up then, does not affect the time for filing an appeal. A party lulled into inaction on that basis may not avail itself of *Cal Rules Ct, Rule 8.108* to file a late appeal after the normal deadline for filing an appeal [ *Safeco Ins. Co. of Ill. v. Architectural Facades Unlimited, Inc.* (2005) 134 CA4th 1477, 1480-1482, 36 CR3d 754 ].

**Exception:**

The Fourth District's Division Three of the Court of Appeals, in a decision discussing none of the cases cited above, has allowed a motion for reconsideration of a determination on a *postjudgment* motion to be filed and decided after entry of default judgment [ *D.R.S. Trading Co., Inc. v. Barnes* (2009) 180 CA4th 815, 819-822, 103 CR3d 329 (relying on *CCP § 1008(e)* to affirm reconsideration of motion to vacate based on attorney fault under *CCP § 473(b)*)].



**Strategic Point:**

Following entry of judgment, a party should abandon any pending motion for reconsideration and determine whether it is appropriate to attack the judgment by [ *Ramon v. Aerospace Corp. (1996) 50 CA4th 1233, 1238, 58 CR2d 217* ]:

- Motion for a new trial [see California Forms of Pleading and Practice, Ch. 371, Motions After Trial, § 371.60 et seq. (Matthew Bender)];
- Motion to vacate [see California Forms of Pleading and Practice, Ch. 371, Motions After Trial, § 371.90 et seq. (Matthew Bender)]; or
- Timely appeal [see California Forms of Pleading and Practice, Ch. 40, Appeal: An Overview et seq. (Matthew Bender)].

With "extremely good cause," a court may construe a party's motion for reconsideration after entry of judgment as a motion for a new trial [20th *Century Ins. Co. v. Superior Court (2001) 90 CA4th 1247, 1261, 109 CR2d 611*, cert. denied, (2002) 535 US 1033, 122 S Ct 1788, 152 L Ed2d 648 (good cause found when trial court erroneously invited plaintiff's post-judgment motion)].

**29.05[3] Distinction Between Orders and Judgments Is Not Always Clear.** Every direction of a court or judge, made or entered in writing, and not included in a judgment, is an order [CCP § 1003]. Despite the wording of section 1003, an order need not include a direction, it may simply grant or deny a motion [ *Passavanti v. Williams (1990) 225 CA3d 1602, 1606 n3, 275 CR 887* ].

A judgment is the final determination of the rights of the parties in an action or proceeding [CCP §§ 577, 1064]. There may be numerous orders made throughout a proceeding but only one judgment [ *Passavanti v. Williams (1990) 225 CA3d 1602, 1605, 275 CR 887* ].

**Exception:**

Multiple final judgments are possible if there are multiple parties or a party has multiple capacities in the action and a judgment is final as to that party or capacity even though the case continues as to other parties, or the same party in a different capacity [ *Justus v. Atchison (1977) 19 C3d 564, 568, 139 CR 97, 565 P2d 122* (multiple parties), disapproved on another ground in *Ochoa v. Superior Court (1985) 39 C3d 159, 171, 216 CR 661, 703 P2d 1*; *Panico v. Truck Ins. Exchange (2001) 90 CA4th 1294, 1300-1301, 109 CR2d 638* (multiple parties); *First Security Bank of California N.A. v. Paquet (2002) 98 CA4th 468, 474, 119 CR2d 787* (multiple capacities)].

This distinction between judgments and orders is not always clear:

- Some "orders," such as a written order of dismissal, are final judgments for purposes of appeal and res judicata, because they are the final determination of the parties' rights [CCP § 581d];
- Some orders, such as those granting or denying a new trial or vacating judgment, are made after final judgment [ *Passavanti v. Williams (1990) 225 CA3d 1602, 1605 n3, 275 CR 887* ]; and
- Judgments sometimes are mislabeled as orders [ *Passavanti v. Williams (1990) 225 CA3d 1602, 1606, 275 CR 887* ].

**Examples:**

The following orders have been held *not* to be final judgments and, thus, have been subject to reconsideration:

- Order granting a demurrer without leave to amend [ *Rains v. Superior Court* (1984) 150 CA3d 933, 945, 198 CR 249 (prior law)].
- Minute order granting summary judgment [see *George Ball Pacific, Inc. v. Coldwell Banker & Co.* (1981) 117 CA3d 248, 253, 172 CR 597 (prior law)].

**Strategic Point:**

If you prevail on a demurrer, summary judgment, or other motion that can end the case but is not a written dismissal that acts as a judgment under *CCP* § 581d, act promptly to ensure that a judgment is entered and notice of entry of judgment given. In addition to precluding reconsideration, doing so will start running the time for appeal [see *Cal Rules Ct, Rule 8.104*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend



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**29.06 Motions for Reconsideration and Renewed Motions Are Distinguishable.**

**29.06[1] Terms Often Used Interchangeably.** The terms "motion to reconsider" and "renewed motion" often are used interchangeably, and both motions require a showing of new or different facts, circumstances, or law, but they are legally distinct. *CCP § 1008(a)* governs motions to reconsider, while *CCP § 1008(b)* governs renewed motions.

**29.06[2] Motion to Reconsider May Be Made by Any Affected Party.** A motion to reconsider may be made by *any affected party* and addresses any order "refused in whole or in part, or granted, or granted conditionally, or on terms." The statute sets a 10-day deadline for filing a motion for reconsideration [*CCP § 1008(a)*].

➡ **Cross References:**

Discussion of affected parties, see 29.07; discussion of deadline, see 29.08.

**29.06[3] Renewed Motion May Be Made Only by Party Whose Original Motion Was Denied.** A renewed motion is a new motion by the *same party* whose prior motion has been refused in whole or part, or granted conditionally or on terms, seeking the same relief. The statute does not set any deadline for renewing a motion. If a party fails to comply with the affidavit requirement of [*CCP § 1008(b)*] when renewing a motion, the subsequent order may be revoked or set aside on ex parte motion [see *CCP § 1008(b)*; compare *CCP § 1008(a)*, which does not contain a similar express ex parte motion provision].

**Example:**

A party's second application for a writ of attachment amounted to a renewed motion, not a motion for reconsideration and therefore did not need to be heard by the same judge who heard the first application. The motion did not ask the court to reconsider the matter and modify, amend, or revoke its prior order on the first application or claim that the court had erred in its original assessment of the evidence or law. The request in the second application for the same relief did not transform it into a motion for reconsideration [ *Deauville Restaurant, Inc., v. Superior Court (2001)*, 90 CA4th 843, 848-849, 108 CR2d 863 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend



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**29.07 Any Party May Seek Reconsideration but Only Original Moving Party May Renew a Motion.**

Any party affected by an order denying a motion in whole or in part, granting the motion, or granting it conditionally, or on terms, may move for *reconsideration* of the order [see *CCP § 1008(a)*].

In some instances, the term "Any party affected" may not be limited to parties to the action in which the order was entered, but may include nonparty members of the public who are affected [see *Wilson v. Science Applications Internat. Corp. (1997) 52 CA4th 1025, 1033, 60 CR2d 883* (media attempt to set aside order sealing settlement)].

A *renewed* motion may only be brought by the party who originally made a motion that was denied in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law [see *CCP § 1008(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend



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**29.08 Time Limits.**

**29.08[1] Motion for Reconsideration Must Be Filed Within 10 Days After Service on Party of Written Notice of Entry of Order.** A party moving for reconsideration must do so within 10 days after being served with written notice of entry of the order [*CCP § 1008(a)*].

**Distinguish:**

The ten-day deadline for filing a motion for reconsideration begins at the prevailing party's service of notice of the ruling, not the clerk's sending of notice [ *Forrest v. Department of Corporations* (2007) 150 CA4th 183, 203, 58 CR3d 466 (motion made more than ten days after clerk's mailing but less than ten days after prevailing party's service of notice was timely)].

**Distinguish:**

If a nonparty who has not been served with the order is moving for reconsideration, the 10-day period would never have commenced to run and will not preclude the motion [see *Wilson v. Science Applications Internat. Corp.* (1997) 52 CA4th 1025, 1033, 60 CR2d 883 ].



**Strategic Point:**

If an order is in your favor, be sure to serve it on all interested parties, or verify that the court clerk has done so, so that those parties cannot come in later and interfere [see *CCP § 1019.5* (notice of court's decision or order)].

**29.08[2] CCP § 1008 Does Not Set Time Limit on Renewal of Motion.** *CCP § 1008(b)* sets no time limit on the making of a renewed motion or the court's ruling on it. In the case of an appealable order, however, a renewed motion must be brought before the order becomes final [see *Stephen v. Enterprise Rent-A-Car* (1991) 235 CA3d 806, 818, 1 CR2d 130 ].

**29.08[3] Time Limits Derived From Other Statutes May Apply.** Other statutes related to the type of order sought under *CCP § 1008* may impose their own time limits on motions for reconsideration and renewed motions.

**Example:**

Under California law, an order that has the effect of denying class action certification a so-called "death knell ruling" is an appealable final judgment. One court held that although *CCP § 1008* imposes no time limitations for renewed motions, a renewed motion for class certification is untimely if not made before the appealable prior order becomes final [ *Stephen v. Enterprise Rent-A-Car* (1991) 235 CA3d 806, 818, 1 CR2d 130 ].

The *Stephen* court noted but did not reach the question of whether a renewed motion, like a motion for reconsideration, was prohibited after entry of judgment [ *Stephen v. Enterprise Rent-A-Car* (1991) 235 CA3d 806, 817 n6, 1 CR2d 130 (acknowledging *Passavanti v. Williams* (1990) 225 CA3d 1602, 275 CR 887 )].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**29.09 Application to Reconsider Must Be Made to Same Judge or Court.**

Before the 1992 amendments, *CCP § 1008(a)* required that a motion to reconsider an order be made to the same judge who made the order. The statute, as amended, requires that the motion be made to the same judge *or court*. Even with the amended wording, courts continue to state that the motion must be heard by the same judge unless that judge is unavailable [ *International Ins. Co. v. Superior Court* (1998) 62 CA4th 784, 786 n2, 72 CR2d 849 (relying on pre-1992 authority)].

**Distinguish:**

A renewed motion need not be heard by same judge who heard initial motion [ *Deauville Restaurant, Inc., v. Superior Court* (2001) 90 CA4th 843, 849, 108 CR2d 863 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**29.10 Court Commissioner May Hear Reconsideration Motion.**

If parties stipulate to have their cause heard by a court commissioner sitting as a temporary judge, the commissioner will have authority to rule on any motion to reconsider its orders in the matter. A second stipulation is not necessary [ *McCartney v. Superior Court* (1990) 223 CA3d 1334, 1339, 273 CR 250 (prior law)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendGovernmentsCourtsCourt Personnel



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**29.11 Must Show New or Different Facts, Circumstances, or Law.**

**29.11[1] Must Establish by Affidavit or Declaration.** Motions to reconsider and renewed motions must be based on new or different facts, circumstances, or law [*CCP § 1008(a), (b)*]. Failure to show new facts, circumstances, or legal authorities that were not previously presented in the original motion is a jurisdictional bar to consideration of a renewed motion [ *Le Francois v. Goel* (2005) 35 C4th 1094, 1104 (reversing trial court's granting of party's motion identical to prior denied motion); *Kerns v. CSE Ins. Group* (2003) 106 CA4th 368, 391, 130 CR2d 754 (vacating trial court order)].

The moving party must provide a supporting affidavit (or declaration under *CCP § 2015.5*) setting forth what new or different facts, circumstances, or law are claimed to be shown [*CCP § 1008(a), (b)*].



**Warning:**

Take care in using case law based on *CCP § 1008* before 1992 amendments. The required showing for motion for reconsideration under former *CCP § 1008(a)* was a "different state of facts," and for renewed motion under former *CCP § 1008(b)* was "new" facts. The 1992 amendments made the grounds for both motions the same, i.e., a showing of "new or different facts, circumstances, or law" [*CCP § 1008(a), (b)*].



**Decision Point:**

If a new case has rendered a ruling wrong, consider the possibility of entering a joint stipulation to obtain a corrected ruling. Be open to this possibility even if the ruling was favorable to you. Weigh the possibility that the incorrect ruling, if allowed to stand, might result in the later reversal of a judgment in your favor.



**Cross Reference:**

Form, see 29.31.

**29.11[2] What Constitutes New Facts Is Within Sound Discretion of Court.** Whether alleged "new" facts are sufficient to satisfy the new facts requirement is within the sound discretion of the trial court [ *Graham v. Hansen* (1982) 128 CA3d 965, 971, 180 CR 604 (applying *CCP § 1008(b)* prior to 1992 amendment)].

New depositions that shed light on previously known facts may be adequate to support the new facts requirement. However, a reason for not having taken the depositions sooner may be needed [ *Film Packages, Inc. v. Brandywine Film Productions, Ltd.* (1987) 193 CA3d 824, 829-830, 238 CR 623 (alternative ground was that court had inherent power to hear renewed motion apart from CCP § 1008(b)); cf. *In re Marriage of Burgard* (1999) 72 CA4th 74, 84 CR2d 739 (failure to understand import of document was not excuse for failing to produce earlier)].



**Warning:**

Do not try to use a motion to reconsider or a renewed motion simply to augment the record.

**29.11[3] Must Not Have Been Considered Previously by Court.** The 1992 amendments may be assumed to approve generally the previous case law relaxation of what constitutes new or different facts justifying reconsideration, but this does not mean all facts not previously presented to a court now suffice [ *Garcia v. Hejmadi* (1997) 58 CA4th 674, 690, 68 CR2d 228 ]. It is not enough for party to reiterate its prior legal reasoning and authorities [see *Gilberd v. AC Transit* (1995) 32 CA4th 1494, 1500, 38 CR2d 626 ].

**Distinguish:**

Reconsideration on the basis of new facts, circumstances, or law is warranted on a showing that the trial court did not consider a timely filed memorandum in support of a special motion to strike [ *Johnston v. Corrigan* (2005) 127 CA4th 553, 556 ].

**29.11[4] Must Not Be Wholly Collateral to Merits of Initial Motion.** The new or different fact or circumstance required must not be something wholly collateral to the merits of the initial motion, such as the fact that respondent had not intended to waive oral argument [ *Gilberd v. AC Transit* (1995) 32 CA4th 1494, 1500 ].

**29.11[5] Later-Enacted Statute Not Sufficient If No Retroactive Application.** A later enacted statute does not constitute "new or different law" for purposes of CCP § 1008 if it does not apply retroactively [CCP § 1008(f)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**29.12 Must Show Satisfactory Explanation for Failure to Produce New or Different Facts, Circumstances, or Law Before Initial Order.**

**29.12[1] Party Must Make Threshold Showing of Diligence.** To be entitled to reconsideration, the moving party must not only show evidence of new or different facts, circumstances, or law, but also must give a satisfactory explanation for having failed to produce that evidence at the original hearing [*see Kalivas v. Barry Controls Corp.* (1996) 49 CA4th 1152, 1161, 57 CR2d 200 (new or different facts); *Baldwin v. Home Savings of America* (1997) 59 CA4 1192, 1198-1200, (new or different law)]. The 1992 amendments to the statute did not eliminate the requirement of a threshold showing of diligence [ *Garcia v. Hejmadi* (1997) 58 CA4th 674, 690, 68 CR2d 228 ].

**29.12[2] Inadvertence and Time Pressure Not Sufficient Explanation.** Inadvertent oversight and time pressure do not justify moving party's failure to identify facts that were within the party's knowledge at the time of the original motion [ *Garcia v. Hejmadi* (1997) 58 CA4th 674, 690, 68 CR2d 228 ].

**29.12[3] Mistake Based on Ignorance of Law or Imprecision in Drafting Not Basis for Reconsideration.** Counsel's incorrect presumption that an offer to compromise included the issue of attorney fees was not the kind of new fact required by CCP § 1008; a mistake based on ignorance of the law or imprecision in drafting is not a proper basis for reconsideration [ *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 670, 73 CR2d 242 ].

**29.12[4] Moving Party's Failure to Understand Relevance of Information in Party's Possession Not Satisfactory Explanation.** A moving party's failure to understand the import of evidence in the party's possession until after hearing on original motion is not sufficient explanation for failing to submit the evidence or law at the hearing [ *New York Times Co. v. Superior Court* (2006) 135 CA4th 206, 213-215 ; 37 CR3d 338 (that deposition transcripts were not thought to be necessary to defeat motion for summary judgment is not satisfactory explanation); *In re Marriage of Burgard* (1999) 72 CA4th 74, 81-82, 84 CR2d 739 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### 29.13 Draft Motion Documents to Emphasize What Is New.

**29.13[1] Notice of Motion and Motion.** A notice of motion and motion is required [*Cal Rules Ct, Rule 3.1112(a)*].



#### Strategic Point:

The moving papers should focus tightly on what is new or different right from the beginning. The papers should be kept as brief as possible. Align yourself with the court, emphasizing that the new development has made it necessary to correct a ruling that was correct when made, but that has become wrong in light of the new development. The moving papers should be limited to addressing what is new without revisiting all the unchanged facts, arguments, and law.



#### Cross References:

Forms, see 29.29, 29.30.

**29.13[2] Supporting Memorandum.** A supporting memorandum is required [*Cal Rules Ct, Rule 3.1113(a)*].



#### Cross References:

Discussion of memoranda generally, see *Ch. 26, Law and Motion Procedure*, 26.43.

Forms, see California Points and Authorities, Ch. 158, Motions to Reconsider and Renewed Motions (Matthew Bender).

**29.13[3] Supporting Affidavit or Declaration.** A party moving for reconsideration or renewing a motion must file a supporting affidavit or declaration [*CCP §§ 1008(a), (b), 2015.5*], setting forth:

- What motion was previously made.
- When motion was made.

- What judge heard motion.
- What order or decisions were made.
- What new or different facts, circumstances, or law are shown in present motion.

The moving party also must explain satisfactorily why the new or different facts, circumstances, or law were not presented with the initial motion [ *Kalivas v. Barry Controls Corp.* (1996) 49 CA4th 1152, 1161, 57 CR2d 200 (facts); *Baldwin v. Home Savings of America* (1997) 59 CA4th 1192, 1193, 1198-1200, 69 CR2d 592 (law)].



#### **Cross References:**

Discussion, see 29.11-29.12. Form, see 29.31.

Discussion of declarations generally, Ch. 26, Law and Motion Procedure, 26.43.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend



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**29.14 If Unable to Meet Statutory Requirements, Party May Suggest Court Invoke Inherent Power to Reconsider Interim Rulings On Its Own Motion.**

*CCP § 1008* clearly limits the parties' ability to file repetitive motions. However, it does not restrict the court's authority to reconsider its prior interim rulings on its own motion under its inherent power to correct errors in those rulings [ *Le Francois v. Goel* (2005) 35 C4th 1094, 1104-1105, 112 P3d 636 (applying its reasoning also to *CCP § 437c(f)(2)*)].

**Distinguish:**

In clarifying the effect of *CCP § 1008* on a court's inherent power to correct errors in interim rulings, the Supreme Court disapproved the rulings in *Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 CA4th 197, 132 CR2d 89, *Wozniak v. Lucutz* (2002) 102 CA4th 1031, 126 CR2d 310, *Kollander Construction, Inc. v. Superior Court* (2002) 98 CA4th 304, 119 CR2d 614, *Blake v. Ecker* (2001) 93 CA4th 728, 113 CR2d 422 and *Remsen v. Lavacot* (2001) 87 CA4th 421, 104 CR2d 612 [ *Le Francois v. Goel* (2005) 35 C4th 1094, 1107, 112 P3d 636 ], which suggested that the court's power on its own motion was limited in some way by *CCP § 1008*. However, reconsideration to examine new evidence not in the record is an order for a new trial beyond trial court's sua sponte authority [ *In re Marriage of Herr* (2009) 174 CA4th 1463, 1469-1470, 95 CR3d 464 ]. In this context, even the trial's court erroneous grant of a motion for reconsideration by a party that is actually the court's ruling on its own motion is harmless error [ *In re Marriage of Barthold* (2008) 158 CA4th 1301, 1308-1309, 70 CR3d 691 ].



**Strategic Point:**

The Supreme Court has acknowledged that a court cannot prevent a party from *suggesting* that the court reconsider an interim ruling on its own motion [ *Le Francois v. Goel* (2005) 35 C4th 1094, 1108, 112 P3d 636 ]. In that case, the court may choose to make its own motion and should provide notice of hearing to the parties for them to contest the motion [ *Le Francois v. Goel* (2005) 35 C4th 1094, 1108-1109, 112 P3d 636 ].



**Warning:**

Do not make your own motion to reconsider; rather, suggest to the court orally at the earliest opportunity that the court make its own motion. An oral suggestion affords the opportunity to gauge the court's reaction to the suggestion. If there is no opportunity to make an oral suggestion, consider making the suggestion in a case management conference statement or other filing with the court. Do not send the court a letter requesting reconsideration of the motion because the letter will address substantive issues, and some judges consider such letters to be an ex parte communication, even when all parties are copied on the letter. Because judges receive far too many requests to reconsider their rulings, it is advisable to make such a suggestion only when counsel believes that there are compelling reasons.

**Judge's Perspective:**

In light of *Le Francois*, while counsel are free to ask the trial judge to review sua sponte the issue previously ruled on, the success of this request will depend greatly on the tact and diplomacy of counsel. Reconsideration requests are not favored by the court, but if it can be shown that the court should revisit the issue again so as to right a wrong then by all means the request should be made.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend





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**29.15 Alternative Methods of Relief May Be Available If Reconsideration Is Unavailable Under CCP § 1008.**

**29.15[1] Other Motions May Be Available to Accomplish Desired Result.** A party unable to comply with *CCP § 1008* should consider whether any of the following methods of relief from an order or judgment would be appropriate:

- Motion for relief from a judgment, dismissal, order, or other proceeding based on mistake, inadvertence, surprise, or excusable neglect, under *CCP § 473(b)* [ *Wozniak v. Lucutz* (2002) 102 CA4th 1031, 1043, 126 CR2d 310 ].
- Motion for correction of clerical mistakes in a judgment or orders [*CCP § 473(d)*].
- Motion for a new trial [*CCP §§ 660, 657*].
- Motion to vacate judgment [*CCP §§ 662, 663*].

➡ **Cross References:**

Discussion of *CCP § 473* motions, see Ch. 36, Defaults and Motions for Relief; see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 29, Setting Aside Judgments and Orders.

Correction of clerical mistakes, see California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

New trial and motions to vacate, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

**29.15[2] Court and Parties May Not Use Alternative Methods of Relief Merely to Circumvent CCP § 1008 Jurisdictional Limits.** A party cannot use a demurrer or a *CCP § 473* motion for relief based on mistake, surprise, inadvertence, or excusable neglect to indirectly obtain reconsideration of a prior adverse order without having to satisfy *Section 1008*'s requirement of "new or different facts, circumstances, or law" [ *Gilberd v. AC Transit* (1995) 32 CA4th 1494, 1501-1502 ; but see *Wozniak v. Lucutz* (2002) 102 CA4th 1031, 1043, 126 CR2d 310 (trial court had jurisdiction to vacate prior order whether under inherent power to reconsider or for surprise under *CCP § 473*); *Community*

*Memorial Hospital v. County of Ventura* (1996) 50 CA4th 199, 205, 56 CR2d 732 (declining to follow *Gilberd* to extent that it might be read to preclude a summary judgment motion based on issues similar to those argued and lost on demurrer)].

Nor can a court avoid the jurisdictional limits of *CCP* § 1008(e) by simply ignoring another judge's prior stay order and setting a case for trial, instead of modifying, amending, or revoking stay order after proper, explicit reconsideration [ *Morite of California v. Superior Court* (1993) 19 CA4th 485, 492-493, 23 CR2d 666 ].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil  
ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief  
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**29.16 Res Judicata Doctrine Does Not Preclude Reconsideration Motion.**

A decision on a motion is not res judicata, and the trial court has jurisdiction to reconsider a prior ruling or to entertain a renewal of a previous motion [ *Curtin v. Koskey* (1991) 231 CA3d 873, 876-877, 282 CR 706 ].

➡ **Cross Reference:**

Discussion of res judicata: California Forms of Pleading and Practice, Ch. 491, Res Judicata (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**29.17 CHECKLIST: Opposing Motion for Reconsideration or Renewed Motion.**



Calendar response and hearing dates.

- ☐ Review motion and supporting documents for adequacy.
- ☐ Consider whether gravamen of motion is actually relief under another statute; include memorandum in opposition to the motion actually made.
- ☐ Grounds for opposition are:
  - ☐ Motion is untimely.
  - ☐ Judgment has been entered.
  - ☐ Supporting affidavit fails to state new or different facts, circumstances, or law.
  - ☐ Affidavit merely reiterates previously presented facts, circumstances, or legal arguments.
  - ☐ Allegedly new or different facts, circumstances, or law are wholly collateral to merits of original motion.
  - ☐ Newly enacted law does not apply retroactively.

**Discussion:**

See 29.19[3][a]

☐ Moving party fails to satisfactorily explain failure to produce allegedly new or different facts, circumstances, or law at initial hearing.

☐ Information was available at time of initial hearing.

☐ Inadvertence and time pressure are not sufficient explanation.

☐ Mistake based on ignorance of law or imprecision in drafting is not proper basis for reconsideration.

☐ Moving party's failure to understand relevance of information in its possession is not satisfactory explanation.

☐ Motion was not made to same judge or court that ruled on original motion.

**Discussion:**

See 29.09

☐ Determine what relief to seek.

☐ Order holding moving party in contempt for noncompliance with *CCP* § 1008.

☐ Sanctions under *CCP* § 128.7.

☐ Order revoking or setting aside noncompliant order.

**Authority:**

*CCP* §§ 1008, 128.7, 1209, 1218, 1219

**Discussion:**

See 29.18-29.20

☐ Draft:

☐ Declaration opposing motion.

☐ Opposing memorandum.

☐ Proposed order.

☐ Serve and file response.

☐ Follow standard noticed motion procedure.

☐ Calendar response and hearing dates.

**Authority:**

*CCP § 1008*

**Discussion:**

*See 29.18-29.20*

**Forms:**

*See 29.32 (proposed order)*

**Standard Procedure Checklist**

*See Ch. 26, Law and Motion Procedure, 26.46*



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**29.18 Options and Strategies for Opposing Party.**

The nature of a motion is determined by the nature of the relief sought, not by the label attached to it [ *San Francisco v. Muller* (1960) 177 CA2d 600, 603, 2 CR 383 ]. In opposing a renewed motion or motion to reconsider, include memorandum in opposition to the motion actually made as well as to the named type of motion.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureJudgmentsRelief From  
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**29.19 Potential Bases for Opposing Motion for Reconsideration or Renewed Motion.**

**29.19[1] Timeliness of Motion.** Motion for reconsideration must be filed within 10 days after service upon the party of written notice of entry of the order [*CCP § 1008(a)*; see *Wiz Technology, Inc. v. Coopers & Lybrand, LLP* (2003) 106 CA4th 1, 16-17, 130 CR2d 263 (filing one day beyond statutory 10-day limitation period is sufficient cause to deny motion)].

**Distinguish:**

*CCP § 1008(b)* does not set a time limit for renewed motions [*CCP § 1008(b)*].

➡ **Cross Reference:**

Discussion of time limits, see 29.08.

**29.19[2] Entry of Judgment.** A trial court cannot entertain a motion to reconsider after entry of judgment.

➡ **Cross Reference:**

Discussion, see 29.05[2], [3].

**29.19[3] Adequacy of Affidavit.**

**29.19[3][a] No New or Different Facts, Circumstances, or Law Shown.** The affidavit or declaration in support of motion for reconsideration or renewed motion must state what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown [*CCP § 1008(a), (b)*].

➡ **Cross Reference:**

Discussion, see 29.11.

**29.19[3][b] Unsatisfactory Explanation for Failure to Produce Information Previously.** Moving party must give a satisfactory explanation for failure to produce alleged new or different facts, circumstances, or law at the time of original motion.





**Cross Reference:**

Discussion, see 29.12.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend



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## **29.20 Seeking Sanctions for Noncompliance With CCP § 1008.**

**29.20[1] Trial Court May Punish Violation of CCP § 1008 as Contempt.** A violation of *CCP § 1008* may be punished as a contempt [*CCP § 1008(d)*; see *CCP §§ 1209, 1218, 1219*].



### **Cross Reference:**

California Forms of Pleading and Practice, Ch. 135, Contempt (Matthew Bender).

**29.20[2] Trial Court May Impose Sanctions Under CCP § 128.7.** Sanctions, as allowable under *CCP § 128.7*, may be imposed for a violation of *CCP § 1008* [*CCP § 1008(d)*].

Mere legal inadequacy of a reconsideration motion, absent a finding of bad faith, frivolous motion, intention to cause unnecessary delay is insufficient to justify sanctions under *CCP § 128.5* (prior law) [see *Lucas v. Santa Maria Public Airport Dist.* (1995) 39 CA4th 1017, 1028-1029, 46 CR2d 177 ].

### **Judge's Perspective:**

Failure to comply with the statutory requirements of *CCP § 1008* can be juxtaposed with the requirements of *CCP § 128.7*, and the combination of the two statutory elements can provide a sufficient basis for the imposition of sanctions. Even if the opposing party has not requested sanctions pursuant to *CCP § 128.7* counsel for the moving party should weigh the risk of the court itself initiating the procedure.

A motion for sanctions under *CCP § 128.7* must be made separately from the motion for reconsideration or opposition to it [*CCP § 128.7(c)(1)*].

A motion for sanctions brought primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, is itself subject to a motion for sanctions [*CCP § 128.7(h)*].

### **Strategic Point:**



Given the timing issues on a 128.7 motion resulting from its safe harbor provision, it would be necessary to request the court for a continuance on the motion for reconsideration or renewed motion to accommodate a 128.7 motion. All in all it may be better simply to point out the absence of any basis for the motion for reconsideration or renewed motion, not mention sanctions, and allow the court to deal with the sanction issue.

**Cross Reference:**

Discussion of and forms for *CCP* § 128.7 sanctions, see Ch. 35, Sanctions.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend



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#### **29.21 Revoking or Setting Aside Order for Failure to Comply With CCP § 1008.**

**29.21[1] Order Made Contrary to CCP § 1008 May Be Revoked.** Any order made contrary to *CCP § 1008* may be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending [*CCP § 1008(d)*].

**29.21[2] Ex Parte Motion to Revoke or Set Aside Order Is Available for Failure to Comply With CCP § 1008(b).** Any order made on a renewed motion may be revoked or set aside on ex parte motion if there was a failure to comply with *CCP § 1008(b)* [*CCP § 1008(b)*; see *Cal Rules Ct, Rule 3.1200 et seq.* (ex parte applications and orders)]. Note that this provision applies only to renewed motions under *CCP § 1008(b)*; there is no comparable provision applicable to motions for reconsideration under *CCP § 1008(a)*.

#### **Cross Reference:**

Forms: See *California Forms of Pleading and Practice*, Ch. 374, *Motions to Reconsider and Renewed Motions*, §§ 374.64, 374.65 (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**29.22 CHECKLIST: Seeking Review of Order Granting or Denying Reconsideration.**

- ☐ Determine precisely which order(s) to attack.
  - ☐ Order granting or denying reconsideration.
  - ☐ Order on merits after reconsideration.
  - ☐ Trial court's failure to rule on motion for reconsideration or renewed motion.

**Authority:**

*Blue Mountain Development Co. v. Carville* (1982) 132 CA3d 1005, 1011, 183 CR 594 ,  
disapproved on another ground in *Passavanti v. Williams* (1990) 225 CA3d 1602,  
1607-1608 n5, 275 CR 887

**Discussion:**

See 29.23-29.28

- ☐ Determine appropriate method of attack.
  - ☐ If nonappealable order granting reconsideration, consider seeking writ relief.

**Authority:**

*Mink v. Superior Court* (1992) 2 CA4th 1338, 1344, 4 CR2d 195

**Discussion:**

See 29.26

☐ If order denies reconsideration, review latest authority on appealability of order.

☐ Order denying reconsideration of nonappealable prior order is not appealable.

**Authority:**

*Ghanooni v. Super Shuttle* (1992) 2 CA4th 380, 381 n2, 3 CR2d 43 (prior law), criticized on other grounds in *Greene v. Amante* (1992) 3 CA4th 684, 689, 4 CR2d 571 (prior law)

**Discussion:**

See 29.25

☐ Courts are split on appealability of order denying reconsideration.

**Authority:**

CCP §§ 904.1, 904.2; *In re Marriage of Burgard* (1999) 72 CA4th 74, 80-81, 84 CR2d 739

**Discussion:**

See 29.27

☐ Determine whether motion extends time to appeal original order:

☐ Renewed motion does not extend time to appeal.

☐ Valid motion to reconsider an appealable order under CCP § 1008(a), extends time to appeal from that order for all parties until earliest of:

☐ 30 days after clerk mails, or party serves, an order denying motion or notice of entry of that order;

☐ 90 days after first motion to reconsider is filed; or

☐ 180 days after entry of the appealable order.

**Prerequisite:**

Reconsideration motion must meet procedural requirements, such as timely filing, to be "valid."

**Authority:**

Cal Rules Ct, Rule 3.108(d) and Advisory Committee Comment

**Exception:**

No extension when court reconsiders order on its own motion [Cal Rules Ct, Rule 3.108(d), Advisory Committee Comment].

**Discussion:**

See 29.28[1], [2]



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**29.23 Distinguishing Between Grant or Denial of Motion for Reconsideration and Grant or Denial on Merits After Reconsideration.**

A trial court may sometimes enter an order "denying reconsideration" when it is plain from the record that the first motion was denied without prejudice and the second ruling was intended to be a ruling on the merits of the original motion, not simply a denial of reconsideration [ *Blue Mountain Development Co. v. Carville* (1982) 132 CA3d 1005, 1011, 183 CR 594 (disapproved on another ground in *Passavanti v. Williams* (1990) 225 CA3d 1602, 1607-1608 n5, 275 CR 887 )].

A trial court may not ignore a notice of motion for reconsideration. If the court has jurisdiction to hear the motion but it appears to be based on substantially the same grounds as the original motion and seeks substantially the same relief, the court may do any of the following [ *Muller v. Tanner* (1969) 2 CA3d 445, 460-461, 82 CR 738 (prior law)]:

- Summarily deny the motion without further reconsideration.
- Give the matter reconsideration and deny it.
- Give the matter reconsideration and reverse the prior decision.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend





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**29.24 Statutory List of Appealable Orders Does Not Include Orders Granting or Denying Reconsideration.**

*CCP* §§ 904.1 and 904.2 set forth the types of orders that are appealable in civil cases. They do not list an order granting or denying reconsideration. This has led to a split of authority on whether such orders are appealable.

➡ **Cross Reference:**

29.27.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**29.25 Orders Granting or Denying Reconsideration of Nonappealable Orders Are Not Themselves Appealable.**

A trial court's denial of a motion to reconsider a nonappealable order has been held to also be nonappealable [ *Ghanooni v. Super Shuttle* (1992) 2 CA4th 380, 381 n2, 3 CR2d 43 (prior law) (criticized on other grounds in *Greene v. Amante* (1992) 3 CA4th 684, 689, 4 CR2d 571 (prior law))].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend



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**29.26 Grant or Denial of Reconsideration of Nonappealable Order May Be Reviewed by Extraordinary Writ.**

A party may seek relief from an order granting or denying reconsideration of a nonappealable order via a writ petition [see *APRI Ins. Co. v. Superior Court* (1999) 76 CA4th 176, 186, 90 CR2d 171 (writ directing denial of reconsideration motion); *Mink v. Superior Court* (1992) 2 CA4th 1338, 1344, 4 CR2d 195 (prior law; writ directing grant of motion for reconsideration)].

Division One of the Second Appellate District has held, however, that, absent compelling facts, an extraordinary writ ought not to be used to review orders granting or denying reconsideration of a summary adjudication order, since such orders are reviewable on appeal from final judgment [ *International Ins. Co. v. Superior Court* (1998) 62 CA4th 784, 788, 72 CR2d 849 ].

**➡ Cross Reference:**

Discussion and forms of extraordinary writs: California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### **29.27 Courts Are Split As to Whether an Order Denying Reconsideration of Appealable Order Is Appealable.**

**29.27[1] Cases Allowing Appeal.** Some courts allow appeal of an order denying reconsideration if the underlying order was appealable, and the motion for reconsideration was based on new or different facts [ *Santee v. Santa Clara County Office of Education* (1990) 220 CA3d 702, 710-711, 269 CR 605 ]. These courts reason that the order qualifies as an order made after judgment under CCP § 904.1 [ *Rabbitt v. Vincente* (1987) 195 CA3d 170, 174, 240 CR 524 ].

If, however, the motion for reconsideration of an appealable order is based on exactly the same factual showing as was offered in support of the original motion, the party cannot appeal from the order denying the motion for reconsideration. Rather, the appeal must be taken from final judgment [ *Gill v. Hughes* (1991) 227 CA3d 1299, 1310-1311, 278 CR 306 ].

**29.27[2] Cases Disallowing Appeal.** Most recent cases hold that a motion for reconsideration is never appealable, for the same reasons that orders denying motions for a new trial or motions to vacate judgment are not appealable. Prohibiting such appeals, they reason, eliminates the possibilities that a nonappealable order or judgment may be made appealable, a party may have two appeals from the same decision, and a party may obtain an unwarranted extension of time to appeal [ *Branner v. Regents of Univ. of Cal.* (3d Dist., 2009) 175 CA4th 1043, 1050, 96 CR3d 690 ; *Association for L.A. Deputy Sheriffs v. Cty. of L.A.* (2d Dist., Div. 8, 2008) 166 CA4th 1625, 1633, 83 CR3d 494 ; *In re Marriage of Burgard* (1999) 72 CA4th 74, 81, 84 CR2d 739 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend



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## **29.28 Determining Whether Motion Extends Time to Seek Review of Original Order.**

**29.28[1] Motion for Reconsideration Extends Time for Appeal.** *Cal Rules Ct, Rule 8.108(e)* explicitly provides for an extension of time to appeal an order if a "valid" motion to reconsider an appealable order under *CCP § 1008(a)* is filed and served.

- The time to appeal from the appealable order is extended for all parties until the earliest of the following [*Cal Rules Ct, Rule 8.108(e)*]:

- ☐ 30 days after the clerk mails, or a party serves, an order denying the motion or a notice of entry of that order.
- ☐ 90 days after the first motion to reconsider is filed.
- ☐ 180 days after entry of the appealable order.

- *Cal Rules Ct, Rule 8.108(e)* applies to any "appealable order," whether made before or after judgment. It does not attempt to resolve the dispute over whether an order denying a motion to reconsider is itself appealable [*Cal Rules Ct, Rule 8.108, Advisory Committee Comment*].

- To be "valid," a motion need only comply with all procedural requirements, such as timely filing. It need not also have substantive merit [*Cal Rules Ct, Rule 8.108, Advisory Committee Comment*]. To toll the appeal period, a motion for reconsideration must be valid at the time it is initially filed [ *Branner v. Regents of Univ. of Cal. (2009) 175 CA4th 1043, 1049, 96 CR3d 690* ] .

### **Example:**

A motion to reconsider that is not accompanied by the affidavit required by *CCP § 1008(a)* at the time it is filed is invalid and does not extend the appeal period [ *Branner v. Regents of Univ. of Cal. (2009) 175 CA4th 1043, 1048-1049, 96 CR3d 690* ] .

The rule operates only to extend the time to appeal otherwise prescribed in *Cal Rules Ct., Rule 8.104(a)*. It cannot shorten the time to appeal. If the normal time to appeal stated in 8.104(a) is longer than the time provided in 8.108(e), the time to appeal stated in 8.104(a) governs [*Cal Rules Ct., Rule 8.108(a)*].

The time for appeal of an appealable order or judgment starts to run on notice of entry of minute order, rather than the later date of the written order, unless the minute order expressly directs that a written order be filed [*Cal Rules Ct., Rule 8.104(d)*]; see *Hughey v. City of Hayward (1994) 24 CA4th 206, 209-210, 30 CR2d 678* ; see also *CCP § 668.5*].

**29.28[2] Court's Sua Sponte Reconsideration or Party's Renewed Motion Under CCP § 1008(b) Does Not Extend Time for Appeal.** *Cal Rules Ct., Rule 8.108(e)* does not apply when a court reconsiders an order on its own motion or when a party renews its motion under *CCP § 1008(b)* [*Cal Rules Ct., Rule 8.108, Advisory Committee Comment*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureAppealsReviewabilityTime Limitations



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**29.29 Notice of Motion and Motion for Reconsideration.**

Notice of Motion and Motion for Reconsideration  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR RE-  
) CONSIDERATION OF ORDER  
) \_\_\_\_\_ [specify, e.g., DENYING  
) MOTION FOR SUMMARY JUDGMENT][, SUP-  
) PORTING DECLARATION OF  
) \_\_\_\_\_ (name), AND SUPPORTING  
) MEMORANDUM]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to \_\_\_\_\_ [name] his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in the courtroom of \_\_\_\_\_ [\_\_\_\_\_] (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [address],

\_\_\_\_\_[city], \_\_\_\_\_ [party, e.g., Defendant] will, and hereby does, move under *Code of Civil Procedure section 1008(a)* for reconsideration of \_\_\_\_\_ [his/her motion or the motion of \_\_\_\_\_ (party, e.g., Plaintiff John Smith)], which the court by [if applicable, add: minute] order made [if applicable, add: and entered] on \_\_\_\_\_ [date] \_\_\_\_\_ [denied or denied in part or granted or granted conditionally or granted on terms], and for \_\_\_\_\_ [modification or amendment or revocation] of that order. The motion is made on the ground that a state of \_\_\_\_\_ [new or different] \_\_\_\_\_ [facts or circumstances or law] exists in that \_\_\_\_\_ [briefly describe the new or different facts, circumstances, or law].

The motion is based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)], the supporting memorandum served and filed with this motion, on the records and file herein, [on such supplemental affidavits or declarations and memoranda as may subsequently be filed herein,] and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [moving party]

#### NOTES.

#### Authority:

CCP § 1008(a)



#### Timing:

See 29.08[1], [3]

#### Grounds:

See 29.11, 29.12

#### Related Form of Declaration:

See 29.31

#### Related Form of Order:

See 29.32

#### Related Form of Memoranda:

See *California Points and Authorities*, § 158.30 (Matthew Bender)





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**29.30 Notice of Renewed Motion and Renewed Motion.**

Notice of Renewed Motion and Renewed Motion  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) NOTICE OF RENEWED MOTION AND RE-  
) NEWED MOTION \_\_\_\_\_ [e.g.,  
) FOR SUMMARY JUDGMENT], SUPPORTING  
) DECLARATION OF \_\_\_\_\_ [name],  
) AND SUPPORTING MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
Date Action Filed: \_\_\_\_\_  
Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon  
thereafter as the matter may be heard, in the courtroom of [\_\_\_\_\_ (Department or Division)  
\_\_\_\_\_ of] this court, located at \_\_\_\_\_ [address], \_\_\_\_\_ [city],  
\_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move the court for  
\_\_\_\_\_ [specify, e.g., summary judgment]. This renewed motion is made under *Code of Civil  
Procedure section 1008(b)* on the grounds that \_\_\_\_\_ [\_\_\_\_\_ (new facts or new

circumstances or new law) exist that did not exist or \_\_\_\_\_ (different facts or different circumstances or different law) are presented than were presented] at the time [party, e.g., Defendant's] prior motion for \_\_\_\_\_ [specify, e.g., summary judgment] was \_\_\_\_\_ [refused in whole or refused in part or granted conditionally or granted on terms] by this court, in that \_\_\_\_\_ [briefly describe the new or different facts, circumstances, or law].

The motion is based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)], [if appropriate, refer to any additional papers, e.g., the attached statement of undisputed material facts,] the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [moving party]

#### NOTES.

#### Authority:

CCP § 1008(b)



#### Timing:

See 29.08[2], [3]

#### Grounds:

See 29.11, 29.12

#### Related Form of Declaration:

See 29.31

#### Related Form of Memoranda:

See California Points and Authorities, § 158.31 (Matthew Bender)



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**29.31 Declaration in Support of Motion for Reconsideration or Renewed Motion.**

Declaration in Support of Motion for Reconsideration or Renewed Motion  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                      |
|---------------|---|--------------------------------------|
| _____ [name], | ) | NO. _____                            |
| Plaintiff,    | ) | DECLARATION OF                       |
| vs.           | ) | _____ [name] IN                      |
| _____ [name], | ) | SUPPORT OF [MOTION TO RECONSIDER OR- |
| Defendant.    | ) | DER _____ (specify, e.g., DENY-      |
|               | ) | ING MOTION FOR SUMMARY JUDGMENT) or  |
|               | ) | RENEWED MOTION                       |
|               | ) | _____ (e.g., FOR SUMMARY             |
|               | ) | JUDGMENT)]                           |
|               | ) | Date: _____                          |
|               | ) | Time: _____                          |
|               | ) | Location: _____                      |
|               | ) | Judge: _____                         |
|               |   | Date Action Filed: _____             |
|               |   | Trial Date: _____                    |

I, \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for Defendant Mary Jones in the action described above or other statement as appropriate] and make this declaration in support of \_\_\_\_\_ [specify, e.g., Defendant

Mary Jones's renewed motion for summary judgment].

2. On \_\_\_\_\_ [date], I, on behalf of \_\_\_\_\_ [party, e.g., Defendant Mary Jones] filed in this court a notice of motion \_\_\_\_\_ [identify prior motion, e.g., for summary judgment]. The motion was heard on \_\_\_\_\_ [date], by the Honorable \_\_\_\_\_ [name]. By [if appropriate, add: minute] order made [if appropriate, add: and entered] on \_\_\_\_\_ [the same date or specify date], the motion was \_\_\_\_\_ [denied in whole or denied in part or granted or granted conditionally or granted on terms]. \_\_\_\_\_ [A conformed copy of the order is attached as Exhibit A and incorporated by reference or The court is requested to take judicial notice of its order].

3. Since the prior motion was heard and ruled on, \_\_\_\_\_ [set forth new facts, circumstances or law within personal knowledge of declarant or of which court must take judicial notice, or facts or circumstances of which court may take judicial notice with request that it do so].

[4. If not already apparent from the statement of the new facts, circumstances, or law, state facts explaining why those facts, circumstances or law were not presented at the time of the original motion.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

NOTES.

**Authority:**

CCP §§ 1008(b), 2015.5

**Drafting Declaration:**

See 29.13[3]

**Related Form of Motion:**

See 29.30

**Related Form of Order:**

See 29.32



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Chapter 29 Motions to Reconsider and Renewed Motions  
V. FORMS

2-29 MB Practice Guide: CA Pretrial Civil Procedure 29.32

**29.32 Order Granting or Denying Motion for Reconsideration.**

Order Granting or Denying Motion for Reconsideration  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                               |
|---------------|---|-------------------------------|
| _____ [name], | ) |                               |
| Plaintiff,    | ) | NO. _____                     |
| vs.           | ) | ORDER ON MOTION TO RECONSIDER |
| _____ [name], | ) | _____                         |
| Defendant.    | ) | [specify subject of order]    |
|               | ) |                               |
|               | ) |                               |

The motion to reconsider brought by \_\_\_\_\_ [party, e.g., Defendant Mary Jones] for an order  
\_\_\_\_\_ [specify nature of underlying motion] came on regularly for hearing by the court on  
\_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; Defendant appeared by  
counsel \_\_\_\_\_ [name].

On proof made to the satisfaction of the court that the motion ought to be \_\_\_\_\_ [granted or denied],  
[EITHER to grant reconsideration and grant the underlying motion]

IT IS ORDERED that the motion to reconsider be, and hereby is, granted and on reconsideration,  
\_\_\_\_\_ [set out particular underlying order that is being granted].

[OR to grant reconsideration and deny the underlying motion]

IT IS ORDERED that the motion to reconsider be, and hereby is, granted and on reconsideration,  
\_\_\_\_\_ [set out particular underlying motion being denied].

[OR to deny the motion for reconsideration]

IT IS ORDERED that the motion be, and hereby is, denied.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

CCP §§ 1003, 1064

**Related Forms of Motion:**

See 29.29

**Related Form of Declaration:**

See 29.31



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Chapter 30 Continuances

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.syn*

**§ 30.syn Synopsis to Chapter 30: Continuances**

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30.02 Objective and Strategy.

30.03 CHECKLIST: Moving for Continuance.

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30.04[1][a] Court May Impose Costs and Conditions on Granting Continuance.

30.04[1][b] Case May Be Removed From Calendar on Granting of Continuance.

30.04[1][c] Case May Be Dismissed for Failure to Prosecute If Not Timely Brought to Trial.

30.04[2] Consider Abatement or Stay Rather Than Continuance If Other Action Pending.

30.04[3] Determine If Continuance Governed by Specific Rather Than General Statute.

30.04[4] Consider Effect of Local Rules Limiting Continuances.

30.04[5] Consider Effect of Preference Status.

30.05 Court Has Discretionary Authority to Grant Continuance.

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30.07 Court Requires Affirmative Showing of Good Cause.

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30.08[2][c] Affidavit or Declaration of Materiality and Due Diligence Required to Postpone Trial.

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30.13 Options and Strategies for Party Opposing Continuance.

30.14 Challenging Good Cause Showing by Moving Party.

30.14[1] Cite Court's Disfavor of Continuances.

30.14[2] Address Judicial Administration Factors.

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30.21 Notice of Motion for Continuance.

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30.23 Declaration of Counsel in Support of Motion for Continuance.

30.24 Declaration of Party in Support of Motion for Continuance.

30.25 Declaration of Physician in Support of Motion for Continuance.

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Chapter 30 Continuances  
I. STRATEGY

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.01*

**30.01 Scope.**

This chapter covers:

- Objectives and strategies for continuances [*see 30.02*].
- Considerations to be assessed before seeking a continuance [*see 30.04*].
- Court authority to grant continuances, factors for determination of good cause, and specific good cause grounds for continuances [*see 30.05-30.08*].
- Procedures for requesting a continuance [*see 30.09*; Forms: *see 30.19-30.28*].
- Preserving testimony and payment of costs as conditions for continuances [*see 30.10, 30.11*; Form 30.26].
- Opposing continuances [*see 30.12-30.16*; Form: *see 30.27*].
- Appeal of continuance orders [*see 30.17, 30.18*].

**Core Statutes:**

*CCP §§ 139, 473(a), 594a-596, 1024, 1054; Cal Rules Ct, Rule 3.1332*



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Chapter 30 Continuances  
I. STRATEGY

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.02*

**30.02 Objective and Strategy.**

Motions and applications for continuances are used to defer a hearing or a trial (or halt a trial) because additional time is required for the parties to fully prepare and present their case.

Continuances raise the competing interests of accommodating the parties' schedules versus the court's need to promptly dispose of cases on the civil calendar. The Trial Court Delay Reduction Act has changed the prior practice of generally granting continuances. With the current goal of disposing of 75 percent of nonexempt unlimited civil cases and 90 percent of nonexempt limited civil cases within one year of filing [see *Cal Rules Ct, Rule 3.714(b)*], it is easy to see why continuances are disfavored.

**Strategic Point:**



The willingness of an individual court to grant continuances varies greatly from courthouse to courthouse and even between individual judges sitting in the same locale.

**Distinguish--Extensions of Time:**

Motions and stipulations for extensions of time are made to increase the time within which to perform a duty or respond after being served with a summons or notice (e.g., a motion to extend statutory time to serve notice of motion or a stipulation to extend time to file responsive pleading). Both extensions of time and continuances result in a similar outcome (i.e. extra time); however, continuances are distinct in that they change established hearing or trial dates rather than increase the time frame within which to perform an act. While "good cause" is required for both procedures, the factual basis for good cause is different between the procedures, and courts have a more rigorous set of standards to be reviewed before granting a continuance.

**Strategic Point--Joint Motions and Stipulations:**



Even if a continuance of the trial date is uncontested or the parties stipulate to a continuance, a request for continuance must be made by a noticed motion or ex parte application [*Cal Rules Ct, Rule, 3.1332(b)*], but the joint motion or stipulation of all parties does show the willingness of the parties to

accommodate one another and reduces the likelihood that a party is prejudiced by the continuance [see *Cal Rules Ct, Rule 3.1332(d)(5), (9)*]. However, the court's obligation to ensure prompt disposition of civil cases is a primary concern, and a stipulation based on a weak showing of good cause will be denied regardless of the parties' willingness to accommodate one another.

**Judge's Perspective:**

Joint Stipulations to continue a trial date are clearly preferred over contested motions. However, counsel need to avoid the notion of being presumptuous when presenting the court with the stipulation. Under no circumstances should counsel simply present a joint stipulation to the court with a proposed order and expect a fast track court to sign the proposed order unless the stipulation was invited by the court in the first place. Counsel should ask the court how best to proceed when a joint request is going to be made.

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 136, Continuances (Matthew Bender).

California Points and Authorities, Ch. 48, Continuance of Proceedings (Matthew Bender).

 **Cross References:**

Discussion of extensions of time, see *Ch. 27, Service of Papers, 27.14 et seq.*

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersContinuances



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Chapter 30 Continuances  
II. MOVING FOR CONTINUANCE

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.03*

**30.03 CHECKLIST: Moving for Continuance.**

☐ Determine need for continuance and possible drawbacks if continuance granted.

- ☐ Cost may be imposed as condition for continuance.
- ☐ Case may be removed from calendar.
- ☐ Case may be dismissed if not brought to trial in statutory time.

**Discussion:**

See 30.04[1]



**Warning:**

Bringing a motion that is frivolous or in bad faith in subject to sanctions [CCP §§ 128.5, 128.7].

☐ Determine whether established good cause grounds for continuance exist:

- ☐ Absent material witness.
- ☐ Absent material evidence.
- ☐ Absent party.
- ☐ Party in military service.

- ☐ Unavailable counsel.
- ☐ Party or witness member of legislature.
- ☐ Other action pending.
- ☐ Amended pleadings.
- ☐ Significant change in status of case.
- ☐ Addition of new party.
- ☐ Insufficient time to bring summary judgment motion.

**Authority:**

*CCP §§ 595, 595.1, 595.4; M&V § 400 et seq.; 50 USC app § 501 et seq.; Cal Rules Ct, Rule 3.1332(c)*

**Discussion:**

See 30.08

☐ Review factors relevant to continuance determination:

- ☐ Proximity of trial date.
- ☐ Previous continuances, time extensions, or trial delays by any party.
- ☐ Length of continuance requested.
- ☐ Availability of alternative means to address problem causing continuance request.
- ☐ Prejudice to party or witness if continuance granted.
- ☐ If case entitled to preferential trial setting, reasons for that status and whether need for continuance outweighs need to avoid delay.
- ☐ Court's calendar and impact on other pending trials.
- ☐ Whether trial counsel is engaged in another trial.
- ☐ Whether all parties have stipulated to a continuance.



☐ Whether interests of justice served by continuance, by trial of matter, or by imposing conditions on continuance.

☐ Any other fact or circumstance relevant to the fair determination of the motion or application.

**Authority:**

*Cal Rules Ct, Rule 3.1332(d)*

**Discussion:**

See 30.07[2]

☐ Determine appropriate new date for trial, the earliest date on which all counsel and court can proceed.



**Timing:**

When moving or applying to continue a trial date, the party must make the motion or application for continuance as soon as reasonably practicable once the necessity for continuance is discovered.

**Authority:**

*Cal Rules Ct, Rule 3.1332(b)*

**Discussion:**

See 30.07[3]

☐ Seek stipulation to continuance by all parties.

☐ Draft stipulation for continuance specifying new date or, if required, to remove case from trial calendar.

☐ Include with notice motion or ex parte application for continuance.

**Authority:**

*CCP §§ 283(1), 595.2; Cal Rules Ct, Rule 3.1332*

**Discussion:**

See 30.02, 30.09[2]

**Forms:**

See 30.19, 30.21, 30.22

☐ Request continuance by noticed motion or ex parte application.

☐ Noticed motion:

☐ Provide 16 court days' notice unless court shortens notice on own motion or after granting request to shorten time.

- ☐ Account for extra time if notice served other than by personal service.
- ☐ Prepare accompanying papers.
  - ☐ Notice of hearing.
  - ☐ Supporting memorandum.
  - ☐ Request for judicial notice, if applicable.
  - ☐ Declarations in support of motion.
  - ☐ Proposed order.
  - ☐ Proof of service.
- ☐ Address motion to assigned judge, or to judge supervising calendar if not yet assigned.
- ☐ Be prepared to pay special filing fee for motion or stipulation for continuance if continuance granted.
- ☐ Ex parte application:
  - ☐ Prepare components of application:
    - ☐ Ex parte application.
    - ☐ Declaration in support of application.
    - ☐ Declaration of notice to opposing parties.
    - ☐ Statement whether shortening time has been previously applied for and/or granted.
    - ☐ Memorandum of points and authorities.
    - ☐ Proposed order.
    - ☐ Other necessary documents, such as a proposed notice of motion.
  - ☐ Notify opposing parties of application no later than 10:00 a.m. the day before hearing.

☐ Be prepared to pay special filing fee for motion or stipulation for continuance if continuance is granted.

**Authority:**

*CCP § 1005(b); Gov Code § 70617(c)(1); Cal Rules Ct, Rules 3.1332(a), 3.1200 et seq.*

**Discussion:**

See 30.09[2], [3]

**Forms:**

See 30.20-30.25, 30.28

☐ If in court, seek oral motion for continuance if emergency.

☐ State for record facts supporting emergency.

☐ Establish good cause for continuance.

☐ Make case for surprise supporting oral motion for continuance.

☐ Be prepared to pay extra \$100 filing fee for motion or stipulation for continuance if continuance is granted.

**Authority:**

*CCP § 128(a)(8); Gov Code § 70617(c)(1)*

**Discussion:**

See 30.09[5]



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Chapter 30 Continuances  
II. MOVING FOR CONTINUANCE

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.04*

### 30.04 Options and Strategies for Party Seeking Continuance.

#### 30.04[1] Consider Negative Consequences If Continuance Granted.

**30.04[1][a] Court May Impose Costs and Conditions on Granting Continuance.** The trial court has discretion to require the payment of the expenses incurred by the nonmoving parties as a result of the postponement as a condition of granting a continuance [*CCP* § 1024; see *DeCesare v. Lember* (1983) 144 CA3d 20, 25-26, 192 CR 354 ].

Courts also have the inherent authority to impose other conditions designed to protect adverse parties against prejudice that might otherwise result from the continuance [see *Muller v. Tanner* (1969) 2 CA3d 445, 458, 82 CR 738 (continuance conditioned on waiver of objection to timeliness of motion for security)].

#### ► Cross Reference:

Payment of costs as condition of continuance, see 30.11.

**30.04[1][b] Case May Be Removed From Calendar on Granting of Continuance.** There is some possibility that a court might grant a continuance but order a case that is not subject to the Trial Court Delay Reduction Act removed from the civil active list. Because counsel may have to repeat the trial setting procedure (or move to set the case for trial) if the case is removed from the active list, counsel should evaluate this possibility before deciding to seek a continuance [see *Cal Rules Ct, Rule 3.1335* (motion to reset for trial)].

#### Judge's Perspective:

Cases are rarely, if ever, removed from the civil active list simply because counsel are requesting a trial continuance. Instead, removal from the civil active list occurs more often when events preclude the trial court from acting further in the matter, such as when the matter is in arbitration, the sole defendant has declared bankruptcy, the matter is pending removal to federal court, or the matter is otherwise stayed [see *Cal Rules Ct, Rule 3.650*].

**30.04[1][c] Case May Be Dismissed for Failure to Prosecute If Not Timely Brought to Trial.** Though unlikely given trial court case management under Fast Track Rules, the use of continuances may lead to involuntary dismissal for delay in prosecution. Repeated requests for continuances may result in discretionary dismissal on the court's own

motion, or on the motion of the defendant if the plaintiff fails to settle or bring the case to trial within two years after filing [see CCP § 583.420(a)(2)(B); see also *Cal Rules Ct, Rule 3.1340*]. If the plaintiff fails to bring the case to trial within five years after filing, mandatory dismissal may result [CCP §§ 583.310, 583.360; see *Blank v. Kirwan* (1985) 39 C3d 311, 331-332, 216 CR 718, 703 P2d 58 (prior law)].

If the facts of a particular case or the practice of the particular court require counsel to take the case off calendar rather than request a continuance to a specified date, the consequences of a dismissal for delay in bringing the action to trial can be avoided if the defendant waives the applicable statutory time requirement [CCP § 583.140; see *Bank of America Nat'l Sav. & Trust Ass'n v. Superior Court* (1937) 22 CA2d 450, 452-453, 71 P2d 296 (applying former CCP § 583(b))].

**30.04[2] Consider Abatement or Stay Rather Than Continuance If Other Action Pending.** When two cases involving substantially the same issues are pending in the same jurisdiction between identical parties, the prior action may be pleaded in abatement of the second action rather than seeking a continuance of one action pending the result of the other action [see CCP § 430.10(c)]. However, if abatement is not applicable because of some difference between the two cases, but the outcome of one of the actions could substantially resolve issues in the other, a continuance (sometimes described as a stay) of the latter case is appropriate [ *Anthony v. General Motors Corp.* (1973) 33 CA3d 699, 707-708, 109 CR 254 (continuance proper when pending case would be collateral estoppel on key issue)].

When one case is brought in California and a related action is pending in another state, instead of requesting a continuance of the California action, move to stay or dismiss on the grounds of inconvenient forum [see CCP §§ 410.30, 418.10(a)(2)].



#### **Warning:**

A motion to stay or dismiss for inconvenient forum must be brought by a defendant before the last day to plead or the issue is waived [see CCP § 418.10(a)].



#### **Cross References:**

Discussion of other action pending as grounds for continuance, see 30.08[8].

Discussion of motion to stay or dismiss for inconvenient forum, see *Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction*, 9.23 et seq.

**30.04[3] Determine If Continuance Governed by Specific Rather Than General Statute.** The general grounds for continuances and the applicable motion procedures are set forth in CCP §§ 139, 473(a)(2), 594a-596, 1024, 1054, and 1054.1. However, specific statutes govern continuances in specific proceedings:

- Postponement of small claims court hearing if all parties are not present [CCP § 116.370(c)(2)].
- Procedure for requesting postponement of small claims court hearing date [CCP § 116.570].
- Proceedings to disqualify judges [CCP § 170.6(a)(4)].
- Proceedings to obtain temporary restraining order [CCP § 527].
- Proceedings to obtain temporary restraining order in labor dispute [CCP § 527.3].
- Proceedings involving adjudication of mining claims [CCP § 595.3].

- Proceedings to partition property [*CCP* § 873.850].
- Mandamus proceedings [*CCP* § 1090].
- Forcible entry and unlawful detainer proceedings [*CCP* § 1173].
- Contempt proceedings [*CCP* § 1217].
- Proceedings before state agency boards and administrative law judges [*Gov Code* § 11524].
- Probate proceedings [*Prob Code* §§ 1045, 1205].
- Motor vehicle actions against nonresidents [*Veh Code* § 17457].

#### **Distinguish--Discovery:**

An extension of time for discovery is not a ground for a continuance [*CCP* § 2024.060].

**30.04[4] Consider Effect of Local Rules Limiting Continuances.** The Trial Court Delay Reduction Act requires all superior courts to implement trial court delay reduction programs and apply firm, consistent policies against continuances as is reasonably possible in all stages of litigation [see *Gov Code* §§ 68605.5, 68607, 68620]. The Act permits parties to stipulate to a single continuance, not to exceed 30 days, within 30 days of filing responsive pleadings [*Gov Code* § 68616(d)].

Most trial courts have local rules governing continuances, either in general or in specific situations. Local rules may affect when continuances can be requested, impose writing and execution requirements, and specify or modify the grounds for continuances [see, e.g., Los Angeles Super Ct Rules, Rule 7.12(a) (a lawyer should not attach unfair and extraneous conditions to extensions); Alameda Super Ct Rules, Rule 5.2 (no hearing may be dropped or continued less than 48 hours before the hearing); Sacramento Super Ct Rules, Rule 11.09 (filing no later than 170 days after complaint filed; stipulation ineffective unless filed with court within 30 days of service of all responsive pleadings; all responsive pleadings must have been served within 30 days of date of stipulation)].

**30.04[5] Consider Effect of Preference Status.** When a case is entitled to preferential trial setting based on age or terminal illness, the case must be set for trial within 120 days [*CCP* § 36]. A continuance beyond that 120-day period may only be granted based on the physical disability of a party or counsel, or on some other showing of good cause in the record [see *CCP* § 36]. If granted, the continuance is limited to 15 days, and only one continuance may be sought by any one party [*CCP* § 36(f)].



#### **Strategic Point--Moving Party:**

If the party in whose favor the preference was granted is not prepared for trial on the continued date, the party may request off-calendar status [see *Greenblatt v. Kaplan's Restaurant* (1985) 171 CA3d 991, 995-996, 217 CR 746 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersContinuances



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Chapter 30 Continuances  
II. MOVING FOR CONTINUANCE

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**30.05 Court Has Discretionary Authority to Grant Continuance.**

The authority to postpone the time of a hearing or trial is inherent in the court's jurisdiction to hear and determine a proceeding [ *Curtis v. Underwood* (1894) 101 C 661, 669, 36 P 110 ]. This authority is independent from the rules of court specifying procedures for the exercise of this authority [see *Cal Rules Ct, Rule 3.1332*], and from statutory and case law delineating when this authority is appropriately exercised [see *CCP §§ 594a-596*; see also *Taylor v. Bell* (1971) 21 CA3d 1002, 1008, 98 CR 855 ].

The trial court has discretion to determine whether to grant a continuance even when the applicable statutory language appears to make postponement mandatory [ *Pham v. Nguyen* (1997) 54 CA4th 11, 15, 62 CR2d 422 ; *Thurmond v. Superior Court* (1967) 66 C2d 836, 838-840, 59 CR 273, 427 P2d 985 ]. This discretion has been described as a legal discretion, not capricious or arbitrary, but one controlled in its exercise by fixed legal principles [ *Kalmus v. Kalmus* (1951) 103 CA2d 405, 415, 230 P2d 57 ]. Further, the court has broad discretion to determine the existence of good cause [ *Estate of Smith* (1973) 9 C3d 74, 81, 106 CR 774, 507 P2d 78 ]. Absent a clear abuse of this discretion, the trial court's finding of good cause to support a continuance will not be disturbed by an appellate court [ *Lewis v. Neptune Society Corp.* (1987) 195 CA3d 427, 429, 240 CR 656 ]. However, trial courts may be reversed for refusing to grant a continuance if their actions, however laudable in controlling their calendar, deny the party an opportunity to fairly and fully present his or her case [ *Hays v. Viscome* (1953) 122 CA2d 135, 140, 264 P2d 173 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersContinuances



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Chapter 30 Continuances  
II. MOVING FOR CONTINUANCE

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.06*

**30.06 Courts Generally Disfavor Continuances.**

Continuances before or during trial in civil cases are disfavored. The dates assigned for trial are firm, and all parties and their counsel must regard the date set for trial as certain [*Cal Rules Ct, Rule 3.1332*; *see Gov Code § 68607(g)* (judges are directed to use firm, consistent policy against continuances, to maximum extent possible and reasonable); *see also Lazarus v. Titmus* (1998) 64 CA4th 1242, 1249, 75 CR2d 676 (upholding denial of continuance when plaintiff's acceptance of job offer and need to attend training conflicted with trial date)].

*Cal Rules Ct, Rule 3.1332* bars the granting of a continuance of a trial date except on an affirmative showing of good cause. A request for continuance almost always affects the court's ability to meet its obligations under the fast track rules. Nonetheless, a request for a continuance supported by a showing of good cause usually ought to be granted, absent some balancing circumstances [*see Estate of Meeker* (1993) 13 CA 4th 1099, 1105, 16 CR2d 825 ].

**Judge's Perspective:**

Recently, the trend has been to focus too much on absolute adherence to fast track time standards. In both fast track and complex litigation, trial judges need to be more flexible and should orient their primary focus on the dispensing of justice [*see Estate of Meeker* (1993) 13 CA 4th 1099, 16 CR2d 825 ; *Polibrid Coatings, Inc. v. Superior Court* (2003) 112 CA4th 920, 923-924 (trial continuance required where necessary to allow late-added defendant an opportunity to reasonably complete discovery and bring a summary judgment motion; denial of continuance reversed where based on need to maintain disposition time goals)]. Specifically, in *Estate of Meeker at page 1105* , the Court states the following: "... [w]e do question the increasing number of trial court decisions reflecting an attitude of absolute adherence to time standards without regard to the court's *raison d'etre*."



**Cross Reference:**

Discussion of grounds, *see 30.08*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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Chapter 30 Continuances  
II. MOVING FOR CONTINUANCE

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.07*

**30.07 Court Requires Affirmative Showing of Good Cause.**

**30.07[1] Showing of Good Cause Required by Moving Party.** Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits; and the court may grant a continuance only upon an affirmative showing of good cause requiring the continuance [*Cal Rules Ct, Rule 3.1332(c)*]. Circumstances that may indicate good cause include [*Cal Rules Ct, Rule 3.1332(c)*]:

- The unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances.
- The unavailability of a party because of death, illness, or other excusable circumstances.
- The unavailability of trial counsel because of death, illness, or other excusable circumstances.
- The substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice;
- 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 in regard to the new party's involvement in the case.
- A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts.
- A significant, unanticipated change in the status of the case as a result of which the case is not ready

for trial.

One element of good cause has been described as necessity [ *County of San Bernardino v. Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 781, 140 CR 383 ].

Other elements typically evaluated in determining the existence of good cause are the party's past record of diligence in proceeding with the case and the degree of prejudice to either side [see *Carl v. Thomas* (1931) 116 CA 294, 300-301, 2 P2d 872 ].



#### **Strategic Point--Moving Party:**

The type of continuance sought ordinarily determines the type of "good cause" that must be shown to support the motion. Although several statutes describe situations that support a finding of good cause for a continuance, case law describes other sets of facts in which continuances have been deemed either justifiable or necessary [ *Taylor v. Bell* (1971) 21 CA3d 1002, 1008, 98 CR 855 ].

**30.07[2] Court's Determination of Good Cause Based on Specific Factors.** In ruling on a motion or application for continuance, the court must consider all the facts and circumstances that are relevant to the determination, which include [ *Cal Rules Ct, Rule 3.1332(d)* ]:

- The proximity of the trial date.
- Whether there was any previous continuance, extension of time, or delay of trial due to any party.
- The length of the continuance requested.
- The availability of alternative means to address the problem that gave rise to the motion or application for a continuance.
- The prejudice that parties or witnesses will suffer as a result of the continuance.
- If the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay.
- The court's calendar and the impact of granting a continuance on other pending trials.
- Whether trial counsel is engaged in another trial.
- Whether all parties have stipulated to a continuance.
- Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance.
- Any other fact or circumstance relevant to the fair determination of the motion or application.

However, *Cal Rules Ct, Rule 1.100(f)* permits a trial court to deny a request for accommodation, which under appropriate circumstances may include a continuance [ *In re Marriage of James & Christine C.* (2008) 158 CA4th 1261, 1274 n.4, 70 CR3d 715 (interpreting *Cal Rules Ct, Rule 1.100(a)(3)*) ], under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, only if the court makes a determination of at least one of three specifically identified

grounds [ *In re Marriage of James & Christine C.* (2008) 158 CA4th 1261, 1265 n.2, 70 CR3d 715 ].

**30.07[3] Court Must Be Notified Immediately of Need for Continuance.** The party must make the motion or application for continuance of the trial date as soon as reasonably practical once the necessity for the continuance is discovered [ *Cal Rules Ct, Rule 3.1332(b)* ]. A delay may support a finding of lack of good cause [ *Lazarus v. Titmus* (1998) 64 CA4th 1242, 1249, 75 CR2d 676 ].

**Legal Topics:**

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Chapter 30 Continuances  
II. MOVING FOR CONTINUANCE

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.08*

**30.08 Grounds for Continuance.**

**30.08[1] Unavailable Material Witness.**

**30.08[1][a] Witness Testimony Must Be Material.** The unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances may be considered good cause for a continuance [*Cal Rules Ct, Rule 3.1332(c)(1)*]. The unavailability of a material witness, or the absence of material evidence, may constitute proper grounds for a continuance [ *Jurado v. Toys "R" Us, Inc.* (1993) 12 CA4th 1615, 1618, 16 CR 2d 158 ; *Cade v. Mid-City Hospital Corp.* (1975) 45 CA3d 589, 599-600, 119 CR 571 ]. The testimony of the absent witness must be material in the sense that the evidence cannot be proven in other ways [see *Oak Knoll Broadcasting Corp. v. Hudgings* (1969) 275 CA2d 563, 565-566, 80 CR 175 (defining material witness)]. Thus, a witness whose testimony is cumulative or only collateral to the controverted issue, or who is needed only for impeachment purposes, is not a material witness for the purpose of granting a continuance [ *Lewis v. Neptune Society Corp.* (1987) 195 CA3d 427, 429, 240 CR 656 (cumulative testimony); *Zlotoff v. Tucker* (1984) 154 CA3d 988, 993-994, 201 CR 692 (collateral issue); *In re Steiner* (1955) 134 CA2d 391, 395, 285 P2d 972 (impeachment only)].

**30.08[1][b] Due Diligence to Procure Attendance Required.** Obtaining a continuance on the basis of the absence of a material witness requires a showing of diligence [see *CCP § 595.4*]. Counsel must state facts that support a claim of diligence [ *Lewis v. Neptune Society Corp.* (1987) 195 CA3d 427, 430, 240 CR 656 ]. In the case of a scheduled witness, counsel should show substantial previous efforts to procure the witness's attendance [see *Marcucci v. Vowinkel* (1913) 164 C 693, 694-695, 130 P 430 ; *Jurado v. Toys "R" Us, Inc.* (1993) 12 CA4th 1615, 1619, 16 CR2d 158 (denial of continuance reversed when one subpoenaed medical expert left country before trial and other moved with no forwarding address); see also *Kramer v. Kramer* (1961) 197 CA2d 727, 731, 17 CR 461 (denial of continuance upheld when witness was on call, but not subpoenaed, and court refused to wait 15 minutes for witness to appear)].

Denial of a continuance is justified if counsel cannot identify the witness or state when the witness will be available [ *Allstate Ins. Co. v. King* (1967) 252 CA2d 698, 703, 60 CR 892 ].

**30.08[1][c] Consider Substitution for Ill Witness and Include Doctor's Declaration.** Though former Cal Rules Ct, App, Div. § 9 is now repealed, the court might still find good cause is not met if there is a reasonable opportunity that another witness may be substituted. Be prepared to show the court why substituting another witness is impossible

or impracticable.



**Strategic Point--Moving Party:**

The illness of a witness should be supported whenever possible by an appropriate declaration of a medical doctor, stating the nature of the illness and anticipated period of incapacity.

**30.08[1][d] Affidavit or Declaration of Materiality and Due Diligence Required to Postpone Trial.** To postpone a trial date, the motion for continuance can only be made by affidavit (or declaration under *CCP* § 2015.5) showing the evidence's materiality and the due diligence used to procure it [*CCP* § 595.4].

**30.08[1][e] Court May Require Affidavit or Declaration of Expected Testimony to Postpone Trial.** For a motion to postpone a trial due to an unavailable material witness, the court may require moving party to state upon affidavit (or declaration under *CCP* § 2015.5) the evidence (testimony) expected to be obtained [*CCP* § 595.4].



**Trap:**

If the adverse party to the continuance admits that the testimony proffered in the affidavit or declaration would be that given at trial, and that it be considered as actually given on the trial, the court must not continue the trial [*CCP* § 595.4]. Moreover, if the proffered testimony is offered and overruled as improper, the court must not continue the trial [*CCP* § 595.4].



**Strategic Point--Movant:**

When preparing the expected testimony, be very careful to include all material points in support of the case. The adverse party may accept the testimony as a tactical decision if important parts of the testimony are left out. The more complete the testimony, the less likely the adverse party will accept it because of the lack of opportunity for cross examination. Additionally, review the testimony for possible evidentiary objections to avoid the court finding the evidence improper and denying the continuance.

**30.08[2] Unavailable Material Evidence.**

**30.08[2][a] Evidence Must Be Material.** A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts may be considered good cause for a continuance [*Cal Rules Ct, Rule 3.1332(c)(6)*]. The absence of material evidence, or the unavailability of a material witness, may constitute proper grounds for a continuance [ *Jurado v. Toys "R" Us, Inc.* (1993) 12 CA4th 1615, 1618, 16 CR 2d 158 ; *Cade v. Mid-City Hospital Corp.* (1975) 45 CA3d 589, 599-600, 119 CR 571 ].

**Distinguish:**

In cases that have held the evidence to be immaterial, the party has usually been exceedingly lax in bringing the case to trial [see *Agnew v. Larson* (1961) 197 CA2d 444, 449-450, 17 CR 538 ]. In contrast, courts may overlook a moderate failure of diligence if the evidence is of critical importance to the party's cause [see *Murr v. Murr* (1948) 87 CA2d 511, 521-522, 197 P2d 369 ].

**30.08[2][b] Due Diligence to Obtain Evidence Required.** Obtaining a continuance on the basis of absent material evidence requires a showing of diligence [*Cal Rules Ct, Rule 3.1332(c)(6)*; see *CCP* § 595.4]. Counsel must state facts that support a claim of diligence [ *Lewis v. Neptune Society Corp.* (1987) 195 CA3d 427, 430, 240 CR 656 ]. Diligence is lacking when counsel requests time to obtain evidence, the need for which should have been anticipated before the trial [ *Estate of Smith* (1973) 9 C3d 74, 81, 106 CR 774, 507 P2d 78 ; *Advantec Group, Inc. v. Edwin's Plumbing Co., Inc.* (2007) 153 CA4th 621, 630-631, 63 CR3d 195 (denial of continuance to obtain certified copy of license)].

**Strategic Point:**

If the plaintiff's complaint alleges that the plaintiff possesses a license necessary to maintain the action, a general denial puts that allegation at issue, without the need to raise the issue by affirmative defense, and because the plaintiff should have anticipated the burden of proving possession of the license, the trial court need not continue the trial to allow the plaintiff to cure the license requirement [see *Advantec Group, Inc. v. Edwin's Plumbing Co., Inc.* (2007) 153 CA4th 621, 630-631, 63 CR3d 195 ]. In such a situation, the defendant may not want to alert the plaintiff to this issue by raising it by a plea in abatement or as an affirmative defense. In turn, the plaintiff should be alert to the need to prove the license requirement at trial or risk a nonsuit and adverse judgment.

However, counsel is not required to anticipate an unpredictable change of events at trial [ *Crosby v. Martinez* (1958) 159 CA2d 534, 541-542, 324 P2d 26 (legal surprise as basis for continuance when evidence admitted in error and rebuttal witness not otherwise needed)].

**30.08[2][c] Affidavit or Declaration of Materiality and Due Diligence Required to Postpone Trial.** A motion to postpone a trial on unavailable material evidence must be made on 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 [CCP § 595.4]. Counsel must describe the desired evidence with particularity and state facts showing its materiality [ *Lea v. Shank* (1970) 5 CA3d 964, 977, 85 CR 709, 86 CR 515 ; see *Lewis v. Neptune Society Corp.* (1987) 195 CA3d 427, 429, 240 CR 656 ]. An affidavit or declaration that states evidence already testified to, or that fails to describe the evidence adequately, is insufficient to support a continuance to produce material evidence [ *Stephens v. Aviation Research & Dev. Pub. Corp.* (1966) 243 CA2d 349, 351, 52 CR 322 ].

**30.08[3] Unavailable Party.**

**30.08[3][a] Mere Absence Insufficient, Good Cause Requires Critical Necessity of Party's Presence.** The unavailability of a party because of death, illness, or other excusable circumstances may be considered good cause for a continuance [ *Cal Rules Ct, Rule 3.1332(c)(2)* ]. The mere absence of a party from a proceeding is not sufficient reason to compel a court to grant a continuance [ *Young v. Redman* (1976) 55 CA3d 827, 832, 128 CR 86 ]. Thus, a party may bring an issue to trial or hearing and proceed with the case in the absence of the other party unless the court, for good cause, otherwise directs [CCP § 594(a)].

Good cause requires more than a showing of serious illness or unavoidable absence [ *Nahas v. Nahhas* (1955) 135 CA2d 440, 442, 287 P2d 381 ]. The party's presence must be critically necessary to assist counsel or to testify [ *Sonstelie v. Bush* (1929) 102 CA 396, 398-399, 283 P 336 ]. Further, the party should have been otherwise proceeding with the case diligently [ *Pacific Gas & Elec. Co. v. Taylor* (1921) 52 CA 307, 310, 198 P 651 ]. A party's illness does not support a continuance if the trial court concludes that the party is able to attend trial [ *Lewis v. Neptune Society Corp.* (1987) 195 CA3d 427, 430, 240 CR 656 ].

Parties must consider trial dates to be definite court appointments taking priority over nonemergencies. Therefore, a party's unavailability will not support a finding of good cause when the conflicting commitment was made with knowledge of the trial date [ *Lazarus v. Titmus* (1998) 64 CA4th 1242, 1249, 75 CR2d 676 ].

**Exception:**

*Cal Rules Ct, Rule 1.100(f)* permits a trial court to deny a disabled party's request for accommodation, which under appropriate circumstances may include a continuance [ *In re Marriage of James & Christine C.* (2008) 158 CA4th 1261, 1274 n.4, 70 CR3d 715 (interpreting *Cal Rules Ct, Rule 1.100(a)(3)*)], under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, only if the court makes a determination of at least one of three specifically identified grounds [ *In re Marriage of*

*James & Christine C. (2008) 158 CA4th 1261, 1265 n.2, 70 CR3d 715 ].*

**Exception:**

A continuance is appropriate when a scheduled trial date unexpectedly changes and a party's prior commitment conflicts with the new date [ *Link v. Cater (1998) 60 CA4th 1315, 1324-1326, 71 CR2d 130* (denial of continuance was abuse of discretion when notification of delay was late and new date conflicted with preexisting medical appointment)].

**Drawback--Continuance Conditioned on Taking Deposition:**

Though former Cal Rules Ct, App, Div. § 9 is now repealed, the court might still condition a continuance of the taking of a deposition. If a party has already or could testify by deposition, continuances based on illness are ordinarily denied except for continuances for evidence-taking [ *Young v. Redman (1976) 55 CA3d 827, 831, 128 CR 86* (voluntarily absent party had already given deposition); *Russell v. Roberts (1974) 39 CA3d 390, 397, 114 CR 305* (party hospitalized but available for evidence-taking)].

**30.08[3][b] Submit Doctor's Declaration If Party Ill.** The illness of a party should be supported, whenever possible, by an appropriate declaration of a medical doctor, stating the nature of the illness and the anticipated duration of any incapacity [see *In re Marriage of James & Christine C. (2008) 158 CA4th 1261, 1275, 70 CR3d 715* (doctor's declaration provided explanation of condition required for accommodation of disability, i.e., continuance, requested under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* in accordance with *Cal Rules Ct, Rule 1.100(f)*) and *In re Marriage of Teegarden (1986) 181 CA3d 401, 405-406, 226 CR 417 ].*

**30.08[4] Party in Military Service.**

**30.08[4][a] Servicemembers Civil Relief Act Is Federal Authority for Continuance.** The Servicemembers Civil Relief Act [50 USC app § 501 *et seq.*; formerly known as the Soldiers' and Sailors' Civil Relief Act] empowers courts to continue any case in which a party is in the military service unless the party's ability to prosecute or defend is not materially affected by reason of military service [50 USC app §§ 521(d)-(f), 522; see *Buttler v. City of Los Angeles (1984) 153 CA3d 520, 526, 200 CR 372 ].*

The Servicemembers Civil Relief Act, enacted in 2003 and replacing the Soldiers' and Sailors' Civil Relief Act, significantly changed the federal law to make the granting of stays essentially automatic; in any action or proceeding in which a person in the military service is involved, the court is required to grant a stay of proceedings for a minimum period of 90 days upon application by the qualified servicemember [50 USC app, §§ 521, 522; see also *Christine M. v. Superior Court (1999) 69 CA4th 1233, 1243-1245, 82 CR2d 220* (interpreting prior law, but showing record supported denial of requested stay)].

**Distinguish:**

Unlike the initial stay, the court has discretion whether to grant an additional stay under the Servicemembers Civil Relief Act [see 50 USC § 522(d)], and the court may deny it if the servicemember's ability to appear and participate in a civil action is not adversely affected by his or her military duties, in which case the court may alternatively appoint counsel [ *George P. v. Superior Court (2005) 127 CA4th 216, 224-225 ].*

**Exception:**

Continuances have been held unnecessary if only issues of law, not fact, are in dispute or if the military party is judgment-proof [ *Whealton v. Whealton (1967) 67 C2d 656, 665-666, 63 CR 291, 432 P2d 979* ; *Culver v. Superior Court (1954) 125 CA2d 76, 78, 270 P2d 78* (interpreting prior law, but may be applicable under new Act)].

**30.08[4][b] State Statutes Provide Protections for Reservists and Members of the National Guard.** California

has enacted statutes similar to the Servicemembers Civil Relief Act to offer protections for service members who are officers and enlisted members of the National Guard called or ordered into active state service by the Governor or President, and Reservists of the United States Military Reserve who have been called to full-time active duty [see *M&V § 400 et seq.*]. At any stage in any action or proceeding in which a service member is involved as plaintiff or defendant during the period of military service or within 60 days thereafter, the court may, in its discretion on its own motion, and must, on application to it by the service member or some person on his or her behalf, stay the action or proceeding unless the court concludes that the plaintiff's ability to prosecute the action or the defendant's ability to conduct his or her defense is not materially affected by reason of the military service [see *M&V § 403(a)*].

The court may order a stay of any action for the period of military service and three months thereafter, or any part of that period, and subject to those terms as may be just. If the service member is a codefendant, plaintiff may, by leave of court, proceed against the others [see *M&V § 403(d)*].



#### **Warning:**

In 2003, the federal Servicemembers Civil Relief Act (formerly the Soldiers' and Sailors' Civil Relief Act) was significantly changed to make the granting of stays brought under this Act essentially automatic upon application by the servicemember. The revisions to the federal law eliminated language allowing the court to deny the stay if in the court's opinion military service did not materially affect the servicemember's ability to prosecute or defend the action [see *50 USC app § 522*]. However, California law, patterned after the former law, retains this requirement. Cases interpreting the federal law prior to the 2003 revisions may be useful in supporting a motion for a continuance brought under the California Military and Veterans Code which requires the servicemember to make a prima facie showing that his or her ability to prosecute or defend is materially affected by reason of military service.

### **30.08[5] Unavailable Trial Counsel.**

**30.08[5][a] Diligence of Counsel Required And Schedule Conflicts Must Be Unavoidable.** The unavailability of trial counsel because of death, illness, or other excusable circumstances may be considered good cause for a continuance [*Cal Rules Ct, Rule 3.1332(c)(3)*; see *Thomas v. Toppins (1928) 206 C 18, 19, 272 P 1042*]. Continuances may be granted to counsel to provide additional preparation time, resolve a conflict between cases, or reschedule a case when counsel is absent. Counsel must show both diligence and necessity [ *County of San Bernardino v. Doria Mining & Eng'g Corp. (1977) 72 CA3d 776, 783, 140 CR 383* ]. When the asserted basis for continuance is the unavailability of counsel, the trial court must carefully consider the reasons for that unavailability when exercising its discretion with due regard to all interests involved [ *Arm v. State Bar (1990) 50 C3d 763, 776, 268 CR 741, 789 P2d 922* ].

When the party and counsel have been diligent, but counsel is nonetheless not ready for trial, denial of a continuance has been held to be reversible error [ *Vann v. Shilleh (1975) 54 CA3d 192, 196-199, 126 CR 401* (denial of continuance reversed when former counsel withdrew, not at party's request, one or two days before trial); *Cohen v. Herbert (1960) 186 CA2d 488, 493-496, 8 CR 922* (denial of continuance reversed when attorney was involved in military duties, opposing party was not prejudiced, and receivership would be imposed absent continuance)]. An unusual problem with a case in and of itself will not support a continuance if the number of trial preparation days was adequate [ *Beck v. Reinholtz (1956) 138 CA2d 719, 722-723, 292 P2d 906* (denial of continuance affirmed when attorney discovered he lacked all necessary information during pretrial period longer than that prescribed by statute)].

*Cal Rules Ct, Rule 3.1332* eases the restrictiveness of the prior rule (former *Cal Rules Ct, App, Div. I, § 9(3)(i)* (repealed January 1, 2004)) with respect to continuances for schedule conflicts of counsel. In determining such questions, the court must apply all relevant factors of the rule [see *Cal Rules Ct, Rule 3.1332(d)*]. The policy of expediting civil cases generally cannot override the trial court's obligation to hear cases on the merits; a civil litigant has a constitutional right to be represented by counsel at trial, which generally may not be abrogated simply because the



trial court concludes that the litigant's counsel of choice takes on too many cases [ *Oliveros v. County of Los Angeles* (2004) 120 CA4th 1389, 1398-1399 ].

**Distinguish:**

Counsel may well still have a duty under the rule to anticipate or take steps to resolve the schedule conflict [see *Bixby v. Hotchkis* (1945) 72 CA2d 368, 371-372, 164 P2d 808 (decided under prior rule)], but appellate courts have not yet expounded on the extent of that duty under the new rule and the consequences for violating it.



**Warning--Local Rules:**

Local court rules or practice may also restrict the availability of continuance on the ground of schedule conflict [see, e.g., San Mateo Super Ct Rules, Rule 2.3(e)(4) (no continuance of trial date on ground that counsel is engaged in trial of another case unless trial counsel and back-up trial counsel were specified at first case management conference)].

**30.08[5][b] Necessity of Counsel Required.** Even when the party and attorney act with diligence, a continuance may be denied if there is no real necessity for its issuance [ *Fejer v. Paonessa* (1951) 104 CA2d 190, 194-195, 231 P2d 507 (denial of continuance affirmed when two of party's attorneys were unprepared but party had adequate representation from third counsel); *County of San Bernardino v. Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 783, 140 CR 383 (denial of continuance affirmed when party sought to substitute counsel without showing that counsel of record was unable or unwilling to provide representation)].

**30.08[5][c] Substitution of Trial Counsel Requires Affirmative Showing.** The substitution of trial counsel may be considered good cause for a continuance, but only where there is an affirmative showing that the substitution is required in the interests of justice [*Cal Rules Ct, Rule 3.1332(c)(4)*].

**30.08[6] Judge Engaged in Another Trial.** The court may, on its own motion, postpone a trial if the court is engaged in the trial of another action at the time fixed for the trial of the instant action [*CCP § 594a; see also CCP § 139* (daily adjournment when judge absent)].

**30.08[7] Member of California Legislature When Legislature in Session.**

**30.08[7][a] Continuance Generally Mandatory.** Subject to stated exceptions, a member of the California Legislature is entitled to a continuance when he or she is a party, attorney of record, or principle witness to a civil action before a trial court or an administrative proceeding before a state board, commission, or officer when the Legislature is in session or in a recess of no more than 40 days [*CCP § 595*]. The action or proceeding may not be brought for trial or hearing before the expiration of 30 days next following final adjournment of the Legislature or the commencement of a recess of more than 40 days without the consent of the attorney of record. If a date is available during recess, continuance must be given to the earlier recess date rather than a date during adjournment [*CCP § 595*].

In the trial court, the continuance applies to any discovery proceeding, pretrial conference, deposition, interrogatory, or any other proceeding arising out of the pending civil action as well as the trial itself [*CCP §§ 595, 595.1*].

**Exceptions:**

The granting of a continuance on this basis is mandatory unless the court determines that a continuance would defeat or abridge a right to relief pendente lite in a paternity action or a right to invoke a provisional remedy such as pendente lite support in a domestic relations controversy, attachment and sale of perishable goods, receivership of a failing business, and temporary restraining order or preliminary injunction, and that the continuance should not be granted [*CCP § 595*].

**30.08[7][b] Continuance Extends Time for Rulings and Parties' Performance.** The continuance for a legislator

suspends the running of any period of time for any ruling or proceeding by the court, board, commission, or officer, or for the performance by any party of any act affected by the postponement for the same duration as the postponement [CCP § 595].

### 30.08[8] Other Action Pending.

**30.08[8][a] Move for Continuance When Abatement Not Applicable.** In general, when two cases involving substantially the same issues are pending in the same jurisdiction between identical parties, the prior action may be pleaded in abatement of the second action [CCP § 430.10(c)]. However, if abatement is not applicable because of some difference between the two cases, but the outcome of one of the actions could substantially resolve issues in the other, a continuance (sometimes described as a stay) of the latter case is appropriate [ *Anthony v. General Motors Corp.* (1973) 33 CA3d 699, 707-708, 109 CR 254 (continuance proper when pending case would be collateral estoppel on key issue); *Pesquera Del Pacifico S. De R. L. v. Superior Court of San Diego County* (1949) 89 CA2d 738, 741, 201 P2d 553 (continuance not necessary when foreign trial raised different issues)]. The party seeking a stay need not be a party to the other proceeding (or subject to collateral estoppel) if the result of the other proceeding would simplify the postponed case and prevent multiple adjudication of some issued affecting some parties [ *Marcus v. Superior Court* (1977) 75 CA3d 204, 209-212, 141 CR 890 ].



#### Timing:

The uncontinued case need not have been filed before the continued case [ *Ehrhart & Assocs., Inc. v. Superior Court* (1960) 185 CA2d 1, 4, 7 CR 844 ]. Continuance may be justified whether the uncontinued case is at the pretrial, trial, or appellate stage [ *Margolis v. Superior Court of San Mateo County* (1957) 151 CA2d 333, 338-339, 311 P2d 167 ].

**30.08[8][b] Use Stay Based on Inconvenient Forum When Other Action Pending Outside California.** When one case is brought in California and a related action is pending in another state, a result similar to a continuance may be available. CCP § 410.30 (inconvenient forum) permits a California court to stay (or dismiss) an action when the court finds that, in the interest of substantial justice, the action should be heard in a forum outside the state. When granting a continuance under case law, the main concern of the court is the effect of the other pending action on issues in the instant case; however, under CCP § 410.30, the trial court examines factors as convenience, residence, and availability of witnesses [see, e.g., *Belnap Freight Lines, Inc. v. Petty* (1975) 46 CA3d 159, 162-164, 119 CR 907 ].



#### Warning:

A motion to stay or dismiss for inconvenient forum must be brought by a defendant before the last day to plead or the issue is waived [see CCP § 418.10(a)]. However, a motion to stay or abate on the ground that another action is pending may be raised after the time frame set by CCP § 418.10, if the defense has been raised in the answer [see CCP § 597]. If the defense has not been raised in the answer, counsel should consider a motion seeking relief to amend the answer, coupled with a motion to stay or abate.



#### Cross Reference:

Discussion of motion to stay or dismiss for inconvenient forum, see *Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction*, 9.23 et seq.

**30.08[9] Amended Pleadings.** When a trial court determines that an amendment of pleadings requires a postponement, the court may on its own motion postpone the trial [CCP § 473(a)(2)]. The decision to allow amendment of the pleadings if requested during trial will not be disturbed absent a clear showing of abuse of discretion [ *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 CA4th 373, 383, 11 CR 2d 524 ]. Counsel may request a continuance on the ground of surprise when the court permits an opposing party to amend the pleadings [see *Carl v. Thomas* (1931) 116 CA 294, 298, 2 P2d 872 ]. Similarly, good cause may exist when the court causes a

significant, unanticipated change in the case by order a change in the parties or pleadings [see *Cal Rules Ct, Rule 3.1332(c)(7)*].



**Strategic Point--Moving Party:**

A continuance required by the amendment of pleadings may be appropriate even if the matter is on the "fast track" [ *Honig v. Financial Corp. of America* (1992) 6 CA4th 960, 967, 7 CR 2d 922 (rule permitting liberal amendment of complaint applies to fast track cases even when amendment requires continuance)].



**Strategic Point--Responding Party:**

The court may require, as a condition to permitting the amendment, the payment of just costs to the adverse party [*CCP § 473(a)(2)*; see 30.11].

**30.08[10] Significant, Unanticipated Change in Status of Case.** A significant, unanticipated change in the status of the case as a result of which the case is not ready for trial may be considered good cause for a continuance [*Cal Rules Ct, Rule 3.1332(c)(7)*].

**30.08[11] Addition of New Party.** The addition of a new party may be considered good cause for a continuance under the following circumstances [*Cal Rules Ct, Rule 3.1332(c)(5)*]:

- The new party has not had a reasonable opportunity to conduct discovery and prepare for trial; or
- The other parties have not had a reasonable opportunity to conduct discovery and prepare for trial in regard to the new party's involvement in the case.

**30.08[12] Insufficient Time to Bring Summary Judgment Motion.** A trial date may be continued to permit sufficient time for a party to conduct discovery and file a motion for summary judgment; the fast track rules must give way to the statutory right to bring a motion for summary judgment [ *Polibrid Coatings, Inc. v. Superior Court* (2003) 112 CA4th 920, 923-924 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**30.09 Procedure for Seeking Continuance.**

**30.09[1] Court May Postpone Trial on Its Own Motion.** A court may postpone a trial on its own motion when [CCP § 594a]:

- The court is engaged in the trial of another action at the time fixed for trial.
- Amended pleadings require postponement [CCP § 473(a)(2)].
- The allowance of time to plead or amend the pleadings requires postponement [CCP § 473(a)(2)].

**30.09[2] Stipulation by Attorneys.**

**30.09[2][a] Written Noticed Motion or Ex Parte Application Required Despite Stipulation of the Parties.**

Even if the parties stipulate to a continuance of the trial date, a notice motion or ex parte application is required for a continuance [Cal Rules Ct, Rule 3.1332(b)].



**Cross References:**

Form of stipulation for continuance, see 30.19; form of notice of joint motion for continuance, see 30.22.

**30.09[2][b] Trial or Hearing on Motion or Demurrer May Be Postponed Up to 30 Days.** A court may postpone a trial, or the hearing of any motion or demurrer, for a period not to exceed 30 days, when all attorneys of record of parties who have appeared in the action agree in writing to the postponement [CCP § 595.2].

CCP § 595.2 has been construed as directory only; if it is impracticable to accommodate the parties, the court may refuse a continuance [ *Lorraine v. McComb* (1934) 220 C 753, 757, 32 P2d 960 ; *Pham v. Nguyen* (1997) 54 CA4th 11, 15, 62 CR2d 422 ]. One court has suggested that although CCP § 595.2 does not create any entitlement to a continuance, trial courts should be cognizant of the exigencies of actual practice and recognize that continuances play a legitimate role in keeping a law practice manageable [ *Pham v. Nguyen* (1997) 54 CA4th 11, 15-16, 62 CR2d 422 (criticizing *County of San Bernardino v. Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 140 CR 383 's suggestion that continuances be granted only grudgingly is too extreme)]. Balancing the competing goals of prompt disposition of

civil cases and accommodating professional courtesy between opposing counsel may require some discernment by the trial court [ *Pham v. Nguyen* (1997) 54 CA4th 11, 16-17, 62 CR2d 422 (trial court did not abuse its discretion in denying continuance)].

**30.09[2][c] Parties May Stipulate to Continuance of Up to 30 Days After Service of Responsive Pleading.** The Trial Court Delay Reduction Act permits parties to stipulate to a single continuance, not to exceed 30 days, within 30 days after service of responsive pleadings [*Gov Code* § 68616(d)].

### **30.09[3] Noticed Motion.**

**30.09[3][a] Written Noticed Motion Required Unless Excused for Good Cause.** Except for good cause, a motion for continuance must be made on written notice to all other parties [*Cal Rules Ct, Rule 3.1332(b)*]. 16 court days notice is required for the motion, with time extensions based on type of service and addresses of parties [see *CCP* § 1005(b)].

#### **Cross References:**

Form of notice of motion for continuance, see 30.21. Form of notice of joint motion for continuance, see 30.22.

Notice of motion, see Ch. 26, Law and Motion Procedure.

Extension of time based on service, see Ch. 27, Service of Papers.

**30.09[3][b] Noticed Motion Must Be Made Promptly.** When moving to continue a trial date, the party must make the motion for continuance as soon as reasonably practicable once the necessity for continuance is discovered [*Cal Rules Ct, Rule 3.1332(b)*].

**30.09[3][c] Supporting Declaration of Good Cause Required.** A continuance before or during trial may not be granted except on an affirmative showing of good cause supported by declaration [*Cal Rules Ct, Rule 3.1332(b)*].

#### **Cross Reference:**

Forms of declaration in support of continuance, see 30.23-30.25.

### **30.09[3][d] Reserved.**

**30.09[3][e] Follow Standard Motion Procedure.** Follow standard motion procedure and submit the following papers:

- Notice of motion.
- Affidavit or declaration in support of motion.
- Supporting memorandum.
- Proof of service.
- Proposed order.

#### **Prerequisite:**

While a motion or application for continuance of trial that requires a hearing is subject to the uniform filing fee for papers filed after the first paper filed [*Gov Code* § 70617(a)(2)], a request, application, or

motion for, or a notice of, each continuance of a hearing is subject to a reduced fee if it does not require a hearing, unless the continuance is required by the court, in which case there is no fee [Gov Code § 70617(c)(1)].

#### **Cross Reference:**

Standard motion procedure, see Ch. 26, Law and Motion Procedure.

**30.09[3][f] Court May Waive Procedural Requirements.** For good cause, trial courts may exercise their discretion to disregard the failure of a party requesting a continuance to satisfy formal requirements such as noticed motion, writings, or affidavits [ *Taylor v. Bell* (1971) 21 CA3d 1002, 1008, 98 CR 855 ; see CCP § 595.4]. However, the court is not required to waive these formalities [ *Mahoney v. Southland Mental Health Assocs. Med. Group* (1990) 223 CA3d 167, 172, 272 CR 602 ].

#### **Drawback:**

If a party fails to satisfy the formal requirements for a continuance, and the trial court denies the continuance for other reasons, the appellate court may uphold the denial without examining the merits [see *County of San Bernardino v. Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 783, 140 CR 383 ].

#### **30.09[4] Ex Parte Application.**

**30.09[4][a] Applicant Must Establish Need for Immediate Relief for Ex Parte Application in Addition to Good Cause for Continuance.** Although generally disfavored, a continuance of the trial date may be requested by ex parte application and supported with good cause [Cal Rules Ct, Rule 3.1332(b), (c)]. Thus, in addition to establishing good cause for the continuance, the movant must also prove a pressing need for immediate relief, to avoid irreparable harm, when the adverse party has no right to be heard, or for any other statutory reason [see Cal Rules Ct, Rules 3.1202(c), 3.1204(b)(3)].



#### **Warning:**

An ex parte application for a continuance should only be filed in exigent circumstances or to advise the court of an unexpected problem that has arisen and that cannot, due to time constraints, be raised by noticed motion.

#### **Cross Reference:**

Form, see 30.20.

**30.09[4][b] Follow Standard Ex Parte Application Procedure.** Ex parte applications require [Cal Rules Ct, Rule 3.1200 et seq.]:

- Notice to all parties no later than 10:00 a.m. the court day before the ex parte appearance unless exceptional circumstances justify a shorter time [Cal Rules Ct, Rule 3.1203].
- The notice to the opposing party to state the specific nature of the relief requested, the date, time, and place for the presentation of the application, and whether the application will be opposed [Cal Rules Ct, Rule 3.1204(a)].
- A declaration that notice was given to the opposing party as required, that the applicant tried in good faith but was unable to inform the opposing party of the application, or that the applicant should not be required to inform the opposing party [Cal Rules Ct, Rule 3.1204(b)].

- The application to state the contact information for all parties' attorneys and whether a similar ex parte application has been previously made and the court's rulings [*Cal Rules Ct, Rule 3.1202(a), (b)*].

- The application be in writing and include [*Cal Rules Ct, Rule 3.1201*]:

- ☐ Case caption and relief requested.
- ☐ Declaration in support of application containing affirmative factual showing containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for relief.
- ☐ Declaration that notice given.
- ☐ Memorandum.
- ☐ Proposed order.

**Prerequisite:**

While a motion or application for continuance of trial that requires a hearing is subject to the uniform filing fee for papers filed after the first paper filed [*Gov Code § 70617(a)(2)*], a request, application, or motion for, or a notice of, each continuance of a hearing is subject to a reduced fee if it does not require a hearing, unless the continuance is required by the court, in which case there is no fee [*Gov Code § 70617(c)(1)*].

 **Cross Reference:**

Discussion of ex parte applications and motions, see *Ch. 26, Law and Motion Procedure, 26.13 et seq.*

**30.09[5] Oral Motion.**

**30.09[5][a] Oral Motion Requires Emergency.** Though oral motions for continuance are not specified in the Rules of Court [*see Cal Rules Ct, Rule 3.1332*], the court's inherent powers to control the proceedings may give the court the authority to grant a continuance of an oral motion to continue [*see CCP § 128(a)(9)*]. Oral motions are unlikely to arise, and it is unlikely that an oral motion to continue would be granted absent some type of emergency. If there is an emergency, a trial judge might defer commencement of trial for a day or two without characterizing it as a continuance, but an ex parte application under *Cal Rules Ct, Rule 3.1200 et seq.* would be the better method to have the written papers and supporting declarations on file to justify the continuance.

**30.09[5][b] Surprise May Support Oral Motion to Continue.** A common situation creating good cause for an oral motion is the occurrence of an event at trial that surprises one of the parties; the surprised party may immediately move for a continuance or mistrial rather than waiting to see how the case progresses [ *McCown v. Spencer (1970) 8 CA3d 216, 228, 87 CR 213* ]. By analogy, surprise at a pretrial hearing may support an oral motion to continue, but the court is likely to require a written motion given that pretrial proceedings have less exigency and the court's disfavor of continuances. If possible, obtain opposing counsel's agreement to a continuance in open court and request the judge to find good cause based on the surprise.



**Warning:**

A continuance on this basis will only be granted under extraordinary conditions in which the "surprise"

was unforeseeable and cannot be remedied by any means other than a continuance.

**Judge's Perspective:**

Depending on the nature of the surprise or unexpected circumstance, trial judges need to be flexible in determining the circumstances that would permit a continuance.

**Prerequisite:**

While a motion or application for continuance of trial that requires a hearing is subject to the uniform filing fee for papers filed after the first paper filed [*Gov Code § 70617(a)(2)*], a request, application, or motion for, or a notice of, each continuance of a hearing is subject to a reduced fee if it does not require a hearing, unless the continuance is required by the court, in which case there is no fee [*Gov Code § 70617(c)(1)*].

 **Cross Reference:**

Discussion of court waiving procedural requirements, see 30.09[3][f].

**30.09[6] Reply to Opposition Papers.** Serve and file all reply papers 5 court days before the hearing unless a shorter time is prescribed by the court [*CCP § 1005(b)*].

**Legal Topics:**

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**30.10 Consent to Testimony by Deposition of Attending Witness.**

If required by the adverse party, the party obtaining a continuance must consent that the testimony of any witness of the adverse party who is in attendance be taken by deposition before a judge, the clerk of the court in which the case is pending, or before a notary public selected by the court. Testimony so taken may be read at trial, with the same effect, and subject to the same objections, as if the witnesses were produced [CCP § 596].



**Strategic Point:**

This is a rarely-invoked procedure. Be prepared to refer the judge to CCP § 596.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**30.11 Payment of Costs As Condition of Continuance.**

The trial court has discretion to require the payment of expenses incurred by the nonmoving parties as a result of the postponement as a condition of granting a continuance [*CCP* § 1024; see *Inman v. Fremont Medical Center* (1975) 49 CA3d 169, 172, 122 CR 372 (continuance conditioned on payment of costs of entire jury panel when continuance requested after panel summoned)]. For example, if a continuance becomes necessary because the court permitted an adverse party to amend a pleading or proceeding, the court may require the payment of just costs as a condition to permitting the amendment [*CCP* § 473(a)(2)]. Expenses that the moving party may be required to pay include:

- Fees paid to jurors [ *Inman v. Fremont Med. Ctr.* (1975) 49 CA3d 169, 172, 122 CR 372 ].
- Travel and lodging expenses [ *Wilkin v. Tadlock* (1952) 110 CA2d 156, 157-158, 241 P2d 1066 ].
- Business expenses caused by postponement [ *Levine v. Pollack* (1995) 37 CA4th 129, 133-139, 43 CR2d 491 ].

However, courts may not require the payment of attorney's fees in exchange for a continuance [ *DeCesare v. Lember* (1983) 144 CA3d 20, 24, 192 CR 354 ] or lost income [ *DeCesare v. Lember* (1983) 144 CA3d 20, 25-26, 192 CR 354 ].

In assessing costs, the court need not limit its assessment to expenses that are ordinarily taxable after a case has been tried [ *McFaddin v. H.S. Crocker Co.* (1963) 219 CA2d 585, 594-595, 33 CR 389 (amount assessed to cover costs and counsel fees); *Inman v. Fremont Medical Center* (1975) 49 CA3d 169, 172, 122 CR 372 (continuance conditioned on costs of empaneling entire jury)].



**Cross Reference:**

Discussion of recovery of costs, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 24, Costs.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.12*

**30.12 CHECKLIST: Opposing Motion for Continuance.**

- ☐ Decide whether to oppose motion for continuance.
  - ☐ Detriment to party.
  - ☐ Comity between parties.
  - ☐ Concessions that might be secured in return for stipulating to continuance.
  - ☐ Possibility that case may be removed from civil calendar.

**Discussion:**

See 30.13

- ☐ If opposing, schedule response and hearing dates.
- ☐ Review grounds for defeating claim of good cause.
  - ☐ Limitations by Fast Track rules.
  - ☐ Rules of Court factors for continuance militate against continuance.
  - ☐ Good cause not established.

- ☐ Detriment to party.

**Authority:**

*Cal Rules Ct, Rule 3.1332*

**Discussion:**

See 30.14, 30.15

**Form:**

See 30.27

- ☐ Consider requesting conditions on grant of continuance.

- ☐ Movant paying expenses for continuance.
- ☐ Movant stipulating to absent witness testimony.
- ☐ Deposition taken of witness attending hearing.
- ☐ Additional time for subsequent procedures such as discovery.

**Authority:**

*CCP §§ 473(a)(2), 596, 1024*

**Discussion:**

See 30.15

**Form:**

See 30.26

- ☐ Draft opposition papers.

- ☐ Memorandum.
- ☐ Supporting declarations.

- ☐ File and serve opposition papers 9 court days before hearing.

**Authority:**

*Cal Rules Ct, Rule 3.1332(a)*

**Discussion:**

See 30.14, 30.16

**Form:**

See 30.27



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**30.13 Options and Strategies for Party Opposing Continuance.**

Continuances are disfavored and should not be granted except on an affirmative showing of good cause requiring the continuance [*Cal Rules Ct, Rule 3.1332*]. While a party opposing a continuance request has a considerable advantage favoring their position from the outset, this advantage should not be used blindly to oppose a continuance. If the request is without merit and is detrimental, oppose it. However, good practice is to be mindful of life's uncertainties such as death and illness, as well as the difficulties in scheduling a law practice. Stipulating to a reasonable continuance based on good cause may well have the favor returned in the future. Moreover, opposing a continuance when good cause is very evident could be deemed frivolous. Sanctions may or may not be imposed, but after such a staunch showing of the need to keep the case on track, the court will most likely be less inclined to grant a continuance when the opposing party later needs one.

**Judge's Perspective:**

Counsel who seek to oppose a continuance need to analyze the situation carefully. The old adage of what goes around comes around is especially true when a party seeks, in a knee jerk fashion, to oppose a request for continuance. Make sure the opposition is justified, and more importantly make sure that you can live with the ramification of opposing the request.



**Strategic Point--Court's Own Motion:**

If the court is continuing the hearing or trial date on its own motion, good cause will most likely exist. However, if the continuance is a detriment or affects the party's rights, counsel should state the objections on the record to preserve appellate issues.



**Cross Reference:**

Discussion of continuance on court's own motion, see *30.09[1]*.



**Strategic Point--Noticed Motion or Ex Parte Application:**

Opposition to a noticed motion or ex parte application for continuance should focus on two parts:

- The motion or application does not comply with statutory and rules procedures; and
- Good cause does not exist to support the continuance.

**Cross Reference:**

Discussion of notice motion or ex parte application for continuance, see 30.09[3], [4].

**Strategic Point--Oral Motion:**

Opposition to an oral motion for continuance should assert that motions for continuances are to be made on written notice to all other parties, and no continuance otherwise requested is granted except in emergencies [*Cal Rules Ct, Rule 3.1332(b)*].

**Cross Reference:**

Discussion of oral motion for continuance, see 30.09[5].

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**30.14 Challenging Good Cause Showing by Moving Party.**

**30.14[1] Cite Court's Disfavor of Continuances.** At beginning of opposition argument, remind the court that continuances before or during trial in civil cases are disfavored; and the date set for trial must be firm [*see Cal Rules Ct, Rule 3.1332(a)*].

► **Cross Reference:**

Discussion of court's disfavoring continuances, see *30.06*.

**30.14[2] Address Judicial Administration Factors.** Review the factors the court should consider under *Cal Rules Ct, Rule 3.1332(d)* and focus on the ones that help oppose the continuance and support them with appropriate declarations.

► **Cross Reference:**

Discussion of judicial administration factors, see *30.07[2]*.

**30.14[3] Refute Specific Assertions of Good Cause.** Review the specific grounds for good cause discussed in *30.08*. Counter assertions of good cause with declarations and requests for judicial notice. Counter arguments to good cause include:

■ Absent witness:

- ☐ Witness immaterial.
- ☐ Due diligence for attendance not shown.
- ☐ Substitute witness available.
- ☐ Expected testimony not provided with motion.



➤ **Cross Reference:**

Discussion of absent witness establishing good cause, see 30.08[1].

■ Absent evidence:

- ☐ Evidence immaterial.
- ☐ Due diligence to obtain evidence not shown.

➤ **Cross Reference:**

Discussion of absent evidence establishing good cause, see 30.08[2].

■ Absent party:

- ☐ Party's presence not a critical necessity.
- ☐ No doctor's declaration supporting illness.

➤ **Cross Reference:**

Discussion of absent party establishing good cause, see 30.08[3].

■ Party's military service:

- ☐ Military service not within statutory definition.
- ☐ Party's ability to prosecute or defend not materially affected by military service.

➤ **Cross Reference:**

Discussion of absent witness establishing good cause, see 30.08[4].

■ Unavailable counsel:

- ☐ Counsel not diligent.
- ☐ Schedule conflict avoidable.
- ☐ Counsel not necessary.
- ☐ Substitute counsel available.

➤ **Cross Reference:**

Discussion of unavailable counsel establishing good cause, see 30.08[5].

## ■ Judge in another trial:

- ☐ Possible assignment to new judge.

➡ **Cross Reference:**

Discussion of judge in other trial establishing good cause, see *30.08[6]*.

## ■ Party or witness member of legislature:

- ☐ Legislature not in session or session postponed.
- ☐ Continuance would defeat or abridge a right to relief pendente lite.

➡ **Cross Reference:**

Discussion of legislative member establishing good cause, see *30.08[7]*.

## ■ Other action pending:

- ☐ Other action does not involve same parties and/or issues.
- ☐ Stay or dismissal based on inconvenient forum.

➡ **Cross Reference:**

Discussion of other action pending establishing good cause, see *30.08[8]*.

## ■ Amended pleading:

- ☐ Amendment insignificant to require continuance.
- ☐ Amendment not a surprise.
- ☐ Amendment caused by party, not court.

➡ **Cross Reference:**

Discussion of amended pleading establishing good cause, see *30.08[9]*.

## ■ Change in case status:

- ☐ Change in parties or pleadings not significant.
- ☐ Change caused by party, not court.
- ☐ Change in status was anticipated.

 **Cross Reference:**

Discussion of case status change establishing good cause, see *30.08[10]*.

■ Addition of new party.

- ☐ New party and other parties have had reasonable opportunity to conduct discovery and prepare for trial.

 **Cross Reference:**

Discussion of addition of new party establishing good cause for continuance, see *38.08[11]*.

■ Motion for summary judgment.

- ☐ Moving party had sufficient time to bring motion for summary judgment within time set for trial.

 **Cross Reference:**

Discussion of party's right to bring motion for summary judgment establishing good cause for continuance, see *38.08[12]*.

**Legal Topics:**

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**30.15 Request Continuance Be Granted Only on Conditions.**

The trial court has discretion to require the payment of the expenses incurred by the nonmoving parties as a result of the postponement as a condition of granting a continuance [CCP § 1024; see *DeCesare v. Lember* (1983) 144 CA3d 20, 25-26, 192 CR 354 ]. Other conditions that may be required include waiver of objection to timeliness for security motion [ *Muller v. Tanner* (1969) 2 CA3d 445, 458, 82 CR 738 ], and the testimony of any witness of the adverse party who is in attendance be taken by deposition before a judge, the clerk of the court in which the case is pending, or before a notary public selected by the court [CCP § 596].

➡ **Cross References:**

Discussion of payment of expenses, see 30.04[1][b], 30.11; of deposition of ill witness, see 30.08[1][c]; of testimony of adverse party witness, see 30.10.

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III. OPPOSING MOTION FOR CONTINUANCE

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.16*

**30.16 Follow Standard Opposition to Motions Practice.**

Opposition papers to a noticed motion for continuance must be filed and served 9 court days before the hearing unless the court prescribes a shorter time [*CCP § 1005(b)*]. Follow standard opposition practice to an ex parte applications.

➡ **Cross References:**

Discussion of motion practice and ex parte applications, see Ch. 26, Law and Motion Procedure.

Discussion of shortening or extending time, see Ch. 27, Service of Papers.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePretrial MattersContinuances



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Chapter 30 Continuances  
IV. APPEAL

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.17*

**30.17 CHECKLIST: Appeal.**

- ☐ Determine if review by extraordinary writ is available.
- ☐ Immediately draft, file, and serve appeal or writ.
  - ☐ Focus on denial of continuance preventing party an opportunity to fairly and fully present his or her case.
  - ☐ Reiterate good cause for continuance.
  - ☐ Request judicial notice, if applicable.

**Discussion:**  
See 30.18



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IV. APPEAL

2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.18

### 30.18 Appellate Review.

**30.18[1] Denial Not Subject to Immediate Appeal.** Appeal may not be taken from an order denying a continuance. However, the order is reviewable on an appeal from an appealable order [ *Cohen v. Herbert* (1960) 186 CA2d 488, 490, 8 CR 922 (appeal from order appointing receiver); see CCP §§ 904-904.5 (appealable judgments and orders)].

**30.18[2] Writ of Mandamus May Be Available.** A writ of mandate, which is used to compel the performance of an act that the law specially enjoins, may issue to compel a continuance that was improperly denied [ *Whalen v. Superior Court* (1960) 184 CA2d 598, 602, 7 CR 610 ; see CCP § 1085 (power to issue writ of mandate)].

**30.18[3] Abuse of Discretion Standard of Review.** In general, a trial court's determination of the existence of good cause for a continuance will not be disturbed on appeal absent a clear abuse of discretion [ *Lewis v. Neptune Society Corp.* (1987) 195 CA3d 427, 429, 240 CR 656 ; see *Pham v. Nguyen* (1997) 54 CA4th 11, 16-17, 62 CR2d 422 (trial court did not abuse its discretion in denying continuance)]. Trial courts may be reversed for refusing to grant a continuance if their actions deny the party an opportunity to fairly and fully present his or her case [ *Hays v. Viscome* (1953) 122 CA2d 135, 140, 264 P2d 173 ].

As a practical matter, a trial court's decision granting or denying a continuance is almost always upheld on appeal, although denial of a continuance may constitute reversible error [see, e.g., *Oak Knoll Broadcasting Corp. v. Hudgings* (1969) 275 CA2d 563, 565-566, 80 CR 175 (denial of continuance upheld when unprepared witness placed on call after service of subpoena); *Hays v. Viscome* (1953) 122 CA2d 135, 140-141, 264 P2d 173 (prejudicial error to deny continuance to call witness whom adverse party failed to call)].



#### Cross Reference:

Discussion of court's discretionary authority to grant continuances, see 30.05.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pretrial Matters Continuances Civil Procedure Remedies Writs Common Law Writs Mandamus



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V. FORMS

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.19*

**30.19 Stipulation for Continuance.**

Stipulation for Continuance  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                        |
|------------------------------|---|----------------------------------------|
| _____ [name],                | ) | NO. _____                              |
| Plaintiff, vs. _____ [name], | ) | STIPULATION OF _____ [identify         |
| Defendant.                   | ) | party, e.g., DEFENDANT MARY JONES] AND |
|                              | ) | _____ [identify party, e.g.,           |
|                              | ) | PLAINTIFF JOHN SMITH] TO CONTINUANCE   |
|                              | ) | Date: _____                            |
|                              | ) | Time: _____                            |
|                              | ) | Location: _____                        |
|                              | ) | Judge: _____                           |
|                              |   | Date Action Filed: _____               |
|                              |   | Trial Date: _____                      |

\_\_\_\_\_

IT IS HEREBY STIPULATED AND AGREED by and between all of the attorneys of record of the parties who have appeared in this \_\_\_\_\_ [action or proceeding] that the \_\_\_\_\_ [trial or hearing] set for \_\_\_\_\_ [date], be postponed and continued until \_\_\_\_\_ [specify date or a subsequent date as the court may set].

This stipulation is made on the ground that good cause for the continuance exists, as shown by the declaration(s) of \_\_\_\_\_ attached to this stipulation.

Dated: \_\_\_\_\_.



\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Plaintiff \_\_\_\_\_ [name]

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Defendant \_\_\_\_\_ [name]

NOTES.

**Authority:**

*CCP §§ 283, 595.2; Gov Code §§ 68607(g), 68616(d)*

**Procedure:**

*See 30.09[2]*

**Related Stipulation:**

Stipulation to absent witness testimony, see 30.26

**Related Form of Written Stipulation:**

*See California Points and Authorities, Ch. 48, Continuance of Proceedings, § 48.11 (Matthew Bender)*



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V. FORMS

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.20*

**30.20 Ex Parte Application for Continuance.**

Ex Parte Application for Continuance  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                     |
|------------------------------|---|-------------------------------------|
| _____ [name],                | ) | NO. _____                           |
| Plaintiff, vs. _____ [name], | ) | EX PARTE APPLICATION OF             |
| Defendant.                   | ) | _____ [identify party, e.g., DE-    |
|                              | ) | FENDANT MARY JONES] FOR CONTINUANCE |
|                              | ) | Date: _____                         |
|                              | ) | Time: _____                         |
|                              | ) | Location: _____                     |
|                              | ) | Judge: _____                        |
|                              | ) | Date Action Filed: _____            |
|                              | ) | Trial Date: _____                   |

\_\_\_\_\_ [identify party, e.g., DEFENDANT MARY JONES] hereby applies for a court order continuing the \_\_\_\_\_ [hearing or trial] in the above-titled action set for \_\_\_\_\_ [date] until \_\_\_\_\_ [specify date or number of days]. [If trial date is being moved, add: All pre-trial deadlines set pursuant to the Code of Civil Procedure should also be amended accordingly to permit counsel to \_\_\_\_\_ [specify, e.g., prepare a defense with respect to damages, and to file the appropriate motions for summary judgment].

This motion is made on the ground(s) that \_\_\_\_\_ [specify grounds establishing good cause for continuance, e.g., the unavailability of a critical witness for deposition or trial due to a heart attack], as set forth in the

accompanying declaration(s) of \_\_\_\_\_ [name(s) of declarant(s)].

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [name]

#### DECLARATION OF NOTICE OF APPLICATION FOR EX PARTE ORDER

[Add required declaration of notice to opposing party of application]

#### DECLARATION IN SUPPORT OF EX PARTE APPLICATION

[Add required declaration supporting application]

#### MEMORANDUM

[Add required memorandum supporting application]

#### ORDER

[Add required proposed order]

NOTES.

**Authority:**

*Cal Rules Court, Rules 3.1332, 3.1200 et seq.*

**Procedure:**

*See 30.09[3]*

**Related Declaration of Notion of Application for Ex Parte Order:**

*See 26.75*

**Related Declaration in Support of Ex Parte Application:**

*See 26.75*

**Related Order Granting Continuance:**

See 30.28



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V. FORMS

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.21*

**30.21 Notice of Motion for Continuance.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                     |
|------------------------------|---|-------------------------------------|
| _____ [name],                | ) |                                     |
| Plaintiff, vs. _____ [name], | ) | NO. _____                           |
| Defendant.                   | ) | NOTICE OF MOTION AND MOTION OF      |
|                              | ) | _____ [identify party, e.g., DE-    |
|                              | ) | FENDANT MARY JONES] FOR CONTINUANCE |
|                              | ) | OF _____ [HEARING OR TRIAL          |
|                              | ) | DATE]                               |
|                              | ) | Date: _____                         |
|                              | ) | Time: _____                         |
|                              | ) | Location: _____                     |
|                              | ) | Judge: _____                        |
|                              | ) | Date Action Filed: _____            |
|                              | ) | Trial Date: _____                   |

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time] in  
[\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] the \_\_\_\_\_ County  
Superior Court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [specify movant, e.g.,  
Defendant Mary Jones] will, and hereby does, move to continue the \_\_\_\_\_ [hearing or trial] date.

This motion will be made on the grounds that \_\_\_\_\_ [specify movant, e.g., Defendant Mary Jones's

key witness, Jordan Briar, died on March 14, 2004]. Under \_\_\_\_\_ [*specify authority, e.g., California Rules of Court, Rule 3.1332(c)(2)*], this constitutes good cause for a continuance of the \_\_\_\_\_ [hearing or trial] date.

The Motion will be based on this Notice and on all papers submitted with this Motion, including the supporting memorandum, the declaration(s) of \_\_\_\_\_ [*name(s)*], any and all reply papers that \_\_\_\_\_ [Defendant Mary Jones] will file in support of its motion, and any oral argument or evidence in support of the motion as will be offered at the time of the hearing.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_ [*name*]

#### NOTES.

#### **Authority:**

*Cal Rules Court, Rule 3.1332*

#### **Procedure:**

*See 30.09[3]*

#### **Related Notice of Joint Motion for Continuance:**

*See 30.22*

#### **Related Declarations in Support of Motion:**

*See 30.23-30.25*

#### **Related Order Granting Continuance:**

*See 30.28*

#### **Related Forms of Memoranda:**

*See California Points and Authorities, Ch. 48, Continuance of Proceedings, §§ 48.10-48.16 (Matthew Bender)*



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2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.22

**30.22 Notice of Joint Motion for Continuance.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff, vs. \_\_\_\_\_ [name],  
Defendant.

)  
) NO. \_\_\_\_\_  
) JOINT MOTION AND NOTICE OF JOINT MO-  
) TION OF \_\_\_\_\_ [identify party,  
) e.g., DEFENDANT MARY JONES] AND  
) \_\_\_\_\_ [identify party, e.g.,  
) PLAINTIFF JOHN SMITH] FOR CONTINUANCE  
) OF \_\_\_\_\_ [HEARING OR TRIAL  
) DATE]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

NOTICE IS HEREBY GIVEN THAT on \_\_\_\_\_ [date], or as soon thereafter as counsel may be heard in the above-entitled court, \_\_\_\_\_ [identify parties, e.g., Defendant Mary Jones and Plaintiff John Smith] will, and hereby do, jointly move the Court for an Order Continuing the \_\_\_\_\_ [Hearing or Trial] Date in this action by \_\_\_\_\_ [number of days] from \_\_\_\_\_ [original date] until \_\_\_\_\_ [continued date]. Good cause exists for the requested Orders, in that \_\_\_\_\_ [specify good cause, e.g., despite diligent prosecution of this action by all parties, given the numerous parties, the

complexity of the issues, and the remaining discovery to be conducted, the parties require a further opportunity to properly prepare this matter for trial].

[*Optional:* The undersigned counsel are authorized to represent to the Court that the remaining parties have no opposition to the requested continuance.]

These joint motions are based on this notice, and \_\_\_\_\_ [*specify supporting documentation, e.g., the attached supporting memorandum, the enclosed stipulation of counsel, and the complete files and records of this case.*]

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for Plaintiff \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for Defendant \_\_\_\_\_

NOTES.

**Authority:**

*CCP §§ 283, 595.2; Cal Rules Court, Rule 3.1332*

**Procedure:**

*See 30.09[2], [3]*

**Related Declaration in Support of Motion:**

*See 30.23-30.25*

**Related Order Granting Continuance:**

*See 30.28*





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V. FORMS

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.23*

**30.23 Declaration of Counsel in Support of Motion for Continuance.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                               |
|------------------------------|---|-----------------------------------------------|
| _____ [name],                | ) |                                               |
| Plaintiff, vs. _____ [name], | ) | NO. _____                                     |
| Defendant.                   | ) | DECLARATION OF _____                          |
|                              | ) | [identify declarant, e.g., JANE LEE, ATTORNEY |
|                              | ) | FOR DEFENDANT MARY JONES,] IN SUPPORT         |
|                              | ) | OF MOTION FOR CONTINUANCE                     |
|                              | ) | Date: _____                                   |
|                              | ) | Time: _____                                   |
|                              | ) | Location: _____                               |
|                              | ) | Judge: _____                                  |
|                              |   | Date Action Filed: _____                      |
|                              |   | Trial Date: _____                             |

I, \_\_\_\_\_ [identify declarant, e.g., Jane Lee] declare:

[If witness unavailable, use:]

1. The following declaration is based on my personal knowledge, and if called upon to testify I could testify competently as to the matters set forth below.

2. I am a member of \_\_\_\_\_ [identify firm], counsel of record for \_\_\_\_\_ [specify

party, *e.g.*, Defendant Mary Jones] in the above-entitled action. I submit this declaration to request that the Court continue \_\_\_\_\_ [the hearing or trial date] presently set for \_\_\_\_\_ [specify date, time, and location].

3. The principal reason for the request is the unavailability of a key witness, \_\_\_\_\_, who resides at \_\_\_\_\_, to testify because [state reason for unavailability, *e.g.*, the witness is recuperating from a heart attack]. I first learned about the unavailability of the witness on \_\_\_\_\_ [date].

4. This witness will be unavailable even though \_\_\_\_\_ [state actions showing diligent effort to secure attendance, *e.g.*, I subpoenaed the witness and then held a personal interview at which I stressed the importance of appearing to testify].

5. The attendance of this witness is required for trial. This witness would testify to \_\_\_\_\_ [describe nature of expected testimony]. This evidence is material because \_\_\_\_\_ [describe materiality of testimony, *e.g.*, this witness is the CEO of \_\_\_\_\_ [name of company], likely the person most knowledgeable as to issues that go to the very heart of the case]. This evidence cannot be proven with the testimony of any other available witness.

6. The witness informed me that he/she can be available to testify on \_\_\_\_\_.

7. I have met and conferred with \_\_\_\_\_, counsel for the plaintiff on the subject of this motion. On \_\_\_\_\_ [date], I requested that plaintiff's counsel and clients agree to a continued trial date, in light of the unavailability of this witness for \_\_\_\_\_ [deposition or trial] until \_\_\_\_\_ [date]. I further notified plaintiff's counsel on \_\_\_\_\_ [date] that I would file this motion if the plaintiff would not agree to a reasonable continuance of trial.

8. The plaintiff will not be prejudiced by a continuance to a later date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on \_\_\_\_\_ [date] in \_\_\_\_\_, California.

Dated: \_\_\_\_\_.

\_\_\_\_\_  
[firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_  
[typed name]

Attorney for \_\_\_\_\_ [name]

[If counsel unavailable, use:]

1. The following declaration is based on my personal knowledge, and if called upon to testify I could testify competently as to the matters set forth below.

2. I am a member of \_\_\_\_\_ [identify firm], counsel of record for \_\_\_\_\_ [specify party, *e.g.*, Defendant Mary Jones] in the above-entitled action. I submit this declaration to request that the Court

continue the \_\_\_\_\_ [hearing or trial] date presently set for \_\_\_\_\_ [date], in \_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court.

3. I am also counsel of record for \_\_\_\_\_ [specify party] in the case of \_\_\_\_\_ [title, court, and number], set for \_\_\_\_\_ [hearing or trial] on \_\_\_\_\_ [date], at \_\_\_\_\_ [city], California. I must be present in that court for trial of that cause, which is expected to last approximately \_\_\_\_\_ days. I therefore request a continuance of the \_\_\_\_\_ [hearing or trial] date until \_\_\_\_\_ [date], or as soon thereafter as is convenient to the court.

4. \_\_\_\_\_ [State reason why conflict occurred, e.g., The conflict in trial dates would not have been reasonably anticipated at the time of the trial setting conference and occurs because of requests by an opposing party in the other case.]

5. \_\_\_\_\_ [State reason why adequate representation is not otherwise available, e.g., Within my law firm, both of these cases were assigned to me for trial and the time is insufficient for another attorney to prepare either case.]

6. \_\_\_\_\_ [State reasons for necessity of proceeding with other case, e.g., The cause to be tried in the other case cannot be continued. Numerous witnesses are under subpoena for appearance in that case who cannot appear at a later date.]

7. \_\_\_\_\_ [Specify party, e.g., Plaintiff John Smith] will not be prejudiced by a continuance of the subject cause until a later date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on \_\_\_\_\_ [date] in \_\_\_\_\_, California.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [name]

#### NOTES.

#### Authority:

CCP § 2015.5; Cal Rules Court, Rule 3.1332

#### Notice of Motion for Continuance:

See 30.21, 30.22

#### Related Declarations in Support of Motion:

See 30.24, 30.25

#### Related Order Granting Continuance:

See 30.28



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*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.24*

**30.24 Declaration of Party in Support of Motion for Continuance.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                           |
|------------------------------|---|-------------------------------------------|
| _____ [name],                | ) |                                           |
| Plaintiff, vs. _____ [name], | ) | NO. _____                                 |
| Defendant.                   | ) | DECLARATION OF _____                      |
|                              | ) | [identify declarant, e.g., DEFENDANT MARY |
|                              | ) | JONES] IN SUPPORT OF MOTION FOR CON-      |
|                              | ) | TINUANCE                                  |
|                              | ) | Date: _____                               |
|                              | ) | Time: _____                               |
|                              | ) | Location: _____                           |
|                              | ) | Judge: _____                              |
|                              |   | Date Action Filed: _____                  |
|                              |   | Trial Date: _____                         |

I, \_\_\_\_\_ [identify declarant, e.g., Mary Jones] declare:

1. The following declaration is based on my personal knowledge, and if called upon to testify I could testify competently as to the matters set forth below.

2. I am the \_\_\_\_\_ [defendant or plaintiff] in the above-captioned action. I have fully and fairly stated all of the facts to my attorney, \_\_\_\_\_ [name], and I have been advised by him/her that I have a good and meritorious defense to the action on each and every \_\_\_\_\_ [count or cause of action] set out in plaintiff's complaint.

[If defendant will not be a witness, use:]

3. \_\_\_\_\_ [If assisting counsel is primary basis for showing necessity of party's presence, state appropriate facts, e.g., I have been advised by my attorney that in order to fully present my defense it will be necessary for me to be present at the trial to consult, confer with, and make suggestions and to give advice to my attorney.]

[If defendant will be a witness, use:]

3. I have been advised by my attorney that in order to fully present my defense it will be necessary for me to be present at the trial to consult, confer with, and make suggestions and to give advice to my attorney. Further, \_\_\_\_\_ [state facts supporting need for party as witness, e.g., I am my own principal witness in this action, and I know all of the circumstances of the transactions with plaintiff and all of the acts, statements, conduct, and representations of plaintiff and I am the only person who knows all of the facts].

4. On \_\_\_\_\_ [date], the \_\_\_\_\_ [action or proceeding] was set for trial on \_\_\_\_\_ [date]. On or about \_\_\_\_\_ [date], I \_\_\_\_\_ [state nature of illness, e.g., began to suffer from a heart attack. I have been advised by my physician and know from my own experience, that my condition is made more severe by physical exertion and excitement].

5. I have been fully advised by my physician and believe that my physical condition by reason of this illness is such that I will be unable to undergo the strain and excitement of attending a trial that my attorney informs me will be of \_\_\_\_\_ days' duration. My physician advises that the strain and excitement of a trial of that length at this time would be injurious to my health and that to give testimony would be dangerous to my physical well-being but that with rest and freedom from excitement for a period of \_\_\_\_\_ days it is probable that I will be able to attend and testify on my own behalf in the action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on \_\_\_\_\_ [date] in \_\_\_\_\_, California.

Dated: \_\_\_\_\_.

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

NOTES.

**Authority:**

CCP § 2015.5; Cal Rules Court, Rule 3.1332

**Notice of Motion for Continuance:**

See 30.21, 30.22

**Related Declarations in Support of Motion:**

See 30.23, 30.25



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2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.25

**30.25 Declaration of Physician in Support of Motion for Continuance.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                                 |
|------------------------------|---|-------------------------------------------------|
| _____ [name],                | ) |                                                 |
| Plaintiff, vs. _____ [name], | ) | NO. _____                                       |
| Defendant.                   | ) | DECLARATION OF _____                            |
|                              | ) | [identify declarant, e.g., DOCTOR RON SCOTT] IN |
|                              | ) | SUPPORT OF MOTION FOR CONTINUANCE               |
|                              | ) | Date: _____                                     |
|                              | ) | Time: _____                                     |
|                              | ) | Location: _____                                 |
|                              | ) | Judge: _____                                    |
|                              | ) | Date Action Filed: _____                        |
|                              | ) | Trial Date: _____                               |

I, \_\_\_\_\_ [identify declarant, e.g., Doctor Ron Scott] declare:

1. The following declaration is based on my personal knowledge, and if called upon to testify I could testify competently as to the matters set forth below.

2. At all times stated I have been a physician and surgeon duly licensed as such and engaged in the practice of my profession in \_\_\_\_\_ [specify state, e.g., California]. \_\_\_\_\_ [Specify party, e.g., Defendant Mary Jones] has been a patient of mine since \_\_\_\_\_ [date].

3. \_\_\_\_\_ [Specify date or At the time of my first examination], I found \_\_\_\_\_ [party,

*e.g.*, Defendant Mary Jones] to be suffering from \_\_\_\_\_ [*nature of illness, e.g.*, myocardial infarction, commonly referred to as a heart attack, which is brought about by a clot in a coronary artery]. I treated him/her for this condition and he/she is still under treatment.

4. This condition is serious and greatly aggravated by excitement of the slightest degree. Because of the condition, \_\_\_\_\_ [*party, e.g.*, Defendant Mary Jones] is in no condition to undergo the strain of attending a trial of several days duration and of testifying in any way in an action in which his/her interests are involved.

5. To attend trial would be extremely injurious to his/her health and to testify would be dangerous to his/her physical well-being.

6. The prognosis is good and, in the absence of any complications, \_\_\_\_\_ [*party, e.g.*, Defendant Mary Jones] should be able to attend trial on or after \_\_\_\_\_ [*date*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on \_\_\_\_\_ [*date*] in \_\_\_\_\_, California.

Dated: \_\_\_\_\_.

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

NOTES.

**Authority:**

*CCP § 2015.5; Cal Rules Court, Rule 3.1332*

**Notice of Motion for Continuance:**

*See 30.21, 30.22*

**Related Declarations in Support of Motion:**

*See 30.23, 30.24*



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Chapter 30 Continuances  
V. FORMS

2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.26

**30.26 Stipulation to Absent Witness Testimony.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                              |
|------------------------------|---|----------------------------------------------|
| _____ [name],                | ) |                                              |
| Plaintiff, vs. _____ [name], | ) | NO. _____                                    |
| Defendant.                   | ) | STIPULATION OF _____ [identify               |
|                              | ) | party, e.g., PLAINTIFF JOHN SMITH] TO TESTI- |
|                              | ) | MONY OF ABSENT WITNESS                       |
|                              | ) | _____ [identify witness, e.g., FRED          |
|                              | ) | JONES]                                       |
|                              | ) | Date: _____                                  |
|                              | ) | Time: _____                                  |
|                              | ) | Location: _____                              |
|                              | ) | Judge: _____                                 |
|                              | ) | Date Action Filed: _____                     |
|                              | ) | Trial Date: _____                            |

\_\_\_\_\_ [Specify party, e.g., Plaintiff John Smith] admits that the evidence contained in the  
\_\_\_\_\_ [affidavit or declaration] of \_\_\_\_\_ [name of witness, e.g., Fred Jones, husband  
of Defendant Mary Jones], filed in this matter on \_\_\_\_\_ [date] would be given by  
\_\_\_\_\_ [name of witness, e.g., Fred Jones]. \_\_\_\_\_ [Specify party, e.g., Plaintiff John  
Smith] consents that this evidence be considered as either actually given on the trial or offered and overruled as  
improper.

This stipulation is made for the sole purpose of opposing the motion of \_\_\_\_\_ [specify party, e.g.,



Defendant Mary Jones] for a continuance. If that continuance is granted, this stipulation will be of no further force or effect.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_ [*name*]

NOTES.

**Authority:**

*CCP § 595.4*

**Discussion:**

*See 30.10*



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Chapter 30 Continuances  
V. FORMS

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.27*

**30.27 Declaration in Opposition to Motion for Continuance.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                                 |
|------------------------------|---|-------------------------------------------------|
| _____ [name],                | ) |                                                 |
| Plaintiff, vs. _____ [name], | ) | NO. _____                                       |
| Defendant.                   | ) | DECLARATION OF _____                            |
|                              | ) | [identify declarant, e.g., ATTORNEY TOM DOE] IN |
|                              | ) | OPPOSITION TO MOTION FOR CONTINUANCE            |
|                              | ) | Date: _____                                     |
|                              | ) | Time: _____                                     |
|                              | ) | Location: _____                                 |
|                              | ) | Judge: _____                                    |
|                              | ) | Date Action Filed: _____                        |
|                              | ) | Trial Date: _____                               |

I, \_\_\_\_\_ [identify declarant, e.g., Attorney Tom Doe] declare:

1. The following declaration is based on my personal knowledge, and if called upon to testify I could testify competently as to the matters set forth below.

2. I am \_\_\_\_\_ [identify declarant, e.g., the attorney of record] for \_\_\_\_\_ [specify party opposing continuance motion, e.g., Plaintiff John Smith] in the above-captioned case originally set for trial on \_\_\_\_\_ [date]. Plaintiff submits this declaration in opposition to \_\_\_\_\_ [identify movant and request sought, e.g., Defendant Mary Jones's last minute request for a three week continuance of the trial date].

3. \_\_\_\_\_ [Set out facts constituting claim of delay, e.g., Approximately three weeks prior to the date set for trial of this action, defendant's attorney, Jane Lee, asked for a continuance of the trial on the ground that she was expected to be in trial on the same date as this action's original trial date of \_\_\_\_\_; I consented to the case trailing until Ms. Lee had finished the trial in the other action but specified that the matter should be disposed of as soon as Ms. Lee was available to try it and that I would oppose any continuance other than to trail the case until Ms. Lee was available for trial].

4. \_\_\_\_\_ [Set out facts why claim of delay is without good cause, e.g., On \_\_\_\_\_ (date), Ms. Lee completed the trial of the cause referred to above and was at that time prepared to go to trial. On \_\_\_\_\_ (date), Defendant Mary Jones discharged Ms. Lee for the sole purpose of obtaining a continuance].

5. \_\_\_\_\_ [Specify additional reasons to deny continuance, e.g., This is an antitrust/monopolization case, and Plaintiff is entitled to have this matter heard before Plaintiff suffers further irreparable damage to Plaintiff's business. Further, Plaintiff's lead trial counsel, \_\_\_\_\_ (name), has a very expensive prepaid family vacation that would be jeopardized by the continuance. Other trial counsel, \_\_\_\_\_ (name), is expecting a baby on \_\_\_\_\_ (date) and has already continued a trial due to this trial conflict. Discovery and trial of that case, along with arrival of a newborn infant, will prevent him/her from participating in this trial for seven months if it is continued for three weeks]. For these reasons, and because Defense counsel's motion is too late and not properly noticed, it should be denied.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [name]

NOTES.

**Authority:**

CCP § 2015.5; Cal Rules Court, Rule 3.1332

**Related Forms of Memoranda:**

See *California Points and Authorities*, Ch. 48, *Continuance of Proceedings*, §§ 48.30-48.39 (Matthew Bender)



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Chapter 30 Continuances  
V. FORMS

*2-30 MB Practice Guide: CA Pretrial Civil Procedure 30.28*

**30.28 Order Granting Continuance.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                       |
|------------------------------|---|-----------------------|
| _____ [name],                | ) |                       |
| Plaintiff, vs. _____ [name], | ) | NO. _____             |
| Defendant.                   | ) | ORDER FOR CONTINUANCE |
|                              | ) |                       |
|                              | ) |                       |

\_\_\_\_\_

Through counsel, \_\_\_\_\_ [specify moving party, e.g., Plaintiff John Smith] filed a  
\_\_\_\_\_ [Noticed Motion or Ex Parte Application] to Continue the [Trial or Hearing] date pursuant to  
the California Judicial Administration Standards. Argument was heard on \_\_\_\_\_ [date] at  
\_\_\_\_\_ [time]. Plaintiff appeared by counsel \_\_\_\_\_ [name]. Defendant appeared by  
counsel \_\_\_\_\_ [name].

The \_\_\_\_\_ [motion or application] sought a continuance of the \_\_\_\_\_ [trial or  
hearing] on the grounds that \_\_\_\_\_ [specify, e.g., Plaintiff's key witness was unavailable to testify at  
trial due to family leave as mandated by state and federal law].

Good cause for the continuance having been shown,

IT IS ORDERED that the Trial Date set for \_\_\_\_\_ [date], be continued to \_\_\_\_\_  
[date], at \_\_\_\_\_ [time], in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_  
of] this court.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature*]

Judge of the Superior Court

NOTES.

**Notice of Motion for Continuance:**

See 30.21, 30.22

**Ex Parte Application for Continuance:**

See 30.20



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Chapter 31 Intervention

*2-31 MB Practice Guide: CA Pretrial Civil Procedure 31.syn*

**§ 31.syn Synopsis to Chapter 31: Intervention**

31.01 Scope.

31.02 Objective and Strategy.

31.03 CHECKLIST: Intervening in an Action or Proceeding.

31.04 Options and Strategies for Person Seeking to Intervene.

31.04[1] Complaint in Intervention Is Used to Protect Interest or Assert Claim of Third Party.

31.04[2] Alternatives to Intervention May Be Available.

31.05 Evaluating Availability of Intervention.

31.05[1] Two Types of Intervention: Mandatory and Permissive.

31.05[2] Mandatory Intervention.

31.05[2][a] Available When Law Confers Unconditional Right to Intervene.

31.05[2][b] Available When Interest Relates to Property or Transaction.

31.05[3] Permissive Intervention.

31.05[3][a] Available When Intervening Party Has Direct Interest in Litigation.

31.05[3][b] Consequential Interest Does Not Justify Permissive Intervention.

31.05[3][c] Consequential Interest May Become Direct.

### 31.06 Time to Intervene.

31.06[1] Application Must Be Timely Made.

31.06[2] Statute Providing Mandatory Intervention May Specify Time.

### 31.07 Procedure for Intervention.

31.07[1] Prospective Intervenor Must Seek Leave of Court to File Complaint.

31.07[2] Leave of Court Is Generally Obtained by Noticed Motion.

31.07[3] If Leave Is Granted, Intervenor Must File and Serve Complaint.

31.07[4] If Leave Is Denied, Intervenor May Appeal.

### 31.08 Effect of Intervention.

31.08[1] Intervenor Becomes Plaintiff or Defendant.

31.08[2] Intervenor Has Same Procedural Rights and Remedies As Original Parties.

31.08[3] Intervenor May Be Able to Continue Suit After Voluntary Dismissal by Plaintiff.

### 31.08A Appeal of Order Denying Intervention.

[1] Order Appealable If Final.

[2] Standard of Review Depends on Issue on Appeal.

### 31.09 CHECKLIST: Opposing Intervention.

### 31.10 Options and Strategy for Person Opposing Intervention.

31.11 To Avoid Waiver of Objection, Party Must Oppose Motion for Leave to Intervene.

31.12 Order Permitting Intervention Is Not Appealable Until After Final Judgment.

### 31.13 CHECKLIST: Responding to Complaint in Intervention.

31.14 Options and Strategy for Responding to Complaint in Intervention.

31.15 If Served With Complaint in Intervention, Respond Within 30-Day Period.

31.16 Responding When Intervenor Assumes Role of Plaintiff.

31.17 Responding When Intervenor Assumes Role of Defendant.

31.18 Notice of Motion and Motion for Leave to Intervene in Pending Action.

31.19 Order on Motion for Leave to Intervene in Pending Action.

31.20 Ex Parte Application for Order Granting Leave to Intervene in Pending Action and Order.

31.21 Complaint in Intervention.





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Chapter 31 Intervention  
I. STRATEGY

*2-31 MB Practice Guide: CA Pretrial Civil Procedure 31.01*

**31.01 Scope.**

This chapter covers:

- Objective and strategy for intervening in an action or proceeding [*see 31.02*].
- Use of a complaint in intervention or alternative procedures to protect interests and assert claims [*see 31.04*].
- The two types of intervention: mandatory and permissive [*see 31.05*].
- Timing [*see 31.06*] and effect of intervention [*see 31.08*].
- Procedures for leave to file a complaint in intervention [*see 31.07*; Forms: *see 31.18 -31.21*].
- Opposing a motion or application for leave to intervene [*see 31.10 -31.12*].
- Responding to a complaint in intervention, including the time to respond [*see 31.14 -31.17*].

**Core Statute:**

*CCP § 387*



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Chapter 31 Intervention  
I. STRATEGY

*2-31 MB Practice Guide: CA Pretrial Civil Procedure 31.02*

**31.02 Objective and Strategy.**

Intervention is a procedure by which a third person, not originally a party to, but claiming an interest in, the action, enters into the pending case through a complaint in intervention to protect a right or make a claim [see CCP § 387].

Intervention is used to [ *People v. Superior Court (1976) 17 C3d 732, 736, 131 CR 800, 552 P2d 760* ]:

- Obviate delay;
- Avoid a multiplicity of suits; and
- Protect the interests of those who will be affected by the judgment.

**Distinguish--Joinder of Parties:**

Joinder is the act of uniting as parties to an action all persons who have the same rights or against whom rights are claimed as plaintiffs or codefendants [see CCP §§ 378, 379, 379.5, 389, 389.5].



**Strategic Point--Party Seeking to Intervene:**

A third person may be able to enter an action through either joinder [see CCP §§ 389, 389.5] or intervention [see CCP § 387]. Joinder may be the more appropriate and expeditious procedure if the third person's interests are completely aligned with those of an existing party. When the interests of the third person are not so clearly aligned with the existing parties, intervention, if available, will allow the third person to frame his or her own allegations in the complaint for intervention.



**Strategic Point--Survival of Complaint in Intervention:**

If a complaint in intervention can be brought independently, it can survive the dismissal of the underlying action *Lohnes v. Astron Computer Prods. (2001) 94 CA4th 1150, 1153, 115 CR2d 34* ].

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 395, Parties (Matthew Bender).

California Points and Authorities, Ch. 124, Intervention (Matthew Bender).

 **Cross References:**

Discussion of joinder, see Ch. 5, Parties.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesInterventionGeneral Overview



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Chapter 31 Intervention  
II. INTERVENING IN AN ACTION OR PROCEEDING

*2-31 MB Practice Guide: CA Pretrial Civil Procedure 31.03*

**31.03 CHECKLIST: Intervening in an Action or Proceeding.**

☐ Determine whether nonparty should seek to intervene in pending action or proceeding to:

- ☐ Join with plaintiff to claim what is sought by complaint;
- ☐ Unite with defendant to resist plaintiff's claims; or
- ☐ Demand anything adverse to both plaintiff and defendant.

**Authority:**  
*CCP § 387(a)*

**Discussion:**  
*See 31.04[1]*

☐ Determine whether nonparty has mandatory right to intervene in action or proceeding:

- ☐ Determine if any provision of law confers unconditional right to intervene.

**Authority:**  
*CCP § 387(b)*

**Discussion:**  
*See 31.05[2][a]*

- ☐ Determine whether:

☐ Nonparty seeking intervention has interest relating to property or transaction that is subject of action;

☐ Nonparty is so situated that disposition of action may as practical matter impair or impede his or her ability to protect that interest; and

☐ Nonparty's interest is not adequately represented by existing parties.

**Authority:**

*CCP § 387(b)*

**Discussion:**

*See 31.05[2][b]*

☐ Determine whether alternative procedure, other than complaint in intervention, is available to protect nonparty's interests or assert nonparty's claims.

**Discussion:**

*See 31.04[2]*

☐ If intervention is not mandatory and no alternative procedure is available, determine whether nonparty otherwise has interest justifying intervention:

☐ Nonparty may seek to intervene if he or she has interest:

☐ In matter in litigation;

☐ In success of either party; or

☐ Against both of parties.

**Authority:**

*CCP § 387(a)*

**Discussion:**

*See 31.05[3][a]*

☐ To justify intervention, nonparty must have either:

☐ Interest of such direct or immediate character that intervenor will either gain or lose by direct legal operation and effect of judgment in action; or

**Authority:**

*Bechtel v. Axelrod* (1942) 20 C2d 390, 392-393, 125 P2d 836

**Discussion:**

See 31.05[3][a]

☐ Interest, which would otherwise be consequential, that has become direct under circumstances of case, such as:

- ☐ Bad faith of a party to the litigation;
- ☐ Assertion by all parties to litigation of claims adverse to person seeking intervention;
- ☐ Collusion; or
- ☐ Impossibility of asserting a position that should be presented in the litigation.

**Authority:**

*Continental Vinyl Products Corp. v. Mead Corp.* (1972) 27 CA3d 543, 551, 103 CR 806

**Discussion:**

See 31.05[3][c]

☐ Determine timing of motion for leave to intervene:

- ☐ Application for leave to intervene must be "timely" made.
- ☐ Statute of limitations governing action may affect right to intervene.
- ☐ Statutory provision granting unconditional right to intervene in particular case may provide standard of timeliness.

**Authority:**

CCP § 387(a), (b)

**Discussion:**

See 31.06

☐ Select method of making application for leave to intervene and prepare appropriate papers:

- ☐ Notice of motion and motion for leave to intervene, with:
  - ☐ Supporting declaration.

- ☐ Supporting memorandum.
- ☐ Proposed order.
- ☐ Proposed complaint in intervention.

**Forms:**

See 31.18 (notice of motion and motion), 31.19 (order on motion), 31.21 (complaint)

☐ Ex parte application for order granting leave to intervene, with:

- ☐ Supporting declaration(s).
- ☐ Memorandum of points and authorities.
- ☐ Proposed order.
- ☐ Proposed complaint in intervention.

**Forms:**

See 31.20 (ex parte application and order), 31.21 (complaint)

☐ Application for order to show cause why leave should not be granted to intervene, with:

- ☐ Supporting declaration.
- ☐ Memorandum of points and authorities.
- ☐ Proposed order.
- ☐ Proposed complaint in intervention.

☐ Oral ex parte application for leave to intervene.

**Discussion:**

See 31.07[2]

- ☐ Serve and file motion, with appropriate filing fee, or present application following standard motion procedure.

**Authority:**

CCP § 387; Gov Code §§ 70611, 70612

**Discussion:**

See 31.07

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.23 (ex parte), 26.39 (noticed motion)

- ☐ When leave to intervene is granted, file complaint in intervention.

**Authority:**

*CCP* § 387(a)

**Discussion:**

See 31.07[3]

**Form:**

See 31.21 (complaint in intervention)

- ☐ Serve complaint in intervention on all parties to action.

**Authority:**

*CCP* § 387(a)

**Discussion:**

See 31.07[3]





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Chapter 31 Intervention  
II. INTERVENING IN AN ACTION OR PROCEEDING

*2-31 MB Practice Guide: CA Pretrial Civil Procedure 31.04*

**31.04 Options and Strategies for Person Seeking to Intervene.**

**31.04[1] Complaint in Intervention Is Used to Protect Interest or Assert Claim of Third Party.** Intervention is a procedure by which a third person, not originally a party to the action, but claiming an interest in the subject matter of the action, enters into the case through a complaint in intervention in order to protect a right or interpose a claim [see *CCP* § 387].

Depending on the circumstances of the case, the intervening party may [*CCP* § 387(a)]:

- Join the plaintiff in claims sought by the complaint;
- Unite with the defendant in resisting the claims of the plaintiff; or
- Demand anything adverse to both the plaintiff and the defendant.

As a precondition to intervention, the nonparty must timely seek leave of court to file a complaint in intervention [see *CCP* § 387].

➡ **Cross Reference:**

Timing for intervention, see 31.06; Discussion of procedure for intervention, see 31.07.

If leave to intervene is granted, the intervenor becomes a party to the action and is regarded as either a plaintiff or defendant, depending on the party with whom the intervenor's interests are aligned [see *Timberidge Enters., Inc. v. City of Santa Rosa* (1978) 86 CA3d 873, 879, 150 CR 606 ].

➡ **Cross Reference:**

Effect of intervention, see 31.08.

**31.04[2] Alternatives to Intervention May Be Available.** In certain circumstances, a nonparty may be able to use other specific statutory procedures, instead of a complaint in intervention, to protect his or her interests or assert claims.

**Examples--Alternative Procedures:**

- Joinder of party having interest in property [*CCP* § 389.5].
- Third party claim in property that is attached [*CCP* § 488.110].
- Third party claim in property subject to writ of possession [*CCP* § 514.050].
- Third party claim in property levied on [*CCP* § 720.010 *et seq.*].
- Action by private party challenging validity of agency acts regarding community development [*CCP* §§ 860-870].
- Will contest by third party [*Prob Code* § 8270].

**➡ Cross References:**

Discussion of joinder, see Ch. 5, Parties.

Discussion of alternative procedures, see *California Forms of Pleading and Practice*, Ch. 395, Parties, § 395.90[3] (*Matthew Bender*).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Civil ProcedurePartiesInterventionGeneral Overview



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Chapter 31 Intervention  
II. INTERVENING IN AN ACTION OR PROCEEDING

*2-31 MB Practice Guide: CA Pretrial Civil Procedure 31.05*

**31.05 Evaluating Availability of Intervention.**

**31.05[1] Two Types of Intervention: Mandatory and Permissive.** Before seeking intervention, a prospective applicant must determine whether "mandatory" or "permissive" intervention, or both, are available.

Under certain statutorily specified circumstances, the right to intervene is "mandatory." If an applicant can show the requisite circumstances for a mandatory intervention, a court will permit the intervention [*see CCP § 387(b)*].

In contrast, in other statutorily specified circumstances, the right to intervene is "permissive." If an applicant shows the requisite circumstances for a permissive intervention, the court has broad discretion in determining whether to permit the intervention [ *US Ecology, Inc. v. California (2001) 92 CA4th 113, 139, 111 CR2d 689* , *see CCP § 387(a)*].



**Strategic Point--Assert Grounds For Mandatory Intervention Whenever Applicable:**

Even if grounds for permissive intervention clearly exist, a nonparty seeking to intervene should also consider the potential grounds for mandatory intervention under *CCP § 387(b)*.



**Cross References:**

Discussion of mandatory intervention, *see 31.05[2]*. Discussion of permissive intervention, *see 31.05[3]*.

**31.05[2] Mandatory Intervention.**

**31.05[2][a] Available When Law Confers Unconditional Right to Intervene.** If any provision of law confers an unconditional right to intervene, the court will permit the intervention [*CCP § 387(b)*].

**Examples--Statutory Provisions Authorizing Intervention:**

- Intervention by employer or employee in action against third party [*Lab Code § 3853*].

- Intervention by person claiming interest in property subject to eminent domain proceeding [*CCP* § 1250.230].
- Intervention by creditor to reach unpaid subscription of shareholder [*Corp Code* § 414(b)].
- Intervention by dissenting shareholder in action for appraisal of stock [*Corp Code* § 1304(a)].
- Intervention by dissenting shareholder or creditor in corporate dissolution proceedings [*Corp Code* § 1800(c)].



#### **Cross Reference:**

California statutes providing specific statutory authorization for intervention, see *California Forms of Pleading and Practice*, Ch. 395, *Parties*, § 395.61[2] (Matthew Bender).

**31.05[2][b] Available When Interest Relates to Property or Transaction.** The court must permit intervention if [*CCP* § 387(b)]:

- The person seeking intervention claims an interest relating to the property or transaction that is the subject of the action;
- The person seeking intervention is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest; and
- The person's interest is not adequately represented by existing parties.

#### **Examples--Mandatory Intervention Available:**

- State Department of Finance (DOF) was permitted to intervene when DOF had interest against success of city in its claim against State of California Commission on State Mandates to recover state funds for housing costs incurred by city [Redevelopment Agency v. Comm'n on *State Mandates* (1996) 43 CA4th 1188, 1197-1198, 51 CR2d 100 ].

#### **Examples--Mandatory Intervention Not Available:**

- Medical benefits provider was not entitled to mandatory intervention in a personal injury action brought by its subscriber against health care providers because the benefits provider did not have an interest in the subject of the litigation, the subscriber's cause of action in tort [ *Cal. Physicians' Serv. v. Superior Court* (1980) 102 CA3d 91, 96-97, 162 CR 266 ].
- Identity of interests between adjacent property owner with neighbor contesting validity of neighbor's offer to dedicate beach access for public use prevented intervention [ *City of Malibu v. California Coastal Com.* (2005) 128 CA4th 897, 902, 906 , 27 CR3d 501 ].

#### **31.05[3] Permissive Intervention.**

**31.05[3][a] Available When Intervening Party Has Direct Interest in Litigation.** Any person may seek permissive intervention in a pending action or proceeding if he or she has an interest [*CCP* § 387(a)]:

- In the matter in litigation;

- In the success of either of the parties; or
- Adverse to both of the parties.

The interest of the person seeking to intervene must be of such a direct or immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment [ *Bechtel v. Axelrod* (1942) 20 C2d 390, 392, 125 P2d 836 ; *Siena Court Homeowners Assn. v. Green Valley Corp.* (2008) 164 CA4th 1416, 1428, 79 CR3d 915 ].

In considering an application for permissive intervention, the court will consider the following [ *Gray v. Begley* (2010) 182 CA4th 1509, 1521, 106 CR3d 729 ; *Hinton v. Beck* (2009) 176 CA4th 1378, 1382-1383, 98 CR3d 612 ; *Noya v. A.W. Coulter Trucking* (2006) 143 CA4th 838, 842, 49 CR3d 584 ; cf. *Bame v. City of Del Mar* (2001) 86 CA4th 1346, 1364, 104 CR2d 183] .:

- Whether the prospective intervenor has a direct interest in the lawsuit;
- Whether or not intervention would enlarge issues raised by the original parties; and
- Whether the reasons for intervention outweigh any opposition by the parties presently in the action.

#### **Examples--Direct Interest:**

- Insurer providing defense to insured under policy has direct interest to intervene in attempt by insured and tortfeasor to settle the case without the participation of the insurer [ *Gray v. Begley* (2010) 182 CA4th 1509, 1521-1525, 106 CR3d 729] .
- Law firm has direct and immediate interest in obtaining attorney fees under CCP § 1021.5 in action in which clients refused to move for attorney fees sufficient for right to intervene under CCP § 387(a), in absence of agreement providing for disposition of fees to another [ *Lindelli v. Town of San Anselmo* (2006) 139 CA4th 1499, 1505-1519, 43 CR3d 707 ].
- In an action against and insured for property damage, an insurer was allowed to intervene because the defendant was a suspended corporation and thus not able to defend. The insurer was liable for any default judgment against the insured and had no means other than intervention to litigate liability or damage issues [ *Reliance Ins. Co. v. Superior Court* (2000) 84 CA4th 383, 384-388, 100 CR2d 807 ].



#### **Strategic Point:**

In the event of default against the insured, the insurer may either intervene prior to judgment or move under CCP § 473 to set aside the default judgment on grounds of mistake, inadvertence, surprise, or excusable neglect [ *Belz v. Clarendon America Ins. Co.* (2007) 158 CA4th 615, 633, 69 CR3d 864 ; see 36.65 et seq.].

- One of three insurers, which had accepted the defense of the insured under liability policy, had direct interest in action brought by two other insurers against insured seeking to rescind their policies; outcome of action for rescission would have direct effect on defending insurer's right to seek equitable contribution from other insurers [ *Truck Ins. Exch. v. Superior Court* (1997) 60 CA4th 342, 346, 70

*CR2d 255* ].

- Nonprofit corporation composed of parents was entitled to intervene in action involving desegregation of school district; reassignment of students would have direct impact on students and their parents, and their interests were not represented by the parties to the action [ *Bustop v. Superior Court* (1977) 69 CA3d 66, 70-71, 137 CR 793 ].

#### **Distinguish--Issues Enlarged:**

In a construction defect action concerning a claim that defendant was liable for the alleged construction defects in a condominium complex, adding a claim that a joint obligor with plaintiff on a use and maintenance agreement concerning the complex is entitled to a portion of plaintiff's recovery pursuant to the joint use and maintenance agreement would enlarge the issues [ *Siena Court Homeowners Assn. v. Green Valley Corp.* (2008) 164 CA4th 1416, 1429-1430, 79 CR3d 915 ].

**31.05[3][b] Consequential Interest Does Not Justify Permissive Intervention.** Permissive intervention is not justified if the asserted interest is indirect, consequential, or remote in that the threatened injury or benefit will not inevitably result from the judgment, but rather from the consequences of the judgment [ *Jersey Maid Milk Prods. Co., Inc. v. Brock* (1939) 13 C2d 661, 664-665, 91 P2d 599 ; *Mary R. v. B & R Corp.* (1983) 149 CA3d 308, 314-315, 196 CR 871 ]. The interest is only consequential when the action in which intervention is sought does not directly affect the interest although the results of the action may indirectly benefit or harm its owner [ *Hinton v. Beck* (2009) 176 CA4th 1378, 1384, 98 CR3d 612] .

#### **Examples--Consequential Interest:**

- An insurer who denies coverage and refuses to defend its insured does not have a direct interest in the litigation between the plaintiff and the insured to warrant intervention, because the insurer loses its right to control the litigation when it denies the defense [ *Hinton v. Beck*, 176 CA4th 1378, 1384, 98 CR3d 612] .

- Although the results of a construction defect action could indirectly benefit or harm intervenor, because plaintiff's ability to meet its obligations under the joint use and maintenance agreement with intervenor concerning the allegedly defectively constructed property could be affected, intervenor's interest was consequential and thus insufficient for intervention [ *Siena Court Homeowners Assn. v. Green Valley Corp.* (2008) 164 CA4th 1416, 1429, 1430, 79 CR3d 915 ].

- Adjacent property owner did not have direct and immediate interest sufficient to intervene in action contesting validity of neighbor's offer to dedicate beach access for public use [ *City of Malibu v. California Coastal Com.* (2005) 128 CA4th 897, 905 , 27 CR3d 501 ].

- Major shareholder of a bankrupt corporation had only a consequential interest in an action being prosecuted by the trustee in bankruptcy because asserted interest of shareholder was in enhancing the value of the stock, an indirect benefit flowing from the success of the suit [ *Continental Vinyl Prods. Corp. v. Mead Corp.* (1972) 27 CA3d 543, 553, 103 CR 806 ].

- Unsecured creditors of defendant had only a consequential interest in an action involving the defendant who would be rendered unable to pay the owed debt if the suit was lost [ *Olson v. Hopkins* (1969) 269 CA2d 638, 642-644, 75 CR 33 ].

**31.05[3][c] Consequential Interest May Become Direct.** What would otherwise be a consequential interest may become a direct interest justifying intervention under the circumstances of a particular case, such as [ *Continental*

*Vinyl Prods. Corp. v. Mead Corp.* (1972) 27 CA3d 543, 551, 103 CR 806 ]:

- Bad faith of a party to the litigation;
- Assertion by all parties to the litigation of claims adverse to the person seeking intervention,
- Collusion; or
- Impossibility of asserting a position that should be presented in the litigation.

**Example--Consequential Interest Becoming Direct:**

- Shareholders entitled to intervene in action against corporation when officers and directors fail to defend suit [ *Eggers v. Nat'l Radio Co.* (1929) 208 C 308, 314, 281 P 58 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionStatutory Right to Intervene



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**31.06 Time to Intervene.**

**31.06[1] Application Must Be Timely Made.** An application for leave to intervene must be "timely" made [CCP § 387(a), (b)].

The statute of limitations governing the action may affect the right to intervene [see *Andersen v. Barton Mem'l Hosp., Inc.* (1985) 166 CA3d 678, 682, 212 CR 626 ].

In a class action, the class notice may specify the date by which intervention must be sought [ *Chavez v. Netflix, Inc.* (2008) 162 CA4th 43, 51, 75 CR3d 413 ].

If otherwise appropriate, intervention is possible even after judgment [ *Mallick v. Superior Court* (1979) 89 CA3d 434, 437, 152 CR 503 ].



**Warning:**

The court may deny intervention if it is untimely [see e.g. *Lohnes v. Astron Computer Prods.* (2001) 94 CA4th 1150, 1153, 115 CR2d 34 ]. Counsel should move to intervene as soon as the necessity is apparent.

**Examples--Timely Application:**

- Even though wrongful death action was timely filed by some of decedent's heirs, an omitted heir seeking to intervene was required to file application within limitations period when asserting a new cause of action [ *Andersen v. Barton Mem'l Hosp.* (1985) 166 CA3d 678, 682-683, 685, 212 CR 626 ].

- Application to intervene was timely when made after motion for new trial was granted and cause was still at issue [ *Eggers v. Nat'l Radio Co.* (1929) 208 C 308, 312, 281 P 58 ].

**Examples--Untimely Application:**



- Request to intervene in class action that was filed January 6, and served by mail on January 5, was untimely under deadline of January 5 in class notice [ *Chavez v. Netflix, Inc.* (April 21, 2008) 162 CA4th 43, \_\_, 75 CR3d 413, 2008 Cal. App. LEXIS 584 at 12 ].

**31.06[2] Statute Providing Mandatory Intervention May Specify Time.** If a statutory provision grants an unconditional right to intervene, the statute may also provide a standard of timeliness [see *Mar v. Sakti Internat. Corp.* (1992) 9 CA4th 1780, 1784-1785, 12 CR2d 388 ].

**Example:**

Application to intervene made "at any time before trial on the facts" was timely pursuant to statutory provision giving employer right to intervene to recover workers' compensation sums in employee's action against third party [ *Mar v. Sakti Internat. Corp.* (1992) 9 CA4th 1780, 1784-1785, 12 CR2d 388 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesInterventionTimeliness



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**31.07 Procedure for Intervention.**

**31.07[1] Prospective Intervenor Must Seek Leave of Court to File Complaint.** An application for leave to file a complaint in intervention is required even when there is an unconditional right to intervene [ *Lohnes v. Astron Computer Prods.* (2001) 94 CA4th 1150, 1153, 115 CR2d 34 ].

Without permission from the court, a party lacks any standing to the action [ *Lohnes v. Astron Computer Prods.* (2001) 94 CA4th 1150, 1153, 115 CR2d 34 ; *Mar v. Sakti Internat. Corp.* (1992) 9 CA4th 1780, 1784, 12 CR2d 388 ].

➡ **Cross Reference:**

Discussion of standing requirement, see Ch. 5, Parties.

**31.07[2] Leave of Court Is Generally Obtained by Noticed Motion.** In nearly all circumstances, intervention will be by noticed motion [see *Bowles v. Superior Court* (1955) 44 C2d 574, 588-589, 283 P2d 704 ]. If a party is moving to intervene as a plaintiff, the party must include a copy of the proposed complaint as part of the motion seeking leave to intervene.

➡ **Cross Reference:**

Forms, see 31.18 (notice of motion and motion for leave to intervene).

An ex parte application should be used only if there is some exigency that requires that the matter not be done by noticed motion [see *Allen v. Cal. Water & Tel. Co.* (1947) 31 C2d 104, 107-108, 187 P2d 393 ]. Counsel should check the local rules with respect to ex parte applications.

⚠ **Warning:**

An ex parte application must comply with *Cal Rules Ct, Rule 3.1200 et seq.*

➡ **Cross References:**

Form, see 31.20 (ex parte application for leave to intervene). Discussion of requirements for ex parte applications, see Ch. 26, Law and Motion Procedure.

Intervention may be allowed by stipulation of all the parties to the pending action and an order of the court.

**Exception--When Case Is Before Temporary Judge or Referee:**

A motion for leave to file a complaint for intervention in a case pending before a temporary judge requested by the parties must be filed with the court and served on all parties and the temporary judge. The motion must be heard by the trial court judge to whom the case is assigned or, if the case has not been assigned, by the presiding judge or his or her designee. If intervention is allowed, the case must be returned to the trial court docket unless all parties stipulate to proceed before the temporary judge [*Cal Rules Ct, Rules 2.835(b), 3.932(b)*].



**Warning:**

The first paper filed in the action on behalf of an intervenor must be accompanied by a filing fee [see *Gov Code §§ 70611, 70612*].

**31.07[3] If Leave Is Granted, Intervenor Must File and Serve Complaint.** If leave to intervene is granted, the intervenor must file a complaint in intervention, setting forth the grounds on which the intervention rests [*CCP § 387(a)*].



**Cross References:**

Discussion of pleadings in general, see Ch. 7, Complaints; Ch. 11, Demurrers and Motions for Judgment on the Pleadings; Ch. 14, Answers; Ch. 16, Cross-Complaints.



**Strategic Point--Party or Parties Opposing Intervenor:**

The pleading filed by the intervenor is referred to as a "complaint" in intervention, even if the intervenor is uniting with the defendant in resisting the claims of the plaintiff. The response required by the party or parties opposing the relief sought by the intervenor will depend on the nature of the allegations of the "complaint," which may be adverse to any or all of the existing parties.



**Cross Reference:**

Discussion of responding to complaint in intervention, see 31.13-31.17.

The complaint in intervention must be served on parties to the action who have not appeared, in the same manner provided for service of summons in an original action [*CCP § 387(a)*].

The complaint in intervention must be served on parties who have appeared [*CCP § 387(a)*]:

- By service of summons on their attorneys, or on the party if he or she has appeared without an attorney, or
- In the manner provided for service of papers in an action [see *CCP §§ 1010-1020*].



**Cross Reference:**

Discussion, see Ch. 8, Service of Summons.

**31.07[4] If Leave Is Denied, Intervenor May Appeal.** An order denying intervention is a final determination against the prospective intervenor and may be appealed [ *Dollenmayer v. Pryor* (1906) 150 C 1, 3-4, 87 P 616 ; *Bame v. City of Del Mar* (2001) 86 CA4th 1346, 1363, 104 CR2d 183 ].



**Warning:**

The prospective intervenor must file a direct appeal from the court's order denying intervention to challenge the propriety of that order [see *Bame v. City of Del Mar* (2001) 86 CA4th 1346, 1363, 104 CR2d 183 ].



**Cross Reference:**

Notice of appeal on order denying intervention, see *California Forms of Pleading and Practice*, Ch. 42, *Appeal: Notice of Appeal*, § 42.80[4] (Matthew Bender).

**Distinguish--Appeal After Final Judgment in Action:**

The denial of leave to intervene can be appealed only on that issue; the unsuccessful intervenor has no right to appeal from a judgment ultimately rendered in the action in which intervention was sought [ *County of Alameda v. Carleson* (1971) 5 C3d 730, 736, 97 CR 385, 488 P2d 953 ]. A successful intervenor has the same right to appeal after final judgment as does an original party [ *Corridan v. Rose* (1955) 137 CA2d 524, 528, 290 P2d 939 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesInterventionMotions to Intervene



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**31.08 Effect of Intervention.**

**31.08[1] Intervenor Becomes Plaintiff or Defendant.** If leave to intervene is granted, the intervenor becomes a party to the action and is regarded as either a plaintiff or a defendant, depending on the party with whom the intervenor's interests are aligned [see *Timberidge Enters., Inc. v. City of Santa Rosa* (1978) 86 CA3d 873, 879, 150 CR 606 ].

An intervening plaintiff generally must accede to the original plaintiffs in the prosecution of the case unless the intervenor can show the court that the original plaintiffs are not pursuing the conduct of the case to their and the intervenor's best interests [see *Mann v. Superior Court* (1942) 53 CA2d 272, 280, 127 P2d 970 ].

**31.08[2] Intervenor Has Same Procedural Rights and Remedies As Original Parties.** As a general rule, an intervenor takes a suit as he or she finds it and cannot take advantage of ordinary procedural irregularities that the original parties have either expressly or impliedly waived [ *Hosp. Council of N. Cal. v. Superior Court* (1973) 30 CA3d 331, 336, 106 CR 247 ].

However, when timely, or otherwise appropriate, the intervenor may [ *Deutschmann v. Sears, Roebuck & Co.* (1982) 132 CA3d 912, 916-918, 183 CR 573 ; *Hosp. Council of N. Cal. v. Superior Court* (1973) 30 CA3d 331, 336, 337 n6, 106 CR 247 ]:

- Object to the court's jurisdiction.
- Object that the complaint does not state a cause of action.
- Demand a jury trial.
- Move to disqualify a judge.

The intervenor can also obtain the same affirmative relief that he or she could properly achieve by cross-complaint if he or she were an original party [ *City of Santa Monica v. Stewart* (2005) 126 CA4th 43, 87, 24 CR3d 72 (attorney's fees under CCP § 1021.5); *Marc Bellaire, Inc. v. Fleischman* (1960) 185 CA2d 591, 595, 8 CR 650 ].

**31.08[3] Intervenor May Be Able to Continue Suit After Voluntary Dismissal by Plaintiff.** The nature of the complaint in intervention determines whether the intervenor can continue the action after a voluntary dismissal by the plaintiff.

An intervenor who seeks only to resist the plaintiff's cause of action cannot deprive that party of the privilege of a voluntary dismissal [ *Klinghoffer v. Barasch* (1970) 4 CA3d 258, 261-262, 84 CR 350 ].

If the intervenor's complaint in intervention constitutes a request for affirmative relief, a cross-complaint, or claims adverse to both of the original parties, the intervenor's right to have the issues determined cannot be affected by the dismissal of the plaintiff's action [ *Farmer v. Union Oil Co.* (1977) 75 CA3d 42, 44-45, 44 n1, 141 CR 848 ; *Voyce v. Superior Court* (1942) 20 C2d 479, 488, 127 P2d 536 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**31.08A Appeal of Order Denying Intervention.**

**[1] Order Appealable If Final.** An order denying a motion to intervene is appealable when it finally and adversely determines the right of the moving party to proceed in the action [ *Noya v. A.W. Coulter Trucking* (2006) 143 CA4th 838, 841, 49 CR3d 584 ; *Jun v. Myers* (2001) 88 CA4th 117, 122-123, 105 CR2d 537 ; see *Hinton v. Beck* (2009) 176 CA4th 1378, 1382, 98 CR3d 612 (order striking intervention complaint is appealable)]. That the motion to intervene was ex parte does not matter [ *Noya v. A.W. Coulter Trucking* (2006) 143 CA4th 838, 841, 49 CR3d 584 ].

**[2] Standard of Review Depends on Issue on Appeal.** An order denying intervention is reviewed on appeal under the deferential abuse-of-discretion standard [ *Noya v. A.W. Coulter Trucking* (2006) 143 CA4th 838, 842, 49 CR3d 584 ; *Reliance Ins. Co. v. Superior Court* (2000) 84 CA4th 383, 386, 100 CR2d 807 ]. However, whether a party has sufficient interest in a statutory fee award to support intervention under CCP § 387 is a question of statutory interpretation subject to de novo review [ *Lindelli v. Town of San Anselmo* (2006) 139 CA4th 1499, 1505, 43 CR3d 707 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesInterventionMotions to Intervene



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III. OPPOSING INTERVENTION

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**31.09 CHECKLIST: Opposing Intervention.**

☐ Review application for leave to intervene to determine whether nonparty has grounds for intervention:

☐ Determine whether nonparty has mandatory right to intervene because:

☐ Provision of law confers unconditional right to intervene; or

☐ Nonparty has an interest relating to the property or transaction that is the subject of the action, and

☐ Nonparty is so situated that the disposition of the action may as a practical matter impair or impede his or her ability to protect that interest.

☐ Nonparty's interest is not adequately represented by existing parties.

**Authority:**

*CCP § 387(b)*

**Discussion:**

*See 31.05[2]*

☐ Determine whether nonparty otherwise has interest justifying intervention:

☐ Nonparty must have interest:



- ☐ In the matter in litigation;
- ☐ In the success of either of the parties; or
- ☐ Against both of the parties.

☐ Interest must be:

- ☐ An interest of such direct or immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment; or
- ☐ An interest, which would otherwise be consequential, that has become direct under the circumstances of the case.

**Authority:**

*CCP § 387(a)*

**Discussion:**

*See 31.05[3]*

☐ Determine whether application for leave to intervene is timely:

- ☐ Application for leave to intervene must be "timely" made.
- ☐ Statute of limitations governing action may affect right to intervene.
- ☐ Statutory provision granting unconditional right to intervene in particular case may provide standard of timeliness.

**Authority:**

*CCP § 387*

**Discussion:**

*See 31.06*

☐ If grounds for intervention are inadequate or application is untimely, prepare, file and serve appropriate opposition to application.

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.23 (ex parte), 26.39 (noticed motion)*



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III. OPPOSING INTERVENTION

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### 31.10 Options and Strategy for Person Opposing Intervention.

A party served with notice of an application for leave to intervene may oppose the application for leave because of [see CCP § 387]:

- Lack of grounds for the intervention; or
- The untimeliness of the application.

#### Strategic Point--Party Opposing Intervention:



An order granting leave to intervene is not appealable until after final judgment. If an existing party opposes the granting of leave to intervene, however, that party should specifically make an objection to the application to intervene to avoid waiving the issue. The issue of whether intervention is proper will not be preserved for appeal by allowing the application for leave to intervene to be granted without objection, and then objecting to the intervention in response to the complaint in intervention [see *Watson v. Collins* (1962) 204 CA2d 27, 30-32, 21 CR 832 ].



#### Cross References:

Discussion of opposition to application for leave, see 31.11. Discussion of response to complaint in intervention, see 31.13-31.17.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesInterventionMotions to Intervene



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**31.11 To Avoid Waiver of Objection, Party Must Oppose Motion for Leave to Intervene.**

A party must make a timely and appropriate objection to intervention or the matter will be considered waived [ *Traweek v. Draper* (1956) 143 CA2d 119, 121-122, 299 P2d 391 ]. A party cannot oppose intervention after treating the complaint in intervention as a valid complaint and filing an answer to it [ *Traweek v. Draper* (1956) 143 CA2d 119, 121-122, 299 P2d 391 ].

An objection to intervention cannot be raised for the first time on appeal [ *Watson v. Collins* (1962) 204 CA2d 27, 30-31, 21 CR 832 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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III. OPPOSING INTERVENTION

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**31.12 Order Permitting Intervention Is Not Appealable Until After Final Judgment.**

A party opposing intervention may not appeal an order permitting intervention until after final judgment [ *Adoption of Lenn E. (1986) 182 CA3d 210, 217, 227 CR 63* ].



**Warning:**

A party must have made a timely objection to intervention to preserve the issue for appeal, or the issue will be considered waived, even though the party may be able to otherwise appeal from the final judgment [see *Watson v. Collins (1962) 204 CA2d 27, 30-32, 21 CR 832* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesInterventionMotions to Intervene



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IV. RESPONDING TO COMPLAINT IN INTERVENTION

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**31.13 CHECKLIST: Responding to Complaint in Intervention.**

- ☐ If leave to intervene has been granted and complaint in intervention served:
  - ☐ Review complaint in intervention to determine the nature of intervenor's claims and prepare appropriate pleading in response:
    - ☐ If intervenor has assumed role of a plaintiff, prepare, as appropriate:
      - ☐ Demurrer to the complaint.
      - ☐ Motion to strike.
      - ☐ Answer.
      - ☐ Cross-complaint.

**Authority:**

*CCP §§ 387(a), 426.30, 428.10, 430.10, 430.30, 435*

**Discussion:**

*See 31.16*

- ☐ If intervenor has assumed role of a defendant, prepare, as appropriate:
  - ☐ Objection by demurrer, if complaint in intervention is in nature of an answer.
  - ☐ Motion to strike.

- ☐ Demurrer or answer if complaint in intervention is in nature of a cross-complaint.

**Authority:**

*CCP §§ 387(a), 430.10, 430.30, 435*

**Discussion:**

*See 31.17*

- ☐ File and serve pleading in response within 30 days of service of complaint in intervention.

**Authority:**

*CCP § 387(a)*

**Discussion:**

*See 31.15*



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*2-31 MB Practice Guide: CA Pretrial Civil Procedure 31.14*

##### **31.14 Options and Strategy for Responding to Complaint in Intervention.**

Counsel should respond to a complaint-in-intervention in the same manner as responding to a regular complaint. The same options of filing an answer, motion to strike, or demurrer are available. Counsel should ensure that any particular affirmative defenses applicable to the plaintiff-in-intervention are pled, and that if a party has an offset as to the plaintiff-in-intervention, that it, too, is pled. Defenses applicable to the plaintiff may be applicable to the plaintiff-in-intervention as well (e.g. comparative fault of the plaintiff applies to the workers' compensation carrier as plaintiff-in-intervention). Any compulsory cross-complaints must be filed and non compulsory cross-complaints should be considered as well.

##### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesInterventionGeneral Overview



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**31.15 If Served With Complaint in Intervention, Respond Within 30-Day Period.**

A party served with a complaint in intervention has 30 days after service to move, demur, or otherwise plead to the complaint [CCP § 387(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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IV. RESPONDING TO COMPLAINT IN INTERVENTION

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**31.16 Responding When Intervenor Assumes Role of Plaintiff.**

If the intervenor is aligned with the plaintiff or otherwise assumes the role of a plaintiff in seeking affirmative relief, an opposing party may file, as appropriate:

- A demurrer to the complaint in intervention [see *CCP* §§ 430.10, 430.30(a)].
- A motion to strike [see *CCP* § 435].
- An answer to the complaint in intervention [see *CCP* §§ 430.10, 430.30(b)].
- A cross-complaint [see *CCP* §§ 426.30, 428.10].



**Cross References:**

Detailed discussion of responses to complaints, see Ch. 11, Demurrers and Motions for Judgment on the Pleadings; Ch. 12, Motions to Strike; Ch. 14, Answers; Ch. 16, Cross-Complaints.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesInterventionGeneral Overview



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IV. RESPONDING TO COMPLAINT IN INTERVENTION

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**31.17 Responding When Intervenor Assumes Role of Defendant.**

If the intervenor unites with a defendant, the complaint in intervention may be treated as an answer, and the original parties need not file a responsive pleading [see *Drinkhouse v. Van Ness* (1927) 202 C 359, 371, 372, 260 P 869 ].

However, if the complaint in intervention is in the nature of answer to the original complaint or to a cross-complaint filed in the action, the opposing party may object to the complaint in intervention by demurrer, on the same grounds as an objection to an answer [see CCP § 430.20].

If an intervenor who unites with a defendant in resisting the claims of the plaintiff also seeks affirmative relief, the party or parties against whom such relief is sought may treat the complaint in intervention as a cross-complaint and respond in the same manner as a response to a complaint [see CCP §§ 430.10, 430.30].

► **Cross Reference:**

Discussion of response to a complaint in intervention seeking affirmative relief, see 31.16.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePartiesInterventionGeneral Overview



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V. FORMS

*2-31 MB Practice Guide: CA Pretrial Civil Procedure 31.18*

**31.18 Notice of Motion and Motion for Leave to Intervene in Pending Action.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name],

Defendant.

\_\_\_\_\_[name],

Intervenor.

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NOTICE OF MOTION AND MOTION FOR  
LEAVE TO INTERVENE, SUPPORTING DE-  
CLARATION OF

\_\_\_\_\_[name], AND SUPPORT-  
ING MEMORANDUM

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Location: \_\_\_\_\_

Judge: \_\_\_\_\_

Date Action Filed: \_\_\_\_\_

Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [parties and their attorneys, e.g., Plaintiff Smith Insurance Co. and its attorney Tom Doe  
and to Defendant Mary Jones and her attorney Jane Lee]:

[EITHER, if intervention is sought under CCP § 387(a) ]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon  
thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_  
of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [

*name of proposed intervenor*] will, and hereby does, move for an order granting leave to file a complaint in intervention in this action \_\_\_\_\_ [*specify nature of action, e.g., for rescission of the liability insurance policy issued by Plaintiff Smith Insurance Co. to Defendant Mary Jones*]. The motion will be made pursuant to *Code of Civil Procedure section 387(a)* on the ground that the proposed intervenor has an interest \_\_\_\_\_ [in the matter in litigation *or* in the success of plaintiff *or* in the success of defendant *or* adverse to both plaintiff and defendant].

[*OR, if intervention is sought under CCP § 387(b)* ]

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [name of proposed intervenor] will, and hereby does, move for an order granting leave to file a complaint in intervention in this action \_\_\_\_\_ [*specify nature of action*]. The motion will be made pursuant to *Code of Civil Procedure section 387(b)* on the ground that the proposed intervenor \_\_\_\_\_ [has an unconditional right to intervene conferred by law *or* claims an interest relating to the \_\_\_\_\_ (property *or* transaction) that is the subject matter of the action and he/she/it is so situated that the disposition of the action may as a practical matter impair or impede his/her/its ability to protect that interest that is not and cannot be adequately represented by the existing parties].

[*CONTINUE*]

The motion will be based on this notice of motion, the proposed complaint in intervention, the declaration of \_\_\_\_\_ [name] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

SUPPORTING DECLARATION OF \_\_\_\_\_

I, \_\_\_\_\_, declare:

1. I am \_\_\_\_\_ [*declarant, e.g., Michael Roe, president of Roe & Co.*], the party seeking intervention pursuant to \_\_\_\_\_ [*Code of Civil Procedure section 387(a) or Code of Civil Procedure section 387(b)*] in the above-described action \_\_\_\_\_ [*specify nature of action, e.g., for rescission of the liability insurance policy issued by Plaintiff Smith Insurance Co. to Defendant Mary Jones*].

[*EITHER, if seeking intervention under CCP § 387(a)* ]

2. \_\_\_\_\_ [I or Name of proposed intervenor] have/has an interest \_\_\_\_\_ [in the matter in litigation or in the success of plaintiff or in the success of defendant or adverse to both plaintiff and defendant].

[OR, if seeking intervention under CCP § 387(b) pursuant to specific statutory authorization]

2. \_\_\_\_\_ [I or Name of proposed intervenor] have/has an unconditional right to intervene in the above-entitled action conferred by \_\_\_\_\_ [specify statute authorizing intervention].

[OR, if seeking intervention under CCP § 387(b) based on interest in property or transaction]

2. \_\_\_\_\_ [I or Name of proposed intervenor] have/has an interest relating to the \_\_\_\_\_ [property or transaction] that is the subject of the above-entitled action.

[CONTINUE]

3. \_\_\_\_\_ [Set forth, in consecutive paragraphs, nature of plaintiff's action, existing parties, and other applicable facts, e.g., Plaintiff Smith Insurance Co. and proposed intervenor Roe & Co. both issued liability insurance policies to Defendant Mary Jones. Plaintiff now seeks rescission of the policy it issued].

[EITHER, if seeking intervention under CCP § 387(a) ]

4. \_\_\_\_\_ [I or Name of proposed intervenor] have/has an interest \_\_\_\_\_ [in the matter in litigation or in the success of plaintiff or in the success of defendant or adverse to both plaintiff and defendant] in that \_\_\_\_\_ [specify, e.g., proposed intervenor has undertaken the defense of Defendant Mary Jones in an action against her and has a potential right to equitable contribution from Plaintiff Smith Insurance Co. Any claim for equitable contribution would be barred if Plaintiff is successful in obtaining rescission of its policy].

[OR, if seeking intervention under CCP § 387(b) pursuant to specific statutory authorization]

4. \_\_\_\_\_ [I or Name of proposed intervenor] have/has an unconditional right to intervene in the above-entitled action in that \_\_\_\_\_ [specify grounds for intervention pursuant to specific statute authorizing intervention].

[OR, if seeking intervention under CCP § 387(b) based on interest in property or transaction]

4. \_\_\_\_\_ [I or Name of proposed intervenor] have/has an interest relating to the \_\_\_\_\_ [property or transaction] that is the subject of the above-entitled action, and am/is so situated that the disposition of the action may as a practical matter impair or impede my/his/her/its ability to protect that interest that is not and cannot be adequately represented by the existing parties, in that \_\_\_\_\_ [specify].

[CONTINUE]

5. \_\_\_\_\_ [Set forth facts showing motion is timely].

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]

#### SUPPORTING MEMORANDUM

[Set out memorandum here]

NOTES.

**Authority:**

CCP § 387

**Methods of Obtaining Leave of Court to Intervene:**

See 31.07[2]

**Grounds for Motion:**

See 31.05



**Timing:**

See 31.06

**Related Form of Order:**

See 31.19

**Related Form of Complaint in Intervention:**

See 31.21

**Related Forms of Memoranda:**

See *California Points and Authorities*, Ch. 124, Intervention, §§ 124.30-124.44 (Matthew Bender)



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Chapter 31 Intervention  
V. FORMS

*2-31 MB Practice Guide: CA Pretrial Civil Procedure 31.19*

**31.19 Order on Motion for Leave to Intervene in Pending Action.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |       |
|---------------|---|-------|
| _____ [name], | ) |       |
| Plaintiff,    | ) |       |
| vs.           | ) |       |
| _____ [name], | ) |       |
| Defendant.    | ) | ORDER |
|               | ) |       |
| _____ [name], | ) |       |
| Intervenor.   | ) |       |
|               | ) |       |
|               | ) |       |

The motion of \_\_\_\_\_ [name], intervenor, for an order granting leave to intervene in the above-entitled action and file a complaint in intervention came on regularly for hearing by the court on \_\_\_\_\_ [date]. Proposed intervenor appeared by counsel \_\_\_\_\_ [name]. Plaintiff appeared by counsel \_\_\_\_\_ [name]. Defendant appeared by counsel \_\_\_\_\_ [name].  
\_\_\_\_\_. [Specify other appearances, if any.]

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and \_\_\_\_\_[*name*] is granted leave to intervene in this action and file the original of the complaint in intervention presented to the court.

---

Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 387*

**Related Form of Motion:**

See *31.18*





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Chapter 31 Intervention  
V. FORMS

*2-31 MB Practice Guide: CA Pretrial Civil Procedure 31.20*

**31.20 Ex Parte Application for Order Granting Leave to Intervene in Pending Action and Order.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

\_\_\_\_\_, [name],

Intervenor.

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EX PARTE APPLICATION FOR LEAVE TO IN-  
TERVENE, SUPPORTING DECLARATION OF

\_\_\_\_\_, [name], SUPPORTING

MEMORANDUM, AND ORDER

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Location: \_\_\_\_\_

Judge: \_\_\_\_\_

Date Action Filed: \_\_\_\_\_

Trial Date: \_\_\_\_\_

APPLICATION

I, \_\_\_\_\_ [name of attorney], hereby apply on behalf of \_\_\_\_\_ [name of proposed  
intervenor] for an order granting leave to intervene in the above-entitled action as authorized by \_\_\_\_\_  
[Code of Civil Procedure section 387(a) or Code of Civil Procedure section 387(b)].

[EITHER, if intervention is sought under CCP § 387(a) ]

This application is being made pursuant to *Code of Civil Procedure section 387(a)* on the ground that \_\_\_\_\_ [name of proposed intervenor] has an interest \_\_\_\_\_ [in the matter in litigation or in the success of plaintiff or in the success of defendant or adverse to both plaintiff and defendant].

[OR, if intervention is sought under CCP § 387(b) ]

This application is being made pursuant to *Code of Civil Procedure section 387(b)* on the ground that the proposed intervenor \_\_\_\_\_ [has an unconditional right to intervene conferred by law or claims an interest relating to the property or transaction that is the subject matter of the action and he/she/it is so situated that the disposition of the action may as a practical matter impair or impede his/her/its ability to protect that interest that is not and cannot be adequately represented by the existing parties].

[CONTINUE]

The names, addresses, and telephone numbers of the parties to this action, or their attorneys, are as follows:  
\_\_\_\_\_ [specify].

This application is based on the attached declaration(s) and supporting memorandum and the proposed complaint in intervention presented with this application.

Date: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

SUPPORTING DECLARATION OF \_\_\_\_\_

I, \_\_\_\_\_, declare:

1. I am \_\_\_\_\_ [identify declarant, e.g., Michael Roe], the party seeking intervention pursuant to \_\_\_\_\_ [Code of Civil Procedure section 387(a) or Code of Civil Procedure section 387(b)] in the above-described action \_\_\_\_\_ [specify nature of action, e.g., brought by my employee, Plaintiff John Smith, against Defendant Mary Jones for damages sustained in an automobile accident].

[EITHER, if seeking intervention under CCP § 387(a) ]

2. \_\_\_\_\_ [I or Name of proposed intervenor] have/has an interest \_\_\_\_\_ [in the matter in litigation or in the success of plaintiff or in the success of defendant or adverse to both plaintiff and defendant].

*[OR, if seeking intervention under CCP § 387(b) pursuant to specific statutory authorization]*

2. \_\_\_\_\_ *[I or Name of proposed intervenor]* have/has an unconditional right to intervene in the above-entitled action conferred by \_\_\_\_\_ *[specify statute authorizing intervention, e.g., Labor Code § 3853]*.

*[OR, if seeking intervention under CCP § 387(b) based on interest in property or transaction]*

2. \_\_\_\_\_ *[I or Name of proposed intervenor]* have/has an interest relating to the \_\_\_\_\_ *[property or transaction]* that is the subject of the above-entitled action.

*[CONTINUE]*

3. \_\_\_\_\_ *[Set forth, in consecutive paragraphs, nature of plaintiff's action, existing parties, and other applicable facts]*.

*[EITHER, if seeking intervention under CCP § 387(a) ]*

4. \_\_\_\_\_ *[I or Name of proposed intervenor]* have/has an interest \_\_\_\_\_ *[in the matter in litigation or in the success of plaintiff or in the success of defendant or adverse to both plaintiff and defendant]* in that \_\_\_\_\_ *[specify]*.

*[OR, if seeking intervention under CCP § 387(b) pursuant to specific statutory authorization]*

4. \_\_\_\_\_ *[I or Name of proposed intervenor]* have/has an unconditional right to intervene in the above-entitled action in that \_\_\_\_\_ *[specify grounds for intervention pursuant to specific statute authorizing intervention, e.g., Labor Code § 3853 specifically authorizes intervention to recover compensation paid to my employee, Plaintiff John Smith, as a result of the automobile accident]*.

*[OR, if seeking intervention under CCP § 387(b) based on interest in property or transaction]*

4. \_\_\_\_\_ *[I or Name of proposed intervenor]* have/has an interest relating to the \_\_\_\_\_ *[property or transaction]* that is the subject of the above-entitled action, and am/is so situated that the disposition of the action may as a practical matter impair or impede my/his/her/its ability to protect that interest that is not and cannot be adequately represented by the existing parties, in that \_\_\_\_\_ *[specify]*.

*[CONTINUE]*

5. \_\_\_\_\_ *[Set forth facts showing motion is timely]*.

*[Add, if declarant is also person giving notice of ex parte application, or attach separate declaration regarding notice]*

6. \_\_\_\_\_ [Specify notice given or why notice should not be required, in accordance with Cal Rules Ct, Rule 3.1204(b) ].

[CONTINUE]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: \_\_\_\_\_

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

#### SUPPORTING MEMORANDUM

[Set out memorandum here]

#### ORDER GRANTING APPLICANT LEAVE TO INTERVENE

Proof having been made to the satisfaction of the court that the application ought to be granted,

IT IS ORDERED that the application be, and hereby is, granted and \_\_\_\_\_ [name] is granted leave to intervene in this action and file the original of the complaint in intervention presented to the court.

Date: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court

#### NOTES.

##### **Authority:**

CCP § 387; Cal Rules Ct, Rule 3.1200 et seq.

##### **Methods of Obtaining Leave of Court to Intervene:**

See 31.07[2]

##### **Grounds for Application:**

See 31.05



##### **Timing:**

See 31.06

##### **Related Form of Complaint in Intervention:**

See *31.21*

**Related Forms of Memoranda:**

See California Points and Authorities, Ch. 124, Intervention, §§ 124.30-124.44 (Matthew Bender)



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Chapter 31 Intervention  
V. FORMS

*2-31 MB Practice Guide: CA Pretrial Civil Procedure 31.21*

**31.21 Complaint in Intervention.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                           |
|---------------|---|---------------------------|
| _____ [name], | ) |                           |
| Plaintiff,    | ) |                           |
| vs.           | ) |                           |
| _____ [name], | ) |                           |
| Defendant.    | ) | COMPLAINT IN INTERVENTION |
|               | ) |                           |
| _____ [name], | ) |                           |
| Intervenor.   | ) |                           |
|               | ) |                           |
|               | ) |                           |

\_\_\_\_\_

Intervenor, \_\_\_\_\_ [name], by leave of court alleges:

1. On \_\_\_\_\_ [date], the court granted intervenor leave to intervene in this action and to file this complaint in intervention.

2. Intervenor is, and at all times herein mentioned was, \_\_\_\_\_ [specify capacity and residence, e.g., a resident of Farallon County, California].

[EITHER, if intervening under CCP § 387(a) ]

3. Intervenor intervenes in this action on the grounds that he/she/it has an interest \_\_\_\_\_ [in the matter in litigation or in the success of plaintiff or in the success of defendant or adverse to both plaintiff and defendant] in that \_\_\_\_\_ [specify], as hereinafter set out more particularly.

[OR, if intervening under CCP § 387(b) pursuant to specific statutory authority]

3. Intervenor intervenes in this action pursuant to \_\_\_\_\_ [specify statute authorizing intervention] in that \_\_\_\_\_ [specify], as hereinafter set out more particularly.

[OR, if seeking intervention under CCP § 387(b) based on interest in property or transaction]

3. Intervenor intervenes in this action on the grounds that he/she/it has an interest relating to the \_\_\_\_\_ [property or transaction] that is the subject of the above-entitled action, and is so situated that the disposition of the action may as a practical matter impair or impede his/her/its ability to protect that interest that is not and cannot be adequately represented by the existing parties, in that \_\_\_\_\_ [specify] as hereinafter set out more particularly.

[CONTINUE]

4. \_\_\_\_\_ [Set forth, in consecutively numbered paragraphs, allegations establishing the right or interest intervenor claims in the action].

5. Intervenor \_\_\_\_\_ [joins with plaintiff in demanding the relief sought by his/her/its complaint or unites with defendant in resisting the claims of plaintiff or demands relief adverse to both plaintiff and defendant or other demand for relief as appropriate].

WHEREFORE, intervenor prays judgment as follows:

1. \_\_\_\_\_ [Specify relief requested].

2. For costs of suit herein incurred.

3. For such further relief as the court may deem proper.

Dated: \_\_\_\_\_

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for Intervenor

[ADD, if desired]

VERIFICATION

I, \_\_\_\_\_[*name*], am the intervenor in the above-entitled action. I have read the foregoing complaint in intervention and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: \_\_\_\_\_

\_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

NOTES.

**Authority:**

*CCP § 387*

**Leave of Court Prerequisite to Filing Complaint:**

*See 31.07[1]*

**Service and Filing of Complaint:**

*See 31.07[3]*





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Chapter 32 Notice of Related Cases, Consolidation, Coordination, and Severance of Actions

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.syn*

**§ 32.syn Synopsis to Chapter 32: Notice of Related Cases, Consolidation, Coordination, and Severance of Actions**

32.01 Scope.

32.02 Objective and Strategy.

32.03 CHECKLIST: Filing and Responding to Notice of Related Cases and Notice of Stay.

32.04 Filing Notice of Related Cases.

32.04[1] Notice of Related Cases Must Be Filed When Party Learns of Related Action.

32.04[2] Definition of "Related Case."

32.04[2][a] "Related Case" May Be Pending, Dismissed, or Disposed of By Judgment.

32.04[2][b] Case Is "Related" If Specified Elements Are Same or Identical, or If Duplicate Court Resources Are Required.

32.04[3] Notice Must Meet Statutory Requirements and Be Served on All Parties Within 15 Days.

32.05 Response to Notice Must Be Served Within 5 Days.

32.06 Court Orders on Cases in Notice of Related Cases.

32.06[1] Judicial Action on Related Cases Pending in One Superior Court.

32.06[1][a] Depends on Whether Court Assigns to One Judge or Uses Master Calendar.

32.06[1][b] Party May File Motion for Order Relating Cases Not Ordered Related.

32.06[1][c] Cases Not Subject to Rules for Relating Cases Must Be Consolidated.

32.06[1][d] These Rules Do Not Apply to Complex Cases in One Superior Court.

32.06[2] Judicial Action on Related Cases Pending in More Than One Superior Court May Consist of Formal or Informal Coordination.

32.06[3] Issuing Court or Party It Directs to Do So Files and Serves Notice of Order.

32.06[4] Cases Not Related Remain With Originally Assigned Court, Judge, or Department.

32.06A Notice of Stay.

32.06A[1] Notice of Stay Must Be Immediately Filed and Served.

32.06A[2] Notice of Termination or Modification of Stay Must Be Immediately Filed and Served.

32.06A[3] Automatic Bankruptcy Stay Terminated in Certain Circumstances.

32.07 CHECKLIST: Seeking and Opposing Consolidation of Actions.

32.07[1] Moving Party's Checklist.

32.07[2] Opposing Party's Checklist.

32.08 Consolidation Defined.

32.08[1] Consolidation Combines Actions in Same Court and County.

32.08[2] Non-Court Proceedings Are Also Subject to Consolidation.

32.08[3] Consolidation Is Not a Matter of Right.

32.08[4] Consolidation May Be for All Purposes or for Trial Only.

32.09 Seeking and Opposing Consolidation.

32.09[1] Consolidation Is Requested by Stipulation or Noticed Motion.

32.09[2] Motion for Consolidation May Be Filed Any Time Up to Trial.

32.09[3] Factors Considered in Assessing Motion for Consolidation.

32.09[3][a] Avoiding Unnecessary Costs and Delays.

32.09[3][b] Parties Must Not Be Prejudiced.

32.09[3][c] Consolidation Must Not Confuse Jury.

32.09[3][d] Evidence Inadmissible in One Action Does Not Preclude Consolidation.

32.09[3][e] Lack of Identical Parties Does Not Preclude Consolidation.

32.10 Court's Order Granting or Denying Consolidation.

32.10[1] Court's Order Must Be Filed in Each Case.

32.10[2] Order Should State Whether Actions Consolidated for All Purposes or Trial Only.

32.11 After Consolidation, All Pleadings Must Include Caption of Lead Case.

32.12 If Consolidation for All Purposes, Subsequent Documents Only Filed in Lead Case.

32.13 Parties to Consolidated Cases May Challenge Assigned Judge.

32.14 CHECKLIST: Seeking and Opposing Coordination by Transfer and Consolidation of Non-Complex Actions.

32.14[1] Moving Party's Checklist.

32.14[2] Opposing Party's Checklist.

32.15 Coordination by Transfer and Consolidation of Non-Complex Actions.

32.15[1] Coordination by Transfer and Consolidation Assigns Non-Complex Cases Filed in Different Courts to One Judge.

32.15[2] Procedure Applies to Non-Complex Cases Only.

32.15[3] Coordination by Transfer and Consolidation Is Allowed Where It Will Promote Justice According to Statutory Criteria.

32.16 Seeking and Opposing Coordination by Transfer and Consolidation.

32.16[1] Coordination by Transfer and Consolidation Is Requested By Party's Noticed Motion.

32.16[2] Motion Must Include Declaration That Actions Meet Statutory Criteria for Coordination, Cases Are Not Complex, and Party Attempted Informal Resolution.

32.16[3] Notice of Motion for Coordination by Transfer and Consolidation Is Served on All Parties.

32.16[4] Any Party May Oppose Motion for Coordination by Transfer and Consolidation.

32.16[5] All Memoranda and Affidavits in Support of or in Opposition to the Motion Must Be Filed at Least Five Days Before Hearing.

32.16[6] Evidence Presented Must Be Written Unless Judge Orders Otherwise.

32.16[7] Parties Must Disclose Other Pending Motions to Transfer.

32.16[8] Only Parties Who Have Filed Papers Can Attend Hearing.

32.17 Court's Order Regarding Motion and Moving Party's Obligations Thereafter.

32.17[1] Court May Make Alternative Disposition If Actions Belong in Another Court.

32.17[2] Court's Order Granting Transfer Must Indicate that Actions Are Not Complex and State Why Transfer and Consolidation Would Promote Justice.

32.17[3] Moving Party Serves Copies of Order and Assures That Transfer Takes Place.

32.17[4] Receiving Judge May Consolidate Actions Without Further Notice or Hearing.

32.17[5] Administrative Office of the Courts Reviews Transfer Orders and Confers With Presiding Judges to Avoid Conflicting Orders.

32.18 CHECKLIST: Seeking and Opposing Coordination of Complex Actions.

32.18[1] Moving Party's Checklist.

32.18[2] Opposing Party's Checklist.

32.19 Coordination of Complex Actions Defined.

32.19[1] Coordination Assigns Complex Actions Filed in Different Courts to One Judge.

32.19[2] Procedure Applies to Complex Cases Only.

32.19[3] Court Determines If Case Is "Complex" by Considering Statutory Factors.

32.19[4] Coordination Is Allowed Where It Will Promote Justice According to Statutory Criteria.

32.20 Seeking and Opposing Coordination.

32.20[1] Petition for Coordination of Complex Cases Is Filed With Chair of Judicial Counsel.

32.20[2] Who May File Petition.

32.20[2][a] All Plaintiffs or Defendants in One Action May File Direct Petition.

32.20[2][b] Presiding Judge May File Direct Petition.

32.20[2][c] Where Direct Petition Not Allowed, Party May Request Permission to File from Presiding Judge.

32.20[2][d] Court May Stay Related Actions for Reasonable Time.

32.20[3] Contents of Petition and Supporting Documents.

32.20[3][a] Petition Specifies Name and Status of Each Action.

32.20[3][b] Petition Must Be Supported by Declaration that Cases Are Complex and Meet Statutory Coordination Criteria.

32.20[3][c] Petition Is Served With Notice of Submission of Petition for Coordination.

32.20[4] Time for Serving and Filing Petition, Statement in Support, and Opposition.

32.20[4][a] Petition Procedure May Be Initiated After Complaint Filed.

32.20[4][b] Statement in Support May Be Served and Filed Within Nine Days of Hearing Date.

32.20[4][c] Opposition May Be Served and Filed At Least Nine Court Days Before Hearing Date.

32.20[4][d] All Memoranda and Affidavit in Support of or in Opposition to Petition Must Be Filed at Least Nine Calendar Days Before Hearing.

32.20[4][e] Duty to Provide Notice of Potential Add-On Cases.

32.20[5] Motion for Stay May Be Included With Petition or Submitted by Any Party Prior to Determination on Petition.

32.20[5][a] Motion or Opposition Must List All Known Related Cases.

32.20[5][b] Motion Must Be Supported by Memorandum and Declarations Establishing That Stay Is Necessary for Coordination.

32.20[5][c] Copies Are Served on All Affected Parties.

32.20[5][d] Opposition Is Served and Filed Within 10 Days.

32.20[5][e] No Hearing Is Required, Unless Requested in Writing.

32.20[5][f] Party Requesting Stay Must Serve Stay Order, and Any Party May File Motion 30 Days After Issuance to Terminate Stay Order.

32.20[6] Petitioner Serves and Files Order of Chair of Judicial Council Assigning Petition to Judge.

32.20[6][a] Petition May Be Assigned to Coordination Motion Judge for Decision or Presiding Judge for Assignment.

32.20[6][b] Petitioner Must Serve on Parties and File in Courts.

32.20[7] After Assignment of Coordination Motion Judge, Each Side Has 20 Days to Challenge Assigned Judge.

32.20[8] Evidence Presented Must Be Written Unless Judge Orders Otherwise.

32.20[9] Hearing Must Be Held If Any Party Objects to Coordination.

32.20[9][a] Assigned Judge Must Set Hearing Date Within 30 Days.

32.20[9][b] Assigned Judge May Continue Hearing Date to Hear Competing Petitions Together.

32.20[9][c] Scheduled Hearing Only Held If Opposition to Petition for Coordination Is Filed.

32.20[10] Coordination Motion Judge May Appoint Liaison Counsel.

### 32.21 Court's Order Regarding Petition.

32.21[1] Order Must Be Filed in Each Included Action.

32.21[2] If Petition Is Denied, Stay Is Lifted After 10 Days and Authority of Coordination Motion Judge Terminates.

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Chapter 32 Notice of Related Cases, Consolidation, Coordination, and Severance of Actions  
I. STRATEGY

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.01*

### **32.01 Scope.**

This chapter covers:

- Notices of related cases [*see* 32.03 -32.06].
- Consolidation of actions [*see* 32.07 -32.13, Forms: *see* 32.27 -32.32].
- Coordination of actions in non-complex cases (by transfer and consolidation) [*see* 32.14 -32.17. Forms: *see* 32.33, 32.34].
- Coordination of actions in complex cases [*see* 32.18 -32.22, Forms: *see* 32.35 -32.42].
- Severance of actions [*see* 32.23 -32.26, Forms: *see* 32.43, 32.44].

#### **Core Statutes:**

*Cal Rules Ct, Rule 3.300* (notices of related actions); *CCP § 1048(a)*; *Cal Rules Ct, Rule 3.350* (consolidation of actions); *CCP § 403*; *Cal Rules Ct, Rule 3.500* (coordination of non-complex actions by transfer and consolidation); *CCP §§ 403 and 404-404.9*; *Cal Rules Ct, Rule 3.501 et seq.* (coordination of complex actions); *CCP § 1048(b)* (severance of actions)





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I. STRATEGY

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### **32.02 Objective and Strategy.**

An attorney has the duty of promptly informing the court and other parties of any action or proceeding pending in any state or federal action in California that has the same parties litigating the same or similar claims, the same property or event, or substantially the same facts and questions of law. The attorney performs this duty by filing and serving a notice of related case, and must do so when he or she "knows or learns of the existence" of the related action.

A party or person causing a stay of proceedings has a duty to immediately notify the court and all parties of the stay. Avoid sanctions by the court, or motions for costs by parties who have expended efforts in litigating what they thought was an ongoing case, by immediately filing the notice.



#### **Warning:**

In some instances the attorney is readily aware of the related action, such as a plaintiff's attorney filing a related action in another court. Other cases may not be so apparent, such as actions with varying degrees of party and facts overlap, when an attorney discovers another case in the media that has the same facts and question of law, or when the other action is outside of California. When in doubt, side in favor of immediate disclosure. If the court determines the attorney was aware of a related case but did not submit a notice for a tactical advantage, the attorney is doing a disservice to the client and is inviting potential discipline proceedings.

Consolidation is the power of the court to order several actions or issues with common question or law or fact, filed in the same county, to be tried together. Coordination is the assignment of civil actions sharing common questions of law or fact, but filed in different counties, to a single judge for trial who coordinates pretrial procedures and may try the cases in one or more courts. Severance is the power of the court to order a separate trial of any cause of action or issue filed in that county.



#### **Strategic Point--Moving Party:**

For coordination and consolidation of actions, bring motions as soon as possible (as soon as the reason for doing so is apparent). If cases are too close to trial, the judge will have more reason to deny the motion.

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 125, Consolidation, Severance and Coordination; Ch. 137, Continuing Duties During Litigation (Matthew Bender).

California Points and Authorities, Ch. 45, Consolidation, Severance, and Coordination of Actions (Matthew Bender).

 **Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersConsolidation of Actions



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II. FILING AND RESPONDING TO NOTICE OF RELATED CASES AND NOTICE OF STAY

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.03*

**32.03 CHECKLIST: Filing and Responding to Notice of Related Cases and Notice of Stay.**

☐ Determine if a case that is pending, was dismissed with or without prejudice, or was disposed of by judgment is "related" to another in California state or federal court by investigating whether it:

☐ Involves the same parties and is based on the same or similar claims; or

☐ Arises from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact; or

☐ Involves claims against, title to, possession of, or damages to the same property; or

☐ Is likely for other reasons to require substantial duplication of judicial resources if heard by different judge.

**Authority:**

*Cal Rules Ct, Rule 3.300(a)*

**Discussion:**

See 32.04[2]

☐ Prepare a Notice of Related Case.

☐ State for each related case:

☐ Court;

☐ Title;

☐ Case number; and

☐ Filing date.

☐ Describe the relationship between the cases.

☐ Identify the case that has the earliest filing date and the court and department in which that case is pending.

**Authority:**

*Cal Rules Ct, Rule 3.300(c)*

**Discussion:**

See 32.04[3]

**Form:**

See 32.26A

☐ File and serve on all known parties in each related action within 15 days.

**Authority:**

*Cal Rules Ct, Rule 3.300(d)*

**Discussion:**

See 32.04[1], [3]

☐ File response in opposition to relating or transferring cases in all pending cases and serve copy on parties on those cases within 5 days.

**Authority:**

*Cal Rules Ct, Rule 3.300(g)*

**Discussion:**

See 32.05

☐ In conferring with judge authorized to decide relating issue:

☐ Argue for desired outcome as to whether cases should be related, consolidated, coordinated, or none of these, depending upon whether the cases are in one or more than one Superior Court, are complex or noncomplex, and are unlimited and/or limited.

☐ If a noncomplex case listed in the Notice of Related Cases is not ordered related, consider filing a motion with the presiding judge or the judge designated by the presiding judge to have the cases related.

- ☐ Prepare order relating cases if court so directs.

**Authority:**

*Cal Rules Ct, Rule 3.300(h), (i)*

**Discussion:**

See 32.06[1] -[3]

- ☐ Plaintiff or other party who caused stay to provide notice of stay of proceedings if action is stayed because:

- ☐ An order of a federal court or a higher state court.
- ☐ Contractual arbitration under *CCP § 1281.4*.
- ☐ Arbitration of attorney fees and costs under *B&P Code § 6201*.
- ☐ Automatic stay caused by a filing in another court, including a federal bankruptcy court.

**Authority:**

*Cal Rules Ct, Rule 3.650(a), (b)*

**Discussion:**

See 32.06A[1]

- ☐ State in notice reason for stay and if stay applies to all or certain parties

**Authority:**

*Cal Rules Ct, Rule 3.650(c)*

**Discussion:**

See 32.06A[1]

**Form:**

See 6.64A

- ☐ File and serve notice with attached stay order immediately on all parties

**Authority:**

*Cal Rules Ct, Rule 3.650(a)*

**Discussion:**

See 32.06A[1]

- ☐ If stay terminated or modified, immediately file and serve notice of termination or modification on all parties

**Authority:**

*Cal Rules Ct, Rule 3.650(d)*

**Discussion:**

See 32.06A[2]

**Form:**

See 6.64B



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*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.04*

### **32.04 Filing Notice of Related Cases.**

**32.04[1] Notice of Related Cases Must Be Filed When Party Learns of Related Action.** A party in a civil action who knows or learns of the existence of a related action or proceeding pending, dismissed, or disposed of by judgment in any state or federal court in California is required to file and serve a Notice of Related Case [*Cal Rules Ct, Rule 3.300(b)*]. This duty applies when a party files a case with knowledge of a related action or proceeding, and applies thereafter whenever a party learns of a related action or proceeding [*Cal Rules Ct, Rule 3.300(f)*].

#### **Exception:**

A party is not required to serve and file a Notice of Related Case if another party has already filed a notice and served all parties on the same case [*Cal Rules Ct, Rule 3.300(k)*].



#### **Strategic Point:**

Be certain to determine whether the court has local rules regarding when a Notice of Related Case is required and, if so, to adhere to them.

#### **Example:**

Under the Los Angeles County Superior Court Rules, a Notice of Related Case is not required when all the cases to be related are already assigned to the same department [Los Angeles Super Ct Rules, Rule 7.3(f)(6)(a)]. Instead, the cases must be consolidated under Los Angeles Super Ct Rules, Rule 7.3(g) [Los Angeles Super Ct Rules, Rule 7.3(f)(6)(b)].

### **32.04[2] Definition of "Related Case."**

**32.04[2][a] "Related Case" May Be Pending, Dismissed, or Disposed of By Judgment.** Another case may be a related case whether it is or has been [*Cal Rules Ct, Rule 3.300(a)*]:

- Pending,
- Dismissed with or without prejudice, or

- Disposed of by judgment.

**32.04[2][b] Case Is "Related" If Specified Elements Are Same or Identical, or If Duplicate Court Resources Are Required.** An action is "related" to another when both [*Cal Rules Ct, Rule 3.300(a)*]:

- Involve the same parties and are based on the same or similar claims; or
- Arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact;
- Involve claims against, title to, possession of, or damages to the same property; or
- Are likely for other reasons to require substantial duplication of judicial resources if heard by different judges.

**32.04[3] Notice Must Meet Statutory Requirements and Be Served on All Parties Within 15 Days.** The Notice of Related Case must state the court, title, case number, and filing date for each related action together with a description of the relationship between the cases. The Notice must also identify the case that has the earliest filing date and the court and department in which that case is pending [*Cal Rules Ct, Rule 3.300(c)*]. The Notice must be served on all known parties in each related action [*Cal Rules Ct, Rule 3.300(d)*].



#### Timing:

The Notice of Related Case must be served and filed as soon as possible, and not more than 15 days after the facts concerning the existence of related cases become known [*Cal Rules Ct, Rule 3.300(e)*].

The California Judicial Council has approved Form CM-015, Notice of Related Case, for optional use in giving notice of a related case [*see Cal Rules Ct, Rule 1.35*].



#### Cross Reference:

Form, notice of related case, see 32.26A.



#### Strategic Point:

Be certain to determine whether the court has additional local rules regarding the filing of the Notice of Related Case and, if so, to adhere to them.

#### Example:

The Los Angeles County Superior Court Rules require that the Notice of Related Case must set forth facts and be accompanied by relevant complaint(s) and/or cross-complaint(s) demonstrating the relationship between the cases [*Los Angeles Super Ct Rules, Rule 7.3(f)(2)(b)(v)*].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersConsolidation of Actions





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**32.05 Response to Notice Must Be Served Within 5 Days.**

Within 5 days of service of the Notice of Related Case on a party, the party may file and serve a response. The response must state why one or more of the cases listed in the Notice are not related or why other good cause exists for the court not to transfer the cases to or from a particular court or department. The response must be filed in all pending cases listed in the Notice and must be served on all parties in those cases [*Cal Rules Ct, Rule 3.300(g)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### **32.06 Court Orders on Cases in Notice of Related Cases.**

#### **32.06[1] Judicial Action on Related Cases Pending in One Superior Court.**

**32.06[1][a] Depends on Whether Court Assigns to One Judge or Uses Master Calendar.** If all of the cases listed together in a Notice of Related Cases have been filed in one Superior Court, the court on notice to all parties may order that the cases (including probate and family law cases) be related and may assign them to a single judge or department [*Cal Rules Ct, Rule 3.300(h)(1)*].

If the court uses a master calendar, the presiding judge may order the cases related. However, if the court assigns cases to a single judge or department, cases may be ordered related as follows [*Cal Rules Ct, Rule 3.300(h)(1)(A)-(C)*]:

- If the cases in the Notice are either all unlimited or all limited civil cases, the judge who has the earliest filed case must determine whether to order the cases related and assigned to his or her department.
- If the cases in the Notice include unlimited and limited civil cases, the judge who has the earliest filed unlimited civil case must determine whether to order the cases related and assigned to his or her department.
- If the cases listed in the Notice include a probate or family law case, the presiding judge or a judge designed by the presiding judge decides whether to order the cases related and, if so, to which judge or department to assign them.

#### **Exception:**

Local rules of court may have different provisions regarding the decision whether to relate cases and, if they are related, how to assign them.

#### **Examples:**

Under the Los Angeles County Superior Court Rules, a Notice of Related Case is not required when all the cases to be related are assigned to the same department [*Los Angeles Super Ct Rules, Rule*

7.3(f)(6)(a)]. Instead, the cases must be consolidated under Los Angeles Super Ct Rules, Rule 7.3(g) [Los Angeles Super Ct Rules, Rule 7.3(f)(6)(b)].

➡ **Cross Reference:**

Consolidation of cases, see 32.07 et seq.

The Los Angeles County Superior Court Rules contain special provisions for when the cases listed in the Notice contain a probate or family law case. If the cases are all pending in the Central District, or if the cases are pending in different districts, Department One determines whether the cases are related and, if so, to which department they are to be assigned. If the cases are all pending in the same district, other than the Central District, the Supervising Judge of that district shall determine whether the cases are related and, if so, to which department they are to be assigned [Los Angeles Super Ct Rules, Rule 7.3(f)(3)(c)].

In San Francisco County Superior Court, assigned to the discovery department to which the earliest-filed case has been assigned, or as the Presiding Judge may direct [San Francisco Super Ct Rules, Rules 8.14(B)(1), 10.0(B)(1)].

➡ **Cross Reference:**

Classification of cases as unlimited or limited, see Ch. 15, Reclassification of Cases.

**32.06[1][b] Party May File Motion for Order Relating Cases Not Ordered Related.** In the event that a case listed in the Notice of Related Cases is not ordered related under *Cal Rules Ct, Rule 3.300(h)(1)(A)-(C)* [see 32.06[1][a]], any party in any of the cases listed in the Notice may file a motion to have the cases related. The motion is to be filed with the presiding judge or the judge designated by the presiding judge [*Cal Rules Ct, Rule 3.300(h)(1)(D)*].

**32.06[1][c] Cases Not Subject to Rules for Relating Cases Must Be Consolidated.** If the procedures for relating cases under *Cal Rules Ct, Rule 3.300* do not apply, the cases must be consolidated under *CCP § 1048* and *Cal Rules Ct, Rule 3.350* [*Cal Rules Ct, Rule 3.300(h)(1)(E)*].

➡ **Cross Reference:**

Consolidation of cases under *CCP § 1048* and *Cal Rules Ct, Rule 3.350*, see 32.07 et seq.

**32.06[1][d] These Rules Do Not Apply to Complex Cases in One Superior Court.** The provisions of *Cal Rules Ct, Rule 3.300(h)(1)* concerning judicial action on a Notice of Related Case in cases before one Superior Court do not apply to cases that have been designated as complex by the parties or determined to be complex by the court [*Cal Rules Ct, Rule 3.300(h)(3)*].

**32.06[2] Judicial Action on Related Cases Pending in More Than One Superior Court May Consist of Formal or Informal Coordination.** The judge to whom the earliest filed case of cases listed in a Notice of Related Case that are pending in more than one Superior Court may on notice to all parties confer with all parties and the judges to whom each related case is assigned. The purpose of the conferring is to determine the feasibility and desirability of joint discovery orders and other informal or formal means of coordinating proceedings in the cases [*Cal Rules Ct, Rule 3.300(h)(2)(A)*].

If it is determined that related cases pending in different Superior Courts should be formally coordinated, that coordination should occur [*Cal Rules Ct, Rule 3.300(h)(2)(B)*]:

- In noncomplex cases, under the procedures in *CCP § 403* and *Cal Rules Ct, Rule 3.500*; or

- In complex cases, under the procedures in *CCP § 404 et seq.* and *Cal Rules Ct, Rule 3.501 et seq.*



#### Cross References:

Coordination of noncomplex actions, see 32.14 et seq. Coordination of complex actions, see 32.18 et seq.

**32.06[3] Issuing Court or Party It Directs to Do So Files and Serves Notice of Order.** The court, department, or judge issuing an order relating cases under *Cal Rules Ct, Rule 3.300* either [*Cal Rules Ct, Rule 3.300(i)*]:

- Files notice of order in all pending cases and serves a copy of notice on all parties listed in Notice of Related Case, or
- Directs counsel for a party to file the notice in all pending cases and serves a copy of notice on all parties.



#### Strategic Point:

Be certain to determine whether the court has local rules regarding the ruling on whether to relate cases as well as the notice of ruling, and, if so, to adhere to them.

#### Example:

Under the Los Angeles County Superior Court Rules, the ruling court reviews cases for pending ADR referrals and "should" ensure the ADR process is for all the related cases and notify parties as such [Los Angeles Super Ct Rules, Rule 7.3(f)(5)].

**32.06[4] Cases Not Related Remain With Originally Assigned Court, Judge, or Department.** A case not ordered related under *Cal Rules Ct, Rule 3.300* for any reason remains assigned to the court, judge, or department in which it was pending at the time of filing and service of the Notice of Related Case[*Cal Rules Ct, Rule 3.300(j)*].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersConsolidation of Actions



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### **32.06A Notice of Stay.**

**32.06A[1] Notice of Stay Must Be Immediately Filed and Served.** A party who requested or caused a stay of a proceeding must immediately serve and file a notice of the stay and attach a copy of the order or other document showing that the proceeding is stayed. If the person who requested or caused the stay has not appeared, or is not subject to the jurisdiction of the court, the plaintiff must immediately file a notice of the stay and attach a copy of the order or other document showing that the proceeding is stayed. The notice of stay must be served on all parties who have appeared in the case [*Cal Rules Ct, Rule 3.650(a)*].

The party responsible for giving notice must provide notice if the case is stayed for any of the following reasons [*Cal Rules Ct, Rule 3.650(b)*]:

- An order of a federal court or a higher state court.
- Contractual arbitration under *CCP § 1281.4*.
- Arbitration of attorney fees and costs under *B&P Code § 6201*.
- Automatic stay caused by a filing in another court, including a federal bankruptcy court.

The notice must state whether the case is stayed with regard to all parties or only certain parties. If it is stayed with regard to only to certain parties, the notice must specifically identify those parties. The notice must also state the reason that the case is stayed [*Cal Rules Ct, Rule 3.650(c)*].



#### **Cross Reference:**

Mandatory form, Notice of Stay of Proceedings (Judicial Council Form CM-180), see 6.64A.

**32.06A[2] Notice of Termination or Modification of Stay Must Be Immediately Filed and Served.** When the stay is vacated, no longer in effect, or modified, the party who filed the notice of stay must immediately file and serve a notice of termination or modification of the stay, and upon that party's failure to give notice, any party with knowledge

of the termination or modification must file and serve the notice [*Cal Rules Ct, Rule 3.650(d)*].

**Cross Reference:**

Form, notice of termination or modification of stay (Judicial Council Form CM-181, mandatory), see 6.64B.

**32.06A[3] Automatic Bankruptcy Stay Terminated in Certain Circumstances.** The automatic stay caused by the filing of a bankruptcy case under *11 USCS § 362(a)* continues until the property is no longer the property of the estate; however the stay is subject to limitations under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub L 109-8], such as:

- If a case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal, the automatic stay terminates with respect to the debtor on the 30th day after the filing of the later case unless, after notice and a hearing, the court extends the stay because the new case is filed in good faith [*11 USCS § 362(c)(3)*].
- With respect to a stay of an act against real property, by a creditor whose claim is secured by an interest in such real property, the court may make an order over the property if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either: (1) a transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or (2) multiple bankruptcy filings affecting the real property [*11 USCS § 362(d)*].
- For personal property in which a creditor has a purchase-money security interest, the automatic stay is terminated if the debtor fails to timely file a reaffirmation agreement on the creditor's claims or redeems the personal property [*11 USCS §§ 362(h), 521(a)*].
- For individuals filing a chapter 7, 11, or 13 case, the automatic stay terminates 60 days after a request for relief from the stay unless a final decision on the request is issued by the court within the 60 days or the period is extended either by agreement or by the court for a specific period of time found necessary for good cause [*11 USCS § 362(e)*].

Other limitations on the automatic stay under the 2005 act apply to family proceedings, landlord-tenant disputes, and tax actions [see Pub L 109-8].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Bankruptcy LawCase AdministrationAdministrative PowersStaysDurationCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & Parties



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III. SEEKING AND OPPOSING CONSOLIDATION OF ACTIONS

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.07*

**32.07 CHECKLIST: Seeking and Opposing Consolidation of Actions.**

**32.07[1] Moving Party's Checklist.**

- ☐ Determine that the proceedings are pending before the same court in the same county.

**Authority:**

*CCP § 1048(a)*

**Discussion:**

*See 32.08[1]*

- ☐ Determine whether consolidation is appropriate.

☐ Factors the court may consider:

☐ Avoidance of unnecessary costs and delays;

☐ Danger of inconsistent rulings;

☐ Timeliness;

☐ Prejudice to parties; and

☐ Confusion to jury.

**Authority:**

*CCP § 1048(a); State Farm Mut. Auto Ins. Co. v. Superior Court (1956) 47 C2d 428,*

431-432, 304 P2d 13 ; *Todd-Stenberg v. Dalkon Shield Claimants Trust* (1996) 48 CA4th 976, 980, 981 n1, 56 CR2d 16

**Discussion:**

See 32.09[2], [3]

☐ Determine the appropriate type of consolidation:

- ☐ Consolidation for all purposes, or
- ☐ Consolidation for purposes of trial only.

**Authority:**

*Hamilton v. Asbestos Corp., Ltd.* (2000) 22 C4th 1127, 1147, 95 CR2d 701, 998 P2d 403 ; *Stubblefield Constr. Co. v. City of San Bernardino* (1995) 32 CA4th 687, 701, 38 CR2d 413 ; *Jaffe v. The Albertson Co.* (1966) 243 CA2d 592, 606-607, 53 CR 25

**Discussion:**

See 32.08[3], [4]

☐ Determine whether all parties will stipulate to consolidation for all purposes or trial only.

☐ If parties agree:

- ☐ Prepare stipulation to consolidate cases.
- ☐ Seek judicial approval of consolidation and prepare order.
- ☐ File order in each case and serve all parties with order.
- ☐ File subsequent documents only in lead case if consolidation granted for all purposes.

**Authority:**

CCP § 1048(a)

**Discussion:**

See 32.09[1], 32.10, 32.11, 32.12

**Forms:**

See 32.27, 32.29, 32.30, 32.32

☐ If all parties will not stipulate to consolidation:

- ☐ Draft notice and motion for consolidation with supporting declarations and memorandum.



- ☐ Draft proposed order.
- ☐ Serve and file motion:
  - ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.

**Authority:**

*CCP § 1048(a); Cal Rules Ct, Rule 3.350(a)*

**Discussion:**

See 32.09[1], [2], [3]

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**Forms:**

See 32.28, 32.29, 32.31, 32.32

- ☐ If order granted:
  - ☐ File order in each case and serve all parties with order.
  - ☐ File subsequent documents only in lead case if consolidation granted for all purposes.

**Authority:**

*Cal Rules Ct, Rule 3.350(b), (c), (d)*

**Discussion:**

See 32.10, 32.11, 32.12

**Forms:**

See 32.29, 32.32

**32.07[2] Opposing Party's Checklist.**

- ☐ Calendar response and hearing dates.
- ☐ Prepare opposition:
  - ☐ Draft declarations opposing motion.
  - ☐ Draft opposing memorandum.
- ☐ Draft proposed order.

☐ Serve and file response.

☐ Follow standard noticed motion procedure.

**Authority:**

*CCP § 1048(a); Hamilton v. Asbestos Corp. (2000) 22 C4th 1127, 1147, 95 CR2d 701, 998 P2d 403*

**Discussion:**

*See 32.08, 32.09[3]*

**Standard Procedure Checklist:**

*See Ch. 26, Law and Motion Procedure, 26.39*



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*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.08*

### **32.08 Consolidation Defined.**

**32.08[1] Consolidation Combines Actions in Same Court and County.** Consolidation is the power of the court to order several actions or issues involving common questions of law or fact filed in the same county to be tried together in order to promote convenience and conserve judicial resources by avoiding unnecessary costs, delays, and duplication. Actions may be consolidated for all purposes with a single judgment or may be consolidated for the purpose of trial of related issues with separate judgments. The court may make any orders concerning consolidated proceedings as may tend to avoid unnecessary costs or delay [*CCP* § 1048(a)].

#### **Distinguish:**

Actions pending in different counties are not eligible for consolidation, but if the cases are not "complex" according to *Cal Rules Ct, Rule 3.400 et seq.*, they may be transferred to the same court and then consolidated [*see CCP* § 403]. If the cases are complex, then they may be coordinated (for some or all purposes).

#### **➡ Cross References:**

Discussion of coordination of non-complex cases by transfer and consolidation, see 32.14 -32.17.

Discussion of coordination of complex cases, see 32.18 -32.22.

**32.08[2] Non-Court Proceedings Are Also Subject to Consolidation.** Actions filed in courts of law are not the only proceedings subject to consolidation. Separate arbitration proceedings pursuant to contract may be ordered consolidated where there is a risk of conflicting rulings by one or more arbitrators. The disputes should arise from the same transaction and involve common issues of law and fact [*CCP* § 1281.3; *see Garden Grove Cmty. Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 CA3d 251, 261-262, 191 CR 15* ].

If the issues involved in a pending action are also the subject of an arbitration proceeding, the court has the power to consolidate both proceedings for all purposes, including trial [*CCP* § 1281.2(c); *Mercury Ins. Group v. Superior Court (1998) 19 C4th 332, 345-347, 79 CR2d 308, 965 P2d 1178* ].

#### **Exception:**

Where the arbitration proceeding is governed by the Federal Arbitration Act (FAA), the FAA preempts state consolidation rules [9 USC §§ 1-2]. Because there is no authority under the FAA for consolidating pending arbitration claims with pending court actions, FAA claims may not be consolidated with nonarbitrable claims in a court action [see *Broughton v. CIGNA Healthplans of Cal.* (1999) 21 C4th 1066, 1088, 90 CR2d 334, 988 P2d 67 ].

**32.08[3] Consolidation Is Not a Matter of Right.** Consolidation is not a matter of right. The decision of whether to consolidate and whether the consolidation is for all purposes, or for trial only, rests solely within the discretion of the trial judge [ *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 C4th 1127, 1149, 95 CR2d 701, 998 P2d 403 ; *Fisher v. Nash Bldg. Co., Inc.* (1952) 113 CA2d 397, 402, 248 P2d 466 ]. The trial court's decision regarding consolidation will not be disturbed on appeal absent a clear showing of abuse of discretion [ *Todd-Stenberg v. Dalkon Shield Claimants Trust* (1996) 48 CA4th 976, 978-979, 56 CR2d 16 ].

**32.08[4] Consolidation May Be for All Purposes or for Trial Only.** Two distinct types of consolidation are possible. The court may order consolidation for all purposes, which results in a single action under one case number with one verdict or set of findings and one judgment [ *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 C4th 1127, 1147, 95 CR2d 701, 998 P2d 403 ; *Jaffe v. The Albertson Co.* (1966) 243 CA2d 592, 606-607, 53 CR 25 ]. Complete consolidation is correct where no doubt exists as to the applicability of the various findings to each of the consolidated cases [ *Page v. Bakersfield Unif. & Towel Supply Co.* (1966) 239 CA2d 762, 772, 49 CR 46 ] or where the plaintiffs could have joined together originally to bring the action [ *Jaffe v. The Albertson Co.* (1966) 243 CA2d 592, 606-607, 53 CR 25 ].

Alternatively, courts may order consolidation for purposes of trial only, that is, consolidation only for the purpose of trial of related issues, with separate judgments and findings [ *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 C4th 1127, 1147, 95 CR2d 701, 998 P2d 403 ; *Stubblefield Constr. Co. v. City of San Bernardino* (1995) 32 CA4th 687, 701, 38 CR2d 413 ]. With consolidation only for trial of related issues, each action maintains its separate identity and independent dispositions of the actions are necessary [ *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 C4th 1127, 1147, 95 CR2d 701, 998 P2d 403 ; *McFarland v. Booker* (1967) 250 CA2d 402, 415-417, 58 CR 417 ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
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*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.09*

### **32.09 Seeking and Opposing Consolidation.**

**32.09[1] Consolidation Is Requested by Stipulation or Noticed Motion.** Consolidation may be ordered upon motion of any party, on stipulation of the parties or on the Court's own motion with notice to the parties and an opportunity to be heard [*CCP § 1048(a)*; *Cal Rules Ct, Rule 3.350(a)*].

#### **Moving Party:**

The moving party must: list all named parties in each case and the names of those who have appeared and their attorneys in the moving papers; include all the captions of all the cases sought to be consolidated, with the case with the lowest number first; and, serve the motion on all parties in all the cases to be consolidated, with a proof of service filed with the moving papers. A copy of the notice of motion must be filed in each case sought to be consolidated [*Cal Rules Ct, Rule 3.350(a)*].

#### **Cross References:**

Forms of stipulation for consolidation of actions, see 32.27, 32.30.

Forms of notice of motion, motion and declaration of motion to consolidate, see 32.28, 32.31.

Forms of order consolidating actions, see 32.29, 32.32.

Discussion/Forms regarding stipulations in general, see Ch. 28, Stipulations.

Discussion/Forms regarding law and motion procedure in general, see Ch. 26, Law and Motion Procedure.

**32.09[2] Motion for Consolidation May Be Filed Any Time Up to Trial.** There is no deadline for filing a motion to consolidate. Cases may even be consolidated on the eve of trial [*CCP § 1048(a)*].



#### **Warning:**

Waiting too long to seek consolidation may result in its denial. Different judges assigned to the cases

may make disparate rulings affecting discovery and trial, rendering the actions too different to consolidate.



#### **Cross References:**

Forms of notice of motion, motion and declaration of motion to consolidate, see 32.28, 32.31.

Forms of order consolidating actions, see 32.29, 32.32.

Discussion/Forms regarding law and motion procedure in general, see Ch. 26, Law and Motion Procedure.

### **32.09[3] Factors Considered in Assessing Motion for Consolidation.**

**32.09[3][a] Avoiding Unnecessary Costs and Delays.** Consolidation is proper when it would avoid unnecessary costs and delays and when actions contain common questions of law or fact [*CCP § 1048(a)*].

**32.09[3][b] Parties Must Not Be Prejudiced.** An order of consolidation is not proper if parties to the action are prejudiced by virtue of the consolidation [ *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1956) 47 C2d 428, 431-432, 304 P2d 13 ].

#### **Example:**

In a declaratory judgment action, an insurer sought a determination that the insured driver was carrying passengers for a charge under a liability policy that excluded coverage if the insured's vehicle was used to carry passengers for a charge. The passengers brought a second action against the insured driver, which action was defended by the insurer. In the second action, the insurer's/insured's defense was that the passengers were not being carried for a charge, but instead were guests within the meaning of a guest statute and therefore could not recover without proof of willful misconduct. Because consolidation would put the insurer in an inconsistent position in arguing the status of the passengers, consolidating the actions was prejudicial to the insurer and sufficient for a finding of abuse of discretion [ *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1956) 47 C2d 428, 431, 304 P2d 13 ].

**32.09[3][c] Consolidation Must Not Confuse Jury.** Consolidation is not proper where such an order would result in confusion to the jury, such as when the same party is obligated to assume inconsistent positions and the jury must apply differing tests to particular fact situations that it may find to exist [ *Todd-Stenberg v. Dalkon Shield Claimants Trust* (1996) 48 CA4th 976, 980, 981 n1, 56 CR2d 16 ].

**32.09[3][d] Evidence Inadmissible in One Action Does Not Preclude Consolidation.** Consolidation may be proper although the evidence presented in one action would not have been admissible in the other action [ *Jud Whitehead Heater Co. v. Obler* (1952) 111 CA2d 861, 866-867, 245 P2d 608 ]. Where consolidation is only for the purpose of trial of related issues, the evidence presented in one case is deemed applicable in the other only to the extent that it is relevant [ *McClure v. Donovan* (1949) 33 C2d 717, 722, 205 P2d 17 ].

**32.09[3][e] Lack of Identical Parties Does Not Preclude Consolidation.** Consolidation may also be appropriate and not an abuse of discretion even though the parties to both actions are not identical [ *Jud Whitehead Heater Co. v. Obler* (1952) 111 CA2d 861, 867, 245 P2d 608 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### **32.10 Court's Order Granting or Denying Consolidation.**

**32.10[1] Court's Order Must Be Filed in Each Case.** The order granting or denying all or part of a motion to consolidate is filed in each case sought to be consolidated [*Cal Rules Ct, Rule 3.350(c)*].

#### **Cross Reference:**

Discussion/Forms on service of papers in general, see Ch. 27, Service of Papers.

**32.10[2] Order Should State Whether Actions Consolidated for All Purposes or Trial Only.** The order must state whether the actions are being consolidated for all purposes, or only for trial of related issues. If the cases involve the same parties, an order consolidating the actions for all purposes should indicate that the causes of action are joined, and that there will be one judgment, and only one set of factual findings and conclusions of law. The cases will be treated as if the actions had been united originally [ *Didier v. Am. Cas. Co. (1968) 261 CA2d 742, 752, 68 CR 217 ; CCP § 632*]. Where pending actions are consolidated for trial of related issues, the order should set forth the issues, and state that separate findings and judgments must be made in each action [ *Hamilton v. Asbestos Corp., Ltd. (2000) 22 C4th 1127, 1147, 95 CR2d 701, 998 P2d 403* ].

#### **Cross References:**

Forms of Order Consolidating Actions, see 32.29, 32.32.

Discussion/Forms regarding law and motion procedure in general, see Ch. 26, Law and Motion Procedure.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**32.11 After Consolidation, All Pleadings Must Include Caption of Lead Case.**

All documents filed in the consolidated case must include the caption and case number of the lead case, followed by the case numbers of all the other consolidated cases [*Cal Rules Ct, Rule 3.350(d)*]. Unless otherwise ordered by the court, the lead case will be the case with the lowest file number [*Cal Rules Ct, Rule 3.350(b)*].

**Legal Topics:**

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**32.12 If Consolidation for All Purposes, Subsequent Documents Only Filed in Lead Case.**

If consolidation is ordered for all purposes including trial, any subsequent document should be filed only in the lead case [*Cal Rules Ct, Rule 3.350(c)*].



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### **32.13 Parties to Consolidated Cases May Challenge Assigned Judge.**

A party to any of the consolidated cases may seek to disqualify the assigned judge by timely challenge [CCP § 170.6]. This is true even if that party previously accepted the judge [ *Nissan Motor Corp. v. Superior Court* (1992) 6 CA4th 150, 155, 7 CR2d 801 ; *Philip Morris, Inc. v. Superior Court* (1999) 71 CA4th 116, 123, 83 CR2d 671 ].

#### **Cross Reference:**

Discussion/Forms regarding disqualification of judges, see *Ch. 22, Disqualification of Judge*, 22.03 -22.14, 22.40 -22.43.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.14*

**32.14 CHECKLIST: Seeking and Opposing Coordination by Transfer and Consolidation of Non-Complex Actions.**

**32.14[1] Moving Party's Checklist.**

- ☐ Determine whether coordination is appropriate.
  - ☐ Factors Considered:
    - ☐ Whether the cases involve a common question of fact or law which is significant to the litigation.
    - ☐ Elimination of unnecessary duplication of judicial resources and effort.
    - ☐ Reduction of the risk of inconsistent rulings among courts.
    - ☐ Reduction of waste of personnel and judicial facilities.
    - ☐ More efficient use of court calendars.

**Authority:**  
*CCP § 404.1*

**Discussion:**  
*See 32.15[3]*

☐ Determine whether case is complex or non-complex.

☐ Standards:

☐ Requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.

☐ Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve.

☐ Management of a large number of witnesses or a substantial amount of documentary evidence.

☐ Management of a large number of separately represented parties.

☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court.

☐ Substantial postjudgment judicial supervision.

☐ Action is deemed provisionally complex for:

☐ Antitrust or trade regulation claims.

☐ Construction defect claims involving many parties or structures.

☐ Securities claims or investment losses involving many parties.

☐ Environmental or toxic tort claims involving many parties.

☐ Claims involving mass torts.

☐ Claims involving class actions.

☐ Insurance coverage claims arising out of any of the claims listed above.

**Authority:**

*CCP § 404; Cal Rules Ct, Rules 3.400, 3.502*

**Discussion:**

See 32.15[2]

☐ Make good faith effort to get all parties to agree to transfer.

☐ If parties agree:

- ☐ Prepare stipulation to coordinate cases.
- ☐ Seek judicial approval of coordination and prepare order.
- ☐ File order in each case and serve all parties with order.

**Authority:**

*CCP § 403; Cal Rules Ct, Rule 3.500(c)*

**Discussion:**

See 32.16, 32.17

☐ If parties will not agree:

☐ Draft motion and notice of motion for coordination with supporting declarations and memorandum.

☐ Declaration must contain statement that:

- ☐ The actions meet the standards specified in *CCP § 404.1*.
- ☐ The actions are not complex as defined by the Judicial Council.
- ☐ The moving party has made a good faith effort to obtain agreement to the transfer from all parties to each action.
- ☐ The moving party has notified all parties of their obligation to disclose to the court any information they may have concerning any other motions requesting transfer of any case that would be affected by the granting of the motion before the court.

**Authority:**

*CCP § 403; Cal Rules Ct, Rule 3.500(c)*

**Discussion:**

See 32.16[1], [2], [3], [5]

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**Form:**

See 32.33

- ☐ Draft proposed order.
- ☐ Order must specify reason for ruling, e.g.:
- ☐ The actions are not complex.
  - ☐ The common question of fact or law is predominating and significant to the litigation.
  - ☐ The convenience of the parties, witnesses, and counsel.
  - ☐ The relative development of the actions and the work product of counsel.
  - ☐ The efficient utilization of judicial facilities and staff resources.
  - ☐ The calendar of the courts.
  - ☐ The disadvantages of duplicative and inconsistent rulings, orders, or judgments.
  - ☐ The likelihood of settlement of the actions without further litigation should coordination be denied.
- ☐ Serve and file motion:
- ☐ Follow standard notice motion procedure.
- ☐ Calendar response and hearing dates.

**Authority:***Cal Rules Ct, Rule 3.500(d)***Discussion:**

See 32.16[5], 32.17[2]

**Standard Procedure Checklist:**See *Ch. 26, Law and Motion Procedure*, 26.39**Form:**

See 32.34

- ☐ If the court orders that the case or cases be transferred from another court, the moving party must:
- ☐ Serve copies of the order on all parties in each case, the Administrative Office of the Courts, and the presiding judge for each case to be transferred.
  - ☐ Take all appropriate action to ensure that the transfer takes place and that proceedings are initiated in the other court or courts to effectuate consolidation.

**Authority:**

*Cal Rules Ct, Rules 3.500(e), (f)*

**Discussion:**

See 32.17

**32.14[2] Opposing Party's Checklist.**

- ☐ Calendar response and hearing dates.
- ☐ Prepare opposition:
  - ☐ Draft declarations opposing motion.
  - ☐ Draft opposing memorandum.
- ☐ Draft proposed order.
- ☐ Serve and file response.
  - ☐ Follow standard noticed motion procedure.

**Authority:**

*CCP § 403; Cal Rules Ct, Rule 3.500(c)*

**Discussion:**

See 32.16[4], [5], [6], [8]

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.46



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**32.15 Coordination by Transfer and Consolidation of Non-Complex Actions.**

**32.15[1] Coordination by Transfer and Consolidation Assigns Non-Complex Cases Filed in Different Courts to One Judge.** In non-complex actions, a judge in one court may order a case pending in a different court or county transferred to his or her court if the cases involve "a common question of fact or law" [CCP § 403]. Upon such transfer, the judge may consolidate the cases for trial without further notice or hearing [CCP §§ 403, 1048].

➤ **Cross Reference:**

Discussion of consolidation of actions, see 32.07 -32.13.

**32.15[2] Procedure Applies to Non-Complex Cases Only.** Coordination by transfer and consolidation is available only for actions which are "not complex" [CCP § 403; *Cal Rules Ct, Rules 3.400 et seq., Cal Rules Ct, Rules 3.502*].

➤ **Cross Reference:**

Discussion of how courts distinguish between "complex" and "non-complex" cases, see 32.19[3].

**32.15[3] Coordination by Transfer and Consolidation Is Allowed Where It Will Promote Justice According to Statutory Criteria.** Coordination by transfer and consolidation is appropriate only where the actions involve a "common question of fact or law," and coordination would "promote the ends of justice" as specified in CCP § 404.1 [CCP §§ 403, 404, 404.1]:

- Whether the "common question of fact or law" is significant to the litigation;
- The convenience of parties, witnesses and counsel;
- The relative development of the actions and the work product of counsel;
- The efficient utilization of judicial facilities and manpower;



- The calendar of the respective courts;
- The disadvantages of duplicative and inconsistent rulings, orders, or judgments;
- The likelihood of settlement of the actions without further litigation should coordination be denied.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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### **32.16 Seeking and Opposing Coordination by Transfer and Consolidation.**

**32.16[1] Coordination by Transfer and Consolidation Is Requested By Party's Noticed Motion.** Transfer and consolidation may be requested by motion of any party [CCP § 403].

#### **Cross Reference:**

Discussion/Forms for law and motion procedure in general, see Ch. 26, Law and Motion Procedure.

**32.16[2] Motion Must Include Declaration That Actions Meet Statutory Criteria for Coordination, Cases Are Not Complex, and Party Attempted Informal Resolution.** The motion must be supported by a declaration stating facts which show the following [CCP § 403; *Cal Rules Ct, Rule 3.500(c)*]:

- The actions meet the standards specified in *CCP § 404.1*;
- The actions are not complex as defined by *Cal Rules Ct, Rule 3.400 et seq.*;
- The moving party has made a good faith effort to obtain agreement to the transfer from all parties to each action;
- The moving party has notified all parties of their obligation to disclose to the court any information they may have concerning any other motions requesting transfer of any case that would be affected by the granting of the motion before the court.

#### **Cross References:**

Discussion of *CCP § 404.1* standards, see *32.15[3]*.

Discussion of how courts distinguish between "complex" and "non-complex" cases, see *32.19[3]*.

Discussion of the duty to disclose pending motions to transfer, see *32.16[7]*.

Form of notice of motion and supporting declaration, see 32.33.

**32.16[3] Notice of Motion for Coordination by Transfer and Consolidation Is Served on All Parties.** Notice of the motion must be served on all parties to each action and on each court in which an action is pending [*CCP* § 403].

 **Cross Reference:**

Discussion/Forms regarding service of papers in general, see Ch. 27, Service of Papers.

**32.16[4] Any Party May Oppose Motion for Coordination by Transfer and Consolidation.** Any party to an action affected by the motion may file papers opposing the motion "within the time permitted by rule of the Judicial Council," [*CCP* § 403] although the Judicial Council has yet to promulgate such a rule. The motion is subject to the requirements generally applicable to motions [*Cal Rules Ct, Rule 3.500(c)*].

 **Cross Reference:**

Discussion/Forms regarding motion procedure generally, see Ch. 26, Law and Motion Procedure.

**32.16[5] All Memoranda and Affidavits in Support of or in Opposition to the Motion Must Be Filed at Least Five Days Before Hearing.** Unless otherwise directed by the assigned judge, all memoranda and declarations in support of, or in opposition to, the motion for coordination by transfer must be served and filed at least nine court days before any hearing [*Cal Rules Ct, Rule 3.513*].

**32.16[6] Evidence Presented Must Be Written Unless Judge Orders Otherwise.** Any evidence presented in support of, or in opposition to, the motion for transfer and consolidation must be initially submitted in writing to the court. Declarations, answers to interrogatories or requests for admissions, depositions, or matters judicially noticed are acceptable [*Cal Rules Ct, Rule 3.514*]. Oral testimony is not permitted at the motion hearing unless the assigned judge allows such testimony to resolve factual disputes raised by the declarations, responses to discovery, or matters judicially noticed [*Cal Rules Ct, Rule 3.514*].

**32.16[7] Parties Must Disclose Other Pending Motions to Transfer.** If they know of any other relevant motions to transfer which are pending before another court, the parties have a duty to disclose this information to the court. Failure to do so by a party may result in a finding that the party unlawfully interfered with the processes of the court [*Cal Rules Ct, Rule 3.500(g)*].

**32.16[8] Only Parties Who Have Filed Papers Can Attend Hearing.** Unless the assigned judge orders otherwise for good cause, only the parties who have submitted a petition, motion, or application, or a written response or opposition to a petition, motion, or application are permitted to attend the hearing on the motion for coordination by transfer and consolidation [*Cal Rules Ct, Rule 3.514*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**32.17 Court's Order Regarding Motion and Moving Party's Obligations Thereafter.**

**32.17[1] Court May Make Alternative Disposition If Actions Belong in Another Court.** After considering the motion, the judge may determine that the actions pending in another court should not be transferred to the judge's court, but transferred and consolidated in another court. In this instance, the judge may order the parties to prepare, serve, and file a motion to have the actions transferred to the appropriate court [*Cal Rules Ct, Rule 3.500(h)*].

**32.17[2] Court's Order Granting Transfer Must Indicate that Actions Are Not Complex and State Why Transfer and Consolidation Would Promote Justice.** If the court orders that the case or cases be transferred from another court, the order shall specify the reasons supporting a finding that the transfer will promote the ends of justice, with reference to the following standards [*Cal Rules Ct, Rule 3.500(d)*]:

- The actions are not complex;
- Whether the common question of fact or law is predominating and significant to the litigation;
- The convenience of the parties, witnesses, and counsel;
- The relative development of the actions and the work product of counsel;
- The efficient utilization of judicial facilities and staff resources;
- The calendar of the courts;
- The disadvantages of duplicative and inconsistent rulings, orders, or judgments; and
- The likelihood of settlement of the actions without further litigation should coordination be denied.

➡ **Cross References:**

Discussion of *CCP* § 404.1 standards, see 32.15[3].

Discussion of how courts distinguish between "complex" and "non-complex" cases, see 32.19[3].

Form of Order, see 32.34.

**32.17[3] Moving Party Serves Copies of Order and Assures That Transfer Takes Place.** If the court orders that the case or cases be transferred from another court, the moving party must immediately:

- Serve the order on all parties to each case and must send copies to the Judicial Council and to the presiding judge of the court from which each case is to be transferred [*Cal Rules Ct, Rule 3.500(e)*];
- Promptly take all appropriate action necessary to assure that the transfer takes place and that proceedings are initiated in the other court or courts to effectuate consolidation [*Cal Rules Ct, Rule 3.500(f)*]

**32.17[4] Receiving Judge May Consolidate Actions Without Further Notice or Hearing.** *CCP* § 403 provides that the court to which a case is transferred under that provision may order the cases consolidated for trial pursuant to *CCP* § 1048 without any further motion or hearing [*CCP* § 403].



**Strategic Point--Moving Party:**

The court normally will not consolidate matters for trial on its own motion, but will conduct a hearing and ask for briefing on the issue of consolidation, unless all counsel agree.



**Strategic Point--Opposing Party:**

If the court consolidates matters for trial on its own motion, an opposing party could later file a motion to sever [see 32.23 -32.26].

The actions may be consolidated for all purposes, or for trial only [ *Hamilton v. Asbestos Corp., Ltd. (2000) 22 C4th 1127, 1147, 95 CR2d 701, 998 P2d 403* ; *Stubblefield Constr. Co. v. City of San Bernardino (1995) 32 CA4th 687, 701, 38 CR2d 413* ]. All documents filed in the consolidated case must include the caption and case number of the lead case, followed by the case numbers of all the other consolidated cases [*Cal Rules Ct, Rule 3.350(d)*].

Parties to the consolidated case may challenge the assigned judge [*CCP* § 170.6].



**Cross References:**

Discussion of consolidation, see 32.07 -32.13.

Discussion of the filing requirements in consolidated cases, see 32.11, 32.12.

Discussion on challenging the assigned judge in a consolidated case, see 32.13.

**32.17[5] Administrative Office of the Courts Reviews Transfer Orders and Confers With Presiding Judges to Avoid Conflicting Orders.** The coordination staff in the Administrative Office of the Courts must review all transfer orders submitted [*Cal Rules Ct, Rule 3.500(f), (g)*] and shall promptly confer with the presiding judges of any courts that have issued conflicting orders under *CCP* § 403. The presiding judges of any such courts shall confer with each other and with the judges who have issued the orders to the extent necessary to resolve the conflict [*Cal Rules Ct, Rule*

3.500(g)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial MattersConsolidation of Actions



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Chapter 32 Notice of Related Cases, Consolidation, Coordination, and Severance of Actions  
V. SEEKING AND OPPOSING COORDINATION (COMPLEX ACTIONS ONLY)

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.18*

**32.18 CHECKLIST: Seeking and Opposing Coordination of Complex Actions.**

**32.18[1] Moving Party's Checklist.**

- ☐ Determine whether coordination is appropriate.
  - ☐ Standards:
    - ☐ Elimination of unnecessary duplication of judicial resources and effort.
    - ☐ Reduction of the risk of inconsistent rulings among courts.
    - ☐ Reduction of waste of personnel and judicial facilities.
    - ☐ More efficient use of court calendars.

**Authority:**  
*CCP § 404.1*

**Discussion:**  
*See 32.19[4]*

- ☐ Determine whether case is complex or non-complex.
  - ☐ Standards:

- ☐ Requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.
  - ☐ Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve.
  - ☐ Management of a large number of witnesses or a substantial amount of documentary evidence.
  - ☐ Management of a large number of separately represented parties.
  - ☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court.
  - ☐ Substantial postjudgment judicial supervision.
- ☐ Action is deemed provisionally complex if it involves:
- ☐ Antitrust or trade regulation claims.
  - ☐ Construction defect claims involving many parties or structures.
  - ☐ Securities claims or investment losses involving many parties.
  - ☐ Environmental or toxic tort claims involving many parties.
  - ☐ Claims involving mass torts.
  - ☐ Claims involving class actions.
  - ☐ Insurance coverage claims arising out of any of the claims listed above.

**Authority:**

*CCP § 404; Cal Rules Ct, Rules 3.400, 3.502*

**Discussion:**

*See 32.19[3]*

- ☐ Must have all plaintiffs or all defendants in any one action support the petition; or,



- ☐ Bring motion before the presiding judge for permission to submit a petition.
- ☐ Determine whether it is necessary to request a stay from court to provide sufficient time to submit a petition.

**Authority:**

*CCP § 404; Cal Rules Ct, Rule 3.520(b)(3)*

**Discussion:**

See 32.20[2], [5]

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**Form:**

See 32.35

- ☐ If have agreement of all parties or permission:
  - ☐ Draft notice of petition and petition for coordination with supporting declarations and memorandum.
  - ☐ Draft proposed order.
  - ☐ Serve and file petition:
    - ☐ The petition, with proof of prior service on all other parties to the included actions, should be submitted in duplicate to:  
Chair of the Judicial Council  
Administrative Office of the Courts  
c/o Coordination Attorney  
455 Golden Gate Avenue  
San Francisco, California 94102-3660

**Authority:**

*CCP § 404; Cal Rules Ct, Rules 3.521, 3.522*

**Discussion:**

See 32.20[3], [4]

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**Forms:**

See 32.39, 32.40

- ☐ Coordination motion judge is assigned and schedules hearing.

- ☐ File, serve, and submit order by Chair of Judicial Council or presiding judge assigning coordination motion judge.
- ☐ Make any challenge to assigned judge within 20 days after service of assignment order.
- ☐ When assigned judge schedules hearing within 30 days of issuance of assignment order:
  - ☐ Calendar hearing date, and submission of any additional memoranda, declarations, or statements in support of the petition at least nine days prior to the hearing date.
  - ☐ File, serve, and submit notice of the hearing date.
  - ☐ Request that the assigned judge restrict the hearing to first consider issues dispositive of the petition, if any.
  - ☐ File, serve, and submit any additional memoranda, declarations, or statements in support of the petition at least nine days prior to the hearing date.
- ☐ If no opposition statement is filed at least nine days prior to the hearing date, the hearing should be vacated.

**Authority:**

*Cal Rules Ct, Rules 3.511(a)(3), (8), 3.512, 3.516, 3.527; Philip Morris, Inc. v. Superior Court (1999) 71 CA4th 116, 122, 83 CR2d 671*

**Discussion:**

See 32.20[6], [7], [9]

- ☐ If petition is denied:
  - ☐ File order in each included case.
  - ☐ Stay orders are lifted 10 days after order filed.

**Authority:**

*Cal Rules Ct, Rules 3.527, 3.529(a)*

**Discussion:**

See 32.21[1], [2]

- ☐ If petition is granted:
  - ☐ Automatic stay is granted.

- ☐ Coordinating trial judge is assigned.
- ☐ Parties have 20 days after service of assignment order to challenge assigned judge.
- ☐ Case management conference should be held within 45 days.

**Authority:**

*Cal Rules Ct, Rules 3.516, 3.529(b), 3.540, 3.541; Philip Morris, Inc. v. Superior Court (1999) 71 CA4th 116, 122, 83 CR2d 671*

**Discussion:**

See 32.21[1], [3], [4], 32.22

**32.18[2] Opposing Party's Checklist.**

- ☐ Upon receiving notice of a motion for permission to request coordination of cases including an action in which you represent a party from the Chair of the Judicial Council:

- ☐ File opposition with presiding judge of that court in accordance with regular motion practice, and serve on required parties and courts.
- ☐ Oppose any requested stay of the action.

**Authority:**

*Cal Rules Ct, Rules 3.510, 3.520(a), (b)(1)*

**Discussion:**

See 32.20[2][c], [d]

- ☐ Upon receiving notice of submission of petition for coordination to the Chair of the Judicial Council, prepare opposing memorandum and declarations.

- ☐ After receiving notice of assignment of coordination motion judge:

- ☐ File opposing memorandum and declarations with assigned judge, and serve on required parties and courts.
- ☐ Make any challenge to assigned judge within 20 days of service of notice.

**Authority:**

*Cal Rules Ct, Rules 3.510, 3.511(a)(5), (6), 3.516, 3.525; Philip Morris, Inc. v. Superior Court (1999) 71 CA4th 116, 122, 83 CR2d 671*

**Discussion:**

See 32.20[4][c], [7], 32.21[4]

☐ Upon receiving notice of a motion for a stay of the proceeding in which you represent a client:

- ☐ Respond to any requested stay of the action within 10 days of service of the motion.

**Authority:**

*Cal Rules Ct, Rule 3.515(d)*

**Discussion:**

See 32.20[5][d]

☐ After receiving notice of hearing on petition for coordination before assigned judge:

- ☐ Calendar hearing date.
- ☐ File any outstanding opposition or supporting papers at least nine court days before hearing date, and serve on required parties and courts.
- ☐ Request, or respond to any request for, consideration of specific dispositive issues at the start of the hearing.

**Authority:**

*Cal Rules Ct, Rules 3.510, 3.525, 3.527, 3.528*

**Discussion:**

See 32.20[4][c], [8], [9]



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Chapter 32 Notice of Related Cases, Consolidation, Coordination, and Severance of Actions  
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*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.19*

### **32.19 Coordination of Complex Actions Defined.**

**32.19[1] Coordination Assigns Complex Actions Filed in Different Courts to One Judge.** Coordination is the assignment to a single judge of civil actions which share common questions of law or fact and are filed in different courts [CCP § 404]. The assigned judge may try the cases in one or more courts [CCP § 404.3]. The assigned judge also has the flexibility to order issues or defenses tried separately, and to order the hearings conducted at various sites in the state as may be selected to provide convenience to witnesses, parties, and counsel [Cal Rules of Ct, Rule 3.541; *McGhan Med. Corp. v. Superior Court* (1992) 11 CA4th 804, 812-814, 14 CR2d 264 ].

Coordination proceedings are useful in determining common issues in personal injury mass tort claims, although each individual plaintiff is responsible for proof of the particular facts for his or her case [ *Jolly v. Eli Lilly & Co.* (1988) 44 C3d 1103, 1125 n19, 245 CR 658, 751 P2d 923 ]. Strict products liability actions can also benefit from coordination in the area of discovery and demurrer or summary judgment rulings [see *McGhan Med. Corp. v. Superior Court* (1992) 11 CA4th 804, 812-814, 14 CR2d 264 ].

**32.19[2] Procedure Applies to Complex Cases Only.** The coordination procedure, which involves submitting a petition for coordination to the Chair of the Judicial Council, is available only for cases that are "complex," as defined by the Judicial Council [CCP § 404]. Non-complex cases are "coordinated" through transfer from one court to another, followed by consolidation with cases pending in the transferee court. This is accomplished via motion to the court [CCP § 403].



#### **Cross References:**

Discussion of coordination by transfer and consolidation, see 32.14-32.17.

Discussion of how courts distinguish between "complex" and "non-complex" cases, see 32.19[3].

**32.19[3] Court Determines If Case Is "Complex" by Considering Statutory Factors.** A case is "complex," if it requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel [Cal Rules Ct, Rules 3.400(a), 3.502]. The factors to be considered by the court in deciding whether an action is a

complex case include, among other things, whether the action is likely to involve [*Cal Rules Ct, Rule 3.400(b)*]:

- Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
- Management of a large number of witnesses or a substantial amount of documentary evidence;
- Management of a large number of separately represented parties;
- Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
- Substantial postjudgment judicial supervision.

Unless the court has significant experience resolving similar claims, or a local rule provides otherwise, an action will be provisionally designated as "complex" if it involves one of the following types of claims [*Cal Rules Ct, Rule 3.400(c), (d)*]:

- Antitrust or trade regulation claims;
- Construction defect claims involving many parties or structures;
- Securities claims or investment losses involving many parties;
- Environmental or toxic tort claims involving many parties;
- Claims involving mass torts;
- Claims involving class actions; or
- Insurance coverage claims arising out of any of the claims listed above.



#### **Cross References:**

Discussion of case management for complex actions, see *Ch. 23, Case Management, 23.12*.

Additional analysis of complex cases, see *California Forms of Pleading and Practice, § 425.15* (Matthew Bender); or

*Deskbook on the Management of Complex Civil Litigation, §§ 1.02, 2.01*.

#### **32.19[4] Coordination Is Allowed Where It Will Promote Justice According to Statutory Criteria.**

Coordination is appropriate where the actions involve a "common question of fact or law," and coordination would "promote the ends of justice," according to the following criteria [*CCP §§ 404, 404.1*]:

- Whether the "common question of fact or law" is significant to the litigation;
- The convenience of parties, witnesses and counsel;
- The relative development of the actions and the work product of counsel;
- The efficient utilization of judicial facilities and manpower;

- The calendar of the respective courts;
- The disadvantages of duplicative and inconsistent rulings, orders, or judgments;
- The likelihood of settlement of the actions without further litigation should coordination be denied.

**Exception:**

The imminence of a trial in any action otherwise appropriate for coordination may be grounds for summary denial of a petition in whole or in part [*Cal Rules Ct, Rule 3.521(d)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Venue Multidistrict Litigation Civil Procedure Pretrial Matters Consolidation of Actions



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## **32.20 Seeking and Opposing Coordination.**

**32.20[1] Petition for Coordination of Complex Cases Is Filed With Chair of Judicial Council.** Coordination proceedings may be commenced by submitting a petition for coordination to the Chair of the Judicial Council [see *CCP* § 404; *Cal Rules Ct, Rule 3.521*].

### **Cross Reference:**

Form of Petition, see 32.39.

## **32.20[2] Who May File Petition.**

**32.20[2][a] All Plaintiffs or Defendants in One Action May File Direct Petition.** The most common method of commencing a coordination proceeding is by direct petition. A direct petition is permitted where all plaintiffs or all defendants in any one action support the petition [*CCP* § 404]. If all parties plaintiff or defendant in an action do not support the petition, the party seeking coordination must first make a motion to the presiding judge for permission to submit a petition [*CCP* § 404; *Cal Rules Ct, Rule 3.520(b)*].

### **Cross References:**

Discussion of how to move the court for permission to submit a petition for coordination, see 32.20[2][c].

Related forms, see 32.35 -32.38.

Discussion/Forms regarding motion procedure in general, see Ch. 26, Law and Motion Procedure.

**32.20[2][b] Presiding Judge May File Direct Petition.** Alternatively, the presiding judge of a court in which one of the actions is pending may file a direct petition for coordination [*CCP* § 404; *Cal Rules Ct, Rule 3.520(b)*].

**32.20[2][c] Where Direct Petition Not Allowed, Party May Request Permission to File from Presiding Judge.** When a direct petition cannot be made because it is not supported by either all plaintiffs or all defendants in one of the actions, any party may make a motion to the presiding judge of a court in which one of the actions is pending for



permission to submit a petition for coordination to the Chair of the Judicial Council [*CCP § 404; Cal Rules Ct, Rule 3.520(b)(1)*]. The motion must also be accompanied by a proposed order stating that the moving party has permission to submit a petition for coordination to the Chair of the Judicial Council [*Cal Rules Ct, Rule 3.520(b)(1)*]. If permission is granted, the movant must serve and file the signed order and submit it to the Chair of the Judicial Council [*Cal Rules Ct, Rule 3.520(b)(2)*].

If permission is granted, the moving party prepares an order that must be served and filed in the action and submitted to the Chair of the Judicial Council. The order grants the moving party permission to submit a petition for coordination to the Chair of the Judicial Council [*Cal Rules Ct, Rule 3.520(b)*].

#### **Cross References:**

Forms, see 32.35, 32.36, 32.38.

Discussion/Forms regarding motion procedure in general, see Ch. 26, Law and Motion Procedure.

**32.20[2][d] Court May Stay Related Actions for Reasonable Time.** To provide sufficient time for a party to submit a petition, the judge can stay all related actions pending in that court for a reasonable time not to exceed 30 calendar days [*Cal Rules Ct, Rules 3.520(b)(3), 3.515(f)*].

#### **Cross References:**

Discussion on requesting a stay while coordination proceedings are pending, see 32.20[5].

Forms of notice of motion and order staying proceedings, see 32.37, 32.38.

Discussion/Forms regarding motion procedure in general, see Ch. 26, Law and Motion Procedure.

### **32.20[3] Contents of Petition and Supporting Documents.**

**32.20[3][a] Petition Specifies Name and Status of Each Action.** The petition for coordination must specify [*Cal Rules Ct, Rule 3.521*]:

- The name of the petitioner (or, if filed by the court, the names of the parties), and the name and address of counsel;
- The names of all other parties in all of the included actions, and the name and address of each party's attorney of record;
- If the party seeking to submit a petition for coordination is a plaintiff, whether the party's attorney has served the summons and complaint on all parties in all included actions in which the attorney has appeared;
- The complete title, the case number, the date the complaint was filed, and the title of the court in each action to be included in the order;
- The complete title and case number of any other action sharing the same "common question of fact or law" with the included actions, as well as a statement of reasons why the action is not included, or a statement that the petitioner knows of no other actions sharing a common question of fact or law;
- The status of each included action, including pretrial motions, discovery, or other orders, if known to the petitioner;

- The facts relied upon to show that each included action meets the statutory criteria for coordination [see *CCP* § 404.1];

- The facts in support of selecting any particular court as a forum for the trial.

#### ➤ **Cross Reference:**

Form of petition, see 32.39.

**32.20[3][b] Petition Must Be Supported by Declaration that Cases Are Complex and Meet Statutory Coordination Criteria.** The petition must be accompanied by a memorandum and a declaration stating facts which demonstrate that the actions are complex and meet the statutory criteria for coordination [*CCP* §§ 404, 404.1; *Cal Rules Ct*, Rule 3.521].

In lieu of proof by declaration of facts, a certified or endorsed copy of the respective pleadings may be attached to the petition for coordination specifying which parts of the pleadings are relied on to support a particular fact [*Cal Rules Ct*, Rule 3.521(c)].

#### ➤ **Cross References:**

Discussion of how courts distinguish between "complex" and "non-complex" cases, see 32.19[3].

Discussion of the statutory criteria for coordination, see 32.19[4].

Form of petition and declaration, see 32.39.

**32.20[3][c] Petition Is Served With Notice of Submission of Petition for Coordination.** The petitioner must submit a copy of the petition to the Chair of the Judicial Council, Administrative Office of the Courts, c/o Coordination Attorney, 455 Golden Gate Avenue, San Francisco, California 94102-3660 [*Cal Rules Ct*, Rules 3.511(a)(1), 3.521(a)].

Within five court days of submitting the petition for coordination, the petitioner must submit to the Chair of the Judicial Council proof of filing of the notice of submission of petition [see *Cal Rules Ct*, Rule 3.522] in each included action and proof of service of the notice of submission of petition and of the petition on all other parties in the included actions [*Cal Rules Ct*, Rules 3.510, 3.521(b), 3.522(b), 3.523].

The petition, as well as any paper listed in *Cal Rules Ct*, Rule 3.511(a) may be submitted electronically to the Chair of the Judicial Council at the following url: [coordination@jud.ca.gov](mailto:coordination@jud.ca.gov) [*Cal Rules Ct*, Rule 3.512(a)]. The party submitting the electronic document must [*Cal Rules Ct*, Rule 3.512(b), (c)]:

- Take all reasonable steps to ensure the submission does not include computer codes or other viruses that might damage the court's computer system.
- Furnish an electronic notification address and immediately provide the court with any changes to this address.
- Use only software that is in the public domain or generally available.
- Have a document that does not result in the loss of document text, format, or appearance when printed.

When a document does not require a signature under penalty of perjury, the document is deemed signed by the party

when the document is submitted electronically [*Cal Rules Ct, Rule 3.512(e)*]. A party is not required to use a digital signature on an electronically submitted document [*Cal Rules Ct, Rule 3.512(f)*].

When a document submitted electronically requires a signature under penalty of perjury, the document is deemed signed by the declarant if, before submission, declarant has signed a printed form of the document [*Cal Rules Ct, Rule 3.512(d)(1)*]. By electronically submitting the document, the party indicates that a printed, signed form has been completed and is available for review and copying by the court or any other party [*Cal Rules Ct, Rule 3.512(d)(2)*]. Any party may serve a demand for the original signed document, served on all parties though the demand need not be filed with the court, and the party on whom the demand is made must produce the original within five days of service of the demand [*Cal Rules Ct, Rule 3.512(d)(3), (4)*].

 **Cross Reference:**

Form of notice, see 32.40.

**32.20[4] Time for Serving and Filing Petition, Statement in Support, and Opposition.**

**32.20[4][a] Petition Procedure May Be Initiated After Complaint Filed.** A petition for coordination, along with the notice of submission and supporting documents, may be served and filed "any time after filing of the complaint" [*Cal Rules Ct, Rule 3.521(a)*].

 **Cross References:**

Forms of petition and notice, see 32.39, 32.40.

Discussion/Forms regarding service of papers in general, see Ch. 27, Service of Papers.

**32.20[4][b] Statement in Support May Be Served and Filed Within Nine Days of Hearing Date.** Any party to an included action who supports coordination may submit a written statement in support of the petition at least nine court days before the date set for hearing. The statement in support may request that a different site or sites be selected based on facts included in the statement [*Cal Rules Ct, Rules 3.526, 3.530(b)*]. The documents may be submitted electronically to the Chair of the Judicial Council [*Cal Rules Ct, Rule 3.512*].



**Strategic Point--Supporting Party:**

Given that the assigned judge may order that a specified issue or issues whose determination may dispose of a petition for coordination, without the necessity of conducting a hearing upon all issues raised by such the petition and by any opposition thereto, be heard and determined prior to any before a hearing on the remaining issues [*Cal Rules Ct, Rules 3.528*], supporting party having such an issue or issues should request in the statement in support that the assigned judge limit the hearing initially to the issue or issues.

 **Cross References:**

Hearing date, see 32.20[9].

Discussion of electronic submission of documents, see 32.20[3][c].

Form of statement in support of petition, see 32.41.

**32.20[4][c] Opposition May Be Served and Filed At Least Nine Court Days Before Hearing Date.** Any party to an included action who opposes coordination may serve and submit a memorandum and declarations in opposition to

the petition at least nine court days before the date set for hearing [*Cal Rules Ct, Rules 3.525*]. The documents may be submitted electronically to the Chair of the Judicial Council [*Cal Rules Ct, Rule 3.512*].



#### **Strategic Points--Opposing Party:**

- Given the assigned judge's duty to recommend a site or sites for the coordination using specified criteria [*see Cal Rules Ct, Rules 3.530*], opposing party should include any opposition to proposed sites and should propose desired alternate sites in the memorandum and declarations.
- Given that the assigned judge may order that a specified issue or issues whose determination may dispose of a petition for coordination, without the necessity of conducting a hearing upon all issues raised by such the petition and by any opposition thereto, be heard and determined prior to any before a hearing on the remaining issues [*Cal Rules Ct, Rule 3.528*], opposing party having such an issue or issues should request in the opposing statement that the assigned judge limit the hearing initially to the issue or issues.



#### **Cross References:**

Hearing date and notice of hearing date, see 32.20[9].

Discussion of electronic submission of documents, see 32.20[3][c].

Form of opposition to petition, see 32.42.

Discussion/Forms regarding motion procedure in general, see Ch. 26, Law and Motion Procedure.

**32.20[4][d] All Memoranda and Affidavit in Support of or in Opposition to Petition Must Be Filed at Least Nine Calendar Days Before Hearing.** Unless the assigned judge orders otherwise, all memoranda and declarations in support of, or in opposition to, a petition must be served and filed at least nine court days before the hearing date [*Cal Rules Ct, Rule 3.513*].



#### **Cross Reference:**

Discussion of electronic submission to the Chair of the Judicial Council, see 32.20[3][c].

**32.20[4][e] Duty to Provide Notice of Potential Add-On Cases.** A party to an included action in a pending petition for coordination must promptly provide notice of any potential add-on cases in which that party is also named or in which that party's attorney has appeared to the coordination motion judge, the Chair of the Judicial Council, and parties appearing in the included actions in the pending petition and in the potential add-on cases [*Cal Rules Ct, Rules 3.531(a)*].

**32.20[5] Motion for Stay May Be Included With Petition or Submitted by Any Party Prior to Determination on Petition.**

**32.20[5][a] Motion or Opposition Must List All Known Related Cases.** Pending the determination of whether coordination is appropriate, the judge making the determination may stay any action being considered for coordination, or any action which could affect an action being considered for coordination [*CCP § 404.5*]. A motion for a stay order may be included as part of a petition for coordination, or it may be served and submitted by a party to an affected action prior to the decision on coordination [*Cal Rules Ct, Rule 3.515(b)*].

The motion for a stay order must list all known related cases pending in California's courts and whether the stay order being requested extends to them [*Cal Rules Ct, Rule 3.515(a)*].

➡ **Cross Reference:**

Forms of motion and order staying proceedings, see 32.37, 32.38.

**32.20[5][b] Motion Must Be Supported by Memorandum and Declarations Establishing That Stay Is Necessary for Coordination.** A motion for a stay order must be supported by a memorandum and by declarations establishing the facts relied on to show that the order is necessary and appropriate to "effectuate the purposes of coordination" [*Cal Rules Ct, Rule 3.515(a)*].

➡ **Cross References:**

Discussion of criteria for coordination, see 32.19[4].

Forms of motion and order staying proceedings, see 32.37, 32.38.

Discussion/Forms regarding motion procedure in general, see Ch. 26, Law and Motion Procedure.

**32.20[5][c] Copies Are Served on All Affected Parties.** Copies of the motion for a stay order may be included with the petition for coordination. If it is not, the motion and supporting papers must be served upon every party to the action to be stayed [*Cal Rules Ct, Rule 3.515(c)*].

➡ **Cross References:**

Discussion of petition contents and notice requirements, see 32.20[1], [3], [4].

Discussion of electronic submission to the Chair of the Judicial Council, see 32.20[3][c].

Discussion/Forms regarding service of papers in general, see Ch. 27, Service of Papers.

**32.20[5][d] Opposition Is Served and Filed Within 10 Days.** Any opposition to the motion for a stay must be served and submitted within 10 days after service of the motion [*Cal Rules Ct, Rule 3.515(a)*]. The opposition should include a memorandum and affidavit and must be served on all affected parties.

➡ **Cross Reference:**

Discussion/Forms regarding motion procedure in general, see Ch. 26, Law and Motion Procedure.

Discussion of electronic submission to the Chair of the Judicial Council, see 32.20[3][c].

**32.20[5][e] No Hearing Is Required, Unless Requested in Writing.** The assigned judge may issue a stay order with or without a hearing. A party filing a motion for a stay order or opposition to a motion may request a hearing to determine whether the stay order should be granted. A request for hearing should be made at the time the requesting party files the motion or opposition. The requesting party must provide notice of any hearing that the assigned judge grants [*Cal Rules Ct, Rule 3.515(e)*].

**Consider:**

A stay order can be limited by its terms to specified proceedings, order, motions or other phases of the action stayed. The party requesting the stay should determine the scope of the stay and submit a proposed order accordingly. Otherwise, the order will suspend all proceedings in the stayed action [*Cal Rules Ct, Rule 3.515(h)*].

**32.20[5][f] Party Requesting Stay Must Serve Stay Order, and Any Party May File Motion 30 Days After Issuance to Terminate Stay Order.** If a stay order is issued, the party that requested the stay must serve and file a copy of the order in each included action that is stayed. Any party that is subject to the stay order may move 30 days following issuance of the stay order to terminate the stay [*Cal Rules Ct, Rule 3.515(g)*].

**32.20[6] Petitioner Serves and Files Order of Chair of Judicial Council Assigning Petition to Judge.**

**32.20[6][a] Petition May Be Assigned to Coordination Motion Judge for Decision or Presiding Judge for Assignment.** On receiving a petition for coordination, the Chair of the Judicial Council may assign a coordination motion judge to determine whether the actions are complex, and if so, whether coordination of the actions is appropriate. Or, the Chair may authorize the presiding judge of a court to assign the matter to judicial officers of the court to make the determination "in the same manner as assignments are made in other civil cases" [*CCP § 404, Cal Rules Ct, Rule 3.524(a)*].

**Exception:**

The Chair of the Judicial Council may assign the petition to the coordination trial judge for existing coordinated cases to decide the petition as a request to coordinate an add-on case under Rule 3.544 if it the included actions in a petition for coordination share a common question of law or fact with cases already ordered coordinated under a separate petition [*Cal Rules Ct, Rule 3.532(a)*].



**Cross References:**

Discussion of how courts distinguish between "complex" and "non-complex" cases, see 32.19[3].

Discussion of the statutory criteria for coordination, see 32.19[4].

**32.20[6][b] Petitioner Must Serve on Parties and File in Courts.** The petitioner must serve any order assigning the petition to a coordination motion judge for decision or to the presiding judge of the court for assignment on each party appearing in an included action and file it with each court in which an included action is pending [*Cal Rules Ct, Rule 3.524(b)*].



**Strategic Point--Petitioner:**

Given that the assigned judge may order that a specified issue or issues whose determination may dispose of a petition for coordination, without the necessity of conducting a hearing upon all issues raised by such the petition and by any opposition thereto, be heard and determined prior to any before a hearing on the remaining issues [*Cal Rules Ct, Rules 3.528*], petitioner having such an issue or issues should request that the assigned judge limit the hearing initially to the issue or issues.

**32.20[7] After Assignment of Coordination Motion Judge, Each Side Has 20 Days to Challenge Assigned Judge.** The assignment of a coordination motion judge may be challenged, but the challenge must be made within 20 days after service of the order of assignment, with an extension of five days if the order is served by mail [*Cal Rules Ct, Rule 3.516; CCP § 1013; Citicorp North America, Inc. v. Superior Court (1989) 213 CA3d 563, 565, 261 CR 668* ].



**Warning:**

Only one peremptory challenge is allowed for each "side" [*CCP § 170.6*]. All plaintiffs or similar parties in the actions included in a petition for coordination constitute a "side," and all defendants or similar parties in the included actions constitute a "side" [*Cal Rules Ct, Rule 3.516; Philip Morris, Inc. v. Superior Court (1999) 71 CA4th 116, 123, 83 CR2d 671* ].

Parties have the right to challenge the assignment of both the coordination motion judge and the coordination trial judge, even if the coordination motion judge is later assigned as the coordination trial judge. Each challenge must be made within 20 days of service of the order of assignment [*Cal Rules Ct, Rule 3.516*; *Stone v. Superior Court* (1994) 25 CA4th 1144, 1147, 31 CR2d 56 ].

#### Examples:

- A challenge to a coordination trial judge filed on April 5 was timely where the coordination motion judge was appointed February 3 and notice that same judge was appointed coordination trial judge was served on March 17 [ *Stone v. Superior Court* (1994) 25 CA4th 1144, 1147, 31 CR2d 56 ].

- The grounds for challenging an assigned judge are prejudice against a party, attorney, or an interest of a party or attorney. The procedure is oral or written motion, which may be made without notice, supported by affidavit or declarations [*Cal Rules Ct, Rule 3.516*; *CCP § 170.6*]. The motion is made to the assigned judge [*Cal Rules Ct, Rule 3.516*].

#### Cross Reference:

Discussion/Forms regarding disqualification of judges in general, see Ch. 22, Disqualification of Judge.

**32.20[8] Evidence Presented Must Be Written Unless Judge Orders Otherwise.** Any evidence presented in support of, or in opposition to, the petition for coordination must be submitted in writing to the court. Declarations, answers to interrogatories or requests for admissions, depositions, or matters judicially noticed are acceptable [*Cal Rules Ct, Rule 3.514*]. Oral testimony is not permitted at the motion hearing unless the assigned judge allows such testimony to resolve factual disputes raised by the declarations, responses to discovery, or matters judicially noticed [*Cal Rules Ct, Rule 3.514*].

#### **32.20[9] Hearing Must Be Held If Any Party Objects to Coordination.**

**32.20[9][a] Assigned Judge Must Set Hearing Date Within 30 Days.** The assigned judge must set a date for hearing the petition for coordination within 30 days of the date of the order assigning the coordination motion judge. The petitioner must give notice of the hearing date to each party appearing in an included action. The assigned judge must order petitioner to notify any party of an included action who has not yet received notice of submission of the petition [*Cal Rules Ct, Rules 3.527(a)*]. In addition, the assigned judge may order that a potential add-on case is an included action for purposes of the hearing on the petition for coordination [*Cal Rules Ct, Rules 3.531(b)*].

#### Cross Reference:

Duty to provide notice of potential add-on case, see 32.20[4][e].

**32.20[9][b] Assigned Judge May Continue Hearing Date to Hear Competing Petitions Together.** A coordination motion judge assigned to decide petition for coordination that lists additional included actions sharing a common question of law or fact with included actions in another petition for coordination pending before the judge may continue the hearing date on the first petition no more than 30 calendar days in order to hear both petitions at the same time [*Cal Rules Ct, Rules 3.527(a)*].

**32.20[9][c] Scheduled Hearing Only Held If Opposition to Petition for Coordination Is Filed.** A hearing must be held to decide a petition for coordination if any party opposes coordination. A petition for coordination may not be denied unless a hearing has been held [*Cal Rules Ct, Rules 3.527(b)*]. If the coordination motion judge determines that a

hearing is not required, the hearing date must be vacated and notice provided to the parties [*Cal Rules Ct, Rules 3.527(a)*].



**Strategic Point--Petitioner:**

Upon the expiration of the nine court days before the hearing date in which opponents of coordination must file opposition [*see Cal Rules Ct, Rules 3.525*], file a motion for vacation of the hearing if the court does not vacate it sua sponte.



**Cross Reference:**

Opposition to petition for coordination, see 32.20[4][c].

**32.20[10] Coordination Motion Judge May Appoint Liaison Counsel.** During coordination proceedings, the coordination motion judge may ask the parties on each side to select a "liaison counsel" to serve as a representative of all parties on that side. If the parties are unable to agree, the judge may appoint liaison counsel [*Cal Rules Ct, Rules 3.501(12), 3.506*]. The liaison counsel has the power to receive and distribute notices from the court, act as a spokesperson for the side he or she represents, and call meetings of counsel to propose joint action [*Cal Rules Ct, Rule 3.501(12)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersConsolidation of Actions





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Chapter 32 Notice of Related Cases, Consolidation, Coordination, and Severance of Actions  
V. SEEKING AND OPPOSING COORDINATION (COMPLEX ACTIONS ONLY)

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.21*

### **32.21 Court's Order Regarding Petition.**

**32.21[1] Order Must Be Filed in Each Included Action.** The coordination motion judge either denies or grants the petition, and depending on how the two applicable but inconsistent Rules of Court are applied, the petitioner and/or the party directed to give notice of entry of the order must submit a copy of the order to the Chair of the Judicial Council [CCP § 404.3; *Cal Rules Ct, Rule 3.511(a)(9), (b)* (petitioner or the party directed to give notice of entry of the order files and serves order granting or denying petition for coordination), *with Cal Rules Ct, Rule 3.529(a)* (petitioner files and serves order granting or denying petition for coordination) and *Cal Rules Ct, Rule 3.540(c)* (petitioner files and serves order assigning coordination trial judge); *see also Cal Rules Ct, Rule 3.512* (electronic submission to Chair of Judicial Council)]. The petitioner must file the order in each included action and serve it upon every party appearing in each included action [*Cal Rules Ct, Rule 3.529(a)*].

**32.21[2] If Petition Is Denied, Stay Is Lifted After 10 Days and Authority of Coordination Motion Judge Terminates.** When an order denying a petition for coordination is filed in an included action and served on the parties, the authority of the coordination motion judge over that action terminates. Any stay entered by the coordination motion judge automatically terminates 10 days after the order is filed [*Cal Rules Ct, Rule 3.529(d)*].

**32.21[3] If Petition Is Granted, Proceedings Are Automatically Stayed and Case Is Assigned to Coordination Trial Judge.** Once an order granting coordination is filed in an included action, all proceedings in that action are automatically stayed [*Cal Rules Ct, Rule 3.529(b)*]. The coordination order must recommend a particular superior court as the site for the coordination proceedings in accordance with specified criteria [*Cal Rules Ct, Rule 3.530*]. On receipt of the order, the Chair of the Judicial Council either assigns a coordination trial judge to preside over the coordinated actions in a particular superior court or authorizes the presiding judge of a particular superior court to assign the matter to judicial officers of the court in the same manner as assignments are made in other civil cases [CCP § 404.3; *Cal Rules Ct, Rule 3.540(a)*; *see Keenan v. Superior Court (1980) 111 CA3d 336, 340-341, 168 CR 561* (applying prior version of court rules)].

After a petition for coordination is granted, but before a coordination trial judge is assigned, the coordination motion judge can make any appropriate order for "good cause" and "as the ends of justice require." "Good cause" must include proof of an "urgent need for judicial action to preserve the rights of a party" [*Cal Rules Ct, Rule 3.529(c)*].

**32.21[4] After Assignment of Coordination Trial Judge, Each Side Has 20 Days to Challenge Assigned**

**Judge.** The assignment of a coordination trial judge may be challenged, but the challenge must be made within 20 days after service of the order of assignment, with an extension of five days if the order is served by mail [*Cal Rules Ct, Rule 3.516*; *CCP § 1013*; *Citicorp North America, Inc. v. Superior Court* (1989) 213 CA3d 563, 565, 261 CR 668 ]. Each "side" may only make one peremptory challenge of the assignment, with all plaintiffs in the coordinated action constituting a "side," and all defendants in the coordinated action constituting a "side" [*Cal Rules Ct, Rule 3.516*; *CCP § 170.6*].

Each side may challenge the assignment of the coordination trial judge regardless of whether a party has already challenged the judge prior to coordination [ *Philip Morris, Inc. v. Superior Court* (1999) 71 CA4th 116, 125, 83 CR2d 671 ].

**Warning:**

Where a case is added to the litigation after a coordination trial judge has been assigned and the 20-day period has run, add-on parties do not have a right to challenge the assignment [*Cal Rules Ct, Rule 3.532(d)*; *Industrial Indem. Co. v. Superior Court* (1989) 214 CA3d 259, 263-264, 262 CR 544 ; see *Philip Morris, Inc. v. Superior Court* (1999) 71 CA4th 116, 125, 83 CR2d 671 ].

**Cross References:**

Adding cases to coordinated actions, see *Cal Rules Ct, Rule 3.544*.

Discussion/Forms regarding disqualification of judges, see Ch. 22, Disqualification of Judge.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersConsolidation of Actions



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*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.22*

### **32.22 Duties of Coordination Trial Judge and Pretrial Management Rules.**

**32.22[1] Judge Has Broad Discretion to Foster Goals of Coordination.** The coordination trial judge has "whatever great breadth of discretion may be necessary and appropriate to ease the transition through the judicial system of the logjam of cases which gives rise to coordination" [ *McGhan Med. Corp. v. Superior Court* (1992) 11 CA4th 804, 812, 14 CR2d 264 ].

#### **Example:**

In a case involving the coordination of hundreds of separate complaints and as many as 20 different counties, the coordination judge had the flexibility to (1) sever noncommon cases or issues, (2) order trial in more than one forum, (3) minimize travel by all participants by lodging discovery materials in a central location accessible by computer networking or fax and by centralizing motion practice in specific county courts [ *McGhan Med. Corp. v. Superior Court* (1992) 11 CA4th 804, 812-813, 14 CR2d 264 ].

**32.22[2] Case Management Conference Should Be Held Within 45 Days.** The coordinating trial judge should hold a case management conference withing 45 days of assignment. At the conference, the judge may [ *Cal Rules Ct, Rule 3.541(a)* ]:

- Appoint liaison counsel;
- Establish a timetable for filing motions other than discovery motions;
- Establish a schedule for discovery;
- Provide a method and schedule for the submission of preliminary legal questions which might expedite the disposition of the coordinated actions;
- Establish a schedule for the prompt determination of matters pertinent to class action issue;
- Establish a central repository to receive and maintain for inspection by the parties evidentiary material and specified documents which are not required to be served on all parties; and

- Schedule further trial conferences, if appropriate.



#### **Cross Reference:**

Discussion/Forms regarding case management in general, see Ch. 23, Case Management.

**32.22[3] Judge Must Actively Manage Coordinated Actions and Has Power to Remand, Transfer, Add-On, Sever or Terminate Coordinated Action.** The coordination trial judge must assume an active role in managing pretrial, discovery and trial proceedings to expedite the determination of the coordinated actions. He or she may do any or all of the following [*Cal Rules Ct, Rules 3.532, 3.541(b), 3.542, 3.543, 3.544, 3.545*]:

- Schedule hearings, conferences or trials at any site in the state deemed appropriate;
- Order any issue or defense to be tried separately and prior to the trial of the remaining issues;
- Remand a coordinated action or any severable claim back to the court where it was originally filed;
- Transfer a coordinated action or several claim to another court;
- Add-on another case to the coordinated action; and
- Terminate a coordinated action by settlement, final dismissal, summary judgment or judgment.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConsolidation of Actions



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*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.23*

**32.23 CHECKLIST: Seeking and Opposing Severance of Actions.**

**32.23[1] Moving Party's Checklist.**

- ☐ Determine whether severance is mandatory pursuant to statute.
- ☐ Determine whether severance is appropriate.
  - ☐ Factors the court may consider:
    - ☐ Furtherance of convenience.
    - ☐ Avoidance of prejudice.
    - ☐ Whether separate trial will be conducive to expedition and economy.
    - ☐ Avoidance of embarrassment, delay or undue expense.

**Authority:**  
*CCP § 1048(b)*

**Discussion:**  
See 32.24

- ☐ Draft motion and notice of motion for severance with supporting declarations and memorandum.

- ☐ Draft proposed order.
- ☐ Serve and file motion:
  - ☐ Follow standard notice motion procedure.
- ☐ Calendar response and hearing dates.

**Authority:**

*CCP § 1048(b)*

**Discussion:**

See 32.25

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.39

**Forms:**

See 32.43, 32.44

**32.23[2] Opposing Party's Checklist.**

- ☐ Calendar response and hearing dates.
- ☐ Prepare opposition:
  - ☐ Draft declarations opposing motion.
  - ☐ Draft opposing memorandum.
- ☐ Draft proposed order.
- ☐ Serve and file response.
  - ☐ Follow standard noticed motion procedure.

**Authority:**

*CCP § 1048(b)*

**Discussion:**

See 32.24, 32.25

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Procedure*, 26.46



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*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.24*

### **32.24 Severance Defined.**

**32.24[1] Severance Allows Separate Trials of Issues or Causes of Action.** The court, in furtherance of convenience or to avoid prejudice, or when separate trial will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of jury trial required by the Constitution or a statute of California or the United States [*CCP* § 1048(b)].

Where applicable, specific statutes on severance govern. Thus, when parties have been joined under *CCP* § 378 (permissive joinder of plaintiffs) or *CCP* § 379 (permissive joinder of defendants), the court may make such orders as may appear just to prevent any party from being embarrassed, delayed, or put to undue expense, and may order separate trials or make such other order as the interests of justice may require [*CCP* § 379.5].

#### **Cross References:**

Forms of motion and order, see 32.43, 32.44.

Discussion/Forms regarding motion procedure in general, see Ch. 26, Law and Motion Procedure.

**32.24[2] Severance May Be Mandated by Statute or Discretionary.** Severance is ordinarily a matter within the discretion of the trial court and is not interfered with except where there has been a manifest abuse of discretion [ *Finley v. Superior Court* (2000) 80 CA4th 1152, 1163, 96 CR2d 128 ; *Omaha Indem. Co. v. Superior Court* (1989) 209 CA3d 1266, 1271, 258 CR 66 ]. However, severance may be mandatory pursuant to particular statutes which govern specific types of actions. For example, *CCP* § 597.5 requires mandatory severance of issues involving the bar of the statute of limitations in medical malpractice cases [see *CCP* §§ 597, 597.5, 598].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersSeparate Trials



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VI. SEEKING AND OPPOSING SEVERANCE OF ACTIONS

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.25*

### 32.25 Seeking and Opposing Severance.

**32.25[1] Claims May Be Severed to Avoid Prejudice.** Severance is commonly used to avoid the prejudice to a party that would result if the claim or issue were not severed.

#### Examples:

- Severance is proper when an insured is sued for negligence and the insurer is sued for bad faith (or merely for disputing coverage) in the same action because to do otherwise would violate the letter and spirit of *Evid Code § 1155*, which precludes the use of evidence that a tortfeasor has insurance for the injury he or she allegedly caused [ *Omaha Indem. Co. v. Superior Court* (1989) 209 CA3d 1266, 1271, 258 CR 66 ].
- Where a cause of action for nominal compensatory damages includes an extremely large punitive damages claim, any undue prejudice caused thereby may be avoided by severing the claim or the punitive damages issue [ *Stencel Aero Eng'g Corp. v. Superior Court* (1976) 56 CA3d 978, 988, 128 CR 691 ].

**32.25[2] Legal and Equitable Claims May Be Severed If They Are Mutually Exclusive.** The court may sever legal and equitable claims for trial and try the equitable claim first, without a jury, if the claims are mutually exclusive remedies. Even if the court's determination of the equitable issue is also dispositive of the legal issues, and nothing remains to be tried to a jury, this does not deprive a party of the right to a jury trial [ *Walton v. Walton* (1995) 31 CA4th 277, 293, 36 CR2d 901 ]. Equitable claims cannot, however, be severed from legal claims where they are not mutually exclusive, such as a claim for damages for trespass and a claim for injunctive relief against future trespass [ *Walton v. Walton* (1995) 31 CA4th 277, 293, 36 CR2d 901 ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:



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**32.26 Judgment of Severed Claim Not Appealable Until There Is Complete Disposition of All Causes of Action.**

An appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties. This is so even if the causes of action disposed of by the judgment were severed by court order, or are characterized as "separate and independent" from those remaining [ *Morehart v. County of Santa Barbara* (1994) 7 C4th 725, 743, 29 CR2d 804, 872 P2d 143 ].

Review by writ of mandate may be available when unusual circumstances make appellate review of an interlocutory judgment appropriate. The writ must demonstrate that postponement of the appeal until the final judgment would cause serious hardship and inconvenience, rendering appeal from the final judgment an inadequate remedy [ *Morehart v. County of Santa Barbara* (1994) 7 C4th 725, 743, 29 CR2d 804, 872 P2d 143 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedurePretrial MattersSeparate Trials



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VII. FORMS  
A. Related Case

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.26A*

**32.26A Judicial Council Form CM-015 Notice of Related Case.**

Click here to view image.

Go to Interactive Fillable Form.

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

**NOTES:**

**Authority:**

*Cal Rules Ct, Rule 3.300*; California Judicial Council Form CM-015 has been adopted by the California Judicial Council for optional use [*Cal Rules Ct, Rule 1.35*]

**Discussion:**

See 32.04[3]

**► Cross Reference:**

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at [www.lexisone.com](http://www.lexisone.com) for an individual or monthly charge. A noninteractive version in PDF format also is available at [www.lexisone.com](http://www.lexisone.com) at no charge

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Chapter 32 Notice of Related Cases, Consolidation, Coordination, and Severance of Actions  
VII. FORMS  
B. Consolidation of Actions

**32.27 Stipulation by Counsel for Consolidation of Actions for All Purposes.**

[illegible]

## STIPULATION TO CONSOLIDATE ACTIONS

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled actions, by their respective counsel, that the actions be consolidated into one action for all purposes and that \_\_\_\_\_ [specify additional matters that will aid the consolidation, e.g., in lieu of Defendant Mary Jones filing an amended answer and cross-complaint, that each and all of the allegations of the complaint in Action No. 777777 be deemed denied, and that Defendant Mary Jones may be granted such affirmative relief by way of accounting and otherwise as may be equitable].

The undersigned hereby jointly apply to the court for an order consolidating Action No. \_\_\_\_\_ with Action No. \_\_\_\_\_ and directing that only one set of findings of fact and conclusions of law, if any, and one judgment be made, that the original of all further papers filed in the above-entitled actions be entitled Smith vs. Jones and filed in Action No. \_\_\_\_\_, and that a copy of such order be filed in Action No. \_\_\_\_\_, but that no further papers or documents or copies thereof need be filed in that action.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name, e.g., Plaintiff John Smith]

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name, e.g., Defendant Mary Jones]

[add signature lines for each attorney]

NOTES.

**Authority:**

CCP §§ 283, 1048(a)

**Grounds for Consolidation:**

See 32.09[3]

**Related Form of Order:**

See 32.29



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## VII. FORMS

## B. Consolidation of Actions

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.28*

**32.28 Notice of Motion and Motion for Order Consolidating Actions for All Purposes and Supporting Declaration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name],

Defendant.

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name],

Defendant.

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CASE NO. \_\_\_\_\_

CASE NO. \_\_\_\_\_

NOTICE OF MOTION AND MOTION TO CON-  
SOLIDATE ACTIONS, DECLARATION OF

\_\_\_\_\_[name], AND SUPPORTING

MEMORANDUM

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Location: \_\_\_\_\_

Judge: \_\_\_\_\_

Date Action Filed: \_\_\_\_\_

Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [specify party, e.g., Plaintiff John Smith] and to \_\_\_\_\_ [name], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of]

this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move under *Code of Civil Procedure Section 1048(a)* for an order consolidating Case No. \_\_\_\_\_ with Case No. \_\_\_\_\_. The motion will be made on the grounds that these actions are pending before this court, that the actions involve a common question of \_\_\_\_\_ [select, as appropriate, law or fact or law and fact], in that \_\_\_\_\_ [specify facts supporting motion, e.g., Defendant, Mary Jones is a defendant in both actions and the actions involve the same traffic accident. Consolidation will avoid unnecessary costs and delay as both cases can be tried as a single case eliminated the costs and expense of a second trial on the same facts].

The parties named in Case No. \_\_\_\_\_ are \_\_\_\_\_ [list all named parties, indicating who has appeared and the names of their respective attorneys of record].

The parties named in Case No. \_\_\_\_\_ are \_\_\_\_\_ [list all named parties, indicating who has appeared and the names of their respective attorneys of record].

[Repeat for each case to be consolidated.]

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

#### DECLARATION

I, \_\_\_\_\_ [name], declare:

I am \_\_\_\_\_ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for Defendant Mary Jones].

1. [Here and in subsequent numbered paragraphs set forth applicable facts in narrative form, e.g., Plaintiffs in both actions were riding in an automobile being driven by Peter Case in Farallon County, California on June 14, 2002 at which time it was involved in a collision with an automobile owned and driven by Defendant, Mary Jones. Both actions arise out of this one automobile collision and the primary issue to be determined is the liability for the collision. The defendants in both actions are the same persons and consolidation of the actions would avoid delay since the same witnesses would be called to testify as to liability and this testimony would be repeated if the actions were tried separately.]

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]

#### SUPPORTING MEMORANDUM

[ADD memorandum here]

NOTES.

**Authority:**

CCP § 1048(a)



**Timing:**

See 32.09[2]

**Grounds for Consolidation:**

See 32.09[3]

**Related Form of Order:**

See 32.29

**Related Form of Memoranda:**

See *California Points and Authorities*, § 45.21 (Matthew Bender)





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Chapter 32 Notice of Related Cases, Consolidation, Coordination, and Severance of Actions

VII. FORMS

B. Consolidation of Actions

2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.29

### 32.29 Order Consolidating Actions for All Purposes.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_ [name],

Plaintiff,

VS.

\_\_\_\_\_ [name],

Defendant.

\_\_\_\_\_ [name],

Plaintiff,

VS.

\_\_\_\_\_ [*name*],

Defendant.

[illegible]

CASE NO. \_\_\_\_\_

CASE NO. \_\_\_\_\_

ORDER CONSOLIDATING ACTIONS

[EITHER]

On the filing of the stipulation of the parties hereto by their respective attorneys, dated \_\_\_\_\_[date], for the consolidation of the above-entitled cases into one action, and good cause appearing therefor,

[OR]

The motion of \_\_\_\_\_ [name of moving party] for an order \_\_\_\_\_ [specify, e.g., consolidating the above-entitled cases into one action] came on regularly for hearing by the court this date. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that Action No. \_\_\_\_\_ be, and it hereby is, consolidated with Action No. \_\_\_\_\_ for all purposes and that \_\_\_\_\_ [specify additional orders to implement the consolidation, e.g., only one set of findings of fact and conclusions of law if any, and only one judgment shall be made herein. A copy of this order shall be filed in both actions but all further pleadings shall be filed only in Action No. 777777 and shall be entitled Smith vs. Jones, Action No. 777777].

IT IS FURTHER ORDERED that \_\_\_\_\_ [specify additional orders to implement the consolidation, e.g., in lieu of Defendant Mary Jones filing an amended answer and cross-complaint, that each and all of the allegations of the complaint in Action No. 888888 be deemed denied and that Mary Jones may be granted such affirmative relief by way of accounting and otherwise as may be equitable].

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

CCP §§ 1003,1048(a); Cal Rules Ct, Rule 3.350

**Discussion of Order Granting or Denying Consolidation:**

See 32.10

**Related Forms:**

See 32.27, 32.28

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Chapter 32 Notice of Related Cases, Consolidation, Coordination, and Severance of Actions

VII. FORMS

B. Consolidation of Actions

### 32.30 Stipulation by Counsel to Consolidate Issues for Trial.

$$\begin{array}{c} ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \end{array}$$

STIPULATION TO CONSOLIDATE ACTIONS  
FOR TRIAL

The undersigned hereby jointly apply to the court for an order to effectuate the above-described consolidation.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name, e.g. Plaintiff John Smith]

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name, e.g. Defendant Mary Jones]

[add signature lines for each attorney]

NOTES.

**Authority:**

CCP §§ 283, 1048(a)

**Discussion of Consolidation:**

See 32.09

**Related Form of Order:**

See 32.32



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VII. FORMS  
B. Consolidation of Actions

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.31*

**32.31 Notice of Motion and Motion for Order Consolidating Issues for Trial and Supporting Declaration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name],

Defendant.

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name],

Defendant.

)

)

)

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CASE NO. \_\_\_\_\_

CASE NO. \_\_\_\_\_

NOTICE OF MOTION AND MOTION TO CONSOLIDATE ACTIONS FOR TRIAL, DECLARATION OF \_\_\_\_\_ [name], AND

SUPPORTING MEMORANDUM

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Location: \_\_\_\_\_

Judge: \_\_\_\_\_

Date Action Filed: \_\_\_\_\_

Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [specify party, e.g., Plaintiff John Smith] and to \_\_\_\_\_ [name], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [moving party, e.g., Defendant

Mary Jones] will, and hereby does, move under *Code of Civil Procedure Section 1048(a)* for an order consolidating Action No. \_\_\_\_\_ with Action No. \_\_\_\_\_ for the purpose of trying the issue(s) of \_\_\_\_\_ [specify, e.g., liability] only, and that \_\_\_\_\_ [specify additional orders required to implement the consolidation]. The motion will be made on the grounds that these actions are pending before this court, that the actions involve a common question of \_\_\_\_\_ [specify as appropriate, e.g., law or fact or law and fact], in that \_\_\_\_\_ [specify the common question, e.g., Defendant /Cross-Complainant Mary Jones contends that she sold the car involved in the accident to Cross-Defendant Peter Case five days prior to the accident] and that consolidation will avoid unnecessary \_\_\_\_\_ [specify, as appropriate, e.g., costs or delay or costs and delay].

The motion will be based on this notice of motion, on the declaration(s)] of \_\_\_\_\_ [name(s)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

#### SUPPORTING DECLARATION

I, \_\_\_\_\_ [name], declare:

I am \_\_\_\_\_ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for Defendant, Mary Jones].

[Here and in subsequent paragraphs set forth applicable facts in narrative form, e.g., Defendant Mary Jones is the alleged owner of an automobile which was involved in an accident with Plaintiffs in Farallon County, California on June 14, 2002. Mary Jones contends that she sold the vehicle to Cross-Defendant, Peter Case, one week prior to the incident. A primary issue to be determined in both actions is ownership of the vehicle. Defendant Mary Jones has answered that she is not the owner of the automobile. Consolidation of the actions would avoid delay since the same witnesses would be called to testify as to ownership of the automobile and this testimony would be repeated if the actions were tried separately.]

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]

SUPPORTING MEMORANDUM

[*ADD memorandum here*]

NOTES.

**Authority:**

*CCP § 1048(a)*; Rules of Proc of St Bar, Rule 108(a)

**Discussion of Consolidation:**

See 32.09

**Related Form of Order:**

See 32.32

**Related Form of Points and Authorities:**

See *California Points and Authorities*, § 45.20 (*Matthew Bender*)



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VII. FORMS

B. Consolidation of Actions

2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.32

### 32.32 Order Consolidating Issues for Trial.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_ [name],

Plaintiff,

VS.

\_\_\_\_\_, [name],

Defendant.

\_\_\_\_\_, [name],

Plaintiff,

VS.

\_\_\_\_\_ [name],

Defendant.

[illegible]

CASE NO. \_\_\_\_\_

CASE NO. \_\_\_\_\_

### ORDER CONSOLIDATING ISSUES FOR TRIAL

[EITHER]

On the filing of the stipulation of the parties hereto by their respective attorneys, dated \_\_\_\_\_[*date*], for the consolidation of the above-entitled actions for the purpose of trying the issue(s) of \_\_\_\_\_ [*specify, e.g., ownership of the vehicle driven by Defendant Mary Jones*], and good cause appearing therefor,



[OR]

The motion of \_\_\_\_\_ [name of moving party] for an order consolidating the above-entitled actions for the purpose of trying the issue(s) of \_\_\_\_\_ [specify, e.g., ownership of the vehicle driven by Defendant Mary Jones] came on regularly for hearing by the court this date. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that Action No. \_\_\_\_\_ be, and it hereby is, consolidated with Action No. \_\_\_\_\_ for the purpose of trying the issue(s) of \_\_\_\_\_ [specify, e.g., ownership of the vehicle driven by Defendant Mary Jones] and that \_\_\_\_\_ [specify additional orders to implement the consolidation].

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

CCP § 1048(a)

**Discussion of Order Granting or Denying Consolidation:**

See 32.10

**Related Forms:**

See 32.30, 32.31



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C. Coordination by Transfer and Consolidation of Non-Complex Actions

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.33*

**32.33 Notice of Motion to Transfer Action for Coordination by Transfer and Consolidation and Supporting Declaration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) CASE NO. \_\_\_\_\_  
) NOTICE OF MOTION FOR ORDER TO TRANS-  
) FER ACTION FOR COORDINATION UNDER  
) CODE OF CIVIL PROCEDURE SECTION 403,  
) SUPPORTING DECLARATION OF  
) \_\_\_\_\_ [name], AND SUPPORTING  
) MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [specify all parties noticed, e.g., Plaintiff John Smith] and to \_\_\_\_\_ [name],  
his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon  
thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of]

this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for an order to transfer \_\_\_\_\_ [identify action by court, case title, and case number], to the above-entitled court for coordination with the above-entitled action. The motion will be made on the grounds that the actions involve a common question of \_\_\_\_\_ [fact or law or fact and law] within the meaning of *Code of Civil Procedure Section 404*, meet the standards for coordination specified in *Code of Civil Procedure Section 404.1*, are not complex actions as defined by the Judicial Council, and that the moving party has made a good faith effort to obtain agreement to the transfer from all parties to each action.

The motion will be based on this notice of motion, on the supporting declaration(s) of \_\_\_\_\_ [name(s) of declarant(s)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Attorney for \_\_\_\_\_

[moving party]

#### DECLARATION

I, \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [identify declarant and the basis of declarant's knowledge, e.g., an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for Defendant, Mary Jones, and I have personal knowledge of the facts stated herein, and, if called to testify, could do so competently].

2. The names of each petitioner and the name and address of his or her attorney of record are as follows:

[list each attorney of record and his/her address e.g.,

Tom Doe  
100 North Main St., Suite 200  
Farallon City, California 90000

Jane Lee  
50 South Main St., Suite 100  
Farallon City, California 90000]

3. The names of the parties to all included actions, the name and address of each party's attorney of record, the complete title of each included action, the number of the action, the title of the court in which the action is pending, and the status of each included action, including the status of any pretrial or discovery motions or orders in that action which are known to petitioner are as follows:

\_\_\_\_\_ [specify, e.g.,

John Smith vs. Mary Jones, *et al.*  
Farallon County Superior Court  
Action No. 1234

No outstanding orders or motions

Plaintiff: John Smith

Attorney for Plaintiff:

Tom Doe  
100 North Main St., Suite 200  
Farallon City, California 90000  
Representing: John Smith

Defendant: Mary Jones

Attorney for Defendants:

Jane Lee  
50 South Main St., Suite 100  
Farallon City, California 90000  
Representing: Mary Jones

John Alpha vs. Mary Omega *et al.*  
Pollywood County Superior Court  
Action No. 9876

No outstanding orders or motions

Plaintiff: John Alpha

Attorney for Plaintiff:

Michael Strong  
500 South Main St.  
Pollywood City, California 80000  
Representing: John Alpha

Defendant: Mary Omega

Attorney for Defendant:

Theresa Fowler  
121 High St., Suite 100  
Pollywood City, California 80000  
Representing: Mary Omega]

4. Alpha vs. Omega is known by petitioner to be pending in a court of this state and shares a common question of \_\_\_\_\_ [fact or law or fact and law] with the included actions. No other action is known to be pending

in a court of this state that shares a common question of \_\_\_\_\_ [fact or law or fact and law] with the included action.

5. The actions are not complex, as defined by the Judicial Council in *California Rules of Court, Rules 3.502 and 3.400* because \_\_\_\_\_ [state facts showing that the actions are not complex within the meaning of *Cal Rules Ct, Rule 3.400, e.g.*, these cases are do not involve any novel legal issues, have only 10 witnesses that will be required to testify and have four parties total; the cases involve a contract dispute, and so are not deemed provisionally complex by statute].

6. The actions meet the coordination standards specified in *Section 404.1 of the Code of Civil Procedure* for the following reasons:

[Specify reason(s), e.g., (a) The common question of law and fact is predominating and significant in each included action in that the underlying question in each case is whether the contracts signed were unconscionable and thus unenforceable; (b) none of the included actions has reached a stage at which coordination would require any substantial revision or duplication of proceedings or of counsel's work product; (c) the assignment of a single judge to preside over disposition of the included actions would make efficient use of judicial facilities and efforts in that if the court finds as a matter of law that the contract was unconscionable, then two separate trials will be eliminated].

7. \_\_\_\_\_ [Describe good faith effort to obtain other parties' agreement to the transfer and coordination].

8. \_\_\_\_\_ [Describe how moving party informed all parties of their obligation to disclose to the court any information they may have concerning any other motions requesting transfer of any case that might be affected by the motion before the court].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

#### SUPPORTING MEMORANDUM

[ADD memorandum here]

NOTES.

#### Authority:

CCP § 403; *Cal Rules Ct, Rules 3.500(c), (d)*

#### Discussion of Coordination by Transfer and Consolidation:

See 32.15, 32.16

#### Related Form of Order:

See 32.34



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VII. FORMS

C. Coordination by Transfer and Consolidation of Non-Complex Actions

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.34*

### 32.34 Order Granting Motion to Transfer Case for Coordination.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name],

Defendant.

)  
)  
)  
)  
)  
)  
)

CASE NO. \_\_\_\_\_

ORDER GRANTING MOTION TO TRANSFER  
ACTION FOR COORDINATION UNDER CODE  
OF CIVIL PROCEDURE SECTION 403

The motion of \_\_\_\_\_ [identify party, e.g., defendant] \_\_\_\_\_ [name] for an order to transfer Action No. \_\_\_\_\_ [specify case number] came on regularly for hearing by the court on \_\_\_\_\_ [date]. Plaintiff \_\_\_\_\_ [name] appeared by counsel \_\_\_\_\_ [name]. Defendant \_\_\_\_\_ [name] appeared by counsel \_\_\_\_\_ [name]. The other included parties appeared as follows: \_\_\_\_\_ [list other appearing parties].

The Court, having considered the declaration and other documents in support of and in opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, finds that the transfer to this court of \_\_\_\_\_ [specify action or actions to be transferred by court, title, and case number] will promote the ends of justice as follows:

[Specify reasons why transfer will promote ends of justice, referring to the standards set out in Cal Rules Ct, Rule

3.500(d), e.g.:

1. The actions included are not complex matters.
2. The common question of law and fact is predominating and significant in each included action in that the underlying question in each case is whether the contracts signed were unconscionable and thus unenforceable.
3. None of the included actions has reached a stage at which coordination would require any substantial revision or duplication of proceedings or of counsel's work product.
4. The assignment of a single judge to preside over disposition of the included actions would make efficient use of judicial facilities and efforts in that if the court finds as a matter of law that the contract was unconscionable, then two separate trials will be eliminated.]

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that \_\_\_\_\_ [set out particular order sought, e.g. the cases of Smith vs. Jones, Case No. 1234 in Farallon County Superior Court and Alpha vs. Omega, Case No. 9876 in Pollywood County Superior Court shall be coordinated through the transfer of Alpha vs. Omega to Farallon County Superior Court].

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

CCP § 403; Cal Rules Ct, Rule 3.500(d)

**Discussion of Court's Order for Coordination by Transfer and Consolidation:**

See 32.17

**Related Form of Notice and Declaration:**

See 32.33



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## VII. FORMS

## D. Coordination of Complex Actions.

2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.35

**32.35 Notice of Motion for Order to Commence Coordination Proceedings and Supporting Declaration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],  
Plaintiff,  
vs.  
\_\_\_\_\_[name],  
Defendant.

)  
) CASE NO. \_\_\_\_\_  
) NOTICE OF MOTION FOR ORDER TO COM-  
) MENCE COORDINATION PROCEEDINGS [AND  
) TO STAY PROCEEDINGS HEREIN]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Dept: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [specify parties to be noticed, e.g., Plaintiff John Smith] and to  
\_\_\_\_\_[name], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon  
thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of]  
this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [moving party, e.g., Defendant  
Mary Jones] will, and hereby does, move for an order granting permission to submit a petition for coordination of  
Action No. \_\_\_\_\_ with Action No. \_\_\_\_\_ [list all actions to be coordinated]. The  
motion will be made on the grounds that there are pending in different courts of this state civil actions containing



common questions of \_\_\_\_\_ [law or fact or law and fact]; and that an order should issue allowing \_\_\_\_\_ [moving party, e.g., Defendant Mary Jones] to submit a Petition for Coordination to the Chair of the Judicial Council [add, if appropriate: and that a stay of proceedings in this action to permit commencement of a coordination proceeding is necessary because: *list reasons*].

The motion will be based on this notice of motion, on the declaration of \_\_\_\_\_ [name] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

NOTES.

**Authority:**

CCP §§ 404, 404.5; Cal Rules Ct, Rule 3.520

**Discussion of Coordination Procedure and Permission to Submit Petition:**

See 32.19, 32.20[2][c]

**Related Form of Order:**

See 32.36

**Related Form of Memoranda:**

See *California Points and Authorities*, § 45.50 (Matthew Bender)



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# VII. FORMS

## D. Coordination of Complex Actions.

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.36*

### 32.36 Order Granting Motion to Commence Coordination Proceedings.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                   |
|---------------|---|-----------------------------------|
| _____ [name], | ) |                                   |
| Plaintiff,    | ) |                                   |
| vs.           | ) | CASE NO. _____                    |
| _____ [name], | ) | ORDER GRANTING MOTION TO COMMENCE |
| Defendant.    | ) | COORDINATION PROCEEDINGS [AND TO  |
|               | ) | STAY PROCEEDINGS HEREIN]          |
|               | ) |                                   |

The motion of \_\_\_\_\_ [name of moving party] for an order to submit a Petition for Coordination to the Chair of the Judicial Council [add, if appropriate: and for an order to stay proceedings to permit commencement of coordination proceedings] came on regularly for hearing by the court this date. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted, and the moving party is ordered forthwith to comply with the requirements of *Rules 3.521(b), 3.522, and 3.523 of the California Rules of Court*. On filing a copy of the petition for coordination and of the notice required by *Rule 3.522 of the California Rules of Court*, and by proof of prior service of copies of the notice and petition for coordination as required by *Rule 3.523 of the California Rules of Court*, the moving party has permission to submit a copy of a petition for coordination accompanied by proof of filing and service, to the Chair of the Judicial Council.

[Add, if appropriate: IT IS FURTHER ORDERED that the motion be, and it hereby is, granted and that further proceedings in this action be stayed from and after the date of entry of this order to permit the commencement of a coordination proceeding.]

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

I concur.

\_\_\_\_\_  
Presiding Judge [signature]

NOTES.

**Authority:**

*CCP § 404; Cal Rules Ct, Rule 3.520(b)(1)*

**Discussion of Coordination Procedure and Permission to Submit Petition:**

*See 32.19, 32.20[2][c]*

**Related Form of Notice and Supporting Declaration:**

*See 32.35*



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VII. FORMS

D. Coordination of Complex Actions.

2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.37

**32.37 Notice of Motion for Order Staying Proceedings to Allow Party to Seek Coordination of Actions.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) CASE NO. \_\_\_\_\_  
) NOTICE OF MOTION FOR ORDER STAYING  
) PROCEEDINGS  
) (Coordination of Actions)  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Dept: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [specify parties to be noticed, e.g., Defendant Mary Jones] \_\_\_\_\_ [name]  
and to \_\_\_\_\_ [name], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ address], \_\_\_\_\_ [city], \_\_\_\_\_ [specify party, e.g., defendant Mary Jones] will move the court for an order staying further proceedings in this action to permit the initiation of coordination proceedings. The motion will be made on the grounds that there are now pending, in different courts of this state, certain civil actions, including this action, sharing [a] common question(s), which are

eligible for coordination, and that a stay of proceedings in this action to permit commencement of a coordination proceeding is necessary because \_\_\_\_\_[*specify reasons*].

The motion will be based on this notice of motion, on the declaration of \_\_\_\_\_[*name*] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

[*party's status and name*]

NOTES.

**Authority:**

*CCP § 404.5; Cal Rules Ct, Rule 3.520(b)(3)*

**Discussion of Application for Stay:**

*See 32.20[5]*

**Related Form of Order:**

*See 32.38*

**Related Form of Memoranda:**

*See California Points and Authorities, § 45.50 (Matthew Bender)*



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VII. FORMS

D. Coordination of Complex Actions.

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.38*

**32.38 Order Staying Proceedings to Allow Party to Seek Coordination of Actions.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                           |
|---------------|---|---------------------------|
| _____ [name], | ) |                           |
| Plaintiff,    | ) | CASE NO. _____            |
| vs.           | ) | ORDER STAYING PROCEEDINGS |
| _____ [name], | ) | (Coordination of Actions) |
| Defendant.    | ) |                           |
|               | ) |                           |
|               | ) |                           |

The motion of \_\_\_\_\_ [name of moving party] for an order staying proceedings in this action to permit commencement of coordination proceedings came on regularly for hearing by the court this date. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

Upon proof made to the satisfaction of the court,

The court finds that there are civil actions pending in different courts of this state, of which this action is one, sharing a common question; that the standards for coordination specified in *Section 404.1 of the Code of Civil Procedure* appear to be met; that coordination of actions may be sought pursuant to *Sections 404-404.9 of the Code of Civil Procedure* and *Rules 3.501-3.550 of the California Rules of Court*; that proceedings in this action should be stayed to permit commencement of a coordination proceeding; good cause appearing and therefor,

IT IS ORDERED that the motion by, and it hereby is, granted and that further proceedings in this action be stayed after

the date of entry of this order to permit the commencement of a coordination proceeding.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*CCP § 404; Cal Rules Ct, Rule 3.520(b)(3)*

**Discussion of Application for Stay:**

*See 32.20[5]*

**Related Form of Notice and Declaration:**

*See 32.37*



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VII. FORMS

D. Coordination of Complex Actions.

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.39*

**32.39 Petition for Coordination of Complex Actions and Supporting Declaration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name],

Defendant.

)  
)  
)  
)  
)  
)  
)

CASE NO. \_\_\_\_\_

PETITION FOR COORDINATION

Petitioner hereby submits a request to the Chair of the Judicial Council for assignment of a judge to determine whether the above-entitled action and the included actions referred to herein are complex actions, and if so, whether coordination of the actions is appropriate.

The request is made on the grounds set forth in *Section 404.1 of the Code of Civil Procedure*, namely, that one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

Declarations, a memorandum, and accompanying supporting papers set forth with more particularity the



appropriateness of the actions for coordination.

Proof of filing in each included action of a notice of submission of petition for coordination and of a copy of this petition as required by *Rule 3.522 of the California Rules of Court* and proof of service on each party appearing in each included action of the notice of submission of petition for coordination and a copy of this petition as required by *Rule 3.523 of the California Rules of Court* are affixed to the original of this petition collectively as Exhibit A.

WHEREFORE, petitioner requests that the actions referred to herein be coordinated pursuant to *Sections 404-404.9 of the Code of Civil Procedure* and *Rules 3.501-3.550 of the California Rules of Court*. Petitioner \_\_\_\_\_ [requests or does not request] that a hearing be held [at \_\_\_\_\_ (*specify site(s)*)] to determine whether coordination is appropriate.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for Petitioner

#### DECLARATION

I, \_\_\_\_\_ [*name*], declare:

1. I am \_\_\_\_\_ [*identify declarant and state basis for declarant's knowledge, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant, Mary Jones. I have personal knowledge of the facts stated herein, and if called to testify thereto, could do so competently*].

2. The names of each petitioner and the name and address of his or her attorney of record are as follows:

[*list each attorney of record and his/her address e.g.,*

Tom Doe  
100 North Main St., Suite 200  
Farallon City, California 90000

Jane Lee  
50 South Main St., Suite 100  
Farallon City, California 90000]

3. The names of the parties to all included actions, the name and address of each party's attorney of record, the complete title of each included action, the number of the action, the title of the court in which the action is pending, and the status of each included action, including the status of any pretrial or discovery motions or orders in that action which are known to petitioner are as follows:

[specify, e.g.,

John Smith vs. Mary Jones, *et al.*  
Farallon County Superior Court No. 1234  
Plaintiff: John Smith

Attorney for Plaintiff:

Tom Doe  
100 North Main St., Suite 200  
Farallon City, California 90000  
Representing: John Smith

Defendant: Mary Jones

Attorney for Defendants:

Jane Lee  
50 South Main St., Suite 100  
Farallon City, California 90000  
Representing: Mary Jones

Alpha vs. Omega, *et al.*  
Pollywood County Superior Court No. 9876

Plaintiff: John Alpha

Attorney for Plaintiff:

Michael Strong  
500 South Main St.  
Pollywood City, California 80000  
Representing: John Alpha

Defendant: Mary Omega

Attorney for Defendant:

Theresa Fowler  
121 High St., Suite 100  
Pollywood City, California 80000  
Representing: Mary Omega]

4. Alpha vs. Omega is known by petitioner to be pending in a court of this state and shares a common question of fact or law with the included actions. No other action is known to be pending in a court of this state that shares a common question of fact or law with the included action.

5. The actions are complex, as defined by the Judicial Council in *California Rules of Court, Rules 3.502 and 3.400* because \_\_\_\_\_[state facts showing that the actions are complex within the meaning of Cal Rules Ct, Rule 3.400 ].

6. The actions meet the coordination standards specified in *Section 404.1 of the Code of Civil Procedure* because:  
[specify reasons for coordination].

None of the included actions has reached a stage at which coordination would require any substantial revision or duplication of proceedings or of counsel's work product.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

NOTES.

**Authority:**

CCP §§ 404, 404.1; Cal Rules Ct, Rule 3.521(a)



**Timing:**

See 32.20[4]

**Discussion of Contents of Petition and Supporting Documents:**

See 32.20[3]

**Related Form of Notice of Submission:**

See 32.40



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VII. FORMS

D. Coordination of Complex Actions.

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.40*

**32.40 Notice of Submission of Petition for Coordination of Actions.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name],

Defendant.

)  
)  
)  
)  
)  
)  
)

CASE NO. \_\_\_\_\_

NOTICE OF SUBMISSION OF PETITION FOR  
COORDINATION

To the clerk of the above-named court, to each party appearing in the above-named action, and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_[date], a petition for coordination of certain actions, including this action, was submitted to the Chair of the Judicial Council pursuant to *Sections 404-404.9 of the Code of Civil Procedure* and *Rules 3.501-3.550 of the California Rules of Court*.

Any party to this action who intends to oppose the petition must serve and submit written opposition thereto at least nine court days before the date of the hearing on the petition for coordination.

The following actions are included in the petition:

\_\_\_\_\_[List included actions by court, number, and title].

A copy of the petition for coordination, the notice of submission of the petition filed in each of the aforementioned actions, and supporting documents is affixed to this notice.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for Petitioner

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.522*

**Discussion of Contents of Petition and Supporting Documents:**

*See 32.20[3]*

**Related Form of Petition:**

*See 32.39*



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VII. FORMS

D. Coordination of Complex Actions.

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.41*

**32.41 Statement in Support of Petition for Coordination.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name],

Defendant.

)  
)  
)  
)  
)  
)  
)

CASE NO. \_\_\_\_\_

STATEMENT IN SUPPORT OF PETITION FOR  
COORDINATION

Support is hereby made to the petition for coordination by \_\_\_\_\_[name of party], a party to the included action \_\_\_\_\_[name of case], \_\_\_\_\_[add, as appropriate: on the grounds stated in the petition for coordination or on the additional grounds and facts evidenced by the affidavits, declarations, and other papers affixed hereto, and as argued in the memorandum affixed hereto].

[Add, as appropriate]

Without prejudice to the aforementioned support for coordination, the court is hereby requested to select a site or sites different from those requested by the petition. The requested site or sites for the coordination requested herein include: \_\_\_\_\_[list requested site or sites]. The facts supporting the selection of the site or sites requested herein include: \_\_\_\_\_[state facts relied on for request].

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's name]

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.526*



**Timing:**

See 32.20[4][b]

**Discussion of Statutory Criteria for Coordination:**

See 32.19[4]

**Related Form of Petition and Declaration:**

See 32.39



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VII. FORMS

D. Coordination of Complex Actions.

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.42*

**32.42 Opposition to Petition for Coordination.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name],

Defendant.

)  
)  
)  
)  
)  
)  
)

CASE NO. \_\_\_\_\_

STATEMENT IN OPPOSITION TO PETITION  
FOR COORDINATION

Opposition is hereby made to the petition for coordination by \_\_\_\_\_[name of party], a party to the included action \_\_\_\_\_[name of case] on the ground(s) that: \_\_\_\_\_[specify some or all of the standards set forth in CCP § 404.1 e.g.:

Trial in Smith v. Jones is imminent.

The convenience of parties, witnesses, and counsel will not be served because Smith v. Jones is ready for trial and the other cases are just beginning discovery. The witnesses in Smith v. Jones are prepared and ready for trial immediately].

Grounds for the opposition to petition for coordination are based on the facts as evidenced by the affidavits, declarations, and other papers attached hereto, and as argued in the memorandum affixed hereto.

Dated: \_\_\_\_\_



\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's name]

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.525*



**Timing:**

See 32.20[4][c]

**Discussion of Statutory Criteria for Coordination:**

See 32.19[4]

**Related Form of Petition and Declaration:**

See 32.39



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VII. FORMS  
E. Severance

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.43*

**32.43 Notice of Motion and Motion for Order Severing Cause of Action or Issue and Supporting Declaration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name],  
Defendant.

)  
) CASE NO. \_\_\_\_\_  
) MOTION AND NOTICE OF MOTION FOR SEV-  
) ERANCE, DECLARATION OF  
) \_\_\_\_\_ [name], AND SUPPORTING  
) MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [specify party noticed, e.g., Plaintiff John Smith] and to \_\_\_\_\_ [name],  
his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon  
thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of]  
this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [name of moving party, e.g.,  
Defendant Mary Jones] will, and hereby does, move under *Code of Civil Procedure Section 1048(b)* for an order  
severing \_\_\_\_\_ [specify claim or issue to be severed, e.g., plaintiff's first cause of action from

plaintiff's second cause of action]. The motion will be made on the grounds that severance will \_\_\_\_\_  
 [add as appropriate: be conducive to expedition and economy or be in furtherance of convenience or avoid prejudice]  
 because \_\_\_\_\_ [state reasons in support of severance].

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)], the  
 supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be  
 presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

[party's status and name]

#### DECLARATION

I, \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [identify declarant and state basis for declarant's knowledge, e.g., an attorney at law  
 duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant  
 Mary Jones. I have personal knowledge of the facts stated herein, and if called to testify thereto, could do so  
 competently].

2. The \_\_\_\_\_ [causes of action or issues] proposed to be severed meet the standards for severance  
 specified in Section 1048(b) of the Code of Civil Procedure because: [specify facts supporting reasons for severance].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [date]

\_\_\_\_\_ [signature]

#### SUPPORTING MEMORANDUM

[ADD memorandum here]

NOTES.

**Authority:**

CCP § 1048(b)

**Discussion of Criteria for Severance:**

See 32.25

**Related Form of Order:**

See 32.44

**Related Forms of Memoranda:**

See *California Points and Authorities*, §§ 45.28-45.31 (Matthew Bender)



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VII. FORMS  
E. Severance

*2-32 MB Practice Guide: CA Pretrial Civil Procedure 32.44*

### 32.44 Order Severing Cause of Action or Issue.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name],

Defendant.

)  
)  
)  
)  
)  
)  
)

CASE NO. \_\_\_\_\_

ORDER SEVERING CAUSE OF ACTION [OR IS-SUE]

The motion of \_\_\_\_\_ [name of moving party] for an order severing \_\_\_\_\_ [specify claim or issue to be severed, e.g., plaintiff's first cause of action from plaintiff's second cause of action] came on regularly for hearing by the court this date. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that \_\_\_\_\_ [specify, e.g., plaintiff's first cause of action be severed from plaintiff's second cause of action and a separate trial of such causes of action be hereby ordered].

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 1048(b)*

**Discussion of Criteria for Severance:**

See 32.25

**Related Form of Motion:**

See 32.43



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Chapter 33 Class Actions

*3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.syn*

**§ 33.syn Synopsis to Chapter 33: Class Actions**

33.01 Scope.

33.02 Objective and Strategy.

33.03 CHECKLIST: Determining Whether Class Action Can Be Maintained.

33.04 Ensure That Action Meets Requirements for Class Action.

33.04[1] Ascertainable Class Must Exist.

33.04[1][a] Satisfy Objective Criteria.

33.04[1][b] Members Must Be Identifiable.

33.04[1][c] Class Must Be Reasonable Size.

33.04[1][d] Members Can Be Located and Notified.

33.04[1][e] Members Must Have Plausible Cause of Action.

33.04[2] Well-Defined Community of Interest Must Exist.

33.04[2][a] Common Questions of Law or Fact Predominate.

33.04[2][b] Typicality of Claims or Defenses of Class Representative.

33.04[2][c] Class Representative Must Adequately Represent Class.

33.04[3] Class Action Must Be Superior Method of Adjudication.

33.04[3][a] Class Proponent's Burden.

33.04[3][b] Court Considers Various Interests in Evaluating Superiority of Method.

33.04[3][c] Legal and Practical Issues Presented.

33.04[3][d] Other Litigation.

33.04[3][e] Practical Difficulties.

33.04[4] Action Must Be of Type Typically Suited to Class Action Treatment.

33.04[5] Class Action Waiver Must Not Be Unconscionable.

33.04[6] Prima Facie Showing of Community of Interest Must Be Reasonable Possibility.

33.05 Defendant Class Actions Require Special Consideration.

33.05[1] Saves Time and Costs.

33.05[2] Due Process Challenges.

33.05[2][a] Adequate Notice and Service Are Jurisdictional.

33.05[2][b] Defendant Represents Class Interests.

33.05[2][c] Adequate Counsel for All Class Members.

33.05[3] Actual Injury by Each Defendant.

33.05[4] Affirmative Relief Required.

33.06 CHECKLIST: Ascertaining Whether Class Representative Is Suitable.

33.07 Class Representative Must Satisfy Criteria.

33.07[1] Class Member.

33.07[2] Represents and Protects Class Interests.

33.07[3] Typicality of Claims or Defenses.

33.07[4] No Conflict of Interest.

33.07[5] Not Perceived to Have Incompatible Interests.

33.07[6] No Special Consideration From Opposing Party.

33.08 Opposing Party May Remove Class Representative.

33.08[1] Trial Court Has Discretion to Remove Representative.



33.08[2] Representative Must Have Viable Claim in Order to Represent Class Asserting the Claim.

33.09 Plaintiff Class May Be Granted Leave to Amend Complaint.

33.10 Conform Format to Rules of Court Requirements.

33.10[1] Designate "CLASS ACTION" in Caption.

33.10[2] Include Proper Heading and Class Action Allegations.

33.11 Allege Facts Sufficient to Withstand Demurrer.

33.11[1] Allegations Should Establish a Community of Interest in Elements of Class Claims.

33.11[2] Complaint Should Specifically Allege Reasons for Superiority of Class Action Method.

33.12 CHECKLIST: Requesting Case Conference.

33.13 Case Conference Structures Action.

33.14 Case Conference May Result in Court Orders.

33.15 CHECKLIST: Filing Motion for Class Certification or for Determination of Other Class Issues.

33.16 Include Proper Content in Motion for Class Certification.

33.16[1] Notice of Motion for Class Certification.

33.16[1][a] Calendar at Least 28 Days' Notice.

33.16[1][b] Discovery May Be Required.

33.16[2] Prepare Memorandum in Support of Motion for Class Certification.

33.16[2][a] Memorandum Must Not Exceed 20 Pages.

33.16[2][b] Include Required Components of Memorandum.

33.16[2][c] Oral Testimony as Evidence in Support of Motion for Class Certification Is Disfavored.

33.16[2][d] Stipulations Are Favored.

33.17 Plaintiff Has Burden of Proof.

33.18 File Motion When Practicable.

33.19 Consider Choice-of-Law Factors.

33.19[1] Complexity.

33.19[2] Choice-of-Law Agreement.

33.19[3] Choice-of-Law Clause Must Satisfy Tests.

33.19[3][a] Scope-of-Clause Test.

33.19[3][b] Enforceability-of-Clause Test.

33.19[3][c] Choice-of-Law Agreement May Be Unenforceable.

33.19[3][d] Foreign-State Law May Be Inimical to Fundamental California Policy.

33.19[4] Choice-of-Law Tests Absent Enforceable Choice-of-Law Agreement.

33.19[4][a] Significant Contacts Test.

33.19[4][b] Governmental Interest Test.

33.19[4][c] Proponent Has Burden to Justify Application of Foreign Law.

33.19[4][d] Court Will Choose Law of Forum With Interests in Greatest Jeopardy of Impairment.

33.20 Reviewing Certification Determination.

33.20[1] Final Judgment Rule Applies.

33.20[2] Order Denying Certification Appealable If Same as Final Judgment.

33.20[3] Order Granting Certification Not Appealable.

33.20[4] Intermediate Orders Reviewed by Mandate or Prohibition.

33.21 CHECKLIST: Providing Notice to Class Members.

33.22 Preparing and Filing Statement Regarding Class Notice and Exclusion from Class.

33.22[1] Submission Requirement.

33.22[2] Contents of Statement.

33.22[3] Contents of Proposed Class Notice.

33.22[4] Manner of Submission.

33.22[4][a] Preparing and Filing Notice of Motion and Proposed Order.

33.22[4][b] Combining With Motion to Certify the Class Action.

33.22[4][c] Filing Memorandum.

33.22[5] Timing and Ruling on the Merits.

33.23 Issuance of Court Order Regarding Notice and Exclusion from Class.

33.23[1] Content of Order.

33.23[2] Factors Court Must Consider in Determining Manner of Notice.

33.24 Notifying Class Members.

33.25 CHECKLIST: Opposing Class Actions.

33.25A Removing the Case to Federal District Court.

33.26 File Merit-Based Challenges Prior to Certification Hearing.

33.26[1] Demur on Grounds of Insufficient Facts.

33.26[2] Move to Strike Class Allegations.

33.27 File Opposition to Motion for Certification.

33.27[1] Adhere to Correct Format and Filing Requirements.

33.27[1][a] Observe Class Action Rule of Court.

33.27[1][b] Include Supporting Papers.

33.27[1][c] Follow Evidence Procedures.

33.27[2] Determine If Appropriate for Discovery to Be Permitted.

33.28 File a Motion for Decertification.

33.28[1] Permitted When Change in Circumstances or New Information.

33.28[2] Bring Motion Before Decision on Merits.

33.28[3] Propounding Party May Amend Complaint.

33.28[4] Decide Whether to Seek Review of Order Denying Decertification.

33.29 Pretrial Dispositive Motions.

33.29[1] Summary Judgment Is Preferred Method of Bringing Merit-Based Challenge.

33.29[2] Motion to Dismiss.

33.29[2][a] Court Must Approve.

33.29[2][b] Supporting Affidavit or Declaration Required.

33.29[2][c] Disposition May Be Followed by Hearing If Request Is Disapproved.

33.29[2][d] Class Notice of Dismissal May Be Required.

33.30 CHECKLIST: Settling Class Actions.

33.31 Prepare Motion for Preliminary Approval of Settlement.

33.31[1] Any Party to Agreement May Initiate Motion.

33.31[2] Include Agreement for Payment of Attorney's Fees.

33.31[3] Include Agreement and Proposed Notice and Order.

33.31[4] Provide Notice to Class Members of Final Approval Hearing.

33.31[5] Include Proposed Order Certifying Provisional Settlement Class.

33.31[6] Order Certifying Settlement Class.

33.31[6][a] Order Regarding Provisional Settlement Class.

33.31[6][b] Order Regarding Final Approval Hearing.

33.32 Seek Final Approval of Settlement.

33.32[1] Notify Class Members If Class Has Been Certified.

33.32[2] Notice Must Include Proposed Settlement and Objection Procedures.

33.32[3] Hearing Is Required and Certain Factors Must Be Considered.

33.32[4] Judgment After Hearing Retains Jurisdiction.

33.32[5] Court May Not Dismiss Upon Entry of Judgment Based on Settlement.

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33.33[2] Fairness May Be Presumed.

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33.34 CHECKLIST: Obtaining Relief and Recovering and Distributing Damages.

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33.36 Identify Appropriate Method for Distribution of Damages

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33.36[2] Alternative Methods of Distribution May Be Appropriate.

33.36[3] Consider Factors to Use in Determining Method of Distribution.

33.37 Determine Method for Distribution of the Residue.

33.37[1] Statutory Procedure for Actions Brought Under CCP § 382.

33.37[1][a] Court Determines Total Amount of Damages and Orders a Report Date.

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33.39 Seek Appellate Review of Pretrial Disposition of Entire Action.

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33.39[1][a] Demurrers and Motions to Strike Are Favored Means of Challenging Class Action.

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33.39[2] Appeal of Interlocutory Orders.

33.39[2][a] Review Available Only If Order Causes Finality.

33.39[2][b] Review Available Only If Order Implicates the "Death Knell" Doctrine.

33.39[3] Appellant Must Have Standing to Appeal.

33.40 Seek Writ Review of Pretrial Disposition of Less Than Entire Action.

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33.40[2] Contents of Petition for Writ of Mandate.

33.40[3] Verification.

33.41 Appeal Final Disposition by Settlement or Judgment After Trial.

33.41[1] Unnamed Class Member Has Standing to Appeal on Behalf of Class.

33.41[2] Standard of Review of Trial Court's Certification Order Is Abuse of Discretion.

33.41[3] Exception to Standard of Review for Order Denying Class Certification Requires Reviewing Court to Examine Trial Court's Reasoning.

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33.43 Theories for Obtaining Fees.

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33.44 Notice of Motion and Motion to Determine Issues for Class Action.

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33.46 Notice of Motion and Motion for Order to Notify Class Members of Pending Action.

33.47 Order for Approval of Notice to Class Members.

33.48 Notice of Pendency of Class Action.

33.49 Declaration in Support of Motion to Request Dismissal of Class Action.



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Chapter 33 Class Actions  
I. STRATEGY

*3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.01*

**33.01 Scope.**

This chapter covers:

- Requirements for the maintenance of a class action [see 33.04, 33.05].
- Requirements for a suitable class representative [see 33.07, 33.09].
- Requirements for challenging class representative [see 33.08].
- Drafting a class action complaint [see 33.10, 33.11] and motion for certification [see 33.15-33.18].
- Case conferences [see 33.12-33.14].
- Filing motion for class certification or determination of other class issues [see 33.15-33.18; Form: see 33.44].
- Determining choice of law [see 33.19].
- Notice requirements to class members [see 33.21-33.24; Forms: see 33.46-33.48].
- Opposing class actions [see 33.25-33.29].
- Settling class actions [see 33.30-33.33; Forms: see 33.48, 33.49].
- Damages awarded in class actions [see 33.34-33.37].
- Appeals related to class actions [see 33.20, 33.38-33.41].
- Attorney's fees in class actions [see 33.42, 33.43].

**Core Statutes:**

*CCP § 382; CC § 1781*

**Core Rules:**

*Cal Rules Ct, Rule 3.760 et seq.*



**Cross Reference:**

Removal of class actions to federal district court under the federal Class Action Fairness Act of 2005, see 17.07[7].





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Chapter 33 Class Actions  
I. STRATEGY

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**33.02 Objective and Strategy.**

In class actions, one or more representative plaintiffs or defendants bring an action on behalf of themselves and a group of similarly situated individuals who will be bound by the judgment. Class action litigation seeks to serve the interests of necessity, convenience, and justice. A class action also permits the simultaneous resolution of many plaintiffs' claims and eliminates the possibility of repetitious or inconsistent litigation.

**Strategic Point--Plaintiffs:**



In filing a writ of mandate for judicial review following exhaustion of administrative relief, even though the administrative review was not conducted on a class basis, consider filing the petition for writ of mandate as a class action. Named plaintiffs in the class petition do not have to have even participated in administrative review of the issues in a class action, but if some of the class have done so on the issues contested in the petition, it reduces the burden necessary for showing a viable action for purposes of class certification [see *Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 CA4th 1494, 1508-1510, 92 CR3d 131 ; for discussion, see 33.304[1][e]].

**Distinguish:**

Class actions differ from representative actions and coordinated actions. In a representative action, an entity is formed to represent the interests of the class, but the entity is not a representative member of the class [see *Salton City Area Prop. Owners Ass'n v. M. Penn Phillips Co.* (1977) 75 CA3d 184, 188, 141 CR 895 (action brought by homeowners association on behalf of association's members)]. In a coordinated action, two or more civil cases that share a common question of fact or law in different courts are coordinated for trial [see CCP §§ 404, 404.1; Cal Rules Ct, Rule 3.501 et seq.].

**Strategic Point:**



Some statutes, such as the Unfair Competition Law [see B & P Code § 17204] and the Labor Code Private Attorneys General Act of 2004 [see Lab Code § 2699], generally allow representational actions only in the form of class actions [ *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Ct.* (2009) 46 C4th 993, 1002, 1005, 95 CR3d 605, 209 P3d 937 (representative actions not permitted under

the Law and the Act); *Arias v. Superior Ct.* (2009) 46 C4th 969, 980, 95 C R3d 588, 209 P3d 923 (representative actions not permitted under the Law)]. However, under the Labor Code Private Attorneys General Act of 2004, that restriction does not apply to a suit for civil penalties [ *Arias v. Superior Ct.* (2009) 46 C4th 969, 982-987, 95 C R3d 588, 209 P3d 923] .



#### **Warning:**

Class counsel is obliged to consider the advantages and disadvantages to the class of adding any reasonable cause of action to the complaint, to bring these considerations to the attention of the class representatives, and to take or recommend such action (including of course the possibility of doing nothing with respect to each additional claim) as would an attorney using the skill, prudence and diligence commonly exercised by attorneys handling such litigation [ *Janik v. Rudy, Exelrod & Zieff* (2004) 119 CA4th 930, 937 , 14 CR3d 751 (counsel can be liable for failure to undertake these duties)].

#### **Detailed Discussion/Forms:**

See discussion of class actions, Cabraser, California Class Actions Practice and Procedure, Ch. 1, History and Overview (Matthew Bender).

California Forms of Pleading and Practice, Ch. 120, Class Actions (Matthew Bender).

California Points and Authorities, Ch. 41, Class and Representative Actions (Matthew Bender).



#### **Cross Reference:**

Discussion of coordinated actions, see Ch. 32, Notice of Related Cases, Consolidation, Coordination, and Severance of Actions.



#### **Timing--Filing of Complaint:**

During the pre-suit due diligence phase of litigation, counsel should carefully consider when to file a class action complaint. The first plaintiff to file can have significance on their appointment as lead counsel or the steering committee. Counsel should also consider the amount of publicity sought before and after filing the complaint, which may cause the filing of "copy cat" lawsuits.



#### **Warning:**

Plaintiff's counsel must also consider the possibility of removal of a qualifying class action to federal district court under the federal Class Action Fairness Act of 2005. A single defendant can remove an eligible case even before class certification, and generous provisions on interlocutory appeal of remand orders ensure that federal courts will decide the extent of their jurisdiction under the Act. Plaintiff's counsel should also consider the impact upon their action, after removal, of the "Consumer Class Action Bill of Rights" [see 28 USC § 1711 *et seq.*] included in the Act. On the other hand, defendant's counsel has leverage under the Act with respect to other parties in addition to the option to have federal courts more inclined to deny class certification than state courts as the forum in which the question is decided.



#### **Cross References:**

Removal of class actions to federal court, see 17.07[7].

Additional discussion of removal of class actions, see Cabraser, California Class Actions Practice and Procedure, Ch. 11, Removal and Remand of Class Actions Filed in State Court (Matthew Bender).

For Tips on updating case law and expanding your research with additional resources, see **How to Use**

**Lexis.com With This Publication** at the front of this volume.

**Distinguish:**

In opposing a class action, be careful to distinguish whether the issues in contention go to the issue of certification or to the merits of the substantive claims. It is an abuse of the trial court's discretion to address substantive issues in the context of a challenge to class certification [ *Medraza v. Honda of North Hollywood* (2008) 166 CA4th 89, 98, 82 CR3d 1 ]. When the substantive theories and claims of a proposed class suit are alleged to be without legal or factual merit, the interests of fairness and efficiency are furthered when the contention is resolved in the context of a formal pleading, i.e., demurrer [see 33.26[1]], or motion for judgment on the pleadings [see 11.38 et seq.], or motion for summary judgment or adjudication [see 38.03 et seq.] that affords proper notice and employs clear standards. Were the courts to condone merit-based challenges as part and parcel of the certification process, similar procedural protections would be necessary to ensure that an otherwise certifiable class is not unfairly denied the opportunity to proceed on legitimate claims [ *Linder v. Thrifty Oil Co.* (2000) 23 C4th 429, 440-441, 97 CR2d 179, 2 P3d 27 ; *Medraza v. Honda of North Hollywood* (2008) 166 CA4th 89, 97-98, 82 CR3d 1 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsGeneral Overview



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Chapter 33 Class Actions

## II. DETERMINING WHETHER CLASS ACTION CAN BE MAINTAINED

*3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.03*

### 33.03 CHECKLIST: Determining Whether Class Action Can Be Maintained.

- ☐ Determine whether ascertainable class exists.
- ☐ Evaluate for:
  - ☐ Questions of common or general interest.
  - ☐ Identification of class members.
  - ☐ Impracticability of individual actions.

#### **Authority:**

*CCP § 382*

#### **Discussion:**

*See 33.04[1]*

- ☐ Determine whether a well-defined community of interest exists.
- ☐ Consider:
  - ☐ Predominant questions of law or fact.
  - ☐ Class representatives having typical claims or defenses.

- ☐ Ability of class representative to represent class.

**Authority:**

See *Daar v. Yellow Cab Co.* (1967) 67 C2d 695, 709, 63 CR 724, 433 P2d 732

**Discussion:**

See 33.04[2]

- ☐ Ensure that class action is superior method of adjudication.

- ☐ Decide if class action will:

- ☐ Address the interests of those affected.
- ☐ Present legal and practical issues and difficulties.
- ☐ Have impact on or from other litigation.

**Discussion:**

See 33.04[3]

- ☐ Consider whether action is type typically suited to class action treatment.

**Discussion:**

See 33.04[4]

- ☐ Determine if the case is removable to federal court under the federal Class Action Fairness Act of 2005.

**Authority:**

28 USCS §§ 1332(d), 1453(b)

**Discussion:**

See 17.10[7]



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Chapter 33 Class Actions

## II. DETERMINING WHETHER CLASS ACTION CAN BE MAINTAINED

3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.04

### 33.04 Ensure That Action Meets Requirements for Class Action.

#### 33.04[1] Ascertainable Class Must Exist.

**33.04[1][a] Satisfy Objective Criteria.** A clear, objective definition characterizes an ascertainable class [ *Lockheed Martin Corp. v. Superior Court* (2003) 29 C4th 1096, 1103-1104, 131 CR2d 1, 63 P3d 913 ; *Daar v. Yellow Cab Co.* (1967) 67 C2d 695, 704, 63 CR 724, 433 P2d 732 ]. To the extent plaintiffs' proposed definitions improperly incorporate the merits of the claim, the trial court should redefine the class [ *Bell v. Superior Court* (2007) 158 CA4th 147, 168, 69 CR3d 328 ].

**33.04[1][b] Members Must Be Identifiable.** There must be sufficient records available to identify class members at remedial stage [ *Lewis v. Robinson Ford Sales, Inc.* (2007) 156 CA4th 359, 369-370, 67 CR3d 347 (records sufficient); *Reyes v. Board of Supervisors* (1987) 196 CA3d 1263, 1274-1275, 1280 ]. Ordinarily, plaintiff has the burden of identifying class members and establishing their number [ *State of California ex rel. Dept. of Motor Vehicles v. Superior Court* (1998) 66 CA4th 421, 438, 78 CR2d 88 ].

#### Distinguish:

The representative plaintiff need not identify the individual members of the class at the class certification stage in order for the class members to be bound by the judgment. Class members are "identifiable" if potential class members are identifiable without unreasonable expense or time and given notice of the litigation, and the proposed class definition offers an objective means of identifying those persons who will be bound by the results of the litigation [ *Medraza v. Honda of North Hollywood* (2008) 166 CA4th 89, 101, 82 CR3d 1 (class representative's inability to identify potential class members at certification hearing was irrelevant)].

#### Exception:

A court may require defendant to contribute to the costs of notification for the purposes of identifying potential class members [ *State of California ex rel. Dept. of Motor Vehicles v. Superior Court* (1998) 66 CA4th 421, 438, 78 CR2d 88 ].

**Strategic Point:**

The use of subclasses is an appropriate device to facilitate class treatment [ *Aguir v. Cintas Corp. No. 2 (2006) 144 CA4th 121, 134, 50 CR3d 135* ]. A party may suggest the use of subclasses to certify a manageable class [see *Rosack v. Volvo of Am. Corp. (1982) 131 CA3d 741, 762, 182 CR 800*, cert. denied, *460 US 1012, 103 S Ct 1253, 75 L Ed2d 482 (1983)* ].

**Distinguish:**

The fact that the class may ultimately turn out to be overinclusive is not a bar to certification of the class [ *Bell v. Superior Court (2007) 158 CA4th 147, 169, 69 CR3d 328* ].

**33.04[1][c] Class Must Be Reasonable Size.** The class must be susceptible to reasonable control of its size [ *Reyes v. Board of Supervisors (1987) 196 CA3d 1263, 1274-1275, 1280* ].

**33.04[1][d] Members Can Be Located and Notified.** Location and notification of the class members should demand only a reasonable expenditure of time and money [ *Lewis v. Robinson Ford Sales, Inc. (2007) 156 CA4th 359, 369-370, 67 CR3d 347* (no unreasonable expenditure required); *Reyes v. Board of Supervisors (1987) 196 CA3d 1263, 1274-1275, 1280* ].

**Cross References:**

Discussion of class allegations required in complaint, see 33.11[2].

Cabraser, *California Class Actions Practice and Procedure*, § 3.03[1], [2] (Matthew Bender).

*Deskbook on the Management of Complex Civil Litigation*, § 3.74 (Matthew Bender).

**33.04[1][e] Members Must Have Plausible Cause of Action.** For a class to be considered ascertainable, its members must have a plausible cause of action against the defendant [ *Sony Electronics Inc. v. Superior Court (2006) 145 CA4th 1086, 1094, 52 CR3d 139* ; *American Suzuki Motor Corp. v. Superior Court (1995) 37 CA4th 1291, 1294-1295, 44 CR2d 526* ]. To determine whether multiple members of the proposed class have a viable cause of action, the trial court is required to examine [ *American Suzuki Motor Corp. v. Superior Court (1995) 37 CA4th 1291, 1295, 44 CR2d 526* ]:

- The issues framed by the pleadings,
- The law applicable to the cause of action alleged, and
- The actual performance of the product, as revealed by the record developed between filing the complaint and moving for certification.

**Example:**

Even though the named plaintiffs have not participated in administrative review of the issues in a class action, so long as certain individuals who are members of the putative class have already exhausted their administrative remedies the class consisting of both groups may go forward on the issues presented, because it would serve no additional useful purpose and nothing more could effectuate the policy of the exhaustion doctrine by requiring those who have not done so to do so outside the class action [ *Tarkington v. California Unemployment Ins. Appeals Bd. (2009) 172 CA4th 1494, 1508-1510, 92 CR3d 131* (exhaustion was sufficient for class to go forward)]. When none of the putative class member plaintiffs, named or otherwise, exhausts administrative remedies, the relevant inquiry is whether the available administrative remedies provide class-wide relief. If the remedies do provide class-wide relief,

than at least one plaintiff must exhaust them before litigation may proceed. If the remedies do not provide class-wide relief, then no plaintiff need exhaust them before suing [see *Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 CA4th 1494, 1508-1510, 92 CR3d 131] .

**Example:**

The language of the standing requirements of the Unfair Competition Law [see *B & P Code* § 17204] makes clear that its mandate of a showing of injury in fact is applicable only to the class representatives and not to all absent class members [In *Re Tobacco II Cases* (2009) 46 C4th 298, 323-324, 93 CR3d 559, 207 P3d 20 (requirement of actual injury did not apply to absent class members); *Pfizer Inc. v. Superior Court* (2010) 182 CA4th 622, 633, 105 CR3d 795 (class overbroad as certified because more than half had no claim); *Weinstat v. Dentsply Int'l, Inc.* (2010) 180 CA4th 1213, 1222, 1224, 103 CR3d 614 (reversing trial court ruling)].

**33.04[2] Well-Defined Community of Interest Must Exist.**

**33.04[2][a] Common Questions of Law or Fact Predominate.** Predominant questions of law or fact must exist among the class members' claims or defenses [ *Linder v. Thrifty Oil Co.* (2000) 23 C4th 429, 435, 97 CR2d 179, 2 P3d 27 ].

**Exception:**

The predominant-interest requirement is not satisfied if:

- Each class member's right to recover is based on a separate set of facts applicable only to that individual [ *Vasquez v. Superior Court* (1971) 4 C3d 800, 809, 94 CR 796, 484 P2d 964 ; *In re Vioxx Class Cases* (2009) 180 CA4th 116, 133-136, 103 CR3d 83 (nature of reliance on misrepresentations and calculation of restitution were individual in claim under *B&P Code* § 17200 *et seq.*); *Evans v. Lasco Bathware, Inc.* (2009) 178 CA4th 1417, 1432, 101 CR3d 354 (differing costs of replacing defective shower pans); *Ali v. U.S.A. Cab Ltd.* (2009) 176 CA4th 1333, 1347-1352, 98 CR3d 568 (workers' compensation action involving issue of employment status); *Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 CA4th 830, 851, 100 CR3d 637 (insurance agent's representations were not scripted by insurance company); *Cohen v. DirecTV, Inc.* (2009) 178 CA4th 966, 981, 101 CR3d 37 (claims of deceptive advertising required individual proof of exposure to advertising and reliance); *Akkerman v. Mecta Corporation, Inc.* (2007) 152 CA4th 1094, 1102-1103, 62 CR3d 39 (products liability tort action)].

- The individual issues are too complex, numerous, diverse, or substantial [ *Osborne v. Subaru of Am., Inc.* (1988) 198 CA3d 646, 653-654, 243 CR 815 ; *Bozaich v. State of California* (1973) 32 CA3d 688, 694-695, 108 CR 392 ].

- The enforcement of a right in favor of some class members would adversely affect the substantial interests of others [ *Knox v. Streatfield* (1978) 79 CA3d 565, 571, 145 CR 39 ].

However, a total community of interest need not exist among class members [ *City of San Jose v. Superior Court* (1974) 12 C3d 447, 460, 115 CR 797, 525 P2d 701 ]. Predominance is a comparative concept [ *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 C4th 319, 334, 17 CR3d 906, 96 P3d 194 ]. The community of interest requirement for certification does not mandate that class members have uniform or identical claims [ *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 C4th 319, 338, 17 CR3d 906, 96 P3d 194 ; *Capitol People First v. State Dep't of Dev. Servs.* (2007) 155 CA4th 676, 692, 66 CR3d 300 ]. Individual issues do not render class certification inappropriate so long as the issues may be effectively managed [ *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 C4th 319, 334, 17 CR3d 906, 96 P3d 194 ].



**Examples:**

Class certification where the community of interest is less than total may be appropriate where:

- An inference of common reliance was adequate to show causation as to each class member sufficient to establish common issues predominate [ *McAdams v. Monier, Inc.* (2010) 182 CA4th 174, 183, 105 CR3d 704 (limiting definition of class); cf., *In re Vioxx Class Cases* (2009) 180 CA4th 116, 133-136, 103 CR3d 83] .

- Class certification was warranted despite individual issues because two central legal issues that are common to all putative class members. [ *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 CA4th 471, 488, 104 CR3d 545] .

- Common issues of unlawful sales and the amount of restitution in a Consumers Legal Remedies Act, Civ. Code, § 1750 et seq., were not dominated by individual issues of causation and injury [ *Steroid Hormone Product Cases* (2010) 181 CA4th 145, 156-158, 104 CR3d 329] .

- Common issues predominated for the purpose of class certification because the question whether an inherently defective product is presently functioning as warranted goes to the remedy for the breach, not proof of the breach itself [ *Hewlett-Packard Co. v. Superior Court* (2008) 167 CA4th 87, 96, 83 CR3d 836] .

- The calculation of individual damages may at some point be required [ *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 C4th 319, 334, 17 CR3d 906, 96 P3d 194 ; *Lewis v. Robinson Ford Sales, Inc.* (2007) 156 CA4th 359, 371] .

- Separate transactions may be involved [ *City of San Jose v. Superior Court* (1974) 12 C3d 447, 460, 115 CR 797, 525 P2d 701] .

- There would be a common recovery [ *Daar v. Yellow Cab Co.* (1967) 67 C2d 695, 707] .

As an analytical matter, the theory of recovery advanced by the proponents of certification must be likely under the evidence to prove amenable to class treatment. When applying this test, the court looks to the allegations in the complaint and the declarations of attorneys representing the class [ *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 C4th 319, 327, 17 CR3d 906, 96 P3d 194 ; *Jaimez v. DAIOHS USA, Inc.* (2010) 181 CA4th 1286, 1298, 1299, 105 CR3d 443 ; *Capitol People First v. State Dep't of Dev. Servs.* (2007) 155 CA4th 676, 692, 66 CR3d 300] . In deciding whether the commonality requirement has been satisfied, courts may consider [ *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 C4th 319, 333, 17 CR3d 906, 96 P3d 194 ; *Capitol People First v. State Dep't of Dev. Servs.* (2007) 155 CA4th 676, 692-693, 66 CR3d 300 (evidence supported finding of community of interest)]:

- Pattern and practice.

- Statistical and sampling evidence.

- Expert testimony.

- Other indicators of a given defendant's classwide practices relevant to assessing whether that common behavior toward similarly situated plaintiffs renders class certification appropriate.

In evaluating the evidence in light of the legal theory, the trial court must not become enmeshed with the merits of the

underlying action, or to concern itself with which side's experts are more qualified. At the class certification stage, the concern is whether the evidence plaintiffs will offer is "sufficiently generalized in nature" [ *Capitol People First v. State Dep't of Dev. Servs.* (2007) 155 CA4th 676, 696, 66 CR3d 300 ]

**Distinguish:**

Class certification will not be permitted if each member is required to litigate substantial and numerous factually unique questions before a recovery may be allowed [ *Arenas v. El Torito Restaurants, Inc.* (2010) 183 CA4th 723, 732, 108 CR3d 15] .

 **Cross Reference:**

Cabraser, *California Class Actions Practice and Procedure*, § 3.02 (Matthew Bender).

**33.04[2][b] Typicality of Claims or Defenses of Class Representative.** The claims or defenses of the class representative must be typical of those of the class members [ *City of San Jose v. Superior Court* (1974) 12 C3d 447, 463-464, 115 CR 797, 525 P2d 701 ].



**Warning--Nonclass Party:**

Challenging a class on typicality grounds is difficult because generally a class member's claims will meet the requirement if the member satisfies the definition of a class member [see, e.g., *Classen v. Weller* (1983) 145 CA3d 27, 44-46, 192 CR 914 ].



**Cross Reference:**

Typicality of claims and defenses, see 33.07[3].



**Warning--Class Party:**

A class action may only be maintained against multiple defendants when the class representative has a cause of action against each defendant [ *Hart v. County of Alameda* (1999) 76 CA4th 766, 775-776, 90 CR2d 386 ].

**Exception:**

When a class representative alleges that multiple defendants were involved in a conspiracy or that multiple defendants were jointly responsible for the class members' injuries the action will be viable [ *Hart v. County of Alameda* (1999) 76 CA4th 766, 775-776, 90 CR2d 386 ].

**33.04[2][c] Class Representative Must Adequately Represent Class.** The class representative must be able to adequately represent the class members [ *Richmond v. Dart Indus., Inc.* (1981) 29 C3d 462, 470, 174 CR 515, 629 P2d 23 ]. A trial court may conclude this requirement is not met if the class member "fail[s] to raise claims reasonably expected to be raised by the members of the class" [ *Evans v. Lasco Bathware, Inc.* (2009) 178 CA4th 1417, 1432, 101 CR3d 354] .

**Example:**

A class representative did not adequately represent the class because the representative did not have consequential damages to other parts of their house caused by a defective shower pan that other claimants had [ *Evans v. Lasco Bathware, Inc.* (2009) 178 CA4th 1417, 1432-1436, 101 CR3d 354 (action could not be split by issues)].



**Cross References:**

Evaluating class representatives, see 33.07.

Further discussion of class representatives adequately representing class, see *California Forms of Pleading and Practice*, § 120.15[2] (Matthew Bender); or  
 Cabraser, *California Class Actions Practice and Procedure*, § 6.05[2] (Matthew Bender).

### **33.04[3] Class Action Must Be Superior Method of Adjudication.**

**33.04[3][a] Class Proponent's Burden.** The party seeking class certification must show that for fair and efficient adjudication, the method is superior to other available methods [ *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 CA4th 319, 332 ; *Schneider v. Vennard* (1986) 183 CA3d 1340, 1345, 228 CR 800 (approving application of Fed R Civ P, Rule 23(b)(3) to actions brought under CCP § 382)].



#### **Strategic Point:**

Class action litigation is proper whenever it may be determined that it is more beneficial to the litigants and to the judicial process to try a suit in one action rather than in several actions. Clearly, the more intimate the judge becomes with the character of the action, the more intelligently he or she may make the determination. If the judicial machinery encourages the decision to be made at the pleading stages and the judge decides against class litigation, he or she divests the court of the power to later alter that decision. Therefore, given that the sustaining of demurrers without leave to amend represents the earliest possible determination of the propriety of class action litigation, it should be looked upon with disfavor [ *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 CA4th 471, 487-488, 104 CR3d 545] .



#### **Cross References:**

Cabraser, *California Class Actions Practice and Procedure*, § 3.03[6] (Matthew Bender).

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**33.04[3][b] Court Considers Various Interests in Evaluating Superiority of Method.** In determining whether a class action is the superior method of adjudicating a case, the interests of the following must be considered [ *Schneider v. Vennard* (1986) 183 CA3d 1340, 1347, 228 CR 800 ]:

- Judicial system;
- Potential class members;
- Named plaintiff;
- Attorneys for litigants;
- Public at large; and
- Defendant.

**33.04[3][c] Legal and Practical Issues Presented.** The legal issues presented by the case must be considered in determining the superiority of the class action method [ *Schneider v. Vennard* (1986) 183 CA3d 1340, 1347, 228 CR 800 ].

**33.04[3][d] Other Litigation.** The extent and nature of other litigation already commenced by or against class members may be an important factor in evaluating whether a class action would be the superior litigation vehicle [

*Schneider v. Vennard* (1986) 183 CA3d 1340, 1347, 228 CR 800 ].

**33.04[3][e] Practical Difficulties.** Difficulties associated with the cost of the action, size of the class, or different damages sustained should be considered in determining if a class action is superior to other methods of adjudication [ *Harper v. 24 Hour Fitness, Inc.* (2008) 167 CA4th 966, 976, 84 CR3d 532 ; *Rosack v. Volvo of Am. Corp.* (1982) 131 CA3d 741, 760-762, 182 CR 800 ].



**Strategic Point--Class Party:**

Suggest bifurcation or subclassing if there are practical difficulties involved [see *Rosack v. Volvo of Am. Corp.* (1982) 131 CA3d 741, 762, 182 CR 800 , cert. denied, 460 US 1012, 103 S Ct 1253, 75 L Ed2d 482 (1983) ].

**Example:**

When individual issues of fact predominate over common issues, "a class action would be extremely difficult to manage [ *Ali v. U.S.A. Cab Ltd.* (2009) 176 CA4th 1333, 1353, 98 CR3d 568 (workers' compensation action involving unmanageable issue of employment status)].



**Cross Reference:**

Allegations required in a class action complaint, see 33.11.

**33.04[4] Action Must Be of Type Typically Suited to Class Action Treatment.** Examples of actions typically suited to class action treatment are:

- Price-fixing action [see *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 CA3d 1341, 1348-1349, 235 CR 228 ; *Rosack v. Volvo of Am. Corp.* (1982) 131 CA3d 741, 763, 182 CR 800 , cert. denied, 460 US 1012, 103 S Ct 1253, 75 L Ed2d 482 (1983) ].
- Contract action [see *MacManus v. A. E. Realty Partners* (1987) 195 CA3d 1106, 1115-1116, 241 CR 315 ].
- Land ownership action [see *Twain Harte Homeowners Assn. v. Patterson* (1987) 193 CA3d 184, 239 CR 316 ].
- Unlawful discrimination action [see *Stephens v. Montgomery Ward & Co.* (1987) 193 CA3d 411, 238 CR 602 ].
- Action regarding employer's unlawful wages and benefits policy [see *Vizcaino v. Microsoft Corp.* (9th Cir 1997) 105 F3d 1334 ].
- Fraud action [see *Danzig v. Jack Grynberg & Assocs.* (1984) 161 CA3d 1128, 208 CR 336 , cert. denied, 474 US 819, 106 S Ct 67, 88 L Ed2d 55 (1985) (class not challenged by employer)].
- Negligence action [see *Hansell v. Santos Robinson Mortuary* (1998) 64 CA4th 608, 75 CR2d 361 ].



**Warning--Personal Injury:**

Personal injury tort actions generally cannot be maintained as class actions [ *Jolly v. Eli Lilly & Co.* (1988) 44 C3d 1103, 1123, 245 CR 658, 751 P2d 923 ].



### **Warning--Injustice or Lack of Benefits:**

Even if all the requirements are met, a court may not allow a class action to be maintained if there is a significant potential to create injustice or if both the litigants and the courts do not accrue substantial benefits [ *Linder v. Thrifty Oil Co. (2000)* 23 C4th 429, 435, 97 CR2d 179, 2 P3d 27 ; *Washington Mut. Bank v. Superior Court (2001)* 24 C4th 906, 914, 103 CR2d 320, 15 P3d 1071 ].

### **Distinguish:**

An action under the Fair Labor Standards Act of 1938 [29 U.S.C. § 216(b)] predicated on an affirmative class opt-in feature cannot be maintained as a class action under California law, which does not authorize the opt-in procedure of the Act [ *Haro v. City of Rosemead (2009)* 174 CA4th 1067, 1076-1077, 94 CR3d 874 ] .



### **Designing a Search for Relevant Cases With the Help of Online Resources:**

To find cases in California state and federal courts that are germane to the procedural and substantive issues in your class action case, helpful resources at lexis.com include:

- Search for cases involving the subject of your class action, e.g., for cases dealing with asymptomatic plaintiffs in medical monitoring cases, under the tab Legal > States Legal--U.S. > California > Cases > CA Federal & State Cases, Combined, search: *medical/5 monitor! and asymptomatic*
- To review recent Mealey's articles discussing class action lawsuits in the emerging area of toxic mold litigation, under Legal tab > Secondary Legal > Mealey Reports & Conferences > Mealey's Litigation Reports > Mold: Mealey's Litigation Report use this search: HEADLINE segment search: *headline (class)*
- To find news articles about California lawsuits pertaining to harmful mold, under Legal tab > States Legal--U.S. > California > General News & Information > California News Publications, search, e.g.: *suit or lawsuit or action or claim or filing w/10 modl*

**33.04[5] Class Action Waiver Must Not Be Unconscionable.** Class action waivers are generally enforced, even in contracts of adhesion, unless they operate effectively as exculpatory contract clauses that are contrary to public policy, in which case they are unconscionable [ *Discover Bank v. Superior Court (2005)* 36 C4th 148, 160-161, 30 CR3d 76, 113 P3d 1100 ; *see CC § 1668*].

California law provides for a three-part inquiry in order to determine whether a class action waiver in a consumer contract is unconscionable. Under this three-part inquiry, courts are required to determine whether [ *Shroyer v. New Cingular Wireless Services, Inc. (2007)* 498 F3d 976, 983 (finding class action waiver unconscionable)]:

- The agreement is a consumer contract of adhesion drafted by a party that has superior bargaining power,
- The agreement occurs in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and
- It is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.

**Warning:**

Choice of law clauses can remove from consideration California law concerning class action waivers [see *Discover Bank v. Superior Court* (2005) 134 CA4th 886, 894-895, 36 CR3d 456 (Delaware choice of law clause enforced because sole defendant was resident of Delaware, Delaware's interest in applying its law, and plaintiff brought separate Delaware law claims as well, which overrode California's interest in barring enforcement of unconscionable class action waiver)], but that same California law can also play a role in the unconscionability determination [ *Klussman v. Cross Country Bank* (2005) 134 CA4th 1283, 1292-1298, 36 CR3d 728 (California law against unconscionable class action waivers gives California additional interest in applying its law where the other state is likely to enforce the waiver)].

**Examples:**

Examples of unconscionable class action waivers include:

- Employer's explanation of class action and arbitration waiver to employee was procedurally unconscionable, even though an option to opt out of the waiver was given [ *Gentry v. Superior Court* (2007) 42 C4th 443, 469-473, 64 CR3d 773, 165 P3d 556 ].
- A one-sided, exculpatory contract of adhesion, to the extent that it insulates a party from liability under California law, because the only remedy in consumer cases in which a company wrongfully exacts a dollar from each of millions of customers is a class action [ *Discover Bank v. Superior Court* (2005) 36 C4th 148, 161, 162-163, 30 CR3d 76, 113 P3d 1100 ].
- Class action waiver of claims concerning reduction of quality of high-definition television signal to customers paying small monthly fee and initial equipment investment of as much as \$1,000 [ *Cohen v. DirecTV, Inc.* (2006) 142 CA4th 1442, 1451-1453, 48 CR3d 813 ].
- A prohibition of class actions unless all parties consent in the selected rules of an arbitration service required in the contract to be used for arbitration of contract disputes, which rules are not readily available to one party, which acts as an exculpatory clause [ *Klussman v. Cross Country Bank* (2005) 134 CA4th 1283, 1292-1298, 36 CR3d 728 ].

**Distinguish:**

The class action waiver must be both procedurally and substantively unconscionable in order to be unenforceable [ *Discover Bank v. Superior Court* (2005) 36 C4th 148, 160, 30 CR3d 76, 113 P3d 1100 ].

**Strategic Point:**

The analysis of class action waivers for unconscionability mirrors that used for determining the unconscionability of arbitration agreements and class arbitration waivers generally [see, e.g., *Shroyer v. New Cingular Wireless Services, Inc.* (2007) 498 F.3d 976, 981-987 (giving overview of California law on unconscionability of class action waivers)].

**Cross References:**

Discussion of unconscionability of arbitration agreements and provisions, see 6.24. Discussion of unconscionability of class arbitration waivers, see 6.13A[2].

**33.04[6] Prima Facie Showing of Community of Interest Must Be Reasonable Possibility.** In seeking class

certification, the class action plaintiff must only establish that there is a reasonable possibility that plaintiffs can establish a prima facie community of interest among the class members. Where there is a reasonable possibility that the plaintiff in a class action can establish a community of interest among class members, the preferred course is to defer decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation [ *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 CA4th 471, 487, 104 CR3d 545] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonality



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Chapter 33 Class Actions

## II. DETERMINING WHETHER CLASS ACTION CAN BE MAINTAINED

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### 33.05 Defendant Class Actions Require Special Consideration.

**33.05[1] Saves Time and Costs.** A defendant class action may be maintained if it will save time and minimize costs [see *Kaye v. Mount La Jolla Homeowners Assn.* (1988) 204 CA3d 1476, 1489-1490, 1494-1495, 252 CR 67 ].

#### 33.05[2] Due Process Challenges.

**33.05[2][a] Adequate Notice and Service Are Jurisdictional.** Defects in service and notification are jurisdictional and require reversal of a judgment against a defendant class [ *Simons v. Horowitz* (1984) 151 CA3d 834, 846, 199 CR 134 ].

**33.05[2][b] Defendant Represents Class Interests.** The named-party defendant must vigorously and tenaciously represent the interests of the class [ *Simons v. Horowitz* (1984) 151 CA3d 834, 846-847, 199 CR 134 ].

**33.05[2][c] Adequate Counsel for All Class Members.** The attorney for the named-party defendant must provide adequate representation for all class members, and not merely individual clients [ *Simons v. Horowitz* (1984) 151 CA3d 834, 846, 199 CR 134 ].



#### **Warning:**

Counsel who wins an aggregate award is obligated to continue representing the class in any proceeding needed for enforcement of the award [ *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 CA4th 540, 547, 102 CR3d 295 ].

**33.05[3] Actual Injury by Each Defendant.** Plaintiff must have been actually injured by each defendant in the class [ *Simons v. Horowitz* (1984) 151 CA3d 834, 845, 199 CR 134 ; *Hart v. County of Alameda* (1999) 76 CA4th 766, 776, 90 CR2d 386 ].

**33.05[4] Affirmative Relief Required.** A defendant class action for declaratory relief is improper when no affirmative relief is sought against the class members, and the class members cannot grant any affirmative relief [see *Pinnacle Holdings, Inc. v. Simon* (1995) 31 CA4th 1430, 1436-1437, 37 CR2d 778 ].



**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsClass MembersDefendantsCivil ProcedureClass ActionsPrerequisitesAdequacy of Representation



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Chapter 33 Class Actions  
III. ASCERTAINING WHETHER CLASS REPRESENTATIVE IS SUITABLE

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**33.06 CHECKLIST: Ascertaining Whether Class Representative Is Suitable.**

☐ Determine whether the class representative meets the criteria for suitability.

☐ Class representative must be a class member.

**Authority:**

*La Sala v. Am. Sav. & Loan Assn* (1971) 5 C3d 864, 875, 97 CR 849, 489 P2d 1113

☐ Class representative must represent and protect class interests.

**Authority:**

*La Sala v. Am. Sav. & Loan Assn* (1971) 5 C3d 864, 872, 97 CR 849, 489 P2d 1113

☐ Class representative must have typical claims or defenses.

**Authority:**

*Stephens v. Montgomery Ward & Co., Inc.* (1987) 193 CA3d 411, 422, 238 CR 602 ; *Fed R Civ P*, Rule 23(a)

☐ Class representative and class counsel must not have a conflict of interest.

**Authority:**

*La Sala v. Am. Sav. & Loan Assn* (1971) 5 C3d 864, 872, 97 CR 849, 489 P2d 1113 ; *Sharp v. Next Entertainment Inc.* (2008) 163 CA4th 410, 433, 78 CR3d 37

☐ Class representative must not be perceived to have incompatible interests.

**Authority:**

*Richmond v. Dart Indus., Inc. (1981) 29 C3d 462, 471, 174 CR 515, 629 P2d 23*

- ☐ Class representative must not receive special consideration.

**Authority:**

*La Sala v. Am. Sav. & Loan Assn (1971) 5 C3d 864, 871-872, 97 CR 849, 489 P2d 1113*

**Discussion:**

See 33.07

- ☐ Determine whether the opposing party could challenge the choice of class representative.

**Authority:**

*Daar v. Yellow Cab Co. (1967) 67 C2d 695, 710, 63 CR 724, 433 P2d 732 ; CCP § 382*

**Discussion:**

See 33.08

- ☐ File an amended complaint if necessary.

**Authority:**

*Scott v. City of Indian Wells (1972) 6 C3d 541, 550, 99 CR 745, 492 P2d 1137 ; La Sala v. American Sav. & Loan Assn (1971) 5 C3d 864, 872, 97 CR 849, 489 P2d 1113 ; CCP § 382*

**Discussion:**

See 33.09



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### 33.07 Class Representative Must Satisfy Criteria.

**33.07[1] Class Member.** The class representative must be an actual member of the class at the time the action is commenced [ *La Sala v. American Sav. & Loan Assn* (1971) 5 C3d 864, 875, 97 CR 849, 489 P2d 1113 ].



#### Strategic Point--Plaintiff:

A named plaintiff may act in the dual roles of class representative and attorney for the class [ *McGhee v. Bank of Am.* (1976) 60 CA3d 442, 451, 131 CR 482 ].

**33.07[2] Represents and Protects Class Interests.** The class representative must be able to represent and protect the interests of the class fairly and adequately [ *La Sala v. American Sav. & Loan Assn.* (1971) 5 C3d 864, 871, 97 CR 849, 489 P2d 1113 ; *Classen v. Weller* (1983) 145 CA3d 27, 46, 192 CR 914 ].



#### Cross Reference:

Adequacy of class representative, see 33.04[2][c].

**33.07[3] Typicality of Claims or Defenses.** The class representative must have claims or defenses that are typical of those of the class [ *Stephens v. Montgomery Ward & Co., Inc.* (1987) 193 CA3d 411, 422, 238 CR 602 ; *Fed R Civ P, Rule 23(a)* ].

#### Exception:

A class representative need not have incurred all of the damages sustained by each class member [ *Wershba v. Apple Computer, Inc.* (2001) 91 CA4th 224, 238, 110 CR2d 145 ].

#### Exception:

The standing requirements of the Unfair Competition Law [see *B & P Code § 17204*] are applicable only to the class representatives and not to all absent class members, but under them, the class representative must show an injury in fact [In *Re Tobacco II Cases* (2009) 46 C4th 298, 323-324, 93 CR3d 559, 207 P3d 20 (requirement of actual injury did not apply to absent class members); *Pfizer Inc. v. Superior*

*Court (2010) 182 CA4th 622, 633-634, 105 CR3d 795* (class representative's experience not representative of other consumer's experiences)]. While only the class representative need establish personal reliance on the defendant's misrepresentation or nondisclosure resulting in damage, the representative need not show that such reliance was the sole or even the predominant or decisive factor in influencing his or her conduct. It is enough that the misrepresentation has played a substantial part, and so has been a substantial factor, in influencing his or her decision. Moreover, a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is "material" if a reasonable person would attach importance to its existence or nonexistence in deciding his or her course of action in the transaction in question. Finally, the class representative need not demonstrate individualized reliance on a specific misrepresentation [In *Re Tobacco II Cases* (2009) 46 C4th 298, 326-327, 93 CR3d 559, 207 P3d 20 ; *Weinstat v. Dentsply Int'l, Inc.* (2010) 180 CA4th 1213, 1222-1223, 103 CR3d 614] .

#### **Cross Reference:**

Typicality of class representative's claims or defenses, see 33.04[2][b].

**33.07[4] No Conflict of Interest.** The class representative cannot have an actual or potential conflict of interest with the other class members [ *Seastrom v. Neways, Inc.* (2007) 149 CA4th 1496, 1502, 57 CR3d 903 (distributors had direct conflict of interest with consumers in proposed class action against manufacturers); see *La Sala v. American Sav. & Loan Assn.* (1971) 5 C3d 864, 872874, 97 CR 849, 489 P2d 1113 ]. As part of this analysis, the trial court assesses the competency of class counsel, if the firm is representing the class as a whole and not simply the interests of the named representative plaintiffs, and if the named plaintiffs have lent their names to litigation that is controlled by class counsel [ *Sharp v. Next Entertainment Inc.* (2008) 163 CA4th 410, 433, 78 CR3d 37 ].

#### **Cross Reference:**

Obtaining consent to conflict of interest on part of attorney, see *Ch. 3, Beginning and Terminating Attorney-Client Relationship*, 3.08.

However, in the realm of class actions, the rules of disqualification cannot be applied so as to defeat the purpose of the class proceedings [ *Sharp v. Next Entertainment Inc.* (2008) 163 CA4th 410, 434, 78 CR3d 37 ].

#### **Warning:**

The majority of courts have refused to permit class attorneys, their relatives, or business associates from acting as the class representative. The failure to abide this rule may result in disqualification of the law firm from representing the putative class [ *Apple Computer Inc. v. Superior Court* (2005) 126 CA4th 1253, 1264 (law firm disqualified)].

**33.07[5] Not Perceived to Have Incompatible Interests.** Class members should not be able to perceive the class representative as having interests incompatible with those of other class members [ *Richmond v. Dart Indus., Inc.* (1981) 29 C3d 462, 471, 174 CR 515, 629 P2d 23 ].

#### **Distinguish:**

Antagonistic interest is not sufficient to bar class certification unless it goes to "the very subject matter of the litigation" [ *Richmond v. Dart Indus., Inc.* (1981) 29 C3d 462, 470, 174 CR 515, 629 P2d 23 ; *Capitol People First v. State Dep't of Dev. Servs.* (2007) 155 CA4th 676, 697, 66 CR3d 300 (conflict did not go to subject matter of litigation)].

#### **Examples:**

Types of conflicts that do not constitute grounds for barring class certification include:

- Different philosophical perspectives on the issues or merits of the case [ *Capitol People First v. State Dep't of Dev. Servs.* (2007) 155 CA4th 676, 700-701, 66 CR3d 300 ].

**33.07[6] No Special Consideration From Opposing Party.** The class representative cannot receive special consideration from the opposing party if it does not inure to the benefit of the entire class [see *La Sala v. American Sav. & Loan Assn.* (1971) 5 C3d 864, 871874, 97 CR 849, 489 P2d 1113 ].



**Strategic Point--Class Party:**

Do not select a class representative who has received any consideration from the opposing party.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsPrerequisitesAdequacy of RepresentationCivil ProcedureClass ActionsPrerequisitesTypicality



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### 33.08 Opposing Party May Remove Class Representative.

**33.08[1] Trial Court Has Discretion to Remove Representative.** Although no specific rule or statute provides for removal of a class representative, the trial court has discretion, based on the facts and circumstances of the case, to order that the action not continue as a class action with the named party representatives [ *Daar v. Yellow Cab Co.* (1967) 67 C2d 695, 710, 63 CR 724, 433 P2d 732 ; see *Apple Computer Inc. v. Superior Court* (2005) 126 CA4th 1253, 1264 ].



#### Timing--Substituting Representative:

The trial court retains the authority, even during the pendency of an appeal of the final judgment, to substitute a suitable representative of the class if the named representative is found to be unsuitable [see *Mallick v. Superior Court* (1979) 89 CA3d 434, 437, 152 CR 503 ].



#### Strategic Point--Precertification Discovery:

Precertification discovery is permissible for the purpose of identifying potential class action plaintiffs to substitute for a class representative who has been found improper; but the method of communication must protect privacy and be narrowly tailored to avoid the ban on improper solicitation [ *Safeco Ins. Co. of Am. v. Superior Ct.* (2009) 173 CA4th 814, 834-835, 92 CR3d 814 (order for discovery affirmed); *CashCall, Inc. v. Superior Court* (2008) 159 CA4th 273, 290, 71 CR3d 441 (lack of standing does not bar original class representative's discovery of suitable substitute class representative(s)); *Best Buy Stores, L.P. v. Superior Court* (2006) 137 CA4th 772, 775, 40 CR3d 575 ].



#### Cross Reference:

Discovery generally, see Matthew Bender(R) Practice Guide: California Civil Discovery.

**33.08[2] Representative Must Have Viable Claim in Order to Represent Class Asserting the Claim.** A named representative who lacks standing to assert a claim is prohibited from representing the class regarding the claim [see *Bailey v. Patterson* (1962) 369 US 31, 32-33, 82 S Ct. 549, 7 L Ed2d 512 ; *Hall v. Time Inc.* (2008) 158 CA4th 847,

853-855, 70 CR3d 466 ].

**Exception:**

Where a defendant in a class action has forced an involuntary settlement on the representative plaintiff after the lawsuit is filed, a representative plaintiff may continue to be a member of the proposed class. These cases so-called "pick off" cases" arise when, prior to class certification, a defendant in a proposed class action gives the named plaintiff the entirety of the relief claimed by that individual. The proper procedure in a pickoff case is for the trial court to consider whether the named plaintiff will continue fairly to represent the class light of the individual relief offered by the defendant. As a practical matter, in most cases, that evaluation may be performed in the context of a ruling on a motion for class certification [Wallace v. Geico Gen. Ins. Co. (2010) 183 CA4th 1390, 1398-1400, 108 CR3d 375 (pickoff cases apply to class action alleging violation of *B&P Code § 17200 et seq.*)].

**Strategic Point:**



A class representative's lack of standing at the beginning of a class action is not necessarily fatal to continuation of the action. Although a complaint filed by a party who lacks standing is subject to demurrer, the rationale for the demurrer "would be that there is a defect in the parties, since the party named as plaintiff is not the real party in interest." Amendments to complaints under *CCP § 473(a)* are liberally allowed to substitute in plaintiffs with standing for original plaintiffs without standing. If, after the court has thus extended an opportunity to amend, the class still lacks a suitable representative, the court may conclude that it must dismiss the action [ *CashCall, Inc. v. Superior Court* (2008) 159 CA4th 273, 287-290, 71 CR3d 441 ].



**Cross References:**

Criteria for class representative, see 33.07. Standing generally, see 5.03 et seq. Substituting parties by amending complaint, see 34.31 et seq.

Replacement of representative, see *Cabraser, California Class Actions Practice and Procedure, Replacement of Representative*, § 6.05[4] (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsJudicial Discretion





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### 33.09 Plaintiff Class May Be Granted Leave to Amend Complaint.

If the court determines that the named plaintiff is unsuitable, it should afford the plaintiff class the opportunity to amend the complaint to redefine the class or to add new individual plaintiffs, or both [ *Scott v. City of Indian Wells* (1972) 6 C3d 541, 550, 99 CR 745, 492 P2d 1137 ; *La Sala v. American Sav. & Loan Assn.*, (1971) 5 C3d 864, 872, 97 CR 849, 489 P2d 1113 ].



#### Cross References:

Leave to amend class allegations in complaint, see 33.28[3].

Discussion of amended complaints, see Ch. 34, Amended and Supplemental Pleadings.



#### Strategic Point--Class Party:

Consider selecting an alternate representative, should the court fail to approve the original named plaintiff.



#### Warning--Class Party:

A career plaintiff who simply lends his or her name to a suit that is controlled entirely by the attorney for the putative class may not be a proper class representative [ *Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 CA4th 572, 577-580, 105 CR2d 896 ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsClass MembersNamed Members



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**33.10 Conform Format to Rules of Court Requirements.**

**33.10[1] Designate "CLASS ACTION" in Caption.** Position capitalized "CLASS ACTION" designation on the first page of the complaint, immediately below the case number and above the description of the nature of the complaint [*Cal Rules Ct, Rule 3.761(a)*].

**33.10[2] Include Proper Heading and Class Action Allegations.** In the body of the complaint and under a separate heading entitled "CLASS ACTION ALLEGATIONS," describe how the requirements for class certification are met [*Cal Rules Ct, Rule 3.761(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsGeneral Overview



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**33.11 Allege Facts Sufficient to Withstand Demurrer.**

**33.11[1] Allegations Should Establish a Community of Interest in Elements of Class Claims.** Absent strong factual showings to the contrary, class allegations are sufficient if facts tend to show an ascertainable class of plaintiffs and questions of law or fact that are common to the class [ *Beckstead v. Superior Court* (1971) 21 CA3d 780, 783-784, 98 CR 779 ].



**Warning:**

An order sustaining a demurrer to the class action allegations of a complaint, without leave to amend, may be appealed. Such an order is effectively a dismissal of the action as to the unnamed class members. As such, its legal effect is a final judgment [ *Brown v. Regents of Univ. of Cal.* (1984) 151 CA3d 982, 986 n1, 198 CR 916 ].



**Cross References:**

Discussion of well-defined community of interest, see 33.04[2].

Discussion of appealing demurrer sustained without leave to amend, see *Ch. 11, Demurrers and Motions for Judgment on the Pleadings*, 11.34 et seq.

**33.11[2] Complaint Should Specifically Allege Reasons for Superiority of Class Action Method.** Plaintiff must show that fair and efficient adjudication requires the class action method of litigating claims [ *Schneider v. Vennard* (1986) 183 CA3d 1340, 1345, 228 CR 800 (approving application of *Fed R Civ P*, Rule 23(b)(3) to actions brought under CCP § 382)], such as:

- Joinder is impracticable because the class is so numerous.
- Individual actions are impracticable because the individual damages are so small.
- Burdensome cost will result because class members cannot afford to initiate individual actions.

- Burden to judicial system as multiple actions would outweigh any burdens imposed on the system by a class action.
- Risk of inconsistent results and standards is present because multiple actions.
- Potential risk to interests of other class members exists.
- Public interest would be served by obtaining definitive answers to questions posed by the case.

#### ► **Cross Reference:**

Discussion of class action as superior method of adjudication, see 33.04[3].



#### **Strategic Point--Plaintiffs:**

Verification of the complaint will require that answers be verified and will preclude a general denial in an unlimited civil case. It will also preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*CCP* § 431.30(d)].

#### ► **Cross References:**

Discussion of answers generally, see Ch. 14, Answers.

Discussion of verification, see California Forms of Pleading and Practice, Ch. 572, Verification (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsPrerequisitesNumerosity



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Chapter 33 Class Actions  
V. REQUESTING CASE CONFERENCE

*3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.12*

**33.12 CHECKLIST: Requesting Case Conference.**

☐ Notice may be given by any party.

**Authority:**

*Cal Rules Ct, Rule 3.762(b)*

☐ Party noticing conference:

- ☐ Select date for conference.
- ☐ Select date at any time after the first defendant has appeared.
- ☐ Obtain prior approval of date from clerk of department assigned to hear the case.
- ☐ Attempt to accommodate schedules of all parties entitled to receive notice.

**Authority:**

*Cal Rules Ct, Rule 3.762(e)*

☐ File and serve notice of conference.



**Timing:**

At least 20 days prior to scheduled date of conference.

**Authority:**

*Cal Rules Ct, Rule 3.762(d)*

- ☐ If the conference is called by a named plaintiff, serve notice on all named parties.

**Authority:**

*Cal Rules Ct, Rule 3.762(b)*

- ☐ If the conference is called by defendant, serve notice on all parties who have appeared in the case.

**Authority:**

*Cal Rules Ct, Rule 3.762(b)*

- ☐ If representing plaintiff, and the conference is called by the court, serve copy of the notice on other parties.

**Authority:**

*Cal Rules Ct, Rule 3.762(c)*



**Timing:**

Within 10 calendar days after receipt of the court's notice, serve copy of the notice on all parties who have been served in the action, whether or not they have appeared.

- ☐ Submit either declaration of service or, if unable to serve any party, declaration stating reasons for failure of service.

**Authority:**

*Cal Rules Ct, Rule 3.762(c)*

- ☐ Attend conference.



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**33.13 Case Conference Structures Action.**

One or more case conference may be held between the court and counsel to discuss class issues, the conduct and scheduling of discovery, scheduling of hearings, and other matters [*Cal Rules Ct, Rule 3.762(a)*].



**Warning:**

Evidence cannot be presented at a case conference.



**Cross References:**

Discussion of case conferences, generally, see Ch. 23, Case Management.

California Forms of Pleading and Practice, Ch. 425, Pretrial Proceedings (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management



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**33.14 Case Conference May Result in Court Orders.**

At the conclusion of the case conference, the court may make an order doing one or more of the following [*Cal Rules Ct, Rule 3.763*]:

- Approve the parties' stipulations,
- Establish a schedule for discovery,
- Set a date for hearing on motion for class certification,
- Set dates for subsequent conferences, and
- Address any other matters related to case management.



**Warning:**

Counsel must possess authority to enter into stipulations at a case conference.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsGeneral Overview





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**33.15 CHECKLIST: Filing Motion for Class Certification or for Determination of Other Class Issues.**

- ☐ Identify class issues to be determined, including:
  - ☐ Whether the class should be certified;
  - ☐ Identify characteristics of class members;
  - ☐ Identify individual named class members.
- ☐ Whether one or more subclasses should be certified;
- ☐ Whether an existing order certifying a class should be amended;
- ☐ Whether a class should be decertified.

**Authority:**

*Cal Rules Ct, Rule 3.764(a)*

- ☐ Prepare motion papers, including:
  - ☐ Notice of motion to certify a class or to amend or modify a certification order;
  - ☐ Supporting memorandum, no longer than 20 pages;
  - ☐ Supporting evidence in the form of documents, including:

- ☐ Declarations of counsel,
- ☐ Declarations of class representatives, and
- ☐ Declarations of other appropriate declarants.

☐ Requests for judicial notice.

**Authority:**

*Cal Rules Ct, Rule 3.764(c)(1)-(3); see also Cal Rules Ct, Rules 3.1113, 3.1306(c)*

**Discussion:**

See 33.16

**Form:**

See 33.44

- ☐ Serve and file papers.



**Timing:**

When practicable, but at least 28 calendar days prior to date appointed for hearing.

**Authority:**

*Cal Rules Ct, Rule 3.764(c)(1)*



**Cross Reference:**

Service of Papers, see Ch. 27

- ☐ Review papers filed in opposition to motion.



**Timing:**

Must be served and filed at least 14 calendar days preceding the noticed or continued hearing, unless the court for good cause orders otherwise.

**Authority:**

*Cal Rules Ct, Rule 3.764(c)(1), (2)*



**Cross Reference:**

Opposing motion for certification, see 33.27.

- ☐ File reply memorandum, no longer than 15 pages.



**Timing:**

Must be served and filed not less than five calendar days preceding the noticed or continued date of the

hearing, unless the court for good cause orders otherwise.

**Authority:**

*Cal Rules Ct, Rule 3.764(c)(1), (2)*

- ☐ Confer with opposing counsel to try to resolve any uncontroverted issues by written stipulation.



**Timing:**

Prior to hearing.

**Authority:**

*Cal Rules Ct, Rule 3.764(e)*

- ☐ Attend hearing.

**Authority:**

*Cal Rules Ct, Rule 3.764(d); Cal Rules Ct, Rule 3.1306 (evidence at hearing)*



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### **33.16 Include Proper Content in Motion for Class Certification.**

#### **33.16[1] Notice of Motion for Class Certification.**

**33.16[1][a] Calendar at Least 28 Days' Notice.** A motion to certify a class or to amend or modify a certification must be filed and served at least 28 calendar days prior to the hearing date. However, they should be filed and served as soon as practicable after the pleadings are settled [ *Danzig v. Jack Grynberg & Assocs.* (1984) 161 CA3d 1128, 1136, 208 CR 336 ; see *Cal Rule Ct, Rule 3.764(c)(1)*].



#### **Cross Reference:**

Form of notice of motion and motion to determine issues for class action, see 33.44.

**33.16[1][b] Discovery May Be Required.** Each party must have an opportunity to conduct discovery on class action issues before filing documents to support or oppose a class action certification motion [ *Stern v. Superior Court* (2003) 105 CA4th 223, 232, 129 CR2d 275 ; see *Union Mut. Life Ins. Co. v. Superior Court* (1978) 80 CA3d 1, 11, 145 CR 316 ].



#### **Strategic Point--Precertification Discovery of Putative Members:**

Discovery of, and precertification communication to, members of the putative class must safeguard putative member privacy rights, but these rights are not absolute and are subject to a balancing test against the discovery rights of the litigants [ *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 C4th 360, 371 (manufacturer required to disclose other purchasers who complained about product); *Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 C3d 785, 787-790 (privacy protections required in letter to putative members)].



#### **Strategic Point--Precertification Discovery of Witnesses as Discovery of Putative**

**Members--Waiver:**

A class plaintiff has a right to conduct discovery of nonprivileged information about witnesses, even among putative class members, such as their identity and location [ *Crab Addison Inc. v. Superior Court* (2008) 169 CA4th 958, 966-967, 87 CR3d 400 (even if the putative class members have executed waivers of notice of pending class actions, public policy warrants discovery)].

**Example:**

Precertification discovery of names and contact information of potential class members is warranted where there is no showing of undue privacy invasion and there is the risk that the alleged abuses by defendant will go unaddressed absent notice to potential class members [ *Lee v. Dynamex, Inc.* (2008) 166 CA4th 1325, 1338-1339, 83 CR3d 241 ].

 **Cross References:**

Standing of class representative to seek discovery, see 33.08.

Discovery generally, see Matthew Bender(R) Practice Guide: California Civil Discovery.

**33.16[2] Prepare Memorandum in Support of Motion for Class Certification.**

**33.16[2][a] Memorandum Must Not Exceed 20 Pages.** An opening memorandum may not exceed 20 pages; otherwise, the provisions of *Cal Rules Ct, Rule 3.1113*, apply [*Cal Rules Ct, Rule 3.764(c)(2)*].

**33.16[2][b] Include Required Components of Memorandum.** The memorandum must contain the following [*Cal Rules Ct, Rules 3.1113(b), 3.764(c)(3)*]:

- A statement of facts,
- A concise statement of the law, evidence, and arguments, and
- A discussion of the statutes, cases, and textbooks cited in support of the position advanced.

 **Cross References:**

Forms for motion to certify class, see California Points and Authorities, Ch. 41, Class and Representative Actions (Matthew Bender).

Forms opposing motion to certify class, see California Points and Authorities, Ch. 41, Class and Representative Actions (Matthew Bender).

Forms supporting motion, see California Points and Authorities, Ch. 41, Class and Representative Actions (Matthew Bender).

**33.16[2][c] Oral Testimony as Evidence in Support of Motion for Class Certification Is Disfavored.** The evidence in support of the motion for class certification must comply with *Cal Rules Ct, Rule 3.1306* [*Cal Rules Ct, Rule 3.764(d)*]. Although the court has discretion, for good cause shown, to admit oral testimony and cross examination, the preferred evidentiary support should be the following [*Cal Rules Ct, Rules 3.764(c)(3), (d), 3.1306(a)*]:

- Declarations of Counsel;
- Declarations of Class Representatives;
- Declarations of Others; and

- Request for Judicial Notice.

**33.16[2][d] Stipulations Are Favored.** The parties should endeavor to resolve any uncontroverted issues by stipulation. If all class issues are so resolved and approved by the court, no hearing on class certification is required [*Cal Rules Ct, Rule 3.764(e)*].



**Strategic Point:**

A party opposing the motion for class certification may submit a responding memorandum, evidentiary materials, and requests for judicial notice [*Cal Rules Ct, Rule 3.764(c)(3)*; discussed in 33.27].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsCertification



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**33.17 Plaintiff Has Burden of Proof.**

The named plaintiff has the burden of proving that the requirements for maintenance of a class action are satisfied [ *Occidental Land, Inc. v. Superior Court* (1976) 18 C3d 355, 360, 134 CR 388, 556 P2d 750 ].

➡ **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsCertification



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#### 33.18 File Motion When Practicable.

A motion for class certification should be filed when practicable [*Cal Rules Ct, Rule 3.764(b)*].

##### **Exception:**

The court may establish a deadline for filing the motion for certification [*Cal Rules Ct, Rule 3.764(b)*].

Class certification must be decided prior to any determination on the merits [ *Fireside Bank v. Superior Court* (2007) 40 C4th 1069, 1083, 56 CR3d 861, 155 P3d 268 ; *Green v. Obledo* (1981) 29 C3d 126, 146 ], provided that [ *Fireside Bank v. Superior Court* (2007) 40 C4th 1069, 1083, 1086, 56 CR3d 861, 155 P3d 268 ]:

- Defendant has not waived objection to ruling on the merits at the same time or before resolution of certification issues.
- Defendant has not raised the issue of the merits of principle issues in the case, such as by demurring or moving for summary judgment before the court has resolved certification issues.

##### **Exception:**

Plaintiff may obtain resolution of certification issues after seeking resolution of the merits, in the absence of a defense waiver, by demonstrating changed circumstances or other good cause justifying the belated motion. In this regard, the court must have a compelling equitable reason to rule on the merits prior to ruling on certification [ *Fireside Bank v. Superior Court* (2007) 40 C4th 1069, 1083-1084, 56 CR3d 861, 155 P3d 268 ].



##### **Warning--Class Party:**

A court may consider the merits of an action in a certification proceeding in an exceptional case, *e.g.*, if the defense has no other reasonable pretrial means to challenge the merits [ *Linder v. Thrifty Oil Co.* (2000) 23 C4th 429, 443, 97 CR2d 179, 2 P3d 27 ]. Be prepared to brief the merits.



**Strategic Point--Plaintiff:**

By first litigating on the merits or by requesting early consideration of liability issues without also objecting to class certification, defendant may inadvertently waive the right to a pretrial certification determination [ *Employment Development Dept. v. Superior Court* (1981) 30 C3d 256, 263-264, 178 CR 612 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsCertification



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### 33.19 Consider Choice-of-Law Factors.

**33.19[1] Complexity.** If claims of nonresident class members will require adjudication under the laws of the members' home states, before certifying a class action [ *Washington Mut. Bank v. Superior Court* (2001) 24 C4th 906, 915, 103 CR2d 320, 15 P3d 1071 ; *Clothesrigger, Inc. v. GTE Corp.* (1987) 191 CA3d 605, 619, 236 CR 605 ] the trial court must ascertain the degree of complexity arising from the application of those laws.

**33.19[2] Choice-of-Law Agreement.** When parties have an agreement that another jurisdiction's law will govern their disputes, the court will examine the scope of the choice-of-law clause and determine its enforceability.



#### Strategic Point:

In determining the enforceability of contractual choice-of-law agreements, California courts apply the principles set forth in Restatement Second of Conflict of Laws § 187, which reflects a strong policy favoring enforcement of such provisions [ *Brack v. Omni Loan Company, Ltd.* (2008) 164 CA4th 1312, 1321, 80 CR3d 275 ].

### 33.19[3] Choice-of-Law Clause Must Satisfy Tests.

**33.19[3][a] Scope-of-Clause Test.** The advocate of the choice-of-law clause has the burden of establishing that the class members' claims fall within the scope of the clause [ *Washington Mut. Bank v. Superior Court* (2001) 24 C4th 906, 916, 103 CR2d 320, 15 P3d 1071 ].

**33.19[3][b] Enforceability-of-Clause Test.** If the class claims fall within the scope of the choice-of-law clause, the court must evaluate the clause's enforceability. The court must determine whether:

- The chosen state has a substantial relationship to the parties or the transaction; or
- There is any other reasonable basis for the parties' choice of law.

**33.19[3][c] Choice-of-Law Agreement May Be Unenforceable.** The choice-of-law clause need not be enforced if

neither test is met [ *Washington Mut. Bank v. Superior Court* (2001) 24 C4th 906, 916, 103 CR2d 320, 15 P3d 1071 ].

**33.19[3][d] Foreign-State Law May Be Inimical to Fundamental California Policy.** If either test is met, the court determines whether the chosen state's law is contrary to a fundamental policy of California. The relative significance of a particular policy or statutory scheme can be determined by considering whether parties may, by agreement, avoid the policy or statutory requirement [ *Brack v. Omni Loan Company, Ltd.* (2008) 164 CA4th 1312, 1322-1323, 80 CR3d 275 ]. Upon assessing the existence of a conflict:

- If no conflict exists, the court will enforce the parties' choice of law [ *Washington Mut. Bank v. Superior Court* (2001) 24 C4th 906, 916, 103 CR2d 320, 15 P3d 1071 ].

- If a conflict exists, the court determines whether California has a materially greater interest than the chosen state in the determination of the issue. If so, the choice-of-law clause will not be enforced [ *Washington Mut. Bank v. Superior Court* (2001) 24 C4th 906, 916-917, 103 CR2d 320, 15 P3d 1071 ]. However, the court of appeals has additionally required that the forum state's interests have to be more seriously impaired by enforcement of the parties' contractual choice-of-law provision than would the interests of the chosen state by application of the law of the forum state, in order for the provision to be unenforceable [ *Brack v. Omni Loan Company, Ltd.* (2008) 164 CA4th 1312, 1324, 80 CR3d 275 ].

#### **Cross References:**

Interpretation of choice-of-law provisions, see California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender); and  
Restatement Second of Conflict of Laws § 187(2).

### **33.19[4] Choice-of-Law Tests Absent Enforceable Choice-of-Law Agreement.**

**33.19[4][a] Significant Contacts Test.** A forum state may apply its own substantive law to the claims of a nationwide class if [ *Phillips Petroleum Co. v. Shutts* (1985) 472 US 797, 821-822, 105 S Ct 2965, 86 L Ed2d 628 ; *Washington Mut. Bank v. Superior Court* (2001) 24 C4th 906, 919, 103 CR2d 320, 15 P3d 1071 ]:

- The state has a significant contact or significant aggregation of contacts with respect to the claims of each class member.
- The application of the forum state's law is not arbitrary or unfair.

**33.19[4][b] Governmental Interest Test.** Even if its own law can be constitutionally applied, California follows a governmental interest analysis. California law will apply to nonresident members so long as the interests of other states do not outweigh California's interest in having its law applied [ *Washington Mut. Bank v. Superior Court* (2001) 24 C4th 906, 921, 103 CR2d 320, 15 P3d 1071 ].

**33.19[4][c] Proponent Has Burden to Justify Application of Foreign Law.** A foreign-law proponent has the burdens of identifying the applicable rule of law in each potentially concerned state and of showing that it materially differs from California law [ *Washington Mut. Bank v. Superior Court* (2001) 24 C4th 906, 919, 103 CR2d 320, 15 P3d 1071 ]:

- If the laws of each state are identical, a court may find California law applicable to class claims.
- If the laws are materially different, a court will determine what interest each state has in having its own law applied to the case.

A class action proponent also has the following burdens [ *Washington Mut. Bank v. Superior Court* (2001) 24 C4th

906, 926, 103 CR2d 320, 15 P3d 1071 ]:

- Demonstrating that state law variations will not swamp common issues and defeat predominance; and
- Presenting sufficient information showing that any state-law differences could be managed fairly and efficiently at trial.



#### **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**33.19[4][d] Court Will Choose Law of Forum With Interests in Greatest Jeopardy of Impairment.** A court will select the law of the state whose interests would be more impaired if its law were not applied, considering the following factors [ *Offshore Rental Co., Inc. v. Cont'l Oil Co. (1978) 22 C3d 157, 166, 148 CR 867, 583 P2d 721* ]:

- Relative commitment of the respective states to the laws involved; and
- History and current status of the states' laws and the functions/purposes of those laws.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureFederal & State InterrelationshipsChoice of LawGovernmental InterestsCivil ProcedureFederal & State InterrelationshipsChoice of LawSignificant RelationshipsCivil ProcedureClass ActionsCertification



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#### 33.20 Reviewing Certification Determination.

**33.20[1] Final Judgment Rule Applies.** The final judgment rule, as codified in *CCP* §§ 904.1, 904.2, generally allows appeals only from a final judgment or from an order that has been expressly made appealable by statute [see *Stephen v. Enterprise Rent-A-Car* (1991) 235 CA3d 806, 811, 1 CR2d 130 ].

**33.20[2] Order Denying Certification Appealable If Same as Final Judgment.** Although not made appealable by statute, an order denying certification is appealable when it is deemed equivalent to a final judgment, or is otherwise a "death knell" to an entire class [ *Richmond v. Dart Indus., Inc.* (1981) 29 C3d 462, 470, 174 CR 515, 629 P2d 23 ; *Haro v. City of Rosemead* (2009) 174 CA4th 1067, 1077-1078, 94 CR3d 874 ; *Szetela v. Discover Bank* (2002) 97 CA4th 1094, 1098, 118 CR2d 862 ].

#### Distinguish:

A denial of certification which disposes of less than all causes of action between the parties may not be appealed until after final judgment, although immediate review by writ of mandate is generally available [see *Vasquez v. Superior Court* (1971) 4 C3d 800, 806-807, 94 CR 796, 484 P2d 964 ; *Rosack v. Volvo of Am. Corp.* (1982) 131 CA3d 741, 748-749, 182 CR 800 ].



#### Cross References:

Discussion of appealable orders, see 33.40[1].

Discussion of orders subject to mandate proceedings, see 33.40[2].

**33.20[3] Order Granting Certification Not Appealable.** An order granting certification for a statewide, rather than a national, class is not appealable [ *Shelley v. City of Los Angeles* (1995) 36 CA4th 692, 696, 42 CR2d 529 ; *General Motors Corp. v. Superior Court* (1988) 199 CA3d 247, 250-251, 244 CR 776 ].

**33.20[4] Intermediate Orders Reviewed by Mandate or Prohibition.** A court order permitting the class action to proceed is reviewable by mandate or prohibition proceedings [see *Chance v. Superior Court* (1962) 58 C2d 275, 278 n. 1, 23 CR 761, 373 P2d 849 ; see also *CCP* §§ 1085-1097, 1107, 1108; *Cal Rules Ct, Rule 8.485 et seq.*]. Such intermediate orders that do not dispose of the entire action or that do not have the effect of a "death knell" are

reviewable by mandate before proceedings take place on the merits [ *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 CA3d 758, 763, 259 CR 789 ].



#### **Cross References:**

Orders subject to mandate proceedings, see 33.40[2].

Discussion of mandate proceedings and form to review certification order or other intermediate class action orders, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsAppellate ReviewCivil ProcedureClass ActionsCertificationCivil  
ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law  
WritsProhibitionCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule



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VII. PROVIDING NOTICE TO CLASS MEMBERS

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**33.21 CHECKLIST: Providing Notice to Class Members.**

☐ Prepare following papers:

☐ Statement regarding class notice and exclusion from class.

**Authority:**

*Cal Rules Ct, Rule 3.766(b)*

**Discussion:**

See 33.22[1], [2]

☐ Proposed class notice.

**Authority:**

*Cal Rules Ct, Rule 3.766(b)*

**Discussion:**

See 33.22[1], [3]

**Form:**

See 33.48

☐ Notice of motion and motion for order (if motion is not combined with motion to certify class), unless otherwise directed by court.

**Discussion:**

See 33.22[4][a], [b]

**Form:**

See 33.46

- ☐ Proposed order governing notice to class members.

**Discussion:**

See 33.22[4][a]

**Form:**

See 33.47

- ☐ Memorandum in support of motion and order, if desired.

**Discussion:**

See 33.22[4][c]

- ☐ File above documents with court:

☐ Concurrently with, or as soon as practicable after motion to certify class is filed, but in any event prior to any determination on merits of class action; or

☐ As otherwise directed by court.

**Authority:**

*Cal Rules Ct, Rule 3.766(c)* (timing of court's order); *Home Sav. & Loan Assn v. Superior Court* (1974) 42 CA3d 1006, 1011, 1015, 117 CR 485 (prior to any determination on merits)

**Discussion:**

See 33.22[5]

- ☐ Court must issue order regarding notice and exclusion from class on certification of a class, or as soon thereafter as practicable.

**Authority:**

*Cal Rules Ct, Rule 3.766(c)*

**Discussion:**

See 33.23

**Form:**

See 33.47

- ☐ If court's order requires that notice be given to class, notify class in time and manner specified in court's order.

**Authority:**

*Cal Rules Ct, Rule 3.766(c)* (time and manner of notice must be specified in order)

**Discussion:**



See 33.23[1], 33.24



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*3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.22*

**33.22 Preparing and Filing Statement Regarding Class Notice and Exclusion from Class.**

**33.22[1] Submission Requirement.** The class proponent must submit the following to the court [*Cal Rules Ct, Rule 3.766(b)*]:

- A statement regarding class notice [*see 3.22[2]*].
- A proposed notice to class members [*see 3.22[3]*].

**33.22[2] Contents of Statement.** The statement regarding class notice must include the following items [*Cal Rules Ct, Rule 3.766(b)*]:

- Whether notice is necessary.
- Whether class members may exclude themselves from the action.
- The time and manner in which notice should be given.
- A proposal regarding which parties should bear the costs of notice.
- If cost shifting or sharing is proposed, an estimate of the cost involved in giving notice.

➡ **Cross Reference:**

Detailed discussion of the above items in the context of the court's order regarding notice and exclusion from the class, *see 33.23[1]*.

**33.22[3] Contents of Proposed Class Notice.** The content of the class notice is subject to court approval. If class members are to be given the right to request exclusion from the class, the notice must include the following [*Cal Rules Ct, Rule 3.766(b)*]:

- A brief explanation of the case, including the basic contentions or denials of the parties.
- A statement that the court will exclude the member from the class if the member so requests by a specified date.
- A procedure for the member to follow in requesting exclusion from the class.
- A statement that the judgment, whether favorable or not, will bind all members who do not request exclusion.
- A statement that any member who does not request exclusion may enter an appearance through counsel if the member so desires.

**Exception:**

The contents of notices in consumer class actions alleging violation of *CC* § 1770 (unfair competition and deceptive trade practices) are specified by *CC* § 1781(e).

 **Cross References:**

Form, see 33.48.

Discussion of class actions for unfair competition actions, see *Matthew Bender(R) Practice Guide: California Unfair Competition and Business Torts*, 2.24.

Discussion of class actions in deceptive trade practice actions, see *Matthew Bender(R) Practice Guide: California Unfair Competition and Business Torts*, 3.08.

**33.22[4] Manner of Submission.**

**33.22[4][a] Preparing and Filing Notice of Motion and Proposed Order.** The rules do not specifically require a noticed motion as a prerequisite to submitting the mandatory statement regarding class notice and exclusion from the class, and proposed class notice. However, the fact that the court is required to issue an order regarding these matters [*Cal Rules Ct, Rule 3.766(c)*; see 33.23] suggests that the statement and proposed class notice should be accompanied by a notice of motion and proposed order unless the court has directed some other procedure. Accordingly, counsel should prepare and file these papers unless the court directs otherwise.

 **Cross Reference:**

Forms, see 33.46 (notice of motion and motion for order), 33.47 (order).

**33.22[4][b] Combining With Motion to Certify the Class Action.** The rules do not specifically authorize the order regarding class notice to be addressed in the motion to certify the class action, but neither do they prohibit these matters from being addressed in that motion. Presumably such matters reside in the discretion of the court. If class notice issues are addressed in a motion to certify the class, that motion is subject to the specific requirements applicable to motions to certify a class [see 33.16].

**33.22[4][c] Filing Memorandum.** Counsel should consider filing a memorandum if necessary to support the positions taken on the items that must be included in the statement regarding class notice [see 33.22[2]]. If the statement regarding notice is filed as part of the motion to certify the class action [see 22.33[4][b]], a memorandum in support of the motion to certify the class action are mandatory [*Cal Rules Ct, Rule 3.764(c)(3)*; see 33.16[2]], and the limitation on a memorandum in connection with such a motion are applicable [*Cal Rules Ct, Rule 3.764(c)(2)*; see 33.16[2][a]].

**33.22[5] Timing and Ruling on the Merits.** The rules do not specify when the statement regarding class notice must be filed. Class notice issues must be settled prior to any determination on the merits [ *Fireside Bank v. Superior Court* (2007) 40 C4th 1069, 1083, 56 CR3d 861, 155 P3d 268 ; *Home Sav. & Loan Assn v. Superior Court* (1974) 42 CA3d 1006, 1011, 1015, 117 CR 485 ], provided that [ *Fireside Bank v. Superior Court* (2007) 40 C4th 1069, 1083, 1086, 56 CR3d 861, 155 P3d 268 ]:

- Defendant has not waived objection to ruling on the merits at the same time or before resolution of notice issues.
- Defendant has not raised the issue of the merits of principle issues in the case, such as by demurring or moving for summary judgment before the court has resolved notice issues.

**Exception:**

Plaintiff may obtain resolution of notice issues after seeking resolution of the merits, in the absence of a defense waiver, by demonstrating changed circumstances or other good cause justifying the belated motion. In this regard, the court must have a compelling equitable reason to rule on the merits prior to ruling on notice issues [ *Fireside Bank v. Superior Court* (2007) 40 C4th 1069, 1083-1084, 56 CR3d 861, 155 P3d 268 ].

The 28-day filing requirement of *Cal Rules Ct, Rule 3.764(c)(1)* applicable to filing a notice of motion to certify a class action are not specifically applicable to filing the statement regarding notice or proposed class notice. Because the court is required to make an order regarding class notice at the time the class is certified, or as soon as practicable thereafter, it seems implicit that the statement should be filed with the court concurrently with, or as soon as possible after, the motion to certify the class is filed [*Cal Rules Ct, Rule 3.766(c)* (timing of court's order)].

 **Cross Reference:**

Motion for class certification, see 33.15.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsNotices



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**33.23 Issuance of Court Order Regarding Notice and Exclusion from Class.**

**33.23[1] Content of Order.** The court is required to issue an order on certification of a class, or as soon thereafter as practicable, determining all of the following [*Cal Rules Ct, Rule 3.766(c)*]:

- Whether notice to class members is necessary.



**Decision Point:**

Since the California class action statute *CCP* 382 does not specify notice requirements in class actions, California courts are encouraged to look to the requirements of *Fed R Civ P, Rule 23* with regard to notice [ *Frazier v. City of Richmond* (1986) 184 CA3d 1491, 1499, 228 CR 376 ; see *Green v. Obledo* (1981) 29 C3d 126, 145-146, 172 CR 206, 624 P2d 256 ; *Home Sav. & Loan Assn v. Superior Court* (1974) 42 CA3d 1006, 1012, 117 CR 485 ]. *Fed R Civ P, Rule 23* describes three types of class actions and defines the notice requirement applicable to each type. *Subdivision (c)(2) of Rule 23* provides that notice is mandatory in class actions defined in subdivision (b)(3) (actions based predominantly on common questions of law and fact). No notice is specifically required in (b)(1) (actions based on need to avoid inconsistent or varying adjudications, or adjudications that would be dispositive of the interests of nonparties or substantially impair or impede their ability to protect their interests) and (b)(2) actions (actions seeking injunctive or declaratory relief). In these latter two classes of actions, state and federal courts generally have held that notice is within the discretion of the trial court [ *Frazier v. City of Richmond* (1986) 184 CA3d 1491, 1499, 228 CR 376 ]. California courts generally have favored resolving doubts as to which notice standard applies in favor of applying the discretionary notice standard [see, e.g., *Frazier v. City of Richmond* (1986) 184 CA3d 1491, 1503, 228 CR 376 ].

**Exception:**

Notice is mandatory in consumer class actions alleging violation of *CC* § 1770 (unfair competition and deceptive trade practices) [*CC* § 1781(e)].

- Whether class members may exclude themselves from the action.

**Exception:**

The right to exclusion is mandatory in consumer class actions alleging violation of *CC* § 1770 (unfair competition and deceptive trade practices) [*CC* § 1781(e)(1)].

- The time and manner of notice. If personal notification is unreasonably expensive or the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally, the court may order a means of notice reasonably calculated to apprise the class members of the pendency of the action, such as publication in a newspaper or magazine; broadcasting on television, radio, or the Internet; or posting or distribution through a trade or professional association, union, or public interest group [*Cal Rules Ct, Rule 3.766(f)*].

- The content of the notice [*see also Cal Rules Ct, Rule 3.766(d)*] (content of class notice subject to court approval)].

- The parties responsible for the cost of notice.



**Cross References:**

Form, see 33.47.

Notice of class actions in unfair competition actions, see *Matthew Bender(R) Practice Guide: California Unfair Competition and Business Torts*, 2.58.

Notice of class actions in deceptive trade practice actions, see *Matthew Bender(R) Practice Guide: California Unfair Competition and Business Torts*, 3.08.

**33.23[2] Factors Court Must Consider in Determining Manner of Notice.** In determining the manner of the notice, the court is required to consider the following factors [*Cal Rules Ct, Rule 3.766(e)*]:

- The interests of the class.
- The type of relief requested.
- The stake of the individual class members.
- The cost of notifying class members.
- The resources of the parties.
- The possible prejudice to class members who do not receive notice.
- The res judicata effect on class members.

**Example:**

Applying these principles, prior to a determination of liability, members of a plaintiff class may not be advised that unless they affirmatively request inclusion in class or perform some other act they will be excluded [ *Hypertouch, Inc. v. Superior Court* (2005) 128 CA4th 1527, 1543-1550 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsNoticesCivil  
ProcedureClass ActionsOpt-Out Provisions



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*3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.24*

**33.24 Notifying Class Members.**

If the court's order requires notice to class members [see 33.23], that notice should be given to the class members in the time and manner specified in the order.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsNotices





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*3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.25*

**33.25 CHECKLIST: Opposing Class Actions.**

☐ Determine if the case is removable to federal court under the federal Class Action Fairness Act of 2005 and file a notice of removal.

**Authority:**

*28 USCS §§ 1332(d), 1446, 1453(b)*

**Discussion:**

See 33.25A

☐ Review factors that support argument that essential requirements for class action are absent, such as:

- ☐ Ascertainable class does not exist.
- ☐ Well defined community of interest does not exist.
- ☐ Class action is inferior method of adjudication.
- ☐ Action is not the type typically suited to class action.

**Authority:**

*CCP § 382; see Vasquez v. Superior Court (1971) 4 C3d 800, 810-811, 94 CR 796, 484 P2d 964*

**Discussion:**

See 33.04

☐ Review factors that support argument that class representative is unsuitable, such as:

- ☐ Representative does not qualify as a member of class.
- ☐ Representative cannot represent and protect class interests.
- ☐ Representative lacks typical claims or defenses.
- ☐ Representative possess interests incompatible with class.
- ☐ Representative has received special consideration from an opposing party.

**Authority:**

*Richmond v. Dart Indus., Inc. (1981) 29 C3d 462, 470, 174 CR 515, 629 P2d 23 ; see La Sala v. Am. Sav. & Loan Assn (1971) 5 C3d 864, 871-875, 97 CR 849, 489 P2d 1113*

**Discussion:**

See 33.07

☐ To raise a merit-based challenge before class certification, file a:

- ☐ Demurrer,
- ☐ Motion to strike, and
- ☐ Motion to dismiss (federal court).

**Discussion:**

See 33.26

☐ To challenge class proponent's motion for certification, file papers in opposition to motion for certification.

**Discussion:**

See 33.27

☐ To challenge the propriety of continuing the action as a class action:

- ☐ File a motion to decertify.

**Grounds:**

Individual issues predominate or class action is otherwise inappropriate means of adjudicating the controversy.

**Timing:**

Before a decision is rendered on the merits.

- ☐ File a petition for a writ of mandate to challenge an order denying decertification.

**Authority:**

*CCP §§ 1084-1097*

**Discussion:**

See 33.28

- ☐ After class certification, file and serve merit-based attack on class action by a motion for summary judgment.

- ☐ After class certification, file a merit-based attack on class action by a motion for dismissal.

- ☐ File a request and obtain court approval to dismiss:

- ☐ The entire action.

- ☐ Any party.

- ☐ Any cause of action.

**Authority:**

*Cal Rules Ct, Rule 3.770(a)*

- ☐ Include an affidavit or declaration setting forth:

- ☐ Facts on which the petitioner relies,

- ☐ Any consideration being given for dismissal.

**Authority:**

*Cal Rules Ct, Rule 3.770(b)*

**Timing:**

If the court issues notice of tentative disapproval, seek a hearing within 15 calendar days after service of Notice to Avoid Disapproval [*Cal Rules Ct, Rule 3.770(b)*].

**Discussion:**

See 33.29



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### **33.25A Removing the Case to Federal District Court.**

The federal Class Action Fairness Act of 2005 permits a single defendant to remove qualifying class actions involving more than \$5,000,000 from state court to federal district court by filing a notice of removal [28 USCS §§ 1332(d), 1446, 1453(b)].

#### **Strategic Point:**



A single defendant can remove an eligible case even before class certification, and generous provisions on interlocutory appeal of remand orders ensure that federal courts will decide the extent of their jurisdiction under the Act [see 28 USCS §§ 1446, 1453].



#### **Cross References:**

Federal district court jurisdiction over class actions and grounds for removal under the Class Action Fairness Act of 2005, see 17.10[7].

Filing a notice of removal to federal district court, see 17.13.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureRemovalBasisGeneral Overview



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### 33.26 File Merit-Based Challenges Prior to Certification Hearing.

**33.26[1] Demur on Grounds of Insufficient Facts.** File a demurrer if the complaint on its face fails to allege facts sufficient to establish an ascertainable class or community of interest in the essential elements of the class claims [ *Linder v. Thrifty Oil Co. (2000) 23 C4 429, 440-441* ].

An oral hearing is a key constituent of due process, not an "empty gesture"; it should be requested if there is a real and genuine factual dispute regarding the necessary elements for maintenance of the action [ *TJX Companies, Inc. v. Superior Court (2001) 87 CA4 747, 749-754* ].



#### Warning:

Defendant's raising the issue of the merits of principal issues in the case, such as by demurring or moving for summary judgment before the court has resolved certification or notice issues waives the right to have class notice issues decided prior to any determination on the merits and gives individual plaintiffs the opportunity to withdraw from the case before final judgment but after judgment on the merits [ *Fireside Bank v. Superior Court (2007) 40 C4th 1069, 1083, 56 CR3d 861, 155 P3d 268* (referring to withdrawal as "one-way intervention"); *Home Sav. & Loan Assn. v. Superior Court (1974) 42 CA3d 1006, 1011, 1015, 117 CR 485* ].



#### Warning--Moving Party:

Demurrers are disfavored, although permissible, in California [ *Linder v. Thrifty Oil Co. (2000) 223 C4th 429, 2 P3d 27* ]. A complaint will survive a demurrer if it alleges facts that tend to show an ascertainable class and questions of law and fact that are common to the class [ *Minsky v. City of Los Angeles (1974) 11 C3d 113, 118, 113 CR 102, 520 P2d 726* ; *Beckstead v. Superior Court (1971) 21 CA3d 780, 784, 98 CR 779* ].



#### Strategic Point:

Only in mass tort actions or other actions equally unsuited to class action treatment can and should class

suitability be determined at the pleading stage, because individual questions of liability and damages frequently predominate over common questions and resolving class suitability at the pleading stage is therefore proper. In cases involving a single set of facts applicable to all members and one question of law common to all class members, class suitability should not be determined by demurrer [ *Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 CA4th 1494, 1510-1512, 92 CR3d 131 (class suitability determination premature); *Prince v. CLS Transportation, Inc.* (2004) 118 CA4th 1320, 1325-1329, 13 CR3d 725] .



#### **Strategic Point--Plaintiff:**

An order that sustains a demurrer to the class action allegations of a complaint without leave to amend may be appealed.



#### **Cross References:**

Appeal after order granting demurrer and motion to strike, see 33.28[4].

Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

**33.26[2] Move to Strike Class Allegations.** A motion to strike is proper to have class-suit allegations stricken from the complaint [ *In re BCBG Overtime Cases* (2008) 163 CA4th 1293, 1298-1299, 78 CR3d 257 (permitting nonclass defendant to file motion to strike class allegations under *Cal Rules Ct, Rule 3.767*); *Stilson v. Reader's Digest Assn, Inc.* (1972) 28 CA3d 270, 273-275, 104 CR 581 ].

#### **Distinguish:**

This type of motion seeks to have the class allegations stricken from the complaint by asking the trial court to hold an evidentiary hearing and determine whether the proposed class should be certified [ *In re BCBG Overtime Cases* (2008) 163 CA4th 1293, 1299, 78 CR3d 257 ].



#### **Timing:**

Class certification is generally not decided at the pleading stage of a lawsuit. The preferred course is to defer decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation. However, if the defects in the class action allegations appear on the face of the complaint or by matters subject to judicial notice, the putative class action may be defeated by a motion to strike [ *In re BCBG Overtime Cases* (2008) 163 CA4th 1293, 1298-1299, 78 CR3d 257 ].



#### **Strategic Point--Defendant:**

A motion to strike may be combined with a demurrer [see *Weaver v. Pasadena Tournament of Roses* (1948) 32 C2d 833, 835, 198 P2d 514 ].



#### **Cross References:**

Discussion of appealable orders, see 33.20, 33.26, 33.28[4].

Motions to strike generally, see Ch. 12, Motions to Strike.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsCertification



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**33.27 File Opposition to Motion for Certification.**

**33.27[1] Adhere to Correct Format and Filing Requirements.**

**33.27[1][a] Observe Class Action Rule of Court.** Opposition papers must be served and filed at least 14 calendar days preceding the noticed or continued hearing, unless the court for good cause orders otherwise. The provisions of *CCP § 1005* otherwise apply [*Cal Rules Ct, Rule 3.764(c)(1)*].

**33.27[1][b] Include Supporting Papers.** The memorandum in opposition must not exceed 20 pages. The *Cal Rules Ct, Rule 3.1113* requirements for memoranda otherwise apply [*Cal Rules Ct, Rule 3.764(c)(2)*]. In addition to the memorandum, the opposing party's documents consist of the party's evidence in opposition, including any declarations of counsel or other appropriate declarants and any requests for judicial notice [*Cal Rules Ct, Rule 3.764(c)(3)*].

**33.27[1][c] Follow Evidence Procedures.** Evidence to be considered at the hearing must be presented in accordance with *Cal Rules Ct, Rule 3.1306* [*Cal Rules Ct, Rule 3.764(d)*].

**33.27[2] Determine If Appropriate for Discovery to Be Permitted.** Each party must have an opportunity to conduct discovery on class action issues before filing documents to support or oppose a class action certification motion [ *Stern v. Superior Court (2003) 105 CA4th 223, 232, 129 CR2d 275* ; *Carabini v. Superior Court (1994) 26 CA4th 239, 241-244, 31 CR2d 520* ].



**Warning:**

A trial court is not required to hear merit-based challenges prior to certification; it retains discretion to determine whether it is more appropriate to allow challenges on the merits only after certification proceedings [ *Linder v. Thrifty Oil Co. (2000) 23 C4th 429, 443, 97 CR2d 179, 2 P3d 27* ].



**Cross Reference:**

Discovery generally, see Matthew Bender(R) Practice Guide: California Civil Discovery.

**Legal Topics:**



For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsCertification



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**33.28 File a Motion for Decertification.**

**33.28[1] Permitted When Change in Circumstances or New Information.** After class certification, if a change of circumstances occurs or new information is discovered that calls into question the appropriateness of continuing the class action, the opposing party may file a motion to decertify the class [*Cal Rules Ct, Rule 3.764(a)(4)*; *Washington Mut. Bank v. Superior Court* (2001) 24 C4th 906, 927, 103 CR2d 320, 15 P3d 1071 ; *Keller v. Tuesday Morning, Inc.* (2009) 179 CA4th 1389, 1397, 102 CR3d 498 ; *Danzig v. Jack Grynberg & Assocs.* (1984) 161 CA3d 1128, 1136, 208 CR 336 ]. Grounds supporting decertification may be that individual issues predominate, or that it is otherwise not an appropriate vehicle for adjudicating the controversy.

**33.28[2] Bring Motion Before Decision on Merits.** Generally, a decertification motion must be brought before a decision is rendered on the merits [*see Danzig v. Jack Grynberg & Assocs.* (1984) 161 CA3d 1128, 1136, 208 CR 336 ].

**Exception:**

A decertification motion may be entertained after a decision on the merits if the motion is based on changed circumstances and the moving party adduces new evidence that became available only after the merits of the case were decided [*see Green v. Obledo* (1981) 29 C3d 126, 148, 172 CR 206, 624 P2d 256 ].

**33.28[3] Propounding Party May Amend Complaint.** Before the court decertifies the class and dismisses the class action the court may offer plaintiffs an opportunity to amend the complaint to redefine the class or to add new individual plaintiffs, or both [ *Kagan v. Gibraltar Sav. & Loan assn* (1984) 35 C3d 582, 596, 200 CR 38, 676 P2d 1060 ].

► **Cross References:**

Amending complaint, see 33.09.

Form of complaint, see *California Forms of Pleading and Practice*, § 120.50 (Matthew Bender).

**33.28[4] Decide Whether to Seek Review of Order Denying Decertification.** A mandate proceeding, rather than

an appeal, is the appropriate proceeding to review an order denying a motion to decertify a class [see *Occidental Land, Inc. v. Superior Court* (1976) 18 C3d 355, 359, 134 CR 388, 556 P2d 750 ].

**Exception:**

If order effectively terminates the entire action as to the class or otherwise has a "death knell" effect on the class, an appeal is appropriate means of review [ *Stephen v. Enterprise Rent-A-Car* (1991) 235 CA3d 806, 811, 1 CR2d 130 ].

 **Cross References:**

Orders subject to mandate proceedings, see 33.40[2].

Checklist for opposing class actions, see 33.25.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsDecertification



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### 33.29 Pretrial Dispositive Motions.

**33.29[1] Summary Judgment Is Preferred Method of Bringing Merit-Based Challenge.** Generally, courts prefer that litigants bring merit-based challenges to class actions as motions for summary judgment rather than including such challenges in the pretrial certification proceedings [ *Linder v. Thrifty Oil Co.* (2000) 23 C4th 429, 440-441, 97 CR2d 179, 2 P3d 27 ].



#### Strategic Point:

When the substantive theories and claims of a proposed class suit are alleged to be without legal or factual merit, the interests of fairness and efficiency are furthered when the contention is resolved in the context of a formal proceeding, such as a motion for summary judgment or summary adjudication, that affords proper notice and employs clear standards. If the class is large, the court may be compelled to resolve those issues given the fact that the potential exposure may be so large that the pressure to settle may otherwise become irresistible [ *Starbucks Corp. v. Superior Court*, 168 CA4th 1436, 1453, 87 CR3d 81 (writ ordering entry of summary judgment granted)].



#### Cross Reference:

Discussion of summary judgments, see Ch. 38, Summary Judgment.

### 33.29[2] Motion to Dismiss.

**33.29[2][a] Court Must Approve.** Court approval is required for dismissal of [*Cal Rules Ct, Rule 3.770(a)*]:

- An entire class action;
- Any party in a class action; and
- Any cause of action in a class action.

**Exception:**

A court may not enter an order dismissing a class action at the same time as, or after, entry of judgment following final approval of a settlement [*Cal Rules Ct, Rule 3.769(h), 3.770(a)*].

**33.29[2][b] Supporting Affidavit or Declaration Required.** Include an affidavit or declaration setting forth [*Cal Rules Ct, Rule 3.770(a)*]:

- Facts on which the petitioner relies;
- A clear statement of whether any direct or indirect consideration is being given for dismissal; and
- If consideration is being given, a detailed statement describing it.

**Timing:**

If the court issues notice of tentative disapproval, seek a hearing within 15 calendar days after service of Notice to Avoid Disapproval [*Cal Rules Ct, Rule 3.770(b)*].

**33.29[2][c] Disposition May Be Followed by Hearing If Request Is Disapproved.** The court may grant the request without a hearing. If the request is disapproved, Notice of Tentative Disapproval must be sent to the attorneys of record. Any party may seek, within 15 calendar days of the service of the Notice of Tentative Disapproval, a hearing on the request. If no hearing is sought within that period, the request for dismissal will be deemed denied [*Cal Rules Ct, Rule 3.770(b)*].

**33.29[2][d] Class Notice of Dismissal May Be Required.** A Class Notice of Dismissal may be ordered depending on the status of prior class notification [*Cal Rules Ct, Rule 3.770(c)*]:

- If the court has certified the class, and notice of the pendency of the action has been provided to class members, notice of the dismissal must be given to the class in the manner specified by the court.
- If the court has not ruled on class certification, or if notice of the pendency of the action has not been provided to class members in a case in which such notice was required, notice of the proposed dismissal may be given in the manner and to those class members specified by the court.
- If the court finds that the dismissal will prejudice the class members, the action may be dismissed without notice to them.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsVoluntary Dismissals



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Chapter 33 Class Actions  
IX. SETTLING CLASS ACTIONS

*3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.30*

**33.30 CHECKLIST: Settling Class Actions.**

- ☐ Finalize settlement agreement, reviewing for fairness and including agreement regarding attorney's fees.

**Authority:**

*Cal Rules Ct, Rule 3.769(a), (b)*

**Discussion:**

See 33.31[1], [2]

- ☐ Prepare, file, and serve:

- ☐ Notice of motion, and
- ☐ Motion for preliminary approval of settlement.

**Authority:**

*Cal Rules Ct, Rule 3.769(c)*

**Discussion:**

See 33.31[3]

- ☐ Prepare proposed order certifying provisional settlement class, evaluating factors such as:

- ☐ Strength of plaintiffs' case,
- ☐ Risk, expense, complexity, and duration of further litigation,

- ☐ Risk of maintaining class action status through trial,
- ☐ Amount offered,
- ☐ Extent of discovery completed and stage of proceedings,
- ☐ Experience and views of counsel, and
- ☐ Reaction of class members.

**Authority:**

*Cal Rules Ct, Rule 3.769(d)*

**Discussion:**

See 33.31[4], 33.32

- ☐ Prepare proposed order granting preliminary approval of settlement.

**Authority:**

*Cal Rules Ct, Rule 3.769(e)*

**Discussion:**

See 33.31[5]

- ☐ Prepare Judicial Council Form CIV-110.

**Form:**

See Judicial Council Form CIV-110, Ch. 39, Voluntary Dismissal, 39.18

- ☐ Notify class members of the final approval hearing.

**Authority:**

*Cal Rules Ct, Rule 3.769(e)*

- ☐ Attend final settlement approval hearing.

**Authority:**

*Cal Rules Ct, Rule 3.769(a)*

**Form:**

See Judicial Council Form 982(a)(5)



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**33.31 Prepare Motion for Preliminary Approval of Settlement.**

**33.31[1] Any Party to Agreement May Initiate Motion.** Any party to a class action settlement agreement may submit a written notice of motion for preliminary approval of the settlement [*Cal Rules Ct, Rule 3.769(c)*]. Court approval, after a hearing, is required for a settlement or compromise of an entire class action, or of a cause of action in a class action, or of a party's inclusion [*Cal Rules Ct, Rule 3.769(a)*].

**33.31[2] Include Agreement for Payment of Attorney's Fees.** Any express or implied agreement regarding either the payment of attorney's fees or submission of an application for approval of attorney's fees must be set forth in full in any application for approval of the dismissal or settlement of an action [*Cal Rules Ct, Rule 3.769(b)*].

**Strategic Point:**



Courts may not rely solely on a fee distribution agreement to allocate fees between counsel in class actions settled under *Cal Rules Ct, Rule 3.769*. Instead, an award of attorney fees in class action litigation must be tied to counsel's actual efforts to benefit the class [ *Mark v. Spencer (2008) 166 CA4th 219, 229, 82 CR3d 569* ]. Thorough judicial review of fee applications is required in all class action settlements and the fairness of the fees must be assessed independently of determining the fairness of the substantive settlement terms [ *Consumer Privacy Cases (2009) 175 CA4th 545, 555, 96 CR3d 127* ] .

**Strategic Point:**



A cap on the maximum award of attorney fees may be appropriate in settlement of some cases. If the court's review independent review leads to a finding that the award should be less than the cap, the difference between the award and the cap does not automatically accrue to the class [ *Consumer Privacy Cases (2009) 175 CA4th 545, 555, 96 CR3d 127* ] . Thus, plaintiff's counsel willing to accept an attorney-fee cap in a settlement might want to include language that any difference is added to the award to the class.



**Warning:**

The failure to include an agreement on distribution of attorney fees in cases involving co-counsel bars a separate action for fees based on a claim for distribution other than that included in the approval of settlement of the class action [ *Mark v. Spencer (2008)* 166 CA4th 219, 228-229, 82 CR3d 569 ].

**Example:**

Trial court erred by ruling that settlement agreement calling for arbitration of attorney fees within a stated range was unenforceable. A finding that a range starting at the actual expenses of counsel and ending slightly lower than class counsel's lodestar plus expenses with no multiplier was proper [ *Cellphone Termination Fee Cases (2009)* 180 CA4th 1110, 1120-1125, 104 CR3d 275 (lack of participation of class members in setting fees does not bar enforcement of provision)].

**Cross Reference:**

Attorney fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 25A, Recovering Attorney's Fees From Opposing Party.

**33.31[3] Include Agreement and Proposed Notice and Order.** The settlement agreement and proposed notice to class members must be filed with the motion. The proposed order must be lodged with the motion [ *Cal Rules Ct, Rule 3.769(c)* ].

**33.31[4] Provide Notice to Class Members of Final Approval Hearing.** If a class action is certified, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain [ *Cal Rules Ct, Rule 3.769(f)* ]:

- An explanation of the proposed settlement;
- Procedures for class members to file written objections to the settlement; and
- Procedures in arranging to appear at the settlement hearing and a statement of all objections.

**33.31[5] Include Proposed Order Certifying Provisional Settlement Class.** The proposed order must be lodged with the motion [ *Cal Rules Ct, Rule 3.769(c)* ].

**33.31[6] Order Certifying Settlement Class.**

**33.31[6][a] Order Regarding Provisional Settlement Class.** Following the preliminary settlement hearing, the court may make an order approving or denying certification of a provisional settlement class [ *Cal Rules Ct, Rule 3.769(d)* ].

**33.31[6][b] Order Regarding Final Approval Hearing.** If the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing [ *Cal Rules Ct, Rule 3.769(e)* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsClass CounselFeesCivil ProcedureClass ActionsCompromises



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**33.32 Seek Final Approval of Settlement.**

**33.32[1] Notify Class Members If Class Has Been Certified.** If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court [*Cal Rules Ct, Rule 3.769(f)*].

**33.32[2] Notice Must Include Proposed Settlement and Objection Procedures.** The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement hearing [*Cal Rules Ct, Rule 3.769(f)*].

**33.32[3] Hearing Is Required and Certain Factors Must Be Considered.** The court must conduct a final approval hearing inquiring into the fairness of the proposed settlement [*Cal Rules Ct, Rule 3.769(g)*].

A trial court may approve a class action settlement agreement only after determining it is fair, adequate, and reasonable. It has broad discretion in making this determination. In exercising its discretion, the court is to consider relevant factors, which may include, but are not limited to [ *Cho v. Seagate Tech. Holdings, Inc. (2009) 177 CA4th 734, 742-743, 99 CR3d 436* ] :

- The strength of the plaintiffs' case.
- The risk, expense, complexity and duration of further litigation as a class action.
- The amount offered in settlement.
- The extent of discovery completed and the stage of the proceedings.
- The experience and views of counsel.
- The presence of a governmental participant.

- The reaction of class members to the proposed settlement.

At the same time, the trial court must give due regard the private consensual agreement between the parties. That regard limits its inquiry to the extent necessary to reach a reasoned judgment that the agreement is [ *Cho v. Seagate Tech. Holdings, Inc. (2009) 177 CA4th 734, 743, 99 CR3d 436* ] :

- Not the product of fraud or overreaching by, or collusion between, the negotiating parties.
- Taken as a whole, is fair, reasonable and adequate to all concerned.

The trial court operates under a presumption of fairness when [ *Cho v. Seagate Tech. Holdings, Inc. (2009) 177 CA4th 734, 743, 99 CR3d 436* ] :

- The settlement is the result of arm's-length negotiation, investigation, and discovery that are sufficient to permit counsel and the court to act intelligently.
- Counsel are experienced in similar litigation.
- The percentage of objectors is small.

Ultimately, the court's determination is an amalgam of delicate balancing, gross approximations, and rough justice [ *Cho v. Seagate Tech. Holdings, Inc. (2009) 177 CA4th 734, 743, 99 CR3d 436* ] .

**33.32[4] Judgment After Hearing Retains Jurisdiction.** If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment [ *Cal Rules Ct, Rule 3.769(h)* ].



#### Warning:

The trial court's judgment is res judicata with respect to distribution of attorney fees in cases involving co-counsel [ *Mark v. Spencer (2008) 166 CA4th 219, 230, 82 CR3d 569* ].



#### Strategic Point:

The court's approval of class action settlement necessarily includes a finding that the notice procedure agreed upon by the parties complies with the requirements of due process and that the settlement itself was fair, adequate, and reasonable, which bars claims of malpractice against counsel for not negotiating different terms [ *Martorana v. Marlin & Saltzman (2009) 175 CA4th 685, 696-697, 96 CR3d 172* (sanctions denied where class member failed to file claim after notice)].



#### Cross Reference:

Attorney fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 25A, Recovering Attorney's Fees From Opposing Party.

**33.32[5] Court May Not Dismiss Upon Entry of Judgment Based on Settlement.** A court may not enter an order dismissing a class action at the same time as, or after, entry of judgment following final approval of a settlement [ *Cal Rules Ct, Rule 3.769(h), 3.770(a)* ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsCompromisesCivil  
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**33.33 Meet Standards of Fairness for Approval of Settlement.**

**33.33[1] Court Has Broad Discretion.** The trial court has broad discretion to determine whether a proposed settlement is fair and just [see *Cal Rules of Ct, Rule 3.769(g)*]. In making this determination, the court should consider the following factors [ *Wershba v. Apple Computer, Inc. (2001) 91 CA4th 224, 244-245, 110 CR2d 145* ; *Clark v. Am. Residential Servs. LLC (2009) 175 CA4th 785, 799, 96 CR3d 441* (most important factor is the strength of the case for plaintiffs on the merits, balanced against amount offered in settlement); *7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 CA4th 1135, 1146* ]:

- The strength of the plaintiffs' case;
- The risk, expense, complexity, and likely duration of further litigation;
- The risk of maintaining class action status through the trial;
- The amount offered in settlement;
- The extent of discovery completed and the stage of the proceedings;
- The experience and views of counsel; and
- The reaction of the class members to the proposed settlement.

This list of factors is not exhaustive and should be tailored to each case.

**Example:**

The court should also consider whether there is any evidence of fraud or collusion in the fashioning of provisions of a settlement agreement concerning attorney fees [ *Cellphone Termination Fee Cases (2009) 180 CA4th 1110, 1119, 104 CR3d 275* ] .

**Strategic Point:**

The court may and undoubtedly should place reliance on the competence and integrity of counsel, the involvement of a qualified mediator, and the paucity of objectors to the settlement. However, the court must also receive and consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed. The trial court is not to attempt to decide the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys. However, as the court does when it approves a settlement as in good faith under *CCP § 877.6* [see 37.30], the court must at least satisfy itself that the class settlement is within the "ballpark" of reasonableness [see *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 C3d 488, 499-500, 213 CR 256, 698 P2d 159 ; *Clark v. Am. Residential Servs. LLC* (2009) 175 CA4th 785, 800, 96 CR3d 441 (court erred by relying on presumption of fairness, see 33.33[2], in lieu of making independent determination of reasonableness)]. While the court is not to try the case, it is "called upon to consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable" [ *Kullar v. Foot Locker Retail, Inc.* (2008) 168 CA4th 116, 131-133, 85 CR3d 20 ].

**Prerequisite--Discovery:**

The settling parties should be given the opportunity to file their discovery requests, which should not be denied simply because the requested information was disclosed during the mediation leading to the proposed settlement. The trial court need not grant all requests that the objector sees fit to make. Discovery requests that seek particular materials that are properly within the scope of *Evid Code § 1119* should be denied. The court should exercise its normal discretion to weigh the relevance and need for particular materials against the cost and burdens of production [see *CCP § 2017.020*; *Greyhound Corp. v. Superior Court* (1961) 56 C2d 355, 378-380, 15 CR 90, 364 P2d 266 ]. Moreover, the trial court should limit discovery in view of the context in which it is being requested. Discovery is required not to prepare the case for trial, but simply to provide sufficient information to permit an intelligent evaluation of the terms on which the case is proposed to be settled. The objecting parties should not be permitted to frustrate the mutual interest of the class members and the defendant to resolve the litigation promptly by conducting extended or unnecessary discovery. The extent of discovery that is appropriate will depend in large part on the extent of the information that the settling parties provide the court to justify the terms of the settlement. If the settling parties have provided a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated, and there is no reason to believe that significant information has been overlooked, very little in the way of additional discovery may be justified. However, where the settling parties provide essentially no information to explain, much less to substantiate, their evaluation of the magnitude or potential merit of the claims being settled, objectors should not be denied access to data that reasonably may be expected to shed light on these issues. Following the opportunity for limited discovery, the trial court should redetermine whether the proposed settlement is fair, adequate and reasonable [ *Kullar v. Foot Locker Retail, Inc.* (2008) 168 CA4th 116, 131-133, 85 CR3d 20 ].

**Cross Reference:**

See Matthew Bender(R) Practice Guide: California Civil Discovery.

**33.33[2] Fairness May Be Presumed.** A presumption of fairness applies if the settlement has been reached under the following conditions [ *Chavez v. Netflix, Inc.* (2008) 162 CA4th 43, 5255, 75 CR3d 413 (presumption not rebutted by claim of coupon settlement); *Dunk v. Ford Motor Co.* (1996) 48 CA4th 1794, 1802, 56 CR2d 483 ]:

- There has been arm's-length bargaining.
- Investigation and discovery have been sufficient to allow counsel and the court to act intelligently.
- Counsel is experienced in similar litigation.
- The percentage of class members who object to the settlement is small.

**33.33[3] Court May Apply Heightened Scrutiny to Settlement.** A class action settlement should be scrutinized more carefully if the settlement was proposed prior to an adversarial class certification determination [ *Wershba v. Apple Computer, Inc. (2001) 91 CA4th 224, 240, 110 CR2d 145* ].



**Cross Reference:**

Settlements, see Ch. 37, Settlement and Release.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsJudicial Discretion



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X. OBTAINING RELIEF AND RECOVERING AND DISTRIBUTING DAMAGES

*3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.34*

**33.34 CHECKLIST: Obtaining Relief and Recovering and Distributing Damages.**

☐ Determine appropriate relief.

☐ Seek precertification injunctive relief, if appropriate.

**Authority:**  
*CCP § 527(b)*

**Discussion:**  
*See 33.36[1]*

☐ Seek actual damages and consider whether aggregate amount will be less than \$1,000.

☐ If appropriate, seek injunctive relief against methods, acts, or practices.

☐ If appropriate, seek restitution of property.

☐ Consider whether punitive damages are proper.

**Authority:**  
*CC §§ 1780, 1781*

**Discussion:**  
*See 33.36[2]*

☐ If action involves unlawful credit transactions regarding women, consider:



☐ Actual damages.

☐ Punitive damages, provided total recovery does not exceed the lesser of \$100,000 or one percent of the creditor's net worth.

☐ Injunctive relief.

**Authority:**

*CC §§ 1812.30, 1812.31*

**Discussion:**

*See 33.36[3]*

☐ Identify appropriate method for distribution of damages.

☐ Cy pres, or fluid recovery, method,

☐ Rollback of defendant's prices,

☐ Escheat to a governmental body for either specified or general purposes,

☐ Establishment of a consumer trust fund, or

☐ Claimant fund sharing.

**Authority:**

*State of California v. Levi Strauss & Co. (1986) 41 C3d 460, 473, 224 CR 605, 715 P2d 564*

**Discussion:**

*See 33.37[1]*

☐ Consider factors for determining method of distribution of damages.

☐ The amount of compensation provided to class members, including nonclaiming members,

☐ The proportion of class members sharing in the recovery,

☐ The extent to which benefits will spill over to nonclass members and the degree to which the spillover benefits will effectuate the purposes of the underlying substantive law, and

☐ The costs of administration.

**Authority:**

*State of California v. Levi Strauss & Co. (1986) 41 C3d 460, 473, 224 CR 605, 715 P2d 564*

**Discussion:**

See 33.37[2]

☐ Determine method for distribution of the residue.

☐ For actions brought pursuant to *CCP* § 382:

☐ Court will determine total amount of damages and order a report date.

☐ Upon receipt of report of actual payments, court amends judgment to direct payment of unpaid residue, plus interest to the following:

☐ Nonprofit organizations or foundations which support projects that will benefit the class or similarly situated persons, or which promote laws consistent with the objectives and purposes of the underlying cause of action,

☐ Child advocacy programs, and

☐ Nonprofit organizations providing civil legal services to the indigent.

**Authority:**

*CCP* § 384(b)

**Timing:**

There is no *statutory* time limit for filing a motion to amend for distribution of the residue under *CCP* § 384 [ *Cundiff v. Verizon California, Inc. (2008) 167 CA4th 718, 731, 84 CR3d 377* ].

**Discussion:**

See 33.37



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Chapter 33 Class Actions

## X. OBTAINING RELIEF AND RECOVERING AND DISTRIBUTING DAMAGES

*3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.35*

### 33.35 Determine Appropriate Relief.

**33.35[1] Court May Grant Precertification Equitable Relief.** In a class action, the court can issue a temporary restraining order or a preliminary injunction, or both, whether or not the class has been certified [*CCP* § 527(b)].

**33.35[2] Court May Order Legal and Equitable Relief.** For the many class actions in which individual damages are too small to warrant traditional methods of proof, courts adopt the guidelines for relief set out in the Consumers Legal Remedies Act, which authorizes the following forms of relief in class actions [*CC* §§ 1780, 1781]:

- Actual damages, but at least an aggregate \$1,000 to the class members;
- An order enjoining the methods, acts, or practices;
- Restitution of property;
- Punitive damages; and
- Any other relief that the court deems proper.

**33.35[3] Legal and Equitable Relief Available in Class Actions for Unlawful Credit Transactions Regarding Women.** *CC* § 1812.31(a) provides the following forms of relief in class actions against creditors who improperly deny credit to women [*see CC* § 1812.30]:

- Actual damages;
- Punitive damages, provided the total recovery does not exceed the lesser of \$100,000 or one percent of the creditor's net worth, and taking into account the amount of any actual damages awarded, the frequency and persistence of violations, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's violation was intentional;
- An order enjoining further violations of *CC* § 1812.30.



**Cross Reference:**

Attorney's fees, see 33.42-33.43.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsGeneral Overview



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Chapter 33 Class Actions

X. OBTAINING RELIEF AND RECOVERING AND DISTRIBUTING DAMAGES

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### 33.36 Identify Appropriate Method for Distribution of Damages

**33.36[1] Cy Pres, Fluid Recovery Method of Fixing Damages Preferred.** Cy pres, or fluid recovery, is the preferred method when numerous individuals each claim a small amount of damages. The fluid recovery method uses three steps to distribute small amounts of damages to each member of a large class [ *State of California v. Levi Strauss & Co. (1986) 41 C3d 460, 472-473, 479, 490, 224 CR 605, 715 P2d 564* ]:

- Defendant pays the total damage liability into a class fund.
- Class members individually collect from the class fund by proving their particular damages, usually according to a lower standard of proof.
- Court determines the means of distribution of the residue.

In appropriate circumstances, fluid recovery may result in the entire class settlement amount being distributed to charitable, governmental, and non-profit organizations without direct payments to any class members [ *In re Vitamin Cases (2003) 107 CA4th 820, 827, 132 CR2d 425* ].

**33.36[2] Alternative Methods of Distribution May Be Appropriate.** Alternative methods of distributing damages in consumer class actions include [ *State of California v. Levi Strauss & Co. (1986) 41 C3d 460, 473, 224 CR 605, 715 P2d 564* ]:

- Rollbacks of the defendant's prices;
- Escheat to a governmental body for either specified or general purposes;
- Establishment of a consumer trust fund; and
- Claimant fund sharing.

California courts have even found pure coupon settlements to be fair and reasonable under certain circumstances [see,

e.g., *In re Microsoft I-V Cases* (2006) 135 CA4th 706, 711-713, 37 CR3d 660 ; *Wershba v. Apple Computer, Inc.* (2001) 91 CA4th 224, 247, 110 CR2d 145 ]. In a pure coupon settlement, the class members would receive a coupon, voucher, or discount that would *partly* defray the cost of making a *new* purchase of goods or services from the defendant. [ *Chavez v. Netflix, Inc.* (2008) 162 CA4th 43, 53-54, 75 CR3d 413 (modified coupon distribution allowing free additional product was approved)].

**33.36[3] Consider Factors to Use in Determining Method of Distribution.** In determining the method to employ for distribution of damages, the court may evaluate the following [ *State of California v. Levi Strauss & Co.* (1986) 41 C3d 460, 473, 224 CR 605, 715 P2d 564 ]:

- The amount of compensation provided to class members, including nonclaiming members;
- The proportion of class members sharing in the recovery;
- The extent to which benefits will spill over to nonclass members and the degree to which the spillover benefits will effectuate the purposes of the underlying substantive law; and
- The costs of administration.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsGeneral Overview



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### **33.37 Determine Method for Distribution of the Residue.**

#### **33.37[1] Statutory Procedure for Actions Brought Under CCP § 382.**

**33.37[1][a] Court Determines Total Amount of Damages and Orders a Report Date.** After determining the total amount that will be payable to all class members, if all members are paid the amount granted in the judgment, the court sets a date when the parties must report back the total amount actually paid [*CCP § 384(b)*].

**33.37[1][b] Court Will Amend Judgment After Report.** Upon receipt of the report of actual payments, the court amends the judgment to direct the defendant to pay the sum of the unpaid residue, plus interest on that sum from the date of entry of the initial judgment to the following [*CCP § 384(b)*]:

- Nonprofit organizations or foundations which support projects that will benefit the class or similarly situated persons, or which promote the law consistent with the objectives and purposes of the underlying cause of action;
- Child advocacy programs; and
- Nonprofit organizations providing civil legal services to the indigent.



#### **Timing:**

*CCP § 384* does not provide any time limit for filing a motion to amend, and the provisions of *CCP § 473(b)* do not apply, including its six-month time limit on filing for general relief from default [ *Cundiff v. Verizon California, Inc.* (2008) 167 CA4th 718, 731, 84 CR3d 377 ].

#### **Exceptions:**

Procedures for distributing the residue do not apply to class actions brought against public entities or public employees [see *Gov Code §§ 811.2, 811.4*].

In addition, the cy pres distribution provisions of *CCP § 384(b)* do not apply to the distribution of

residue resulting from a settlement in which the settlement agreement provides for the complete distribution of the residue on terms that are fair, adequate, and reasonable [ *In re Microsoft I-V Cases* (2006) 135 CA4th 706, 722, 37 CR3d 660 ]. The requirement in CCP § 384(b) for distribution of residue applies to claims made "remedies as well as to "fluid recovery" remedies [ *Cundiff v. Verizon California, Inc.* (2008) 167 CA4th 718, 731, 84 CR3d 377 ].

**33.37[2] Statutory Procedures Must Comport With Cy Pres Remedy.** The procedures for distribution of the residue must not be construed to abrogate any equitable cy pres remedy that may be available for all or part of the residue in any class action [CCP § 384(c)].



**Cross Reference:**

Discussion of damages, see California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsGeneral Overview





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Chapter 33 Class Actions  
XI. APPEALING ORDERS AND JUDGMENT

3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.38

**33.38 CHECKLIST: Appealing Orders and Judgment.**

☐ Appeal of pretrial rulings:

☐ Preserve appellate issues by making or opposing demurrers and motions to strike.

**Authority:**

*Linder v. Thrifty Oil Co. (2000) 23 C4th 429, 440-441, 97 CR2d 179, 2 P3d 27*

**Discussion:**

See 33.39[1]

☐ Appeal pretrial interlocutory orders if "death-knell" orders.

**Authority:**

*Coopers & Lybrand v. Livesay (1978) 437 US 463, 469-470, 98 S Ct 2454, 57 L Ed2d 351 ; General Motors Corp. v. Superior Court (1988) 199 CA3d 247, 250-252, 244 CR 776*

**Discussion:**

See 33.39[2][b]

☐ Check potential appellant's standing to intervene and to appeal.

**Authority:**

*Simons v. Horowitz (1984) 151 CA3d 834, 842-843, 199 CR 134*

**Discussion:**

See 33.39[3]

☐ Writ review of pretrial disposition of less than entire action:

☐ File and serve petition for writ of mandate challenging grant or denial of class certification or class representative prior to a hearing or any action by the court.

☐ Verify petition for writ of mandate.

**Authority:**

*CCP §§ 1085, 1086, 1088.5*

**Discussion:**

*See 33.40*

☐ Appeal of final disposition by settlement or by judgment after trial.

☐ File and serve standard appeal.

**Discussion:**

*See 33.41*



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XI. APPEALING ORDERS AND JUDGMENT

3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.39

**33.39 Seek Appellate Review of Pretrial Disposition of Entire Action.**

**33.39[1] Appeal of Pretrial Rulings on the Merits.**

**33.39[1][a] Demurrers and Motions to Strike Are Favored Means of Challenging Class Action.** The California Supreme Court favors weeding out meritless class action claims at the pretrial stage through demurrer proceedings and other pretrial dispositive motions [ *Linder v. Thrifty Oil Co.* (2000) 23 C4th 429, 440, 97 CR2d 179, 2 P3d 27 ].

**33.39[1][b] Court Retains Discretion to Delay Merit-Based Challenges.** The trial court nevertheless retains discretion to determine whether it is more appropriate in a given case to allow pretrial challenges on the merits after class certification proceedings [ *Linder v. Thrifty Oil Co.* (2000) 23 C4th 429, 443, 97 CR2d 179, 2 P3d 27 ].

**33.39[2] Appeal of Interlocutory Orders.**

**33.39[2][a] Review Available Only If Order Causes Finality.** Piecemeal litigation is disfavored, and appeals are generally allowed only from a final judgment or from an order that has been expressly made appealable by statute [CCP §§ 904.1, 904.2; *Stephen v. Enterprise Rent-A-Car* (1991) 235 CA3d 806, 811, 1 CR2d 130 ].

**33.39[2][b] Review Available Only If Order Implicates the "Death Knell" Doctrine.** If an order deprives individual class members of the economic ability and the incentive to pursue the lawsuit to a final judgment, it has a "death knell" effect and is appealable before final judgment [ *Coopers & Lybrand v. Livesay* (1978) 437 US 463, 469-470, 98 S Ct 2454, 57 L Ed2d 351 ; *General Motors Corp. v. Superior Court* (1988) 199 CA3d 247, 249, 250-252, 244 CR 776 ].

**Examples:**

- An order sustaining a demurrer to the complaint, to the extent it alleged statewide rather than nationwide class was appealable [ *Van de Kamp v. Bank of Am. Nat'l Trust & Sav. Ass'n* (1988) 204 CA3d 819, 866-867, 251 CR 530 ].

● Plaintiffs' refusal to refile all class-action claims dismissed with leave to amend does not preclude appeal of the order under the doctrine [ *Alch v. Superior Court* (2004) 122 CA4th 339, 359, 19 CR3d 339 ]. However, this decision by Division Eight of the Second Appellate District appears to conflict with a decision by the same court to the effect that, under the death knell doctrine, only an order denying certification of a class is appealable [ *Farwell v. Sunset Mesa Property Owners Association, Inc.* (2008) 163 CA4th 1545, 1552, 78 CR3d 666 (dismissal with leave to amend on demurrer based on inappropriate class representative not appealable)].

**Warning:**

Failure to appeal a certification decision at the time it is made can have a res judicata effect and render the decision final and binding [ *Reich v. Club Universe* (1981) 125 CA3d 965, 970, 178 CR 473 ].

**Distinguish:**

Although of lesser scope than requested, a trial court order that certified a class of 21,000 members, and that dismissed one of two causes of action as class actions, was not an appealable order [ *General Motors Corp. v. Superior Court* (1988) 199 CA3d 247, 249, 250-252, 244 CR 776 ].

**33.39[3] Appellant Must Have Standing to Appeal.** An unnamed class member need not obtain permission to intervene or be designated a named plaintiff before appealing [ *Simons v. Horowitz* (1984) 151 CA3d 834, 842-843, 199 CR 134 ].

**Warning:**

The Courts of Appeal have declined to import the law governing "pick off" cases, by which a representative plaintiff whose claim is involuntarily disposed of could nonetheless proceed with an appeal of an adverse class certification ruling so long as the plaintiff had reserved a right to shift attorney fees to other class members, into the context of a voluntary settlement [ *Watkins v. Wachovia Corp.* (2009) 172 CA4th 1576, 1590, 92 CR3d 409 (individual settling plaintiff denied standing to appeal); *Larner v. Los Angeles Doctors Hospital Associates, LP* (2008) 168 CA4th 1291, 1304, 86 CR3d 324 ("pick off" rule would not apply to settlement after summary judgment granted to opposing party)].

**Cross Reference:**

Criteria for determining standing, see California Forms of Pleading and Practice, Ch. 2, Procedural Guide for Civil Actions (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureClass ActionsAppellate Review



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Chapter 33 Class Actions  
XI. APPEALING ORDERS AND JUDGMENT

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**33.40 Seek Writ Review of Pretrial Disposition of Less Than Entire Action.**

**33.40[1] Petition for Writ of Mandate Challenging Class Certification or Class Representative.** File a petition for a writ of mandate when review is sought for intermediate orders that do not dispose of the entire action, such as:

- Denial of class certification operates only against the class and not against a named plaintiff [ *Vasquez v. Superior Court* (1971) 4 C3d 800, 820-821, 94 CR 796, 484 P2d 964 ; *Rosack v. Volvo of Am. Corp.* (1982) 131 CA3d 741, 748-749, 182 CR 800 ].
- Order certifying statewide rather than nationwide class [ *General Motors Corp. v. Superior Court* (1988) 199 CA3d 247, 249, 250-252, 244 CR 776 ].
- Order dismissing one of several class causes of action, but allowing others to stand [ *Vasquez v. Superior Court* (1971) 4 C3d 800, 806-807, 94 CR 796, 484 P2d 964 ].
- Order denying motion to decertify class [see *Occidental Land, Inc. v. Superior Court* (1976) 18 C3d 355, 359-360, 134 CR 388, 556 P2d 750 ].



**Timing:**

Prior to a hearing or any action by the court [CCP § 1088.5].



**Strategic Point--Petitioner:**

If unsure whether a petition for a writ of mandate or an appeal is appropriate, file both.

**33.40[2] Contents of Petition for Writ of Mandate.** A petition for a writ of mandate should allege facts showing that:

- Petitioner is a beneficially interested party [ *Funeral Directors Asso. v. Bd. of Funeral Dirs. &*

*Embalmers (1944) 67 CA2d 311, 313, 154 P2d 39* ].

- Proper grounds exist compelling performance of an act that the law specially enjoins [*see CCP § 1085(a)*].
- Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law [*see CCP § 1086*].

➤ **Cross References:**

Examples of orders subject to mandate proceeding, see 33.20, 33.28[4].

Discussion of mandate proceedings, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender).

**33.40[3] Verification.** A petition for a writ of mandate must be verified [*CCP § 1086*].

**Exception:**

When the court has granted the application for the writ ex parte [*CCP § 1107*].

➤ **Cross Reference:**

Discussion of verification, see California Forms of Pleading and Practice, Ch. 572, Verification (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsAppellate ReviewCivil ProcedureClass ActionsCertification



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XI. APPEALING ORDERS AND JUDGMENT

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**33.41 Appeal Final Disposition by Settlement or Judgment After Trial.**

**33.41[1] Unnamed Class Member Has Standing to Appeal on Behalf of Class.** Because all class members are bound by the judgment, an unnamed class member need not obtain permission to intervene or be designated a named plaintiff prior to pursuing an appeal [ *Chavez v. Netflix, Inc. (2008) 162 CA4th 43, 51, 75 CR3d 413* (appeal allowed despite denial of intervention); *Wershba v. Apple Computer, Inc. (2001) 91 CA4th 224, 235, 110 CR2d 145* (unnamed class members who appear at final fairness hearing and object to proposed settlement have standing to appeal)].

**33.41[2] Standard of Review of Trial Court's Certification Order Is Abuse of Discretion.** On appeal, a trial court's order of certification will not be reversed if it is supported by correct legal principles and is not an abuse of discretion such as [ *Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 C4th 319, 326-327*; *Linder v. Thrifty Oil Co. (2000) 23 C4th 429, 435-436, 97 CR2d 179, 2 P3d 27*; *Reese v. Wal-Mart Stores, Inc. (1999) 73 CA4th 1225, 1229, 87 CR2d 346* ]:

- The court used improper criteria to grant or deny certification.
- The court's order relies on erroneous legal assumptions.

**33.41[3] Exception to Standard of Review for Order Denying Class Certification Requires Reviewing Court to Examine Trial Court's Reasoning.** If a trial court has failed to follow a correct legal analysis when deciding to deny class certification, an appellate court is required to reverse the order even though there may be substantial evidence to support it [ *Bartold v. Glendale Fed. Bank (2000) 81 CA4th 816, 828, 97 CR2d 226* (appellate court reviews only reasons given by trial court for its ruling on class certification and ignores any other grounds that might otherwise support the ruling)].

**33.41[4] Standard of Review for Decision on Settlement Is Abuse of Discretion.** A trial court has broad discretion to determine whether a class action settlement is fair and reasonable. Appellate review is limited to determining whether the record discloses a clear abuse of discretion by the trial court [ *Kullar v. Foot Locker Retail, Inc. (2008) 168 CA4th 116, 128, 85 CR3d 20*; *Chavez v. Netflix, Inc. (2008) 162 CA4th 43, 51, 75 CR3d 413* ]. Great weight is accorded the trial court's views [ *Kullar v. Foot Locker Retail, Inc. (2008) 168 CA4th 116, 128, 85 CR3d 20* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsAppellate Review





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Chapter 33 Class Actions  
XII. OBTAINING ATTORNEY'S FEES

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**33.42 CHECKLIST: Obtaining Attorney's Fees.**

☐ Determine whether there is an express or implied agreement concerning the payment of attorney's fees.

☐ If an agreement exists, set forth the agreement in full in an application for approval of the dismissal or settlement of a certified class action.

**Authority:**

*Cal Rules Ct, Rule 3.769(b)*

☐ Determine appropriate theory supporting payment of attorney's fees:

☐ Common fund theory.

**Authority:**

*Serrano v. Priest (1978) 20 C3d 25, 35-38, 141 CR 315, 569 P2d 1303*

**Discussion:**

See 33.43[1]

☐ Private attorney general theory.

**Authority:**

*CCP 1021.5; Serrano v. Priest (1978) 20 C3d 25, 43-47, 141 CR 315, 569 P2d 1303*

**Discussion:**

See 33.43[2]

- ☐ Substantial benefit theory.

**Authority:**

*Serrano v. Priest (1978) 20 C3d 25, 38-42, 141 CR 315, 569 P2d 1303*

**Discussion:**

See 33.43[3]

- ☐ If no agreement exists, there is no basis for an award of fees if:

- ☐ No determination of the composition of the class has been made, and
- ☐ The action has not been pursued to judgment or settlement.

**Authority:**

*Anthony v. Superior Court (1976) 59 CA3d 760, 771, 130 CR 758*

- ☐ Collect attorney's fees.

**Authority:**

*Cal Rules Ct, Rule 3.769(b); Anthony v. Superior Court (1976) 59 CA3d 760, 771, 130 CR 758*



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### 33.43 Theories for Obtaining Fees.

**33.43[1] Common Fund Theory.** When a number of persons are entitled in common to a specific fund and an action brought by plaintiffs for the benefit of all results in the creation or preservation of that fund, plaintiffs may be awarded attorney's fees out of the fund [ *Trope v. Katz* (1995) 11 C4th 274, 279, 45 CR2d 241, 902 P2d 259 ; *Serrano v. Priest* (1978) 20 C3d 25, 35-38, 141 CR 315, 569 P2d 1303 ].

**33.43[2] Private Attorney General Theory.** An award can be made under the private attorney general theory [ *Ketchum v. Moses* (2001) 24 C4th 1122, 1131, 104 CR2d 377, 17 P3d 735 ]. Such an award is proper when [ *Serrano v. Priest* (1978) 20 C3d 25, 46-47, 141 CR 315, 569 P2d 1303 ]:

- The interests furthered by the action are constitutional;
- The benefits flowing from the action are to be widely enjoyed among citizens of the state; and
- Subsidization of plaintiffs is justified in the event of their victory.

On motion, a court may award attorney's fees in any action that has resulted in the enforcement of an important right affecting the public interest if [CCP § 1021.5]:

- A significant benefit has been conferred on the general public or a large class of persons;
- The necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate; and
- In the interest of justice the recovery should not be reduced by the fee.

Under CCP § 1021.5, a plaintiff may recover attorney's fees for services relating to administrative hearings and collateral litigation where these hearings or litigation are "intertwined inextricably" with the lawsuit, and the legal services performed are "both useful and necessary to the ultimate resolution of the action, and directly contributed to that resolution." Even the fees incurred defending against an amicus curiae brief that meets these standards may be

recovered [ *Ramon v. County of Santa Clara* (2009) 173 CA4th 915, 923-925, 93 CR3d 278] .

#### **Prerequisite:**

Only an opposing party can be liable for attorney fees under CCP § 1021.5. Defining "opposing party" requires consideration of both the origin and the entire procedural history of the subject action between the parties. First, determine who is the successful party in favor of whom fees may be awarded. The courts utilize a broad, pragmatic view of what constitutes a "successful party" in order to effectuate the policy underlying CCP § 1021.5. It is the "impact" of the case as a whole that is to be considered. This must include a recognition of the roles of all the different participants or parties, as of all the relevant time periods. Once the successful party is ascertained, the "opposing party" is one party whose position in the litigation was adverse to that of the successful party [ *McGuigan v. City of San Diego* (2010) 183 CA4th 610, 624-626, 107 CR3d 554 (city-intervenor was not opposing party to successful party)]. Those found liable for CCP § 1021.5 fees have been either real parties in interest that had a direct interest in the litigation, the furtherance of which was generally at least partly responsible for the policy or practice that gave rise to the litigation, or codefendants with a direct interest intertwined with that of the principal defendant [ *McGuigan v. City of San Diego* (2010) 183 CA4th 610, 629, 107 CR3d 554] .



#### **Trap:**

Successful and opposing parties for purposes of the judgment are not necessarily the same as those on appeal for purposes of attorney fees under CCP § 1021.5 [ *McGuigan v. City of San Diego* (2010) 183 CA4th 610, 624-626, 107 CR3d 554 (successful party in the judgment was not entitled to additional fees for defense of judgment on appeal concerning an issue that did not affect its interests directly)].

**33.43[3] Substantial Benefit Theory.** When substantial benefits are conferred on defendant, defendant may be required to yield some of those benefits in the form of an award of attorney's fees [ *Trope v. Katz* (1995) 11 C4th 274, 279, 45 CR2d 241, 902 P2d 259 ; *Serrano v. Priest* (1978) 20 C3d 25, 34, 38-42, 141 CR 315, 569 P2d 1303 ]. Thus, an objector must establish his or her efforts produced a concrete benefit for the class, allowing it to recover more (or otherwise be in an improved position) than it would have in the absence of the objector's effort [ *Consumer Privacy Cases* (2009) 175 CA4th 545, 560, 96 CR3d 127] .



#### **Cross References:**

Checklist for obtaining attorney's fees, see 33.43.

Discussion of attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 25, Attorney's Fees; California Forms of Pleading and Practice, Ch. 174, Costs and Attorney's Fees (Matthew Bender).

**33.43[4] Lodestar Method Is Primary Method.** The primary method for establishing the amount of "reasonable" attorney fees is the lodestar method. The lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. Once the trial court fixes the lodestar, it may increase or decrease that amount by applying a positive or negative multiplier to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented. The purpose of this adjustment is to fix a fee at the fair market value for the particular action by determining, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar, in order to approximate the fair market rate for those services. Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis. To properly use the lodestar approach, the court requires plaintiffs' counsel to submit detailed support for their fee claims and to deny those claims found unsupported [ *Consumer Privacy Cases* (2009) 175 CA4th 545, 556-557, 96 CR3d 127 (objector failed to establish benefit to class)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsClass CounselFees



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XIII. FORMS

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**33.44 Notice of Motion and Motion to Determine Issues for Class Action.**

Notice of Motion and Motion to Determine Issues for Class Action

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF \_\_\_\_\_

|                                                              |   |                                    |
|--------------------------------------------------------------|---|------------------------------------|
| _____ [name],                                                | ) | NO. _____                          |
| Individually and on behalf of all others similarly situated, | ) | NOTICE OF MOTION AND MOTION TO DE- |
| Plaintiffs, vs. _____ [name],                                | ) | TERMINE                            |
| Defendant.                                                   | ) | ISSUES FOR CLASS ACTION            |
|                                                              | ) |                                    |
|                                                              | ) | Date: _____                        |
|                                                              | ) | Time: _____                        |
|                                                              | ) | Location: _____                    |
|                                                              | ) | Judge: _____                       |
|                                                              | ) | Date Action Filed: _____           |
|                                                              | ) | Trial Date: _____                  |

To each party and to the attorney of record for each party herein:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., Plaintiff John Smith] will, and hereby does, move for an order that \_\_\_\_\_ [specify issues to be determined, e.g., the action be certified as a class action and that Plaintiff John Smith be determined to be a suitable class representative]. The motion will be made on the grounds that \_\_\_\_\_ [specify, e.g., there is an ascertainable class, there are common, similar, and unique questions of fact and law, the class action is superior to

other available methods for the fair and efficient adjudication of the controversy, and the class representative is a member of the class and is able fairly and adequately to protect the interest of the class].

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [party's status and name]

NOTES.

**Authority:**

*Cal Rules Ct, Rules 3.764, 3.765*

**Establishing Issues Concerning Class Action and Certification:**

*See 33.04, 33.16, 33.21*



**Timing:**

*See 33.18*

**Drafting Motion:**

*See 33.16*

**Alternative Use:**

May be modified for use as a notice of a case conference [see *Cal Rules Ct, Rule 3.762(b)*]. *See 33.12, 33.13*

**Accompanying Documents:**

*See 33.16*

**Related Form of Order:**

*See 33.45*

**Related Forms of Memoranda:**

*See California Points and Authorities, Ch. 41, Class and Representative Actions (Matthew Bender)*



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XIII. FORMS

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**33.45 Order Determining Issues for Class Action.**

Order Determining Issues for Class Action  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                                          |   |                  |
|----------------------------------------------------------|---|------------------|
| _____ [name],                                            | ) |                  |
| Individually and on behalf of all others similarly situ- | ) | NO. _____        |
| ated,                                                    | ) | [PROPOSED] ORDER |
| Plaintiffs, vs. _____ [name],                            | ) |                  |
| Defendant.                                               | ) |                  |
|                                                          | ) |                  |

The motion of \_\_\_\_\_ [*identify party, e.g., Plaintiff John Smith*] for an order came on regularly for hearing by the court on \_\_\_\_\_ [*date*]. Plaintiff appeared by counsel \_\_\_\_\_ [*name*]; defendant appeared by counsel \_\_\_\_\_ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED as follows:

1. \_\_\_\_\_ [*Specify, e.g., An ascertainable class exists composed of \_\_\_\_\_ (specify facts identifying the constitution of the class)*];
2. \_\_\_\_\_ [*Specify, e.g., The issues of fact and law that are common to all class members in this action are \_\_\_\_\_ (specify)*].
3. \_\_\_\_\_ [*Specify, e.g., The issues of fact and law that are similar for all class members in this action*]



are \_\_\_\_\_ (*specify*).

4. \_\_\_\_\_ [*Specify, e.g., The issues of fact and law that are unique to each class member in this action*]  
are \_\_\_\_\_ (*specify*).

5. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

6. The class \_\_\_\_\_ [representative is a member *or* representatives are members] of the class and is/are able fairly and adequately to protect the interests of the class.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature*]

Judge of the Superior Court

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.767*

**Related Form of Motion:**

See 33.44

**Alternative Use:**

Form may be used for an order denying certification or otherwise determining that the action cannot proceed as a class action. It may also include an order dismissing the action [*see Cal Rules Ct, Rule 3.770*]



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**33.46 Notice of Motion and Motion for Order to Notify Class Members of Pending Action.**

Notice of Motion and Motion for Order to Notify Class Members of Pending Action  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                                              |   |                                                                  |
|--------------------------------------------------------------|---|------------------------------------------------------------------|
| _____ [name],                                                | ) | NO. _____                                                        |
| Individually and on behalf of all others similarly situated, | ) | NOTICE OF MOTION AND MOTION FOR ORDER TO NOTIFY CLASS MEMBERS OF |
| Plaintiffs, vs. _____ [name],                                | ) | PENDING ACTION                                                   |
| Defendant.                                                   | ) | Date: _____                                                      |
|                                                              | ) | Time: _____                                                      |
|                                                              | ) | Location: _____                                                  |
|                                                              | ) | Judge: _____                                                     |
|                                                              | ) | Date Action Filed: _____                                         |
|                                                              | ) | Trial Date: _____                                                |

To each party and to the attorney of record for each party herein:

NOTICE IS HEREBY GIVEN that, on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [party, e.g., Plaintiff John Smith] will, and hereby does, move for an order requiring \_\_\_\_\_ [defendant or plaintiff] to notify each member of the class of the pendency of this action. The motion will be made on the ground that \_\_\_\_\_ [personal or published] notice of the pendency of this action is necessary to adjudicate the claims of the class.

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ *[name(s)]* and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ *[firm name, if any]*

By: \_\_\_\_\_ *[signature]*

\_\_\_\_\_ *[typed name]*

Attorney for \_\_\_\_\_

*[party's status and name]*

NOTES.

**Authority:**

*CCP § 1010*

**Notice to Class Members of Pendency of Action:**

*See 33.21-33.24*

**Accompanying Documents:**

*See 33.21, 33.22*

**Related Form of Order:**

*See 33.47*



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Chapter 33 Class Actions  
XIII. FORMS

*3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.47*

**33.47 Order for Approval of Notice to Class Members.**

Order for Approval of Notice to Class Members  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                                                          |   |                  |
|----------------------------------------------------------|---|------------------|
| _____ [name],                                            | ) |                  |
| Individually and on behalf of all others similarly situ- | ) | NO. _____        |
| ated,                                                    | ) | [PROPOSED] ORDER |
| Plaintiffs, vs. _____ [name],                            | ) |                  |
| Defendant.                                               | ) |                  |
|                                                          | ) |                  |

The motion of \_\_\_\_\_ [party, e.g., Plaintiff John Smith] for an order came on regularly for hearing by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

On proof made to the satisfaction of the court that the motion ought to be granted,

THE COURT FINDS the following:

1. Notice to class members is necessary, and
2. Class members \_\_\_\_\_ [may or may not] exclude themselves from this action.

ACCORDINGLY, IT IS ORDERED as follows:

1. Notice shall be given to the class members identified herein by \_\_\_\_\_ [specify manner of notice,

*e.g.*, personal service of the notice on each class member *or* mailing a copy of the notice by first-class mail, postage prepaid, to each class member at his or her last known address (as supplied by defendant's business records) *or* publication of the notice as specified in *Gov Code § 6064*. \_\_\_\_\_ [Plaintiff *or* Defendant] shall be responsible for providing notice as specified herein and shall file an affidavit with the court on compliance with this order, setting forth the manner in which notice was provided and \_\_\_\_\_ [showing proof of service for each class member *or* giving the names and addresses of those notified *or* giving the name of the newspaper in which the notice was published and the dates of publication, and showing proof of publication]. The cost of providing the notice shall be borne by \_\_\_\_\_ [*specify, e.g., plaintiff and defendant in equal portions*].

2. The notice of pendency of class action shall be in the form of the notice attached to this order.

3. The date specified in the notice relating to a request for exclusion will be a date specified by plaintiff which shall be not less than \_\_\_\_\_ or more than \_\_\_\_\_ days from the date of \_\_\_\_\_ [service *or* mailing *or* publication] of the notice.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the Superior Court

#### NOTES.

#### **Authority:**

*CCP § 1003*

#### **Discussion:**

*See 33.21, 33.22[4][a]*

#### **Accompanying Document:**

*See 33.48, 33.22*

#### **Related Form of Motion:**

*See 33.46*



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Chapter 33 Class Actions  
XIII. FORMS

*3-33 MB Practice Guide: CA Pretrial Civil Procedure 33.48*

**33.48 Notice of Pendency of Class Action.**

Notice of Pendency of Class Action  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name], )  
Individually and on behalf of all others similarly situ- )  
ated, )  
Plaintiffs, vs. \_\_\_\_\_ [name], )  
Defendant. )  
)

NO. \_\_\_\_\_  
NOTICE OF PENDENCY OF CLASS ACTION

NOTICE IS HEREBY GIVEN THAT:

1. The plaintiffs named below have brought an action in this court against the following defendant(s):  
\_\_\_\_\_[names].

The plaintiffs who are named in this action are as follows: \_\_\_\_\_[names].

2. The named plaintiffs allege that this action is brought not only on behalf of themselves, but on behalf of all  
\_\_\_\_\_[identify class].

[3. On \_\_\_\_\_[date], this court (conditionally) certified this action to proceed as a class action.]

4. The named plaintiffs allege that \_\_\_\_\_[set forth allegations and contentions of plaintiff in narrative form]. The plaintiffs' action therefore requests \_\_\_\_\_[specify relief sought].

Defendant(s) contends/contend \_\_\_\_\_ [set forth contentions of defendant(s), including denials, in narrative form].

5. If you do not wish to be considered a member of this class and to be represented by the plaintiffs named above, you may be excluded from the action by mailing a letter requesting exclusion from the class to \_\_\_\_\_ [name, title, and address of court clerk], which must be postmarked on or before \_\_\_\_\_ [date]. The letter should include the name and number of the case (\_\_\_\_\_ [case name and number]), your name and address, and a clear statement that you do not wish to be considered a member of the class and do not wish to be bound by the judgment in the action.

Under the rule of res judicata, the judgment whether favorable or not will include all class members who do not request exclusion by a letter as described above, postmarked on or before \_\_\_\_\_ [date].

6. If you elect to become a member of this class, you may be subjected to a cross complaint or to some other affirmative action by defendants.

7. You are further notified that, although this action is pending, defendants are not prevented in any way from exercising all remedies available by contract and law.

8. If you do not request exclusion, this action will be maintained on your behalf by the attorney(s) mentioned above. If you wish, you may enter an appearance in the case through counsel. In addition, you may move the court for permission to appear as a named class corepresentative. You may also move to associate additional counsel to represent the class.

9. The estimated total amount of recovery in the action is \$ \_\_\_\_\_. The anticipated fee that will be sought by counsel for the class is \$ \_\_\_\_\_, and the anticipated other expenses and costs to the class that will be paid from the funds recovered before distribution of the net proceeds to class members are \$ \_\_\_\_\_. The estimated net amount to be recovered by each member if the action is successful is \_\_\_\_\_ [specify dollar amount or formula to be used to determine amount of individual recovery]. No fees or costs will be assessed against class members if the plaintiffs do not prevail in the action.

10. Further information concerning this action may be obtained by contacting the attorneys for the parties in this action, who are as follows:

1. Attorney for Plaintiffs:

\_\_\_\_\_ [name]  
 \_\_\_\_\_ [address]  
 \_\_\_\_\_ [telephone]

2. Attorney for Defendants:

\_\_\_\_\_ [name]  
 \_\_\_\_\_ [address]  
 \_\_\_\_\_ [telephone]

You are also encouraged to consult your own attorney concerning this action, particularly if there is any part of this notice you do not understand.

11. It should be understood that the court in this action does not at present express any opinion as to the merits of the action.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the \_\_\_\_\_ Court

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.766*

**Notification of Class Action to Class Members:**

See 33.21-33.24

**Drafting Notice:**

See 33.22[3]

**Accompanying Documents:**

See 33.47, 33.48; see also 33.22 (discussion)

**Related Form of Motion:**

See 33.46

**Related Form of Order:**

See 33.47





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Chapter 33 Class Actions  
XIII. FORMS

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**33.49 Declaration in Support of Motion to Request Dismissal of Class Action.**

Declaration in Support of Motion to Request Dismissal of Class Action  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                              |   |                                      |
|------------------------------|---|--------------------------------------|
|                              | ) |                                      |
|                              | ) | NO. _____                            |
|                              | ) | DECLARATION OF _____ [name]          |
| _____ [name],                | ) | IN SUPPORT OF MOTION TO REQUEST DIS- |
| Plaintiff, vs. _____ [name], | ) | MISSAL OF CLASS ACTION               |
| Defendant.                   | ) | Date: _____                          |
|                              | ) | Time: _____                          |
|                              | ) | Dept.: _____                         |
|                              | ) | Judge: _____                         |
|                              | ) | Date Action Filed: _____             |
|                              |   | Trial Date: _____                    |

I, \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for \_\_\_\_\_ [identify moving party or make other statement as appropriate].

2. \_\_\_\_\_ [Set forth facts of settlement, e.g., On October 1, 2003, plaintiff and defendant in the above-entitled action reached agreement under which defendant will pay to plaintiff \$10,000 as a class fund for distribution to class members as shall be determined by the Court. In consideration of this amount, plaintiff has agreed to dismiss the above-entitled action against defendant (with prejudice). A copy of the settlement agreement is attached

to this declaration and incorporated by reference as though fully set forth herein.]

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]

NOTES.

**Authority:**

*CCP § 2015.5; Cal Rules Ct, Rule 3.770*

**Dismissal Based on Settlement:**

See 33.30-33.33



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Chapter 37 Settlement and Release

*3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.syn*

**§ 37.syn Synopsis to Chapter 37: Settlement and Release**

37.01 Scope.

37.02 Objective and Strategy.

37.03 CHECKLIST: Making a Settlement Offer Pursuant to CCP § 998.

37.03[1] Checklist for Party Making Settlement Offer.

37.03[2] Checklist for Party Responding to Settlement Offer.

37.04 Options and Strategies for Parties Considering Settlement.

37.05 CCP § 998 Offer Allows Judgment to Be Taken or an Award to Be Taken in Accordance With Certain Terms and Conditions.

37.05[1] 998 Offer Must Be Served No Less Than 10 Days Before Trial or Arbitration.

37.05[1A] Offer Must Be in Writing, State Terms and Conditions, and Allow for Acceptance Within It.

37.05[1B] Judicial Council Form May Be Used in Simple Cases.

37.05[2] Party Who Makes Erroneous 998 Offer May Seek Relief From Judgment Entered Per Mistaken Offer.

37.05[3] Rejection of Offer May Affect Parties' Ability to Obtain Costs.

37.06 Calculating Amount of 998 Offer.

37.07 Joint 998 Offers Are Permissible.

37.07[1] Joint Offers Must Be Unconditional.

37.07[2] Offer May Be Made to or by Multiple Plaintiffs.

37.07[2][a] Offer by Single Defendant to Multiple Plaintiffs Must Designate the Amount Offered to Each Plaintiff.

37.07[2][b] Offer Made by Multiple Plaintiffs Must Apportion Amount Demanded.

37.07[3] Offer May Be Made to or by Multiple Defendants.

37.07[3][a] Multiple Defendants May Make Joint 998 Offer to Single Plaintiff.

37.07[3][b] Single Plaintiff May Make 998 Offer to Multiple Defendants.

37.07[3][c] Plaintiff May Make 998 Offer to Fewer Than All Defendants.

37.08 Acceptance of 998 Offer Leads to Judgment.

37.08[1] 998 Offer Must Be Filed With Court When Offer Is Accepted.

37.08[2] Judgment Entered Pursuant to 998 Offer Operates as Bar.

37.08[3] Acceptance of 998 Offer Must Be Communicated to Offeror.

37.08[3][a] Service of Acceptance Not Required.

37.08[3][b] Written Acceptance Is Required by Statute.

37.08[3][c] Local Rules Specifying Methods of Service Are Irrelevant for Purposes of 998 Offer Acceptances.

37.08[4] Dismissal With Prejudice May Serve as Equivalent of Judgment.

37.08[5] Statutory Costs and Fees Not Available Only If Accepted 998 Offer Bars Them.

37.09 998 Offer Expires After 30 Days.

37.10 Party May Revoke 998 Offer Before Acceptance.

37.11 Counteroffer Does Not Terminate Original 998 Offer.

37.12 Party Rejecting 998 Offer Must Obtain More Favorable Judgment or Pay Specified Costs of Other Party.

37.12[1] Plaintiff Who Rejects 998 Offer and Fails to Obtain More Favorable Judgment Does Not Recover Postoffer Costs and Must Pay Defendant's Postoffer Costs.

37.12[1][a] Plaintiff Does Not Recover Postoffer Costs.

37.12[1][b] Plaintiff Must Pay Defendant's Postoffer Costs.

37.12[1][c] Postoffer Costs Excluded in Determining Whether Plaintiff Obtained More Favorable Judgment.

37.12[1][d] Before Awarding Costs When There Has Been a Joint Offer, Court Must Be Able to Apportion Offer.

37.12[1][e] Postoffer Payments Added to Judgment.

37.12[1][f] Nonmonetary Elements Must Be Considered in Calculation of Award.

37.12[2] Defendant Who Rejects 998 Offer and Fails to Obtain More Favorable Judgment May Be Ordered to Pay Plaintiff's Costs.

37.12[3] Offeree Has Burden of Showing Any Defect Claimed as Basis for Rejection.

37.13 Court May Order Party to Pay Other Party's Expert Costs When 998 Offer Is Not Accepted and Offeree Fails to Obtain More Favorable Judgment.

37.14 Defendant Who Does Not Accept 998 Offer and Fails to Obtain More Favorable Judgment Must Pay Plaintiff Prejudgment Interest in Personal Injury Actions.

37.14[1] CC § 3291 Applies in "Personal Injury" Actions.

37.14[2] Definition of "Personal Injury" Depends on Nature of Action.

37.14[3] Award May Be Allocated Between Personal Injury and Other Injury in Mixed Actions.

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37.14[5] CC § 3291 Does Not Apply to Public Entity or Employee.

37.14[6] Award Is Mandatory If Statutory Conditions Are Met.

37.14[7] Complaint Need Not Include Prayer for Prejudgment Interest.

37.14[8] Prejudgment Interest Is Calculated According to the Statute.

37.14[9] Policy Limits Offer by Insurer Terminates Obligation to Pay Prejudgment Interest.

37.14[10] Prejudgment Interest Excluded in Determining Whether Plaintiff Obtained More Favorable Judgment.

37.15 CCP § 998 Offers Subject to Reasonableness Requirement.

37.15[1] Party May Not Claim Costs After Unreasonable 998 Offer.

37.15[2] Offer Measured by Objective Tests.

37.15[3] Judgment More Favorable Than Offer Is Prima Facie Evidence of Reasonableness.

37.16 CCP § 998 Will Not Apply Unless Court Can Determine If Judgment More Favorable Than Offer.

37.17 CCP § 998 Offers Specifically Not Available in Certain Actions.

37.17[1] CCP § 998 Does Not Apply in Eminent Domain Proceedings.

37.17[2] CCP § 998 Does Not Apply in Some Inverse Condemnation Actions.

37.17[3] CCP § 998 Does Not Apply in Family Law Matters.

37.17[4] CCP § 998 Does Not Apply in Enforcement Actions by Public Prosecutors.

37.18 CHECKLIST: Entering Into a Settlement Agreement.

37.19 Attorney Must Have Authority to Enter Into Agreement.

37.20 Attorney Must Communicate All Written Settlement Offers to Client.

37.21 Litigants Permitted to Enter Into Settlements Without Agreement of Attorney.

37.22 Settlement Agreements Governed by Contract Principles.

37.22[1] Parties Should Look to Contract Law in Preparing Settlement Agreements.

37.22[2] Consideration Is Required for Valid Settlement Agreement.

37.22[3] Settlement Agreements Are Subject to Statute of Frauds.

37.22[4] Statutes May Provide for Exceptions From General Contract Principles.

37.22[4][a] Cy Pres Distribution of Residue From Settlement Occurs Unless Agreement Disposes of Residue Completely.

37.22[4][b] Signed Written Settlement Agreement Resulting From Mediation May Be Made Not Confidential by Its Terms.

37.22[5] Only Amount of Settlement May Be Confidential Under Agreement Concerning Conduct That May Be Prosecuted as Felony Sexual Offense.

37.23 Plaintiff May Settle With Less Than All Joint Codefendants.

37.23[1] Good-Faith Settlement With Fewer Than All Defendants Does Not Discharge Others From Liability to Plaintiff.

37.23[2] Good-Faith Settlement With Fewer Than All Defendants Reduces Claims Against Other Parties.

37.23[3] Reduction May Be Assessed by Jury or Court.

37.23[4] Good-Faith Settlement With Fewer Than All Defendants Discharges Settling Defendant From Liability for Contribution or Equitable Indemnity.

37.23[5] If Settling Tortfeasor Paid More Than Required, Settlor May Be Entitled to Comparative Indemnity.

37.23[6] Future Payments Are Discounted to Present Cash Value.

37.23[7] Nonmonetary Consideration.

37.23[7][a] Must Be Valued and Used to Offset Judgment.

37.23[7][b] Valuation Must Be Made in Good Faith and Should Be Valued at Time of Settlement.

37.23[8] Plaintiff May Receive More Than Total Judgment Entered If Settling Defendant Assigns Indemnity Rights.

37.23[9] Parties Must Include a Valuation or Allocation in Agreement If Cash Amount Is Not Determinative.

37.24 Proposition 51 Restricts Liability for Noneconomic Damages.

37.24[1] Party Is Only Severally Liable for Own Comparative Share of Noneconomic Damages.

37.24[2] Manner of Apportionment.

37.24[2][a] Parties to Settlement May Agree on Apportionment Scheme.

37.24[2][b] Settlement May Be Apportioned in Same Ratio as Jury Apportioned Damages.

37.25 Plaintiff May Enter Into "Sliding Scale" or "Mary Carter" Agreement With One or More Defendants.

37.25[1] "Sliding Scale" Agreement Limits Liability of Agreeing Defendant.

37.25[2] "Sliding Scale" Agreement Requires Notice of Intent.

37.25[3] Parties Must Inform Court of Agreement.

37.25[4] Court Must Disclose Agreement to Jury Under Certain Circumstances.

37.26 Plaintiff or Other Party Seeking Affirmative Relief Must Notify Court of Settlement on Mandatory Judicial Council Form.

37.27 Plaintiff or Other Party Seeking Affirmative Relief Must Serve and File Request for Dismissal.

37.27[1] Request for Dismissal Is Generally Filed Within 45 Days of Settlement.

37.27[2] Request for Dismissal May Be Filed Later Under Certain Circumstances.

37.27[2][a] Request May Be Filed After Completion of Settlement Terms Performed More Than 45 Days After Settlement Date.

37.27[2][b] Request May Be Filed After Hearing on Motion to Approve Settlement of Claims By Minor or Person With Disability.

37.27[2][c] Request May Be Filed By Deadline Set By Court on Request for Extension of Time to File.

37.27[3] Due Process Requires Notice to Parties Before Entry of Dismissal.

37.28 CHECKLIST: Bringing Motion to Determine Good-Faith Settlement.

37.28[1] Moving Party's Checklist.

37.28[2] Opposing Party's Checklist.

37.29 Motion to Determine Good-Faith Settlement.

37.29[1] Any Party May Request a Hearing.

37.29[2] Parties Must Be Granted Hearing, If Requested, When Settlement Reached Before Judgment Is Entered.

37.29[3] Motion Applies to Personal Injury Actions and Tort Actions Arising Out of Commercial Transaction.

37.29[4] Motion Does Not Apply to Primary Insurers of the Same Risk.

37.29[5] Must Be More Than One Tortfeasor or Obligor.

37.29[6] Settlement Must Involve the Plaintiff or Claimant and One or More of the Alleged Tortfeasors.

37.30 Test for Good Faith.

37.30[1] Court Ascertains Whether Settlement Is Grossly Disproportionate to Reasonable Estimate of Settlor's Liability.

37.30[2] Various Factors Considered.

37.30[3] Evaluation Made on Basis of Information Available at Time of Settlement.

37.30[4] Gross Disproportionality to Damages Sought in Complaint Not Dispositive.

37.31 Good-Faith Determination.

37.31[1] By Noticed Motion.

37.31[1][a] Noticed Motion Required If Hearing Requested.

37.31[1][b] Moving Papers Must Be Served and Filed at Least 16 Court Days Prior to Hearing.

37.31[1][c] Court May Shorten Time for Notice for Good Cause.

37.31[1][d] Opposing Papers Must Be Filed and Served at Least 9 Court Days Prior to Hearing.

37.31[1][e] Reply Papers Must Be Filed and Served at Least Five Court Days Prior to Hearing.

37.31[2] By Application.

37.31[2][a] Must Give Notice of Settlement to All Parties and Court and Present with Application and Proposed Order.

37.31[2][b] Application Must Indicate Terms of Settlement.

37.31[2][c] Notice, Application and Order Must Be Sent by Certified Mail.

37.31[2][d] Within 25 Days of Mailing or 20 Days of Personal Service, Nonsettling Party May File Motion to Contest Good Faith of Settlement.



- 37.31[2][e] If No Parties File Motion, Court May Approve Settlement.
- 37.31[2][f] May Not Use Application Procedure If Settlement Includes Confidentiality Agreement.
- 37.31[3] Due Process Requires Notice to All Tortfeasors.
- 37.31[4] Court Does Not Require Jurisdiction Over Tortfeasor.
- 37.32 Good-Faith Determination Is a Question of Fact.
- 37.33 Burden of Proof to Show Lack of Good Faith Is on Nonsettling Tortfeasor.
- 37.34 Court May Decide Based on Affidavits or Declarations but May Receive Other Evidence.
- 37.35 Moving Party Must Set Forth Evidentiary Basis of Allocations and Valuations.
- 37.36 Party Cannot Seek Confirmation of Settlement and Withhold It on Grounds of Confidentiality.
- 37.37 Objecting Party May Move for Continuance.
- 37.38 Special Master May Be Used to Allow Court to Make Independent Judgment.
- 37.39 Jury Trial Not Required for Hearing.
- 37.40 Settling Defendant May Recover Comparative Indemnity From Nonsettling Tortfeasor.
- 37.41 Claims for Indemnity Are Barred by Good-Faith Settlement.
- 37.42 Sliding Scale Agreements May Be Confirmed as Good-Faith Agreements.
- 37.43 Settling Party May Obtain Discharge From Comparative Indemnity Claims by Requesting Dismissal of Affected Pleading or Portion of Pleading.
- 37.44 Judicial Determination That Settlement Is Not in Good Faith Does Not Necessarily Invalidate Settlement.
- 37.45 Review of Good-Faith Settlement Determination.
- 37.45[1] Good-Faith Determination Is Interlocutory and Nonappealable, but Determination May Be Reviewed by Writ.
- 37.45[2] Writ Petition Must Be Filed Within 20 Days After Service of Written Notice of Determination or as the Court Allows.
- 37.45[3] Reviewing Court Must Notify Parties of Decision on Whether to Hear Writ Within 30 Days of Receipt of Materials.
- 37.46 Settlement Agreement May Be Enforced by Parties.
- 37.46[1] Settlement Agreements Are Governed by Contract Principles.
- 37.46[2] Oral Settlements Enforceable Unless Statute of Frauds Applies.

37.46[3] Settlement May Be Enforced by Summary Judgment Motion.

37.46[4] Settlement May Be Raised as Affirmative Defense.

37.46[5] Settlement May Be Enforced by Special Motion.

37.47 Party May Make Motion to Enforce Settlement and Enter Judgment Under CCP § 664.6.

37.47[1] CCP § 664.6 Allows for Judgment by Stipulation.

37.47[2] CCP § 664.6 Inapplicable to Settlements Reached Before Lawsuit Filed or After Judgment.

37.47[3] CCP § 664.6 Allows Court to Retain Jurisdiction to Enforce Settlement.

37.47[4] Court Must Determine If Parties Entered Into Binding Settlement.

37.47[5] Parties Must Sign Written Settlement Agreements.

37.47[6] Oral Settlement Must Be Made Before the Court.

37.47[7] Five-Year Dismissal Deadline Not Applicable.

37.48 Party Can Plead Compromise and Settlement as Affirmative Defense.

37.48[1] Party Must Plead Elements of Compromise.

37.48[2] Party May Plead Accord and Satisfaction as Affirmative Defense.

37.48[3] Defendant May Plead Tender as Defense in Action to Recover Money.

37.49 Parties May File Supplemental Pleading and Seek Separate Trial When Settlement Reached Following Initial Pleadings.

37.50 Party May Move for Relief From Judgment Entered Pursuant to CCP § 998.

37.51 Parties to Appeal Reaching Settlement Must Inform Appellate Court.

37.51A Appellate Court May Reverse Judgment on Basis of Settlement Only Upon Proper Findings.

37.51B Standard of Review of Ruling on CCP § 664.6 Motion Is "Substantial Evidence."

37.52 CHECKLIST: Entering Into a Valid Release Agreement.

37.53 Options and Strategies for Entering Into a Valid Release Agreement.

37.54 Release Is Abandonment, Relinquishment, or Surrender of a Known Claim.

37.54[1] Definition of "Releasor" and "Releasee" Is Broader Than "Creditor" and "Debtor."

37.54[2] Covenant Not to Sue Is Not a Relinquishment but an Agreement Not to Enforce a Cause of Action.

37.55 Release Operates to Relinquish a Known Right or Claim.

37.55[1] Release Relinquishes Claim by Person in Whom It Exists.

37.55[2] Release Estops Parties From Relitigating Claim.

37.55[3] Release of One Joint Tortfeasor Does Not Release Others.

37.55[4] Release Does Not Extend to Unknown Claims.

37.55[5] Exculpatory Release That Exempts Releasor From Fraud, Willful Injury, or Violation of Law Is Invalid.

37.56 Rules Governing Contract Interpretation Apply to Releases.

37.56[1] Parties Generally Held to Express Terms of Release.

37.56[2] Courts Interpret Releases as They Would Any Contract.

37.56[3] Court Must Consider Other Documents Referred to in Release.

37.56[4] Court May Consider Extrinsic Evidence of Parties' Intentions.

37.56[5] Release Construed Against Drafting Party.

37.57 Valid Release Agreement Must Meet Certain Standards.

37.57[1] Parties Must Assent to Terms of Release.

37.57[2] Release Need Not Be Written Unless Statute of Frauds So Requires.

37.57[3] Oral Release Must Be Supported by Consideration.

37.57[4] Written Release Must Expressly Show Intent.

37.57[5] Release Is Operative Once Delivered.

37.57[6] If Release Contains a Condition Precedent, Release Is Not Operative Until Occurrence of Condition.

37.58 CHECKLISTS: Enforcing or Challenging a Release Agreement After Execution.

37.58[1] Enforcing a Release Agreement.

37.58[2] Opposing Enforcement of Release.

37.59 Methods for Enforcement of Release.

37.59[1] Release May Be Raised as Affirmative Defense to an Action.

37.59[2] Release May Be Enforced as a Specifically Performable Settlement and Release Agreement.

37.59[3] Release May Be Enforced by Declaratory Relief Action.

37.60 Party May Oppose Enforcement of Release.

37.60[1] Party May Challenge Validity of Release on Contract Grounds.

37.60[2] Party May Controvert Affirmative Defense Pleading Release.

37.60[3] Party May Bring Action to Cancel, Void, Reform, or Rescind a Release.

37.60[4] Challenging Party Has Burden of Proof.

37.61 Release May Be Subject to Rescission.

37.61[1] Release May Be Rescinded in Same Manner as Other Contracts.

37.61[2] Rescission Only Necessary With Respect to Voidable Release.

37.61[3] Release May Be Rescinded on Various Grounds.

37.61[3][a] Release May Be Rescinded Mutually by Consent.

37.61[3][b] Party May Rescind Due to Lack of Consent.

37.61[3][c] Party May Rescind Due to Mutual Mistake.

37.61[3][d] Party May Rescind Due to Mental Incompetence.

37.61[3][e] Party May Rescind for Failure of Consideration.

37.61[4] Rescinding Party Must Give Notice to Other Party.

37.61[5] Release Subject to Rescission May Be Ratified.

37.62 Certain Releases May Be Absolutely Void.

37.62[1] Release Is Void When There Is Fraud in Its Inception.

37.62[2] Release Is Void When Releasor Is Mentally Incompetent.

37.62[3] Rescission Is Unnecessary When Release Is Absolutely Void.

37.63 Plaintiff's or Defendant's CCP § 998 Offer to Compromise Before Commencement of Trial.

37.63A Judicial Council Form CIV-090, Offer to Compromise and Acceptance Under Code of Civil Procedure Section 998

37.64 Notice of Acceptance of Plaintiff's or Defendant's CCP § 998 Offer to Compromise.

37.65 Judicial Council Form CM-200 Notice of Settlement of Entire Case

37.66 Notice of Motion to Enter Judgment Pursuant to Settlement.

37.67 General Release Agreement.

37.68 Notice of Motion and Declaration for Hearing Regarding Good Faith of Settlement Finding.

37.69 Order for Determination of Good-Faith Settlement.

37.70 Notice of Good-Faith Settlement.

37.71 Application for Order Determining Good Faith of Settlement.

37.72 Declaration in Support of Application for Determination of Good-Faith Settlement.



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Chapter 37 Settlement and Release  
I. STRATEGY

*3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.01*

**37.01 Scope.**

This chapter covers:

- Objectives and strategy for making a settlement offer and entering into settlement and release agreements [see 37.02].
- Making and responding to settlement offers pursuant to *CCP* § 998 [see 37.03 -37.07, 37.09 -37.11, 37.15 -37.17; Forms: see 37.63, 37.64].
- The implications of acceptance or rejection of settlement offers pursuant to *CCP* § 998 [see 37.08, 37.12-37.14].
- Drafting and entering into settlement agreements [see 37.18 -37.22, 37.25 -37.27; Form: see 37.65].
- Settlement with one or more, but less than all, co-defendants when there are multiple defendants [see 37.23].
- Motion to confirm that settlement is in good faith [see 37.28 -37.45; Forms 37.68, 37.69]
- Enforcement and objection to the enforcement of settlement agreements subsequent to their execution [see 37.46 -37.51; Form: see 37.66].
- Forming and interpreting release agreements [see 37.52 -37.57; Form: see 37.67].
- Enforcing, or opposing the enforcement of, release agreements [see 37.59 -37.62].

**Core Statutes:**

*CC* §§ 1541-1543; *CCP* §§ 664.6, 877, 877.5, 877.6, 998

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsGeneral Overview



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Chapter 37 Settlement and Release  
I. STRATEGY

*3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.02*

**37.02 Objective and Strategy.**

Voluntary settlement and compromise of a claim allows the parties to resolve a dispute before or after litigation begins. *CCP* § 998 provides specific procedures for settlement offers. A *CCP* § 998 offer raises the possibility that the responsibility for payment of costs and expert witness fees will shift to the other party.

Under *CCP* § 877, a good-faith settlement with less than all of the joint tortfeasor defendants reduces the potential liability of the nonsettling defendants by the amount of the settlement and releases the settling party from liability to the nonsettling defendants for contribution or equitable indemnity. A settling party can file a *CCP* § 877.6 motion to confirm that the settlement is in good faith to end any further involvement in the litigation. The settlement may also provide protection from other joint tortfeasors, even though they are not parties to the case. The settlement can be raised as a bar in a subsequent action or a nonparty may be given notice of a good-faith application for a motion.

General contract principles apply to settlement agreements, and a settlement agreement may be enforced in the same manner as any other contract or by a *CCP* § 664.6 motion. Parties to a settlement commonly execute a release agreement whereby the releasor agrees to relinquish a known claim. While under *CC* § 1542, a general release does not extend to claims that are unknown or unsuspected at the time of the execution of the release, all standard settlement agreements executed in California should include a waiver of the provisions of that statute.

For continuity, tactical reasons, and to avoid the filing of a separate action to enforce the agreement, parties often request the court to retain jurisdiction over the settlement agreement because absent this request the court loses jurisdiction once the underlying suit is dismissed.

Settlements before trial resolve more than 95% of all litigation. Even those cases that are tried are often ultimately resolved by settlement.

Early settlements promote the parties' interest in resolving the dispute before substantial litigation expense is incurred. But often the parties start a case with the extreme positions that prompted the plaintiff to file a complaint; the parties only recognize the strengths of their opponent's positions and the weaknesses of their own positions after some discovery and motion practice has occurred. Settlements often occur only after the case reaches the "courthouse steps," because it takes the imminence of a trial and the associated risk of loss to force the parties to realistically evaluate their positions. In the end, cases settle only when both sides conclude that on a cost-benefit basis settlement is preferable to



taking the case to trial.

Tactical decisions often must be made as to whether the positions of the parties are close enough to merit disclosing evidence or arguments that would be more effectively made at trial under circumstances in which the other side may not be prepared. Generally a favorable settlement can be achieved only when the other side is convinced that a settlement will produce a more favorable result than proceeding to trial.

Civil litigation often involves a "zero-sum game" because the dispute is primarily a monetary dispute--what the plaintiff gets necessarily equals what the defendant must pay. But occasionally there are opportunities to devise creative settlement strategies where each side can maximize its interest without necessarily adversely affecting the opposing party's interest. The parties sometimes can achieve at least a partial "win-win" result by negotiating with consideration of the tax implications of the settlement. For example, a structured settlement can be used so that the defendant's purchase of an annuity contract is deductible by the defendant at the time of settlement, but taxable to the plaintiff only when the annuity payments are received by the plaintiff over a period of years. The parties may also be able to affect the tax implications of a settlement by making a defensible allocation in the settlement agreement between different types of payments--some of which are taxable and some of which are not.

Settlements usually are intended by the defendant to buy "complete peace" so the plaintiff never again "darkens the defendant's door." To achieve that goal, care is required to assure that the definition of the parties releasing claims and the parties being released are broad enough to assure that other individuals affiliated with the parties, such as agents and subsidiaries, are within the scope of the releasors and releasees. Although standard "boilerplate" may seem unnecessary, serious problems can result from a release that is not broad enough to protect individuals or entities affiliated with--and perhaps entitled to indemnity from--the settling party. Conversely, while it is customary to have a very broad definition of the claims released and to include a mutual release, it can be very important to assure that no inadvertent release of claims occurs. For example, a bank that enters a mutual release in an employment dispute would need to assure that it has not precluded itself from filing an action against the plaintiff if the plaintiff failed to make timely payments on the plaintiff's home or auto loan.

#### **Judge's Perspective:**

The Court is always looking for ways to assist the parties in an early resolution of the matter. From the court's perspective, this is the single most important opportunity in the life of the case that the court can facilitate. If counsel feel comfortable with the trial judge, then it would be wise to engage that judge in settlement discussions. While counsel will need to stipulate to have the trial judge serve in both capacities, the use of the trial judge has an added benefit, because the trial judge is familiar with the case and can candidly share thoughts about the case's strengths and weaknesses. The court should always be looking for opportunities to assist counsel in the resolution of the case.

#### **Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 174, Costs and Attorney's Fees; Ch. 300, Indemnity and Contribution; Ch. 520, Settlement and Release (Matthew Bender).

California Points and Authorities, Ch. 60, Costs; Ch. 115, Indemnity and Contribution; Ch. 131, Judgments (Matthew Bender).

#### **Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
[Civil Procedure](#)[Settlements](#)[General Overview](#)



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3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.03

**37.03 CHECKLIST: Making a Settlement Offer Pursuant to CCP § 998.**

**37.03[1] Checklist for Party Making Settlement Offer.**



Determine timing:

- ☐ 998 offer must be served no less than 10 days before trial or arbitration.

**Authority:**

*CCP § 998(b)*

**Discussion:**

*See 37.05[1]*



Determine whether 998 offer will be made by or to multiple plaintiffs:



Offer by single defendant to multiple plaintiffs must designate amount offered to each.

**Authority:**

*Randles v. Lowry (1970) 4 CA3d 68, 74, 84 CR 321 ; Meissner v. Paulson (1989) 212 CA3d 785, 791, 260 CR 826*

**Discussion:**

*See 37.07[2][a]*



Offer by multiple plaintiffs must apportion amount demanded by each plaintiff.

**Authority:**

*Hurlbut v. Sonora Cmty. Hosp. (1989) 207 CA3d 388, 409-410, 254 CR 840*

**Discussion:**

See 37.07[2][b]

☐ Determine whether 998 offer will be made by or to multiple defendants:

☐ Multiple defendants may make 998 offer to single plaintiff.

**Authority:**

*Santantonio v. Westinghouse Broad. Co. (1994) 25 CA4th 102, 114-116, 30 CR2d 486*

**Discussion:**

See 37.07[3][a]

☐ Single plaintiff may make 998 offer to multiple defendants or to less than all defendants. Plaintiff must specify the amount he or she seeks from each defendant in the offer.

**Authority:**

*Taing v. Johnson Scaffolding Co. (1992) 9 CA4th 579, 586, 11 CR2d 820*

**Discussion:**

See 37.07[3][b], [c]

☐ Determine appropriate amount for 998 offer.

**Discussion:**

See 37.06

☐ Determine whether 998 offer should include a request for dismissal with prejudice.

**Authority:**

*Goodstein v. Bank of San Pedro (1994) 27 CA4th 899, 905-906, 32 CR2d 740*

**Discussion:**

See 37.08[4]

☐ Draft 998 offer and serve on relevant opposing party(ies).

☐ Offer must be in writing, include a statement of the offer, state the terms and conditions of the judgment or award, and include a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted.

**Authority:**

*CCP § 998(b)*

**Discussion:**

See 37.05[1], 37.05[1A], 37.05[1B]

**Forms:**

See 37.63, 37.63A

- ☐ If offer is accepted, file offer and proof of acceptance with the court or arbitrator.

**Authority:**

*CCP § 998(b)(1)*

**Discussion:**

See 37.08[1]

**37.03[2] Checklist for Party Responding to Settlement Offer.**



If accepting, party must accept offer within 30 days after it is made or prior to trial, whichever occurs first.



Five day extension of offer served by mail.

**Authority:**

*CCP §§ 998(b)(2), 1013(a)*

**Discussion:**

See 37.09

- ☐ If desired, execute acceptance of 998 offer and serve on offeror.



Acceptance of a 998 offer, whether made on the document containing the offer or on a separate document of acceptance, must be in writing and signed by counsel for the accepting party or, if not represented, by the accepting party.

**Authority:**

*CCP § 998(b)*

**Discussion:**

See 37.08[3][b]

**Form:**

See 37.64



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*3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.04*

#### **37.04 Options and Strategies for Parties Considering Settlement.**

A party making a settlement offer needs to evaluate a variety of factors. The factors include the potential value of the case and the likelihood of winning, taking into consideration the strength of the case on the law and evidence, including the potential effectiveness or weakness of crucial witness for both parties. The party responding to the offer will engage in essentially the same evaluation, but considering exposure as opposed to value.

If a party has interests that extend beyond the present case, another factor may appear. Resistance or amenability to settlement may be influenced by a party's desire to obtain a precedent, or to avoid setting one. In some instances, extreme animosity between the parties may be an obstacle.

In most cases in which an offer pursuant to *CCP* § 998 is made, the parties discuss resolution by some means other than the entry of judgment. Nevertheless, if there is a possibility that judgment can be taken against your client, the ramifications of the judgment should be thoroughly discussed with that client.

##### **Judge's Perspective:**

The single most important factor that counsel should be mindful of when formulating demands and offers is that whatever the figure is, make sure that credibility rings through the amount. Too often counsel forget that their conduct throughout the settlement process brings credibility into play, and if lost, the dynamics of settlement can be markedly affected.

##### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Settlements General Overview



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3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.05

### **37.05 CCP § 998 Offer Allows Judgment to Be Taken or an Award to Be Taken in Accordance With Certain Terms and Conditions.**

**37.05[1] 998 Offer Must Be Served No Less Than 10 Days Before Trial or Arbitration.** An offer pursuant to *CCP* § 998 must be served not less than 10 days before the commencement of trial or contractual arbitration under *CCP* §§ 1281 (arbitration of contracts generally) or 1295 (arbitration of medical services contracts) [*CCP* § 998(b)].

#### **Example:**

An uninsured motorist arbitration pursuant to *Ins Code* § 11580.2, even though it is mandated by statute, is a contractual arbitration subject to the provisions of *CCP* § 1281, and therefore is an arbitration within the meaning of *CCP* § 998 and subject to the latter statute's cost-shifting provisions [ *Pilimai v. Farmers Ins. Exchange Co.* (2006) 39 C4th 133, 141-142, 45 CR3d 760, 137 P3d 939 ].



#### **Timing:**

For purposes of *CCP* § 998(b), a trial or arbitration is deemed to be commenced at the beginning of the opening statement of the plaintiff or counsel and, if there is no opening statement, at the time the oath or affirmation is administered to the first witness, or the introduction of any evidence [*CCP* § 998(b)(3)].

The time for serving an offer under *CCP* § 998 must be extended by the requisite number of days prescribed by *CCP* § 1013 before the commencement of the action for methods of service other than personal [ *Lecuyer v. Sunset Trails Apts.* (2004) 120 CA4th 920, 927 ]. However, no formal proof of service is required; and it is sufficient proof of mailing if the notice or other paper served by mail bears a notation of the date and place of mailing [ *Berg v. Darden* (2004) 120 CA4th 721, 733 ].



#### **Strategic Point--Plaintiff:**

*CCP* § 998 does not set any minimum period that must elapse following commencement of suit for service of a valid 998 offer [ *Barba v. Perez* (2008) 166 CA4th 444, 452, 82 CR3d 715 ]. Thus, an early 998 offer by the plaintiff that the defendant ignores may bind the defendant, even if the deadline for a

response expires before the deadline for filing an answer in the action. However, the discretionary grant of costs is still subject to the requirement of reasonableness [see 37.15[2]]. In a decision enforcing a 998 offer against a defendant who had sufficient information about the reasonableness of the offer when it was made, the court of appeals suggested in dictum that a plaintiff's 998 offer in the absence of sufficient knowledge of the facts on the part of the defendant and the plaintiff's uncooperation with defendant's informal discovery requests for additional information may be grounds for denying costs [ *Barba v. Perez* (2008) 166 CA4th 444, 452, 82 CR3d 715 (998 served with complaint was binding after no response by defendant who had full information on plaintiff's damages)]. Accordingly, plaintiff may gain advantage by filing a complaint with detailed allegations with or closely followed by a reasonable 998 offer. An additional benefit of serving a 998 offer early is that interest on the judgment is calculated from the date of the 998 offer in personal injury cases [see CC § 3291], so the earlier the offer is served, the more interest accrues.

**37.05[1A] Offer Must Be in Writing, State Terms and Conditions, and Allow for Acceptance Within It.** A 998 offer must be in writing, include a statement of the offer, and state the terms and conditions of the judgment or award. The offer must also include 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)].



**Strategic Point:**

The offer does not have to dispose of all claims by or against the offeree [ *Arno v. Helinet Corp.* (2005) 130 CA4th 1019, 1026 (relief granted after rejection of offer regarding some claims)]. Furthermore, that the offer did not cover all claims has not resulted in a proration of the costs, fees, or interest awarded [see *Arno v. Helinet Corp.* (2005) 130 CA4th 1019, 1026 ]. However, in order that the court to determine whether the judgment is more favorable than the offer, counsel for the offeror of an offer covering only some claims should see to it that the terms of the judgment specify the relief granted for the particular claims encompassed in the offer separately from relief granted for other claims.



**Cross Reference**

Form, offer to compromise before commencement of trial, see 37.63.

**37.05[1B] Judicial Council Form May Be Used in Simple Cases.** The Judicial Council has approved Form CIV-090, Offer to Compromise and Acceptance Under *Code of Civil Procedure Section 998*, for optional use in making and accepting 998 offers in simple cases. The form may be used in cases in which there is one plaintiff and one defendant and judgment is solely monetary.

**Prerequisite:**

Judicial Council Form CIV-090 requires that a proposed judgment be included with the completed form.



**Cross Reference:**

Judicial Council Form CIV-090, Offer to Compromise and Acceptance Under *Code of Civil Procedure Section 998*, see 37.63A.

**37.05[2] Party Who Makes Erroneous 998 Offer May Seek Relief From Judgment Entered Per Mistaken Offer.** If a party makes a clerical error in a CCP § 998 offer to compromise, he or she may seek relief pursuant to the discretionary relief provision of CCP § 473(b) [ *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 252, 121 CR2d 187, 47 P3d 1056 (party making offer was allowed to seek discretionary relief when legal assistant typed the word "against" instead of the phrase "in favor of" and therefore the document mistakenly offered to settle the case for a judgment against the attorney's client)].



### **Cross References:**

Discussion of relief from judgment under *CCP* § 473(b), see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 29.10 *et seq.*; California Forms of Pleading and Practice, Ch. 489, Relief From Judgments and Orders (Matthew Bender).

**37.05[3] Rejection of Offer May Affect Parties' Ability to Obtain Costs.** *CCP* § 998 provides for withholding or augmenting of allowable costs pursuant to *CCP* §§ 1031 and 1032 and expert witness fees [*CCP* § 998(c)(1)(d)] when the party to whom the offer is made does not obtain a judgment or award more favorable than the offer.

### **Cross Reference:**

Discussion of calculation of the amount of an award, see 37.12.

Allowable costs are set out in *CCP* § 1033.5 and include attorney's fees authorized by statute or by law and those recoverable under a contract [*CCP* § 1033.5(a)(10)]. In addition, rejection of the offer may entitle a personal injury plaintiff to recover interest. *CC* § 3291 provides for the payment of interest at 10 percent from the date of the first offer of judgment that is exceeded by the verdict.

### **Cross References:**

Discussion of the effect of rejection of a 998 offer on costs, see 37.12.

Discussion of the award of prejudgment interest, see 37.14.



### **Warnings:**

- The party making the offer to compromise should cite to *CCP* § 998 within the offer to put the opposing party on notice or the court may refuse to award costs to which the party would otherwise be entitled [ *Stell v. Jay Hales Dev. Co.* (1992) 11 CA4th 1214, 1231-1232, 15 CR2d 220 (settlement proposal making no reference to *CCP* § 998 and requiring an immediate response not a statutory *CCP* § 998 offer entitling party to expert witness fees)].

- Before making or responding to a 998 offer, discuss with your client the client's potential liability for costs (and in the case of a personal injury defendant, interest) triggered by the 998 offer. A client is not fully and fairly advised concerning the settlement offer without this information.

### **Strategic Points--Defendant:**



- *CCP* § 998 offers are particularly important in contract disputes in which the contract provides that the prevailing party recovers attorneys' fees [see *CC* § 1717]. Attorneys' fees invariably are far larger than the amount of recoverable costs. *CCP* § 998 allows a party to redefine success and ultimately be viewed as the "prevailing party" [ *Hsu v. Abbata* (1995) 9 C4th 863, 876, 39 CR2d 824, 891 P2d 804 ]. A *CCP* § 998 offer of judgment is a particularly important procedure for a defendant who is a party to a contractual attorneys' fee provision and faced with a contract claim by a plaintiff that is likely to recover some amount of damages, but whose settlement demands are excessive. The plaintiff in that situation may pursue the claim and take an unreasonable settlement position because it is likely to recover its

attorneys' fees. *CCP* § 998 allows a defendant in such a situation to turn the tables on such a plaintiff and create a risk that the plaintiff may be liable for the defendant's attorneys' fees.

■ If the defendant wishes to waive liability for contractual attorney's fees and costs, it should expressly so state in its 998 offer. If the defendant neglects to include a waiver of fees and costs in the 998 offer, the defendant may be liable for those items as postjudgment costs [see *Ritzenthaler v. Fireside Thrift Co.* (2001) 93 CA4th 986, 991, 113 CR2d 579 ].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Offers of Judgment Making of Offers Civil Procedure Settlements Offers of Judgment Rejections Civil Procedure Settlements Offers of Judgment Time Limitations



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### **37.06 Calculating Amount of 998 Offer.**

Setting the amount of an offer of judgment under *CCP* § 998 can be difficult because the amount needs to be favorable enough to the other side that there is a reasonable likelihood of obtaining a result at trial that is more favorable to the client. If the ultimate result is not more favorable than the bar set by the offer, no cost-shifting will occur. The theoretically ideal *CCP* § 998 offer is one dollar more favorable to the other side than the ultimate outcome. As a result, defendants sometimes offer a round number plus one dollar (\$1,000,001) and plaintiffs offer a round number minus one dollar (\$999,999). Often the purpose of a *CCP* § 998 offer is to "up the stakes" and to create some downside to the opposing party for taking an unreasonable settlement position based on the gamble that a jury might reach an unusual result. But if the offer is not close enough to the other party, the other party will not feel any pressure as a result of the increased stakes. Also, when calculating the offer, be sure to account for costs that may put you over or under your initial calculations.

Prior to making a *CCP* § 998 offer to compromise, it is important to properly evaluate the amount you are requesting. Several resources are available to assist you in determining what the value should be. Among them are the use of jury reporting services, speaking with fellow counsel, and having a firm understanding of the nature and extent of the damages and economic factors in the underlying litigation. Because the strategic significance of a *CCP* § 998 offer to compromise cannot be overstated, you must perform your due diligence before ever proposing a settlement figure.

#### **Preparing for Negotiation of a Damages Demand Using Online Resources:**

Many resources are available online for researching recent verdicts and settlements that can help you propose a reasonable demand for damages or assess your opponent's demand. The nature of the injury and other factual patterns can guide you to online resources featuring both California or national recovery profiles. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal U.S. > California > Find Briefs, Motions, Pleadings & Jury Verdicts > Jury Verdicts and Settlements, Combined

 Sample Search: To find examples of California verdicts or settlements in a products liability action involving quadriplegia injuries from a "rollover" accident, try this search:

*product liability and quadr! and rollover or roll over.*

☐ Sample Search: To find examples of California verdicts or settlements in a wrongful death action based on misdiagnosis, try this TOPIC segment search: *topic (wrongful death and misdiagnos! or diagnos! and cancer!)*.

■ Legal tab > States Legal -- U.S. > California > Find Briefs, Motions, Pleadings & Jury Verdicts > What's It Worth? A Guide to Personal Injury Awards and Settlements.

☐ Sample Search: For a national perspective in helping to assess the damages demand for, e.g., an ankle injury, try an INJURY segment search, such as: *injury (brok! or fractur! /2 ankle)*.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSettlementsOffers of JudgmentMaking of Offers



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**37.07 Joint 998 Offers Are Permissible.**

**37.07[1] Joint Offers Must Be Unconditional.** A joint 998 offer, either by a single party to multiple parties or by multiple parties to a single party, must be unconditional [ *Hutchins v. Waters* (1975) 51 CA3d 69, 72-74, 123 CR 819 ]. For example, an offer to multiple parties may not be conditioned on acceptance by all of them [ *Burch v. Children's Hosp. of Orange County Thrift Stores, Inc.* (2003) 109 CA4th 537, 544, 135 CR2d 404 ].

The conditionality of an offer can be implied from the nature of the offer [ *Menees v. Andrews* (2004) 122 CA4th 1540, 1546 ]. The offering party has the burden of showing that a joint offer is unconditional [ *Menees v. Andrews* (2004) 122 CA4th 1540, 1546 ].

**37.07[2] Offer May Be Made to or by Multiple Plaintiffs.**

**37.07[2][a] Offer by Single Defendant to Multiple Plaintiffs Must Designate the Amount Offered to Each Plaintiff.** A 998 offer to multiple plaintiffs must designate the amount offered to each plaintiff or it is a nullity [ *Randles v. Lowry* (1970) 4 CA3d 68, 74, 84 CR 321 ; *Meissner v. Paulson* (1989) 212 CA3d 785, 791, 260 CR 826 ].

**Exception:**

Where there is more than one plaintiff, a defendant may still extend a single, joint offer, conditioned on acceptance by all of them, if the separate plaintiffs have a unity of interest such that there is a single, indivisible injury [ *Peterson v. John Crane, Inc.* (2007) 154 CA4th 498, 505, 65 CR3d 185 ].

**Distinguish:**

A separate 998 offer or an apportioned and unconditional joint offer only has to be extended to each party, not to each capacity of multiple capacities in which a singular individual may choose to sue. Thus, only a single offer to more than one *person* must generally be apportioned and unconditional [ *Peterson v. John Crane, Inc.* (2007) 154 CA4th 498, 506-512, 65 CR3d 185 ].

**37.07[2][b] Offer Made by Multiple Plaintiffs Must Apportion Amount Demanded.** A 998 offer made by multiple plaintiffs must apportion the amount demanded among all the plaintiffs so that it can be determined whether any plaintiff received a more favorable amount at trial [ *Hurlbut v. Sonora Cmty. Hosp.* (1989) 207 CA3d 388,

409-410, 254 CR 840 ].

**Exception:**

At least one court has refused to apply this rule when the sole plaintiff whose case was tried was awarded damages in excess of the entire 998 offer to all plaintiffs [ *Fortman v. Hemco, Inc.* (1989) 211 CA3d 241, 262-263, 259 CR 311 ].

**Exception:**

Courts have split on whether this rule should apply in wrongful death actions [see, e.g., *Stallman v. Bell* (1991) 235 CA3d 740, 745-747, 286 CR 755 (court stated there is a single verdict in wrongful death action to be compared to single offer); *Canavin v. Pacific Southwest Airlines* (1983) 148 CA3d 512, 529-530, 196 CR 82 (court stated proper procedure was for court to apportion, in separate proceeding, the amount awarded in the verdict among various plaintiffs); *Gilman v. Beverly Cal. Corp.* (1991) 231 CA3d 121, 124-126, 283 CR 17 (joint offer void because wrongful death action is not joint cause of action, but merely involves compulsory joinder of the separate causes of action of each heir-plaintiff); *Smith v. Premier Alliance Ins. Co.* (1995) 41 CA4th 691, 698, 48 CR2d 461 (court has authority to apportion settlement)].

**37.07[3] Offer May Be Made to or by Multiple Defendants.**

**37.07[3][a] Multiple Defendants May Make Joint 998 Offer to Single Plaintiff.** Multiple defendants sued on a joint and several liability theory may make a joint offer to compromise to a single plaintiff, with all defendants to be released on acceptance of the offer [ *Santantonio v. Westinghouse Broad. Co.* (1994) 25 CA4th 102, 114-116, 30 CR2d 486 ; *Brown v. Nolan* (1979) 98 CA3d 445, 449-451, 159 CR 469 ].



**Warning:**

This is complicated by the fact that Proposition 51 eliminated joint and several liability for noneconomic damages. In cases involving noneconomic damages (e.g., pain and suffering), multiple defendants will have potentially varying liability for those damages [see CC § 1431.2].



**Cross References:**

Discussion of Proposition 51, see 37.24.

California Forms of Pleading and Practice, Ch. 300, Indemnity and Contribution (Matthew Bender).

**37.07[3][b] Single Plaintiff May Make 998 Offer to Multiple Defendants.** A plaintiff seeking damages against multiple defendants may make separate 998 offers to each defendant. However, in order for the 998 offer to trigger the penalties for nonacceptance, the offer must be sufficiently specific to determine the exact amount that the plaintiff is seeking from each defendant [ *Palmer v. Schindler Elevator Corp.* (2003) 108 CA4th 154, 157, 133 CR2d 339 ; *Taing v. Johnson Scaffolding Co.* (1992) 9 CA4th 579, 586, 11 CR2d 820 ].

**Exception:**

A 998 offer made to a married couple asserting damage to a singular interest in community property does not have to be allocated between husband and wife [ *Vick v. Dacorsi* (2003) 110 CA4th 206, 208 ]. However, a requirement of joint acceptance by plaintiffs who are a married couple makes the joint offer impermissibly conditioned upon joint acceptance [ *Menees v. Andrews* (2004) 122 CA4th 1540, 1544 ].



**Warnings:**

A plaintiff's lump sum offer to multiple defendants having potentially varying liability will not qualify as a valid 998 offer [ *Burch v. Children's Hosp. of Orange County Thrift Stores, Inc.* (2003) 109 CA4th

537, 547, 135 CR2d 404 ].

Note that Proposition 51 eliminated joint and several liability for noneconomic damages. In cases involving noneconomic damages (e.g., pain and suffering), multiple defendants will have potentially varying liability for those damages [see CC § 1431.2].



**Strategic Point--Plaintiff:**

If there is any possibility that the defendants will have varying liability, either serve separate 998 offers on each defendant or serve a single but apportioned offer on all defendants.

**37.07[3][c] Plaintiff May Make 998 Offer to Fewer Than All Defendants.** A plaintiff may also make a 998 offer to fewer than all defendants. The offer to a particular defendant may take into account the defendant's liability for the conduct of other defendants due to the principles of vicarious liability [ *Lakin v. Watkins Associated Industries* (1993) 6 C4th 644, 658 n9, 25 CR2d 109, 863 P2d 179 ; *Bihun v. AT&T Info. Sys., Inc.* (1993) 13 CA4th 976, 1000-1001, 16 CR2d 787 (involving 998 offers made to employer based on conduct of both employer and employee for which employer was liable under a vicarious liability theory)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSettlementsOffers of JudgmentMaking of Offers



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### **37.08 Acceptance of 998 Offer Leads to Judgment.**

**37.08[1] 998 Offer Must Be Filed With Court When Offer Is Accepted.** An accepted 998 offer must be filed, with proof of acceptance, with the court in which the action is pending, and the clerk or judge must enter the judgment accordingly [*CCP § 998(b)(1)*].

#### **Exception:**

If the settlement provides for a dismissal terminating the plaintiff's action with prejudice, there will be no "judgment" for the court to enter [*see 37.08[4]*].

If the matter is an arbitration, the offer with proof of acceptance must be filed with the arbitrator or arbitrators who must promptly render an award accordingly [*CCP § 998(b)(1)*].

**37.08[2] Judgment Entered Pursuant to 998 Offer Operates as Bar.** A judgment or award entered pursuant to *CCP § 998* operates as a bar to the reopening of the original controversy [ *County of Los Angeles v. Law Bldg. Corp.* (1967) 254 CA2d 848, 853, 62 CR 542 (compromise agreement resulting in dismissal); *Klinker v. Klinker* (1955) 132 CA2d 687, 695, 283 P2d 83 (judgment by stipulation)].

#### **➡ Cross Reference:**

Discussion of judgments operating as a bar to reopening a controversy, see California Forms of Pleading and Practice, Ch. 491, Res Judicata (Matthew Bender).

### **37.08[3] Acceptance of 998 Offer Must Be Communicated to Offeror.**

**37.08[3][a] Service of Acceptance Not Required.** *CCP § 998* does not require service of an acceptance; rather, the acceptance of an offer must be communicated to the offeror to become effective. Consent is deemed to be fully communicated as soon as the party accepting the proposal has put his or her acceptance in the course of transmission to the proposer [*CC § 1582*; *Drouin v. Fleetwood Enters.* (1985) 163 CA3d 486, 491, 209 CR 623 ].

**37.08[3][b] Written Acceptance Is Required by Statute.** Effective January 1, 2006, any acceptance of a 998 offer, whether made on the document containing the offer or on a separate document of acceptance, must be in writing



and signed by counsel for the accepting party or, if not represented by counsel, by the accepting party [CCP § 998(b)]. Under prior case decisions applying the general statutes on consent to contract [see CC § 1582], any mode of communicating acceptance was appropriate unless the offer specifies a certain mode [CC § 1582; *Hofer v. Young* (1995) 38 CA4th 52, 56-57, 45 CR2d 27]. Acceptance must be communicated in a clear and unequivocal fashion [ *Gray v. Stewart* (2002) 97 CA4th 1394, 1397, 119 CR2d 217; *Bias v. Wright* (2002) 103 CA4th 811, 817-821, 127 CR2d 137 (a purported oral acceptance evidenced by a written acceptance that includes an additional term not present in the 998 offer is not absolute and unequivocal)].



#### Cross Reference:

Form of Notice of Acceptance of Offer to Compromise, see 37.64.

#### 37.08[3][c] Local Rules Specifying Methods of Service Are Irrelevant for Purposes of 998 Offer

**Acceptances.** Because acceptance of a 998 offer is not required to be served, general contract principles govern acceptance of such offers rather than the local rules specifying methods of service [CC § 1582; *Drouin v. Fleetwood Enters.* (1985) 163 CA3d 486, 491, 209 CR 623].

#### Example:

In a case where defendants faxed and mailed an acceptance of plaintiff's 998 offer two days before the 35-day time limit and the letter had the wrong zip code and therefore did not arrive in time, the acceptance by fax was still valid despite the fact that service by fax was not allowed in defendants' county. CCP § 998 does not require that an acceptance be served, and therefore it was irrelevant that the county local rules did not permit fax service. Under general principles of contract law, the 998 offer was deemed accepted on dispatch [ *Hofer v. Young* (1995) 38 CA4th 52, 56-57, 45 CR2d 27 ].

**37.08[4] Dismissal With Prejudice May Serve as Equivalent of Judgment.** A dismissal with prejudice can serve as the equivalent of a judgment against the defendant for purposes of CCP § 998 [ *Goodstein v. Bank of San Pedro* (1994) 27 CA4th 899, 905-906, 32 CR2d 740 ].

#### Example:

A Court of Appeal has upheld the validity of a section 998 offer made with the following terms [ *Goodstein v. Bank of San Pedro* (1994) 27 CA4th 899, 905-906, 32 CR2d 740 ]:

"In full settlement of this action, [Bank] hereby offers to pay [Goodstein] the total sum of \$150,000 in exchange for each of the following: [P] 1. The entry of a Request for Dismissal with prejudice on behalf of the Plaintiff in favor of [Bank]; [P] 2. The execution and transmittal of a General Release by [Goodstein] in favor of [Bank]; [P] 3. Each party is to bear their own respective costs and attorney's fees."



#### Strategic Point:

While a judgment or award entered pursuant to 998 is deemed to be a "compromised" settlement, it may provide little comfort to the defendant, particularly if the defendant is a professional or for business reasons does not wish to have a judgment entered. One alternative is to serve a section 998 offer providing for entry of dismissal with prejudice, as in the example above. The heading for the offer should indicate that the offer is being made pursuant to the *Goodstein v. San Pedro* case, and a general release should be attached. Caution should be exercised, however: the addition of too many terms to such a release will likely invalidate the 998 offer.

**37.08[5] Statutory Costs and Fees Not Available Only If Accepted 998 Offer Bars Them.** A party who secures a recovery by accepting a CCP § 998 offer is entitled to statutory costs and fees unless they are excluded by the offer [

*Engle v. Copenbarger & Copenbarger, LLP* (2007) 157 CA4th 165, 169, 68 CR3d 461 ]. If an accepted 998 offer is silent on costs and fees, the prevailing party is entitled to costs and, if authorized by statute or contract, fees [ *Engle v. Copenbarger & Copenbarger, LLP* (2007) 157 CA4th 165, 168, 68 CR3d 461 (denial of costs and fees reversed); *Rappenecker v. Sea Land Service, Inc.* (1979) 93 CA3d 256, 263, 155 CR 516 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsOffers of JudgmentAcceptances



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**37.09 998 Offer Expires After 30 Days.**

If a 998 offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it must be deemed withdrawn and cannot be mentioned at trial [CCP § 998(b)(2)]. The 30 day period is extended by five days if the offer is served by mail [CCP § 1013(a); *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 C3d 266, 272-275, 276 CR 321, 801 P2d 1072 ].

Absent an *unequivocal* rejection of a 998 offer, the offer remains effective and may be accepted until it has been revoked or until it expires [ *Guzman v. Visalia Cmty. Bank* (1999) 71 CA4th 1370, 1378, 84 CR2d 581 (offeree's criticism of a 998 offer does not operate as a rejection that terminates the offer); *Nott v. Superior Court* (1988) 204 CA3d 1102, 1108-1109, 251 CR 842 (offeree's expression of displeasure at a 998 offer during judicial arbitration does not constitute an express rejection that would terminate a 998 offer and the offer may still be accepted by the offeree following the arbitration)].



**Warning:**

CCP § 998 does not set any minimum period that must elapse following commencement of suit for service of a valid 998 offer [ *Barba v. Perez* (2008) 166 CA4th 444, 452, 82 CR3d 715 ]. Thus, the plaintiff may serve a 998 offer with the complaint that is binding on the defendant, even if the deadline for a response expires before the deadline for filing an answer in the action. The defendant therefore must not ignore or overlook any early 998 offer from the plaintiff. However, the discretionary grant of costs is still subject to the requirement of reasonableness [see 37.15[2]]. In a decision enforcing a 998 offer against a defendant who had sufficient information about the reasonableness of the offer when it was made, the court of appeals suggested in dictum that a plaintiff's 998 offer in the absence of sufficient knowledge of the facts on the part of the defendant and the plaintiff's uncooperation with defendant's informal discovery requests for additional information may be grounds for denying costs. The court also suggested that the defendant would be expected to request informal discovery of the facts, if not known by the defendant, and to request additional time in which to evaluate an offer, if time is needed to do so or to undertake the informal discovery [ *Barba v. Perez* (2008) 166 CA4th 444, 452, 82 CR3d 715 (998 served with complaint was binding after no response by defendant who had full information on plaintiff's damages)].

**Strategic Point--Defendant:**

An additional consideration in determining defendant's response to the early service of a 998 offer is that interest on the judgment is calculated from the date of the 998 offer in personal injury cases [*see CC § 3291*], so the earlier the offer is served, the more interest accrues on any subsequent judgment.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Settlements Offers of Judgment Time Limitations



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### 37.10 Party May Revoke 998 Offer Before Acceptance.

An offeror may make an express revocation of a 998 offer before it expires or before acceptance [ *T.M. Cobb Co. v. Superior Court* (1984) 36 C3d 273, 280-282, 204 CR 143, 682 P2d 338 ; see also *Estate of Watts* (1984) 162 CA3d 1160, 1162-1165, 208 CR 846 ].



#### **Warning:**

An offer revoked before the expiration of the period statutorily specified by *CCP* § 998(b)(2) forfeits its status as a 998 offer subject under the remaining provisions of § 998 to the cost-shifting provisions [ *Marcey v. Romero* (2007) 148 CA4th 1211, 1216 ].

Additionally, an unexpired but still unaccepted 998 offer is necessarily revoked and superseded by a subsequent different offer [ *Distefano v. Hall* (1968) 263 CA2d 380, 385, 69 CR 691 ; *T.M. Cobb Co. v. Superior Court* (1984) 36 C3d 273, 279, 204 CR 143, 682 P2d 338 ]. Even if the subsequent different offer is legally invalid, it will operate to extinguish any earlier offers [ *Palmer v. Schindler Elevator Corp.* (2003) 108 CA4th 154, 158-159, 133 CR2d 339 (second offer was improperly directed to multiple defendants jointly and severally)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Settlements Offers of Judgment Withdrawals



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**37.11 Counteroffer Does Not Terminate Original 998 Offer.**

An offeree's counteroffer does not terminate a 998 offer. The offeree can continue to negotiate regarding the offer during the 30-day period and still accept the original offer unless it is expressly revoked or rejected [ *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 C3d 266, 270-272, 276 CR 321, 801 P2d 1072 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSettlementsOffers of JudgmentCounteroffers



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### **37.12 Party Rejecting 998 Offer Must Obtain More Favorable Judgment or Pay Specified Costs of Other Party.**

#### **37.12[1] Plaintiff Who Rejects 998 Offer and Fails to Obtain More Favorable Judgment Does Not Recover Postoffer Costs and Must Pay Defendant's Postoffer Costs.**

**37.12[1][a] Plaintiff Does Not Recover Postoffer Costs.** A plaintiff who does not accept a defendant's 998 offer and fails to obtain a more favorable award or judgment does not recover his or her postoffer costs [CCP § 998(c)(1)].

A specific statutory provision allowing the award of costs does not trump 998 if its language can be reconciled with the provisions of CCP § 998 [see *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 C4th 985, 989-990, 73 CR2d 682, 953 P2d 858 (provisions of CC § 1794(d) reconcilable with 998); *Duale v. Mercedes-Benz USA, LLC* (2007) 148 CA4th 718, 726, 56 CR3d 19 (provisions of CC § 1794(d) reconcilable with 998)].

**37.12[1][b] Plaintiff Must Pay Defendant's Postoffer Costs.** A plaintiff who does not accept a defendant's 998 offer and fails to obtain a more favorable award or judgment must pay defendant's postoffer costs [CCP § 998(c)(1); *Duale v. Mercedes-Benz USA, LLC* (2007) 148 CA4th 718, 726, 56 CR3d 19 ]. If the plaintiff prevails, but is awarded an amount less than the defendant's 998 offer, the defendant's costs are deducted from any damages awarded to plaintiff, and if the costs awarded to defendant exceed plaintiff's damages, the net amount is awarded to defendant and judgment is entered accordingly [CCP § 998(e)].

#### **Example:**

CCP § 998 does not grant greater rights to attorney's fees than those provided by the underlying statute [ *Mangano v. Verity, Inc.* (2008) 167 CA4th 944, 951, 84 CR3d 526 ; *Ford Motor Credit Co. v. Hunsberger* (2008) 163 CA4th 1526, 1530, 78 CR3d 661 (CC § 1717(b)(2) bars award of contractual attorney fees under 998 after voluntary dismissal)]. It instead merely expands the group of those who are treated as prevailing parties and who therefore may be entitled to attorney's fees as prevailing parties under the authorizing statute [ *Mangano v. Verity, Inc.* (2008) 167 CA4th 944, 951, 84 CR3d 526 ].

#### **➡ Cross References:**

Discussion regarding costs, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 24, Costs; California Forms of Pleading and Practice, Ch. 174, Costs and Attorney's Fees

(Matthew Bender).

**37.12[1][c] Postoffer Costs Excluded in Determining Whether Plaintiff Obtained More Favorable Judgment.**

In determining whether the plaintiff obtained a more favorable judgment, the court or arbitrator must exclude the postoffer costs [CCP § 998(c)(2)(A)].

**37.12[1][d] Before Awarding Costs When There Has Been a Joint Offer, Court Must Be Able to Apportion Offer.**

In the case of a joint offer made by or to multiple parties, the court must be able to apportion the offer to determine whether any party obtained a more favorable judgment, and if the court does not have the evidence to do so, it will not award 998 costs or fees [ *Hurlbut v. Sonora Cmty. Hosp.* (1989) 207 CA3d 388, 409-410, 254 CR 840 ].

 **Cross Reference:**

Discussion of joint offers, see 37.07.

**37.12[1][e] Postoffer Payments Added to Judgment.**

A defendant's postoffer payment must be added to the jury's award to determine whether the plaintiff obtained a more favorable judgment than the amount of the defendant's § 998 offer [ *Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 CA4th 847, 854 ].

**Examples:**

- Postoffer payments for property damage added to judgment on tort and contract claims [ *Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 CA4th 847, 850 ].

- When a defendant in a contract action on a debt makes a CCP § 998 offer that is not accepted, and subsequently makes a voluntary payment on the debt that is the subject of the action, this payment must be included with any judgment later awarded in plaintiff's favor when determining whether the judgment is less favorable than the settlement offer [ *Mesa Forest Prods., Inc. v. St. Paul Mercury Ins. Co.* (1999) 73 CA4th 324, 334-335, 86 CR2d 398 ].

**37.12[1][f] Nonmonetary Elements Must Be Considered in Calculation of Award.**

With respect to an award of costs to the prevailing party, CCP § 1032(a)(4) specifically permits the trial court to determine who is the prevailing party when a party recovers other than monetary relief by putting a monetary value on the nonmonetary relief [ *Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 CA4th 847, 856 (injunction)]. When a CCP § 998 offer includes a nonmonetary component, the offer must be evaluated in light of all the terms and conditions attached to it, and not just the monetary component, in order to determine whether the plaintiff has received a more favorable judgment. When the reverse is true, i.e., the offer contains only a monetary offer, but the relief recovered is both monetary and nonmonetary, the trial court must also consider the offer in light of the totality of the recovery [ *Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 CA4th 847, 855-856 ].

**37.12[2] Defendant Who Rejects 998 Offer and Fails to Obtain More Favorable Judgment May Be Ordered to Pay Plaintiff's Costs.** If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award, the court or arbitrator has discretion to order the defendant to pay a reasonable sum to cover plaintiff's costs [CCP § 998(d); *Pilimai v. Farmers Ins. Exchange Co.* (2006) 39 C4th 133, 151 (expert, deposition, and exhibit costs); *Arno v. Helinet Corp.* (2005) 130 CA4th 1019, 1023-1024 (award upheld); *Berg v. Darden* (2004) 120 CA4th 721, 726 (denial of award reversed)].

**Exception:**

This rule does not apply in eminent domain actions [CCP § 998(d)].



**Distinguish:**

Although a plaintiff who rejects a 998 offer and fails to obtain a more favorable judgment must pay defendant only his or her postoffer costs [see 37.12[2]], *CCP* § 998(d) does not impose a "postoffer" restriction on recovery of plaintiff's costs upon the defendant's failure to obtain a more favorable judgment than a 998 offer that the defendant has rejected.

When a *CCP* § 998 offer is withdrawn by a party prior to its statutory expiration, the withdrawing party's right to cost-shifting under *CCP* § 998 is to be determined by the last rejected § 998 offer [ *One Star, Inc. v. STARR Surgical Co.* (2009) 179 CA4th 1082, 1094, 102 CR3d 195 ] .

**37.12[3] Offeree Has Burden of Showing Any Defect Claimed as Basis for Rejection.** The offeree rejecting a 998 offer on the basis of a defect in the offer probably has the burden of proof of the defect, including ambiguities in the legal sufficiency of an offer [see *Peterson v. John Crane, Inc.* (2007) 154 CA4th 498, 506 n.8, 65 CR3d 185 ("it would be consistent with the settlement purposes of section 998 for an offeree to clarify any perceived ambiguity of an offer with the offeror")].

**Strategic Point:**

Counsel for an offeree who has questions about an offer that bear on its validity under *CCP* § 998 should consider seeking a written clarification or stipulation from the offeror as to any ambiguity or legal sufficiency of the offer. If the offeror refuses clarification or stipulation concerning the legal sufficiency or ambiguity of a 998 offer, counsel should seek a ruling from the trial court along with an extension of time to accept or reject the offer until the question is resolved. Otherwise, counsel risks a ruling that an offer rejected as legal insufficient is actually valid [see, e.g., *Peterson v. John Crane, Inc.* (2007) 154 CA4th 498, 506-512, 65 CR3d 185 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**37.13 Court May Order Party to Pay Other Party's Expert Costs When 998 Offer Is Not Accepted and Offeree Fails to Obtain More Favorable Judgment.**

If either party fails to accept the other party's 998 offer and that party does not obtain a more favorable award or judgment, the court or arbitrator, in its discretion, may require the party to pay a reasonable sum to cover costs of the service of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary for preparation and presentation of the offering party's case for trial or arbitration [*CCP § 998(c)(1), (d)*; *Santantonio v. Westinghouse Broad. Co.* (1994) 25 CA4th 102, 121, 30 CR2d 486 ; *Weisman v. Blue Shield of Cal.* (1984) 163 CA3d 61, 68, 209 CR 169 ].

**Exception:**

This rule does not apply in eminent domain actions [*CCP § 998(c)(1), (d)*].

**Exception:**

Expert witness fees may not be awarded in action claiming under federal statute barring awards of expert witness fees [ *Kinsey v. Union Pacific Rail. Co.* (2009) 178 CA4th 201, 205-207, 100 CR3d 253 ; *Miller v. Union Pacific Railroad Co.* (2007) 147 CA4th 451, 458, 53 CR3d 893 ].

**Distinguish:**

While the defendant must only pay postoffer costs of plaintiff's expert witnesses [*CCP § 998(d)*], the corresponding provision concerning the plaintiff's payment of defendant's expert fees does not impose a "postoffer" restriction on recovery of expert witness fees [ *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 C4th 507, 533, 46 CR3d 742 (order directing plaintiff's payment of defendant's expert witness fees may apply to fees incurred before as well as after the 998 offer); *see CCP § 998(c)(1)*].

The costs for services of expert witnesses may not exceed those specified in *Gov Code § 68092.5* [*CCP § 998(h)*]; *see also Evers v. Cornelson* (1984) 163 CA3d 310, 314-320, 209 CR 497 ]. Fees may not be assessed with respect to a witness who testifies both as a percipient witness and an expert witness [ *Stiles v. Estate of Ryan* (1985) 173 CA3d 1057, 1067, 219 CR 647 ].

**Distinguish--Split of Authority:**

Whether the ability of the assessed party to pay expert witness fees is a proper factor for the court to

consider in discerning the reasonableness of the amount of a fee award is the subject of a split in opinion in the Court of Appeals. Division Seven of the Second Appellate District has ruled that when opposing parties possess vastly disparate economic resources, the trial court may "scale" the award to their respective resources [ *Seever v. Copley Press, Inc. (2006)* 141 CA4th 1550, 1561-1562, 47 CR3d 206 ]. In contrast, Division One of the First Appellate District declined to write such a "judicial gloss" into the statute [ *Clark v. Optical Coating Laboratory, Inc. (2008)* 165 CA4th 150, 186, 80 CR3d 812 ].

**Cross Reference:**

Discussion of recovery of expert costs, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 24, Costs.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSettlementsOffers of JudgmentRejections



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**37.14 Defendant Who Does Not Accept 998 Offer and Fails to Obtain More Favorable Judgment Must Pay Plaintiff Prejudgment Interest in Personal Injury Actions.**

**37.14[1] CC § 3291 Applies in "Personal Injury" Actions.** CC § 3291, which authorizes the award of prejudgment interest to a plaintiff in addition to costs when a defendant fails to accept plaintiff's 998 offer and fails to obtain a more favorable judgment, applies only in actions brought to recover damages for personal injury, whether by negligence or by willful intent and whether the injury was fatal or otherwise [CC § 3291].

**37.14[2] Definition of "Personal Injury" Depends on Nature of Action.** The definition of "personal injury" for purposes of CC § 3291 depends on the nature of the action but is broader than simply bodily injury [ *Holmes v. General Dynamics Corp.* (1993) 17 CA4th 1418, 1435-1437, 22 CR2d 172 ].

**Examples:**

The following are examples of cases in which prejudgment interest has or has not been allowed.

- Not allowed for contractual action against one's own insurance company to recover compensation for a personal injury [ *Pilimai v. Farmers Ins. Exchange Co.* (2006) 39 C4th 133, 147 ].

- Not allowed in actions that essentially involve invasion of a property right, even though damages for incidental emotional distress may be recoverable [ *Gourley v. State Farm Mutual Automobile Insurance Co.* (1991) 279 CR 307, 806 P2d 1342 (not allowed for insurance bad-faith claim)].

- Allowed when claims of emotional distress are not merely incidental to an invasion of a property interest, such as defamation claims [ *Lakin v. Watkins Associated Industries* (1993) 6 C4th 644, 657 n8, 25 CR2d 109, 863 P2d 179 ; *O'Hara v. Storer Communications, Inc.* (1991) 231 CA3d 1101, 1117-1119, 282 CR 712 ].

- Allowed in actions brought on a strict products liability theory [ *Fortman v. Hemco, Inc.* (1989) 211 CA3d 241, 262, 259 CR 311 ].

● Not allowed on claims for wrongful termination of employment in violation of public policy [ *Holmes v. General Dynamics Corp.* (1993) 17 CA4th 1418, 1435-1437, 22 CR2d 172 ].

**37.14[3] Award May Be Allocated Between Personal Injury and Other Injury in Mixed Actions.** In actions involving damages for personal injury and other damages, the award must be allocated because prejudgment interest may be awarded only on the personal injury portion [CC § 3291].

The plaintiff bears the burden of proving what portion of the judgment constitutes damages for personal injury [ *Lakin v. Watkins Associated Industries* (1993) 6 C4th 644, 661, 25 CR2d 109, 863 P2d 179 ].

Prejudgment interest is not computed on a punitive damages award [ *Lakin v. Watkins Associated Industries* (1993) 6 C4th 644, 662-664, 25 CR2d 109, 863 P2d 179 ].



**Warning:**

In a case of a mixed action, request special jury findings to allocate the damages awarded among the various injuries [ *Morin v. ABA Recovery Service, Inc.* (1987) 195 CA3d 200, 211-212 ].

**37.14[4] [Reserved]**

**37.14[5] CC § 3291 Does Not Apply to Public Entity or Employee.** CC § 3291 does not apply to a public entity or a public employee for an act or omission within the scope of his or her employment [CC § 3291].

**37.14[6] Award Is Mandatory If Statutory Conditions Are Met.** If a plaintiff makes a CCP § 998 offer that defendant fails to accept within 30 days or prior to trial, whichever occurs first, and then obtains a more favorable judgment, the plaintiff is entitled to prejudgment interest in addition to costs [CC § 3291]. This is so even if defendant ultimately offers to settle for an amount that exceeds the judgment [ *Morin v. ABA Recovery Serv., Inc.* (1987) 195 CA3d 200, 205-207, 240 CR 509 ].

**37.14[7] Complaint Need Not Include Prayer for Prejudgment Interest.** Plaintiff's complaint need not include a prayer for prejudgment interest in order for CC § 3291 to be applicable [ *Lakin v. Watkins Associated Industries* (1993) 6 C4th 644, 662 n12, 25 CR2d 109, 863 P2d 179 ].

**37.14[8] Prejudgment Interest Is Calculated According to the Statute.** Prejudgment interest is calculated at the legal rate of 10 percent per annum, calculated from the date of the plaintiff's first CCP § 998 offer that is exceeded by the judgment, and interest accrues until the judgment is satisfied [CC § 3291; *Ray v. Goodman* (2006) 142 CA4th 83, 91-92, 47 CR3d 659 ]. However, regardless of the number of defendants, plaintiff is entitled to only one assessment of prejudgment interest on the entire judgment [ *Cadlo v. Metalclad Insulation Corp.*, (2009) 172 CA4th 1040, 1046, 1047, 91 CR3d 653 ].

Prejudgment interest accrued under CC § 3291 is not considered part of the judgment, and a plaintiff may not obtain interest on this prejudgment interest [ *Hess v. Ford Motor Co.* (2002) 27 C4th 516, 530-533, 117 CR2d 220, 41 P3d 46 ; *Steinfeld v. Foote-Goldman Proctologic Med. Group, Inc.* (1997) 60 CA4th 13, 23, 70 CR2d 41 ].

Furthermore, the 10 percent interest rate of CC § 3291 cannot be combined with the 10 percent interest rate of CCP § 685.010(a) (post-judgment interest) [ *Mendez v. Kurten* (1985) 170 CA3d 481, 487, 215 CR 924 ].

**37.14[9] Policy Limits Offer by Insurer Terminates Obligation to Pay Prejudgment Interest.** A policy limits offer by an insurer terminates any obligation to pay prejudgment interest assessed against the insured [ *State Farm Mut. Auto Ins. Co. v. Crane* (1990) 217 CA3d 1127, 1134-1138, 266 CR 422 ].

**37.14[10] Prejudgment Interest Excluded in Determining Whether Plaintiff Obtained More Favorable**

**Judgment.** In determining whether plaintiff obtained a more favorable judgment than the defendant's 998 offer, prejudgment interest accruing after the 998 offer has been made is excluded from the judgment [ *Bodell Constr. Co. v. Trustees of the Cal. State Univ.* (1998) 62 CA4th 1508, 1523-1527, 73 CR2d 450 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Offers of Judgment Rejections Torts Procedure Settlements Offers



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### 37.15 CCP § 998 Offers Subject to Reasonableness Requirement.

**37.15[1] Party May Not Claim Costs After Unreasonable 998 Offer.** Because *CCP* § 998 offers are subject to a good faith or reasonableness requirement, a party may not make an unreasonable settlement offer and then claim costs when the offeree rejects the offer and fails to obtain a more favorable judgment [ *Clark v. Optical Coating Laboratory, Inc.* (2008) 165 CA4th 150, 185, 80 CR3d 812 (defendant's offer); *Arno v. Helinet Corp.* (2005) 130 CA4th 1019, 1024-1025 (plaintiff's offer)].

#### Example:

Plaintiff brings a tort action against Defendants A, B, and C. Defendant A makes a settlement offer of \$15,001, which Plaintiff does not accept. Plaintiff then settles the case with B and C. The jury finds that Plaintiff suffered damages exceeding \$1,000,000, but after taking into effect Plaintiff's comparative fault and the damages already recovered as a result of the settlements, the net judgment is that Plaintiff take nothing from A. Assuming that Plaintiff can establish that A's offer of \$15,001 was a token or nominal offer, A will not be able to claim costs from Plaintiff under *CCP* § 998, even though Plaintiff failed to obtain a "more favorable judgment" from A [see *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 CA3d 692, 696-698, 241 CR 108 ].

**37.15[2] Offer Measured by Objective Tests.** In evaluating whether a 998 offer is reasonable, courts consider (1) information that was known or reasonably should have been known by the offeror at the time the offer was made; and (2) information that was known, or should have been known, by offeror. The court evaluates whether, based on the information known, the defendant's offer represented a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial [ *Arno v. Helinet Corp.* (2005) 130 CA4th 1019, 1023-1024 ; *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 CA3d 692, 699, 241 CR 108 ]. In exercising this discretion, the trial court may consider any factor that may impact the reasonableness of a § 998 offer [ *Arno v. Helinet Corp.* (2005) 130 CA4th 1019, 1026 (may consider existence of insurance policy)].

Although a token offer with no reasonable prospect of acceptance will not meet the reasonableness standard, a defendant's small offer in the face of a large claim can satisfy the reasonableness requirement if the defendant perceives himself or herself to be fault free and has concluded that he or she has a very significant likelihood of prevailing at trial [ *Culbertson v. R.D. Werner Co., Inc.* (1987) 190 CA3d 704, 710, 235 CR 510 ; see also *Jones v. Dumrichob* (1998)

63 CA4th 1258, 1263-1264, 74 CR2d 607 (offer for waiver of costs held to be valid 998 offer)].



**Strategic Point:**

On appeal, the burden is on the party complaining to establish an abuse of discretion in the granting of a fee award under 998 [ *Clark v. Optical Coating Laboratory, Inc. (2008) 165 CA4th 150, 185-186, 80 CR3d 812* ].



**Cross Reference:**

Calculating amount of 998 Offer, see 37.06.

**37.15[3] Judgment More Favorable Than Offer Is Prima Facie Evidence of Reasonableness.** A judgment that is more favorable than the offer is prima facie evidence that the offer was reasonable. The burden is on the offeree to prove unreasonableness [ *Santantonio v. Westinghouse Broad. Co. (1994) 25 CA4th 102, 117, 30 CR2d 486* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Offers of Judgment Making of Offers Civil Procedure Settlements Offers of Judgment Rejections





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**37.16 CCP § 998 Will Not Apply Unless Court Can Determine If Judgment More Favorable Than Offer.**

A court cannot shift costs under *CCP* § 998 when the offer cannot be evaluated to determine if it is more or less favorable than the judgment, such as under the following circumstances:

- Plaintiff did not present any expert testimony regarding present value of structured settlement [ *Hurlbut v. Sonora Comm. Hosp.* (1989) 207 CA3d 388, 409-410, 254 CR 840 ].
- Offer required relinquishment of claims not raised in complaint that could not be fairly evaluated [ *Chen v. Interinsurance Exch. of the Auto. Club* (2008) 164 CA4th 117, 122-123, 78 CR3d 755 ; *Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 CA3d 692, 699, 247 CR 483 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Settlements Offers of Judgment Rejections



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### 37.17 CCP § 998 Offers Specifically Not Available in Certain Actions.

**37.17[1] CCP § 998 Does Not Apply in Eminent Domain Proceedings.** The procedure for offers to compromise does not apply to an offer made by a plaintiff in an eminent domain proceeding [*CCP § 998(g)(1)*].

**37.17[2] CCP § 998 Does Not Apply in Some Inverse Condemnation Actions.** The procedure for offers to compromise does not apply in inverse condemnation actions to award costs to a governmental entity when the private plaintiff prevails but is awarded damages that are less than the government's offer [ *Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist.* (1978) 80 CA3d 863, 878, 146 CR 5 ]. However, *CCP § 998* may be used by the government entity when the private plaintiff does not recover any damages for inverse condemnation [ *Goebel v. City of Santa Barbara* (2001) 92 CA4th 549, 559, 111 CR2d 901 ].

**37.17[3] CCP § 998 Does Not Apply in Family Law Matters.** The procedure for offers to compromise does not apply in family law matters [ *In re Marriage of Green* (1989) 213 CA3d 14, 23-24, 261 CR 294 .

**37.17[4] CCP § 998 Does Not Apply in Enforcement Actions by Public Prosecutors.** The procedure for offers to compromise does not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or city attorney, acting as public prosecutor [*CCP § 998(g)(2)*].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Offers of Judgment Making of Offers Real Property Law Eminent Domain Proceedings Procedure Real Property Law Inverse Condemnation Procedure



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**37.18 CHECKLIST: Entering Into a Settlement Agreement.**

- ☐ Attorney must communicate all written settlement offers and all significant oral offers to client and must have authority to enter into agreement on behalf of client before doing so.

**Authority:**

*Cal Rules Prof Conduct, Rules 3-500, 3-510; Navrides v. Zurich Ins. Co. (1971) 5 C3d 698, 702 n1, 97 CR 309, 488 P2d 637*

**Discussion:**

See 37.19 -37.20

- ☐ Settlement agreements must be supported by consideration.

**Authority:**

*Tooley v. Parker (1942) 51 CA2d 542, 549-551, 125 P2d 66 ; Gill v. Southern Pac. Co. (1916) 174 C 84, 88, 161 P 1153*

**Discussion:**

See 37.22[2]

- ☐ Determine whether settlement agreement contains a statute of frauds requirement.

**Authority:**

*Nicholson v. Barab (1991) 233 CA3d 1671, 1681-1683, 285 CR 441*

**Discussion:**

See 37.22[3]

☐ Plaintiff or other party seeking affirmative relief must notify court and case's arbitrator when entire case is settled.

**Authority:**

*Cal Rules Ct, Rule 3.1385(a)*

**Discussion:**

See 37.26

**Form:**

See 37.65

☐ Plaintiff or other party seeking affirmative relief must serve and file request for dismissal of the entire case.

**Timing:**

The request must be served and filed within 45 days of the settlement except when:

- Conditions of settlement provide for performance more than 45 days after settlement,
- An appropriate request for approval of settlement of claims by minor or person with disability is pending, or
- The court, on a proper motion and showing of good cause, has extended the period for serving and filing the settlement.

**Authority:**

*Cal Rules Ct, Rule 3.1385(b)-(e)*

**Discussion:**

See 37.27

☐ When multiple defendants jointly and severably liable and less than all defendants settle, settling defendant may want to file application or motion to confirm good-faith settlement.

**Authority:**

*CCP §§ 877, 877.6*

**Discussion:**

See 37.28 et seq.

**Form:**

See 37.68



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**37.19 Attorney Must Have Authority to Enter Into Agreement.**

An attorney must be specifically authorized to settle a claim and has no implied or ostensible authority to enter into a settlement simply because the attorney is employed by his or her client [ *Navrides v. Zurich Ins. Co.* (1971) 5 C3d 698, 702 n1, 97 CR 309, 488 P2d 637 ; *Alvarado Cmty. Hosp. v. Superior Court* (1985) 173 CA3d 476, 480, 219 CR 52 ]. However, there is a rebuttable presumption that an attorney has the authority to settle his or her client's claim [ *Gagnon Co. Inc. v. Nevada Desert Inn* (1955) 45 C2d 448, 460-461, 289 P2d 466 ; *Ford v. State of Cal.* (1981) 116 CA3d 507, 516-517, 172 CR 162 , disapproved on another ground in *Duran v. Duran* (1983) 150 CA3d 176, 197 CR 497 ].

**Exception:**

A client is bound by an unauthorized settlement if the client accepts the settlement's benefits or otherwise ratifies the settlement [ *Navrides v. Zurich Ins. Co.* (1971) 5 C3d 698, 704, 97 CR 309, 488 P2d 637 (client's action to enforce settlement agreement ratified the settlement); *Villa v. Cole* (1992) 4 CA4th 1327, 1336-1337, 6 CR2d 644 (client accepted benefits of agreement); *City of Fresno v. Baboian* (1975) 52 CA3d 753, 758-760, 125 CR 332 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSettlementsSettlement AgreementsValidity



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**37.20 Attorney Must Communicate All Written Settlement Offers to Client.**

An attorney must promptly communicate all written settlement offers to his or her client, including all amounts, terms, and conditions of any offer of settlement made by or on behalf of an opposing party. Oral offers must also be communicated if they constitute a significant development in the case [*Cal Rules Prof Conduct, Rules 3-500, 3-510*]. For purposes of this rule, a "client" is a person employing the attorney or possessing the authority to accept an offer of settlement or, in a class action, a representative of the class [*B&P Code § 6103.5(a)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSettlementsSettlement AgreementsGeneral Overview



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**37.21 Litigants Permitted to Enter Into Settlements Without Agreement of Attorney.**

Litigants may enter into a settlement without the involvement of their attorneys as long as there is no fraud, coercion, or overreaching and both parties understand their rights to the advice of counsel [ *In re Marriage of Hasso* (1991) 229 CA3d 1174, 1184-1185, 280 CR 919 ].



**Warning:**

Parties can resolve a claim or dispute without lawyers, but parties that attempt to negotiate a settlement without an attorney run the risk of undervaluing or overvaluing the case and agreeing to a settlement that is not as favorable as would have occurred if they had the advice of experienced counsel. Unrepresented parties also risk being disadvantaged on other settlement terms.



**Strategic Point:**

While lawyers often can facilitate a resolution, there are times when the parties may be able to reach agreement on certain key points by direct discussion between the parties, with the respective lawyers in a position to give advice when needed. Particularly in commercial disputes involving sophisticated clients, lawyers should take care to promote their clients' interests in achieving a favorable, but early, resolution of litigation. Sometimes that requires a shift in focus from acting primarily as an advocate to placing an increased emphasis on the role of an advisor.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Settlements Settlement Agreements General Overview





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**37.22 Settlement Agreements Governed by Contract Principles.**

**37.22[1] Parties Should Look to Contract Law in Preparing Settlement Agreements.** Settlement agreements are governed by the general principles of contract law [see, e.g., *Folsom v. Butte County Assn. of Governments* (1982) 32 C3d 668, 677, 186 CR 589, 652 P2d 437 ; *Vaillette v. Fireman's Fund Ins. Co.* (1994) 18 CA4th 680, 686, 22 CR2d 807, 23 CR2d 807 ; *In re Marriage of Hasso* (1991) 229 CA3d 1174, 1180, 280 CR 919 ]. Accordingly, a court will not enforce a settlement agreement provision that is illegal, contrary to public policy, or unjust [ *California State Auto Ass'n Inter-Ins. Bureau v. Superior Court* (1990) 50 C3d 658, 664, 268 CR 284, 788 P2d 1156 ; *Timney v. Lin* (2003) 106 CA4th 1121, 1127, 131 CR2d 387 ].



**Warning:**

Once the parties have reached a settlement, they "may not escape their obligations by refusing to sign a written agreement that conforms to the oral terms" [ *Osumi v. Sutton* (2007) 151 CA4th 1355, 1360, 60 CR3d 693 ]. At that point, the agreement is enforceable by a motion under CCP § 664.6, which may result in a trial on what the exact terms of the agreement are [see 37.47].

**37.22[2] Consideration Is Required for Valid Settlement Agreement.** Settlement agreements must be supported by consideration [ *Tooley v. Parker* (1942) 51 CA2d 542, 549-551, 125 P2d 66 ; *Gill v. Southern Pac. Co.* (1916) 174 C 84, 88, 161 P 1153 ].

**37.22[3] Settlement Agreements Are Subject to Statute of Frauds.** Settlement agreements are subject to statute of frauds requirements [ *Nicholson v. Barab* (1991) 233 CA3d 1671, 1681-1683, 285 CR 441 ; see CC § 1624].

**Example:**

A settlement agreement that was in writing but agreed to orally and acknowledged in pleading and testimony fell within the exception that there is sufficient evidence that a contract has been made when the party against whom enforcement is sought admits in its pleading, testimony, or otherwise in court that a contract was made [ *Pietrobon v. Libarle* (2006) 137 CA4th 992, 998, 40 CR3d 718 ].



**Cross Reference:**

Discussion of statute of frauds requirements, California Forms of Pleading and Practice, Ch. 530, Statute of Frauds (Matthew Bender).

### 37.22[4] Statutes May Provide for Exceptions From General Contract Principles.

**37.22[4][a] Cy Pres Distribution of Residue From Settlement Occurs Unless Agreement Disposes of Residue Completely.** The cy pres distribution provisions of *CCP* § 384(b) apply to the distribution of residue resulting from a settlement unless the settlement agreement provides for the complete distribution of the residue on terms that are fair, adequate, and reasonable [ *In re Microsoft I-V Cases (2006)* 135 CA4th 706, 722, 37 CR3d 660 ].

#### Cross Reference:

Discussion of cy pres distribution of residue in class actions, see *Ch. 33, Class Actions*, 33.37.

**37.22[4][b] Signed Written Settlement Agreement Resulting From Mediation May Be Made Not Confidential by Its Terms.** The Evidence Code provisions concerning confidentiality of documents submitted in mediation proceedings [see *Ch. 24, Pretrial ADR*, 24.56[4], [5]] apply to settlement agreements resulting from mediation [ *Stewart v. Preston Pipeline (2005)* 134 CA4th 1565, 1574, 36 CR3d 901 (without more, agreement would have been confidential under *Evid Code* § 1119)]. However, those provisions specifically permit disclosure of a signed written settlement agreement prepared in the course of mediation if either of the following conditions, among others, is met [*Evid Code* § 1123; *Simmons v. Ghaderi (2008)* 44 C4th 570, 588-589, 80 CR3d 83 (evidence from mediation of unrecorded oral agreement to settle and unsigned draft written settlement inadmissible)]:

- The agreement contains words to the effect that it is admissible or subject to disclosure.
- The agreement contains words to the effect that it is enforceable or binding.

For these purposes, a settlement agreement resulting from mediation and signed by counsel is considered to be a signed agreement [ *Stewart v. Preston Pipeline (2005)* 134 CA4th 1565, 1579-1580, 36 CR3d 901 (agreement's terms rendered it not confidential)]. To qualify as containing "words to that effect," a writing must directly express the parties' agreement to be bound by the document they sign [ *Fair v. Bakhtiari (2006)* 40 C4th 189, 197, 51 CR3d 871, 147 P3d 653 ]. However, nothing in *CCP* § 425.16(c) requires that the express agreement in writing permitting disclosure be contained in the settlement agreement; nor is there a requirement that the agreement regarding disclosure be made at or after the time of the settlement [ *Estate of Thottam (2008)* 165 CA4th 1331, 1336, 81 CR3d 856 ].

#### Warning:

Counsel should be sure to satisfy *Evid Code* § 1123 and provide that the mediation privilege is waived as to actions for enforcement of the settlement agreement by securing from the parties a statement of agreement. Absent such a waiver provision, a party may be precluded from presenting evidence of the settlement for subsequent proceedings [see *Stewart v. Preston Pipeline (2005)* 134 CA4th 1565, 1573, 36 CR3d 901 ]. The trend in case law of strictly upholding the mediation privilege is raising serious questions about the ability to enforce settlements that have been the subject of mediation.

**37.22[5] Only Amount of Settlement May Be Confidential Under Agreement Concerning Conduct That May Be Prosecuted as Felony Sexual Offense.** A settlement agreement in a civil action the factual foundation for which establishes a cause of action for civil damages for an act that may be prosecuted as a felony sex offense may not be confidential [*CCP* § 1002(a)].

#### Exceptions:

There are two exceptions to this restriction on settlement agreements in such actions:

- An agreement may prevent the defendant or a person acting on his or her behalf from disclosing medical information or personal identifying information, as defined in *Penal Code* § 530.5(b), regarding the victim of the felony sex offense or of any information revealing the nature of the relationship between the victim and the defendant. This exception does not limit the right of a crime victim to disclose this information [*CCP* § 1002(b)].

- The amount of money paid in settlement of a claim may be confidential [*CCP* § 1002(c)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Contracts Law Types of Contracts Settlement Agreements



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**37.23 Plaintiff May Settle With Less Than All Joint Codefendants.**

**37.23[1] Good-Faith Settlement With Fewer Than All Defendants Does Not Discharge Others From Liability to Plaintiff.** A good-faith settlement between the plaintiff and one or more, but fewer than all, tortfeasors claimed to be liable for the same tort or co-obligators mutually subject to contribution rights does not discharge any other party from liability to the plaintiff unless the terms of the settlement so provide [CCP § 877(a)].

**Exceptions:**

There are some exceptions to the general rule that a release of fewer than all defendants does not release others. Substantive law provides at least two exceptions: (1) a contractor's release of claim against owner releases a claim against the architect to the extent the architect was acting as an agent of the owner [ *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 CA3d 278, 302, 136 CR 603 ]; and (2) release of a principal may also operate to release a surety [CC § 2819].

**37.23[2] Good-Faith Settlement With Fewer Than All Defendants Reduces Claims Against Other Parties.**

Except as modified by the Fair Responsibility Act of 1986 (Proposition 51) [CC §§ 1431.1-1431.5], a good-faith settlement between the plaintiff and one or more, but fewer than all, tortfeasors claimed to be liable for the same tort or co-obligators mutually subject to contribution rights reduces the claims against other parties in the amount stipulated in the settlement or in the amount of consideration paid for it, whichever is greater [CCP § 877(a)]. Plaintiff's claims against nonsettling tortfeasors, however, are not reduced by costs awarded to the plaintiff as a prevailing party [ *Reed v. Wilson* (1999) 73 CA4th 439, 443-446, 86 CR2d 510 ]. A stipulation of the amount that the settling defendant actually owes is not the same as a stipulation of the amount of the consideration paid in settlement, nor of the amount to be set off against the claims of the other defendants [ *Federal Sav. and Loan Ins. Corp. v. Butler* (9th Cir. 1990) 904 F2d 505, 513 ; see *Arbuthnot v. Relocation Realty Serv. Corp.* (1991) 227 CA3d 682, 688, 278 CR 135 ].



**Trap:**

If the amount of settlement with fewer than all defendants before judgment exceeds the award in the judgment against remaining defendants, those defendants are deemed the prevailing parties for purposes of attorney fees under CCP § 877 [ *Goodman v. Lozano* (2010) 47 C4th 1327, 1338-1339, 104 CR3d 219, 223 P3d 77] . Parties to a settlement with fewer than all defendant must therefore structure the fee

award in the settlement accordingly.

**Distinguish:**

At least one court has ruled that the offset of a settlement from liability of other nonsettling parties under CCP § 877(a) only applies to that amount of settlement monies actually paid [see *Garcia v. Duro Dyne Corp.* (2007) 156 CA4th 92, 100-102, 67 CR3d 100 ].



**Strategic Point:**

The trial court may retain jurisdiction to reduce an award for damages against a nonsettling defendant by the amount of a settlor's payment of settlement money to the plaintiff [see, e.g., *Cadlo v. Metalclad Insulation Corp.* (First Dist., Div. Five, 2007) 151 CA4th 1311, 1318, 61 CR3d 104 ]. Counsel for a nonsettling defendant, therefore, should request that the trial court reserve its jurisdiction in that manner in any case reaching final judgment before the payment of settlement money by another settling defendant. In the alternative, the nonsettling defendant may try making an ex parte application for postjudgment setoffs once the settlement is actually paid [see *Fortman v. Hemco, Inc.* (Second Dist., Div. Four, 1989) 211 CA3d 241, 264, 259 CR 311 (trial court has discretion to deny offset and invite nonsettling defendant to make motion in future)].

If the plaintiff is found to have been contributorily negligent, the total damages must first be reduced by the percentage of fault attributable to the plaintiff before any reduction for a good-faith settlement is made [ *Lemos v. Eichel* (1978) 83 CA3d 110, 118-119, 147 CR 603 ].



**Strategic Point:**

The allocation of the settlement amounts is complex and should be analyzed carefully by counsel for the settling plaintiff, as well as counsel for the nonsettling defendants. In essence, the settling defendants are not entitled to an offset of the portion of the settlement that is allocable to the non-economic losses because the defendants are only responsible to pay their own percentage share of those losses. Thus, a plaintiff can obtain a windfall if a settling defendant pays more than its "share" of the non-economic losses, because that amount will not reduce the plaintiff's recovery against the other defendants.



**Cross Reference:**

For discussion regarding determination of good-faith settlements, see 37.28 et seq.

**37.23[3] Reduction May Be Assessed by Jury or Court.** The reduction of an award against other tortfeasors under CCP § 877(a) is normally applied in one of two ways: either by the jury after evidence is submitted to it of the settlement with instructions to reduce the award by the amount paid in settlement, or by the court if the settlement is not presented to the jury [ *May v. Miller* (1991) 228 CA3d 404, 409, 278 CR 341 ]. If the jury is informed of the settlement but not specifically instructed to reduce its judgment against nonsettling tortfeasors, the court has broad discretion to apply Section 877(a) to reduce the judgment by the amount of the settlement [ *May v. Miller* (1991) 228 CA3d 404, 410-411, 278 CR 341 ].



**Strategic Point:**

While the court may make the offset from the jury's award, the court is not entitled, absent a stipulation of the parties, to calculate the amount of the settlement allocable to non-economic vs. economic losses in a personal injury action [see 37.24]. One of the parties may want to insure that the jury award does

allocate the damages awarded between economic and non-economic losses so that the court may apply the same ratio to settlement amounts.

**37.23[4] Good-Faith Settlement With Fewer Than All Defendants Discharges Settling Defendant From Liability for Contribution or Equitable Indemnity.** A good-faith settlement between the plaintiff and one or more, but fewer than all, tortfeasors claimed to be liable for the same tort or co-obligors mutually subject to contribution rights discharges the settling defendant from any claim for contribution or comparative or equitable indemnity to any other party [CCP § 877(a); see *American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 C3d 578, 604, 146 CR 182, 578 P2d 899 (extending meaning of term "contribution" to encompass judicially created doctrine of comparative or equitable indemnity)].

**Exceptions:**

CCP § 877 does not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves or to contract debts on contracts entered into prior to January 1, 1988 [CCP § 877(c), (d)].

Express contractual indemnity claims are not barred by a good-faith settlement determination [ *C.L. Peck Contractors v. Superior Court* (1984) 159 CA3d 828, 833-834, 205 CR 754 ].

 **Cross Reference:**

Discussion of motion for good-faith settlement, see 37.28 -37.45.

**37.23[5] If Settling Tortfeasor Paid More Than Required, Settlor May Be Entitled to Comparative Indemnity.** If a settling tortfeasor actually paid more than it would have been required to pay under the trier of fact's ultimate apportionment of fault and finding of damages, the entire amount of the settlement is still deducted from the judgment against the other defendants; the balance of the judgment is apportioned to the other defendants according to the jury's apportionment of comparative fault [ *Bracket v. State of Cal.* (1986) 180 CA3d 1171, 1175-1177, 226 CR 1 (decided prior to enactment of Proposition 51)]. In such a case, the settling tortfeasor is entitled to comparative indemnity from the nonsettling defendants for the amount of its overpayment [see *American Bankers Ins. Co. v. Avco-Lycoming Division* (1979) 97 CA3d 732, 736, 159 CR 70 ].

**Exception:**

In an action for personal injury, the entire amount may not be deducted; only the amount allocable to the economic losses may be deducted from the award for economic loss [see CC § 1431.2].

**37.23[6] Future Payments Are Discounted to Present Cash Value.** In the case of a structured settlement calling for future periodic payments by a settling tortfeasor, the injured party's award is reduced by the future payments discounted to their present cash value, not by the total dollar amount of the future payments [ *Franck v. Polaris E-Z Go Div. of Textron, Inc.* (1984) 157 CA3d 1107, 1116-1121, 204 CR 321 ; see *Seymour v. Summa Vista Cinema, Inc.* (9th Cir. 1987) 809 F2d 1385, 1389-1390 ].

**37.23[7] Nonmonetary Consideration.**

**37.23[7][a] Must Be Valued and Used to Offset Judgment.** If a settlement involves nonmonetary consideration, the consideration must be valued and offset against any judgment against other defendants [ *Armstrong World Indus., Inc. v. Superior Court* (1989) 215 CA3d 951, 955-958, 264 CR 39 ; see *Alcal Roofing & Insulation v. Superior Court* (1992) 8 CA4th 1121, 1128, 10 CR2d 844 ].

Nonmonetary consideration that has been found subject to evaluation and credit includes:

- Assignment of the settling defendant's indemnity rights against the nonsettling defendants [ *Regan*

*Roofing Co. v. Superior Court* (1994) 21 CA4th 1685, 1711, 27 CR2d 62 ; *Erreca's v. Superior Court* (1993) 19 CA4th 1475, 1496, 24 CR2d 156 ];

- Assignment of a settling defendant's rights against its insurer [ *Southern Cal. Gas Co. v. Superior Court* (1986) 187 CA3d 1030, 1034-1037, 232 CR 320 ];

- Assignment of rights against an employer [ *Arbuthnot v. Relocation Realty Serv. Corp.* (1991) 227 CA3d 682, 688-690, 278 CR 135 ];

- Waiver of litigation costs [ *Garcia v. Duro Dyne Corp.* (2007) 156 CA4th 92, 105-106, 67 CR3d 100 ; *Armstrong World Indus., Inc. v. Superior Court* (1989) 215 CA3d 951, 955-957, 264 CR 39 ].

**37.23[7][b] Valuation Must Be Made in Good Faith and Should Be Valued at Time of Settlement.** The valuation must be made in good faith, and should be part of the confirmation process [ *Arbuthnot v. Relocation Realty Serv. Corp.* (1991) 227 CA3d 682, 689-690, 278 CR 135 ]. Valuation generally should take place at the settlement stage, even if the nonmonetary consideration involves an assignment of rights that may eventually be reduced to an exact amount in a judgment. Valuation as of the time of settlement allows the court to evaluate the good faith of the overall settlement as of that time [ *Erreca's v. Superior Court* (1993) 19 CA4th 1475, 1498-1499, 24 CR2d 156 ]. Valuation may be deferred if it is not necessary to the good-faith determination [ *Aero-Crete, Inc. v. Superior Court* (1993) 21 CA4th 203, 209, 25 CR2d 804 ].

**37.23[8] Plaintiff May Receive More Than Total Judgment Entered If Settling Defendant Assigns Indemnity Rights.** The value placed on a settling defendant's assignment to the plaintiff of indemnity rights against nonsettling defendants is a complex matter. A good-faith value must be credited for offset against any judgment obtained against the nonsettling defendants [ *Regan Roofing Co. v. Superior Court* (1994) 21 CA4th 1685, 1710-1715, 27 CR2d 62 ; *Erreca's v. Superior Court* (1993) 19 CA4th 1475, 1502-1505, 24 CR2d 156 ; *but see* 37.24 (effect of Proposition 51)]. Although a plaintiff under this scenario might ultimately receive more than the total judgment entered, it is not considered a double recovery [ *Regan Roofing Co. v. Superior Court* (1994) 21 CA4th 1685, 1711-1713, 27 CR2d 62 ; *Bush v. Superior Court* (1992) 10 CA4th 1374, 1385-1387, 13 CR2d 382 ]. Rather the settling defendant is electing to risk paying more than its actual comparative share by surrendering rather than pursuing its indemnity rights. This may be the prudent course if the value of those rights is speculative at the time of settlement [ *Erreca's v. Superior Court* (1993) 19 CA4th 1475, 1502-1505, 24 CR2d 156 ].

**37.23[9] Parties Must Include a Valuation or Allocation in Agreement If Cash Amount Is Not Determinative.** When the cash amount of the settlement is not determinative of the amount of the offset with regard to any remaining defendant, the settling parties must include an allocation or a valuation in their agreement [ *Alcal Roofing & Insulation v. Superior Court* (1992) 8 CA4th 1121, 1124-1125, 10 CR2d 844 ]. This allocation or valuation is then subject to the requirement that it be made in good faith, committed to the discretion of the court in the good-faith settlement approval process [ *Regan Roofing Co. v. Superior Court* (1994) 21 CA4th 1685, 1701, 27 CR2d 62 ; *Erreca's v. Superior Court* (1993) 19 CA4th 1475, 1489, 24 CR2d 156 ]. If found to be in good faith, the allocation is effective to determine the amount of setoff available to the nonsettling defendants [see *Regan Roofing Co. v. Superior Court* (1994) 21 CA4th 1685, 1703, 27 CR2d 62 ].

**Distinguish:**

The failure to include a valuation for the settlement in the agreement will result in the court's finding that the settlement does not meet the good faith test [ *Franklin Mint Co. v. Superior Court* (2005) 130 CA4th 1550, 1556-1557 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral

OverviewTortsProcedureSettlementsMultipartiesContributionTortsProcedureSettlementsMultipartiesIndemnityTortsProcedureSettlements  
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**37.24 Proposition 51 Restricts Liability for Noneconomic Damages.**

**37.24[1] Party Is Only Severally Liable for Own Comparative Share of Noneconomic Damages.** In actions covered by Proposition 51, plaintiffs who settle with one joint tortfeasor can no longer make up the difference between the compensable noneconomic damages and settlement amounts from other joint tortfeasors after trial because a party against whom a judgment is entered will only be severally liable for his or her comparative share of noneconomic damages [see *CC* § 1431.2]. Further, the amount by which a judgment against the nonsettling defendants is reduced on account of a settlement does not include amounts paid on account of the settling defendant's several-only liability for noneconomic damages [ *Garcia v. Duro Dyne Corp.* (2007) 156 CA4th 92, 102, 67 CR3d 100 ; *Espinoza v. Machonga* (1992) 9 CA4th 268, 271-277, 11 CR2d 498 ]. Only a joint and several judgment for economic damages may be reduced based on a prior settlement, and then only to the extent that the settlement represents compensation for the plaintiff's economic damages [ *Conrad v. Ball Corp.* (1994) 24 CA4th 439, 443, 29 CR2d 441 ; *Regan Roofing Co. v. Superior Court* (1994) 21 CA4th 1685, 1705-1708, 27 CR2d 62 ].

**Example:**

Suppose that P sues A, B, and C, for personal injuries. Before trial, C pays \$50,000 to P in a settlement that is confirmed as having been made in good faith, and C is released from all liability. P proceeds to trial against A and B. The jury awards \$100,000 economic damages and \$100,000 noneconomic damages and apportions fault 25 percent to A, 25% to B, and 50 percent to C. As required by Proposition 51, several judgments are entered against both A and B, each for \$25,000 in noneconomic damages (25 percent of \$100,000) [see *CC* § 1431.2(a)]. A joint judgment must also be entered against A and B for P's economic damages, but A and B are entitled to a reduction of the \$100,000 amount of economic damages to reflect the settlement [*CCP* § 877(a)]. The amount of the reduction depends on the amount of the settlement that is allocated to economic damages [ *Espinoza v. Machonga* (1992) 9 CA4th 268, 271-277, 11 CR2d 498 ].

**➡ Cross Reference:**

For discussion of possible exceptions to the applicability of Proposition 51, see *California Forms of Pleading and Practice*, Ch. 300, *Indemnity and Contribution*, § 300.63[3].

**37.24[2] Manner of Apportionment.**

**37.24[2][a] Parties to Settlement May Agree on Apportionment Scheme.** Proposition 51 and *CCP* § 877 are both silent on the manner of apportionment, and several approaches are possible.

One approach is for the parties to the settlement to agree on an apportionment scheme and include an allocation or valuation of their various claims in the settlement agreement [see *Regan Roofing Co. v. Superior Court* (1994) 21 CA4th 1685, 1706-1708, 27 CR2d 62 ; *Erreca's v. Superior Court* (1993) 19 CA4th 1475, 1488, 24 CR2d 156 ; *Alcal Roofing & Insulation v. Superior Court* (1992) 8 CA4th 1121, 1129, 10 CR2d 844 ].

**Strategic Point:**

A high apportionment to economic damages favors the settling defendant by preserving greater indemnity rights, while a high apportionment to noneconomic damages favors the plaintiff by assuring payment of damages that are not recoverable from other defendants.

**37.24[2][b] Settlement May Be Apportioned in Same Ratio as Jury Apportioned Damages.** Another possible approach is to defer the question until such time as there is a trial involving the nonsettling defendants, and then to apportion the settlement between economic and noneconomic damages in the same ratio that the jury apportioned its award of damages.

**Example:**

As in the example above [37.24[1]], the settlement amount of \$50,000 would be apportioned in a 1:1 ratio, allocating \$25,000 to economic damages and \$25,000 to noneconomic damages. The amount allocated to economic damages would be subtracted from the jury's award of economic damages (\$100,000 minus \$25,000), and a joint and several judgment would be entered against A and B for the balance (\$75,000). P could collect from either or both, but under indemnity principles, A and B would each ultimately be responsible for half of this amount [see *Sagadin v. Ripper* (1985) 175 CA3d 1141, 1173-1174, 221 CR 675 ].

**Cross Reference:**

Discussion of the effects of Proposition 51, see *California Forms of Pleading and Practice*, § 300.60 *et seq.* (Matthew Bender); or  
Levy et al., *California Torts*, Ch. 74, Resolving Multiparty Tort Litigation (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
TortsProcedureSettlementsMultipartiesPartial Settlements



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**37.25 Plaintiff May Enter Into "Sliding Scale" or "Mary Carter" Agreement With One or More Defendants.**

**37.25[1] "Sliding Scale" Agreement Limits Liability of Agreeing Defendant.** A "sliding scale" or "Mary Carter" agreement is an agreement between a plaintiff or plaintiffs and one or more, but not all, alleged tortfeasor defendants that limits the liability of the agreeing tortfeasor defendants to an amount that is dependent on the amount that plaintiff recovers from the nonagreeing defendant or defendants [*CCP* § 877.5(b)].

**Example:**

A sliding scale agreement may include an agreement in the form of a loan from the agreeing tortfeasor defendant to the plaintiff that is repayable in whole or in part from the recovery against a nonagreeing tortfeasor defendant [*CCP* § 877.5(b)]. For example, if defendant A enters a settlement agreement with Plaintiff for a noncontingent \$1,000,000 and an interest-free loan of \$3,500,000 repayable to A on Plaintiff's recovery from defendant B, the agreement is a sliding scale agreement [*see United Services Automobile Assn. v. Superior Court* (2001) 93 CA4th 633, 637-638 ].

➡ **Cross Reference:**

Discussion of "sliding scale" or "Mary Carter" agreements, see California Forms of Pleading and Practice, Ch. 300, Indemnity and Contribution, Pt. II (Matthew Bender).

**37.25[2] "Sliding Scale" Agreement Requires Notice of Intent.** In order for a "sliding scale" agreement to be effective, at least 72 hours before entering into the agreement a notice of intent to enter an agreement must be served on all nonsignatory alleged defendant tortfeasors. The court may allow a shorter time on a showing of good cause [*CCP* § 877.5(c)].

**37.25[3] Parties Must Inform Court of Agreement.** The parties entering into the agreement must promptly inform the court of the existence of the agreement and its terms and provisions [*CCP* § 877.5(a)(1)].

**37.25[4] Court Must Disclose Agreement to Jury Under Certain Circumstances.** If the action is tried before a jury and a defendant who is a party to the agreement is called as a witness at trial, the court must, on motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that the disclosure will create substantial danger of undue prejudice, confusing the issue, or misleading the jury. The information disclosed to

the jury must be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness [*CCP* § 877.5(a)(2)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Releases From Liability Mary Carter  
Agreements Torts Procedure Settlements Multiparties Partial Settlements



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**37.26 Plaintiff or Other Party Seeking Affirmative Relief Must Notify Court of Settlement on Mandatory Judicial Council Form.**

When an entire case is settled, the plaintiff or other party seeking affirmative relief must immediately file a written notice of settlement with the court using the Judicial Council form, Notice of Settlement. The party must also serve the notice on any arbitrator or other court-connected ADR neutral involved in the case. If a hearing, conference, or trial is imminent, the plaintiff must give immediate oral notice as well [*Cal Rules Ct, Rule 3.1385(a)(1)*; Judicial Council Form CM-200].



**Warning:**

Failure to provide written notice of settlement may be deemed an unlawful interference with the proceedings of the court [*Cal Rules Ct, Rule 2.30*; *CCP § 1209(a)(8)* (unlawful interference with proceedings of the court is contempt of court)].



**Cross Reference:**

Discussion of contempt of court, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 23, Contempt.



**Warning:**

Failure to notify the arbitrator or other court-connected ADR neutral at least 2 days before the arbitration hearing may result in the court ordering payment of the arbitrator's hearing fees [*Cal Rules Ct, Rule 3.1385(a)(2)*].



**Cross References:**

Form of notice of settlement, see 37.65 (Judicial Council Form CM-200).

Discussion of procedures when the settlement agreement conditions dismissal on the satisfactory completion of specified terms that are not to be performed within 45 days, see 37.27[2].

**Strategic Point:**

If a party seeking affirmative relief in a collections case, as defined in *Cal Rules Ct, Rule 3.740(a)*, files a notice of settlement under *Cal Rules Ct, Rule 3.1385*, the trial court must vacate all hearing, case management conference, and trial dates [*Cal Rules Ct, Rule 3.741*].

**Cross Reference:**

Discussion of "collections case" as defined in *Cal Rules Ct, Rule 3.740(a)*, see *Ch. 23, Case Management, 23.04[1][i]*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**37.27 Plaintiff or Other Party Seeking Affirmative Relief Must Serve and File Request for Dismissal.**

**37.27[1] Request for Dismissal Is Generally Filed Within 45 Days of Settlement.** The plaintiff or other party seeking affirmative relief must file and serve a request for dismissal of the entire case with the court within 45 days after the date of the settlement [*Cal Rules Ct, Rule 3.1385(b)*].

If the plaintiff or other party required party does not file the request, the court must dismiss the entire case 45 days after it receives notice of settlement unless good cause is shown why the case should not be dismissed [*Cal Rules Ct, Rule 3.1385(b)*].

**Example:**

A party's allegation that no enforceable settlement has been reached constitutes good cause under *Cal Rules Ct, Rule 3.1385(b)* and precludes the trial court from dismissing the action [ *Irvine v. Regents of University of California (2007) 149 CA4th 994, 1000 , 57 CR3d 500* ].

➡ **Cross Reference:**

Judicial Council Form CIV-110 request for dismissal, see *Ch. 39, Voluntary Dismissal, 39.18*.

In practice it is relatively rare that the time limit in *Cal Rules Ct, Rule 3.1385(b)* becomes operative. Usually a defendant's motivation in entering a settlement is to obtain a release and dismissal, and the defendant makes sure that the written settlement agreement specifies a relatively short period of time for the plaintiff to file a request for dismissal after the pre-conditions, such as a good-faith settlement determination. Rule 3.1385(b) assures that the parties will complete the process so the court can treat the case as closed.

**37.27[2] Request for Dismissal May Be Filed Later Under Certain Circumstances.**

**37.27[2][a] Request May Be Filed After Completion of Settlement Terms Performed More Than 45 Days After Settlement Date.** In some cases, a settlement may be conditioned on the satisfactory completion of terms that are not to be performed within 45 days of the date of settlement. In such a case, the notice of settlement must specify the date on which the dismissal will be filed. If the plaintiff does not file a dismissal within 45 days after the dismissal date specified in the notice, the court must dismiss the entire case unless good cause is shown why the case should not be

dismissed [*Cal Rules Ct, Rule 3.1385(c)*].

**Distinguish:**

A settlement with open material terms is not a conditional settlement. In fact, it is not a settlement at all because, like all contracts, it is not binding because the settling parties have not agreed on all its material terms [ *Levitz v. The Warlocks (2007) 148 CA4th 531, 535, 55 CR3d 800* ].

**37.27[2][b] Request May Be Filed After Hearing on Motion to Approve Settlement of Claims By Minor or Person With Disability.** If the settlement of the case involves the compromise of the claim of a minor or person with a disability, then the court must not hold an order to show cause hearing on dismissal before the court has held a hearing to approve the settlement [*Cal Rules Ct, Rule 3.1385(d)*].

**Prerequisite:**

The parties to a case involves the compromise of the claim of a minor or person with a disability have to have filed appropriate papers to seek court approval of the settlement [*Cal Rules Ct, Rule 3.1385(d)*].

**37.27[2][c] Request May Be Filed By Deadline Set By Court on Request for Extension of Time to File.** The parties may take such additional time beyond the statutory 45-day deadline to complete the settlement as the court has granted upon a showing of good cause by setting a specific future deadline for the filing [*see Cal Rules Ct, Rule 3.1385(e)*].

**Prerequisites:**

If a party who has served and filed a notice of settlement determines that the case cannot be dismissed within the prescribed 45 days, that party must serve and file a notice and a supporting declaration advising the court of that party's inability to dismiss the case within the prescribed time, showing good cause for its inability to do so, and proposing an alternative date for dismissal. The notice and a supporting declaration must be served and filed at least five court days before the time for requesting dismissal elapses. Upon a showing of good cause, the court must continue the matter to allow additional time to complete the settlement. The court may take such other actions as may be appropriate for the proper management and disposition of the case [*Cal Rules Ct, Rule 3.1385(e)*].

**37.27[3] Due Process Requires Notice to Parties Before Entry of Dismissal.** If the plaintiff does not file a timely dismissal, both Rule 3.1385(b) and Rule 3.1385(c) authorize parties to show good cause why the case should not be dismissed [*Cal Rules Ct, Rule 3.1385(b), (c)*]. This creates an implicit notice requirement; prior to Rule 3.1385(b) or Rule 3.1385(c) dismissal, the trial court should provide the parties with notice and an opportunity to make the showing of good cause [*see Lee v. Placer Title Co. (1994) 28 CA4th 503, 510, 33 CR2d 572 (construing former Rule 225(b) dismissal)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsVoluntary DismissalsNoticesGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview





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**37.28 CHECKLIST: Bringing Motion to Determine Good-Faith Settlement.**

**37.28[1] Moving Party's Checklist.**

- ☐ Determine whether prerequisites for hearing are present:
  - ☐ Case involves two or more parties who are joint tortfeasors or co-obligors on a contract debt.
  - ☐ Settlement was reached prior to entry of judgment.
  - ☐ Case is a personal injury action, or a tort case arising out of a commercial transaction.
  - ☐ Settlement involves plaintiff or claimant and one or more of the alleged tortfeasors.

**Authority:**

*CCP § 877.6(a)(1); Andruss v. Superior Court (1996) 46 CA4th 1276, 1278-1279, 54 CR2d 466 ; Kohn v. Superior Court (1983) 142 CA3d 323, 332, 191 CR 78*

**Discussion:**

See 37.29

- ☐ Determine if noticed motion or application is appropriate.
  - ☐ Must use noticed motion if hearing is requested.

- ☐ Must use noticed motion if settlement includes confidentiality agreement.

**Authority:**

*CCP § 877.6(a)*

**Discussion:**

See 37.31

- ☐ To bring noticed motion:

- ☐ Draft notice and motion for determination of good-faith settlement, supporting declarations, memorandum, and proposed order.
- ☐ File and serve moving and supporting papers at least 16 court days prior to hearing.
- ☐ Moving party may include request to dismiss pleading or portion of pleading

- ☐ Follow standard noticed motion procedure.

- ☐ If lacking time, ask court to shorten time.
- ☐ Calendar response and hearing dates.

**Authority:**

*CCP §§ 877.6(a)(1), 1005(b); Cal Rules Ct, Rule 3.1382*

**Discussion:**

See 37.31[1][b]

**Standard Procedure Checklist:**

See *Ch. 26, Law and Motion Practice*, 26.39

**Forms:**

See 37.68, 37.69

- ☐ File reply papers, if necessary, at least 5 court days prior to hearing.

**Authority:**

*CCP § 1005(b)*

**Discussion:**

See *Ch. 26, Law and Motion Practice*, 26.39

☐ To bring by application:

- ☐ Give notice of settlement to all parties and court along with application and proposed order.
- ☐ Draft application, listing each party and portion of pleading affected by settlement and date affected pleading was filed.
- ☐ Indicate on application the settling parties, and the basis, terms, and amount of the settlement.
- ☐ If desired, include request to dismiss pleading or portion of pleading.
- ☐ Send notice, application, and proposed order by certified mail, return receipt requested.
- ☐ File proof of service with court.
- ☐ If no opposition filed within 25 days of mailing or 20 days of personal service, court can approve settlement.

**Authority:**

*CCP § 877.6(a)(2); Cal Rules Ct, Rule 3.1382*

**Discussion:**

*See 37.31[2]*

**Forms:**

*See 37.70, 37.71, 37.72*

☐ Set forth evidentiary basis of any allocations and valuations in motion or application.

**Authority:**

*Erreca's v. Superior Court (1993) 19 CA4th 1475, 1495-1496, 24 CR2d 156*

**Discussion:**

*See 37.35*

**37.28[2] Opposing Party's Checklist.**

☐ If opposing noticed motion:

- ☐ Calendar response and hearing dates.

- ☐ Draft declarations and opposing memorandum.
- ☐ Draft proposed order.
- ☐ File and serve opposing papers no later than 9 court days prior to hearing.

☐ Follow standard noticed motion procedure.

**Authority:**

*CCP § 1005(b)*

**Discussion:**

*See 37.31[1][d]*

**Standard Motion Checklist:**

Ch. 26, Law and Motion Practice, 26.46

☐ If opposing application:

- ☐ Draft notice of motion and motion to contest good-faith settlement, supporting declarations, and memorandum.
- ☐ File notice of motion to contest good-faith settlement within 25 days of mailing or within 20 days of personal service of notice and application.
- ☐ Calendar response and hearing dates.

**Authority:**

*CCP § 877.6(a)(2)*

**Discussion:**

*See 37.31[2][d]*

☐ If there is insufficient factual evidence to prove that settlement was not in good faith:

- ☐ Move for continuance to gather information.
- ☐ Request formal discovery, if needed.

**Authority:**

*CCP § 877.6(d); City of Grand Terrace v. Superior Court (1987) 192 CA3d 1251, 1265, 238 CR 119*

**Discussion:**

*See 37.37*

☐ If court determines that settlement was made in good faith:

☐ File writ of mandate to obtain review of determination within 20 days after service of written notice of determination.

**Authority:**

*CCP § 877.6(e); see Abbott Ford, Inc. v. Superior Court (1987) 43 C3d 858, 868, 239 CR 626, 741 P2d 124*

**Discussion:**

See 37.45



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**37.29 Motion to Determine Good-Faith Settlement.**

**37.29[1] Any Party May Request a Hearing.** Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt are entitled to a hearing, on noticed motion, regarding the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors [CCP § 877.6(a)(1)].

"Joint tortfeasor" refers to all tortfeasors joined in a single action, regardless of whether their acts were contemporaneous or successive [ *Turcon Constr. Inc. v. Norton-Villiers, Ltd.* (1983) 139 CA3d 280, 283, 188 CR 580 ; see CCP § 877]. The fact that a settling tortfeasor neither needs nor seeks protection from claims for contribution or indemnity under CCP § 877.6(c) does not prevent use of the hearing procedure to secure a determination of the good faith of a settlement [ *Barth-Wittmore Ins. v. H.R. Murphy Enters., Inc.* (1985) 169 CA3d 124, 135, 214 CR 894 ].

Courts are divided whether the language of CCP § 877.6 granting a party the right to a hearing on the issue of good faith extends to settlements entered into among tortfeasors named as cross-complainants and cross-defendants apportioning their own liability [see *KAOM, Inc. v. Superior Court* (1995) 35 CA4th 549, 553-554, 41 CR2d 310 ; *Arizona Pipeline Co. v. Superior Court* (1994) 22 CA4th 33, 42, 27 CR2d 118 ; *Alcal Roofing & Insulation v. Superior Court* (1992) 8 CA4th 1121, 1128, 10 CR2d 844 ; see also 37.29[6]].

**Detailed Discussion/Forms:**

See *California Points and Authorities*, §§ 115.150-115.162 (Matthew Bender).

**37.29[2] Parties Must Be Granted Hearing, If Requested, When Settlement Reached Before Judgment Is Entered.** Parties are absolutely entitled to a hearing on the issue of the good faith of their settlement provided the settlement is reached before judgment is entered, even if a summary judgment is entered prior to the court hearing the CCP § 877.6 good-faith motion [ *Andruss v. Superior Court* (1996) 46 CA4th 1276, 1278-1279, 54 CR2d 466 ]. Postjudgment settlements are not covered by CCP §§ 877 and 877.6 [ *Jhaveri v. Teitelbaum* (2009) 176 CA4th 740, 750, 98 CR3d 268 ; *Be v. Western Truck Exch.* (1997) 55 CA4th 1139, 1144, 64 CR2d 527 ].

**37.29[3] Motion Applies to Personal Injury Actions and Tort Actions Arising Out of Commercial Transaction.** The statutes apply not only to personal injury actions, but to tort actions arising out of commercial

transactions as well [ *Kohn v. Superior Court* (1983) 142 CA3d 323, 332, 191 CR 78 ].

**37.29[4] Motion Does Not Apply to Primary Insurers of the Same Risk.** "Co-obligors on a contract debt" does not encompass insurers of the same risk because their respective obligations are not joint, but rather arise out of separate contracts. Therefore, a settlement paid by one insurer, whether or not it is determined to be in good faith, cannot defeat the equitable contribution rights of another insurer under insurance law principles [see *Herrick Corp. v. Canadian Ins. Co.* (1994) 29 CA4th 753, 759-761, 34 CR2d 844 ; *Hartford Accident & Indem. Co. v. Superior Court* (1994) 29 CA4th 435, 440 n4, 34 CR2d 520 ].

**37.29[5] Must Be More Than One Tortfeasor or Obligor.** Good-faith confirmation under CCP § 877.6 does not come into play if there is only one tortfeasor or obligor. The action must involve two or more parties who are at least alleged to be joint tortfeasors or co-obligors. Also, it is essential that some, but not all of the parties have settled [ *Hartford Accident & Indem. Co. v. Superior Court* (1995) 37 CA4th 1174, 1178-1179, 44 CR2d 126 ]. Further, even if there are multiple tortfeasors, the statute may not be used as a vehicle to resolve competing claims between two subrogees or assignees of the same party [ *Maryland Cas. Co. v. Bailey & Sons, Inc.* (1995) 35 CA4th 856, 876-877, 41 CR2d 519 ].

**37.29[6] Settlement Must Involve the Plaintiff or Claimant and One or More of the Alleged Tortfeasors.** CCP § 877.6 applies to settlements entered into "by the plaintiff or other claimant" and one or more alleged tortfeasors. It does not matter whether the tortfeasors acted in concert to create a single injury, or successively to create distinct and divisible injuries, or whether the injured party filed a single action against the tortfeasors [ *Bob Parrett Construction, Inc. v. Superior Court*, 140 CA4th 1180, 1188, 45 CR3d 250 ].

**Example:**

A cross-defendant may enter a good-faith settlement with the plaintiff before trial [see *Widson v. International Harvester Co.* (1984) 153 CA3d 45, 57-58, 200 CR 136 ]. This will serve to bar a cross-complaint, presuming it is not one for contractual indemnity or other contractual rights.

There is a split of authority as to whether the term "other claimant" in the statute allows one tortfeasor to settle its comparative indemnity rights with other tortfeasors and obtain the effects of a good-faith settlement. In one case, the court held that a settlement entered into among all but one tortfeasor apportioning their own liability is not within the scope of CCP § 877.6; therefore, a judicial determination that such a settlement is in good faith does not bar the indemnity rights of a nonsettling tortfeasor against settling tortfeasors [ *Arizona Pipeline Co. v. Superior Court* (1994) 22 CA4th 33, 39-47, 27 CR2d 118 ; see also *Alcal Roofing & Insulation v. Superior Court* (1992) 8 CA4th 1121, 1128, 10 CR2d 844 ]. However, a different Division of the same District has reached the opposite conclusion. It found a "tortfeasor only" settlement to be in conformity with the policies behind settling multi-party tort litigation, and refused to require a tortfeasor to settle with the plaintiff before allowing it to escape liability for comparative indemnity under CCP § 877(a) [ *KAOM, Inc. v. Superior Court* (1995) 35 CA4th 549, 553-555, 41 CR2d 310 ; see also *Maryland Cas. Co. v. Bailey & Sons, Inc.* (1995) 35 CA4th 856, 878 n24, 41 CR2d 519 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements Validity Torts Procedure Settlements Multiparties Partial Settlements



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Chapter 37 Settlement and Release  
IV. BRINGING MOTION TO DETERMINE GOOD-FAITH SETTLEMENT

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**37.30 Test for Good Faith.**

**37.30[1] Court Ascertains Whether Settlement Is Grossly Disproportionate to Reasonable Estimate of Settlor's Liability.** The test to determine if a settlement is made in good faith is whether the settlement is grossly disproportionate to what a reasonable person at the time of settlement would estimate the settlor's liability to be [ *City of Grand Terrace v. Superior Court* (1987) 192 CA3d 1251, 1262, 238 CR 119 ; see *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499, 213 CR 256, 698 P2d 159 ].

**37.30[2] Various Factors Considered.** The trial court has wide discretion in deciding whether a settlement is in good faith, and in arriving at an allocation of valuation of the various interests involved [ *North County Contractor's, Ass'n v. Touchstone Ins. Servs.* (1994) 27 CA4th 1085, 1094-1095, 33 CR2d 166 ]. In making the determination, the court must take into account a number of factors. These factors include the following:

- A rough approximation of plaintiff's total recovery and the settlor's proportionate liability for the total amount paid in settlement [ *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499-500, 213 CR 256, 698 P2d 159 ; *Long Beach Memorial Medical Center v. Superior Court* (2009) 172 CA4th 865, 873, 91 CR3d 494] .

**Examples:**

- Doctors settling for \$200,000 in action for \$10 million is not in good faith where even their counsel admitted their liability was around \$1.5 million [ *Long Beach Memorial Medical Center v. Superior Court* (March 26, 2009) 172 CA4th 865, 873-874, 91 CR3d 494] .
- If the settlement does not require the more culpable tortfeasor to bear its fair share of the loss, the court can find that it is not in good faith [ *Bay Dev., Ltd. v. Superior Court* (1990) 50 C3d 1012, 1034-1035, 269 CR 720, 791 P2d 290 ; *Far West Fin. Corp. v. D & S Co.* (1988) 46 C3d 796, 815, 251 CR 202, 760 P2d 399] .



- The allocation of settlement proceeds among the plaintiffs in multi-plaintiff cases [ *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 C3d 488, 499-500, 213 CR 256, 698 P2d 159* ] .

- A recognition that a settlor should pay less in settlement than the settlor would if found liable after a trial [ *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 C3d 488, 499-500, 213 CR 256, 698 P2d 159* ] .

- The financial conditions and insurance policy limits of settling defendants [ *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 C3d 488, 499-500, 213 CR 256, 698 P2d 159* ] .

**Example:**

- Doctors settling for \$200,000 in action for \$10 million in which their insurance coverage had a \$2 million cap was not in good faith [ *Long Beach Memorial Medical Center v. Superior Court (2009) 172 CA4th 865, 874-875, 91 CR3d 494* ] .

- The liability of the settling defendant to codefendants under a theory of indemnity [ *Long Beach Memorial Medical Center v. Superior Court (2009) 172 CA4th 865, 875, 91 CR3d 494* (comparative indemnity); *TSI Seismic Tenant Space, Inc. v. Superior Court (2007) 149 CA4th 159, 167, 56 CR3d 751* (implied indemnity)].

**Example:**

- Timing of settlement after hospital and medical group settled with plaintiff showed that doctors settling for \$200,000 in action for \$10 million did not do so in good faith, because it was designed to cut off indemnification rights of the earlier settling codefendants, given that plaintiffs preferred to not go to trial against only remaining defendants, the doctors [ *Long Beach Memorial Medical Center v. Superior Court (2009) 172 CA4th 865, 875-876, 91 CR3d 494* ] .

- The existence of any collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants [see *Pruyn v. Agricultural Ins. Co. (1995) 36 CA4th 500, 527, 42 CR2d 295* ] .

**Example:**

- A settlement, to the extent that it is dictated by the tactical advantage of removing a deep-pocket defendant, is not made in "good faith" consideration of the relevant liability of all parties, and where a settlement was tactical and did not reflect the cooperative decisionmaking among all interested parties that is one of the aims of settlements, it was injurious to the interests of codefendants [ *Long Beach Memorial Medical Center v. Superior Court (2009) 172 CA4th 865, 875-876, 91 CR3d 494* ] .

**37.30[3] Evaluation Made on Basis of Information Available at Time of Settlement.** Practical considerations require that the evaluation be made on the basis of information available at the time of settlement. A defendant's settlement figure must not be grossly disproportionate to what a reasonable person would estimate the settling

defendant's liability to be at the time of the settlement. The party asserting the lack of good faith has the burden of proof that the settlement is so far "out of the ballpark" in relation to these factors that it is inconsistent with the equitable objectives of § 877.6 [see CCP § 877.6(d)]. That demonstration would establish that the proposed settlement was not a settlement made in "good faith" within the meaning of CCP § 877.6 [ *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499-500, 213 CR 256, 698 P2d 159 ].

**37.30[4] Gross Disproportionality to Damages Sought in Complaint Not Dispositive.** A settlement may be in good faith even if it is for a sum grossly disproportionate to the damages prayed for in the complaint, if it is not disproportionate to what the trial court might have considered the probable recovery of the plaintiff from the settling joint tortfeasor [ *Kohn v. Superior Court* (1983) 142 CA3d 323, 327-328, 191 CR 78 ]. Even if the claimant's damages are obviously great, and the liability for them is certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent and uninsured or underinsured, joint tortfeasor [ *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499, 213 CR 256, 698 P2d 159 ]. Speculation that the tortfeasor may subsequently obtain assets from which a judgment may be satisfied is improper, as the determination must be made on the basis of information available at the time of settlement [ *County of Los Angeles v. Guerrero* (1989) 209 CA3d 1149, 1158, 257 CR 787 ; see *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499, 213 CR 256, 698 P2d 159 ].



#### Strategic Point:

It would be rare to have a settlement not be in good faith in a personal injury action now that liability for noneconomic losses is several. It could occur, however, in an extraordinary case with large economic losses.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements Validity



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**37.31 Good-Faith Determination.**

**37.31[1] By Noticed Motion.**

**37.31[1][a] Noticed Motion Required If Hearing Requested.** A party seeking a determination that a settlement is in good faith may proceed by noticed hearing or, under some circumstances, by notice and application [*see CCP § 877.6(a)*]. If a hearing is desired or required, written notice must be given [*CCP §§ 877.6(a), 1005(a)(5)*]. A motion for determination of good-faith settlement may include a request to dismiss a pleading or a portion of a pleading. The notice of motion must list each party and pleading or portion of pleading affected by the settlement and the date on which the affected pleading was filed [*Cal Rules Ct, Rule 3.1382*].

**37.31[1][b] Moving Papers Must Be Served and Filed at Least 16 Court Days Prior to Hearing.** All moving and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing [*CCP § 1005(b)*]. In addition, if the notice is served by mail, the required 16-day period is increased by 5 calendar days if the place of mailing and the place of address are within the state of California, 10 calendar days if either the place of mailing or the place of address is outside the state of California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. If the notice is served by fax, express mail, or another method of overnight delivery, the 16-day period is increased by two calendar days [*CCP § 1005(b)*]. An extension of two court days, as opposed to calendar days, may apply in case of electronic service made pursuant to a local rule [*see CCP § 1010.6(a)(6)*].

➡ **Cross Reference:**

For form of motion and order, see 37.68, 37.69.

**37.31[1][c] Court May Shorten Time for Notice for Good Cause.** On a showing of good cause, the court may shorten the time for giving the required notice to permit the determination of the issue to be made before the commencement of the trial of the action, or before the verdict or judgment if settlement is made after the trial has commenced [*CCP § 877.6(a)(1); see also CCP § 1005(b)*].

➡ **Cross Reference:**

For discussion on motions to shorten time, see *Ch. 27, Service of Papers, 27.08-27.13*.

**37.31[1][d] Opposing Papers Must Be Filed and Served at Least 9 Court Days Prior to Hearing.** Opposing papers must be filed and served at least 9 court days before the time appointed for the hearing [CCP § 1005(b)]. There is a two court day extension if served by electronic service pursuant to local rules [CCP § 1010.6(a)(6)]. The provisions extending the time within which a right may be exercised or an act may be done when service is made by mail, do not apply [CCP § 1005(b)].

**37.31[1][e] Reply Papers Must Be Filed and Served at Least Five Court Days Prior to Hearing.** Reply papers must be filed and served at least 5 court days before the time appointed for the hearing [CCP § 1005(b)]. There is a two court day extension if served by electronic service pursuant to local rules [CCP § 1010.6(a)(6)]. The provisions extending the time within which a right may be exercised or an act may be done when service is made by mail, do not apply [CCP § 1005(b)].

### **37.31[2] By Application.**

**37.31[2][a] Must Give Notice of Settlement to All Parties and Court and Present with Application and Proposed Order.** As an alternative to a noticed hearing, a settling party may give notice of settlement to all parties and to the court, together with an application for determination of good-faith settlement and a proposed order [CCP § 877.6(a)(2)]. An application for determination of good-faith settlement may include a request to dismiss a pleading or a portion of a pleading. The application must list each party and pleading or portion of pleading affected by the settlement and the date on which the affected pleading was filed [Cal Rules Ct, Rule 3.1382].



#### **Strategic Point:**

The application procedure is simpler than the motion procedure. Under the application procedure, no court appearance is required. The application is commonly used when there is not a time deadline and when it appears that no one will object.

#### **Judge's Perspective:**

The court will always prefer to have the issue addressed by way of noticed motion. The reason for this preference is that it is easier for the court to keep track of the objections interposed by the opposing party and it safeguards against some party later on saying that it did not have an opportunity to be heard. The application process places the burden on the court to not only calendar the time period for objections to be interposed but then likewise makes it incumbent on the court after the deadline to make sure that it has not missed any papers subsequently filed by an objector. Too often, the proposed order has been signed only for the court to learn that some objecting party's papers did not make it to the file on time.

**37.31[2][b] Application Must Indicate Terms of Settlement.** The application must indicate the settling parties, and the basis, terms, and amount of the settlement [CCP § 877.6(a)(2)].



#### **Cross Reference:**

For form of notice, application, and supporting declaration, see 37.70, 37.71, 37.72.

**37.31[2][c] Notice, Application and Order Must Be Sent by Certified Mail.** The notice, application, and proposed order must be given by certified mail, return receipt requested, and proof of service must be filed with the court [CCP § 877.6(a)(2)].

**37.31[2][d] Within 25 Days of Mailing or 20 Days of Personal Service, Nonsettling Party May File Motion to Contest Good Faith of Settlement.** Within 25 days of the mailing of the notice, application, and proposed order, or within 20 days of personal service, a nonsettling party may file a notice of motion to contest the good faith of the

settlement [CCP § 877.6(a)(2)]. The notice by a nonsettling party must be given as provided in CCP § 1005(b) [CCP § 877.6(a)(2)].



#### Cross Reference:

For discussion of service, see 37.31[1][b].

**37.31[2][e] If No Parties File Motion, Court May Approve Settlement.** If none of the nonsettling parties files a motion, the court may approve the settlement [CCP § 877.6(a)(2)].

**37.31[2][f] May Not Use Application Procedure If Settlement Includes Confidentiality Agreement.** This procedure is not available if the settlement agreement includes a confidentiality agreement regarding the case or the terms of the settlement [CCP § 877.6(a)(2)].



#### Strategic Point:

Confidentiality provisions are contained in most settlement agreements. Parties may stipulate to a protective order that will allow disclosure of the settlement agreement to the parties, but require the parties to keep the terms confidential. Absent such a stipulation, most judges are likely to permit the entry of such a protective order to preserve the confidentiality of the settlement terms to the parties in the action. Pursuant to the protective order, the settlement agreement is then attached to the motion for good-faith settlement, but filed under seal. Absent unusual public safety or other concerns, most judges would likely allow the settlement agreement to be filed under seal under *Cal Rules Ct*, 2.550, 2.551.



#### Strategic Point--Plaintiff:

Most defendants will require, as a matter of course, that confidentiality be included in a settlement. However, there is frequently no reason to have confidentiality in the settlement agreement, and counsel should not as a pro forma matter accept inclusion of a confidentiality provision.



#### Warnings:

Remember that if you wish to enforce a settlement agreement that is confidential, it will be difficult to do so while maintaining the confidentiality provisions.

Some courts have local policies of refusing to enforce the confidentiality of settlement agreements [see San Diego Super Ct Rules, Rule 2.48].

A settlement agreement in a civil action the factual foundation for which establishes a cause of action for civil damages for an act that may be prosecuted as a felony sex offense generally may not be confidential [CCP § 1002(a); see 37.22[5]].



#### Cross Reference:

Discussion of obtaining or opposing order to seal court records, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 2.11 et seq.

**37.31[3] Due Process Requires Notice to All Tortfeasors.** Counsel for a settling defendant should ensure that all tortfeasors who might conceivably be liable to the plaintiff for the injury alleged are parties to the action by complaint or cross-complaint at the time of settlement, or at least by the time of the good-faith hearing under CCP § 877.6. Due process [see *US Const*, amend XIV; *Cal Const*, art I, § 17] requires that a tortfeasor who is not yet a party but whose

potential liability is known, or reasonably should have been known, to the settling parties must have an opportunity to be heard on the good faith of a prior settlement [ *Singer Co. v. Superior Court* (1986) 179 CA3d 875, 881, 890-893, 225 CR 159 ]. Once the tortfeasor is made a party, it is entitled to a new good-faith hearing. The tortfeasor may engage in limited discovery to elicit the evidence relevant to the determination of good faith that was available at the time of settlement, whether or not the evidence was actually presented [ *Singer Co. v. Superior Court* (1986) 179 CA3d 875, 881, 895, 225 CR 159 ].

**37.31[4] Court Does Not Require Jurisdiction Over Tortfeasor.** Nothing in *Section 877.6* requires that the court have jurisdiction over the joint tortfeasor for the good-faith settlement to apply as long as the joint tortfeasor had notice and an opportunity to challenge the good-faith determination [ *Britz, Inc. v. Dow Chem. Co.* (1999) 73 CA4th 177, 184, 86 CR2d 188 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSettlementsSettlement AgreementsValidity



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**37.32 Good-Faith Determination Is a Question of Fact.**

Whether a settlement is in good faith is a question of fact to be determined by the trial court on the basis of the evidentiary material presented to it [ *City of Grand Terrace v. Superior Court* (1987) 192 CA3d 1251, 1263-1264, 238 CR 119 ; *Barth-Wittmore Ins. v. H.R. Murphy Enters., Inc.* (1985) 169 CA3d 124, 131, 214 CR 894 ]. The court will examine the legal theories under which the defendant may be liable, to determine if there is a reasonable likelihood that the settling defendant faces substantial liability [see *Gehl Bros. Mfg. Co. v. Superior Court* (1986) 183 CA3d 178, 184-186, 228 CR 19 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**37.33 Burden of Proof to Show Lack of Good Faith Is on Nonsettling Tortfeasor.**

The burden of proving the settlement rests on the settling party. Once the settlement is shown, the burden of proof shifts to the nonsettling tortfeasor to show that the settlement was not made in good faith [*CCP* § 877.6(d); *City of Grand Terrace v. Superior Court* (1987) 192 CA3d 1251, 1261, 238 CR 119 ].



**Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**37.34 Court May Decide Based on Affidavits or Declarations but May Receive Other Evidence.**

The good-faith issue may be determined by the court on the basis of affidavits or declarations served with the notice of motion and the counteraffidavits (or counterdeclarations) filed in response. The court may, in its discretion, receive other evidence at the hearing [*CCP* § 877.6(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**37.35 Moving Party Must Set Forth Evidentiary Basis of Allocations and Valuations.**

A party seeking confirmation must set forth the evidentiary basis of any allocations and valuations made and must demonstrate that the allocation was reached in a sufficiently adversarial manner to justify the presumption that a reasonable valuation was reached [ *Erreca's v. Superior Court (1993) 19 CA4th 1475, 1495-1496, 24 CR2d 156* ].

**Example:**

A conclusional declaration by plaintiff's counsel that the settling defendant is not liable is insufficient to establish that the settlement represents a good-faith approximation of that defendant's proportionate share of liability [ *Greshko v. County of Los Angeles (1987) 194 CA3d 822, 834-835, 239 CR 846* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**37.36 Party Cannot Seek Confirmation of Settlement and Withhold It on Grounds of Confidentiality.**

A party may not both seek confirmation of a settlement agreement, and withhold it from nonsettling defendants on grounds of confidentiality. However, there appear to be two different interpretations of whether a settlement agreement must be revealed in its entirety to nonsettling defendants before it may be confirmed.

The Fourth District Court of Appeal held that when a written settlement agreement exists at the time the settling parties seek good-faith confirmation, the settling parties must produce the agreement for a nonsettling party who opposes the motion [ *Mediplex of Cal. v. Superior Court* (1995) 34 CA4th 748, 754, 40 CR2d 397 ].

However, the First District Court of Appeals held that a settlement agreement need not be executed and presented to the court as long as all of the parties are timely advised of the important terms of the settlement [ *Alcal Roofing & Insulation v. Superior Court* (1992) 8 CA4th 1121, 1127, 10 CR2d 844 ]. The *Alcal* court held that at a minimum, a party seeking confirmation of a settlement should explain to the court and to all other parties (1) who has settled with whom; (2) the dollar amount of each settlement; (3) if any settlement is allocated and how it is allocated between issues and/or parties; and (4) what nonmonetary consideration has been included and how the parties to the settlement value the nonmonetary consideration [ *Alcal Roofing & Insulation v. Superior Court* (1992) 8 CA4th 1121, 1129, 10 CR2d 844 ].

**Strategic Point:**



Although there seems to be support for the disclosure of only the important terms of the settlement agreement, the nonsettling parties have a persuasive argument that the entire settlement agreement must be disclosed. If the settling parties want to allow access to only the non-standard provisions, the nonsettling parties should be allowed to require the settling parties to set out what they believe to be the standard provisions of such a settlement. In the end, the nonsettling parties should be allowed, at a minimum, discovery of the complete settlement agreement. Other than with respect to settlements that occur during a mediation and, thus, are protected under *Evid Code* §§ 1115-1128, documents exchanged in settlement negotiations or communications made during settlement negotiations are not protected from discovery. Often discovery could lead to the discovery of admissible evidence even though the settlement discussions might not be admissible at trial to prove liability [*Evid Code* § 1152] or to prove the invalidity of the claim [*Evid Code* § 1154]. Although the public policy promoting settlements almost

certainly would allow a trial judge to preclude depositions of persons involved in ongoing negotiations, once the negotiations have concluded in a binding settlement agreement, it seems implausible that some limited discovery of documents exchanged in settlement negotiations would interfere with the settlement process. Documents exchanged across the settlement negotiation table clearly are not within any applicable privilege since the parties exchange such documents to persuade the opposing party, whose interests in the negotiations are clearly adverse. The Evidence Code sections that provide discovery protections regarding mediations lend support to the argument that, absent a mediation, such documents are discoverable. Because the parties that are negotiating a settlement invariably do not wish to have their respective arguments the subject of later discovery by nonsettling parties, it often is desirable to negotiate sensitive settlements only as part of a mediation.



**Warning:**

Counsel should be sure to satisfy *Evid Code* § 1123 and provide that the mediation privilege is waived as to actions for enforcement of the settlement agreement by securing from the parties a statement of agreement. Absent such a waiver provision, a party may be precluded from presenting evidence of the settlement for subsequent proceedings [see *Stewart v. Preston Pipeline* (2005) 134 CA4th 1565 , 1573, 36 CR3d 901 ]. The trend in case law of strictly upholding the mediation privilege is raising serious questions about the ability to enforce settlements that have been the subject of mediation.



**Cross Reference:**

Discussion of settlement confidentiality, see 37.22[4][b].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Torts Procedure Settlements Multiparties Partial Settlements



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**37.37 Objecting Party May Move for Continuance.**

In many instances the defendant who objects to the settlement does not possess sufficient factual information at the time of the hearing to carry the burden of proof that the settlement was not made in good faith. In such a case, it is appropriate for the objector to move for a continuance of the hearing, if necessary, for the purpose of gathering sufficient facts. The process might include further formal discovery to support the statutory burden of proof regarding all potentially applicable *Tech-Bilt* factors [*CCP* § 877.6(d); *City of Grand Terrace v. Superior Court* (1987) 192 CA3d 1251, 1265, 238 CR 119 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**37.38 Special Master May Be Used to Allow Court to Make Independent Judgment.**

Potential problems arise if the same judge conducts extensive settlement negotiations and then passes on the good faith of the settlement at the confirmation hearing. A judge who hears a settlement proceeding is not automatically barred from hearing a good-faith settlement motion. However, a judge should not preside over extensive settlement negotiations that produce tentative resolutions of complex issues, particularly if not all parties are represented, and then also hear the confirmation motion [ *Erreca's v. Superior Court (1993) 19 CA4th 1475, 1493, 24 CR2d 156* ]. It may be prudent to refer complex settlement negotiations arising out of a settlement conference to a special master. The master is an officer of the court who is assumed to be acting independently. The master makes a report on settlement matters to the court, and the court is then free to exercise its independent judgment by accepting or rejecting it [ *Erreca's v. Superior Court (1993) 19 CA4th 1475, 1493, 24 CR2d 156* ].

**Judge's Perspective:**

The use of special masters has become increasingly important in cases where a number of plaintiffs represented by the same counsel settle their case for one global amount. Generally, the special masters assist the court and counsel in the allocation process.

**Locating Special Masters Using Online Resources.**

Many resources are available online for locating special masters. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Access Directories > CA Listings--Martindale Hubbell(R) Law Directory.

- Sample Search: To find a person with prior special master qualifications in California, try a search in the Martindale Hubbell(R) Law Directory such as: *special master*. If a special master is sought for a particular area of the state, try a search in this type of format: *special master /100 los angeles*.

- To find articles about or written by a special master once a suitable special master has been located, search the law reviews and other periodicals in Legal tab > Secondary Legal > Law Reviews, CLE,

### Legal Journals & Periodicals, Combined

 Sample search: For legal articles written by a particular special master, try a simple search: *first name /3 last name*.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersReferencesCivil ProcedureSettlementsSettlement AgreementsValidity



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Chapter 37 Settlement and Release  
IV. BRINGING MOTION TO DETERMINE GOOD-FAITH SETTLEMENT

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**37.39 Jury Trial Not Required for Hearing.**

A good-faith settlement confirmation hearing under *CCP* § 877.6 is equitable in nature and not an action at law. Therefore, a jury trial is neither authorized by the statute nor constitutionally required [ *Widson v. International Harvester Co.* (1984) 153 CA3d 45, 56-57, 200 CR 136 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSettlementsSettlement AgreementsValidity





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##### **37.40 Settling Defendant May Recover Comparative Indemnity From Nonsettling Tortfeasor.**

Subject to possible limitations imposed by Proposition 51 [see 37.24], a settling defendant may recover comparative indemnity from a nonsettling tortfeasor [ *Bolamperti v. Larco Mfg. (1985) 164 CA3d 249, 251-255, 210 CR 155* ; *Teachers Ins. Co. v. Smith (1982) 128 CA3d 862, 866, 180 CR 701* ]. It does not matter whether the settling party was originally sued by the plaintiff or was brought into the action as a cross-defendant for indemnity [ *Widson v. International Harvester Co. (1984) 153 CA3d 45, 57, 200 CR 136* ].

The settling defendant is not required to first prove that the amount paid in settlement exceeded the settling defendant's proportionate share as a condition on seeking indemnity [ *Gross v. Allen (1994) 22 CA4th 354, 360-361, 27 CR2d 429* ]. Conversely, the proposed indemnitor is not bound by the settlement amount as the measure of the plaintiff's damages, even if the settlement has been found to be in good faith. The indemnitor may attempt to prove that the damages were less than the settlement, and consequently, that its liability for indemnity is less than the amount claimed based on the settlement [ *Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp. (1994) 8 C4th 100, 118-119, 32 CR2d 263, 876 P2d 1062* ].

If there is a contract that expressly provides for indemnity rights between codefendants, a good-faith settlement by the contract indemnitor does not defeat a nonsettling indemnitee's right to express contractual indemnity [ *Bay Dev., Ltd. v. Superior Court (1990) 50 C3d 1012, 1019, 1032, 269 CR 720, 791 P2d 290* ; *C. L. Peck Contractors v. Superior Court (1984) 159 CA3d 828, 834, 205 CR 754* ].

##### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
TortsProcedureSettlementsMultipartiesIndemnity



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**37.41 Claims for Indemnity Are Barred by Good-Faith Settlement.**

A good-faith settlement discharges the settling tortfeasor from all liability for comparative indemnity to any other parties [CCP § 877(b); *American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 C3d 578, 604, 146 CR 182, 578 P2d 899; *Willdan v. Sialic Contractors Corp.* (2007) 158 CA4th 47, 54, 69 CR3d 633]. A determination by the court that the settlement was made in good faith bars any other joint tortfeasor from any further claims against the settling tortfeasor for equitable comparative contribution or partial or comparative indemnity based on comparative negligence or comparative fault [CCP § 877.6(c); see *Fullerton Redev. Agency v. S. Cal. Gas Co.* (2010) 183 CA4th 428, 432, 107 CR3d 396 (bars contribution and indemnity claims asserted under *H&S Code* § 25363); *Mid-Century Ins. Exch. v. Daimler-Chrysler Corp.* (2001) 93 CA4th 310, 315-317, 112 CR2d 880]. This bar extends to both claims for total equitable indemnity and claims for implied contractual indemnity [ *Bay Dev., Ltd. v. Superior Court* (1990) 50 C3d 1012, 1028-1035, 269 CR 720, 791 P2d 290 (implied contractual immunity); *Far West Fin. Corp. v. D & S Co.* (1988) 46 C3d 796, 800, 817, 251 CR 202, 760 P2d 399 (total equitable indemnity)].

**Exception:**

A settlement agreement that expressly excludes specific claims from the agreement preserves both the claims and the right to comparative indemnity from joint tortfeasors [ *Willdan v. Sialic Contractors Corp.* (2007) 158 CA4th 47, 54-57, 69 CR3d 633 ].

**Distinguish:**

A claim by a joint tortfeasor seeking neither indemnity nor contribution and that the trial court would not contemplate in determining the proportionate liability of a settling tortfeasor is not a claim for indemnity and hence survives a good faith settlement bar under CCP § 877.6(c) [ *In re Heritage Bond Litigation* (9th Cir. 2008) 546 F3d 667, 681 ].

**Distinguish:**

Express contractual indemnity claims are not barred by a good-faith settlement determination [ *C.L. Peck Contractors v. Superior Court* (1984) 159 CA3d 828, 833-834, 205 CR 754 ].

 **Cross Reference:**

Discussion of indemnity, see California Forms of Pleading and Practice, Ch. 300, Indemnity and Contribution (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

TortsProcedureSettlementsMultipartiesIndemnity



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**37.42 Sliding Scale Agreements May Be Confirmed as Good-Faith Agreements.**

Sliding-scale agreements may be confirmed as in good faith under *CCP* § 877.6. Confirmation has the same effect for a sliding-scale settlement agreement as it has for a regular settlement agreement [see *J. Allen Radford Co. v. Superior Court* (1989) 216 CA3d 1418, 1423-1424, 265 CR 535 ].

To meet its burden of proving a lack of good faith, a nonsettling defendant is entitled to discover all of the terms of the settlement agreement [ *J. Allen Radford Co. v. Superior Court* (1989) 216 CA3d 1418, 1423-1424, 265 CR 535 ].



**Strategic Point--Nonsettling Party:**

Any sliding scale settlement should be read carefully by the nonsettling party to ensure that it obtains full value for set-off purposes and that there are no provisions within the agreement that unfairly burden the nonsettling party.



**Cross References:**

Discussion on sliding scale agreements, see 37.25.

Discussion on whether a settlement agreement must be produced to be confirmed as in good faith, see 37.36.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Settlements Releases From Liability Mary Carter Agreements



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**37.43 Settling Party May Obtain Discharge From Comparative Indemnity Claims by Requesting Dismissal of Affected Pleading or Portion of Pleading.**

*CCP* §§ 877 and 877.6(c) provide for the discharge of the settling party from comparative indemnity claims once the court has determined that the settlement is in good faith. However, neither statute specifies a procedure by which the discharge or bar may be implemented with regard to the settling and nonsettling tortfeasors. *Cal Rules of Ct, Rule 3.1382*, allowing for dismissal of a pleading or a portion of a pleading to be requested at the time of making the good-faith application or motion, affords the best mechanism for obtaining discharge of such claims.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
TortsProcedureSettlementsMultipartiesIndemnity



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**37.44 Judicial Determination That Settlement Is Not in Good Faith Does Not Necessarily Invalidate Settlement.**

A judicial determination that a settlement is not in good faith does not necessarily invalidate the settlement unless the settlement agreement itself so provides [see *Killian v. Millard* (1991) 228 CA3d 1601, 1607 n2, 279 CR 877 ; *Rankin v. Curtis* (1986) 183 CA3d 939, 949, 228 CR 753 ]. Rather, the effect is that the settling defendants will not be afforded protection from subsequent indemnity claims by nonsettling defendants [see *Killian v. Millard* (1991) 228 CA3d 1601, 1607 n2, 279 CR 877 ].



**Warning:**

If your client presumes that he or she will be protected by a settlement, the settlement agreement must be contingent on a good-faith finding. Otherwise, your client will remain exposed to cross-actions.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSettlementsSettlement AgreementsValidity



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**37.45 Review of Good-Faith Settlement Determination.**

**37.45[1] Good-Faith Determination Is Interlocutory and Nonappealable, but Determination May Be Reviewed by Writ.** A determination that a settlement was made in good faith is an interlocutory decree and is nonappealable [ *Chernett v. Jacques* (1988) 202 CA3d 69, 71, 248 CR 63 ; *Barth-Wittmore Ins. v. H.R. Murphy Enters., Inc.* (1985) 169 CA3d 124, 130, 214 CR 894 ]. However, any party aggrieved by the trial court's determination that a settlement was made with or without good faith may petition the proper court for a writ of mandate to obtain a review of the determination [CCP § 877.6(e); see *Abbott Ford, Inc. v. Superior Court* (1987) 43 C3d 858, 868, 239 CR 626, 741 P2d 124 ].

The good-faith determination cannot be reviewed for the first time in an appeal from the final judgment arising out of the trial of the plaintiff's claims against the nonsettling defendants [ *Main Fiber Prods., Inc. v. Morgan & Franz Ins. Agency* (1999) 73 CA4th 1130, 1136-1137, 87 CR2d 108 ]. A party may, however, challenge the good-faith determination in a post-judgment appeal when its prejudgment writ has been summarily denied [see *Maryland Cas. Co. v. Andreini & Co.* (2000) 81 CA4th 1413, 1425, 97 CR2d 752 ].

Review by writ may encompass the order or judgment dismissing the indemnity claim because of the good-faith determination, but such review is not compelled by CCP § 877.6(e) [ *Housing Group v. Superior Court* (1994) 24 CA4th 549, 552, 29 CR2d 460 ].



**Warning:**

If you wish to challenge the trial court finding on good faith, you must file a writ.



**Cross Reference:**

Discussion of procedure for writ of mandate, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender).

**37.45[2] Writ Petition Must Be Filed Within 20 Days After Service of Written Notice of Determination or as the Court Allows.** The writ of mandate petition must be filed within 20 days after service of written notice of the determination, or within such additional time, not exceeding 20 days, as the trial court may allow [CCP § 877.6(e)].

**37.45[3] Reviewing Court Must Notify Parties of Decision on Whether to Hear Writ Within 30 Days of Receipt of Materials.** The reviewing court must, within 30 days of the receipt of all materials to be filed by the parties, determine whether it will hear the writ and notify the parties of the determination [*CCP* § 877.6(e)(1)]. If the court grants a hearing on the writ, the hearing must be given special precedence over all other civil matters on the court's calendar except those matters to which equal or greater calendar precedence is granted by law [*CCP* § 877.6(e)(2)]. The running of any time period after which the action would be subject to dismissal pursuant to *CCP* §§ 583.110-583.440 is tolled during the review period [*CCP* § 877.6(e)(3)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSettlementsSettlement AgreementsGeneral Overview





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**37.46 Settlement Agreement May Be Enforced by Parties.**

**37.46[1] Settlement Agreements Are Governed by Contract Principles.** Settlement agreements are contracts that may be enforced as any other contract, including by way of an action for specific performance [ *Nicholson v. Barab* (1991) 233 CA3d 1671, 1681, 285 CR 441 ; *Gopal v. Yoshikawa* (1983) 147 CA3d 128, 132, 195 CR 36 ; *Barndt v. County of Los Angeles* (1989) 211 CA3d 397, 403-406, 259 CR 372 ]. However, a court will not enforce a settlement agreement provision that is illegal, contrary to public policy, or unjust [ *California State Auto Ass'n Inter-Ins. Bureau v. Superior Court* (1990) 50 C3d 658, 664, 268 CR 284, 788 P2d 1156 ; *Timney v. Lin* (2003) 106 CA4th 1121, 1127, 131 CR2d 387 ].

 **Cross Reference:**

Discussion of specific performance, see California Forms of Pleading and Practice, Ch. 528, Specific Performance (Matthew Bender).



**Strategic Point:**

If settlement is not reached in court so that *CCP* § 664.6 is not applicable, the parties should consider the inclusion of an arbitration clause in the written settlement agreement to address any post-settlement agreement disputes.

**37.46[2] Oral Settlements Enforceable Unless Statute of Frauds Applies.** Oral settlement agreements are enforceable in the same manner as oral agreements in general, unless the statute of frauds requires a writing [see, e.g., *Ryan v. Garcia* (1994) 27 CA4th 1006, 1009, 33 CR2d 158 ].

 **Cross Reference:**

Discussion of statute of frauds requirements, see California Forms of Pleading and Practice, Ch. 530, Statute of Frauds (Matthew Bender).

**37.46[3] Settlement May Be Enforced by Summary Judgment Motion.** Settlement may be enforced by a motion for summary judgment under *CCP* § 437c, provided there are no undisputed facts [ *Kilpatrick v. Beebe* (1990)

219 CA3d 1527, 1529-1530, 269 CR 52 ; *Hastings v. Matlock* (1980) 107 CA3d 876, 882-883, 166 CR 229 (no summary judgment when facts are disputed)].

➡ **Cross Reference:**

Discussion of summary judgment motions, see Ch. 38, Summary Judgment.

**37.46[4] Settlement May Be Raised as Affirmative Defense.** Settlement may be raised as an affirmative defense [ *Thompson v. Williams* (1989) 211 CA3d 566, 571, 259 CR 518 ].

➡ **Cross Reference:**

Discussion of pleading settlement as affirmative defense, see 37.48.

**37.46[5] Settlement May Be Enforced by Special Motion.** Some settlements may also be enforced by means of a special motion under *CCP* § 664.6.

➡ **Cross Reference:**

Discussion of motions under *CCP* § 664.6, see 37.47.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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### 37.47 Party May Make Motion to Enforce Settlement and Enter Judgment Under CCP § 664.6.

**37.47[1] CCP § 664.6 Allows for Judgment by Stipulation.** If parties to pending litigation stipulate, either in writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, the court may entertain a motion to enter judgment pursuant to the terms of the settlement [CCP § 664.6]. The trial court's order must accurately state all terms of the agreed settlement [ *Hines v. Lukes* (2008) 167 CA4th 1174, 1185, 84 CR3d 689 ].



#### Strategic Point:

A plaintiff may voluntarily dismiss an action under CCP § 581 in which a motion for enforce settlement under CCP § 664.6 is pending any time before a ruling on the enforcement motion [ *Lewis C. Nelson & Sons, Inc. v. Lynx Iron Corp.* (2009) 174 CA4th 67, 80, 94 CR3d 468] .



#### Cross Reference:

Form of Notice of Motion to Enter Judgment Pursuant to CCP § 664.6, see 37.66.

#### Detailed Discussion/Forms:

See *California Points and Authorities*, §§ 131.21, 131.25, 131.26 (Matthew Bender).

**37.47[2] CCP § 664.6 Inapplicable to Settlements Reached Before Lawsuit Filed or After Judgment.** CCP § 664.6 only applies to settlements reached during pending litigation. It does not apply to settlements reached before a lawsuit is filed [ *Kirby v. Southern Cal. Edison Co.* (2000) 78 CA4th 840, 844-846, 93 CR2d 223 ; *Housing Group v. United Nat. Ins. Co.* (2001) 90 CA4th 1106, 109 CR2d 497 ].

Likewise, CCP § 664.6 does not apply to settlements reached after a cause of action is reduced to judgment [ *Walton v. Mueller* (2009) 180 CA4th 161, 173, 102 CR3d 605] .

**37.47[3] CCP § 664.6 Allows Court to Retain Jurisdiction to Enforce Settlement.** The court may, if requested by the parties before dismissal of the suit, retain jurisdiction over the parties to enforce the settlement until performance

in full of the terms of the settlement [CCP § 664.6]. The request must be made orally before the court or in a signed writing, and it must be made by the parties, not by their attorneys or agents [ *Wackeen v. Malis* (2002) 97 CA4th 429, 433, 118 CR2d 502 ]. The request to retain jurisdiction must be made orally or in writing to the court, and merely including the request in the settlement agreement without directly asking the court to retain jurisdiction is insufficient [ *Hagan Eng'g, Inc. v. Mills* (2003) 115 CA4th 1004, 1010-1011 ].



#### **Warning:**

If the parties do not request continuing jurisdiction, the court has no subject matter jurisdiction over the matter once the suit has been dismissed [ *Wackeen v. Malis* (2002) 97 CA4th 429, 433, 118 CR2d 502 ].

**37.47[4] Court Must Determine If Parties Entered Into Binding Settlement.** A court may enforce a settlement pursuant to CCP § 664.6 so long as there is a sufficient meeting of the minds between the parties for the settlement to be binding [ *In re Marriage of Assemi* (1994) 7 C4th 896, 905, 30 CR2d 265, 872 P2d 1190 ; *Malouf Bros. v. Dixon* (1991) 230 CA3d 280, 283-284, 281 CR 235 ].



#### **Strategic Point:**

In a dispute over a 664.6 motion, the trial court acts as the trier of fact, and may consider oral testimony or determine the motion upon declarations alone. When the same judge hears the settlement and the motion to enter judgment on the settlement, he or she may consult his or her memory [ *Osumi v. Sutton* (2007) 151 CA4th 1355, 1360, 60 CR3d 693 ]. Accordingly, after filing or responding to notice of filing of a 664.6 motion, counsel must prepare declarations covering all issues of fact raised in the motion and be prepared for trial on any or all of them.

#### **Distinguish:**

A trial judge may not create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon [ *Osumi v. Sutton* (2007) 151 CA4th 1355, 1360-1361, 60 CR3d 693 ].

In assessing whether a settlement is binding, the court looks to the following factors [ *In re Marriage of Assemi* (1994) 7 C4th 896, 911, 30 CR2d 265, 872 P2d 1190 ]:

- Whether the material terms of the settlement were explicitly defined.
- Whether the supervising judicial officer questioned the parties regarding their understanding of the terms.
- Whether the parties expressly acknowledged their understanding of, and agreement to be bound by, those terms.

A settlement agreement, like any other contract, is unenforceable if the parties fail to agree on a material term or if a material term is not reasonably certain. Leaving an unresolved term for future agreement is not invariably fatal, since a settlement may be enforceable if the parties agree the remaining issue will be decided by arbitration [ *Lindsay v. Lewandowski* (2007) 139 CA4th 1618, 1623, 43 CR3d 846 (court voided stipulation)].

**37.47[5] Parties Must Sign Written Settlement Agreements.** CCP § 664.6 may only be used to enforce a settlement signed by the parties themselves, not by their attorneys or agents [ *Levy v. Superior Court* (1995) 10 C4th 578, 580, 586, 41 CR2d 878, 896 P2d 171 (attorney); *Gauss v. GAF Corp.* (2002) 103 CA4th 1110, 1112, 127 CR2d 370 (agent)]. Additionally, a written settlement agreement must be signed by both parties, not just the party to be

charged, in order to be enforced [ *Harris v. Rudin, Richman & Appel* (1999) 74 CA4th 299, 304-306, 87 CR2d 822 ].

**37.47[6] Oral Settlement Must Be Made Before the Court.** To be enforceable under CCP § 664.6, an oral settlement must be made before the court, at a judicially supervised proceeding [CCP § 664.6; *Skulnick v. Roberts Express, Inc.* (1992) 2 CA4th 884, 889, 3 CR2d 597 ].

**Example:**

It has been held that a settlement made in the course of a binding arbitration before a retired judge qualified as "before the court" within the meaning of CCP § 664.6 [ *In re Marriage of Assemi* (1994) 7 C4th 896, 906-910, 30 CR2d 265, 872 P2d 1190 ]. A settlement placed on the record at a deposition, however, does not qualify as "before the court" [ *City of Fresno v. Maroot* (1987) 189 CA3d 755, 762, 234 CR 353 ; *Datatronic Sys. Corp. v. Speron, Inc.* (1986) 176 CA3d 1168, 1173-1174, 222 CR 658 ].

**Distinguish:**

CCP § 664.6 does not require that the party to be bound consent to the settlement "on the record," only that the party consent to it "orally before the court." Thus, a party who stipulates orally before the trial court to the settlement by stating in open court that he or she understands the terms of the agreement and accepts them may not challenge the terms of the settlement [ *1538 Cahuenga Partners, LLC v. Turmeko Properties, Inc.* (2009) 176 CA4th 139, 143, 97 CR3d 552] .

Courts have split over whether the failure to comply with an applicable statute of frauds bars enforcement of oral settlement agreements, even though they are placed on the record in front of a judicial officer [see, e.g., *Kohn v. Jaymar-Ruby, Inc.* (1994) 23 CA4th 1530, 1534-1534, 28 CR2d 780 (holding failure to comply with statute of frauds does not bar enforcement); *Nicholson v. Barab* (1991) 233 CA3d 1671, 1683, 285 CR 441 (court refused to exempt oral settlement agreement from statute of frauds requirement)].

**37.47[7] Five-Year Dismissal Deadline Not Applicable.** The five-year time period in CCP § 583.310 for bringing an action to trial does not bar a court from enforcing a settlement agreement pursuant to CCP § 664.6 more than five years after the case has been filed [ *Canal Street, Ltd. v. Sorich* (2000) 77 CA4th 602, 608, 91 CR2d 811 ; *Malouf Bros. v. Dixon* (1991) 230 CA3d 280, 284-285, 281 CR 235 ; but see *Varwig v. Leider* (1985) 171 CA3d 312, 315-316, 217 CR 208 (contra, but not followed in subsequent opinions and superseded by statute)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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### **37.48 Party Can Plead Compromise and Settlement as Affirmative Defense.**

**37.48[1] Party Must Plead Elements of Compromise.** A party may plead the following elements to establish compromise and settlement as a valid defense to an action [ *Stub v. Belmont* (1942) 20 C2d 208, 215-217, 124 P2d 826 ]:

- A dispute in good faith over a legal claim;
- Offer and acceptance of the compromise; and
- Consideration.

**37.48[2] Party May Plead Accord and Satisfaction as Affirmative Defense.** A party may plead the following elements to establish accord and satisfaction as a defense to a claim [ *Potter v. Pacific Coast Lumber Co.* (1951) 37 C2d 592, 597, 234 P2d 16 ; *Thompson v. Williams* (1989) 211 CA3d 566, 571, 259 CR 518 ]:

- There was a bona fide dispute between the parties;
- The debtor made it clear that acceptance of the amount tendered was subject to the condition that it was to be in full satisfaction of the creditor's claim; and
- The creditor clearly understood, in accepting the amount tendered, that the debtor intended the remittance to constitute payment in full of the claim.

#### **Cross Reference:**

Discussion of accord and satisfaction, see California Forms of Pleading and Practice, Ch. 6, Accord and Satisfaction (Matthew Bender).

**37.48[3] Defendant May Plead Tender as Defense in Action to Recover Money.** In an action for recovery of money, a defendant may plead as an affirmative defense that before commencement of the action he or she tendered to

the plaintiff the full amount to which the plaintiff was entitled, and thereon deposit in court, for plaintiff, the amount so tendered. If the defendant prevails on the affirmative defense, the plaintiff cannot recover costs, but must pay costs to the defendant [*CCP* § 1025].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements Effects



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**37.49 Parties May File Supplemental Pleading and Seek Separate Trial When Settlement Reached Following Initial Pleadings.**

A party who claims that the dispute at issue in a lawsuit has been settled may file a supplemental complaint or answer [CCP § 464] regarding the settlement and ask the court to bifurcate the trial and try the issue of whether there has been a settlement in advance of any trial on the merits pursuant [CCP § 597; see *Hastings v. Matlock* (1980) 107 CA3d 876, 881, 883, 166 CR 229 ].



**Cross Reference:**

Discussion of bifurcation, see *Ch. 23, Case Management*, 23.20 -23.24.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**37.50 Party May Move for Relief From Judgment Entered Pursuant to CCP § 998.**

A party may make a motion for relief under *CCP* § 473(b) in order to challenge a judgment entered pursuant to *CCP* § 998 [ *Zamora v. Clayborn Constr. Group, Inc. (2002) 28 C4th 249, 252, 121 CR2d 187, 47 P3d 1056* ].

➡ **Cross References:**

Discussion of relief from judgment under *CCP* § 473(b), see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, 29.10 et seq.*; California Forms of Pleading and Practice, Ch. 489, Relief From Judgments and Orders (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.51

**37.51 Parties to Appeal Reaching Settlement Must Inform Appellate Court.**

If a civil case settles after a notice of appeal has been filed, either as a whole or as to any party, the appellant who has settled must immediately serve and file a notice of settlement in the Court of Appeal [*Cal Rules Ct, Rule 8.244(a)(1)*].

If the parties have designated a clerk's or a reporter's transcript and the record has not been filed in the Court of Appeal, the appellant must also immediately serve a copy of the notice on the superior court clerk [*Cal Rules Ct, Rule 8.244(a)(1)*].

If the case settles after the appellant receives a notice setting oral argument or a prehearing conference, the appellant must also immediately notify the Court of Appeal of the settlement by telephone or other expeditious method [*Cal Rules Ct, Rule 8.244(a)(2)*].

Within 45 days after filing a notice of settlement, or the end of a longer time period that the court has allowed on a showing of good cause, the appellant who filed the notice of settlement must file either an abandonment [*see Cal Rules Ct, Rule 8.244(b)*] if the record has not yet been filed in the Court of Appeal, or a request to dismiss [*see Cal Rules Ct, Rule 8.244(c)*] if the record has already been filed in the Court of Appeal [*Cal Rules Ct, Rule 8.244(a)(3)*]. If the appellant does not timely file an abandonment, a request to dismiss, or a letter stating good cause why the appeal should not be dismissed, the court may dismiss the appeal as to that appellant and order each side to bear its own costs on appeal [*Cal Rules Ct, Rule 8.244(a)(4)*].



**Warning:**

Counsel who fails to notify the Court of Appeals of settlement as required by *Cal Rules Ct, Rule 8.244* may be subject to sanction under *Cal Rules Ct, Rule 8.276(a)(4)* in the amount of the Court's actual costs [ *Huschke v. Slater (2008) 168 CA4th 1153, 1162-1163, 86 CR3d 187* ] .

**Exception:**

The aforementioned rules do not apply to settlements requiring findings to be made by the Court of Appeal under *CCP § 128(a)(8)* [*Cal Rules Ct, Rule 8.244(a)(5)*; *see 37.51A*].



**Cross Reference:**

Voluntary abandonment or stipulated dismissal of appeal, *see California Forms of Pleading and*

*Practice, Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, § 48.11* (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral Overview



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*3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.51A*

**37.51A Appellate Court May Reverse Judgment on Basis of Settlement Only Upon Proper Findings.**

An appellate court may only reverse or vacate a duly entered judgment upon an agreement of the parties if it finds [CCP § 128(a)(8)]:

- There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal, and
- The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSettlementsSettlement AgreementsGeneral Overview



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*3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.51B*

**37.51B Standard of Review of Ruling on CCP § 664.6 Motion Is "Substantial Evidence."**

A reviewing court applies the standard of review of substantial evidence to a trial court's ruling on a motion to enforce a settlement under *CCP* § 664.6. In reviewing a finding that there is a binding settlement agreement, the courts apply a policy favoring settlements. Accordingly, they will resolve all evidentiary conflicts and draw all reasonable inferences to support the trial court's finding that these parties entered into an enforceable settlement agreement and its order enforcing that agreement [ *Osumi v. Sutton* (2007) 151 CA4th 1355, 1360, 60 CR3d 693 ].



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Chapter 37 Settlement and Release  
VI. ENTERING INTO A VALID RELEASE AGREEMENT

3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.52

**37.52 CHECKLIST: Entering Into a Valid Release Agreement.**

☐ Parties must assent to terms of release.

**Authority:**

*Smith v. Occidental etc. S.S. Co. (1893) 99 C 462, 470-471, 34 P 84*

**Discussion:**

See 37.57[1]

**Form:**

See 37.67

☐ Release must be in writing if statute of frauds requires a writing.

**Authority:**

*CC §§ 1541, 1624; Hastings v. Matlock (1980) 107 CA3d 876, 882, 166 CR 229*

**Discussion:**

See 37.57[2]

☐ Oral release must be supported by consideration.

**Authority:**

*CC § 1541*

**Discussion:**

See 37.57[3]

☐ Written release must expressly show releasor's intent to extinguish obligation.

**Authority:**

*Sheehan v. Atlanta Int'l Ins. Co.* (9th Cir 1987) 812 F2d 465, 470 ; *Tenzer v. Superscope, Inc.* (1985)  
39 C3d 18, 31 n7, 216 CR 130, 702 P2d 212

**Discussion:**

See 37.57[4]



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3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.53

**37.53 Options and Strategies for Entering Into a Valid Release Agreement.**

Counsel should always fully discuss the terms and the effect of a release with the client.

It is also important to determine whether any release will be mutual. Plaintiffs may ask for a release from the defendants, and if this is a term of the settlement, the defendant must be certain that it is willing to waive any and all claims that it may have against the plaintiff.

**Strategic Point:**



A release arising out of a postjudgment settlement that does not release the plaintiff's attorney from liability arising out of the action and leaves a judgment in favor of defendant intact preserves the defendant's right, if any, to claim status as the prevailing party in the action for purposes of a subsequent suit against the plaintiff's attorney for malicious prosecution [ *Siebel v. Mittlesteadt* (2007) 41 Cal4th 735, 743, 62 CR3d 155, 161 P3d 527 (court did not resolve issues concerning the enforceability of client-only releases and public policy defenses available to attorneys in malicious prosecution action under such circumstances)]. Accordingly, counsel negotiating a postjudgment release for a prevailing defendant wanting to preserve a possible malicious prosecution case against the plaintiff's attorney should exclude plaintiff's counsel from general release. Similarly, counsel for the plaintiff having any doubt as to the possibility of sustaining a malicious prosecution judgment as a result of the litigation should consider seeking requisite language in the release agreement. However, at that point, the interests of counsel and the client may diverge, creating a conflict of interest that must be handled in accordance with professional ethics rules.



**Cross Reference:**

Handling conflict between interests of counsel and client, see *Ch. 3, Beginning and Terminating the Attorney-Client Relationship*, § 3.03 et seq.

**Legal Topics:**

For related research and practice materials, see the following legal topics:



Civil ProcedureSettlementsReleases From LiabilityGeneral Overview



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VI. ENTERING INTO A VALID RELEASE AGREEMENT

*3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.54*

**37.54 Release Is Abandonment, Relinquishment, or Surrender of a Known Claim.**

**37.54[1] Definition of "Releasor" and "Releasee" Is Broader Than "Creditor" and "Debtor."** A "creditor" may surrender a claim by giving a release to the "debtor." However, a release may surrender a claim other than one based on a debt. The term "releasor" designates the person who surrenders a claim, and "releasee" designates the person against whom that claim might have been enforced [CC §§ 1541-1543].

**37.54[2] Covenant Not to Sue Is Not a Relinquishment but an Agreement Not to Enforce a Cause of Action.** A covenant not to sue can be distinguished from a release in that a covenant not to sue is not a present abandonment or relinquishment of a right or claim, but merely an agreement not to enforce an existing cause of action. A covenant not to sue does not extinguish a cause of action [ *Pellett v. Sonotone Corp.* (1945) 26 C2d 705, 711, 160 P2d 783 ]. Practically speaking, however, the two types of agreement have the same effect, which is that there can be no further recovery from the settling defendant [ *Messler v. Bragg Mgmt. Co.* (1985) 39 C3d 290, 298, 216 CR 443, 702 P2d 601 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityCovenants Not to Sue



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3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.55

**37.55 Release Operates to Relinquish a Known Right or Claim.**

**37.55[1] Release Relinquishes Claim by Person in Whom It Exists.** A release is the abandonment, relinquishment, or surrender of a known right or claim, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced, operating to extinguish a cause of action [ *Pellett v. Sonotone Corp.* (1945) 26 C2d 705, 711, 160 P2d 783 ; *Hastings v. Matlock* (1980) 107 CA3d 876, 882, 166 CR 229 ; *Skrbina v. Fleming Cos.* (1996) 45 CA4th 1353, 1366, 53 CR2d 481 ; see also CC § 1541].

**37.55[2] Release Estops Parties From Relitigating Claim.** A valid release conclusively estops the parties from reviving and relitigating the claim released [ *Faye v. Feldman* (1954) 128 CA2d 319, 328, 275 P2d 121 ].

**Exception:**

If it is shown that one of the parties did not assent to the release or that fraud, deception, misrepresentation, duress, or undue influence was involved, the party is not estopped from claiming the release is not binding [ *Skrbina v. Fleming Cos.* (1996) 45 CA4th 1353, 1366-1367, 53 CR2d 481 ].

**37.55[3] Release of One Joint Tortfeasor Does Not Release Others.** A release of one or more but not all of a number of joint tortfeasors or co-obligors does not extinguish the cause of action against or discharge the remaining tortfeasors [CC § 1543; CCP § 877]. Pursuant to CCP § 877, such a settlement and release that is in good faith reduces the claims against the remaining tortfeasors by the amount stipulated by the release or by the amount paid in consideration for the release, whichever is greater [CCP § 877(a)]. In the determination of the amount of the setoff, while the nonsettling defendant is entitled to a fair setoff, the injured plaintiff also has a right that the setoff not be excessive [ *Franklin Mint Co. v. Superior Court* (2005) 130 CA4th 1550, 1556-1557 ]. CCP § 877 does not apply to co-obligors who have expressly agreed in writing to an apportionment of liability among themselves [CCP § 877(b)].

► **Cross References:**

Discussion of release of fewer than all joint tortfeasors or obligors, see 37.23.

Discussion of CCP § 877.6 motion to determine that a settlement is in good faith, see 37.28 -37.45.

**37.55[4] Release Does Not Extend to Unknown Claims.** A general release does not extend to claims that the

releasor does not know or suspect to exist in his or her favor at the time of executing the release when those claims, if known by the creditor, would have materially affected the settlement with the debtor [CC § 1542].

Whether a later-discovered claim was intended to be covered by a broad release can be a disputable issue of fact [ *Butler v. Vons Companies, Inc.* (2006) 140 CA4th 943, 950, 45 CR3d 151 ]. If the release unambiguously encompasses all unknown claims, the uncommunicated subjective intent of the releasor that unknown claims were not to be released does not create a triable issue of fact [ *Winet v. Price* (1992) 4 CA4th 1159, 1167, 1170-1171 n7, 6 CR2d 554 ]. Courts have considered the following factors in determining whether a release of unknown claims was knowingly made [ *Casey v. Proctor* (1963) 59 C2d 97, 113, 28 CR 307, 378 P2d 579 ]:

- The amount of consideration received compared with the risk of the existence of unknown injuries;
- The presence of bargaining and negotiation leading to the settlement;
- The closeness of the issue of liability;
- Whether the subject of personal injuries was discussed; and
- The reasonableness of the contention that the injuries were, in fact, unknown at the time the release was executed.

#### Strategic Point:



In practice, most settlement agreements provide an express waiver of CC § 1542 so that there is a release of even unknown claims. The defendant wishes to obtain complete peace. Note that the release of an unknown claim arising from a past event is different from a claim from an event that has not yet occurred. Problems can arise, for example, in the settlement of construction defect litigation when one of the defects is a safety-related defect that could injure third parties after the settlement. If an arguably responsible defendant pays to settle the safety-related defect claim but the homeowners' association has not yet remedied the safety-related defect, the settling defendant could potentially be held liable for future injuries notwithstanding a waiver of CC § 1542. In such cases the settling defendant may need to insist on an indemnity provision or a contractual commitment that the safety-related defect will be remedied within a short period of time.

**37.55[5] Exculpatory Release That Exempts Releasor From Fraud, Willful Injury, or Violation of Law Is Invalid.** An exculpatory release that attempts to exempt a person from responsibility for his or her own fraud, willful injury to another's person or property, or violation of law violates public policy [CC § 1668]. This rule does not apply to a release from liability for future simple negligence or strict liability, and even a release agreement that is found to be a contract of adhesion is enforceable if it does not defeat the weaker party's reasonable expectations and is not unconscionable [ *Hulsey v. Elsinore Parachute Ctr.* (1985) 168 CA3d 333, 341-342, 214 CR 194 ].

A release limiting an attorney's liability to his or her client for future malpractice is invalid [see *Cal Rules Prof Conduct, Rule 3-400(A)*; but see *Donnelly v. Ayer* (1986) 183 CA3d 978, 984, 228 CR 764 (upholding validity of agreement to settle an existing malpractice claim after the attorney-client relationship had been terminated)].



#### Cross Reference:

Form of release agreement designed for use as an exculpatory release of future claims, see *California Legal Forms, Ch. 77, Discharge of Obligations, § 77.123 (Matthew Bender)*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral ReleasesContracts LawTypes of ContractsReleasesTortsProcedureSettlementsReleasesGeneral Overview



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Chapter 37 Settlement and Release  
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3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.56

**37.56 Rules Governing Contract Interpretation Apply to Releases.**

**37.56[1] Parties Generally Held to Express Terms of Release.** In the absence of unfair conduct on the part of the releasee, courts have held that the law should hold the parties to the express terms of the release [ *Casey v. Proctor* (1963) 59 C2d 97, 111, 28 CR 307, 378 P2d 579 ].

**37.56[2] Courts Interpret Releases as They Would Any Contract.** The general rules governing the interpretation and construction of contracts apply to releases [ *Hess v. Ford Motor Co.* (2002) 27 C4th 516, 524, 117 CR2d 220, 41 P3d 46 ; *Elite Show Servs., Inc. v. Staffpro, Inc.* (2004) 119 CA4th 263, 268 ; see also CC § 1635-1662 (rules governing interpretation of contracts)].

Neither the clerk nor the court is authorized to adjudicate a dispute over the terms of § 998 agreements before entering judgment [ *Berg v. Darden* (2004) 120 CA4th 721, 727 ].

► **Cross Reference:**

Discussion of the rules for interpreting contracts, see California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

**37.56[3] Court Must Consider Other Documents Referred to in Release.** If a release refers to another document or transaction, the court must construe the release together with all referenced documents or transactions to determine the intention of the parties [ *Consumers Holding Co. v. County of Los Angeles* (1962) 204 CA2d 234, 241, 22 CR 106 ].

**37.56[4] Court May Consider Extrinsic Evidence of Parties' Intentions.** When the language of a release is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement, but to aid the court in ascertaining the true intent of the parties [ *Butler v. Vons Companies, Inc.* (2006) 140 CA4th 943, 949, 45 CR3d 151 (release ambiguous); *Denver D. Darling, Inc. v. Controlled Environments Construction, Inc.* (2001) 89 CA4th 1221, 1236, 108 CR2d 213 ; see CCP § 1856].

**Prerequisite:**

The party claiming a release is ambiguous may have to introduce evidence showing the ambiguity. The

test for admissibility of such evidence is whether it is relevant to prove a meaning to which the language of the instrument is reasonably susceptible [ *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 C2d 33, 37, 69 CR 561, 442 P2d 641 ].

**Exception:**

When there is no ambiguity in the express language of the release, extrinsic evidence is not admissible to prove a contrary intention of a party that was undisclosed during negotiations [see, e.g., *Edwards v. Comstock Ins. Co.* (1988) 205 CA3d 1164, 1167-1169, 252 CR 807 (in case in which insureds executed "release of all claims" with their insurer, parol evidence of undisclosed intention to retain right to bring bad-faith action was inadmissible) see also *Claxton v. Waters* (2004) 34 C4th 367, 377, 96 P3d 496 (extrinsic evidence excluded about scope of preprinted workers' compensation release)].

**37.56[5] Release Construed Against Drafting Party.** Releases are construed against those who draft them and ambiguities are construed against those who cause them to exist [ *Berg v. Darden* (2004) 120 CA4th 721, 727 ; *Estate of O'Donnell* (1978) 80 CA3d 514, 519, 145 CR 617 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Civil Procedure Settlements Releases From Liability Interpretation of Releases



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VI. ENTERING INTO A VALID RELEASE AGREEMENT

3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.57

**37.57 Valid Release Agreement Must Meet Certain Standards.**

**37.57[1] Parties Must Assent to Terms of Release.** All parties to the release must assent to its terms, or else the release never becomes effective [ *Smith v. Occidental etc. S.S. Co. (1893) 99 C 462, 470-471, 34 P 84* ; *Wheat v. Morse (1961) 197 CA2d 203, 206, 17 CR 226* ]. A releasor who has no disability preventing him or her from reading a written release is generally bound by its clear provisions [ *DuBois v. Sparrow (1979) 92 CA3d 290, 298, 154 CR 717* ]. However, if a misapprehension as to the nature and scope of the release is due to misconduct of the releasee, the release is binding only to the extent actually intended by the releasor [ *Casey v. Proctor (1963) 59 C2d 97, 103, 28 CR 307, 378 P2d 579* ; *Jordan v. Guerra (1943) 23 C2d 469, 475-476, 144 P2d 349* ].

➤ **Cross Reference:**

Form of General Release Agreement, see 37.67.

**37.57[2] Release Need Not Be Written Unless Statute of Frauds So Requires.** In general, a release need not be in writing unless it is subject to the statute of frauds [CC §§ 1541, 1624; *Hastings v. Matlock (1980) 107 CA3d 876, 882, 166 CR 229* ].

**Judge's Perspective:**

All releases should be in writing.

**37.57[3] Oral Release Must Be Supported by Consideration.** An oral release must be supported by new consideration [CC § 1541]. A written release may, but need not be, supported by consideration [CC § 1541; *Worthington v. State Bd. of Control (1968) 266 CA2d 697, 699-700, 72 CR 449* ].

**37.57[4] Written Release Must Expressly Show Intent.** A written release that is unsupported by consideration must be plain and explicit and expressly show the releasor's intent to extinguish the obligation [ *Sheehan v. Atlanta Int'l Ins. Co. (9th Cir 1987) 812 F2d 465, 470* ; *Tenzer v. Superscope, Inc. (1985) 39 C3d 18, 31 n7, 216 CR 130, 702 P2d 212* ].

**37.57[5] Release Is Operative Once Delivered.** A written release, signed by the releasor, is considered operative once it is delivered, whether consideration is paid at that time or not [ *Hofland v. Gustafson (1955) 132 CA 907, 132*



*CA2d Supp 907, 909, 282 P2d 1039* ].

**37.57[6] If Release Contains a Condition Precedent, Release Is Not Operative Until Occurrence of Condition.** If a release is subject to a condition precedent, it is not operative until the occurrence of the condition [ *Johnson v. Pickwick Stages Sys. (1930) 108 CA 279, 284, 291 P 611* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewContracts LawTypes of ContractsReleases



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VII. ENFORCING OR CHALLENGING A RELEASE AGREEMENT AFTER EXECUTION

*3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.58*

**37.58 CHECKLISTS: Enforcing or Challenging a Release Agreement After Execution.**

**37.58[1] Enforcing a Release Agreement.**

☐ If complaint filed against you:

☐ Draft answer including release as an affirmative defense.

☐ File answer.

**Authority:**

*Pellett v. Sonotone Corp. (1945) 26 C2d 705, 711, 160 P2d 783 ; Landis v. Morrissey (1886) 69 C 83, 86, 10 P 258*

**Discussion:**

See 37.59[1]

☐ If enforcement of agreement sought:

☐ Bring action for specific performance.

**Authority:**

*Hastings v. Matlock (1980) 107 CA3d 876, 882, 166 CR 229*

**Discussion:**

See 37.59[2]

- ☐ If declaratory relief sought:
- ☐ Draft notice of motion and motion for declaratory relief along with supporting declarations and memorandum of points and authorities.
  - ☐ Serve and file motion.
- ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.

**Authority:**

*Union P. R. Co. v. Zimmer (1948) 87 CA2d 524, 528, 197 P2d 363*

**Discussion:**

See 37.59[3]

**Standard Motion Checklist:**

Ch. 26, Law and Motion Practice, 26.39

**37.58[2] Opposing Enforcement of Release.**

- ☐ If enforcement will be opposed through action on contract:
- ☐ Draft notice of motion and motion to challenge validity of release along with supporting declarations and memorandum.
  - ☐ Serve and file motion.
- ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.

**Authority:**

*Union P. R. Co. v. Zimmer (1948) 87 CA2d 524, 528, 197 P2d 363 (mutual mistake); Baird v. Pacific Elec. Ry. Co. (1919) 39 CA 512, 514, 179 P 449*

**Discussion:**

See 37.60[1]

**Standard Motion Checklist:**

Ch. 26, Law and Motion Practice, 26.39

- ☐ If enforcement will be opposed by using affirmative defense to filed action:
- ☐ Draft notice of motion and motion for trial of special defense along with supporting declarations and memorandum.
  - ☐ Serve and file motion.
- ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.

**Authority:**

*CCP § 597; Hastings v. Matlock (1980) 107 CA3d 876, 881, 166 CR 229 ; Baird v. Pacific Elec. Ry. Co. (1919) 39 CA 512, 514, 179 P 449*

**Discussion:**

See 37.60[2]

**Standard Motion Checklist:**

Ch. 26, Law and Motion Practice, 26.39

- ☐ If enforcement will be opposed by canceling a void or voidable release:
- ☐ Draft notice of motion and motion to cancel release along with supporting declarations and memorandum.
  - ☐ Serve and file motion.
- ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.

**Authority:**

*CC § 3412*

**Discussion:**

See 37.60[3], 37.62

**Standard Motion Checklist:**

Ch. 26, Law and Motion Practice, 26.39

- ☐ If enforcement will be opposed by having a release declared void:

- ☐ Draft notice of motion and motion to declare release void along with supporting declarations and memorandum.
- ☐ Serve and file motion.
- ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.

**Authority:**

*CC § 1060*

**Discussion:**

*See 37.60[3], 37.62*

**Standard Motion Checklist:**

Ch. 26, Law and Motion Practice, 26.39

- ☐ If enforcement will be opposed by reforming a release:
  - ☐ Draft notice of motion and motion to reform release along with supporting declarations and memorandum.
  - ☐ Serve and file motion.
- ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.

**Authority:**

*CC § 3399*

**Discussion:**

*See 37.60[3]*

**Standard Motion Checklist:**

Ch. 26, Law and Motion Practice, 26.39

- ☐ If enforcement will be opposed by rescinding the release:
  - ☐ Draft notice of motion and motion to rescind a voidable release along with supporting declarations and memorandum.

☐ Serve and file motion.

☐ Follow standard noticed motion procedure.

☐ Calendar response and hearing dates.

**Authority:**

*CC § 1692*

**Discussion:**

*See 37.60[3], 37.61, 37.62*

**Standard Motion Checklist:**

*See Ch. 26, Law and Motion Practice, 26.39*



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Chapter 37 Settlement and Release

## VII. ENFORCING OR CHALLENGING A RELEASE AGREEMENT AFTER EXECUTION

3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.59

### 37.59 Methods for Enforcement of Release.

**37.59[1] Release May Be Raised as Affirmative Defense to an Action.** A release may be pleaded as an affirmative defense to an action based on the obligation that was extinguished by the release [ *Pellett v. Sonotone Corp.* (1945) 26 C2d 705, 711, 160 P2d 783 ; *Landis v. Morrissey* (1886) 69 C 83, 86, 10 P 258 ].

#### Exception:

If the release is subject to a condition precedent that has not occurred, it will not bar a cause of action because it is not operative until the occurrence of the condition [ *Johnson v. Pickwick Stages Sys.* (1930) 108 CA 279, 284, 291 P 611 ].

**37.59[2] Release May Be Enforced as a Specifically Performable Settlement and Release Agreement.** A party may also bring an action for specific performance of a settlement and release agreement. The complaint must allege a definite, just, and reasonable contract, adequacy of consideration, and resultant breach [see *Hastings v. Matlock* (1980) 107 CA3d 876, 882, 166 CR 229 ].

#### ➡ Cross Reference:

California Forms of Pleading and Practice, Ch. 528, Specific Performance (Matthew Bender).

**37.59[3] Release May Be Enforced by Declaratory Relief Action.** In certain circumstances, the releasor or the releasee may bring a declaratory relief action for a declaration of his or her rights under a release [CCP § 1060]. In the declaratory relief action, the court may make a binding declaration of the rights and duties of the parties, including a declaration as to the validity of the release [see, e.g., *Union P. R. Co. v. Zimmer* (1948) 87 CA2d 524, 528, 197 P2d 363 (releasor attempted to rescind release and releasee believed rescission was invalid)].

#### ➡ Cross Reference:

California Forms of Pleading and Practice, Ch. 182, Declaratory Relief (Matthew Bender).

### Legal Topics:

For related research and practice materials, see the following legal topics:

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Chapter 37 Settlement and Release  
VII. ENFORCING OR CHALLENGING A RELEASE AGREEMENT AFTER EXECUTION

3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.60

### 37.60 Party May Oppose Enforcement of Release.

**37.60[1] Party May Challenge Validity of Release on Contract Grounds.** A party may challenge the validity of the release on the same grounds available for a challenge to the validity of a contract [*see, e.g., Union P. R. Co. v. Zimmer* (1948) 87 CA2d 524, 528, 197 P2d 363 (mutual mistake); *Baird v. Pacific Elec. Ry. Co.* (1919) 39 CA 512, 514, 179 P 449 (defense of release may be controverted by evidence of fraud, mistake, undue influence, compromise, payment, estoppel, mental incompetency, and like defenses)].

**37.60[2] Party May Controvert Affirmative Defense Pleading Release.** A releasor may challenge the enforcement of a release by controverting the affirmative defense that a release precludes the claim [*see, e.g., Baird v. Pacific Elec. Ry. Co.* (1919) 39 CA 512, 514, 179 P 449 ].



#### Strategic Point:

When the releasee pleads the release as an affirmative defense and the releasor controverts this affirmative defense, the releasee may move for a trial of that defense before trial of any other issue in the case [CCP § 597; *Hastings v. Matlock* (1980) 107 CA3d 876, 881, 166 CR 229 ].

**37.60[3] Party May Bring Action to Cancel, Void, Reform, or Rescind a Release.** A releasor may bring an action to cancel a void or voidable written release [CC § 3412]. He or she may also bring an action to declare a release void [CC § 1060], reform a release agreement [CC § 3399], or rescind a voidable release [CC § 1692].



#### Cross Reference:

Discussion of void releases, see 37.62.

**37.60[4] Challenging Party Has Burden of Proof.** The party challenging the validity of the release generally has the burden of proof on that issue [*see, e.g., Myers v. Carter* (1963) 215 CA2d 238, 242, 30 CR 91 ; *Chung v. Johnston* (1954) 128 CA2d 157, 164, 274 P2d 922 ; *Castor v. Bernstein* (1906) 2 CA 703, 708, 84 P 244 ].



#### Cross Reference:

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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Chapter 37 Settlement and Release

## VII. ENFORCING OR CHALLENGING A RELEASE AGREEMENT AFTER EXECUTION

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### 37.61 Release May Be Subject to Rescission.

**37.61[1] Release May Be Rescinded in Same Manner as Other Contracts.** A release agreement is subject to rescission in the same manner as other contracts are subject to rescission [ *Matthews v. A.T. & S.F. Ry.* (1942) 54 CA2d 549, 557, 129 P2d 435 ].

**37.61[2] Rescission Only Necessary With Respect to Voidable Release.** Rescission is only necessary with respect to a voidable release, not an absolutely void release [ *Garcia v. California Truck Co.* (1920) 183 C 767, 770, 192 P 708 ].

### 37.61[3] Release May Be Rescinded on Various Grounds.

**37.61[3][a] Release May Be Rescinded Mutually by Consent.** A release may be rescinded mutually by consent [CC § 1689(a)].

**37.61[3][b] Party May Rescind Due to Lack of Consent.** A party to a release may rescind the release when the rescinding party, or any party jointly contracting with the rescinding party, has given his or her consent by mistake, or when that consent was obtained by duress, menace, fraud, or undue influence [CC § 1689(b)(1); *Carr v. Sacramento P.C. Co.* (1917) 35 CA 439, 447, 170 P 446 ].

#### Exception:

A release may be rescinded for a unilateral mistake concerning its effect only if the mistake arose from an unrectified misrepresentation by one party of which the other was aware [ *Larsen v. Johannes* (1970) 7 CA3d 491, 503, 86 CR 744 ]. Accordingly, a releasor cannot claim that he or she was mistaken about what was in a release when he or she failed to read it before signing it [ *Hoffman v. Sports Car Club of Am.* (1986) 180 CA3d 119, 126, 225 CR 359 ].

**37.61[3][c] Party May Rescind Due to Mutual Mistake.** A party to a release may rescind the release for mutual mistake [see *O'Meara v. Haiden* (1928) 204 C 354, 358, 268 P 334 ].

**Strategic Point:**

Standard settlement agreement language prevents rescission based on mutual mistake when the parties are unaware of the full extent of physical injury. In fact, a case may not be ripe for settlement until the plaintiff's lawyer is in a position to obtain a diagnosis/prognosis from the treating physician that there is not much risk that the full extent of the physical injuries are unknown.

**37.61[3][d] Party May Rescind Due to Mental Incompetence.** Mental incompetence is a ground for rescission of a release when the rescinding party was of unsound mind, but not entirely without understanding, and made the contract before his or her incapacity was judicially determined [CC §§ 39, 1689(b)(7)]. The releasor need not have been incompetent to make any kind of contract; the test, rather, is whether he or she was mentally competent to deal with the particular subject with full understanding of his or her rights, such that he or she actually understood the nature, purpose, and effect of the release [ *Carr v. Sacramento P.C. Co.* (1917) 35 CA 439, 442, 170 P 446 ].

**37.61[3][e] Party May Rescind for Failure of Consideration.** A release may be unilaterally rescinded for a substantial failure of consideration [CC § 1689(b)(2)-(4); *Hofland v. Gustafson* (1955) 132 CA 907, 132 CA2d Supp 907, 909-910, 282 P2d 1039 ].

**37.61[4] Rescinding Party Must Give Notice to Other Party.** A party who becomes aware of his or her right to rescind, must promptly, on discovering the ground for rescission, give notice of rescission to the other party. The rescinding party must also restore to the other party everything of value that he or she has received from the other party under the contract or offer to make restitution on the condition that the other party do likewise, unless the other party is unable or refuses to do so [CC § 1691].

**Exceptions:**

The releasor need not restore or offer to restore in any of the following circumstances [ *Weger v. Rocha* (1934) 138 CA 109, 117-118, 32 P2d 417 ]:

- When the releasor has received only that which has no value to either of the parties.
- When the releasor has merely received a promissory note.
- When the release is absolutely void rather than voidable.
- When it clearly appears that the releasee could not possibly have been injuriously affected by a failure to restore.
- When, without fault of the releasor, there have been peculiar complications that make it impossible for the releasor to offer full restoration.

**37.61[5] Release Subject to Rescission May Be Ratified.** A release subject to rescission may be ratified by the conduct of the releasor [ *Eustace v. Lynch* (1941) 43 CA2d 486, 491, 111 P2d 372 (releasor's acceptance of benefits of release agreement subsequent to attempted rescission can amount to waiver of the right to assert the invalidity of the release and constitute a ratification of the terms of the release)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### **37.62 Certain Releases May Be Absolutely Void.**

**37.62[1] Release Is Void When There Is Fraud in Its Inception.** A release is absolutely void when there is fraud in the inception.

#### **Example:**

A release is void if the releasor was tricked or deceived into signing a release that was different in terms and object from that which he or she has made and understood that he or she was executing [ *Meyer v. Haas* (1899) 126 C 560, 563, 58 P 1042 ].

**37.62[2] Release Is Void When Releasor Is Mentally Incompetent.** A release is also absolutely void when the releasor is mentally incompetent at the time of executing the release [ *Backus v. Sessions* (1941) 17 C2d 380, 384, 390, 110 P2d 51 ].

**37.62[3] Rescission Is Unnecessary When Release Is Absolutely Void.** An absolutely void release need not be rescinded because there is no contract to rescind [ *Garcia v. California Truck Co.* (1920) 183 C 767, 770, 192 P 708 ]. A releasor may controvert an affirmative defense seeking to enforce a void release [ *Baird v. Pacific Elec. Ry. Co.* (1919) 39 CA 512, 514, 179 P 449 ]. A releasor may also seek affirmative relief opposing a void release's enforcement [CC §§ 1060, 3412].

#### **Legal Topics:**

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**37.63 Plaintiff's or Defendant's CCP § 998 Offer to Compromise Before Commencement of Trial.**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

|               |   |                                             |
|---------------|---|---------------------------------------------|
| _____ [name], | ) |                                             |
| Plaintiff,    | ) | NO. _____                                   |
| vs.           | ) | _____ [PLAINTIFF'S or DEFEND-               |
| _____ [name], | ) | ANT'S] OFFER TO COMPROMISE                  |
| Defendant.    | ) | TO _____ [name and designation of           |
|               | ) | party, e.g., JOHN SMITH, PLAINTIFF], AND TO |
|               | ) | _____ [name], HIS/HER ATTOR-                |
|               | ) | NEY OF RECORD:                              |

[EITHER, if defendant is offering to compromise]

Defendant, \_\_\_\_\_ [name], offers to have \_\_\_\_\_ [judgment or award] taken against himself/herself and for plaintiff, \_\_\_\_\_ [name], in the above-entitled action pursuant to *Section 998 of the Code of Civil Procedure* for the sum of \$\_\_\_\_\_, \_\_\_\_\_ [each party to bear his/her own costs (and attorney's fees) or plus taxable costs incurred to date of judgment]], and according to the additional terms and conditions as follow: \_\_\_\_\_ (specify).

[OR, if plaintiff is offering to compromise]

Plaintiff, \_\_\_\_\_ [name], offers to have \_\_\_\_\_ [judgment or award] taken against

defendant, \_\_\_\_\_ [name], and for himself/herself in the above-entitled action pursuant to *section 998 of the Code of Civil Procedure* for the sum of \$\_\_\_\_\_, \_\_\_\_\_ [each party to bear his/her own costs (and attorney's fees) or plus taxable costs incurred to date of judgment][, and according to the additional terms and conditions as follow: \_\_\_\_\_ (specify)].

[CONTINUE]

If you accept this offer, please date and sign the accompanying notice of acceptance, and file the offer and notice of acceptance in the above-entitled action prior to trial or within 30 days of the date of this offer, whichever occurs first, or else it will be deemed withdrawn.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

\_\_\_\_\_ [Plaintiff or Defendant]

\_\_\_\_\_ [signature]

Attorney for \_\_\_\_\_ [Plaintiff or Defendant]

Service on \_\_\_\_\_ [date], of the above offer to compromise is admitted.

\_\_\_\_\_ [signature]

Attorney for \_\_\_\_\_

[specify party accepting service]

#### STATEMENT OF ACCEPTANCE BY OFFEREE

NOTICE IS HEREBY GIVEN that [plaintiff or defendant], \_\_\_\_\_ [name], accepts the offer made by [defendant or plaintiff (opposite of previous blank)] \_\_\_\_\_ [name], in the above-entitled action for the sum of \$\_\_\_\_\_, \_\_\_\_\_ [each party to bear his/her own costs (and attorney's fees) or plus taxable costs incurred to date of judgment][, and according to the additional terms and conditions as follow: \_\_\_\_\_ (specify; the sum, terms concerning costs and fees, and any special fees must be identical to those stated in first paragraph above)].

Dated: \_\_\_\_\_

[EITHER, if opposing party is represented by counsel]

\_\_\_\_\_ [signature]

Attorney for \_\_\_\_\_ [Plaintiff or Defendant]

(party accepting)]

[OR, if opposing party is not represented by counsel]

\_\_\_\_\_ [signature]

\_\_\_\_\_ [Plaintiff or Defendant  
(party accepting)]

Service on \_\_\_\_\_ [date], of the above acceptance of the offer to compromise is admitted.

\_\_\_\_\_ [signature]

Attorney for \_\_\_\_\_ [Defendant or Plaintiff  
(party offering)]

NOTES.

**Authority:**

CCP § 998

**Offers Pursuant to CCP § 998:**

See 37.03 -37.17



**Timing:**

See 37.05[1], 37.09

**Availability of 998 Offer:**

See 37.17

**Related Form for Offer to Compromise and Acceptance in Simple Cases:**

See 37.63A

**Related Form of Notice of Acceptance of Offer to Compromise:**

See 37.64





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**37.63A Judicial Council Form CIV-090, Offer to Compromise and Acceptance Under Code of Civil Procedure  
Section 998**

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[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

**Authority:**

*CCP § 998; Judicial Council Form CIV-090, Offer to Compromise and Acceptance under Code of Civil Procedure Section 998, has been approved for optional use.*



**Timing:**

*See 37.05[1], 37.09.*

**Availability of 998 Offer:**

*See 37.17.*

**Related Form of Plaintiff's or Defendant's Offer to Compromise:**

*See 37.63*

**Related Form of Notice of Acceptance of Offer to Compromise:**

*See 37.64*



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**37.64 Notice of Acceptance of Plaintiff's or Defendant's CCP § 998 Offer to Compromise.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                               |
|---------------|---|-------------------------------|
| _____ [name], | ) |                               |
| Plaintiff,    | ) |                               |
| vs.           | ) | NO. _____                     |
| _____ [name], | ) | NOTICE OF ACCEPTANCE OF       |
| Defendant.    | ) | _____ [PLAINTIFF'S or DEFEND- |
|               | ) | ANT'S] OFFER TO COMPROMISE]   |
|               | ) |                               |

\_\_\_\_\_

TO \_\_\_\_\_ [name and designation of party, e.g., JOHN RAE, DEFENDANT], AND TO  
\_\_\_\_\_ [name], HIS/HER ATTORNEY OF RECORD:

[EITHER, for plaintiff's acceptance of offer to compromise]

NOTICE IS HEREBY GIVEN that plaintiff, \_\_\_\_\_ [name], accepts the offer made by defendant to have judgment entered against defendant and for plaintiff, \_\_\_\_\_ [name], in the above-entitled action for the sum of \$\_\_\_\_\_, \_\_\_\_\_ [each party to bear his/her own costs (and attorney's fees) or plus taxable costs incurred to date of judgment][, and according to the additional terms and conditions as follow: \_\_\_\_\_ (specify)].

[OR, for defendant's acceptance of offer to compromise]

NOTICE IS HEREBY GIVEN that defendant, \_\_\_\_\_[*name*], accepts the offer made by plaintiff to have judgment entered for plaintiff and against defendant, \_\_\_\_\_[*name*], in the above-entitled action for the sum of \$\_\_\_\_\_, \_\_\_\_\_[each party to bear his/her own costs (and attorney's fees) or plus taxable costs incurred to date of judgment][, and according to the additional terms and conditions as follow: \_\_\_\_\_ (*specify*)].

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature*]

\_\_\_\_\_ [Plaintiff or Defendant]

\_\_\_\_\_ [*signature*]

Attorney for \_\_\_\_\_ [Plaintiff or Defendant]

NOTES.

**Authority:**

CCP § 998



**Timing:**

See 37.09

**Consequences of Accepting 998 Offer:**

See 37.08

**Related Form of Plaintiff's or Defendant's Offer to Compromise:**

See 37.63

**Related Form for Offer to Compromise and Acceptance in Simple Cases:**

See 37.63A

**Related Form of Notice of Settlement:**

See 37.65



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**37.65 Judicial Council Form CM-200 Notice of Settlement of Entire Case**

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Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1385(a)*



**Timing:**

See 37.26

**Need to File Request for Dismissal:**

See 37.27



**Cross Reference:**

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at [www.lexisone.com](http://www.lexisone.com) for an individual or monthly charge. A noninteractive version in PDF format also is available at [www.lexisone.com](http://www.lexisone.com) at no charge.



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**37.66 Notice of Motion to Enter Judgment Pursuant to Settlement.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                     |
|---------------|---|-------------------------------------|
| _____ [name], | ) |                                     |
| Plaintiff,    | ) | NO. _____                           |
| vs.           | ) | NOTICE OF MOTION AND MOTION FOR EN- |
| _____ [name], | ) | FORCEMENT OF SETTLEMENT             |
| Defendant.    | ) | Date: _____                         |
|               | ) | Time: _____                         |
|               | ) | Location: _____                     |
|               | ) | Judge: _____                        |
|               | ) | Date Action Filed: _____            |
|               | ) | Trial Date: _____                   |

To \_\_\_\_\_ [identify party, e.g., plaintiff \_\_\_\_\_ (name)] and to  
\_\_\_\_\_ [name] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [city], \_\_\_\_\_ [identify party, e.g., defendant] \_\_\_\_\_ [name] will, and hereby does, move for an order to enter judgment in accordance with the terms of the settlement entered into by \_\_\_\_\_ [specify parties, e.g., plaintiff and defendant] on \_\_\_\_\_ [date] at \_\_\_\_\_ [city], California, a copy of which is attached as Exhibit "A" and incorporated herein. The motion will be made on the grounds that judgment may properly be so entered to enforce the settlement pursuant to *Code of Civil Procedure* section 664.6.

The motion will be based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name(s)] and the supporting memorandum served and filed herewith, on the records and file in this action, and on such evidence as may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [moving party]

NOTES.

**Authority:**

CCP § 664.6

**Grounds for Motion:**

See 37.47



**Timing:**

See 37.47

**Detailed Discussion/Forms:**

See *California Points and Authorities*, §§ 131.21, 131.25, 131.26 (Matthew Bender)



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### 37.67 General Release Agreement.

#### GENERAL RELEASE OF EXISTING CLAIMS

\_\_\_\_\_[Name of releasor], \_\_\_\_\_[street address], \_\_\_\_\_[city and state], hereinafter referred to as "Releasor," and \_\_\_\_\_[name of releasee], \_\_\_\_\_[street address], \_\_\_\_\_[city and state], hereinafter referred to as "Releasee," in consideration of the promises made herein, agree as follows:

1. Releasor has sustained \_\_\_\_\_[injury and/or damages] arising out of

*[EITHER, if claims arise from contract]*

\_\_\_\_\_[describe transaction, e.g., a contract entered into between Releasor and Releasee] on \_\_\_\_\_[date], at \_\_\_\_\_[city and state], a copy of which is marked as Exhibit \_\_\_\_\_, attached hereto, and incorporated herein by reference.

*[OR, if claims arise from tort]*

\_\_\_\_\_[describe occurrence, e.g., an automobile accident] that occurred on \_\_\_\_\_[date] in \_\_\_\_\_[city and state].

*[ADD, if releasor has commenced an action against releasee based on transaction or occurrence giving rise to claims released]*

2. On \_\_\_\_\_ [date], Releasor filed an action in the \_\_\_\_\_ Court for the County of \_\_\_\_\_, California, case number \_\_\_\_\_, entitled \_\_\_\_\_. This action arose out of the \_\_\_\_\_ [occurrence or transaction] described in Paragraph 1.

[CONTINUE]

3. Releasor, on behalf of himself/herself, his/her heirs, executors, administrators, and assigns[, and in consideration of \$\_\_\_\_\_ paid to him/her by Releasee], hereby fully releases Releasee, his/her successors, and all other persons and associations, known or unknown, from all claims and causes of action by reason of any \_\_\_\_\_ [injury and/or damage] which \_\_\_\_\_ [has or have] been sustained, or may be sustained, as a result of the above-described \_\_\_\_\_ [transaction or occurrence].

[ADD, if release extends to unknown claims]

4. Releasor acknowledges and agrees that this release applies to all claims that Releasor may have against Releasee arising out of the above-described \_\_\_\_\_ [transaction or occurrence] for injuries, damages, or losses to Releasor's person and property, real or personal, whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, or patent or latent.

5. Releasor certifies that he/she has read *section 1542 of the Civil Code*, set out below, and indicates that fact by signing his/her initials here: \_\_\_\_\_.

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

6. Releasor hereby waives application of *section 1542 of the Civil Code* by signing his/her initials here: \_\_\_\_\_.

7. Releasor understands and acknowledges that the significance and consequence of this waiver of *section 1542 of the Civil Code* is that even if Releasor should eventually suffer additional damages arising out of the above-described \_\_\_\_\_ [transaction or occurrence] he/she will not be permitted to make any claim for those damages. Furthermore, Releasor acknowledges that he/she intends these consequences even as to claims for \_\_\_\_\_ [injury and/or damages] that may exist as of the date of this release but which Releasor does not know exist, and which, if known, would materially affect Releasor's decision to execute this release, regardless or whether Releasor's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

[CONTINUE]

8. Releasor warrants and represents that in executing this release, he/she has relied on legal advice from the attorney of his/her choice, that the terms of this release and its consequences have been completely read and explained to Releasor by that attorney, and that Releasor fully understands the terms of this release.

9. Releasor acknowledges and represents that he/she has been apprised of all relevant information and data furnished by \_\_\_\_\_ [name of expert] and all other information relevant to his/her claim and this release, including, without limitation, \_\_\_\_\_ [specify, e.g., future risks, complications, and costs]. Releasor further acknowledges and represents that, in executing this release, he/she has not relied on any inducements, promises, or



representations made by Releasee or any party representing or serving Releasee.

10. Releasor acknowledges and warrants that his/her execution of this release is free and voluntary. [Releasor further declares that at the time he/she executed this release, he/she was neither an inpatient nor an outpatient of a medical facility for treatment of the injury that gave rise to the claim to which this release relates.]

11. This release pertains to a disputed claim and does constitute an admission of liability by Releasee for the above-described \_\_\_\_\_ [transaction or occurrence].

[ADD, if Releasor will move to dismiss underlying cause of action]

12. Releasor will prepare and file a request for dismissal with prejudice of the action described in Paragraph 2 by \_\_\_\_\_ [date].

READ THE ABOVE CAREFULLY BEFORE SIGNING

\_\_\_\_\_ [date and place]

Releasor \_\_\_\_\_ [signature]

Declaration of Witness

I, \_\_\_\_\_ [name], certify that Releasor acknowledged in my presence that he/she had read and fully understood the meaning and consequences of the foregoing release, and signed it in my presence.

\_\_\_\_\_ [date and place]

\_\_\_\_\_ [signature]

\_\_\_\_\_ [Address of witness]

Declaration of Releasor's Attorney

I, \_\_\_\_\_ [name], a member of the State Bar of California and attorney for Releasor, certify that I am satisfied that Releasor fully understands the effect, significance, and consequence of the release set forth above.

\_\_\_\_\_ [date and place]

Attorney for Releasor \_\_\_\_\_ [signature]

NOTES.

**Authority:**

*CC §§ 1541-1543*

**Drafting Release:**

*See 37.57*



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**37.68 Notice of Motion and Declaration for Hearing Regarding Good Faith of Settlement Finding.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [names],  
Defendant.

)  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR  
) HEARING REGARDING GOOD FAITH OF SET-  
) TLEMENT AND SUPPORTING DECLARATION  
) OF \_\_\_\_\_ [name], AND SUPPORT-  
) ING MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To: \_\_\_\_\_ [party, e.g., Plaintiff], \_\_\_\_\_ [name], and to his or her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as counsel can be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_] of this court, located at \_\_\_\_\_ [street address] will, and hereby does, move under section 877.6 of the Code of Civil Procedure for a review of the settlement entered into between \_\_\_\_\_ [Plaintiff, e.g., John Smith], plaintiff, and \_\_\_\_\_ [Defendant, e.g., Mary Jones], defendant, in the above entitled action.

The motion will be based on the \_\_\_\_\_ [affidavit(s) or declaration(s)] of \_\_\_\_\_ [names], supporting memorandum, attached hereto, on all the pleadings, records, and papers on file herein, and on all the evidence, both oral and documentary, to be introduced at the hearing.

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [moving party]

DECLARATION OF \_\_\_\_\_ [name]  
REGARDING GOOD FAITH OF SETTLEMENT

I, \_\_\_\_\_ [name] declare:

1. I am the attorney of record for \_\_\_\_\_ [name, e.g., Defendant, Mary Jones]. I make this declaration in support of \_\_\_\_\_ [name, e.g., Defendant, Mary Jones's] motion for order determining good faith of settlement in accordance with *Code of Civil Procedure section 877.6*.

2. The Court is requested to take judicial notice of the complaint in this action under *Evidence Code section 452(d)(1)*. Plaintiff, \_\_\_\_\_ [name, e.g., John Smith], seeks to recover damages for \_\_\_\_\_ [nature of claim, e.g., an automobile accident which occurred on June 30, 2001]. Persons alleged in the complaint to be [joint tortfeasors or co-obligors] are defendants \_\_\_\_\_ [names, e.g., Mary Jones and Peter Chu].

3. On or about \_\_\_\_\_ [date], plaintiff and defendant entered into a settlement agreement, under which this defendant agreed to pay the plaintiff \_\_\_\_\_ [state amount, e.g., \$10,000] and the plaintiff agreed to settle all claims against this defendant and to dismiss this defendant from this action.

4. The terms of this settlement are as follows: \_\_\_\_\_ [specify terms].

5. [Continue declaration as necessary].

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]

SUPPORTING MEMORANDUM

[Set out memorandum here]

NOTES.

**Authority:**

*CCP § 877.6*

**Grounds for Good-Faith Determination:**

*See 37.30*

**Related Form of Order:**

*See 37.69*

**Detailed Discussion/Forms:**

*See California Points and Authorities, §§ 115.150-115.162 (Matthew Bender)*



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Chapter 37 Settlement and Release  
VIII. FORMS

3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.69

### 37.69 Order for Determination of Good-Faith Settlement.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                |   |
|----------------|---|
| _____ [name],  | ) |
| Plaintiff,     | ) |
| vs.            | ) |
| _____ [names], | ) |
| Defendant.     | ) |
|                | ) |
|                | ) |

#### FINDING THAT SETTLEMENT ENTERED INTO IN GOOD FAITH

The motion of \_\_\_\_\_ [moving party, e.g., Plaintiff, John Smith] for hearing on the good faith of a settlement in the above-entitled action, having come on for a hearing before me on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name]. Having considered all the evidence both oral and documentary, introduced at the hearing, and good cause appearing therefor;

THE COURT HEREBY FINDS that the settlement dated \_\_\_\_\_ [date], entered into between \_\_\_\_\_ [Plaintiff, e.g., John Smith], plaintiff, and \_\_\_\_\_ [Defendant, e.g., Mary Jones], defendant, was and is made in good faith.

Date: \_\_\_\_\_.

---

Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 877.6*

**Related Form of Notice of Motion:**

*See 37.68*



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Chapter 37 Settlement and Release  
VIII. FORMS

*3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.70*

**37.70 Notice of Good-Faith Settlement.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name], )  
Plaintiff, )  
vs. )  
\_\_\_\_\_, [names], )  
Defendant. )  
)  
)  
)

NOTICE OF GOOD-FAITH SETTLEMENT

TO THE SUPERIOR COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that plaintiff \_\_\_\_\_ [name, e.g., John Smith] has entered into a settlement with defendant \_\_\_\_\_ [name, e.g., Mary Jones] and that defendant will apply to this court for a determination that the settlement was made in good faith in accordance with the provisions of *Code of Civil Procedure section 877.6(a)(2)*. A copy of the application and proposed order determining good-faith settlement are served and filed concurrently with this notice of settlement.

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]



Attorney for \_\_\_\_\_

NOTES.

**Authority:**

*CCP § 877.6(a)(2)*

**Related Form of Application:**

*See 37.71*

**Related Form of Notice of Settlement:**

*See 37.72*



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Chapter 37 Settlement and Release  
VIII. FORMS

3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.71

**37.71 Application for Order Determining Good Faith of Settlement.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [names],  
Defendant.

)  
) APPLICATION FOR ORDER DETERMINING  
) GOOD FAITH OF SETTLEMENT (CCP §  
) 877.6(a)(2)) AND PROPOSED ORDER  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

\_\_\_\_\_, [name, e.g., Defendant, Mary Jones] applies to this court in accordance with the provisions of *Code of Civil Procedure Section 877.6(a)(2)* for a determination that the settlement described below was entered into in good faith.

1. Settling Parties: The parties to this settlement are [names, e.g., Plaintiff, John Smith and Defendant, Mary Jones].

2. Terms: The basis of the settlement is that [name, e.g., Defendant, Mary Jones] contends that \_\_\_\_\_ [state facts demonstrating general contentions and reasonableness of settlement]. Defendant has agreed to pay plaintiff the sum of \_\_\_\_\_ [state amount, e.g., \$10,000] in exchange for a general release and request for dismissal of this action with prejudice. This settlement is expressly conditioned on the court's determination that it is made in good faith.

3. Amount: Defendant Mary Jones has agreed to pay plaintiff John Smith \$10,000. This settlement amount represents fair and reasonable consideration for the compromise, release, and waiver of plaintiff's claims.

This application is based on this application and the attached declaration(s) of \_\_\_\_\_ [*name of declarants*].

Date: \_\_\_\_\_.

\_\_\_\_\_ [*firm name*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

NOTES.

**Authority:**

CCP § 877.6(a)(2)

**Related Form of Notice of Settlement:**

See 37.70

**Related Form of Declaration:**

See 37.72



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Chapter 37 Settlement and Release  
VIII. FORMS

3-37 MB Practice Guide: CA Pretrial Civil Procedure 37.72

**37.72 Declaration in Support of Application for Determination of Good-Faith Settlement.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                |   |                                        |
|----------------|---|----------------------------------------|
| _____ [name],  | ) |                                        |
| Plaintiff,     | ) | DECLARATION OF _____                   |
| vs.            | ) | [name] REGARDING GOOD FAITH OF SETTLE- |
| _____ [names], | ) | MENT                                   |
| Defendant.     | ) | Date: _____                            |
|                | ) | Time: _____                            |
|                | ) | Location: _____                        |
|                | ) | Judge: _____                           |
|                | ) | Date Action Filed: _____               |
|                | ) | Trial Date: _____                      |

I, \_\_\_\_\_ [name] declare:

1. I am the attorney of record for \_\_\_\_\_ [name, e.g., Defendant, Mary Jones]. I make this declaration in support of \_\_\_\_\_ [name, e.g., Defendant, Mary Jones's] application for determination of good-faith settlement in accordance with *Code of Civil Procedure section 877.6(a)(2)*.

2. The Court is requested to take judicial notice of the complaint in this action under *Evidence Code section 452(d)(1)*. Plaintiff, \_\_\_\_\_ [name, e.g., John Smith], seeks to recover damages for \_\_\_\_\_ [nature of claim, e.g., an automobile accident which occurred on June 30, 2001]. Persons alleged in the complaint to be [joint tortfeasors or co-obligors] are defendants \_\_\_\_\_ [names, e.g., Mary Jones and Peter Chu].

3. On or about \_\_\_\_\_ [date], plaintiff and defendant entered into a settlement agreement, under which this defendant agreed to pay the plaintiff \_\_\_\_\_ [state amount, e.g., \$10,000] and the plaintiff agreed to settle all claims against this defendant and to dismiss this defendant from this action. This agreement was expressly conditioned on the court's determining that the settlement was made in good faith.

4. \_\_\_\_\_ [State general terms of settlement].

5. \_\_\_\_\_ [Continue declaration as necessary].

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]

NOTES.

**Authority:**

CCP § 877.6(a)(2)

**Related Form of Notice of Settlement:**

See 37.70

**Related Form of Application:**

See 37.71



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Chapter 38 Summary Judgment

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.syn*

**§ 38.syn Synopsis to Chapter 38: Summary Judgment**

38.01 Scope.

38.02 Objective and Strategy.

38.02[1] Expedite Litigation by Avoiding Unnecessary Trials.

38.02[2] Timing and Discovery Must Be Balanced.

38.03 CHECKLIST: Moving for Summary Judgment or Summary Adjudication.

38.04 Options and Strategies for Moving Party.

38.04[1] Decide Whether Summary Judgment or Summary Adjudication Is Appropriate.

38.04[2] Conduct and Evaluate Discovery With View Toward Use for Summary Proceedings.

38.04[3] Summary Judgment Motion Differs From Other Pretrial Motions.

38.04[3][a] Motion for Judgment on the Pleadings Is Used When Pleading Fails to State Facts Sufficient to Constitute Cause of Action or Defense.

38.04[3][b] Trial of Special Issues Is Used to Resolve Factual Issues Regarding Certain Defenses.

38.05 Defense Motion for Summary Judgment.

38.05[1] Grounds for Motion.

38.05[2] Motion May Be Based on Absence of Essential Element of Plaintiff's Case.

38.05[2][a] Moving Defendant Has Initial Burden to Show That Plaintiff's Causes of Action Lack Merit.

38.05[2][b] Moving Defendant May Show Lack of Merit by Establishing Absence of Essential Element to Cause of Action.

38.05[2][c] Moving Defendant May Establish Absence of Essential Element by Showing Plaintiff Cannot Reasonably Obtain Supporting Evidence.

38.05[2][d] Moving Defendant Must Actually Present Evidence.

38.05[2][e] Factually Devoid Discovery Response by Plaintiff May Provide Basis for Meeting Burden of Production.

38.05[2][f] Discovery Objection Is Not Equivalent of Factually Devoid Response.

38.05[2][g] Burden Shifts to Opposing Plaintiff to Show a Triable Issue of Material Fact.

38.05[2][h] Opposing Plaintiff Must Set Forth Evidence.

38.05[3] Defense Motion May Be Based on Affirmative Defense.

38.05[3][a] Moving Defendant Has Initial Burden to Show That Undisputed Facts Support Each Element of the Affirmative Defense.

38.05[3][b] Burden Shifts to Opposing Plaintiff to Show a Triable Issue of Material Fact.

38.05[3][c] Opposing Plaintiff Must Set Forth Evidence.

38.05[4] Defendant Must Show Absence of Triable Issue of Fact for All Theories Pled.

38.05[5] Summary Judgment for Defendant Is Favored in Actions for Defamation or Invasion of Privacy.

38.06 Plaintiff's Motion for Summary Judgment.

38.06[1] Grounds for Motion.

38.06[2] Plaintiff Must Show Every Element of Cause of Action.

38.06[3] Plaintiff Must Support Motion With Evidence.

38.06[4] If Plaintiff Makes Prima Facie Showing, Burden Shifts to Defendant.

38.06[5] Opposing Defendant Must Set Forth Evidence.

38.07 Cross-Motions May Be Made When Parties Agree on Material Facts.

38.08 Summary Judgment May Not Be Granted When Damages Must Be Determined.

38.09 Summary Adjudication Motion Can Dispose of Part of Case.

38.09[1] May Be Used as Alternative to Summary Judgment Motion.

38.09[2] Available Only If Completely Disposes of Matter.

38.09[3] Procedurally Same as Motion for Summary Judgment.

38.09[4] Available Only on Motion.

38.09[5] Denial of Motion for Summary Adjudication May Bar Later Motion for Summary Judgment.

38.09[6] Motion for Summary Adjudication May Raise Same Issues as Previously Overruled Demurrer.

38.09[7] Denial or Grant of Summary Adjudication Motion May Not Serve as Basis for Comment at Subsequent Trial.

38.10 Defense Motion for Summary Adjudication.

38.10[1] Grounds for Motion.

38.10[2] Defense Motion May Be Based on Plaintiff's Inability to Establish Element of One or More Causes of Action.

38.10[3] Defense Motion May Be Based on Affirmative Defense.

38.10[4] Defense Motion May Be Based on the Ground of Lack of Merit to Claim for Punitive Damages.

38.10[5] Plaintiff's Motion or Defense Motion May Be Made to Determine an Issue of Duty.

38.11 Plaintiff's Motion for Summary Adjudication.

38.12 Particular Actions in Which Summary Proceedings Are Limited or Unavailable.

38.12[1] Limited in Summary Proceedings for Obtaining Possession of Real Property.

38.12[1][a] Parties in Unlawful Detainer, Forcible Entry, or Forcible Detainer Action May Move for Summary Judgment.

38.12[1][b] Time Limitations for Notice of Motion Differ.

38.12[1][c] Time Limitations for Trial Differ.

38.12[2] Not Available in Consumer Class Actions.

38.12[3] Not Available in Medical Malpractice Action in Which Defendant Seeks Security.

38.13 Timing of Motion Is Restricted.

38.13[1] Lengthy Notice Period and Window for Making Motion Must Be Considered.

38.13[2] Motion Is Made on 75 Days' Notice and Must Be Filed 16 Court Days Before the Hearing.

38.13[2][a] Service.

38.13[2][b] Filing.

38.13[3] Motion Made No Sooner Than 60 Days After General Appearance.



38.13[4] Motion Must Be Heard 30 Days Before Trial.

38.14 Summary Judgment/Adjudication Is Available Only on Notice.

38.15 Moving Party Must Submit Supporting Evidence.

38.15[1] Affidavits and Declarations.

38.15[1][a] Most Common Method.

38.15[1][b] Must Be Based on Personal Knowledge.

38.15[1][c] Affiant or Declarant Must Be Competent.

38.15[1][d] Must Contain Admissible Evidence.

38.15[1][e] Court Generally Cannot Deny Motion Merely on Grounds of Credibility or Want of Cross-Examination.

38.15[1][f] May Incorporate Documentary Evidence.

38.15[2] Admissions as Derived From Responses to Requests for Admissions, Depositions, Answers to Interrogatories, Pleadings, and Factual Stipulations.

38.15[2][a] Requests for Admissions.

38.15[2][b] Depositions and Interrogatories.

38.15[2][c] Pleadings.

38.15[2][d] Factual Stipulations.

38.15[3] Deposition Testimony and Interrogatories.

38.15[4] Supporting Evidence May Include Matters for Which Judicial Notice Is Sought.

38.15[4][a] Select Matters.

38.15[4][b] List Matters and Provide Copies.

38.15[5] Supporting Evidence That Exceeds 25 Pages Must Be Bound and Include a Table of Contents.

38.15[6] Moving Party's Papers Are Strictly Construed.

38.15[7] Motion for Summary Judgment and Accompanying Statement Are Neither Pleadings Nor Judicial Admissions.

38.16 Moving Party Must Submit Statement of Material Facts.

38.16[1] Facts in Separate Statement Must Refer to Specific Evidence.

38.16[2] Separate Statement Should Include All Essential Facts.

38.17 Moving Party Must Submit Supporting Memorandum.

38.18 Defendant May Move for Defense Costs in Actions for Indemnity or Contribution Under California Tort Claims Act.

38.18[1] Available If Plaintiff's Proceeding Was Brought in Bad Faith.

38.18[2] Available Only on Notice and Motion Made Prior to Judgment.

38.18[3] Include Attorney's and Expert Witness Fees.

38.18[4] Right to Seek Damages for Malicious Prosecution Is Waived.

38.19 CHECKLIST: Opposing Summary Judgment/Adjudication Motion.

38.20 Options and Strategies for Opposing Parties.

38.20[1] Opposing Party May Make Motion for Continuance If Needed and Appropriate.

38.20[1][a] To Obtain Affidavits or Conduct Further Discovery.

38.20[1][b] Need Must Be Demonstrated.

38.20[1][c] If Moving Party Unreasonably Impedes Discovery, Court May Grant Further Continuance or Deny Summary Motion.

38.20[2] Plaintiff Cannot Avoid Time Limitations by Moving for Voluntary Dismissal.

38.20[3] Plaintiff May Be Denied Delayed Amendment of Complaint.

38.20[4] Opposing Party Does Not Have Right to Submit Additional Evidence After Moving Party's Reply.

38.21 Opposition Papers Must Be Served and Filed 14 Days Before Hearing.

38.21[1] Courts Adhere Strictly to 14-Day Requirement.

38.21[2] Statute Makes No Provision for Service of Opposing Papers by Mail.

38.22 If Moving Party Meets Initial Burden, Opposing Party Must Show Triable Issue of Material Fact.

38.22[1] Initial Burden of Proof Remains With Moving Party.

38.22[2] Burden Shifts to Opposing Party After Moving Party Meets Initial Burden.

38.22[2][a] Defendant as Opposing Party.

38.22[2][b] Plaintiff as Opposing Party.

### 38.23 Opposing Party Must Submit Evidentiary Material.

38.23[1] Opposing Evidence May Be Presented Through Affidavits, Admissions, Interrogatories, Depositions, and Matters Subject to Judicial Notice.

38.23[2] Allegations or Denials in Pleadings Insufficient to Show Triable Issue of Material Fact.

38.23[3] If Opposing Affidavits or Declarations Are Not Filed, Court Can Accept Facts Alleged in Moving Party's Affidavits and Declarations as True.

38.23[4] If Unopposed, Lack of Credibility of Moving Party's Affidavits and Declarations Is Not Ground for Denying Summary Judgment.

38.23[5] Requirements for Opposing Affidavits/Declarations.

38.23[5][a] Must Set Forth Admissible Evidence.

38.23[5][b] Must Disclose Existence of Material Fact.

38.23[5][c] May Not Be Based on Conjecture or Legal Conclusions.

38.23[6] Additional Opposing Evidence May Be Presented as Exhibits.

38.23[7] If Opposing Evidence Exceeds 25 Pages, Evidence Must Be Bound and Include a Table of Contents.

38.23[8] Opposing Party's Papers Are Liberally Construed.

38.23[9] Declaration May Not Contradict Witness' Prior Statement Under Oath.

### 38.24 Opposing Party Must Submit Opposing Statement of Material Facts.

38.24[1] Must Respond to Moving Party's Statement.

38.24[2] Must Adhere to Format Requirements.

38.24[3] Must Dispute Material Issue of Fact.

38.24[4] May Not Assert Matters Not Yet Pleaded.

### 38.25 Opposing Party Must Submit Opposing Memorandum.

38.25[1] Memorandum Should State Opposing Legal Points, Coordinate Opposing Papers, and Make Appropriate Objections.

38.25[2] Memorandum Must Adhere to Format Requirements.

### 38.26 Procedural and Evidentiary Objections Will Be Waived If Not Timely Made.

38.26[1] Objections to Proper Notice.

38.26[2] Objections to the Adequacy of Supporting Affidavits or Declarations.

38.26[3] Objecting to Moving Party's Evidence.

38.26[3][a] Evidentiary Objections Must Be Made in Writing or Transcribed at the Summary Hearing.

38.26[3][b] Written Objections Must Conform to Court Rule and Generally Be Served and Filed With Other Opposition Papers.

38.26[3][c] Proposed Order on Objections Must Accompany Written Objections to Evidence.

38.27 Sanctions for Bad-Faith Affidavits May Be Available on Notice Given in Opposing Papers or on Court's Own Motion.

38.27[1] Available on Notice and Motion.

38.27[2] Memorandum Required.

38.27[3] Parties Must Have Opportunity to Be Heard.

38.28 Cross-Motion Is Required to Obtain Affirmative Relief.

38.29 CHECKLIST: Replying to Opposition to Summary Judgment/Adjudication.

38.30 Options and Strategies for Replying Party.

38.31 Reply Papers Must Be Served and Filed Five Days Before Hearing.

38.31[1] Five-Day Requirement.

38.31[2] No Provision for Service by Mail.

38.32 Moving Party May Reply With Supplementary Evidence.

38.32[1] Reply May Include New Evidence to Rebut Opposition Evidence.

38.32[2] Court's Consideration of Supplemental Declaration Is Discretionary.

38.33 Moving Party May Reply With a Reply Memorandum.

38.33[1] Identify Inaccuracies in the Opposing Memorandum, Make Objections, and Address Facts.

38.33[2] Must Adhere to Format Requirements.

38.33A Reply May Include Written Objections to Opposing Party's Evidence Along With Proposed Order on Objections.

38.34 Sanctions for Bad-Faith Affidavits May Be Available on Notice Given in Reply Papers or on Court's Own Motion.

38.35 CHECKLIST: Obtaining Ruling on Summary Judgment or Adjudication Motions.

38.36 Options and Strategies for Hearing.

38.37 Court Will Conduct Hearing Before Issuing Ruling.

38.37[1] Purposes of Hearing Are for Oral Argument and to Raise Procedural and Evidentiary Objections.

38.37[1][a] Oral Argument.

38.37[1][b] Procedural and Evidentiary Objections.

38.37[1][c] Objecting Party Must Obtain Ruling on Evidentiary Objections.

38.37[2] No Right to Present Testimony.

38.38 Court Will Evaluate Evidence to Determine If Triable Issues of Fact Exist.

38.38[1] Court Will Consider All Evidence Set Forth in Papers.

38.38[2] Evidence Is Not Weighed.

38.38[3] Moving Party's Evidence Is Strictly Construed; Opposing Party's Evidence Is Liberally Construed.

38.38[4] Admissions Against Interest Obtained Through Discovery Are Given Extra Weight, but Not Shielded From Court's Examination.

38.38[5] Admissions Contained in a Party's Pleadings Are Given Less Weight, and May or May Not Be Binding.

38.39 Court May Grant Motion on Issue Not Raised by Party, But May Not Deny Motion on Grounds Not Pleaded.

38.40 Court Will State Reasons for Decision.

38.40[1] Decision Denying the Motion Must Specify One or More Triable Issues of Material Fact.

38.40[2] Decision Granting the Motion Must Specify Evidence Supporting and, If Applicable, Opposing Motion.

38.40[3] Reasons for Any Other Determination Must Be Stated.

38.40[4] Purpose of Court's Statement of Reasons Is to Allow Meaningful Appellate Review.

38.40[5] Failure to Provide Statement of Reasons May Provide Basis for Opposing Party to Bring Motion for Clarification.

38.41 Court Has Power to Impose Sanctions.

38.41[1] Court May Impose Sanctions If It Determines That Affidavits Have Been Presented in Bad Faith or Solely for Reasons of Delay.

38.41[2] Court May Impose Sanctions for Bad Faith in Making or Opposing a Motion for Summary Judgment or Adjudication.

38.42 Motion for Reconsideration.

38.42[1] Must Be Made Prior to Entry of Judgment.

38.42[2] Must Be Based on New or Different Facts, Circumstances or Law.

38.42[3] Specific Provisions Apply to a Motion for Summary Judgment Based on Issues Asserted in an Earlier Adjudication Motion.

38.43 Prevailing Party Prepares Order and Submits Judgment for Entry.

38.43[1] Prevailing Party Prepares Order or Judgment, and Notifies Other Parties.

38.43[2] Judgment Is Entered in the Court's "Judgment Book."

38.44 Losing Party May Move for a New Trial.

38.45 Losing Party May Move to Vacate.

38.46 CHECKLIST: Obtaining Appellate Review When Summary Judgment or Summary Adjudication Is Granted.

38.47 Options and Strategies for Obtaining Appellate Review of Granted Motion.

38.48 Losing Party May Seek Review of Grant of Summary Judgment.

38.48[1] Appeal After Judgment.

38.48[2] Immediate Writ Review of Grant of Summary Judgment Against Some But Not All Defendants.

38.49 Losing Party May Seek Review of Grant of Summary Adjudication by Mandate.

38.50 Independent Standard of Review Applies to Evidence.

38.50[1] Review Is De Novo.

38.50[2] Limited to Facts in Submitted Evidentiary Materials.

38.50[3] In Reassessing Legal Significance of Evidentiary Materials, Appellate Court Applies Same Standard as Trial Court.

38.50[4] Appellate Court Searches for Contradictory Facts and Inferences.

38.50[5] Appellate Court's Function Is to Issue Finding, Not Issue Determination.

38.50[6] Appellate Court Will Disregard Any New Factual Allegations.

38.50[7] Evidentiary Objections Not Raised in Trial Court Are Waived.

38.51 Independent Standard of Review Applied to Law.

38.51[1] Judgment Can Be Affirmed on Any Applicable Theory of Law.

38.51[2] Parties Must Be Given Reasonable Opportunity to Address Any New Legal Issue Considered on Appeal.

- 38.52 CHECKLIST: Obtaining Appellate Review When Summary Judgment or Summary Adjudication Is Denied.
- 38.53 Options and Strategies for Obtaining Appellate Review of Denied Motion.
- 38.54 Losing Party May Seek Review of Denial of Summary Judgment or Adjudication by Petition for Peremptory Writ.
- 38.54[1] Petition for Peremptory Writ Is Appropriate Means of Obtaining Review.
- 38.54[2] Standard of Review.
- 38.54[3] Appellate Court May Compel Trial Court to Grant Motion.
- 38.55 Petition Must Be Filed Within Statutory Time Limits.
- 38.55[1] Time Limitations Begin After Written Service of Notice of Entry of Order.
- 38.55[2] Petition Must Be Filed Within 20 Days of Personal Service, or as Extended, If Notice Is Not Personally Served.
- 38.55[3] For Good Cause, Superior Court May Extend Time by 10 Days.
- 38.56 Notice of Motion and Motion for Summary Judgment.
- 38.57 Notice of Motion and Motion for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty.
- 38.58 Cover Sheet for Evidence Supporting Motion for Summary Judgment or Adjudication.
- 38.59 Declaration in Support of Motion for Summary Judgment or Summary Adjudication.
- 38.60 Statement of Undisputed Material Facts Supporting Motion for Summary Judgment.
- 38.61 Statement of Undisputed Material Facts Supporting Motion for Summary Adjudication.
- 38.62 Order Granting Motion for Summary Judgment.
- 38.63 Order Granting Motion for Summary Judgment and Judgment.
- 38.64 Order Granting Motion for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty.
- 38.65 Summary Judgment.
- 38.66 Cover Sheet for Evidence Opposing Motion for Summary Judgment or Adjudication.
- 38.67 Declaration in Opposition to Motion for Summary Judgment or Summary Adjudication.
- 38.68 Statement of Disputed and/or Undisputed Material Facts Opposing Motion for Summary Judgment.
- 38.69 Statement of Disputed and/or Undisputed Material Facts Opposing Motion for Summary Adjudication.
- 38.69A Written Objections to Evidence on Motion for Summary Judgment or Summary Adjudication.

38.69B Order on Written Objections to Evidence on Motion for Summary Judgment or Summary Adjudication.

38.70 Order Denying Motion for Summary Judgment and/or Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty.

38.71 Notice of Motion, Motion, and Supporting Declaration for Order Imposing Monetary Sanctions.





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Chapter 38 Summary Judgment  
I. STRATEGY

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.01*

**38.01 Scope.**

This chapter covers:

- Objective and strategy for summary proceedings [see 38.02].
- Moving for [see 38.03 -38.18; 38.27 -38.33; Forms: see 38.56 -38.65, 38.71] and responding to [see 38.19 -38.26, 38.28; Forms 38.66-38.70, 38.71] motions for summary judgment or adjudication.
- Moving for sanctions for bad-faith affidavits [see 38.27, 38.34, 38.41; Form: see 38.71].
- Obtaining ruling on summary proceeding motions [see 38.43 -38.45; Forms: see 38.62 -38.65, 38.70].
- Obtaining appellate review when summary judgment or summary adjudication is granted [see 38.46 -38.51].
- Obtaining appellate review when summary judgment or summary adjudication is denied [see 38.52-38.55].

**Core Statute:**

*CCP § 437c*

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentGeneral Overview



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Chapter 38 Summary Judgment  
I. STRATEGY

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.02*

### 38.02 Objective and Strategy.

**38.02[1] Expedite Litigation by Avoiding Unnecessary Trials.** Summary judgment and summary adjudication are used to expedite litigation and to prevent unnecessary trials. In ruling on a summary judgment or adjudication motion, courts will cut through the parties' pleadings to determine whether a trial is necessary to resolve their dispute [ *Aguilar v. Atlantic Richfield Co.* (2001) 25 C4th 826, 843, 107 CR2d 841, 24 P3d 493 ]. Summary judgment proceedings are governed by CCP § 437c.

Summary judgment will be granted only if material facts are not in dispute, and judgment can be granted as a matter of law [CCP § 437c(c)].

Similarly, a summary adjudication motion will be granted only if facts are not in dispute, and the motion will completely dispose of a cause of action, an affirmative defense, a claim for damages, or an issue of duty [CCP § 437c(f)(1)].

Summary judgment motions are, of course, critically important because the motion, if granted, will terminate the case. Even if not granted, in some situations the motion may assist in forcing settlement negotiations by causing a party to focus on the weaknesses in the case.



#### Strategic Point:

Once judgment is entered after the granting of a motion for summary judgment, any motion for reconsideration undetermined at the time of entry of the judgment is effectively denied [ *Safeco Ins. Co. of Ill. v. Architectural Facades Unlimited, Inc.* (2005) 134 CA4th 1477, 1483, 36 CR3d 754 ]. Any party wishing the trial court to determine a pending motion for reconsideration of a ruling or order after the granting of a motion for summary judgment must request that the court not enter judgment on the summary judgment motion until after considering the motion for reconsideration.

**38.02[2] Timing and Discovery Must Be Balanced.** Summary judgment is subject to significant statutory and practical time constraints. A party cannot bring the motion until 60 days after the opposing party or parties have made a

general appearance in the action, unless the court shortens the time period. The motion must be heard no later than 30 days before trial, unless the court shortens the time period. There is a 75-day notice period for the motion (with extensions depending on the manner of service) that cannot be shortened by the court. Although the court may allow an earlier or later motion for good cause, these statutory constraints frame the timing of the motion [see *CCP § 437c(a)*].

**Strategic Point:**



Local court rules may not shorten the 75-day notice period or vary the evidentiary requirements set forth in *CCP § 437c(a)*. If a local court has rules deviating from these provisions, counsel should nonetheless comply with the statutory provisions, in order to avoid the vacation of any subsequent summary judgment or adjudication [see *Boyle v. CertainTeed Corp. (2006) 137 CA4th 645, 653-656, 40 CR3d 501* (summary judgment vacated based on impermissible local rules)].

**Strategic Point:**



As a moving defendant, the 75 day notice period allows the plaintiff to conduct discovery during the approximate 2 month window before the opposition is due. However, if the trial date has been continued without a continuance of the discovery cutoff, that opportunity will be precluded. On the other hand, occasionally, the plaintiff's opposition will contain material for which the defense might want to take a deposition. That would be precluded if the discovery cutoff has passed.

The practical constraints are that discovery must be complete at least as to the central issues that will determine the case. For the moving party, going to the effort and expense of the motion has no point until adequate discovery has been conducted to reveal that the other side cannot raise material issues of fact. For the opposing party, adequate discovery to uncover the disputed facts that will keep the party's action or defense alive is equally crucial.

A successful summary judgment motion or opposition will be greatly facilitated if counsel has adhered to a clear discovery plan that has identified all the relevant issues and every fact that must be established to prove each issue. If discovery was carefully organized to elicit the opposing party's evidence as to those facts, and if the responses have been similarly organized on an ongoing basis, the decision whether to make the motion and the preparation of the motion will be greatly simplified.

There are occasions when a summary judgment motion can force the opposing side to present a declaration from one of its experts. That may provide the opportunity to depose the other side's expert earlier than might occur under the ordinary disclosure rules.

**Judge's Perspective:**

Over the years, motions for summary adjudication/judgment have gone through an interesting transition. Originally, these motions were brought by the defense when it appeared that there was a clear dispositive affirmative defense that could be successfully pursued. More recently, however, trial courts now see these motions virtually on a uniform basis just prior to trial. It appears that the prevailing trend by the defense is that it is far safer (from a standard of practice standpoint) to bring the motion and lose than not bring the motion at all. Concomitant to an increasing number of these motions is a disturbing trend toward a belief that the trial court can weigh evidence when ruling. This is not the case, and counsel must always keep in mind that "the function of the trial court on a motion for summary judgment is merely to determine whether such issues of fact exist and not to decide the merits of the issues themselves" [see *Molko v. Holy Spirit Assn. (1988) 46 C3d 1092, 1107, 252 CR 122, 762 P2d 46*]. It should likewise be kept in mind that the recent amendments to *CCP § 437c* have been designed to make sure that these motions are only brought after discovery has been completed as to the issue(s) involved and the

responding party has had sufficient time in which to prepare opposition.

 **Cross Reference:**

Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 1, Strategy and Planning.

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 537, Summary Judgment (Matthew Bender).

California Points and Authorities, Ch. 221, Summary Judgments (Matthew Bender).

 **Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentStandardsGeneral Overview



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Chapter 38 Summary Judgment  
II. MOVING FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.03*

**38.03 CHECKLIST: Moving for Summary Judgment or Summary Adjudication.**

- ☐ Decide whether summary judgment is appropriate:
  - ☐ Review elements of each cause of action within action and any alleged defenses.
  - ☐ Evaluate evidence to determine whether all elements can be separately established considering:
    - ☐ Discovery responses.
    - ☐ Matters governed by collateral estoppel.
    - ☐ Matters subject to judicial notice.
    - ☐ Admissions outside discovery.
  - ☐ Consider whether additional discovery should be pursued before making motion.
  - ☐ Determine whether evidence reveals any triable issues of material fact as to any of the elements of the cause of action.
  - ☐ Determine whether evidence reveals any triable issues of material fact relating to an affirmative defense to the cause of action.
  - ☐ Determine whether opposing party will stipulate to all or some of the material facts.

**Authority:***CCP § 437c(a), (c)***Discussion:***See 38.04, 38.05*

- ☐ Decide whether summary adjudication is appropriate:
- ☐ Determine elements of one or more causes of action within an action.
  - ☐ Determine whether all elements for the cause of action can be separately established.
  - ☐ Determine whether evidence reveals any triable issues of material fact as to any of the elements of the cause of action.
  - ☐ Determine whether evidence reveals any triable issues of material fact relating to an affirmative defense to the cause of action.
  - ☐ Determine whether there is merit to a claim for punitive damages.
  - ☐ Determine whether there is an issue of duty that can be determined as a matter of law.

**Authority:***CCP § 437c(f)(1)***Discussion:***See 38.04, 38.09, 38.10*

- ☐ Determine whether any other pretrial motion option may be available or more appropriate:
- ☐ Motion for judgment on the pleadings.
  - ☐ Trial of special issues.

**Authority:***CCP §§ 438, 597***Discussion:***See 38.04[3]*

- ☐ Calculate time window for filing summary judgment or summary adjudication motion:
- ☐ Plaintiff may not move until 60 days after opposing party's general appearance.
  - ☐ Defendant may not move until 60 days after the action is filed.

**Exception:**

Court, with or without notice, may direct that summary judgment motion may be made at earlier time.

- ☐ Party must serve motion papers no later than 105 days before trial.
- ☐ Notice of motion must be served 75 days before hearing.

**Exception:**

If service by mail or facsimile is used, counsel must factor in extra time for service of motion.

- ☐ Motion must be heard 30 days before trial.

**Exception:**

Court, with or without notice can order a later hearing for good cause.

**Authority:**

*CCP § 437c(a)*

**Discussion:**

See 38.13

- ☐ Conduct any additional discovery needed for summary judgment motion.

**Discussion:**

See 38.04[2]

- ☐ Prepare summary judgment/adjudication motion papers:

- ☐ Draft notice of motion and motion.

**Authority:**

*CCP § 437c(a)*

**Discussion:**

See 38.14

**Forms:**

See 38.56, 38.57

- ☐ Compile evidentiary admissions derived from:

- ☐ Requests for admissions.
  - ☐ Depositions and interrogatories.

☐ Requests to produce documents

☐ Pleadings.

☐ Factual stipulations.

**Discussion:**

See 38.15[1][f], [2]

☐ Prepare deposition testimony, written discovery responses and documents for use as exhibits.

**Authority:**

CCP § 437c(b)(1); Cal Rules Ct, Rule 3.1116

**Discussion:**

See 38.15[3]

☐ Assemble and organize the supporting evidence:

☐ Draft affidavits/declarations, which must:

☐ Be based on personal knowledge.

☐ Set forth admissible evidence.

☐ Affirmatively show that the declarant is competent to testify.

☐ Include all necessary facts for summary judgment or summary adjudication.

☐ Incorporate and authenticate documentary evidence by reference to documents, discovery responses, and depositions.

☐ Incorporate any matter in court's file supporting motion:

☐ Must specify exact matter to which reference is made.

☐ May not incorporate entire file.

**Authority:**

CCP § 437c(b)(1), (7)

**Discussion:**

See 38.15[1]

**Form:**



See 38.59

- ☐ Identify and prepare documents for matters for which judicial notice is sought.
  - ☐ Prepare separate document listing items for which notice is requested.
  - ☐ Provide court and each party with a copy of the material.
  - ☐ When material is part of court file:
    - ☐ Specify in writing the part of court file to be judicially noticed.
    - ☐ Make arrangements with clerk for file to be in courtroom at the time of hearing.
    - ☐ Check local rules of court for additional requirements.

**Authority:**

*CCP § 437c(b)(1); Cal Rules Ct, Rules 3.1113(l), 3.1306(c)*

**Discussion:**

*See 38.15[4]*

- ☐ If supporting evidence exceeds 25 pages, prepare table of contents, and bind evidence.

**Authority:**

*Cal Rules Ct, Rule 3.1350(g)*

**Discussion:**

*See 38.15[5]*

- ☐ Write statement of material facts:
  - ☐ Set forth in numerical sequence the undisputed material facts in the left column, following each material fact with reference to supporting evidence in that same column.
  - ☐ Be prepared to provide electronic version on request.

**Authority:**

*CCP § 437c(b)(1); Cal Rules Ct, Rule 3.1350(d)*

**Discussion:**

*See 38.16*

**Forms:**

See 38.60, 38.61

- ☐ Write supporting memorandum.

**Authority:**

*Cal Rules Ct, Rules 2.100 et seq., 3.1113*

**Discussion:**

See 38.17

- ☐ Prepare proposed order.

- ☐ Lodge with court prior to or at hearing.

**Authority:**

*CCP § 437c(g), Cal Rules Ct, Rule 3.1312*

**Discussion:**

38.43

**Forms:**

See 38.62 -38.64, 38.70

- ☐ Serve motion papers.



**Timing:**

At least 75 days before time appointed for hearing, plus:

- Two days if served by facsimile transmission, express mail, or other method of overnight delivery.
- Two days if served by electronic transmission pursuant to local rules permitting electronic filing and service of documents.
- Five days if served by regular mail within California.
- Ten days if served by regular mail outside California, within the United States.
- 20 days if served by regular mail outside the United States.

- ☐ File proof of service of motion.



**Timing:**

No later than five court days before appointed hearing date.

- ☐ File notice of motion and supporting papers.

**Timing:**

No later than 16 court days before appointed hearing date.

**Warning:**

Prudent counsel should not wait to the last minute to file the motion. While the code permits the motion to be filed much later than the service of the motion, there is no leeway for error given the lengthy notice period. Consult local rules for scheduling requirements and confirm the hearing date at the earliest possible time. In most circumstances, service and filing are done contemporaneously.

**Authority:**

*CCP § 437c(a); CCP §§ 1005(b), 1010.6(a)(6); Cal Rules Ct, Rule 3.1300(a), (c), (e)*

**Discussion:**

See 38.13

**Judge's Perspective:**

Notwithstanding a statute and/or California Rule of Court that might permit the motion to be filed much later than the service time period, *never* wait until the last minute to file the summary judgment motion with the court. All trial courts, and especially those designated as complex litigation courts, like to see the papers as early as possible. The court's research attorneys need as much time as possible to prepare their workups for the court.



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Chapter 38 Summary Judgment  
II. MOVING FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.04*

**38.04 Options and Strategies for Moving Party.**

**38.04[1] Decide Whether Summary Judgment or Summary Adjudication Is Appropriate.** Given the minimum 105 day time limit before trial within which a motion for summary judgment or adjudication must be served (75 days' notice with a hearing date 30 days before trial) [CCP § 437c(a)], a party must give early consideration to determining whether a case is appropriate for a summary motion.

Filing a summary motion may be worthwhile for a plaintiff if, after conducting discovery and researching the elements of the asserted causes of action or defenses, the plaintiff determines that the essential facts supporting one or more of its causes of action or the defendant's defenses are not in dispute and that the plaintiff has a winning case on the law.

Filing a summary motion may be worthwhile for a defendant who determines that the plaintiff cannot prove a cause of action or that the defendant can prove one of its affirmative defenses. Plaintiffs also should not fail to consider the use of motions for summary judgment in certain circumstances. For example, in a malicious prosecution action the absence of probable cause in the underlying action is a matter of law; also, the existence of coverage under a policy during insurance litigation is a matter of law.

To the extent that the plaintiff's claims turn on disputed factual issues, a defendant should weigh the downside of bringing a motion for summary judgment. Such motions are expensive and require defendants to commit to certain positions [see *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 CA4th 952, 955-962, 65 CR2d 821 (insurer cannot make motion for summary judgment based on asserted policy language without waiving any "missing policy" issues)]. Because motions for summary judgment usually must be made near the close of discovery and shortly before trial, defense counsel should consider whether the effort and expense would be better spent preparing for trial, particularly if the plaintiff can easily show a triable issue of fact. In contrast, when a case turns on the resolution of an unsettled issue of law and the material facts of the case are not in dispute, a motion for summary judgment can provide the least expensive method to reach resolution.

**Strategic Point:**



Counsel must determine whether to seek summary judgment or adjudication, or one of the following

alternatives:

- Motion for judgment on the pleadings [*see CCP § 438*].
- If there are disputed facts, a trial of special defenses [*see CCP § 438*].
- If the action is based on a petition for writ of administrative mandate on the administrative record, a motion for judgment on the writ [*see CCP § 1094; Dunn v. County of Santa Barbara (2006) 135 CA4th 1281, 1290-1293, 38 CR3d 316* (summary judgment vacated based on impermissible local rules)].

#### **Cross References:**

Discussion of motion for judgment on the pleadings and trial of special defenses, see 38.04[3].

Discussion of petition for writ of administrative mandate, see *Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction*, 10.10[2].

#### **Warning--Summary Judgment Available Only on Motion:**

Summary judgment is available only to a moving party. The court will not grant summary judgment to a nonmoving party who successfully opposes a motion for summary judgment. If an opposing party believes that summary judgment is warranted, that party must file a cross-motion seeking summary judgment in its favor [*CCP § 437c(a); Dvorin v. Appellate Dep't of Superior Court (1975) 15 C3d 648, 650-651, 125 CR 771* (absent a motion, ordering summary judgment denies the opposite party opportunity to allege additional facts justifying trial of factual issues)]. Recognize that the cross-motion will need to follow the same notice period and attempt to resolve the scheduling issues so both motions may be heard at the same time. In cases that involve a dispositive, unresolved legal issue, cross-motions for summary judgment can be the most efficient method to resolve the case. However, if there are any significant fact issued in the case, the filing of a cross-motion might limit the opposing party's ability to oppose the initial motion by arguing that there are triable issues of fact. Rarely can a party argue that it is entitled to summary judgment as a matter of law while also arguing that the opposing party's motion should be denied both because the position is unfounded and because there is a triable issue of fact.

#### **Judge's Perspective--Cross-Motions:**

Generally, cross-motions for summary judgment/adjudication are pursued when either the factual record is or has been agreed on or the issue involved is one that lends itself to adjudication as a matter of law. A cross-motion should never be brought if it is simply being used as a vehicle to respond to the original moving papers.

#### **Warning--Summary Adjudication Available Only on Motion:**

On a motion for summary judgment, the court cannot grant summary adjudication for the moving party unless he or she makes an alternative motion for that relief [*see Jimenez v. Protective Life Ins. Co. (1992) 8 CA4th 528, 534-535, 10 CR2d 326* ].

If the court denies summary adjudication, a party may not later move for summary judgment based on issues asserted in the prior motion for summary adjudication, unless that party establishes newly discovered facts or circumstances, or a change of law supporting the issues reasserted in the summary judgment motion [*CCP § 437c(f)(2)*].

**Strategic Point:**

In almost any case in which punitive damages are alleged, they should be attacked by summary adjudication separately, if appropriate, or as an alternative in a summary judgment motion.

**38.04[2] Conduct and Evaluate Discovery With View Toward Use for Summary Proceedings.** Because summary judgment and summary adjudication proceedings are based on the factual record, a discovery plan should be developed with an eye from the beginning toward using the discovery in a summary motion as well as for trial.

The information gathered during discovery can be incorporated as exhibits to the declarations submitted in support of the motion for summary judgment. In addition, based on the information obtained through discovery, it may be possible for the parties to enter into certain stipulations of fact in connection with the motion to eliminate issues that are not disputed.

From the moving party's perspective, it is important to present focused arguments and evidence, and to present them as simply as possible. The opposing party often will tend to try to make the factual issues seem as complicated as possible. The Statement of Undisputed Material Facts should be used to map out the facts and evidence supporting the motion. Care should be taken to assure that the proponent prepare and present evidence in an admissible form, and conversely, that objections to the opponent's evidence be asserted to avoid waiver.

**Strategic Point:**

Establish a system to keep track of the responses so that:

- Admissions that will be used in summary judgment papers to establish the facts necessary to prevail on the motion are identified;
- Areas that need further discovery to obtain necessary admissions are pursued.

**Judge's Perspective:**

While it is always good to have a discovery plan that will enable you to prepare for either moving or opposing the 437c motion, remember that the trial court is not permitted to weigh evidence inclusive of declarations. Moreover, matters going to the weight of the evidence must be disregarded in ruling on the motion [ *Binder v. Aetna Life Ins. Co. (1999) 75 CA4th 832, 840, 89 CR2d 540* ]. Even vague ambiguous testimony may raise a triable issue of fact [see *Aetna Cas. & Sur. Co. v. Aceves (1991) 233 CA3d 544, 558, 284 CR 477* ].

So strong is the prohibition regarding the weighing of evidence that appellate courts have consistently admonished trial courts against the drawing of inferences. Therefore, if an inference is controverted by other evidence, or even by other reasonable inferences, then there is a triable issue of fact and the motion must be denied [see *Gigax v. Ralston Purina Co. (1982) 136 CA3d 591, 602, 186 CR 395* ]. Note that a witness's declaration as to one's own intent is admissible as a statement of fact [see *Hoover Cmty. Hotel Dev. Corp. v. Thomson (1985) 167 CA3d 1130, 1136-1137, 213 CR 750* ].

**Cross References:**

Discussion of preparing supporting evidence, see 38.15. Discussion of preparing responding evidence, see 38.23. Discussion of weight given to admissions obtained through discovery, see 38.38[4].

Discussion of discovery planning, see Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 1, Strategy and Planning.

### **38.04[3] Summary Judgment Motion Differs From Other Pretrial Motions.**

**38.04[3][a] Motion for Judgment on the Pleadings Is Used When Pleading Fails to State Facts Sufficient to Constitute Cause of Action or Defense.** A motion for judgment on the pleadings is used after the time to demur has expired to challenge an opposing party's pleading on the grounds that the pleading fails to state facts sufficient to constitute a cause of action or defense [*see CCP § 438*].

A motion for summary judgment or adjudication may be treated as a motion for judgment on the pleadings when it seeks judgment on the grounds, for example, that a cause of action fails to allege facts sufficient to constitute a cause of action [ *Wood v. Riverside Gen. Hosp.* (1994) 25 CA4th 1113, 1119-1120, 31 CR2d 8 (motion for summary judgment on grounds plaintiff failed to allege essential element of cause of action should have been treated by trial court as motion for judgment on the pleadings)]. If it does so, the court may grant the motion with leave to amend, and after the cause of action has been properly pled, the moving party may renew the motion for summary judgment to determine if there are triable issues of fact underlying the cause of action [ *Wood v. Riverside Gen. Hosp.* (1994) 25 CA4th 1113, 1119-1120, 31 CR2d 8 (affirming summary judgment without requiring two-step procedure because ruling would have been the same after an amended complaint and renewed summary judgment motion); *see Hejmadi v. AMFAC, Inc.* (1988) 202 CA3d 525, 536 (court granting leave to amend should not summarily adjudicate issues underlying cause of action until after complaint is amended); *see also Foreman & Clark Corp. v. Fallon* (1971) 3 C3d 875, 889 n. 9, 92 CR 162, 479 P2d 362 (summary adjudication based on a superseded complaint is void), *Cal. Concrete Co. v. Beverly Hills Sav. & Loan Assn.* (1989) 215 CA3d 260, 272 (failure to plead statutory bar waives defense on motion for summary judgment; amendment denied)].

If extrinsic evidence is needed to establish facts to support a ruling, it is incorrect for a trial court to treat a motion for summary judgment as a motion for judgment on the pleadings [ *Taylor v. Lockheed Martin Corp.* (2000) 78 CA4th 472, 479, 92 CR2d 873 ].



#### **Decision Point:**

Before deciding to bring a motion for summary judgment, consider whether the opposing party's pleading is defective so as to support a motion for judgment on the pleadings, a motion that involves considerably less expense and burden.



#### **Cross Reference:**

See Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

**38.04[3][b] Trial of Special Issues Is Used to Resolve Factual Issues Regarding Certain Defenses.** If there are disputed issues of fact regarding a defense, and that defense may resolve a case or a cause of action in a defendant's favor, the defendant should move for a trial of special issues, rather than for summary judgment.

A trial of special issues may proceed after a party's motion, or on the court's own motion. The following defenses are subject to a trial of special issues [*CCP § 597*]:

- The action is barred by the statute of limitations [*see also CCP § 597.5* (separate trial of limitations defense in medical malpractice case)].
- The action is barred by a prior judgment.
- Another action is pending on the same cause.

- Another defense exists not involving the merits of the action, but constituting a bar or ground of abatement to its prosecution.


**Warning:**

Although a trial of special issues is an attractive procedural device to resolve critical factual issues, unless waived by the parties, the same trier of fact must decide all trial phases [see *European Beverage, Inc. v. Superior Court* (1996) 43 CA4th 1211, 1214, 51 CR2d 147 ]. A trial of special issues is often used when the facts to be disposed of are few.


**Cross References:**

Discussion of separate trial of defenses, see *Ch. 23, Case Management*, 23.22, 23.23.

*California Forms of Pleading and Practice*, Ch. 3, *Abatement*, § 3.110 et seq. (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentTime Limitations





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Chapter 38 Summary Judgment  
II. MOVING FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.05*

**38.05 Defense Motion for Summary Judgment.**

**38.05[1] Grounds for Motion.** A defendant can move for summary judgment when [CCP § 437c(a), (c)]:

- There are no triable issues of material fact;
- All of the plaintiff's causes of action have no merit; and
- The defendant is entitled to judgment as a matter of law.

A cause of action has no merit if [CCP § 437c(o)]:

- One or more of the elements of the cause of action cannot be separately established, even if the element is separately pleaded; or
- The defendant establishes an affirmative defense to the cause of action.

**38.05[2] Motion May Be Based on Absence of Essential Element of Plaintiff's Case.**

**38.05[2][a] Moving Defendant Has Initial Burden to Show That Plaintiff's Causes of Action Lack Merit.** The defendant may move for summary judgment if the defendant's evidence demonstrates that all of plaintiff's causes of action have no merit [CCP § 437c(a)].

The burden of persuasion remains with the party moving for summary judgment [ *Aguilar v. Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841, 24 P3d 493 ]. When the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not the material fact was true, or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff does not possess and cannot reasonably obtain needed evidence [ *Kahn v. East Side Union High School Dist.* (2003) 31 C4th 990, 1003, 75 P3d 30 ; *Aguilar v. Atlantic Richfield Co.* (2001) 25 C4th 826, 851, 854, 107 CR2d 841, 24 P3d 493 ].

### Cross Reference:

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**38.05[2][b] Moving Defendant May Show Lack of Merit by Establishing Absence of Essential Element to Cause of Action.** A moving defendant may show that the plaintiff's cause of action has no merit by establishing the absence of at least one essential element to that cause of action [*CCP* § 437c(o)(1)].

**38.05[2][c] Moving Defendant May Establish Absence of Essential Element by Showing Plaintiff Cannot Reasonably Obtain Supporting Evidence.** A moving defendant need not support the motion with affirmative evidence conclusively negating an essential element of the plaintiff's case. The defendant need only show that the plaintiff does not possess, and cannot reasonably obtain evidence necessary to support an essential element of plaintiff's cause of action [ *Aguilar v. Atlantic Richfield Co. (2001) 25 C4th 826, 853-854, 107 CR2d 841, 24 P3d 493* ; *Leslie G. v. Perry & Assocs. (1996) 43 CA4th 472, 482, 50 CR2d 785* ].

**38.05[2][d] Moving Defendant Must Actually Present Evidence.** The moving defendant must present some evidence in support of its motion, unlike federal law under which argument pointing to the absence of evidence may be sufficient to win a *Fed R Civ P, Rule 56* motion [ *Aguilar v. Atlantic Richfield Co. (2001) 25 C4th 826, 854-855, 107 CR2d 841, 24 P3d 493* ; *Gaggero v. Yura (2003) 108 CA4th 884, 889-890, 134 CR2d 313* ].

### Examples:

- Sufficient evidence would be an admission from the plaintiff that after extensive discovery the plaintiff has discovered nothing to support an essential element of plaintiff's case [ *Aguilar v. Atlantic Richfield Co. (2001) 25 C4th 826, 855, 107 CR2d 841, 24 P3d 493* ].

Examples of acceptable evidence include:

- Defendant's comprehensive evidence consisting of plaintiff's and plaintiff's witnesses' deposition testimony and plaintiff's responses to special interrogatories showed that the plaintiff could not produce sufficient evidence to make a claim for asbestosis [ *Andrews v. Foster Wheeler LLC (2006) 138 CA4th 96, 103, 41 CR3d 229* ].

### Distinguish:

Merely pointing out the absence of evidence to support a plaintiff's claim is insufficient to meet the initial burden of production. The defendant must also produce evidence that the plaintiff cannot reasonably obtain evidence to support his or her claim [ *Boyle v. CertainTeed Corp. (2006) 137 CA4th 645, 652, 40 CR3d 501* (attorney declaration insufficient); *Gaggero v. Yura (2003) 108 CA4th 884, 891, 134 CR2d 313* ].

### Example:

In products liability case, plaintiff's responses to questions if he was exposed to product that he could not remember any instances of exposure are insufficient to support summary judgment [ *Weber v. John Crane, Inc. (2006) 143 CA4th 1433, 1440-1441, 50 CR3d 71* ].

### Strategic Point:



As indicated in the *Aguilar v. Atlantic Richfield Co.* case, if the plaintiff provides factually devoid or

vague discovery responses with respect to an essential element, you can seek an admission from the plaintiff that he or she has no evidence supporting the element. You can later use the admission to support your summary judgment motion.

#### **Cross References:**

Discussion of evidence requirements, see 38.15.

Discussion of federal law on summary judgment, 11 Moore's Federal Practice, Ch. 56, Summary Judgment, 56.13 (Matthew Bender 3d ed.).

**38.05[2][e] Factually Devoid Discovery Response by Plaintiff May Provide Basis for Meeting Burden of Production.** Plaintiff's factually devoid discovery response can satisfy the moving defendant's initial burden of production [ *Union Bank v. Superior Court* (1995) 31 CA4th 573, 590, 592-593, 37 CR2d 653 ].

#### **Example:**

In response to an interrogatory requesting all facts that would support a particular element of a claim, plaintiffs stated that they "believed" that a certain series of events occurred. The court held that such a response satisfied the defendant's initial burden of establishing that plaintiffs could not establish an element of their claim [ *Union Bank v. Superior Court* (1995) 31 CA4th 573, 590, 592-593, 37 CR2d 653 ].

A deposition objection and instruction not to answer are not the equivalent of a factually devoid response, and cannot be used to shift the burden from the moving defendant to the plaintiff [ *Gaggero v. Yura* (2003) 108 CA4th 884, 893, 134 CR2d 313 ].

#### **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**38.05[2][f] Discovery Objection Is Not Equivalent of Factually Devoid Response.** A plaintiff's discovery objection and instruction not to answer are not the equivalent of a factually devoid response, as no logical inference of an absence of facts can be drawn [ *Gaggero v. Yura* (2003) 108 CA4th 884, 892-893, 134 CR2d 313 (plaintiff's objection to deposition was based on purported right to privacy in financial records)].



#### **Strategic Point:**

If plaintiff's objection is unjustified, defendant should bring a motion to compel answers; any later response indicating that plaintiff had no evidence to support its claims may then be utilized by the defendant to meet the initial burden [see *Gaggero v. Yura* (2003) 108 CA4th 884, 891-892, 134 CR2d 313 ].

#### **Cross Reference:**

Objections based on discovery privileges, see Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 2, Scope of Discovery.

**38.05[2][g] Burden Shifts to Opposing Plaintiff to Show a Triable Issue of Material Fact.** If the defendant shows that one or more elements of plaintiff's cause of action cannot be established, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as that cause of action [CCP § 437c(p)(2); *Merrill v. Navegar, Inc.* (2001) 26 C4th 465, 476-477, 110 CR2d 370, 28 P3d 116 ; *Weseloh Family Ltd. Partnership v. K.L.*

*Wessel Constr. Co., Inc. (2001) 125 CA4th 152, 162* ].

However, if the defendant's evidence is only factually devoid discovery responses, the court may not shift the burden to the plaintiff unless stringent review of the direct, circumstantial, and inferential evidence confirms the absence of an essential element of plaintiff's cause of action [ *Andrews v. Foster Wheeler LLC (2006) 138 CA4th 96, 101, 103, 41 CR3d 229* ].

If the plaintiff cannot meet the burden of proof regarding an essential element of his or her case, all other facts are rendered immaterial [ *Certain Underwriters at Lloyd's of London v. Superior Court (1997) 56 CA4th 952, 959, 65 CR2d 821* ].



#### **Cross References:**

Discussion of burden shifting, see 38.22.

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**38.05[2][h] Opposing Plaintiff Must Set Forth Evidence.** The plaintiff may not rely on the mere allegations or denials of its pleadings to show that a triable issue of material fact exists. The plaintiff must set forth the specific facts showing that a triable issue of material fact exists as to the element in the challenged cause of action [CCP § 437c(p)(2); *Merrill v. Navegar, Inc. (2001) 26 C4th 465, 476-477, 110 CR2d 370, 28 P3d 116* ; *Weseloh Family Ltd. Partnership v. K.L. Wessel Constr. Co., Inc. (2001) 125 CA4th 152, 162* ].

#### **Example--Element of Proximate Cause Lacking:**

Although a plaintiff attacked by unknown assailants in defendant's apartment complex raised triable issues as to whether the defendants owed her a duty of care and whether the defendants breached that duty by failing to provide additional security guards or functioning, locked security gates, her evidence was insufficient to show causation as a triable factual issue, and summary judgment for the defendant was granted. Because assailants' identity remained unknown and they may have resided in the apartment complex, she was unable to prove that they would not have succeeded in assaulting her even if the defendants had provided additional security precautions, the burden she would have to meet at trial [ *Saelzler v. Advanced Group 400 (2001) 25 C4th 763, 780-781, 107 CR2d 617, 23 P3d 1143* ].

#### **Example--Element of Duty Lacking:**

A bank has a duty to inspect and remedy defects on property acquired through foreclosure only if it has actual knowledge of the defects and the ability to prevent foreseeable harm. The plaintiffs' opposition to the defendant bank's summary judgment motion created no triable issue of fact regarding whether the bank had actual knowledge of the dangerous condition of the property, or the power to repair defects on the property. Therefore, the bank owed no duty to plaintiffs, whose son died of injuries sustained after he was attacked by a dog owned by the former owners of the property [ *Martinez v. Bank of Am. (2000) 82 CA4th 883, 886-887, 98 CR2d 576* ; accord *Weseloh Family Ltd. Partnership v. K.L. Wessel Constr. Co., Inc. (2001) 125 CA4th 152, 162* ].

#### **38.05[3] Defense Motion May Be Based on Affirmative Defense.**

**38.05[3][a] Moving Defendant Has Initial Burden to Show That Undisputed Facts Support Each Element of the Affirmative Defense.** The defendant may move for summary judgment based on the existence of an affirmative defense to the plaintiff's cause of action [CCP § 437c(o)(2)].

#### **Prerequisite:**

Most affirmative defenses are waived if not pleaded in responsive pleadings [see Ch. 14, Answers,

14.18[1]; *Cal. Concrete Co. v. Beverly Hills Sav. & Loan Assn.* (1989) 215 CA3d 260, 272 ].

When a defendant's summary judgment motion is based on the assertion of an affirmative defense, the defendant has the initial burden to demonstrate that the undisputed facts support each element of the affirmative defense. If the defendant does not meet this burden, the motion will be denied [ *Consumer Cause, Inc. v. SmileCare* (2001) 91 CA4th 454, 467-468, 110 CR2d 627 ]. The moving party's burden is unaffected by the strength of the opposition to the motion [ *Scalf v. D.B. Log Homes, Inc.* (2005) 128 CA4th 1510, 1519 ]. The submission of evidence that is equivocal or from which conflicting inferences may be drawn is insufficient to meet the movant's burden [ *Anderson v. Metalclad Insulation Corp.* (1999) 72 CA4th 284, 297, 85 CR2d 331 ].

#### **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**38.05[3][b] Burden Shifts to Opposing Plaintiff to Show a Triable Issue of Material Fact.** If the defendant meets the burden of showing that there is a complete defense to the action, the burden shifts to plaintiff to show an issue of fact concerning at least one element of the defense [CCP § 437c(p)(2); *Anderson v. Metalclad Insulation Corp.* (1999) 72 CA4th 284, 289-290, 85 CR2d 331 ].

#### **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**38.05[3][c] Opposing Plaintiff Must Set Forth Evidence.** The plaintiff or cross-complainant may not rely on the mere allegations or denials of its pleadings to show that a triable issue of material fact exists. The plaintiff must set forth the specific facts showing that a triable issue of material fact exists as to the affirmative defense to the challenged cause of action [CCP § 437c(p)(2)].

#### **Cross References:**

Discussion of burden shifting, see 38.22. Discussion of evidence requirements, see 38.15, 38.23.

Discussion of affirmative defenses, see *Ch. 14, Answers*, 14.18, 14.19.

**38.05[4] Defendant Must Show Absence of Triable Issue of Fact for All Theories Pled.** If the plaintiff pleads several theories (*e.g.*, that the product at issue in a strict products liability cause of action is defective in different ways), the defendant must demonstrate that there are no material facts requiring trial on any of them [ *Wright v. Stang Mfg. Co.* (1997) 54 CA4th 1218, 1228, 63 CR2d 422 ].

**38.05[5] Summary Judgment for Defendant Is Favored in Actions for Defamation or Invasion of Privacy.** Summary judgment is favored in defamation and invasion of privacy cases due to the chilling effect of protracted litigation on *First Amendment* rights. Courts are inclined to grant the motion absent a showing of high probability that the plaintiff will ultimately prevail in the case [ *Alszev v. Home Box Office* (1998) 67 CA4th 1456, 1460, 80 CR2d 16 ].



#### **Warning--Clear and Convincing Standard of Proof Applies to Plaintiff:**

A plaintiff responding to a defendant's summary judgment motion in a *First Amendment* defamation case applying the *New York Times* test must respond with evidence that shows actual malice by a clear and convincing standard [see *Reader's Digest Assn. v. Superior Court* (1984) 37 C3d 244, 252, 208 CR 137, 690 P2d 610 ].

#### **Cross Reference:**

Discussion of showing required for defendant's motion, see *California Forms of Pleading and Practice*, Ch. 537, Summary Judgment § 537.33[2][b][ii], [d][ii] (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentBurdens of Production & ProofAbsence of Essential Element of ClaimCivil  
ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentBurdens of  
Production & ProofNonmovants



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**38.06 Plaintiff's Motion for Summary Judgment.**

**38.06[1] Grounds for Motion.** A plaintiff may move for summary judgment when [CCP § 437c(a), (c)]:

- There are no triable issues of material fact;
- There is no defense to the plaintiff's action; and
- The plaintiff is entitled to judgment as a matter of law.

**38.06[2] Plaintiff Must Show Every Element of Cause of Action.** The plaintiff may move for summary judgment on the ground that there is no defense to the action [CCP § 437c(a)].

A plaintiff meets his or her burden of showing that there is no defense to a cause of action if the plaintiff proves each element of the cause of action entitling the plaintiff to judgment on that cause of action [CCP § 437c(p)(1)].

The party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact [ *Aguilar v. Atlantic Richfield Co. (2001) 25 C4th 826, 850-851, 107 CR2d 841, 24 P3d 493* ].

**38.06[3] Plaintiff Must Support Motion With Evidence.** The plaintiff must support the motion with evidence including affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken [CCP § 437c(b)(1); *Aguilar v. Atlantic Richfield Co. (2001) 25 C4th 826, 843, 107 CR2d 841, 24 P3d 493* ].



**Cross Reference:**

Discussion of evidence requirements, see 38.15.

**38.06[4] If Plaintiff Makes Prima Facie Showing, Burden Shifts to Defendant.** Once the plaintiff meets his or her burden, the burden shifts to the defendant to show that a triable issue of one or more material facts exists to that cause of action, or to a defense to it [CCP § 437c(p)(1); *Aguilar v. Atlantic Richfield Co. (2001) 25 C4th 826,*

850-851, 107 CR2d 841, 24 P3d 493 ].

 **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**38.06[5] Opposing Defendant Must Set Forth Evidence.** The defendant or cross-defendant may not rely on the mere allegations or denials of its pleadings to show that a triable issue of material fact exists. The defendant must set forth specific facts showing that a triable issue of fact exists as to at least one of the elements of the plaintiff's cause of action, or to an affirmative defense to that cause of action [*CCP* § 437c(p)(1)].

 **Cross References:**

Discussion of burden shifting, see 38.22. Discussion of evidence requirements, see 38.23.

Discussion of showing required for plaintiff's motion, see *California Forms of Pleading and Practice*, § 537.33[2][b][i] (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentBurdens of Production & ProofNonmovants





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**38.07 Cross-Motions May Be Made When Parties Agree on Material Facts.**

Parties may agree to the material facts and use cross-motions for summary judgment to resolve disputed issues of law [see *Dixon v. Salvation Army* (1983) 142 CA3d 463, 464, 191 CR 111 ].



**Warning--Trial Court Can Make Independent Determination:**

The mere fact that both sides move for summary judgment does not preclude the trial court from making an independent determination that there are issues of material fact precluding summary judgment before proceeding to decide any questions of law [ *Coast Elevator Co. v. State Bd. of Equalization* (1975) 44 CA3d 576, 583-584, 118 CR 818 (disapproved on another ground in *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 C3d 86, 93 n4, 130 CR 321, 550 P2d 593 )].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentMotions for Summary JudgmentCross-Motions



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**38.08 Summary Judgment May Not Be Granted When Damages Must Be Determined.**

Even if there are no issues of fact regarding liability, summary judgment cannot be granted if issues as to the calculation of damages exist [ *Department of Industrial Relations v. UI Video Stores, Inc. (1997) 55 CA4th 1084, 1097, 64 CR2d 457* (summary judgment reversed)].

The correct trial court procedure is a motion to bifurcate the issues of liability and damages under *CCP* § 598 and try the liability issue on undisputed facts [ *Department of Industrial Relations v. UI Video Stores, Inc. (1997) 55 CA4th 1084, 1097, 64 CR2d 457* ].

➡ **Cross Reference:**

Discussion of bifurcation, see *Ch. 23, Case Management, 23.20*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentStandardsGeneral Overview



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**38.09 Summary Adjudication Motion Can Dispose of Part of Case.**

**38.09[1] May Be Used as Alternative to Summary Judgment Motion.** A summary adjudication motion may be made by itself, or as an alternative to the summary judgment motion [CCP § 437c(f)(2)] and should be considered, either by itself, or as an alternative to summary judgment when [CCP § 437c(f)(2)]:

- A plaintiff's case consists of multiple causes of action;
- The plaintiff asserts a claim for punitive damages;
- The defendant has asserted more than one affirmative defense; or
- The case raises an issue of duty.

**38.09[2] Available Only If Completely Disposes of Matter.** A motion for summary adjudication can be granted only if it "completely disposes" of a cause of action, affirmative defense, claim for punitive damages, or issue of duty [CCP § 437c(f)(1); *Hindin v. Rust* (2004) 118 CA4th 1247, 1258 (distinguishing between count and cause of action)].

**Distinguish:**

As a result of a 1990 amendment to the statute, "facts" of any kind, whether undisputed, underlying, supporting, or subsidiary, are not subject to summary adjudication [ *Raghavan v. The Boeing Co.* (2005) 133 CA4th 1120, 1136 ].

**38.09[3] Procedurally Same as Motion for Summary Judgment.** Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment [CCP § 437c(f)(2)].

**38.09[4] Available Only on Motion.** Summary adjudication is available only on a motion requesting summary adjudication, either by itself or as an alternative to summary judgment [CCP § 437c(f)(2)]. If counsel moves only for summary judgment, but fails to move for, and give alternative notice of motion for summary adjudication, the court cannot grant summary adjudication [ *Motevalli v. Los Angeles Unified Sch. Dist.* (2004) 122 CA4th 97, 113 (harmless error); *Jimenez v. Protective Life Ins. Co.* (1992) 8 CA4th 528, 534-535, 10 CR2d 326 ].

**38.09[5] Denial of Motion for Summary Adjudication May Bar Later Motion for Summary Judgment.** If the court denies summary adjudication, a party may not later move for summary judgment based on issues asserted in the prior motion for summary adjudication, unless that party establishes newly discovered facts or circumstances, or a change of law supporting the issues reasserted in the summary judgment motion [CCP § 437c(f)(2)].

**Example:**

Successive motions for summary judgment involving "duty" in a general sense were not the same motion because they involved different legal theories [ *Patterson v. Sacramento City Unified School Dist.* (2007) 155 CA4th 821, 827, 66 CR3d 337 ].

**38.09[6] Motion for Summary Adjudication May Raise Same Issues as Previously Overruled Demurrer.** A motion for summary adjudication may revisit issues of law overruled on demurrer without complying with the requirements of a CCP § 1008 motion for reconsideration [ *Community Mem'l Hosp. v. County of Ventura* (1996) 50 CA4th 199, 205, 56 CR2d 732 (refusing to follow *Gilberd v. AC Transit* (1995) 32 CA4th 1494, 1502, 38 CR2d 626 , to the extent it may be read to the contrary)].

**38.09[7] Denial or Grant of Summary Adjudication Motion May Not Serve as Basis for Comment at Subsequent Trial.** In the subsequent trial of an action, neither a party, nor a witness, nor the court may comment to the jury regarding the grant or denial of a motion for summary adjudication [CCP § 437c(n)(3)].

**Example:**

Not even the subject of the basis for the summary adjudication may be mentioned before the jury, and a trial court's instruction to the jury to consider issues addressed in the summary adjudication proceeding to be established facts is improper [ *Raghavan v. The Boeing Co.* (2005) 133 CA4th 1120, 1134-1139, 35 CR3d 397 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**38.10 Defense Motion for Summary Adjudication.**

**38.10[1] Grounds for Motion.** The defendant can move for summary adjudication when [CCP § 437c(f)(1)]:

- There are no triable issues of fact as to one or more causes of action; and
  - ☐ One or more causes of action within an action has no merit;
  - ☐ One or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs; or
  - ☐ There is no merit to a claim for punitive damages under CC § 3294.
- The defendant is entitled to judgment on that cause of action as a matter of law.

**38.10[2] Defense Motion May Be Based on Plaintiff's Inability to Establish Element of One or More Causes of Action.** The defendant can move for summary adjudication on the grounds that one or more causes of action within an action has no merit because an essential element cannot be separately established, even if the element is separately pleaded [CCP § 437c(f)(1), (o)(1)].



**Cross Reference:**

Discussion of elements lacking from cause of action, see 38.05[2].

**38.10[3] Defense Motion May Be Based on Affirmative Defense.** The defendant can move for summary adjudication on the grounds that one or more causes of action within an action has no merit because the defendant has an affirmative defense to that cause of action [CCP § 437c(f)(1), (o)(2)].



**Strategic Point:**

When preparing the answer to the complaint, it is often helpful to assert affirmative defenses in such a fashion that they can be used as a platform for a motion for summary judgment.



**Cross Reference:**

Discussion of affirmative defenses, see 38.05[3].

**38.10[4] Defense Motion May Be Based on the Ground of Lack of Merit to Claim for Punitive Damages.** The defendant may move for summary adjudication on the grounds that there is no merit to a claim for punitive damages as specified in CC § 3294 [CCP § 437c(f)(1)].



**Warning--Clear and Convincing Standard of Proof Applies to Plaintiff:**

A plaintiff responding to a defendant's motion for summary adjudication with respect to a punitive damages claim must establish malice, oppression, or fraud under the clear and convincing evidence standard applicable at trial [see *Basich v. Allstate Ins. Co.* (2001) 87 CA4th 1112, 1120-1121, 105 CR2d 153 ].

**38.10[5] Plaintiff's Motion or Defense Motion May Be Made to Determine an Issue of Duty.** Either party may move for summary adjudication as to an issue of duty within an action [CCP § 437c(f); *Linden Partners v. Wilshire Linden Assocs.* (1998) 62 CA4th 508, 518-519, 73 CR2d 708 ].

Under recent case authority, summary adjudication is available to dispose completely of an issue of duty alone even if it does not dispose completely of an entire cause of action or defense, or terminate some portion of the action [ *Linden Partners v. Wilshire Linden Assocs.* (1998) 62 CA4th 508, 519-522, 73 CR2d 708 ; see also *Novak v. Low, Ball & Lynch* (1999) 77 CA4th 278, 285-286, 91 CR2d 453 ].

**Examples--Summary Adjudication on Issue of Duty Alone:**

- Trial court should have granted motion for summary adjudication in favor of public utilities commission, because the commission did not control a railroad crossing at which an accident occurred on account of the fact that it could order the railroad to improve safety devices as the crossing [ *Pub. Util. Com. v. Superior Court* (2010) 181 CA4th 364, 375-381, 105 CR3d 234 ] .

- A trial court properly granted the first issue of plaintiff's motion for summary adjudication that defendant had a duty to deliver an estoppel certificate that accurately stated the amount of rent, while denying summary adjudication on the cause of action as a whole because facts regarding the correct amount of rent were disputed [ *Linden Partners v. Wilshire Linden Assocs.* (1998) 62 CA4th 508, 519-522, 73 CR2d 708 ].

- A trial court was ordered to grant plaintiff insured's summary adjudication motion that defendant law firm owed him a duty to allow his independent counsel to participate in settlement negotiations, even though plaintiff still needed to prove causation and damages to prevail in the lawsuit [ *Novak v. Low, Ball & Lynch* (1999) 77 CA4th 278, 285-286, 91 CR2d 453 ].



**Warning--Contrary Authority Exists:**

There is, however, conflicting authority, that a summary adjudication ruling that determines an issue of duty must dispose of an entire cause of action or affirmative defense, or terminate some portion of an action [ *Regan Roofing Co. v. Superior Court* (1994) 24 CA4th 425, 436-437, 29 CR2d 413 (summary adjudication regarding insurer duty to defend reversed)]. *Linden Partners* discussed and specifically

rejected *Regan Roofing*, and *Novak* did not mention *Regan Roofing* or *Linden Partners*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**38.11 Plaintiff's Motion for Summary Adjudication.**

The plaintiff may move for summary adjudication when [CCP § 437c(f)(1)]:

- There are no triable issues of fact as to one or more causes of action;
- There is no defense to one or more causes of action within an action and no merit to any affirmative defenses to that or those causes of action [see *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 C4th 1145, 1160, 81 CR3d 708 ]; and
- The plaintiff is entitled to judgment on one or more causes of action as a matter of law.



**Cross Reference:**

Discussion of absence of defense, see 38.05[5].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**38.12 Particular Actions in Which Summary Proceedings Are Limited or Unavailable.**

**38.12[1] Limited in Summary Proceedings for Obtaining Possession of Real Property.**

**38.12[1][a] Parties in Unlawful Detainer, Forcible Entry, or Forcible Detainer Action May Move for Summary Judgment.** A motion for summary judgment is available in actions for unlawful detainer, forcible entry, or forcible detainer on the same basis as a motion under *CCP* § 437c [*CCP* § 1170.7].

 **Cross Reference:**

Discussion of unlawful detainer proceedings, see Matthew Bender(R) Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer.

**38.12[1][b] Time Limitations for Notice of Motion Differ.** Time limitations set forth in *CCP* § 437c(a), (b)(2), and (b)(4) are expressly inapplicable to summary proceedings for obtaining possession of real property under *CCP* §§ 1159-1179a [*CCP* § 437c(r)].



**Timing:**

A motion for summary judgment made in summary proceedings for obtaining possession of real property may be made at any time after the answer is filed on giving 5 days' notice [*CCP* § 1170.7; *Cal Rules Court, Rule 3.1351(a)*].

**38.12[1][c] Time Limitations for Trial Differ.** *CCP* § 437c does not extend the extremely short period for bringing unlawful detainer or forcible entry or detainer cases to trial as provided by *CCP* § 1170.5 [*CCP* § 437c(q)].

 **Cross Reference:**

Discussion of unlawful detainer proceedings, see Matthew Bender(R) Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer; California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Actions (Matthew Bender).

**38.12[2] Not Available in Consumer Class Actions.** A *CCP* § 437c motion will not be granted in any action

commenced as a class action pursuant to *CC § 1781(a)* of the Consumers Legal Remedies Act (*CC §§ 1750-1784*) [*CC § 1781(c)(3)*]. However, the court can hold a hearing, on motion of any party to the action, to determine if the action is without merit or there is no defense to the action [*CC § 1781(c)(3)*]. Notice of the time and place of the hearing must be served on the other parties at least 10 days prior to the hearing [*CC § 1781*]. The motion must be supported by an affidavit of any person or persons having knowledge of the facts [*CC § 1781*].

 **Cross Reference:**

Discussion of Consumer Class Actions, see *California Forms of Pleading and Practice*, Ch. 504, Sales: Consumers Legal Remedies Act (Matthew Bender).

**38.12[3] Not Available in Medical Malpractice Action in Which Defendant Seeks Security.** Any defendant who moves for an order requiring the plaintiff to post security for defense costs in a medical malpractice action as provided by *CCP § 1029.6(a)* cannot afterwards move for summary judgment [*CCP § 1029.6(e), (f)*].

Similarly, any defendant who moves for summary judgment is thereafter precluded from moving for security under *CCP § 1029.6(a)* [*CCP § 1029.6(e), (f)*].

 **Cross Reference:**

Discussion of *CCP § 1029.6*, see *California Forms of Pleading and Practice*, § 295.19 (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentTime Limitations



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Chapter 38 Summary Judgment  
II. MOVING FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.13*

**38.13 Timing of Motion Is Restricted.**

**38.13[1] Lengthy Notice Period and Window for Making Motion Must Be Considered.** Because a summary judgment motion must be served at a minimum of 105 days before trial [*see CCP § 437c(a)*], a party should start thinking about what is needed for the motion early on in the litigation to assure there is time to obtain the necessary discovery.

**38.13[2] Motion Is Made on 75 Days' Notice and Must Be Filed 16 Court Days Before the Hearing.**

**38.13[2][a] Service.** Time requirements pertaining to service of notice of the motion and supporting papers for motion for summary judgment and summary adjudication motions are as follows [*CCP § 437c(a)*]:

- 75 days before the time appointed for the hearing, if personally served.
- 77 days (75 days, plus an additional 2 days) before the time appointed for the hearing if the notice is served by:
  - ☐ Facsimile transmission;
  - ☐ Express mail; or
  - ☐ Another method of delivery providing for overnight delivery.
- 80 days (75 days, plus an additional 5 days) before the time appointed for the hearing if notice is served by regular mail, and the address is within California.
- 85 days (75 days, plus an additional 10 days) before the time appointed for the hearing, if notice is served by regular mail, and the address is outside of California, but within the United States.

- 95 days (75 days, plus an additional 20 days) before the time appointed for the hearing, if the notice is served by regular mail, and the address is outside the United States.

**Trap:**

The extra court days required for particular aforementioned forms of nonpersonal service are to be added at the end of the 75-day period for service of notice of motion for summary judgment or adjudication, rather than at the beginning of that period [ *Barefield v. Washington Mut. Bank* (2006) 136 CA4th 299, 302-303, 38 CR3d 858 (overnight service)].

Proof of service of the motion must be filed no later than five court days before the appointed hearing date [ *Cal Rules Ct, Rule 3.1300(c)*].

**Warning--75-Day Notice Period Cannot Be Shortened:**

Trial courts cannot shorten the 75-day notice period required for a motion for summary judgment [ *McMahon v. Superior Court* (2003) 106 CA4th 112, 115-118, 130 CR2d 407 ]. There is no exception for complex cases, as well [ *Hernandez v. Superior Court* (2003) 112 CA4th 285, 299 ].

Silence and compelled participation in hearing on summary judgment do not constitute waiver of insufficient notice [ *Urshan v. Musicians' Credit Union* (2004) 120 CA4th 758, 768 (decided under prior limitation)].

**Trap:**

A notice of hearing on the motion for summary judgment of less than the requisite number of days is invalid [ *Robinson v. Woods* (2008) 168 CA4th 1258, 1267, 86 CR3d 241 (reversing grant of summary judgment where notice period was only 76 days by mail service)]. However, some courts may still require the opposing party's response to address the merits of the motion itself [see discussion of authorities in *Robinson v. Woods* (2008) 168 CA4th 1258, 1262-1267, 86 CR3d 241] . Counsel must therefore consider responding in the opposition papers and at the hearing on the merits as well as on the issue of proper notice. Given that, counsel should ascertain whether the inadequate notice will in fact limit preparation for the hearing on the merits of the motion and, therefore, is worth objecting to.

**Strategic Point:**

If the defect in fact will limit preparation for the hearing on the motion, the opposition to the hearing on the grounds of inadequate notice should make the prejudice clear [see *Robinson v. Woods* (2008) 168 CA4th 1258, 1268, 86 CR3d 241] . Counsel should also consider requesting at the hearing a continuance of the hearing (and trial if the 30-day interval between trial and the hearing [see 38.13[4]] is implicated), in order to gain additional time to prepare the opposition on the merits to the motion for summary judgment [see also *Ch. 26, Law and Motion Procedure*, 26.48]. In addition, counsel should argue the authority for the proposition that the continuance must not be only for the additional days of statutorily required notice on the original hearing, but should be a continuance of trial for a sufficient period as to allow a new motion and full notice of hearing [see *Robinson v. Woods* (2008) 168 CA4th 1258, 1267-1268, 86 CR3d 241] .

**Warning--Service of Motion Does Not Extend Time for Filing Responsive Pleadings:**

A defendant cannot extend the time within which the party must otherwise file a responsive pleading by filing a motion for summary judgment [CCP § 437c(a)].

**Strategic Point:**

Court may exempt general civil case from time disposition goals and continue trial date to provide late added party with sufficient time to bring summary judgment motion; fast track rules must give way to statutory right to bring summary judgment motion [ *Polibrid Coatings, Inc. v. Superior Court (2003)* 112 CA4th 920, 923-924 ].

**Cross Reference:**

Service of noticed motion, see Ch. 26, Law and Motion Procedure; Ch. 27, Service of Papers.

**38.13[2][b] Filing.** The notice of motion and supporting papers must be filed 16 court days before the appointed hearing date, and no later than the close of business of the clerk's office on the day the papers are due [see CCP § 1005(b); *Cal Rules Ct, 3.1300(a), (e)*].

Papers submitted for filing after the time set forth in *Cal Rules Ct, Rule 3.1300* will be filed, but the court, in its discretion, may refuse to consider these papers in ruling on the motion [*Cal Rules Ct, Rule 3.1300(d)*]. If the court refuses to consider the papers, the minutes or order are required to so indicate [*Cal Rules Ct, Rule 3.1300(d)*].

**Judge's Perspective:**

As previously stated, it is best to file and serve the moving papers at the same time.

**38.13[3] Motion Made No Sooner Than 60 Days After General Appearance.** A party may move for summary judgment any time after 60 days have elapsed since the general appearance of the party against whom the motion is directed [CCP § 437c(a)].

**Exception:**

With or without notice, if good cause is shown, the court may direct that summary judgment may be made at an earlier time after the general appearance of the party against whom the motion is directed [CCP § 437c(a); *McMahon v. Superior Court (2003)* 106 CA4th 112, 115-118, 130 CR2d 407 ].

A party has generally appeared if he or she has filed a complaint [ *Brown v. Swickard (1985)* 163 CA3d 820, 826-827, 209 CR 844 & n10, 163 CA3d 820, 209 CR 844 ] or done any of the following [CCP § 1014]:

- Answered.
- Demurred.
- Filed a motion to strike.
- Filed a notice of motion to transfer under CCP § 396b.
- Moved for jurisdictional reclassification under CCP § 403.040.
- Given the plaintiff written notice of appearance.

**Warning--Above Acts Not Exclusive:**

The acts listed above pursuant to CCP § 1014 are not exclusive [ *Creed v. Schultz (1983)* 148 CA3d 733, 739, 196 CR 252 ]. Any act of a defendant is equivalent to a general appearance when, by the act, the defendant intentionally submits him or herself to the court's jurisdiction for the purpose of obtaining

any ruling or order of the court going to merits of the case [ *Davenport v. Superior Court* (1920) 183 C 506, 511, 191 P 911 ].

The defendant's 60-day waiting period is computed from the time the action is filed [ *Saint Mary Med. Ctr. v. Superior Court* (1997) 50 CA4th 1531, 1537, 58 CR2d 182 ].

**Exception:**

At least one court has upheld a plaintiff's filing of a motion for summary adjudication of the issues less than 60 days after the defendant's general appearance when the hearing on the motion occurred after the 60-day period [ *Sadlier v. Superior Court* (1986) 184 CA3d 1050, 1053-1054, 229 CR 37 ].

**38.13[4] Motion Must Be Heard 30 Days Before Trial.** A motion for summary judgment must be heard no later than 30 days before the date of trial [CCP § 437c(a)].

**Exception:**

The court can order a later hearing for good cause [CCP § 437c(a); see *McMahon v. Superior Court* (2003) 106 CA4th 112, 115-118, 130 CR2d 407 ; *Cooksey v. Alexakis* (2004) 123 CA4th 246, 251 n2 (soonest court date as good cause)].



**Warning:**

A notice of hearing less than 30 days prior to trial is invalid without a prior ruling from the court finding good cause for the lesser interval between trial and the hearing on the motion for summary judgment. Similarly, it is error for the trial court to rule on the motion for summary judgment at the same hearing at which it rules on the request for a hearing on the summary judgment motion less than 30 days prior to trial [ *Robinson v. Woods* (2008) 168 CA4th 1258, 1268, 86 CR3d 241 ].

The 30-day time period is calculated based on the trial date in existence when the motion is noticed [ *Green v. Bristol Myers Co.* (1988) 206 CA3d 604, 609 n4, 253 CR 745 ; see also *Sentry Ins. Co. v. Superior Court* (1989) 207 CA3d 526, 529, 255 CR 13 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentTime Limitations



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**38.14 Summary Judgment/Adjudication Is Available Only on Notice.**

The party seeking summary judgment or summary adjudication must request the order by a written notice of motion [CCP § 437c(a); *Magana Cathcart McCarthy v. CB Richard Ellis, Inc.* (2009) 174 Cal. App. 4th 106, 118, 94 Cal. Rptr. 3d 109 (improper for parties to enter into a stipulated judgment that the trial court would have granted summary judgment in the matter for purposes of expediting an appeal)]. Joining in a motion without separate notice is insufficient [ *Lerma v. County of Orange* (2004) 120 CA4th 709, 718-719 ].

The notice of motion must be accompanied by the following [CCP § 437c(b)(1); *Cal Rules Ct, Rule 3.1350*]:

- Supporting declarations or other evidence [see 38.15];
- A separate statement of material facts [see 38.16];
- A supporting memorandum [see 38.17]; and
- Any additional papers required by a local court rule.



**Cross References:**

Form of notice of motion and motion for summary judgment, see 38.56; form of notice of motion and motion for summary adjudication, see 38.57.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentNotices



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**38.15 Moving Party Must Submit Supporting Evidence.**

**38.15[1] Affidavits and Declarations.**

**38.15[1][a] Most Common Method.** A sworn statement, in the form of either an affidavit or a declaration, is the most common method for providing the necessary evidence in support of a motion for summary judgment [CCP §§ 437c(b)(1), 2003, 2015.5].



**Cross Reference:**

Form of declaration in support of summary judgment or summary adjudication, see 38.59.

**38.15[1][b] Must Be Based on Personal Knowledge.** The affidavit or declaration must be based on personal knowledge [CCP § 437c(d); *Stockinger v. Feather River Community College* (2003) 111 CA4th 1014, 1025-1026 ; *Regents of the Univ. of Cal. v. Superior Court* (1966) 41 CA4th 1040, 1044, 48 CR2d 922 ].

**38.15[1][c] Affiant or Declarant Must Be Competent.** The affidavit or declaration must affirmatively allege facts that show that the affiant or declarant is competent to testify to the matters stated within it [CCP § 437c(d); *Regents of the Univ. of Cal. v. Superior Court* (1966) 41 CA4th 1040, 1044, 48 CR2d 922 ].

**38.15[1][d] Must Contain Admissible Evidence.** The affidavit or declaration must set forth admissible evidence and be in the form of evidentiary facts [CCP § 437c(d); *Stockinger v. Feather River Community College* (2003) 111 CA4th 1014, 1025-1026 (transcripts of persons claiming to answer under penalty of perjury do not convert statements into admissible affidavits or declarations for summary judgment purposes); *Krantz v. BT Visual Images* (2001) 89 CA4th 164, 173-174, 107 CR2d 209 (defendant's conclusory declarations merely stating that the allegations of the complaint were untrue are not a sufficient basis for summary judgment); *Regents of the Univ. of Cal. v. Superior Court* (1966) 41 CA4th 1040, 1044, 48 CR2d 922 ].

**38.15[1][e] Court Generally Cannot Deny Motion Merely on Grounds of Credibility or Want of Cross-Examination.** The general rule is that a court cannot deny a motion for summary judgment merely on grounds of credibility or for want of cross-examination of witnesses who furnish affidavits or declarations in support of the motion [CCP § 437c(e)].



**Exception--Discretionary Denial Allowed in Certain Instances If Affiant Is Sole Witness:**

The court can exercise discretion to deny summary judgment if [CCP § 437c(e)]:

- The only proof a material fact offered in support of a motion for summary judgment is an affidavit or declaration who was the sole witness to that fact; or

- A material fact is an individual's state of mind, or lack thereof, and the moving party seeks to establish that fact solely by the individual's affirmation of that state of mind [ *Meighan v. Shore* (1995) 34 CA4th 1025, 1046, 40 CR2d 744 (mental process); *Times-Mirror Co. v. Superior Court* (1998) 198 CA3d 1420, 1430, 244 CR 556 (sole witness); *Allen v. McMillion* (1978) 82 CA3d 211, 215-216, 147 CR 77 (state of mind)].

 **Cross Reference:**

Discussion, see 38.23[4].

**38.15[1][f] May Incorporate Documentary Evidence.** All documentary evidence submitted in support of the motion should be incorporated by reference into an affidavit or declaration. Any incorporated documents must satisfy evidentiary rules [ *Dugar v. Happy Tiger Records, Inc.* (1974) 41 CA3d 811, 815, 116 CR 412 ], including authentication [Evid Code §§ 1400-1454] and the Secondary Evidence Rule [Evid Code §§ 1520-1567].

Matter in the court's file, which is incorporated by reference, must be set forth with specificity. The entire file may not be incorporated [CCP § 437c(b)(7)].

**38.15[2] Admissions as Derived From Responses to Requests for Admissions, Depositions, Answers to Interrogatories, Pleadings, and Factual Stipulations.**

**38.15[2][a] Requests for Admissions.** Admissions are derived primarily through the use of requests for admissions, in either of the following ways:

- Matters may be admitted in an answer to a request for admission [CCP § 2033.410];

- Matters may be deemed admitted on the motion of the party who serves a request for admissions, when the party served with the request has failed to provide a timely response. The failure to answer the request for admissions is deemed an admission of the matters contained in such request [CCP § 2033.280(b); see also *Jack v. Wood* (1968), 258 CA2d 639, 644, 65 CR 856 ]. Summary judgment may be based on such admissions and requests for admissions, and on the moving party's affidavit [see CCP § 437c(b)(1)].

 **Cross Reference:**

Matthew Bender(R) Practice Guide: California Civil Discovery, Ch.12, Requests for Admissions.

**38.15[2][b] Depositions and Interrogatories.** Admissions derived from deposition testimony or interrogatories may:

- Be incorporated within a declaration; or

- Submitted as a separate exhibit [see 38.15[3]].

 **Cross Reference:**

Discussion of weight given to admissions obtained through discovery, see 38.38[4].

**38.15[2][c] Pleadings.** Admissions derived from the pleadings of the opposing party may be either expressly pled [see, e.g., *Aim Ins. Co. v. Culcasi* (1991) 229 CA3d 209, 213 n1, 280 CR 766 (allegations in cross-complaint)], or they may result from an ineffective denial [see, e.g., *Oliver v. Swiss Club Tell* (1963) 222 CA2d 528, 540, 35 CR 324 (a denial based on information and belief with respect to facts that are presumptively within the knowledge of the defendant is insufficient and such a denial constitutes an admission of the allegation of the complaint)].

#### **Cross Reference:**

Discussion of weight given to admissions in pleadings, see 38.38[5].

**38.15[2][d] Factual Stipulations.** Admissions may be derived from factual stipulations entered into with the opposing party [see, e.g., *Smith v. Walter E. Heller & Co.* (1978) 82 CA3d 259, 269, 147 CR 1 ].

**38.15[3] Deposition Testimony and Interrogatories.** Depositions and answers to interrogatories may be used to support or oppose a motion for summary judgment by submitting them as an exhibit to a declaration [CCP § 437c(b)(1)].

When deposition testimony is submitted as an exhibit, the following requirements apply [Cal Rules Ct, Rule 3.1116]:

- Other than the title page, the exhibit must contain only the relevant pages of the transcript. The original deposition transcript page number must be clearly visible.
- The relevant portions of any testimony in the deposition must be marked in a manner that calls attention to that testimony.

Interrogatories and their answers should similarly be prepared as exhibits.

#### **Cross References:**

Use of discovery responses to meet movant's burden of production, see 38.05[2], 38.06[3].

#### **38.15[4] Supporting Evidence May Include Matters for Which Judicial Notice Is Sought.**

**38.15[4][a] Select Matters.** Matters of which judicial notice must or may be taken can be used to support or oppose a motion for summary judgment or adjudication [CCP § 437c(b)(1)]. Matters subject to judicial notice include:

- Statutes, case law, and court rules of the United States and California [see *Evid Code* §§ 451(a), (d), 452(a), (e)].
- Court records [see *Evid Code* § 452(d)].
- Facts and propositions:
  - ☐ Of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute [see *Evid Code* § 451(f)].
  - ☐ That are such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute [see *Evid Code* § 452(g)].

 That are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonable indisputable accuracy [see *Evid Code* § 452(h)].

**38.15[4][b] List Matters and Provide Copies.** A party requesting permissive judicial notice of any matter must [Cal Rules Ct, Rule 3.1113(l), 3.1306(c)]:

- Prepare a separate document listing the specific items for which notice is requested; and
- Provide the court and each party with a copy of the material.

If the material is part of a file in the court in which the motion is being heard, the party must [Cal Rules Ct, Rule 3.1306(c)]:

- Specify in writing the part of the court file sought to be judicially noticed; and
- Arrange with the clerk to have that file in the courtroom at the time of the hearing.



**Warning--Local Rules May Impose Additional Requirements:**

For example, in Los Angeles County Superior Court, and San Francisco Superior Court, at least five days before the hearing, the party requesting judicial notice of a court file must file a separate document with the clerk of the department in which the motion is to be heard requesting the clerk to order delivery of the file to the department for the hearing. Moreover, the file must be delivered to the department at least two court days before the hearing to give the judge an opportunity to review the file in preparation for the hearing [Los Angeles Co Super Ct Rules, Rule 9.2; San Francisco Super Ct Rules, Rule 8.9B].



**Strategic Point:**

Matters subject to mandatory judicial notice under *Evid Code* § 451 should be drawn to the court's attention by appropriate reference in the separate statement of material facts and the supporting memorandum.

Any failure by a court to notice matters subject to mandatory judicial notice under *Evid Code* § 451 may be deemed harmless or invited error if the matter was not brought to the court's attention [Assembly Committee on Judiciary Comment to *Evid Code* § 451; *Stafford v. Ware* (1960) 187 CA2d 227, 231-232, 9 CR 706 ].



**Cross References:**

Ch. 26, *Law and Motion Procedure*, 26.17.

California Forms of Pleading and Practice, Ch. 321, Judicial Notice (Matthew Bender).

**38.15[5] Supporting Evidence That Exceeds 25 Pages Must Be Bound and Include a Table of Contents.** If the supporting evidence exceeds 25 pages, the evidence must be bound in a separately bound volume, and must include a table of contents [Cal Rules Ct, Rule 3.1350(g)].



**Cross Reference:**

Form, see 38.58.

**38.15[6] Moving Party's Papers Are Strictly Construed.** The moving party's papers are strictly construed, accepting as fact only those portions that are not contradicted by opposing papers [ *Salazar v. Southern Cal. Gas Co.* (1997) 54 CA4th 1370, 1376, 63 CR2d 522 ].

**38.15[7] Motion for Summary Judgment and Accompanying Statement Are Neither Pleadings Nor Judicial Admissions.** Neither a motion for summary judgment nor its accompanying statement of undisputed facts is a pleading within the meaning of CCP § 422.10. Thus, the motion and separate statement are not binding judicial admissions [ *Myers v. Trendwest Resorts, Inc.* (2009) 178 CA4th 735, 747-749, 100 CR3d 658 ] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentSupporting MaterialsAffidavitsCivil ProcedureSummary JudgmentSupporting MaterialsDiscovery Materials



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**38.16 Moving Party Must Submit Statement of Material Facts.**

**38.16[1] Facts in Separate Statement Must Refer to Specific Evidence.** The supporting papers for a motion for summary judgment must include a separate statement of material facts that:

- Sets forth plainly and concisely all material facts that the moving party contends are undisputed [CCP § 437c(b)(1)].
- Follows each of the material facts stated by a reference to the supporting evidence [CCP § 437c(b)(1)].
  - ☐ References to supporting evidence must be specific and supported by citation to exhibit, title, page, and line numbers [Cal Rules Ct, Rule 3.1350(d)].
  - ☐ Set forth in numerical sequence the undisputed material facts in the left column, following each material fact with reference to supporting evidence in that same column, leaving the right column blank [Cal Rules Ct, Rule 3.1350(d), (h)].
- Is provided in an electronic version to any other party or the court within three days of a request to do so [Cal Rules Ct, Rule 3.1350(i)].

**38.16[2] Separate Statement Should Include All Essential Facts.** The separate statement must contain each fact that is needed to support a ruling in favor of the moving party. Failure to include an essential fact in the separate statement is grounds for denial of the motion [CCP § 437c(b)(1)]. However, there is a split of authority whether a court may consider a fact not set forth in the separate statement in ruling on the motion [*compare King v. United Parcel Service, Inc. (Third Dist., 2007) 152 CA4th 426, 437-438, 60 CR3d 359* (trial court's decision whether to consider evidence in record but not referenced in moving party's separate statement rests is reviewed for abuse of discretion), *Zimmerman, Rosenfeld, Gersh & Leeds v. Larson (Second Dist., Fourth Div., 2005) 131 CA4th 1466, 1478* (in exercising its discretion to overlook procedural errors in moving papers, trial court may not consider supplemental evidence submitted in reply to fill glaring omissions and concessions in the original statement), and *San Diego*

*Watercrafts, Inc. v. Wells Fargo Bank N.A. (Fourth Dist., Third Div., 2002) 102 CA4th 308, 315-316, 125 CR2d 499* (court has discretion to consider evidence not referenced in separate statement because CCP § 437c(b) is permissive, not mandatory) *with Mills v. Forestex Co. (Fifth Dist., 2003) 108 CA4th 625, 641, 134 CR2d 273* (material facts not set forth in separate statement do not exist, mention in supporting memorandum insufficient) *and United Cmty. Church v. Garcin (Second Dist., First Div., 1991) 231 CA3d 327, 337, 282 CR 368* (fact not referenced in separate statement may not be considered by court)].



#### **Warning--Include All Essential Facts:**

Do not take a chance that the court will not consider some of your evidence. Make sure the separate statement is complete. It is not enough to rely on evidence contained in a declaration or deposition transcript without stating the facts and referring to the supporting evidence in the separate statement. Conversely, be wary of the risk of having too extensive a list of undisputed material facts in the separate statement because a trial judge may deny the motion on the ground that it only takes one triable issue of material fact, and the moving party acknowledges that the particular fact is material by including it in the statement.



#### **Strategic Point--Highlight Essential Facts:**

Some of the facts in the separate statement will be foundational or of lesser importance than others. Counsel may want to highlight the motion's core facts through use of bold typeface or organization to make it easy for the judge to find and focus on them.



#### **Cross Reference:**

Forms, see 38.60, 38.61.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentSupporting MaterialsGeneral Overview



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**38.17 Moving Party Must Submit Supporting Memorandum.**

The motion must be accompanied by a supporting memorandum [see *Cal Rules Ct, Rules 3.1113(a), 3.1350(c), (e)*] that:

- Must not exceed 20 pages in length, exclusive of exhibits declarations, attachments, and a table of contents [*Cal Rules Ct, Rule 3.1113(d)*].
- Must be in type not smaller than 12 points [*Cal Rules Ct, Rule 2.104*].
- Must be one and one-half spaced or double-spaced (with exceptions for the description of real property, footnotes, and quotations [*Cal Rules Ct, Rule 2.108*].
- Need not cite to the evidence in the record when the statement of undisputed material facts required by *CCP § 437c(b)(1)* and *Cal Rules Court, Rule 3.1350(c)* and *(d)* does so [see *Basich v. Allstate Ins. Co. (2001) 87 CA4th 1112, 1118, 105 CR2d 153* ].

**Exception:**

A longer memorandum may be permitted with court approval [*Cal Rules Ct, Rule 3.1113(e)*].

**Distinguish--Multiple Parties:**

The page limits of *Cal Rules Ct, Rule 3.113(d)* apply to all plaintiffs or all defendants on each side of a motion, rather than as separate page limitations as to each plaintiff or defendant (e.g., three co-plaintiffs opposing a single summary judgment motion are limited to a single memorandum of 20 pages instead of an aggregated 60 pages). Should multiple plaintiffs or multiple defendants want to increase the page limit of a memorandum, they must use the application process to file a longer memorandum under *Cal Rules Ct, Rule 3.113(e)* [ *Collins v. Hertz Corp (2006) 144 CA4th 64, 71, 50 CR3d 149* ].

➡ **Cross References:**

See Ch. 26, Law and Motion Procedure.

For forms of memoranda that can be used in summary judgment motions, see California Points and

Authorities, Ch. 221, Summary Judgments (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law





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**38.18 Defendant May Move for Defense Costs in Actions for Indemnity or Contribution Under California Tort Claims Act.**

**38.18[1] Available If Plaintiff's Proceeding Was Brought in Bad Faith.** A defendant who is granted summary judgment in any civil action for indemnity or contribution, or in any civil proceeding under the California Tort Claims Act (*Gov Code §§ 810-998.3*), may move for defense costs as additional sanctions on the grounds that the proceeding was not brought in good faith and with reasonable cause [*CCP § 1038(a)*].

**38.18[2] Available Only on Notice and Motion Made Prior to Judgment.** An award of defense costs under *CCP § 1038* can be made only:

- On notice contained in a party's papers and an opportunity to be heard [*CCP § 1038(a)*]; and
- On a motion made prior to judgment [*CCP § 1038(c)*].

**38.18[3] Include Attorney's and Expert Witness Fees.** "Defense costs" include [*CCP § 1038(b)*]:

- Reasonable attorney's fees.
- Expert witness fees.
- Expense of services of experts, advisers, and consultants in defense of the proceeding, and when reasonably and necessarily incurred in defending the proceeding.

➡ **Cross Reference:**

Discussion of recovery of costs and attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Chs. 24, Costs, and 25, Attorney's Fees.

**38.18[4] Right to Seek Damages for Malicious Prosecution Is Waived.** Any party requesting defense costs under *CCP § 1038* waives any right to seek damages for malicious prosecution [*CCP § 1038(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSanctionsBaseless FilingsFrivolous Lawsuits



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Chapter 38 Summary Judgment

III. OPPOSING SUMMARY JUDGMENT OR SUMMARY ADJUDICATION MOTION

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.19*

**38.19 CHECKLIST: Opposing Summary Judgment/Adjudication Motion.**

☐ Determine whether a motion for continuance is needed to obtain further affidavits/declarations, and/or conduct further discovery.

**Authority:**

*CCP § 437c(h)*

**Discussion:**

See 38.20[1]



Calculate time window for opposing summary judgment or summary adjudication or to make motion for continuance:

- Opposition papers and/or motion for continuance must be served on all parties and filed with court not less than 14 days before the scheduled or continued hearing date.

**Authority:**

*CCP § 437c(b)(1), (h)*

**Discussion:**

See 38.21



Determine whether a cross-motion for summary judgment or summary adjudication is appropriate and can be made within 105-day statutory time window:

- Hearing, 30 days before trial; plus

■ Service, 75 days before hearing date (plus additional days if service is by mail or facsimile).

**Authority:**

*CCP § 437c(a)*

**Exception:**

The court can order a later hearing for good cause [*CCP § 437c(a)*].

**Discussion:**

See 38.28

☐ Review moving party's statement of facts to determine which facts should be disputed.

☐ Review discovery documents to find opposing factual evidence contained in:

- ☐ Depositions.
- ☐ Interrogatory responses.
- ☐ Production of documents.
- ☐ Responses to requests for admissions.

**Discussion:**

See 38.22

☐ Conduct any additional discovery needed to show issues of fact or for cross-motion.

**Discussion:**

See 38.04[2]

☐ Assemble and organize the opposing evidence:

- ☐ Draft opposing affidavits/declarations, which must:
  - ☐ Disclose the existence of triable issue(s) of material fact.
  - ☐ Be based on personal knowledge.
  - ☐ Set forth admissible evidence.
  - ☐ Affirmatively show that the declarant is competent to testify.

☐ Be facially credible.

☐ Not be based on conjecture, or assert legal conclusions.

☐ Incorporate and authenticate documentary evidence by reference to documents, discovery responses and depositions.

☐ Incorporate any matter in court's file supporting motion:

☐ Must specify exact matter to which reference is made.

☐ May not incorporate entire file.

**Authority:**

*CCP § 437c(b)(2), (7)*

**Discussion:**

*See 38.23[1]-[5]*

**Form:**

*See 38.67*

☐ Prepare additional opposing evidence for use as exhibits when appropriate:

☐ Admissions.

☐ Depositions.

☐ Interrogatories.

**Authority:**

*CCP § 437c(b)(2)*

**Discussion:**

*See 38.23[6]*

☐ Identify and prepare documents for matters for which judicial notice is sought.

☐ Prepare separate document listing items for which notice is requested.

☐ Provide court and each party with a copy of the material.

☐ When material is part of court file:

- ☐ Specify in writing the part of court file sought to be judicially noticed.
- ☐ Make arrangements with clerk for file to be in courtroom at the time of hearing.
- ☐ Check local rules of court for any additional requirements.

**Authority:**

*CCP § 437c(b)(7); Cal Rules Ct, Rule 3.1113(l), 3.1306(c)*

**Discussion:**

*See 38.15[4], 38.23[6]*

- ☐ If supporting evidence exceeds 25 pages, prepare table of contents, and bind evidence.

**Authority:**

*Cal Rules Ct, Rule 3.1350(g)*

**Discussion:**

*See 38.23[7]*

**Form:**

*See 38.66*

- ☐ Write opposing statement of material facts:
  - ☐ Respond to each of the material facts contended by the moving party to be undisputed.
  - ☐ Indicate whether the opposing party agrees or disagrees that those facts are undisputed.
  - ☐ If facts disputed, state nature of dispute, describe the evidence that supports the position that the fact is controverted, and support the evidence by citation to exhibit, title, page, and line numbers in the evidence submitted.
  - ☐ Be prepared to provide electronic version if requested to do so.

**Authority:**

*CCP § 437c(b)(3)*

**Discussion:**

*See 38.24*

**Forms:**

*See 38.68, 38.69*

- ☐ Write opposing memorandum:

- ☐ State opposing legal points and authorities.
- ☐ Coordinate the other opposing papers.
- ☐ Make objections to moving party's notice and moving papers.

**Authority:**

*Cal Rules Ct, Rules 2.100 et seq., 3.1113*

**Discussion:**

See 38.25, 38.26[1], [2]

- ☐ Prepare objections to moving party's evidence and proposed order on objections.
  - ☐ Decide whether to serve and file written objections to evidence or to deliver oral objections in court.
  - ☐ If preparing oral objections, arrange for court reporter at hearing.
  - ☐ If preparing written objections to moving party's evidence:
    - ☐ Make format and content conform to requirements of court rules, and
    - ☐ Serve and file the collected objections separately at the same time as the other opposition papers.
  - ☐ Prepare proposed order on evidentiary objections.

**Authority:**

*CCP § 437c(b)(5); Cal Rules Ct, Rules 3.1352, 3.1354*

**Discussion:**

See 38.26[3]

**Forms:**

See 38.69A, 38.69B

- ☐ Make motion for sanctions for bad-faith affidavits, if appropriate.

**Warning:**

The trial court must make specific rulings on a party's objections to evidence and, if the party making the objections does not make a request that the court rule on them at the hearing, the objections are deemed waived and all evidence may be considered by the reviewing court [ *Koebke v. Bernardo Heights Country Club* (2004) 116 CA4th 791, 817 ].

**Authority:***CCP § 437c(j)***Discussion:***See 38.27***Form:***See 38.71*☐ Prepare proposed order.☐ Lodge with court prior to or at hearing.**Authority:***CCP § 437c(g), Cal Rules Ct, Rule 3.1312***Discussion:***See 38.43***Form:***See 38.70*☐ Serve and file the opposing papers 14 days prior to hearing.**Authority:***CCP § 437c(b)(2)***Discussion:***See 38.21*☐ Serve and file notice of cross-motion and supporting papers, if applicable and timely.**Authority:***CCP § 437c(a)***Discussion:***See 38.13 -38.18, 38.28***Forms:***See 38.56 -38.61*





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3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.20

### 38.20 Options and Strategies for Opposing Parties.

#### 38.20[1] Opposing Party May Make Motion for Continuance If Needed and Appropriate.

**38.20[1][a] To Obtain Affidavits or Conduct Further Discovery.** Opposing counsel may move for a continuance on the grounds that facts essential to support its opposition may exist, but cannot, for reasons stated, yet be presented. The court can order a continuance to permit opposing counsel to obtain affidavits or conduct further discovery [CCP § 437c(h)]. CCP § 437c mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion; however, if the facts sought are not material then the continuance may be denied [ *Yuzon v. Collins* (2004) 116 CA4th 149, 167, 10 CR3d 18 ]. Likewise, a continuance is not automatic where the responsive statement simply is substantively defective [ *Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 CA4th 554, 573-577, 88 CR3d 363 (no automatic second chance at responsive statement)].



#### **Warning:**

Merely stating that facts may exist, but cannot yet be presented, is insufficient to meet the requirements for continuance. The supporting declaration must explain why the information in the requested documents is essential to opposing the motion and why additional time is needed [ *Combs v. Skyriver Communications, Inc.* (2008) 159 CA4th 1242, 1270, 72 CR3d 171 ].



#### **Warning:**

The failure to timely seek a continuance of hearing to obtain evidence in opposition to a motion for summary judgment constitutes lack of diligence required for motion for reconsideration of the granting of summary judgment [ *New York Times Co. v. Superior Court* (2006) 135 CA4th 206, 215, 37 CR3d 338 (party failed to move for continuance to allow completion of deposition transcripts)]. Thus, a party knowing of evidence tending to show a factual controversy warranting denial of a motion for summary judgment must present it at the hearing and, therefore, must properly seek a continuance prior to the hearing if more time is necessary for obtaining it at the time a motion for continuance must be filed.

The motion for the continuance can be made by ex parte motion at any time on or before the date the opposition

response to the motion is due [CCP § 437c(h)].



#### Cross Reference:

Discussion of continuances, see Ch. 30, Continuances.

**38.20[1][b] Need Must Be Demonstrated.** A motion for continuance must be supported by a declaration from the party's attorney [ *Wachs v. Curry* (1993) 13 CA4th 616, 622-624, 16 CR2d 496 ; *Hill v. Physicians & Surgeons Exch.* (1990) 225 CA3d 1, 7-8, 274 CR 702 ] showing:

- What efforts were made to take conduct discovery and why they could not have been taken earlier [ *Cooksey v. Alexakis* (2004) 123 CA4th 246, 257, 19 CR3d 810 (deliberate delay of discovery as lack of diligence); *Lerma v. County of Orange* (2004) 120 CA4th 709, 716, 15 CR3d 609 (illness of counsel); *A & B Painting & Drywall, Inc. v. Superior Court* (1994) 25 CA4th 349, 356-357, 30 CR2d 418 ]; and
- That the proposed discovery could reasonably lead to facts essential to justify opposing to the motion [ *Scott v. CIBA Vision Corp.* (1995) 38 CA4th 307, 326, 44 CR2d 902 ].



#### Warning--New 75-Day Notice Period May Cause Court to Deny Continuance:

Because a summary judgment motion is now heard on a minimum of 75 days' notice instead of 28 days' notice as under prior law [see CCP § 437c(a)], an opposing party should have enough time to complete discovery without seeking a continuance to do so. Without a strong showing of diligence and an explanation of the reasons why discovery cannot be completed in the two-month period before the opposition need be filed, a court may deny a motion for a continuance.

#### Judge's Perspective:

The amendments to CCP § 437c seem to indicate that continuances based on requests to conduct discovery should be granted with more liberality. However, existing case law already made it very clear that a trial court would have no discretion to deny the continuance on a good-faith showing by affidavit that the continuance was needed to obtain facts essential to justify opposition to the motion [see *Nazar v. Rodeffer* (1986) 184 CA3d 546, 555-556, 229 CR 209 ]. The trial court's experience has shown that most requests for continuances based on a desire to conduct discovery fail to specify what discovery is needed and the time necessary to complete same. While it may be easier to obtain a continuance in light of the recent statutory amendments, counsel would be well advised to be specific in detailing the need for further discovery and both the time and devices needed to complete the requested discovery. General and vague conclusions will not suffice [see, e.g., *California Automobile Ins. Co. v. Hogan* (2003) 112 CA4th 1292, 1305, 5 CR3d 761 ].

**38.20[1][c] If Moving Party Unreasonably Impedes Discovery, Court May Grant Further Continuance or Deny Summary Motion.** If, after granting a continuance to allow specified additional discovery, the court determines that the party seeking summary judgment has unreasonably failed to allow the discovery to be conducted, the court can either [CCP § 437c(i)]:

- Grant another continuance to permit the discovery to be completed; or
- Deny the motion for summary judgment.

**38.20[2] Plaintiff Cannot Avoid Time Limitations by Moving for Voluntary Dismissal.** A plaintiff may not frustrate the summary judgment statute by filing a voluntary dismissal without prejudice in lieu of opposing a defendant's motion. Because the right to dismiss a case is not absolute, the court may ignore the request for dismissal and grant the pending summary judgment motion [ *Cravens v. State Bd. Of Equalization* (1997) 52 CA4th 253, 255,

257, 60 CR2d 436 (summary judgment for defendant granted because defendant's moving papers met its burden of proof despite plaintiff's last minute request for dismissal)]. The determining factor is fairness, which in turn depends on the plaintiff's motivation and intent in dismissing the complaint [ *Tire Distributors, Inc. v. Cobrae* (2005) 132 CA4th 538, 546-547, 33 CR3d 761 (request for dismissal without prejudice after date response to summary judgment motion was due but well before summary judgment was granted was motivated only by compliance with settlement agreement)].



#### Cross Reference:

Discussion of voluntary dismissal, see Ch. 39, Voluntary Dismissal.

**38.20[3] Plaintiff May Be Denied Delayed Amendment of Complaint.** Given that even a good amendment of a complaint proposed in proper form, but presented after unwarranted delay may be denied [ *Melican v. Regents of University of California* (2007) 151 CA4th 168, 175-177, 59 CR3d 672 (amendment requested three days before summary judgment hearing was properly denied)], counsel should not count on being able to amend a complaint immediately before a hearing on a defendant's motion for summary judgment. Upon receiving the notice of motion, plaintiff's counsel must decide and act to amend a complaint that can be salvaged without delay.

**38.20[4] Opposing Party Does Not Have Right to Submit Additional Evidence After Moving Party's Reply.** CCP § 437c does not allow for the submission of additional evidence by the opposing party after the moving party's reply. Accordingly, the trial court has discretion whether to permit an opposing party to respond to a moving party's response to the opposing party's response to the moving party's motion [ *Hollywood Screentest of America, Inc. v. NBC Universal, Inc.* (2007) 151 CA4th 631, 643, 60 CR3d 279 ].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentOppositionMotions for Additional Discovery



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*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.21*

#### **38.21 Opposition Papers Must Be Served and Filed 14 Days Before Hearing.**

**38.21[1] Courts Adhere Strictly to 14-Day Requirement.** Any opposition to a summary judgment or adjudication motion must be served and filed no less than 14 days preceding the hearing date, unless the court for good cause orders otherwise [*CCP § 437c(b)(2)*]; *but see Teselle v. McLoughlin (2009) 173 CA4th 156, 161-162, 92 CR3d 696* (late filing by one day of statement of disputed material facts did not violate policy of *CCP § 437c* where moving defendant failed to provide evidence in support of one element of its defense)].



#### **Warning--Late Filed Papers:**

Good cause must be shown before late filed papers will be accepted by the court and a showing of diligence is required before a court will consider evidence discovered by the opposing party after the time for filing its opposition papers has passed [*see, e.g., Hobson v. Raychem Corp. (1999) 73 CA4th 614, 625, 86 CR2d 497* (appellant did not establish diligence or good cause for submissions filed the day before the hearing but did for submissions filed a week before the hearing)]. If a court allows the opposing party to submit evidence after its opposing papers are due, it should continue the hearing to give the moving party an opportunity to respond to the late submitted evidence [ *Hobson v. Raychem Corp. (1999) 73 CA4th 614, 623, 86 CR2d 497* ].

**38.21[2] Statute Makes No Provision for Service of Opposing Papers by Mail.** Unlike the time requirements for serving the notice of motion under *CCP § 437c(a)*, the statute makes no provision for extending the time period for service by mail [*see CCP § 437c(b)(2)*].



#### **Warning--Service of Opposing and Reply Papers Must Be Expedited:**

All opposition and reply papers to a summary judgment or adjudication motion must be served by a method reasonably calculated to ensure delivery to the other party on the next business day after the papers are filed, as required by *CCP § 1005(c)* [*CCP § 437c(b)(6)*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentTime Limitations



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### **38.22 If Moving Party Meets Initial Burden, Opposing Party Must Show Triable Issue of Material Fact.**

**38.22[1] Initial Burden of Proof Remains With Moving Party.** The opposing party has no burden to present opposing evidence if the moving party fails to meet its initial burden [ *Scheiding v. Dinwiddie Construction Co.* (1999) 69 CA4th 64, 83-84, 81 CR2d 360 ].

#### **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

### **38.22[2] Burden Shifts to Opposing Party After Moving Party Meets Initial Burden.**

**38.22[2][a] Defendant as Opposing Party.** Once a plaintiff, as a moving party, meets the burden of showing that there is no defense to a cause of action, and has proved each element of that cause of action, the burden shifts to the defendant to show that a triable issue of one or more material facts exists as to that cause of action, or a defense to that cause of action [CCP § 437c(p)(1)].

#### **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**38.22[2][b] Plaintiff as Opposing Party.** Once a defendant has met his or her burden of showing that a cause of action has no merit by showing that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or defense [CCP § 437c(p)(2)].



#### **Strategic Point:**

General pleadings are controlled by specific allegations. For that reason, where plaintiff alleges a permissible conclusion of law but also avers specific additional facts that either do not support that

conclusion or are inconsistent with it, the specific allegations will control, and a complaint that might have been sufficient with general allegations alone may be rendered defective [ *Melican v. Regents of University of California* (2007) 151 CA4th 168, 174-175, 59 CR3d 672 ]. Accordingly, upon receiving notice of defendant's summary judgment motion, counsel for plaintiff should immediately evaluate the attack on the complaint for whether the defect can be remedied by amendment to the complaint; and counsel should, where appropriate, move to amend without delay.



#### **Cross References:**

Discussion of burden shifting, see 38.05[2], [3], 38.06[4].

Discussion of parties' respective burdens of persuasion and production, see *California Forms of Pleading and Practice*, § 537.33[2][b] -[d] (Matthew Bender).

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Summary Judgment Burdens of Production & Proof Nonmovants



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### 38.23 Opposing Party Must Submit Evidentiary Material.

**38.23[1] Opposing Evidence May Be Presented Through Affidavits, Admissions, Interrogatories, Depositions, and Matters Subject to Judicial Notice.** Evidentiary material must be filed as part of the opposition in order to raise a triable issue of material fact in opposition to a motion for summary judgment [ *Arciniega v. Bank of San Bernardino, N.A.* (1997) 52 CA4th 213, 224, 60 CR2d 495 (criticized on another point in *Rice v. Crow* (2000) 81 CA4th 725, 726, 737-741, 97 CR2d 110 )].

Opposing evidence may be presented in any of the following forms [CCP § 437c(b)(2)]:

- Affidavits or declarations [see 38.23[5]].
- Admissions.
- Answers to interrogatories or deposition testimony.
- Matter of which judicial notice should be taken.

**38.23[2] Allegations or Denials in Pleadings Insufficient to Show Triable Issue of Material Fact.** An opposing party may not rely on the mere allegations or denials of its pleadings to show that a triable issue of material fact exists. The opposing party must set forth the specific facts that show that a triable issue of fact exists as to the elements of the opposing party's cause of action or affirmative defense [CCP § 437c(p)(1), (2)].

**38.23[3] If Opposing Affidavits or Declarations Are Not Filed, Court Can Accept Facts Alleged in Moving Party's Affidavits and Declarations as True.** If the opposing party does not file opposing affidavits or declarations, the court may accept as true the facts alleged in the moving party's affidavits and declarations, provided they are within the personal knowledge of the affiant or declarant, and are facts to which he or she could competently testify [ *Lyons v. Security Pac. Nat. Bank* (1995) 40 CA4th 1001, 1014, 48 CR2d 174 ; see CCP § 2015.5 (use of declarations)].

#### Example--Refuting Expert Affidavit Needed:

During the summary judgment proceedings, plaintiffs were required to submit their own expert



declaration to refute the averments contained by the opposing party's expert declaration [ *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 CA4th 463, 467, 71 CR3d 707 (erroneous exclusion of plaintiff's only expert witness in such a case requires reversal)].

**Example--Counsel's Assertions and Allegations Do Not Substitute for Opposing Declarations:**

The assertions and allegations of opposing party's attorney, unsupported by declarations or affidavits, did not create a factual issue [ *Lyons v. Security Pac. Nat. Bank* (1995) 40 CA4th 1001, 1014, 48 CR2d 174 ].

**Example--Expert's Opinion Must Be Supported By Admissible Evidence.**

Defendant's expert declaration was insufficient when the doctor declared he based his opinion on medical and hospital records to refute a claim of medical malpractice, these records were not in evidence, were not based on personal knowledge, and the records were hearsay because no foundation was made to admit them under the business records exception [ *Garibay v. Hemmat* (2008) 161 CA4th 735, 742, 74 CR3d 715 ].

**38.23[4] If Unopposed, Lack of Credibility of Moving Party's Affidavits and Declarations Is Not Ground for Denying Summary Judgment.** In general, summary judgment will not be denied on grounds of credibility of the witnesses furnishing affidavits or declaration in support of the summary judgment [CCP § 437c(e)].

**Exception--Summary Judgment May Be Denied Without Opposing Affidavits in Two Instances:**

The court may exercise discretion to deny summary judgment to the moving party when [CCP § 437c(e)]:

- **Witness Is Sole Witness to Material Fact.** If the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that material fact; or

- **Material Fact Is an Individual's State of Mind.** If the material fact is an individual's state of mind, or lack thereof, and the sole means of establishing that fact is the individual's affirmation of that state of mind [ *Meighan v. Shore* (1995) 34 CA4th 1025, 1046, 40 CR2d 744 (mental process); *Times-Mirror Co. v. Superior Court* (1998) 198 CA3d 1420, 1430, 244 CR 556 (sole witness); *Allen v. McMillion* (1978) 82 CA3d 211, 215-216, 147 CR 77 (state of mind)].

 **Cross Reference:**

Discussion, see 38.15[1][e].

**38.23[5] Requirements for Opposing Affidavits/Declarations.**

**38.23[5][a] Must Set Forth Admissible Evidence.** Opposing affidavits or declarations must [CCP § 437c(d)]:

- Be made by a person with personal knowledge;
- Set forth admissible evidence; and
- Show affirmatively that the affiant or declarant is competent to testify to the matters stated in the affidavits or declarations [ *Regents of the Univ. of Cal. v. Superior Court* (1966) 41 CA4th 1040, 1044, 48 CR2d 922 ].

**38.23[5][b] Must Disclose Existence of Material Fact.** An opposing affidavit or declaration does not have to prove the opposition's case. Even a sole declaration is sufficient if it:

- Discloses the existence of a triable issue of material fact [ *McManis v. San Diego Postal Credit Union* (1998) 61 CA4th 547, 555, 71 CR2d 617 ]; and
- Is facially credible [ *Estate of Housley* (1997) 56 CA4th 342, 359-361, 65 CR2d 628 ].

**Example--Sole Declaration Can Raise Issue of Fact on Statute of Frauds Defense:**

The defendant moved for summary judgment on the grounds that the statute of frauds precluded enforcement of an alleged oral agreement that testator would leave property to plaintiff. The plaintiff's declaration constituted sufficient evidence to make a prima facie case for the application of equitable estoppel to enforce the alleged oral agreement [ *Estate of Housley* (1997) 56 CA4th 342, 359-361, 65 CR2d 628 ].

**38.23[5][c] May Not Be Based on Conjecture or Legal Conclusions.** An opposing affidavit is insufficient if it is based on mere speculation, or conjecture, or consists of an expert's conclusory assertions [ *Bushling v. Fremont Med. Ctr.* (2004) 117 CA4th 493, 510 ; *Frank & Freedus v. Allstate Ins. Co.* (1996) 45 CA4th 461, 468-469, 52 CR2d 678 ; *American Golf Corp. v. Superior Court* (2000) 79 CA4th 30, 39, 93 CR2d 683 ; *Benavidez v. San Jose Police Dept.* (1999) 71 CA4th 853, 865, 84 CR2d 157 ]. However, an expert's opinion is admissible if the opinion rests on matters of a type reasonably relied on, and the basis for the opinion is established [ *Sanchez v. Hillerich & Bradsy Co.* (2002) 104 CA4th 703, 718, 128 CR2d 529 ].

**Example--Expert's Lack of Factual Basis:**

An expert's opinion that the shoulder injury medical malpractice plaintiff suffered following abdominal surgery probably resulted from plaintiff being dropped or improperly positioned during the procedure, but not citing any factual basis other than injury itself for believing that either had occurred, was entitled to no weight since it did not provide a factual basis or reasoned explanation for the opinions they contained [ *Bushling v. Fremont Med. Ctr.* (2004) 117 CA4th 493, 510 ].

**Example--Expert's Affidavit Must Be Specific as to Causation:**

Because it would always be possible for a plaintiff who suffers a sports injury to obtain expert testimony that the injury would not have occurred if the recreation provider had done something differently, such expert testimony is not sufficient to establish that the recreation provider increased the inherent risks of the sport. An expert's declaration objecting to the location and construction of a yardage marker on a golf course was not sufficient to establish that the recreation provider increased the inherent risks of the sport [ *American Golf Corp. v. Superior Court* (2000) 79 CA4th 30, 39, 93 CR2d 683 ].

**Example--Expert Cannot Draw Legal Conclusions:**

The defendant, a police department that was sued for failing to take adequate precautions to protect the plaintiff and her son, moved for summary judgment on the ground that it did not have a duty to the plaintiff. To the extent the plaintiff's expert's declaration drew legal conclusions such as whether a special relationship was created when the officers replied to the 911 call, whether the officers increased the risk to plaintiffs, and whether the officers used plaintiffs as "bait," the declaration was rejected [ *Benavidez v. San Jose Police Dept.* (1999) 71 CA4th 853, 865, 84 CR2d 157 ].

**Example--Expert's Declaration Rejected as Speculative:**

The expert's declaration, regarding the possible sudden and accidental release of pollutants due to firefighting techniques, which was offered to establish that the insured's claims fell within the sudden and accidental exception to the pollution exclusion, was no more than speculation and could not create a triable question of fact [ *Travelers Cas. & Sur. Co. v. Superior Court* (1998) 63 CA4th 1440, 1462, 75

*CR2d 54* ].

 **Cross Reference:**

Form of declaration in opposition to summary judgment or summary adjudication, see 38.67.

**38.23[6] Additional Opposing Evidence May Be Presented as Exhibits.** The requirements relating to an opposing party's additional opposing evidence, including admissions, depositions, interrogatories, and matters for which judicial notice is sought, are the same as the requirements for preparing the moving party's supporting evidence.

 **Cross References:**

Discussion of requirements, see 38.15[2] (admissions); 38.15[3] (depositions and interrogatories); 38.15[4] (matters for which judicial notice is sought).

**38.23[7] If Opposing Evidence Exceeds 25 Pages, Evidence Must Be Bound and Include a Table of Contents.** If the supporting evidence exceeds 25 pages, the evidence must be bound in a separately bound volume, and must include a table of contents [*Cal Rules Ct, Rule 3.1350(g)*].

 **Cross Reference:**

Form, see 38.66.

**38.23[8] Opposing Party's Papers Are Liberally Construed.** The opposing party's papers are liberally construed, all facts therein being accepted as true [ *Salazar v. Southern Cal. Gas Co. (1997) 54 CA4th 1370, 1376, 63 CR2d 522* ].

**38.23[9] Declaration May Not Contradict Witness' Prior Statement Under Oath.** Parties cannot create an issue of material fact by submitting a declaration that contradicts previous statements made under oath [ *Carson Redevelopment Agency v. Padilla (2006) 140 CA4th 1323, 1328, 44 CR3d 881* (deposition); *Tesco Controls, Inc. v. Monterey Mechanical Co. (2004) 124 CA4th 780, 798* (deposition)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentOppositionSupporting Materials



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Chapter 38 Summary Judgment

### III. OPPOSING SUMMARY JUDGMENT OR SUMMARY ADJUDICATION MOTION

3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.24

#### 38.24 Opposing Party Must Submit Opposing Statement of Material Facts.

**38.24[1] Must Respond to Moving Party's Statement.** Opposition papers to a motion for summary judgment or adjudication must include a separate statement of material facts that responds to the moving party's statement of facts, indicating which facts are disputed, and that contains other material facts which the opposing party contends are in dispute [CCP § 437c(b)(3)].



#### **Warning--Failure to Provide Separate Statement May Constitute Grounds for Granting Motion:**

The court has discretion to grant a motion for summary judgment if an opposing party fails to comply with the requirement of providing a separate statement [CCP § 437c(b)(3); *Whitehead v. Habig* (2008) 163 CA4th 896, 902, 77 CR3d 679 ; *Kaplan v. LaBarbera* (1997) 58 CA4th 175, 179, 67 CR2d 903 ]. Note, however, that some cases hold that the court is required to determine that the moving party has met its initial burden of proof, before the court can exercise its discretion under CCP § 437c(b)(3) to grant summary judgment based solely on the opposing party's failure to file a proper separate statement [ *Thatcher v. Lucky Stores, Inc.* (2000) 79 CA4th 1081, 1086, 94 CR2d 575 ; *Rubenstein v. Rubenstein* (2000) 81 CA4th 1131, 1151-1152, 97 CR2d 707 ; *Kulesa v. Castleberry* (1966) 47 CA4th 103, 111-112 ].

#### **Distinguish:**

When the opposing party files a separate statement, but it is procedurally defective (i.e., incorrect format, improper juxtaposition of arguments), the trial court must give the opposing party an opportunity to correct the defects before ruling on the motion, and if the defective statement nonetheless provides notice of the opposing party's allegations and arguments, the trial court cannot ignore the opposing party's evidence in ruling on the motion [ *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 CA4th 1197, 1210-1216 ]. However, in response to a case in which a party filed 2,200 pages of responsive statement containing 764 objections to the motion for summary judgment, the court of appeals stated that [ *Nazir v. United Airlines, Inc.* (2009) 178 CA4th 243, 290, 100 CR3d 296 ] :

The deficiencies in summary judgment papers can appear in a variety of places, and the approaches

taken by the courts to address the deficiencies can vary as well, limited only by the inspiration or creativity of the particular law and motion judge--and, of course, due process. There is no universal solution, no panacea, and we do not even attempt to offer suggestions. We write here only to confirm the existence of the inherent power, to remind trial courts of it, and to encourage them to use it when appropriate.

**38.24[2] Must Adhere to Format Requirements.** The separate statement of material facts must [CCP § 437c(b)(3)]:

- Respond to each of the material facts contended by the moving party to be undisputed;
- Indicate whether the opposing party agrees or disagrees that those facts are undisputed; and
- Be provided in an electronic version to any other party or the court within three days of a request to do so [Cal Rules Ct, Rule 3.1350(i)].

In addition, the special format requirements for preparing the opposing statement are as follows [Cal Rules Ct, Rule 3.1350(f)]:

- Each material fact claimed by the moving party to be undisputed must be set out verbatim on the left side of the page.
  - ☐ Below each material fact must be the moving party's evidence to establish that fact, complete with the moving party's references to exhibits.
- On the right side of the page, directly opposite the recitation of the moving party's statement of material facts and supporting evidence, the opposing party must unequivocally state whether that fact is "Disputed" or "Undisputed."
  - ☐ An opposing party who contends that a fact is disputed must on the right side of the page directly opposite the fact in dispute:
    - State the nature of the dispute;
    - Describe the evidence that supports the position that the fact is controverted; and
    - Identify the evidence by citation to exhibit, title, page, and line numbers in the evidence submitted.
- Reference objections to specific evidence that are included in the list of evidentiary objections [see 38.26[3]] by putting the objection number in the right column of the statement in opposition, but do not restate or reargue the objections in the statement [Cal Rules Ct, Rule 3.1354(b)].



**Warning:**

The failure of a separate statement of facts to respond to each of the other party's alleged facts or to indicate whether each fact is undisputed, or to comply with the special format requirements of *Cal Rules Ct, Rule 3.1350(f)*, is grounds for granting the motion for summary judgment [CCP § 437c(b)(3); *Collins v. Hertz Corp.* (2006) 144 CA4th 64, 72-73, 50 CR3d 149 ].

**38.24[3] Must Dispute Material Issue of Fact.** The presence of a factual dispute will not defeat a summary

judgment motion unless the fact in dispute is "material," i.e., it must relate to some claim or defense in issue under the pleadings, and it must also be essential to the judgment in some way [ *Riverside County Community Facilities Dist. v. Bainbridge* 17 (1999) 77 CA4th 644, 653 ; *Romero v. American President Lines, Ltd.* (1995) 38 CA4th 1199, 1203, 45 CR2d 421 ; *Los Angeles Nat. Bank v. Canton* (1991) 229 CA3d 1267, 1274, 280 CR 831 ]. The materiality of a disputed fact is measured by the pleadings [ *Conroy v. Regents of University of California* (2009) 45 C4th 1244, 1250, 91 CR3d 532, 203 P3d 1127 (argument in statement of material facts is immaterial to facts set forth in complaint)].

**38.24[4] May Not Assert Matters Not Yet Pleaded.** If an opposing party wants to raise some factual assertion, legal theory, defense, or claim it has not yet pled, that party should seek leave to amend its pleading before the hearing on the summary judgment motion. The papers filed in response to a motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings [ *Conroy v. Regents of University of California* (2009) 45 C4th 1244, 1250, 91 CR3d 532, 203 P3d 1127 (theory of liability presented in opposition to summary judgment and not contained in complaint was irrelevant); *Distefano v. Forester* (2001) 85 CA4th 1249, 1264-1265, 102 CR2d 813 ].



#### Cross References:

Forms, see 38.68, 38.69.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentOppositionSupporting Materials



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*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.25*

### **38.25 Opposing Party Must Submit Opposing Memorandum.**

**38.25[1] Memorandum Should State Opposing Legal Points, Coordinate Opposing Papers, and Make Appropriate Objections.** The opposing memorandum is used to:

- State the opposing legal points and authorities;
- Coordinate with the other opposing papers; and
- Make objections to:
  - ☐ Notice [*see discussion in 38.13 and 38.26[1]*]; and
  - ☐ The sufficiency of supporting declarations.

#### **► Cross References:**

Evidence, *see 38.15[1] and 38.26[2], [3]*.



#### **Warning--Objections to Notice and Evidence Can Be Waived:**

Objections to notice are waived if not raised at the hearing.

**38.25[2] Memorandum Must Adhere to Format Requirements.** The memorandum:

- Must not exceed 20 pages in length, exclusive of exhibits declarations, attachments, and a table of contents [*Cal Rules Ct, Rule 3.1113(d)*].
- Must be in type not smaller than 12 points [*Cal Rules Ct, Rule 2.104*].
- Must be one and one-half spaced or double-spaced (with exceptions for the description of real

property, footnotes, and quotations) [*Cal Rules Ct, Rule 2.108*].

- Need not cite to the evidence in the record as long as the statement of undisputed material facts required by *CCP § 437c(b)(3)* and *Cal Rules Court, Rule 3.1350(c)* and *(d)* does so [see *Basich v. Allstate Ins. Co. (2001) 87 CA4th 1112, 1118, 105 CR2d 153* ]. However, better practice is to provide cites to the facts in the memorandum.

**Exception:**

A longer memorandum may be filed with court approval [*Cal Rules Ct, Rule 3.1113(e)*].

**Distinguish--Multiple Parties:**

The page limits of *Cal Rules Ct, Rule 3.113(d)* apply to all plaintiffs or all defendants on each side of a motion, rather than as separate page limitations as to each plaintiff or defendant (e.g., three co-plaintiffs opposing a single summary judgment motion are limited to a single memorandum of 20 pages instead of an aggregated 60 pages). Should multiple plaintiffs or multiple defendants want to increase the page limit of a memorandum, they must use the application process to file a longer memorandum under *Cal Rules Ct, Rule 3.113(e)* [ *Collins v. Hertz Corp (2006) 144 CA4th 64, 71, 50 CR3d 149* ].

 **Cross References:**

Discussion, see Ch. 26, Law and Motion Procedure.

For forms of memoranda that can be used in opposing summary judgment motions, see *California Points and Authorities*, Ch. 221, Summary Judgments (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentOppositionMemoranda in Opposition





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*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.26*

### **38.26 Procedural and Evidentiary Objections Will Be Waived If Not Timely Made.**

**38.26[1] Objections to Proper Notice.** Objections to a moving party's failure to give proper notice of a motion for summary judgment or adjudication as required by *CCP* § 437c(a) will be waived if the responding party appears at the hearing and argues the motion on the merits with no reference to the failure to provide adequate notice [ *Carlton v. Quint* (2000) 77 CA4th 690, 696-698, 91 CR2d 844 ].



#### **Cross Reference:**

Service requirements, see 38.14.

#### **Judge's Perspective--Options When Service Is Improper:**

If service of the motion is improper, then counsel may wish to consider the following alternatives:

1. Notify opposing counsel immediately that service is defective and request to be served timely and properly. If this notification (either written or oral) fails to elicit the desired response then proceed with the following:
2. Move ex parte for an order shortening time to have heard a motion to strike the motion for summary adjudication/judgment for its failure to be properly served and in the alternative seek the imposition of sanctions pursuant to *CCP* § 128.7.

At the very least, improper service can be addressed at the time of the ex parte application, and counsel should ask the court how best the court wishes to handle the issue.

**38.26[2] Objections to the Adequacy of Supporting Affidavits or Declarations.** Any objection that the moving party's supporting affidavits or declarations do not comply with the requirements of *CCP* § 437c(d) are waived if not made at the summary judgment hearing [*CCP* § 437c(d)].

#### **38.26[3] Objecting to Moving Party's Evidence.**

**38.26[3][a] Evidentiary Objections Must Be Made in Writing or Transcribed at the Summary Hearing.** Evidentiary objections not made at the hearing will be waived [CCP § 437c(b)(5)].



**Strategic Point:**

A party has a right to waive objections, which right the court may not deny by interposing and sustaining its own hearsay objection [ *Andrews v. Mobile Aire Estates (2005) 125 CA4th 578, 587 n6* ].

A party who desires to make an evidentiary objection must either submit written objections or arrange for a court reporter to be present at the hearing [Cal Rules Ct, Rule 3.1352].



**Cross Reference:**

Evidentiary objections in opposing statement of fact, see 38.24[2].

**38.26[3][b] Written Objections Must Conform to Court Rule and Generally Be Served and Filed With Other Opposition Papers.** A party's collected written objections must [Cal Rules Ct, Rule 3.1354(b)]:

- Number each individual objection separately;
- Present the individual objections in one of the two allowed formats; and
- Be served and filed separately from other papers in opposition to the motion.



**Timing:**

Unless otherwise excused by the court on a showing of good cause, all written objections to evidence in opposition to a motion for summary judgment or summary adjudication must be served and filed at the same time as the objecting party's opposition papers are served and filed [Cal Rules Ct, Rule 3.1354(a)].

Each individual objection included by a party in its collected written objections must [Cal Rules Ct, Rule 3.1354(b)(1)-(4)]:

- Identify the name of the document in which the specific material objected to is located;
- State the exhibit, title, page, and line number of the material objected to;
- Quote or set forth the objectionable statement or material; and
- State the grounds for each objection to that statement or material.



**Cross Reference:**

Form of written objections to evidence on motion for summary judgment or summary adjudication, see 38.69A.

**38.26[3][c] Proposed Order on Objections Must Accompany Written Objections to Evidence.** A party submitting written objections to evidence before the hearing on a motion for summary judgment or summary adjudication must include a proposed order on the objections. The proposed order must provide places for the court to indicate whether it has sustained or overruled each objection and for the signature of the judge. The proposed order must conform to one of two formats permitted by court rule [Cal Rules Ct, Rule 3.1354(c)].



**Cross Reference:**

Form of order on written objections to evidence on motion for summary judgment or summary adjudication, see *38.69B*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentOppositionGeneral Overview



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*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.27*

**38.27 Sanctions for Bad-Faith Affidavits May Be Available on Notice Given in Opposing Papers or on Court's Own Motion.**

**38.27[1] Available on Notice and Motion.** If the opposing party believes that the moving party's affidavits have been presented in bad faith, or solely for purposes of delay, the opposing party may make a motion seeking the amount of the reasonable expenses that the filing of the affidavits caused the opposing party to incur [CCP § 437c(j)]. "Reasonable expenses" does not include the aggrieved party's attorney's fees [ *Collins v. Department of Transportation* (2003) 114 CA4th 859, 870 ].

A separate noticed motion for sanctions is not required so long as notice is contained in the opposing party's other papers [CCP § 437c(j)].

**38.27[2] Memorandum Required.** A memorandum must be filed and a copy served with the notice of motion [CCP §§ 1005(b), 1010; *Cal Rules Ct, Rule 3.1113(a)*].

**38.27[3] Parties Must Have Opportunity to Be Heard.** Sanctions may not be imposed except after an opportunity to be heard [CCP § 437c(j)].



**Cross References:**

Discussion, see 38.34, 38.41; form, see 38.71.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSanctionsBaseless FilingsBad Faith Motions



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### 38.28 Cross-Motion Is Required to Obtain Affirmative Relief.

The opposing party must make a cross-motion for summary judgment or summary adjudication to obtain such affirmative relief [*CCP* § 437c(a), (f); *Dvorin v. Appellate Dep't of Superior Court* (1975) 15 C3d 648, 650-651, 125 CR 771 (absent a motion, ordering summary judgment denies the opposite party opportunity to allege additional facts justifying trial of factual issues)].



#### Timing--Cross-Motion Must Comply With Time Requirements:

Any cross-motion for affirmative relief must comply with the 105-day time window [*CCP* § 437c(a)]:

- Hearing, 30 days before trial; plus
- Service, 75 days before hearing date (plus additional days if service is by mail or facsimile).

#### Exception:

The court may order a later hearing for good cause [*CCP* § 437c(a); *McMahon v. Superior Court* (2003) 106 CA4th 112, 115-118, 130 CR2d 407 ].



#### Cross References:

Notice, timing, service, and filing requirements, see 38.13, 38.14.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Summary Judgment Motions for Summary Judgment Cross-Motions



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*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.29*

**38.29 CHECKLIST: Replying to Opposition to Summary Judgment/Adjudication.**

- ☐ Review the opposing party's statement of facts and evidence to determine if supplementary evidence should be filed.
- ☐ Draft supplementary affidavits or declarations.
- ☐ If supplementary evidence is filed, write supplemental statement of material facts.

**Discussion:**

See 38.32

- ☐ Draft reply memorandum:
  - ☐ Point out inaccurate points or authorities raised in opposition memorandum.
  - ☐ Make objections to opposing party's filing and service, and form and content of moving papers.
  - ☐ Address any new facts included in the opposing party's papers.

**Discussion:**

See 38.33

- ☐ If submitting written objections rather than making oral objections at the hearing, prepare written objections to opposing party's evidence, along with proposed order on objections, for serving and filing with other reply papers.

**Authority:**

*Cal Rules Ct, Rule 3.1354*

**Discussion:**

See 38.33A

**Forms:**

See 38.69A, 38.69B

- ☐ Make motion for sanctions for bad-faith affidavits, if appropriate.

**Authority:**

*CCP § 437c(j)*

**Discussion:**

See 38.34

**Form:**

See 38.71

- ☐ File and serve the reply papers five days prior to hearing.

**Exception:**

The court can order otherwise for good cause.

**Authority:**

*CCP § 437c(b)(4)*

**Discussion:**

See 38.31



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### **38.30 Options and Strategies for Replying Party.**

A party moving for summary judgment often wishes to keep the motion as simple as possible and to avoid anticipated counter-arguments that may or may not be made. However, judges are wary of the tactic of "sandbagging," by which the moving party waits until the reply to address important arguments that could have been addressed in the moving papers. The moving party needs to strike a balance between keeping the motion simple and fairly raising and briefing all obviously important arguments in the moving papers.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law





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*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.31*

### **38.31 Reply Papers Must Be Served and Filed Five Days Before Hearing.**

**38.31[1] Five-Day Requirement.** Any reply to the opposition must be served and filed by the moving party no less than five days before the noticed or continued hearing date [*CCP* § 437c(b)(4)].

#### **Exception:**

The court can order otherwise for good cause [*CCP* § 437c(b)(4)].

**38.31[2] No Provision for Service by Mail.** Unlike the time requirements for serving the notice of motion under *CCP* § 437c(a), the statute makes no provision for extending the time period for service by mail [*see CCP* § 437c(b)(4)].



#### **Timing--Service of Opposing and Reply Papers Must Be Expedited:**

*CCP* § 437c(b)(6) requires that the reply papers must be served by a method reasonably calculated to ensure delivery to the other party on the next business day after the papers are filed, as required by *CCP* § 1005(c).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law



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### 38.32 Moving Party May Reply With Supplementary Evidence.

**38.32[1] Reply May Include New Evidence to Rebut Opposition Evidence.** *CCP § 437c(b)(4)* has been interpreted as allowing the inclusion of evidentiary matter, such as supplemental declarations, with the reply [ *Weiss v. Chevron, U.S.A., Inc. (1988) 204 CA3d 1094, 1098-1099, 251 CR 727* ; *Johnson v. Banducci (1963) 212 CA2d 254, 259-260, 27 CR 764* ]. Supplementary evidentiary papers should include facts explaining why supplementary evidence is necessary [ *Johnson v. Banducci (1963) 212 CA2d 254, 259-260, 27 CR 764* ].

If supplementary evidence is submitted, counsel should prepare a supplementary statement of undisputed facts to accompany the supplemental evidence, in the same manner as the statement of material facts supporting the motion [see 38.16].

#### Strategic Point:



In the supplemental statement of facts, counsel may reference objections to specific evidence that are included in the list of evidentiary objections [see 38.33A] by putting the objection number in the right column of the statement in opposition, but should not restate or reargue the objections in the statement [ *Cal Rules Ct, Rule 3.1354(b)* ].

**38.32[2] Court's Consideration of Supplemental Declaration Is Discretionary.** When supplemental evidence is submitted with the reply, the court should give the opposing party an opportunity to respond to that evidence before considering it [ *Alliant Ins. Services, Inc. v. Gaddy (2008) 159 CA4th 1292 1308, 72 CR3d 259* ; *Weiss v. Chevron, U.S.A., Inc. (1988) 204 CA3d 1094, 1098-1099, 251 CR 727* (hearing was postponed after reply evidence was submitted by defendant but plaintiff refused opportunity to rebut reply evidence; therefore granting summary judgment for defendant was proper); see also *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A. (2002) 102 CA4th 308, 316, 125 CR2d 499* (court's consideration of evidence in supplementary declaration constituted violation of opposing party's due process rights when opposing party had no opportunity to rebut the evidence)]. However, the trial court does not have discretion to consider supplemental evidence submitted in reply to fill glaring omissions and concessions in the original motion filing [ *Zimmerman, Rosenfeld, Gersh & Leeds v. Larson (2005) 131 CA4th 1466, 1478* ].

If supplemental evidence is submitted with the reply, the party opposing the motion should not simply object to the newly submitted evidence; rather, that party should also respond with any additional evidence that supports the party's claims [ *Weiss v. Chevron, U.S.A., Inc. (1988) 204 CA3d 1094, 1100-1101, 251 CR 727* ("[p]rocedurally, a party who has the opportunity to place all chips upon the table by augmenting the record, fails to do so and decides to gamble against an unfavorable ruling, cannot complain when the croupier's toss comes up short of expectations")].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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### **38.33 Moving Party May Reply With a Reply Memorandum.**

**38.33[1] Identify Inaccuracies in the Opposing Memorandum, Make Objections, and Address Facts.** The reply memorandum is used to:

- Point out any inaccurate points or authorities raised in the opposing memorandum.
- Object to:
  - ☐ The timeliness of filing or service of the opposing papers.
  - ☐ The form and content of the opposing papers, including objections based on the following defects:
    - Failure to file a responsive statement of facts.
    - Any insufficiency in the responsive statement of facts.
  - ☐ Evidence, including objections to the sufficiency of supporting declarations.

■ Address facts included in the opposing party's papers that the moving party failed to address in its moving papers. If appropriate, the moving party may adopt the opposing party's own evidence to demonstrate that no triable issue of material fact exists [*see 216 Sutter Bay Assocs. v. County of Sutter (1997) 58 CA4th 860, 879-881, 68 CR2d 492* ].

#### **➡ Cross References:**

Evidentiary requirements, see 38.15, 38.23.

For forms of memoranda that can be used in opposition to summary judgment motions, see California Points and Authorities, Ch. 221, Summary Judgments (Matthew Bender).

**38.33[2] Must Adhere to Format Requirements.** The memorandum:

- Must not exceed 10 pages in length, exclusive of exhibits declarations, attachments, and a table of contents [*Cal Rules Ct, Rule 3.1113(d)*].
- Must be in type not smaller than 12 points [*Cal Rules Ct, Rule 2.104*].
- Must be one and one-half spaced or double-spaced (with exceptions for the description of real property, footnotes, and quotations) [*Cal Rules Ct, Rule 2.108*].

**Exception:**

A longer memorandum may be permitted with court approval [*Cal Rules Ct, Rule 3.1113(e)*].



**Cross Reference:**

Discussion, see Ch. 26, Law and Motion Procedure.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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### **38.33A Reply May Include Written Objections to Opposing Party's Evidence Along With Proposed Order on Objections.**

Rather than making oral objections at the hearing on the motion [see 38.26[3][a]], the moving party may submit collected written objections to specific evidence presented in the opposing party's statement of facts [Cal Rules Ct, Rule 3.1354(a)]. The collected objections must be prepared separately from other reply papers. The objections must conform to the requirements of the applicable court rule [see Cal Rules Ct, Rule 3.1354(b); for discussion, see 38.26[3][b]].



#### **Timing:**

Unless otherwise excused by the court on a showing of good cause, all written objections to evidence in support of a motion for summary judgment or summary adjudication must be served and filed at the same time as the objecting party's reply papers are served and filed [Cal Rules Ct, Rule 3.1354(a); see 38.31].



#### **Warning:**

At least two districts of the Court of Appeals have ruled that the failure to obtain rulings on evidentiary objections to opposition evidence in summary judgment proceedings waives the objections [see *Swat-Fame, Inc. v. Goldstein* (2d Dist. 2002) 101 CA4th 613, 623-624, 124 CR2d 556 ; *Vineyard Springs Estates, LLC v. Superior Court* (3d Dist. 2004) 120 CA4th 633, 642, 15 CR3d 587 ]. However, this issue is before the Supreme Court in *Reid v. Google*, 72 CR3d 112, 175 P3d 1170, 2008 Cal. LEXIS 1041 ; see also 38.37[1][c]]. The California Supreme Court in *Reid v. Google* is considering an important practical issue for trial judges and counsel in summary judgment motions: "Are evidentiary objections not expressly ruled on at the time of decision on a summary judgment motion preserved for appeal?" As discussed above, the current weight of authority holds that the trial court is required to expressly rule on all objections, and if that is not done, the objection is waived. In *Reid v. Google*, the trial court did not rule on each evidentiary objection, but rather issued a ruling pursuant to *Biljac Associates v. First Interstate Bank* (1990) 218 CA3d 1410, 1419-1429, 267 CR 819 and opted to rely only on "competent and admissible evidence," and the Court of Appeal found that procedure to be appropriate. One problem with the "waiver rule" is that the objecting party is absolutely barred from raising the evidentiary issue on appeal even though the waiver was not the result of any fault of the objecting party. The other practical problem is that the "waiver rule" expects the trial court to undertake

the tremendous burden of expressly ruling on every evidentiary objection. In *Reid v. Google*, the California Supreme Court will decide whether to adopt the "waiver rule," a "presumed overruled" rule, or a "presumed sustained" rule. The "presumed overruled" test has the advantage that the trial courts would not need to rule on every evidentiary objection, yet all objections properly raised in the trial court would be preserved for renewal on appeal. The California Supreme Court likely will decide the issue in 2009. At least until *Reid v. Google* is decided, lawyers involved in summary judgment motions should press trial judges to rule on their evidentiary objections or they may risk having an appellate court consider those objections waived.

#### **Strategic Point:**



Objections are best presented in writing, although oral objections are permissible under *Cal Rules Ct, Rule 3.1352*. Written objections must conform to the formats specified in *Cal Rules Ct, Rule 3.1354*. At the hearing, counsel, as discussed above, should orally renew the objections and seek a ruling.

#### **Distinguish:**

Where trial court refuses to rule on evidentiary objections, objections are impliedly overruled, and objected-to evidence is subject to appellate review [ *Demps v. San Francisco Housing Authority (1st Dist. 2007) 149 CA4th 564, 578, 57 CR3d 204* ].



#### **Cross Reference:**

Form of written objections to evidence on motion for summary judgment or summary adjudication, see 38.69A.

A party submitting written objections to evidence before the hearing on a motion for summary judgment or summary adjudication must include a proposed order on the objections that conforms to the requirements of the court rule [see *Cal Rules Ct, Rule 3.1354(c)*; for discussion, see 38.26[3][c]].



#### **Cross Reference:**

Form of order on written objections to evidence on motion for summary judgment or summary adjudication, see 38.69B.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law



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Chapter 38 Summary Judgment

IV. REPLYING TO OPPOSITION TO SUMMARY JUDGMENT/ADJUDICATION

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.34*

**38.34 Sanctions for Bad-Faith Affidavits May Be Available on Notice Given in Reply Papers or on Court's Own Motion.**

If the moving party believes that the opposing party's affidavits have been presented in bad faith, or solely for purposes of delay, the moving party should include with the reply, a motion seeking the amount of the reasonable expenses that the filing of the affidavits caused the opposing party to incur [*CCP* § 437c(j)].



**Cross References:**

Discussion, see 38.27, 38.41; form, see 38.71.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSanctionsBaseless FilingsBad Faith Motions





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*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.35*

**38.35 CHECKLIST: Obtaining Ruling on Summary Judgment or Adjudication Motions.**

☐ Prepare for oral argument:

- ☐ Prepare to answer court's inquiries.
- ☐ Identify most essential issues regarding the case.

**Discussion:**

See 38.37

☐ Raise objections:

- ☐ Objections to proper notice.
- ☐ Objections to adequacy of supporting affidavits or declarations.
- ☐ Evidentiary objections:

☐ Arrange to have stenographer at hearing for evidentiary objections not made in advance in writing.

☐ Obtain ruling on evidentiary objections.

**Authority:**

CCP § 437c(a), (b)(5), (d); Cal Rules Ct, Rules 3.1352, 3.1354

**Discussion:**

See 38.37

☐ If appropriate, make motion for sanctions:

☐ For bad-faith affidavits and declarations.

**Authority:**

*CCP § 437c(j)*

**Discussion:**

See 38.41[1]

☐ For bad faith in making or opposing motion for summary judgment or adjudication.

**Authority:**

*CCP § 128.6*

**Discussion:**

See 38.41[2]

☐ Prevailing party prepares and submits order:

☐ Order denying motion must specify material facts in controversy.

☐ Order denying motion must specify evidence proffered in support of and in opposition to motion that indicates that a triable controversy exists.

☐ Order granting motion must specify reasons for determination.

☐ Order granting motion must specifically refer to evidence proffered in support of and in opposition to motion that indicates that no triable issue exists.

**Authority:**

*CCP § 437c(g)*

**Discussion:**

See 38.40

**Forms:**

See 38.62-38.64, 38.70

☐ Losing party can make motion for reconsideration based on lack of specifications of reasons for court's decision.

**Authority:**

*CCP § 1008*

**Discussion:**

See 38.42

- ☐ Prevailing party submits judgment for entry and notifies other parties.

**Authority:**

*CCP* §§ 664, 668.5

**Discussion:**

See 38.43

- ☐ Losing party may move for new trial.

**Authority:**

*CCP* § 659

**Discussion:**

See 38.44

- ☐ Losing party may move to vacate.

**Authority:**

*CCP* § 473

**Discussion:**

See 38.45



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### **38.36 Options and Strategies for Hearing.**

The court often will have questions of counsel at the hearing on a motion for summary judgment. Many judges treat these motions with great care and will want to have specific questions answered by counsel. The memoranda will identify the crucial facts that are disputed, and counsel must be prepared to address these issues in court. Avoiding them will only highlight the weaknesses in your position.

The importance of the hearing on the motion is confirmed by case law that emphasizes the right of a party to be heard in open court. Prudent counsel should approach this opportunity to convince the court of the soundness of the party's position, and preparation for the hearing is often similar to the preparation made before a closing argument at trial.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentHearingsGeneral Overview



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### 38.37 Court Will Conduct Hearing Before Issuing Ruling.

#### 38.37[1] Purposes of Hearing Are for Oral Argument and to Raise Procedural and Evidentiary Objections.

**38.37[1][a] Oral Argument.** *CCP § 437c* has been interpreted as requiring the court to allow litigants an oral hearing on summary judgment and summary adjudication motions prior to ruling [ *Brannon v. Superior Court (2004) 114 CA4th 1203, 1211* ; *Gwartz v. Superior Court (1999) 71 CA4th 480, 482, 83 CR2d 865* ; *Mediterranean Constr. Co. v. State Farm Fire & Cas. Co. (1998) 66 CA4th 257, 259-260, 77 CR2d 781* ].

The hearing offers litigants the opportunity to [ *Mediterranean Constr. Co. v. State Farm Fire & Cas. Co. (1998) 66 CA4th 257, 264, 77 CR2d 781* ]:

- Argue their case orally; and
- Respond to the court's inquiries through the give-and-take of questioning.



#### Strategic Point--Oral Argument Should Be Used to Complement Written Argument:

Oral argument allows litigants to speak directly to the decision maker concerning the most essential issues in the case [see *Mediterranean Constr. Co. v. State Farm Fire & Cas. Co. (1998) 66 CA4th 257, 264, 77 CR2d 781* ].

#### Judge's Perspective:

Presenting oral argument on summary judgment motions is the most difficult skill a trial attorney has to master. If you simply repeat what is in your papers, you run the risk of the trial judge becoming impatient. If you add matters at oral argument that are not in your papers, then you run the risk of the trial judge and your opponent inquiring as to why those points were not contained in your papers and cannot now be addressed.

In essence, be brief and hit only a few of your strong points and hope that your trial judge has read your

papers and likes to hear oral argument. Moreover, if the tentative is in your favor then be smart and submit. Do not talk yourself out of a ruling. There is no such thing as a brilliant summary judgment argument, only final arguments before a jury.

**38.37[1][b] Procedural and Evidentiary Objections.** The following objections are waived if a party proceeds at an oral hearing without raising them:

- Objections to proper notice [*CCP* § 437c(a)];
- Objections to the adequacy of supporting affidavits or declarations [*CCP* § 437c(d)]; and
- Evidentiary objections [*CCP* § 437c(b)(5)].



**Warning--Court Stenographer Needed for Evidentiary Objections:**

Litigants who raise evidentiary objections at the hearing (as opposed to written objections in advance) must arrange for a court reporter to attend the hearing to record their objections for the record [*Cal Rules Ct, Rules 3.1352, 3.1354*].



**Strategic Point:**

A party has a right to waive objections, which right the court may not deny by interposing and sustaining its own hearsay objection [ *Andrews v. Mobile Aire Estates (2005) 125 CA4th 578, 587* ].



**Cross Reference:**

Written evidentiary objections, see 38.26[3].

**38.37[1][c] Objecting Party Must Obtain Ruling on Evidentiary Objections.** In determining whether the papers submitted show that the moving party is entitled to judgment, the court cannot consider evidence to which objections have been made and sustained. However, if a party raises evidentiary objections, but does not secure rulings on the objections, the objections are treated as waived. An appellate court will then consider all the evidence set forth in the moving party's papers as properly admitted [ *PMC, Inc. v. Kadisha (2000) 78 CA4th 1368, 1378, 93 CR2d 663* ].

**Exception--Trial Court Fails to Rule on Party's Evidentiary Objection:**

If counsel specifically requests a ruling on written evidentiary objections, but the trial court fails to make a ruling, the evidentiary objections will be preserved for appellate review [ *City of Long Beach v. Farmers & Merchants Bank (2000) 81 CA4th 780, 783-785, 97 CR2d 140* ].

**Example:**

In a case in which defense counsel twice orally raised the issue of securing rulings on previously filed written evidentiary objections in court before the trial judge, and the judge still did not rule on the objections, the objections were preserved for review [ *City of Long Beach v. Farmers & Merchants Bank (2000) 81 CA4th 780, 783-785, 97 CR2d 140* ].

**Judge's Perspective:**

It is important for counsel to preserve their evidentiary objections with the trial court at the time of the hearing. The recent trend in the appellate courts has been to indicate that it is the duty of the trial judge to actually rule on the evidentiary objections submitted by either side. Previously, trial judges have relied on the decision rendered by Division 2 of the First Appellate District in *Biljac Assocs. v. First Interstate Bank (1990) 218 CA3d 1410* . In that case the appellate court held that a trial judge need not rule on each

individual evidentiary objection. The *Biljac* court felt that it was sufficient for the trial judge to state that only relevant and competent evidence was considered [ *Biljac Assocs. v. First Interstate Bank* (1990) 218 CA3d 1410, 1419-1420, 267 CR 819 ]. Since *Biljac*, however, Division 7 of the Second District Court of Appeal in *Swat-Fame, Inc. v. Goldstein* (2002) 101 CA4th 613 , has held that the trial court judge should rule on the evidentiary objections and that reliance on *Biljac* is and was inappropriate [ *Swat-Fame, Inc. v. Goldstein* (2002) 101 CA4th 613, 623-624, 124 CR2d 556 ]. The appellate court's reasoning in *Biljac* was very simple: because the standard for review on appeal of summary adjudication/judgment is a de novo review there seemed to be no point in forcing the trial court to do that which the court of appeal would have to do anyway. The appellate panel in *Swat-Fame* does not disagree with the standard for review as set forth in *Biljac*--it just maintains that the trial judge should undertake this additional task. In 2004, another panel of the Third District Court of Appeal expressly ruled that the trial judge must rule on each evidentiary objection in proper form submitted by the parties. The court relied on the rule that a party's failure to obtain a ruling waives the evidentiary objection for justifying the requirement even where the objecting party repeatedly requests them [ *Vineyard Springs Estates, LLC v. Superior Court* (2004) 120 CA4th 633, 642, 15 CR3d 587 ; accord, *Madden v. Del Taco, Inc.* (3d Dist., 2007) 150 CA4th 294, 301, 58 CR3d 313 ]. On January 30, 2008, the Supreme Court granted review in *Reid v. Google*, 72 CR3d 112, 175 P.3d 1170, 2008 Cal. LEXIS 1041 , on the *Biljac* issue and whether a trial court must rule individually on evidentiary objections. See 38.33A.

**38.37[2] No Right to Present Testimony.** Litigants do not have the right to present oral testimony at the hearing [ *Cal Rules Ct, Rule 3.1306(a)*; *Mediterranean Constr. Co. v. State Farm Fire & Cas. Co.* (1998) 66 CA4th 257, 263, 265, 77 CR2d 781 ; see also *Cal Rules Ct, Rule 3.1306(b)* (procedure for requesting permission to present oral testimony)].

#### Cross References:

Discussion of preparation of witnesses for examination, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 7.21 *et seq.*

Discussion of questioning witnesses and objections, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 11, Questioning Witnesses and Objections.

Discussion of obtaining and using interpreters for questioning witnesses at hearings, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 8, Interpreters.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentHearingsOral Arguments



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### **38.38 Court Will Evaluate Evidence to Determine If Triable Issues of Fact Exist.**

**38.38[1] Court Will Consider All Evidence Set Forth in Papers.** In determining whether a triable issue of material fact exists, the court is required to consider all the evidence set forth in the papers, and all the inferences reasonably deducible from that evidence [*CCP* § 437c(c); *Tchorbadjian v. Western Home Ins. Co.* (1995) 39 CA4th 1211, 1217, 46 CR2d 370 ].

#### **Exception--Inadmissible Evidence Not Considered:**

The court will not consider evidence to which objections have been made and sustained by the court [*CCP* § 437c(c)].

#### **Example:**

It is error for the trial court to disregard all of a party's testimony, or to select only those parts of the testimony that support the trial court's ruling [ *Singleton v. United States Gypsum Co.* (2006) 140 CA4th 1547, 1558, 45 CR3d 597 ].

**38.38[2] Evidence Is Not Weighed.** The trial court may not:

- Weigh evidence, in the manner of a factfinder, as to which version is more likely to be true [ *Binder v. Aetna Life Ins. Co.* (1999) 75 CA4th 832, 840, 89 CR2d 540 ];
- Evaluate credibility [ *Hernandez v. Department of Transportation* (2003) 114 CA4th 376, 388 ; *Binder v. Aetna Life Ins. Co.* (1999) 75 CA4th 832, 840, 89 CR2d 540 ];
- Weigh one inference against another [ *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 CA4th 833, 841, 77 CR2d 12 ].

#### **38.38[3] Moving Party's Evidence Is Strictly Construed; Opposing Party's Evidence Is Liberally Construed.**

The court accepts as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence [ *Leep v. American Ship Management* (2005) 126 CA4th 1028, 1039 ; *City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 CA4th 1167, 1176, 99 CR2d 198 ; *Kelsey v. Waste Mgmt.* (1999) 76 CA4th 590,



594, 90 CR2d 510 ; *Depew v. Crocodile Enters., Inc.* (1998) 63 CA4th 480, 485, 73 CR2d 673 ].

General pleadings are controlled by specific allegations. For that reason, where a party alleges a permissible conclusion of law but also avers specific additional facts that either do not support that conclusion or are inconsistent with it, the specific allegations will control, and a pleading that might have been sufficient with general allegations alone may be rendered defective [ *Melican v. Regents of University of California* (2007) 151 CA4th 168, 174-175, 59 CR3d 672 ].

Any evidentiary doubts are resolved in favor of the opposing party [ *City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 CA4th 1167, 1176, 99 CR2d 198 ], with all facts contained in the opposing party's papers being accepted as true for the purpose of deciding the motion [ *Leep v. American Ship Management* (2005) 126 CA4th 1028, 1039 ; *Salazar v. Southern Cal. Gas Co.* (1997) 54 CA4th 1370, 1376, 63 CR2d 522 ].

The trial court has discretion to overlook procedural errors in the moving and opposition papers, but only if the evidence presented warrants it [ *Zimmerman, Rosenfeld, Gersh & Leeds v. Larson* (2005) 131 CA4th 1466, 1478 (glaring omissions and concessions could not be overlooked)].

**38.38[4] Admissions Against Interest Obtained Through Discovery Are Given Extra Weight, but Not Shielded From Court's Examination.** Admissions against interest obtained through discovery are entitled to greater weight than evidentiary allegations in affidavits or declarations [ *D'Amico v. Board of Med. Exam'rs* (1974) 11 C3d 1, 21-22, 112 CR 786, 520 P2d 10 ]. An opposing party cannot create an issue of fact by offering a declaration contradicting admissions made in the course of that party's deposition [ *Benavidez v. San Jose Police Dept.* (1999) 71 CA4th 853, 860-861, 84 CR2d 157 ; *Barton v. Elexsys Int'l, Inc.* (1998) 62 CA4th 1182, 1191-1192, 73 CR2d 212 ; *Roth v. Rhodes* (1994) 25 CA4th 530, 545, 30 CR2d 706 ].

Such admissions, although given extra weight under the D'Amico rule, are not shielded from careful examination in light of the entire record. A summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence [ *Price v. Wells Fargo Bank* (1989) 213 CA3d 465, 482, 261 CR 735 ]. All admissions elicited in the course of discovery are not created equal under the D'Amico rule; and deposition answers are simply evidence and do not constitute incontrovertible judicial admissions as do concessions in a pleading or answers to requests for admissions [ *Scalf v. D.B. Log Homes, Inc.* (2005) 128 CA4th 1510, 1522 ].

**Example:**

Opposing party's deposition testimony that he found "nothing wrong" and had no criticisms of moving party's product were not the equivalent of judicial admissions and did not carry the moving party's burden of demonstrating the absence of a factual dispute on express indemnity claim [ *Scalf v. D.B. Log Homes, Inc.* (2005) 128 CA4th 1510, 1523 ].

All admissions elicited in the course of discovery are not created equal under the D'Amico rule; and deposition answers are simply evidence and do not constitute incontrovertible judicial admissions as do concessions in a pleading or answers to requests for admissions [ *Scalf v. D.B. Log Homes, Inc.* (2005) 128 CA4th 1510, 1522 ]. Furthermore, the D'Amico rule applies only where deposition admission is contradicted solely by self-serving affidavit or declaration. The rule bars a party opposing summary judgment from filing a declaration that purports to impeach his or her own prior sworn testimony [ *Scalf v. D.B. Log Homes, Inc.* (2005) 128 CA4th 1510, 1521-1522 (existence of other contradictory evidence precluded summary judgment)]. Deposition testimony that is conclusory or that lacks foundation is insufficient to shift the burden on a summary judgment motion [ *Scalf v. D.B. Log Homes, Inc.* (2005) 128 CA4th 1510, 1521-1522 ].

**38.38[5] Admissions Contained in a Party's Pleadings Are Given Less Weight, and May or May Not Be Binding.** There is conflicting authority regarding the extent to which a complaint's factual allegations constitute judicial admissions binding on the plaintiff. The weight to be accorded these admissions appears to be determined on a

case-by-case basis, depending on the nature of the admissions, whether the complaint is verified, whether the admission is unambiguous, and the contradictory evidence offered by the opposing plaintiff [ *Kirby v. Albert D. Seeno Constr. Co.* (1992) 11 CA4th 1059, 1066-1067, 14 CR2d 604 ].

*Compare:*

**Example--Plaintiff Bound by Allegations in Complaint:**

A defendant moving for summary judgment may rely on the allegations contained in the plaintiff's complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues. Contradictory evidence is limited to that which collaterally attacks the prior judicial admission on the basis of mistake, inadvertence, or lack of authority [ *Barr v. AcandS, Inc.* (1997) 57 CA4th 1038, 1055-1056, 67 CR2d 494 ].

*With:*

**Example--Court Should Not Give Conclusive Effect to Ambiguous Statement in Unverified Complaint:**

It would be improper to give conclusive effect to an ambiguous statement in an unverified complaint and to ignore the explanation of the statement contained in deposition testimony taken under oath. When the facts submitted in opposition to a summary judgment motion indicate the existence of a material factual issue, summary judgment should not be entered based on mistaken legal conclusions in the complaint [ *Kirby v. Albert D. Seeno Constr. Co.* (1992) 11 CA4th 1059, 1066-1067, 14 CR2d 604 ]. This rule usually precludes summary judgment that relies on a superseded pleading [ *Deveny v. Entropin, Inc.* (2006) 139 CA4th 408, 426, 42 CR3d 807 ].

 **Cross Reference:**

Discussion of court's evaluation of evidence on summary judgment motion, see *California Forms of Pleading and Practice*, § 537.33[2] (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentStandardsGeneral Overview



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**38.39 Court May Grant Motion on Issue Not Raised by Party, But May Not Deny Motion on Grounds Not Pleaded.**

Although CCP § 437c does not permit a trial court to enter summary judgment on its own motion [ *Scheiding v. Dinwiddie Constr. Co.* (1999) 69 CA4th 64, 75, 81 CR2d 360 ; *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 CA4th 952, 958, 65 CR2d 821 ], the trial court may grant summary judgment on an issue that the moving party has not raised, but only if the trial court [ *Bacon v. Southern Cal. Edison Co.* (1997) 53 CA4th 854, 860, 62 CR2d 16 ; *Gomez v. Acquistapace* (1966) 50 CA4th 740, 744, 57 CR2d 821 ]:

- Notifies the opposing party of its intent to do so; and
- Provides an opportunity to respond to the new issue.

In contrast, summary judgment cannot be denied on a ground not raised by the pleadings [ *Kendall v. Walker* (2009) 181 CA4th 584, 598, 104 CR3d 262 ] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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#### **38.40 Court Will State Reasons for Decision.**

**38.40[1] Decision Denying the Motion Must Specify One or More Triable Issues of Material Fact.** An order denying a motion for summary judgment or adjudication on the grounds that there is a triable issue as to one or more material facts must, by written or oral order [*CCP* § 437c(g)]:

- Specify those facts as to which the court has determined a triable controversy exists; and
- Specifically refer to the evidence proffered in support of and in opposition to the motion.

**38.40[2] Decision Granting the Motion Must Specify Evidence Supporting and, If Applicable, Opposing Motion.** An order granting a motion for summary judgment or adjudication must, by written or oral order [*CCP* § 437c(g)]:

- Specify the reasons for the determination; and
- Specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion that indicates that no triable issue exists.

**38.40[3] Reasons for Any Other Determination Must Be Stated.** The court is required to state its reasons for any other determination made on the grant or denial of a motion for summary judgment [*CCP* § 437c(g)].

**38.40[4] Purpose of Court's Statement of Reasons Is to Allow Meaningful Appellate Review.** A key objective for the statement of reasons pursuant to *CCP* § 437c(g) is to allow for meaningful appellate review [ *Wedeck v. Unocal Corp.* (1997) 59 CA4th 848, 864, 69 CR2d 501 ].

Some appellate courts have treated the trial court's failure to provide a statement of reasons as harmless error, particularly if the appellate court's independent review establishes the validity of the judgment [ *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 CA4th 577, 594 n7, 96 CR2d 880 ; *Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 CA4th 772, 782, 31 CR2d 162 ].

However, the failure to provide a statement of reasons may not be regarded as harmless error if the issues are complex [ *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 CA4th 439, 448-449, 105 CR2d 856 ].

**38.40[5] Failure to Provide Statement of Reasons May Provide Basis for Opposing Party to Bring Motion for Clarification.** Until judgment is entered, the trial court has the power to change its decision on a motion for clarification [ *Bernstein v. Consolidated Am. Ins. Co.* (1995) 37 CA4th 763, 774, 43 CR2d 817 disapproved on other grounds in *Vandenberg v. Superior Court* (1999) 21 C4th 815, 841, n12, 88 CR2d 366, 982 P2d 229 ].

**Example--Order Denying Summary Adjudication Corrected on Court's Own Motion When Opposing Party's Proposed Order Did Not Articulate Basis for Ruling:**

The minute order denying the moving party's motion for summary adjudication failed to comply with *CCP § 437c(g)*. The opposing party brought a motion for clarification. When the trial court undertook the task of providing reasons, and attempted to identify the disputed factual issues requiring a trial, it was unable to do so. Consequently, it corrected its prior erroneous ruling denying the opposing party's summary adjudication motion. In this situation, the court was not entertaining a motion of the opposing party for reconsideration of the prior ruling, but was correcting an erroneous ruling on its own motion [ *Bernstein v. Consolidated Am. Ins. Co.* (1995) 37 CA4th 763, 774, 43 CR2d 817 ].



**Cross References:**

Forms, see 38.62, 38.63, 38.64, 38.70.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentStandardsGeneral Overview



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### **38.41 Court Has Power to Impose Sanctions.**

**38.41[1] Court May Impose Sanctions If It Determines That Affidavits Have Been Presented in Bad Faith or Solely for Reasons of Delay.** If the court determines at any time that any of the affidavits have been presented in bad faith or solely for purposes of delay, the court can order the party presenting the affidavits to pay the other party the amount of reasonable expenses the filing of the affidavits caused the other party to incur [CCP § 437c(j)].

Sanctions cannot be imposed except on a party's motion, or the court's own motion, and only after an opportunity to heard [CCP § 437c(j)].

#### **Cross References:**

Discussion of sanctions motion, see 38.27, 38.34.

**38.41[2] Court May Impose Sanctions for Bad Faith in Making or Opposing a Motion for Summary Judgment or Adjudication.** Parties may seek to recover reasonable expenses, including attorney's fees, on the more general ground that the motion for summary judgment or opposition to the motion was made in bad faith in that it was frivolous or solely intended to cause unnecessary delay [CCP § 128.6(a)].

Expenses may not be imposed except on notice contained in a party's moving or responding papers, or the court's own motion, after notice and opportunity to be heard [CCP § 128.6(c)].

An order imposing expenses must be in writing and must recite in detail the conduct or circumstances justifying the order [CCP § 128.6(c)].

#### **Cross Reference:**

Discussion, see Ch. 35, Sanctions.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSanctionsBaseless FilingsBad Faith Motions



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*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.42*

### **38.42 Motion for Reconsideration.**

**38.42[1] Must Be Made Prior to Entry of Judgment.** Prior to the entry of judgment, a party may move for reconsideration of the order [*CCP* § 1008], or make a renewed motion for summary judgment or summary adjudication [*CCP* § 437c(f)(2)].

#### **Cross Reference:**

Discussion of motions to reconsider, see Ch. 29, Motions to Reconsider and Renewed Motions.

**38.42[2] Must Be Based on New or Different Facts, Circumstances or Law.** A motion for reconsideration must be supported by new or different facts, circumstances, or law [*CCP* §§ 437c(f)(2), 1008]. A summary judgment cannot be based on issues asserted in a prior, losing summary adjudication motion [*CCP* § 437c(f)(2)].

#### **Cross Reference:**

Discussion, see 38.09[5].

**38.42[3] Specific Provisions Apply to a Motion for Summary Judgment Based on Issues Asserted in an Earlier Adjudication Motion.** The specific requirements of *CCP* § 437c(f)(2), rather than the general provisions of *CCP* § 1008, govern a motion for summary judgment based on issues asserted in an earlier adjudication motion that was denied [ *Bagley v. TRW, Inc.* (1999) 73 CA4th 1092, 1096 n3, 86 CR2d 909 (repackaged motion based on same material facts and law denied)].

#### **Distinguish:**

While a party may move for reconsideration of a motion for summary judgment based upon "new or different facts, circumstances, or law within ten days after the motion is denied by complying with the requirements of *CCP* § 1008, the motion made more than ten days after an original motion is a new motion that must comply with the requirements for motions for summary judgment set out *CCP* § 437c [ *UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 CA4th 357, 367-368, 87 CR3d 81 (new motion after more than ten days denied for failure to comply with 75-day notice period of *CCP* § 437c)].





**Cross Reference:**

Discussion of motions to reconsider, see Ch. 29, Motions to Reconsider and Renewed Motions.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief  
From JudgmentMotions to Alter & Amend



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### 38.43 Prevailing Party Prepares Order and Submits Judgment for Entry.

**38.43[1] Prevailing Party Prepares Order or Judgment, and Notifies Other Parties.** The party submitting an order or judgment for entry must prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding and file the original with the proof of service by mail [CCP § 664.5(a)].

"Judgment," as used in CCP § 664.5 includes any judgment, decree, or signed order from which an appeal lies [CCP § 664.5(c)].



#### **Warning--Counsel Should Prepare Proposed Order Before Hearing:**

Some courts require a party moving for or opposing summary judgment or adjudication to bring to the hearing a proposed form of order that complies with CCP § 437c(g) [see San Francisco Super Ct Rules, Rule 8.11(C)].



#### **Strategic Point--Bring Proposed Order to Hearing:**

Whether required or not, bring a proposed order to the hearing because the judge might sign it at the conclusion of the hearing without the other party having a meaningful opportunity to object to the form of order.



#### **Warning:**

While a trial court may shift to counsel the burden of preparing a formal order on a motion for summary judgment under CCP § 437c(g), the total abdication of judicial responsibility is error. Thus, granting a summary judgment motion without any specification of the reasons for doing so, then directing counsel for the prevailing party to prepare an order including findings necessary to support the order, without telling the prevailing party what any of those findings should be, is not permitted [ *Carnes v. Superior Court* (2005) 126 CA4th 688, 692 ].

**Strategic Point--Prepare Combined Order and Judgment:**

Unless the court otherwise requires, it would appear to be the better practice to prepare a combined form of order and judgment to avoid unnecessary duplication and any possibility of conflict between the order and the judgment.

**Cross Reference:**

Form, see 38.63.

**38.43[2] Judgment Is Entered in the Court's "Judgment Book."** Judgment is entered either in the court's judgment book, or, in certain counties, as provided in *CCP* § 668.5 [*CCP* § 668].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral Overview



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#### **38.44 Losing Party May Move for a New Trial.**

A party may seek relief from summary judgment in the trial court by moving for a new trial in accordance with *CCP* § 659 [Aguilar v. Atlantic Richfield Co. (2001) 25 C4th 826, 858, 107 CR2d 841, 24 P3d 493; *Tortorella v. Castro* (2006) 140 CA4th 1, 9, 43 CR3d 853 ].



#### **Cross Reference:**

Discussion of motions for new trial, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 21, Motion for New Trial.

However, because technically there was no trial, the net effect of granting the motion is simply denial of the motion for summary judgment. Accordingly, in these circumstances, appellate courts either construe the trial court's order as an appealable order granting new trial or treat the appeal as a petition for mandate [ *Waschek v. DMV* (1997) 59 CA4th 640, 643 n4, 69 CR2d 296 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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#### **38.45 Losing Party May Move to Vacate.**

The discretionary provision of *CCP* § 473(b), that allows a court on any terms as may be just, to relieve a party from a judgment or order taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect may be applied to summary judgments [*CCP* § 473(b); *Huh v. Wang* (6th Dist., 2007) 158 CA4th 1406, 1419, 71 CR3d 65 (request for relief from summary judgment was not made diligently, and attorney's neglect was inexcusable "press of business"); *Uriarte v. United States Pipe & Foundry Co.* (1996) 51 CA4th 780, 791, 59 CR2d 332 ].

As expressly worded, the mandatory provision of *CCP* § 473(b) applies only to relief sought in response to defaults, default judgments, or dismissals. While several districts of the California Court of Appeals have ruled that that language allowing a court to vacate a default, default judgment, or dismissal resulting from attorney mistake, inadvertence, surprise, or excusable neglect does not apply to summary judgments, because a summary judgment is neither a "default," a "default judgment," nor a "dismissal" with the meaning of *CCP* § 473(b) [see *Huh v. Wang* (6th Dist., 2007) 158 CA4th 1406, 1415, 71 CR3d 65 ; *Vandermoon v. Sanwong* (3d Dist., 2006) 142 CA4th 315, 320, 47 CR3d 772 ; *Prieto v. Loyola Marymount University* (2d Dist., Div. 8, 2005) 132 CA4th 290, 294, 33 CR3d 639 (failure to oppose summary judgment motion); *Garcia v. Hejmadi* (1st Dist., Div. 2, 1997) 58 CA4th 674, 684, 68 CR2d 228 (after trial on the merits)], at least one district has applied it to cases concluded by summary judgment [see *Avila v. Chua* (2d Dist., Div. 5, 1997) 57 CA4th 860, 868, 67 CR2d 373 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview



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**38.46 CHECKLIST: Obtaining Appellate Review When Summary Judgment or Summary Adjudication Is  
Granted.**

☐ Seek review of summary judgment by appeal.

**Authority:**

*CCP § 437c(k), (m)(1)*

**Discussion:**

*See 38.48*

☐ Seek review of summary adjudication by writ of mandate.

**Discussion:**

*See 38.49*

☐ Submit supplemental briefs on any new legal issues raised and considered by appellate court.

**Authority:**

*CCP § 437c(m)(2)*

**Discussion:**

*See 38.51[2]*

☐ Petition for rehearing if court fails to allow supplemental briefing.

**Authority:**

*CCP § 437c(m)(2)*

**Discussion:**

See 38.51[2]



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GRANTED

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.47*

**38.47 Options and Strategies for Obtaining Appellate Review of Granted Motion.**

Case law is replete with decisions overturning rulings on motions for summary judgment. The strict requirements for both procedure and law make for ample opportunity to find a reversible error. To avoid malpractice claims, counsel should carefully document any decision by the client not to pursue appellate review of an adverse ruling on a motion for summary judgment. Verbal agreements should be reduced to writing and indicate that the client was fully informed of the consequences of the decision.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentAppellate ReviewGeneral Overview





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### 38.48 Losing Party May Seek Review of Grant of Summary Judgment.

**38.48[1] Appeal After Judgment.** A summary judgment entered under *CCP* § 437c is an appealable judgment as in other cases [*CCP* § 437c(m)(1)] although the order granting a summary judgment motion is not reviewable by appeal until after a judgment is entered [ *Stoltz v. Wong Communications Ltd. P'ship* (1994) 25 CA4th 1811, 1816, 31 CR2d 229 ].

No final judgment may be entered on a motion for summary judgment unless [*CCP* § 437c(k)]:

- It terminates an action; or
- A separate judgment may properly be awarded.



#### Timing:

Appeal must be taken within the requisite period applicable to the final judgment on the motion for summary judgment [see *Cal Rules Ct, Rule 8.104(a)*]. A subsequent ruling on attorney fees and costs may amend the final judgment, but unless it amends other terms of the judgment, it does not restart the appeal period for appealing the summary judgment itself [ *Torres v. City of San Diego* (2007) 154 CA4th 214, 222, 64 CR3d 495 ].

#### Example--Separate Judgment May Be Awarded Between at Least Two Parties to an Action:

A separate judgment may properly be awarded, and an appeal may lie from an otherwise interlocutory summary judgment, when, for example, the summary judgment disposes of all issues to be determined between at least two parties [ *Morehart v. County of Santa Barbara* (1994) 7 C4th 725, 740-741, 29 CR2d 804, 872 P2d 143 (dicta)].

**Exception--Reviewing Court May Treat an Appeal from an Order as an Appeal from a Final Judgment to Prevent Unnecessary Delay:**

Even if the order granting summary judgment is technically nonappealable, a reviewing court may exercise its discretion to consider an appeal directly from that order in the interest of justice and to prevent unnecessary delay [ *Zavala v. Arce* (1997) 58 CA4th 915, 924 n7, 68 CR2d 571 ; *Allabach v. Santa Clara County Fair Assn.* (1996) 46 CA4th 1007, 1010-1011, 54 CR2d 330 ].



#### **Strategic Point:**

The trial court does not have to exercise its discretion in favor of treating an appeal of an order of summary judgment as an appeal of a subsequent dismissal, and indeed, some courts refuse to "bail out attorneys who ignore the statutory limitations on appealable orders" [e.g., *Cohen v. Equitable Life Assurance Society* (1987) 196 CA3d 669, 671, 242 CR 84 ]. For that reason, counsel should point out any extenuating circumstances other than error when requesting that the court accept the appeal of an order as the appeal of the dismissal after summary judgment [ *Mukthar v. Latin American Security Service* (2006) 139 CA4th 284, 288 & n. 4, 42 CR3d 563 ].



#### **Cross Reference:**

Discussion of review of summary proceeding by appeal, see *California Forms of Pleading and Practice*, Ch. 537, *Summary Judgment* § 537.43 (Matthew Bender).

#### **38.48[2] Immediate Writ Review of Grant of Summary Judgment Against Some But Not All Defendants.**

Immediate writ review of an order granting summary judgment against some but not all of the defendants in a case is appropriate where the trial is proceeding against one or more codefendants. Immediate review is preferable to obviate possible multiple trials in the case [ *Johnson v. Superior Court* (2006) 143 CA4th 297, 304, 49 CR3d 52 ; *Lopez v. Superior Court* (1996) 45 CA4th 705, 710 n. 1, 52 CR2d 821 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentAppellate ReviewAppealability



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### 38.49 Losing Party May Seek Review of Grant of Summary Adjudication by Mandate.

An order granting a summary adjudication is generally not an appealable order [ *Canandaigua Wine Co., Inc. v. County of Madera* (2009) 177 CA4th 298, 301, 99 CR3d 264 (summary adjudication that does not dispose of all causes of action between the parties is not appealable)]. However, because a trial court has no discretion on a motion for summary adjudication, and must grant the motion if no triable issue of material fact exists, a court that errs has made an error of law. This automatically constitutes an abuse of discretion, making it proper to obtain relief by means of mandate [ *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 CA4th 970, 974, 989, 90 CR2d 743 ; *City of Oakland v. Superior Court* (1966) 45 CA4th 740, 750, 53 CR2d 120 ].

#### **Exception--Grant of Summary Adjudication Is Appealable If Order Effectively Disposes of Case:**

If a trial court's order granting summary adjudication as to one cause of action effectively disposes of the case, appeal is proper [ *Belio v. Panorama Optics, Inc.* (1995) 33 CA4th 1096, 1101-1102, 39 CR2d 737 ].

#### **➤ Cross Reference:**

Discussion of review of grant of summary adjudication by mandate, see *California Forms of Pleading and Practice*, § 537.44[2] (Matthew Bender).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentAppellate ReviewAppealability



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### VI. OBTAINING APPELLATE REVIEW WHEN SUMMARY JUDGMENT OR SUMMARY ADJUDICATION IS GRANTED

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#### **38.50 Independent Standard of Review Applies to Evidence.**

**38.50[1] Review Is De Novo.** The appellate court conducts a de novo review to determine whether any triable issues exist [ *Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 334, 100 CR2d 352, 8 P3d 1089 ; *Republic Indem. Co. v. Schofield* (1996) 47 CA4th 220, 225, 54 CR2d 637 ].

**38.50[2] Limited to Facts in Submitted Evidentiary Materials.** The appellate court is limited to the facts shown in [ *Aloha Pacific, Inc. v. California Insurance Guarantee Assn.* (2000) 79 CA4th 297, 307, 93 CR2d 148 ; *Spray, Gould & Bowers v. Associated Int'l Ins. Co.* (1999) 71 CA4th 1260, 1266, 84 CR2d 552 ]:

- Evidentiary material submitted to the trial court; and
- Facts admitted and uncontested in the pleadings.

**38.50[3] In Reassessing Legal Significance of Evidentiary Materials, Appellate Court Applies Same Standard as Trial Court.** The moving party's affidavits and declarations are strictly construed; the opposing party's affidavits and declarations are liberally construed [ *Kelly v. First Astri Corp.* (1999) 72 CA4th 462, 471, 84 CR2d 810 ; *Bernstein v. Consolidated Am. Ins. Co.* (1995) 37 CA4th 763, 769, 43 CR2d 817 ].

The court accepts as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence [ *City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 CA4th 1167, 1176, 99 CR2d 198 ; *Sutherland v. Barclays Am./Mortgage Corp.* (1997) 53 CA4th 299, 309, 61 CR2d 614 ].

**38.50[4] Appellate Court Searches for Contradictory Facts and Inferences.** The appellate court looks for contradictions in the evidence or in inferences reasonably deducible from the evidence that raise a triable issue of material fact [ *Assilzadeh v. California Fed. Bank* (2000) 82 CA4th 399, 409, 98 CR2d 176 ].

**38.50[5] Appellate Court's Function Is to Issue Finding, Not Issue Determination.** The court does not weigh one inference against another or against other evidence [ *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 CA4th 833, 841, 77 CR2d 12 ] or decide the merits of the factual issues themselves [ *Marquez v. Enterprise Rent-A-Car* (1997) 53

CA4th 319, 322, 61 CR2d 557 ; *City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 CA4th 1167, 1188, 99 CR2d 198 ].

**38.50[6] Appellate Court Will Disregard Any New Factual Allegations.** The appellate court is required to consider only those facts before the trial court, disregarding any new factual allegations made for the first time on appeal [ *Ashdown v. Ameron Internat. Corp.* (2000) 83 CA4th 868, 874, 100 CR2d 20 ; *Monteleone v. Allstate Ins. Co.* (1996) 51 CA4th 509, 514, 59 CR2d 48 ].

**Example:**

When reviewing the granting of a motion for summary judgment, an appellate court may properly decline to take judicial notice under *Evid Code* §§ 452 and 459 of a matter that should have been presented to the trial court for its consideration in the first instance [ *City of Oakland v. Hassey* (2008) 163 CA4th 1477, 1489 n5, 78 CR3d 621 ].

**38.50[7] Evidentiary Objections Not Raised in Trial Court Are Waived.** The appellate court may not consider evidentiary objections not raised in the trial court [CCP § 437c(b)(5), (d); *Weil v. Federal Kemper Life Assurance Co.* (1994) 7 C4th 125, 149 n9, 27 CR2d 316, 866 P2d 774 ].

**Exception:**

In reviewing summary judgment, as in any other appeal, if a party's position depends on patently inadmissible evidence admitted over a proper objection, a reviewing court is empowered, and indeed obliged, to acknowledge the error and disregard the evidence [ *Mamou v. Trendwest Resorts, Inc.* (2008) 165 CA4th 686, 711, 81 CR3d 406 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentAppellate ReviewStandards of Review



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### 38.51 Independent Standard of Review Applied to Law.

**38.51[1] Judgment Can Be Affirmed on Any Applicable Theory of Law.** If the facts are undisputed, the appellate court should affirm the trial court's judgment if it is correct on any theory of law applicable to the case, including, but not limited to, the theory the trial court adopted [ *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1994) 21 CA4th 1586, 1595, 26 CR2d 762 ].



#### **Warning--Theory of Law Must Be Supported by Facts Presented to Trial Court:**

A reviewing court will not consider an issue of law unsupported by the existing evidence [ *Green v. Green* (1963) 215 CA2d 37, 46, 30 CR 23 ].

**38.51[2] Parties Must Be Given Reasonable Opportunity to Address Any New Legal Issue Considered on Appeal.** Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied on by the trial court, the reviewing court is required to give the parties an opportunity to present their views on the issue by submitting supplemental briefs [CCP § 437c(m)(2)].

A party's supplemental briefing may argue that additional evidence relating to the new ground exists, but that the party has not had an adequate opportunity to [CCP § 437c(m)(2)]:

- Present the evidence; or
- Conduct discovery on that issue.

After supplemental briefing, the reviewing court may CCP § 437c(m)(2):

- Reverse; or
- Remand to allow the parties to present additional evidence or to conduct discovery on that issue.

A party may make a timely petition for a rehearing if the court fails to allow supplemental briefing [*CCP* § 437c(m)(2)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentAppellate ReviewStandards of Review



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DENIED

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**38.52 CHECKLIST: Obtaining Appellate Review When Summary Judgment or Summary Adjudication Is Denied.**

☐ File petition for a peremptory writ.



**Timing:**

Within 20 days of personal service of notice of entry of order denying summary judgment plus:

- Two days if served by facsimile transmission, express mail, or other method of overnight delivery;
- Five days if served by regular mail in California;
- 10 days if served by regular mail outside California, within the United States;
- 20 days if served by regular mail outside the United States.

**Authority:**

*CCP § 437c(m)(1)*

**Discussion:**

*See 38.54; 38.55*

**Exception:**

For good cause, prior to expiration of the initial time period, the superior court may extend the time for one additional period, not to exceed 10 days.



**Authority:**

*CCP § 437c(m)(1)*

**Discussion:**

See 38.55[3]



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VII. OBTAINING APPELLATE REVIEW WHEN SUMMARY JUDGMENT OR SUMMARY ADJUDICATION IS  
DENIED

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.53*

**38.53 Options and Strategies for Obtaining Appellate Review of Denied Motion.**

When a motion for summary judgment has been denied, the result is the matter moving forward for trial. If the party making the motion feels the denial of the motion was without legal support, pursuing and securing a peremptory writ will reduce the overall costs of the litigation by ending the action if the writ is issued. However, if the ruling on the motion was a "close call," the writ may well be denied, the parties will be back where they were before the writ was sought, but the overall expense of the case will have gone up. The strength of the motion will be a significant factor in the decision to pursue the writ. Should the matter go to trial and the judgment be against the party who brought the motion, that party will still get the opportunity of reviewing the ruling on the motion if and when the appeal is taken.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentAppellate ReviewAppealability



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## VII. OBTAINING APPELLATE REVIEW WHEN SUMMARY JUDGMENT OR SUMMARY ADJUDICATION IS DENIED

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### 38.54 Losing Party May Seek Review of Denial of Summary Judgment or Adjudication by Petition for Peremptory Writ.

**38.54[1] Petition for Peremptory Writ Is Appropriate Means of Obtaining Review.** On entry of any order pursuant to *CCP* § 437c except the entry of summary judgment, a party may petition the appropriate reviewing court for a peremptory writ [*CCP* § 437c(m)(1); *West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 CA4th 935, 946, 98 CR2d 612 ].

**38.54[2] Standard of Review.** The standard of review on a peremptory writ is the same as that applicable on appeal [ *Parsons Mfg. Corp. v. Superior Court* (1984) 156 CA3d 1151, 1156-1157, 203 CR 419 ].



#### Cross References:

Discussion of standard of review, see 38.50, 38.51.

Discussion of review of summary proceedings by peremptory writ, see *California Forms of Pleading and Practice*, § 537.44 (Matthew Bender).

**38.54[3] Appellate Court May Compel Trial Court to Grant Motion.** The appellate court may compel the trial court to issue an order granting a summary judgment or adjudication motion, if it determines that such an order is proper [ *Reader's Digest Assn. v. Superior Court* (1984) 37 C3d 244, 250 n2, 208 CR 137, 690 P2d 610 , *cert. denied*, 478 US 1009 (1986) ]. In accordance with *CCP* § 1086, it is proper to grant the writ if there is no other adequate remedy, the petitioner may suffer irreparable harm, and the matter is of widespread interest [ *Starbucks Corp. v. Superior Court*, (2008) 168 CA4th 1436, 1453, 86 CR3d 482 (writ granted in class action)].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentAppellate ReviewAppealability



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## VII. OBTAINING APPELLATE REVIEW WHEN SUMMARY JUDGMENT OR SUMMARY ADJUDICATION IS DENIED

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.55*

### **38.55 Petition Must Be Filed Within Statutory Time Limits.**

**38.55[1] Time Limitations Begin After Written Service of Notice of Entry of Order.** The time period for filing the petition is triggered by service of notice of entry of the order denying summary judgment [*CCP* § 437c(m)(1)]. The following methods constitute sufficient service:

- Service by the prevailing party of a copy of the notice of entry of the trial court's order on counsel for the adverse party, or on the party, if the party has no attorney [*CCP* §§ 1015, 1019.5(a)]; or
- Mailing of a copy of the court's minute order by the court clerk [ *Schmidt v. Superior Court* (1989) 207 CA3d 56, 60, 254 CR 827 (decided under prior law, that provided for 10-day, instead of 20-day initial notice period)].

Service by the clerk of an unfiled copy of the order, or any order that does not indicate that it has been entered will not constitute adequate notice so as to trigger the period for petitioning for the writ [see *Eldridge v. Superior Court* (1989) 208 CA3d 1350, 1355, 256 CR 724 ].

**38.55[2] Petition Must Be Filed Within 20 Days of Personal Service, or as Extended, If Notice Is Not Personally Served.** A party must petition for a peremptory writ within 20 days of personal service of notice of entry of a summary proceeding order [*CCP* § 437c(m)(1)].

If the notice of order has not been made by personal service, the following time extensions apply [*CCP* § 437c(m)(1)]:

- If service is made by mail, the initial period within which to file the petition is increased by:
  - ☐ Five days, if the place of address is within the State of California.
  - ☐ 10 days if the place of address is outside the State of California, but within the United States.

☐ 20 days if the place of address is outside the United States.

● If notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the initial period within which to file the petition is increased by two court days.

**38.55[3] For Good Cause, Superior Court May Extend Time by 10 Days.** Prior to the expiration of the initial time period, the superior court may, for good cause, extend the time for one additional period not to exceed 10 days [CCP § 437c(m)(1); *Schmidt v. Superior Court* (1989) 207 CA3d 56, 61, 254 CR 827 ].



**Warning--Limitation Period Mandatory and Jurisdictional:**

The limitation period of CCP § 437c(m)(1) is mandatory and jurisdictional [ *Eldridge v. Superior Court* (1989) 208 CA3d 1350, 1352, 256 CR 724 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureSummary JudgmentAppellate ReviewAppealability



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Chapter 38 Summary Judgment

VIII. FORMS

A. Moving for Summary Judgment or Adjudication

3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.56

### 38.56 Notice of Motion and Motion for Summary Judgment.

Notice of Motion and Motion for Summary Judgment  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name]  
Defendant

)  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION BY  
) \_\_\_\_\_ [identify party, e.g., Plaintiff  
) John Smith] FOR \_\_\_\_\_  
) [SUMMARY JUDGMENT or SUMMARY JUDG-  
) MENT OR ALTERNATIVELY, FOR SUMMARY  
) ADJUDICATION] [, SEPARATE STATEMENT OF  
) UNDISPUTED FACTS, SUPPORTING MEMOR-  
) ANDUM, (AND) SUPPORTING EVIDENCE (AND  
) REQUEST FOR JUDICIAL NOTICE])  
Date: \_\_\_\_\_  
Time: \_\_\_\_\_  
Location: \_\_\_\_\_  
Judge: \_\_\_\_\_  
Date Action Filed: \_\_\_\_\_  
Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [identify party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon

thereafter as the matter may be heard, in [\_\_\_\_\_] (Department or Division) of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [specify party, e.g., Plaintiff John Smith] will, and hereby does, move for an order that judgment be entered in favor of \_\_\_\_\_ [specify party, e.g., Plaintiff John Smith] and against \_\_\_\_\_ [specify party, e.g., Defendant Mary Jones] as prayed for in \_\_\_\_\_ [specify pleading, e.g., plaintiff's First Amended Complaint]. The motion is made on the grounds that \_\_\_\_\_ [there is no defense to the action or the action has no merit], there is no triable issue of material fact and \_\_\_\_\_ [specify moving party, e.g. Plaintiff John Smith] is entitled to judgment as a matter of law. [In the alternative, \_\_\_\_\_ (specify moving party, e.g., Plaintiff John Smith) will, and hereby does, move for an order granting summary adjudication in favor of \_\_\_\_\_ (specify moving party, e.g., Plaintiff John Smith) and against \_\_\_\_\_ (specify opposing party, e.g. Defendant Mary Jones), as to \_\_\_\_\_ (specifically state cause of action, affirmative defense, claim for punitive damages or issue of duty, e.g., plaintiff's First Cause of Action and defendant's First and Second Affirmative Defenses to the First Cause of Action). The alternative motion is made on the grounds that \_\_\_\_\_ (specify, e.g., as to plaintiff's First Cause of Action, there is no defense thereto; as to defendant's First and Second Affirmative Defenses to the First Cause of Action of the Complaint, there is no merit.]

The motion [and alternative motion] is/are based on this notice of motion, the attached declaration(s) of \_\_\_\_\_ [name(s)], [the affidavit(s) of \_\_\_\_\_ (name(s)),] [the admission(s) of \_\_\_\_\_ (names(s)),] [the deposition(s) of \_\_\_\_\_ (name(s))] [the answers to interrogatories by \_\_\_\_\_ (name(s)),] [the attached request for judicial notice], the attached separate statement of undisputed material facts, the attached supporting memorandum, the papers, records, and file herein, and such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [party's status and name e.g., Plaintiff John Smith]

[ADD request for judicial notice]

[ADD separate statement of undisputed material facts]

[ADD supporting memorandum]

NOTES.

**Authority:**

CCP § 437c

**Grounds for Motion:**

See 38.05



**Timing:**

See 38.13

**Drafting Notice of Motion:**

See 38.14

**Related Forms of Memoranda:**

See *California Points and Authorities*, § 221.20 et seq. (Matthew Bender)





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A. Moving for Summary Judgment or Adjudication

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**38.57 Notice of Motion and Motion for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty.**

Notice of Motion and Motion for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name]  
Defendant

)  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION BY  
) \_\_\_\_\_ [identify party, e.g., Defendant  
) ant Mary Jones] FOR SUMMARY ADJUDICATION  
) [, SEPARATE STATEMENT OF UNDISPUTED  
) FACTS, SUPPORTING MEMORANDUM, (AND)  
) SUPPORTING EVIDENCE (AND REQUEST FOR  
) JUDICIAL NOTICE)]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [identify party, e.g., Plaintiff John Smith and to his/her attorney of record]:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon

thereafter as the matter may be heard, in [\_\_\_\_\_] (Department or Division) of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_, [identify party, e.g., Defendant Mary Jones] will, and hereby does, move for an order granting summary adjudication in favor of \_\_\_\_\_ [specify moving party, e.g., Defendant Mary Jones] and against \_\_\_\_\_ [specify opposing party, e.g., Plaintiff John Smith] with respect to \_\_\_\_\_ [specifically state cause of action, affirmative defense, claim for punitive damages, or issue of whether one or more defendants owed a duty to one or more plaintiffs, e.g., the First and Fifth Causes of Action of plaintiff's First Amended Complaint, the claim for punitive damages set out in the Second Cause of Action of plaintiff's First Amended Complaint]. The motion is made on the grounds that \_\_\_\_\_ [specify, e.g., there is no merit to the First and Fifth Causes of Action of plaintiff's First Amended Complaint and no merit to the claim for punitive damages set out in the Second Cause of Action of plaintiff's First Amended Complaint.]

The motion is based on this notice of motion, the attached declaration(s) of \_\_\_\_\_ [name(s)], [the affidavit(s) of \_\_\_\_\_ (name(s)),] [the admission(s) of \_\_\_\_\_ (name(s))], [the deposition(s) of \_\_\_\_\_ (name(s))], [the attached request for judicial notice], the attached separate statement of undisputed material facts, the attached supporting memorandum, the papers, records, and file herein, and such evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [specify moving party, e.g., Plaintiff John Smith]

[ADD request for judicial notice]

[ADD separate statement of undisputed material facts]

[ADD supporting memorandum]

NOTES.

**Authority:**

CCP § 437c

**Grounds for Motion:**

See 38.10



**Timing:**

See 38.13

**Drafting Notice of Motion:**

See 38.14

**Related Forms of Memoranda:**

See *California Points and Authorities*, §§ 221.21, 221.31 (Matthew Bender)



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A. Moving for Summary Judgment or Adjudication

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.58*

**38.58 Cover Sheet for Evidence Supporting Motion for Summary Judgment or Adjudication.**

Cover Sheet for Evidence Supporting Motion for Summary Judgment or Adjudication

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs. \_\_\_\_\_ [name]  
Defendant

)  
) NO. \_\_\_\_\_  
) EVIDENCE IN SUPPORT OF  
) \_\_\_\_\_ [moving party's]  
) MOTION FOR \_\_\_\_\_  
) [SUMMARY JUDGMENT *or* SUMMARY ADJU-  
) DICATION *or* SUMMARY JUDGMENT OR IN  
) THE ALTERNATIVE SUMMARY ADJUDICA-  
) TION]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
Date Action Filed: \_\_\_\_\_  
Trial Date: \_\_\_\_\_

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NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1350(c)(4), (g)*

**Drafting Cover Sheet:**

*See 38.15[5]*



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VIII. FORMS

A. Moving for Summary Judgment or Adjudication

3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.59

**38.59 Declaration in Support of Motion for Summary Judgment or Summary Adjudication.**

Declaration in Support of Motion for Summary Judgment or Summary Adjudication

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],

Plaintiff,

vs.

\_\_\_\_\_[name]

Defendant

)

)

NO. \_\_\_\_\_

)

DECLARATION OF \_\_\_\_\_ [name]

)

IN SUPPORT OF MOTION FOR SUMMARY

)

\_\_\_\_\_ [JUDGMENT or ADJUDIC-

)

ATION or JUDGMENT OR SUMMARY ADJU-

)

DICATION]

)

Date: \_\_\_\_\_

)

Time: \_\_\_\_\_

)

Location: \_\_\_\_\_

Judge: \_\_\_\_\_

Date Action Filed: \_\_\_\_\_

Trial Date: \_\_\_\_\_

I, \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [identify declarant, e.g., the plaintiff in the above-entitled action or other statement as appropriate].

2. \_\_\_\_\_ [Here and in subsequent paragraphs state evidentiary facts with particularity, to establish in whole or in part each element necessary to support an order for summary judgment and/or summary adjudication, as

*desired*].

3. \_\_\_\_\_ *[If not already established by the foregoing evidentiary facts, state additional evidentiary facts to establish, with particularity, that the declarant has personal knowledge of the foregoing facts and is competent to testify to such facts under oath.]*

[4. I have personal knowledge of the foregoing facts, and if called as a witness can and will competently testify to them under oath.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_

\_\_\_\_\_ *[signature]*

\_\_\_\_\_ *[typed name]*

NOTES.

**Authority:**

*CCP § 437c(b)*

**Sufficiency Requirements:**

*See 38.15[1]*

**Sanctions for Bad-Faith Affidavit or Declaration:**

*See 38.27; 38.41. See Form 38.71*



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VIII. FORMS

A. Moving for Summary Judgment or Adjudication

3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.60

### 38.60 Statement of Undisputed Material Facts Supporting Motion for Summary Judgment.

Statement of Undisputed Material Facts Supporting Motion for Summary Judgment

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name]

Defendant

)

)

)

)

)

)

)

)

)

)

NO. \_\_\_\_\_ SEPARATE STATE-  
MENT OF UNDISPUTED MATERIAL FACTS IN  
SUPPORT OF \_\_\_\_\_'s [moving  
party] MOTION FOR SUMMARY

\_\_\_\_\_ [JUDGMENT or JUDG-  
MENT OR SUMMARY ADJUDICATION]

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Location: \_\_\_\_\_

Judge: \_\_\_\_\_

Date Action Filed: \_\_\_\_\_

Trial Date: \_\_\_\_\_

\_\_\_\_\_ [Identify moving party, e.g., Plaintiff John Smith] in the above-entitled \_\_\_\_\_  
[action or proceeding] submits the following undisputed material facts pursuant to *Code of Civil Procedure Section 437c(b)* in support of plaintiff's motion for \_\_\_\_\_ [summary judgment or summary judgment or in the  
alternative summary adjudication with respect to \_\_\_\_\_ (specifically state cause of action, affirmative  
defense, claim for damages, or issue of duty verbatim as stated in notice of motion)].

[If the motion involves more than one cause of action or affirmative defense, organize the material facts into sections



accordingly, identifying the source of each section, e.g.:]

1. As to the First Cause of Action, alleged in plaintiff's First Amended Complaint and denied by defendant's Amended Answer thereto:

|                                                                   |                                                    |
|-------------------------------------------------------------------|----------------------------------------------------|
| Moving Party's Undisputed Material Facts and Supporting Evidence: | Opposing Party's Response and Supporting Evidence: |
|-------------------------------------------------------------------|----------------------------------------------------|

1. \_\_\_\_\_ [Set forth plainly and concisely each material fact contended to be undisputed, separately numbered, e.g., Plaintiff Smith and Defendant Jones reached an agreement whereby Jones would construct a house for Smith in exchange for Smith's payment of \$130,000.]. \_\_\_\_\_ [Refer to the evidence submitted in support of the motion that supports the contention that such fact is undisputed, e.g., Defendant Jones' answer at 2:3-4; Smith declaration, 2:1-13; contract, Ex. A to Smith declaration.].

2. [Set forth additional facts, e.g., The contract called for Jones to complete construction of the house by March 11, 2001.].

\_\_\_\_\_ [Refer to evidence supporting additional undisputed fact, e.g., Contract, Ex. A to Smith declaration.].

3. \_\_\_\_\_ [Set forth additional facts, e.g., On December 15, 2000, prior to completion of the house's exterior framing, Jones stopped all construction on the house.].

\_\_\_\_\_ [Refer to evidence supporting additional undisputed fact, e.g., Smith declaration, 3:1-15; Jones deposition, 31:4-14.].

4. \_\_\_\_\_ [Set forth additional facts, e.g., Smith has paid Jones the \$25,000 retainer required by the contract and a total of \$30,000 in progress payments.].

\_\_\_\_\_ [Refer to evidence supporting additional undisputed fact, e.g., Smith declaration, 3:21-25; Jones' response to Smith's request for admission no.

\_\_\_\_\_, Ex. B(1).].

5. \_\_\_\_\_ [Set forth additional facts, e.g., On March 25, 2003, Smith hired a new contractor, Joe Contractor, to complete construction of the home at a cost of \$110,000.]. \_\_\_\_\_ [Refer to evidence supporting additional undisputed fact, e.g., Smith declaration, 4:11-17; Contract, Ex.

A to Smith declaration; Joe Contractor declaration, 1:20-2:6.].

6. \_\_\_\_\_ [*Set forth additional facts, e.g., The final cost of construction was \$35,000 more than specified in the Smith-Jones contract.*]. \_\_\_\_\_ [*Refer to evidence supporting additional undisputed fact, e.g., Smith declaration, 4:19-21.*].

7. [*Set forth any additional facts contended to be undisputed in this and succeeding numbered paragraphs.*]. \_\_\_\_\_ [*Refer to evidence supporting additional undisputed facts.*].

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [name/title]

NOTES.

**Authority:**

CCP § 437c(b)(1); Cal Rules Ct, Rule 3.1350(c), (d), (h), (i)

**Format of Statement:**

See 38.16

**Related Form of Statement:**

38.68



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A. Moving for Summary Judgment or Adjudication

3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.61

### 38.61 Statement of Undisputed Material Facts Supporting Motion for Summary Adjudication.

Statement of Undisputed Material Facts Supporting Motion for Summary Adjudication  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                      |
|---------------|---|--------------------------------------|
| _____ [name], | ) |                                      |
| Plaintiff,    | ) | NO. _____                            |
| vs.           | ) | SEPARATE STATEMENT OF UNDISPUTED MA- |
| _____ [name]  | ) | TERIAL FACTS IN SUPPORT OF           |
| Defendant     | ) | _____ 's [moving party] MOTION       |
|               | ) | FOR SUMMARY ADJUDICATION             |
|               | ) | Date: _____                          |
|               | ) | Time: _____                          |
|               | ) | Location: _____                      |
|               | ) | Judge: _____                         |
|               |   | Date Action Filed: _____             |
|               |   | Trial Date: _____                    |

\_\_\_\_\_ [Identify moving party, e.g., Defendant Mary Jones] in the above-entitled  
\_\_\_\_\_ [action or proceeding] submits the following undisputed material facts pursuant to *Code of Civil Procedure Section 437c(b)* in support of defendant's motion for \_\_\_\_\_ [summary adjudication with respect to \_\_\_\_\_ (specifically state cause of action, affirmative defense, claim for damages, or issue of duty verbatim as stated in notice of motion)].

[Specify cause of action, claim for damages, or issue of duty that is subject of motion, e.g.:]

**ISSUE 1--THE FIRST CAUSE OF ACTION FOR NEGLIGENCE IS BARRED BECAUSE PLAINTIFF EXPRESSLY ASSUMED THE RISK OF INJURY**

Moving Party's Undisputed Material Facts and Supporting Evidence:

Opposing Party's Response and Supporting Evidence:

1. \_\_\_\_\_ [Set forth plainly and concisely each material fact contended to be undisputed, separately numbered, e.g., Plaintiff was injured while mountain climbing with Any Company USA.]. \_\_\_\_\_  
[Refer to the evidence submitted in support of the motion that supports the contention that such fact is undisputed, e.g., Plaintiff's deposition, 12:3-4.].

2. \_\_\_\_\_ [Set forth additional facts, separately numbered, e.g., Before leaving on the mountain climbing trip, plaintiff signed a waiver of liability for acts of negligence.].

\_\_\_\_\_ [Refer to evidence supporting additional undisputed fact, e.g., Jones declaration, 5:4-5; Waiver of liability in Ex. A to Jones declaration.].

[3. Set forth any additional material facts contended to be undisputed in this and succeeding numbered paragraphs].

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [specify moving party, e.g., Defendant Mary Jones]

NOTES.

**Authority:**

CCP § 437c(b)(1); Cal Rules Ct, Rule 3.1350(c), (d), (h), (i)

**Format of Statement:**

See 38.16

**Related Form of Statement:**

See 38.69



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VIII. FORMS

A. Moving for Summary Judgment or Adjudication

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### 38.62 Order Granting Motion for Summary Judgment.

Order Granting Motion for Summary Judgment  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                            |
|---------------|---|--------------------------------------------|
| _____ [name], | ) |                                            |
| Plaintiff,    | ) | NO. _____                                  |
| vs.           | ) | ORDER GRANTING _____'s                     |
| _____ [name]  | ) | [moving party, e.g., Plaintiff John Smith] |
| Defendant     | ) | MOTION FOR SUMMARY JUDGMENT                |
|               | ) |                                            |
|               | ) |                                            |

The motion(s) of \_\_\_\_\_ [specify prevailing party e.g., Plaintiff John Smith] [and  
\_\_\_\_\_ (specify opposing party making cross-motion, e.g., Defendant Mary Jones)] for summary  
judgment was/were heard by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel  
\_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

Having considered all the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, except that to which objection was sustained, the Court determines that there is no triable issue as to any material fact and that \_\_\_\_\_ (specify prevailing party, e.g., Plaintiff John Smith) is entitled to judgment as a matter of law, for the following reasons:

1. \_\_\_\_\_ [Plaintiff or Defendant], in support of his/her/its motion, proffered evidence that \_\_\_\_\_ [established each element necessary to sustain judgment in his/her/its favor or (refuted a necessary element of plaintiff's cause of action and/or established an affirmative defense to plaintiff's cause of action)]

as follows: \_\_\_\_\_ [specify material facts claimed by moving party with reference to their location in the supporting papers].

2. \_\_\_\_\_ [Plaintiff or Defendant], in opposition to \_\_\_\_\_ [defendant's or plaintiff's] motion, \_\_\_\_\_ [proffered no evidence or preferred evidence as follows: \_\_\_\_\_ (specify facts claimed by opposing party with reference to their location in the opposing papers)]. [This evidence proffered in opposition to \_\_\_\_\_ (defendant's or plaintiff's) motion, is not sufficient to raise a triable issue of fact in that \_\_\_\_\_ (specify, e.g., it constitutes inadmissible hearsay, to which objection at the hearing was duly made and sustained).]

[ADD, if the court is also denying the opposing party's cross-motion(s) for summary judgment and/or adjudication]

The Court further determines that the cross-motion of \_\_\_\_\_ [specify opposing party making cross-motion, e.g., defendant Mary Jones] for an order granting \_\_\_\_\_ [summary judgment and/or summary adjudication] should be denied for the following reasons: \_\_\_\_\_ [state reasons for denial as required under CCP § 437c(g); for examples of reasons, see the form in 38.70].

[The Court further determines that the \_\_\_\_\_ (declaration(s) and/or affidavit(s)) of \_\_\_\_\_ (name(s)) presented by \_\_\_\_\_ (specify opposing party, e.g., defendant) was/were presented \_\_\_\_\_ (in bad faith and/or solely for the purpose of delay).]

Accordingly,

IT IS ORDERED that the motion of \_\_\_\_\_ [specify prevailing party, e.g., Plaintiff John Smith] for summary judgment be, and hereby is, granted and that judgment be entered providing that \_\_\_\_\_ [specify prevailing party, e.g., Plaintiff John Smith] \_\_\_\_\_ [specify judgment, e.g., recover from Defendant the sum of \$100,000 with interest thereon at the legal rate from and after August 10, 2003, and his/her costs in the sum of \$2700].

[ADD, if the court is also denying an alternative motion for summary adjudication by the prevailing party, and/or is denying the opposing party's cross-motion(s) for summary judgment and/or adjudication]

IT IS FURTHER ORDERED that \_\_\_\_\_ [the alternative motion of \_\_\_\_\_ (specify moving party, e.g., plaintiff John Smith) for an order granting summary adjudication and/or the cross-motion of \_\_\_\_\_ (specify opposing party making cross-motion, e.g., defendant Mary Jones) for an order granting \_\_\_\_\_ (summary judgment and/or summary adjudication)] be, and hereby is, denied.

[IT IS FURTHER ORDERED that \_\_\_\_\_ (specify opposing party, e.g., defendant Mary Jones) pay \_\_\_\_\_ (specify moving party, e.g., plaintiff John Smith) the sum of \$\_\_\_\_\_ as the amount of reasonable expenses incurred by \_\_\_\_\_ (specify moving party, e.g., plaintiff John Smith) as a result of the filing of the \_\_\_\_\_ (declaration(s) and/or affidavit(s)) referred to above.]

Dated: \_\_\_\_\_

\_\_\_\_\_  
[signature]  
Judge of the Superior Court

NOTES.

**Authority:**

*CCP § 437c*

**Drafting Order:**

*See 38.42, 38.43*

**Related Form of Order:**

*See 38.63, 38.64, 38.70*



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A. Moving for Summary Judgment or Adjudication

3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.63

### 38.63 Order Granting Motion for Summary Judgment and Judgment.

Order Granting Motion for Summary Judgment and Judgment  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                                   |
|---------------|---|---------------------------------------------------|
| _____ [name], | ) |                                                   |
| Plaintiff,    | ) | NO. _____                                         |
| vs.           | ) | ORDER GRANTING _____'s                            |
| _____ [name]  | ) | [moving party, e.g., Plaintiff John Smith] MOTION |
| Defendant     | ) | FOR SUMMARY JUDGMENT AND JUDGMENT                 |
|               | ) | Date: _____                                       |
|               | ) | Time: _____                                       |
|               | ) | Location: _____                                   |
|               | ) | Judge: _____                                      |
|               | ) | Date Action Filed: _____                          |
|               | ) | Trial Date: _____                                 |

The motion(s) of \_\_\_\_\_ [specify prevailing party e.g., Plaintiff John Smith] [and  
\_\_\_\_\_ (specify opposing party making cross-motion, e.g., Defendant Mary Jones)] for summary  
judgment was/were heard by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel  
\_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

Having considered all the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, except that to which objection was sustained, the Court determines that there is no triable issue as to any material fact and that \_\_\_\_\_ (specify prevailing party, e.g., Plaintiff John Smith) is entitled to judgment as a matter of law, for the following reasons:



1. \_\_\_\_\_ [Plaintiff or Defendant], in support of his/her/its motion, proffered evidence that \_\_\_\_\_ [established each element necessary to sustain judgment in his/her/its favor or (refuted a necessary element of plaintiff's cause of action and/or established an affirmative defense to plaintiff's cause of action)] as follows: \_\_\_\_\_ [specify material facts claimed by moving party with reference to their location in the supporting papers].

2. \_\_\_\_\_ [Plaintiff or Defendant], in opposition to \_\_\_\_\_ [defendant's or plaintiff's] motion, \_\_\_\_\_ [proffered no evidence or proffered evidence as follows: \_\_\_\_\_ (specify facts claimed by opposing party with reference to their location in the opposing papers)]. [This evidence proffered in opposition to \_\_\_\_\_ (defendant's or plaintiff's) motion, is not sufficient to raise a triable issue of fact in that \_\_\_\_\_ (specify, e.g., it constitutes inadmissible hearsay, to which objection at the hearing was duly made and sustained).]

[ADD, if the court is also denying the opposing party's cross-motion(s) for summary judgment and/or adjudication]

The Court further determines that the cross-motion of \_\_\_\_\_ [specify opposing party making cross-motion, e.g., defendant Mary Jones] for an order granting \_\_\_\_\_ [summary judgment and/or summary adjudication] should be denied for the following reasons: \_\_\_\_\_ [state reasons for denial as required under CCP § 437c(g); for examples of reasons, see the form in 38.70].

[The Court further determines that the \_\_\_\_\_ (declaration(s) and/or affidavit(s)) of \_\_\_\_\_ (name(s)) presented by \_\_\_\_\_ (specify opposing party, e.g., defendant Mary Jones) was/were presented \_\_\_\_\_ (in bad faith and/or solely for the purpose of delay).]

Accordingly,

[ADD, if the court is denying an alternative motion for summary adjudication by the prevailing party, and/or is denying the opposing party's cross-motion(s) for summary judgment and/or adjudication:]

IT IS ORDERED that \_\_\_\_\_ [the alternative motion of \_\_\_\_\_ (specify moving party, e.g., Plaintiff John Smith) for an order granting summary adjudication and/or the cross-motion of \_\_\_\_\_ (specifying opposing party making cross-motion, e.g., Defendant Mary Jones) for an order granting \_\_\_\_\_ (summary judgment and/or summary adjudication)] be, and hereby is, denied.

IT IS [FURTHER] ORDERED, ADJUDGED, AND DECREED the motion of \_\_\_\_\_ [specify prevailing party, e.g., Plaintiff John Smith] be, and hereby is, granted [and, further, that \_\_\_\_\_ (specify opposing party, e.g., Defendant Mary Jones) pay \_\_\_\_\_ (specify moving party, e.g., Plaintiff John Smith) the sum of \$ \_\_\_\_\_ as the amount of reasonable expenses incurred by \_\_\_\_\_ (specify moving party, e.g., Plaintiff John Smith) as a result of the filing of the \_\_\_\_\_ (declarations(s) and/or affidavit(s)) referred to above.]

IT IS [FURTHER] ORDERED, ADJUDGED, AND DECREED that the motion of \_\_\_\_\_ [specify prevailing party, e.g., Plaintiff John Smith] be, and hereby is, granted [and, further that \_\_\_\_\_ (specify opposing party, e.g., Defendant Mary Jones) pay \_\_\_\_\_ (specify moving party, e.g., Plaintiff John Smith) the sum of \$ \_\_\_\_\_ as the amount of reasonable expenses incurred by \_\_\_\_\_ (specify moving party, e.g., Plaintiff John Smith) as a result of the filing of the hereinabove referred to (declaration(s)

*and/or* affidavit(s)]].

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*CCP § 437c*

**Drafting Order:**

*See 38.40, 38.43*

**Related Form of Order:**

*See 38.62, 38.64, 38.70*



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Chapter 38 Summary Judgment

VIII. FORMS

A. Moving for Summary Judgment or Adjudication

3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.64

**38.64 Order Granting Motion for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty.**

Order Granting Motion for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],

Plaintiff,

vs.

\_\_\_\_\_, [name]

Defendant

)  
)  
)  
)  
)  
)  
)

NO. \_\_\_\_\_  
ORDER

The motion(s) of \_\_\_\_\_ [specify moving party e.g., Plaintiff John Smith] for an order granting summary adjudication [and, alternatively, for an order granting summary judgment] [and the motion of \_\_\_\_\_ (specify opposing party making cross-motion, e.g., Defendant Mary Jones)] for summary judgment and/or summary adjudication) was/were heard by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

Having considered all the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, except that to which objection was sustained, the Court makes the following determinations for the reasons specified:

1. There is no triable issue as to any material fact and \_\_\_\_\_ [specify prevailing party, e.g., Plaintiff John Smith] is entitled as a matter of law to summary adjudication in his/her/its favor and

against \_\_\_\_\_ [*specify opposing party, e.g., Defendant Mary Jones*] on \_\_\_\_\_ [*specify first matter on which adjudication is granted, e.g., the First Cause of Action of plaintiff's First Amended Complaint*] for the following reasons:

a. \_\_\_\_\_ [Plaintiff or Defendant], in support of his/her/its motion for summary adjudication on this \_\_\_\_\_ [cause of action or affirmative defense or claim for punitive damages or issue of duty], proffered evidence that established each element of this \_\_\_\_\_ [cause of action or affirmative defense or claim for punitive damages or issue of duty] as follows:

\_\_\_\_\_ [*specify material facts claimed by the moving party with reference to their location in the supporting papers*].

b. \_\_\_\_\_ [Plaintiff or Defendant], in opposition to \_\_\_\_\_ [defendant's or plaintiff's] motion, \_\_\_\_\_ [proffered no evidence or proffered evidence as follows: \_\_\_\_\_ (*specify facts claimed by opposing party with reference to their location in the opposing papers*)]. [The foregoing evidence proffered in opposition to \_\_\_\_\_ [defendant's or plaintiff's] motion is not sufficient to raise a triable issue fact in that \_\_\_\_\_ (*specify, e.g., it constitutes inadmissible hearsay, to which objection at the hearing was duly made and sustained*)].

[2. Set out any additional matters on which summary adjudication is granted, if any in this and succeeding number paragraphs.]

[ADD, if the court is also denying summary adjudication of additional matters that were included in the prevailing party's motion, and/or is denying an alternative motion for summary judgment by the prevailing party, and/or is denying the opposing party's cross-motion(s) for summary judgment and/or adjudication]

The Court further determines that \_\_\_\_\_ [the motion of \_\_\_\_\_ (*specify moving party, e.g., Plaintiff John Smith*) for an order granting summary adjudication with respect to \_\_\_\_\_ (*specify additional matter included in the motion, e.g., the claim for punitive damages set out in the Fourth Cause of Action of plaintiff's First Amended Complaint*) and/or the alternative motion of \_\_\_\_\_ (*specify moving party e.g., Plaintiff John Smith*) for an order granting summary judgment and/or the cross-motion of \_\_\_\_\_ (*specify opposing party making cross-motion, e.g., Defendant Mary Jones*) for an order granting \_\_\_\_\_ (summary judgment or summary adjudication)] should be denied for the following reasons: \_\_\_\_\_ [*state reasons for denial as required under Code Civ. Proc. § 437c(g); for examples of reasons, see the form in 38.70*].

[The Court further determines that the \_\_\_\_\_ (declaration(s) and/or affidavit(s)) of \_\_\_\_\_ (name(s)) presented by \_\_\_\_\_ (*specify opposing party, e.g., Defendant Mary Jones*) was/were presented \_\_\_\_\_ (in bad faith and/or solely for the purpose of delay).]

Accordingly,

IT IS ORDERED that the motion for an order granting summary adjudication be, and hereby is, granted in favor of \_\_\_\_\_ [*specify moving party, e.g., Plaintiff John Smith*] and against \_\_\_\_\_ [*specify opposing party, e.g., Defendant Mary Jones*] with respect to \_\_\_\_\_ [*specify matter(s) on which summary adjudication is granted, e.g., the First and Firth Causes of Action of plaintiff's First Amended Complaint*], and that this adjudication will be carried into any final judgment subsequently entered in this \_\_\_\_\_ [action

or proceeding].

[ADD, if the court is also denying summary adjudication of additional matters that were included in the prevailing party's motion, and/or is denying an alternative motion for summary judgment by the prevailing party, and/or is denying the opposing party's cross-motion(s) for summary judgment and/or adjudication]

IT IS FURTHER ORDERED that \_\_\_\_\_ [the motion of \_\_\_\_\_ (specify moving party, e.g., Plaintiff John Smith)] for an order granting summary adjudication with respect to \_\_\_\_\_ (specify additional matter included in the motion, e.g., the claim for punitive damages set out in the Fourth Cause of Action of plaintiff's First Amended Complaint) and/or the alternative motion of \_\_\_\_\_ (specify moving party e.g., Plaintiff John Smith) for an order granting summary judgment and/or the cross-motion of \_\_\_\_\_ (specify opposing party making cross-motion, e.g., Defendant Mary Jones) for an order granting \_\_\_\_\_ (summary judgment and/or summary adjudication)] be, and hereby is, denied.

[IT IS FURTHER ORDERED that \_\_\_\_\_ (specify opposing party, e.g., Defendant Mary Jones) pay \_\_\_\_\_ (specify moving party, e.g., Plaintiff John Smith) the sum of \$ \_\_\_\_\_ (specify amount) as the amount of reasonable expenses incurred by \_\_\_\_\_ (specify moving party, e.g., Plaintiff John Smith) as a result of the filing of the \_\_\_\_\_ (declarations(s) and/or affidavit(s)) referred to above.]

Dated: \_\_\_\_\_

\_\_\_\_\_  
[signature]  
Judge of the Superior Court

NOTES.

**Authority:**

CCP § 437c(g)

**Drafting Order:**

See 38.40, 38.43

**Related Form of Order:**

See 38.62, 38.63, 38.70



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Chapter 38 Summary Judgment

VIII. FORMS

A. Moving for Summary Judgment or Adjudication

3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.65

### 38.65 Summary Judgment.

Summary Judgment

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                                    |
|---------------|---|----------------------------------------------------|
| _____ [name], | ) |                                                    |
| Plaintiff,    | ) |                                                    |
| vs.           | ) | NO. _____                                          |
| _____ [name]  | ) | ORDER GRANTING _____'s [spe-                       |
| Defendant     | ) | cify moving party, e.g., Plaintiff John Smith] FOR |
|               | ) | SUMMARY JUDGMENT AND JUDGMENT                      |
|               | ) |                                                    |

On \_\_\_\_\_ [date], the court granted the motion of \_\_\_\_\_ [specify moving party, e.g., Plaintiff John Smith] made under *Code of Civil Procedure Section 437c* on the ground that \_\_\_\_\_ [there is no defense to the action or the action has no merit] for an order that judgment be entered for [specifying moving party, e.g., Plaintiff John Smith] and against \_\_\_\_\_ [specify opposing party, e.g., Defendant Mary Jones]. In accordance with that order,

IT IS ORDERED, ADJUDGED, AND DECREED that \_\_\_\_\_ [specify judgment rendered, e.g., Plaintiff John Smith shall recover from Defendant Mary Jones the principal sum of \$100,000 plus interest thereon at the legal rate from and after August 10, 2003, and his/her costs in the sum of \$2700.]

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court [signature]

NOTES.

**Authority:**

*CCP § 437c*

**Drafting Judgment:**

*See 38.43*



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VIII. FORMS  
B. Opposing Summary Judgment or Adjudication

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**38.66 Cover Sheet for Evidence Opposing Motion for Summary Judgment or Adjudication.**

Cover Sheet for Evidence Opposing Motion for Summary Judgment or Adjudication  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name]  
Defendant

)  
) NO. \_\_\_\_\_  
) \_\_\_\_\_ [opposing party's] EVID-  
) ENCE IN OPPOSITION TO \_\_\_\_\_  
) [moving party's] MOTION FOR  
) \_\_\_\_\_ [SUMMARY JUDGMENT  
) or SUMMARY ADJUDICATION or SUMMARY  
) JUDGMENT OR IN THE ALTERNATIVE SUM-  
) MARY ADJUDICATION]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

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NOTES.

**Authority:**

*Cal Rules Ct, Rule 3.1350(e)(3), (g)*

**Drafting Cover Sheet:**

See 38.23[7]



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3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.67

**38.67 Declaration in Opposition to Motion for Summary Judgment or Summary Adjudication.**

Declaration in Opposition to Motion for Summary Judgment or Summary Adjudication  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                     |
|---------------|---|-------------------------------------|
| _____ [name], | ) |                                     |
| Plaintiff,    | ) | NO. _____                           |
| vs.           | ) | DECLARATION OF _____ [name]         |
| _____ [name]  | ) | IN OPPOSITION TO MOTION FOR SUMMARY |
| Defendant     | ) | _____ [JUDGMENT or ADJUDIC-         |
|               | ) | ATION or JUDGMENT OR SUMMARY ADJU-  |
|               | ) | DICATION]                           |
|               | ) | Date: _____                         |
|               | ) | Time: _____                         |
|               | ) | Location: _____                     |
|               | ) | Judge: _____                        |
|               | ) | Date Action Filed: _____            |
|               | ) | Trial Date: _____                   |

I, \_\_\_\_\_ [name], declare:

1. I am \_\_\_\_\_ [identify declarant, e.g., the defendant in the above-entitled action or other statement as appropriate].

2. \_\_\_\_\_ [Here and in subsequent paragraphs state evidentiary facts with particularity, to show either triable issue of material fact or triable controversy as to specified issues which would justify denial of motion for

*summary judgment or summary adjudication, respectively*].

3. \_\_\_\_\_ *[If not already established by the foregoing evidentiary facts, state additional evidentiary facts to establish, with particularity, that the declarant has personal knowledge of the foregoing facts and is competent to testify to such facts under oath.]*

[4. I have personal knowledge of the foregoing facts, and if called as a witness can and will competently testify to them under oath.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_

\_\_\_\_\_ *[signature]*

\_\_\_\_\_ *[typed name]*

NOTES.

**Authority:**

*CCP § 437c*

**Sufficiency Requirements:**

*See 38.23[5]*

**Sanctions for Bad-Faith Affidavit or Declaration:**

*See 38.34, 38.41. See Form 38.71*



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3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.68

**38.68 Statement of Disputed and/or Undisputed Material Facts Opposing Motion for Summary Judgment.**

Statement of Disputed and/or Undisputed Material Facts Opposing Motion for Summary Judgment  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],  
Plaintiff,  
vs.  
\_\_\_\_\_[name]  
Defendant

)  
) NO. \_\_\_\_\_  
) \_\_\_\_\_'s [opposing party] SEPAR-  
) ATE STATEMENT OF UNDISPUTED MATERIAL  
) FACTS IN OPPOSITION TO  
) \_\_\_\_\_'s [moving party] MOTION  
) FOR SUMMARY \_\_\_\_\_  
) [JUDGMENT or JUDGMENT OR SUMMARY AD-  
) JUDICATION]  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

\_\_\_\_\_[Identify opposing party, e.g., Defendant Mary Jones] in the above-entitled  
\_\_\_\_\_[action or proceeding] submits this separate statement in opposition to the separate statement of  
undisputed material facts of \_\_\_\_\_[identify moving party, e.g., Plaintiff John Smith] pursuant to *Code  
of Civil Procedure Section 437c(b)*:

*[Respond separately to each material fact that the moving party contends to be undisputed, indicating agreement or disagreement with contention as to undisputed nature of each fact, and indicating ground for any disagreement, as in the following example]*

Undisputed Material Facts and Alleged Response and Evidence:

Supporting Evidence:

1. \_\_\_\_\_ *[Set forth verbatim and in same order each material fact said by moving party to be without substantial controversy and the alleged supporting evidence, e.g., Plaintiff Smith and defendant Jones reached an agreement whereby Jones would construct a house for Smith in exchange for Smith's payment of \$130,000. Jones answer at 2:3-4; Smith declaration, 2:1-13; contract, Ex. A to Smith declaration].*

\_\_\_\_\_ *[Respond opposite the opposing party's contention; if disputed, state nature of dispute and admissible evidence that supports position that fact is controverted, e.g., Undisputed].*

2. \_\_\_\_\_ *[Set forth additional facts, e.g., The contract called for Jones to complete construction of the house by March 11, 2001. Contract, Ex. A, Jones declaration].*

\_\_\_\_\_ *[Respond opposite the opposing party's contention; if disputed, state nature of dispute and admissible evidence that supports position that fact is controverted, e.g., Undisputed].*

3. \_\_\_\_\_ *[Set forth additional facts and evidence, e.g., On December 15, 2000, prior to completion of the house's exterior framing, Jones stopped all construction on the house. Smith declaration, 3:1-15. Jones deposition, 31:4-14].*

\_\_\_\_\_ *[Respond opposite the opposing party's contention; if disputed, state nature of dispute and admissible position that supports position that fact is controverted, e.g., Disputed. Plaintiff's evidence was taken out of context. Later portions of the Jones deposition show that Jones began to complete the exterior framing on December 18, but was instructed by Smith to leave the property and not return. Deposition of Jones, Ex. 2(a) at 31:15-27, 32:1-15].*

*[4. Set out any additional responses to moving party's facts in this and successively numbered paragraphs in the same two column format.]*

*[ADD if raising additional issues]*

\_\_\_\_\_ *[Identify opposing party, e.g., Defendant Mary Jones] also contends that the following material fact(s) is/are disputed:*

1. \_\_\_\_\_ *[Set forth plainly and concisely additional material facts not mentioned by moving party, if any, that opposing party contends are disputed].*

\_\_\_\_\_ *[Refer to admissible evidence that shows existence of triable dispute regarding that fact].*

[2. Set forth any additional disputed facts in this and succeeding numbered paragraphs.]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [name/title]

NOTES.

**Authority:**

*CCP § 437c(b)(3); Cal Rules Ct, Rule 3.1350(c), (d), (h), (i)*

**Format of Statement:**

*See 38.24*

**Related Form of Statement:**

*See 38.60*



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**38.69 Statement of Disputed and/or Undisputed Material Facts Opposing Motion for Summary Adjudication.**

Statement of Disputed and/or Undisputed Material Facts Opposing Motion for Summary Adjudication  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |                                      |
|---------------|---|--------------------------------------|
| _____ [name], | ) |                                      |
| Plaintiff,    | ) | NO. _____                            |
| vs.           | ) | _____ 's [opposing party] SEPAR-     |
| _____ [name]  | ) | ATE STATEMENT OF UNDISPUTED MATERIAL |
| Defendant     | ) | FACTS IN OPPOSITION TO               |
|               | ) | _____ 's [moving party] MOTION       |
|               | ) | FOR SUMMARY ADJUDICATION             |
|               | ) | Date: _____                          |
|               | ) | Time: _____                          |
|               | ) | Location: _____                      |
|               | ) | Judge: _____                         |
|               | ) | Date Action Filed: _____             |
|               | ) | Trial Date: _____                    |

\_\_\_\_\_ [Identify opposing party, e.g., Plaintiff John Smith] in the above-entitled  
\_\_\_\_\_ [action or proceeding] submits this separate statement in opposition to the separate statement of  
undisputed material facts of \_\_\_\_\_ [identify moving party, e.g., Defendant Mary Jones] pursuant to  
Code of Civil Procedure Section 437c(b):

[Respond separately to each material fact that the moving party contends to be undisputed, indicating agreement or  
disagreement with contention as to undisputed nature of each fact, and indicating ground for any disagreement, as in

*the following example]*

*[Specify cause of action, defense, claim for damages, or issue of duty that is subject of motion, e.g.:]*

**ISSUE 1--THE FIRST CAUSE OF ACTION FOR NEGLIGENCE IS BARRED BECAUSE PLAINTIFF EXPRESSLY ASSUMED THE RISK OF INJURY**

Undisputed Material Facts and Alleged Response and Evidence:

Supporting Evidence:

1. \_\_\_\_\_ *[Set forth verbatim and in the same order each material fact said by moving party to be without substantial controversy and the alleged supporting evidence, e.g., Plaintiff was injured while mountain climbing on a trip with Any Company USA. Plaintiff's deposition, 12:3-4].*

\_\_\_\_\_ *[Respond opposite the opposing party's contention; if disputed, state nature of dispute and admissible evidence that supports position that fact is controverted, e.g., Undisputed]*

2. \_\_\_\_\_ *[Set forth additional facts and evidence, e.g., Before leaving on the mountain climbing trip, plaintiff signed a complete waiver of liability. Jones Declaration, 5:4-5; waiver of liability, Ex. A to Jones declaration].*

\_\_\_\_\_ *[Respond opposite the opposing party's contention; if disputed, state nature of dispute and admissible evidence that supports position that fact is. controverted, e.g., Disputed. Plaintiff did not sign waiver of liability; his signature on the waiver is forged. Smith declaration, 3:6-7].*

*[3. Set out any additional responses to moving party's facts in this and successively numbered paragraphs in the same two column format.]*

*[ADD if raising additional issues]*

\_\_\_\_\_ *[Identify opposing party, e.g., Plaintiff John Smith] also contends that the following material fact(s) is/are disputed:*

1. \_\_\_\_\_ *Set forth plainly \_\_\_\_\_ [refer to and concisely additional material facts admissible evidence that shows not mentioned by moving party, if any, that existence of triable dispute opposing party contends are disputed regarding that fact].*

*[2. Set forth any additional disputed facts in this and succeeding numbered paragraphs].*

By: \_\_\_\_\_ *[signature]*

\_\_\_\_\_ *[name/title]*

NOTES.

**Authority:**

CCP § 437c(b)(3); Cal Rules Ct, Rule 3.1350(e), (f), (h), (i)



**Format of Statement:**

See *38.24*

**Related Form of Statement:**

See *38.61*



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*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.69A*

**38.69A Written Objections to Evidence on Motion for Summary Judgment or Summary Adjudication.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],  
Plaintiff,  
vs.  
\_\_\_\_\_[name]  
Defendant.

)  
) NO. \_\_\_\_\_  
) [Opposing/Moving]  
) Party's Objections to  
) [Moving/Opposing]  
) Party's Evidence  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Dept: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_  
)

**Objections to** \_\_\_\_\_ [State name of document citing evidence objected to, i.e., **Jackson Declaration**

[CHOOSE EITHER THIS FORMAT:]

**Objection Number 1**

"\_\_\_\_\_ [Quote or describe evidence objected to, i.e., Johnson told me that no widgets were ever received]." (\_\_\_\_\_ [State the exhibit, title, e.g., Jackson declaration], page[s] \_\_\_\_\_ [State page number of exhibit, i.e., 3], line[s] \_\_\_\_\_ [State line number of the material objected to, e.g., 7-8].)

**Grounds for Objection 1:** \_\_\_\_\_ [Identify ground(s) for objection and authority, e.g., Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a))].

**Objection Number 2** [Number subsequent objections consecutively]

"\_\_\_\_\_ [Quote or describe evidence objected to, i.e., A lot of people find widgets to be very useful]." (\_\_\_\_\_ [State the exhibit, title, e.g., Jackson declaration], page[s] \_\_\_\_\_ [State page number of exhibit, i.e., 17], line[s] \_\_\_\_\_ [State line number of the material objected to, e.g., 5].)

**Grounds for Objection 2:** \_\_\_\_\_ [Identify ground(s) for objection and authority, e.g., Irrelevant (Evid. Code, §§ 210, 350-351)].

[OR THIS FORMAT:]

**Material Objected to:**

**Grounds for Objection:**

1. \_\_\_\_\_ [State the exhibit, title, e.g., Jackson declaration], page[s] \_\_\_\_\_ [State page number of exhibit, i.e., 3], line[s] \_\_\_\_\_ [State line number of the material objected to, e.g., 7-8.]: "\_\_\_\_\_ [Quote or describe evidence objected to, i.e., Johnson told me that no widgets were ever received]."

[Identify ground(s) for objection and authority, e.g., Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code § 702(a))].

2. \_\_\_\_\_ [State the exhibit, title, e.g., Jackson declaration], page[s] \_\_\_\_\_ [State page number of exhibit, i.e., 17], line[s] \_\_\_\_\_ [State line number of the material objected to, e.g., 5]: "\_\_\_\_\_ [Quote or describe evidence objected to, i.e., A lot of people find widgets to be very useful]."

\_\_\_\_\_ [Identify ground(s) for objection and authority, e.g., Irrelevant (Evid. Code, §§ 210, 350-351)].

[CONTINUE:]

Dated: \_\_\_\_\_

\_\_\_\_\_ [firm name, if any]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_ [objecting party]

NOTES:

**Authority:**

*Cal Rules Ct, Rule 3.1354*

**Application:**

Form 38.69A may be used by moving or opposing party to object to specific evidence included in other party's statement of facts.

**Format of Objections:**

*See 38.26[3][b]*

**Related Form of Order:**

*See 38.69B*



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Chapter 38 Summary Judgment  
VIII. FORMS  
B. Opposing Summary Judgment or Adjudication

*3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.69B*

**38.69B Order on Written Objections to Evidence on Motion for Summary Judgment or Summary Adjudication.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name]  
Defendant.

)  
) NO. \_\_\_\_\_  
) Order on [Opposing/Moving]  
) Party's Objections to  
) [Moving/Opposing]  
) Party's Evidence  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Dept: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_  
)

**Objections to** \_\_\_\_\_ [State name of document citing evidence objected to, i.e., **Jackson Declaration**

[CHOOSE EITHER THIS FORMAT:]

**Objection Number 1**

"\_\_\_\_\_ [Quote or describe evidence objected to, i.e., Johnson told me that no widgets were ever received]." (\_\_\_\_\_ [State the exhibit, title, e.g., Jackson declaration], page[s] \_\_\_\_\_ [State page number of exhibit, i.e., 3], line[s] \_\_\_\_\_ [State line number of the material objected to, e.g., 7-8].)

**Grounds for Objection 1:** \_\_\_\_\_ [Identify ground(s) for objection and authority, e.g., Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a))].

**Court's Ruling on Objection 1:**

Sustained: \_\_\_\_\_

Overruled: \_\_\_\_\_

**Objection Number 2** [Number subsequent objections consecutively]

"\_\_\_\_\_ [Quote or describe evidence objected to, i.e., A lot of people find widgets to be very useful]." (\_\_\_\_\_ [State the exhibit, title, e.g., Jackson declaration], page[s] \_\_\_\_\_ [State page number of exhibit, i.e., 17], line[s] \_\_\_\_\_ [State line number of the material objected to, e.g., 5].)

**Grounds for Objection 2:** \_\_\_\_\_ [Identify ground(s) for objection and authority, e.g., Irrelevant (Evid. Code, §§ 210, 350-351)].

**Court's Ruling on Objection 2:**

Sustained: \_\_\_\_\_

Overruled: \_\_\_\_\_

[OR THIS FORMAT:]

| Material Objected to:                                                                                                                                                                                                                                                                                       | Grounds for Objection:                                                                                                                  | Ruling on the Objection:             |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------|
| 1. _____ [State the exhibit, title, e.g., Jackson declaration], page[s] _____ [State page number of exhibit, i.e., 3], line[s] _____ [State line number of the material objected to, e.g., 7-8].: "<br>[Quote or describe evidence objected to, i.e., Johnson told me that no widgets were ever received]." | [Identify ground(s) for objection and authority, e.g., Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code § 702(a))]. | Sustained: _____<br>Overruled: _____ |
| 2. _____ [State the exhibit, title, e.g., Jackson declaration], page[s] _____ [State page number of exhibit, i.e., 17], line[s] _____ [State line number                                                                                                                                                    | _____ [Identify ground(s) for objection and authority, e.g., Irrelevant (Evid. Code, §§ 210, 350-351)].                                 | Sustained: _____<br>Overruled: _____ |

*of the material objected to, e.g.,*  
5]: "\_\_\_\_\_  
[Quote or describe evidence ob-  
jected to, i.e., A lot of people  
find widgets to be very useful]."

[CONTINUE:]

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court

NOTES:

**Authority:**

Cal Rules Ct, Rule § 3.1354

**Application:**

Form 38.69B may be used by moving or opposing party to prepare proposed order on objections to specific evidence included in other party's statement of facts.

**Format of Objections:**

See 38.26[3][c]

**Related Form of Order:**

See 38.69A



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B. Opposing Summary Judgment or Adjudication

3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.70

**38.70 Order Denying Motion for Summary Judgment and/or Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty.**

Order Denying Motion for Summary Judgment and/or Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|               |   |           |
|---------------|---|-----------|
| _____ [name], | ) |           |
| Plaintiff,    | ) |           |
| vs.           | ) | NO. _____ |
| _____ [name]  | ) | ORDER     |
| Defendant     | ) |           |
|               | ) |           |
|               | ) |           |

The motion(s) of \_\_\_\_\_ [specify moving party e.g., Plaintiff John Smith] for an order granting [summary judgment or summary adjudication or summary judgment or, in the alternative, summary adjudication] was heard by the court on \_\_\_\_\_ [date]. Plaintiff appeared by counsel \_\_\_\_\_ [name]; defendant appeared by counsel \_\_\_\_\_ [name].

Having considered all the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, except that to which objection was sustained, the Court determines that the motion should be denied for the reason(s) that:

[EITHER]



A triable controversy exists with respect to the following material fact(s), as indicated:

1. \_\_\_\_\_ [*Specify all material fact(s) presenting a triable controversy and refer specifically to supporting and opposing evidence that indicates the existence of such controversy, e.g., Whether the defendant knew, or had reason to know, of defective condition of furnace when she rented the premises to plaintiff. (Declaration of Plaintiff John Smith, pp. 13:23-19:7; Declaration of Defendant Mary Jones, pp. 2:15-8:4).*]

[2. Specify additional triable controversies in this and succeeding numbered paragraphs; if denying motion for summary adjudication of cause of action, defendant's duty, punitive damages claim, or affirmative defense in its entirety, specify the matter for which summary adjudication is sought (i.e., cause of action, affirmative defense, claim for punitive damages, or issue of duty) as to which the controversy exists.]

[OR]

The evidence submitted by \_\_\_\_\_ [*specify moving party, e.g., Plaintiff John Smith*] in support of the motion is insufficient to show that he/she/it is entitled to judgment as a matter of law in that: \_\_\_\_\_ [*specify insufficiency, e.g., The supporting Declaration of \_\_\_\_\_ (name) includes no admissible evidence and the remaining Declaration of Plaintiff John Smith alone fails to establish that the defendant proximately caused the injury suffered by plaintiff.*]

[OR]

\_\_\_\_\_ [*Specify moving party, e.g., Plaintiff John Smith*] failed to comply with the requirement of a separate statement, and the Court exercises its discretion to deny the motion on this ground.

[OR]

It appears from the declaration(s) of \_\_\_\_\_ [*name(s)*], submitted in opposition to the motion, that facts essential to justify the opposition may exist but could not, for good cause shown, be presented at the hearing. The Court exercises its discretion to deny the motion on this ground.

[OR]

\_\_\_\_\_ [*Specify any other reasons for the determination, e.g., One of the material facts contended to be undisputed by Plaintiff John Smith is the negligent conduct of defendant estate's decedent, and the only evidence of this fact is stated in the declaration of plaintiff, the sole remaining witness to that fact. The court exercises its discretion to deny the motion on this ground.*]

[CONTINUE]

Accordingly,

IT IS ORDERED that the motion of \_\_\_\_\_ [*specify moving party, e.g., Plaintiff John Smith*] for an order granting \_\_\_\_\_ [*summary judgment or summary adjudication or summary judgment or, in the*]

alternative, summary adjudication] be denied.

[*OPTIONAL*]

The Court further determines that the \_\_\_\_\_ [declaration(s) *and/or* affidavit(s)] of \_\_\_\_\_ [name(s)] presented by \_\_\_\_\_ [specify moving party, *e.g.*, Plaintiff John Smith] was/were presented \_\_\_\_\_ [in bad faith *and/or* solely for the purpose of delay.]

Accordingly,

IT IS FURTHER ORDERED that \_\_\_\_\_ [specify moving party, *e.g.*, Plaintiff John Smith] pay \_\_\_\_\_ (specify opposing party, *e.g.*, Defendant Mary Jones) the sum of \$\_\_\_\_\_ [specify amount] as the amount of reasonable expenses incurred by \_\_\_\_\_ [specify opposing party, *e.g.*, Defendant Mary Jones] as a result of the filing of the \_\_\_\_\_ [declarations(s) *and/or* affidavit(s) referred to above.]

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

Judge of the \_\_\_\_\_ Court

NOTES.

**Authority:**

*CCP § 437c(g)*



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Chapter 38 Summary Judgment

VIII. FORMS

C. Moving for Sanctions

3-38 MB Practice Guide: CA Pretrial Civil Procedure 38.71

**38.71 Notice of Motion, Motion, and Supporting Declaration for Order Imposing Monetary Sanctions.**

Notice of Motion, Motion, and Supporting Declaration for Order Imposing Monetary Sanctions

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_, [name],  
Plaintiff,  
vs.  
\_\_\_\_\_, [name]  
Defendant

)  
) NO. \_\_\_\_\_  
) NOTICE OF MOTION AND MOTION FOR OR-  
) DER FOR PAYMENT OF EXPENSES AS SANC-  
) TIONS, SUPPORTING DECLARATION OF  
) \_\_\_\_\_ [name], AND SUPPORTING  
) MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_ [identify party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [specify party, e.g., Plaintiff John Smith] will, and hereby does, move for an order awarding reasonable expenses in the amount of \$\_\_\_\_\_, to be paid by \_\_\_\_\_ [identify party presenting affidavits or declarations, e.g., Defendant Mary Jones]. The motion is

made on the grounds that \_\_\_\_\_ [*describe action that is the basis of the motion for sanctions, e.g., the declaration filed by Defendant Mary Jones in this case on July 1, 2003, was presented in bad faith*].

The motion is based on this notice of motion, the attached declaration(s) \_\_\_\_\_ of \_\_\_\_\_ [*name(s)*], and the supporting memorandum served and filed with it, on the records and file in this action, and on any such evidence that may be presented at the hearing of the motion.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*firm name*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_ [*party's status and name e.g., Plaintiff John Smith*]

SUPPORTING DECLARATION OF \_\_\_\_\_ [*name*]

I, \_\_\_\_\_ [*name*], declare:

1. I am \_\_\_\_\_ [*identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith*].

2. \_\_\_\_\_ [*Specify party who presented affidavit(s) or declaration(s), e.g., Defendant Mary Jones*]  
\_\_\_\_\_ [*specify conduct, e.g., presented the declaration of Bob Green on July 1, 2003, in support of a motion for summary judgment in the above-entitled action with knowledge that the statements contained in paragraphs 3 and 5 of the declaration were untrue. Defendant's attorney Jane Lee admitted to the court that there was no factual basis for these statements at the hearing on the motion for summary judgment on July 1, 2003*].

3. As a result of this conduct, \_\_\_\_\_ [*specify moving party, e.g., Plaintiff John Smith*] has incurred expenses in the sum of \$ \_\_\_\_\_ as follows \_\_\_\_\_ [*itemize expenses showing that each was incurred as a result of the specified conduct*].

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ [*date*]

\_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion.*]

Respectfully submitted,

\_\_\_\_\_ [*firm name, if any*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_ [*party's status and name*]

NOTES.

**Authority:**

*CCP § 437c(j)*

**Grounds for Sanctions:**

*See 38.27, 38.34, 38.41[1]*

**Related Form of Memoranda:**

*See California Points and Authorities, § 221.32 (Matthew Bender)*



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Chapter 39 Voluntary Dismissal

*3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.syn*

**§ 39.syn Synopsis to Chapter 39: Voluntary Dismissal**

39.01 Scope.

39.02 Objective and Strategy.

39.03 CHECKLIST: Determining Whether to Request Voluntary Dismissal.

39.04 Effect of Voluntary Dismissal Depends on Type of Dismissal.

39.04[1] Without Prejudice.

39.04[2] With Prejudice.

39.05 Voluntary Dismissal Available Despite Trial Court Delay Reduction Program.

39.06 Voluntary Dismissal May Affect Other Parties' Rights.

39.06[1] Parties May Remain After Voluntary Dismissal.

39.06[2] Court Loses Jurisdiction Over Action.

39.06[3] Cross-Complainant's Actions Remain Pending.

39.06[4] Other Plaintiffs May Proceed With Separate Complaint.

39.07 Voluntary Dismissal Cuts Off Most Pending Motions.

39.07[1] Certain Motions May Not Be Heard.

39.07[2] Court May Still Impose Sanctions on CCP § 128.7 Motion.

39.08 Voluntary Dismissal Affects Settlements.

39.09 CHECKLIST: Requesting Voluntary Dismissal.

39.10 Requesting Voluntary Dismissal Before Trial.

39.10[1] Voluntary Dismissal Before Trial May Be With or Without Prejudice.

39.10[2] Methods of Obtaining Voluntary Dismissal Before Trial.

39.10[2][a] By Request.

39.10[2][b] By Consent.

39.10[3] Plaintiff Must Have Knowledge of Request.

39.10[4] Other Parties' Knowledge Not Required.

39.10[5] Right to Voluntary Dismissal May Be Limited or Terminated.

39.10[5][a] Affirmative Relief Is Sought.

39.10[5][b] Motion to Transfer Is Pending.

39.10[5][c] Party Is "Judge Shopping."

39.10[5][d] Demurrer Is Sustained.

39.10[5][e] In Lieu of Opposing Summary Judgment.

39.10[5][f] Commencement of Evidentiary Proceedings Before Referee or Other Finder of Fact.

39.10[5][g] Motion for Sanction Is Pending.

39.10[5][h] Plaintiff Is Not Real Party in Interest.

39.10[5][i] After Demanding Trial De Novo Following Arbitration Award.

39.10[5][j] After Involuntary Dismissal.

39.10[5][k] Class Actions.

39.10[6] No Right to New Action If Compulsory Cross-Complaint Is Pending.

39.11 Requesting Voluntary Dismissal After Commencement of Trial.

39.11[1] Voluntary Dismissal After Commencement of Trial Is Generally With Prejudice.

39.11[2] Methods of Obtaining Voluntary Dismissal After Commencement of Trial.

39.11[2][a] By Request.

39.11[2][b] By Consent.

39.11[2][c] By Abandonment.

39.11[3] Cross-Complaint Is Not Affected by Voluntary Dismissal After Commencement of Trial.

39.12 CHECKLIST: Recovering Costs and Fees.

39.13 Costs and Statutory Attorney Fees May Be Awarded.

39.14 Contractual Attorney Fees Generally Are Not Recoverable.

39.15 CHECKLIST: Appealing After Voluntary Dismissal.

39.16 Appeal Is Generally Not Permitted.

39.17 Appeal May Lie in Certain Circumstances.

39.17[1] Voluntary Dismissal Is Not True Relinquishment.

39.17[2] Consent Judgments.

39.17[3] Stipulated Dismissals of Fewer Than All Causes of Action.

39.17[4] Plaintiff's Mistake, Inadvertence, Surprise, or Excusable Neglect.

39.18 Judicial Council Form CIV-110 Request for Dismissal.

39.19 Judicial Council Form CIV-120 Notice of Entry of Dismissal and Proof of Service.





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Chapter 39 Voluntary Dismissal  
I. STRATEGY

*3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.01*

**39.01 Scope.**

This chapter covers:

- Determining whether to request a voluntary dismissal [*see* 39.03 -39.08].
- Requesting a voluntary dismissal [*see* 39.09; Forms: *see* 39.18 -39.19] before trial [*see* 39.10] and after commencement of trial [*see* 39.11].
- Obtaining costs and attorney fees after a voluntary dismissal [*see* 39.12 -39.14].
- Appealing a voluntary dismissal [*see* 39.15 -39.17].

**Core Statute:** *CCP* § 581



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Chapter 39 Voluntary Dismissal  
I. STRATEGY

3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.02

**39.02 Objective and Strategy.**

Voluntary dismissals provide a plaintiff some freedom to control the course of litigation. Although there are some limitations, plaintiffs have a near absolute right to dismiss before trial commences. After trial commences, plaintiffs may only dismiss with prejudice [see *Kyle v. Carmon* (1999) 71 CA4th 901, 908-909, 84 CR2d 303 ].

A voluntary dismissal is requested by plaintiff or taken with plaintiff's express consent [see CCP § 581(b)(1), (2), (e); *Datner v. Mann Theatres Corp. of Cal.* (1983) 145 CA3d 768, 770, 193 CR 676 ].

**Strategic Point:**



A plaintiff should be aware that a voluntary dismissal may leave him or her exposed to malicious prosecution liability if the underlying claim did not have sufficient factual or legal support. On the other hand, a voluntary dismissal filed promptly after learning of or realizing the absence of factual or legal support for the action may minimize or avoid malicious prosecution liability as long as the action was initially brought in good faith, and will minimize the potential attorney's fees damages the defendant may be able to recover in a malicious prosecution action.



**Warning:**

Voluntarily dismissing an action while a motion for sanctions under CCP § 128.7 is pending will not deprive the court of the authority to impose sanctions [ *Eichenbaum v. Alon* (2003) 106 CA4th 967, 976, 131 CR2d 296 ].

**Detailed Discussion/Forms Reference:**

California Forms of Pleading and Practice, Ch. 212, Dismissal, § 212.30 et seq. (Matthew Bender).

California Points and Authorities, Ch. 90, Dismissal (Matthew Bender).



**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsVoluntary DismissalsGeneral Overview



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Chapter 39 Voluntary Dismissal  
II. DETERMINING WHETHER TO REQUEST VOLUNTARY DISMISSAL

*3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.03*

**39.03 CHECKLIST: Determining Whether to Request Voluntary Dismissal.**

☐ Determine whether requesting voluntary dismissal is advantageous:

- ☐ Avoids litigation costs for action likely to be unsuccessful.
- ☐ If currently lacking evidence, dismiss without prejudice before trial to retain ability to bring subsequent action with sufficient evidence.

☐ Determine whether plaintiff may file subsequent action:

- ☐ Dismissal without prejudice does not bar subsequent action.
- ☐ Dismissal with prejudice bars subsequent action.

**Discussion:**

See 39.04

☐ Determine likelihood of obtaining voluntary dismissal:

- ☐ Trial court delay reduction program will not prevent voluntary dismissal.

**Discussion:**

See 39.05

- ☐ Voluntary dismissal may not be available in certain circumstances.

**Discussion:***See 39.10[5]*☐ Consider effects of voluntary dismissal:☐ On other parties:☐ Generally cuts off defendant's rights.**Discussion:***See 39.06[2]*☐ Does not affect cross-complainant's actions.**Discussion:***See 39.06[3]*☐ May be limited to the plaintiff dismissing the action.☐ On pending motions:☐ Generally cut off.**Discussion:***See 39.07*☐ On settlements:☐ Settlement becomes unenforceable by court unless parties stipulate.**Discussion:***See 39.08*



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II. DETERMINING WHETHER TO REQUEST VOLUNTARY DISMISSAL

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**39.04 Effect of Voluntary Dismissal Depends on Type of Dismissal.**

**39.04[1] Without Prejudice.** A dismissal without prejudice is not rendered on the merits and does not bar the filing of a subsequent action based on the same facts [ *Stephan v. Am. Home Builders* (1971) 21 CA3d 402, 406, 98 CR 354 ].

A dismissal made by a clerk's entry is presumed to be without prejudice [ *Gagnon Co., Inc. v. Nev. Desert Inn, Inc.* (1955) 45 C2d 448, 455, 289 P2d 466 ; *Lewis v. Johnson* (1939) 12 C2d 558, 563, 86 P2d 99 ].



**Warning:**

A subsequent action must be filed within the applicable statute of limitations [ *Troche v. Daley* (1990) 217 CA3d 403, 412, 266 CR 34 ].



**Cross Reference:**

Discussion of statutes of limitations, see Ch. 4, Limitation of Actions.

**39.04[2] With Prejudice.** A dismissal with prejudice bars a subsequent action on the same cause [ *Gagnon Co., Inc. v. Nev. Desert Inn* (1955) 45 C2d 448, 455, 289 P2d 466 ; *Roybal v. Univ. Ford* (1989) 207 CA3d 1080, 1085, 255 CR 469 ].

A dismissal with prejudice may occur because [see CCP § 581(d), (e); *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 C2d 47, 55, 92 P2d 804 ; see *Torrey Pines Bank v. Superior Court* (1989) 216 CA3d 813, 820-821, 265 CR 217 ]:

- There was actually a determination on the merits;
- The parties reached a settlement and the dismissal was intended to act as a final disposition on the merits; or
- There is a statutory requirement for dismissal with prejudice.

A dismissal that fails to specify whether it was with or without prejudice is deemed to be with prejudice unless plaintiff contends otherwise [ *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 CA4th 1422, 1430, 77 CR2d 574 ]. A dismissal entered in open court pursuant to a stipulation or motion addressed to the court is ordinarily considered a final disposition on the merits [ *Gagnon Co., Inc. v. Nev. Desert Inn, Inc.* (1955) 45 C2d 448, 455, 289 P2d 466 ; *Lewis v. Johnson* (1939) 12 C2d 558, 563, 86 P2d 99 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With PrejudiceCivil

ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without Prejudice



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Chapter 39 Voluntary Dismissal

## II. DETERMINING WHETHER TO REQUEST VOLUNTARY DISMISSAL

*3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.05*

### **39.05 Voluntary Dismissal Available Despite Trial Court Delay Reduction Program.**

The Trial Court Delay Reduction Act does not impair plaintiff's right to exercise his or her right to voluntarily dismiss an action under *CCP § 581(b)(1)* [ *Harris v. Billings* (1993) 16 CA4th 1396, 1404-1405, 20 CR2d 718 ]. The court should allow a dismissal without prejudice, along with an agreement to toll the statute of limitations for a certain time agreed to by the parties to facilitate settlement negotiations [ *Harris v. Billings* (1993) 16 CA4th 1396, 1400, 1404, 20 CR2d 718 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without Prejudice





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Chapter 39 Voluntary Dismissal  
II. DETERMINING WHETHER TO REQUEST VOLUNTARY DISMISSAL

3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.06

**39.06 Voluntary Dismissal May Affect Other Parties' Rights.**

**39.06[1] Parties May Remain After Voluntary Dismissal.** Plaintiff may voluntarily dismiss his or her action as to some but not all parties [ *Basinger v. Rogers & Wells* (1990) 220 CA3d 16, 22-23, 269 CR 332 ].

**39.06[2] Court Loses Jurisdiction Over Action.** A voluntary dismissal terminates the action against the defendant and deprives the trial court of both personal and subject matter jurisdiction to enter any order against plaintiff sought by defendant or issued sua sponte, except concerning any cross-complaint seeking affirmative relief or motion to transfer venue filed by the defendant, and as to any award of costs and attorney's fees sought by defendant [CCP § 581(i); *Kyle v. Carmon* (1999) 71 CA4th 901, 909, 84 CR2d 303 ].

**Example:**

Upon the valid voluntary dismissal of an action without prejudice, the court loses jurisdiction to dismiss the action with prejudice for failure to appear at a show-cause hearing after failure to appear at a mandatory settlement conference [ *Franklin Capital Corp. v. Wilson* (2007) 148 CA4th 187, 194195, 55 CR3d 424 ].

**39.06[3] Cross-Complainant's Actions Remain Pending.** A voluntary dismissal of the complaint does not affect pending cross-complaints filed by the defendant or by other cross-complainants and cross defendants [ *Sanabria v. Embrey* (2001) 92 CA4th 422, 425, 111 CR2d 837 ; *Carroll v. Import Motors, Inc.* (1995) 33 CA4th 1429, 1434, 39 CR2d 791 ].



**Cross Reference:**

Discussion of cross-complaints, see Ch. 16, Cross-Complaints.

**39.06[4] Other Plaintiffs May Proceed With Separate Complaint.** Parties may agree to limit the effect of the voluntary dismissal to the plaintiff dismissing the action. Such an agreement does not preclude another plaintiff who filed a separate complaint involving the same transaction from proceeding with his or her action [see *Manning v. Wymer* (1969) 273 CA2d 519, 523-527, 78 CR 600 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureDismissalsVoluntary DismissalsGeneral Overview



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Chapter 39 Voluntary Dismissal  
II. DETERMINING WHETHER TO REQUEST VOLUNTARY DISMISSAL

*3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.07*

**39.07 Voluntary Dismissal Cuts Off Most Pending Motions.**

**39.07[1] Certain Motions May Not Be Heard.** Voluntary dismissal precludes the hearing of most pending motions, including:

- Motions for summary judgment unless opposition papers have already been filed [ *Zapanta v. Universal Care, Inc.* (2003) 107 CA4th 1167, 1173-1174, 132 CR2d 842 ].
- Anti-SLAPP motions [ *Kyle v. Carmon* (1999) 71 CA4th 901, 909, 84 CR2d 303 ].
- Motions to enforce settlement under CCP § 664.6 [ *Lewis C. Nelson & Sons, Inc. v. Lynx Iron Corp.* (2009) 174 CA4th 67, 80, 94 CR3d 468] .

**39.07[2] Court May Still Impose Sanctions on CCP § 128.7 Motion.** Voluntarily dismissing an action while a motion for sanctions under CCP § 128.7 is pending does not deprive the court of the authority to impose sanctions [ *Eichenbaum v. Alon* (2003) 106 CA4th 967, 976, 131 CR2d 296 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureDismissalsVoluntary DismissalsGeneral Overview



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*3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.08*

**39.08 Voluntary Dismissal Affects Settlements.**

A voluntary dismissal generally deprives the court of jurisdiction to enforce the terms of a settlement under *CCP* § 664.6.

**Exception:**

The parties may agree to the court's retention of jurisdiction to enforce the settlement terms [ *Wackeen v. Malis* (2002) 97 CA4th 429, 433, 118 CR2d 502 ].



**Cross Reference:**

Discussion of settlements, see Ch. 37, Settlement and Release.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Dismissals Voluntary Dismissals General Overview



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Chapter 39 Voluntary Dismissal  
III. REQUESTING VOLUNTARY DISMISSAL

*3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.09*

**39.09 CHECKLIST: Requesting Voluntary Dismissal.**

☐ Determine timing of request for voluntary dismissal:

☐ Any time before trial.

**Authority:**  
*CCP § 581(b)(1)*

**Discussion:**  
*See 39.10*

**Grounds:**  
For any reason.

☐ After commencement of trial.

**Authority:**  
*CCP § 581(e)*

**Discussion:**  
*See 39.11*

**Grounds:**  
Plaintiff requests it, or parties consent to it.

☐ Make request for voluntary dismissal:

☐ Determine if request must be filed with a clerk.

☐ If no clerk, make request to the judge:

☐ Orally, or

☐ In writing.

**Authority:**

*CCP § 581(b)(1)*

☐ Fill out required Judicial Council Form and prepare appropriate copies:

☐ Describe type of action.

☐ Indicate whether dismissal is with or without prejudice.

☐ Indicate whether dismissal is of entire action or only of the complaint, petition, or cross-complaint.

☐ Sign form.

☐ If cross-complaint is pending, obtain signature of defendant's attorney to end entire action.

**Authority:**

*CCP § 581(b), (j)*

**Form:**

See 39.18 (Judicial Council Form CIV-110 Request for Dismissal)

☐ File form with court clerk or if no clerk, with judge.

☐ Submit costs to clerk or judge.

**Authority:**

*CCP § 581(b)(1)*

☐ Prepare, serve on all parties, and file notice of entry of dismissal.

**Authority:**

*Cal Rules Ct, Rule 3.1390*

**Grounds:**

Dismissal has been entered.



**Timing:**

After dismissal is entered.

**Form:**

See 39.19 (Judicial Council Form CIV-120 Notice of Entry of Dismissal and Proof of Service)



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3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.10

**39.10 Requesting Voluntary Dismissal Before Trial.**

**39.10[1] Voluntary Dismissal Before Trial May Be With or Without Prejudice.** Plaintiff may make or file a request for voluntary dismissal without prejudice under *CCP* § 581(b)(1), for any reason, at any time before actual commencement of trial [see *Kyle v. Carmon* (1999) 71 CA4th 901, 908-909, 84 CR2d 303 ].

"Trial" refers to jury or court trials on the merits, as well as other procedures that effectively dispose of the case [ *Wells v. Marina City Properties, Inc.* (1981) 29 C3d 781, 785, 176 CR 104, 632 P2d 217 ; *Groth Bros. Oldsmobile, Inc. v. Gallagher* (2002) 97 CA4th 60, 66, 118 CR2d 405 ]. For purposes of *CCP* § 581, a trial is deemed to commence at the beginning of the opening statement or argument of any party or his or her counsel. If there is no opening statement, a trial begins upon the administering of the oath or affirmation to the first witness, or the introduction of any evidence [*CCP* § 581(a)(6); see *Henderson Receivables Origination LLC v. Tomahawk* (2009) 172 CA4th 290, 302, 91 CR3d 232 and *Kyle v. Carmon* (1999) 71 CA4th 901, 908-909, 84 CR2d 303 ]. This language is not necessarily exclusive of the circumstances under which a trial begins [ *Gray v. Superior Court* (1997) 52 CA4th 165, 171, 60 CR2d 428 ].

**39.10[2] Methods of Obtaining Voluntary Dismissal Before Trial.**

**39.10[2][a] By Request.** Plaintiff may voluntarily dismiss an action for any reason, at any time before actual commencement of trial, on plaintiff's written request to the clerk, filed with papers in the case, or by oral or written request to the court at any time before the actual commencement of trial, upon payment of any necessary costs [*CCP* § 581(b)(1)].

**Exceptions:**

See 39.10[5].



**Warning:**

The attorney of for the party or parties applying for dismissal must consent in writing to the dismissal. If the attorney does not consent, dismissal must be by court order after notice to the attorney [*CCP* § 581(j)].



**Strategic Point--Plaintiff:**

Plaintiff should try to negotiate a waiver of court costs or other rights defendant may have in exchange for a voluntary dismissal.

**39.10[2][b] By Consent.** Any party may dismiss an action with or without prejudice with the written consent of all other parties [CCP § 581(b)(2)].

**Warning:**

The attorney of for the party or parties applying for dismissal must consent in writing to the dismissal. If the attorney does not consent, dismissal must be by court order after notice to the attorney [CCP § 581(j)].

**39.10[3] Plaintiff Must Have Knowledge of Request.** Voluntary dismissal entered by plaintiff's attorney without plaintiff's knowledge and consent is voidable within a reasonable time after plaintiff learns of it [ *Romadka v. Hoge* (1996) 232 CA3d 1231, 1236, 283 CR 878 ; *Whittier Union High Sch. Dist. v. Superior Court* (1977) 66 CA3d 504, 507-509, 136 CR 86 ].

**39.10[4] Other Parties' Knowledge Not Required.** Plaintiff may voluntarily dismiss an action before trial as a matter of right without the knowledge of other parties or the consent of the court [ *Roski v. Superior Court* (1971) 17 CA3d 841, 845, 95 CR 312 ].

**39.10[5] Right to Voluntary Dismissal May Be Limited or Terminated.**

**39.10[5][a] Affirmative Relief Is Sought.** Voluntary dismissal without prejudice before trial is not available if defendant or an intervenor seeks affirmative relief against plaintiff in a cross-complaint or complaint in intervention [CCP § 581(i)].

A pleading seeks affirmative relief if it contains affirmative allegations or introduces new affirmative matter that entitles the pleader to relief [ *In re Marriage of Tamraz* (1994) 24 CA4th 1740, 1747, 30 CR2d 233 ; *In re Mercantile Guaranty Co.* (1968) 263 CA2d 346, 351, 69 CR 361 ].

**Cross Reference:**

Discussion of effect of voluntary dismissal on cross-complaints, see 39.06[3].

**39.10[5][b] Motion to Transfer Is Pending.** Voluntary dismissal without prejudice before trial is not available if there is a motion pending for an order transferring the action to another court under CCP § 396b [CCP § 581(i)].

**Cross Reference:**

Discussion of venue, see Ch. 6, *Determining Forum*, 6.31 et seq.

**39.10[5][c] Party Is "Judge Shopping."** The expanded provisions in *Cal Rules Ct, Rule 3.300(a), (h)* on related cases are intended to prevent "judge shopping" by forcing notice of a newly filed case to be filed with the judge in a voluntarily dismissed case, among others, and by giving the judge of the earliest filed case the power to decide where related cases will be assigned [California Judicial Council Report, "Civil Law: Related Cases ...," at 3 (October 6, 2006)].

**Cross Reference:**

Related cases, see Ch. 32, Notice of Related Cases, Consolidation, Coordination, and Severance of

Actions, 32. 03 et seq.

Local court rules may prevent a voluntary dismissal and the refile of the action to obtain a different judge.

**Example:**

Los Angeles Super Ct Rules, Rule 7.3(d) provides that if a case is dismissed by a party or by the judge prior to judgment and the same or essentially the same claims involving the same or essentially the same parties are alleged in another action, the later action will be assigned to the judge to whom the first case was assigned.

**Exception:**

A judge to whom a case is assigned may, for good cause, order that the case be assigned to a different judge.

**39.10[5][d] Demurrer Is Sustained.** A decision sustaining a demurrer to plaintiff's complaint without leave to amend terminates plaintiff's right to a voluntary dismissal without prejudice under CCP § 581(b)(1) [ *Mid-Century Ins. Co. v. Superior Court* (2006) 138 CA4th 769, 776, 41 CR3d 833 ; *Groth Bros. Oldsmobile, Inc. v. Gallagher* (2002) 97 CA4th 60, 66-67, 118 CR2d 405 ].

After a demurrer has been sustained with leave to amend, a plaintiff may voluntarily dismiss without prejudice if:

- Plaintiff requests the voluntary dismissal before the expiration of the time to amend [ *Parsons v. Umansky* (1994) 28 CA4th 867, 870-871, 34 CR2d 144 ], or
- A demurrer to an amended complaint is pending decision [ *Christensen v. Dewor Devs.* (1983) 33 C3d 778, 785, 191 CR 8, 661 P2d 1088 ; see *Kyle v. Carmon* (1999) 71 CA4th 901, 911-912, 84 CR2d 303 ].

Plaintiff may not voluntarily dismiss his or her action without prejudice if a demurrer is sustained with leave to amend and plaintiff fails to amend within the time authorized by the court. Whether the court has entered a judgment of dismissal on the sustained demurrer is irrelevant [ *Wells v. Marina City Properties, Inc.* (1981) 29 C3d 781, 789, 176 CR 104, 632 P2d 217 ; *Groth Bros. Oldsmobile, Inc. v. Gallagher* (2002) 97 CA4th 60, 66, 118 CR2d 405 ]. The court may dismiss the complaint as to defendant [CCP § 581(f)(2)].

The question of whether the plaintiff may voluntarily dismiss without leave to amend after the court has tentatively granted a demurrer is the subject of a split among districts of the Court of Appeals. While the Second District Court of Appeals allows it [ *Datner v. Mann Theatres Corp.* (1983) 145 CA3d 768, 770-771, 193 CR 676 (after tentative ruling granting demurrer but before hearing on demurrer)], the First District [ *Groth Bros. Oldsmobile, Inc. v. Gallagher* (2002) 97 CA4th 60, 66-67, 118 CR2d 405 (trial court erred in refusing to vacate dismissal)] and the Third Division of the Second District [ *Mid-Century Ins. Co. v. Superior Court* (2006) 138 CA4th 769, 776, 41 CR3d 833 ] Courts of Appeals do not.

**Distinguish:**

Only the sustaining of a demurrer that disposes of *all* the claims in the case may preclude voluntary dismissal [Gogri v. Jack In *The Box Inc.* (2008) 166 CA4th 255, 269-273, 82 CR3d 629 ].

 **Cross Reference:**

Discussion of demurrers, see Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

**39.10[5][e] In Lieu of Opposing Summary Judgment.** Plaintiff may not employ a voluntary dismissal without prejudice in lieu of following the proper procedures for opposing defendant's motion for summary judgment. If the time

for opposing the summary judgment motion has passed, a plaintiff who attempts a voluntary dismissal remains subject to the court's continuing jurisdiction to rule on the motion for summary judgment [ *Cravens v. State Bd. of Equalization* (1997) 52 CA4th 253, 255, 60 CR2d 436 ]. The determining factor is fairness, which in turn depends on the plaintiff's motivation and intent in dismissing the complaint [ *Tire Distributors, Inc. v. Cobrae* (2005) 132 CA4th 538, 546-547, 33 CR3d 761 (request for dismissal without prejudice after date response to summary judgment motion was due but well before summary judgment was granted was motivated only by compliance with settlement agreement)]. However, if the request for dismissal is filed before the party's opposition to the motion is due, the court is without jurisdiction to rule on the motion [ *Zapanta v. Universal Care, Inc.* (2003) 107 CA4th 1167, 1173-1174, 132 CR2d 842 ].



#### Cross Reference:

Discussion of summary judgment, see Ch. 38, Summary Judgment.

**39.10[5][f] Commencement of Evidentiary Proceedings Before Referee or Other Finder of Fact.** Plaintiff's right to voluntarily dismiss his or her complaint at any time before commencement of trial may be terminated by the commencement of evidentiary proceedings before a finder of fact such as a referee appointed to make an advisory opinion to the court. In this circumstance, it may be deemed that a trial commences when the parties appear and present evidence before the referee [ *Gray v. Superior Court* (1997) 52 CA4th 165, 167, 173, 60 CR2d 428 (evidentiary hearing before referee in partition action was trial within the meaning of CCP § 581)].



#### Strategic Point--Plaintiff:

A plaintiff with a weak case may want to consider dismissal before an evidentiary hearing where adverse findings of fact may preclude his or her right to dismiss a case without prejudice.



#### Strategic Point--Defendant:

If an evidentiary hearing has taken place and findings of fact made adverse to the plaintiff, the defendant may be able to prevent a voluntary dismissal without prejudice by asserting that the trial has commenced.

**39.10[5][g] Motion for Sanction Is Pending.** If defendant files a motion for a terminating discovery sanction, plaintiff may not defeat such motion by filing a voluntary dismissal just before the sanction hearing [ *Hartbrodt v. Burke* (1996) 42 CA4th 168, 175-176, 49 CR2d 562 ].

**39.10[5][h] Plaintiff Is Not Real Party in Interest.** A plaintiff who is not the real party in interest does not have the absolute right to terminate an action. If plaintiff is not the real party in interest and has a fiduciary duty to the real party in interest, the court must approve a voluntary dismissal. Plaintiff must demonstrate that the rights of the real party in interest have been adequately protected [see *Marcarelli v. Cabell* (1976) 58 CA3d 51, 55, 129 CR 509 ]. This rule applies in the following proceedings:

- Probate proceedings [see *Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 CA3d 573, 579, 165 CR 1 ].
- Child custody matters [ *Ford v. Superior Court* (1959) 171 CA2d 228, 230, 340 P2d 296 ].
- Guardianship matters [see *Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 CA3d 573, 579, 165 CR 1 ].
- Shareholder derivative suits [see *Marcarelli v. Cabell* (1976) 58 CA3d 51, 55, 129 CR 509 ].

- Class actions [see *Cal Rules Ct, Rule 3.770*].

#### **Cross Reference:**

Discussion of restrictions in class actions, see 39.10[5][k].

**39.10[5][i] After Demanding Trial De Novo Following Arbitration Award.** Plaintiff may not be entitled to a voluntary dismissal requested after demanding a trial de novo following a judicial arbitration award in defendant's favor. Plaintiff's request for voluntary dismissal repudiates the demand for a trial de novo and reinstates the arbitration award [ *Kelley v. Bredelis* (1996) 45 CA4th 1819, 1825-1826, 53 CR2d 536 ; *Herbert Hawkins Realtors, Inc. v. Milheiser* (1983) 140 CA3d 334, 337-340, 189 CR 450 ].

**39.10[5][j] After Involuntary Dismissal.** Plaintiff may not voluntarily dismiss an action after defendant has obtained a ruling dismissing the same action involuntarily, but before the order for involuntary dismissal has been filed [ *M & R Properties v. Thomson* (1992) 11 CA4th 899, 900-901, 14 CR2d 579 ]. Defendant's right to a mandatory dismissal prevails over plaintiff's right to voluntary dismissal [ *M & R Properties v. Thomson* (1992) 11 CA4th 899, 905, 14 CR2d 579 ].

**39.10[5][k] Class Actions.** Plaintiff may not voluntarily dismiss an action that has been certified as a class action until adequate notice has been given to the class and the court orders dismissal [CCP § 581(k); *Cal Rules Ct, Rule 3.770*; *La Sala v. American Sav. & Loan Assn.* (1971) 5 C3d 864, 868, 871, 97 CR 849, 489 P2d 1113 ].

#### **Exception:**

A court may not enter an order dismissing a class action at the same time as, or after, entry of judgment following final approval of a settlement [*Cal Rules Ct, Rule 3.769(h), 3.770(a)*].

#### **Cross Reference:**

Discussion of dismissal in class actions, see *Ch. 33, Class Actions*, 33.29[2] et seq.

**39.10[6] No Right to New Action If Compulsory Cross-Complaint Is Pending.** The compulsory cross-complaint statute, CCP § 426.30, precludes plaintiff from bringing a new action after having dismissed an earlier complaint without prejudice under CCP § 581(c) if the new action is based on claims arising from the same transaction that formed the basis of a cross-complaint that is pending in the first action. [ *Carroll v. Import Motors, Inc.* (1995) 33 CA4th 1429, 1435-1436, 39 CR2d 791 ].

If this issue arises, the proper course is to request leave to file a late compulsory cross-complaint in the first action [ *Carroll v. Import Motors, Inc.* (1995) 33 CA4th 1429, 1436, 39 CR2d 791 ; see CCP § 426.50].

#### **Cross Reference:**

Discussion of compulsory and permissive cross-complaints, see *Ch. 16, Cross-Complaints*, 16.05.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without PrejudiceCivil ProcedureDismissalsVoluntary DismissalsNoticesGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsStipulations



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Chapter 39 Voluntary Dismissal  
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*3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.11*

**39.11 Requesting Voluntary Dismissal After Commencement of Trial.**

**39.11[1] Voluntary Dismissal After Commencement of Trial Is Generally With Prejudice.** Under *CCP* § 581(d), plaintiff's complaint or any cause of action may be voluntarily dismissed in its entirety or as to any defendant with prejudice after commencement of trial. A "trial" is deemed to commence at the beginning of the opening statement or argument of any party or his or her counsel. If there is no opening statement, a trial begins at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence [*CCP* § 581(a)(6)].

**Exceptions:**

*CCP* § 581(e) provides for voluntary dismissal without prejudice after commencement of trial:

- If all affected parties consent to voluntary dismissal without prejudice, or
- By order of the court based on a showing of good cause.

**➤ Cross References:**

Additional discussion of voluntary dismissal after commencement of trial, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, 12.27 *et seq.*

Entry of judgment after voluntary dismissal, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 26, Entry of Judgment.

Setting aside judgment after voluntary dismissal, see *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 29, Setting Aside Judgments and Orders.

**39.11[2] Methods of Obtaining Voluntary Dismissal After Commencement of Trial.**

**39.11[2][a] By Request.** After commencement of trial, the plaintiff may request voluntary dismissal with prejudice of the complaint or any of the causes of action asserted in it [*CCP* § 581(e)]. The dismissal can be without prejudice if the court so orders on a showing of good cause [*CCP* § 581(e)].

*CCP § 581(e)* does not affect plaintiff's right, prior to the entry of judgment, to dismiss one or more counts of the complaint that set forth alternative remedies to the counts on which plaintiff elects to stand [see *Steele v. Litton Indus., Inc.* (1968) 260 CA2d 157, 171-172, 68 CR 680 ].

**39.11[2][b] By Consent.** After commencement of trial, the plaintiff may dismiss an action without prejudice if all other parties give their the written consent [*CCP § 581(e)*].



**Warning:**

The attorney of for the party or parties applying for dismissal must consent in writing to the dismissal. If the attorney does not consent, dismissal must be by court order after notice to the attorney [*CCP § 581(b)(2), (j)*].



**Warning:**

Failure to object to dismissal without prejudice establishes consent under *CCP § 581(e)* [ *Davis v. Pine Mountain Lumber Co.* (1969) 273 CA2d 218, 227, 77 CR 825 ].

**39.11[2][c] By Abandonment.** During the period between the commencement of trial to the submission of the case, the court shall dismiss with prejudice plaintiff's complaint or any cause of action asserted in it, in its entirety or as to any defendant, if plaintiff abandons it [*CCP § 581(d)*].

Plaintiff's intent to abandon a case, sufficient to support a *§ 581(d)* voluntary dismissal, must be clear, unequivocal, and express. Plaintiff's intent may be shown by a motion to dismiss, stipulation of the parties, or some other form of express intent on the record [ *Kaufman & Broad Building Co. v. City & Suburban Mortgage Co.* (1970) 10 CA3d 206, 212-213, 88 CR 858 ; *D & J, Inc. v. Ferro Corp.* (1986) 176 CA3d 1191, 1195, 222 CR 656 ].

**Example:**

If plaintiff makes an insufficient showing of just cause on a motion for dismissal after commencement of trial under *CCP § 581(e)*, the court may treat plaintiff's voluntary dismissal attempt as an abandonment if defendant wishes to proceed with trial [see *Burnett v. Burnett* (1948) 88 CA2d 805, 807, 199 P2d 685 ].

**39.11[3] Cross-Complaint Is Not Affected by Voluntary Dismissal After Commencement of Trial.** Plaintiff's voluntary dismissal with prejudice after commencement of trial does not dismiss a cross-complaint filed in the same action [see *CCP § 581(e)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotionsCivil ProcedureDismissalsVoluntary DismissalsStipulations



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Chapter 39 Voluntary Dismissal  
IV. RECOVERING COSTS AND FEES

*3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.12*

**39.12 CHECKLIST: Recovering Costs and Fees.**

☐ File request to obtain costs and statutory attorney's fees.

☐ Request court order for payment of costs.

**Discussion:**

See 39.13

☐ For noncontractual claims, argue that a contractual provision provides for attorney fees.

**Discussion:**

See 39.14



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**39.13 Costs and Statutory Attorney Fees May Be Awarded.**

A trial court may award costs and statutory attorney fees incurred up to the date of the voluntary dismissal [ *Maxwell v. Cooltech, Inc.* (1997) 57 CA4th 629, 632 n2, 67 CR2d 293 ; *Bell v. Hummel* (1982) 136 CA3d 1009, 1015, 186 CR 688 (overruled on other grounds in *Laird v. Blacker* (1992) 2 C4th 606, 617, 7 CR2d 550, 828 P2d 691 ); see *Townzen v. County of El Dorado* (1998) 64 CA4th 1350, 1358, 76 CR2d 281 ].

Plaintiff's payment of defendant's costs or attorney fees is not a prerequisite to obtaining a voluntary dismissal [see *Hopkins v. Superior Court* (1902) 136 C 552, 553-554, 69 P 299 ; *Eddings v. White* (1964) 229 CA2d 579, 585, 40 CR 453 ].

**Strategic Point--Defendant:**



A defendant seeking recovery of costs should have a formal judgment of dismissal entered ordering payment of court costs [see CCP § 1032(b)].



**Warning:**

Service of a notice of entry of a voluntary dismissal by the plaintiff starts the running of the 15-day period within which a defendant seeking costs must serve and file a memorandum of costs under *Cal Rules Court, Rule 3.1700(a)*, and the 60-day period within which a defendant seeking attorney's fees must serve and file a motion to claim attorney's fees under *Cal Rules Court, Rule 3.1702(b)*, even when cross-complaints among other parties are still pending [ *Sanabria v. Embrey* (2001) 92 CA4th 422, 425 430, 111 CR2d 837 ; *Fries v. Rite Aid Corp.* (2009) 173 CA4th 182, 188, 92 CR3d 523 (nothing in Rule 3.1700 or its predecessor suggests a defendant must file a proposed judgment along with a memorandum of costs in order to recover its costs after a voluntary dismissal)].



**Cross References:**

Discussion of recovery of costs and statutory attorney's fees, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 24, Costs; Ch. 25, Attorney's Fees.

**Legal Topics:**



For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview



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**39.14 Contractual Attorney Fees Generally Are Not Recoverable.**

Contractually authorized attorney fees are not recoverable following voluntary dismissal because there is no prevailing party for the purpose of a fee award [CC § 1717(b)(2); *Santisas v. Goodin* (1998) 17 C4th 599, 602, 617, 71 CR2d 830, 951 P2d 399; *Ford Motor Credit Co. v. Hunsberger* (2008) 163 CA4th 1526, 1530, 78 CR3d 661 (CC § 1717(b)(2) bars award of contractual attorney fees under CCP § 998 after voluntary dismissal)].

**Exception:**

CC § 1717 does not bar recovery of attorney fees incurred in defending tort or other noncontract claims arising from a contract with a broad attorney fee provision. A court will examine the contractual fee provision to determine whether attorney fees incurred in defending tort or other noncontract claims are recoverable [ *Santisas v. Goodin* (1998) 17 C4th 599, 602, 617, 71 CR2d 830, 951 P2d 399 (holding that *International Industries, Inc. v. Olen* (1978) 21 C3d 218, 145 CR 691, 577 P2d 1031 does not bar recovery)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview



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Chapter 39 Voluntary Dismissal  
V. APPEALING AFTER VOLUNTARY DISMISSAL

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**39.15 CHECKLIST: Appealing After Voluntary Dismissal.**

☐ File an appeal:

☐ Grounds are:

☐ Voluntary dismissal was not true relinquishment of action.

**Discussion:**

See 39.17[1]

☐ Judgment was by consent to facilitate appeal.

**Discussion:**

See 39.17[2]

☐ Parties stipulated to judgment on part of cause of action and dismissal was entered with prejudice.

**Discussion:**

See 39.17[3]

☐ Plaintiff made a mistake or inadvertently caused voluntary dismissal.

**Discussion:**

See 39.17[4]



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**39.16 Appeal Is Generally Not Permitted.**

Generally, neither the plaintiff nor the defendant has any right to appeal after a voluntary dismissal [ *Stewart v. Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1012, 105 CR2d 115 (defendant); *Yancey v. Fink* (1991) 226 CA3d 1334, 1342-1343, 277 CR 415 (plaintiff)].

**Exception:**

The denial of a defendant's motion to vacate a voluntary dismissal may be reviewed by a petition for a writ of mandate [ *H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1366, 118 CR2d 71 ; *Gray v. Superior Court* (1997) 52 CA4th 165, 171-172, 60 CR2d 428 ].

Once plaintiff voluntarily dismisses without prejudice, a court may not vacate the dismissal or enter a new order dismissing the action with prejudice [ *Harris v. Billings* (1993) 16 CA4th 1396, 1400, 1404, 20 CR2d 718 ].

**➡ Cross Reference:**

Discussion of appeals, see California Forms of Pleading and Practice, Ch. 40, Appeal: An Overview (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureDismissalsVoluntary DismissalsAppellate Review



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Chapter 39 Voluntary Dismissal  
V. APPEALING AFTER VOLUNTARY DISMISSAL

3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.17

**39.17 Appeal May Lie in Certain Circumstances.**

**39.17[1] Voluntary Dismissal Is Not True Relinquishment.** An appeal may lie if a voluntary dismissal after an adverse ruling by the trial court is intended to expedite appeal and is not truly a voluntary relinquishment of the action [ *Stewart v. Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1012, 105 CR2d 115 ; *Casey v. Overhead Door Corp.* (1999) 74 CA4th 112, 116 n2, 87 CR2d 603 (overruled in part on other grounds in *Jimenez v. Superior Court* (2002) 29 C4th 473, 478, 127 CR2d 614, 58 P3d 450 )]. The voluntary dismissal operates as a request for an entry of judgment based on the adverse ruling [ *Denney v. Lawrence* (1994) 22 CA4th 927, 930 n1, 27 CR2d 556 ].

**39.17[2] Consent Judgments.** B&P Code § 16750(g) impliedly defines a "consent judgment" as a settlement of an action. The general rule is that a party may not appeal a consent judgment [ *Norgart v. Upjohn Co.* (1999) 21 C4th 383, 400, 87 CR2d 453, 981 P2d 79 ]. If, however, consent was given merely to facilitate an appeal following adverse determination of a critical issue, the party will not lose the right to appeal [ *Building Industry Assn. v. City of Camarillo* (1986) 41 C3d 810, 817, 226 CR 81, 718 P2d 68 ; *Norgart v. Upjohn Co.* (1999) 21 C4th 383, 400-402, 87 CR2d 453, 981 P2d 79 ].

**39.17[3] Stipulated Dismissals of Fewer Than All Causes of Action.** If the parties stipulate to judgment on fewer than all causes of action and plaintiff voluntarily dismisses the remaining causes of action with prejudice, the judgment may be appealable [ *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 CA4th 1422, 1429-1431, 77 CR2d 574 ]. However, if plaintiff voluntarily dismisses the remaining causes of action without prejudice, the judgment does not dispose of all the causes of action and there is no appealable judgment [ *Hill v. City of Clovis* (1998) 63 CA4th 434, 442-446, 73 CR2d 638 ; see *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 CA4th 1422, 1429-1431, 77 CR2d 574 ].



**Cross References:**

Discussion of judgments on stipulations, see California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

Discussion of stipulations, see Ch. 28, Stipulations.

**39.17[4] Plaintiff's Mistake, Inadvertence, Surprise, or Excusable Neglect.** A voluntary dismissal entered as a

result of plaintiff's mistake, inadvertence, surprise, or excusable neglect may be vacated under *CCP* § 473(b) [ *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 254-255, 121 CR2d 187, 47 P3d 1056 ; *Basinger v. Rogers & Wells* (1990) 220 CA3d 16, 21-23, 269 CR 332 ].

**Example:**

Plaintiff settles a case and dismisses under a mistake of fact [see *Palace Hardware Co. v. Smith* (1901) 134 C 381, 66 P 474 (misconception of the amount owed to plaintiff)].



**Cross Reference:**

Discussion of relief from judgment, see, Ch. 36, Defaults and Motions for Relief.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsVoluntary DismissalsAppellate ReviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview



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Chapter 39 Voluntary Dismissal  
VI. FORMS

*3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.18*

**39.18 Judicial Council Form CIV-110 Request for Dismissal.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

California Judicial Council Form CIV-110, pictured above, has been adopted for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Authority:**

*CCP § 581*

**Grounds for Requesting Voluntary Dismissal:**

*See 39.03*



**Timing:**

*See 39.09 -39.11*

**Drafting Request:**

*See 39.09*

**Related Form of Notice:**

*See 39.19*



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Chapter 39 Voluntary Dismissal  
VI. FORMS

*3-39 MB Practice Guide: CA Pretrial Civil Procedure 39.19*

**39.19 Judicial Council Form CIV-120 Notice of Entry of Dismissal and Proof of Service.**

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at [www.hotdocs.com/downloads/player/latest](http://www.hotdocs.com/downloads/player/latest)

NOTES.

**Authority:**

California Judicial Council Form CIV-120, pictured above, has been adopted for mandatory use [*Cal Rules Ct, Rule 1.31*]

**Authority:**

*Cal Rules Ct, Rule 3.1390*

**Grounds for Filing Notice:**

See 39.09



**Timing:**

See 39.09

**Related Form of Request:**

See 39.18





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Chapter 40 Dismissal for Delay in Bringing to Trial

*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.syn*

**§ 40.syn Synopsis to Chapter 40: Dismissal for Delay in Bringing to Trial**

40.01 Scope.

40.02 Objective and Strategy.

40.03 CHECKLIST: Mandatory Dismissal for Delay in Bringing to Trial.

40.03[1] Moving Party's Checklist.

40.03[2] Defending Party's Checklist.

40.04 Statutes for Dismissal Apply to Civil Actions.

40.05 Plaintiff Must Proceed With Reasonable Diligence in Prosecuting Claim.

40.06 Local Fast Track Rules Have Reduced Mandatory Dismissal Statute's Importance.

40.07 Mandatory Time Periods for Dismissal Set by Statute.

40.08 Must Bring Case to Trial Within Five Years.

40.09 New Trial.

40.09[1] If New Trial Is Granted, Time to Bring to Trial Is Three Years.

40.09[2] Order Vacating Appointment in Binding Arbitration Is Equivalent to Declaration of Mistrial.

40.09[3] Order Setting Aside Default Judgment Does Not Qualify as a New Trial Order.

40.09[4] Order Vacating Default Judgment for Failure to Answer Does Not Qualify as an Order for a New Trial.

40.09[5] Order Setting Aside Judgment When Trial Held in Defendant's Absence Is Equivalent to Order for New Trial.

40.10 When Action Commences.

40.10[1] Action Commences on Date Original Complaint Is Filed or Date New Party Is Added.

40.10[2] Contractual Arbitration Cases Commence at Time Court Files Order Compelling Arbitration.

40.11 Commencement of Trial.

40.11[1] Jury Case Commences When Jury Impaneled.

40.11[2] Non-Jury Case Commences When First Witness Is Sworn and Gives Some Testimony.

40.11[3] Judicially Arbitrated Case Considered Commenced Only When Parties Stipulated to Binding Arbitration Without Right to Trial De Novo.

40.11[4] Action May Be Brought to Trial When Judgment Which Determines an Issue of Law or Fact Is Rendered Pursuant to Pretrial Order.

40.12 Statute Inapplicable Once Case Brought to Trial.

40.13 Stipulation to Extend Time to Bring Case to Trial.

40.13[1] Stipulation May Be Written or Oral Agreement Made in Court.

40.13[2] Stipulation May Be Made After Expiration of Time.

40.13[3] Must Expressly Waive Right to Dismissal or Extend Time of Trial.

40.14 Statutory Exclusions From Five-Year Time Computation.

40.14[1] Suspension of Court's Jurisdiction.

40.14[2] Stay or Injunction of Prosecution of Action.

40.14[3] Impossibility, Impracticability, or Futility.

40.14[3][a] Plaintiff Has Burden of Proof of Entitlement to Tolling.

40.14[3][b] Courts of Appeal Split Three Ways on How to Determine Impossibility, Impracticability, or Futility.

40.14[4] Submission to Arbitration.

40.14[5] Military Service of Party.

40.14[6] Review of Determination of Good-Faith Settlement.

40.14[7] Extension After Statutory Tolling.

40.15 Plaintiff May Move for Trial Preference.

40.16 Types of Defenses.

40.16[1] Waiver May Be Available.

40.16[2] Estoppel.

40.16[2][a] Estoppel May Be Available.

40.16[2][b] Estoppel Inapplicable If Plaintiff Causes Additional Delay.

40.16[2][c] Estoppel May Be Used Against the Court.

40.16[3] Settlement Agreement May Be a Defense.

40.17 Court Should Consider Factors Relevant to Discretionary Dismissal.

40.18 Defendant in Whose Favor Dismissal Is Entered Is Entitled to Recover Costs.

40.18A Plaintiff May Move for a New Trial.

40.19 CHECKLIST: Discretionary Dismissal for Delay in Bringing to Trial.

40.19[1] Moving Party's Checklist.

40.19[2] Defending Party's Checklist.

40.20 Discretionary Dismissal Available for Two-Year Delay.

40.21 Time Periods Determined in Same Manner as Mandatory Dismissal.

40.22 Discretionary Dismissal After Two Years for New Trial.

40.23 Court Must Consider All Relevant Matters in Making Its Decision.

40.24 Dismissal by Court Will Be Upheld Absent Miscarriage of Justice or Decision Exceeds the Bounds of Justice.

40.25 Plaintiff Must Exercise Diligence in Bringing Case to Trial.

40.26 Court Setting Case for Trial Does Not Preclude Motion for Dismissal.

40.27 Party Seeking Dismissal Must Serve and File Motion 45 Days Before Hearing Generally.

40.28 If Court Seeks Dismissal, It Must Give 20 Days' Notice.

40.29 Party Waives Objection to Notice by Challenging on the Merits.

40.30 Filing of Notice of Motion to Dismiss Does Not Preclude Efforts to Bring to Trial.

40.31 Written Opposition Must Be Served and Filed Within 15 Days.

40.32 Response to Written Opposition May Be Served and Filed Within 15 Days.

40.33 Opposing Party May Reply to Response Within Five Days.

40.34 Burdens of Proof.

40.34[1] Moving Party Has Initial Burden.

40.34[2] Burden Then Shifts to Show Excuse for Delay.

40.35 Court May Make Provisional or Conditional Orders.

40.35A Plaintiff May Move for a New Trial.

40.36 Party May Appeal Dismissal Order.

40.37 Party May Not Directly Appeal Denial of Dismissal.

40.38 Reviewing Court Will Not Overturn Dismissal on Appeal Unless Clear Case of Abuse Is Shown.

40.39 Reviewing Court Will Uphold a Denial of Dismissal If There Is Any Showing of Good Cause for Delay.

40.40 Notice of Motion for Mandatory Dismissal Based on Failure to Bring to Trial Within Five Years and Supporting Declaration.

40.41 Notice of Motion for Mandatory Dismissal Based on Failure to Bring Action to New Trial Within Three Years.

40.42 Notice of Motion for Discretionary Dismissal for Failure to Bring to Trial Within Two Years and Supporting Declaration.



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Chapter 40 Dismissal for Delay in Bringing to Trial  
I. STRATEGY

*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.01*

**40.01 Scope.**

This chapter covers:

- Objectives and strategy for filing and defending motions for dismissal based on delay in bringing to trial [see 40.02].
- Mandatory dismissals based on delay in bringing to trial [see 40.03 -40.18].
- Discretionary dismissals based on delay in bringing to trial [see 40.27 -40.33].
- Procedure for filing motions to dismiss based on delay in bringing to trial [see 40.19 -40.33].
- Procedure for defending motions to dismiss based on delay in bringing to trial [see 40.31 -40.33].

**Core Statutes:**

*CCP §§ 583.110-589.161, 583.310-583.430*



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Chapter 40 Dismissal for Delay in Bringing to Trial  
I. STRATEGY

3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.02

**40.02 Objective and Strategy.**

A dismissal of an action is a termination of the court's consideration of a case prior to completion of a full trial of the issues of fact [ *Schisler v. Mitchell* (1959) 174 CA2d 27, 29, 344 P2d 61 ]. A voluntary dismissal is one entered at the request of the party filing the action [see CCP § 581(b)(1), (2), (e)]; an involuntary dismissal is a dismissal by the court [see CCP §§ 581(b)(3)-(5), (d), (f), (g), (l), 583.110 et seq.]. The dismissal for failure to bring to trial is an involuntary dismissal which can be either mandatory or discretionary.

The policies favoring the parties' right to stipulate in their own interests and favoring a disposition on the merits are generally to be preferred over the policy requiring dismissal for failure to proceed with reasonable diligence, except as otherwise expressly provided by statute or court rule adopted pursuant to statute [CCP § 583.130; see also *Denham v. Superior Court* (1970) 2 C3d 557, 566, 86 CR 65, 468 P2d 193 (decided under prior law)].

The aim of the requirement "is to 'promote the trial of cases before evidence is lost or destroyed, or the memory of witnesses becomes dimmed, and to protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time' (citations omitted)" [ *Moran v. Superior Court* (1983) 35 C3d 229, 237, 197 CR 546, 673 P2d 216 ].



**Strategic Point--Moving Party:**

Check timing to make sure all exclusionary time is eliminated from date calculations.

**Detailed Discussion/Forms:**

See California Forms of Pleading and Practice, Ch. 212, Dismissal, § 212.60 et seq. (Matthew Bender).

*California Points and Authorities*, Ch. 90, Dismissal, § 90.50 et seq. (Matthew Bender).



**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary  
DismissalsFailures to Prosecute



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Chapter 40 Dismissal for Delay in Bringing to Trial  
II. MANDATORY DISMISSAL FOR DELAY IN BRINGING TO TRIAL

*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.03*

**40.03 CHECKLIST: Mandatory Dismissal for Delay in Bringing to Trial.**

**40.03[1] Moving Party's Checklist.**

- ☐ Determine whether plaintiff proceeded with reasonable diligence.

**Authority:**

*CCP § 583.130*

**Discussion:**

*See 40.05*

- ☐ Determine whether it has been more than five years since the initial case commenced.

**Authority:**

*CCP § 583.310*

**Discussion:**

*See 40.08*

- ☐ Determine timing for mandatory dismissal for case to be brought again to trial after new trial granted for:

☐ In actions when a trial is commenced but no judgment is entered due to a mistrial or the jury is unable to reach a verdict, within three years after the order of the court declaring a mistrial or the disagreement of the jury is entered.

☐ In actions when a new trial is granted after judgment and no appeal is taken, within three years after the order granting the new trial is entered.



- ☐ In actions when, on appeal, an order granting a new trial is affirmed or a judgment is reversed and the action is remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

**Authority:**

CCP § 583.320

**Discussion:**

See 40.09[1]

- ☐ Determine date when action commences:

- ☐ Date original complaint was filed or date new party is added.
- ☐ For contractual arbitration, may date that court files order compelling arbitration.

**Authority:**

CCP §§ 350, 583.310; *Gray v. Firthe* (1987) 194 CA3d 202, 209, 239 CR 389; *Gainey v. Occidental Land Research* (1986) 186 CA3d 1051, 1054, 231 CR 249

**Discussion:**

See 40.10

- ☐ Determine if trial has commenced:

- ☐ For jury trial, commences when jury is impaneled.
- ☐ For non-jury trial, commences when first witness sworn and gives some relevant testimony.
- ☐ For judicially arbitrated cases, commences only if parties stipulate to binding arbitration with no right to trial de novo.
- ☐ Trial may commence during pretrial orders if it determines an issue of law or fact.

- ☐ If trial has commenced, statute is without effect.

**Authority:**

*McDonough Power Equip. Co. v. Superior Court* (1972) 8 C3d 527, 532, 105 CR 330, 503 P2d 1338 (decided under prior law); *Weeks v. Roberts* (1968) 68 C2d 802, 805, 69 CR 305, 442 P2d 361 (decided under prior law); *Dodd v. Ford* (1984) 153 CA3d 426, 429-431, 200 CR 256 (decided under prior law)

**Discussion:**

See 40.11, 40.12

☐ Determine whether there are any statutory exclusions from the time computation.

- ☐ Suspension of court's jurisdiction.
- ☐ Stay or injunction of prosecution.
- ☐ Impossibility, impracticability, or futility in prosecution.
- ☐ Submission to arbitration.
- ☐ Military service by party.
- ☐ Review of determination of good-faith settlement.
- ☐ Special exclusion after statutory tolling.

**Authority:**

*CCP §§ 583.340(a), (b), (c), 583.350, 877.6(e)(3), 1141.17(a), (b), Cal Rules Ct, Rule 3.515, 50 USC app § 525*

**Discussion:**

*See 40.14*

☐ If five-year time period has passed:

- ☐ Draft motion and notice of motion to dismiss based on delay in bringing case to trial, with supporting declaration and memorandum.
- ☐ Draft proposed order.
- ☐ Serve and file motion.

☐ Follow standard noticed motion procedure.

- ☐ Calendar response and hearing dates.

**Authority:**

*CCP § 538.310 et seq.; Cal Rules Ct, Rule 3.1342(a)*

**Discussion:**

*See 40.03 -40.17*

**Forms:**

*See 40.40, 40.41*

- ☐ Prepare and file motion to collect costs if client is prevailing party.

**Authority:**

*CCP § 1032(a)(4),(b); Cal Rules Ct, Rule 3.1700*

**Discussion:**

See 40.18

**40.03[2] Defending Party's Checklist.**

- ☐ If time approaching five-year time period:

☐ Move for trial preference.

**Authority:**

*CCP § 36*

**Discussion:**

See 40.15

- ☐ Try to get written stipulation or oral agreement made in court to extend time to bring case to trial.

☐ Stipulation may be made after expiration of time.

☐ Must expressly waive right to dismissal or extend time to bring to trial.

**Authority:**

*CCP § 583.330; General Ins. Co. of Am. v. Superior Court (1975) 15 C3d 449, 454-455, 124 CR 745, 541 P2d 289*

**Discussion:**

See 40.13

- ☐ Calendar response and hearing dates.

- ☐ Determine grounds for opposition:

☐ Waiver.

☐ Estoppel.

☐ Settlement Agreement.

☐ Factors for discretionary dismissal.

☐ Prepare opposition:

- ☐ Collect any relevant evidence.
- ☐ Draft declarations opposing motion.
- ☐ Draft memorandum opposing motion.
- ☐ Draft proposed order.
- ☐ Serve and file response:

☐ Follow standard notice motion procedure.

**Authority:**

*CCP §§ 583.140, 583.360(b); Canal Street, Ltd. v. Sorich (2000) 77 CA4th 602, 608-609, 91 CR2d 811 ; Greene v. State Farm Fire & Casualty Co. (1990) 224 CA3d 1583, 1590, 274 CR 736 ; Sisler v. Superior Court (1988) 205 CA3d 864, 868, 252 CR 665*

**Discussion:**

See 40.16



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**40.04 Statutes for Dismissal Apply to Civil Actions.**

*CCP § 583.110 et seq.* apply to civil actions but not to special proceedings except to the extent that these statutes are incorporated by reference in the special proceeding [*CCP § 583.120(a)*]. However, a court may, by rule or otherwise under its inherent authority, apply *CCP § 583.110 et seq.* to all or part of a special proceeding, unless to do so would be inconsistent with the character of the special proceeding or the statute governing the proceeding [*CCP § 583.120(b)*; *Oskooi v. Fountain Valley Reg'l Hosp. & Med. Ctr.* (1996) 42 CA4th 233, 238-239, 49 CR2d 769 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureDismissalsInvoluntary DismissalsGeneral Overview



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**40.05 Plaintiff Must Proceed With Reasonable Diligence in Prosecuting Claim.**

Every plaintiff must proceed with reasonable diligence in the prosecution of an action or cross-complaint, however, all parties must cooperate in bringing the action to trial or other disposition [*CCP* § 583.130].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute



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*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.06*

**40.06 Local Fast Track Rules Have Reduced Mandatory Dismissal Statute's Importance.**

The stricter requirements of trial court delaying reduction programs [*Gov Code §§ 68600-68620*] have lessened the impact of the mandatory five-year period of *CCP § 583.310*. Case disposition time standards promulgated by the Judicial Council direct superior courts to dispose of 90 percent of general civil cases within 12 months, 98 percent of general civil cases within 18 months, and 100 percent of general civil cases within 24 months [*Cal Rules Ct, Stnds Jud Admin, Stnd 2.2(c), (f); but see Cal Rules Ct, Stnds Jud Admin, Stnd 2.2(g)* (superior court case involving "exceptional circumstances" or requiring "continuing review" is exempt from time standards)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute



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Chapter 40 Dismissal for Delay in Bringing to Trial  
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*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.07*

**40.07 Mandatory Time Periods for Dismissal Set by Statute.**

*CCP §§ 583.310-583.350* set forth periods in which the plaintiff must bring an action to trial. If an action is not brought to trial within the mandatory time periods, the court must dismiss the action [*CCP § 583.360(a)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteGovernmentsLegislationStatutes of  
LimitationsTime Limitations





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*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.08*

**40.08 Must Bring Case to Trial Within Five Years.**

An action must be brought to trial within five years of the time action is commenced against a defendant [*CCP* § 583.310].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Dismissals Involuntary Dismissals Failures to Prosecute Governments Legislation Statutes of Limitations Time Limitations



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*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.09*

**40.09 New Trial.**

**40.09[1] If New Trial Is Granted, Time to Bring to Trial Is Three Years.** If a new trial is granted, the action must again be brought to trial [*CCP* § 583.320(a)]:

- In actions when a trial is commenced but no judgment is entered due to a mistrial or the jury is unable to reach a verdict, within three years after the order of the court declaring a mistrial or the disagreement of the jury is entered.
- In actions when a new trial is granted after judgment and no appeal is taken, within three years after the order granting the new trial is entered.
- In actions when, on appeal, an order granting a new trial is affirmed or a judgment is reversed and the action is remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

However, if the three-year period expires before the end of the initial five-year period under *CCP* § 583.310, the action need not be brought to trial again before expiration of the five-year period of *CCP* § 583.310 [*CCP* § 583.320(b)].

**Exception:**

The time requirements for bringing an action again to trial do not apply to ancillary or collateral proceedings subsequent to the original trial, such as a motion for attorney's fees [ *No Oil, Inc. v. City of Los Angeles* (1984) 153 CA3d 998, 1003-1006, 200 CR 768 ].

**40.09[2] Order Vacating Appointment in Binding Arbitration Is Equivalent to Declaration of Mistrial.**

When the parties stipulate to binding arbitration without a right to a trial de novo, the binding arbitration is equivalent to a trial. In such a case, when the arbitration hearing is abruptly terminated and arbitrator's appointment vacated, the order vacating the appointment is equivalent to an order declaring a mistrial within the meaning of former *CCP* § 583 (now see *CCP* § 583.320(a)(1)) [ *Dodd v. Ford* (1984) 153 CA3d 426, 429-431, 200 CR 256 ].

**40.09[3] Order Setting Aside Default Judgment Does Not Qualify as a New Trial Order.** If a default judgment

has been obtained under *CCP* § 585, an order setting aside the default judgment does not qualify as a new trial order for the purposes of *CCP* § 583.320 [ *Misic v. Segars* (1995) 37 CA4th 1149, 44 CR2d 100 ].

**40.09[4] Order Vacating Default Judgment for Failure to Answer Does Not Qualify as an Order for a New Trial.** An order vacating a default judgment for the defendant's failure to answer is not equivalent to an order for a new trial, since a default judgment results from a non-adversarial hearing rather than a trial [ *Tiholiz v. Superior Court* (1980) 104 CA3d 201, 205, 163 CR 452 (decided under prior law); see *Misic v. Segars* (1995) 37 CA4th 1149, 1154, 44 CR2d 100 ].

**40.09[5] Order Setting Aside Judgment When Trial Held in Defendant's Absence Is Equivalent to Order for New Trial.** An action is "brought to trial" when a plaintiff proceeds to try the action under *CCP* § 594 in the defendant's absence, so that an order setting aside the judgment in the plaintiff's favor is equivalent to an order granting a new trial [ *Briley v. Sukoff* (1979) 98 CA3d 405, 408-410, 159 CR 452 (decided under prior law)].

#### **Legal Topics:**

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**40.10 When Action Commences.**

**40.10[1] Action Commences on Date Original Complaint Is Filed or Date New Party Is Added.** An action commences on the date the original complaint is filed, as to any defendant named in that complaint either expressly or by a fictitious name. However, when a new party defendant is added to the action, the action commences as to that defendant on the date of the order adding him or her as a party or on the date the pleading naming him or her as a new party is filed [ *Gray v. Firthe* (1987) 194 CA3d 202, 209, 239 CR 389 ; *see also* CCP §§ 350 (action commences when complaint is filed), 583.310 (five-year period begins when action commences against defendant)]. Similarly, the relation-back doctrine applies in the context of CCP § 583.310, so that claims added to an action that do not relate back to the claims filed in the original pleading commenced as of the date that they were added by amendment of pleadings [ *Brumley v. FDCC California, Inc.* (2007) 156 CA4th 312, 320, 67 CR3d 292 ].



**Cross Reference:**

Relation back doctrine, *see* 4.44[1].

**40.10[2] Contractual Arbitration Cases Commence at Time Court Files Order Compelling Arbitration.**

Several courts interpreting prior law have ruled that, when an action is subject to contractual arbitration, the five-year period for bringing the action to an arbitration hearing commences at the time the court files the order compelling arbitration [ *Gainey v. Occidental Land Research* (1986) 186 CA3d 1051, 1054, 231 CR 249 ; *Preston v. Kaiser Found. Hospitals* (1981) 126 CA3d 402, 408-410, 178 CR 882 ; *but see* *Lockhart-Mummery v. Kaiser Found. Hospitals* (1980) 103 CA3d 891, 896, 163 CR 325 (five-year period is measured from date of filing the complaint)]. It is uncertain whether courts will follow this approach under CCP § 583.310.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**40.11 Commencement of Trial.**

**40.11[1] Jury Case Commences When Jury Impaneled.** An action is "brought to trial" when the jury is impaneled [ *Hartman v. Santamarina* (1982) 30 C3d 762, 765-767, 765 n3, 180 CR 337, 639 P2d 979 (decided under prior law)].

However, one court of appeal has held that a party can put a jury trial beyond the bar of the dismissal statute by commencing the jury selection process, as a contrary rule may invite an unscrupulous party to delay or prolong voir dire examination of prospective jurors until the expiration of the five-year period [ *Hilliard v. A.H. Robins Co.* (1983) 148 CA3d 374, 389-390, 196 CR 117 ].

**40.11[2] Non-Jury Case Commences When First Witness Is Sworn and Gives Some Testimony.** An action is "brought to trial" in a nonjury case if one witness has been sworn and gives some testimony relevant to the issues [ *Weeks v. Roberts* (1968) 68 C2d 802, 805, 69 CR 305, 442 P2d 361 (decided under prior law); *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn.* (1977) 71 CA3d 706, 711-712, 139 CR 651 (decided under prior law)].

Alternatively, an action may be brought to trial if the plaintiff requests leave to present his or her first witness, but is denied [ *Clements v. Ragghianti* (1957) 155 CA2d 188, 191, 317 P2d 706 (decided under prior law)].

**40.11[3] Judicially Arbitrated Case Considered Commenced Only When Parties Stipulated to Binding Arbitration Without Right to Trial De Novo.** Usually, submission of an action to judicial arbitration [see CCP §§ 1141.10-1141.31] is not considered bringing the action to trial, since a trial de novo may be subsequently demanded. However, commencement of a judicial arbitration hearing was held equivalent to commencement of a trial when the parties had stipulated to binding arbitration without a right to trial de novo [ *Dodd v. Ford* (1984) 153 CA3d 426, 429-431, 200 CR 256 (decided under prior law)].

**40.11[4] Action May Be Brought to Trial When Judgment Which Determines an Issue of Law or Fact Is Rendered Pursuant to Pretrial Order.** An action may be "brought to trial" when a judgment is rendered pursuant to a pretrial order which determines an issue of law or fact [ *McDonough Power Equipment Co. v. Superior Court* (1972) 8 C3d 527, 532, 105 CR 330, 503 P2d 1338 (decided under prior law)].

**Examples:**

Examples of situations in which an action is "brought to trial" include the following:

- When the court dismisses an action with prejudice following the sustaining of a demurrer [ *Berri v. Superior Court* (1955) 43 C2d 856, 858-860, 279 P2d 8 (decided under prior law)].
- When the court enters a judgment following a motion for summary judgment [ *S. Pac. Co. v. Seaboard Mills* (1962) 207 CA2d 97, 104, 24 CR 236 (decided under prior law)].
- When a case is submitted on stipulated facts for final determination of legal questions [ *Ryerson v. Riverside Cement Co.* (1968) 266 CA2d 789, 795, 72 CR 595 (decided under prior law)].

Examples of situations in which an action is not "brought to trial" include the following:

- When cases brought together are bifurcated and then severed in such a manner that the trial of one cause of action decides no element of the other causes of action, those other causes of action have not been "brought to trial" [ *Sagi Plumbing v. Chartered Construction Corp.* (2004) 123 CA4th 443, 449 ].
- When a court grants discretionary dismissal of an action for delay in prosecution [ *Fannin Corp. v. Superior Court* (1974) 36 CA3d 745, 751, 111 CR 920 (decided under prior law)].
- When a court grants a motion for partial summary judgment or summary adjudication of issues [ *King v. California* (1970) 11 CA3d 307, 310-312, 89 CR 715 (decided under prior law)].
- When a court sets a trial date for a date after the expiration of the applicable period [ *Tunis v. Superior Court* (1963) 59 C2d 465, 467, 30 CR 135, 380 P2d 823 (decided under prior law)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**40.12 Statute Inapplicable Once Case Brought to Trial.**

If an action is "brought to trial" within the applicable time period for doing so, the mandatory requirement measured by that particular period is satisfied even if the trial is not completed [ *Hartman v. Gordon H. Ball, Inc.* (1969) 269 CA2d 779, 780-782, 75 CR 618 (decided under prior law)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**40.13 Stipulation to Extend Time to Bring Case to Trial.**

**40.13[1] Stipulation May Be Written or Oral Agreement Made in Court.** The parties may extend the time within which an action must be brought to trial under *CCP* §§ 583.310 and 583.320 by:

- A written stipulation, which need not be filed, but if not filed, must be brought to the court's attention if relevant to a motion for dismissal [*CCP* § 583.330(a)].
- An oral agreement made in open court, if entered in the minutes of the court or if a transcript is made [*CCP* § 583.330(b)].

**40.13[2] Stipulation May Be Made After Expiration of Time.** A stipulation may be made after the expiration of the applicable time period, so long as dismissal of the action has not yet been ordered [ *General Ins. Co. of Am. v. Superior Court* (1975) 15 C3d 449, 454-455, 124 CR 745, 541 P2d 289 ]. However, a stipulation entered into after the five-year period has expired will extend the five-year term only if it expressly waives the right to dismissal or extends the time of trial to a date beyond the five-year period [ *Miles v. Speidel* (1989) 211 CA3d 879, 883-885, 259 CR 582 ].

**40.13[3] Must Expressly Waive Right to Dismissal or Extend Time of Trial.** A stipulation is effective under *CCP* § 583.330 if it expressly waives the right to mandatory dismissal for failure to satisfy the requirements of *CCP* § 583.310 or 583.320, or if it expressly permits the plaintiff to bring the action to trial or retrial at some date beyond the applicable time period [ *General Ins. Co. v. Superior Court* (1975) 15 C3d 449, 455, 124 CR 745, 541 P2d 289 (decided under prior law); *J.C. Penney Co. v. Superior Court* (1959) 52 C2d 666, 669, 343 P2d 919 (decided under prior law)].

A stipulation may also be effective if it shows intent to extend the applicable time period by indefinitely extending the time for performance of some other act that is a necessary prerequisite to bringing the action to trial [ *Regan Distributors, Inc. v. Yurosek & Son, Inc.* (1979) 88 CA3d 924, 928-929, 152 CR 127 (decided under prior law)]. However, the mere granting of an open extension of time to answer, which is exercised within the statutory period, may not extend the period under circumstances that do not preclude the plaintiff from bringing the case to trial within the prescribed time [ *Gentry v. Nielsen* (1981) 123 CA3d 27, 33, 176 CR 385 (decided under prior law)].



If the stipulation extends the applicable period for an indefinite period of time, a court may construe it to include an implied condition that the extension be for a reasonable period of time [ *Chapin v. Superior Court* (1965) 234 CA2d 571, 576, 44 CR 496 (decided under prior law; court opined that additional five years was maximum boundary for "reasonable time")].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**40.14 Statutory Exclusions From Five-Year Time Computation.**

**40.14[1] Suspension of Court's Jurisdiction.** Any time during which the court's jurisdiction to try the action was suspended is excluded when computing the time within which an action must be brought to trial or retrial under *CCP* §§ 583.310-583.350 [*CCP* § 583.420(a)].

Suspension of jurisdiction under *CCP* § 583.340(a) must be an entire absence of power to hear or determine the case [ *White v. Renck* (1980) 108 CA3d 835, 840-841, 166 CR 701 (decided under prior law)].

The suspension of jurisdiction exclusion is an express statutory exception to the five-year or three-year bar, separate and distinct from exceptions based upon impossibility or impracticability. Thus, where lack of jurisdiction is asserted, plaintiff's diligence, or lack thereof, is irrelevant [ *Spanair S.A. v. McDonnell Douglas Corp.* (2009) 172 CA4th 348, 358, 90 CR3d 864] .

**40.14[2] Stay or Injunction of Prosecution of Action.** Any time during which the prosecution of the trial of the action is stayed or enjoined is excluded in computing the time within which an action must be brought to trial or retrial under *CCP* §§ 583.310-583.350; *see also Cal Rules Ct, Rule 3.515* (stay pending coordination of actions as excluded from calculation of time periods under *CCP* § 583.110 *et seq.*) [*CCP* § 583.420(b)].

For purposes of *CCP* § 583.340(b), a "stay" is a temporary suspension of a case, or some proceeding in it, until the happening of a defined contingency [ *Holland v. Dave Altman's R.V. Ctr.* (1990) 222 CA3d 477, 482, 271 CR 706 ].

**Example:**

That a stay of certain types of proceedings within an action--a partial stay of an action--is a stay of prosecution under 583.340(b) is consistent with the general policy favoring trial over dismissal for failure to prosecute an action. Thus, a stay of all discovery tolls the five-year period in which to prosecute an action [ *Bruns v. E-Commerce Exchange, Inc.*, 172 CA4th 488, 499, 90 CR3d 889 (reversing trial court order failing to toll for three discovery stays)].

**40.14[3] Impossibility, Impracticability, or Futility.**

**40.14[3][a] Plaintiff Has Burden of Proof of Entitlement to Tolling.** Any time during which it was impossible, impracticable, or futile to bring an action to trial is excluded in computing the time within which an action must be brought to trial or retrial under *CCP* §§ 583.310-583.350. The plaintiff has a duty to use reasonable diligence in prosecuting his or her action [ *Lauriton v. Carnation Co.* (1989) 215 CA3d 161, 164, 263 CR 476 ].

**Examples of Impossibility, Impracticability or Futility:**

- When, as a matter of law or fact, it would not be possible to commence trial [ *Christin v. Superior Court* (1937) 9 C2d 526, 532-533, 71 P2d 205 ].
- When, although proceeding to trial is neither legally nor factually impossible, it would involve excessive and unreasonable difficulty in light of the circumstances of the individual case, including the acts and conduct of the parties and the nature of the proceedings [ *Brunzell Constr. Co., Inc. v. Wagner* (1970) 2 C3d 545, 554, 86 CR 297, 468 P2d 553 (decided under prior law)].
- A period of court congestion when the congestion causes unusual or abnormal delays beyond the plaintiff's control [ *Lazelle v. Lovelady* (1985) 171 CA3d 34, 38-42, 217 CR 145 (decided under prior law); *Bennett v. Bennett Cement Contractors, Inc.* (1981) 125 CA3d 673, 677-678, 178 CR 633 (decided under prior law); see also *Chin v. Meier* (1991) 235 CA3d 1473, 1477-1478, 1 CR2d 499 ].
- Delay in bringing a case to trial attributable to the sickness or death of counsel. The existence of impracticability is determined in light of all the circumstances of the individual case, including acts and conduct of the parties and nature of the proceedings themselves. The critical factor in applying the exception to a given factual situation is whether plaintiff exercised reasonable diligence in prosecuting his or her case [ *Him v. Superior Court* (1986) 184 CA3d 35, 39, 228 CR 839 ]. The death or illness of a plaintiff's attorney may result in a period of time when prosecution of the case is impracticable and beyond the plaintiff's control; however, the death or illness of defense counsel does not create the same impediment to a plaintiff's prosecution of his or her case [ *Sanchez v. City of Los Angeles* (2003) 109 CA4th 1262, 1273, 135 CR2d 869 ].
- Delay in discovery caused by court orders that nullify prior discovery efforts and require their repetition [ *Bruns v. E-Commerce Exchange, Inc.*, 172 CA4th 488, 505-506, 90 CR3d 889 (reversing trial court order failing to toll for court-induced repetition in discovery)].
- Delay in the court's transfer of files for purposes of coordination proceedings [ *Bruns v. E-Commerce Exchange, Inc.*, 172 CA4th 488, 506-508, 90 CR3d 889 (reversing trial court order failing to toll for court delay in file transfer)].
- An unavoidable delay in proceeding to trial against one defendant (caused, for example, by intervening injunctions and appeals) that results in plaintiff delaying proceedings against the other defendants in the action if it would have been impracticable and futile for plaintiff to sever the causes of action and proceed separately against the co-defendants [ *Brunzell Constr. Co., Inc. v. Wagner* (1970) 2 C3d 545, 554-556, 86 CR 297, 468 P2d 553 (decided under prior law)].
- If another action is pending that arose out of the same incident or involves some of the same issues. One example is if the outcome in the pending case would resolve a legal issue unsettled or essential to plaintiff's case and the interests of judicial economy would be promoted by delaying trial [see *Rose v. Knapp* (1951) 38 C2d 114, 117-118, 237 P2d 981 (decided under prior law); *Stella v. Great Western Sav. & Loan Assn.* (1970) 13 CA3d 732, 737-739, 91 CR 771 (decided under prior law)].

■ The period between the time defendant defaulted and the time the default judgment was ultimately set aside because there is no adversary against whom the plaintiff may reasonably prosecute the action [ *Bruns v. E-Commerce Exchange, Inc.*, 172 CA4th 488, 508-509, 90 CR3d 889 (reversing trial court order failing to toll for court delay until default judgments set aside); see *Misic v. Segars* (1995) 37 CA4th 1149, 1156, 44 CR2d 100 ; see, e.g., *Dale v. ITT Life Ins. Corp.* (1989) 207 CA3d 495, 498-499, 255 CR 8 ].

**40.14[3][b] Courts of Appeal Split Three Ways on How to Determine Impossibility, Impracticability, or Futility.** Prior to the 1984 amendment of CCP § 583.340, a plaintiff who failed to exercise reasonable diligence in bringing a case to trial after some event had made it for a period impossible to do so could not add the period of impossibility to the five-year period for bringing the case to trial. The 1984 amendment of CCP § 583.340(c) inserted language making the tolling mandatory [ *Chin v. Meier* (1991) 235 CA3d 1473, 1477, 1 CR2d 499 ; *Rose v. Scott* (First Dist., Div. Three 1991) 233 CA3d 537, 542, 284 CR 487 ; *Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court (Hudson)* (1990) 217 CA3d 464, 470-471, 266 CR 50 (citing 17 Cal. Law Revision Com. Rep at 936)]. The Cal. Law Revision Commission's Comment to that amendment states the following [17 Cal. Law Revision Com. Rep at 936]]:

Under Section 583.340 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial. This overrules cases such as *State of California v. Superior Court*, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979) , and *Brown v. Superior Court*, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976) .

The courts of appeal are of three views on the effect of the amendment in light of the Comment [see *De Santiago v. D & G Plumbing, Inc. (Fourth Dist., Div. Two 2007)* 155 CA4th 365, 376, 65 CR3d 882 ]. Under one view, if the trial court concludes there was a period of impossibility, impracticability, or futility over which plaintiff had no control, it must toll the running of the five-year period for that amount of time, even if there is ample time after the tolling period for the plaintiff to bring the case to trial [ *Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co. (Fifth Dist. 1994)* 24 CA4th 247, 257, 29 CR2d 144 ; *Rose v. Scott (First Dist., Div. Three 1991)* 233 CA3d 537, 542, 284 CR 487 ]. Under this view, the plaintiff need not show that he or she would have brought the case to trial within the five-year period but for the period of impracticability [ *New West Fed. Savings & Loan Assn. v. Superior Court (Fifth Dist. 1990)* 223 CA3d 1145, 1155, 273 CR 37 ].



#### Strategic Point:

The requirement of the aforementioned view of impossibility, impracticability, or futility requires that the event causing the disability must have been beyond the control of the plaintiff, which may have a similar function as a requirement of reasonable diligence. However, it applies only to the event causing the period of impossibility, impracticability, or futility, and does not apply to the period after the end of that period. In that respect, it seems to follow the model of tolling of statutes of limitation. The remaining two views, in contrast, apply diligence to the period after the end of the period of impossibility, impracticability, or futility that remains in the original five-year period in which to bring the case to trial.

Other cases espouse the view that the plaintiff has a duty to use reasonable diligence in prosecuting his or her action in order to be entitled to the tolling for an event creating an impossibility, impracticability, or futility [see, e.g., *Jordan v. Superstar Sandcars (Fourth Dist., Div. Two 2010)* 182 CA4th 1416, 1420, 107 CR3d 5 (critical factor of due diligence increases as five-year deadline approaches); *De Santiago v. D & G Plumbing, Inc. (Fourth Dist., Div. Two 2007)* 155 CA4th 365, 65 CR3d 882 ; *Tamburina v. Combined Ins. Co. of America (Third Dist. 2007)* 147 CA4th 323, 336, 54 CR3d 175 (diligence is critical factor in applying exception); *Moss v. Stockdale, Peckham & Werner (Second Dist.*

1996) 47 CA4th 494, 502, 54 CR2d 805 (legal malpractice action); *Lauriton v. Carnation Co. (Fifth Dist. 1989)* 215 CA3d 161, 164, 263 CR 476 ]. Under this view, the exclusion of CCP § 583.340(c) does not apply when a plaintiff fails to take reasonable steps to expedite the proceedings in the remaining time in the original five-year period after the disability from the event ceases [see *Schwenke v. J & P Scott, Inc. (1988)* 205 CA3d 71, 79-80, 252 CR 91 ]. In determining whether the impracticability exception applies under this view, the court must find the following three factors [ *Tamburina v. Combined Ins. Co. of America (Third Dist. 2007)* 147 CA4th 323, 328, 54 CR3d 175 ]:

- A circumstance of impracticability.
- A causal connection between that circumstance and the plaintiff's failure to move the case to trial.
- The plaintiff was reasonably diligent in moving the case to trial.

Under what might be described as a third view [see *De Santiago v. D & G Plumbing, Inc. (Fourth Dist., Div. Two 2007)* 155 CA4th 365, 375, 65 CR3d 882 ], the plaintiff must show a causal connection between the circumstances on which plaintiff relies and the failure to satisfy the five-year requirement [ *Sanchez v. City of Los Angeles (Second Dist., Div. Three 2003)* 109 CA4th 1262, 1271, 135 CR2d 869 ; *Sierra Nevada Mem'l-Miners Hosp., Inc. v. Superior Court (1990)* 217 CA3d 464, 473, 266 CR 50 ]. Further, at least one case pursuing the causal connection also considered the notion of the plaintiff's control of the cause, but unlike the first view above, applied it to the period after the end of the event causing the impossibility, impracticability, or futility [see *Sanchez v. City of Los Angeles (Second Dist., Div. Three 2003)* 109 CA4th 1262, 1273, 135 CR2d 869 ]. The causal connection operates like the reasonable diligence requirement noted in the second view discussed above [see *De Santiago v. D & G Plumbing, Inc. (Fourth Dist., Div. Two 2007)* 155 CA4th 365, 375, 65 CR3d 882 ].

**40.14[4] Submission to Arbitration.** Submission of an action to judicial arbitration under CCP § 1141.10 *et seq.* suspends the running of the time periods specified in CCP § 583.110 *et seq.* if an action is or remains submitted to arbitration more than four years and six months after the plaintiff has filed the action [see CCP § 1141.17(a)]. The time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a request for a de novo trial is filed under CCP § 1141.20 is not included in computing the five-year period specified in CCP § 583.310 [CCP § 1141.17(b)].

Section 1141.17 is the exclusive ground for tolling based on the submission of a case to judicial arbitration [ *Howard v. Thrifty Drug & Discount Stores (1995)* 10 C4th 424, 434, 41 CR2d 362, 895 P2d 469 ]. There is no further tolling to prevent dismissal under CCP § 583.310 if a request for a trial de novo is filed, the court selects a trial date beyond the five-year statutory period taking into account the tolling under CCP § 1141.17(b), and plaintiff fails to object to the trial date and to inform the court of the statutory period. It is plaintiff's obligation to exercise reasonable diligence in calculating the mandatory dismissal date under CCP § 583.310 and to request a trial date within the statutory period [ *Lee v. Park (1996)* 43 CA4th 305, 308-309, 50 CR2d 511 ]. The plaintiff must inform the court of the impending five-year deadline at the time of or shortly after the request for trial de novo [ *Howard v. Thrifty Drug & Discount Stores (1995)* 10 C4th 424, 434-435, 41 CR2d 362, 895 P2d 469 ].

#### Cross Reference:

Discussion of tolling by judicial order for mediation of limitation on bringing action to trial, see 24.61.

**40.14[5] Military Service of Party.** Federal law may suspend statutory limitation periods during the time that a party is in active military service.

#### Example:

50 USC app § 525 tolls the time period for bringing an action to trial or retrial [ *Buttler v. City of Los Angeles (1984)* 153 CA3d 520, 524-525, 200 CR 372 (decided under prior law)].

**40.14[6] Review of Determination of Good-Faith Settlement.** When a trial court has determined that a plaintiff's settlement with a joint tortfeasor or co-obligor on a contract debt was made in good faith, the determination is subject to review by petition for writ of mandate, and the periods for bringing an action to trial are tolled during the period of the review [CCP § 877.6(e)(3)].

**40.14[7] Extension After Statutory Tolling.** If the time within which an action must be brought to trial or retrial under CCP § 583.310 *et seq.* is tolled or extended by statute and at the end of the tolling or extension period less than six months remain in the applicable time period, the action is not subject to mandatory dismissal under CCP § 583.310 *et seq.* if it is brought to trial or retrial within six months after the end of the tolling or extension period [CCP § 583.350].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**40.15 Plaintiff May Move for Trial Preference.**

As a means of expediting the trial when the time limit for bringing an action to trial is approaching, a plaintiff may move for trial preference [CCP § 36]. A court may grant a motion for trial preference in a civil case, on a showing of cause by the movant that satisfies the court that the interests of justice will be served by granting the preference [CCP § 36(e)]. The court, however, has discretion to grant or deny such a motion, even when it is made to avoid dismissal under CCP § 583.310 *et seq.*, on an evaluation of the totality of the circumstances [ *Salas v. Sears, Roebuck & Co. (1986) 42 C3d 342, 344-349, 228 CR 504, 721 P2d 590* ]. However, an order of dismissal has been upheld even though it was made before the mandatory expiration date, on the ground that the time remaining to bring the action to trial was grossly inadequate under the circumstances [ *Massey v. Bank of America (1976) 56 CA3d 29, 33, 128 CR 144* (decided under prior law)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**40.16 Types of Defenses.**

**40.16[1] Waiver May Be Available.** The requirements of *CCP* §§ 583.310-583.360 are mandatory and not subject to extension, excuse, or exception except as expressly provided by statute [*CCP* § 583.360(b)]. Thus, aside from the extensions under *CCP* §§ 583.330 (stipulation) and 583.350 (special extension after statutory tolling and exclusions from computation, there is generally no defense to a motion for mandatory dismissal under *CCP* § 583.360(a) other than that of waiver or estoppel [*CCP* § 583.140]. Nothing in *CCP* § 583.110 *et seq.* affects the principles of waiver [*CCP* § 583.140].

**Examples Which Did Not Constitute Waiver:**

- Mere presence at a trial setting conference at which the trial date is set beyond the time required for bringing an action to trial [ *Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc.* (1983) 143 CA3d 791, 796, 192 CR 169 (decided under prior law); *Singelyn v. Superior Court* (1976) 62 CA3d 972, 974, 133 CR 486 (decided under prior law)].
- A request for a continuance made by the defendant after expiration of the applicable time period [ *Balboa Ins. Co. v. Aguirre* (1983) 149 CA3d 1002, 1008-1009, 197 CR 250 (decided under prior law)].

**40.16[2] Estoppel.**

**40.16[2][a] Estoppel May Be Available.** Nothing in *CCP* § 583.110 *et seq.* affects the principles of estoppel [*CCP* § 583.140; *Greene v. State Farm Fire & Casualty Co.* (1990) 224 CA3d 1583, 1590, 274 CR 736 ].

The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he or she intentionally led another to believe a particular circumstance and to rely on such belief to his or her detriment. The elements of the doctrine are as follows [ *Greene v. State Farm Fire & Casualty Co.* (1990) 224 CA3d 1583, 1590, 274 CR 736 (quoting *Strong v. County of Santa Cruz* (1975) 15 C3d 720, 725, 125 CR 896, 543 P2d 264 )]:



- The party to be estopped must be apprised of the facts and must intend that his or her conduct will be acted on, or must so act that the party asserting the estoppel has a right to believe it was so intended.
- The party must be ignorant of the true state of facts and must rely on the conduct to his or her injury.

Conduct of the defendant that reasonably induces the plaintiff to take no action to bring the action to trial within the time required may give rise to the defense of estoppel [ *Borglund v. Bombardier, Ltd.* (1981) 121 CA3d 276, 280-281, 175 CR 150 (decided under prior law)].

#### **Examples of Conduct by the Defendant That May Give Rise to Estoppel:**

- Submitting documents that indicate a willingness to proceed to a disposition on the merits [ *City of Los Angeles v. Gleneagle Dev. Co.* (1976) 62 CA3d 543, 562-564, 133 CR 212 ; *Mustalo v. Mustalo* (1974) 37 CA3d 580, 584-585, 112 CR 594 (decided under prior law)].
- Actively seeking a postponement [ *Woley v. Turkus* (1958) 51 C2d 402, 408-409, 334 P2d 12 (decided under prior law); *Breacher v. Breacher* (1983) 141 CA3d 89, 92-93, 190 CR 112 (decided under prior law)].

#### **Examples of Conduct Not Giving Rise to Estoppel:**

- A defendant's mere presence at a trial-setting conference at which the trial date is set beyond the time required for bringing an action to trial [ *Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc.* (1983) 143 CA3d 791, 796, 192 CR 169 (decided under prior law); *Singelyn v. Superior Court* (1976) 62 CA3d 972, 974, 133 CR 486 (decided under prior law)].
- A defendant's request for a continuance made after expiration of the applicable time period [ *Balboa Ins. Co. v. Aguirre* (1983) 149 CA3d 1002, 1008-1009, 197 CR 250 (decided under prior law)].
- A defendant's agreement to trail a matter until after the expiration of the applicable time period, when plaintiff should have used due diligence in preventing the matter from being off calendar when the date expired [ *Hoffman v. California* (1985) 171 CA3d 1100, 1107-1108, 217 CR 867 (decided under prior law)].
- A defendant's failure to appear voluntarily for a deposition, combined with efforts to seek a continuance of an arbitration hearing and assurances by defendant that defendant will be available for such a hearing before the statutory period expires [ *Tejada v. Blas* (1987) 196 CA3d 1335, 1341-1342, 242 CR 53 ]].
- Plaintiff's assumption that defense counsel's declaration of unavailability until after the expiration of the five-year period meant that defendant would agree to an extension does not support equitable estoppel [ *Jordan v. Superstar Sandcars* (2010) 182 CA4th 1416, 1423, 107 CR3d 5] .

**40.16[2][b] Estoppel Inapplicable If Plaintiff Causes Additional Delay.** Facts that might otherwise give rise to a defense of estoppel may not prevent dismissal if there is additional delay after the period of postponement that can be attributed to plaintiff [ *Andre v. Gen. Dynamics, Inc.* (1974) 43 CA3d 839, 844, 118 CR 95 (decided under prior law); *Smith v. El Centro Lodge* (1969) 271 CA2d 713, 717-718 (decided under prior law)].

**40.16[2][c] Estoppel May Be Used Against the Court.** The conflicting interests of a trial court in expeditiously

clearing its calendar of old cases and a plaintiff in having a full trial on the merits may result in a situation in which equitable estoppel may be applied against the court to prevent it from pursuing its interest to the detriment of the plaintiff [ *Greene v. State Farm Fire & Casualty Co.* (1990) 224 CA3d 1583, 1590, 274 CR 736 ].

**40.16[3] Settlement Agreement May Be a Defense.** The courts of appeal are in conflict as to whether another exception to mandatory dismissal exists when the parties have entered into a settlement agreement. Under one view, the settlement agreement renders the five-year statutory limitation legally irrelevant, since an action settled by agreement will not proceed to trial [ *Gorman v. Holte* (1985) 164 CA3d 984, 987-988, 211 CR 34 ]. At least one court of appeal taking this view has ruled that judgment does not have to be entered on the settlement agreement [ *Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co.* (Fifth Dist. 1994) 24 CA4th 247, 254-255, 29 CR2d 144 (unenforced settlement tolled five-year dismissal period)]. However, the contrary view holds that an action must be dismissed under the five-year rule, regardless of whether the parties had entered into a settlement agreement [ *Varwig v. Leider* (1985) 171 CA3d 312, 315-316, 217 CR 208 (decided under prior law)]. *Varwig* has been criticized as having the potential to prevent settlements on the eve of trial shortly before the five-year deadline or settlements that enable the defendant to avoid a court judgment [ *Malouf Bros. v. Dixon* (1991) 230 CA3d 280, 285, 281 CR 235 ]. One court noted that since *Varwig* the five-year statute has been amended to incorporate what had been simply a judicially created exception to the mandatory five-year dismissal. The computation of the five-year period now specifically excludes the time during which bringing the action to trial was impossible, impracticable, or futile. Thus, the time during which a settlement agreement is in effect tolls the five-year period because attempting to bring an action to trial when all issues have been resolved through settlement would be futile [ *Canal Street, Ltd. v. Sorich* (2000) 77 CA4th 602, 608-609, 91 CR2d 811 ]. Another court of appeals has read the First District's *Varwig* as simply requiring entry of judgment on the settlement agreement as a prerequisite for the settlement to preclude mandatory dismissal [ *Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co.* (Fifth Dist. 1994) 24 CA4th 247, 253, 29 CR2d 144 ].



#### **Cross Reference:**

Discussion of impossibility, impracticability and futility, see 40.14[3].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Dismissals Involuntary Dismissals Failures to Prosecute Civil Procedure Trials General Overview



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**40.17 Court Should Consider Factors Relevant to Discretionary Dismissal.**

Whenever a plaintiff makes any motion, including referring the case to arbitration, which seeks to avoid the mandatory five-year statute, the trial court, before entering any order on the merits of the motion, should consider the factors relevant to a motion to dismiss under the discretionary dismissal provisions of *CCP § 583.420* [ *Sisler v. Superior Court* (1988) 205 CA3d 864, 868, 252 CR 665 ].



**Cross Reference:**

Discussion of factors, see 40.23.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureTrialsGeneral Overview



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*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.18*

**40.18 Defendant in Whose Favor Dismissal Is Entered Is Entitled to Recover Costs.**

A defendant in whose favor a dismissal is entered is a "prevailing party" [CCP § 1032(a)(4)]. Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding [CCP § 1032(b)].



**Cross References:**

Discussion of recovery of costs, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 24, Costs.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview



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*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.18A*

**40.18A Plaintiff May Move for a New Trial.**

The plaintiff may seek relief from judgment of dismissal for delay in bringing the case to trial by moving for a new trial in accordance with CCP § 659 if the plaintiff has grounds therefore [Finnie v District No. 1--Pacific Coast Dist. etc. Ass'n (1992) 9 CA4th 1311, 1315-1317, 12 CR2d 348 (that plaintiff filed motion to vacate, rather than a motion for new trial, was of no consequence; and the motion could properly be treated as a motion for new trial after mandatory dismissal under CCP § 583.320(a))].



**Cross Reference:**

Discussion of motions for new trial, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 21, Motion for New Trial.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.19*

**40.19 CHECKLIST: Discretionary Dismissal for Delay in Bringing to Trial.**

**40.19[1] Moving Party's Checklist.**

- ☐ Determine if it has been more than two years since case commenced.
- ☐ Determine whether case has been brought to trial or conditionally settled within two years after case commenced.

**Authority:**

*CCP § 583.420(a)(2), (b); Cal Rules Ct, Rule 3.1340(a)*

**Discussion:**

*See 40.10, 40.11, 40.21, 40.23*

- ☐ Determine whether it has been more than two years since:
  - ☐ Entry of an order of the court declaring a mistrial or the disagreement of the jury if a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision.
  - ☐ Entry of an order granting a new trial if after judgment a new trial is granted and no appeal is taken.
  - ☐ Filing of the remittitur by the clerk of the trial court if on appeal an order granting a new trial is affirmed or a judgment is reversed and the action is remanded for a new trial.

**Authority:**

CCP § 583.420(a)(3)

**Discussion:**

See 40.21, 40.22

- ☐ Determine whether Plaintiff proceeded with reasonable diligence.

**Authority:**

CCP § 583.130; *Cal Rules Ct, Rule 3.1342(e)*

**Discussion:**

See 40.25

- ☐ If Party determines it has been more than two years and wishes to bring motion:
- ☐ Draft motion and notice of motion for discretionary dismissal for delay in bringing to trial with supporting declarations and memorandum.
  - ☐ File and serve motion at least 45 days before date set for hearing on motion.

- ☐ If court brings motion, it must give notice to all parties at least 20 days before the hearing date.

**Authority:**

*Cal Rules Ct, Rule 3.1340(b), 3.1342(a); Sakhai v. Zipora (2009) 180 CA4th 593, 598-600, 102 CR3d 691*

**Discussion:**

See 40.27, 40.28

- ☐ Determine whether party waived objection to notice by challenging on the merits.

**Authority:**

*Clark v. Stabond Corp. (1987) 197 CA3d 50, 59, 242 CR 676*

**Discussion:**

See 40.29

- ☐ Prepare response to written opposition and serve and file within 15 days after service of written opposition.

**Authority:**

*Cal Rules Ct, Rule 3.1342(c)*

**Discussion:**

See 40.31

- ☐ Be prepared to meet initial burden of showing the dismissal is warranted.

**Authority:**

*Lopez v. State of California* (1996) 49 CA4th 1292, 1295, 57 CR2d 266 ; *Marra v. Mission Foods Corp.* (1993) 19 CA4th 724, 727, 23 CR2d 741 ; *Visco v. Abatti* (1983) 144 CA3d 904, 908, 192 CR 833 (decided under prior law)

**Discussion:**

See 40.34

- ☐ If motion to dismiss is denied, do not appeal directly from denial, but challenge denial either by petition for a writ of mandate or on appeal from a final judgment.

**Authority:**

*Oskooi v. Fountain Valley Regional Hospital* (1996) 42 CA4th 233, 237, 49 CR2d 769

**Discussion:**

See 40.37

**40.19[2] Defending Party's Checklist.**

- ☐ If court or opposing party brings motion, make efforts to bring case to trial.

**Authority:**

*Cal Rules Ct, Rule 3.1342(a)*

**Discussion:**

See 40.30

- ☐ Evidence court must consider:

- ☐ Court's file in the case.
- ☐ Affidavits, declarations, and supporting data submitted by the parties.
- ☐ Extent to which parties engaged in any settlement negotiations or discussions.
- ☐ Diligence of parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party.
- ☐ Nature and complexity of case.
- ☐ Law applicable to the case, including pendency of other litigation under a common set of facts or determinative of legal or factual issues in the case.
- ☐ Nature of any extensions of time or other delay attributable to either party.
- ☐ Condition of court's calendar and availability of an earlier trial date if matter was ready for trial.



- ☐ Whether interests of justice are best served by dismissal or trial of case.
- ☐ Any other fact or circumstance relevant to a fair determination of the issue.

**Authority:**

*Cal Rules Ct, Rule 3.1342(e)*

**Discussion:**

See 40.23

- ☐ Calendar response and hearing dates.
- ☐ Draft declarations opposing motion.
- ☐ Draft memorandum opposing motion.
- ☐ Draft proposed order.
- ☐ Serve and file response within 15 days after service of notice of motion.

**Authority:**

*Cal Rules Ct, Rule 3.1342(b)*

**Discussion:**

See 40.31

- ☐ Prepare reply to response, if necessary, and serve and file within five days after service of the response.

**Authority:**

*Cal Rules Ct, Rule 3.1342(d)*

**Discussion:**

See 40.33

- ☐ A dismissal order is appealable.
- ☐ Counsel intending to seek review by appeal of the dismissal of an action should take care to perfect the appeal by obtaining an order of dismissal and judgment. A mere "notice of ruling" of dismissal is not appealable.

**Authority:**

*Hydrotech Sys., Ltd. v. Oasis Waterpark (1991) 52 C3d 988, 993 n3, 277 CR 517, 803 P2d 370 ;  
Shpillar v. Harry C's Redlands (1993) 13 CA4th 1177, 1180, 16 CR2d 814*

**Discussion:**

See 40.36



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**40.20 Discretionary Dismissal Available for Two-Year Delay.**

A trial court may, in its discretion, dismiss an action for delay in prosecution under the provisions of *CCP* §§ 583.410-583.430, either on its own motion or on the defendant's motion, if it appears appropriate to the court under the circumstances of the case [*CCP* § 583.410(a)]. The case must not have been brought to trial or "conditionally settled" within two years after it was commenced against the defendant [*CCP* § 583.420(a)(2); *Cal Rules Ct, Rule 3.1340(a)*].

**Example:**

California's interest in assuring an adequate forum for a California plaintiff is not absolute, and can be overcome when the plaintiff is unreasonably dilatory in prosecuting the action in the convenient forum [ *Van Keulen v. Cathay Pacific Airways, Ltd.* (2008) 162 CA4th 122, 130, 75 CR3d 471 (plaintiff's lack of reasonable diligence lost California's interest in providing an adequate forum)].

A case is "conditionally settled" if both of the following are true [*Cal Rules Ct, Rule 3.1340(c)*]:

- A settlement agreement conditions dismissal on satisfactory completion of specified terms not to be fully performed within two years after filing of the case.
- Notice of the settlement is filed with the court under *Cal Rules Ct, Rule 3.1385*.

The court has no discretion to dismiss under *CCP* §§ 583.410-583.430 for failure to bring to trial if the delay is for a period shorter than two years [ *General Motors Corp. v. Superior Court* (1966) 65 C2d 88, 98, 52 CR 460, 416 P2d 492 (decided under prior law); see *Roman v. Usary Tire & Service Center* (1994) 29 CA4th 1422, 1430-1431, 35 CR2d 329; but see *Vernon v. Great W. Bank* (1996) 51 CA4th 1007, 1011-1013, 59 CR2d 350 (order of dismissal with prejudice five months after mistrial proper, whether viewed as dismissal for failure to diligently prosecute, or as dismissal for failure to appear on day of trial under *CCP* § 581(b)(5), when there was a pattern of conduct showing a failure to prosecute diligently and a total disregard of the court's orders, including failing to appear on the date ordered for retrial knowing continuance had already been denied, but instead sending another attorney to make a special appearance to report that plaintiff's counsel was at that moment ready for another trial in another court)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**40.21 Time Periods Determined in Same Manner as Mandatory Dismissal.**

The time period for the purpose of discretionary dismissal is calculated in the same manner as for mandatory dismissal for failure to bring to trial within five years [*CCP* § 583.420(b)].

➡ **Cross Reference:**

Discussion of time periods, see *40.10*, *40.11*, *40.14*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute



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**40.22 Discretionary Dismissal After Two Years for New Trial.**

If a new trial has been granted, the court has discretion to dismiss the action if it is not brought again to trial within two years after one of the following [CCP § 583.420(a)(3)]:

- Entry of an order of the court declaring a mistrial or the disagreement of the jury if a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision.
- Entry of an order granting a new trial if after judgment a new trial is granted and no appeal is taken.
- Filing of the remittitur by the clerk of the trial court if on appeal an order granting a new trial is affirmed or a judgment is reversed and the action is remanded for a new trial.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**40.23 Court Must Consider All Relevant Matters in Making Its Decision.**

In ruling on the motion, the court is required to consider all matters relevant to a proper determination of the motion, including [*Cal Rules Ct, Rule 3.1342(e)*]:

- The court's file in the case.
- The affidavits and declarations and supporting data submitted by the parties.
- The extent to which the parties engaged in any settlement negotiations or discussions.
- The diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party.
- The nature and complexity of the case.
- The law applicable to the case, including pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case.
- The nature of any extensions of time or other delay attributable to either party.
- The condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial.
- Whether the interests of justice are best served by dismissal or trial of the case.
- Any other fact or circumstance relevant to a fair determination of the issue.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**40.24 Dismissal by Court Will Be Upheld Absent Miscarriage of Justice or Decision Exceeds the Bounds of Justice.**

The discretion of the trial court is broad and will not be disturbed unless there has been a miscarriage of justice or the trial court exceeded the bounds of reason [ *Luti v. Graco, Inc.* (1985) 170 CA3d 228, 232, 215 CR 902 (decided under prior law); see *Landry v. Berryessa Union Sch. Dist.* (1995) 39 CA4th 691, 698, 46 CR2d 119 ].

The court's order will be deemed an abuse of the court's discretion if the record affirmatively shows the court failed to consider all relevant factors as required by *Cal Rules Ct, Rule 3.1342(e)* [ *Visco v. Abatti* (1983) 144 CA3d 904, 907, 192 CR 833 (decided under prior law); *Tannatt v. Joblin* (1982) 130 CA3d 1063, 1066-1070, 182 CR 112 (decided under prior law)]. However, the court is presumed to have considered all relevant factors when ruling on a motion for discretionary dismissal, and need not recite the fact that it complied with this rule or enumerate the specific basis for its ruling in its order [ *Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 C3d 554, 562-563, 194 CR 773, 669 P2d 9 (decided under prior law)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**40.25 Plaintiff Must Exercise Diligence in Bringing Case to Trial.**

Plaintiff must proceed with reasonable diligence [*CCP* § 583.130; *Cal Rules Ct, Rule 3.1342(e)*]. If the plaintiff fails to show reasonable or excusable delay, the court may dismiss the action in its discretion even if defendant fails to establish actual prejudice [ *Putnam v. Clague* (1992) 3 CA4th 542, 549, 5 CR2d 25 ; see *Lopez v. California* (1996) 49 CA4th 1292, 1295, 57 CR2d 266 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**40.26 Court Setting Case for Trial Does Not Preclude Motion for Dismissal.**

When a trial court routinely sets a matter for trial, it does so without regard to a motion to dismiss for failure to prosecute. The issue of whether the criteria for dismissal is present is not before the court at that time unless it is expressly brought to the court's and counsel's attention. Although a trial court has power under *CCP* § 583.410 to dismiss on its own motion, the court need not exercise it at any particular time, nor is the court forced to address the issue at routine case management conferences. Thus, a trial court does not pass on those issues in a routine trial setting context, and when a trial date has been routinely set, the court is not prevented from subsequently ruling on a motion to dismiss and granting discretionary dismissal [ *Lopez v. California* (1996) 49 CA4th 1292, 1296-1297, 57 CR2d 266 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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#### **40.27 Party Seeking Dismissal Must Serve and File Motion 45 Days Before Hearing Generally.**

A party seeking discretionary dismissal must generally serve and file a notice of motion at least 45 days before the date set for hearing of the motion. The moving party may serve and file an affidavit or declaration stating facts in support of the motion together with the supporting memorandum [*Cal Rules Ct, Rule 3.1342(a)*]. A court may reduce the 45-day notice period, pursuant to *CCP § 1005(b)*, which permits a court to prescribe a shortened notice period with respect to motions [*see Kunzler v. Karde (1980) 109 CA3d 683, 688, 167 CR 425 (decided under prior law)*].



#### **Cross Reference:**

Form for dismissal, see *40.42*.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Dismissals Involuntary Dismissals Failures to Prosecute Civil Procedure Dismissals Involuntary Dismissals Motions



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III. DISCRETIONARY DISMISSAL FOR DELAY IN BRINGING TO TRIAL

*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.28*

**40.28 If Court Seeks Dismissal, It Must Give 20 Days' Notice.**

If the court seeks to dismiss an action *sua sponte* under CCP § 584.420(a)(2)(B), for failure to bring the action to trial or conditionally settle it within two years after commencement, the clerk must set a hearing on the dismissal and mail notice to all parties at least 20 days before the hearing date [*Cal Rules Ct, Rule 3.1340(b)*; *Sakhai v. Zipora (2009) 180 CA4th 593, 598-600, 102 CR3d 691 (Cal Rules Ct, Rule 3.1342 inapplicable to motion by court)*].

The notice provision of *Cal Rules Ct, Rule 3.1340(b)* does not appear to apply to court-originated discretionary dismissal motions other than those under *CCP § 583.420(a)(2)(B)*. Thus, there is no express notice requirement for court-originated motions for discretionary dismissal for delay in bringing action to retrial under *CCP § 583.420(a)(3)*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute



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**40.29 Party Waives Objection to Notice by Challenging on the Merits.**

Similarly, the plaintiff waives any objection to an inadequate notice period by appearing at the hearing and challenging the motion on the merits rather than specially objecting to lack of compliance with the notice requirement [ *Clark v. Stabond Corp.* (1987) 197 CA3d 50, 59, 242 CR 676 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute



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**40.30 Filing of Notice of Motion to Dismiss Does Not Preclude Efforts to Bring to Trial.**

The filing of the notice of motion does not preclude the opposing party from further prosecution of the case to bring it to trial [*Cal Rules Ct, Rule 3.1342(a)*]. In fact, the lengthy 45-day notice period of *Cal Rules Ct, Rule 3.1342(a)*, is intended to provide the plaintiff with ample time within which to complete any necessary preparation and move to set his or her case for trial, if so inclined. Thus, if plaintiff moves to set the case specially for trial and defendant then files a motion for discretionary dismissal, plaintiff cannot complain that he or she was prejudiced by the fact that the court shortened the notice period for the dismissal motion to hear the motions together [ *Farrar v. McCormick* (1972) 25 CA3d 701, 705, 102 CR 190 (decided under prior law)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions



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*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.31*

**40.31 Written Opposition Must Be Served and Filed Within 15 Days.**

Within 15 days after service of the notice of motion, the opposing party may serve and file a written opposition [*Cal Rules Ct, Rule 3.1342(b)*].



**Warning:**

The court may grant the motion without a hearing on the merits if no opposition is filed [*Cal Rules Ct, Rule 3.1342(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions



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**40.32 Response to Written Opposition May Be Served and Filed Within 15 Days.**

Within 15 days after service of the written opposition, if any, the moving party may serve and file a response [*Cal Rules Ct, Rule 3.1342(c)*].



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*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.33*

**40.33 Opposing Party May Reply to Response Within Five Days.**

The opposing party may then serve and file a reply within five days after service of the response [*Cal Rules Ct, Rule 3.1342(d)*].





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#### **40.34 Burdens of Proof.**

**40.34[1] Moving Party Has Initial Burden.** On a motion for discretionary dismissal, defendant has the initial burden of showing that the dismissal is warranted [ *Marra v. Mission Foods Corp.* (1993) 19 CA4th 724, 727, 23 CR2d 741 ; *Visco v. Abatti* (1983) 144 CA3d 904, 908, 192 CR 833 (decided under prior law)].



#### **Cross Reference:**

Discussion of burdens of proof and persuasion, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burden of Proof and Persuasion.

**40.34[2] Burden Then Shifts to Show Excuse for Delay.** Once the party moving for dismissal has shown that the dismissal is warranted, the burden shifts to the plaintiff opposing the motion to show some excuse for the delay [ *Lopez v. State of California* (1996) 49 CA4th 1292, 1295, 57 CR2d 266 ; *Marra v. Mission Foods Corp.* (1993) 19 CA4th 724, 727, 23 CR2d 741 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil Procedure Dismissals Involuntary Dismissals Failures to Prosecute



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*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.35*

**40.35 Court May Make Provisional or Conditional Orders.**

When the facts warrant, the court may continue or defer its ruling pending performance of any conditions to a grant or denial that it may impose to effectuate substantial justice [*CCP* § 583.430(a); *Cal Rules Ct, Rule 3.1342(f)*]. The court may make any necessary order to effectuate its authority under *CCP* § 583.430(a), including, but not limited to, provisional and conditional orders [*CCP* § 583.430(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute



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*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.35A*

#### **40.35A Plaintiff May Move for a New Trial.**

The plaintiff may seek relief from judgment of dismissal for delay in bringing the case to trial by moving for a new trial in accordance with CCP § 659 if the plaintiff has grounds therefor [see *Finnie v District No. 1--Pacific Coast Dist. etc. Ass'n* (1992) 9 CA4th 1311, 1315-1317, 12 CR2d 348 (motion for new trial after mandatory dismissal under CCP § 583.320(a))].



#### **Cross Reference:**

Discussion of motions for new trial, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 21, Motion for New Trial.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure  
Dismissals  
Involuntary Dismissals  
Failures to Prosecute  
Civil Procedure  
Dismissals  
Involuntary Dismissals  
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*3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.36*

#### **40.36 Party May Appeal Dismissal Order.**

A dismissal order is appealable [ *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 C3d 988, 993 n3, 277 CR 517, 803 P2d 370 ]. Counsel intending to seek review by appeal of the dismissal of an action should take care to perfect the appeal by obtaining an order of dismissal and judgment. A mere "notice of ruling" of dismissal is not appealable, and courts of appeal are increasingly reluctant to save erroneous appeals by permitting appellant to obtain an appealable order or judgment after the fact [ *Shpiller v. Harry C's Redlands* (1993) 13 CA4th 1177, 1180, 16 CR2d 814 ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsInvoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsInvoluntary  
DismissalsFailures to Prosecute



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**40.37 Party May Not Directly Appeal Denial of Dismissal.**

A denial of a dismissal motion is not directly appealable. It may, however, be challenged either by a petition for a writ of mandate or on appeal from a final judgment [ *Oskooi v. Fountain Valley Reg'l Hosp & Med. Ctr.* (1996) 42 CA4th 233, 237, 49 CR2d 769 ]. If defendant does not exercise the option of seeking pretrial review by a writ of mandate, however, and waits to raise the issue on appeal after trial, the court may be not be inclined to disturb plaintiff's victory on the merits after the judicial resources have already been expended on the trial [see *Reid v. Balter* (1993) 14 CA4th 1186, 1195-1196, 18 CR2d 287 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsInvoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsInvoluntary  
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**40.38 Reviewing Court Will Not Overturn Dismissal on Appeal Unless Clear Case of Abuse Is Shown.**

The reviewing court will not substitute its opinion for that of the trial court unless a clear case of abuse is shown and there has been a miscarriage of justice [ *Blank v. Kirwan* (1985) 39 C3d 311, 331, 216 CR 718, 703 P2d 58 ], the trial court is able to assess credibility and resolve any conflicts in the evidence, and its factual findings are entitled to great weight [see *Shamblin v. Brattain* (1988) 44 C3d 474, 479, 243 CR 902, 749 P2d 339 ]. However, a grant of dismissal is subject to closer appellate scrutiny, with doubts resolved in favor of the plaintiff, if the circumstances indicate a reasonable excuse for the delay and there is an absence of actual prejudice to the defendants [ *City of Los Angeles v. Gleneagle Dev. Co.* (1976) 62 CA3d 543, 561-563, 133 CR 212 (decided under prior law)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsInvoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsInvoluntary  
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**40.39 Reviewing Court Will Uphold a Denial of Dismissal If There Is Any Showing of Good Cause for Delay.**

The appellate court will generally uphold a denial of a motion to dismiss if there is any showing of good cause for the delay, and no miscarriage of justice would result [ *Denham v. Superior Court* (1970) 2 C3d 557, 564, 566, 86 CR 65, 468 P2d 193 (decided under prior law)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsInvoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsInvoluntary  
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**40.40 Notice of Motion for Mandatory Dismissal Based on Failure to Bring to Trial Within Five Years and Supporting Declaration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],  
Plaintiff,  
vs. \_\_\_\_\_[names],  
Defendant.

)  
) NOTICE OF MOTION AND MOTION TO DIS-  
) MISS ACTION, SUPPORTING DECLARATION  
) OF \_\_\_\_\_[name], AND SUPPORT-  
) ING MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_[party, e.g. Plaintiff John Smith] and to \_\_\_\_\_[name], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_[date], at \_\_\_\_\_[time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_[street address], \_\_\_\_\_[moving party, e.g. Defendant Mary Jones] will, and hereby does, move for an order to dismiss the above-entitled action pursuant to CCP §§ 583.310 and 583.360(a). The motion is made on the ground that \_\_\_\_\_[defending party, e.g. Plaintiff John Smith] has failed to prosecute the above-entitled action and to bring it to trial within five years after it was commenced



against the [defendant or cross-defendant] \_\_\_\_\_[*name*].

The motion is based on this notice of motion, on the declaration(s) of \_\_\_\_\_[*name*] and the supporting memorandum served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [*firm name*]

By: \_\_\_\_\_ [*signature*]

\_\_\_\_\_ [*typed name*]

Attorney for \_\_\_\_\_

#### SUPPORTING DECLARATION OF \_\_\_\_\_

I, \_\_\_\_\_, declare:

1. I am \_\_\_\_\_ [*declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above*].

2. \_\_\_\_\_ [*State facts showing that the applicable mandatory period for bringing the action to trial has elapsed, even when taking into account any known stipulated extensions of time or time excluded from calculation, e.g., This action was commenced against defendant in the above-entitled court on January 2, 1997. This court lacked jurisdiction to proceed with this action from March 8, 1997, until November 8, 1997, pending plaintiff's appeal from the order of February 12, 2002, sustaining defendant's demurrer without leave to amend. The action was not brought to trial on or before August 3, 2003, a period of more than five years from the date that the action was commenced, excluding the period of time during which the court lacked jurisdiction over the action. No stipulation to continue this action beyond that time has been filed*].

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*]

#### SUPPORTING MEMORANDUM

[*Set out memorandum here*]

NOTES.

**Authority:**

*CCP §§ 583.310-583.360*



**Timing:**

*See 40.08, 40.09*

**Related Forms of Memoranda:**

*See California Points and Authorities, Ch. 90, Dismissal, §§ 90.80-90.82, 90.100-90.105 (Matthew Bender)*



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3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.41

**40.41 Notice of Motion for Mandatory Dismissal Based on Failure to Bring Action to New Trial Within Three Years.**

Notice of Motion for Mandatory Dismissal Based on Failure to Bring Action to New Trial Within Three Years  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

|                    |   |                                     |
|--------------------|---|-------------------------------------|
| _____ [name],      | ) |                                     |
| Plaintiff,         | ) | NOTICE OF MOTION AND MOTION TO DIS- |
| vs. _____ [names], | ) | MISS ACTION, SUPPORTING DECLARATION |
| Defendant.         | ) | OF _____ [name], AND SUPPORT-       |
|                    | ) | ING MEMORANDUM                      |
|                    | ) | Date: _____                         |
|                    | ) | Time: _____                         |
|                    | ) | Location: _____                     |
|                    | ) | Judge: _____                        |
|                    |   | Date Action Filed: _____            |
|                    |   | Trial Date: _____                   |

To \_\_\_\_\_ [party, e.g. Plaintiff John Smith] and to \_\_\_\_\_ [name], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_ [date], at \_\_\_\_\_ [time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] this court, located at \_\_\_\_\_ [street address], \_\_\_\_\_ [moving party, e.g. Defendant Mary Jones] will, and hereby does, move for an order to dismiss the above-entitled action pursuant to CCP §§ 583.320 and 583.360. The motion is made on the ground that \_\_\_\_\_ [party, e.g. Plaintiff John Smith] has failed to exercise reasonable diligence in prosecuting the above-entitled action and \_\_\_\_\_ [specify elapse of

*minimum period of delay, as applicable, under CCP §§ 583.320, 583.360(a), e.g., has failed to bring the case to trial within three years of the court filing the order of mistrial].*

The motion is based on this notice of motion, on the declaration(s) of \_\_\_\_\_ [name] and the supporting memorandum served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

#### SUPPORTING DECLARATION OF \_\_\_\_\_

I, \_\_\_\_\_, declare:

1. I am \_\_\_\_\_ [declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. \_\_\_\_\_ [State facts showing that the applicable mandatory period for bringing the action to trial has elapsed, even when taking into account any known stipulated extensions of time or time excluded from calculation, e.g., This action was commenced against defendant in the above-entitled court on January 2, 1995. It was brought to trial on April 20, 2000. The jury was unable to make a decision and Judge Williams declared a mistrial. The order declaring the mistrial was filed on July 1, 2000. The action was not brought to trial on or before July 2, 2003, a period of more than three years from the date that the court filed the order of mistrial, excluding the period of time during which the court lacked jurisdiction over the action. No stipulation to continue this action beyond that time has been filed].

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]

#### SUPPORTING MEMORANDUM

[Set out memorandum here]

NOTES.

**Authority:**

*CCP* §§ 583.320(a), 583.360(a)



**Timing:**

See 40.09

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 90, Dismissal*, §§ 90.80-90.82, 90.100-90.105 (Matthew Bender)



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3-40 MB Practice Guide: CA Pretrial Civil Procedure 40.42

**40.42 Notice of Motion for Discretionary Dismissal for Failure to Bring to Trial Within Two Years and Supporting Declaration.**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF \_\_\_\_\_

\_\_\_\_\_[name],  
Plaintiff,  
vs. \_\_\_\_\_[names],  
Defendant.

)  
) NOTICE OF MOTION AND MOTION TO DIS-  
) MISS ACTION, SUPPORTING DECLARATION  
) OF \_\_\_\_\_[name], AND SUPPORT-  
) ING MEMORANDUM  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Location: \_\_\_\_\_  
) Judge: \_\_\_\_\_  
) Date Action Filed: \_\_\_\_\_  
) Trial Date: \_\_\_\_\_

To \_\_\_\_\_[party, e.g. Plaintiff John Smith] and to \_\_\_\_\_[name], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on \_\_\_\_\_[date], at \_\_\_\_\_[time], or as soon thereafter as the matter may be heard, in [\_\_\_\_\_ (Department or Division) \_\_\_\_\_ of] of this court, located at \_\_\_\_\_[street address], \_\_\_\_\_[moving party, e.g. Defendant Mary Jones] will, and hereby does, move for an order to dismiss the above-entitled action pursuant to CCP §§ 410-430. The motion is made on the ground that \_\_\_\_\_[defending party, e.g. Plaintiff John Smith] has failed to exercise reasonable diligence and has failed to prosecute the above-entitled action and to bring it to trial within two

years after it was commenced against the [defendant or cross-defendant] \_\_\_\_\_[name].

The motion is based on this notice of motion, on the declaration(s) of \_\_\_\_\_[name] and the supporting memorandum served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.

Date: \_\_\_\_\_.

\_\_\_\_\_ [firm name]

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

Attorney for \_\_\_\_\_

#### SUPPORTING DECLARATION OF \_\_\_\_\_

I, \_\_\_\_\_, declare:

1. I am \_\_\_\_\_ [declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. \_\_\_\_\_ [State facts showing that the applicable discretionary period for bringing the action to trial has elapsed, even when taking into account any known stipulated extensions of time or time excluded from calculation, e.g., This action was commenced against defendant in the above-entitled court on January 2, 2001. This court lacked jurisdiction to proceed with this action from March 8, 2001, until November 8, 2001, pending plaintiff's appeal from the order of February 12, 2001, sustaining defendant's demurrer without leave to amend. The action was not brought to trial on or before August 3, 2003, a period of more than two years from the date that the action was commenced, excluding the period of time during which the court lacked jurisdiction over the action. No stipulation to continue this action beyond that time has been filed].

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]

#### SUPPORTING MEMORANDUM

[Set out memorandum here]

NOTES.

**Authorities:**

*CCP* §§ 583.410-583.430



**Timing:**

See 40.27

**Related Forms of Memoranda:**

See *California Points and Authorities, Ch. 90, Dismissal*, §§ 90.83-90.85, 90.106 (Matthew Bender)